

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

UNITED STATES OF AMERICA :
 :
 v. : **Criminal No. 21-cr-138 (JEB)**
 :
 AARON MOSTOFSKY, :
 Defendant :

**GOVERNMENT’S MOTION FOR PERMISSION TO FILE A RESPONSE TO
MOSTOFSKY’S SEVERABILITY CLAIM**

Defendant Mostofsky has again taken the position that the government should not be permitted to provide initial briefing on an issue—this time, the severability of an allegedly unconstitutional element—presented by Mostofsky in support of his Motion to Dismiss (*inter alia*) Count One of the Second Superseding Indictment. ECF47. Count One charges a violation of 18 U.S.C. § 231(a)(3). ECF69. Because this Court will benefit from briefing from both sides, as it has throughout this case, it should permit the government to file its brief notwithstanding Mostofsky’s objection.

This Court will recall that, after the government obtained a Second Superseding Indictment that first alleged that Mostofsky’s violation of 18 U.S.C. § 231(a)(3) affected commerce, Mostofsky argued that the government should not be permitted to respond to his claim that the commerce element of the § 231(a)(3) charge was defective, even though the previous indictment did not charge the commerce element. During a status conference on November 22, 2021, this Court rejected Mostofsky’s objection and permitted the government to respond to that argument.

After the government filed its brief regarding the commerce element, ECF76, Mostofsky responded that the government had failed to address whether the allegedly defective commerce element was severable. ECF77 at 2-7. But Mostofsky had not argued in ECF47 that the allegedly

defective commerce element in the § 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.

The government has drafted a brief addressing severability, which would be its opening argument on the matter. In a telephone conversation today with the undersigned, Nick Smith, counsel for Mostofsky, stated that he opposed the filing of that brief because the government did not present it in its prior submission regarding the commerce element. This is a rehash of the same complaint Mostofsky previously raised against the government's briefing of the commerce issue, which this Court rejected. Otherwise stated, Mostofsky wants this Court to rule on his severability claim without *any* response from the government.

If this Court is to decide the severability issue raised by Mostofsky, it should do so based on briefing from both sides. If the Court permits the filing of the government's severability brief and Mostofsky elects to file a responsive briefing, the government will not object. Permitting briefing from both sides also comports with this Court's allowance of Mostofsky to notice in this case briefing filed in other Capitol Riot cases regarding legal issues raised in Mostofsky's motion to dismiss.

Conclusion

The government respectfully requests that this Court allow it to file its response to ECF77 and address, for the first time in this case, the severability issue.

Respectfully submitted,

Matthew M. Graves
United States Attorney
D.C. Bar No. 481052

By: s/ Graciela R. Lindberg
Assistant United States Attorney
Bar No. TX 00797963
11204 McPherson Road, Suite 100A
Laredo, Texas 78045
graciela.linberg@usdoj.gov
(956) 721-4960