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

UNITED STATES' RESPONSE TO THE PETITION FOR REHEARING EN BANC

JEFFREY B. WALL
Acting Solicitor General

BRIAN C. RABBITT
Acting Assistant Attorney General

HASHIM M. MOOPPAN
Counselor to the Solicitor General

ERIC J. FEIGIN
Deputy Solicitor General

FREDERICK LIU
VIVEK SURI
Assistants to the Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

MICHAEL R. SHERWIN
Acting United States Attorney

KENNETH C. KOHL
Acting Principal Assistant United States Attorney

JOCELYN BALLANTINE
Assistant United States Attorney
555 Fourth Street, NW, Room 11-858
Washington, D.C. 20530
(202) 252-7252

TABLE OF CONTENTS

Page

BACKGROUND 1

ARGUMENT 4

I. The Panel's Interpretation Of Rule 48 Does Not Warrant Rehearing En Banc 4

II. The Panel's Application Of Mandamus Standards Does Not Warrant En Banc Review 11

III. The Rehearing Petition Is Procedurally Improper 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases:

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) 4

Aiken County, In re, 725 F.3d 255 (D.C. Cir. 2013) 4

Bond v. United States, 564 U.S. 211 (2011) 14

Boston's Children First, In re, 244 F.3d 164 (1st Cir. 2001) 16

Cheney v. U.S. District Court, 542 U.S. 367 (2004) 11, 14

Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003) 14

FEC v. NRA Political Victory Fund, 513 U.S. 88 (1994) 16

Heckler v. Chaney, 470 U.S. 821 (1985) 9

Hollingsworth v. Perry, 570 U.S. 693 (2013) 15

ICC v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270 (1987) 7, 9

Ligon v. City of New York, 736 F.3d 166 (2d Cir. 2013) 16

Real v. Yagman, 484 U.S. 963 (1987) 16

Richards, In re, 213 F.3d 773 (3d Cir. 2000) 9

**Rinaldi v. United States*, 434 U.S. 22 (1977) 6, 7, 10

Steffel v. Thompson, 415 U.S. 452 (1974) 4

United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973) 7, 8

United States v. Armstrong, 517 U.S. 456 (1996) 6

United States v. Carrigan, 778 F.2d 1454 (10th Cir. 1985) 9, 10

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES—Continued

Page

**United States v. Fokker Servs. B.V.*, 818 F.3d 733 (D.C. Cir. 2016) 3, 4, 5, 7, 8, 9, 11, 13

United States v. Hamm, 659 F.2d 624 (5th Cir. Unit A Oct. 1981)..... 10

United States v. Nixon, 418 U.S. 683 (1974) 4, 9

United States v. Providence Journal Co., 485 U.S. 693 (1988) 16

United States Court of Int'l Trade v. United States, 534 U.S. 1117 (2002) 16

**United States*, *In re*, 345 F.3d 450 (7th Cir. 2003) 5, 6, 9, 11

Wayte v. United States, 470 U.S. 598 (1985) 13

Constitution, Statutes, Regulation, and Rules:

*U.S. Const. art. II..... 4

*U.S. Const. art. III 4, 15

U.S. Const. amend. V (Due Process Clause) 15

18 U.S.C. § 1001(a)(2)..... 2

28 U.S.C. § 516..... 16

28 U.S.C. § 518..... 16

28 C.F.R. § 0.20..... 16

Fed. R. App. P. 21(a) 14, 15

Fed. R. App. P. 21(b)(4) 16

Fed. R. App. P. 21 advisory committee's note to 1996 amendments 15

Fed. R. App. P. 35(a) 10

Fed. R. App. P. 35(b) 15

TABLE OF AUTHORITIES—Continued

Page

Fed. R. Crim. P. 11 8

Fed. R. Crim. P. 48 ..... 3, 6, 7, 8, 10, 11

Fed. R. Crim. P. 48(a) 2, 4, 6, 7, 9, 13

In this case, the panel followed established precedent from this Court and the Supreme Court to stop an intrusive process that would usurp the core executive power to decide whether to continue a prosecution. Both this and another circuit have granted mandamus in similar circumstances. In response, the district judge—an officer who would not normally be an interested party—took the extraordinary step of filing a petition in his own name seeking rehearing en banc. That petition only underscores that no case or controversy exists between the actual parties—the government and the defendant—and that any continuation of the criminal proceedings would transform them into a judicial, rather than executive, prosecution. As far as the government is aware, only one district judge has ever before filed a petition for rehearing en banc in a mandamus case, and that petition was denied. This Court should follow the same course here.

BACKGROUND

This case arises out of the government's decision to dismiss the prosecution of petitioner Michael Flynn, a former national security advisor to President Trump. In January 2017, when Flynn was serving on the President-Elect's transition team, the FBI learned of calls between Flynn and Russian ambassador Sergey Kislyak, which encouraged Russia to modulate its response to sanctions imposed by President Obama. The FBI, which had transcripts of

the relevant calls, interviewed Flynn about the calls without notifying Department leadership overseeing the matter and without warning Flynn that he was under investigation or that false statements were illegal. Flynn's description of the calls was inaccurate in several respects. But the interviewing agents did not ask him about those inconsistencies, and both they and higher-ups at the FBI doubted that Flynn was willfully lying. The FBI concluded shortly after the interview that Flynn was not an agent of Russia. *See* U.S. Br. 1-8.

In 2017, the Special Counsel's Office charged Flynn with making false statements in violation of 18 U.S.C. § 1001(a)(2), and Flynn pleaded guilty in a negotiated plea deal. Flynn subsequently obtained new counsel and, earlier this year, moved to withdraw his guilty plea and to dismiss the information. After reviewing the case, including newly available materials, the government determined that dismissal was appropriate and filed a Rule 48(a) motion to dismiss. The district court appointed retired federal judge John Gleeson, who had authored an op-ed expressing opposition to the government's motion, to serve as amicus curiae to present arguments "in opposition" to the motion. App. 77. The court set a briefing schedule with multiple rounds of briefing. Judge Gleeson subsequently submitted a 73-page brief, relying on extra-record factual materials and questioning the government's application of the law, the strength

of its case, its internal deliberations, and its motives. *See* U.S. Br. 9-11; D. Ct. Doc. 225.

Shortly after the appointment, Flynn sought mandamus from this Court. Given that filing, the government supported his request without filing its own separate petition, participating in briefing and argument to the same extent as a separate petitioner. The Court granted mandamus. Relying on this Court's decision in *United States v. Fokker Services B.V.*, 818 F.3d 733 (2016), the panel explained that the Executive has broad authority over decisions to dismiss pending criminal charges and that the judiciary's role under Rule 48 is limited to "extraordinary cases." Op. 5 (citation omitted). Because this case did not present such extraordinary circumstances, and because the particular process envisioned by the district court would result in "specific harms to the exercise of the Executive Branch's exclusive prosecutorial power" and "usurp[]" core executive authority, the panel held that mandamus was warranted. Op. 8, 19.

Judge Wilkins dissented. In his view, mandamus was not warranted in these circumstances, on the theory that the petition was premature and that the separation-of-powers concerns should not be considered because the government had not separately petitioned for mandamus. Dissenting Op. 1-19. Judge Wilkins also resisted the majority's determination that *Fokker* governs this case, taking the view that its "sweeping" statements about executive authority

to dismiss prosecutions were "dicta" that should not be "b[i]nd[ing]" on the Court. *Id.* at 3-4.

The district court stayed proceedings. The district judge subsequently filed an unsolicited petition for rehearing en banc.

ARGUMENT

I. The Panel's Interpretation Of Rule 48 Does Not Warrant Rehearing En Banc

Under Article II, "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). In particular, the Executive has the "indubitable" power to "direct that the criminal be prosecuted no further." *In re Aiken County*, 725 F.3d 255, 263 (D.C. Cir. 2013) (opinion of Kavanaugh, J.) (citation omitted). Meanwhile, under Article III, a court may exercise "judicial Power" only over an "actual controversy," *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974)—*i.e.*, a live "dispute between parties who face each other in an adversary proceeding," *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937). Once the prosecution and the defense agree that a case should come to an end, there no longer remains a case or controversy over which a court may exert judicial power.

Rule 48(a) provides that "[t]he government may, with leave of court, dismiss an indictment, information, or complaint." In *United States v. Fokker*

Services B.V., 818 F.3d 733 (D.C. Cir. 2016), a case involving a district court's consideration of a deferred prosecution agreement, this Court explained that courts must read "statutes and rules" "against the background of 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." *Id.* at 741-742. The Court explained that, against that background, "the Supreme Court has declined to construe Rule 48(a)'s 'leave of court' requirement to confer *any substantial role* for courts in the determination whether to dismiss charges." *Id.* at 742 (emphasis added). Instead, the "principal object of the 'leave of court' requirement" is "narrow": "to protect a defendant against prosecutorial harassment when the government moves to dismiss an indictment over the defendant's objection." *Id.* (brackets, citation, and ellipsis omitted). Absent concerns about harassment, the authority to decide whether to dismiss a prosecution "remains with the Executive." *Id.* *Fokker* accords with other decisions explaining that a district court may deny an unopposed motion to dismiss, if at all, only in an extraordinary case where the prosecutor "accepts a bribe" or otherwise appears to be acting without "the approval of the Justice Department." *In re United States*, 345 F.3d 450, 453-454 (7th Cir. 2003).

In this case, the panel broke no new legal ground about the meaning of Rule 48, applying the principles set out in *Fokker* to conclude that, "[w]hatever the precise scope of Rule 48's 'leave of court' requirement, this is plainly not the rare case where further judicial inquiry is warranted." Op. 6. The panel observed that "Flynn agrees with the government's motion to dismiss" and that "there has been no allegation that the motion reflects prosecutorial harassment." *Id.* And in light of the government's "extensive discussion of newly discovered evidence casting Flynn's guilt into doubt" and the "'presumption of regularity'" to which prosecutors are entitled, Op. 6-7 (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1996)), there was no basis to suspect that that the prosecutors had "accept[ed] a bribe" or were acting without "the approval of the Justice Department," *In re United States*, 345 F.3d at 453-454. The panel's case-specific application of law to fact was correct and does not warrant review by the full Court.

The district judge's contrary arguments lack merit. First, the judge erroneously contends (Pet. 6-8) that the panel opinion conflicts with *Rinaldi v. United States*, 434 U.S. 22 (1977) (per curiam). There, the Supreme Court held that a district court had abused its discretion by refusing to grant a Rule 48(a) motion to dismiss, and it explained that "[t]he principal object of the 'leave of court requirement'" is "to protect a defendant against prosecutorial

harassment." *Id.* at 29 n.15. Both the result and the reasoning of *Rinaldi* thus support the panel opinion here.

The district judge focuses (Pet. 7) on *Rinaldi*'s statement that it was appropriate to remand with instructions for the district court to dismiss "[b]ased on [*the Court's*] *independent evaluation* of the unusual circumstances disclosed by this record." 434 U.S. at 23 (emphasis added). In *Rinaldi*, however, the Court did not endorse the development of a new record each time the government files a Rule 48 motion; rather, the Court took the litigation as it found it and determined that dismissal was required. The Court did not hold that a district court is entitled to conduct an independent inquiry into the *substance* of the dismissal decision, as the judge here contemplates. A contrary reading of *Rinaldi* would contradict the Supreme Court's admonition that "it is entirely clear" that the legal reasoning underlying a refusal to prosecute "cannot be the subject of judicial review," *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (*BLE*), as well as this Court's post-*Rinaldi* admonition that Rule 48(a) "confers no new power in the courts to scrutinize and countermand the prosecution's exercise of its traditional authority over charging and enforcement decisions," *Fokker*, 818 F.3d at 743.

Second, the district judge erroneously contends (Pet. 15-16) that the panel decision conflicts with this Court's pre-*Fokker* decision in *United States v.*

Ammidown, 497 F.2d 615 (1973). *Ammidown* involved a court's refusal to enter a conviction pursuant to a plea agreement under Rule 11, which requires the district court affirmatively to pronounce sentence and enter a judgment of conviction. By contrast, Rule 48—like a deferred prosecution agreement—does not require that kind of exercise of judicial authority. The Court in *Ammidown* even expressly observed that "Rule 48(a) does not apply as such to the case at bar." *Id.* at 619-620. Moreover, *Ammidown* emphasized that "it has traditionally been the prosecutor who determines which case will be pressed to conclusion" and that "trial judges are not free to withhold approval … merely because their conception of the public interest differs from that of the prosecuting attorney." *Id.* at 621-622. And although *Ammidown* contains some ambiguous dicta, this Court has read *Ammidown* to stand for the proposition that "courts generally *lack* authority to second-guess the prosecution's constitutionally rooted exercise of charging discretion," *Fokker*, 818 F.3d at 750 (citing *Ammidown*, 497 F.2d at 621-622) (emphasis added)—not, as the district judge suggests (Pet. 15), for the proposition that courts may inquire "into whether the proposed disposition serves 'due and legitimate prosecutorial interests.'" This Court should not grant rehearing en banc in order to address the purported conflict with dicta in *Ammidown*—particularly given that, since *Ammidown* was decided in 1973, the Supreme Court has repeatedly emphasized that the Executive's exercise of

prosecutorial discretion is not subject to judicial review. *See, e.g.*, *BLE*, 482 U.S. at 283; *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Nixon*, 418 U.S. at 693.

Third, the district judge incorrectly suggests (Pet. 16 n.4) that the panel decision conflicts with "[d]ecisions from other circuits." Quite the opposite, the panel decision accords with *In re United States*, where the Seventh Circuit issued a writ of mandamus because a district judge (like the judge here) refused to grant an unopposed Rule 48(a) motion. The Seventh Circuit explained that it was "unaware … of *any* appellate decision that actually upholds a denial of a motion to dismiss a charge" on the basis of a circumstance other than harassment. 345 F.3d at 453 (emphasis added).

The three decisions that the district judge cites (Pet. 16 n.4) do not support the claim of an "inter-circuit conflict." In the first case, *In re Richards*, 213 F.3d 773 (3d Cir. 2000), the Third Circuit concluded that the trial judge went to "the outer limits of his authority" by "ordering a hearing" on the government's Rule 48(a) motion, but that mandamus was inappropriate in light of the lack of "binding precedent" on the point. *Id.* at 788-789 & n.9. In this case, by contrast, there *is* binding precedent—*Fokker*—establishing that courts lack "free-ranging authority … to scrutinize the prosecution's discretionary charging decisions." 818 F.3d at 741. The second case, *United States v. Carrigan*, 778 F.2d 1454 (10th Cir. 1985), involved acceptance of a proposed plea agreement; the court

concluded that "[its] standard of review [was] governed by Rule 11(e) and not by Rule 48(a)." *Id.* at 1464. In the final case, *United States v. Hamm*, 659 F.2d 624 (5th Cir. Unit A Oct. 1981) (en banc), the Fifth Circuit directed the district court to *grant* the government's motion to dismiss. *Id.* at 633. The Fifth Circuit stated in dicta that a district court could deny a motion to dismiss in certain "extraordinary cases"—for instance, where "'the prosecutor is motivated to dismiss because he has accepted a bribe.'" *Id.* at 629-630 (citation omitted). But this case does not present a circumstance where the dismissal may not reflect the true views of the Executive Branch.

Finally, the district judge challenges the merits of the panel's reading of Rule 48, emphasizing (Pet. 14-15 & n.3) a supposed distinction between motions to dismiss before conviction and those after conviction. Ordinarily, however, disagreement with the merits of a panel decision, absent a conflict, is an insufficient basis for en banc review. Fed. R. App. P. 35(a). In any event, the Supreme Court has itself ordered dismissal where the government's "motion was not made until after the trial had been completed." *Rinaldi*, 434 U.S. at 25. As *Rinaldi* makes clear, Rule 48 requires courts to respect the Executive's non-prosecution decisions whether before or after a conviction—even where a judgment has been entered, which has not yet occurred here absent sentencing. *See* U.S. Br. 24-26; U.S. Reply Br. 3-4.

II. The Panel's Application Of Mandamus Standards Does Not Warrant En Banc Review

The panel correctly recognized that mandamus is warranted where the right to relief is "clear and indisputable," there is "no other adequate means to attain the relief," and the issuing court is satisfied that "the writ is appropriate under the circumstances." Op. 5 (citation omitted). And the panel properly recognized that those standards have been satisfied here. Op. 4-11. The Supreme Court has explained that "[a]ccepted mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Cheney v. U.S. District Court*, 542 U.S. 367, 382 (2004). And this Court and other courts have previously issued mandamus where a district court has usurped executive authority over charging decisions. *E.g.*, *Fokker*, 818 F.3d at 747-750; *In re United States*, 345 F.3d at 452.

The district judge's contrary arguments lack merit. The judge principally argues (Pet. 8-11) that the panel issued mandamus prematurely; in the judge's view, waiting for the district court to consider and resolve the Rule 48 motion, then seeking mandamus in the event it denies the motion, would provide adequate alternative relief. That objection misses the point: at stake is not mere consideration of a pending motion, but a full-scale adversarial procedure spearheaded by a court-appointed amicus hostile to the government's position

raising factual questions, relying on extra-record materials, probing the government's internal deliberations, and second-guessing core prosecutorial judgments. D. Ct. Doc. 225, at 38-60. Accordingly, while the panel specifically recognized that "[a] hearing may sometimes be appropriate before granting leave of court under Rule 48," it determined that the hearing contemplated by the district court here would "be used as an occasion to superintend the prosecution's charging decisions" and would cause "specific harms." Op. 7-10.

The district judge's own words and actions support that determination. The judge's opposition to the mandamus petition contemplates "factual … development," Opp. 29; an examination of the Executive's "bona fides," *id.* (citation omitted); a review of "declarations [and] affidavits," Opp. 15; an investigation into whether the "line prosecutors" agreed with the "then-Acting U.S. Attorney," *id.*; and an inquiry into whether the Executive's decision serves "due and legitimate prosecutorial interests," Opp. 23 (citation omitted). The district court also has appointed as amicus curiae a lawyer who had previously opined that the government's motion "reeks of improper political influence" and has urged the district court to examine the prosecutors' subjective motives. U.S. Reply Br. 12 (citations omitted).

In short, the panel was correct to conclude that, in this particular case, the district court had undertaken a process that "threatens to chill law enforcement"

and "interfere[s] with the internal deliberations of the Executive Branch." Op. 16 (citations and internal quotation marks omitted). What is more, the contemplated process would do so in the name of subjecting the Executive judgment to the very "scrutiny" and "oversight" foreclosed by *Fokker*. 818 F.3d at 741, 743-744, 750; *see Wayte v. United States*, 470 U.S. 598, 607-608 (1985) (explaining that "[j]udicial supervision in this area … entails systemic costs of particular concern"). Allowing that process to play out would impose irreparable injury on the government and on petitioner, and granting mandamus from any denial of the government's dismissal motion cannot adequately remedy those harms.

An example illustrates the flaw in the district judge's logic. Suppose that a district court wishes to conduct a hearing into whether a deferred prosecution agreement is too lenient—even though *Fokker* is express that the court has no authority to reject such an agreement on that ground. *See* 818 F.3d at 737-738. It would surely be appropriate to issue a writ of mandamus to stop the ongoing intrusion on prosecutorial authority. It would not matter that the court might eventually accept the agreement, nor that it might want the hearing only to expose to public scrutiny its concerns over the Executive's charging decisions. *Fokker* leaves that oversight to the political branches and the public, not to the courts under Rule 48(a). So too here, it was appropriate for the panel to issue

mandamus to stop the district court's ongoing violation of the separation of powers.

The district judge alternatively disregards the serious separation-of-powers concerns raised by this case on the technicality that the government did not file its own mandamus petition. Pet. 9-10. That objection is misguided. First, once petitioner filed his own mandamus petition, the government became a party to the mandamus proceeding under Federal Rule of Appellate Procedure 21(a). There was no need for the government to file a duplicative petition in order to bring its contentions before the panel. *See Cobell v. Norton*, 334 F.3d 1128, 1140 n.* (D.C. Cir. 2003). Second, regardless of the government's participation, petitioner is entitled to invoke the separation-of-powers concerns at issue here, because "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). Third, prolonging the prosecution after a government dismissal causes concrete injury to petitioner, which justifies mandamus where, as here, it is combined with "exceptional circumstances amounting to a judicial 'usurpation of power.'" *Cheney*, 542 U.S. at 390. Finally, the technical, case-specific question whether

the government was required to file its own petition—which it could still do, if deemed necessary—does not warrant en banc review.*

III. The Rehearing Petition Is Procedurally Improper

The parties and now a panel of this Court agree that this case should come to an end. Yet the district judge, first through his contemplation of extended and intrusive proceedings on the government's motion to dismiss and now through his petition for rehearing en banc, insists on keeping the litigation going. The rehearing petition raises a host of procedural problems:

- *Article III standing.* A person has Article III standing to seek appellate review only if he has a "personal stake" in the litigation. *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013). But a judge does not have—and under the Due Process Clause, *cannot* have—such a stake. That is so even for a writ of mandamus, which "is not actually directed to a judge in any more personal way than is an order reversing a court's judgment." Fed. R. App. P. 21 advisory committee's note to 1996 amendments (1996 Note).

- *Party status.* Only a "party" may petition for rehearing en banc. Fed. R. App. P. 35(b). Judges were once considered nominal respondents in mandamus proceedings, but in 1996, "the rule [was] amended so that the judge is not treated as a respondent." 1996 Note; *see* Fed. R. App. P. 21(a) (listing parties). The district judge thus is not a party—not even a nominal one.

---

* The district judge also faults the government and Flynn for not asking the district court to reconsider its actions. Pet. 10. That has never been a prerequisite to mandamus relief; in fact, in *Fokker* itself, the parties did not seek reconsideration before petitioning for mandamus. *See United States v. Fokker Servs. B.V.*, No. 14-cr-121 (D.D.C.).

- *Lack of court authorization.* A district court may "address the petition [for mandamus]" only if "invited or ordered to do so by the court of appeals." Fed. R. App. P. 21(b)(4). The panel ordered the district judge to respond to the mandamus petition, but neither the panel nor the full Court invited or ordered the judge to file an en banc petition.

- *Lack of Solicitor General authorization.* Entities in the federal government generally must obtain authorization from the Solicitor General before filing appeals, rehearing en banc petitions, and certiorari petitions. *See* 28 U.S.C. §§ 516, 518; 28 C.F.R. § 0.20; *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 92-99 (1994). Even the Judicial Branch must follow that procedure. *See United States v. Providence Journal Co.*, 485 U.S. 693, 698-707 (1988); U.S. Br. in Opp. at 19-22, *United States Court of Int'l Trade v. United States*, 534 U.S. 1117 (2002) (No. 01-684). Yet the district court has failed to seek—much less obtain—the Solicitor General's authorization for the petition here.

Given those procedural problems, it is unsurprising that the district judge fails to cite a single instance in which a court of appeals has granted rehearing at a district judge's behest. In fact, we are aware of only one case in which a district judge has even *asked* for rehearing en banc—a request the court of appeals denied after noting that "the basis for filing such a petition may be open to dispute." *In re Boston's Children First*, 244 F.3d 164, 171-172 (1st Cir. 2001). Analogous attempts by district judges to seek review or reconsideration of mandamus or reassignment orders have likewise failed. *See United States Court of Int'l Trade v. United States*, 534 U.S. 1117 (2002) (denying court's petition for a writ of certiorari from mandamus order); *Real v. Yagman*, 484 U.S. 963 (1987) (denying judge's petition for a writ of certiorari from a reassignment order); *Ligon v. City*

of New York, 736 F.3d 166, 168, 171 (2d Cir. 2013) (per curiam) (denying a district judge's "unprecedented" motion for reconsideration of a reassignment order and noting that "[a] district judge has no legal interest in a case or its outcome"); 01-30656 Docket entry (5th Cir. Aug. 3, 2001) (denying district judge's motion for panel "reconsideration" of a mandamus order).

At a minimum, the en banc court would have to resolve those thorny procedural questions before proceeding to the merits on this petition. For that reason too, the petition should be denied.

CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted,

JEFFREY B. WALL
Acting Solicitor General

BRIAN C. RABBITT
Acting Assistant Attorney General

HASHIM M. MOOPPAN
Counselor to the Solicitor General

ERIC J. FEIGIN
Deputy Solicitor General

FREDERICK LIU
VIVEK SURI
Assistants to the Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

MICHAEL R. SHERWIN
Acting United States Attorney

KENNETH C. KOHL
Acting Principal Assistant United States Attorney

/s/ Jocelyn Ballantine
JOCELYN BALLANTINE
Assistant United States Attorney
555 Fourth Street, NW, Room 11-858
Washington, D.C. 20530
(202) 252-7252

JULY 2020

CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Federal Rule of Appellate Procedure 35(b)(2) because it contains 3,897 words. This response 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 July 20, 2020, I electronically filed the foregoing response 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