UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, v. ROBERT MENENDEZ and SALOMON MELGEN, Defendants.	Crim. No. 2:15-cr-00155 Hon. William H. Walls

DEFENDANTS' TRIAL BRIEF REGARDING
THE MEANING AND SIGNIFICANCE OF THE TERM "CONSTITUENT"

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INTRODUCTION

As the Court requested, Defendants hereby respectfully submit their position regarding the term "constituent" under the circumstances of this case. In this context, the meaning of "constituent" – a term not found in the U.S. Constitution or any statute giving rise to the charged offenses – is not a legal question for the Court to answer. Rather, the word's meaning and significance is a factual question for the jury, because the word potentially bears on Defendants' states of mind.

In order for the jury to assess the evidence and render a verdict on the charged offenses, it need not decide who is or is not a "constituent" of Senator Menendez. Rather, the jury need only consider whether the Senator had lawful reasons for taking the alleged official actions and whether Dr. Melgen had lawful reasons for giving the alleged things of value. At most, the concept of "constituency" may become collaterally relevant to the factfinders during trial if it illuminates Defendants' subjective motives and intentions. Just as it would be inappropriate for the Court to direct or instruct the jury about the meaning of the word "friendship," it would be inappropriate to fashion a single definition of "constituent" and direct or instruct the jury about the word's meaning. Doing so would invade the province of the jury and take sides on a contested issue of fact.

A central dispute in this case is the prosecution's theme that it was somehow inappropriate for Senator Menendez and his staff to address issues that his friend Dr. Melgen brought to his attention. The prosecution suggests this was improper simply because Dr. Melgen lived in Florida and not New Jersey, where Senator Menendez was elected. The inference that the prosecution hopes the jury will draw is that Dr. Melgen's out-of-state residence supports their theory that the Senator's actions for Dr. Melgen were motivated by alleged bribes.

Defendants do not dispute that during the relevant period, Dr. Melgen was a citizen of Florida, not New Jersey, and that he was not Senator Menendez's *electoral* constituent. But it was not unusual for Senator Menendez and his office to take the actions they allegedly took for Dr. Melgen – for example, visa inquiries – because they frequently took the same actions for other people outside of New Jersey. In particular, Senator Menendez's attention to cultural minorities and under-represented communities, particularly Hispanic-Americans, as well as immigration issues generally, exemplifies his focus on ethnic constituencies and issue constituencies whose members are not limited to New Jersey residents.

The Court should not look to any outside authority to define "constituent" because the term's usage in this case requires evidentiary context. A dictionary's definitions of "constituent" are merely explanations set forth by its editors, and there is no fixed legal meaning of the term. When the Court first raised the issue, it proposed a definition of an electoral constituent: "a resident of a political district of which the person under consideration is the elected representative." (Trial Tr. (Sept. 7, 2017) at 155:18-24.) However, there are many other definitions of "constituency" that describe legislators' broader communities of petitioners and supporters, without regard to geographic location, for whom legislators should feel responsible. *E.g.*, MERRIAM-WEBSTER ONLINE DICTIONARY, "Constituency," *available at* https://www.merriam-webster.com/dictionary/constituency (offering various definitions including "a group or body that patronizes, supports, or offers representation"). But such dictionary definitions are beside the point, as "constituency" has no fixed definition and presents no legal question for the Court to consider.

The prosecutors want to define the word narrowly to buttress the negative inference they want the jury to draw regarding Defendants' subjective intent. However, if the prosecution

wishes to introduce evidence at trial about a meaning of "constituent" that might let it argue for such a negative inference, the prosecution must show that *Senator Menendez* himself understood the term to have the same, narrow meaning the prosecution ascribes to it. The meaning of "constituent" is thus a fact issue for the jury and is not a proper subject for the Court's direction or instruction.

This complex and contested factual issue should not be reduced to a semantic debate. At trial, the prosecution is free to present relevant evidence, if any exists, to support the argument it presented in its opening statement: that the Senator supposedly should have known he should not have helped people outside of New Jersey, and the jury should view any help he gave to a non-resident as evidence of corrupt intent. Conversely, at trial the defense is free to present evidence to the contrary. As Defendants proffer below, this evidence will show that the Senator believed it was proper to help people both inside *and* outside of New Jersey; therefore, the jury should not place any significance on Dr. Melgen's Florida residence. Indeed, the Indictment itself alleges that Senator Menendez owed a fiduciary duty to the United States as a whole, and not just to the people of New Jersey.

In short, the anticipated prosecution and defense uses at trial of the concept of "constituency" are limited to proving or refuting Defendants' alleged criminal intent. These are fact questions solely for the jury's consideration. If the Court were to address this term in any way, including by instructing the jurors about the meaning of "constituent," it would inject itself into a factual issue, create a non-existent element for the charged offenses, conflict with Dr. Melgen's First Amendment rights, and run afoul of the Constitution's separation of powers.

ARGUMENT

I. THE TERM "CONSTITUENT" HAS NO LEGAL SIGNIFICANCE HERE, AND THERE IS NO LEGALLY RELEVANT DISTINCTION BETWEEN ELECTORAL CONSTITUENTS AND NON-CONSTITUENTS.

The U.S. Constitution never uses the word "constituent." The statutes charged in this case do not use the word "constituent." And no law, custom, or congressional precedent supports the prosecution's suggestion that a legislator cannot advocate on behalf of someone outside the legislator's electoral constituency.

The Constitution does not distinguish between electoral constituents and non-constituents when guaranteeing private citizens – like Dr. Melgen – "the right . . . to petition the Government for a redress of grievances," U.S. Const., amend. I, and the freedom to express their support of candidates and causes through political contributions, *id.*; *see generally Buckley v. Valeo*, 424 U.S. 1 (1976). The Constitution also makes no distinction between electoral constituents and non-constituents when discussing a Senator's powers. *See generally* U.S. Const., art. I, §§ 3-7. In fact, the Constitution references electoral constituents only when explaining that a Senator must be "an Inhabitant of that State for which [s]he shall be chosen," *id.* § 3, cl. 3, and defining that electoral constituency; *see* U.S. Const., amend. XVII (providing for two Senators "from each State, elected by the people thereof"). The Constitution nowhere limits the class of people on whose behalf a Senator may work.

Moreover, the Third Circuit has held that electoral constituency or non-constituency is irrelevant to one basic form of a legislator's authority: the power to send "franked" (*i.e.*, postage-free) mail. In *Schiaffo v. Helstoski*, 492 F.2d 413 (3d Cir. 1974), the Third Circuit rejected the argument "that recipients of mailings under [the statutory franking] provision are limited to [a House member's] constituents . . . ." *Id.* at 428-29. Among other things, the Third

Circuit emphasized that a legislator's duties do not fall cleanly along geographic lines, even when simply mailing documents:

> Although frequently when the franking privilege is discussed, reference is made to mailings to constituents, ***mailings to nonconstituents are nonetheless a necessary part of a congressman's legislative business too.*** For example, nonconstituents may write to a congressman who has developed expertise in a particular area of public concern requesting information, and the congressman would probably be regarded as remiss if he failed to respond. Or, conversely, a congressman, seeking information regarding a specific matter, may write to a nonconstituent who has relevant information.

Id. at 429 (emphasis added; footnotes omitted); *see also id.* at 429 n.83 (noting that the decision did not "turn on the characterization of [the mail recipients] as 'constituents' or 'nonconstituents'"). Because the Third Circuit has acknowledged that dealings with "non-constituents" are necessarily part of legitimate legislative business, the Court should reject outright any suggestion that it can or should inject itself into determining how the Senator viewed his "constituency."

II. ELECTED OFFICIALS, INCLUDING SENATOR MENENDEZ, ROUTINELY SERVE THE INTERESTS OF PEOPLE BEYOND THEIR ELECTORAL CONSTITUENCIES.

It is no crime for Senator Menendez to take official actions that help supporters who are not New Jersey citizens. Indeed, the prosecution has conceded that the Senator serves the American people as a whole. The Indictment itself confirms that Senator Menendez's constituency is not solely electoral, by alleging that the Senator's duties run not just to New Jersey citizens but to the United States generally, and that any deprivation of honest services was felt not just by New Jersey citizens but by the United States. (Superseding Indict. ¶ 2 ("As a United States Senator, MENENDEZ owed a fiduciary duty *to the United States* and the citizens of New Jersey" (emphasis added)); *see also id.* ¶¶ 9(c), 253.)

It is true that Senators are voted into office by geographic constituencies, and, at least historically, that political constituencies have overlapped with geographic constituencies. However, as advances in technology, travel, and communication (particularly, the Internet) have created greater interconnectedness throughout the citizenry, political constituencies based on ideology, cultural ties, and other criteria – as well as these constituencies' financial support – have outstripped the geographic boundaries of any given State or District. The modern realities of being a U.S. Senator frequently include the need to conduct fundraising activities across the country. Tellingly, over *half* of the itemized contributions to Senator Menendez's 2012 re-election campaign – none of which are at issue in this prosecution, not even Dr. Melgen's – came from contributors outside New Jersey. The fact that people all over the United States seek to support Senator Menendez's advocacy confirms that his "political" constituency extends far beyond New Jersey's borders.

Racial and ethnic constituencies have also long played a key role in nationalized, non-electoral constituencies. For example, on March 25, 1971, the newly formed Congressional Black Caucus ("CBC") delivered a statement to President Nixon that outlined the CBC's view that black legislators' constituents are not confined to the geographical boundaries of the Districts or States electing those officials:

> [O]ur concerns and obligations as Members of Congress do not stop at the boundaries of our districts; our concerns are national and international in scope. We are petitioned daily by citizens living hundreds of miles from our districts who look on us as Congressmen-at-large for black people and poor people in the United States. ***Even though we think first of those we were directly elected to serve, we cannot, in good conscience, think only of them – for what affects one black community, one poor community, one urban community, affects all.***
>
> We think it of singular significance that the leaders of national and local civil rights and human rights organizations, and hundreds of

> private citizens from all walks of life, have asked us to express their general and specific concerns.

Statement to the President of the United States by the Congressional Black Caucus 1-2, U.S. House of Representatives (Mar. 25, 1971) (emphasis added), *available at* https://cbc.house.gov/uploadedfiles/cbc_letter_to_nixon.pdf; *see also* 117 Cong. Rec. H8710 (daily ed. Mar. 30, 1971) (statement of CBC's first chairman, Rep. Charles Diggs of Michigan, entering statement into congressional record).

Senator Menendez employs the same broad definition of political constituency. He is a long-time member of the Congressional Hispanic Caucus, a group that views their constituency in a similarly expansive way as the Congressional Black Caucus. The evidence will show that petitioners across the country (especially those of Latino heritage) often approach the Senator for help with their problems, and that the Senator's staffers try to help petitioners regardless of where they live. Fifteen percent of the U.S. population is Hispanic, and yet there were times when Senator Menendez was the only U.S. Senator of Latino heritage. He has responded to the concerns of this under-represented population throughout his career.

In the exercise of his constitutional duties, the Senator also regularly advocates and legislates on behalf of non-electoral constituents. Such exercise of his duties is not only proper, but required. For example, as one of the only Senators of Latino heritage, he advocates for Latinos across the country on a range of issues from immigration reform to discrimination. (*See* Exhibit A (May 10, 2010 Letter from Sen. Menendez to Major League Baseball Players Association expressing his opposition to an *Arizona* anti-immigration law); and Exhibit B (Dec. 23, 2011 Letter from Sen. Menendez *et al.* to President Obama, regarding unfair terms of an administrative claims program offered to Hispanic and female farmers nationwide to address discrimination in federal farm loan programs).) By way of a second example, Senator Menendez

is a member of the Senate Foreign Relations Committee. In that role, he advocates for all U.S. citizens, because foreign relations and national security are inherently issues of national concern. (*See* Exhibit C (Dec. 13, 2011 Press Release regarding Sen. Menendez's efforts to pass sanctions targeting Iran's central bank).) The Senator's advocacy in that role has no inherent tie to citizens of New Jersey, and, in fact, such a parochial limitation would be contrary to the express purpose of the Senate Foreign Relations Committee. Senator Menendez also regularly advocates for the three million U.S. citizens residing in the Commonwealth of Puerto Rico, who have no elected congressional representatives, on a range of issues specific to the citizens of Puerto Rico. (See Exhibit D (June 2, 2011 Letter from Sen. Menendez to Secretary K. Sebelius and Commissioner M. Astrue regarding the application of Medicare Part B in Puerto Rico).)

III. THE CONSTITUENCY QUESTION WILL ONLY BE RELEVANT, IF AT ALL, TO THE JURY'S FACTUAL ASSESSMENT ABOUT DEFENDANTS' SUBJECTIVE MOTIVES AND INTENT.

The concept of "constituency" is only potentially relevant to explain Defendants' motives and intent. This is a bribery prosecution, which requires proof of a *quid pro quo*. There is little or no dispute regarding the alleged *quid* and *quo*, *i.e.*, what happened. Instead, the proof at trial will focus on the *pro* – whether the prosecution can prove beyond a reasonable doubt that Defendants acted with the requisite criminal intent and exchanged things of value for official acts. "Constituency" has no legal bearing on the elements of the crimes charged here. (*See generally* Defs.' Joint Proposed Jury Instructions (Dkt. 208).)

Nonetheless, the prosecution has argued that Senator Menendez's advocacy for Dr. Melgen conflicted with his office's ostensible website policy of not helping people living outside New Jersey. (*See* Trial Tr. (Sept. 6, 2017) at 72.) Thus, according to the prosecution, the fact that the Senator assisted Dr. Melgen, a Florida citizen, supposedly makes it more likely that the Senator was motivated to do so by a corrupt agreement. Such argument relies upon the jury

finding that the term "constituent" is limited to an electoral constituent *and* that at the relevant times, the Senator's Office had a policy against assisting non-residents. However misguided, the prosecution is free to argue that Senator Menendez had an irregular motive whenever assisting anyone who resides outside of New Jersey.

At the same time, Defendants are free to argue the contrary. The defense anticipates that the evidence will show that the prosecution's argument is fundamentally flawed, because Senator Menendez – like so many elected officials – believed his constituency to be much broader than the boundaries of his state, and that it is perfectly appropriate to respond to the concerns of both residents of New Jersey *and* non-residents alike, which was his practice. This evidence of the Senator's subjective belief (and what Dr. Melgen knew of that belief) will undermine the prosecution's theory that by assisting Dr. Melgen, a Florida resident, the jury can infer an improper motive.

Rather than relying on an unknown author's stray sentence on Senator Menendez's official website, stripped of all context, the jury need only look to how Senator Menendez's own statements reflect his state of mind. The Senator's published writings reflect his belief that he represents Latino communities across the country. *E.g.*, Robert Menendez, GROWING AMERICAN ROOTS: WHY OUR NATION WILL THRIVE AS OUR LARGEST MINORITY FLOURISHES 28 (2010) ("A Latino legislator does not govern on behalf of his or her community, but serves as a representative of the group for the greater service to America."); *id.* at 48-49 ("I have of course always been proud to serve as an elected official of Hispanic descent in the United States. In my career, many people have taken me as a symbol, and as their own representative even far beyond the borders of my constituencies."). Ever since he was elected in 1992 to represent a single New Jersey district in the House of Representatives, Senator Menendez has felt a special obligation to

help Hispanic-Americans – no matter where they live. *See id.* at 27-28 ("[Being elected to the House] went beyond my being one congressional member from one district in New Jersey. It gave me an opportunity to talk about some of these issues not only from a New Jersey perspective but also in terms of a national Hispanic perspective. As a result I started traveling around the country, seeking to bring more Latinos to Congress, at the same time helping other members who had growing Latino populations in their districts, identifying what the issues were, how to campaign and engage.").

IV. THE COURT SHOULD NOT INTERVENE ON A FACTUAL QUESTION BY ASCRIBING A SINGLE MEANING TO THE TERM "CONSTITUENT."

Any attempt to define the word "constituent," whether through an evidentiary ruling or jury instruction, would unfairly prejudice the defense, as the Court would be taking sides on a disputed issue of fact. If the Court were to define "constituent" in solely geographical terms, it would be endorsing the prosecutors' theory of the case. If the Court were to say that a constituency can be based on ethnicity or political support, it would be endorsing the defense's theory of the case. It should do neither. The Court should allow the two sides to present this factual question to the jury and argue its bearing (if any) on Defendants' subjective intent. Any other course of action would also conflict with two core constitutional values: (1) Dr. Melgen's First Amendment right to petition any governmental officer he sees fit, and (2) Senator Menendez's authority under Article I to exercise his discretion as he sees fit.

First, the term "constituent" is not an element of the charged offenses, and goes only to the questions of motive and intent. No definition of "constituency" is needed, just as no definition of "friendship" is needed – even though both concepts potentially concern the jury's consideration of Defendants' motives and intent.

Second, any jury instruction about the meaning of "constituent" would be constitutionally infirm. Dr. Melgen has a First Amendment right to petition "the Government" generally, U.S. Const., amend. I, and "the right to petition extends to all departments of the Government," *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Nothing limits Dr. Melgen – or any other citizen – to petitioning only those people for whom he can vote. *Cf.* Statement to the President of the United States by the Congressional Black Caucus 1-2, *supra* p. 6 ("We are petitioned daily by citizens living hundreds of miles from our districts who look on us as Congressmen-at-large for black people and poor people in the United States."). Indeed, even lobbyists enjoy the Petition Clause right "to persuade Congressional action," *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967), and lobbyists are often not represented by the legislators they seek to persuade. *See also Eastern R. Conf. v. Noerr Motors* 365 U.S. 127, 140-41 (1961) ("a publicity campaign to influence governmental action falls clearly into the category of political activity" protected by the Petition Clause).

Further, any Court direction as to evidence or jury instruction suggesting that the Senator cannot properly assist persons living outside New Jersey would violate separation-of-powers principles by suggesting limits to the Senate's authority that are not imposed by either the Constitution or Senate Rules. In other contexts, it is recognized that "a decision to investigate concerns raised by a constituent or non-constituent falls squarely within a legislator's discretion . . . ." *Brawner v. Educ. Mgmt. Corp.*, No. 11-CV-6131, 2012 WL 3064019, at *9 n.15 (E.D. Pa. July 27, 2012) (applying Federal Tort Claims Act's discretionary function exception to shield a U.S. Senator from plaintiff's tort claims), *aff'd*, 513 F. App'x 148 (3d Cir. 2013). Any instruction on "constituency" would improperly place the Judicial Branch's

imprimatur on the Executive Branch's attempts to define and constrain the particular petitioners whom the Legislative Branch may assist.

The Constitution assigned to Congress the responsibility for determining the rules of its own proceedings. *See* U.S. Const., art. I, § 5. Senate Rules do not support the view that a Senator's duties are confined to electoral constituents. Senate Rule 43, concerning "Representation by Members," speaks only of "petitioners" and how, "[i]n responding to petitions for assistance, a Member of the Senate, acting directly or through employees, has the right to assist petitioners before executive and independent government officials and agencies." Senate R. 43(1). This includes "communicat[ion] with an executive or independent government official or agency on any matter to . . . (a) request information or a status report; (b) urge prompt consideration; (c) arrange for interviews or appointments; (d) express judgments; (e) call for reconsideration of an administrative response which the Member believes is not reasonably supported by statutes, regulations or considerations of equity or public policy; or (f) perform any other service of a similar nature consistent with the provisions of this rule." *Id.* R. 43(2). The Rule does not "limit the authority of Members . . . , to perform legislative, including committee, responsibilities." *Id.* R. 43(5). And nothing in Rule 43 defines "constituent" or restricts a Senator's duties to geographic constituents.

Rule 43 was drafted in 1992 in response to a 1991 report by the Senate Select Committee on Ethics that emphasized the importance of avoiding the appearance of favoritism for campaign contributors. That report also stressed that "[n]onetheless, if an individual or organization has contributed to a Senator's campaigns or causes, but has a case which the ***Senator reasonably believes*** he or she is obliged to press because it is in the public interest or the cause of justice or equity to do so, ***then the Senator's obligation is to pursue that case.***" Senate Select Comm. on

Ethics, *Investigation of Senator Alan Cranston*, S. Rep. 102-223, 102d Cong., 1st Sess. 11-12 (1991) (emphases added).

Every document germane to this question – the Constitution, the statutes in question, the Senate Rules, the Senator's actual words, and the evidence showing the Senator's frequent dealings with people outside the State of New Jersey – confirms that there is no single definition of "constituent" relevant here. Any attempt to craft one would be fraught with constitutional concerns and would substantially prejudice the defense.

CONCLUSION

For all of the foregoing reasons, the Court should not take sides in this semantic dispute of fact that could affect the outcome of the case.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2017, a true and correct copy of the foregoing brief was filed with the CM/ECF system for the United States District Court for the District of New Jersey, which will send electronic notification of the filing to all counsel of record.

/s/ Murad Hussain