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. 20-19 (FAB)

CONSOLIDATED REPLY TO THE DEFENDANTS' RESPONSES IN OPPOSITION TO THE UNITED STATES' MOTION *IN LIMINE* TO PRECLUDE PRESENTATION OF IRRELEVANT EVIDENCE AND ILLEGITIMATE DEFENSES

It is telling that neither Defendant Ariel Gutiérrez-Rodríguez nor Defendant Julia Beatrice Keleher has attempted to distinguish any of the cases cited in the United States' motion *in limine* filed at Docket No. 183, which made reference to the cases cited in the documents filed at Docket No. 148 at 10-15 and Docket No. 170.[1] Rather than address the United States' arguments head-on, Defendant Gutiérrez makes much ado about his right to present a defense (a right which the United States recognizes all criminal defendants have), while ignoring that this right must be exercised within the confines of the law. Defendant Keleher, for her part, largely bases her opposition to the United States' motion on a legally misguided notion of what the United States must prove at trial, erroneously claiming that her lack of authority to perform the act for which the indictment alleges she was bribed would be "dispositive."

[1] The cases cited in the documents filed at Docket Nos. 148 and 170 constitute the "ample authority holding or supporting that a briber and bribee may be guilty of bribery even if the bribee lacked authority to accomplish the result the briber desired" which this Count found to be "persuasive." *United States v. Keleher*, No. 20-19 (FAB), 2020 U.S. Dist. LEXIS 225991, at *13 (D.P.R. Dec. 1, 2020). Neither Defendant Gutiérrez nor Defendant Keleher cite a single one of these cases in their respective responses in opposition. *See generally* Docket Nos. 185, 191.

As further discussed below, the defendants' arguments are meritless, and the Court should accordingly reject them.

I. DISCUSSION

A. Defendant Gutiérrez's response

In his response, Defendant Gutiérrez describes the United States' arguments as "absolutely irrational," while insisting that *Defendant Keleher's* lack of authority is probative of *his* "lack of intent." Docket No. 185 at 1-2. Notably, Defendant Gutiérrez fails to clearly explain how, or why this is so. Instead, he suggests that the United States has raised "*obviously* groundless arguments" in its "*immeasurable* effort to avoid a fair trial," and has thereby failed to live up to its responsibility of representing "a sovereignty." Docket No. 185 (emphasis added). Such grandiloquent expressions ascribing a nefarious motive in filing a motion do not constitute legal argument, and accordingly warrant no response.

Turning to the legal merits of Defendant Gutiérrez's opposition, the United States emphasizes the following points: (1) while a criminal defendant has a Sixth Amendment right to present a defense, this right is not absolute; (2) evidence of Defendant Keleher's authority (or lack thereof) has no bearing on Defendant Gutiérrez's intent; and (3) nothing about the indictment's language makes Defendant Keleher's actual authority relevant either to Defendant Gutiérrez's intent to influence, or to whether he sought to influence an "official act." Each point is discussed in turn.

1. The right to present a defense does not mean "anything goes"

The United States agrees with the obvious and legally unremarkable proposition that the Sixth Amendment affords to all criminal defendants the right to present a defense. U.S. Const. Am. VI. This right, however, is not absolute. *See, e.g.*, *United States v. Acevedo-Hernández*, 898

F.3d 150, 169 (1st Cir. 2018) ("The Sixth Amendment … does not provide an absolute right to present a defense."). The right to present a defense, for example, "does not include the right to present irrelevant evidence." *United States v. Gottesfeld*, 319 F. Supp. 3d 548, 553 (D. Mass. 2018) (citations omitted); *see also United States v. Brown*, 669 F.3d 10, 20 (1st Cir. 2012) ("[T]he constitutional right to present a defense is not impaired where the evidence proffered has been properly ruled irrelevant."). Nor does the right to present a defense embrace a right to urge a jury either to disregard or nullify the law. *United States v. Luisi*, 568 F. Supp. 2d 106, 120 (D. Mass. 2008) ("A court may 'block defense attorneys' attempts to serenade a jury with the siren song of nullification…and…may instruct the jury on the dimensions of their duty to the exclusion of jury nullification.'") (quoting *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993)).

Contrary to what Defendant Gutiérrez suggests, the United States does not seek to preclude him from presenting a defense as he is entitled to do under the Sixth Amendment. If, for instance, Defendant Gutiérrez would like to testify on his own behalf, and tell the jury that he never intended to influence Defendant Keleher by facilitating her receipt of benefits in connection with her purchase of an apartment, the United States would have no objection. Similarly, should Defendant Gutiérrez wish to testify that he sought Defendant Keleher's signature on the letter purporting to cede a portion of the Padre Rufo School for no apparent (or for some benign) purpose because *he* never believed that she had any authority to cede any school property, the United States would have no legal ground to object to the admissibility of such testimony.[2] But the extent of Defendant

[2] The United States, of course, would reserve the right to test the credibility of such testimony during cross-examination, and present argument during closing and rebuttal as to why such testimony would be inconsistent with the evidence. Inasmuch as Defendant Gutiérrez intends to elicit evidence of his intent through third parties, however, such evidence would be inadmissible because a witness cannot testify about another's state of mind. *See, e.g.*, Fed. R. Evid. 602 (requiring witness "to have personal knowledge of the matter" about which he testifies); *United States v. Serrano-Delgado*, 350 F. Supp. 3d 36, 37 (D.P.R. 2018) (Besosa, J.) (holding that defendant could *not* "elicit testimony from any third-party witness as to [the defendant's] own state

Keleher's *actual* authority has no bearing on what Defendant Gutiérrez thought, did, or intended—or on whether "the alleged *quid pro quo* agreement involved [an] official act," Docket No. 185 at 4. And his self-serving, conclusory assertions notwithstanding, Defendant Gutiérrez has not presented any legally compelling reason why the Court should conclude otherwise.

Quoting Justice Hugo Black, Defendant Gutiérrez claims that "the government seems to forget that '[a]ny rule that impedes the discovery of truth in a court of law impedes as well the doing of justice.'" Docket No. 85 at 2 (quoting *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (Black, J., concurring)). This quote is taken out of context. *Hawkins* involved a criminal case in which the prosecution compelled the testimony of the defendant's spouse over the defendant's objection. Justice Black *concurred* with the Supreme Court's conclusion that it was error to permit the testimony of the defendant's spouse over the defendant's objection despite recognizing that a blanket rule allowing a defendant to invoke marital privilege "should receive the most careful scrutiny" because it could "impede[] the discovery of truth" and "the doing of justice." *Hawkins*, 358 U.S. at 81. Nothing in *Hawkins*, or in Justice Black's concurrence in that case, supports the wholesale proposition that litigants should have free reign to present to a jury any evidence and any argument they would like. And if there were such a rule, it would not inure to Defendant

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of mind.") (emphasis added); *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig*., Civ. No. 14-md-02503, 2018 U.S. Dist. LEXIS 11921, at *67 (D. Mass. Jan. 25, 2018) (stating that "expert testimony as to another's state of mind is inadmissible); *Fenje v. Feld*, 301 F. Supp. 2d 781 (N.D. Ill. 2003) (a lay witness is not competent to testify as to another person's state of mind); *United States v. Popejoy*, 578 F.2d 1346, 1351-52 (10th Cir. 1978) (holding that it was improper for FBI agent to testify that the defendant was "knowledgeable of the robbery," because such statement "was clearly incompetent as opinion evidence on a crucial element of the offense…"). Any self-serving out-of-court statements made by Defendant Gutiérrez would likewise be inadmissible because they would constitute hearsay. *Serrano-Delgado*, 350 F. Supp. 3d at 37 (holding that defendant "could not present his own self-serving out-of-court statements through third parties" because such evidence would be hearsay).

Gutiérrez's benefit. To provide but one example, Defendant Gutiérrez would surely protest if prosecutors argued to the jury that the fact that he is a felon who was previously convicted of fraud supports the notion that he is guilty of the alleged fraud in this case. And he would be correct to protest because such argument would be improper under Federal Rule of Evidence 404(b)(1) irrespective of its truth.[3]

2. Whether Defendant Keleher had any actual authority over the disposition of school property is irrelevant[4]

The United States respectfully disagrees with Defendant Gutiérrez's conclusory assertion that Defendant Keleher's actual authority to perform her end of the alleged *quid pro quo* "would be clear evidence of the defendant's [*i.e., Defendant Gutiérrez's*] intent to defraud," and intent to influence an official act. Docket No. 185 at 4. The United States' disagreement with this assertion is premised on the law articulated by the First Circuit and other federal courts. *See Kemler v. United States*, 133 F.2d 235, 238 (1st Cir. 1942) (observing that "[t]he clear purpose of the statute [prohibiting bribery] is to protect the public from the evil consequences of corruption in the public service…[and that] the gravamen the offense … is the giving or offering of a bribe to a person … for the purpose of influencing official conduct" while stating "*it can make no difference* …[that] the doer discovers that for some reason or another, be it a mistake on his part or a mistake on the

[3] The United States does not mean to suggest that evidence of Defendant Gutierrez's prior conviction is absolutely barred. If Defendant Gutierrez were to testify, for instance, Federal Rule of Evidence 609(a)(2) would allow the United States to attack his character for truthfulness with evidence of his prior conviction. *See* Fed. R. Evid. 609(a)(2) (permitting attacking a witness's character for truthfulness with evidence of prior conviction for an offense involving dishonesty).

[4] Just as it did in response to the motions to dismiss, the United States assumes for present purposes that proof of an official act is a requirement of federal program bribery. Additionally, the United States cites cases involving the statute prohibiting bribing federal officials, 18 U.S.C. § 201 *et seq*., because courts have defined honest services fraud and federal program bribery by reference to this statute. *See, e.g.*, *United States v. McDonnell*, 136 S. Ct. 2355 (2017); *see also United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013) (discussing similarities and differences between section 666 and section 201).

part of some officer … there was actually no occasion for him to have done it.") (emphasis added); *United States v. Suhl*, 885 F.3d 1106, 1112 (8th Cir. 2018) ("Neither [the honest-services fraud or federal-funds bribery] statutes, nor *McDonnell*, imposes a universal requirement that bribe payors and payees have a meeting of the minds about an official act. A payor defendant completes the crimes of honest-services and federal-funds bribery as soon as he gives or offers payment in exchange for an official act, *even if the payee does nothing* or immediately turns him in to law enforcement") (emphasis added); *United States v. Ring*, 706 F.3d 460, 467 (D.C. Cir. 2013) (recognizing that Section 201 "defines two separate crimes: the act of offering a bribe and the act of soliciting or accepting a bribe" and "in the context of a bribe payor[,] . . . the *offer of the bribe is the violation of the statute* . . . the *official need not accept that offer*") (emphasis added); *United States v. Fountain*, 792 F.3d 310, 317 (3d Cir. 2015) (affirming Hobbs Act bribery convictions of IRS employee and briber who paid to obtain fraudulent tax refund despite employee's lack of "any power over the IRS's decision to grant any of the fraudulent refunds" because "the *focus of our inquiry* is on [the briber's] state of mind.") (emphasis added); *United States v. Andrews*, 681 F.3d 509, 530 (3d Cir. 2012) (holding that public official, "who qualified as an 'agent' under § 666, *did not have to possess actual authority* over the business, transaction, or series of transactions, that [defendant briber] sought to influence").

In furtherance of his argument that "[w]hether the public official acted or not according to the illegal agreement also shows intent," Defendant Gutiérrez cites four cases, none of which support this proposition or the proposition that a public official's actual authority to perform the bribed-for act is probative of the briber's intent to influence an official act. Docket No. 185 at 5 (citing *United States v. McDonnell*, 136 S. Ct. 2355 (2017); *Woodward v. United States*, 905 F.3d 40 (1st Cir. 2018); *United States v. Rabbit*, 583 F.2d 1014 (8th Cir. 1978); and *United States v.*

Urciuoli, 513 F.3d 290 (1st Cir. 2008)). These cases have absolutely nothing to do with whether a public official's actual authority has any bearing on a *briber's* intent to influence an official act. Three of these cases address the sufficiency of the evidence presented against a *bribee* public official to sustain a bribery charge. *See McDonnell*, 136 S. Ct. 2355 (vacating convictions of public official *bribee* and his wife because jury instruction defining "official act" was "overinclusive" resulting in possibility that jury convicted based on erroneous understanding of official act); *Woodward*, 905 F.3d at 40 (affirming honest services and wire fraud convictions of *bribee* public official, while rejecting argument that the acts in connection with which the bribee accepted bribes were not "official acts"); *Rabbit*, 583 F. 2d at 1014 (reversing *bribee* public official's wire fraud and Hobbs Act bribery convictions stemming from his undisclosed acceptance of commissions from architecture firm he recommended for contracts because evidence was insufficient to support finding that said firm had reasonable belief bribee public official had authority over contract awards).[5] *Urciuoli*, the fourth case Defendant Gutiérrez cites, is also inapposite because nothing in that case supports the proposition that a briber's criminal liability depends on a bribee's actual authority or ability to perform the desired act. And that case does not support the proposition that a bribee's actual authority or ability to perform has any relevance to a briber's intent to influence any official act. *See Urciuoli*, 513 F.3d at 297 (vacating honest services fraud convictions of *bribers* upon concluding that jury instructions were "over-broad insofar as they licensed the jury to consider" whether public official bribee's urging mayors to comply with

[5] The Court should note that other courts have criticized the reasoning in *Rabbitt*. *See, e.g.*, *United States v. Lee*, 919 F.3d 340, 353 (6th Cir. 2019) (disapproving of *Rabbitt*'s reasoning while observing that the First and Seventh Circuits had "called *Rabbitt*'s logic into question."); *United States v. Holzer*, 816 F.2d 304, 308-09 (7th Cir. 1987) ("We very much doubt the soundness of this [*i.e.*, *Rabbitt*'s] reasoning."); *Urciuoli*, 513 F.3d at 296 (recognizing criticism of *Rabbitt*, yet avoiding the issue of "whether or not *Rabbitt* is correct.").

state law could constitute "a deprivation of honest services.").

It is apparent that in seeking to tie his criminal liability to Defendant Keleher's actual performance of an official act, ability to perform an official act, or authority to perform an official act, Defendant Gutiérrez wishes to raise a defense of factual impossibility: namely, that it was impossible to bribe Defendant Keleher to dispose of any portion of the Padre Rufo School based on her lack of authority to do so. Factual impossibility is not a legitimate defense to offenses that do "not require that the unlawful goal be achieved." *See United States v. Dixon*, 449 F.3d 194, 202 (1st Cir. 2006); *accord United States v. Mehanna*, 735 F.3d 32, 53 (1st Cir. 2013) ("[F]actual impossibility is not a defense to…liability…for inchoate offenses such as conspiracy or attempt."). Because the attainment of the unlawful goal is not an element of either honest services fraud or federal program bribery, factual impossibility would not be a legitimate defense to raise at trial.[6] *See United States v. Colburn*, 475 F. Supp. 3d 18, 26 (D. Mass. 2020) (holding that factual impossibility is not a defense to federal program bribery or honest services wire fraud because "neither requires that the fraud or bribe accomplish the intended goal."); *see also Osborn v. United States*, 385 U.S. 323, 333 (1966) (rejecting factual impossibility as a defense to charge of endeavoring to bribe a juror) (cited with approval in *United States v. Aguilar*, 515 U.S. 593, 610-11 (1995)); *United States v. Potter*, 463 F.3d 9, 22 (1st Cir. 2006) (rejecting claim of factual impossibility in holding that "[i]f defendants formed … a scheme [to deprive the public of

[6] There is a plethora of case law rejecting defendants' efforts to raise defenses of factual impossibility in a variety of contexts. *See, e.g.*, *Potter*, 463 F.3d at 22 (observing that "[a] plot to purchase drugs is unlawful even if the supposed supplier turns out to be a government agent."); *United States v. Saldaña-Rivera*, 914 F.3d 721 (1st Cir. 2019) (affirming conviction of defendant charged with sexual enticement of minor notwithstanding the fact that the defendant was communicating with an undercover agent, and no minor was actually involved in the commission of the offense).

legislator's honest services]…it *would not matter* if their belief as to [the legislator's] power were mistaken") (emphasis added); *United States v. Gjieli*, 717 F.2d 968 (6th Cir. 1983) ("The focus of [statute prohibiting bribes of federal officers] is upon *the briber's intent to corrupt*, not upon prevention, per se, of the briber's ultimate ends, or upon the bribed individual's ability to effect a result. Because the *briber's intent* is controlling, it is *irrelevant* whether that intent was correctly formulated.") (emphasis added); *United States v. Fedorovsky*, No. TDC-16-0437, 2017 U.S. Dist. LEXIS 75948, at *6-7 (D. Md. May 18, 2017) (rejecting the argument that defendant who paid a bribe to an undercover agent expecting to obtain a contract with the Department of Energy could not have influenced an "official act" merely because "the contract he sought was not real").

Indeed, if Defendant Gutiérrez were allowed to present evidence in furtherance of a factual impossibility defense, or argue that Defendant Keleher's actual authority should preclude a conviction, such argument would merely serve to confuse and mislead the jury, and constitute an invitation to nullify the law. "[I]f we allow lawyers to appeal for jury nullification at will and indefinitely, and if we grant defendants a Sixth Amendment right to explain themselves in legally irrelevant terms – then we move to a 'system' in which the loudest voice carries the day, in which the phrase 'order in the court' literally has no meaning, and in which the law has about as much force as the Cheshire Cat's grin." *Zal v. Steppe*, 968 F.2d 924, 931 (9th Cir. 1992) (Trott, J., concurring);[7] *id.* at 925-29 (holding that no Sixth Amendment violation stemmed from trial judge's

[7] Defendant Gutiérrez's citation of *United States v. Brown*, 859 F.3d 730 (9th Cir. 2017) for the proposition that "[l]imiting Mr. Gutiérrez's defense as requested by the government would violate his fundamental rights to assistance of counsel, present a defense, due process and a fair trial" is misplaced. *Brown* had nothing whatsoever to do with whether a bribee's lack of authority is probative of a briber's intent. Rather, *Brown* involved a defendant charged with publishing a notice and advertisement of child pornography on a closed online bulletin board. The Ninth Circuit vacated the defendant's conviction, holding that it is was structural error for the trial judge not to permit defense counsel to argue that "the features of the board don't meet the … common and contemporary definition of 'notice' and 'advertisement.'" *Brown*, 859 F.3d at 736. Notably, the Ninth Circuit recognized that had defense counsel wanted to argue that the defendant's posts

precluding abortion protestors charged with criminal trespass from raising defenses of "(1) necessity; (2) defense of others; (3) compliance with international law, treatises, or declarations; and (4) mistake of fact," and from using certain words such as "baby killer," "killing centers," "abortion" and "unborn" because "there can be no constitutional violation if [the defendant] had no right to present the excluded defenses.").

3. Nothing about the allegations in the indictment makes Defendant Keleher's actual authority relevant to Defendant Gutiérrez

Without citing any case law, Defendant Gutiérrez claims that "the language chosen by the government itself to charge the defendants" makes the evidence and line of argument the United States seeks to exclude relevant. Docket No. 185 at 6-8. Defendant Gutiérrez paraphrases some of the indictment's allegations before stating in a conclusory fashion that "[t]he language in the indictment shows that it is relevant to Mr. Gutiérrez's defense to demonstrate" that the actions described in the indictment were "for legitimate purposes, not to bribe, and that the fact that Keleher had no authority to act as claimed in the indictment is consistent with such legitimate purposes." Docket No. 185 at 7.

While the United States agrees that Defendant Gutiérrez is entitled to present evidence to negate the notion that he had any criminal intent, the United States fails to see how Defendant Keleher's actual authority (or lack of authority) is probative of either Defendant Gutiérrez's state of mind, or his intent. Nothing other than Defendant Gutiérrez's conclusory assertion draws a link between circumstances external to Defendant Gutiérrez (*i.e.*, the question of Defendant Keleher's actual authority), and Defendant Gutiérrez's state of mind and intent. The Court should not allow

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"could not qualify as 'advertisements' or 'notice' because he had posted on a closed board," such argument would have been improper under circuit precedent. *Brown* supports the proposition that criminal defendants have a right to argue "a *legitimate* defense theory," not that they have the right to present any theory they believe to be helpful to their cause. *See id.* at 737.

Defendant Gutiérrez either to confuse or mislead the jury with irrelevant evidence and argument, or to invite the jury to reach a verdict based on anything other than its consideration of *relevant* and *admissible* evidence and the law.

B. Defendant Keleher's Response

The arguments Defendant Keleher has raised in response to the United States' motion *in limine* aptly illustrate why the United States filed its motion, and why it should be granted. Mischaracterizing the United States' burden, Defendant Keleher claims that the United States "must prove beyond a reasonable doubt that Ms. Keleher accepted a thing of value *intending to take official action in return*." Docket No. 191 at 1 (emphasis added). She then goes on to claim that: the United States' interpretation of *McDonnell* is erroneous, *id.* at 10-11; evidence of her actual authority is both relevant and admissible, *id.* at 6; the United States is "pivot[ing] from its allegations in the indictment," *id.* at 9; and if the Court will not deny the United States' motion, it should reserve judgment. She is wrong on all fronts.

As further discussed below, (1) the United State has not misinterpreted *McDonnell*, (2) evidence of Defendant Keleher's actual authority is irrelevant, (3) the United States has not pivoted from any of the indictment's allegations; and (4) a ruling *in limine* is warranted precisely to avoid unnecessary mid-trial litigation about an issue that is ripe for resolution now.

1. Defendant Keleher mischaracterizes the United States' interpretation of *McDonnell*

Contrary to what she claims, the United States has never argued that "*McDonnell* made evidence of whether the action the public official agreed to take in return for the benefit is an official act irrelevant," Docket No. 191 at 11. What the United States previously argued is that a public official's actual ability to make good on her promise is irrelevant. Under *McDonnell*, "a public official is *not required* to make a decision or take an action on a 'question, matter, cause,

suit, proceeding or controversy" to establish an illicit *quid pro quo*. 136 S. Ct. at 2371 (emphasis added). Nor is it necessary to prove that a public official had an actual "inten[t] to perform the 'official act'." *Id.* This is why the *McDonnell* court concluded that "[a] jury could …. conclude that an agreement was reached if the evidence shows that the public official received a thing of value knowing that it was given with the *expectation* that the official would perform an 'official act' in return." *See id.*

The United States' interpretation of *McDonnell* is entirely consistent with how other courts have interpreted this decision. *See, e.g.*, *Cordaro v. United States*, 933 F.3d 232, 243 (3d Cir. 2019) (concluding that "under *McDonnell*," it did "not matter" that the defendant "lacked the authority" to perform an official act "so long as he agree[d] to do so."); *see also United States v. Kimbrew*, 944 F.3d 810, 821-22 (9th Cir. 2019) (stating that a public official "can be convicted even if he never intended to perform the official act for which he was bribed," while observing that "execution is *immaterial*.") (emphasis added); *United States v. Kimbrew*, No. 17-459 (RGK) (C.D. Cal. 2018), ECF 55 (granting prosecution's motion *in limine* to preclude playacting defense in case involving allegations of bribery of a federal officer).[8]

Indeed, if anyone has misinterpreted *McDonnell*, it is Defendant Keleher. Her claim that "the Supreme Court vacated McDonnell's conviction because setting up a meeting, hosting events, and making phone calls were not official acts" is inaccurate. Docket No. 191 at 11. The Supreme Court vacated McDonnell's conviction because the trial judge's instructions permitted the jury to erroneously find that these acts, standing alone, could constitute official acts. The Supreme Court

[8] The motion *in limine* the United States filed in this case is similar to that which was filed in *Kimbrew*. The *Kimbrew* court granted the prosecution's motion, but did not write an opinion. The prosecution's motion and the in-chambers order granting the motion are attached for the Court's convenience. The defendant in *Kimbrew* was ultimately convicted, and the Ninth Circuit affirmed the conviction. *Kimbrew*, 944 F.3d at 810.

nonetheless recognized that "[i]f an official sets up a meeting, hosts an event, or makes a phone call on a question or matter that is or could be pending before another official, that could serve as evidence of an agreement to take an official act." *McDonnell*, 136 S. Ct. at 2371.

2. The United States must prove that Defendant Keleher intended to be influenced in the performance of an official act, not that she took or had the authority to take official action

Despite Defendant Keleher's assertion to the contrary, the United States bears no burden of proving that she "accepted a thing of value *intending to take* official action in return," Docket No. 191 at 1 (emphasis added). To prove beyond a reasonable doubt that Defendant Keleher committed honest services wire fraud and federal program bribery, the United States must establish that she "corruptly solicit[ed] or demand[ed]…or "accept[ed] or agree[d] to accept anything of value from any person, *intending to be influenced*" in the performance of an official act. *See* 18 U.S.C. § 666(a)(1)(B) (emphasis added); *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999) ("Bribery requires intent 'to influence' an official act or '*to be influenced*' in an official act"); *United States v. Carrasco-Castillo*, 442 F. Supp. 3d 479, 490 (D.P.R. 2020) (Besosa, J.) (same).

Nothing in the law requires the United States to prove that Defendant Keleher actually performed, intended to perform, or had the authority to perform the bribed-for act. *See, e.g.*, *McDonnell*, 136 S. Ct. at 2370-71 (stating that "a public official is not required to actually make a decision or take an action…it is enough that the official agree to do so."); *Carrasco-Castillo*, 442 F. Supp. 3d at 490 (noting that "*quid pro quo* agreement" is what triggers federal program bribery "irrespective of whether an agent performs official acts in furtherance of a corrupt scheme"); *United States v. Blackett*, No. 2010-28, 2015 U.S. Dist. LEXIS 92970 (D.V.I. July 17, 2015) (noting that statute proscribing bribes to federal officials "does *not require* that the public official

actually take an official act…[and] applies even where the official lacks the authority to take the sought action."); *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 824-25 (9th Cir. 1985) (concluding that trial judge correctly articulated the law in instructing the jury "that a person may be convicted of bribery even though the action requested is not within the official's power to perform."); *United States v. Evans*¸ 572 F.2d 455 (5th Cir. 1978) (stating that "[n]either the ability to perform or the actual performance of some identifiable official act as *quid pro quo* is necessary for a violation of [federal bribery] statutes" while observing that "it is *immaterial* that the donee-official's position is ministerial or subordinate, *or even that he actually lacks the authority to perform an act to benefit the donor*.") (emphasis added); *see also* cases cited in *Keleher*, 2020 U.S. Dist. LEXIS 225991, at *13 n.2, and in Docket No. 148 at 10-15 and Docket No. 170.

In light of these authorities, Defendant Keleher's assertion that the United States must prove that she "accepted improper concessions on her apartment purchase…in exchange for *action*," Docket No. 191 at 6—an assertion for which she cites no authority whatsoever—is inaccurate. And her claim that the United States' position in this case is contrary to the Department of Justice's own interpretation of the law regarding the relevance of a public official's actual authority is likewise inaccurate (and irrelevant).

Based not only on her service as a federal prosecutor, but also on a prior failed effort to suggest that counsel for the United States was acting in a manner inconsistent with DOJ policy,[9] counsel for Defendant Keleher knows that "the internal guidelines of a federal agency, that are not mandated by statute or the constitution, do not confer substantive rights on any party." *United*

[9] This is the second time in this case that counsel for Defendant Keleher suggests that counsel for the United States has violated DOJ policy. *See* Docket No. 98 (quoting section of Justice Manual not pertinent to the appearance of *amici curiae* before district courts to suggest that the United States' opposition to the intervention of the ACLU and the EFF as *amici* in this case violated DOJ policy unless Solicitor General approved opposition).

States v. Craveiro, 907 F.2d 260, 264 (1st Cir. 1990). Despite this, she quotes a part of the DOJ Criminal Resource Manual to suggest that the United States' position is at odds with that of DOJ. She is wrong.

Nothing in the Criminal Resource Manual supports the proposition that actual authority is relevant to, or dispositive of anything. The portion of the Criminal Resource Manual which Defendant Keleher quotes is taken out of context. To illustrate why this is so, the United States provides the full excerpt below, with the highlighted portions representing those snippets which Defendant Keleher quotes:

> It is not essential to a bribery charge against a public official that he or she have the authority to make a final decision on an official matter. When the advice and recommendation of the public official would be influential, a violation of Section 201(b) may be established. *United States v. Heffler*, 402 F.2d 924 (3d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969); *Wilson v. United States*, 230 F.2d 521 (4th Cir.), *cert. denied*, 351 U.S. 931 (1956); *Krogmann v. United States*, 225 F.2d 220 (6th Cir. 1955).
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> It is also possible in some circuits to convict either the giver or the taker of a bribe (or both) even if the public official does not have the power to bring about the result that prompted the bribe. It is sufficient as to a charge against the public official that the public official represented that the official act in question was within his or her power, *United States v. Arroyo*, 581 F.2d 649 (7th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); or as to the giver of the bribe that the giver believed the recipient had the power to bring about the desired result. *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817 (9th Cir.), *cert. denied*, 471 U.S. 1139 (1985); *United States v. Gjieli*, 717 F.2d 968 (6th Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984). If, however, the public official has no authority at all to act in the matter and his or her acts in response to the payment of a bribe are unauthorized and illegal, it has been held that the "official act" component is lacking. *Blunden v. United States*, 169 F.2d 991 (6th Cir. 1948). Such a case could nonetheless be charged as an effort to induce a public official to commit a fraud on the United States or to do an act in violation of official duty. *United States v. Gjieli*, *supra*.

Criminal Resource Manual, § 2044, *available at* https://www.justice.gov/archives/jm/criminal-resource-manual-2044-particular-elements (last visited Apr. 12, 2021).

As the Court may observe, the non-highlighted text Defendant Keleher chose to omit places the highlighted text in its proper context. Nothing in the above-quoted text supports Defendant Keleher's broad proposition that "under the Department of Justice's own interpretation of the law, whether the official, in fact, has authority to take the contemplated action is not only relevant, but is dispositive in that it negates an element of the offense." Docket No. 191 at 10. The Criminal Resource Manual cites *United States v. Blunden*, a case that is over seven decades old, merely to show that "it has been held that" an official act is lacking where the public official lacks actual authority. *See Blunden*, 169 F.3d 991 (6th Cir. 1948) (agreeing with proposition that "person offering the bribe [must] believe that the employee [public official] had the necessary authority and also that the employee possess the actual authority" to perform bribed-for act.). Notably, the validity of *Blunden*, which as best the United States can ascertain has not been cited by any court since 1983, is questionable even under the law of the Sixth Circuit. *See Hurley v. United States*, 192 F.2d 297 (4th Cir. 1951) ("The cases support the proposition that for a conviction…*it is immaterial that the bribee does not have the power of decision* to accomplish the result which the offerer of the bribe desires…We are not unmindful of *Blunden v. United States*…but insofar as that decision is in conflict with our decision here, we think it incorrect."); *Pipkin v. United States*, 243 F.2d 491 (5th Cir. 1957) (rejecting argument that trial court erred in directing verdict of acquittal on the basis that defendant "could not under any circumstances have had any … influence in the granting of the contract involved as would make him guilty under the statute," and dismissing *Blunden* as "not correctly decided"); *United States v. Gjieli*, 717 F.2d 968 (6th Cir. 1983) (distinguishing *Blunden* on basis that it interpreted earlier version of section 201, and choosing "to follow the reasoning of the Second, Seventh, Fourth, Fifth, and D.C. Circuits, all of

which have imposed § 201 liability on bribers who erroneously perceived that the bribed public official had the authority to follow the desired act").[10]

Only Defendant Keleher's self-serving, conclusory assertion supports the notion that whether she "possessed the authority to cede the land in question" is probative of "her state of mind when she allegedly committed the offense." *See* Docket No. 191 at 7. The United States does not dispute that Defendant Keleher is entitled to present evidence to negate criminal intent. But there is no logical reason to conclude that a factor that is entirely extraneous to Defendant Keleher's state of mind (*i.e.*, whether she had *actual* authority) has any bearing on her mental state. And inasmuch as Defendant Keleher might argue—as she evidently intends to do, *see* Docket No. 191 at 7-8; Docket No. 159 at 4 n.1—either that she lacked the intent to perform because she understood she lacked authority to dispose of any school property, or that she was merely playacting when she signed a letter purporting to cede a portion of the school by authorizing construction, such defenses are legally illegitimate. *See, e.g.*, *McDonnell*, 136 S. Ct. at 2370-71 (observing that an official could incur liability upon a jury's finding that she "received a thing of value knowing that it was given with the expectation that [she] would perform an 'official act' in return.") (emphasis added); *United States v. Peleti*, 576 F.3d 377, 382 (7th Cir. 2009) ("To commit bribery, the public official must receive the money 'corruptly.' An officer can act corruptly without intending to be influenced; the officer need only 'solicit or receive the money on the representation that the money is for the purpose of influencing his performance of some official act.'") (citations omitted); *United States v. Myers*, 692 F.2d 823, 841-42 (2nd Cir. 1982) (observing that '"being influenced' does not describe the [recipient's] true intent, it describes the intention he conveys to the briber in exchange for the bribe," and holding that an official commits bribery if he gives "*false*

[10] As best the United States can ascertain, *Gjieli* represents the last time that any court has cited *Blunden*.

promises of assistance to people he believed were offering him money to influence his official actions") (emphasis added).

Defendant Keleher's argument that actual authority has bearing on whether there was an "official act" is also unavailing. Docket No. 191 at 7. As this Court correctly recognized in denying the defendants' motions to dismiss, "[t]he test in *McDonnell*" requires that an "official act" be a "question or matter… pending or … able to be brought before 'a' public official or 'any' public official, not just the official under indictment." *Keleher*, 2020 U.S. Dist. LEXIS 225991, at *12. Defendant Keleher's *actual* authority, and the *actual* effect of her letter purporting to cede school property simply has no bearing on the extent to which the alleged bribed-for act (*i.e.*, signing the letter purporting to cede a portion of school property) constitutes an official act; this is so because the crime lies in the scheme to defraud and the intent to be influenced, not on *actually* defrauding or *actually* being influenced. *Pasquantino v. United States*, 544 U.S. 349 (2005) (noting that wire fraud "punishes the scheme, not its success."); *United States v. Orenuga*, 439 F.3d 1158 (D.C. Cir. 2005) ("The Supreme Court has made it clear that the acceptance of the bribe is the violation of the statute, not performance of the illegal promise.") (internal quotation marks and citation omitted); *United States v. Pawlowski*, 351 F. Supp. 3d 840, 868 (E.D. Pa. 2018) (holding that defendant's argument "that the Government failed to prove an official act under *McDonnell* because he had no authority to take any official action…is also unpersuasive.") (involving federal program bribery, Hobbs Act bribery, and honest services fraud).

At bottom, any effort to argue that a jury should acquit because Defendant Keleher lacked the authority to achieve the purpose of the corrupt agreement would amount to raising a defense of factual impossibility. As discussed in Section A.2, *supra*, any such defense would be legally improper and serve no proper purpose.

3. The United States is not backing away from the allegations in the indictment

Defendant Keleher claims that the indictment does not allege that she "accepted a benefit agreeing to sign the letter relating to the Padre Rufo School but failed to do so," and suggests that no conviction can stand should the jury find that she failed to take action, never intended to take action, or lacked the authority to take action. *See* Docket No. 191 at 8. She cites no authority for this proposition. For good reason—the proposition is contrary to the body of law the United States has cited throughout this document.

More to the point, the United States has not backtracked from any of the allegations in the indictment. As Defendant Keleher has correctly pointed out, signing the letter "*purporting* to give" a portion of the Padre Rufo School is the official act alleged. And as previously discussed, the United States need not prove that this letter had any binding effect to establish either the existence of a corrupt *quid pro quo* or an official act. *See* Section B.2, *supra*.[11]

4. The Court should grant the United States motion *in limine*

The United States filed the motion *in limine* to minimize the amount of litigation that would

[11] Although there is no need for the United States to advance its trial strategy at this stage, proceeding under a theory that Defendant Keleher mistakenly, but sincerely, believed the authorization in the letter to have had some binding effect would not constitute a variance from the indictment. Docket No. 191 at 9. The indictment makes clear that the letter "*purported*" to give part of the school to Company C, and that Defendant Keleher conspired to commit and actually committed honest services fraud, and that she "solicit[ed] and demand[ed] for her own benefit, and accepted and *agreed* to accept things of value…intending to be influenced…" Docket No. 3. Under these circumstances, a jury would be entitled to convict Defendant Keleher upon finding that she intended to be influenced irrespective of whether she actually intended, or had the authority, to cede property as she purported to do in the letter she signed. *See United States v. Dellosantos*, 649 F.3d 109 (1st Cir. 2011) ("A variance occurs when the crime charged remains unaltered, but the evidence adduced at trial proves different facts than those alleged in the indictment.'").

be required to take place at trial outside the presence of the jury, and to preclude the defendants from presenting a legally illegitimate defense. A pretrial ruling would allow for a more efficient trial, and would permit the parties to tailor their trial strategy in accordance with what the Court will allow and not allow.

II. CONCLUSION

Defendant Keleher's conclusion perfectly illustrates the types of legally improper arguments she would like to make—that the following facts are dispositive and compel an acquittal: "her lack of authority to cede the land in question"; "she did not believe that she had the authority to cede this land" and "her letter was not official action or the business of her agency." Docket No. 191 at 12. Precluding the defendants from raising such arguments would not improperly tie anyone's hands, but would ensure compliance with the law.

Contrary to what Defendant Keleher professes, the task of this Court is not to promote abstract ideas "of fairness and justice." The Court's task is to apply the law, and ensure that the parties and the jury follow the law. For this reason, the United States' motion *in limine* should be granted.

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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