UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, v. JULIA BEATRICE KELEHER, et al., Defendants.	CRIMINAL NO. 19-431 (PAD)

RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO MODIFY GAG ORDER

After filing not one, but two motions requesting that the Court transfer this case's venue because of negative pretrial publicity, Defendant Julia Beatrice Keleher asks the Court to modify its gag order so that she may make public statements that "do not have a substantial likelihood of prejudicing the parties' ability to have a fair trial." *See* Docket No. 199. What would constitute a statement that does "not have a substantial likelihood of prejudicing the parties' ability to have a fair trial" is ambiguous, and open to subjective interpretation. By contrast, the Court's gag order, as drafted, is clear and easy to follow. What is more, the Court acted well within constitutional bounds in entering the gag order at Docket No. 17 for the sake of ensuring that all parties receive a fair trial. Keleher's motion should be denied because the Court's gag order is designed to protect Keleher and her co-defendants from the very type of pretrial publicity about which they have complained in moving to transfer venue. *See* Docket Nos. 172, 177.

DISCUSSION

By entering the gag order at Docket No. 17, the Court tacitly recognized that this case should not be a referendum on Keleher's tenure as the Puerto Rico Secretary of Education, the respective platforms of the New Progressive Party or the Popular Democratic Party, or the extent to which Puerto Rico is generally plagued by public corruption. Rather, the jury that is ultimately empaneled in this case must decide ***only*** whether Keleher and her co-defendants committed the

offenses alleged in the indictment which the grand jury returned on July 9, 2019.

"At a time when passion and prejudice are heightened by emotions stirred by [current events] . . . the dignity and good order with which all proceedings in court should be conducted" require the parties to keep their focus squarely on the "facts or issues in the case." *Viereck v. United States*, 318 U.S. 236, 247-48 (1943). Otherwise, we, as a society, run the risk that the result of the trial will reflect more the "passion and prejudice" of the venire, than the fundamental promise "that justice shall be done." *See id*.

The United States is mindful that "intense publicity surrounding a criminal proceeding – what Justice Frankfurter referred to as 'trial by newspaper' – poses significant and well-known dangers to a fair trial." *United States v. Brown*, 218 F.3d 415, 423 (5th Cir. 2000) (quoting *Pennekamp v. Florida*, 328 U.S. 331, 359-61 (1946) (Frankfurter, J., concurring)). "Paramount among these dangers is the potential that pretrial publicity may taint the jury venire, resulting in a jury that is biased toward one party or another." *Id.* "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Id*. (quoting *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1075 (1991)). "Accordingly, trial courts have 'an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity.'" *Id*. (quoting *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 378 (1979)). "This duty comports with the constitutional status of all First Amendment freedoms, which are not absolute but must instead be 'applied in light of the special characteristics of the [relevant] environment.'" *Id*. at 424 (alteration in original) (quoting *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). Thus, "[o]n several occasions [the Supreme] Court has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant." *Id*. (quoting *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 32 n.18 (1984)). It is beyond dispute that the interest

of the public, the state, and a defendant in "a fair trial may not be compromised by commentary, from any lawyer or party, offered up for media consumption on the courthouse steps." *Id*. (citing *Estes* v. *Texas*, 381 U.S. 532, 540 (1965)).

The Supreme Court has held that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press." *Gentile*, 501 U.S. at 1074; *see also In re Morrissey*, 168 F.3d 134 (4th Cir. 1999) (affirming that "the 'reasonable likelihood' standard [i]s constitutional" when applied to lawyers); *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981) (holding that restrictions on the dissemination of information related to a pending case are constitutional if dissemination would be "reasonably likely" to "threaten[] material harm" to the fairness of a trial). "Lawyers should not be surprised when they learn that their chosen professional status, as in the cases of judges, restricts their conduct and speech at times." *United States* v. *Scarfo*, 263 F.3d 80, 93 (3d Cir. 2001). "Lawyers representing clients in pending cases are key participants in the criminal justice system, and the [court] may demand some adherence to the precepts of that system in regulating their speech as well as their conduct." *Gentile*, 501 U.S. at 1074. Indeed, "as officers of the court," lawyers "have a fiduciary responsibility not to engage in public debate . . . that will obstruct the fair administration of justice." *Id*. (quoting *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring)). Since they "have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since [their] statements are likely to be received as especially authoritative." *Id*.

As Keleher has recognized, "[u]nrestricted statements by the participants in this trial would only serve to increase the volume of pre-trial publicity." Docket No. 199 at 4. The Court's gag order, as drafted, permits the parties to discuss matters that are part of the public record. *See*

Docket No. 17 at 1 (excluding from the gag order information relating to the case which is "entered without restriction on the docket or disclosed in open court"). The Court has also incorporated a mechanism whereby the parties may seek "relief under seal for good cause shown." *Id.* at 2. From the United States' perspective, the Court's gag order is narrowly tailored toward achieving a compelling interest, namely, a fair trial for all parties.

CONCLUSION

To adopt Keleher's proposed amendment to the Court's gag order risks creating a situation whereby the parties engage in a race to the bottom, trying the case before the press rather than in the courtroom. Such a situation would prejudice all parties, and represent an affront to the judicial process. The Court's gag order should remain as is, and Keleher's motion to modify the gag order should be denied.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 13th day of January, 2020 in San Juan, Puerto Rico

W. STEPHEN MULDROW
UNITED STATES ATTORNEY

/s/ Jose Capo Iriarte
Jose Capo Iriarte
Senior Litigation Counsel

/s/ Alexander L. Alum
Alexander L. Alum – USDC G01995
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and a copy of such filing will be emailed to defense counsel of record.

/s/ Alexander L. Alum
Alexander L. Alum
Assistant United States Attorney