

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

UNITED STATES OF AMERICA,

v.

JULIA BEATRICE KELEHER, et al.,
Defendants.

CRIMINAL NO. 20-19 (FAB)

**MOTION TO PRECLUDE NON-PARTIES FROM
PARTICIPATING AS LITIGANTS IN THIS CASE**

On June 3, 2020, the undersigned Assistant United States Attorney received an email from a representative of the American Civil Liberties Union (ACLU) and the Electronic Frontier Foundation (EFF) indicating that the ACLU and the EFF intend to file an amicus brief in support of Defendant Julia Beatrice Keleher's motion to suppress evidence.¹ The ACLU and the EFF's anticipated filing of a motion requesting amicus status appears to be part of Defendant's larger effort to enlist non-parties to make legal arguments on her behalf; the Court should note that Defendant filed an amicus brief on behalf of the National Association of Criminal Defense Lawyers (without first requesting judicial authorization) in support of her motion to dismiss the indictment in Criminal No. 19-431 (PAD).² The United States respectfully requests that the Court preclude the ACLU and the EFF from participating as litigants in this case because they represent no party, and a non-party has no right to intervene in pretrial criminal proceedings.

¹ The email exchange between United States and the representative of the ACLU and the EFF is attached as Exhibit 1.

² The United States opposed the filing of the amicus brief after it was filed, and requested that it be stricken. The Honorable Pedro A. Delgado nonetheless authorized the filing of the amicus brief after the fact.

A. PERTINENT LEGAL CONSIDERATIONS

Unlike the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure contain no provision allowing for the intervention of non-parties. *Compare* Fed. R. App. P. 29 (setting forth procedures for participation of amici curiae), *and* Fed. R. Civ. P. 24 (setting forth procedure for non-parties to intervene in a civil case), *with* the Federal Rules of Criminal Procedure. The United States is not aware of any authority supporting the proposition that it would be appropriate for a non-party to file *anything* in a criminal case at the trial court level, much less a brief in support of a Defendant’s motion to suppress. Assuming, for the sake of argument, that there may be circumstances in which a non-party’s participation in the pretrial stages of a criminal case may be appropriate, this is not such a case.

“The term ‘amicus curiae’ means friend of the court, not friend of a party.” *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (in chambers). Courts do not “grant rote permission” to non-parties seeking to file amicus briefs. *Voices for Choices v. Illinois Telephone Co.*, 339 F.3d 542, 544 (7th Cir. 2003). Rather, they typically authorize the filing of amicus briefs only when: (1) one of the parties is inadequately represented, (2) “the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest,” or (3) the would-be amicus has pertinent information enabling it to assist the court “beyond what the parties are able to do.” *See, e.g., NOW, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000); *see also Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 32 (D.D.C. 2002) (denying ACLU’s motion to intervene as amicus where it “presented no unique information or perspective” and sought “only to make legal arguments on behalf of . . . a more than adequately represented party”); *Strasser v. Doorley*, 432 F.2d 567 (1st Cir. 1970) (observing that courts “lacking consent of the

parties should go slow in accepting, and even slower in inviting, an amicus brief unless, as a party, although short of a right to intervene, the amicus has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance.”); *Kentucky v. Long*, 637 F. Supp. 1150, 1151 (W.D. Ky. 1986) (“[T]he Court feels it would not be proper for [would-be amicus] to intervene in a criminal case at the trial level, as the parties are quite capable of arguing their own cases.”).

There are good reasons for not allowing non-parties free reign to file amicus briefs. As the Seventh Circuit Court of Appeals has observed:

[J]udges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties’ briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal [court] process.

Voices for Choices, 339 F.3d at 544.

B. THE COURT SHOULD DENY ANY REQUEST FOR LEAVE TO FILE AN AMICUS BRIEF ON DEFENDANT’S BEHALF

The ACLU and the EFF purport to seek to file an amicus brief to discuss “particularity under the Fourth Amendment,” and advance an argument that courts should require “taint teams” when the seizure of data cannot be reasonably limited. *See* Exhibit 1. Defendant’s motion to suppress raises this very argument. *See* Docket No. 71 at 14-20. The fact that the ACLU and the EFF may have an interest in the legal issue that Defendant has raised does not entitle them to participate in this case as litigants. *Voices for Choices*, 339 F.3d at 544 (observing that “whether to allow the filing of an amicus curiae brief is a matter of ‘judicial grace’”). The Court should deny amicus status to the ACLU and EFF for three primary reasons.

First, Defendant is not inadequately represented. Quite the opposite— she is represented by competent counsel with decades of experience who is fully capable of litigating the pending motion to suppress.

Second, taking the representations of the ACLU and the EFF at face value, any amicus brief will merely rehash the arguments that Defendant’s competent counsel has already raised. Under such circumstances, the ACLU and the EFF do not aid the court as an amicus should, but instead impose a burden on the Court. *See* Supreme Court Rule 37(1) (“An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose *burdens* the Court, and its filing is *not favored*.”) (emphasis added); *see also Ryan*, 125 F.3d at 1063 (noting that amicus briefs which “duplicate the arguments made in the litigants’ briefs, in effect merely extend[] the length of the litigants’ brief,” and “should not be allowed” because “[t]hey are an abuse.”).

Third, the ACLU and the EFF cannot possibly articulate how any decision in this case would materially affect their rights in connection with any other case. Even if they could cite a case in which they have a direct interest, as a district court, nothing this Court decides will have a binding effect by operation of stare decisis or res judicata on any other court. *See, e.g., Vertex Surgical, Inc. v. Paradigm Biodevices, Inc.*, 648 F. Supp. 2d 226–231 (D. Mass. 2009) (observing that “district court decisions are neither authoritative nor precedential . . . [W]hile they bind the parties by virtue of res judicata, they are not authoritative as precedent and therefore *do not establish the rules of nonparties*.”) (emphasis added) (citations omitted).

No compelling legal or factual basis exists to permit the filing of an amicus brief in support of Defendant's motion to suppress. Accordingly, the United States respectfully requests that this Court preclude the filing of amicus briefs, including any such filings by the ACLU or the EFF.

C. CONCLUSION

“In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, . . . [the Court] should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give [the Court] all the help [it] need[s].” *Ryan*, 125 F.3d at 1064. The Court should bar any non-party from participating as a litigant in this case

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 12th day of June, 2020.

W. STEPHEN MULDROW
United States Attorney

/s/ Alexander L. Alum
Alexander L. Alum – G01915
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, which will send notification of such filing to all counsel of record.

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

Alum, Alexander L. (USAPR)

From: Alum, Alexander L. (USAPR)
Sent: Wednesday, June 3, 2020 2:37 PM
To: Jennifer Granick
Cc: Brett Max Kaufman; intern - Thomas McBrien; Jose Fuste; Maria Dominguez
Subject: RE: ACLU EFF motion to participate as amicus in US v. Keleher

Dear Ms. Granick:

The government does not consent to your participation as amicus.

Sincerely,

Alexander L. Alum
Assistant United States Attorney

From: Jennifer Granick [REDACTED] >
Sent: Wednesday, June 3, 2020 1:29 PM
To: Alum, Alexander L. (USAPR) <[REDACTED]>
Cc: Brett Max Kaufman [REDACTED]; intern - Thomas McBrien [REDACTED] >
Subject: ACLU EFF motion to participate as amicus in US v. Keleher

Mr. Alum:

I hope you are well. I write on behalf of the ACLU and the Electronic Frontier Foundation. We are seeking your consent to file an amicus brief in support of the defendant in US v. Keleher, Case No. 20-019 (FAB). Our plan is to file a motion for leave to participate as amicus by early next week, and ask the court to set a due date for our brief of June 22. We understand that that is the deadline for defendant Ariel Gutierrez-Rodriguez's motions as well, so it makes sense.

Our proposed brief will discuss particularity under Fourth Amendment doctrine and explain why, in cases where the government cannot reasonably limit its data seizure, courts can and should employ other means such as taint teams, lest the subsequent search of seized data is overbroad and unconstitutional.

Please let us know if you will consent to our participation as amicus and to the filing date of June 22. As I mentioned, we want to file the motion soon, so if you want to discuss further or have any questions, I'm available to talk right away.

Thank you,

Jennifer Stisa Granick
Pronouns: she/her(s)

Surveillance and Cybersecurity Counsel|Speech, Privacy, and Technology Project
American Civil Liberties Union
39 Drumm St., San Francisco, CA 94111-4805
[REDACTED]

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