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 A Writ Of Mandamus
To The U.S. District Court For The District Of Columbia

BRIEF FOR THE UNITED STATES

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The Constitution vests in the Executive Branch the power to decide when—and when not—to prosecute potential crimes. Exercising that Article II power here, the Executive filed a motion to dismiss the indictment, and petitioner consented. Despite that exercise of prosecutorial discretion, and the lack of any remaining Article III controversy between the parties, the district court failed to grant the motion and bring the case to a close. It instead appointed an amicus curiae to argue against dismissal and to consider additional criminal charges.

This Court should issue a writ of mandamus compelling dismissal. Federal Rule of Criminal Procedure 48(a) provides that "[t]he government may, with leave of court, dismiss an indictment." That language does not authorize a court to stand in the way of a dismissal the defendant does not oppose, and any other reading of the Rule would violate both Article II and Article III. Nor, under the circumstances of this case, may the district court assume the role of prosecutor and initiate criminal charges of its own. Instead of inviting further proceedings, the court should have granted the government's motion to dismiss. And given the court's infringement on the Executive's performance of its constitutional duties, a writ of mandamus is appropriate, as this Court held in similar circumstances in *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016).

STATEMENT

A. Factual background

Petitioner Michael Flynn served as a surrogate and advisor for then-candidate Donald J. Trump during the 2016 presidential campaign. In 2016, the Federal Bureau of Investigation began investigating petitioner as part of a larger investigation into whether individuals associated with President Trump's campaign were coordinating with the Russian government to interfere with the election. Doc. 198-3, at 2-3.

After several months, the FBI identified no "derogatory information" about petitioner and determined that he "was no longer a viable candidate" for investigation. Doc. 198-2, at 3-4. In early January 2017, the FBI stated in a draft internal memorandum that it was "closing [its] investigation" of petitioner. *Id.* at 5.

Around the same time, the FBI learned that petitioner and Sergey Kislyak, then Russia's ambassador to the United States, had spoken by telephone in late December, around the time that President Obama announced sanctions against Russia for election interference. Doc. 198-4, at 3; Doc. 198-6, at 4. The FBI later prepared transcripts of the relevant calls. Doc. 198-6, at 8, 13. When they spoke, petitioner asked Kislyak not to escalate tensions in response to the sanctions, and Kislyak later confirmed that Russia had taken the incoming

administration's position into account in determining its response. Doc. 4, at 3. FBI personnel considered whether petitioner had violated the Logan Act, 18 U.S.C. § 953, which prohibits U.S. citizens from trying to influence foreign governments in disputes with the United States. *See* Doc. 198-9, at 2. But that idea got little traction within the Department of Justice because there has never been a conviction under the Logan Act in its 200-year history and, regardless, communications by an incoming administration with foreign officials are not necessarily out of the ordinary. Doc. 198-4, at 4; Doc. 198-5, at 3, 10; Doc. 198-6, at 10-11.

On January 4, 2017, Peter Strzok, then FBI Deputy Assistant Director, learned that petitioner's file "serendipitously" had been left open. Doc. 198-8, at 2. Strzok instructed agents to "keep [the investigation] open for now." *Id.* In electronic messages, Strzok and Lisa Page, then an FBI attorney, expressed relief and commented that the FBI's "utter incompetence" in failing to timely close the file was actually "help[ing]" them. *Id.*

Approximately a week later, a news report indicated that petitioner and Kislyak had spoken on the day Russian sanctions were announced. *See* Doc. 198-5, at 3. A spokesperson for the President-Elect responded that petitioner's calls focused on logistics. *Id.* Two days later, the Vice President-Elect stated in a public news interview that he had spoken to petitioner and that petitioner's

conversation with Kislyak did not relate to sanctions. *Id.* FBI Director James Comey took the view that the FBI should not notify the incoming administration about the content of the conversations between petitioner and Kislyak. *Id.* at 5. The Acting Attorney General, the Director of National Intelligence, and the director of the Central Intelligence Agency disagreed, but the latter two ultimately backed off. *Id.*; Doc. 198-4, at 6.

On January 22, 2017, following the President's inauguration, petitioner was sworn in as National Security Advisor. Doc. 133-1, at 1. The next day, Comey directed two "experienced" FBI agents to interview petitioner. Doc. 198-6, at 7. Comey resolved that neither White House counsel nor anyone at the Justice Department would be notified in advance of the interview. *Id.*; Doc. 198-5, at 5-6. On the day of the interview, the Acting Attorney General decided "enough was enough" and called Comey to tell him that it was time to notify the White House about the substance of petitioner's calls. Doc. 198-5, at 5. When Comey returned the call, he told her that two agents were already on the way to interview petitioner. *Id.* The Acting Attorney General and others at the Department were "flabbergasted" that the FBI had decided to proceed without coordinating with the Department. Doc. 198-4, at 7.

Before the interview, FBI officials discussed whether to show petitioner the text of the relevant calls. In notes made to prepare for the discussion, FBI

Chief of Counterintelligence E.W. Priestap took the view that the FBI should "rethink" its decision not to show petitioner the text. Doc. 198-11. Priestap's notes observed that the FBI "regularly show[ed] subjects evidence with the goal of getting them to admit their wrongdoing." *Id.* In his notes, Priestap questioned whether the FBI's goal was getting the "[t]ruth/[a]dmission" or "get[ting] [petitioner] to lie, so we can prosecute him or get him fired?" *Id.* FBI leadership ultimately decided not to show petitioner the text. Doc. 198-6, at 8; Doc. 198-14, at 4. They also decided not to warn petitioner that lying to the FBI is a crime. Doc. 198-14, at 4.

FBI Deputy Director Andrew McCabe spoke by phone to petitioner, asking to have two agents "sit down" with him to hear about his conversations with Kislyak. Doc. 198-12. Petitioner noted that the FBI likely knew what was said in the calls because it "listen[s] to everything [the Russians] say." *Id.* McCabe indicated that he nevertheless wanted the interview to be done as "quickly, quietly and discre[et]ly as possible." *Id.* Petitioner agreed to meet alone with the agents that same day without involving the White House Counsel's Office. *Id.*

Less than two hours later, petitioner met with Strzok and a second agent at the White House. Petitioner was "relaxed," "unguarded," and "talkative." Doc. 198-14, at 4. He "clearly saw the FBI agents as allies." *Id.* The agents did

not record the interview, but took handwritten notes. Doc. 198-13, at 2-8. After returning to the FBI, the agents drafted an FD-302, the FBI's Interview Report form, summarizing the interview, and they continued to revise it thereafter. Doc. 198-7, at 2-6; *see* Doc. 198-8, at 4.

According to the final FD-302, when the agents asked petitioner whether he recalled any conversation with Kislyak in which he encouraged Kislyak not to "escalate the situation" in response to the sanctions, petitioner responded, "Not really. I don't remember. It wasn't, 'Don't do anything.'" Doc. 198-7, at 6. According to the FD-302, the agents asked petitioner whether he recalled a conversation in which Kislyak stated that Russia had taken the incoming administration's position into account when responding to the sanctions; petitioner stated that he did not recall such a conversation. *Id.* The agents' handwritten notes do not reflect that question being asked or petitioner's response. *See* Doc. 198-13, at 2-8.

The final FD-302 also reports that petitioner incorrectly stated that, in earlier calls with Kislyak, petitioner had not made any request about voting on a UN Resolution in a certain manner or slowing down the vote. Doc. 198-7, at 5. Petitioner indicated that the conversation, which took place on a day when he was calling many other countries, was "along the lines of where do you stand[] and what's your position." *Id.* The final FD-302 also states that

petitioner was asked whether Kislyak described any Russian response to his request and said that Kislyak had not, *id.*, although the agents' handwritten notes do not reflect petitioner being asked that question or giving that response. *See* Doc. 198-13, at 2-8.

After the interview, the agents agreed that petitioner "did not give any indicators of deception." Doc. 198-14, at 4. Both agents had the impression that petitioner "was not lying or did not think he was lying." *Id.* at 5. In their view, it was possible that petitioner really did not remember the substance of his calls with Kislyak. *See* Doc. 198-5, at 6. Comey later described the "two experienced agents" reporting that they "saw nothing that indicated to them that [petitioner] knew he was lying to them." Doc. 198-6, at 7-8. When Comey was asked on March 2, 2017, whether he believed that petitioner lied, he responded "I don't know. I think there is an argument to be made that he lied. It is a close one." *Id.* at 10.

Soon after the interview, Priestap, Strzok, and other senior FBI officials briefed individuals at the Department. Doc. 198-4, at 7. When the Department raised the issue of re-interviewing petitioner, the FBI was "pretty emphatic" that a re-interview was unnecessary. Doc. 198-5, at 6; *see* Doc. 198-4, at 7. Department officials briefed the White House, and the Department arranged to provide transcripts of petitioner's calls. Doc. 198-5, at 7-11; Doc. 198-6, at 9.

An internal Department memorandum indicates that, by late January 2017, the FBI advised the Department that it did not believe that petitioner was acting as a Russian agent. *See* Doc. 123, at 2. The President asked for petitioner's resignation on February 13. *See* Doc. 198-6, at 9.

Thereafter, new information emerged about essential participants in the investigation. Strzok was removed from the investigation due to apparent political bias and was later terminated from the FBI. The second interviewing agent was criticized by the Inspector General for his tactics in connection with the larger investigation. *See* Doc. 169, at 6-7. And McCabe was terminated after the Department of Justice determined that he lied under oath, including to FBI agents. Office of the Inspector General, U.S. Dep't of Justice, *A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe* 2 (Feb. 2018).

B. Procedural background

On November 30, 2017, the Special Counsel's Office filed a criminal information charging petitioner with a single count of making false statements in violation of 18 U.S.C. § 1001(a)(2). Doc. 1. The next day, petitioner pleaded guilty to that offense before the Honorable Rudolph Contreras. *See* Docs. 3, 4. The statement of the offense provided that petitioner "made materially false statements and omissions" that "impeded and otherwise had a material impact

on the FBI's ongoing investigation into the existence of any links or coordination between individuals associated with the [Trump] Campaign and Russia's efforts to interfere with the 2016 presidential election." Doc. 4, at 1-2. The case was subsequently reassigned to the Honorable Emmet G. Sullivan. Doc. 9.

The district court set a sentencing hearing for December 18, 2018. In pre-sentencing filings, the government agreed that petitioner had substantially cooperated, and that a probation-only sentence could be appropriate. Doc. 46, at 1. At the outset of the hearing, the court informed petitioner that it would conduct an "extension … of the plea colloquy." App. 6. The court asked petitioner to reaffirm his plea under oath. App. 8-11. On the advice of counsel, petitioner maintained his guilty plea and indicated that he was "ready to proceed to sentencing." App. 11, 14, 17.

The district court then addressed petitioner, stating that his offense "arguably … undermines everything this flag over here stands for … . Arguably, you sold your country out." App. 34. The court stated that it was "not hiding [its] disgust, [its] disdain for this criminal offense." *Id.* The court suggested that petitioner consider delaying the sentencing until after his cooperation was complete. App. 48. After conferring with counsel, petitioner requested a continuance. App. 47.

Petitioner subsequently retained new counsel. Doc. 88, at 2. He then filed a *Brady* motion, which the district court denied. Doc. 144, at 2-3. In January 2020, petitioner moved to withdraw his guilty plea, asserting ineffective assistance of prior counsel. Docs. 151, 154, 160. Petitioner also filed a motion to dismiss the case for government misconduct. Doc. 162.

On May 7, 2020, while those motions remained pending, the government moved to dismiss the case under Federal Rule of Criminal Procedure 48(a). The government first explained a court's "narrow" role in addressing a Rule 48(a) motion. Doc. 198, at 10 (quoting *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016)). The government then set out its reasons for the dismissal, explaining why it had concluded that continued prosecution would not serve the interests of justice. *Id.* at 12-20; *see* pp. 21-23, *infra*. Petitioner consented to the motion. Doc. 202.

A few days later, retired federal judge John Gleeson co-authored an article urging the district court to scrutinize the government's motion, including by appointing "an independent attorney to act as a 'friend of the court'" and provide for an adversarial inquiry. John Gleeson et al., *The Flynn Case Isn't Over Until the Judge Says It's Over*, Wash. Post (May 11, 2020), www.washingtonpost.com/opinions/2020/05/11/flynn-case-isnt-over-until-judge-says-its-over. On May 13, 2020, the court appointed Judge Gleeson as amicus curiae "to present arguments

in opposition to the government's Motion to Dismiss"; it also directed amicus to "address whether the Court should issue an Order to Show Cause why [petitioner] should not be held in criminal contempt for perjury." App. 77. Court-appointed amicus then indicated that he intends to inform the court about "any additional factual development" amicus may need "before finalizing [his] argument in opposition to the government's motion." Doc. 209, at 1.

The district court subsequently set a briefing schedule on the government's Rule 48(a) motion, providing for multiple briefs submitted by the court-appointed amicus, the government, and petitioner, as well as additional briefs from non-court-appointed amici, with oral argument scheduled for July 16, 2020. May 20, 2020 Order.

ARGUMENT

The All Writs Act empowers courts of appeals to issue writs of mandamus. 28 U.S.C. § 1651(a); *see Cheney v. U.S. District Court*, 542 U.S. 367, 380 (2004). In reviewing a mandamus petition, "[t]he threshold question" is whether the district court's ruling "constituted legal error"; if it did, "the remaining question is whether the error is the kind that justifies mandamus." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 756-757 (D.C. Cir. 2014). The answers to those questions are plain under *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016). In *Fokker*, this Court issued a writ of mandamus

to compel a district court to grant an unopposed motion to terminate a prosecution, in order to avoid "an unwarranted impairment of another branch in the performance of its constitutional duties." *Id.* at 750 (citation omitted). The Court should do the same here, for the same reason.

I. The District Court Should Have Granted The Government's Motion To Dismiss The Indictment

Under Articles II and III of the Constitution, the power to prosecute belongs to the Executive, not the Judiciary. Federal Rule of Criminal Procedure 48, read against the backdrop of that constitutional principle, required the district court to grant the government's motion to dismiss the indictment with prejudice because that motion was unopposed. At a minimum, it required the court to grant the motion under the circumstances of this case, notwithstanding petitioner's guilty plea.

A. The Constitution commits the power to prosecute to the Executive rather than the Judiciary

1. Article II provides that "[t]he executive Power shall be vested in a President," U.S. Const. art. II, § 1, cl. 1; that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States," § 2, cl. 1; and that the President "shall take Care that the Laws be faithfully executed," § 3. Taken together, those provisions vest the power to prosecute crimes in the Executive. *In re Aiken County*, 725 F.3d 255, 263 (D.C. Cir. 2013). The Supreme

Court thus has recognized that, as a general matter, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). This Court has likewise recognized that "[t]he power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws." *CCNV v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986). Notably, "[t]he Executive's charging authority embraces decisions about … whether to dismiss charges once brought." *Fokker*, 818 F.3d at 737.

A "corollary" of "[t]he Executive's exclusive authority" is that "neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals." *Aiken*, 725 F.3d at 263 (citation omitted). For example, in light of the executive power over prosecutions, the remedy for a selective prosecution based on impermissible considerations "is to dismiss the prosecution, not to compel the Executive to bring another prosecution," *id.* at 264 n.7; *see United States v. Armstrong*, 517 U.S. 456, 466-467 (1996); an agency's exercise of enforcement discretion is immune from judicial review under the Administrative Procedure Act, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); and "the refusal to prosecute cannot be the subject of judicial review," *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987).

2. Article III, meanwhile, provides that the federal courts may exercise only "judicial Power" over "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. A case or controversy is a "dispute between parties who face each other in an adversary proceeding." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937). And "an actual controversy must be extant at all stages of review." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974). It follows that, if the dispute between the parties comes to an end, the court's exercise of judicial power must end as well. For instance, if all parties to a civil case agree that the case should be dismissed, the stipulated dismissal "resolves all claims before the court" and "leav[es] [the court] without a live Article III case or controversy." *In re Brewer*, 863 F.3d 861, 869 (D.C. Cir. 2017). Likewise in a criminal case: if the United States and the defendant agree that the indictment should be dismissed, there remains no dispute between the parties, there is no need for a court to impose judgment against the defendant, and there is thus no basis for the further exercise of judicial power.

B. Rule 48, read against the backdrop of the Constitution, required the district court to grant the government's motion to dismiss because the motion was unopposed

1. Rule 48(a) provides: "The government may, with leave of court, dismiss an indictment, information, or complaint." "The principal object of [Rule 48(a)'s] 'leave of court' requirement" is "to protect a defendant against

prosecutorial harassment." *Rinaldi v. United States*, 434 U.S. 22, 29 n.15 (1977) (per curiam); *see Fokker*, 818 F.3d at 742. If a prosecutor could dismiss cases unilaterally, he could harass a defendant by "charging, dismissing, and recharging … over the defendant's objection." *Rinaldi*, 434 U.S. at 29 n.15. But that concern provides no basis for judicial intervention where a defendant consents to the dismissal, let alone where the government agrees to dismiss with prejudice to refiling. Indeed, reading Rule 48(a) to grant district courts a broader and more open-ended authority to override the Executive's prosecutorial decisions and to keep alive an otherwise moot controversy would violate Articles II and III—flouting the principle that courts should avoid adopting interpretations that raise serious constitutional problems. *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 226 (D.C. Cir. 2013).

Fokker confirms that Rule 48(a) does not grant courts such power. In *Fokker*, this Court considered whether a district court could reject a proposed deferred prosecution agreement "based on the court's view that the prosecution had been too lenient." 818 F.3d at 741. The Court observed that "[t]he Constitution allocates primacy in criminal charging decisions to the Executive Branch" and that "the Judiciary generally lacks authority to second-guess those Executive determinations, much less to impose its own charging preferences." *Id.* at 737. "Those settled principles," the Court emphasized, "counsel against

interpreting statutes and rules in a manner that would impinge on the Executive's constitutionally rooted primacy over criminal charging decisions." *Id.* at 742.

The Court then interpreted Rule 48(a) in light of those principles. *Fokker*, 818 F.3d at 742. It explained that Rule 48(a) allows a court to deny leave in order "'to protect a defendant against prosecutorial harassment,'" but that "the 'leave of court' authority gives no power to deny [dismissal] based on a disagreement with the prosecution's exercise of charging authority" or "to scrutinize and countermand the prosecution's exercise of its traditional authority over charging and enforcement decisions." *Id.* at 742-743 (citation omitted). "For instance, a court cannot deny leave of court because of a view that the defendant should stand trial notwithstanding the prosecution's desire to dismiss the charges." *Id.* at 742. Nor may a court deny leave on the ground that the prosecution has "fail[ed] to redress the gravity of the defendant's alleged conduct." *Id.* "The authority to make such determinations remains with the Executive." *Id.*; *see United States v. Scantlebury*, 921 F.3d 241, 250 (D.C. Cir. 2019) ("The 'leave of court' authority gives no power to a district court to deny [dismissal] based on a disagreement with the prosecution's exercise of charging authority.") (brackets and citation omitted); *In re United States*, 345 F.3d 450, 453 (7th Cir. 2003) (explaining that, under Rule 48(a), a court may "protect a

defendant from the government's harass[ment]," but may not properly deny a motion to dismiss when "the defendant ha[s] agreed to it").

2. Dicta in some cases have suggested a broader conception of a district court's power under Rule 48(a). This Court rejected those views in *Fokker*, and those views are in any event incorrect.

In *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973)—which involved a plea under Federal Rule of Criminal Procedure 11 rather than a motion to dismiss under Rule 48(a)—this Court stated that, even "when the defendant concurs in the dismissal," a district court "will not be content with a mere conclusory statement by the prosecutor that dismissal is in the public interest, but will require a statement of reasons and underlying factual basis." 497 F.2d at 620. The Court further stated that the district court has "the role of guarding against abuse of prosecutorial discretion" and, to that end, should grant a motion to dismiss only if it is "satisfied that the reasons advanced for the proposed dismissal are substantial." *Id.* Some other courts have similarly asserted that a district court may deny an unopposed motion to dismiss if it is "in bad faith or contrary to the public interest." *In re United States*, 345 F.3d at 453 (collecting cases); *see Rinaldi*, 434 U.S. at 29 n.15 (finding it "unnecessary to decide" whether some lower courts have acted impermissibly in asserting the power to deny unopposed motions to dismiss when "clearly contrary to the

public interest"). Those statements are all dicta; "[w]e are unaware … of any appellate decision that actually upholds a denial of a motion to dismiss a charge on such a basis." *In re United States*, 345 F.3d at 453.

This Court should not follow those dicta here. "The Constitution does place judicially enforceable limits on the powers of the nonjudicial branches of the government—for example, the government may not make its prosecutorial decisions on racially discriminatory grounds—but they are the limits found in the Constitution and thus do not include 'bad faith' and 'against the public interest.'" *In re United States*, 345 F.3d at 453. Nor do those judicially enforceable limits include a requirement to provide a "statement of reasons" that is not "conclusory." *Ammidown*, 497 F.2d at 620. Quite the opposite, any such requirement would—at least absent "clear evidence" of an unconstitutional motive, *Armstrong*, 517 U.S. at 465 (citation omitted)—contradict the principle that the Executive is entitled to "confidentiality" in its "decisionmaking process." *Association of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993) (quoting *Nixon*, 418 U.S. at 705-706).

In addition, the dicta rest on an unsound premise: that when the Executive decides no longer to prosecute a case, district courts have freewheeling and standardless authority to prevent what they regard as "abuse" of that prosecutorial discretion. *Ammidown*, 497 F.2d at 620. "The remedy for

… abuses of the power … to decline to prosecute comes in the form of public disapproval, congressional 'retaliation' on other matters, or ultimately impeachment in cases of extreme abuse"—not in the form of judicial override. *Aiken*, 725 F.3d at 266. Indeed, the dicta make no sense as a practical matter, because even if a district court were to deny an unopposed motion to dismiss with prejudice, it would have no effective mechanism to force the Executive to put on a case at trial against its will.

The dicta also contradict more recent decisions of the Supreme Court. Since this Court decided *Ammidown* in 1973, the Supreme Court has explained that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case," *Nixon*, 418 U.S. at 693; that "the decision of a prosecutor in the Executive Branch not to indict" is "the special province of the Executive Branch," *Chaney*, 470 U.S. at 832; that "the refusal to prosecute cannot be the subject of judicial review," *Locomotive Eng'rs*, 482 U.S. at 283; and that the exercise of "a prosecutor's discretion" involves "the performance of a core executive constitutional function," *Armstrong*, 517 U.S. at 464-465. In light of those intervening decisions, this Court in *Fokker* read *Ammidown* to mean that "courts generally *lack* authority to second-guess the prosecution's constitutionally rooted exercise of charging discretion." 818 F.3d at 750 (citing *Ammidown*, 497 F.2d at 621-622) (emphasis added).

C. At a minimum, Rule 48 required the district court to grant the motion to dismiss under the circumstances of this case

1. Even assuming that a district court may ever deny an unopposed motion to dismiss, it may do so only in extraordinary circumstances. The Supreme Court has explained that, even in those few areas where a federal court may review a decision whether to prosecute, the court must apply a "presumption of regularity," presuming that prosecutors "have properly discharged their official duties" unless "clear evidence" shows otherwise. *Armstrong*, 517 U.S. at 464 (citation omitted). This Court likewise has emphasized that "'judicial authority is … at its most limited' when reviewing the Executive's exercise of discretion over charging determinations." *Fokker*, 818 F.3d at 741.

Other courts of appeals agree that any authority a district court may have to deny an unopposed motion to dismiss is limited. Some have treated Rule 48(a) as a purely procedural requirement—"a '[s]unshine' provision" that requires the prosecution to provide reasons for its decision, but that grants the court no "substantive" authority to review the adequacy of those reasons. *In re Richards*, 213 F.3d 773, 789 (3d Cir. 2000). Others have stated that "any authority a court might have to deny a Rule 48(a) motion would be limited to cases in which dismissal is 'clearly contrary to manifest public interest.'" *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 141 (2d Cir. 2017) (citation

omitted). Courts "that have elucidated this 'public interest' test have stressed how 'severely cabined' it is, 'equat[ing] a dismissal that is clearly contrary to the public interest with one in which the prosecutor appears motivated by bribery, animus towards the victim, or a desire to attend a social event rather than trial.'" *Id.* (citation omitted). If a prosecutor "accepts a bribe" or prefers "to go on vacation rather than conduct a trial," his actions would suggest that he "is acting alone rather than at the direction or with the approval of the Justice Department." *In re United States*, 345 F.3d at 454.

2. Even if they applied, those standards would not allow a Rule 48 denial in these circumstances. The Rule 48(a) motion here represents the authoritative position of the Executive Branch, and moreover it provides a facially adequate explanation for the Executive's decision on several alternative grounds. The district court and court-appointed amicus therefore may not conduct evidentiary proceedings based on speculation about the government's motives.

In its motion, the government first explained that, after "an extensive review and careful consideration," it had determined that continued prosecution of the case would "not serve the interests of justice." Doc. 198, at 1. It explained that record materials could be taken to suggest that the FBI "was eager to interview [petitioner] irrespective of any underlying investigation" and that the

interview was undertaken predominantly "to elicit those very false statements and thereby criminalize [petitioner]." *Id.* at 16-17. The Executive Branch is entitled to determine that, based on the circumstances surrounding the interview, it can no longer make the "policy judgment" that continued prosecution serves a substantial federal interest. *Id.* at 2 (quoting U.S. Dep't of Justice, *Justice Manual* § 9-27.001 (2020)); *see Fokker*, 818 F.3d at 743.

The government also explained that, "mindful of the high burden to prove every element of [the] offense beyond a reasonable doubt," it no longer believes it could secure a conviction at trial. Doc. 198, at 2. Although petitioner previously pleaded guilty, it is Justice Department policy that prosecutions should not be initiated—and thus should not be continued—"unless the attorney for the government believes that the admissible evidence is sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact." *Justice Manual* § 9-27.200 cmt. The government expressed concern specifically about its ability to prove materiality. The government obtained petitioner's plea on the theory that his "false statements and omissions impeded and otherwise had a material impact on the FBI's ongoing investigation into the existence of any links or coordination between individuals associated with the [Trump] Campaign and Russia's efforts to interfere with the 2016 presidential election." Doc. 4, at 1-2. But the government identified substantial evidence that neither the truthful

information nor the fact of any false statement was significant to that investigation, Doc. 198, at 13-18 & n.6, and the FBI concluded shortly after the interview that petitioner was not an agent of Russia, *see* p. 8, *supra*. The government explained that it doubted whether it should attempt to prove to a jury that the information was nevertheless objectively significant. Doc. 198, at 17.

After comprehensive review, the government was also concerned that it would be unable to prove beyond a reasonable doubt that petitioner willfully made false statements. Doc. 198, at 18-20. The government determined that the foundational evidence of willful falsity would have had major weaknesses at trial in light of the interviewing agents' own doubts about whether petitioner was lying, the equivocal nature of some of the critical statements in his interview, and substantial impeaching material for the key witnesses. *See* pp. 2-8, *supra*. The government's judgment about the underlying strength of the case, and its decision not to rely on the plea, are "particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607 (1985). And just as in *Rinaldi*, where the district court was required to grant a postconviction Rule 48(a) motion, *see* 434 U.S. at 32, the government's motion here applied an established charging policy.

Simply put, the district court has no authority to reject the Executive's conclusion that those reasons justify a dismissal of the charges. The government's detailed explanation is far more than "a mere conclusory statement," *Ammidown*, 497 F.2d at 620, amply satisfying any procedural requirement that the government provide reasons for its decision to end a prosecution. There also is no evidence at all—much less the kind of clear evidence needed to overcome the presumption of regularity—that the prosecutors were motivated by bribery or similar considerations. Because this case involves "the prosecution's constitutionally rooted exercise of charging discretion," it is a "usurpation of judicial power" to second-guess it. *Fokker*, 818 F.3d at 750 (citation omitted).

D. The timing of the government's motion cannot justify denying the motion

Amici here and proposed amici below have principally argued that the district court may deny the motion to dismiss because the government filed it after petitioner had pleaded guilty. *E.g.*, Watergate Prosecutors Br. 7; D. Ct. Separation of Powers Scholars Br. 17-18 (Scholars Br.). But nothing in the text of Rule 48(a) suggests that the Executive's authority to obtain dismissal expires or shrinks upon the entry of a guilty plea. Quite the contrary, it is "well established that the government may move to dismiss even after a complaint has turned into a conviction." *United States v. Hector*, 577 F.3d 1099, 1101 (9th Cir.

2009); *see, e.g.*, *United States v. Gonzalez*, 58 F.3d 459, 460 (9th Cir. 1995) (dismissal after conviction); *Rinaldi*, 434 U.S. at 25 (dismissal after conviction and sentencing); *Bronsozian v. United States*, No. 19-6220, 2020 WL 1906543, at *1 (U.S. Apr. 20, 2020) (dismissal after conviction, sentencing, and affirmance by the court of appeals).

Amici argue that, under *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the Executive has no power to "command the federal courts to reopen final judgments." Scholars Br. 23 (brackets and citation omitted). But "judgment in a criminal case means sentence." *Berman v. United States*, 302 U.S. 211, 212 (1937). And a judgment becomes "final" for purposes of the separation of powers only after "all appeals have been forgone or completed." *Plaut*, 514 U.S. at 227. Here, the district court has not yet pronounced sentence, so there is not even a judgment, much less one that has become final after the exhaustion of appeals. Far from authorizing further proceedings at the district court's behest, the Constitution requires the court to honor the Executive's unopposed decision to drop the pending charges, and precludes the case from proceeding to sentencing in the absence of a live controversy.

Amici also argue that dismissal at this stage would interfere with the district court's authority to "decide what sentence to impose." Scholars Br. 13. But a district court lacks the authority to impose a criminal sentence after an

unopposed motion to dismiss with prejudice, just as it lacks the authority in a civil case to award damages after the plaintiff moves to dismiss. Thus, in *Fokker*, this Court explained that "the Judiciary's traditional authority over sentencing decisions" could not justify judicial interference with "the Executive's traditional power over charging decisions." 818 F.3d at 746. And in *In re United States*, the Seventh Circuit directed a district court to grant a motion to dismiss, notwithstanding the court's belief that "the government was trying to circumvent [its] sentencing authority" through dismissal. 345 F.3d at 452.

II. The District Court Erred When, Instead Of Granting The Motion To Dismiss, It Entered An Order Appointing An Amicus Curiae And Contemplating Its Own Prosecution

Rather than dismiss the indictment, the district court entered an order appointing an amicus (1) to present arguments against dismissal and (2) to address whether the court "should issue an Order to Show Cause why [petitioner] should not be held in criminal contempt for perjury." App. 77. The failure to dismiss the indictment was error. And the court's efforts to pursue additional charges of contempt compounded its error. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (reaffirming "the principle of party presentation"). When, like many other defendants, petitioner pleaded guilty but later asserted his innocence, he did not expose himself to prosecution for criminal contempt of court. The court lacks authority to bring its own

prosecution of petitioner, for two independent reasons. First, any false statements in this context are not contempt under 18 U.S.C. § 401. Second, even if petitioner's conduct were punishable as contempt, the authority to prosecute him would lie with the Executive, not the court.

A. False statements in a plea colloquy or motion to withdraw are not contempt under 18 U.S.C. § 401

1. Congress enacted the Act of March 2, 1831, ch. 99, 4 Stat. 487, to "drastically" "curtail the range of conduct which courts could punish as contempt." *In re Michael*, 326 U.S. 224, 227 (1945). The current contempt statute, 18 U.S.C. § 401, "is based on [the] Act passed in 1831." *In re McConnell*, 370 U.S. 230, 233 (1962). Section 401 provides in pertinent part that "[a] court of the United States shall have power to punish by fine or imprisonment … such contempt of its authority" as "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." 18 U.S.C. § 401(1).

"[O]bstruction" is an "element [that] must clearly be shown in every case where the power to punish for contempt is exerted." *Ex parte Hudgings*, 249 U.S. 378, 383 (1919); *see In re Brown*, 454 F.2d 999, 1005 (D.C. Cir. 1971) ("Absent any evidence to warrant a finding of an actual obstruction of the administration of justice, there can be no violation of the first subdivision of Section 401."). In the context of Section 401(1), the Supreme Court has construed the term "obstruction" narrowly, "against the background rule that the contempt power

was to be confined to the least possible power adequate to protect the administration of justice against immediate interruption of its business." *United States v. Dunnigan*, 507 U.S. 87, 93-94 (1993) (internal quotation marks and citations omitted). The Court has therefore held that Section 401(1) requires a showing of "actual obstruction," *McConnell*, 370 U.S. at 236—for instance, disruption in the courtroom or interference with court proceedings, *Nye v. United States*, 313 U.S. 33, 48, 52 (1941). "[O]bstruction" thus has a much narrower meaning in this context than in others. *Dunnigan*, 507 U.S. at 93-94.

In addition, Section 401(1) requires a showing of "contumacious intent," *Brown*, 454 F.2d at 1007—namely, an "inten[t] to obstruct the administration of justice," *In re Sealed Case*, 627 F.3d 1235, 1238 (D.C. Cir. 2010). "The foundation for the criminal contempt power is the need to protect the judicial process from wilful impositions." *Brown*, 454 F.2d at 1006. Accordingly, this Court has recognized that "a degree of intentional wrongdoing is an ingredient of the offense of criminal contempt." *Id.*

2. Petitioner pleaded guilty to making false statements to the FBI but later moved to withdraw his plea, asserting his innocence. The suggestion of "perjury" is apparently based on statements petitioner made, either in pleading guilty or in moving to withdraw his plea. App. 77. Even assuming that petitioner committed perjury, however, he cannot be prosecuted for contempt

under Section 401(1). That is because perjury, in itself, does not satisfy either the "obstruction" or the "intent" elements of contempt under Section 401(1).

a. The Supreme Court has repeatedly affirmed that "perjury alone does not constitute an 'obstruction' which justifies exertion of the contempt power." *Michael*, 326 U.S. at 228; *see Dunnigan*, 507 U.S. at 93; *Clark v. United States*, 289 U.S. 1, 11 (1933); *Hudgings*, 249 U.S. at 383-384. The Court has acknowledged that perjury "may produce a judgment not resting on truth," but has explained that perjury alone does not "obstruct or halt the judicial process" within the meaning of Section 401(1). *Michael*, 326 U.S. at 227. That is because "the ordinary task of trial courts is to sift true from false testimony." *Dunnigan*, 507 U.S. at 93. Thus, "the problem caused by simple perjury [i]s not so much an obstruction of justice as an expected part of its administration." *Id.*

That is not to say that perjury must go unpunished. There is a separate federal criminal statute—enforced by the Executive—prohibiting perjury. 18 U.S.C. § 1621. Perjury also can warrant an increased sentence. *See* U.S.S.G. § 3C1.1. But perjury, without more, simply is not criminal contempt under Section 401(1). *Hudgings*, 249 U.S. at 384.

b. Petitioner also cannot be prosecuted for contempt because there is no evidence of "contumacious intent." *Brown*, 454 F.2d at 1007. Even assuming that petitioner had the intent to commit perjury, that would not establish that he

had the "inten[t] to obstruct the administration of justice." *Sealed Case*, 627 F.3d at 1238. There is no indication that petitioner pleaded guilty and then moved to withdraw his plea as "part of some greater design to interfere with judicial proceedings." *Dunnigan*, 507 U.S. at 93. Rather, the record shows that petitioner—like other defendants who enter pleas they later seek to withdraw—pleaded guilty with the intent to resolve the allegations against him on the best terms he thought possible at the time. Doc. 160-23, at 8-9. Our adversarial system treats plea colloquies and later motions to withdraw as an accepted part of normal judicial proceedings. Fed. R. Crim. P. 11(b), (d). An intent to acquiesce in the prosecution's charges, even falsely, is not an intent to interfere with judicial proceedings themselves for purposes of contempt under Section 401(1).

B. Even if petitioner committed criminal contempt, the authority to prosecute him would lie with the U.S. Attorney, not the district court

As explained above, the Constitution vests the power to prosecute crimes in the Executive. To the extent that courts may exercise such power at all, it is only as "part of the judicial function." *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 795 (1987). Thus, even if petitioner committed criminal contempt, the district court could initiate its own prosecution of him only if

doing so were a valid exercise of "[t]he judicial Power." U.S. Const. art. III, § 1; *see Young*, 481 U.S. at 800 n.10.

Such a prosecution would not be a valid exercise of the judicial power here. The judicial power authorizes a court to initiate criminal-contempt proceedings—and to appoint a private attorney to prosecute the contempt—only when necessary to "vindicate its own authority without complete dependence on other Branches." *Young*, 481 U.S. at 796. This case does not fall within that narrow exception. Even if petitioner's conduct constituted contempt, prosecuting that conduct would not be necessary to allow the district court to function. The court thus has no authority to initiate its own prosecution of petitioner or appoint a private attorney to prosecute him. It erred in doing anything other than dismissing the indictment.*

III. A Writ Of Mandamus Is Appropriate And Necessary Relief In Light Of The District Court's Unprecedented Order

A writ of mandamus is a "drastic and extraordinary remedy." *Cheney*, 542 U.S. at 380. "Before a court may issue the writ, three conditions must be satisfied: (i) the petitioner must have 'no other adequate means to attain the

* The district court's order also refers to Federal Rule of Criminal Procedure 42. App. 77. Rule 42, however, addresses only "the manner of exercising" the power conferred by Section 401(1). *Sacher v. United States*, 343 U.S. 1, 6 (1952). It neither expands the definition of contempt nor provides authorization for initiating criminal-contempt proceedings. *See Young*, 481 U.S. at 793-794.

relief he desires'; (ii) the petitioner must show that his right to the writ is 'clear and indisputable'; and (iii) the court 'in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.'" *Fokker*, 818 F.3d at 747 (citation omitted).

In *Fokker*, this Court issued a writ of mandamus compelling a district court to grant an unopposed motion to dismiss charges in accordance with a deferred prosecution agreement. 818 F.3d at 747-750. The Court explained that the mandamus petitioner—there, the government—lacked adequate alternative means to obtain relief, because "interlocutory appeal [wa]s unavailable, and appeal after final judgment" would have been "inadequate." *Id.* at 747. The Court further explained that the right to the writ was "'clear and indisputable,'" because "numerous decisions of the Supreme Court and this court made clear that courts generally lack authority to second-guess the prosecution's constitutionally rooted exercise of charging discretion." *Id.* at 747, 750 (citation omitted). Finally, the Court found that mandamus was appropriate because the district court's disagreement with dismissal constituted "an unwarranted impairment of another branch in the performance of its constitutional duties." *Id.* at 750 (quoting *Cheney*, 542 U.S. at 390).

In *In re United States*, the Seventh Circuit similarly issued a writ of mandamus where a district court denied an unopposed motion to dismiss

charges and instead appointed a special prosecutor to continue the prosecution. 345 F.3d at 454. The court explained that "[t]he historic and still the central function of mandamus is to confine officials within the boundaries of their authorized powers." *Id.* at 452. "[I]n our system of criminal justice," the court continued, "the authorized powers of federal judges do not include the power to prosecute crimes." *Id.* The court accordingly "d[id] not think that there can be much doubt that" mandamus was appropriate. *Id.*

For the same reasons that the mandamus factors were met in *Fokker* and *In re United States*, those factors are met here. The only distinction between the cases is that, in *Fokker* and *In re United States*, the district court had entered an order denying the motion, while here the district court has entered an order providing for further proceedings and contemplating additional, court-initiated criminal charges. That distinction makes no legal difference. This Court has emphasized the "settled constitutional understandings under which authority over criminal charging decisions resides fundamentally with the Executive, *without the involvement of—and without oversight power in—the Judiciary*." *Fokker*, 818 F.3d at 741 (emphasis added). Courts have "no power" under Rule 48(a) "to *scrutinize* and countermand the prosecution's exercise of its traditional authority over charging and enforcement decisions." *Id.* at 742-743 (emphasis added). Indeed, the threat of intrusive judicial proceedings and criminal

charges—and potentially even evidentiary proceedings if the court-appointed amicus has his way—only makes the separation-of-powers problem worse. The district court plans to subject the Executive's enforcement decision to extensive judicial inquiry, scrutiny, oversight, and involvement. Under the Supreme Court's and this Court's precedents, it is clear and indisputable that the district court has no authority to embark on that course.

CONCLUSION

This Court should issue a writ of mandamus directing the district court to grant the government's motion under Rule 48(a) to dismiss the indictment.

Respectfully submitted,

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JUNE 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 21(d)(1) because it contains 7,790 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word in Calisto MT 14-point font, a proportionally spaced typeface.

/s/ Jocelyn Ballantine
JOCELYN BALLANTINE

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2020, I electronically filed the foregoing brief with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jocelyn Ballantine
JOCELYN BALLANTINE

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), respondent hereby states as follows:

(A) Parties, Intervenors, and Amici. The parties appearing before the district court are petitioner Michael T. Flynn; respondent the United States, appearing by and through the United States Attorney's Office in and for the District of Columbia; and amicus John Gleeson. Covington & Burling LLP is an interested party in district court. The parties appearing before this Court are petitioner Michael T. Flynn; respondent the United States; and respondent the Hon. Emmet G. Sullivan.

Amici before this Court are: Ohio; Alabama; Alaska; Arkansas; Florida; Georgia; Indiana; Louisiana; Mississippi; Missouri; Montana; Oklahoma; South Carolina; Texas; Utah; West Virginia; Lawyers Defending American Democracy, Inc.; Nick Akerman; Richard Ben-Veniste; Richard J. Davis; Carl B. Feldbaum; George T. Frampton, Jr.; Kenneth S. Geller; Gerald Goldman; Stephen E. Haberfeld; Henry L. Hecht; Paul Hoeber; Philip A. Lacovara; Paul R. Michel; Robert L. Palmer; Frank Tuerkheimer; Jill Wine-Banks; Roger M. Witten; Hon. Mark W. Bennett (Ret.); Hon. Bruce D. Black (Ret.); Hon. Gary A. Feess (Ret.); Hon. Jeremy D. Fogel (Ret.); Hon. William Royal Furgeson, Jr. (Ret.); Hon. Nancy Gertner (Ret.); Hon. James T. Giles (Ret.); Hon. Thelton E. Henderson (Ret.); Hon. Faith S. Hochberg (Ret.); Hon. Richard J. Holwell

(Ret.); Hon. Carol E. Jackson (Ret.); Hon. D. Lowell Jensen (Ret.); Hon. George H. King (Ret.); Hon. Timothy K. Lewis (Ret.); Hon. John S. Martin (Ret.); Hon. A. Howard Matz (Ret.); Hon. Carlos R. Moreno (Fmr.); Hon. Stephen M. Orlofsky (Ret.); Hon. Marilyn Hall Patel (Ret.); Hon. Layn R. Phillips (Fmr.); Hon. Shira A. Scheindlin (Ret.); Hon. Fern M. Smith (Ret.); Hon. Thomas I. Vanaskie (Ret.); Hon. T. John Ward (Ret.); John M. Reeves; the New York City Bar Association; Edwin Meese III; and the Conservative Legal Defense and Education Fund.

(B) Rulings Under Review. The rulings at issue in this mandamus proceeding are:

(1) The district court's failure to grant the government's motion to dismiss, filed on May 7, 2020, Doc. 198.

(2) The district court's May 12, 2020 order regarding amicus participation. That ruling is not reported, but is included in the appendix at App. 75.

(3) The district court's May 13, 2020 order appointing amicus curiae, Doc. 205. That ruling is not reported, but is included in the appendix at App. 77-78.

(4) The district court's May 18, 2020 order granting amicus pro hac vice status. That ruling is not reported.

(C) Related Cases. This case has not previously been before this Court or any other court for appellate review. Respondent is unaware of any related case involving substantially the same parties and the same or similar issues.

/s/ *Jocelyn Ballantine*
JOCELYN BALLANTINE