No. 20-5143

IN THE UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

***In re:* MICHAEL T. FLYNN,**
Petitioner

BRIEF OF THE NEW YORK CITY BAR ASSOCIATION AS *AMICUS CURIAE* IN OPPOSITION TO THE PETITION FOR A WRIT OF MANDMUS

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DISCLOSURE STATEMENT

The New York City Bar Association is a New York not-for-profit corporation. It has no shareholders, parent corporations or subsidiaries. It is not owned or controlled by any other entity. Nor does it own or control any other entity. Its purpose is to advocate reform of the law in the public interest, increase access to justice, and support the rule of law in the United States.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *amici*. Except for the New York City Bar Association filing here as *amicus curiae*, all parties and *amici* appearing before the district court and this Court are listed in the petition for a writ of mandamus.

B. Ruling Under Review. Petitioner seeks review of the district court's appointment of *amicus curiae* (ECF 205) and the district court's May 18, 2020 minute order allowing the *amicus* to appear *pro hac vice* in the case and setting a briefing schedule. Petitioner also requests review of the district court's failure to grant the government's motion to dismiss the case with prejudice pursuant to Rule 48(a).

C. *Amicus* is not aware of any related cases other than the pending case before the district court.

Dated: June 1, 2020 */s/ Gregory S. Smith*

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STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Amicus curiae is the New York City Bar Association (the "Association"), a non-profit voluntary association of approximately 25,000 members across the nation established in 1870. Through its Task Force on the Rule of Law, its Task Force on the Independence of Lawyers and Judges, its Committee on Federal Courts and some 150 other committees, the Association strives to improve the administration of justice and to educate the legal profession and the public on the laws and legal principles that are the foundation of American democracy. The Association advocates for laws in the public interest, seeks to increase access to justice, and through its committee reports, *amicus curiae* submissions and public programs, serves as a voice of the legal profession in striving for a just and equitable rule of law.

The Association submits this brief in support of the district court's designation of *amicus curiae* to oppose the motion of the Government to dismiss the case against the Petitioner Michael Flynn and in opposition to his petition for a writ of mandamus ("the Petition") directing the district judge to grant the Department of Justice's motion to dismiss its criminal case against Petitioner, vacate the appointment of Hon. John Gleeson as *amicus curiae* and transfer this case to another district court judge.

The Association has sought this Court's leave to file this brief because it believes the district court's action is important to vindicate the impartial workings

of our judicial system in connection with a case that, as discussed below, raises serious public concern about the fair administration of justice in a case involving a senior government officer and close associate of the President of the United States. Under these circumstances, the district court's action to vindicate that essential public interest is well within the sound exercise of its discretion and should be respected by this Court.

No party or counsel for any party authored this brief in whole or in part or contributed funding that was intended for preparing or submitting it. No person other than the Association and its counsel contributed money to fund the preparation or submission of this brief.

QUESTIONS PRESENTED

1. Should this Court grant the petition and issue a writ of mandamus in a case where the district court has not yet decided the government's Fed.R.Crim.P. 48(a) motion to dismiss and the government and petitioner both may appeal an adverse ruling?

2. Should this Court vacate the district court's appointment of an *amicus curiae* to present arguments in opposition to the government's Rule 48(a) motion to dismiss in this unusual case where petitioner previously swore under oath that he was guilty at two plea hearings but the parties are now aligned in arguing for his case to be dismissed?

INTRODUCTION

Petitioner Michael T. Flynn, the former National Security Advisor to the President of the United States, twice pleaded guilty before two district court judges to making false statements to the FBI in violation of 18 U.S.C. § 1001. Nonetheless, after Petitioner twice admitted his guilt under oath in open court, but before the district court imposed sentence, the government moved on May 7, 2020, to dismiss with prejudice the Information that was the basis for Petitioner's guilty plea (D.D.C. ECF 198).

On May 13, 2020, the district court issued an order appointing the Hon. John Gleeson (Ret.) as *amicus curiae* to "present arguments in opposition to the government's Motion to Dismiss" and to "address whether the Court should issue an Order to Show Cause why [Petitioner] should not be held in criminal contempt for perjury pursuant to 18 U.S.C. § 401, Federal Rule of Criminal Procedure 42, the Court's inherent authority, and any other applicable statutes, rules, or controlling law" (D.D.C. ECF 205). Petitioner now seeks a writ of mandamus ordering the district court to grant the government's motion to dismiss, vacating the district court's appointment of *amicus curiae* and re-assigning the case to a third district judge for any further proceedings.

Mandamus lies only when three conditions are met: (1) no other adequate means of relief are available to the petitioner; (2) the petitioner's right to the writ is

clear and indisputable; and (3) the writ is appropriate under the circumstances. *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004). Petitioner in this case fails to meet even the first condition because there are adequate means of relief available to him in the form of direct appeal. Moreover, the district court was well within its discretion to appoint an *amicus curiae* to aid the court in its exercise of discretion under Rule 48(a). Accordingly, this Court should deny the petition for a writ of mandamus in its entirety.

ARGUMENT

I. THE PETITION FOR A WRIT OF MANDAMUS MUST BE DENIED BECAUSE THERE ARE OTHER MEANS OF RELIEF AVAILABLE TO PETITIONER.

This Court must deny Flynn's petition for a writ of mandamus. A writ of mandamus is "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004), quoting *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947). Because a writ of mandamus "is one of the most potent weapons in the judicial arsenal, three conditions *must* be satisfied before it may issue." *Cheney*, 542 U.S. at 380 (emphasis added).

First, "'the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires,' a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Id*. at 380-81, quoting

Fahey, 332 U.S. at 260. *See also In re al-Nashiri*, 791 F.3d 71, 78 (D.C. Cir. 2015) ("Mandamus is inappropriate in the presence of an obvious means of review: direct appeal from final judgment."); *Barnhart v. Devine*, 771 F.2d 1515, 1524 (D.C. Cir. 1985) ("It is, of course, elementary that mandamus is an extraordinary form of relief which lies only when no adequate alternative remedy exists."). Second, a mandamus petitioner "must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381 (internal quotations and citations omitted).

Petitioner in this case cannot satisfy the first condition required for a writ of mandamus because there are, without question, "other adequate means to obtain the relief" Petitioner seeks, namely, the direct appeal process, and even that relief will only be necessary if the district court should resolve the pending matter adversely to Petitioner. The Supreme Court has specifically stated that it is "unwilling to utilize [writs of mandamus] as substitutes for appeals" and that the requirement that no other adequate means be available to a mandamus petitioner to obtain the relief sought was "designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Fahey*, 332 U.S. at 260; *Cheney*, 542 U.S. at 380-81. In seeking a writ of mandamus directing the district court to dismiss his case after

pleading guilty, that is, after swearing under oath that he committed the crime alleged by the prosecution, Petitioner seeks to substitute a writ of mandamus for the regular appeal process available to him at the conclusion of his criminal case.

Petitioner's reliance on *In re United States*, 345 F.3d 450 (7th Cir. 2003) is misplaced because it is factually distinguishable from this case. In *In re United States* the defendant pled guilty to one count of an indictment pursuant to an agreement with the government to dismiss the remaining two counts. *Id*. Although the court rejected the plea agreement, the defendant decided to proceed with his guilty plea, and the district court imposed sentence. *Id*. at 451-52. The district court subsequently granted the government's motion to dismiss one of the two remaining counts of the indictment but denied the motion to dismiss the third count and appointed a private lawyer to prosecute it. *Id*. at 452. The government sought a writ of mandamus to dismiss both the remaining charge against the defendant and the private lawyer appointed to prosecute it. *Id*. In that case, had the writ not issued petitioner would have had to endure an unnecessary criminal trial.

By contrast, in the instant case the petitioner has pleaded guilty, but the district court has not yet imposed sentence. Additionally, the district court has not ruled on the government's motion to dismiss. Thus, the appellate process is available for the Petitioner to seek relief, if and when he is sentenced and the government's motion to dismiss is denied. *See United States v. Carrigan*, 778 F.2d 1454, 1466-67 (10th

Cir. 1985) (district court's "rejection of the proposed plea bargain does not justify the issuance of a writ. A defendant or the Government may seek review of such an order on direct appeal after a final judgment of conviction and sentencing. Therefore, it cannot be said that the parties have no adequate means to seek the desired relief.").

Even if this Court first considers whether the district court legally erred as Petitioner alleges it should (Pet. at 11), and finds that district court did legally err, Petitioner must still meet all three factors of the three-factor test for the writ to lie. The very essence of the first factor is that the writ cannot lie if the district court's error can be addressed another way. Here, the district court has not yet ruled on the government's motion to dismiss, so Petitioner has not suffered any harm from which to seek relief. Because any potential harm to Petitioner is hypothetical at this point in time, the extraordinary remedy of mandamus is premature. In the event any remedy is necessary after the district court rules on the motion to dismiss, a direct appeal on a fully developed record is an entirely adequate remedy. Accordingly, because Petitioner cannot meet the first of the three conditions required for issuance of a writ of mandamus, his petition must be denied.

II. THE DISTRICT COURT WAS WELL WITHIN ITS DISCRETION TO APPOINT *AMICUS CURIAE.*

The district court was well within its discretion to appoint *amicus curiae* to present arguments in support of Petitioner's twice-entered guilty plea to lying to the

FBI and in opposition to the government's motion to dismiss pursuant to Fed. R. Crim. P. 48(a). Rule 48(a) provides that the government may dismiss an indictment, information or complaint only "with leave of court." The Supreme Court in *Rinaldi v. United States*, 434 U.S. 22 (1977), explained that the "leave of court" requirement "obviously vest[s] some discretion in the court," and while "[t]he principal object of the 'leave of court' requirement is apparently to protect a defendant against prosecutorial harassment, e.g., charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection," the Court noted that Rule 48(a) has "also 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.

Federal appellate courts interpreting Rule 48(a), including this Court, have also emphasized that the phrase "by leave of court" was "intended to clothe the federal courts with a discretion broad enough to protect the public interest in the fair administration of criminal justice," *United States v. Cowan*, 524 F.2d 504, 512 (5th Cir. 1975), and that a court deciding a Rule 48(a) motion should not "serve merely as a rubber stamp for the prosecutor's decision." *United States v. Ammidown*, 497 F.2d 615, 622 (D.C. Cir. 1973).

Thus, a district court deciding a Rule 48(a) motion "has independent responsibilities that may bear on his or her decision on the requested dismissal. In

other words, there are independent rights, interests, and duties that a court may protect, by using Rule 48(a) as a 'sunshine' provision that exposes the reasons for prosecutorial decisions." *In re Richards*, 213 F.3d 773, 788 (3d Cir. 2000) (holding it improper to issue writ of mandamus to prevent trial court from holding hearing on Rule 48(a) motion). Because "the public has a generalized interest in the processes through which prosecutors make decisions about whom to prosecute that a court can serve by inquiring into the reasons for a requested dismissal," a court deciding whether to dismiss a prosecution pursuant to Rule 48(a) can "force prosecutors to publicly reveal their reasons for not proceeding before granting a requested dismissal. Bringing these decisions into the open may, in turn, lead to attempts by the public to influence these decisions through democratic channels." *Id*. at 789. *Amicus curiae* is concerned that in this well-publicized, high profile case, the need for clearly informing the public of the reasons for the government's decision to discontinue the prosecution is especially great.

It was a proper exercise of the district court's discretion to appoint an *amicus curiae* to aid it in exercising its responsibilities to determine, rather than rubber stamp, a Rule 48(a) motion. "District courts have inherent authority to appoint or deny *amici*." *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008) (internal quotations omitted) (collecting cases). Moreover, "[i]t is solely within the court's discretion to determine 'the fact, extent, and manner' of the [*amicus's*]

participation." *Id*. (quoting *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003)). "Amicus participation is normally appropriate when (a) a party is not represented competently or is not represented at all, (b) the amicus has an interest in some other case that may be affected by the decision in the present case, or (c) when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Hard Drive Prods., Inc. v. Does 1-1,495*, 892 F. Supp. 2d 334, 337 (D.D.C. 2012) (internal quotations omitted).

In this case, the district court's appointment of an *amicus curiae* to offer an informed response to the government's extraordinary motion to dismiss the criminal case against Petitioner, a former National Security Advisor to the President who twice admitted, under oath, to lying to the FBI, is critical to informing the public interest and protecting the fair administration of our criminal justice system. *See Tapia v. United States*, 564 U.S. 319, 323 (2011) ("Because the United States agrees with Tapia's interpretation of the [sentencing] statute, we appointed an *amicus curiae* to defend the judgment below."). Far from "sally[ing] forth each day looking for wrongs to right", *United States v. Sineneng-Smith*, 2020 U.S. LEXIS 2639 (2020), the district court in this case appointed an *amicus curiae* to respond to a question posed by a party to the case, namely the government, when it filed its motion seeking dismissal of the criminal case against Petitioner at this late stage. Unlike the lower court in *Sineneng-Smith*, where the court itself framed a question for *amici* that was

"never raised" by a party there, the question raised by the government, namely, shall the Information be dismissed, begs for an advocate to respond. *Id*. at *6. The appointment of an *amicus curiae* is particularly important here in view of the strong public interest in having a fully developed record in the district court and a decision on final disposition of the case formed only after the facts surrounding the government's motion to dismiss are fully established. Upending this process by granting the mandamus relief sought by Petitioner would leave festering doubts and questions.

Moreover, Petitioner's reliance on *United States v. Fokker Servs., B.V.*, 818 F.3d 733 (D.C. Cir. 2016) in support of his argument that this Court should grant the government's motion to dismiss and vacate the district court's order appointing an *amicus curiae* is unavailing. In fact, *Fokker* specifically supports appointment of *amici* when the parties agree in seeking to overturn a district court's decision. *Id*. at 740 ("Because both parties seek to overturn the district court's denial of their joint motion to exclude time, we appointed an *amicus curiae* to present arguments defending the district court's action."). While the *amici* in *Fokker* was appointed by the appellate court rather than the district court, the purpose was the same as the appointment of an *amicus curiae* in this case: to present counter arguments that would not otherwise be made because the parties agreed that the charges against Petitioner should be dismissed after he twice pleaded guilty and his plea was

accepted by the district court.[1] And, for essentially the same reasons as are argued herein, this Court rejected the writ of mandamus sought in *Fokker*.

The abrupt about-face by the government on the eve of Petitioner's sentencing threatens to undermine public confidence in, and raises substantial questions about, the administration of justice. This is particularly true where the Petitioner is a close associate of the President and former high-ranking member of the current administration, especially in light of Attorney General William Barr's recent decision to override his own staff prosecutors' sentencing recommendations in the case of Roger Stone, another intimate of the President. *See United States of America v. Roger J. Stone*, Crim. No. 19-018 (ABJ) (D.D.C. Feb. 20, 2020). Thus, the highly irregular circumstances of this case cry out for the district court, with the aid of the appointed *amicus*, to ensure that the government's motion to dismiss is not "prompted by considerations clearly contrary to the public interest," *Rinaldi*, 434 U.S. at 29 n.15, or "tainted with impropriety." *Id*. at 30.

Furthermore, because it is left to the discretion of the district court to determine "the fact, extent, and manner of the participation," *Jin*, 557 F. Supp. 2d at 136 (internal quotations omitted), it was not improper for the district court to direct

[1] *Fokker* is also factually distinguishable from this case because it concerned a government motion to exclude time pursuant to a deferred prosecution agreement, while the government motion here seeks outright dismissal of a criminal case after the Petitioner has twice pleaded guilty and on the eve of sentencing. *Fokker*, 818 F.3d at 739-40.

the *amicus* to "present arguments in opposition to the government's Motion to Dismiss" and to "address whether the Court should issue an Order to Show Cause why [petitioner] should not be held in criminal contempt for perjury pursuant to 18 U.S.C. § 401, Federal Rule of Criminal Procedure 42, the Court's inherent authority, and any other applicable statutes, rules, or controlling law" (D.D.C. ECF 205). Accordingly, the district court's appointment of an *amicus curiae* to elucidate the reasoning behind the government's motion to dismiss and aid in its determination whether to grant the motion should not be disturbed.

CONCLUSION

For the foregoing reasons. this Court should deny the petition for a writ of mandamus.

Dated: June 1, 2020

Respectfully submitted,

/s/ Gregory S. Smith

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 21(d)(1) because this brief contains 3,143 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Dated: June 1, 2020

/s/ Gregory S. Smith

CERTIFICATE OF SERVICE

I certify that on June 1, 2020, I filed a copy of the foregoing document via the CM/ECF system of the United States Court of Appeals for the District of Columbia Circuit, which will send notice of this filing to all counsel of record.

/s/ Gregory S. Smith