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)

RESPONSE BRIEF FOR JUDGE EMMET G. SULLIVAN

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INTRODUCTION

Much of the briefing in this Court has focused on whether the government's pending motion to dismiss must be granted. But Judge Sullivan has not decided that motion. He has not yet received full briefing on that motion. And he has not had the opportunity to ask a single question about that motion. All he has done is put a process in place to aid his consideration of the issues it presents.

These facts require denying the petition. Mr. Flynn and the government, now joined in favor of mandamus, seek unprecedented relief: An extraordinary writ precluding a district court from even considering a motion that requires "leave of court" before it can be granted, that raises open questions of law and unanswered questions of fact, and that would require dissolving multiple court orders. This Court's mandamus precedents—which the government barely mentions—require denying that relief, for two independent reasons.

First, mandamus is unavailable because Mr. Flynn and the government have adequate alternative remedies. To the extent they object to the district court's appointment of an amicus, they could have—but did not—raise that

issue before the district court. And their challenges to the district court's consideration of the motion to dismiss are improper because the court may grant it, which is what the parties want. Denying mandamus in such circumstances preserves the basic order of our judicial system, in which district courts assess the facts and issue legal rulings that appellate courts review if asked. That process makes particularly good sense in this case, because the incomplete record before this Court leaves key questions unanswered—such as whether the unusual facts here cast some doubt on the presumption of regularity for prosecutorial decisions, and the effect dismissal would have on Mr. Flynn's statements about his work for Turkey, which were unrelated to the January 2017 FBI interview and not addressed in the government's motion, but were part of his plea agreement and factual admissions.

Second, mandamus is also unavailable because Mr. Flynn and the government lack a "clear and indisputable" right to relief. Initially, the government appeared to acknowledge that courts have discretion to review and inquire about Rule 48 motions, by filing a detailed motion rather than a perfunctory notice, asking the district court to grant the motion upon "consideration" of "the reasons stated," Dkt. 198-1, [1] and declining to seek

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

reconsideration of the district court's briefing order or join Mr. Flynn in petitioning for mandamus. Now, the government has joined Mr. Flynn in claiming that Judge Sullivan cannot scrutinize its motion at all, and that the agreement of the parties is all that is required to end the case. But the only thing that is clear and indisputable about these arguments is they have not been adopted in a single case cited by the government or Mr. Flynn.

The Supreme Court suggested, and Congress approved, a version of Rule 48 that requires "leave of court" in all circumstances. Following that textual command in Rule 48, the Supreme Court in *Rinaldi*, as well as this Court in *Fokker* and *Ammidown*, recognized courts' authority to consider such motions even when they are unopposed. Even the out-of-circuit authorities cited by the government contemplate some circumstances where district courts could deny an unopposed motion to dismiss in a criminal case. As these cases reflect, it is consistent with the separation of powers to allow district courts presented with motions to dismiss to assess the contours of their authority and review the facts, particularly where granting the motion would entail dissolving multiple court orders, including a conviction.

What is less clear is the scope of the district court's discretion in conducting that inquiry. But that question is not properly before this Court. It is

instead the question that Judge Sullivan set out to resolve before Mr. Flynn sought emergency relief in this Court. And the steps he has taken so far—appointing an amicus to ensure adversarial briefing, setting an expedited briefing schedule, and scheduling a hearing—are quintessential Article III functions that courts rely on to decide pending motions. After spending more than two years convincing the district court of Mr. Flynn's crimes and enlisting its Article III power to convict him, it is not asking too much for the government and Mr. Flynn to participate in that process before the district court rules.

The petition should be denied.

ARGUMENT

The question before the Court is whether it should deploy "one of the most potent weapons in the judicial arsenal," *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004), to prevent the district court from considering a pending motion. In answering that question, this Court need not begin with the question "whether the district court's ruling constituted legal error." Gov't Br. 11. This Court routinely denies mandamus where the petitioner has adequate alternative remedies, or lacks a clear and indisputable right to relief, without antecedent review of the merits. *See, e.g.*, *In re Stone*, 940 F.3d 1332, 1338–39

(D.C. Cir. 2019) (denying mandamus based on available alternative remedies); *Citizens for Responsibility & Ethics in Wash. v. Trump*, 924 F.3d 602, 608 (D.C. Cir. 2019) (denying mandamus because right to relief was not clear and indisputable); *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 355 (D.C. Cir. 2007) (same); *Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192, 198–200 (D.C. Cir. 2002) (both).

This well-established approach is particularly prudent where, as here, the claimed "legal error" involves an alleged constitutional violation. As explained below, the district court's consideration of a pending motion, pursuant to a Federal Rule that expressly invites the district court to do just that, does not violate the Constitution. Beyond that straightforward issue, the government raises a host of separation of powers concerns purportedly presented by the district court's denial of an unopposed Rule 48 motion. *See* Gov't Br. 15–17, 20–24. But if Judge Sullivan grants the government's motion, there will be no need for either him or this Court to address those concerns. Denying mandamus thus avoids needless resolution of theoretical constitutional questions, consistent with well-established practices. *See, e.g.*, *In re al-Nashiri*, 791 F.3d 71, 81 (D.C. Cir. 2015) ("*al-Nashiri I*") (refusing to "enter the fray" and grant mandamus in light of open constitutional questions because a "fundamental

and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them") (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)); *Syracuse Peace Council v. F.C.C.*, 867 F.2d 654, 657 (D.C. Cir. 1989); *see also Ashwander v. Tenn. Valley Authority*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring).

In short, this petition can and should be resolved by Mr. Flynn's inability to satisfy this Circuit's especially demanding mandamus standard.

I. MR. FLYNN'S AND THE GOVERNMENT'S ADEQUATE ALTERNATIVE REMEDIES PRECLUDE MANDAMUS.

A petitioner cannot show the absence of "adequate means to attain the relief he desires," *Cheney*, 542 U.S. at 380, where, as here, there is a pending motion in the district court, and all the court has done is establish a process to aid the prompt resolution of that motion. The court's appointment of an amicus to address an unopposed motion follows the practice of this Court and the Supreme Court. *See* Dkt. 205 (citing *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 740 (D.C. Cir. 2016)); *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1582–83 (2020). If Mr. Flynn has concerns with any aspect of that appointment, he should have raised them to the district court in the first instance.

Otherwise, Mr. Flynn can "attain the relief he desires" (dismissal of the information) through a favorable ruling from the district court. There is no need for this Court's intervention through an extraordinary writ.

Indeed, this Court has routinely denied mandamus on issues that were not presented to the district court or that have not yet been addressed. *Stone* is instructive. There, a criminal defendant and his family members sought a writ of mandamus to vacate district court orders imposing certain restrictions on their speech. *Stone*, 940 F.3d at 1338. This Court first refused to grant mandamus as to the defendant, because he could have, but did not, pursue relief available in the district court or on direct appeal. *Id.* at 1338–39. It then declined to grant mandamus as to the family members: Because they could "move the District Court to reconsider or modify the conditions of release and, if unsuccessful, appeal the denial of that motion," mandamus was improper. *Id.* at 1340–41. As this Court observed, "it is the trial court and not this court that should engage in the initial consideration of the interests at stake." *Id.* at 1340 (quoting *United States v. Hubbard*, 650 F.2d 293, 309–10 (D.C. Cir. 1980)); *see also Republic of Venezuela*, 287 F.3d at 198 (refusing to order the district court to deny pending remand motions, in part because this Court is "particularly disinclined to issue the writ before the district court has acted");

In re Richards, 213 F.3d 773, 787–88 (3d Cir. 2000) (denying mandamus where district court had scheduled hearing on unopposed Rule 48 motion).

Stone requires denying mandamus here. As in *Stone*, the parties did not raise any objections to the amicus appointment or briefing schedule in the district court. And there is no decision on the government's motion that is ripe for either a motion for reconsideration or appellate review. On the contrary, Judge Sullivan has not yet had an opportunity to resolve "the interests at stake." *Stone*, 940 F.3d at 1341.

The government offers no explanation for why there are no "adequate alternative remedies" here. And the few mandamus cases it cites disprove its suggestion that the absence of a decision on the motion to dismiss "makes no legal difference." Gov't Br. 33. Other than a single agency case, addressed below, the government's authorities involve situations in which the district court had already decided the motions at issue. *See Fokker*, 818 F.3d at 737–38 (reviewing district court's order denying motion to defer time under Speedy Trial Act); *In re Kellogg Brown & Root*, 756 F.3d 754, 756 (D.C. Cir. 2014) (reviewing district court's order granting motion); *In re United States*, 345 F.3d 450, 452 (7th Cir. 2003) (reviewing order denying unopposed Rule 48 motion). In these cases, the courts of appeals granted mandamus based on the

district court's rulings, but they did not suggest it was error—much less clear and indisputable error—for the district courts to have conducted proceedings in aid of making those rulings. Indeed, *Fokker* "determined that the district court erred in denying the motion to exclude time," 818 F.3d at 747—not in holding "a series of status conferences," "request[ing] several additional written submissions from the government" on its motion, or seeking an explanation for "why the interests of justice supported the court's approval of the deal embodied by the DPA," *id.* at 740.

The remaining mandamus precedent invoked by the government, *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013),[2] confirms the importance of waiting for a decision before granting the writ. This Court granted mandamus in *Aiken* only after giving the agency (the Nuclear Regulatory Commission) one opportunity after another to process a licensing application. The Court denied a 2010 mandamus petition and held a subsequent 2012 petition in abeyance to allow the Commission to exercise its discretion in the first instance. *Id.* at 258.

[2] The government quotes from Part III of that opinion, which did not command a majority, *see Aiken*, 725 F.3d at 257, to support its view of the Executive's broad and judicially unreviewable discretion to prosecute, *see* Gov't Br. 12–13, 18–19 (citing *Aiken*, 725 F.3d at 263, 266). But notwithstanding that language, the Court in *Aiken* granted mandamus to override the Executive's exercise of discretion. 725 F.3d at 266–67.

It granted mandamus in 2013 only after the Commission continued to defer action, *id.* at 259, in direct contravention of a Congressional command to "consider" the issue, *id.* at 257. And even then, this Court simply ordered the Commission to process the application, without directing the result it should reach. *Id.* at 267. The ruling of *Aiken*—unaddressed by the government—confirms the importance of allowing the initial decisionmaker an adequate opportunity to address the issues in the first instance.

Even beyond these legal and structural considerations, denying mandamus is the right outcome here. The district court's further consideration of the motion may help resolve some of the factual and legal questions that remain outstanding. *See* Sullivan Br. 1–2 (listing questions); 3B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 802 ("Requirement of Leave of Court") (4th ed. 2020) ("Since the court must exercise sound judicial discretion in considering a request for dismissal, it must have factual information supporting the recommendation."); *see also United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts.") .

One particularly salient example is the status of Mr. Flynn's statements regarding work he performed for Turkey, which were not mentioned in the

information, but were relevant conduct for his guilty plea and included in his statement of offense. Mr. Flynn admitted on multiple occasions to making materially false statements in Foreign Agent Registration Act ("FARA") filings to the Department of Justice. *See* Sullivan Br. 6; Dkt. 4 at 5 (Statement of the Offense); Dkt. 50 at 7 (Def.'s Mem. in Aid of Sentencing) (not disputing government's description of offense in its sentencing memorandum); Dkt. 46 at 3–5 (Gov't's Mem. in Aid of Sentencing) (describing materially false statements in FARA filings); Dkt. 75 at 2 (Addendum to Gov't's Mem. in Aid of Sentencing) (noting Mr. Flynn's agreement that he violated FARA). The government previously asserted that Mr. Flynn could be prosecuted for these offenses, *see* Dkt. 103 at 27:23–28:5, and Mr. Flynn's plea agreement tolls the statute of limitations for them, Dkt. 3 at 6. While the Special Counsel's Office promised not to further prosecute Mr. Flynn for that conduct, it did so only "[i]n consideration of [Mr. Flynn's] guilty plea," *id.* at 2, which Mr. Flynn initially sought to withdraw, *see* Dkt. 151, 160-23 at 1, but now oddly wants to keep in place, Dkt. 199.

The government has not addressed this offense conduct at all, raising questions about what if any rights Mr. Flynn and the government would retain if the government's motion is granted. And the district court has not yet had

the opportunity to inquire whether the government maintains its factual representations that Mr. Flynn is guilty as to those false statements.[3] Allowing the district court to inquire into this matter at the scheduled hearing will benefit the parties and aid any future consideration of the case by this Court, by illuminating the full circumstances surrounding the proposed dismissal and the government's current position on Mr. Flynn's conduct.

II. MR. FLYNN AND THE GOVERNMENT CANNOT SHOW A "CLEAR AND INDISPUTABLE" RIGHT TO RELIEF.

The petition should also be denied because the law does not clearly and indisputably require the relief sought.

As this Court has repeatedly held, mandamus is not available simply because a party believes it is right on the merits; if the rule were otherwise, mandamus petitions would be an ordinary litigation tool. Instead, and as the

[3] Although the government has not, in these proceedings, addressed Mr. Flynn's false statements regarding work he performed for Turkey, the government in January asserted to the Fourth Circuit that it had "substantial evidence" that "Flynn … would engage in lobbying and political advocacy subject to the direction or control of the Turkish government without disclosing that relationship." Br. for U.S., *United States v. Rafiekian*, No. 19-4803 (4th Cir. 2020), ECF No. 23 at 54–55. The government recently filed a reply brief in the same case that did not retract or cast doubt on those statements. Reply Br. for U.S., *Rafiekian*, ECF No. 51.

language of the standard suggests, a party's entitlement to relief must be clear and indisputable.

Mandamus is thus unavailable where a petition presents unresolved questions. "[O]pen questions are the antithesis of the 'clear and indisputable' right needed for mandamus relief." *In re al-Nashiri*, 835 F.3d 110, 137 (D.C. Cir. 2016) ("*al-Nashiri II*"). Questions are "open" unless the answers are "clearly mandated by statutory authority or case law." *In re Al Baluchi*, 952 F.3d 363, 369 (D.C. Cir. 2020). This standard is "demanding," and requires close factual and legal similarity. *Id.* Where, for example, this Court has not squarely resolved a case involving "like issues and comparable circumstances," and other circuits have resolved similar cases adversely to the petitioner, mandamus is improper. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 355 (D.C. Cir. 2007).

This Court's decision in *al-Nashiri I* is instructive. There, the petitioner raised several legal challenges on mandamus, including that the military judges on the Court of Military Commission Review ("CMCR") were principal officers who had been unlawfully appointed. *See* 791 F.3d at 74–75. This argument "g[ave the Court] pause." *Id.* at 82. As this Court noted, judges on the CMCR were subject to removal for "good cause" or "military necessity,"

and their decisions were reviewable only by the D.C. Circuit. *Id.* And the D.C. Circuit had previously concluded that Copyright Royalty Judges, who are subject to removal for cause and whose decisions are "reviewed by this Court," are principal officers. *Id.* This Court nevertheless denied mandamus, concluding that whether "CMCR military judges [are] principal or inferior officers" was an "open question[]" because they could be removed not just for cause but also for military necessity—a "non-trivial" difference in the scope of the removal authority. *Id.* at 83–86; *see also Al Baluchi*, 952 F.3d at 369 ("[W]e will deny mandamus even if a petitioner's argument, though 'pack[ing] substantial force,' is not clearly mandated by statutory authority or case law.") (quoting *In re Khadr*, 823 F.3d 92, 99 (D.C. Cir. 2016)).

The government and Mr. Flynn have shown far less in the way of clear and indisputable precedent than the unsuccessful mandamus petitioner in *al-Nashiri I*. Contrary to the government's suggestion, the relief sought in the petition does not implicate a situation where the judge has "assume[d] the role of prosecutor and initiat[ed] criminal charges on its own." Gov't Br. 1. The government charged Mr. Flynn with a criminal offense and obtained his conviction after two different district court judges accepted his guilty plea. Instead, the relief sought here is a directive from this Court foreclosing *any*

consideration by the district court of the government's Rule 48 motion or the possibility of contempt, and requiring the district court to dissolve its orders without being able to ask the parties a single question. The parties have failed to cite any authority supporting that extraordinary request.

A. Mr. Flynn And The Government Are Not Clearly And Indisputably Entitled To An Order Granting The Rule 48(a) Motion Without Any Inquiry By The District Court.

The plain text of Rule 48(a) contradicts the government's assertion that the Rule "does not authorize a court to stand in the way of a dismissal the defendant does not oppose." Gov't Br. 1.[4] The rule preserves judicial authority to resolve motions to dismiss in all circumstances, requiring "leave of court" even where the defendant supports the motion. Fed. R. Crim. P. 48(a). This requirement was inserted at the suggestion of the Supreme Court and was approved by Congress. *See* Sullivan Br. 22–23. That history at the very least casts doubt on the government's contention, Gov't Br. 15, that judicial review of an unopposed Rule 48 motion violates the separation of powers. This Court should not lightly conclude that the Supreme Court endorsed, and Congress

[4] The history of amicus appointments in criminal cases, as well as the local rules, foreclose any argument that there is "clear and indisputable" error in appointing an amicus to present briefing on a pending, unopposed motion. *See* Sullivan Br. 29–31.

approved, a rule that by its plain text provokes a separation of powers violation in its common usage (*viz.*, when the government seeks to dismiss criminal charges and the defendant agrees). *Cf. Sibron v. New York*, 392 U.S. 40, 58 (1968) (observing, in context of reviewing "confession of error" by state prosecutor, that the government's changed position "does not 'relieve this Court of the performance of the judicial function'") (quoting *Young v. United States*, 315 U.S. 257, 258 (1942)).

The Supreme Court's decision in *Rinaldi v. United States* confirms the point. There, the government and the defendant agreed that the indictment should be dismissed based on the government's violation of a federal policy precluding multiple prosecutions for the same act. 434 U.S. 22, 24–25 (1977). The district court denied the motion to dismiss, and the Supreme Court ultimately reversed. But the Supreme Court did not base its decision on the fact that the motion was unopposed, or so much as suggest that the parties' agreement deprived the judiciary of the authority to rule. Instead, the Court observed that Rule 48 "has … been held to permit the court to *deny* a Government dismissal motion to which the defendant has consented if the motion is prompted by considerations clearly contrary to the public interest." *Id.* at 29 n.15 (emphasis added) (citing cases, including *United States v. Ammidown*,

497 F.3d 615, 620 (D.C. Cir. 1973)); *see also id.* at 34 (Rehnquist, J., dissenting) (leave of court requirement "would seem clearly directed toward an independent judicial assessment of the public interest in dismissing the indictment"). The Supreme Court reversed the district court only because it had "abus[ed its] discretion"—a finding that the Supreme Court made after an "examination of the record" showed that the "decision to terminate this prosecution … was motivated by considerations which cannot fairly be characterized as clearly contrary to manifest public interest." *Id.* at 30–32.

This Court's precedents likewise preserve a district court's authority to adjudicate a Rule 48 motion. Drawing upon an analysis of separation of powers principles, this Court in *Fokker* observed that judicial authority to deny Rule 48 motions is circumscribed in situations involving a decision to commence prosecution. 818 F.3d at 742. Because initiating a prosecution involves a core executive function, a judge generally can second-guess such decisions only where there is evidence of "prosecutorial harassment." *Id.* (quoting *Rinaldi*, 434 U.S. at 29 n.15). But that ruling had limits. *First*, *Fokker* did not

suggest—nor did the government argue—that a district judge's mere consideration of a Rule 48 motion violated the law.[5] *Second*, this Court grounded its analysis in the "presumption of regularity" that applies to "prosecutorial decisions … in the absence of clear evidence to the contrary." *Id.* at 741. *Third*, this Court noted that different legal contexts might lead to a different separation of powers analysis.

Specifically, *Fokker* observed that a judge's decision to accept a plea under Rule 11—unlike the circumstances before it—involves "formal judicial action." *Id.* at 746. While "trial judges are not free to withhold approval of guilty pleas … merely because their conception of the public interest differs from that of the prosecuting attorney," *id.* at 745 (quoting *Ammidown*, 497 F.3d at 622), this Court was careful to mention that accepting a plea involves "enter[ing] a judgment of *conviction*, which in turn carries immediate sentencing implications" and triggers "the Judiciary's traditional authority over

[5] To counsel's knowledge, the government has not previously supported mandamus to prevent a district judge from considering a Rule 48 motion, or any remotely similar motion. The government did not seek mandamus to foreclose the district judge's extended consideration of whether to defer time under the Speedy Trial Act in *Fokker*, *see supra* at 9—it waited for the district court to rule. *See* 818 F.3d at 737–38. Nor did it seek or support mandamus when Judge Sullivan appointed an amicus to help him decide that same issue in *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11 (D.D.C. 2015).

sentencing decisions," *id.* at 746 (emphasis in original); *cf. In re Wild*, 955 F.3d 1196, 1218 (11th Cir. 2020) (Newsom, J.) (agreeing with *Fokker* that courts "assume a more active role" as a prosecution progresses). For this reason, *Fokker*'s suggestion that a Rule 48 motion is more like a DPA, and "[u]nlike a plea agreement," 818 F.3d at 746, is best understood as applying to Rule 48 motions filed before a conviction. Concluding otherwise would nullify *Fokker*'s recognition that "formal judicial action" may lead to a different calculus regarding the court's discretion. *Id.* There is no question courts are "competent," *id.* at 741, to enter orders and subsequently review them.

Ammidown, cited with approval in *Fokker*, *see* 818 F.3d at 745–746, 750, set forth the judiciary's different role in the Rule 11 context that *Fokker* described. In deciding whether to accept a plea to a lesser charge, judges need not "serve merely as a rubber stamp for the prosecutor's decision." *Ammidown*, 497 F.2d at 622. Instead, the district court has the role of "guarding against abuse of prosecutorial discretion" even "when the defendant concurs in the dismissal." *Id.* at 620. Among other considerations, the judge retains the authority to "assure protection of the public interest," including by at least

inquiring whether the proposed disposition serves "due and legitimate prosecutorial interests." *Id.* at 622; *Rinaldi*, 434 U.S. at 29 n.15 (citing *Ammidown* without questioning its holding).[6]

Given that *Fokker* cites *Ammidown* with approval, the government's effort to suggest that intervening Supreme Court cases overruled *Ammidown* is particularly misguided. This Court has a process for overruling prior opinions without sitting *en banc*: an *Irons* footnote, which allows a panel, after review by the full court, to "overrul[e] a more recent precedent which, due to an intervening Supreme Court decision … a panel is convinced is clearly an incorrect statement of current law." Policy Statement, D.C. Cir., *On* En Banc *Endorsement of Panel Decisions*, (Jan. 17, 1996) < perma.cc/5DPA-MJNK>; *see SecurityPoint Holdings, Inc. v. Transp. Sec. Admin.*, 836 F.3d 32, 35 n.1 (D.C. Cir. 2016) (using *Irons* footnote to overrule *Waterman Steamship Corp. v. Maritime Subsidy Bd.*, 901 F.2d 1119 (D.C. Cir. 1990)). *Fokker* did no such thing to *Ammidown*, and the latter remains good law in this Circuit.

[6] The government's effort to distinguish this language in *Ammidown* as dictum is untenable. While *Ammidown* did not involve a Rule 48 motion, neither did *Fokker*, the case that serves as the linchpin of the government's argument.

The circumstances of this case arguably involve even more significant Article III interests than in *Fokker* and *Ammidown*. Here, two different judges have accepted Mr. Flynn's guilty plea, and Judge Sullivan independently found Mr. Flynn's January 2017 lies to the FBI to be material. *See* Sullivan Br. 25–26.[7] The government's motion thus does not merely request approval of its decision to drop the case, but dissolution of multiple court orders, including the defendant's conviction, issued in exercise of the district court's Article III authority. *See, e.g.*, *Young*, 315 U.S. at 259 ("[O]ur judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of the parties."); *McNabb v. United States*, 318 U.S. 332, 347 (1943) ("We are not concerned with law enforcement

[7] Judge Sullivan first found materiality sufficient to form a factual basis for Mr. Flynn's guilty plea at the December 2018 plea colloquy. *See* Dkt. 103 at 16:11–15 ("Having carefully read all the materials provided to the Court in this case, including those materials reviewed under seal and in-camera, I conclude that there was and remains to be a factual basis for Mr. Flynn's plea of guilty"); *id.* at 19:9–11 ("Mr. Flynn made materially false statements and omissions during a January 24th, 2017 interview with the FBI."). But he informed the parties that he wanted to hear more details on materiality before proceeding to sentencing, where the court must consider the full nature and circumstances of the offense. *See id.* at 19:19–22, 50:11–22. Then, in December 2019, Judge Sullivan made detailed legal and factual findings that Mr. Flynn's false statements in the FBI interview were material. *See* Dkt. 144 at 49–53.

practices except insofar as courts themselves become instruments of law enforcement."); *see also U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) (Article III rulings are not the "property" of litigants to be dissolved as they see fit). At minimum, this different legal context means that Mr. Flynn's petition does not involve "like issues and comparable circumstances" to *Fokker*, thus precluding mandamus. *Doe*, 473 F.3d at 355; *see supra* at 13–14 (discussing *al-Nashiri I*, 791 F.3d at 82–86).

Indeed, another court has expressly allowed a trial court to consider a Rule 48 motion in a similar legal context. In *Richards*, the Third Circuit denied mandamus where a territorial court scheduled a hearing on an unopposed motion to dismiss filed after the defendant had tried to enter a plea. 213 F.3d at 777. The court noted that Rule 48 did not preclude the judge from holding "a hearing on the parties' claims, especially in light of the checkered course of the case up to that point." *Id.* at 787–88; *see also id.* at 777, 787 (noting that parties had agreed to a misdemeanor plea in connection with an offense originally charged as second-degree rape, and that there had been allegations of "judge-shopping"). That hearing, the court noted, would allow "a judge who suspects wrongful behavior into the proceedings of the individuals before it" to "inquire into what the true circumstances are." *Id.* at 789; *cf. United States*

v. Carrigan, 778 F.2d 1454, 1463 (10th Cir. 1985) (Rule 48(a) "permits courts faced with dismissal motions to consider the public interest in the fair administration of criminal justice and the need to preserve the integrity of the courts."); *United States v. Cowan*, 524 F.2d 504, 512–13 (5th Cir. 1975) (same).

Even the government cites authorities suggesting that unopposed motions to dismiss may be denied in rare circumstances, which of course suggests they at least can be considered. *See* Gov't Br. 20–21 (citing *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 141 (2d Cir. 2017) (denying Rule 48 motion may be warranted where "the prosecutor appears motivated by bribery, animus toward the victim, or a desire to attend a social event rather than trial"); *In re United States*, 345 F.3d at 453 (similar)). These pronouncements from other circuit courts confirm that whether Judge Sullivan has the power to consider the Rule 48 motion is, at the very least, an open question precluding mandamus relief. *See Doe*, 473 F.3d at 354–55.

The government misses the mark with its remaining—and much broader-ranging—argument that there is no longer a justiciable controversy the moment the government and defendant agree on dismissal. Gov't Br. 1, 14. There is, at minimum, reason to doubt the government's passing suggestions of mootness, meaning that mandamus would remain inappropriate. The

sole authority cited by the government is a case involving the civil rule on stipulated dismissals, which permits dismissals "without a court order." Fed. R. Civ. P. 41(a)(1)(A); *see In re Brewer*, 863 F.3d 861, 868 (D.C. Cir. 2017) ("stipulated dismissal[s]" are "'effective automatically' upon filing and require[] no further action on behalf of a district court"). But *Brewer* did not hold that *Article III* requires what that civil rule provides. A holding to that effect would, once again, suggest that Rule 48 exceeds the Article III power in many (if not most) cases in which it is invoked.

It would also call into question multiple precedents involving unopposed motions, including *Rinaldi*, *Fokker*, and *Ammidown*; raise doubts about this Court's and the Supreme Court's decisions to appoint amici in cases involving a confession of error, *see supra* n.4; and contravene the well-established principle that courts have an obligation to independently assess jurisdictional issues. *See, e.g.*, *Elec. Privacy Info. Ctr. v. U. S. Dep't of Commerce*, 928 F.3d 95, 100 (D.C. Cir. 2019); *LeFande v. District of Columbia*, 841 F.3d 485, 492 (D.C. Cir. 2016). Further, if the government were correct that the agreement of the parties eliminates Article III jurisdiction, it would be unable to seek the

relief requested in its motion—dismissal *with prejudice*. *See Flynt v. Weinberger*, 762 F.2d 134, 136 (D.C. Cir. 1985) (per curiam); *Murray v. Conseco, Inc.*, 467 F.3d 602, 605 (7th Cir. 2006).[8]

None of the foregoing is intended to suggest that Judge Sullivan will deny, or is likely to deny, the government's motion. What matters for present purposes is that precedents from several courts, including the Supreme Court and this Court, preserve judicial authority to resolve Rule 48 motions and inquire about the presumption of regularity, and make clear that the nature and scope of that authority depends on the legal posture and factual context of the case. Contrary to the government's suggestion, Gov't Br. 34, all Judge Sullivan has done so far is establish a process for helping him assess the bounds of that authority in this case. Foreclosing that process is not "clearly mandated by statutory authority or case law." *Al Baluchi*, 952 F.3d at 369.

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[8] Although not cited by the government, the Eighth Circuit's decision in *United States v. Dupris*, 664 F.2d 169, 175 (8th Cir. 1981), dismissed a criminal case as moot pursuant to an unopposed Rule 48 motion. But *Dupris* involved a government motion to dismiss before trial and thus did not address the Article III interests implicated by the court's acceptance of a guilty plea. *See Fokker*, 818 F.3d at 745–46. The case was also decided after the district court had *denied* the motion to dismiss and multiple courts, including the Supreme Court, had assessed that decision in light of the record. *See Dupris*, 664 F.2d at 170–71. Moreover, the *Dupris* opinion did not require dismissal with prejudice. *Id.* at 175. *Dupris* thus does not clearly and indisputably support the relief sought here.

On the contrary, allowing Judge Sullivan to provide due consideration to the government's motion preserves one of the central purposes of the separation of powers—ensuring checks and balances. *See* Federalist No. 48 (James Madison) ("[T]he powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others."). Contrary to the government's position here, "the separate powers were not intended to operate with absolute independence." *Nixon*, 418 U.S. at 707. The Constitution instead "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). In this unique case, the judicial system and the public will benefit from adherence to the ordinary process envisioned by precedent, in which district courts are permitted to inquire about the government's motions and representations, rather than reflexively accepting them as a basis for dissolving orders entered pursuant to Article III authority.

B. Mr. Flynn And The Government Are Not Clearly And Indisputably Entitled To An Order Foreclosing Any Consideration Of Contempt.

As to contempt, the only action the district court has taken thus far is appointing an amicus to aid its consideration of *whether* a show cause order for contempt should issue. Dkt. 205. The answer to that question may well be "no," for any number of reasons. None of the authority cited by the government establishes—let alone clearly and indisputably—that the district court is foreclosed from considering the question.

To start, the government errs in implying that 18 U.S.C. § 401 is like other criminal laws that must be enforced by the Executive. *See* Gov't Br. at 26–27, 30. The statute is titled "Power of court," and its first sentence provides that "[a] court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority." 18 U.S.C. § 401. The statutory language is a clear and indisputable indicator that the judiciary *does* have the power to investigate contempt.

The government's analysis of a court's authority under Section 401 supports only two commonsense points. The first is that perjury at a trial does not itself violate the statute. As the government's cases establish, perjury in that context does not "obstruct the administration of justice," *In re Michael*,

326 U.S. 224, 225 n.1 (1945), as required by Section 401, because "the function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact finding tribunal must hear both truthful and false witnesses," *id.* at 227–28. The second is that simply withdrawing a plea does not necessarily amount to a violation of the statute, Gov't Br. 30, which must be correct, given that the law expressly allows defendants to withdraw pleas lest innocent people be convicted. *See* Fed. R. Crim. P. 11(d).

Those noncontroversial propositions do not clearly and indisputably resolve the questions here. Mr. Flynn's recent positions contradict numerous representations under oath in his plea colloquies and at multiple hearings, not just about his offense of conviction, but also about the adequacy of services provided by his former counsel and whether he was pressured or coerced into taking a plea. Based in part on those earlier representations, the district court delayed sentencing at least once, opening the door for Mr. Flynn's motions claiming innocence, the government's motion to dismiss the information, and Mr. Flynn's attempt to withdraw and then maintain his plea. Moreover, the parties sought such extensions to permit Mr. Flynn to testify, regarding his work for Turkey, in a related case that was filed pursuant to his cooperation, only for Mr. Flynn to recant his prior statements and not be called as a witness

by the government. Dkt. 150 at 22–23; *see also* Dkt. 71, 88 (joint status reports seeking extensions). The new factual representations by Mr. Flynn explaining his changes of position may well present extenuating circumstances for his reversals, but the record here at minimum provides a basis for examining whether Mr. Flynn's conduct before the district court could amount to "obstruct[ion] of the administration of justice." 18 U.S.C. § 401(1).

The government's discussion of the court's inherent contempt powers does not support mandamus either. The government observes that a district judge "has no authority to initiate its own prosecution of petitioner or appoint a private attorney to prosecute him." Gov't Br. 31. This assertion is wrong as a matter of law. *See* Fed. R. Crim. P. 42(a)(2) (authorizing a judge to appoint a special prosecutor to investigate contempt). It also misdescribes what Judge Sullivan has done: He has not appointed a special prosecutor to pursue contempt, but rather appointed an amicus to address whether taking that step would be appropriate here. The government cites no authority foreclosing that practice.

Further, the government offers no authority for its suggested restrictions on the court's contempt power. *See* Gov't Br. 30–31. The only case

the government cites in this section of its brief rejected similarly artificial limits on the inherent authority of the courts. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 797–98 (1987) (rejecting argument that "only … the Executive Branch" can prosecute "out-of-court contempts"). And this Court has repeatedly upheld the judiciary's broad authority to ensure the integrity of the judicial process. *See Ali v. Tolbert*, 636 F.3d 622, 627 (D.C. Cir. 2011) (Courts have "inherent authority … to protect their institutional integrity and to guard against abuses of the judicial process."); *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995) ("As old as the judiciary itself, the inherent power enables courts to protect their institutional integrity and to guard against abuses of the judicial process with contempt citations, fines, awards of attorneys' fees, and such other orders and sanctions as they find necessary.") As these cases recognize, the criminal contempt power is an exception to the government's constitutional authority over prosecutorial decisions, and this Court should not countenance the Executive Branch's attempt to nullify that Article III power.

* * *

Because mandamus is an extraordinary writ, this Court has relied on many different rationales for denying it. The request to foreclose the district

court's consideration of the government's pending motion runs the table. The parties could have, but did not, challenge the amicus appointment and briefing order in the district court. The parties may still obtain the relief they seek in the ordinary course. The government's motion to dismiss involves open questions of fact and the district court has not had the opportunity to ask a single factual question. The legal questions presented are not clearly and indisputably resolved by this Court's precedent, and another court has denied relief in similar circumstances. Resolving those legal questions now would involve the potentially unnecessary determination of constitutional questions. And granting the relief sought would undercut multiple precedents of this Court and the Supreme Court, suggest that a duly enacted rule of criminal procedure is unconstitutional in the mine run of cases where it is invoked, and leave the judiciary powerless to act in the face of even the most extreme instances of prosecutorial irregularity and corruption.

Whether this case involves such extreme circumstances is an issue the district court has not remotely reached. Despite the assumptions underlying Mr. Flynn's and the government's briefs, Judge Sullivan has not decided to deny the motion to dismiss or to proceed with a contempt inquiry. All he has decided is that there may be something to decide. And all he has done is adopt

a process for resolving open questions that previously resulted in a decision this Court approved. *See Fokker*, 818 F.3d at 747 (citing with approval *Saena Tech*, 140 F. Supp. 3d 11).

Foreclosing that process through an extraordinary writ undermines the central tenets of our judicial system—that waiting for issues to be squarely and properly presented, ensuring full consideration of open questions, and understanding all the relevant facts leads to better decision-making by both district and appellate courts.

CONCLUSION

The petition should be denied.

Respectfully submitted.

By: /s/ Beth A. Wilkinson

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JUNE 10, 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 7,069 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 10, 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 10, 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.

/s/ Beth A. Wilkinson
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DATED: JUNE 10, 2020