No. 20-5143

In the United States Court of Appeals for the District of Columbia Circuit

IN RE MICHAEL T. FLYNN,
Petitioner

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (CRIM. NO. 17-232) (THE HONORABLE EMMET G. SULLIVAN)

BRIEF FOR JUDGE EMMET G. SULLIVAN IN RESPONSE TO MAY 21, 2020 ORDER

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INTRODUCTION

The unique facts of this case warrant evaluation by the trial judge before any review by this Court.

It is unusual for a criminal defendant to claim innocence and move to withdraw his guilty plea after repeatedly swearing under oath that he committed the crime. It is unprecedented for an Acting U.S. Attorney to contradict the solemn representations that career prosecutors made time and again, and undermine the district court's legal and factual findings, in moving on his own to dismiss the charge years after two different federal judges accepted the defendant's plea.

These reversals presented Judge Sullivan with several substantial questions. Was he required to grant the government's post-plea motion to dismiss, and reverse his findings that Mr. Flynn's false statements to the FBI about his contacts with Russia were material, without *any* inquiry into the facts set forth in, and surrounding, the government's filing? What implications would dismissal have on Mr. Flynn's separate false statements to the Department of Justice about his work for Turkey, which were part of his plea agreement but not addressed in the government's motion? Do the facts here provide reason

to question the "presumption of regularity" that ordinarily attaches to prosecutorial decisions, *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016)? And what, if anything, should Judge Sullivan do about Mr. Flynn's sworn statements to the court, where he repeatedly admitted to the crime and to the voluntariness of his guilty plea, only to now claim that he never lied to the government and was pressured and misled into pleading guilty? Because the parties before him now support the same relief, Judge Sullivan turned to an approach used by federal courts across the country, as well as district courts in this Circuit: He appointed an amicus to present counterarguments, and set a briefing schedule giving the government and Mr. Flynn the last word.

The question before this Court is whether it should short-circuit this process, forbid even a limited inquiry into the government's motion, and order that motion granted. The answer is no. Mandamus is an extraordinary remedy that should be denied where the district court has not actually decided anything. The government's motion is pending before Judge Sullivan and could well be granted, so Mr. Flynn can obtain the exact relief he seeks through ordinary judicial process.

Moreover, Judge Sullivan's consideration of the government's motion is not clearly foreclosed by Rule 48 or this Court's precedents, as would be required to justify mandamus. The government's motion acknowledges that Rule 48 does not require Judge Sullivan to serve as a mere rubber stamp. And while this Court observed in *Fokker* that separation-of-powers principles limit a judge's role in reviewing the government's charging decisions, it also explained that different separation-of-powers considerations may exist where the district court already accepted a plea and was proceeding to sentencing. Finally, the unusual facts of this case raise at least a plausible judicial question, anticipated by *Fokker*, whether the presumption of regularity for prosecutorial decisions is overcome.

Mr. Flynn's case has garnered considerable attention. But that is no reason to resolve it outside the normal judicial process. This is a "court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The questions presented should be resolved by the district court in the first instance. If Judge Sullivan's decision is anything short of what the parties sought, this Court will have an opportunity to review it, without writing on a blank slate.

Because there is no reason for this Court to "enter the fray now," *In re al-Nashiri*, 791 F.3d 71, 81 (D.C. Cir. 2015), the petition should be denied.

FACTUAL BACKGROUND

A. In 2017, The Government Charges Mr. Flynn With Making Materially False Statements And He Admits His Guilt.

On December 1, 2017, Mr. Flynn waived indictment and pleaded guilty to a one-count criminal information charging him with making materially false statements, in violation of 18 U.S.C. § 1001. Dkts. 1, 16.[1] In conjunction with the plea, the government submitted a statement of offense to the district court. Dkt. 4. Like all the government's filings, this submission was made pursuant to the Rules of Professional Conduct, which require accurate representations to the court. *See* D.D.C. Local Crim. R. 57.26(a); D.C. R. Prof'l Conduct 3.3 (2015). Mr. Flynn also signed the statement, declaring "under penalty of perjury that it is true and correct." Dkt. 4 at 6.

The statement of offense recounted three sets of materially false statements. Two involved lies Mr. Flynn told to the FBI, in a January 24, 2017 interview, regarding his contacts with Russia and other countries regarding U.S. foreign policy. *Id.* at 2–5. The remaining statements involved lies to the

[1] All cites to "Dkt." are to the district court docket.

DOJ, in documents Mr. Flynn filed on March 7, 2017, about work that he and his consulting firm did for Turkey. *Id.* at 5.

Mr. Flynn's plea agreement incorporated the statement of offense, and in consideration for his guilty plea the prosecutors agreed not to charge him further for that conduct. Dkt. 3 at 1–2. In a section of the agreement binding only on the parties, Mr. Flynn agreed to "forgo the right to any further discovery or disclosures of information not already provided" at the time of his plea. *Id.* at 6.

District Judge Rudolph Contreras took his initial plea. Judge Contreras placed Mr. Flynn under oath, confirming his understanding that "if you do not answer my questions truthfully, you could be prosecuted for perjury or making a false statement[.]" Dkt. 16 at 4. Mr. Flynn then confirmed that he had "sufficient time to consult with [his] attorneys" and was "satisfied with the services that they have provided." *Id.* at 6.

At this hearing, the government represented the basis for its charge. Among other things, the government claimed that "the defendant made material false statements and omissions during an interview with the [FBI] on January 24, 2017" regarding his interactions with Russia, *id.* at 14; that "[a]t

the time of the interview, the FBI had an open investigation into Russia's efforts to interfere in the 2016 presidential election," *id.* at 14–15; and that "on March 7, 2017, the defendant filed multiple documents with [DOJ] … pertaining to a project performed by him and his company for the principal benefit of the Republic of Turkey" where "the defendant made materially false statements and omissions," *id.* at 17. The government also provided a detailed description of why each statement was materially false. *See id.* at 15–18.

Mr. Flynn agreed with the government's recitation, and that he "in fact [did] what the government has stated that it can prove at trial[.]" *Id.* at 19. Mr. Flynn then confirmed his guilt of "making false statements, in violation of 18 U.S.C. § 1001," after agreeing that he understood the proceedings and did not have any questions. *Id.* at 30.

B. In Late 2018, The Government And Mr. Flynn Reaffirm His Criminal Conduct, And Judge Sullivan Finds That Mr. Flynn Made Materially False Statements.

Shortly after the entry of Mr. Flynn's guilty plea, the case was randomly reassigned to Judge Sullivan. Dkt. 9. Thereafter, Judge Sullivan entered a standing order advising the government of its continuing obligation to provide exculpatory evidence to Mr. Flynn pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Dkts. 10, 20.

Judge Sullivan presided over his first status hearing on July 10, 2018. He made clear that the timing of sentencing was up to the parties, and that he had no intention "to micromanage what's going on with the parties in this case vis-à-vis cooperation." Dkt. 40 at 9. When the parties jointly reported that the case was ready for sentencing, Judge Sullivan referred it to the Probation Office for presentence investigation. Minute Order (Sept. 19, 2018).

A full year after Mr. Flynn originally pleaded guilty, the parties filed sentencing memoranda. The government's memorandum reiterated that Mr. Flynn's false statements in both the January 2017 FBI interview and the March 2017 DOJ filings were "material" under § 1001. Dkt. 46 at 2–4. Mr. Flynn "d[id] not take issue" with the government's description of his offense. Dkt. 50 at 7. But his memorandum contained "additional facts regarding the circumstances of the FBI interview" alleged to be "relevant to the Court's consideration of a just punishment." *Id.* at 7–8.

As a result, the December 18, 2018 sentencing turned into a second plea colloquy. As Judge Sullivan explained:

> The Court takes its responsibility here today, as always, very seriously.
>
> Mr. Flynn's briefing concerned the Court, as he raised issues that may affect or call into question his guilty plea, and, at the very least, maybe his acceptance of responsibility.

> As such, the Court concludes that it must now first ask Mr. Flynn certain questions to ensure that he entered his guilty plea knowingly, voluntarily, intelligently, and with fulsome and satisfactory advice of counsel.
>
> I cannot recall any incident in which the Court has ever accepted a plea of guilty from someone who maintained that he was not guilty, and I don't intend to start today.

Dkt. 103 at 7.

After being placed under oath again, Mr. Flynn confirmed that (1) he did not wish to "challenge the circumstances" surrounding his FBI interview; (2) by pleading guilty he would be giving up "forever" his right to challenge that interview; (3) he knew at the time of his interview that lying to the FBI was a crime; and (4) he was "satisfied with the services provided by [his] attorneys." *Id.* at 7–9. Mr. Flynn also disclaimed any reliance on revelations that certain FBI officials involved in the interview were being investigated for misconduct. *Id.* at 9.

Judge Sullivan told Mr. Flynn that he could move to withdraw his guilty plea, that he could take a break and confer further with his attorneys in a private room, and that he could get a second opinion from an independent, court-appointed attorney on whether to withdraw his plea. *Id.* at 8–10. Despite these offers, Mr. Flynn persisted in admitting his guilt a second time under oath:

> THE COURT: Mr. Flynn, anything else you want to discuss with me about your plea of guilty? This is not a trick. I'm not trying to trick you. If you want some time to withdraw your plea or try to withdraw your plea, I'll give you that time. If you want to proceed because you are guilty of this offense, I will finally accept your plea.
>
> THE DEFENDANT: I would like to proceed, Your Honor.
>
> THE COURT: All right. Because you are guilty of this offense?
>
> THE DEFENDANT: Yes, Your Honor.

Id. at 15–16. Only after these repeated offers and colloquies did Judge Sullivan accept Mr. Flynn's guilty plea to making materially false statements to the government. *Id.* at 16.

Consistent with his usual practice, Judge Sullivan offered to further delay sentencing to give Mr. Flynn the full benefit of his ongoing effort to provide substantial assistance to the government. *Id.* at 30–31. Judge Sullivan cautioned Mr. Flynn that "the sentence the Court imposes today, if sentencing proceeds, may not be the sentence that you would receive after your cooperation ends." *Id.* at 31. As Judge Sullivan explained, "It could be that any sentence of incarceration imposed after your further cooperation is completed would be for less time than a sentence may be today. I can't make any guarantees, but I'm not hiding my disgust, my disdain for this criminal offense." *Id.* at 33.

To get a full understanding of the plea agreement struck by the parties, Judge Sullivan also asked the government whether it had declined to prosecute Mr. Flynn for other chargeable conduct, including whether Mr. Flynn's conduct "rises to the level of treasonous activity on his part[.]" *Id.* at 35–36. The government responded that this was a "serious question" that it could not answer on the spot. *Id.* at 36.

After a recess to allow Mr. Flynn to confer with his counsel about the timing of sentencing, Judge Sullivan explained the reason for his earlier inquiry, clarifying that he had asked about "other potential offenses for the purpose of understanding the benefit, if any, that Mr. Flynn has received in the plea deal," but "wasn't suggesting he's committed treason." *Id.* at 40. The government confirmed, after having reviewed the applicable statute, that it had no basis to suspect Mr. Flynn of treason. *Id.* at 40–41.

The defense then accepted Judge Sullivan's offer to delay sentencing to allow Mr. Flynn to complete his cooperation. Counsel cited *United States v. Rafiekian*, Crim. No. 18-457 (E.D. Va.), where Mr. Flynn was expected to testify at trial as a government witness. Judge Sullivan granted the request and postponed sentencing. *Id.* at 47–48.

C. In 2019 And Early 2020, Mr. Flynn Alleges *Brady* Violations; The Government And Judge Sullivan Confirm That The False Statements Were Material.

Mr. Flynn hired new counsel in June 2019. Dkt. 87. Before entering an appearance, counsel wrote to the Attorney General and Deputy Attorney General to request a "review of the entire Flynn case for *Brady* material that has not been produced and prosecutorial misconduct writ large." Dkt. 122-2 at 2.[2]

On July 9, 2019, the *Rafiekian* court unsealed filings indicating that Mr. Flynn would not be testifying. The parties here nonetheless agreed that Mr. Flynn's sentencing should be deferred until at least after the *Rafiekian* trial. Dkt. 97 at 2; Dkt. 98 at 11.

Mr. Flynn then requested fifty categories of documents and information from the government and asked for dismissal of the prosecution based on purported *Brady* violations. *See* Dkts. 111, 116, 124, 144-1. The government characterized these motions as an "extraordinary reversal" in Mr. Flynn's position, noting that he was now claiming innocence "despite having admitted his

[2] On counsel's first appearance in the case, Judge Sullivan disclosed that several years earlier, she had sent him a copy of her book, *Licensed to Lie*, with the inscription: "Judge Emmet Sullivan, to all those who seek, hallow, and do Justice. With the greatest respect and gratitude for your honorable service …." Dkt. 94 at 3. Neither party objected to Judge Sullivan's proceeding with the case. *Id.*

guilt, under oath, before two federal judges[.]" Dkt. 131 at 1–2. Further, Mr. Flynn had already declined to withdraw his plea in light of the FBI misconduct investigation. *See supra* at 8–10.

After substantial briefing, Judge Sullivan denied the motions. Dkt. 144. In a 92-page Memorandum Opinion, Judge Sullivan explained that most of the requested information was not "relevant and material" to Mr. Flynn's offense or sentencing, *id.* at 16–17, 57–72; that other information was already provided to Mr. Flynn, did not exist, or was not within the government's possession, *id.* at 22–57; and that "[e]ven if Mr. Flynn established a *Brady* violation," dismissal would be "unwarranted" because "[t]he remedy for a *Brady* violation is retrial, not dismissal." *Id.* at 92. Judge Sullivan also found again, as a legal and factual matter, that Mr. Flynn's false statements to the government were material. *See id.* at 49–53.

In January 2020, the government filed a supplemental sentencing memorandum, reiterating its representations about Mr. Flynn's guilt. *See* Dkt. 150 at 5–14. The government again asserted that "this case is about multiple false statements that the defendant made to various DOJ entities." *Id.* at 5; *see also id.* at 9, 12–13, 17 (explaining bases for materiality). The government recommended that Mr. Flynn be sentenced to 0 to 6 months in prison, noting that he

had committed a "serious" offense, in a position of "public trust," that undermined "[t]he integrity of our criminal justice [system, which] depends on witnesses telling the truth. That is precisely why providing false statements to the government is a crime." *Id.* at 2, 26, 31.

Mr. Flynn then moved to withdraw his guilty plea, claiming that he was innocent and would file a supplemental motion on that basis. Dkt. 151 at 16.

D. In Early 2020, Mr. Flynn Submits A Sworn Affidavit Contradicting His Prior Sworn Statements.

Mr. Flynn filed his supplemental motion on January 29, 2020. Dkt. 160. In support, he submitted a declaration signed "under penalty of perjury." Dkt. 160-23 at 12. This declaration contains numerous statements that contradict Mr. Flynn's earlier sworn statements and representations to the court, also made under penalty of perjury. Mr. Flynn asserted:

- That he pleaded guilty because of "sudden and intense time pressure," *id.* at 5, and "intense pressure from the Special Counsel's Office, which included a threat to indict my son," *id.* at 8—notwithstanding his prior testimony that he pleaded guilty because he was guilty "and for no other reason," Dkt. 16 at 30;
- That he had told his prior counsel "numerous times that I did not lie to the [FBI]," Dkt. 160-23 at 10, notwithstanding his earlier testimony that he was satisfied with their services in advising him to plead guilty, and his refusal of Judge Sullivan's offer to confer with independent counsel;

- That he had wanted to withdraw his guilty plea prior to his second plea colloquy, Dkt. 160-23 at 9–10, despite rejecting Judge Sullivan's offer to do just that; and
- That "[i]n truth, I never lied," and that "the truth is I am innocent of these charges," *id.* at 11, despite having repeatedly admitted the false statements offense.

In response, Judge Sullivan further continued sentencing. Minute Order (Feb. 10, 2020).

The motions to withdraw the guilty plea have not been decided. Judge Sullivan has yet to receive any declarations from Mr. Flynn's prior counsel; question Mr. Flynn under oath about the withdrawal, *see* Fed. R. Crim. P. 11(d)(2)(B); or assess his credibility regarding the claims in his declaration.

E. In May 2020, The Government Contradicts Its Prior Representations To The Court And Moves To Dismiss.

On May 7, 2020, the government's lead prosecutor filed a notice of withdrawal. Dkt. 197. Later that day, the government filed a motion under Federal Rule of Criminal Procedure 48(a) to dismiss the information against Mr. Flynn, with prejudice. Dkt. 198. After spending more than two years claiming that Mr. Flynn's "false statements to the FBI on January 24, 2017, were absolutely material," Dkt. 132 at 10, the government now claimed that any lies by Mr. Flynn in the same interview were "not … material," Dkt. 198 at 2.

Several aspects of the government's filing are notable. *First*, the motion acknowledges that a Rule 48(a) dismissal requires leave of the court. *Id.* at 10. While the government argued that the court's discretion was "narrow" and "circumscribed," *id.*, it did not argue that the court lacked discretion altogether. The motion also spans 20 pages of largely factual argument supporting the request, confirming that the government was not asking the court to exercise a ministerial function.

Second, the only attorney who signed the motion was Timothy Shea, the then-Acting U.S. Attorney, who has since left that post. *See id.* at 20; Press Release, Dep't of Justice, *Designation of Timothy J. Shea to Serve as Acting Administrator for the DEA* (May 18, 2020) <perma.cc/P98M-5D8Z>. The motion did not explain the absence of any line prosecutors, including those who had previously prosecuted the case. Nor did it contain any declarations or affidavits from witnesses with personal knowledge supporting the government's new factual representations.

Third, the motion does not mention Mr. Flynn's March 2017 false statements to DOJ relating to his work for Turkey, which were described in the statement of offense and were relevant conduct for his guilty plea.

Fourth, the government has not moved to withdraw any of its prior pleadings in the case, including its sentencing memoranda, or any of the representations it previously made in open court regarding the purported materiality of Mr. Flynn's false statements.

F. Judge Sullivan Establishes A Process For Deciding The Government's Motion.

Given the absence of adversarial briefing on the issues presented by the government's motion, Judge Sullivan exercised his "inherent authority" to appoint former prosecutor and retired federal district judge John Gleeson as amicus. Dkt. 205. Judge Sullivan appointed him "to present arguments in opposition to the government's Motion to Dismiss," and "address whether the Court should issue an Order to Show Cause why Mr. Flynn should not be held in criminal contempt for perjury pursuant to 18 U.S.C. § 401, Federal Rule of Criminal Procedure 42, the Court's inherent authority, and any other applicable statutes, rules, or controlling law." *Id.*[3]

[3] Judge Sullivan had previously denied leave to file briefs to certain would-be intervenors and amici. *See, e.g.*, Dkt. 25 (denying leave to file "Letter Regarding the Plea"); Dkt. 32 (denying leave to file "Emergency Motion to Intervene … on Behalf of all Americans"); Dkt. 69 (denying leave to file "Amicus Curiea [sic] Brief Supporting Dismissal Due to Want of Federal Jurisdiction"). When Judge Sullivan issued these orders, the questions now before the district court had not arisen and the would-be intervenors and amici were seeking to address unrelated issues of their own choosing.

In a separate order, Judge Sullivan set a briefing schedule, guaranteeing Mr. Flynn and the government the last word. Minute Order (May 19, 2020). The schedule permitted additional potential amici to seek leave to weigh in on any side of the issues, and again provided Mr. Flynn and the government the right to respond. Two days later, Mr. Flynn filed this mandamus petition. After this Court ordered Judge Sullivan to file a response, *see* Fed. R. App. P. 21(b)(4), the Administrative Office of the U.S. Courts authorized him to retain counsel under 28 U.S.C. § 463. *See Ex parte Fahey*, 332 U.S. 258, 260 (1947) (a mandamus petition has "the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel").

To date, Judge Sullivan has not received any of the requested briefs from the parties and court-appointed amicus or made any factual findings or legal determinations in connection with the government's motion or the possibility of contempt. Throughout the proceedings below, neither party moved to recuse him nor sought a judicial reassignment.

REASONS FOR DENYING THE PETITION

"Mandamus 'is a drastic and extraordinary remedy reserved for really extraordinary causes.'" *In re Khadr*, 823 F.3d 92, 97 (D.C. Cir. 2016) (quoting

Cheney v. U.S. District Court, 542 U.S. 367, 380 (2004)). Mandamus is appropriate only where: (1) the petitioner has "no other adequate means to attain the relief he desires"; (2) the petitioner shows his right to the writ is "clear and indisputable"; and (3) the court, "in the exercise of its discretion," is satisfied that the writ is "appropriate under the circumstances." *Cheney*, 542 U.S. at 380–81 (quotation omitted).

Mr. Flynn cannot satisfy any of these conditions.

I. MR. FLYNN CAN SECURE THE RELIEF HE SEEKS WITHOUT MANDAMUS.

There is no basis for "directing the district court to grant" the government's motion to dismiss (Pet. 1) before the district court has considered and decided it. Mandamus is an inappropriate vehicle for resolving a pending motion.

"[T]he general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it." *Ex parte Rowland*, 104 U.S. 604, 617 (1881). Mandamus is not to be "used as a substitute for the regular appeals process," *Dhiab v. Obama*, 787 F.3d 563, 568 (D.C. Cir. 2015) (quoting *Cheney*, 542 U.S. at 380–81), lest it "thwart the Congressional policy against piecemeal appeals in criminal cases," *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943). *See*

In re al-Nashiri, 791 F.3d 71, 78 (D.C. Cir. 2015) ("Mandamus is inappropriate in the presence of an obvious means of review: direct appeal from final judgment.").

As Mr. Flynn appears to concede, mandamus is even more inappropriate where no rulings have been issued at all. *See* Pet. 28 (arguing that mandamus relief is available "from a denial of the dismissal of a count or case" (quoting *In re United States*, 345 F.3d 450, 452 (7th Cir. 2003))); *see also In re Stone*, 940 F.3d 1332, 1340–41 (D.C. Cir. 2019) (denying mandamus because "[i]t is the trial court and not this court" that should "engage in the initial consideration" (quotation omitted)); *Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192, 198 (D.C. Cir. 2002) (denying mandamus "before the district court has acted"). Nothing differs in the Rule 48 context. On the contrary, the Third Circuit denied a similar request for mandamus where a district court scheduled a hearing on a Rule 48 motion rather than immediately granting it. *See In re Richards*, 213 F.3d 773, 787 (3d Cir. 2000) (noting that the trial judge "should have the opportunity to consider and issue its order").

These settled principles resolve Mr. Flynn's petition. Judge Sullivan has not ruled on the government's motion to dismiss or any issues regarding contempt. If either issue is resolved unfavorably for Mr. Flynn, he can pursue

review in this Court. *See, e.g.*, *United States v. Hamm*, 659 F.2d 624, 625 (5th Cir. Unit A Oct. 1981) (en banc) (reversing district court's Rule 48 ruling after judgment). And if such circumstances arise, this Court will be better equipped to evaluate the issues with the benefit of any determinations Judge Sullivan may make.

The fact that Judge Sullivan has decided nothing yet distinguishes this Court's decision to grant mandamus in *Fokker*. There, the district judge had "rejected" the government's effort to exclude time from the Speedy Trial Act clock in a deferred prosecution agreement because "the prosecution had been too lenient in agreeing to, and structuring, the DPA." 818 F.3d at 737–38, 740. This Court granted mandamus because that decision created immediate complications for the government: If it tried the defendant or secured a plea, a deferred prosecution would no longer be available, and if the government let the speedy trial clock run, it might be unable to prosecute the defendant. *See id.* at 749.

Because no decision has been made here, Mr. Flynn does not face any comparable harm. Indeed, his petition largely elides the "no other adequate means" criterion. *See* Pet. 27–28. To the extent Mr. Flynn, who has been released on his own recognizance throughout the proceedings, Dkt. 5, claims

harm from the pendency of his criminal case, that does not suffice. *See, e.g.*, *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953) ("[E]xtraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay." (citation omitted)); *al-Nashiri*, 791 F.3d at 80 (same in capital case).

Mr. Flynn likewise errs in seeking mandamus on the basis that further proceedings in the district court "will subject [DOJ] to sustained assaults on its integrity." Pet. 28. Judge Sullivan has not disparaged DOJ's integrity in any way. And although the government has attacked the investigation of Mr. Flynn, it has not asserted any misconduct by the career prosecutors who previously oversaw the case. In any event, given the serious allegations in Mr. Flynn's most recent sworn statement, further proceedings in the district court will ensure the integrity of the judicial process and serve the public interest. *See Richards*, 213 F.3d at 788.

II. MR. FLYNN HAS NOT SHOWN A CLEAR AND INDISPUTABLE RIGHT TO RELIEF UNDER RULE 48.

This Court "cannot use mandamus to remedy anything less than a 'clear abuse of discretion or usurpation of judicial power.'" *al-Nashiri*, 791 F.3d at 82 (quoting *Bankers Life*, 346 U.S. at 383). The district court's consideration of the Rule 48 motion does not approach this standard.

A. This Court's Precedents Do Not Preclude Judge Sullivan's Assessment Of The Government's Motion.

The government has acknowledged that district courts retain some discretion in adjudicating Rule 48(a) motions. Dkt. 198 at 10. For good reason: That position accords with the rule's text and history, as well as its interpretation by this Court.

Under Rule 48, the government must seek "leave of court" before dismissing an indictment or information—a command arising from the Supreme Court's guidance. Before the adoption of the Federal Rules of Criminal Procedure, judges expressed frustration that the common law "compelled [them] to grant the dismissal of an indictment" even when there was evidence that prosecutorial motives "savored too much of favoritism." Leon R. Yankwich, *Increasing Judicial Discretion in Criminal Proceedings*, 1 F.R.D. 746, 752 (1941). The version of Rule 48 submitted to the Supreme Court preserved that "unqualified authority to *nolle pros* a case without consent of the court." *See* Thomas Ward Frampton, *Why Do Rule 48(a) Dismissals Require "Leave of Court"?*, 73 Stan. L. Rev. Online (forthcoming 2020) (manuscript at 8) <perma.cc/AJF6-XNS2> (quoting Mem. of the Sup. Ct. to Adv. Comm., June 10, 1942). The Court questioned that approach, *see id.*, citing a decision holding that the government's confession of error "does not relieve this Court of

the performance of the judicial function," *Young v. United States*, 315 U.S. 257, 258 (1942); *see id.* at 259 (noting that the public interest is not solely entrusted to "the enforcing officers" of the law, but "to our consideration and protection as well"). Ultimately, the rule incorporated the "leave of court" requirement.

That requirement "obviously vest[s] *some* discretion in the [district] court." *Rinaldi v. United States*, 434 U.S. 22, 20 n.15 (1977) (per curiam) (emphasis added). In *United States v. Ammidown*, 497 F.2d 615 (1973), this Court addressed the scope of the district court's Rule 48 discretion in the context of evaluating a plea. The rule, the Court explained, does not require "the trial court to serve merely as a rubber stamp"; it must be satisfied that dismissal "adequately protects the public interest." *Id.* at 622 (quotation omitted). To override the government's recommendation, a trial judge "must provide a reasoned exercise of discretion" that advances "one or more of the following components: (a) fairness to the defense, such as protection against harassment; (b) fairness to the prosecution interest, as in avoiding a disposition that does not serve due and legitimate prosecutorial interests; (c) protection of the sentencing authority reserved to the judge." *Id.* *Ammidown* observed that

unopposed Rule 48(a) motions should ordinarily be granted. *Id.* But it preserved a district judge's responsibility to evaluate those motions where there are questions about whether dismissal serves "legitimate prosecutorial interests," and sentencing is underway. *Id.* *Ammidown* remains the law in this Circuit and district courts must follow it.

This Court's decision in *Fokker* likewise does not compel Judge Sullivan "to grant the government's motion to dismiss" automatically. *See* C.A. Order (May 21, 2020). Like *Ammidown*, *Fokker* did not arise in the Rule 48 context, but rather analogized to that rule in addressing district courts' authority to reject government motions to defer time under the Speedy Trial Act.

The DPA context informs *Fokker*'s holding. That case focused on a district court's interference with deciding whether to commence prosecution—a matter "at the core of the Executive's duty to see to the faithful execution of the laws." 818 F.3d at 741 (quotation omitted). Because those decisions "lie squarely within the ken of prosecutorial discretion," this Court concluded that courts have no power "to deny a prosecutor's Rule 48(a) motion to dismiss charges based on a disagreement with the prosecution's exercise of charging authority." *Id.* at 742.

As *Fokker* acknowledged, the separation-of-powers considerations may be different once cases move past "pending charges." *Id.* at 744. Indeed, *Fokker* expressly contrasted the issue it was resolving with "a court's review of a proposed plea agreement under Rule 11 of the Federal Rules of Criminal Procedure," which implicates "the Judiciary's traditional power over criminal *sentencing*." *Id.* at 745. While a court cannot reject a plea because of "mere disagreement" with "charging decisions," *id.*, decisions surrounding pleas involve "markedly different" considerations because they implicate the courts' Article III function: A plea is a request for the district court to "enter[] a judgment of *conviction*, which in turn carries immediate sentencing implications." *Id.* at 745–46. In other words, when the government presents a guilty plea, it asks the court to announce that there is a good faith basis to find that the defendant did what the government says he did, and punish him for it.

Fokker's and *Ammidown*'s analyses of plea considerations do not squarely address the separation of powers balance in this context. The government's request is not merely for the district court to enter an order accepting a plea, but to *dissolve* two findings of guilt by two different judges. *Cf. United States v. Robinson*, 587 F.3d 1122, 1133 (D.C. Cir. 2009) ("[I]it is no trifling matter to allow a defendant to withdraw a guilty plea '[a]fter [he] has

sworn in open court that he actually committed the crimes, after he has stated that he is pleading guilty because he is guilty, after the court has found a factual basis for the plea, and after the court has explicitly announced that it accepts the plea.'" (quoting *United States v. Hyde*, 520 U.S. 670, 676 (1997)). The government's request for dismissal here thus overlaps in time with "the sentencing authority reserved to the judge." *Ammidown*, 497 F.2d at 622. Indeed, the government's motion was only possible because Judge Sullivan deferred sentencing at Mr. Flynn's request several times.

That the separation of powers balance may be different here than in *Fokker* and *Ammidown* does not mean those decisions lack persuasive force, or that the district court can ignore them in exercising whatever limited discretion it has. The point is that the district court's consideration of the government's motion is consistent with Rule 48 and does not "def[y] this Court's binding precedent." Pet. 1. Especially where, as here, a case presents issues of first impression in the Circuit, the legal system benefits from allowing the district court to exercise its traditional role.

B. The Unique Facts Of This Case Raise Plausible Questions About The Presumption Of Regularity Afforded To Prosecutorial Decisionmaking.

The record before the district court raises at least a plausible question whether the central premise of *Fokker*'s deference to the government—the "presumption of regularity" that applies to prosecutorial decisions, *see* 818 F.3d at 741—could be overcome. While the district court may well conclude that there is insufficient basis to overcome the presumption, it serves neither the interests nor the appearance of justice to foreclose the district court from even considering that question.

The relevant facts are set forth in detail above. For several years, the government represented to the district court, across multiple court filings and appearances, that Mr. Flynn was guilty of making materially false statements. As recently as January of this year, the government maintained those representations. And Mr. Flynn repeatedly affirmed his guilt, under oath and penalty of perjury, despite being given multiple opportunities to disclaim it. It was not until this year that Mr. Flynn, and then the government, told the district court that its finding of guilt should be reversed and that the government's prior solemn representations were legally and factually untrue.

That the government filed a "lengthy motion and exhibits" supporting dismissal does not conclusively establish that it "acted properly." Pet. 21. The length of the government's motion suggests that its reversal was not an everyday occurrence. The circumstances of that filing are also unusual. It was signed by the Acting U.S. Attorney alone, with no line prosecutors joining; it featured no affidavits or declarations supporting its many new factual allegations; it was not accompanied by a motion to vacate the government's prior, contrary filings and representations; it cited minimal legal authority in support of its view on materiality; and it did not mention the March 2017 statements regarding Mr. Flynn's work for Turkey that were relevant conduct for his guilty plea and included in his statement of offense, but were unrelated to his January 2017 FBI interview.

Whether these circumstances could constitute "clear evidence" overcoming the "presumption of regularity," *Fokker*, 818 F.3d at 741, is a question that has not been fully briefed or decided in the district court. A finding that the "Government's later efforts to terminate the prosecution were … tainted with impropriety," *Rinaldi*, 434 U.S. at 30, cannot and should not be lightly made. For now, it suffices to say that the unusual developments in this case

provide at least a plausible "reason to question" the "bona fides" of the government's motion, *Fokker*, 818 F.3d at 747. As this Court's precedents envision, Judge Sullivan can—and arguably must—consider those issues before granting a motion to dismiss.

III. MANDAMUS IS NOT WARRANTED BECAUSE THIS COURT WOULD BENEFIT FROM JUDGE SULLIVAN'S CAREFUL EVALUATION OF THE CASE.

The Court should exercise its discretion to deny mandamus. *See Cheney*, 542 U.S. at 381. As just explained, one of the Rule 48 questions presented here raises substantial legal questions, and another is factbound. These are the types of questions suited for the "regular … process" of factual and legal development in the district court. *Id.* at 380–81.

A. Judge Sullivan Has Adopted A Sensible Process For Evaluating The Substantial Questions Presented Here.

The process Judge Sullivan has established, including the appointment of an amicus, will permit him to fully consider the issues, and will aid this Court as well if further review becomes necessary. The government and Mr. Flynn currently are aligned in support of dismissal, with nobody presenting the other side of the complex and important Rule 48 questions raised by that request. Because "[t]he Court cannot be an advocate," someone else must fill the void created by this breakdown in the adversarial process. *United States v. Saena*

Tech Corp., 140 F. Supp. 3d 11, 19 (D.D.C. 2015) (Sullivan, J.). In such circumstances, appellate courts often appoint an amicus to ensure sound decisionmaking. *See, e.g. Fokker*, 818 F.3d at 740; *Ammidown*, 497 F.2d at 618; *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 765 (2020); *Greenlaw v. United States*, 554 U.S. 237, 243 (2008); *see also Herring v. New York*, 422 U.S. 853, 862 (1975) (presentation of both sides of an argument is "[t]he very premise of our adversary system of criminal justice"); *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J., in chambers) (allowing amicus brief and noting that "opposing views promote[] sound decision making"). There is no principled reason to preclude district courts—which also exercise Article III power—from doing the same.

Indeed, district courts have appointed and invited amici in other criminal cases. In this district alone, numerous judges (including Judge Sullivan) have engaged in the practice.[4] Even a cursory review shows that other district

[4] *See, e.g.*, *United States v. Church*, Crim. No. 95-173, Dkt. 49 (D.D.C. Dec. 19, 1995) (Kessler, J.) (appointing ACLU "sua sponte … to participate in the pleadings on defendants' motion to dismiss" indictment); *United States v. Clarke*, Crim. No. 06-102, Dkt. 410 (D.D.C. Mar. 20, 2009) (Bates, J.) (inviting Federal Public Defender to file amicus brief regarding costs for Rule 15 depositions); *United States v. Jackson-White*, Crim. No. 13-91 (D.D.C. July 21, 2013) (Berman Jackson, J.) (minute order) (appointing Federal Public Defender "as an amicus curiae concerning the matters raised in the government's

courts accept amicus briefs in criminal matters as well.[5] These examples confirm Judge Sullivan's power to appoint an amicus here.

Contrary to Mr. Flynn's suggestion (Pet. 11), the local rules do not bar this practice. The district court's civil rules "govern all proceedings in the United States District Court for the District of Columbia" and *allow* for the participation of amici. *See* D.D.C. Local Civ. R. 1.1(a), 7(o). Even separate from those rules, "federal district courts possess the inherent authority to appoint *amici curiae*[.]" *In re App. of Fed. Bureau of Investigation for an Order*

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motion to correct sentence"); *United States v. Pitts*, Crim. No. 19-49 (D.D.C. July 30, 2019) (Sullivan, J.) (minute order) (appointing ethics counsel as amicus to address "appropriate referrals for discipline" of prosecutor for acknowledged misrepresentations); *United States v. Suggs*, Crim. No. 07-152 (D.D.C. Nov. 6, 2015) (Huvelle, J.) (minute order) (appointing Federal Public Defender as amicus to address government's contention that defendants lack standing to challenge certain evidence).

[5] *See, e.g.*, *United States v. Arpaio*, Crim. No. 16-1012, Dkt. 243 (D. Ariz. Oct. 4, 2017) (granting amicus briefing on scope of President's pardon power); *United States v. Matthews*, 11 F. Supp. 2d 656, 663 (D. Md. 1998) (evaluating amicus briefing on First Amendment implications of prosecution); *United States v. Mullet*, 868 F. Supp. 2d 618, 624 (N.D. Ohio 2012) (evaluating amicus briefing on intersection of Hate Crimes Prevention Act and Religious Freedom Restoration Act); *United States v. Pac. Gas & Elec. Co.*, Crim. No. 14-175, Dkt. 952 (N.D. Cal. Dec. 5, 2018) (inviting California Attorney General to submit amicus brief addressing potential criminal liability under state law); *United States v. Vargas*, Crim. No. 13-6025, Dkt. 55 (E.D. Wash. Oct. 18, 2013) (inviting Electronic Freedom Foundation to submit amicus brief to address defendant's motion to suppress).

Requiring the Prod. of Tangible Things, No. BR 13-158, 2013 WL 12335411, at *2 (FISA Ct. Dec. 18, 2013). *See also Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008) (same).

The Supreme Court's recent decision in *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020), does not call the practice into question. *See* Pet. 7–8. That case rejected the Ninth Circuit's effort to override the parties' adversarial presentation of issues by appointing three amici to address issues neither party contemplated. 140 S. Ct. at 1578. The Court did not question the use of appointed amici when the adversarial process breaks down because the parties are aligned. In fact, the Court's opinion contained an appendix of examples where it had adopted that approach. *Id.* at 1582–83.

There is also no merit to Mr. Flynn's implication (Pet. 29-30) that the district court's appointment of retired Judge Gleeson suggests he will rule against Mr. Flynn. Someone needs to fill the adversarial gap to ensure full consideration of the issues, and a former prosecutor and federal judge is well positioned to do so. In any event, Judge Sullivan's record shows that he will not blindly accept Judge Gleeson's recommendations. In a criminal case before Judge Sullivan, the government and defendants were aligned in support of a DPA, and no one was "taking the other side." *United States v. Saena Tech*

Corp., Crim. No. 14-66, Dkt. 38 at 39 (Nov. 14, 2014). Judge Sullivan appointed an amicus known for his skepticism of DPAs to address the district court's role in approving the agreement,[6] and then *rejected* the amicus's "too broad" arguments in ultimately agreeing with the government and defendant. *See Saena Tech*, 140 F. Supp. 3d at 34; *see also Fokker*, 818 F.3d at 747 (citing Judge Sullivan's decision with approval). Thus, Judge Sullivan's actions here are not a merits preview.

B. Denying Mandamus Facilitates Efficient Resolution Of This Case.

Denying mandamus also makes sense because it would allow this Court to consider all the legal issues presented by this case at once, rather than piecemeal, if such consideration is even necessary. Regardless how this Court resolves the Rule 48 issue, questions remain whether Mr. Flynn should be subject to any sanction pursuant to statute, the Federal Rules, and federal courts' inherent authority to discipline those who fail to tell the truth under oath and obstruct justice in the courtroom. *See* 18 U.S.C. §§ 401–402; Fed. R. Crim. P. 42; *Chambers v. NASCO, Inc.*, 501 U.S. 32, 41–44 (1991) (upholding court's

[6] *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853, 922, 936 (2007) (arguing that DPAs allow prosecutors to "step[] far outside of their traditional role" and "a federal judge need not accept a 'fait accompli' deferral agreement").

inherent authority to punish "acts which degrade the judicial system, including … misleading and lying to the Court" (quotations omitted)). This factbound inquiry involves well-established Article III powers, and the district court should be permitted to address it in the first instance.

The contempt power is "settled law" that "is essential to the administration of justice." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795 (1987). It springs from the court's Article III responsibility to protect its essential functions, including preserving the integrity of courts and the truth-seeking process. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994). Under this inherent power, "a court may issue orders, punish for contempt, vacate judgments obtained by fraud, conduct investigations as necessary to exercise the power, bar persons from the courtroom, assess attorney's fees, and dismiss actions." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 461 (4th Cir. 1993).

To be clear, a contempt finding or sanction against Mr. Flynn may prove unwarranted. If the representations in his January 2020 declaration are true, they present attenuating circumstances for his prior, contrary statements. But the nature and extent of Mr. Flynn's reversals under oath—from whether

he lied to the government in January and March 2017, to whether he was coerced into pleading guilty, misled by his former attorneys, or improperly dissuaded from withdrawing his guilty plea in 2018 when Judge Sullivan offered that option—raise questions that any judge should take seriously. They thus provide a basis for invoking the district court's authority to "conduct investigations as necessary." *Id.*[7]

* * *

Week after week, this Court addresses all manner of legal questions aided by factfinding and legal analysis from the able district judges in this Circuit. In this unusual case, one of those long-tenured judges appointed an amicus to enhance his ability to perform those precise tasks in the near future. Because our judicial system is premised on the notion that adversarial presentation of the issues leads to better decisions, and because no decisions have yet

[7] Contrary to Mr. Flynn's suggestion (Pet. 11–17), Judge Sullivan's appointment of an amicus to brief the contempt power is appropriate. Because contempt implicates core Article III powers, "Courts cannot be at the mercy of another Branch in deciding whether [contempt] proceedings should be initiated." *Young*, 481 U.S. at 796. That is why the Federal Rules explicitly authorize the appointment of a special prosecutor to investigate contempt. *See id.*; *see also* Fed. R. Crim. P. 42(a)(2). Judge Sullivan's amicus order is more restrained: It does not appoint Judge Gleeson to prosecute any contempt charge, but merely to address whether initiating a contempt proceeding here would be appropriate, and gives Mr. Flynn the last word on the question.

been made, the Court should holster the "potent weapon[]" of mandamus, *Will v. United States*, 389 U.S. 90, 107 (1967), and allow Judge Sullivan to evaluate the government's motion to dismiss in the first instance.

CONCLUSION

The petition should be denied.

Respectfully submitted.

By: /s/ Beth A. Wilkinson

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JUNE 1, 2020

CERTIFICATION OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies as follows:

1. Exclusive of the exempted portions provided in Fed. R. App. P. 32(f) and Cir. R. 32(e)(1), the brief contains 7,787 words in compliance with the length limitation in Fed. R. App. P. 21(d)(1).

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Century font.

/s/ Beth A. Wilkinson
BETH A. WILKINSON

DATED: JUNE 1, 2020

CERTIFICATE OF SERVICE

I, Beth A. Wilkinson, counsel for the Hon. Emmet G. Sullivan and a member of the Bar of this Court, certify that, on June 1, 2020, I electronically filed the foregoing with the Clerk using the Court's electronic filing system. As all participants in the case are registered with the Court's electronic filing system, electronic filing constitutes service on the participants. *See* Fed. R. App. P. 25(c)(2)(A); Cir. R. 25(f).

I further certify that all parties required to be served have been served.

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DATED: JUNE 1, 2020