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

UNITED STATES OF AMERICA, Plaintiff, v. **JULIA BEATRICE KELEHER [1]**, Defendant.	CRIMINAL CASE NO.: 20-019 (FAB)

RESPONSE IN OPPOSITION TO THE GOVERNMENT'S "MOTION REQUESTING ORDER PRECLUDING NON-PARTIES FROM PARTICIPATING AS LITIGANTS IN THIS CASE"

COMES NOW the defendant, Julia Beatrice Keleher, through her undersigned counsel, and respectfully files this response to the Government's *Motion Requesting Order Precluding Non-parties from Participating as Litigants in This Case* (Docket No. 83) as directed by the Court (Docket No. 84).

INTRODUCTION

On June 12, 2020, the Government filed a motion requesting a Court order barring so-called "third-parties" from "intervening" in pretrial proceedings by filing an *amicus* brief in support of Ms. Keleher's pending motion to suppress. (Docket No. 83). The Government's argument is premised upon the following allegations: 1) that Ms. Keleher is competently represented and her counsel can fully brief the suppression issue, 2) that any amicus brief would necessarily merely rehash the issues raised in Ms. Keleher's motion to suppress, 3) and that the District Court's decision would have no precedential effect on other court and is, thus, unimportant to any potential *amicus*. (*Id.* at 4-5). For the reasons set forth below, the Court should deny the Government's motion.

ARGUMENT

The Court has the authority to permit non-parties to file amicus briefs

If the Government were correct that decisions of a District Court have no precedential effect and therefore that all matters before District Courts are of no concern to any amicus, organizations would never waste their time writing and filing amicus briefs in District Courts and, if they did, District Courts would decline to accept them for filing as a matter of course. In fact, non-parties to litigation often file amicus briefs in District Courts, District Courts have authority to accept amicus briefs, and District Courts routinely accept such briefs for filing because they are of assistance to the court.

District Courts have inherent authority to allow *amici curiae* to participate in briefing. *See, e.g., Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008); *NGV Gaming, Ltd. v. Upstream Point Molate*, LLC, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005); *United States v. Louisiana*, 751 F.Supp. 608, 620 (E.D. La. 1990); *United States v. Michigan*, 116 F.R.D. 655, 660 (W.D. Mich. 1987). Non-parties with a particular interest and expertise in aspects of a pending case can "often make useful contributions to litigation." *Stuart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013).

In exercising their discretion to grant leave to file *amicus* briefs, District Courts often look for guidance to Federal Rule of Appellate Procedure 29, which applies to *amicus* briefs in federal appellate cases. *See, e.g., Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 147 F. Supp. 3d 373, 389 (D. Md. 2015). Rule 29 provides, in relevant part, that amicus briefs must be accompanied by a motion requesting leave to file the brief "stating the movant's interest" and the reason why an *amicus* brief "is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3). There are, however, "no strict prerequisites that

must be established prior to qualifying for *amicus* status; an individual seeking to appear as *amicus* must merely make a showing that his participation is useful to or otherwise desirable to the court." *Merritt v. McKenney*, 2013 WL 4552672, *3 (N.D. Cal. Aug. 27, 2013) (quoting *In re Roxford Foods Litig.*, 790 F. Supp. 987, 997 (E.D. Cal. 1991) (quoting *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990)); *see also Ellsworth Assocs. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996) (Participation by an *amicus curiae* is generally allowed when "the information offered is timely and useful."). Indeed, because "courts generally permit third parties to participate as *amici curiae* when they have "relevant expertise and a stated concern for the issues at stake in [the] case," *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 237 (D.D.C. 2011), the Government's motion seeks the imposition of heightened requisites on an *amicus* appearing on behalf of Ms. Keleher, despite the absence of a scintilla of legal support.

The premise of the Government's motion seems at odd with the Department of Justice's own official policy with respect to amicus filings. Section 2-2.125 of the Justice Manual states, in relevant part:

> The normal practice of the Department of Justice is to freely grant its consent to the filing of amicus briefs, even where it might reasonably be contended that the amicus brief does not make a positive contribution to the proper resolution of an appeal. A Department attorney, when asked for consent to file an amicus brief, may condition consent on compliance with the timeliness and length requirements of Federal Rule of Appellate Procedure 29, or on compliance with any local court rule or an existing order of the court in the pending matter relating to briefing schedules, page lengths, or similar matters. Otherwise, a Department attorney shall generally consent to the filing of an amicus brief.[1]

[1] Indeed, the Department of Justice's acceptance of the value of amicus briefs, even those opposing the government, is so strong, that the Department of Justice does not provide discretion to any individual AUSA or even any individual United States Attorney's Office to oppose a request from an amicus for leave to file. Rather, DOJ policy requires: "Before refusing consent to, or opposing, the filing of an amicus brief in a court of appeals under Rule 29, on any grounds other than the procedural grounds described in the preceding paragraph, a Department attorney should consult with the appropriate Main Justice Appellate Section. If following such consultation, the determination is made to decline to consent to or oppose an amicus filing, the question will be submitted to and reviewed by the appropriate Deputy Solicitor General, whose decision on the issue will be final." It is unclear whether the Government in this

The Government's first argument is specious at best. The Government cites no authority, because there is none, standing for the proposition that a court may only accept an amicus brief if the parties in the case lack competent counsel. In any criminal case, if the defendant lacked competent counsel, her Sixth Amendment rights would be violated.[2] The remedy would not be to permit an amicus filing. Rather, it would be incumbent on the court to disqualify the incompetent counsel and allow the defendant to retain, or to appoint, new counsel who was competent to represent the defendant. As set forth above, the standard for accepting an amicus filing is not whether the parties have competent counsel, but rather, whether the *amicus* has relevant expertise and an interest in the case.

The Government's second argument is also specious and highlights the impropriety of the relief it seeks. There is no *amicus* that has filed leave to file a brief in this case. Rather, the Government seeks a ruling from this Court prospectively precluding a hypothetical *amicus* brief that neither the Government nor the Court has seen on the assumption that the brief will only rehash arguments already made by the parties. But, of course, there is no basis for the Court to find that the hypothetical future *amicus* brief only rehashes arguments that have already been made by the parties. If and when an *amicus* seeks leave to file a brief, the Court would be in a position to review the brief and make the determination whether the brief is merely repeating arguments already made or, instead, is elaborating on those arguments, looking at them from a different perspective based on the *amicus*' expertise, or raising new arguments altogether. In other words, the Court can make the decision whether it is an appropriate *amicus* brief that has the potential to

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case complied with DOJ policy and sought and obtained the necessary approvals before filing its motion not merely to oppose *an* amicus filing in this case, but also to oppose *any* amicus from filing in this case.

[2] The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

be helpful to the Court. By asking the Court to make this decision in a vacuum rather than in the context of any particular brief, the Government effectively seeks an advisory opinion that no future brief can meet the standard to be accepted for filing because any such brief will *necessarily* only repeat arguments already made. The Government cites to no legal authority whatsoever supporting its request that the Court preemptively preclude the filing of *amicus* briefs and provides no factual basis for its illogical assertion that the parties have made every conceivable argument and addressed every issue from every conceivable angle such that it is impossible that any non-party could possibly present an argument or a perspective not already before the Court.

Finally, the knock on the District Court's non-binding authority completely misses the mark. There is an overwhelming public interest in legally-sound judicial decisions by the District Courts. Indeed, federal District Courts on a daily basis make decisions that profoundly affect not only the litigants before them, but also the development of federal law. To say that an organization would gain nothing by asking to be heard at the trial court level because the trial court has no binding authority is to forget that all landmark decisions commence at the district court level.

The myriad examples cited above in which District Courts were asked by non-parties leave to file an *amicus* brief dispels the Government's fallacy that non-parties have no interest in decisions made by federal district courts, as well as the notion that Courts do not want or need additional information from non-parties with particular expertise. While the Government might prefer the Court to make decisions impacting this case with less information rather than more information, the examples above ably illustrate that most courts believe that the quality of a court's decision-making only improves when it has additional information before it from non-parties who have expertise with respect to a particular issue the court is addressing.

While the Government claims here that all amicus filings should be precluded because it is impossible that an amicus brief could be of assistance to the Court, the Hon. Pedro Delgado in Ms. Keleher's other pending case accepted an amicus brief for filing, rejecting the same arguments the Government raises here.

What the Government claims here is impossible has already occurred in the other case against Ms. Keleher in this Court. While speaking of how an *amicus* brief would merely rehash arguments raised in a prior motion, the Government cavalierly discounts the value of such a contribution from respected organizations whose members rank at the top of the legal profession. The Hon. Pedro Delgado in Ms. Keleher's other pending case, 19-cr-431 (PAD). (19-cr-431, Docket Nos. 337, 338), however, received a motion for leave to file an *amicus* brief from the National Association of Criminal Defense Lawyers (NACDL), through Ms. Keleher's counsel. NACDL sought leave to appear as an *amicus* in support of Ms. Keleher's argument for dismissal of several counts of the indictment. The Government opposed the motion and filed a motion that was virtually identical to the one now pending before the Court. Without delay, Judge Delgado disregarded the Government's arguments and accepted the *amicus* filing. Indeed, he did so without even seeking a response from NACDL to the arguments raised by the Government here.

No amicus has sought leave to appear on Ms. Keleher's behalf and, thus, the Government's motion is premature

The Government's filing is based, apparently, on the fact that an organization reached out to counsel for the Government inquiring as to whether they would consent to their appearance at *amicus* in this case. To this date, however, no *amicus* has sought leave to appear in this case. Without the benefit of knowing who the *amicus* filer is and the issues the brief would address, and their interest in the case, this Court would be unable to make a reasoned analysis and responsibly dispose of the issue. Because there is no actual justiciable issue pending before the Court, the Government is in essence asking the Court to issue an advisory opinion in advance of the possible

appearance of an *amicus* on Ms. Keleher's behalf. This is impermissible. *See Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 239-41, 57 S.Ct. 461, 81 L.Ed. 617 (1937)(Holding that a justiciable controversy must be "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."). Accordingly, the Court should wait until a potential *amicus* seeks leave to appear and issue a decision at that juncture when it can evaluate whether the particular brief at issue, in fact, only repeats arguments identical to those already made by the parties or, instead, offers additional insight from the perspective of an organization with expertise in an issue before the Court.

CONCLUSION

Curiously, it appears the Government is working strenuously to shield the Court from the valuable input of third parties who take exception to the Government's conduct during the investigation of Ms. Keleher. Such a position could credibly intimate its concern that government tactics may be subjected to serious scrutiny. The same Government who quickly moved to bar Ms. Keleher and her attorneys from commenting on the facts of the case is now quickly working to bar third parties from opining on the Government's unconstitutional investigatory tactics. The Court should see through these attempts to tie Ms. Keleher's hands. She is entitled to a fair, open proceeding where all facts and positions are readily discussed. An open process puts the Court in the best position to rule on any requests for relief. To hold otherwise would be to play to the Government's obstructionist tactics, and to validate its preemptive and unjustified attempts to preclude an *amicus* filing.

WHEREFORE, the defendant, Julia Beatrice Keleher, respectfully requests that the Court DENY the Government's motion (Docket No. 83).

Respectfully submitted on this 26th day of June 2020, in San Juan, Puerto Rico.

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 provide access to all parties of record.

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