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 (No. 1:17-cr-232-EGS-1)

CORRECTED BRIEF OF WATERGATE PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *amici*. – Except for the present filers, who are 16 individuals who served on the Watergate Special Prosecution Force, all parties and *amici* appearing before the district court and in this Court are listed in the Petition for a Writ of Mandamus.

B. Rulings Under Review. – Petitioner seeks review of the district court's order appointing an *amicus curiae* (ECF No. 205) and the district court's minute order allowing the *amicus* to appear *pro hac vice* and setting a briefing schedule. Petitioner also seeks to compel the district court to issue an immediate ruling on the Government's pending Motion to Dismiss under Rule 48(a) (ECF No. 198).

C. Related Cases. – Other than the proceedings in the district court, *Amici* are not aware of any related cases.

/s/ Lawrence S. Robbins
Lawrence S. Robbins

Dated: May 27, 2020

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

Amici Curiae are 16 individuals who served on the Justice Department's Watergate Special Prosecution Force ("Watergate Prosecutors").[1] The Watergate Prosecutors have given notice to the district court that they intend to seek leave to file an *amicus* brief in response to the Government's Motion to Dismiss the Flynn Information. Pet. 6; *see* App. 2 at 64-73. After the submission of that notice, the district court issued an order "anticipat[ing] that individuals and organizations will seek leave of the Court to file amicus curiae briefs." App. 3 at 75. Flynn's mandamus petition now seeks to preclude the Watergate Prosecutors from participating as *amici* before the district court. *See* Pet. 16. The Watergate Prosecutors thus have a compelling interest in the disposition of the petition.

The Watergate Prosecutors also bring a unique perspective to this mandamus proceeding. Flynn's prosecution was commenced, and his conviction (in the form of a guilty plea) was secured, by the office of a Special Counsel appointed to ensure an appropriate degree of independence, after the Acting Attorney General determined that such an appointment would be "in the public interest." 28 C.F.R. § 600.1(b). The Watergate Prosecutors were likewise appointed to pursue

[1] *Amici* are Nick Akerman, Richard Ben-Veniste, Richard J. Davis, Carl B. Feldbaum, George T. Frampton, Jr., Kenneth S. Geller, Gerald Goldman, Stephen E. Haberfeld, Henry L. Hecht, Paul R. Hoeber, Philip Allen Lacovara, Paul R. Michel, Robert L. Palmer, Frank Tuerkheimer, Jill Wine-Banks, and Roger Witten.

investigation of politically connected officials in an objective, non-partisan way. Because of their work as members of the Watergate Special Prosecutor's Office, they have unique insight into prosecutorial independence and the respective responsibilities of the Executive and Judicial Branches in fostering the public's confidence in the institutions of the criminal law when close associates of the President are suspected of crimes.

The Watergate Prosecutors have sought the Court's leave to file this brief.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No person other than *Amici Curiae* and their counsel authored any part of this brief or contributed money intended to fund its preparation or submission.

INTRODUCTION

Petitioner Michael T. Flynn stands convicted, on his own guilty plea, of making false statements to the FBI in violation of 18 U.S.C. § 1001. On May 7, 2020, after Flynn twice entered guilty pleas to the charges, the Government took the extraordinary step of moving to dismiss the information that was the basis for that conviction. *See* D.D.C. ECF No. 198 ("Mot."). Although the ink on that still-pending motion is barely dry, Flynn asks this Court to issue an extraordinary writ of mandamus ordering the district court to grant the Government's motion "immediately" (Pet. 2) without exercising the discretion required under Federal Rule of Criminal Procedure 48(a), and without hearing from any *amici curiae* on the scope of its authority.

Mandamus may issue *only* when the petitioner has shown "(1) a clear and indisputable right to relief, (2) no other adequate means of redress, *and* (3) appropriateness under the circumstances." *In re Trade and Commerce Bank ex rel. Fisher*, 890 F.3d 301, 303 (D.C. Cir. 2018) (emphasis added).

Petitioner fails the second requirement because, as he admits, he will be able to return to this Court and seek review if the district court denies the government's dismissal motion. *Cf. 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."). For that reason alone, this Court should deny relief.

But Petitioner also fails to demonstrate any clear and indisputable right to relief or the appropriateness of mandamus here. Mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes," where there has been a judicial "usurpation of power or a clear abuse of discretion." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (quotation marks omitted). Far from a "usurpation of power," the district court's preliminary housekeeping orders appointing one *amicus curiae*, and entertaining the possibility of receiving additional *amicus* participation, were entirely within that court's powers. As shown below, Rule 48(a), by its terms, *requires* district courts to exercise independent judgment when deciding a motion to dismiss federal charges. Independent judgment is unquestionably informed by an adversary presentation in which not all parties are singing from the same hymnbook. The district court's discretion, moreover, is heightened where, as here, the Government seeks effectively to vacate a court order accepting a guilty plea. With neither party before the court prepared to advocate on behalf of the validity of the district court's orders, it was within the judicial province to appoint *amicus* counsel to do so.

Perhaps in the ordinary case, a government motion under Rule 48(a) would, as Petitioner contends, warrant a "presumption of regularity." Pet. 21. Even then, however, the plain language of the rule would obligate a district court to exercise a measure of discretion in deciding the motion. Here, the substance of the

Government's motion departs so dramatically from settled legal principles and traditional prosecutorial norms as to suggest that it was tailor-made for this particular politically connected defendant—and, as such, constitutes "a restricted railway ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

ARGUMENT

THE DISTRICT COURT HAS SIGNIFICANT DISCRETION BOTH IN DECIDING THE GOVERNMENT'S RULE 48(A) MOTION AND IN APPOINTING *AMICI CURIAE* TO ASSIST IN ITS DECISION

Petitioner Flynn contends that the "presumption of regularity" deprives the district court of the authority "to do anything but grant the Motion to Dismiss." Pet. 25. It follows, says Flynn, that the district court had no authority to appoint counsel to contest the Government's motion. Both propositions would be mistaken even under a less exacting standard. But it is absurd to suggest that the district court "usurped" its jurisdiction in appointing *amicus* counsel and signaling that it may accept other *amicus* submissions to assist its consideration of the Government's motion.

A. A district court is not required to serve "as a rubber stamp for the prosecutor's decision" to dismiss an information, even when (as often occurs) "the defendant concurs in the dismissal." *United States v. Ammidown*, 497 F.2d 615, 620, 622 (D.C. Cir. 1973). Rule 48(a), by its terms, requires "leave of court" before

federal charges may be dismissed. The Supreme Court added the "leave of court" language precisely "to prevent abuse of the uncontrolled power of dismissal previously enjoyed by prosecutors." *Id.* at 619-20. As a recent study of Rule 48(a) confirms, the Court deliberately sought to "vest[] district judges with the power to limit unwarranted dismissals by corruptly motivated prosecutors." Thomas Ward Frampton, *Why Do Rule 48(a) Dismissals Require "Leave of Court"?*, 73 Stan. L. Rev. Online (forthcoming 2020), https://bit.ly/2WFEwNE. The Court intentionally altered the traditional common law rule that allowed a prosecutor to enter a *nolle prosequi* at his discretion, without any action by the court. *Id.* Rule 48(a) presents the district court with a *judicial decision* to make, not a ministerial duty.

In deciding whether to grant "leave of court" under Rule 48(a), courts must "balance the constitutional duty of … the Executive Branch, to take care that the laws are faithfully executed with the constitutional powers of the federal courts." *United States v. Hamm*, 659 F.2d 624, 628 (5th Cir. Unit A Oct. 1981) (en banc) (quotation marks omitted). That balance—and the relative weight accorded to the Article II and Article III interests at stake—depends on the procedural posture of a case.

Decisions to dismiss "*pending* criminal charges" may, as Flynn argues, "lie squarely within the ken of prosecutorial discretion." *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016) (emphasis added); Pet. 9. Even then, a

district judge must "obtain and *evaluate* the prosecutor's reasons." *Ammidown*, 497 F.2d at 622 (emphasis added). The judge may withhold approval if he is not "satisfied that the reasons advanced for the proposed dismissal are substantial," or "if he finds that the prosecutor [either] has failed to give consideration to factors that must be given consideration in the public interest" or has otherwise "abused his discretion." *Id.* at 620, 622.

After a guilty plea has been accepted, however, judicial scrutiny of a Rule 48(a) motion is necessarily even more searching. "A plea of guilty … bring[s] the prosecution to a[n] … end[.]" *Coleman v. Burnett*, 477 F.2d 1187, 1193-94 (D.C. Cir. 1973). It "is a conviction," *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), after which "nothing remains but to give judgment and determine punishment," *id.*; *see Kercheval v. United States*, 274 U.S. 220, 223 (1927) (same). A guilty plea is therefore "an event of signal significance," *Florida v. Nixon*, 543 U.S. 175, 187 (2004), which marks a criminal proceeding's transition from the domain of "the Executive's traditional power over charging decisions" to that of "the Judiciary's traditional authority over sentencing decisions," *Fokker Servs.*, 818 F.3d at 746.

Because the prosecution is complete once a guilty plea is accepted, the denial of a post-plea Rule 48(a) motion is unlikely to intrude upon any Article II prerogatives. The conviction has already been obtained; accordingly, such a motion does not call upon courts to second-guess the Executive's decision regarding which

cases to pursue in light of the relative "strength" of the cases, *Fokker Servs.*, 818 F.3d at 741, or its limited "prosecution resources," *Ammidown*, 497 F.2d at 621.[2]

By contrast, granting a post-plea Rule 48(a) motion threatens several core Article III values. When a court accepts a guilty plea, it "exercises its coercive power by entering a judgment of conviction." *Fokker Servs.*, 818 F.3d at 746. Article III courts have a strong interest in the "conservation of judicial resources and [the] finality of judicial decisions." *Garris v. Lindsay*, 794 F.2d 722, 726 (D.C. Cir. 1986) (per curiam). That concern with finality "has special force with respect to convictions based on guilty pleas," *United States v. Timmreck*, 441 U.S. 780, 784 (1979), which courts accept only with "care and discernment," *Brady v. United States*, 397 U.S. 742, 748 (1970), and "the utmost solicitude of which courts are capable," *Boykin*, 395 U.S. at 243-44.

In addition, Article III courts have a strong interest in "protect[ing] … the sentencing authority reserved to the judge." *Ammidown*, 497 F.2d at 622; *see United States v. Brayboy*, 806 F. Supp. 1576, 1580 (S.D. Fla. 1992) (holding that it would raise a separation-of-powers problem if the Executive could use Rule 48(a) to "eliminate [a] [c]ourt's authority to sentence, or if a sentence has been imposed, to

[2] Despite his extensive reliance on that case for its Rule 48(a) standard (*see* Pet. 9-11, 17-21), Flynn nowhere mentions that *Fokker* concerned a hypothetical *pre*-conviction motion to dismiss charges that were still "pending." *Fokker Servs.*, 818 F.3d at 742.

set aside that result").

District courts must, therefore, have substantial discretion in ruling on Rule 48(a) motions filed after the court has accepted a guilty plea. The casual vacatur of guilty pleas "debases the judicial proceeding at which a defendant pleads and the court accepts his plea." *United States v. Hyde*, 520 U.S. 670, 676 (1997). For that reason, a defendant's motion to withdraw a guilty plea is committed to "the [trial] court's discretion." *United States v. Thomas*, 541 F. Supp. 2d 18, 23 (D.D.C. 2008). That discretion is substantial, and "a defendant who fails to show some error under Rule 11 has to shoulder an extremely heavy burden" to show it has been abused. *United States v. Leyva*, 916 F.3d 14, 22 (D.C. Cir. 2019). So too for motions under Federal Rule of Criminal Procedure 33(a) to vacate a judgment in the "interests of justice": "Trial courts enjoy broad discretion," *United States v. Wheeler*, 753 F.3d 200, 208 (D.C. Cir. 2014), precisely because such motions seek to undo a court order issued following a full and fair invocation of the judicial process.

A post-plea Rule 48(a) motion is, in all material respects, no different. After a court has exercised its "grave and solemn" responsibilities in accepting a plea of guilty, *Brady*, 397 U.S. at 748, the parties cannot expect the court's order to be undone simply because they ask for it. Instead, because of the substantial Article III values at stake, a discretionary "interests of justice" inquiry similar to that for the

vacatur of judgments under Rule 33 should apply.[3]

B. A district court also has substantial discretion to appoint an *amicus curiae* to assist its exercise of discretion under Rule 48(a), especially when no party is defending the effectiveness of the validly accepted guilty plea.

"Amicus participation is normally appropriate … 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) (quotation marks omitted) (citing authorities). Indeed, from 1954 to 2011, the Supreme Court "tapped an attorney to support an undefended judgment below, or to take a specific position as an amicus, forty-three times." Brian P. Goldman, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 Stan. L. Rev. 907, 909-10 (2011); *see also United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1582 (2020) (addendum of cases) (citing 11 additional examples from 2015 to present); *Fokker Servs.*, 818 at 740 ("we appointed an amicus curiae to present arguments defending the district

[3] In *Rinaldi v. United States*, 434 U.S. 22 (1977), the Supreme Court reversed the denial of a post-conviction Rule 48(a) motion. But that case's narrow holding did not purport to "delineate[]" all the contours of how and when courts may exercise their discretion under Rule 48. *Id.* at 29 n.15. Indeed, as this Court has since observed, "both the text of the rule and its roots in the common law doctrine of *nolle prosequi* cast doubt on Rule 48's applicability post-conviction." *United States v. Smith*, 467 F.3d 785, 789 (D.C. Cir. 2006).

court's action").

To be sure, courts should not "sally forth each day looking for wrongs to right" and must "wait for cases to come to them," *Sineneng-Smith*, 140 S. Ct. at 1579; but this case *did* come to the district court, and the court accepted a guilty plea and entered a conviction. Now that the court has issued orders accepting Flynn's plea, it has sufficient authority to receive briefing from *amici curiae* in determining whether a motion to set aside that order should be granted.

Nor does it matter that there is a local civil rule concerning *amicus* participation, *see* D.D.C. LCvR 7(o), but no formal analog in the criminal rules. The civil rule prescribes *only* the contents and format of an *amicus*'s brief, and the manner of its filing, not the court's authority to accept such a brief. It has no bearing on the district courts' "*inherent* authority to appoint or deny *amici*," or to consider motions for leave to participate as an *amicus*. *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008) (emphasis added) (collecting authorities). In any event, the local civil rules "govern *all* proceedings in the United States District Court for the District of Columbia" and "supplement the Federal Rules of Civil *and Criminal* Procedure." LCvR 1.1(a) (emphasis added).[4]

[4] Courts have "inherent authority to appoint counsel to investigate and prosecute violation of a court's order." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994) (citing *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)). They necessarily have the much less intrusive power of hearing from

C. The substance of the Government's Rule 48(a) motion confirms that the district court acted well within its powers to appoint *amicus* counsel before deciding whether to grant the Government's motion, despite whatever "presumption of regularity" might otherwise attach to such a motion. Pet. 21. Rule 48(a) contemplates that a district court may "appropriately inquire into whether there were any improprieties attending the Government's petition to dismiss," particularly where "suspicions … [are] aroused by the Government's shift in position as to the merits" of a prosecution. *In re Richards*, 213 F.3d 773, 787, 789 (3d Cir. 2000); *see id.* (holding it improper to issue writ of mandamus to prevent trial court from holding hearing on Rule 48(a) motion); *see also, e.g.*, *United States v. Nixon*, 318 F. Supp. 2d 525, 529-30 (E.D. Mich. 2004) (court required production of documents for *in camera* review in considering unopposed Rule 48(a) motion); *United States v. KPMG LLP*, No. 05 CR. 903 (LAP), 2007 WL 541956, at *2 (S.D.N.Y. Feb. 15, 2007) (court accepted submissions of *amici* seeking to vacate an unopposed order of dismissal under Rule 48(a)).

1. The Government's Motion rests on several mischaracterizations of the relevant facts and the governing law, and thus the "reasons advanced for the proposed dismissal are [not] substantial." *Ammidown*, 497 F.2d at 620. The

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*amic*i on whether one of their orders—*e.g.*, the order accepting Flynn's guilty plea—should be vacated.

Government relies, for example, on a single, sixty-four-year-old decision in contending that Flynn's statements were "material" only if they were "reasonably likely to influence [a] tribunal in making a determination *required to be made*." Mot. 1, (quoting *United States v. Weinstock*, 231 F.2d 699, 701 (D.C. Cir. 1956) (emphasis in Motion)). But this Court has rejected that *very argument*, holding that the Supreme Court has "adopted a different definition of materiality under section 1001." *United States v. Stadd*, 636 F.3d 630, 638 (D.C. Cir. 2011) (citing *Neder v. United States*, 527 U.S. 1 (1999)). Contrary to the Government's submission, it is sufficient that the false statements have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed," full stop. *Id.* (quoting *Neder*, 527 U.S. at 16).

The Government also insists that Flynn's statements were not "material," because the FBI had no "legitimate investigative basis" to conduct the January 24, 2017, interview in which the false statements were made. Mot. 2. For that reason, the Government says, the interview was not sufficiently "predicated." *Id.* But whether the FBI's various investigative steps were sufficiently "predicated" under internal FBI policy is irrelevant to whether Flynn's statements had "a natural tendency to influence, or [were] capable of influencing, the decision of the decisionmaking body to which [they were] addressed." *Stadd*, 636 F.3d at 638. In fact, the Supreme Court has rejected the argument that 18 U.S.C. § 1001 applies only

where necessary to "protect the *authorized* functions of governmental departments and agencies." *Brogan v. United States*, 522 U.S. 398, 403 (1998) (emphasis added). We are unaware of a single case in which a statement was held to be immaterial simply because the interviewing agents neglected to follow agency protocol before speaking with the defendant. *Cf. United States v. Christie*, 624 F.3d 558, 573 (3d Cir. 2010) (internal government policies "do not themselves create rights for criminal defendants"); *United States v. Caceres*, 440 U.S. 741, 754 (1979) ("[T]his is not an APA case …. Rather, we are dealing with a criminal prosecution[.]").

In any event, even a cursory review of the facts leaves little doubt that the FBI's interview of Flynn was sufficiently "predicated." As the Government itself once argued below—and as Flynn conceded by his guilty pleas—"[h]ere, there were multiple bases for the FBI to interview the defendant. The defendant's false statements publicly attributed to him by White House officials about his communications with Russia were alone a sufficient and appropriate basis for conducting the investigative step of interviewing the defendant." ECF No. 132 at 12. It defies comprehension to suggest that an incoming National Security Advisor, whom Russia knew to have misled both the Vice President and the Press Secretary about his conversations with the Russian Ambassador to the United States, should not have been interviewed by federal agents concerned about potential Russian blackmail.

2. Leave of court may also be denied because the Government has "failed to give consideration to factors that must be given consideration in the public interest." *Ammidown*, 497 F.2d at 622. The Government's motion rests on its Article II control over "charging decisions." But here the crucial charging decision was validly made on behalf of the Justice Department by the Special Counsel appointed by the Acting Attorney General. The special counsel regulations, under which this prosecution was commenced—and terminated with the acceptance of the guilty plea—were designed to further "the public interest" in ensuring that criminal prosecution decisions would not be made "by a United States Attorney's Office or litigating Division of the Department of Justice [that has] a conflict of interest." 28 C.F.R. § 600.1; *see* Office of the Attorney General, Order No. 3915-2017, https://bit.ly/2LFt7Xw (appointing the special counsel). As the Supreme Court has recognized, regulations like these have the "force of law," *United States v. Nixon*, 418 U.S. 683, 695 (1974), and allowed the Special Counsel to exercise his delegated discretion to bring the charges and to obtain the district court's order accepting the Petitioner's plea of guilty. Yet that independent exercise of discretion, annealed into a court order, is precisely what the Government's current motion attempts to undo.

"The untainted administration of justice is … one of the most cherished aspects of our institutions." *Mesarosh v. United States*, 352 U.S. 1, 14 (1956). As Attorney General (and later Supreme Court Justice) Robert Jackson explained, the

safety of both citizens and of the Republic "lies in the prosecutor who … serves the law and *not factional purposes*." Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc'y 18, 20 (1940) (emphasis added). Yet despite the Department of Justice's own prior recognition that prosecution and investigation of this case by the United States Attorney would present a conflict of interest and not be in the "public interest," *see* 28 C.F.R. § 600.1, the United States Attorney—in a motion signed only by him—seeks to unwind the work of the Special Counsel's Office *without so much as addressing* the risk that his decision will be perceived as conflicted or politically motivated.

Even before a court has "exercise[d] its coercive power by entering a judgment of conviction," *Fokker Servs.*, 818 F.3d at 746, a judge "may withhold approval [to dismiss an information] if he finds that the prosecutor has failed to give consideration to factors that must be given consideration in the public interest," *Ammidown*, 497 F.2d at 622. Where, by its own account, the Government is asking the court to undo its orders accepting Flynn's guilty plea, it must at a minimum explain why its request is consistent with the court's duty to ensure that "the waters of justice are not polluted." *Mesarosh*, 352 U.S. at 14.

* * *

In considering this Petition, all this Court needs to find is that Flynn has no "clear and indisputable right" (*In re Trade and Commerce Bank*, 890 F.3d at 303) to

prevent the district court from exercising, with the aid of *amici curiae*, the informed discretion that Rule 48(a) expressly confers on it. It is difficult to imagine a case more ill-suited than this for the "'drastic and extraordinary' remedy" (*Cheney*, 542 U.S. at 380) of a writ of mandamus.

CONCLUSION

This Court should deny the petition for a writ of mandamus.

Dated: May 27, 2020

Respectfully submitted,

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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 3,896 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.

/s/ Lawrence S. Robbins
Lawrence S. Robbins

Dated: May 27, 2020

CERTIFICATE OF SERVICE

I certify that on May 27, 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/ Lawrence S. Robbins
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