**UNITED STATES DISTRICT COURT**
**DISTRICT OF PUERTO RICO**

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| **UNITED STATES OF AMERICA**,<br><br>Plaintiff,<br><br>v.<br><br>**JULIA BEATRICE KELEHER [1]**,<br><br>Defendant. | **CASE NUMBER**: 19-431 (PAD) |

**JULIA BEATRICE KELEHER'S MOTION TO DISMISS COUNTS ONE THROUGH TWENTY-THREE OF THE SUPERSEDING INDICTMENT**

COMES NOW the defendant, Julia Beatrice Keleher, through her undersigned counsel, and respectfully files this motion to dismiss Counts One through Twenty-Three of the *Superseding Indictment* (Docket No. 368), all but one of the counts brought against her, pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure.

## I. INTRODUCTION

The Superseding Indictment charges Ms. Keleher with various crimes related to what the Government characterizes as three distinct schemes orchestrated by Ms. Keleher while she was Secretary of the Puerto Rico Department of Education ("DOE"). Counts One through Eleven allege Ms. Keleher used her position as Secretary to orchestrate a scheme to deprive the DOE of the right to the exclusive use of its confidential information and, in so doing, committed Wire Fraud and Aggravated Identity Theft. Counts Twelve through Fifteen are based on the issuance of a DOE contract to Colon & Ponce, Inc. ("C&P"), which the Government alleges was awarded through a sham competitive bidding process. Finally, Counts Sixteen through Twenty-three allege Ms. Keleher schemed with others to improperly permit C&P and BDO Puerto Rico, P.S.C.

("BDO") to hire Individual C as an independent contractor and charge DOE for Individual C's services, despite C&P and BDO's contracts with the DOE prohibiting them from subcontracting.[1]

Ms. Keleher did not commit any of the alleged offenses. Indeed, Counts One through Eleven (the counts related to the use of DOE confidential information), Counts Twelve through Fifteen (the counts related to the C&P contract), and Counts Sixteen through Twenty-three (the counts related to the purported subcontracting scheme) fail even to state an offense. These counts fail as a matter of law to allege any money or tangible property of which Ms. Keleher supposedly intended to deprive, or actually deprived, any victim. Rather, the vast majority of the allegations amount to nothing more than a legally deficient theory of honest services fraud repackaged as money or property fraud. As was the case with the Original Indictment in this matter, the Superseding Indictment's effort to recast these deficient honest services allegations as traditional money or property wire fraud fails as a matter of law.

As the Supreme Court recently unanimously stated in *Kelly v. United States*, 140 S.Ct. 1565 (2020), the wire fraud statute does not extend to all alleged acts of dishonesty by state or local officials, but rather only to schemes where the object of the fraud is money or property that has historically been cognizable under the mail and wire fraud statutes. Where what is at issue is a public official making decisions about how the government's resources are allocated, allegations that the decision was corrupted by alleged undisclosed self-dealing do not constitute a scheme to defraud the government of money or property. Rather, such allegations are indistinguishable from those the Court analyzed in *Skilling v. United States*, 561 U.S. 358 (2010), and do not fall within the ambit of the wire fraud statute. *See Kelly* at 1571; *see also United States v. Ochs*, 842 F.2d

[1] The Government's improper joinder of counts in the Superseding Indictment will be addressed in a separate motion to sever. Further, Counts Sixteen through Twenty-three fail to state an offense because, as a matter of law, the DOE contracts with C&P and BDO did not prohibit the contractor from using an independent contractor such as Individual C to assist the contractor in its performance of the contract. These issues will also be addressed in separate motions.

515, 527 (1st Cir. 1988) (even prior to *Skilling*, the First Circuit had held: "we do not think courts are free simply to recharacterize every breach of fiduciary duty as a financial harm, and thereby to let in through the back door the very prosecution theory that the Supreme Court tossed out the front"). Each of the these counts against Ms. Keleher must be dismissed.

***The Alleged Improper Transmission of Confidential Information Scheme ("The Confidential Information Scheme")***

Ms. Keleher is alleged to have defrauded and deprived DOE of some purported property "right to the exclusive use of its confidential information" through unidentified "deceptive means." Counts One to Eleven charge Ms. Keleher with wire fraud and aggravated identity theft for allegedly violating her employment agreement by sending DOE-created spreadsheets containing information about DOE schools to Individual A, a former colleague who worked for a company that was seeking to provide services to the Commonwealth. Neither Ms. Keleher nor her former colleague are alleged to have benefitted personally from this alleged "scheme."

***The Alleged Colon & Ponce Scheme ("The C&P Scheme")***

Ms. Keleher is alleged to have conspired with Glenda and Mayra Ponce-Mendoza (who were charged in the Original Indictment, but are not charged in the Superseding Indictment) in connection with the DOE's award of a contract to C&P. Counts Twelve to Fifteen allege that Ms. Keleher sought to cause DOE to award the contract to C&P under "the guise of a sham competitive RFQ process." Again, it is not alleged that Ms. Keleher benefitted personally from this alleged scheme.

***The C&P and BDO Subcontracting Scheme ("The Subcontracting Scheme")***

Ms. Keleher is alleged to have arranged to have C&P and then BDO contract for the services of Individual C under their respective contracts with DOE, even though DOE's contracts with C&P and with BDO did not allow for subcontracting. Specifically, Counts Sixteen through

Twenty-three charge Ms. Keleher with Wire Fraud and Wire Fraud Conspiracy for her alleged participation in a purported scheme to have DOE pay C&P and BDO for services that were performed by someone who subcontracted with C&P and BDO, which was allegedly not permitted under the DOE contracts.

***None of the alleged schemes constitutes wire fraud***

As set forth below, Counts One through Twenty-Three must be dismissed because the three alleged schemes fail to constitute wire fraud or conspiracy to commit wire fraud. The facts as alleged in the Superseding Indictment, even if taken as true, fail as a matter of law to establish an essential element of wire fraud: that Ms. Keleher intended to obtain, or obtained, money or property from any identifiable victim.[2]

Admittedly, the Superseding Indictment attempts to parrot the statute and allege that the intent of each scheme was to deprive the DOE of money or property. The Confidential Information Scheme allegedly sought to deprive the DOE of "the right to the exclusive use of its confidential information;" the C&P Contracting Scheme allegedly sought to deprive the DOE of "moneys in connection" with the C&P contract; and the Subcontracting Scheme purportedly had the goal of depriving the DOE "of its moneys in connection" with the C&P and BDO contracts. However, the Superseding Indictment fail to allege, as it must, that *the object* of each alleged scheme was the deprivation of money or property that is cognizable under the wire fraud statute. That deficiency is fatal to all three schemes.

As in *Kelly*, rather than allege honest services fraud, the Superseding Indictment in this case attempts to evade the holding in *Skilling* by alleging "traditional" wire fraud. But it fails in

[2] Because the aggravated identity theft counts, Counts Nine through Eleven, are predicated on an underlying wire fraud offense charged in Counts One through Eight, the failure of the wire fraud counts to state an offense is also fatal to the aggravated identity fraud counts.

this regard as well. The Superseding Indictment fails to allege the DOE had a property right in the information that is the subject of the Confidential Information Scheme, much less a property right that historically has been recognized under the mail or wire fraud statutes. Indeed, the information in question is not confidential as a matter of Puerto Rico law. With respect to the C&P Contracting Scheme, the Superseding Indictment fails to allege that Ms. Keleher lacked the authority to award the contracts and/or contract amendments to C&P or BDO, or that Ms. Keleher intended that C&P would not actually provide DOE with the services for which the companies would be paid under their respective contracts. Accordingly, the alleged object of the supposed scheme was not that DOE would be deprived of money, because DOE indisputably would receive services in return for the money. Rather, the alleged object was that DOE would be deprived of its intangible right to spend that money with a contractor that was selected through a fair competitive bidding process, rather than an allegedly "sham" process. It is black letter law, however, that an intangible right to a fair bidding process is not a property right under the mail and wire fraud statutes. The counts associated with the alleged Subcontracting Scheme suffer from the same infirmity. The Superseding Indictment does not allege that there was any intent that Individual C would not perform services for DOE. Accordingly, the object of the alleged scheme was not to deprive DOE of money—DOE would receive Individual C's services in return for the money it paid C&P and BDO under their respective contracts. Rather, the alleged object of the scheme was to deprive DOE of the intangible right to have those services performed by employees of C&P and BDO, respectively, rather than by an independent contractor who performed the work allegedly in breach of the provision in each contract prohibiting subcontracting. The intangible right to enforce a contractual prohibition on subcontracting is not a property right that has historically been recognized as cognizable under the mail and wire fraud statutes. Accordingly, the Superseding

Indictment fails to state an offense under the principles set forth by the Supreme Court in *Skilling* and *Kelly*.

In *Kelly*, the Supreme Court unanimously and emphatically rejected an attempt to assert allegations that are insufficient under *Skilling* to constitute honest services wire fraud and recast them as money or property fraud, even where an incidental byproduct of the scheme was a monetary loss to the victim. *See Kelly* at 1572. Allegations of wrongdoing, including deception, corruption, and abuse of power by a public official do not suffice to state the offense of wire fraud. *Id.* at 1568. As the Court has made clear, the wire fraud statute does not "criminaliz[e] all acts of dishonesty by state and local officials." *Id.* at 1568. As the Court held in *McNally v. United States*, 483 U.S. 350 (1987), "[f]ederal prosecutors may not use property fraud statutes to 'set[] standards of disclosure and good government for local and state officials.'" *Id.* at 1571 (citing *McNally*, 483 U.S. at 360).

*Skilling* "specifically rejected a proposal to construe the statute as encompassing 'undisclosed self-dealing by a public official,' even when he hid financial interests." *Id*. The Court held that what matters is what a public official is alleged to have done – here, allocate government resources by determining which contractors would perform services for the government – not whether the public official allegedly did so "for bad reasons; and [she] did so by resorting to lies." *Id.* at 1573. The allocation of government resources, a "run-of-the-mine exercise of regulatory power [,] cannot count as the taking of property." *Id.* (citing *Cleveland v. United States*, 531 U.S. 12 (2000)).

Indeed, even the Third Circuit decision that was reversed in *Kelly* recognized that a state official cannot "deprive [a government agency] of its right to control its money or property if that right to control [was] committed to [the actor's] unilateral discretion." *United States v. Baroni*,

909 F.3d 550, 563 (3d Cir. 2018) *rev'd on other grounds, Kelly v. United States*, 140 S.Ct. 1565 (2020). Thus, in *Baroni*, the Third Circuit, even in defining "property" far more broadly than it is defined under the law of the First Circuit, and in a manner later rejected by the Supreme Court, acknowledged that merely alleging that a state official exercised her discretion over a state agency's money or property with an improper motive is insufficient to meet the element of mail or wire fraud of depriving the state of "money or property."[3]

At most, then, the Superseding Indictment alleges that Ms. Keleher, who is not alleged to have been offered a bribe or kickback, deprived the DOE of the right to her honest services by corruptly disclosing allegedly confidential DOE information and subverting DOE's fair and open procurement process and control over its selection of contractors and subcontractors. But such acts cannot serve as the predicate for the offenses charged, which require that the object of the scheme be to deprive a victim of money or property. The Superseding Indictment, having studiously avoided charging Ms. Keleher under an honest services theory of fraud, attempts to charge deficient honest services allegations as traditional wire fraud. The law in the First Circuit, confirmed by the Supreme Court in *Kelly*, however, makes clear that the government may not recast a fatally flawed allegation of honest services fraud as a traditional scheme to defraud money or property.

## II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

***The Original Indictment***

On July 9, 2019, Ms. Keleher was indicted, together with five co-defendants, and charged with eighteen felony counts. (*See generally* Docket No. 3.) The charges against Ms. Keleher were

[3] The proposition that a state official cannot deprive a government agency of its right to control its money or property if the control was committed to the official's discretion was accepted by the District Court, the Third Circuit, and the government, *see United States v. Baroni*, 909 F.3d 550, 563 (3d Cir. 2018), and was, therefore, not an issue before the Supreme Court's consideration in *Kelly*.

brought in the context of two distinct conspiracies, as described, respectively, in Counts One and Twelve of the indictment, the C&P Contracting Scheme and the BDO Contracting Scheme. (*Id.*).[4]

***The Superseding Indictment***

On August 10, 2020, a federal grand jury returned a ninety-eight-count superseding indictment against five defendants, including Ms. Keleher. (Superseding Indictment, Docket No. 368.) Ms. Keleher is charged in fewer than a quarter of those counts. (*Id.*) Most conspicuously the government removed Ms. Keleher from the BDO Contracting Scheme, which the Superseding Indictment now characterizes as the BDO Lobbying Services Fee Scheme (Counts Twenty-five to Forty-eight). In its place the government has added new charges. The Superseding Indictment lays out three unique alleged schemes involving Ms. Keleher, and four additional distinct schemes in which Ms. Keleher is not charged.

Counts One to Eleven of the Superseding Indictment relate to a newly charged Confidential Information Scheme. Counts One to Eight charge substantive wire fraud, each citing an email allegedly sent in furtherance of the alleged scheme, in violation of 18 U.S.C. §1341. Counts Nine to Eleven charge Aggravated Identity Theft, in violation of 18 U.S.C. §1028A, under the theory that the spreadsheets Ms. Keleher allegedly sent to Individual A, attached to emails from her Gmail account, contain "names and DOE position numbers" of individuals employed by DOE.

Counts Twelve to Fifteen relate to the C&P Contracting Scheme. Counts Twelve to Fourteen charge substantive wire fraud, each citing an email allegedly sent in furtherance of the alleged scheme to award a contract to C&P. Count Fifteen charges a wire fraud conspiracy, in

[4] Ms. Keleher filed a motion to dismiss the Original Indictment based on its failure to allege that she intended to deprive any victim of money or tangible property. (Docket No. 297). The Government presumptively superseded the indictment at least partially in an attempt to cure the deficiencies raised in Ms. Keleher's motion. As will be demonstrated here, however, the Superseding Indictment suffers from the same fatal infirmities as the original indictment and the newly added allegations likewise fail to state an offense.

violation of 18 U.S.C. §1349, between Ms. Keleher and the Ponce-Mendoza sisters in relation to the C&P contracting scheme.

Counts Sixteen to Twenty-Four contain the newly alleged Subcontracting Scheme. Counts Sixteen through Twenty-Three charge Ms. Keleher with substantive wire fraud offenses tied to the work performed by Individual C at the DOE while employed by C&P and BDO. Count Twenty-Three charges a wire fraud conspiracy between Ms. Keleher and others related to that purported scheme. Count Twenty-Four alleges federal program bribery, in violation of 18 U.S.C. 666(a)(1)(B), related to this alleged scheme, under a theory that Ms. Keleher—getting nothing personally out of the arrangement—caused C&P to pay Individual C to provide services to DOE under the C&P contract with DOE, as an independent contractor, allegedly in violation of the provision of C&P's contract that precluded subcontracting, in exchange for causing DOE to amend C&P's contract so that C&P could pay Individual C for Individual C's services.

Counts Twenty-five to Ninety-eight charge other individuals with schemes unrelated to Ms. Keleher and the counts under which she is charged.

***The Confidential Information Scheme***

Ms. Keleher was the Secretary of the DOE between January 2017 and March 2019. (Docket No. 368 at ¶1). Individual A is alleged to have been a former colleague of Ms. Keleher's and the president of Company A, an entity that sought contracts in relation to DOE. (*Id.* at ¶14).

On February 11, 2017, Ms. Keleher sent Individual A two separate emails with what the Superseding Indictment characterizes as confidential PR DOE information, spreadsheets that contained the names, salaries, and position numbers of DOE employees. (*Id.* at ¶20). The first email, sent at 2:55 P.M., contained five spreadsheets. (Count One charges wire fraud based on Ms. Keleher emailing these spreadsheets from her work email address to her personal email address

and Count Three charges her with wire fraud for emailing these spreadsheets from her personal email address to Individual A; the spreadsheets are attached as Exhibits 1 and 2).[5] [6]

One spreadsheet, titled "Lista de Personal Region San Juan 2016-2017", included the names, salaries (gross and net), position numbers, and position classifications of DOE employees in the San Juan region. (Exhibit 1). The other four spreadsheets, all titled "Resultados META_PR", contained aggregated data about the performance of DOE in students in state-mandated standardized testing. Each of the four spreadsheets pertained to a different school subject—Spanish, Science, English, and Mathematics. (Exhibit 2). None of the five spreadsheets attached to this email were marked as confidential.[7]

The second email, sent at 3:12 P.M., attached three identical spreadsheets, all titled "Lista de maestros con su salario", which also included the names, salaries (gross and net), position numbers, and position classifications of DOE employees. (Count Two charges wire fraud based on Ms. Keleher emailing these spreadsheets from her work email address to her personal email address and Count Four charges her with wire fraud for emailing these spreadsheets from her

[5] Ms. Keleher will be submitting Exhibits 1 through 5 separately, as these exhibits contain information that the Superseding Indictment alleges is confidential. Although Ms. Keleher strongly disputes the information in question is confidential, she will nevertheless file these exhibits separately and with a case-participants-only restriction. Moreover, the spreadsheets submitted as Exhibits 1, 2, 3, and 5 only include an exemplar of the data Ms. Keleher sent Individual A. The original spreadsheets have thousands of rows and are far too voluminous to submit to the Court. The information, submitted, however is complete for purposes of the arguments set forth in this motion.

[6] On a motion to dismiss, the Court may consider facts not in dispute. *See e.g. United States v. Weaver*, 659 F.3d 353, 355 n.* (4th Cir. 2011) ("Although there is no provision for summary judgment in the Federal Rules of Criminal Procedure, the district court's pretrial dismissal of the § 922(h) charges was procedurally appropriate under Rule 12(b)(2). . . . As circuit courts have almost uniformly concluded, a district court may consider a pretrial motion to dismiss an indictment where the government does not dispute the ability of the court to reach the motion and proffers, stipulates, or otherwise does not dispute the pertinent facts." (collecting cases)). The Superseding Indictment identifies by name and date the excel spreadsheets it contends Ms. Keleher provided to Individual A that allegedly contained confidential information. The government has produced these spreadsheets in discovery. Because there is no dispute that these are the spreadsheets at issue or what information these spreadsheets contain, there is no need to defer to trial making the determination whether the information in these spreadsheets is the type of information that can be considered confidential and, accordingly, we have attached them as exhibits for the Court's consideration.

[7] A sample spreadsheet with results of the Science-based achievement testing is attached as Exhibit 2. The other three spreadsheets contain identical information but pertain to other subjects for which aptitude is tested.

personal email address to Individual A; the spreadsheets are attached as Exhibit 3). None of the three spreadsheets attached to this email were marked as confidential.

On February 12, 2017 at 4:37 P.M., Ms. Keleher sent Individual A another email which included a message from the director of the Arsenio Martinez High School raising questions about the DOE's process for classifying particular schools as excellent. (Count Five charges wire fraud based on Ms. Keleher emailing the message from the director of the Arsenio Martinez High School from her work email address to her personal email address and Count Six charges her with wire fraud for emailing this message from her personal email address to Individual A; the message is attached as Exhibit 4). The director does not provide any information to Ms. Keleher that may be reasonably considered confidential.

Several days later, on February 20, 2017, Ms. Keleher sent another email to Individual A with additional spreadsheets that contained the same information. (*Id.*). Specifically, the email attached four identical spreadsheets that also contained the DOE employee numbers, names, classroom numbers, and per-classroom enrollment for teacher at four schools, each with its own spreadsheet. (Count Seven charges wire fraud based on Ms. Keleher emailing these spreadsheets from her work email address to her personal email address and Count Eight charges her with wire fraud for emailing these spreadsheets from her personal email address to Individual A; the spreadsheets are attached as Exhibit 5). None of the four spreadsheets attached to this email were marked as confidential.

The Superseding Indictment alleges Ms. Keleher used her position as Secretary of the DOE to obtain, disclose, and convert the information in those emails for Individual A's use, thereby engaging in a scheme to defraud DOE by depriving it of an intangible property right to the exclusive use of its confidential information. (*Id.* at ¶19).

***The Colon & Ponce Contracting Scheme***

Glenda Ponce-Mendoza was one of Ms. Keleher's several Special Assistants at the DOE. (*Id*. at ¶6). C&P was a corporation organized under the laws of the Commonwealth of Puerto Rico. (*Id.* at ¶5). Mayra Ponce-Mendoza was a partner at C&P. (*Id.*).

On April 11, 2017, Glenda Ponce-Mendoza forwarded a professional services proposal from C&P to Ms. Keleher. (*Id.* at ¶32). Several months later, on May 16, 2017, the DOE sent a request for proposal ("RFP") to Mayra Ponce-Mendoza, as the principal of C&P, and to several additional companies, requesting proposals to provide services to the DOE. (*Id*. at ¶33).

On May 24, 2017, Ms. Keleher signed the proposal submitted by C&P in response to the RFP. (*Id.* at ¶35). On June 8, 2017, C&P executed contract 2017-AF0220 with the DOE. The amount of the contract was $43,550.00. (*Id*. at ¶39).

The Superseding Indictment alleges that Ms. Keleher and the Ponce-Mendoza sisters conspired to defraud DOE by depriving it of money in connection with the C&P contract under the "guise of a sham competitive RFQ process." (*Id.* at ¶40).

***The Subcontracting Scheme***

In August 2017, Individual C began working at the DOE without yet having a contract with the DOE. (*Id.* at ¶47). On October 25, 2017, Individual C signed a contractor agreement with C&P to provide services to C&P for $40.00/hr. (*Id.* at ¶50). On October 25, 2017, C&P executed an amended contract, 2017-AF0220-A, with DOE. (*Id*. at ¶49.) The total value of the amended contract was $95,000.00. (*Id*.). Paragraph 24 of the contract prohibited C&P from subcontracting, giving, or transferring the services object of the contract, but made C&P responsible for the hiring and/or recruitment of personnel that would provide the services needed by DOE. (*Id.* at ¶45).

Subsequently, on December 28, 2017, Individual C signed an independent contractor agreement with BDO whereby Individual C would provide services to BDO at a rate of $40.00/hr. (*Id.* at ¶53). The Superseding Indictment alleges that both C&P and BDO breached their contracts with DOE by contracting with Individual C in violation of the provision in each contract precluding subcontracting. (*Id.* at ¶55)

Both C&P and BDO invoiced the DOE for services provided by Individual C to DOE. (Id. at ¶51, ¶54). The Superseding Indictment alleges that the payment of these invoices for services provided by Individual C were part of a scheme to defraud and deprive the DOE of money in connection with these two contracts.

## III. RULE 12 STANDARD

Pursuant to Federal Rule of Criminal Procedure 12(b)(3), a defendant may file a pretrial motion, *inter alia*, to raise defects in instituting the prosecution and in the indictment, including failure to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(v). The United States Supreme Court has interpreted Rule 12 to permit pretrial resolution of a motion to dismiss the indictment when "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Covington*, 395 U.S. 57, 60 (1969). Accordingly, "[i]t is perfectly proper, and in fact mandated, that the district court dismiss an indictment if the indictment fails to allege facts which constitute a prosecutable offense." *United States v. Coia*, 719 F.2d 1120, 1123 (11th Cir. 1983).

Generally, "a motion to dismiss is 'capable of determination' before trial if it involves questions of law instead of questions of fact on the merits of criminal liability." *United States v. Craft*, 105 F.3d 1123, 1126 (6th Cir. 1997); *United States v. Flores*, 404 F.3d 320, 324 (5th Cir. 2005) ("the district court did not err by considering the purely legal question at hand in Flores's

pretrial motion"); *United States v. Korn*, 557 F.2d 1089, 1090 (5th Cir. 1977) ("'[t]he propriety of granting a motion to dismiss an indictment under [Fed. R. Crim. P.] 12 by pretrial motion is by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of fact.'"); *United States v. Jones*, 542 F.2d 661, 664-65 (6th Cir. 1976) (Rule 12 and accompanying notes support decision to dismiss indictment on motion raising legal questions); *see also United States v. Smith*, 866 F.2d 1092, 1097 (9th Cir. 1989) (one of the purposes of Rule 12(b) is "conservation of judicial resources by facilitating the disposition of cases without trial").

"District courts may ordinarily make preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do not invade the province of the ultimate factfinder." *Craft*, 105 F.3d at 1126; see also Fed. R. Crim. P. 12(b)(1) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits."); Fed. R. Crim. P. 12(b)(3) (noting that certain "defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits").

## IV. ARGUMENT

### 1. All Wire Fraud Counts Pertaining to the Three Alleged Schemes Must be Dismissed Under Rule 12 for Failure to State an Offense.

#### A. The Supreme Court's decision in *Skilling* prohibits charging the conduct alleged in Counts One to Eight as traditional Wire Fraud.

The elements of wire fraud are:

> First, that there was a scheme, substantially as charged in the indictment, to defraud [or to obtain money or property by means of false or fraudulent pretenses];
>
> Second, that the scheme to defraud involved the misrepresentation or concealment of a material fact or matter [or the scheme to obtain money or property by means

> of false or fraudulent pretenses involved a false statement, assertion, half-truth or knowing concealment concerning a material fact or matter];
>
> Third, that [defendant] knowingly and willfully participated in this scheme with the intent to defraud; and
>
> Fourth, that for the purpose of executing the scheme or in furtherance of the scheme, [defendant] caused an interstate [or foreign] wire communication to be used, or it was reasonably foreseeable that for the purpose of executing the scheme or in furtherance of the scheme, an interstate [or foreign] wire communication would be used, on or about the date alleged.

*First Circuit Pattern Criminal Jury Instructions* (2010) §4.18.1341. Thus, the offense of conspiracy to commit wire fraud requires, among other things, that "two or more persons conspired, or agreed, to commit" the substantive crime of defrauding an identifiable victim of something of value. *Carpenter v. United States*, 484 U.S. 19, 26 (1987) ("Sections 1341 and 1343 reach any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises."); *Cleveland v. United States*, 531 U.S. 12, 15, 18 (2000) ("§1341 requires the object of the fraud to be 'property' in the victim's hands."). As a result, allegations of deceit or misrepresentations, standing alone, are insufficient to support the offense. Instead, proof of wire fraud requires a showing of an intent to defraud and deprive victims of money or property on the part of the defendants. *See Carpenter*, 484 U.S. at 26; *Cleveland*, 531 U.S. at 15. In order to establish a wire fraud offense, the government must therefore plead and ultimately "prove that defendants contemplated some actual harm or injury to their victims" in the form of money or property. *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987).

In *Skilling*, the Supreme Court limited honest services mail and wire fraud to bribery and kickback schemes furthered by use of the mail or wire communications. The Court did so because without limiting deprivations of "honest services" to those that have been historically cognizable under the mail and wire fraud statute, *i.e.*, those involving bribes and kickbacks, the mail and wire

fraud statutes would be unconstitutionally vague because they could potentially be applied to any alleged deprivation of an intangible right.

At issue was the conviction of Jeffrey Skilling on charges that grew out of the collapse of Enron, an energy-trading and utilities company based in Houston, Texas. The Supreme Court noted that "the Government never alleged that [Skilling] solicited or accepted side payments from a third party in exchange for making . . . misrepresentations." *Id. at* 366. *Skilling* held this failure to be fatal. "[H]onest services" in the mail or wire fraud context encompasses only "paradigmatic cases of bribes and kickbacks." *Id. at* 411.[8]

Only core conduct involving bribery of public officials can constitute honest services fraud as a result of the *Skilling* ruling. *See United States v. George*, 676 F.3d 249, 260 (1st Cir. 2012)("[T]to convict someone of honest-services fraud, a factual showing of bribery or kickbacks is compulsory."); *United States v. Halloran*, 664 F. App'x 23, 26 (2d Cir. 2016)("§ 1346 criminalizes only the bribe-and-kickback core")(citing *Skilling* at 408-09); *United States v. Botti*, 711 F.3d 299, 310 (2d Cir. 2013) ("The Supreme Court held in *Skilling* that the honest services fraud encompassed by 18 U.S.C. § 1346 must be limited to schemes involving bribes or kickbacks in order to avoid due process concerns."). *See also United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) (in a case prior to *Skilling*: "although a public official might engage in reprehensible misconduct related to an official position, the conviction of that official cannot stand where the conduct does not actually deprive the public of its right to her honest services . . . [Defendant] was not bribed or otherwise influenced in any public decision-making capacity. Nor did he embezzle funds. He did not receive, nor can it be found that he intended to receive, any tangible

[8] For example, the classic case of *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941), was referenced by the Supreme Court in the *Skilling* opinion. *Shushan* made clear that "[a] scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery but would also be a scheme to defraud the public" of the intangible right of honest services. *Id.* at 115.

benefit.")(citations omitted); *see also United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996) (in another case prior to *Skilling*: "The cases in which a deprivation of an official's honest services is found typically involve either bribery of the official or her failure to disclose a conflict of interest, **resulting in personal gain**.") (emphasis added).[9]

In the course of differentiating honest services fraud from traditional wire fraud, the Court in *Skilling* noted that the honest services fraud theory lacks the "symmetry" between the defendant's gain and the victim's loss that is present in traditional wire fraud, where "the victim's loss of money or property" necessarily "supplie[s] the defendant's gain." *Id*.

To illustrate this point, the Court articulated a hypothetical scenario:

> For example, if a city mayor (the offender) accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length, **the city (the betrayed party)** would suffer no tangible loss.

*Id.* The Court's hypothetical in *Skilling* clearly confirms that a corrupted bidding process, of precisely the sort the Government may try to argue is alleged in this indictment, does not by itself deprive a governmental entity of money or property that could support a charge of traditional wire fraud. The Superseding Indictment, while it may attempt to allege a breach of fiduciary duty for non-disclosure of self-dealing, does not even purport to allege that Ms. Keleher intended to receive

[9] A case that illustrates the impact of the *Skilling* decision on honest services fraud is *Weyhrauch v. United States*, 548 F.3d 1237 (9th Cir. 2008). The case involved an attorney and Alaskan Congressman, Bruce Weyhrauch, who allegedly solicited a series of contacts with the representatives of an oil field services company seeking future legal work in exchange for favorable action in connection with pending oil tax legislation. The indictment alleged that Weyhrauch "'deprive[d] the State of Alaska of its intangible right to [his] 'honest services' . . . performed free from deceit, self-dealing, bias, and concealment.'" *Id*. at 1239. Weyhrauch was convicted and the conviction was affirmed on appeal, even though the indictment failed to allege that Weyhrauch had received any compensation or benefits from the oil company executives. After *Skilling* was decided, however, the Supreme Court vacated the Ninth Circuit's judgment and remanded the case. *See Weyhrauch v. United States*, 561 U.S. 476 (2010). The Ninth Circuit reversed its prior holding and excluded the government's "honest services" offense evidence on the basis that, after *Skilling*, non-disclosure of a conflict of interest could no longer provide the basis for an "honest services" wire/mail fraud charge. *Id.*

or did receive a pecuniary benefit in return for sending that information to Individual A. Accordingly, its allegations are deficient as an honest services fraud theory.

**B. Efforts to recast honest services fraud theories as traditional money or property fraud rejected prior to *Kelly*.**

*Skilling* has confined § 1346 honest services fraud to cases involving bribes, kickbacks, or other pecuniary gain being paid in return for the dereliction of honest services. Allegations that fall outside the scope of this definition of honest services cannot simply be recast as money or property fraud. In *United States v. Ratcliff*, 488 F.3d 639 (5th Cir. 2007), the district court granted a motion to dismiss in a case charging as money or property fraud an elected Parish official's scheme to conceal campaign finance violations, alleging that the scheme was intended to get the official re-elected and deprive the parish of money, his salary: "Unfortunately, because the government cannot invoke § 1346 in this case, it has attempted to use the salary theory as a way around its inability to charge the defendant with defrauding the citizens of Livingston Parish of their right to a fair election . . . the undersigned is not willing to permit the government to expand the reach of § 1341 by allowing it to utilize the questionable salary theory." *United States v. Ratcliff*, 381 F. Supp. 2d 537, 549 (M.D. La. 2005). The Fifth Circuit affirmed. "Although the charged scheme involves Ratcliff ultimately receiving money from the parish, it cannot be said that the parish would be deprived of this money by means of Ratcliff's misrepresentations, as the financial benefits budgeted for the parish president go to the winning candidate regardless of who that person is." *Ratcliff*, 488 F.3d at 645.[10]

[10] The Sixth Circuit reached the same result in a similar case, *United States v. Turner*, 465 F.3d 667, 680 (6th Cir. 2006)(holding that the district court should have dismissed the charges, observing, "the government and citizens have not been deprived of any money or property because the relevant salary would be paid to someone regardless of the fraud. In such a case, the citizens have simply lost the intangible right to elect the official who will receive the salary.").

The First Circuit has held the government cannot perform an end run of the Supreme Court's limitations on honest services fraud by recasting a case as involving intangible property. Thus, after the Supreme Court held in *McNally v. United States*, 483 U.S. 350 (1987), that "money or property" did not include honest services fraud (and before the concept was reinstated by the enactment of § 1346), the First Circuit rejected the government's attempt to frame allegations of honest services fraud as traditional money or property fraud: "We understand that the intangible rights doctrine has become firmly entrenched in the federal courts and that old habits die hard. But we do not think courts are free simply to recharacterize every breach of fiduciary duty as a financial harm, and thereby to let in through the back door the very prosecution theory that the Supreme Court tossed out the front." *United States v. Ochs*, 842 F.2d 515, 527 (1st Cir. 1988). Similarly, the Eleven Circuit has ruled that a "'property interest' [that] is indistinguishable from the intangible right to good government described in McNally … cannot sustain [a] mail fraud count," even if reframed in property terms. *United States v. Goodrich*, 871 F.2d 1011 (11th Cir. 1989).[11]

**C. *Kelly v. United States***

Any doubt about the correctness of the approach in the First Circuit has (again) been put to rest by the Supreme Court's resounding and unanimous decision in *Kelly*. *Kelly* arose out of the so called "Bridgegate" scandal, in which two senior political officials at the Port Authority of New York and New Jersey were alleged to have engaged in a scheme to impose crippling gridlock on the Borough of Fort Lee, New Jersey, after Fort Lee's mayor refused to endorse the 2013 reelection bid of then-Governor Chris Christie. The government alleged that, using the pretext of conducting a "traffic study," the defendants and others conspired to limit Fort Lee motorists' access to the

[11] The Supreme Court in *Skilling* emphasized that when Congress enacted § 1346, the honest services provision of the mail fraud statute, after *McNally* held that money or property did not include honest services, Congress was intending to reach only "core" or "paradigmatic" honest services cases, those involving kickback or bribery schemes.

George Washington Bridge during the first week of the school year in September 2013, and in so doing, caused severe traffic jams. *Kelly v. United States*, 140 S. Ct. 1565, 1569–71, (2020).

The defendants were charged with various felony counts, including, as in this case, conspiring to commit, and committing, "traditional" money or property wire fraud, rather than honest services fraud.

> First, the Government claims that Baroni and Kelly sought to "commandeer[]" part of the Bridge itself—to "take control" of its "physical lanes." Tr. of Oral Arg. 58–59. Second, the Government asserts that the two defendants aimed to deprive the Port Authority of the costs of compensating the traffic engineers and back-up toll collectors who performed work relating to the lane realignment.

*Kelly* at 1566. Following a jury trial, defendants were convicted of all counts and appealed their convictions. The Third Circuit affirmed the defendants' wire fraud convictions, accepting the Government's contention that the defendants had defrauded the Port Authority of its *property*.

The Supreme Court rejected the Third Circuit's expansive view of "property" rights cognizable under the wire fraud statute and reversed the convictions. The Supreme Court concluded that "[t]he realignment of the toll lanes was an exercise of regulatory power" and did not meet the property requirement of the wire fraud statute. *Id.* at p. 1568. The Court was unpersuaded by the Third Circuit's assessment that the payment of salaries to the employees of the Port Authority implicated a "property right", concluding that the "employees' labor was just the incidental cost of that regulation, rather than itself an object of the officials' scheme." *Id*. In considering the concept of deprivation of property, the Supreme Court reflected on the fact that the defendants did not (of course) walk away with the lanes nor did they take the lanes from the government by converting them to a non-public use. *Id*. at 1573. In contrast to an appropriation of the lanes, the Court held that the extent of the defendants' efforts was limited to exercising

regulatory rights of "allocation, exclusion, and control" of the lanes between different groups of drivers. *In accord, Cleveland v. United States*, 531 U.S. 12, 15 (2000).

The Supreme Court's unanimous decision in *Kelly* leaves no doubt that traditional money or property wire fraud is not a mechanism for prosecution of acts of dishonesty by local officials, absent an allegation and proof that the object of the scheme is the deprivation of a cognizable property right. In *Kelly*, the Supreme Court acknowledged that the defendants had engaged in wrongdoing but recognized that the wire fraud statutes did not fit the conduct alleged in the indictment: "[t]he evidence the jury heard no doubt shows wrongdoing–deception, corruption, abuse of power. But the federal statutes at issue [wire fraud and federal program fraud] do not criminalize all such conduct." *Kelly* at 1568. The Court *also* made emphatically clear that a "property right" should be narrowly construed in order to derail ambitious attempts by the Federal government to recast as traditional money or property fraud what are in reality deficient honest services fraud offenses involving deceit and corrupt conduct by local officials that did not contemplate financial harm as an object of the scheme. *Id.* at 1572-73.

The Supreme Court's ruling in *Kelly* sends a message to both district and appellate courts that the Court will not allow its holding in *Skilling* to be undermined, and that it will be vigilant in precluding the prosecution of schemes that, although they allegedly involve deceit and corruption, do not allege that the central aim of the defendant's conduct is to deprive a victim of money or property. The Supreme Court tightened the reigns of statutory construction as they pertain to the concept of a "property right" under the wire fraud statute, **by requiring that such a property right must be central to the scheme and an "object of the fraud,"** not merely an incidental by-product of the scheme to defraud. *Id*. at 1573. (emphasis ours)[12]

[12] The Supreme Court noted that if one looks hard enough for an economic impact in a scenario involving acts of deception or corruption, a collateral financial impact will usually be found. In the wake of its decision in *Kelly*,

**D. Counts One through Eight fail to state an offense.**

Counts One to Eight charge Ms. Keleher with traditional money or property wire fraud in connection with the transmission of what the Superseding Indictment characterizes as DOE confidential information (*i.e.*, the names and DOE employee numbers of DOE employees). These counts fail as a matter of law because the Superseding Indictment does not allege that Ms. Keleher intended by disclosing supposedly confidential DOE information to obtain money from DOE, much less that this was the object of the alleged scheme.[13]

Counts One though Eight are only viable to the extent that they allege a scheme whose object is to deprive DOE of cognizable property. They do not. In fact, the Superseding Indictment pleads the contrary—it merely alleges that Ms. Keleher intended to deprive the DOE of its intangible right to the exclusive use of confidential information. This intangible right is not one that has historically been recognized as a property. As in *Kelly*, Counts One through Eight attempt to do an end run around *Skilling* by alleging money or property fraud in the absence of allegations of a bribe or kickback where the alleged object of the alleged scheme is not the deprivation of money or cognizable property.

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however, it is now unequivocally clear that an incidental financial impact is insufficient to satisfy the requirement of the pecuniary harm required by the wire fraud statute. *See Kelly* at 10. ("We specifically rejected a proposal to construe the statute as encompassing 'undisclosed self-dealing by a public official,' even when he hid financial interests. *Skilling* at 405, 410. The upshot is that federal fraud law leaves much public corruption to the States (or their electorates) to rectify. Cf. N. J. Stat. Ann. §2C:30–2 (West 2016) (prohibiting the unauthorized exercise of official functions). Save for bribes or kickbacks (not at issue here), a state or local official's fraudulent schemes violate that law only when, again, they are "for obtaining money or property." 18 U. S. C. §1343; see §666(a)(1)(A) (similar).

[13] To the extent that the Superseding Indictment implies that the alleged scheme contemplated that Individual A would use the confidential information to obtain a contract in relation to DOE, this does not mean that an object of the scheme was to deprive a victim of money. There is no allegation that the scheme contemplated that Individual A would not actually provide services or would charge an inflated price for those services. Accordingly, the object of the scheme is not to deprive a victim of money; the government agency would be paying money and returning services in return.

***i. The DOE does not have a property right in the in the exclusive use of the information at issue in Counts One through Eight.***

The only way the Government's theory of wire fraud in relation to the Confidential Information scheme can survive is if it is properly alleged that Ms. Keleher sought to deprive the DOE of a property right. The property right asserted in the Superseding Indictment is an intangible right to the exclusive use of confidential information.

Prior to its *Kelly* decision, the Supreme Court recognized that deprivations of certain types of confidential information can support convictions under § 1343. Specifically, in *Carpenter v. United States*, 484 U.S. 19 (1987), the Supreme Court affirmed convictions stemming from the fraudulent misappropriation of pre-publication Wall Street Journal articles. *Id.* at 28. In rejecting the contention that the defendants had not defrauded the Journal of money or property by disclosing and using the information in the stories before publication, the Court explained that "[t]he Journal, as [one of the defendant's] employer, was defrauded of much more than its contractual right to his honest and faithful service." *Id.* at 25. Indeed, "the object of the scheme was to take the Journal's confidential business information ... and its intangible nature does not make it any less 'property' protected by the mail and wire fraud statutes." *Id.* The Court concluded that "[t]he Journal had a property right in keeping confidential" the information divulged by the columnist, and that the mail fraud statute was therefore applicable. *Id.* at 26. *See also United States v. Martin*, 228 F.3d 1, 16 (1st Cir. 2000) ("confidential information may be considered property for the purposes of §§ 1341 and 1343." ) (citing *United States v. Czubinski*, 106 F.3d 1069, 1074 (1st Cir.1997)).

Notwithstanding *Carpenter* and its progeny, however, the *Kelly* court later made clear that a "property right" should be narrowly construed in order to derail ambitious attempts by the Federal government to recast as traditional money or property fraud what are in reality deficient

honest services fraud offenses involving deceit and corrupt conduct by local officials that did not contemplate financial harm as an object of the scheme. *Kelly* at 1573. In any event, here DOE retained the information at issue and Ms. Keleher's alleged disclosure of the information to Individual A no more deprived DOE of the information and transferred it to someone else than Kelly and Baroni deprived the government of the lanes of traffic on the George Washington Bridge and transferred them to someone else.

Further, there are important distinctions between the confidential information involved in *Carpenter* and the confidential information that is captured in Counts One through Eight. While courts have historically recognized that for profit businesses have a property interest in trade secrets and other confidential business information, the same is not true with respect to information in the possession of the government. The Superseding Indictment does not attempt to allege the information shared by Ms. Keleher had commercial value. Nor could it. Intellectually honesty would not support such an argument. The names and employee numbers of DOE employees does not have a business value to the Government. It may arguably be information an employee may want to keep private, but that does not mean that DOE's intangible "right to the exclusive use of its confidential information" is a property right.

***ii. The information shared by Ms. Keleher is not confidential under Puerto Rico law.***

*a. Names, employee numbers, and salaries*

None of the information at issue is confidential information. The names, salaries (gross and net), position numbers, and position classifications of DOE employees at issue in Counts One,

Two, Three, Four, Seven, and Eight is not information of the sort that has been traditionally recognized as one that triggers a property right.[14]

It is the public policy of the Commonwealth of Puerto Rico that information and documentation "produced by the government shall be presumed public and accessible to all persons equally." Law Num. 141 of 2019, Article 3. To that end, several months ago, Eva Prados-Rodriguez, a candidate to Puerto Rico's House of Representatives filed a *Petition for Mandamus* in Puerto Rico State Court: San Juan Superior Division requesting current lists of names and salaries of all persons employed by the Puerto Rico legislature and its legislators. *See Prado-Rodriguez v. Rivera-Schatz*, et al., Civil Num. SJ2020CV05245. The parties there agreed that the names and positions of these public employees were not confidential information. Their dispute was regarding the disclosure of employee salaries, information which would arguably call for greater discretion than a name and employee number.

Judge Anthony Cuevas-Ramos, of the San Juan Superior Court's extraordinary remedy division, found in Ms. Prado-Rodriguez's favor and ordered the respondents to provide Ms. Prado-

[14] Indeed, federal law explicitly contemplates that this information will be disclosed. Specifically, Section 1111 of the Every School Succeeds Act, Pub. L. No. 114–95, provides in relevant part for public reporting of:

> (x) The per-pupil expenditures of Federal, State, and local funds, including actual personnel expenditures and actual nonpersonnel expenditures of Federal, State, and local funds, disaggregated by source of funds, for each local educational agency and each school in the State for the preceding fiscal year.

To that end, many states disclose the salaries of public-school teachers in a manner not unlike the spreadsheets at issue in Counts One, Two, Three Four, Seven, and Eight. The Court can take judicial notice that this data is available online for districts in Pennsylvania (https://data.ydr.com/educator-salary-search/?cntyarea=philadelphia&query=Lopez&cityselectsb=county%2Fphiladelphia), New York (http://rochester.nydatabases.com/database/educator-salaries-new-york), Delaware (https://www.openthebooks.com/delaware-state-employees/?Year_S=0&Emp_S=Red%20Clay%20Consolidated%20School%20District), and New Jersey (https://content-static.northjersey.com/Data/caspio/bundle/NJTeachersPay.html), among others.

The Puerto Rico Civil Code also contains a section detailing the salary scale for all DOE teachers. *See* 18 L.P.R.A. § 309.

Rodriguez with the information she had requested.[15] In his decision, Judge Cuevas-Ramos recited the Puerto Rico Supreme Court's precedent regarding public access to the Commonwealth's information and noted that the Supreme Court of Puerto Rico has repeatedly held that the public has a fundamental right to access governmental information. *See* Exhibit 6 at p. 7 (citing *Soto v. Secretary of Justice, et al.*, 12 P.R. Offic. Trans. 597 (1982)). In applying the law to the facts of that matter, Judge Cuevas-Ramos noted that the respondents had objected to the disclosure of employee salaries under the theory that this information was confidential. *Id.* at 10. Judge Cuevas-Ramos recognized that some employee information, such as social security numbers and contracts, may be considered confidential but summarily disposed of the argument that salary information of government employees was confidential by noting that public employees do not have an expectation of privacy over their salary information. *Id.* In the end, the legislature was ordered to provide the requested information and it did so without appealing Judge Cuevas-Ramos' decision, a fact that was widely reported in Puerto Rico.[16] Afterwards, other agencies in Puerto Rico followed suit and published the same information on their website.[17]

*b. Standardized test results*

The results of standardized tests, the information at issue in Counts One and Three, likewise is not confidential information. The Court can take judicial notice of the fact that aggregated results of standardized testing for students at each DOE school are available on the

[15] A copy of the decision is attached hereto as Exhibit 6. A certified translation will be filed with the Court forthwith.

[16] The table of the Puerto Rico Legislature's employee names, salaries, and job titles may be accessed here: https://bloximages.newyork1.vip.townnews.com/elvocero.com/content/tncms/assets/v3/editorial/4/62/462b350e-157b-11eb-b0af-bb9384454939/5f9352ceaa5a2.pdf.pdf. The Court can take judicial notice of this publicly available information.

[17] A similar table pertaining to the Judiciary of Puerto Rico may be accessed here: http://www.ramajudicial.pr/Prensa/Salarios-Personal-Rama-Judicial-2020.pdf.

DOE's webpage and may be accessed at the following link: https://perfilescolar.dde.pr/.[18] The reason that this information is made publicly available is because federal law requires its publication. The No Child Left Behind Act, 20 U.S.C. §§ 6301–6578, mandates:

> (E) PUBLIC DISSEMINATION.—The local educational agency shall, not later than the beginning of the 2002– 2003 school year, unless the local educational agency has received a 1-year extension pursuant to subparagraph (A), publicly disseminate the information described in this para- graph to all schools in the school district served by the local educational agency and to all parents of students attending those schools in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand, and make the information widely available through public means, such as posting on the Internet, distribution to the media, and distribution through public agencies, except that if a local educational agency issues a report card for all students, the local educational agency may include the information under this section as part of such report.

20 U.S.C.A. § 6311(h)(2)(E). Additionally, since 2003, schools have been required to issue report cards at the state, district and school level. These report cards, in relevant part, must contain:

> (h) REPORTS.—
>
> (1) ANNUAL STATE REPORT CARD.—
>
> (A) IN GENERAL.—Not later than the beginning of the 2002–2003 school year, unless the State has received a 1-year extension pursuant to subsection (c)(1), a State that receives assistance under this part shall prepare and disseminate an annual State report card.
>
> (B) IMPLEMENTATION.—The State report card shall be—
> (i) concise; and
> (ii) presented in an understandable and uniform format and, to the extent practicable, provided in a language that the parents can understand.
>
> (C) REQUIRED INFORMATION.—The State shall include in its annual State report card (i) information, in the aggregate, on student achievement at each proficiency level on the State academic assessments described in subsection (b)(3) (disaggregated by race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged, except that such

[18] Past DOE school evaluations may be accessed at this link: http://intraedu.dde.pr/evaluacion/Site%20Pages/rcard.aspx.

> disaggregation shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student);
>
> (ii) information that provides a comparison between the actual achievement levels of each group of students described in subsection (b)(2)(C)(v) and the State's annual measurable objectives for each such group of students on each of the academic assessments required under this part;
>
> (iii) the percentage of students not tested (disaggregated by the same categories and subject to the same exception described in clause (i));
>
> (iv) the most recent 2-year trend in student achievement in each subject area, and for each grade level, for which assessments under this section are required;
>
> (v) aggregate information on any other indicators used by the State to determine the adequate yearly progress of students in achieving State academic achievement standards;
>
> (vi) graduation rates for secondary school students consistent with subsection (b)(2)(C)(vi);
>
> (vii) information on the performance of local educational agencies in the State regarding making adequate yearly progress, including the number and names of each school identified for school improvement under section 1116; and

20 U.S.C.A. § 6311(h)(1) (*See* Exhibit 7 (Sample report card accessed through https://perfilescolar.dde.pr/)); *see also* Every Student Succeeds Act, Pub.L. No. 114–95, 129 Stat. 1802, 2171 (2015).[19]

* * * * * * * * *

The Superseding Indictment alleges DOE employee names, salaries, employee numbers, and standardized test results of students constitute confidential information and, on that basis,

[19] The only other information disclosed by Ms. Keleher that the Superseding Indictment alleges deprived DOE of a property right to the exclusive use of its confidential information is the message from the director of the Arsenio Martinez High School raising questions about the DOE's process for classifying particular schools as excellent. (Counts Five and Six). The Superseding Indictment fails to allege any factual basis from which a jury could conclude that this inquiry was required to be treated as confidential. In any event, the email was submitted as Exhibit 5 and the Court can readily ascertain that no confidential information is discussed in the context of that inquiry. To the extent the Government contends that school classifications are confidential, the Court can take judicial notice that school classification information is publicly available at the following link: http://intraedu.dde.pr/Comunicados%20Oficiales/201411050004.pdf.

alleges that DOE had an intangible property right in the exclusive use of that information. But since federal and/or Puerto Rico law makes provision for the disclosure of this very type of information to the public, there plainly is no longstanding, widely recognized governmental property interest in the government's exclusive access to such information. To apply the wire fraud statute under the theory that the disclosure of information generally accessible to the public deprives the government of a cognizable "property" interest would suffer from the very vagueness concerns articulated in *Skilling* if "honest services" were untethered from the historical underpinnings of what constitutes a deprivation of honest services, i.e., accepting a bribe or a kickback. *Kelly* counsels that "property" likewise cannot be untethered from its historical meaning. To whatever extent, after *Kelly*, wire fraud could be premised on the disclosure of government information typically kept confidential, Counts One through Eight cannot possibly state an offense as they are premised on the disclosure of information that under applicable law is not treated as confidential.

**E. Counts Twelve to Fifteen fail as a matter of law to state an offense of wire fraud related to the C&P Contracting Scheme because the DOE was not deprived of money or property.**

Counts Twelve to Fifteen of the Superseding Indictment must also be dismissed because, despite the Superseding Indictment's bald assertions that the DOE was deprived of monies related to the C&P contract (Docket No. 368, ¶40), the Government as a matter of law cannot support that allegation. The Superseding Indictment fails to allege, for example, that DOE did not require the services C&P provided under the contract or that the conspirators intended that C&P would not provide the services contemplated under the contract. Accordingly, Counts Twelve through Fifteen fail to allege a deprivation of money. They certainly fail to allege a scheme the object of which was to deprive DOE of money. The object of the alleged scheme was to have a particular contractor

provide services to DOE in return for money. As *Kelly* and before it *Cleveland* recognize, the mere allocation of the government's resources is not a deprivation of the government's money or property.

Monies would ultimately be expended by DOE to fund the contract, whether the contract was awarded to C&P or to one of the other bidders. The selection of a contractor to provide services for a government agency is an exercise of regulatory power. It is simply a decision regarding the allocation of agency resources (between potential contractors). The fact that one contractor may have been favored going into the RFP process does not change this fact. So, as a matter of law, it cannot be said that DOE was deprived of any money as a result of the award of the contract to C&P. Because the wire fraud statute prohibits only deceptive "schemes to deprive [the victim of] money or property" the wire fraud counts in the Indictment relating to C&P must be dismissed. *Kelly v. United States*, 140 S. Ct. at 1574. Just as the Supreme Court held in *Kelly* that the allocation of lanes on the George Washington bridge "was a quintessential exercise of regulatory power," *id.*, the act of awarding contracts by the head of an agency is a quintessential exercise of regulatory power, allocating the agency's resources between various vendors who could have performed the services at issue.

At most, the Superseding Indictment suggests, without so stating, that DOE and the public were deprived of an intangible right to a fair and open bidding process because Ms. Keleher "steered" the contract to C&P through a "sham" process on account of her special assistant's relationship with the company. But intangible rights to a fair and open bidding process and the alleged breach of a public official's fiduciary duties through undisclosed self-dealing is not a property right cognizable under the wire fraud statute. They cannot serve as the predicate for the offenses charged. Rather, the Superseding Indictment is yet another attempt by prosecutors to

"set[] standards of disclosure and good government for local and state officials." *Id.* at 1571 (quoting and citing to *McNally*, 483 U. S. at 360).

**F. Counts Sixteen to Twenty-Three fail as a matter of law to state an offense of wire fraud related to the Subcontracting Scheme.**

***i. Counts Sixteen to Twenty-three Must be Dismissed because they do not allege DOE was deprived of money or cognizable property.***

Counts Sixteen through Twenty-Three purport to allege scheme to deprive DOE of moneys. *Id.* at ¶ 55. Much like the counts that precede them, Counts Sixteen to Twenty-three of the Superseding Indictment must be dismissed because the Government, as a matter of law, cannot support its allegation that the DOE was deprived of money as a result of the alleged Subcontracting Scheme involving Individual C, C&P, and BDO. Individual C worked for the benefit of the DOE while employed by C&P and BDO. The Superseding Indictment does not allege that DOE did not require Individual C's services. Similarly, the Superseding Indictment does not aver that the hours invoiced by C&P and BDO for work performed by Individual C were not accurate, or that DOE was otherwise overcharged for her services. Thus, there is no alleged intent to deprive DOE of money.

At worst, then, the Superseding Indictment charges Ms. Keleher with depriving the DOE of the intangible right to knowledge that the services it was receiving pursuant to a particular contract were indeed performed by that contractor and not by a third party. This intangible right, however, has not been recognized as a cognizable property right and these counts fail as a matter of law.

***ii. Counts One to Twenty-three Do Not Allege that Ms. Keleher as Secretary of DOE Lacked Discretion to Award a Contract Amendment to C&P and Therefore Does Not Allege that By Doing So She Deprived DOE of Money or Property.***

Further, amending C&P's contract so that it could pay Individual C to provide services to DOE was well within Ms. Keleher's authority as Secretary of the DOE. Accordingly, because "[a]n official who allows political motives to influence a decision she unilaterally possesses the authority to make does not commit fraud, even if she conceals her true motives" this theory of criminal liability fails to support a charge of wire fraud. Brief for the United States in Opposition to Bridget Ann Kelly's Petition for a Writ of Certiorari to the United States Court of Appeals at 15 (emphasis added).[20]

**2. Counts Nine to Eleven Must Be Dismissed for Failure to State an Offense.**

Counts Nine to Eleven must be dismissed for the same reasons set forth above in Arguments 1A and 1B, *infra*, because the offense of wire fraud is a necessary predicate offense in order to support a charge of Aggravated Identity Theft. *See* 18 U.S.C. §1028A(a)(1) (Requiring that a "felony enumerated in subsection (c)" of the statute be committed to support a charge of aggravated identity theft.).

**3. Counts Twelve to Fifteen Must be Dismissed as a Matter of Law Because Do Not Allege that Ms. Keleher as Secretary of DOE Lacked Discretion to Award the Contract to C&P and Therefore Does Not Allege that By Doing So She Deprived DOE of Money or Property.**

Separately, Counts Twelve through Eighteen fail to state an offense because they never allege that Ms. Keleher, as Secretary of DOE, lacked the authority to issue a DOE contract to C&P. Even prior to the Supreme Court's decision in *Kelly*, under the law of the First Circuit, the DOE could not be viewed as a victim deprived of money or property, because there is no allegation that Ms. Keleher lacked the discretion to award the contract at issue to C&P. Indeed, even the Third Circuit in the decision reversed in *Kelly* acknowledged that where a government official has

[20] Accessible here: https://www.supremecourt.gov/DocketPDF/18/18-1059/99881/20190515160215857_18-1059%20Kelly%20Opp.pdf.

discretionary authority, a wire fraud allegation cannot rest on the manner in which that authority was exercised. This proposition was conceded by the Government in its opposition to the petition for *certiorari.*

While the Superseding Indictment attacks Ms. Keleher's motive for exercising her discretion, it does not contend that she lacked authority to award the contract. In *Baroni*, the Court of Appeals decision reversed on other grounds by the Supreme Court in *Kelly*, the Third Circuit acknowledged that "Baroni could not deprive the Port Authority of money and property he was authorized to use for any purpose. Nor could he deprive the Port Authority of its right to control its money or property if that right to control were committed to his unilateral discretion." *Baroni*, 909 F.3d at 563. In opposing Kelly's petition for certiorari, the government conceded that "[a]n official who allows political motives to influence a decision ***she unilaterally possesses the authority to make does not commit fraud***, even if she conceals her true motives." Brief for the United States in Opposition to Bridget Ann Kelly's Petition for a Writ of Certiorari to the United States Court of Appeals at 15 (emphasis added).[21]

Counts Twelve to Fifteen against Ms. Keleher do not state an offense because the Superseding Indictment does not allege (nor could it) that she did not have the discretion to award the contract at issue to C&P. Rather, the Superseding Indictment takes exception only with her motive for exercising that authority. As conceded by the Government to the United States Supreme Court in *Baroni*, this is insufficient to sustain a charge of wire fraud.

## V. CONCLUSION

[21] The Supreme Court did not address the issue of unilateral authority in its decision in *Kelly*, as the government, defendants, and the Third Circuit all agreed on this point.

Prosecutors have referred to the mail and wire fraud statutes as "our Stradivarius, our Colt 45, our Louisville Slugger … and our true love." Jed S. Rakoff, The Federal Mail Fraud Statute (Part I), 18 Duq. L. Rev. 771, 771 (1980). In this case, however, the Government's blind reliance on wire fraud as its catch-all statute is fatal to its case. Ms. Keleher anticipates that, faced with a tidal wave of precedent disfavoring its charging decision, the Government will rely on its tried and true manner of defeating motions under Rule 12—alleging that this is her attempt to test the sufficiency of the evidence against her. Although this is often the case when defendants file motions to dismiss under Rule 12, it is not the case here. This case involves a fatally flawed and legally insufficient indictment that cannot be cured at trial or otherwise. Even assuming the truth of all its factual allegations, the Superseding Indictment does not state the offenses charged in Counts One to Twenty-three.

With respect to the Confidential Information scheme, the Superseding Indictment fails to allege the deprivation of a cognizable property right, but rather an intangible right to the exclusive use by the government of information. This is not a historically recognized property right. Nor, for that matter, was the information at issue confidential information.

With respect to the C&P "sham" contracting scheme, the Superseding Indictment does not allege a scheme to defraud DOE of money. Rather, the object of the alleged scheme was to have DOE pay money in return for service. At best, what is alleged is the deprivation of DOE's intangible right to a fair contracting process, a right that is not a cognizable property right. Further, there is no wire fraud when a public official with discretion to select a government contractor exercises that discretion based on allegedly improper motives.

Similarly, the allegations related to the C&P subcontracting scheme fail to state an offense. There is no allegation that the object of the scheme was to deprive DOE of money, since

there is no allegation that Individual C failed to provide the services for which DOE was invoiced and paid. At best, the alleged object of the scheme was the deprivation of the intangible right of DOE to ensure that its contractors perform services themselves rather than subcontract to third parties. This intangible right is not a cognizable property interest. And, as with the C&P contracting scheme, there is no allegation that Ms. Keleher lacked the discretion to amend the C&P contract even if C&P was in breach of that contract's clause prohibiting subcontracting.

*Kelly* plainly forecloses reading the wire fraud statute as broadly as the Government has done in this case. In *Kelly*, the Supreme Court reiterated its commitment to this principle and to ensuring restraint in the definition of a "property right" in property fraud offenses, to prevent the recasting of deficient honest services fraud offenses as traditional money or property wire fraud.

**WHEREFORE**, the defendant, Julia Beatrice Keleher, respectfully requests the Court GRANT this motion and dismiss Counts One to Twenty-three of the *Superseding Indictment* (Docket No. 368) under Rule 12.

Respectfully submitted on this 7th day of January 2021, 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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