IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, v. **JULIA BEATRICE KELEHER**, Defendant.	**CRIMINAL CASE NO.**: 19-431 (PAD)

REPLY IN SUPPORT OF MOTION TO MODIFY GAG ORDER

Finding no colorable argument against the relief sought by Julia B. Keleher ("Keleher") in her *Motion to Modify Gag Order* (Docket No. 199), the Government once again resorts to confusing the issues in this case. In its superficial response, the Government misrepresents Keleher's arguments, fails to provide case law supporting its contention that a gag order with text akin to the one in this case is "within constitutional bounds," and induces the Court to error by alleging that Keleher is requesting a modification of the gag order to "make public statements" regarding the case (Docket No. 206, p. 1) and try this case "before the press rather than in the courtroom." *Id.*, p. 4.

The cornerstone of the Government's argument is that modifying the order, as requested by Keleher, would give way to Keleher running rampant in the media making public statements to inflame the masses, thus affecting the Government's right to a fair trial. Firstly, Keleher has never expressed an intention of making statements to the media or making public statements about the facts of this case. Second, the Government's reasoning falls far short of the mark.

ARGUMENT

a. The Gag Order in this case has not served its intended purpose

The gag order in this case has done nothing to curb the inflammatory, inaccurate, and irresponsible media coverage of this indictment—to the contrary, it has contributed to the one-sided media frenzy that has pitted the public against defendants. As argued extensively in both motions for change of venue filed before the Court (Docket Nos. 172 and 177), it will be impossible for Keleher to receive a fair trial in Puerto Rico due to the massive adverse and inflammatory publicity generated by the investigation and indictment in the case, particularly that directed at Keleher; the animosity generated by controversial decisions made by Keleher during her tenure as Secretary of the Department of Education; and the turbulent political environment permeating the Commonwealth of Puerto Rico. Despite the Government's characterization of the gag order as the cure for all prejudice posed by the media in this case, the gag order has done nothing to rectify the massive and inflammatory media generated by this case and can do nothing to rectify it.

This gag order has served only to silence the defense. The Government had a lengthy press conference, pandered to the masses, and condemned Keleher in the media. The mass protests continued to fuel the fire as the massive hatred of Keleher worsened. To this date, the publicity surrounding this case has not subsided, as every procedural incident in this case makes front-page news. Now comes the news that the Government indicted Keleher in a separate case based on facts presumptively known to the Government well ahead of the filing of this indictment. *See generally* 20-cr-019 (FAB)[1]. Keleher, on the other hand, must continue to sit idly, condemned by the masses, as she abides by an unconstitutional gag order restraining her ability to discuss her case.

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[1] The Court entered an identical gag order in that case.

b. The Gag Order is not constitutional

The Government perfunctorily states that the Court acted well within constitutional bounds in entering the gag order" and that the order is "narrowly tailored toward achieving a compelling interest" in this case. The Government's opposition primarily relies on the Fifth Circuit's decision in *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000).[2] Even under the standards set forth in *Brown*, however, the Court's order is short of constitutional. In that case, the defendant alleged that the district court's gag order in that case, which prohibited "parties, lawyers, and potential witnesses from giving to 'any public communications media' 'any extrajudicial statement or interview' about the trial (other than matters of public record) that 'could interfere with a fair trial or prejudice any defendant, the government, or the administration of justice'" was unconstitutional. *Id.* at 418. Although the Fifth Circuit found the case to be a close call, the court conducted a prior restraint analysis and found the gag order's "substantial likelihood" standard to be constitutionally sufficient.

Now, the Government comes before the Court relying on this decision in its opposition of a proposed modification which virtually tracks the language of the order in *Brown*. The Government, meanwhile, has provided no law in support of its assertions that an order prohibiting any case-related statement that is not publicly entered on the docket is constitutionally permissible. That is because there is none, as no circuit court has upheld a gag order with such a blanket prohibition.

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[2] The Government also cites several cases pertaining to gag orders on lawyers. *See generally* Docket No. 206, p.3. However, because Keleher is not requesting the Court modify the gag order as to the lawyers in this case, she need not address that line of case law.

Most importantly, the Government's position fails to address why it is necessary for the Court to go beyond the directives of the Local Rule enacted specifically to address cases such as this one. Specifically, Local Rule 83G provides, in relevant part, that:

> In widely-publicized or sensational cases, the Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses **likely** to interfere with the rights of the accused or the parties to a fair trial by an impartial jury, the seating and conduct in the courtroom or spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order.

PRD Local Rule 83G(g)(emphasis ours). Without providing any authority in support of its position, the Government now urges the Court not to modify its order, alleging it is constitutional, despite it not comporting with the any of the constitutional standards delineated by federal circuit courts addressing the constitutionality of these types of orders. *See In re Russell,* 726 F.2d 1007, 1010 (4th Cir.1984)("reasonable likelihood" of prejudicing a fair trial); *United States v. Tijerina,* 412 F.2d 661, 666–67 (10th Cir.1969)(same); *United States v. Ford*, 830 F.2d 596, 600-02 ("clear and present danger"); *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 249 (7th Cir.1975), *cert. denied sub nom.* *Cunningham v. Chicago Council of Lawyers,* 96 S.Ct. 3201 (1976) ("serious and imminent threat"); *Levine v. United States District Court,* 764 F.2d 590, 596 ("clear and present danger").

c. Keleher has never expressed an intention of making statements to the media or making public statements regarding this case

In the first sentence of its response, the Government alleges that it is Keleher's intention to make public statements regarding her case. But that is not the relief that the motion requests, nor has she expressed any intention to do so. As Keleher made clear in her motion, she "has no intention of fueling the mediatic frenzy caused by this case. In fact, she is cognizant that doing so

would run counter to her arguments in favor of a change of venue." Docket No. 199, p. 5. The Government's allegations that this case will be tried in the media if the gag order is modified is thus a red herring.

At the moment, Keleher has expressed no intention to make any public statements regarding her case. The narrow carve-out to the gag order requested by Keleher is intended to facilitate her ability to reasonably discuss her case, her defenses, and assert her innocence without fear of incurring in contempt of court. Moreover, the requested modification would also enable her Keleher to address any false or inaccurate statements made about her in the media which, upon evaluation of previous media descriptions of Keleher, are rampant in today's news.

CONCLUSION

The Gag Order in this case has done nothing to guarantee Keleher will have a fair trial. To the contrary, it has prevented her and her attorneys from correcting the record from false and misleading reporting that followed the Government's press conference in this case. She continues to be vilified in the media with no one correcting the lies, which has led to a pervasive and deep-seated prejudice against Keleher in Puerto Rico. Most importantly, the Gag Order in this case violates Keleher's First Amendment rights and threatens principles of fair play insofar as it bars Keleher from correcting the public record from often vicious and defamatory lies by way of a content-based prior restraint on her speech. The Government's opposition fails to dispute this fact. With the amendment requested by Keleher, the Court would ensure the parties' First Amendment rights are duly protected, enabling her to rebut false and misleading reports and the false and vicious attacks that will likely cause her lifetime reputation harm. Accordingly, the Court should grant Keleher's *Motion to Lift or Substantially Modify Gag Order* (Docket No. 199) thus narrowly tailoring the text of its order to comport with constitutional principles.

RESPECTFULLY SUBMITTED.

WE HEREBY CERTIFY: That today we have electronically filed the foregoing document with the clerk of the Court for the District of Puerto Rico, using the CM/ECF system which will send a copy and notification of filing to all counsel of record.

In San Juan, Puerto Rico, this 23rd day of January, 2020.

By:

DMRA Law LLC
Counsel for the Defendant Julia B. Keleher
Centro Internacional de Mercadeo
Torre 1, Suite 402
Guaynabo, PR 00968
Tel. 787-331-9970

s/Maria A. Dominguez
Maria A. Dominguez
USDC-PR No. 210908
maria.dominguez@dmralaw.com

s/ Javier Micheo Marcial
Javier Micheo Marcial
USDC-PR No. 305310
javier.micheo@dmralaw.com