

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

UNITED STATES OF AMERICA,

v.

JULIA BEATRICE KELEHER, et al.,
Defendants.

CRIMINAL NO. 19-431 (PAD)

**RESPONSE IN OPPOSITION TO MOTION REQUESTING AMICUS STATUS
FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND
MOTION TO STRIKE EXHIBITS APPENDED TO SAID MOTION**

Defendant Julia Beatrice Keleher (hereinafter the defendant) has requested that the Court accord amicus status to the National Association of Criminal Defense Lawyers (NACDL), and has filed amicus briefs prepared by the NACDL in support of motions to dismiss the indictment. Docket No. 324. The NACDL represents none of the charged defendants, and is not itself a party in this case. It nonetheless seeks to participate as amicus “to express its interest in maintaining the necessary limits on the federal fraud statutes,” and because this case is “at a stage at which the Court can prevent [what the NACDL claims are] invalid theories of criminal liability from serving as trial balloons or stalking horses for subsequent prosecutions.” Docket No. 324-1. The Court should deny the defendant’s request to accord amicus status to the NACDL because a non-party has no right to intervene in the pretrial proceedings of a criminal case. The Court should also strike from the docket the documents which the defendant filed on the NACDL’s behalf without first obtaining the Court’s permission.

A. PERTINENT LEGAL CONSIDERATIONS

Unlike the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure contain no provision allowing for the intervention of non-parties. *Compare* Fed. R. App. P. 29 (setting forth procedure for participation of amici curiae), *and* Fed. R. Civ. P. 24 (setting forth procedure for non-parties to intervene in a civil case), *with* the Federal Rules of Criminal Procedure. Indeed, neither the defendant nor the NACDL has cited any authority to support the proposition that it would be appropriate for a non-party to file *anything* in a criminal case at the trial court level, much less a brief in support of a defendant's pretrial motion to dismiss an indictment. Assuming, for the sake of argument, that there may be circumstances in which a non-party's participation in the pretrial stage of a criminal case may be appropriate, this is not such a case.

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

represented party”); *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) (observing that courts “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.”); *Kentucky v. Long*, 637 F. Supp. 1150, 1151 (W.D. Ky. 1986) (“[T]he Court feels it would not be proper for [would-be amicus] to intervene in a criminal case at the trial level, as the parties are quite capable of arguing their own cases.”).

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

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

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

B. LEAVE TO FILE THE NACDL’S AMICUS BRIEF SHOULD BE DENIED, AND THE DOCUMENTS THE DEFENDANT FILED ON THE NACDL’S BEHALF SHOULD BE STRICKEN

The NACDL seeks amicus status in this case because it is a “bar association that works on behalf of criminal defense lawyers,” and “has a particular interest in the scope of criminal statutes, especially the fraud statutes and which allegations fail to satisfy its ‘money or property’ fraud element.” Docket No. 324-2. In seeking leave to file an amicus brief, neither the defendant nor the NACDL provides the legal framework described by courts for evaluating the propriety of allowing a would-be amicus to intervene. Rather, without citing legal authority, the NACDL asserts an interest in curbing prosecutors from seeking “validation of exotic theories of criminal

liability,” which the NACDL claims will serve as “trial balloons or stalking horses for subsequent prosecution.” Docket Nos. 324-1, 324-2. None of the NACDL’s purported reasons for seeking to intervene in this case provide legal support for granting the NACDL amicus status. Merely because a case touches upon legal issues of great interest to a person or group does not entitle said person or group to participate in that case as a litigant. *Voices for Choices*, 339 F.3d at 544 (observing that “whether to allow the filing of an amicus curiae brief is a matter of ‘judicial grace’”). The Court should deny the defendant’s request to accord amicus status to the NACDL, and strike the briefs the NACDL prepared for three primary reasons.

First, no defendant in this case is inadequately represented. Quite the opposite— all defendants are represented by competent counsel with decades of experience who are fully capable of litigating the pending motions to dismiss the indictment.

Second, the NACDL’s proposed amicus brief does little other than raise the same arguments that the defendant and Defendant Fernando Scherrer-Caillet have raised in their respective motions to dismiss the indictment. *Compare, e.g.*, Docket No. 297 (the defendant’s motion to dismiss), *and* Docket No. 309 (one of Defendant Scherrer’s three motions to dismiss), *with* Docket No. 324-2 (NACDL’s proposed amicus brief). Under such circumstances, the NACDL does not aid the court as an amicus should, but instead imposes a burden on the Court. *See* Supreme Court Rule 37(1) (“An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose *burdens* the Court, and its filing is *not favored*.”) (emphasis added); *see also Ryan*, 125 F.3d at 1063 (noting that amicus briefs which “duplicate the arguments made in the litigants’ briefs, in effect merely extend[] the length of the litigants’ brief,” and “should not be allowed” because “[t]hey are an abuse.”).

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

No compelling legal or factual basis exists to permit the filing of the amicus brief the defendant filed on the NACDL’s behalf. Although the defendant purported to request permission to file an amicus brief on behalf of the NACDL, Docket No. 324, she actually took a “better to ask for forgiveness than to ask for permission” approach as she filed the NACDL’s amicus brief *before* the Court authorized her to do so, Docket No. 324-2. Accordingly, the United States not only opposes leave to file an amicus brief, but also moves to strike the amicus brief that the defendant improvidently tendered.

C. CONCLUSION

“In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, . . . [the Court] should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties’ briefs do not give [the Court] all the help [it] need[s].” *Ryan*, 125 F.3d at 1064. The Court should deny the defendant’s request to accord amicus status to the NACDL, and should strike the NACDL’s documents which were prematurely filed without the Court’s authorization.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 3rd day of June, 2020.

W. STEPHEN MULDROW
United States Attorney
/s/ Alexander L. Alum
Alexander L. Alum – G01915
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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