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

UNITED STATES OF AMERICA, **Plaintiff**, **v.** JULIA BEATRICE KELEHER [1]; ARIEL GUTIÉRREZ-RODRÍGUEZ [2], **Defendants**.	**Criminal No.** 20-019 (FAB)

OPINION AND ORDER

Before the Court is the government's motion to bar the American Civil Liberties Union ("ACLU") and the Electronic Frontier Foundation ("EFF") from participating as *amici curiae* in this case. (Docket No. 83.) The defendants Julia Beatrice Keleher ("Keleher") and Ariel Gutiérrez-Rodríguez ("Gutiérrez,") and together with Keleher, (the "defendants") ask the Court to deny the motion. (Docket Nos. 95, 98.) As discussed below, the motion is **GRANTED**.

I. Background

On June 3, 2020, a representative of the ACLU and EFF e-mailed an Assistant United States Attorney involved in this case. (Docket No. 101, Ex. 6 at p. 1.) The representative requested the government's "consent to file an *amicus* brief in support of the

defendant" in this case. Id. The representative explained the nature of the intended brief, stating,

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

Id. The representative further noted her intent to file a motion the following week seeking leave to participate in this case as *amici* and a due date for their brief of June 22. Id.

The government responded the same day. Id. The government stated that it "does not consent to your participation as *amicus*." Id.

The organizations' representative replied that day as well. Id. She noted that the organizations' motion would reflect the government's opposition. Id.

On June 12, the government filed the motion pending before the Court. (Docket No. 83.) The Court ordered the defendants to respond. (Docket No. 84.)

II. Parties' Positions

A. Government

The government asks the Court to preclude ACLU and EFF from participating as *amici curiae* in this case. (Docket No. 83.)

The government gives three reasons why the Court should grant its motion.

First, the government states that Keleher is adequately represented. Id. at p. 4. The government points to numerous cases that consider a litigant's legal representation and her need for supplemental assistance in determining whether to permit *amicus* participation. See id. at pp. 2–3 (collecting cases); Docket No. 101 at p. 7 (same).

Second, the government argues that ACLU and EFF would "merely rehash" arguments made by Keleher in her motion to suppress. (Docket No. 83 at pp. 3–4 (citing Docket No. 71 at pp. 14–20).) The government notes that Gutiérrez also addresses particularity pursuant to the Fourth Amendment. (Docket No. 101 at p. 8 n.9 (citing Docket No. 90).) The government states that the Court need not consider arguments besides those raised by the parties. Id. at p. 8.

Third, the government contends that ACLU and EFF do not articulate how a decision in this case would affect their rights in another case. (Docket No. 83 at p. 4.) The government adds that, as a district court, the binding effect of the Court's decisions is generally limited to the parties. Id.

The government also states that its motion is not premature. (Docket No. 101 at pp. 8–10.) The government notes

that ACLU and EFF indicated the subject matter which they seek to address as *amici*. Id. The government also points out that ACLU and EFF stated that their intent to file a motion for leave to participate after learning that the government did not consent to their request. Id.

Finally, the government recognizes that Judge Pedro A. Delgado of this Court accepted an *amicus* brief in another case in which Keleher is a defendant. Id. at p. 10. The government distinguishes the circumstances because the *amicus* brief was filed in that case before Judge Delgado had an opportunity to decide whether to permit the participation. Id.

B. Gutiérrez

In a short response, Gutiérrez requests the Court allow the *amici* briefing. (Docket No. 95.) According to Gutiérrez,

> The issue of particularity under the Fourth Amendment as it relates to large data seizures is an important one and a third party view on this matter briefed by the ACLU and the [EFF] may throw light and perspective on the issue of overbroad and unconstitutional search practices of email accounts.

Id. at p. 1.

C. Keleher

Keleher argues that the Court should deny the government's motion. (Docket No. 98.) Keleher states that the government is "attempt[ing] to tie [her] hands" through

"obstructionist tactics" and 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 [Keleher]." Id. at p. 7.

Keleher argues that district courts have inherent authority to permit the filing of *amicus* briefs. Id. at pp. 2–3. According to Keleher, *amicus* briefs are often filed in district courts. Id. at p. 2. Keleher notes that in another case pending before this Court, Judge Pedro A. Delgado permitted, over the government's objection, an *amicus* brief from the National Association of Criminal Defense Lawyers. Id. at p. 6.

Keleher suggests that the standard for whether a district court should accept an *amicus* brief is whether the person's participation will be useful to the court. Id. at pp. 2–3 (collecting cases). Keleher recommends that the Court look to Rule 29 of the Federal Rules of Appellate Procedure for guidance. Id.

Keleher disputes the government's arguments for denial of *amicus* participation. Id. at pp. 4–5. Keleher contends that *amicus* participation cannot only be limited to situations in which a party lacks competent counsel, because the remedy in that situation would be to appoint new counsel. Id. at p. 4. Keleher further argues that the Court cannot know whether ACLU and EFF

will merely "rehash" arguments made by the defendants without first reviewing the proposed *amicus* brief. Id. at pp. 4–5. Keleher also discounts the likelihood that the arguments would repeat the defendants' arguments because the *amicus* briefs would come from "respected organizations whose members rank at the top of the legal profession." Id. at p. 6. Keleher further states that the precedential effect of district court decisions on other parties is not a reason to deny *amicus* participation because important decisions begin at district courts and the public has an interest in sound decisions by district courts. Id. at p. 5. Keleher observes 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." Id. at p. 5.

Additionally, Keleher contends that the government is seeking an advisory opinion because no persons have sought leave to appear as *amici* in this case. Id. at pp. 6–7. Keleher advises the Court to delay a decision until someone requests leave to participate as *amicus*, at which time the Court "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." Id. at p. 7.

Keleher also argues that the government's motion appears in conflict with Department of Justice Policy. Id. at p. 3. She quotes from the Department of Justice Manual which counsels that consent to requests to file *amicus* briefs should generally be freely given. Id. Keleher also observes that it is unclear whether the government received approval for the objection to filing an *amicus* brief that the manual ordinarily requires in appellate cases. Id. at p. 3 n.1.

III. Applicable Law

Whether to permit *amicus* participation is a matter of judicial discretion. Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970). *Amicus* participation may be appropriate in some circumstances and not others. See, e.g., United States v. Puerto Rico, 398 F. Supp. 3d 1, 2–4 (D.P.R. 2019) (Gelpí, J.) (noting important contributions made by ACLU in some circumstances and admonishing ACLU for improper participation in other circumstances).

The Federal Rules of Criminal Procedure do not contain a provision on *amicus* participation. United States v. Kollintzas, 501 F.3d 796, 800 (7th Cir. 2007). To ascertain the applicable standard on whether to permit *amicus* participation in this case,

the Court considers how other courts have addressed similar questions. *Amicus* participation is not unheard of in criminal cases at the district level, see, e.g., United States v. Ahmed, 788 F. Supp. 196, 198 n.1 (S.D.N.Y. 1992); United States v. Gotti, 755 F. Supp. 1157, 1157–59 (E.D.N.Y. 1991), and the Court draws on the reasoning from those courts. *Amicus* participation is more prevalent at the appellate level, see Linda Sandstrom Simard, An Empirical Study of *Amici Curiae* in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism, 27 Rev. Litig. 669, 686–87 (2008), and the Court looks to how it is addressed there, too.

Two distinguished appellate jurists have disparate views of, and apply contrasting standards to, *amicus* participation. Judge Posner looks at *amicus* filings in a "fish-eyed[] fashion." Ryan v. Commodities Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers). He notes that *amicus* filings can often (i) introduce extraneous reading and thereby burden the court system, (ii) constitute an attempt to circumvent page limitations imposed on litigants' briefs, and (iii) serve to introduce interest-group politics into the federal courts. Nat'l Org. for Women, Inc. v. Scheidler, 223 F.3d 615, 616–17 (7th Cir. 2000).

Judge Posner explains that the Seventh Circuit Court of Appeals' policy is

> not to grant rote permission to file an *amicus curiae* brief; never to grant permission to file an *amicus curiae* brief that essentially merely duplicates the brief of one of the parties . . . ; [and] to grant permission to file an *amicus* brief only when (1) a party is not adequately represented (usually, is not represented at all); or (2) when the would-be *amicus* has a direct interest in another case, and the case in which he seeks permission to file an *amicus curiae* brief may, by operation of *stare decisis* or *res judicata*, materially affect that interest; or (3) when the *amicus* has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do.

Id. at 617. Judge Posner does not see value in permitting *amicus* filings that "contain a few additional citations not found in the parties' briefs and slightly more analysis on some points" but which "essentially . . . cover the same ground" as the litigants' briefs. Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., in chambers).

Then-Judge Alito employs a more welcoming standard to *amicus* filings. Neonatology Assocs., P.A. v. Comm'r Internal Revenue, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J., in chambers). He views a requirement to show a party is inadequately represented as "most undesirable," and notes that "an *amicus* brief may be particularly helpful when the party supported is unrepresented or inadequately represented, but it does not follow that an *amicus* brief is undesirable under all other circumstances." Id. The

reasons, then-Judge Alito explains, relate to the expertise that *amicus curiae* may contribute or their ability to make points that a litigant might be reticent to make. Id. He further notes that an inadequate representation requirement would disincentivize *amicus* filings across the board because of an unwillingness to allege inadequate representation. Id. Additionally, then-Judge Alito suggests that the resources expended in reviewing *amicus* filings to ascertain whether to allow the filings could equal or exceed the time it takes to review the filings at the merits stage. Id. at 133.

The First Circuit Court of Appeals has given some guidance to district courts on whether to accept or invite *amicus* briefs. The guidance hews close to the approach of the Seventh Circuit Court of Appeals. In Strasser, 432 F.2d at 569, the court said,

> [A] district court lacking joint consent of the parties should go slow in accepting, and even slower in inviting, an *amicus* brief unless, as a party, although short of a right to intervene, the *amicus* has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance.

District courts presiding over criminal cases have applied standards like those elaborated by Judge Posner and the Strasser court. Several district courts have rejected *amicus* participation where a party was adequately represented, see, e.g., Ahmed, 788 F. Supp. at 198 n.1; Gotti, 755 F. Supp. at 1157–59, or found

amicus participation appropriate where a party was not adequately represented, see, e.g., United States v. Davis, 180 F. Supp. 2d 797, 798 (E.D. La. 2001). District courts also consider whether a person desiring to participate as *amicus* has interests that will be affected by the criminal proceedings. See, e.g., Minute Order, United States v. Stone, Crim. No. 19-18 (D.D.C. Feb. 15, 2019) (allowing person to participate as *amicus* where he was named as an uncharged individual in an indictment and was the subject of smears and intimidation by the defendant); United States v. Alkaabi, 223 F. Supp. 2d 583, 592–93 (D.N.J. 2002) (authorizing the Royal Embassy of Saudi Arabia to participate as *amicus* where multiple cases had been filed against Saudi Arabian citizens and there was heightened scrutiny against persons of Arab descent); United States v. Yonkers Contr. Co., 697 F. Supp. 779, 781 (S.D.N.Y. 1988) (authorizing persons to participate as *amicus* where they were plaintiffs in a related civil action).

Finally, in civil cases, various district courts apply different standards to *amicus* participation. Some restrict the participation similarly to Judge Posner and the Strasser court. News & Sun-Sentinel Co. v. Cox, 700 F. Supp. 30, 32 (S.D. Fla. 1988) (alteration and internal quotation marks omitted) ("[A]cceptance of an *amicus curiae* should be allowed only sparingly, unless the *amicus* has a special interest, or unless the

Court feels that existing counsel need assistance."). Others are more inviting. See, e.g., Merritt v. McKenney, Civ. No. 13-1391, 2013 WL 4552672, at *3 (N.D. Cal. Aug. 27, 2013) (internal quotation marks omitted) ("There are 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.").

IV. Discussion

The materials before the Court indicate that ACLU and EFF desire to participate in this case as *amicus curiae* in support of Keleher's motion to suppress. (Docket No. 101, Ex. 6 at p. 1.) The Court holds that ACLU and EFF are not permitted to participate in that fashion.

As other courts have noted, permission for *amicus* participation partly depends on whether a party needs the supplemental assistance. See, e.g., Strasser, 432 F.2d at 569; Ahmed, 788 F. Supp. at 198 n.1; Gotti, 755 F. Supp. at 1157–59. No party argues that the *amicus* participation is needed for a proper hearing and presentation of their case. Rather, Keleher says the Court should accept a filing if "the *amicus* has relevant expertise and an interest in the case." (Docket No. 98 at p. 3.) Gutiérrez states that the *amicus* participation may add perspective

on particularity. (Docket No. 95 at p. 1.) The Court's criminal docket, however, is not a bulletin board for third-parties to opine on constitutional issues.

Keleher attacks the notion "that an organization would gain nothing by asking to be heard at the trial court level." (Docket No. 98 at p. 3.) That argument is a red herring. Whether a person would gain by being heard in this Court is relevant to the extent that certain interests would be affected by the decision reached in this case. See Nat'l Org. for Women, 223 F.3d at 617 (referring to a direct interest in another case); Strasser, 432 F.2d at 569 (referring to "special interests"); see, e.g., Alkaabi, 223 F. Supp. 2d at 592–93; Yonkers Contr. Co., 697 F. Supp. at 781. Keleher does not actually identify any special interest of ACLU and EFF that would be affected. To be sure, ACLU and EFF have an interest in sound decisions from this Court, but that is no different from any other person. Insofar as Keleher suggests that ACLU and EFF would gain from an opportunity to voice their view of the law, that is not among the interests upon which *amicus* participation may be based.

It is also specious for Keleher to support her resistance with the contention 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." (Docket No. 98 at p. 5.) The contention has superficial appeal but is belied by the actual practice of litigation. Judicial time is scarce. *Amicus* briefs, along with the volleys of responses and replies they engender, may expend that time for extraneous reading. See Voices for Choices, 339 F.3d at 544. Extraneous reading does not necessarily improve the quality of judicial decision-making. It is not therefore apparent that the Court should accept all *amicus* filings or that the Court must evaluate each filing before deciding whether to accept it. Where neither the Court nor the parties believes an *amicus* brief is necessary to a proper presentation of a defendant's case, it is less likely that the Court's time is well spent reviewing the brief.

Judge Delgado's authorization of the *amicus* filing in another case, Minute Order, United States v. Keleher, Crim. No. 19-431 (D.P.R. June 4, 2020), does not compel the Court to accept an *amicus* filing here. Nor does it provide persuasive authority one way or the other, as Judge Delgado's minute order does not articulate the reasoning behind his decision. See id.

Keleher contends that a decision granting the government's motion would constitute an advisory opinion. It is questionable whether the prohibition on advisory opinions applies here. See Evan Tsen Lee, Deconstitutionalizing Justiciability: The Example

of Mootness, 105 Harv. L. Rev. 603, 644–51 (1992) (noting disparate uses of the term "advisory opinion" and arguing that the term only applies to where a judgment is subject to review by a co-equal branch of government or where an opinion would constitute advice to a co-equal branch prior to that branch's contemplated action); cf. Boston Chapter, NAACP v. Beecher, 716 F.2d 931, 933 (1st Cir. 1983) (explaining that rendering a ruling in a moot case would constitute an advisory opinion), vacated by Boston Firefighters Union Local 718 v. Boston Chapter NAACP, Inc., 468 U.S. 1206, 1206 (1984) (finding that case was not moot). Even assuming that the prohibition applies, Keleher is wrong in her contention.

The criminal case before the Court is a case or controversy between the government, Keleher, and Gutiérrez. ACLU and EFF requested the government's consent to participate in this case, explained that they wished to comment on particularity pursuant to the Fourth Amendment, and indicated an intent to file a motion to participate. (Docket No. 101, Ex. 6 at p. 1.) Keleher and Gutiérrez argue to this Court in support of that participation and ask the Court to deny the government's motion. (Docket Nos. 95, 98.) No party doubts the ACLU's and EFF's intent to file an *amici* brief.

In these circumstances, resolving the dispute over *amici* participation would not constitute an advisory opinion. The

dispute is not hypothetical, abstract, academic, or moot, see Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240 (1937), even though permitting ACLU and EFF to file their *amici* brief would, after expenditure of the Court's time, further inform the Court on the nature of their requested participation. Rather, the dispute is "definite and concrete, touching the legal relations of parties having adverse legal interests," id. at 240–41, because the government seeks to block ACLU and EFF from commenting on particularity in support of the defendants' suppression motions and the defendants desire the opposite. There is sufficient immediacy, Golden v. Zwickler, 394 U.S. 103, 959–60 (1969), as no one doubts that ACLU and EFF intend to file an *amici* brief. And the parties are vigorously and aversely contesting the matter. Cf. Muskrat v. United States, 219 U.S. 346, 361 (1911) (refusing to issue advisory opinion where litigants did not have adverse interests). The dispute allows for specific relief of a conclusive character, Aetna, 300 U.S. at 241, namely, the denial of *amici* participation in support of Keleher's motion to suppress.

V. Conclusion

For the reasons discussed above, the government's motion, (Docket No. 83,) is **GRANTED**.

IT IS SO ORDERED.

San Juan, Puerto Rico, July 27, 2020.

s/ Francisco A. Besosa
FRANCISCO A. BESOSA
UNITED STATES DISTRICT JUDGE