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.: 19-431(PAD)

DEFENDANT JULIA BEATRICE KELEHER'S MOTION TO SUPPRESS

TO THE HONORABLE COURT:

COMES NOW Defendant Julia Beatrice Keleher ("Ms. Keleher"), through undersigned counsel, and, pursuant to Federal Rules of Criminal Procedure 12(b)(3)(C) and 41(h), respectfully moves to suppress and exclude all evidence—physical and testimonial—obtained or derived, directly or indirectly, from unlawful searches and seizures of emails from Ms. Keleher's personal email accounts. In the investigation of this case, the Government obtained the contents of personal email accounts of Ms. Keleher pursuant to search warrants, but then exceeded the scope of its authorizations under the warrants by conducting searches and seizures unauthorized by the warrants.

Between January and October 2018, the Government obtained five search warrants that were issued to third-party providers for personal email accounts of Ms. Keleher. In applying for each warrant, the Government made a showing to the Magistrate Judge in which it asserted that it had probable cause to believe that specified offenses had been committed, described the nature of the alleged illegal scheme(s), and sought and obtained authorization only to search for evidence of the specified alleged scheme(s). In total, the Government made probable cause showings with

respect to three distinct alleged unlawful schemes. The Indictment subsequently returned, however, in Counts Twelve through Eighteen, charges a scheme unrelated to any of these three schemes. Counts Fifteen and Sixteen cite two emails obtained from the personal email accounts of Ms. Keleher as having been sent in furtherance of the scheme alleged in Count Twelve. None of the warrants authorized the Government to search for or seize either of these emails. In discovery, the prosecution team has produced tens of thousands of personal emails of Ms. Keleher that none of the warrants authorized the Government to search for or seize. And, the Government has indicated its intention to introduce these emails at trial to prove Counts Twelve through Eighteen of the Indictment. Because the Government obtained these emails as the result of an unlawful search – having never applied to a neutral magistrate for a warrant to search for these emails, having never made a probable cause showing to a neutral magistrate that these emails may contain evidence of a crime, and having never received authorization from a neutral magistrate to search for and seize these emails–these unlawfully seized emails must be suppressed.

Specifically, Ms. Keleher requests suppression and exclusion of all evidence searched, seized, or obtained by the Government by exceeding the scope of the following search warrants:

(1) 18-116 (SCC) authorizing a limited search and seizure of Ms. Keleher's entire email account [redacted]@GMAIL.COM for the period November 1, 2012 to the present;

(2) 18-854 (SCC) authorizing a limited search and seizure of Ms. Keleher's entire email account [redacted]@GMAIL.COM for the period January 26, 2018 to the present;

(3) 18-859 (SCC) authorizing a limited search and seizure of Ms. Keleher's entire email account [redacted]@HOTMAIL.COM for the period November 1, 2016 to the present;

(4) 18-506 (M) authorizing a limited search and seizure of Ms. Keleher's entire email account [redacted]@GMAIL.COM for the period July 1, 2016 to the present; and

(5) 18-507 (M) authorizing a limited search and seizure of Ms. Keleher's entire email account ████████@GMAIL.COM for the period July 1, 2016.

Ms. Keleher also asks the Court to order the Government not to conduct any further search or review of these emails beyond the scope of the search warrants.

Additionally, Ms. Keleher seeks an evidentiary hearing to allow the Court to determine the scope of the violation of these warrants. Ms. Keleher reserves the right following an evidentiary hearing to seek further remedies, including the suppression of all evidence obtained or derived as a result of these search warrants. A memorandum of law in support of this Motion is attached.

Respectfully submitted on this 18th day of May 2020, in San Juan, Puerto Rico.

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Memorandum of Law in Support of
Ms. Keleher's Motion to Suppress

PRELIMINARY STATEMENT

Between January and October 2018, Magistrate Judges in the District of Puerto Rico authorized issuance of five seizure warrants to third-party providers of Ms. Keleher's personal email accounts for specified periods of time. The five warrants related to four different email accounts belonging to Ms. Keleher.

In the first of these warrant applications, the Government asserted probable cause to believe that certain offenses had been committed related to the award of a contract by the Puerto Rico Department of Education ("DOE") to Colon & Ponce ("C&P") while Ms. Keleher served as the Secretary of Education and probable cause that the emails it was seeking would contain evidence of the alleged illegal scheme related to the award of the C&P contract, and sought authorization upon obtaining the emails from the third-party provider to search for evidence related to the illegal scheme related to the award of the C&P contract.

In the second and third of these warrant applications, the Government again asserted probable cause related to the alleged illegal scheme related to the award of the C&P contract, but further asserted it also had probable cause to believe offenses had been committed related to Ms. Keleher's efforts to have a portion of her salary subsidized by private donations to the P[redacted] R[redacted] E[redacted] F[redacted] ("PR EDF"), and sought authorization to search the emails obtained from the third party providers for evidence of both the alleged C&P scheme and the alleged scheme to supplement Ms. Keleher's salary. In both the second and third warrant applications, the Government represented to the Magistrate Judge that it would employ a taint team to search the emails for the evidence for which the Government obtained authorization to search for and seize and would

provide to the prosecution team only those emails that were not privileged and were evidence of the alleged C&P scheme or the alleged scheme to supplement Ms. Keleher's salary.

In the fourth and fifth of these warrants applications, the Government re-asserted probable cause with respect to the alleged criminal conduct related to the award of the C&P contract and efforts to subsidize Ms. Keleher's salary. In these warrant applications, however, the Government also asserted probable cause to believe that specified offenses had also been committed related to the award of a contract by DOE to the J[redacted] and E[redacted] J[redacted] Institute of Ethics (hereinafter, "J[redacted] Institute") pertaining to the "T[redacted] V[redacted] C[redacted]" initiative and probable cause to believe that evidence of this alleged scheme would also be in the emails to be seized. Thus, the Government sought authorization to search the emails obtained from the third party provider in response to these two warrants for evidence of the alleged C&P scheme, the alleged scheme to subsidize Ms. Keleher's salary or the alleged J[redacted] Institute scheme. In both the fourth and fifth warrant applications, the Government represented to the Magistrate Judge that it would employ a taint team to search the emails for the evidence for which the Government obtained authorization to search for and seize and would provide to the prosecution team only those emails that were not privileged and were evidence of the alleged C&P scheme, the alleged scheme to supplement Ms. Keleher's salary, or the alleged J[redacted] Institute scheme.

The magistrate judges approved each of the warrant applications granting the Government only the authorization it had sought, based on the representations the Government had made. The Government's investigation culminated in the July 2019 Indictment of Ms. Keleher and others,

which in Counts One through Eleven, charges Ms. Keleher with offenses related to the award of the C&P contract.[1]

In Counts Twelve, Fifteen, and Sixteen, the Indictment alleges crimes against Ms. Keleher related to the award of contracts or contract amendments to another company, BDO Puerto Rico, P.S.C. ("BDO"). Counts Fifteen and Sixteen of the Indictment charge Ms. Keleher with substantive wire fraud offenses tied to the DOE's contracting with BDO, each citing an email allegedly sent in furtherance of the alleged scheme. Specifically, Count Fifteen cites an email sent to Ms. Keleher from Alberto Velazquez-Piñol at [redacted]@GMAIL.COM on February 7, 2017. Indictment at ¶ 115. This email would have been obtained by the Government from Google pursuant to the first search warrant discussed above. Count Sixteen cites an email sent by Ms. Keleher to Alberto Velazquez-Piñol from [redacted]@GMAIL.COM on February 14, 2017. *Id.* This email would also have been obtained by the Government from Google pursuant to the first search warrant discussed above. The application for this warrant did not purport to set forth probable cause to believe any offenses had been committed related to the award of contracts or contract amendments to BDO, assert that there was probable cause to believe there was evidence of such a scheme in the emails to be seized from Google and searched, reference Mr. Alberto Velazquez-Piñol, or seek authorization to search the emails for communications to or from Alberto Velazquez-Piñol or for evidence of a scheme related to contracts between DOE and BDO. Nor did any of the other warrant applications in this case do so.[2]

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[1] The Indictment does not contain any allegations related to efforts to subsidize Ms. Keleher's salary or to the contract award to the J[redacted] Institute related to the "T[redacted] V[redacted] C[redacted]" initiative.

[2] The Government has produced in discovery copies of fourteen warrants authorizing the seizure of entire email accounts from third party providers seeking authorization to search within those accounts for evidence of particularized criminal conduct for which the Government set forth probable cause in the application. Not one of the applications for these warrants contained any allegation of probable cause to search for evidence of crimes related to the BDO contracts.

In discovery, the prosecution team has produced the entirety of all of the emails from all four personal email accounts of Ms. Keleher that were seized from third party providers based on the five warrants. Further, in its Rule 12 disclosure, the Government designated as evidence it intends to introduce at trial emails from three of these four accounts.[3]

It is apparent that the Government, having obtained authorization to obtain disclosure of emails from third party providers for a limited and particularized purpose – that did not include searching for and seizing emails related to any alleged illegal scheme involving the award of contracts or contract amendments to BDO – exceeded that authorization. The Government impermissibly treated the particularized orders as general warrants, and unlawfully searched the emails for evidence for which it had made no probable cause showing and had received no authorization to search. The Government based charges on emails for which it had no authorization to search or seize and has indicated it intends to introduce at trial emails that include emails it obtained unlawfully. By conducting impermissible searches beyond the authorized scope of the search warrants, the Government violated Ms. Keleher's Fourth Amendment rights. The evidence it obtained, directly and derivatively, from these Fourth Amendment violations must be suppressed. An evidentiary hearing must be held to determine the scope of the violation and to determine what additional remedies may be appropriate.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Government Applied For Authorization, and Only Obtained Authorization, To Search Ms. Keleher's Personal Email Accounts for Evidence of Specific Suspected Illegality for Which It Had Made a Probable Cause Showing.

[3] The Government has not indicated an intent to introduce any emails from Ms. Keleher's Hotmail account.

On or around January 26, 2018, the Government applied to the Honorable Magistrate Judge Sylvia Carreño-Coll for several warrants to obtain the contents of entire email accounts from the third party email providers of individuals the Government alleged it had probable cause to believe had committed criminal offenses related to the award of the C&P contract. The Government represented that it would search these emails for evidence of these offenses. The Government did not seek authorization, much less obtain authorization, to search these emails for any other purposes. The warrants included a warrant to Google, the third-party provider of one of Ms. Keleher's personal email accounts, [REDACTED]@GMAIL.COM (**Exhibit A**, Case No. 18-116 (SCC)) for emails from November 1, 2012 to the present.[4]

On or around May 17, 2018, the Government again applied to Magistrate Judge Carreño-Coll for several warrants to seize entire email accounts from third-party providers, including [REDACTED]@GMAIL.COM for January 26, 2018 to the present and [REDACTED]@HOTMAIL.COM for November 1, 2016 to the present (**Exhibits B and C**, Case Nos. 18-854 (SCC) and 18-859 (SCC), respectively). In these applications, the Government once again set forth the same alleged probable cause to search for evidence of criminal conduct related to the issuance of the C&P contract. The Government added the assertion that it also had probable cause to search for evidence of criminal conduct related to Ms. Keleher's efforts to have a portion of her salary subsidized by private donations to the P[REDACTED] R[REDACTED] E[REDACTED] F[REDACTED] ("PR EDF"). In these applications, the Government represented to the Magistrate that it would employ a taint team to review the email accounts so that the prosecution team would be given access only to non-

[4] In January and May of 2018, in addition to the warrants targeting Ms. Keleher's email account, the Government also applied for search warrants for the accounts of several other individuals, including Glenda Ponce-Mendoza. Ms. Keleher, however, will limit her discussion to the warrants addressing her email accounts.

privileged emails relevant to the alleged criminal schemes for which the Government had made a probable cause showing to the Magistrate. (*See* Exhibits B and C, p. 25, Aff. ¶ 45.)

Finally, on or before September 28, 2018, the Government applied to the Honorable Magistrate Judge Marcos E. López for two additional search warrants, one to search the email account associated with the address [redacted]@GMAIL.COM (**Exhibit D**, Case No. 18-1506(M)) for July 1, 2016 to the present and the other to search the email account associated with the address [redacted]@GMAIL.COM (**Exhibit E**, Case No. 18-1507(M)) for July 1, 2016 to the present. In these applications, the Government reiterated the same allegations of probable cause to search for evidence related to criminal conduct in relation to both the award of the C&P contract and Ms. Keleher's efforts to have a portion of her salary covered by private donations to the PR EDF, but also set forth alleged probable cause related to the award of the contract to the J[redacted] Institute in relation to the "T[redacted] V[redacted] C[redacted]" initiative. The Government again represented to the Magistrate that it would employ a taint team to review the email accounts so that the prosecution team would be given access only to emails that were not privileged and were relevant to the alleged criminal schemes for which the Government had made a probable cause showing to the Magistrate. (*See* Exhibits D and E, p. 26, Aff. ¶ 50.)

A. With respect to each of the warrant applications, the affiant set forth the alleged schemes for which the Government asserted it had probable cause and obtained authorization with respect to evidence of those schemes; none of the schemes for which the affiant purported to make a probable cause showing involved BDO or is otherwise related to the scheme subsequently charged in Counts Twelve through Eighteen of the Indictment.

Each affidavit submitted to the Court enumerated specific statutory offenses and made a specific factual showing detailing the alleged conduct at issue. The affidavits asserted that there was probable cause that evidence of this alleged conduct would be contained in the emails. In the

first affidavit, a single unlawful scheme was alleged. In the second and third affidavits, a second unlawful scheme was alleged. In the fourth and fifth affidavits, a third unlawful scheme was alleged. Each of the alleged schemes set forth in the warrant applications, and which applications alleged which schemes, is set forth below.

<u>Suspected Scheme 1:</u> Colón & Ponce (alleged in all five warrant applications)

Colón & Ponce was a Puerto Rico company; one of the principals of the company was Mayra Ponce. (Aff. ¶ 7.) Mayra Ponce's sister is Glenda Ponce, who worked as a DOE contractor with the DOE Secretary's Office. (*Id.* ¶ 8.) Glenda Ponce and C█████ D█████, a Special Assistant with the DOE Secretary's Office, approached Ms. Keleher about contracting with Colón & Ponce. (*Id.* ¶¶ 9–10.) Ms. Keleher thereafter indicated she wanted to contract with Colón & Ponce to assist her with duties or projects, notwithstanding a DOE policy requiring a competitive bidding process. (*Id.* ¶ 10.) The DOE, through its contracting unit, sent a request for quotes ("RFQ") to seven vendors, including Colón & Ponce. (*Id.* ¶ 12.) Shortly after the RFQ was sent, Glenda Ponce approached the evaluating official, told him or her that Colón & Ponce had already submitted a proposal to the DOE, and told him or her that Ms. Keleher wanted to contract with Colón & Ponce. (*Id.* ¶ 13.)

The evaluating official received five proposals in total and recommended every company for selection except for Colón & Ponce, ostensibly because of a lack of experience among the company's principals. (*Id.* ¶ 14.) Notwithstanding this single lower-level official's decision not to recommend C&P, the DOE selected and awarded the contract to Colón & Ponce. (*Id.* ¶¶ 15–16.)

Thereafter, Ms. Keleher approved an amendment to the contract that increased the contract award amount. (*Id.* ¶ 17.) This amendment was approved mainly to allow M███ C█████ to receive

compensation for acting as a special assistant to Ms. Keleher, a position that C[redacted] held without compensation for months before she was employed by Colón & Ponce. (*Id.* ¶¶ 17, 19.)

V[redacted] M[redacted]—a former business associate of Ms. Keleher's who had purchased Ms. Keleher's company over six months earlier—reviewed Colón & Ponce's original bid proposal and made suggestions, including "adding and/or boosting Glenda Ponce's experience in education matters . . . and recommending the non-disclosure of Glenda Ponce's name in the proposal." (*Id.* ¶ 21.) She also reviewed the proposal to amend and increase the award amount. (*Id.* ¶ 21.) Colón & Ponce made payments to one of M[redacted]'s companies after the DOE contract was awarded. (*Id.* ¶ 26.) M[redacted] also exchanged emails with Ms. Keleher and Glenda Ponce about several other DOE matters not related to Colón & Ponce, "such as the creation of [DOE] personnel positions and the development of academic projects by the [DOE]." (*Id.* ¶ 28.)

<u>Suspected Scheme 2:</u> P[redacted] R[redacted] E[redacted] F[redacted] (alleged in the second through fifth warrant applications)

In July 2017, the Puerto Rico Fiscal Agency and Financial Advisory Authority (hereinafter, "FAFAA") entered into a contract with Ms. Keleher for her to serve as Secretary of Education and FAFAA government restructure officer for education, in exchange for a salary of $250,000 per year. (*Id.* ¶ 37.)

In September or October 2017, Ms. Keleher proposed the idea of creating a foundation to receive donations to help rebuild the public education system in Puerto Rico after Hurricane Maria in September 2017. (*Id.* ¶ 33.) In November 2017, the PR E[redacted] F[redacted] C[redacted] (hereinafter, "Education Foundation") was registered as a nonprofit to support the public education system on the island. (*Id.* ¶ 34.) M[redacted] C[redacted] is one of the three incorporators of the nonprofit. (*Id.*)

In October and November 2017, Ms. Keleher communicated with W B at a nonprofit called T F (hereinafter, "T") to request a donation to the Education Foundation. (*Id.* ¶ 35.) T might have approved a $15 million donation to the Education Foundation to be disbursed over five years. (*Id.* ¶ 38.) The donation appeared intended to fund the salaries of officials to be hired in the independent education regions that DOE was going to create under Ms. Keleher. (*Id.*)

In December 2017, Ms. Keleher asked R (with the Government Ethics Office) whether there could be an ethical problem if a foundation made a donation to the Puerto Rico Fiscal Agency and Financial Advisory Authority (hereinafter, "FAFAA"). (*Id.* ¶ 36.) She explained that T donated funds to the Education Foundation, and one of the approved expenses was to cover Ms. Keleher's salary for five years. (*Id.*)

In January 2018, R—again, the top government ethics officer—assured Ms. Keleher that there were no ethical issues with the proposed donation transaction providing for her salary. (*Id.* ¶ 39.)

<u>Suspected Scheme 3:</u> T V C (alleged in the fourth and fifth warrant applications)

There was a "public controversy" surrounding the award of a contract to a company, the J Institute. (*Id.* at ¶ 30.) It was alleged that Z R, Executive Director of the Puerto Rico Government Ethics Office, referred this vendor to Secretary Keleher, "which would have potentially been inappropriate and unethical." (*Id.*) In February 2017, R, scheduled a meeting with Ms. Keleher and other individuals related to a DOE project called "T V C." (*Id.* ¶ 31.) In March 2017, R sent Ms. Keleher an email attaching the

proposal for T V C. (*Id.*) In December 2017, DOE awarded a public contract related to the T V C to the J I.

Summary of Suspected Schemes for Which Government Asserted It Had Probable Cause

In sum, the affiant set forth facts purporting to show the Government had probable cause to suspect that:

- Ms. Keleher, C D, G P, Mayra Ponce, COLÓN & PONCE, V M, and others "devised a fraudulent scheme circumventing the [DOE] rules and regulations to illegally award a contract to [COLÓN & PONCE] and later amend and increase the [COLÓN & PONCE] contract amount for the sole purpose of benefiting M.C. after her position as [a DOE] employee was not approved." (*Id.* ¶ 41.)

- Ms. Keleher communicated with T to request a donation to be used toward her salary as Secretary of Education. (*Id.* at ¶ 35)

- Ms. Keleher, Z R, the J Institute, T F, PR E F, and others "might have been involved in a fraudulent scheme to illegally award [J Institute] the contract in the [DOE] and to donate funds to PR E F to pay for Secretary Keleher's contract with FAFAA."[5] (*Id.* at ¶¶ 30-31.)

Request to search and seize based on the probable cause showing

The affiant in the first warrant application listed the following statutory offenses as having potentially been violated: 18 U.S.C. §§ 666, 371, 1341, 1343, 1346, and 1956 (theft or bribery concerning programs receiving federal funds, conspiracy, mail fraud, wire fraud, and money laundering). (*Id.* at ¶ 4.) In the second through fifth warrant applications, it listed these same offenses, but also added § 1956. (*Id.*)

The Government listed the information to be disclosed by the email provider in Attachment B to all five warrants for Ms. Keleher's email accounts as the complete email boxes identified

[5] Although the alleged schemes related to the PR EDF and T V C appear to be factually independent, the affiant grouped them together when alleging probable cause to search.

within the identified date ranges. *See* Exhibit B, Section I. The reason the information is to be disclosed by the provider to the Government is so that the Government could search for and seize the evidence specified in the warrant. (*Id.* at ¶ 1.) ("Upon receipt of the information described in Section I of Attachment B, government-authorized persons will review that information to locate the items described in Section II of Attachment B:") Each warrant specified the evidence sought as follows (with emphasis added):

(1) 18-116 (SCC) listed all documents and information from Ms. Keleher's @GMAIL.COM account *that are evidence or instrumentalities of specific suspected federal crimes involving "Julia B. Keleher*, Glenda PONCE, C D , M E. C , [and] COLON & PONCE, INC." from January 1, 2017 to the present. (Exhibit B, Section III);

(2) 18-854 (SCC) listed all documents and information from Ms. Keleher's @GMAIL.COM account *that are evidence or instrumentalities of specific suspected federal crimes involving "Julia B. Keleher*, Glenda PONCE, C D , M E. C , V M , M C , COLON & PONCE, INC. and W B " from January 26, 2018 to the present. (Exhibit B, Section III);

(3) 18-859 (SCC) listed all documents and information from Ms. Keleher's @HOTMAIL.COM account *that are evidence or instrumentalities of specific suspected federal crimes involving "Julia B. Keleher*, Glenda PONCE, C D , M E. C , V M , M C , COLON & PONCE, INC. and W B " from November 1, 2016 to the present. (Exhibit B, Section III);

(4) 18-506 (M) listed all documents and information from Ms. Keleher's @GMAIL.COM account *that are evidence or instrumentalities of specific suspected federal crimes involving "Julia B. Keleher*, Glenda PONCE, C D , M E. C , V M , M C , COLON & PONCE, INC. and William BELL" from July 1, 2016 to the present. (Exhibit B, Section III); and

(5) 18-507 (M) listed all documents and information from Ms. Keleher's @GMAIL.COM account *that are evidence or instrumentalities of specific suspected federal crimes involving "Julia B. Keleher*, Glenda PONCE, C D , M E. C , V M , M C , COLON & PONCE, INC. and W B " from July 1, 2016. (Exhibit B, Section III).

The affiant explains that the Government is setting forth probable cause to search only for the enumerated evidence of the particular alleged unlawful conduct. (*Id.* at ¶ 4.) ("There is also probable cause to search the information described in Attachment A for evidence, instrumentalities, contraband or fruits of these crimes further described in Attachment B.") The affiant further explained why the Government was requesting the information it asked to search: information stored in connection with an email account "may provide the crucial 'who, what, why, when, where, and how' of *the criminal conduct under investigation*." (*Id.* ¶ 49.) (emphasis added).

B. The Government requested the Third-Party Providers be required to disclose all data from the accounts, but that the Government only be permitted to search for and seize emails that were evidence of the alleged schemes for which it had made a probable cause showing in the search warrant application.

The Government requested that the third party providers be required to disclose all of the data available from and about the five email accounts for a specified period of time. (Exhibits A-E, Attachment B, Sections I–III.) Specifically, the e-mail provider was to produce the contents of all emails associated with the account (including stored copies, drafts, source and destination addresses, dates and time, and size and length of emails); all records or other information regarding the identification of the account (including full name, physical address, identifiers, records of session times and durations, and IP addresses); types of services utilized; and all records or other information (including address books, contacts, calendar data, and pictures). (*Id.*)

Although the Government requested that the email provider be ordered to disclose all of this data, the warrants only authorized the Government to search for and seize information "that constitutes fruits, contraband, evidence and instrumentalities of violations of Title 18, United States Code, Sections 666, 371, 1341, 1343, and 1346 [and in the later warrants, 1956], those violations involving" Ms. Keleher, Glenda Ponce, C[redacted] D[redacted], M[redacted] C[redacted], V[redacted] M[redacted],

M█████ C████, Colón & Ponce, and W██████ B███, "as well as other individuals/corporations."[6] (*Id.*, Section III.)

C. The Government searched for and seized emails for which it had not sought or obtained authorization to search for and seize and for which it had made no probable cause showing.

In all but the first affidavit seeking to search Ms. Keleher's emails, the Government assured the Magistrate that it would employ a taint team and the prosecution team would only receive data that could provide information about the criminal conduct under investigation, *i.e.*, information that would fall within the authorized scope of the warrant. (Affidavit ¶¶ 49–50.)

The employment of a procedure that limited searching of the emails to the subjects authorized by the warrants, whether performed by the prosecution team with respect to the first warrant or a taint team with respect to the remaining warrants, was, as explained in greater detail below, necessary for the warrant to comply with the Fourth Amendment's particularity requirement. The fact that Counts Twelve through Eighteen are based on emails seized from Google pursuant to the first warrant that are completely unrelated to the scheme for which it purported to make a probable cause showing when applied for that search warrant, however, shows that the Government searched for and seized emails for which it had made no probable cause showing, had not sought authorization to search for and seize, and had not obtained authorization to search for or seize. Plainly, the Government overstepped the boundaries of the search warrant.

[6] This must refer to Z████ R█████, J████████ Institute, T██████ F█████████, PR E████████ F█████████, and others which "might have been involved in a fraudulent scheme to illegally award [Josephson Institute] the contract in the [DOE] and to donate funds to PR E████████ F█████████ to pay for Secretary Keleher's contract with FAFAA," because these individuals and entities are for some reason not specifically listed in the description of information to be searched for and seized.

Further, with respect to the last four of the five search warrants, while the Government represented to the Magistrate Judge that it would employ a taint team to do the searching and the prosecution team would only be given access to materials the warrant authorized the Government to seize, something went seriously wrong with that process, assuming it was ever employed. In discovery, the prosecution team has produced the entirety of the email boxes. Plainly, the prosecution team has had access to all of the emails, not just those that were supposed to have first been filtered by the taint team in order to limit the access of the prosecution team to only those emails for which a probable cause showing had been made and authorization to seize had been sought and obtained. Not only has the prosecution team plainly had access to emails it should not ever have had, but also the prosecution team has indicated in its Rule 12 designation of evidence its intent to introduce such emails at trial.

For example, emails from the accounts [redacted]@gmail.com and the emails from the account [redacted]@gmail.com were obtained only through warrants where the application represented searches would be conducted using a taint team. The prosecution team should never have had access to any of the emails from either of these accounts that do not relate to the C&P contract, Ms. Keleher's salary, or the J[redacted] I[redacted] contract. Yet, the prosecution team turned over the entirety of both email accounts in discovery and has designated the entirety of both accounts as documents it may seek to admit at trial to prove Counts Twelve through Eighteen related to the alleged BDO scheme. The Court should grant this suppression motion to preclude the introduction of this unlawfully obtained evidence.

II. The Indictment Includes Charges Against Ms. Keleher Both for Conduct Connected with the DOE's Award of a Contract to Colón & Ponce and for Conduct Connected with the Award of Contracts and Contract Amendments to BDO.

On July 9, 2019, a grand jury returned a 32–count Indictment against Ms. Keleher and five other defendants. (*See* Docket No. 3). The Indictment charges Ms. Keleher, Glenda Ponce-Mendoza, and Mayra Ponce-Mendoza with illegally "steering" the DOE contract identified in the affidavit to Colón & Ponce and thereafter amending it. (*Id.*)

In Counts Twelve through Eighteen, the Indictment also charges Ms. Keleher, along with two individuals not charged related to the C&P contract award, Alberto Velazquez-Piñol ("Velazquez-Piñol") and Fernando Scherrer-Caillet ("Scherrer-Caillet"), with alleged illegality connected with DOE contract with BDO. (*See Id.*) Velazquez-Piñol, Scherrer-Caillet, and the alleged BDO contract scheme in which they were charged, were not mentioned in any of the search warrant affidavits, much less did the affiant attempt to make a probable cause showing of any crimes having been committed pertaining to the BDO contract award. None of the warrant applications sought authorization for either the prosecution team or a taint team to search Ms. Keleher's personal emails for and seize emails to or from Velazquez-Piñol or Scherrer-Caillet or emails related to the BDO contract award.

Despite the alleged BDO-related scheme being wholly absent from the allegations in the search warrant affidavits, the emails referenced in Counts Fifteen and Sixteen of the Indictment are from the emails disclosed to the Government as a result of the first search warrant. The prosecution team has produced in discovery all of the emails disclosed pursuant to all five warrants. That the prosecution team had access to these emails makes clear that the representation in four of the five warrants about restricting the prosecution team's access to the emails disclosed by the third party providers was blatantly disregarded. And, in its Rule 12 designation of evidence, the prosecution team has reserved the right to introduce any and all emails seized from Ms. Keleher's [redacted]@GMAIL.COM, [redacted]@GMAIL.COM, and

█████████████@GMAIL.COM accounts (Docket No. 200, ¶38), emails disclosed to the Government pursuant to the first, second, fourth, and fifth warrants, to prove the BDO scheme alleged in Counts Twelve through Eighteen.

Plainly the Government searched for, seized, and intends to introduce at trial emails that the third party providers disclosed to the Government pursuant to the search warrants, but for which the Government had no authorization to search or to seize. The Government unilaterally converted the limited search and seizure authorization it had obtained into the wholesale seizure of the entirety of Ms. Keleher's personal email. The Government then engaged in a general search of the universe of emails for evidence entirely unrelated to the probable cause showings it made to the Magistrate Judge. The Government has violated Ms. Keleher's Fourth Amendment rights and the direct and derivative evidence of those searches must be suppressed.

Thus, ultimately, with respect to the second through fifth warrants, any filtering of the emails performed by the taint team was meaningless because, at some point, the particularity required in the warrant application and on which the warrant authorization was based was ignored and the entirety of the email contents was provided to the prosecution team. With respect to these four warrants, the Government's violation of Ms. Keleher's Fourth Amendment rights is even more egregious than with respect to the first warrant. With the first warrant, the prosecution team wholly disregarded the safeguards that assured the Magistrate that the search and seizure met the particularity requirement of the Fourth Amendment. In the latter four of the five warrants, both the taint team (if one was ever employed) and the prosecution team ignored those safeguards and converted the warrant to an unlawful general search. Plainly, either the taint team or the prosecution team, having obtained the emails under the guise that they would only search for evidence related C&P, Ms. Keleher's salary, or the J█████ I█████,

rummaged through the emails looking for unrelated evidence. The Government searched the emails for evidence of a scheme related to BDO without ever having applied for a warrant to do so, without ever making a probable cause showing related to BDO to a neutral magistrate, and without ever having received authorization from a neutral magistrate to search for or seize emails related to BDO.

LAW AND ARGUMENT

The prosecution team, by searching and seizing emails outside the authorized scope of the five warrants, violated Ms. Keleher's Fourth Amendment rights. Evidence obtained or derived directly or indirectly from those unauthorized and unreasonable seizures and searches must be suppressed.

I. The Fourth Amendment Requires Suppression of Evidence Obtained by Law Enforcement Agents Who Exceed the Authorized Scope of a Search Warrant.

The Fourth Amendment to the U.S. Constitution prohibits "unreasonable searches and seizures," and further states that no search warrant "shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.[7] These protections exist to "safeguard the privacy and security of individuals against arbitrary invasions by Government officials." *Camara v. Mun. Ct.*, 387 U.S. 523, 528 (1967). The protections are enforced through the exclusionary rule, whereby courts prohibit the admission of evidence obtained or derived from a violative government search. *See United States v. Cruz-*

[7] The Amendment's rights are fundamental in the United States. Similar provisions exist in the state constitutions of California, where the search warrants were served on Google, and Pennsylvania, where Ms. Keleher lives. Cal. Const. art I § 13; Pa. Const. art I § 8. The Constitution of the Commonwealth of Puerto Rico mirrors these protections, and explicitly requires that evidence obtained in violation of those protections shall be inadmissible in the courts. *See* P.R. Const. art. II § 10.

Mercedes, 945 F.3d 569, 575 (1st Cir. 2019) ("The Supreme Court long ago recognized the exclusionary rule in response to the perniciousness of unlawfully obtained evidence.").

The limitation on searches to only searches authorized with particularity by a neutral magistrate is a fundamental, bedrock constitutional principle. The Founding Fathers wrote the Fourth Amendment to the Bill of Rights specifically to prohibit the use of general searches:

> The Founding generation crafted the Fourth Amendment as a "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California*, 573 U. S. ___, ___ (2014) (slip op., at 27). In fact, as John Adams recalled, the patriot James Otis's 1761 speech condemning writs of assistance was "the first act of opposition to the arbitrary claims of Great Britain" and helped spark the Revolution itself. *Id.*, at ___–___ (slip op., at 27–28) (quoting 10 Works of John Adams 248 (C. Adams ed. 1856)).

Carpenter v. United States, 138 S. Ct. 2206, 2213 (2018)

Where a search is conducted pursuant to a properly issued search warrant, the scope of that search is "limited by the terms of its authorization." *Walter v. United States*, 447 U.S. 649, 656 (1980).[8] The Supreme Court reasons that:

> [b]y limiting the authorization to search to the specific areas and things for which there is probable cause to search, the [particularity] requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

Maryland v. Garrison, 480 U.S. 79, 84 (1987). "When investigators fail to limit themselves to the particulars in the warrant," in contrast, "both the particularity requirement and the probable cause requirement are drained of all significance as restraining mechanisms, and the warrant limitation becomes a practical nullity." *United States v. Mousli*, 511 F.3d 7, 12 (1st Cir.2007); *see also United*

[8] Ms. Keleher assumes *arguendo* and for purposes of this Motion that the search warrants in question were properly issued.

States v. Upham, 168 F.3d 532, 536 (1st Cir.1999) ("It is settled law that the search and seizure conducted under a warrant must conform to the warrant.").

If the Government exceeds the limitations in a search warrant, the exclusionary rule operates to exclude evidence obtained through that violative search and the fruits of that search. *See United States v. Aboshody*, 951 F.3d 1, 5 (1st Cir. 2020) (exclusionary rule applies where Government conduct reflects a deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights); *United States v. Towne*, 705 F. Supp. 2d 125, 135 (D. Mass. 2010) (quoting *United States v. Hamie*, 165 F.3d 80, 84 (1st Cir.1999)) ("If items are seized outside the scope of the warrant, 'the normal remedy is to suppress the use of all items improperly taken'"); *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1174 (9th Cir. 2010) (en banc) (per curiam) ("When, as here, the Government comes into possession of evidence by circumventing or willfully disregarding limitations in a search warrant, it must not be allowed to benefit from its own wrongdoing by retaining the wrongfully obtained evidence or any fruits thereof."), *overruled in part on other grounds as recognized by Demaree v. Pederson*, 887 F.3d 870, 876 (9th Cir. 2018) (per curiam).

II. The Government Exceeded the Scope of the Search Warrants when it Searched Ms. Keleher's Email for Evidence of Criminal Activity Well Beyond the Alleged Criminal Activity in the Search-Warrant Application for which a Probable Cause Showing was Made to the Magistrates and for Which They Authorized the Government to Search and Seize.

A. The Fourth Amendment particularity and scope requirements apply with special force when a warrant authorizes a search of an email account.

"As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, [the Supreme] Court has sought to 'assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.' *Kyllo v. United States*, 533 U. S. 27, 34 (2001)." *Carpenter*, 138 S. Ct. at 2213. Courts consistently

recognize that individuals have a reasonable expectation of privacy in emails sent through a commercial internet service provider. *See United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) (cited with approval by the First Circuit in *Johnson v. Duxbury, Massachusetts*, 931 F.3d 102, 108 n.5 (1st Cir. 2019)); *see also In re Applications for Search Warrants for Information Associated with Target Email Address*, Nos. 12–MJ–8119–DJW & 12–MJ–8191–DJW, 2012 WL 4383917, at *5 (D. Kan. Sept. 21, 2012); *United States v. Ali*, 870 F.Supp.2d 10, 39 n.39 (D.D.C. 2012); *United States v. Lucas*, 640 F.3d 168, 178 (6th Cir. 2011); *United States v. Forrester*, 512 F.3d 500, 511 (9th Cir. 2008) ("Privacy interests in [mail and email] are identical."); *c.f. United States v. Hamilton*, 701 F.3d 404, 408 (4th Cir. 2012) ("[E]mail has become the modern stenographer . . . [and] are confidential.") Indeed, in today's world, where people communicate significantly (if not primarily) by electronic means, "[b]y obtaining access to someone's email, Government agents gain the ability to peer deeply into his activities." *See United States v. Warshak*, 631 F.3d at 284.

The Fourth Amendment's requirements are never formalities, *McDonald v. United States*, 355 U.S. 451, 455 (1948), but its particularity and scope requirements are especially important when the Government seeks to intrude on the privacy of a person's electronically stored information, such as email communications. *United States v. Galpin*, 720 F.3d 436, 446 (2d Cir. 2013). As the Second Circuit, sitting *en banc*, recognized when considering the seizure and search of a computer hard drive,

> The seizure of a computer hard drive, and its subsequent retention by the government, can give the government possession of a vast trove of personal information about the person to whom the drive belongs, much of which may be entirely irrelevant to the criminal investigation that led to the seizure.

United States v. Ganias, 824 F.3d 199, 217 (2d Cir. 2016) (*en banc*); *United States v. Burgess*, 576 F.3d 1078, 1091 (10th Cir. 2009) ("If the warrant is read to allow a search of all computer records

without description or limitation it would not meet the Fourth Amendment's particularity requirement."); *see also In the Matter of a Warrant for All Content and Other Information Associated with the Email Account xxxxxxx gmail.com*, 33 F. Supp.3d 386, 394 (S.D.N.Y. 2014) ("We perceive no constitutionally significant difference between the searches of hard drives just discussed and searches of email accounts.").

With respect to electronic discovery, there is no dispute that the Government initially is permitted to obtain the entire contents of an email account, but only so that it can separate the documents that have been set forth with particularity in the warrant from other documents that have not, the relevant from irrelevant documents. Fed. R. Crim. P. 41(e)(2)(B). Thus, to comport with the Fourth Amendment, the electronic information disclosed to a prosecution team for use as evidence must be limited to that for which the Government has probable cause to probe. *See Comprehensive Drug Testing, Inc.*, 621 F.3d at 1180 ("The Government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents."), *overruled in part on other grounds as recognized by Demaree v. Pederson*, 887 F.3d 870, 876 (9th Cir. 2018). Electronic documents that do not pertain to information for which the Government has articulated probable cause cannot be seized. *See, e.g.*, *Galpin*, 720 F.3d at 446 ("[A]n otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based.") (citing 2 W. LaFave, Search and Seizure § 4.6(a) (5th ed. 2012); *United States v. Rosa*, 626 F.3d 56, 62 (2d Cir. 2010) (Warrants that fail to "link [the evidence sought] to the criminal activity supported by probable cause" do not satisfy particularity requirement because they "lack[ ] meaningful parameters on an otherwise limitless search" of a defendant's electronic media); *In re Search of Records, Information, and Data Associated with 14 Email Addresses Controlled by*

Google, LLC, --- F.Supp.3d ---, Case No. 18-mc-50318, 2020 WL 556205 at *7 (E.D. Mich. Feb. 4, 2020) ("[I]t is sufficiently particular for the warrant to permit seizure of items related to the criminal statutes identified . . . within the context of the [redacted] scheme."); *United States v. Chavez*, No. 3:18-CR-00311-MOC-DCK-3, 2019 WL 5849895, at *9 (W.D.N.C. Nov. 7, 2019) (although probable cause supported the warrant to search the defendant's Facebook account, the failure to limit the warrant temporally or to members of the fraud caused it to be overbroad); *United States v. Irving*, 347 F. Supp.3d 615, 624 (D. Kan. 2018) (a warrant to search a defendant's Facebook was overbroad when defined only by a specified crime without any other scope or time limitations) (quoting *Cassady v. Goering*, 567 F.3d 628, 634 (10th Cir. 2009)); *see also Gmail Accounts*, 371 F.Supp.3d at 845–46; *In the Matter of the Search of Google Email Accts.*, 92 F. Supp.3d at 946; *In re Redacted@gmail.com*, 62 F. Supp.3d at 1104; *United States v. Matter of Search of Info. Assoc. with Fifteen Email Addresses*, 2017 WL 4322826, at *7, 11; *cf. United States v. Chalavoutis*, 2019 WL 6467722 at *5 (E.D.N.Y. Dec. 2, 2019) (search upheld where warrant appropriately "limited the information to be seized . . . by reference to the crimes investigated, the participants, a time frame, and types of information and documents.").

B. The Government exceeded the authorized scope of the search warrants by seizing and searching information completely and obviously unrelated to the schemes for which it had made a probable cause showing and for which it had obtained authorization to search for and to seize.

The search warrants at issue here were granted to allow the Government to examine emails relating to: (1) the award of the C&P contract, (2) Ms. Keleher's efforts to have a portion of her salary covered by private donations to the PR EDF, and (3) the award of the contract to the J[redacted] [redacted] I[redacted] in relation to the "T[redacted] V[redacted] C[redacted]" initiative. *See supra* Section I.a.1. Despite the search warrants' clear language limiting the scope of the search and seizure, which was

required to satisfy the particularity requirement of the Fourth Amendment, the Government searched Ms. Keleher's emails for and seized information that substantially exceeded the purview of the probable cause and the activities described in the search warrants.[9]

It is difficult to fathom, for example, how emails from Velazquez-Piñol, forwarding an engagement letter for BDO to amend its contract and discussing contract language, could be viewed by the Government as emails legitimately relating to the "'who, what, why, when, where, and how' of the criminal conduct under investigation," the award of DOE contracts to Colon & Ponce and to the J[redacted] I[redacted] (*See Id.* ¶ 49). Yet clearly those exact emails were identified as a result of the Government's search of Ms. Keleher's emails and seized by the Government, because they are the basis for Counts Fifteen and Sixteen of the Indictment.

Here, Ms. Keleher does not dispute the Government was entitled, by the terms of the warrant and under Rule 41, to require the third party providers to disclose the emails from Mr. Keleher's personal email accounts to the Government. But the Government's authority with respect to these emails was limited. It obtained authorization for the prosecution team, with respect to the first warrant, and a taint team, with respect to the other four warrants, to conduct a preliminary review of the emails to determine what information was within the scope of the search warrants issued. Fed. R. Crim. P. 41(e)(2)(B).

Typically, this is done by performing electronic searches, using key words designed to return only the relevant emails authorized to be seized. Here, word searches would have had to be

[9] The Government, despite its own express language to the contrary in the search-warrant applications, may now attempt to argue that the search warrants authorized the seizure and search of *all* of Ms. Keleher's emails. If that were the case (it is not), the search warrants on their face would violate the Fourth Amendment's particularity and breadth/scope requirements, as the Government's search warrant affidavits do not even attempt to justify such a sweeping search of Ms. Keleher's email accounts.

conducted to identify emails related to the C&P contract, Ms. Keleher's salary, or the contract award to the J[redacted] I[redacted]. Those emails, and only those emails, could be reviewed further to determine what subset of them were in fact relevant to the alleged schemes for which a probable cause showing had been made. Neither the prosecution team or the taint team would have had authorization to use key words such as "BDO," "Velazquez-Piñol," or "Scherrer-Caillet" designed to undercover evidence of a scheme related to contracts or contract amendments between the Department of Education and BDO, an alleged scheme unrelated to the subjects for which the Government had authorization to search. The limited authority to separate out relevant and irrelevant information did not permit the Government to seize emails beyond the scope of the authorized warrant, rummage through them looking for evidence of unrelated misconduct.

Yet, the Government plainly did so and then used the fruits of those unauthorized and lawful searches as the basis for bringing an entirely unrelated set of criminal charges against Ms. Keleher. Rule 41 makes clear that the Government's review of electronic media must be "consistent with the warrant." Fed. R. Crim. P. 41. The Government was well aware of the need to comport with the search warrants and, in fact, expressly agreed to employ taint teams in four of the five warrants to ensure the prosecution team did not even ***access*** emails outside the scope of the warrant. Yet, the Government entirely disregarded the representation it had made to the Magistrate to obtain the warrant, that a taint team would be used and the prosecution team would not obtain access to emails beyond the scope of the probable cause showing, which the Government had not sought or obtained access to search for or seize.

As set forth above, suppression is the appropriate remedy for items that are searched for and seized in a manner that exceeded the authorization to search and seize set forth in a warrant. Those items were seized unlawfully, in violation of Ms. Keleher's Fourth Amendment rights. All

emails from Ms. Keleher's personal accounts that are unrelated to the award of the C&P contract, the payment of her salary, or the J[redacted] I[redacted] must be suppressed. This includes all emails from those accounts relating to Alberto Velazquez-Piñol, Fernando Scherrer-Caillet, or the Department of Education's contractual relationship with BDO.

C. Further relief may be appropriate and all of the emails obtained pursuant to the search warrants issued to third party providers for the personal email accounts of Ms. Keleher may be subject to suppression.

1. There is reason to believe the Government flagrantly disregarded the warrant.

It is unclear without the benefit of an evidentiary hearing how it is that the Government came to disregard the representations it had made to obtain the warrant and just how egregious its violation of Ms. Keleher's Fourth Amendment rights was. Where the Government engages in "flagrant disregard" for the terms of a warrant, the proper remedy is the suppression of all of the items seized, not just the suppression of those items seized beyond the terms of the warrant. *United States v. Hamie*, 165 F.3d 80, 83–84 (1st Cir. 1999) (suppression of all evidence seized appropriate where, *inter alia*, "officers flagrantly disregarded the terms of the warrant"); *United States v. Medlin*, 842 F.2d 1194, 1198–99 (10th Cir.1988) (officers' "flagrant disregard" for terms of warrant renders entire search illegal).

Here, that would mean that suppression would not be limited to the emails related to the alleged BDO scheme, but instead that all of the emails seized from Ms. Keleher's personal email accounts, including the emails related to the alleged C&P scheme set forth in the warrant applications would be suppressed. The Government's conduct appears to have been deliberate. With respect to all five warrants, the Government searched for and seized emails that it had no authorization to search for or seize. It then brought charges based on this unlawful search. In doing so, the Government converted the warrants to unlawful general warrants. Everything seized as a result of

these warrants must be suppressed. *See United States v. Young*, 877 F.2d 1099, 1105 (1st Cir. 1989)(Collecting cases regarding general searches.).

2. The Government failed to employ a taint team after assuring the Magistrate that it would do so in order to limit the information received by the prosecution team.

The "flagrant disregard" is even more apparent with respect to the last four of the five warrants, where the Government represented it would use a taint team and obtained the warrants on that basis, and then proceeded to ignore that requirement altogether. In all but the first warrant issued, the Government assured the Magistrate that it would employ a taint team to filter emails outside the scope of the warrant and ensure the prosecution only received those messages for which it had authorization to search. *See Affidavits* ¶¶ 49–50; *supra* Section I.a.2. The Magistrates approved the warrants with the limitation that only information related to the conduct under investigation would be transmitted to the prosecution team.

The Government explicitly assured the Magistrate Judge that it had designed a taint team filter process to do just that. Despite acknowledging that a taint team was necessary and explicitly representing that one would be employed, however, the Government did not properly screen or limit its search of Ms. Keleher's emails as required by the terms of the search warrants and the probable cause supporting them and the prosecution team was given access to the entirety of the emails.

The emails beyond the scope of the search and seizure authority provided by the warrants never should have been turned over to the prosecution team by the Government's filter team. *Comprehensive Drug Testing, Inc.*, 621 F.3d at 1180; *Chavez*, 2019 WL 5849895, at *9; *Irving*, 347 F. Supp.3d at 624. That they not only were reviewed and seized by the prosecution team, but now serve as the prosecution's evidence for their own distinct alleged conspiracy, contained in Counts

Twelve through Eighteen, illustrates the gravity of the Fourth Amendment violation. The Government engaged in exactly the type of "general, exploratory rummaging in a person's belongings" that the Fourth Amendment is supposed to prevent. *See Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971); *Andresen v. Maryland*, 427 U.S. 204, 220 (1981). The fact that the government's illegal search went afoul of explicit assurances it made to the Magistrate Judge in order to obtain the search warrants only makes the violations in this case more egregious.

As set forth above, Ms. Keleher is entitled to suppression of the emails related to the alleged BDO scheme based on the papers, which demonstrate that those emails were seized without authorization. Ms. Keleher also seeks an evidentiary hearing to determine whether the Government's disregard of the terms of the warrant was sufficiently blatant that not only should the emails the warrant did not authorized be searched or seized be suppressed, but all emails received pursuant to the warrant should be suppressed.

D. The Government's unlawful search and seizure of emails plainly outside the scope of the probable cause and activities described in the search warrants cannot be justified under the plain view doctrine.

"The plain view doctrine constitutes an exception to the warrant requirement of the fourth amendment. Under certain circumstances, evidence discovered in plain view may be lawfully seized even though the police were not originally authorized to search for it." *United States v. Rutkowski*, 877 F.2d 139, 140 (1st Cir. 1989). A law enforcement officer "may seize an object in plain view as long as he has lawfully reached the vantage point from which he sees the object, has probable cause to support his seizure of that object, and has a right of access to the object itself." *United States v. Paneto*, 661 F.3d 709, 713 (1st Cir. 2011).

"In general terms, probable cause exists when police have sufficient reason to believe that they have come across evidence of a crime." *Id.* at 714 (citing *Texas* v. *Brown*, 460 U.S. 730, 742

(1983)). "In the 'plain view' context, 'probable cause exists when the incriminating character of [the] object is immediately apparent to the police.'" *United States v. Mata-Pena*, 233 F. Supp. 3d 281, 288 (D.P.R. 2017); *Horton v. California*, 496 U.S. 128, 136–37 (1990) (for plain view doctrine to apply, the "incriminating character" of evidence must be "immediately apparent"); *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971) (extension of original search pursuant to plain view doctrine "legitimate" only where "it is immediately apparent to the police that they have evidence before them"). "Put in more conventional terms, the [Government's] discovery of the object [at issue] must so galvanize their knowledge that they can be said, at that very moment or soon thereafter, to have probable cause to believe the object to be contraband or evidence." *Rustkowski*, 877 F.2d at 141; *United States v. Perrotta*, 289 F.3d 155, 167 (1st Cir. 2002) ("Evidentiary value is 'immediately apparent' if there are 'enough facts for a reasonable person to believe that the items in plain view may be contraband or evidence of a crime.'"). "[T]he Government . . . has the burden of establishing entitlement to the exception, which means that it must demonstrate in any given case" that each element of the doctrine has been satisfied. *Rutkowski*, 877 F.2d at 141.

Even if emails relevant to the alleged BDO scheme were inadvertently discovered while searching for emails related to the C&P contract, Ms. Keleher's salary, or the J████ I████ contract award, with respect to the first warrant, which seems unlikely, that would not have given the prosecution team authority to conduct any further search for evidence related to BDO. With respect to the latter four warrants, if the taint team inadvertently discovered while searching for emails related to the C&P contract, Ms. Keleher's salary, or the J████ I████ contract award, which seems unlikely, the taint team was precluded from providing the prosecution team access to such emails.

Allowing the prosecution team to search for evidence of the alleged BDO scheme because it inadvertently discovered the possibility of such a scheme or letting the taint team turn over emails it inadvertently discovered to the prosecution team, under the auspices of the plain view doctrine would neuter the Fourth Amendment's particularity requirements in electronic discovery cases. Such an application of the plain view doctrine would significantly expand the "serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant." *United States v. Galpin*, 720 F.3d 436, 447 (2d Cir. 2013); *United States v. Carey*, 172 F.3d 1268 (10th Cir.1999) (suppressing child pornography evidence found on defendant's computer where scope of warrant was limited to suspected drug crimes). Such a result would also reward the Government for its misrepresentations to the Court and utter disregard of a constitutional safeguard it assured the Court it would employ.

The plain view doctrine cannot be expanded beyond recognition. If the Government, regardless of whether the prosecution team or the taint team, believed it had a basis to search through Ms. Keleher's emails for information pertaining to Velazquez-Piñol or BDO, based on something it saw in plain view while conducting the search authorized by the warrant, the proper recourse was clear. The Government should have submitted a new search warrant application to the court detailing its basis for probable cause with respect to the BDO scheme, and delineating with particularity what it sought to seize. *See United States v. Burgess*, 576 F.3d 1078, 1092 (10th Cir.2009) (affirming denial of motion to suppress where officer searching computer files for drug evidence "immediately stopped [his review] upon seeing an instance of suspected child pornography and obtained another warrant to search for pornography.").[10]

[10] If in searching for evidence related to the schemes articulated in the warrants, the taint team saw contraband (such as child pornography) in plain view, it would nonetheless have been required to obtain a new warrant before

The substantial gap in time between the execution of the five search warrants and the eventual Indictment in this case clearly demonstrates that the Government had ample time to seek an additional warrant to search for BDO-related emails. And, because the Government already had seized the entirety of Ms. Keleher's mailboxes, there was no risk that relevant information would be lost while another warrant was sought and, if appropriate, authorized. That the Government chose not to take such an obvious step is deeply concerning, and reflects, at a minimum, the reckless way the Government has investigated this case in complete disregard of Ms. Keleher's rights.

In any event, the Government's reliance on the plain view doctrine here would clearly be misplaced because there is no way the "incriminating character" of the emails at issue was "immediately apparent" to investigators. *Horton*, 496 U.S. at 136. This is not a case where the Government executed a search warrant at the defendant's residence and immediately saw drugs and weapons sitting on the kitchen table. Nor is this a case where the Government searched emails between individuals suspected of committing financial crimes and inadvertently came across child pornography exchanged between those very same individuals. The emails here have nothing to do with the criminal violations the Government was investigating, ***or any other obviously criminal conduct***. There is no way, for example, that when an investigator reviewed an email in which Ms. Keleher received an engagement letter from a long-time DOE contractor, the investigator immediately had "probable cause to believe [it] to be contraband or evidence." *Rustkowski*, 877 F.2d at 141. As a result, it is clear the Government's otherwise unlawful search and seizure of the emails

conducting a search of the emails for additional evidence of contraband. As set forth below, that requirement applies with greater force if the taint team in searching for evidence related to the Colon & Ponce or J[redacted] I[redacted] contracts saw not contraband in plain, but rather merely an email related to the BDO contracting process that it deemed suspicious. The taint team simply because it saw what it believed might be evidence of an unrelated crime could not simply redirect its search and start searching for any emails relevant to the BDO contract. Before it could conduct such a search, it would plainly have needed a warrant authorizing it do so.

at issue could not be salvaged under the plain view doctrine. Yet, even if it did, this would only allow it to seize that single email, not to continue to search for additional emails related to Ms. Keleher's decision to award a contract or contract amendment to BDO.

III. Alternatively, if Suppression of the Emails related to the BDO Scheme is Not Granted on the Papers, the Court Should Order an Evidentiary Hearing; Regardless, It Should Hold an Evidentiary Hearing to Determine What Additional Relief is Warranted.

Suppression of the emails related to the alleged BDO scheme should be granted on the papers because it cannot reasonably be disputed that the email evidence related to the BDO scheme, charged in Counts Twelve through Eighteen, has nothing to do with the criminal activity the Magistrate Judge authorized the Government to search for and seize; this evidence was seized without authorization and must be suppressed. Emails between Ms. Keleher and Alberto Velazquez-Piñol are completely unrelated to the suspected criminal schemes identified in the affidavits of probable cause. These messages have nothing to do with the allegedly unlawful award of contracts by DOE to Colon and Ponce or the J[redacted] I[redacted]. Emails related to the alleged unlawful scheme involving BDO's contracts with the Department of Education do not involve Glenda Ponce, C[redacted] D[redacted], M[redacted] C[redacted], V[redacted] M[redacted], M[redacted] C[redacted], COLÓN & PONCE, or W[redacted] B[redacted], who are the specific individuals and entities identified by the Government in the search warrant affidavits as potentially having responsive information concerning the suspected crimes under investigation. Accordingly, the Court must suppress any emails from the email accounts that were the subject of the search warrants that are being introduced with respect to Counts Twelve, Fifteen, and Sixteen (the BDO-related counts charging Ms. Keleher).

Nevertheless, if the Government claims that emails it intends to introduce in support of Counts Twelve, Fifteen, and Sixteen were somehow properly discovered pursuant to the search warrants or otherwise, or the Court finds that this Motion cannot be granted on the papers for any

other reason, an evidentiary hearing should be ordered. The Court has wide discretion to hold an evidentiary hearing on this Motion. *See United States v. Brown*, 621 F.3d 48, 57 (1st Cir. 2010) ("[T]he decision of whether to conduct an evidentiary hearing [on a motion to suppress] is left to the sound discretion of the district court."). To obtain a hearing, "a defendant bears the burden of 'mak[ing] a sufficient threshold showing that material facts are in doubt or dispute, and that such facts cannot reliably be resolved on a paper record." *United States v. Agosto-Pacheco*, Criminal No. 18-082 (FAB), 2019 WL 4566956 at *6 (D.P.R. Sept. 20, 2019) (Besosa, J.) (quoting *United States v. Cintrón*, 724 F.3d 32, 36 (1st Cir. 2013)).

Here, it is clear from the record that the Government applied for search warrants and obtained authorization only to look for and seize evidence of specific schemes for which they arguably had probable cause: alleged illegality in connection with the awarding of DOE contracts to Colón & Ponce, alleged illegality in connection with the awarding of a DOE contract to the J█ █████ Institute related to T██ V█████ C█████, and alleged illegality in Ms. Keleher's attempts to have a portion of her salary subsidized by the PR EDF. Despite representing that it would filter the email returns to only seize evidence relevant to those schemes, the prosecution team appears to have searched the entirety of Ms. Keleher's email boxes for unrelated schemes and seized those emails, which it will seek to introduce at trial. It may not be permitted to do so and those emails should be suppressed.

Regardless, an evidentiary hearing must be held to determine if the Government not only unlawfully seized emails related to the alleged BDO scheme, and therefore those emails should be suppressed, but whether the Government also acted in such flagrant disregard of the warrants that all of the evidence disclosed to the Government pursuant to those warrants, even the evidence such as evidence pertaining to the award of the C&P contract, for which the warrant authorized search

and seizure, must be suppressed. A number of material facts are not apparent from the record as it currently exists, however, including: (1) the manner in which the Government carried out its preliminary searches; (2) its method for segregating material that potentially fell within the scope of the warrant's search and seizure authorization from material that did not; (3) whether a taint team was used and what procedures it employed; (4) at what point were manual or electronic word searches performed for the purpose of searching for evidence of the alleged BDO scheme; and (5) how the prosecution team came to have access to the entire email files, which it produced to the defense in discovery. In sum, only the extent and chronology of the Government's disregard for the warrants remains to be uncovered because the fact that the scope of the warrants was exceeded cannot be reasonably disputed.

CONCLUSION

The Government requested five warrants to search and seize evidence regarding whether Ms. Keleher and others were involved in a scheme to divert a public contract to Colón & Ponce, whether Ms. Keleher's attempts to have part of her salary covered by the PR EDF, and whether Ms. Keleher and others were involved in a scheme to divert a public contract to the J Institute related to the T V C program, having made a probable cause showing to a neutral magistrate with respect to these alleged schemes and only with respect to these alleged schemes. Consistent with the Fourth Amendment, the Magistrate Judge authorized the search of emails related to those schemes exclusively. Yet, the Government disregarded the limited authority it had to search the emails it obtained pursuant to the warrant only for such evidence and only to seize such evidence. The Indictment and the Government's Rule 12 disclosure reveal that the Government searched for and seized emails related to the BDO scheme, despite having no authorization to do so. To make matters worse, in four of the five applications, the Government,

explicitly assured the Magistrate Judge that it would employ a taint team to screen the emails so that only information for which the probable cause had been made and which the search warrant authorized searching for and seizing. The very purpose of such a representation is to assure the Magistrate that unauthorized materials, even if inadvertently and innocently discovered in the course of attempting to comply with the warrant, would not be provided to the prosecution team because the warrant does not authorize the prosecution team to access these materials. And that is precisely the process the Magistrate Judge authorized.

Despite its representations to the Court, the Government seized the entirety of the emails and exceeded the authority the Magistrate Judge by providing the prosecution team access to the entirety of these materials. That the prosecution team was given unauthorized access to the entirety of the emails is beyond dispute since the prosecution team had the entirety of the emails and produced them in discovery and has designated them for use at trial. What resulted from the prosecution team's access to these emails was Counts Fifteen and Sixteen in this case, which are based on emails seized from Ms. Keleher's personal email accounts but for which the Government had no authority to seize.

Further, an evidentiary hearing must be held to determine whether the appropriate sanction is suppression of **all** emails seized pursuant to the warrants targeting Ms. Keleher's emails, including those that fall within the scope of probable cause articulated to the Magistrate. If the Court is not inclined to suppress all emails, however, it must, at minimum, suppress those emails that are outside the scope of the warrants. Specifically:

(1) With respect to Ms. Keleher's [REDACTED]@GMAIL.COM account, the Court should suppress any and all emails that do not constitute evidence or instrumentalities of specific suspected federal crimes involving "Julia B. Keleher, Glenda PONCE, C[REDACTED] D[REDACTED], M[REDACTED] E. C[REDACTED], [and] COLON & PONCE, INC."

from January 1, 2017 to the present (Exhibit A, Section III), and any evidence derived from such emails;

(2) With respect to Ms. Keleher's @GMAIL.COM account, the Court must suppress any and all emails that do not constitute evidence or instrumentalities of specific suspected federal crimes involving "Julia B. Keleher, Glenda PONCE, C D , M E. C , V M , M C , COLON & PONCE, INC. and W B " from July 1, 2016 to the present. (Exhibit D, Section III) and any evidence derived from such emails; and

(3) With respect to Ms. Keleher's @GMAIL.COM account, the Court must suppress any and all emails that do not constitute evidence or instrumentalities of specific suspected federal crimes involving "Julia B. Keleher, Glenda PONCE, C D , M E. C , V M , M C , COLON & PONCE, INC. and W B " from July 1, 2016, and any evidence derived from such emails. (Exhibit E, Section III).

WHEREFORE, the defendant, Julia Beatrice Keleher, respectfully requests that the Court GRANT this motion and to hold an evidentiary hearing to determine what additional relief is warranted.

Respectfully submitted on this 18th day of May 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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