UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA Plaintiff, v. JULIA BEATRICE KELEHER [1] Defendant.	:	Case No. 19-431 (PAD)

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS' MEMORANDUM OF LAW *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS

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Statement of Interest

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys amdm their clients to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 including affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in the scope of criminal statutes, especially the federal fraud statutes and which allegations fail to satisfy its "money or property" fraud element.

Introduction

Earlier this month, the Supreme Court removed any doubt that could have remained that the Indictment in this case fails to allege sufficiently an essential element of the mail and wire fraud, 18 U.S.C. §§341 & 1343, and theft of government funds, 18 U.S.C. §641, statutes. In *Kelly v. United States*, ___ U.S. ___, 140 S. Ct. 1565 (May 7, 2020), the Court reaffirmed unanimously and unambiguously that the government cannot contrive fraud charges that fail to allege a cognizable "property" interest that a defendant is charged with obtaining (or attempting

to obtain).[1]

Kelly did not break new ground, but simply restated prior precedent with emphasis and clarity: "not every corrupt act by state or local officials is a federal crime[,]" *id.*, at 1574, because "[s]ave for bribes or kickbacks [not at issue in *Kelly*, or herein], a state or local official's fraudulent schemes violate that law only when, again, they are 'for obtaining money or property.'" *Id.* at 1568 , *citing* 18 U.S.C. §1343.

Indeed, *Kelly* merely followed an unbroken line of cases that have held that a sovereign's regulatory authority, and/or non-discretionary functions, do *not* constitute "property" for the purposes of federal fraud statutes. *See, e.g., Cleveland v. United States*, 531 US. 12 (2000); *McNally v. United States*, 483 U.S. 350 (1987).

Here, as detailed below, and set forth as well in the May 18, 2020 Memoranda of Law submitted by defendants Julia Beatrice Keleher (ECF Dkt # 297) ("Keleher Memo") and Fernando Scherrer-Caillet (ECF Dkt # 309) ("Scherrer-Caillet Memo"), the Indictment does not allege that Puerto Rico was deprived of any "property." Instead, all that is alleged is a corrupt exercise of government authority, whether defined as a regulatory, non-discretionary, or contracting function.

As NACDL did in *Cleveland* and *Kelly*,[2] it files this brief *amicus curiae* in order to

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[1] As set forth in the accompanying May 27, 2020, Motion for Leave to File this Memorandum of Law *Amicus Curiae*, defendants Keleher and Scherrer-Caillet have both consented to the motion for leave to file this *amicus* Memorandum of Law. Assistant United States Attorney Alexander L. Alum informed counsel for *amicus* that the government would not take any position until it had an opportunity to review the motion.

[2] NACDL's *amicus* brief in *Cleveland* is available at 2000 WL 719563; its *amicus* brief in *Kelly* is available at 2020 WL 4729854.

express its interest in maintaining the necessary limits on the federal fraud statutes that the Supreme Court has imposed time and again. Reducing and resisting overcriminalization is a core issue for NACDL, and this case presents an issue squarely within that mandate. In addition, defending these principles is critically important at the trial court level, before lives and careers are ruined, and even punishment imposed, in advance of ultimate vindication years later that can never provide adequate recompense to a defendant. Moreover, each case provides its own important precedent as prosecutors seek validation of exotic theories of criminal liability under the federal fraud statutes that can be used in succeeding cases.

As the Supreme Court's decision in *Cleveland* and its predecessors dictated the result in *Kelly*, it is respectfully submitted that *Kelly* controls the result herein. Accordingly, for all the reasons set forth below, as well as in defendants' motions, Counts 1-3 & 10 and 12 & 15-16 of the Indictment should be dismissed for failure to state an offense.

STATEMENT OF THE FACTS

Amicus respectfully adopts the facts as set forth in the Memoranda of Law filed by defendants Keleher and Scherrer-Caillet in support of their motions to dismiss (ECF Dkt #s 297 & 309, respectively).

ARGUMENT

POINT I

A GOVERNMENT'S EXERCISE OF ITS CONTRACTING AUTHORITY IS NOT A COGNIZABLE FORM OF "MONEY OR PROPERTY" UNDER THE FEDERAL MAIL, WIRE, OR PROGRAM FRAUD STATUTES CHARGED

The past 30 years have witnessed a familiar cycle of mail fraud prosecutions pursuant to federal fraud statutes, particularly 18 U.S.C. §1341, and its "money or property" element: following the Supreme Court's imposition of important limitations on the statute in *McNally v. United States*, 483 U.S. 350, 356 (1987), periodically prosecutions and convictions occur that test the boundaries of the meaning and concept of "money or property." The conception of "property" in those prosecutions often exceeds the scope of the statute prescribed by the Supreme Court's direction, requiring courts – and sometimes the Supreme Court itself, as it did demonstrably in *Kelly* – to intervene to restate the applicable restrictions.

In *Kelly*, the Court, retracing its jurisprudence, explained that it had "made clear" that the requisite "property" element "prevents these statutes from criminalizing all acts of dishonesty by state and local officials." 140 S. Ct. at 1571. In reviewing *McNally*, the Court in *Kelly* recounted that "[s]ome decades ago, courts of appeals often construed the federal fraud laws to 'proscribe[ ] schemes to defraud citizens of their intangible rights to honest and impartial government[,]" *id.*, at 1571, *quoting McNally*, 483 U.S. at 355, but in *McNally* "[t]his Court declined to go along." 140 S. Ct. at 1571.

Following *McNally*, and the passage of 18 U.S.C. §1346 – a statute not charged here – to cover a gap in enforcement authority, prosecutors utilized that statute liberally to charge public officials with depriving the sovereign of "honest services," which, rather than traditional

property, substituted as the object of the fraud.[3] However, in *Skilling v. United States*, 561 U.S. 358 (2010), the Court limited §1346 to situations in which a public official received a specific, identifiable *quid pro quo* in the form of a bribe or kickback. *Id*., at 405, 407. *See also Kelly*, 140 S. Ct. at 1571. *See also United States v. Ochs*, 842 F.2d 515, 527 (1st Cir. 1988) (even before *Skilling,* the First Circuit recognized that §1346 did not permit prosecutors or courts "simply to recharacterize every breach of fiduciary duty as a financial harm, and thereby to let in through the back door [via §1346] the very prosecution theory that the Supreme Court tossed out the front [in *McNally*]").

Thus, certain avenues of federal prosecution under §1346 were foreclosed by *Skilling*. As a result, as in *Kelly*, prosecutors on occasion returned to traditional mail and wire fraud, albeit with strained and contrived – and wholly insufficient – versions of "property." Indeed, in *Kelly*, the Court reiterated that it had previously "specifically rejected a proposal to construe the statute as encompassing 'undisclosed self-dealing by a public official,' even when he hid financial interests." 140 S. Ct. at 1571, *quoting Skilling*, 561 U.S. at 409.

This case presents a transparent example of such prosecutorial overreach, as it fails to identify any "money or property" cognizable under the applicable federal mail, wire, and/or theft statutes (18 U.S.C. §§1341, 1343 & 641). Permitting the charges to proceed would effectively eliminate the brakes the Supreme Court has carefully and repeatedly applied to these statutes for the past three decades.

Also, in attempting to criminalize governmental policy decisions that allegedly were

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[3] *See* Anti-Drug Abuse Act of 1988, P.L. No. 100-690, §7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. §1346 (1994)) (proscribing "a scheme or artifice to deprive another of the intangible right of honest services").

based on improper grounds – as alleged here, personal and family favoritism, or political preference – the Indictment attempts precisely what the Supreme Court in *Kelly* expressly declared – in what the Court characterized as its "oft-repeated instruction" – the statutes at issue are not authorized to accomplish: "Federal prosecutors may not use property fraud statutes to "set[ ] standards of disclosure and good government for local and state officials." *Kelly*, 140 S. Ct. at 1574, *quoting McNally*, 483 U.S. at 360.

Here, as detailed in the defendants' Memos of Law, with respect to the Ponce-Mendoza contracts that are the subject of Counts 1-3 & 10, the Indictment alleges that the fraud was "accomplished . . . through a corrupted bidding process wherein Colon & Ponce was provided with a competitive advantage based in part, on the close relationship between" Ms. Keleher and two co-defendants, Glenda Ponce-Mendoza and Mayra Ponce-Mendoza. *See* Indictment, at ¶ 15. *See also* Keleher Memo, at 2-3.

Yet *Kelly* makes clear that such conduct, even if improper, is not sufficient to sustain a federal fraud prosecution. As the Court explained, "[t]he question presented is whether the defendants committed property fraud[,]" and while "[t]he evidence the jury heard no doubt shows wrongdoing – deception, corruption, abuse of power[,]" nevertheless "the federal fraud statutes at issue do not criminalize all such conduct." 140 S. Ct. at 1568. Rather, "[u]nder settled precedent, the officials could violate those laws only if an object of their dishonesty was to obtain the [government agency's] money or property. *Id*.

The Indictment does not allege any such purpose or intention with respect to Counts 1-3 & 10. There is not any accusation that Ms. Keleher was paid a bribe or kickback or received any other remuneration or accommodation or personal benefit. There is not any accusation that the

services required under the contracts were not performed, or that they involved some inflated cost or improper payment to the Ponce-Mendoza company. It is alleged merely that the award of the contract was an act of favoritism based on personal relationships. Again, while that might constitute "deception, corruption, abuse of power," it is not a fraud under the relevant statutes.

Similarly, the charges in Counts 12 & 15-16 are based on decisions premised on *relationships*, and *not* the deprivation of property. Thus, the Indictment's claim that "Government officials acted based on the political affiliation of proposed contractors[,]" in granting BDO Puerto Rico, P.S.C. ("BDO") the contract, Indictment, at ¶ 71, simply does not satisfy the statutes' requirement that there be a deprivation of property. *See also id*., at ¶ 80 (contracts were awarded "without complying with applicable government regulations and competitive proposal processes").

In that respect, the alleged BDO scheme presents the converse of *Kelly:* not to punish a political rival as in *Kelly*, but here to steer contracts to personal friends and political allies. *See Kelly*, 140 S. Ct. at 1568 ([i]n fact, [defendants] did so for a political reason – to punish the mayor of Fort Lee for refusing to support the New Jersey Governor's reelection bid").

Yet, as with Counts 1-3 & 10, the circumstances demand the same result as in *Kelly*, as there is not any allegation of a deprivation of property: the Indictment does not assert the contract was a sham, or that BDO did not perform as obligated, or that others would have performed the contract at less expense.

In addition, the schemes alleged in Counts 1-3 & 10, and 12 & 15-16, are analytically indistinguishable from that found inadequate in *Cleveland* as well. In *Cleveland*, as the Court in *Kelly* described, "[t]he Government argued that his fraud aimed to deprive the State of property

by altering its licensing decisions[,]" an argument "[t]he Court rejected . . ." 140 S. Ct. at 1572.

As the Court in *Kelly* cautioned in reaffirming its directives in *Cleveland*, "[t]he State's 'intangible rights of allocation, exclusion, and control' – its prerogatives over who should get a benefit and who should not – do 'not create a property interest.'" *Id*., *quoting Cleveland*, 531 U.S. at 23. Instead, as the Court in *Kelly* elaborated, and reiterated throughout its opinion, "the Court [in *Cleveland*] stated, those rights 'amount to no more and no less than' the State's 'sovereign power to regulate.'" *Id*., at 1572; 531 U.S. at 20. *See also id*. ("[t]o borrow *Cleveland*'s words, [the defendants in *Kelly*] exercised the regulatory rights of "allocation, exclusion, and control"); *id.*, at 1573 ("[t]he realignment of the toll lanes was an exercise of regulatory power – something this Court has already held fails to meet the statutes' property requirement"); *id*., at 1568 (realignment of toll lanes "was a quintessential exercise of regulatory power" and "that run-of-the-mine exercise of regulatory power cannot count as the taking of property"), *citing Cleveland*, 531 U.S. at 12; *id*. ("this Court has already held a scheme to alter such a regulatory choice is not one to appropriate the government's property"), *citing Cleveland*, 531 U.S. at 23.

That result obtained in *Kelly* (as it did in *Cleveland* as well) notwithstanding the fact that "according to all the Government's evidence," the defendants exercised such "allocation, exclusion and control" for "bad reasons, and they did so by resorting to lies." 140 S. Ct. at 1573. Consequently, the Indictment's claim, at ¶ 86, that with respect to the BDO contract the defendants made "false representations and took action in violation of federal and Puerto Rico law in order to solicit, procure, and aware government contracts paid with federal funds," are simply insufficient to state a fraud to obtain "property" under the applicable statutes.

In *Kelly*, too, "[t]o complete the scheme, [a co-conspirator] then devised 'a cover story.'" 140 S. Ct. at 1569. Nonetheless, the Court concluded that in order to state an offense, "the Government had to show not only that [the defendants] engaged in deception, but that an 'object of the[ir] fraud [was] 'property.'" *Id*., at 1571, *quoting Cleveland*, 531 U.S. at 26.

That limitation is also consistent with restrictions on the mail fraud statute in ordinary contexts. In *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993), the Seventh Circuit held that "[l]osses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement" that "[a] deprivation is a necessary but not a sufficient condition of mail fraud." *Id*., at 1227. *See also Kelly*, 140 S. Ct. at 1574 n.2 (*citing Walters*).

Nor does the accusation in the Indictment, at ¶ 68, that "[e]ntities seeking government contracts utilized individuals with government influence to seek and obtain government contracts" articulate a crime pursuant to the federal fraud statutes at issue herein. As the Supreme Court stated in *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (*quoting McConnell v. FEC*, 540 U.S. 93, 297 (2003)), "[i]ngratiation and access, in any event, are not corruption." *Id*. at 360. As the Supreme Court has made unmistakable in its series of opinions commencing with *McNally*, more, in the form of either a *quid pro quo* or the deprivation of property, is required. *See also* Scherrer-Caillet Memo (#309), at 12-15; Keleher Memo (#297), at 15-16.

Moreover, endorsement of the government's theory herein would politicize the fraud statutes beyond recognition by potentially criminalizing every governmental decision made with a political or personal component, regardless whether the sovereign suffered a property deprivation. Thus, any contract awarded for the "wrong reason" would be vulnerable. For example, if a contract was awarded because the company receiving it had a large and valuable

electoral constituency that a government official wanted to placate, that would be a crime. If a contract was awarded to a minority-owned or operated business for purposes of achieving diversity, that also would be a crime. Even if a contract was awarded to a legitimate company to punish another company for some political reason, that, too, would constitute a crime pursuant to the government's construction. *See also Kelly*, at 1574 n.2 (*citing Walters*, 997 F.2d at 1224, with regard to whether a practical joke that expended government funds would be a criminal act under an expansive application of §1341).[4]

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[4] While the Scherrer-Caillet Memo (#309), at 8-12, more than sufficiently addresses the issue of commissions paid to Alberto Velazquez-Piñol, *see* Indictment, at ¶ 97, it is worth noting that for an expense to constitute "property" for purposes of the federal fraud statutes, it "must play more than some bit part in a scheme: It must be an 'object of the fraud.'" *Kelly*, 140 S. Ct. at 1573, (*quoting Pasquantino v. United States*, 544 U.S. 349, 355 (2005). *See also id*., ("a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme") (footnote omitted).

Also, here, the government received the full value of its bargain with respect to the BDO contract, regardless of any misrepresentations with respect to how BDO spent the money. *See, e.g., United States v. Regent Office Supply*, 421 F.2d 1174, 1182 (2d Cir. 1970) (defendants' misrepresentations in their pitch to prospective customers not sufficient to establish mail or wire fraud because "defendants intended to deceive their customers but they did not intend to defraud them, because the falsity of their representations was not shown to be capable of affecting the customer's understanding of the bargain nor of influencing his assessment of the value of the bargain to him, and thus no injury was shown to flow from the deception"). *See also United States v. Rossomondo*, 144 F.3d 197, 198-99 (2d Cir. 1998) (defendant did not intend to deprive Fire Department Pension Fund of property by underreporting outside income because he did not believe the amount met the threshold for reimbursement of his pension payments); *United States v. D'Amato*, 39 F.3d 1249, 1259-60 (2d Cir. 1994) (defendant who created invoices that disguised his role because it would otherwise be "politically embarrassing" and to "avoid negative publicity" did not commit mail fraud); *United States v. Miller*, 997 F.2d 1010, 1022-23 (2d Cir. 1993) (defendants' undisclosed use of funds from investors in excess of investors' downpayment to purchase other apartments for defendants' benefit did not constitute "property" under statute in part because defendants had earned the money as an advance fee under their contract with investors). Nor is there any allegation that BDO contemplated harm to the government of Puerto Rico with respect to its money or property. *See, e.g., United States v. Starr*, 816 F.2d 94, 98 (1987) (prosecution required to "prove that defendants contemplated some actual harm or injury to their victims" in the form of money or property).

Consequently, the charges herein threaten to expand the federal fraud statutes' "money or property" element to the point where it is rendered meaningless, and would thereby contravene the Supreme Court's serial efforts to confine it to the statute's objectives and cognizable traditional notions of "property." Thus, here, sustaining the fraud counts would nullify *Kelly* and *Cleveland*, which represent the culmination of the Court's carefully constructed jurisprudence over what is now a 30-year period.

Also, allowing prosecutors discretion to determine whether a sovereign's executive function should be classified as "property" for the purposes of the mail fraud statute would result in federal executive branch officials, namely federal prosecutors, acting in a legislative capacity. In addition, the appropriate balance between the state and federal government would be seriously altered.

As the Court in *Kelly* recognized, "[t]he upshot" of its construction of the "federal fraud laws leaves much public corruption to the States (or their electorates) to rectify." 140 S. Ct. at 1571 (*citation* to New Jersey criminal statute omitted). Repeating the admonition it delivered in *Cleveland*, the Court added, "[i]f U.S. Attorneys could prosecute as property fraud every lie a state or local official tells in making such a decision, the result would be – as *Cleveland* recognized – 'a sweeping expansion of federal criminal jurisdiction.'" *Id*.

The Court in *Kelly* further understood the strategic importance for the criminal justice system of nipping such jurisdictional aggrandizement in the bud:

> if those prosecutors could end-run *Cleveland* just by pointing to the regulation's incidental costs, the same ballooning of federal power would follow. In effect, the Federal Government could use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking. The property fraud statutes do not countenance that outcome. They do not "proscribe[ ] schemes to

> defraud citizens of their intangible rights to honest and impartial government." They bar only schemes for obtaining property.

140 S. Ct at 1574, *quoting McNally*, 483 U.S. at 355.

As the Supreme Court has declared, "'[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'" *Printz v. United States*, 521 U.S. 898, 921 (1997) (*quoting Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). Also, absent statutory language or legislative history, a broad reading of a federal statute to "transform relatively minor state offenses into federal felonies," is unwarranted. *Rewis v. United States*, 401 U.S. 808, 812 (1971).

As set forth ante, NACDL respectfully seeks *amicus* status because of the importance of the issue to NACDL's mission and membership, and because this is the stage of the case at which the Court can prevent invalid theories of criminal liability from serving as trial balloons or stalking horses for subsequent prosecutions. The trial courts should not be a government laboratory for expansion of statutes' breadth beyond their scope that has been so precisely and repeatedly measured by the Supreme Court.

The Supreme Court's message has been clear, continuous, and categorical: a sovereign's exercise of authority involving "allocation, exclusion, and control" does *not* qualify as "property" under the federal fraud statutes charged herein, and without that essential element a prosecution thereunder is invalid and must be dismissed.

Conclusion

Accordingly, for all the reasons set forth below, *amicus* National Association of Criminal

Defense Lawyers respectfully submits that defendants' motions to dismiss Counts 1-3 & 10 and 12 & 15-16 should be granted.

Dated: 27 May 2020
New York, New York

Respectfully submitted,

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