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
United States District Court for the District of Columbia
Case No. 1:17-cr-232

CORRECTED BRIEF OF *AMICUS CURIAE* JOHN M. REEVES IN SUPPORT OF GRANTING MANDAMUS IN FAVOR OF PETITIONER MICHAEL T. FLYNN AND RESPONDENT THE UNITED STATES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), undersigned *amicus* certifies the following:

A. Parties and *Amici*. Except for undersigned *amicus* and the following, all parties, intervenors, and *amici* appearing before the district court and in this court are listed in the petition for a writ of mandamus:

The States of Ohio, Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Louisiana, Mississippi, Missouri, Montana, Oklahoma, South Carolina, Texas, Utah, and West Virginia.

While several prospective *amici*—including undersigned—and/or intervenors have pending motions to participate either as *amici* or intervenors in both this Court and the district court, none of those motions have been granted as of this brief's filing.

B. Rulings Under Review. References to the rulings at issue appear in the petition for a writ of mandamus.

C. Related Cases. This case has not previously been before this court, and there are no pending related cases.

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STATEMENT OF *AMICUS* INTEREST AND AUTHORITY TO FILE

John M. Reeves ("JMR") is an attorney with a solo legal practice in St. Louis, Missouri. He specializes in appellate litigation, and has written—on his own—over 250 appellate briefs since 2008. His practice also includes defending municipalities and officials in civil litigation under 42 USC §1983—litigation that very often involves appellate review of interlocutory court orders, such as immunity denials. From 2008 to 2015, JMR served as an Assistant Missouri Attorney General in Jefferson City, Missouri, first in the criminal appellate division and then in the litigation division. The Missouri Attorney General's Office is notable for including among its alumni a former judge of this very Court who now serves on the Supreme Court of the United States. *See* Clarence Thomas, *My Grandfather's Son*, 87-89, 93-104, 108-109 (HarperCollins 2007). In October 2019, JMR co-founded the Missouri Bar's first-ever statewide committee devoted exclusively to improving appellate practice, and he presently co-chairs that committee. All of the arguments in this brief are made in JMR's individual capacity, and not in an official capacity as a representative of any other entity, private or public.

As an attorney specializing in appellate litigation, including interlocutory appeals and writs, JMR has an interest in ensuring the proper development of caselaw in this area. In addition, as a former Missouri state criminal appellate attorney, JMR has an interest in ensuring that federal courts apply Fed.R.Crim.P. 48(a) in a manner that upholds the separation of powers. While Fed.R.Crim.P. 48(a) does not directly apply to Missouri state criminal proceedings, the Missouri Supreme Court has relied upon it in interpreting the powers of Missouri prosecutors. *See State ex rel. Norwood v. Drumm*, 691 S.W.2d 238, 240 (Mo. 1985).

An *amicus* brief is desirable to guarantee this Court's full consideration of the following three matters: (1) how mandamus relief is appropriate not only when a district court *denies* a motion to dismiss under Fed.R.Crim.P. 48(a), but also when, as here, a district court *refuses to rule* on such a motion; (2) how, when the Government seeks dismissal *with prejudice* under Fed.R.Crim.P. 48(a), the district court lacks discretion to do anything other than grant dismissal; and (3) how a district court's inherent criminal contempt powers do not include the power to punish a defendant for alleged perjury. Neither Flynn's

petition nor the State Attorneys' General *amici* brief directly examine these issues, yet they are central to resolving this extraordinary situation. JMR's proposed *amicus* brief addresses all three matters.

JMR has filed with this Court a motion for leave to file this brief.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

JMR is the sole author of this brief. No counsel for any party authored this brief in whole or in part. Nor did any party, any party's counsel, or any other person contribute money intended to fund preparing or submitting this brief.

STATEMENT OF THE CASE

On May 7, 2020, Respondent the United States ("the Government") filed a motion to dismiss the criminal information against Petitioner Michael T. Flynn ("Flynn") under Fed.R.Crim.P. 48(a) in the district court. Notably, the Government sought dismissal *with* prejudice, meaning it voluntarily sought to bar itself from ever refiling the criminal charges against Flynn. (Doc.198 at 1).[1] Five days later, Flynn filed a notice consenting to the Government's motion and declaring his "agree[ment] that the dismissal of this case meets the interests of justice," and "request[ing] that this matter be dismissed immediately, with prejudice." (Doc. 202). But instead of granting the Government's consent motion, Respondent Judge Emmet G. Sullivan ("Judge Sullivan") gave notice that he would shortly be setting a briefing schedule "governing the submission of any amicus curiae briefs." (Apx.3 at 75).

The following day—May 13, 2020—Judge Sullivan *sua sponte* appointed The Honorable John Gleeson (Ret.) as *amicus curiae* to (1)

[1] The term "Doc" refers to the ECF-generated document filed with the district court, followed by the relevant document number and page number.

present arguments in opposition to the Government's motion to dismiss with prejudice, and (2) to "address whether the Court should issue an Order to Show Cause why Mr. Flynn should not be held in criminal contempt for perjury…." (Apx.4 at 77).

Flynn has now filed this petition for a writ of mandamus. This Court, in turn, has ordered Judge Sullivan to respond, and invited the Government to respond, both by June 1, 2020. Two days ago, the Government indicated through its spokesperson that it intends to file a response in this Court supporting dismissal in the district court. *See* Interview with Kerri Kupec, *The Sean Hannity Show*, 2:42—3:43 (Fox News May 27, 2020) (available at https://youtu.be/xjKyFUQ1Djs) (accessed May 28, 2020, 10:26 pm Eastern Time).

SUMMARY OF THE ARGUMENT

A federal appellate court should limit the deployment of its "drastic and extraordinary" mandamus powers to "extraordinary" situations. *See Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 380 (2004). This case is such a situation. In complete disregard of its duties to uphold the separation of powers under the Constitution, along with a disturbing indifference to the rights of a criminal defendant who loyally served his country in the United States Army for over 30 years, a district court has refused to rule on the Government's consent motion to dismiss criminal charges with prejudice, instead appointing—gratuitously, and without any authority to do so—outside counsel as *amicus* to argue against granting dismissal of the criminal case. It has thus unreasonably delayed resolving the Government's motion. This Court should issue mandamus to the district court, directing it to take no further action other than granting the Government's dismissal motion, thus finally bringing this travesty to an end.

ARGUMENT

I. Mandamus is proper not only following a district court's denial of a motion to dismiss under Fed.R.Crim.P. 48(a), but also when a district court unreasonably delays and refuses to rule on the matter.

This Court has made clear that mandamus is a proper remedy if a district court denies a motion to dismiss under Fed.R.Crim.P. 48(a). *See U.S. v. Fokker Serv.*, 818 F.3d 733, 742-743, 747-750 (D.C. Cir. 2016). But mandamus is not limited to such a situation. Rather, it is also available where, as here, a district court, while not *denying* a motion to dismiss, has *refused to rule* on the matter through an unreasonable delay. *See Telecom. Research and Action Center v. FCC*, 750 F.2d 70, 75-77, 76 n. 28 (D.C. Cir. 1984). In *Action Center*, the petitioners—several telecommunications companies—had been under a prolonged investigation by the FCC as to whether or not they had to reimburse their ratepayers for alleged overcharging. *Id.* at 72. But the FCC continuously put off rendering a decision on the matter. *Id.* at 73-74. Finally, the petitioners sought mandamus relief from this Court, asking it to order the FCC to issue a ruling. *Id.* at 72.

This Court agreed that mandamus was appropriate. It held that the All Writs Act, 28 U.S.C. §1651(a), empowered it to "resolve claims of

unreasonable delay…." *Action Center*, 750 F.2d. at 76. Nor did this Court limit its ruling to curing an agency's unreasonable delay—it also held that mandamus could issue to cure a district court's unreasonable delay in ruling on a matter. *See id*. at 76 n. 28. ("The authority of an appellate court to issue mandamus to an agency is analogous to its authority to issue the writ to District Courts."). This Court noted how "[t]he Supreme Court has long recognized the authority of appellate courts to compel district court action through mandamus." *Id*. (citing *McClellan v. Carland*, 217 U.S. 268 (1910); *Ex Parte Bradstreet*, 32 U.S. 634 (1833); *Ex Parte Crane*, 30 U.S. 190 (1831)). *See also In re School Asbestos Litigation*, 977 F.2d 764, 792-793 (3d Cir. 1992) (joined by Alito, J.) (ruling that mandamus was the proper remedy for the district court's refusal to rule on the merits of a summary judgment motion).

Judge Sullivan will no doubt argue that his appointment of *amicus* to oppose the Government's dismissal motion does not constitute an unreasonable delay or a refusal to rule, but rather is simply his way of ensuring that when he does decide to rule, he will have taken into consideration all of the applicable law on the matter, per the "leave of court" requirements of Fed.R.Crim.P. 48(a). But this overlooks how "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." *Fokker*, 818 F.3d at 742. Indeed, a district court has "no power…to deny a prosecutor's Rule 48(a) motion to dismiss charges based on a disagreement with the prosecution's exercise of charging authority." *Id*. Yet Judge Sullivan has appointed *amicus* for the precise purpose of raising arguments "disagree[ing] with the prosecution's exercise of charging authority." *See id*. This unwarranted intrusion into the Government's charging authority is itself an "unreasonable delay" and refusal to rule on the Government's dismissal motion, thus justifying mandamus. *See Action Center*, 750 F.2d at 76.

Judge Sullivan's appointing of *amicus* to oppose the Government's dismissal motion, instead of immediately ruling on it, may be likened to a district court refusing, in the civil context, to rule on a dismissal motion asserting absolute immunity or qualified immunity, and instead ordering discovery to commence. Both absolute immunity and qualified immunity guarantee not only immunity from liability, but also immunity from suit, including the burdens of discovery and trial. *See*

Mitchell v. Forsyth, 472 U.S. 511 (1985). An order denying a motion to dismiss on such grounds is eligible for an interlocutory appeal under the collateral order doctrine, in order to guarantee the vindication of such rights. *Id.* at 524-529. To that end, the Supreme Court has admonished lower courts that "immunity claims [must] be resolved at the earliest possible stage of litigation." *See Hunter v. Bryant*, 502 U.S. 224, 234 (1991). A district court's refusal to rule on an immunity claim discards this admonition that it resolve the matter as early as possible. Even worse, it puts the defendant claiming such immunity in a Catch-22 position: as the district court has not actually denied the immunity claim, there is no interlocutory appeal available in the first place. *Miller v. Gammie*, 335 F.3d 889, 894-895 (9th Cir. 2003) (en banc).

Recognizing this quandary, the Ninth Circuit, sitting en banc, has held that mandamus is proper where a district court holds in abeyance a dismissal motion asserting immunity and instead orders discovery to take place. *See id*. The district court cannot skirt an interlocutory appeal of an immunity denial by attempting to avoid ruling on the immunity issue in the first place. *See id.* Should the district court attempt such a run-around by putting off a ruling and instead ordering

discovery, mandamus is appropriate to compel it to rule on the matter. *See id; but see Payne v. Britten*, 749 F.3d 697, 703-704 (8th Cir. 2014) (Riley, C.J., concurring in part and dissenting in part) (collecting non-D.C. Circuit appellate rulings holding that such a refusal to rule is itself eligible for an interlocutory appeal, and not mandamus, and that the Ninth Circuit's approach "is unnecessarily formalistic.").

Mandamus serves "to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction." *Cheney*, 542 U.S. at 380 (cleaned up). Its deployment is justified to remedy "a clear abuse of discretion…." *Id*. (cleaned up). Just as a district court has no discretion to delay ruling on an immunity motion through the ordering of discovery, but rather must resolve the issue at the earliest possible time, so too a district court has no discretion delay ruling on an uncontested motion to dismiss with prejudice under Fed.R.Crim.P. 48(a) by appointing *amicus* to oppose the motion. In both situations, mandamus is proper to reign in such an unnecessary, unlawful delay and compel the district court to do its job. *See Miller,* 335 F.3d at 894-895; *see also Fokker*, 818 F.3d at 749-750.

While it may be appropriate, in the immunity context, to limit mandamus to directing the district court to simply *issue* a ruling on the matter, without directing the district court as to *how* it should rule, *cf.* *Robinson v. Mericle*, 56 F.3d 946, 947 (8th Cir. 1995) (remanding the interlocutory appeal to the district court to decide the qualified immunity issue in the first instance), the same cannot be said for a district court that refuses—like Judge Sullivan has—to rule on a consent motion to dismiss a criminal indictment *with prejudice* under Fed.R.Crim.P. 48(a). As explained in the next section below, a district court confronted with such a situation has no discretion to do anything other than grant the dismissal, Fed.R.Crim.P. 48(a)'s "leave of court" language notwithstanding. To hold otherwise would eviscerate the Constitution's separation of powers. It is therefore proper to issue mandamus not only directing Judge Sullivan to vacate his *amicus* order and immediately rule on the Government's dismissal motion, but also directing Judge Sullivan to *grant* the motion and dismiss the criminal indictment against Flynn with prejudice.

II. A district court lacks discretion to do anything other than grant a Fed.R.Crim.P. 48(a) motion to dismiss when the Government seeks dismissal *with prejudice*.

Under Fed.R.Crim.P. 48(a), the Government may only dismiss a criminal case "with leave of court." While much ink has been spilled over the last several decades as to the exact meaning of this phrase, "the 'principal object of the "leave of court" requirement' has been understood to be a narrow one—'to protect a defendant against prosecutorial harassment…when the [g]overnment moves to dismiss an indictment over the defendant's objection.'" *Fokker,* 818 F.3d at 742 (quoting *Rinaldi v. U.S.*, 434 U.S. 22, 29 n. 15 (1977)). "A court thus reviews the prosecution's motion under Rule 48(a) primarily to guard against the prospect that dismissal is part of a scheme of 'prosecutorial harassment' of the defendant through repeated efforts to bring—and then dismiss—charges." *Fokker*, 818 F.3d at 742.

The risk of "prosecutorial harassment" through the Government's repeated attempts to bring and dismiss charges can only exist where the Government moves for dismissal *without prejudice*, as this is the only situation that can create the potential for such harassment through attempted refiling. *See Bloate v. U.S.*, 559 U.S. 196, 214 (2010)

("A district court may dismiss the charges *without prejudice*, thus allowing the Government to refile charges or reindict the defendant.") (emphasis in original). Since, by contrast, a dismissal *with prejudice* of its very nature bars the Government from recharging a criminal defendant, *Ciralsky v. CIA*, 355 F.3d 661, 672 n. 11 (D.C. Cir. 2004), it does not carry with it any risk of subjecting the defendant to future prosecutorial harassment.

Several decades ago, this Court suggested, in *dicta*, that it could conceivably be proper for a district court to deny a Fed.R.Crim.P. 48(a) motion to dismiss with prejudice, even if the defendant consented to such dismissal. *U.S. v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973). It speculated that, even if a defendant concurred in a motion to dismiss with prejudice, a district court might still need to examine "whether the action sufficiently protects the public," *id.*, but provided no further elaboration on what that phrase meant. *See id.*

This Court's own subsequent decisions make clear that, to the extent *Ammidown* suggests a district court can second-guess the Government's decision to dismiss with prejudice, such a suggestion is directly repugnant to the Constitution's separation of powers. This Court itself

ruled in *Fokker* that Fed.R.Crim.P. 48(a)'s "leave of court" language has to be construed "in a manner that preserves the Executive's long-settled primacy over charging decisions and that denies courts substantial power to impose their own charging preferences." *Fokker*, 818 F.3d at 743. In coming to this conclusion, this Court has effectively discarded its *dicta* in *Ammidown*.

When the Government moves, with the defendant's consent, to dismiss a criminal case with prejudice, there is simply no way for the district court to deny such a motion without at the same time usurping the Executive's authority to make charging decisions. In appointing amicus to oppose the Government's consent motion to dismiss, Judge Sullivan "is playing U.S. Attorney. It is no doubt a position that he could fill with distinction, but it is occupied by another person." *See In re U.S.*, 345 F.3d 450, 453 (7th Cir. 2003) (Posner, J., joined by Easterbrook and Wood, J.J.). Judge Sullivan "could not properly refuse to enforce a statute because he though the legislators were acting in bad faith or that the statute disserved the public interest; it is hard to see, therefore, how he could properly refuse to dismiss a prosecution merely

because he was convinced that the prosecutor was acting in bad faith or contrary to the public interest." *See id*.

At the end of the day, when the Government files a consent motion to dismiss with prejudice, it makes no difference what its motivations are or whether it is acting in bad faith—such concerns are, quite simply, irrelevant to the analysis. As Flynn's petition demonstrates, there is no question that the Government, in seeking dismissal here, is acting in good faith, without any evidence of impropriety, corruption, or supposed improper political influence. (Pet. at 25). But it is unnecessary—indeed, it is improper—for this Court or Judge Sullivan even to examine these matters in the first place. This Court can—and should—grant mandamus directing Judge Sullivan to dismiss the case without having any "occasion to disagree (or agree) with [Judge Sullivan's] concerns about the government's charging decisions in this case." *See Fokker*, 818 F.3d at 738. "[T]he fundamental point is that those determinations are for the Executive—not the courts—to make." *Id*.

III. A district court's criminal contempt powers do not include the power to punish for alleged perjury.

In appointing *amicus* to oppose the Government's dismissal motion, Judge Sullivan also asked him to brief whether Flynn should be "held in criminal contempt for perjury…." (Apx.4 at 77). But while a district court is empowered to "punish by fine or imprisonment, or both at its discretion" any "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command," 18 U.S.C. §401(3), "perjury alone does not constitute an 'obstruction' which justifies exertion of the contempt power…." *In re Michael*, 326 U.S. 224, 228 (1945). Rather, "there must be added to the essential elements of perjury under the general law the further element of obstruction to the Court in the performance of its duty." *Id*. (cleaned up).

Aside from the fact that there is no evidence whatsoever that Flynn has committed perjury, at no time has Flynn ever obstructed the Court in its ability to perform its duty in presiding over his criminal case. As far as JMR can tell, Judge Sullivan seems to believe that a defendant who pleads guilty and subsequently moves to withdraw that guilty plea is guilty of lying to the court. To say the least, it is very disturbing that a federal district court judge could hold such a position. Following a

guilty plea but prior to sentencing, "the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason." Fed.R.Crim.P. 32(d). Indeed, "[w]ithdrawal of a guilty plea before sentencing is liberally granted…." *U.S. v. Ford*, 993 F.2d 249, 251 (D.C. Cir. 1993). A "viable claim of innocence," furthermore, is a legitimate ground for seeking to withdraw a guilty plea. *See U.S. v. Leyva*, 916 F.3d 14, 22 (D.C. Cir. 2019). But under Judge Sullivan's apparent reasoning, any time a criminal defendant moves to withdraw a guilty plea, he is guilty of criminal contempt and should be punished accordingly, even if overwhelming evidence demonstrates that he is, in fact, innocent of the underlying charges, and even if the Government confesses error and moves to dismiss such charges. Such blatant disregard for the rights of criminal defendants and mockery of basic criminal caselaw cannot be allowed to stand.

CONCLUSION

This Court should grant Flynn's mandamus petition and direct Judge Sullivan—or another judge upon reassignment—to vacate all amicus orders in the district court and take no further action other than granting the Government's motion to dismiss with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will automatically send notice to counsel for Petitioner Michael D. Flynn and counsel for respondent Emmet G. Sullivan.

As the Respondent the United States has yet to enter its appearance in this matter and begin receiving e-notices via the CM-ECF system, I further certify that on May 29, 2020, I served an electronic copy of the foregoing in .pdf format via e-mail to the following:

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains **3,381** words, excluding those parts exempted by Fed.R.App.P. 32(f) and Circuit Rule 32(e)(1), and consequently complies with the 3,900 word limit of Fed.R.App.P. 21(d)(1) and 29(a)(5).

I further that certify 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) as it is written in proportionally-spaced, 14-point Century Schoolbook font using Microsoft Office Word 2016.

/s/ John M. Reeves