No. 20-5143

In the

United States Court of Appeals

for the

District of Columbia Circuit

IN RE: MICHAEL T. FLYNN, *Petitioner.*

On Appeal from the United States District Court for the District of Columbia, Action No. 1:17-cr-00232-EGS-1 · Honorable Emmet G. Sullivan, U.S. District Judge

CORRECTED BRIEF OF *AMICI CURIAE* FORMER FEDERAL DISTRICT COURT JURISTS IN SUPPORT OF THE DISTRICT COURT

JOHN W. KEKER (SBN 49092)
ROBERT VAN NEST (SBN 84065)
ELLIOT R. PETERS (SBN 158708)
DAN JACKSON (SBN 216091)
BROOK DOOLEY (SBN 230423)
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, California 94111-1809
jkeker@keker.com • rvannest@keker.com • epeters@keker.com
djackson@keker.com • bdooley@keker.com
Telephone: (415) 391-5400

Attorneys for Amici Curiae

COUNSEL PRESS · (213) 680-2300 PRINTED ON RECYCLED PAPER

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici.*

The parties, intervenors, and *amici* appearing before the district court are listed in the Emergency Petition for a Writ of Mandamus ("Petition" or "Pet.") filed by Petitioner Michael T. Flynn. In this Court, in addition to the parties, intervenors, and *amici* listed in the Petition and the present filers, to the best of the knowledge of the undersigned attorney for *amici*, motions for leave to file *amicus* briefs have been filed by 16 individuals who served on the Watergate Special Prosecutions Force (the "Watergate Prosecutors"), and by Lawyers Defending American Democracy, Inc. A notice of intention to participate as *amici curiae* has been filed by the states of Ohio, Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Louisiana, Mississippi, Missouri, Montana, Oklahoma, South Carolina, Texas, Utah, and West Virginia.

The *amici* represented in this brief are: Hon. Mark W. Bennett (Ret.); Hon. Bruce D. Black (Ret.); Hon. Gary A. Feess (Ret.); Hon. Jeremy D. Fogel (Ret.); Hon. William Royal Furgeson, Jr. (Ret.); Hon. Nancy Gertner (Ret.); Hon. James T. Giles (Ret.); Hon. Thelton E. Henderson (Ret.); Hon. Faith S. Hochberg (Ret.); Hon. Richard J. Holwell (Ret.); Hon. Carol E. Jackson (Ret.); Hon. D. Lowell Jensen (Ret.); Hon. George H. King (Ret.); Hon. Timothy K. Lewis (Ret.); Hon. John S. Martin (Ret.); Hon. A. Howard Matz (Ret.); Hon. Carlos R. Moreno

(Fmr.); Hon. Stephen M. Orlofsky (Ret.); Hon. Marilyn Hall Patel (Ret.); Hon. Layn R. Phillips (Fmr.); Hon. Shira A. Scheindlin (Ret.); Hon. Fern M. Smith (Ret.); Hon. Thomas I. Vanaskie (Ret.); and Hon. T. John Ward (Ret.).

B. Rulings Under Review.

References to the rulings at issue appear in the Petition.

C. Related Cases.

This case has not previously been before this Court. There are no pending related cases.

Respectfully submitted,

Dated: May 29, 2020

KEKER, VAN NEST & PETERS LLP

By: /s/ Dan Jackson
Dan Jackson
Attorneys for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

I. IDENTITY, INTEREST, AND AUTHORITY OF *AMICI CURIAE* 1

II. SUMMARY OF ARGUMENT 3

III. ARGUMENT 5

A. Rule 48(a) gives district courts the authority to inquire into the prosecution's reasons for dismissal, and to deny leave of court if unsatisfied with those reasons, in order to protect the public interest 6

B. The district court also has ample authority based on the separation of powers and the law of the case 9

C. Judicial inquiry is especially justified where, as here, the government alleges prior bad faith, and Petitioner alleges he was framed 11

D. District courts have authority to appoint *amici curiae* in criminal cases 12

E. In any event, mandamus is inappropriate here 14

IV. CONCLUSION 16

CERTIFICATE OF COMPLIANCE 17

CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

CASES

Commodity Futures Trading Comm'n v. Schor,
478 U.S. 833 (1986)....................2, 14

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990)....................4, 11, 12

Donnelly v. Parker,
486 F.2d 402 (D.C. Cir. 1973)....................15

Ex parte Fahey,
332 U.S. 258 (1947)....................5, 14

Firestone Tire & Rubber Co. v. Risjord,
449 U.S. 368 (1981)....................14

Herring v. New York,
422 U.S. 853 (1975)....................4, 13

In re al-Nashiri,
791 F.3d 71 (D.C. Cir. 2015)....................14

Marbury v. Madison,
5 U.S. 137 (1803)....................3, 9

Marinello v. United States,
138 S. Ct. 1101 (2018)....................3, 15

Mitchell v. United States,
526 U.S. 314 (1999)....................11

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995)....................9, 10

Rinaldi v. United States,
434 U.S. 22 (1977)....................8, 9

Singh v. George Washington Univ.,
383 F. Supp. 2d 99 (D.D.C. 2005)....................10

U.S. v. Strayer,
846 F.2d 1262 (10th Cir. 1988)....................12

United States v. Ammidown,
497 F.2d 615 (D.C. Cir. 1973)..........3, 5, 7, 8, 9, 13, 15

United States v. Cowan,
524 F.2d 504 (5th Cir. 1975)..........7

United States v. Flynn,
411 F. Supp. 3d 15 (D.D.C. 2019)..........10

United States v. Fokker Servs. B.V.,
818 F.3d 733 (D.C. Cir. 2016)..........9, 12, 13

United States v. James,
861 F. Supp. 151 (D.D.C. 1994)..........12

United States v. Sineneng-Smith,
140 S. Ct. 1575 (2020)..........13

United States v. Woody,
2 F.2d 262 (D. Mont. 1924)..........6, 7, 9

Will v. Calvert Fire Ins. Co.,
437 U.S. 655 (1978)..........4

STATUTES AND RULES

28 U.S.C. § 453..........7

D.C. Cir. R. 29..........13

Fed. R. Crim. P. 48(a)..........5, 6, 7, 8, 9, 12, 15

OTHER AUTHORITIES

The Federalist No. 78, (Alexander Hamilton)..........2, 3

Report of the Committee of the Council of Censors 6 (Bailey ed. 1784)..........10

Thomas Ward Frampton, *Why Do Rule 48(a) Dismissals Require “Leave of Court”?*, 73 Stan. L. Rev. Online (forthcoming 2020),
https://bit.ly/3brIn4X..........6, 7, 9

I. IDENTITY, INTEREST, AND AUTHORITY OF *AMICI CURIAE*

Amici curiae formerly served on district courts throughout the nation, having been appointed to those courts by administrations of both parties. Specifically, *amici* are: Hon. Mark W. Bennett (Ret.); Hon. Bruce D. Black (Ret.); Hon. Gary A. Feess (Ret.); Hon. Jeremy D. Fogel (Ret.); Hon. William Royal Furgeson, Jr. (Ret.); Hon. Nancy Gertner (Ret.); Hon. James T. Giles (Ret.); Hon. Thelton E. Henderson (Ret.); Hon. Faith S. Hochberg (Ret.); Hon. Richard J. Holwell (Ret.); Hon. Carol E. Jackson (Ret.); Hon. D. Lowell Jensen (Ret.); Hon. George H. King (Ret.); Hon. Timothy K. Lewis (Ret.); Hon. John S. Martin (Ret.); Hon. A. Howard Matz (Ret.); Hon. Carlos R. Moreno (Fmr.); Hon. Stephen M. Orlofsky (Ret.); Hon. Marilyn Hall Patel (Ret.); Hon. Layn R. Phillips (Fmr.); Hon. Shira A. Scheindlin (Ret.); Hon. Fern M. Smith (Ret.); Hon. Thomas I. Vanaskie (Ret.); and Hon. T. John Ward (Ret.). *Amici* respectfully submit this brief pursuant to Federal Rule of Appellate Procedure 29, Circuit Rule 29, and the accompanying motion.[1]

[1] No party's counsel authored this brief in whole or in part. No party, party's counsel, or any other person or entity (other than *pro bono* counsel for *amici*) contributed money that was intended to fund preparing or submitting this brief. Counsel for *amici* certify that a separate brief is necessary in order to present the unique perspective of *amici* as retired federal district court jurists. Counsel for *amici* further certify that they inquired whether counsel for Petitioner, and for the government, would consent to the filing of this brief, but had not received any response to those inquiries by the time of preparation for filing; and that Respondent (the district court) neither opposes nor consents to the filing of briefs by *amici*. *Amici* have moved for this Court's leave to file this brief.

Many of these *amici* also served as United States Attorneys, and the Honorable D. Lowell Jensen was Deputy Attorney General of the United States. Some of the *amici* served on federal and state appellate courts and higher: the Honorable Timothy K. Lewis and the Honorable Thomas I. Vanaskie both served on the United States Court of Appeals for the Third Circuit after serving on district courts; and the Honorable Carlos R. Moreno served on the California Supreme Court after serving on the district court. The common interest of *amici* here, however, arises from their service on district courts, and their abiding dedication to the integrity and independence of those courts.

Amici collectively have centuries of judicial experience and have presided over thousands of criminal cases. Because the prosecution and defense in this case have effectively joined sides, the judiciary has "institutional interests that the parties cannot be expected to protect." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986). *Amici*, therefore, submit this brief in support of their interest in the "institutional integrity of the Judicial Branch." *Id.*

Based on their years of experience and service, *amici* know—as the Framers of our Constitution knew—that the "independent spirit" of district judges is "essential to the faithful performance of so arduous a duty." The Federalist No. 78, (Alexander Hamilton). Everyone "ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-

morrow the victim of a spirit of injustice, by which he may be a gainer to-day." *Id.* The "inevitable tendency" of capricious law enforcement "is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress." *Id.* Only independent federal courts can prevent such "nonuniform" enforcement by the Executive Branch, which "risks undermining necessary confidence in the criminal justice system." *Marinello v. United States*, 138 S. Ct. 1101, 1109 (2018).

II. SUMMARY OF ARGUMENT

Amici respectfully urge this Court to deny the Petition, which incorrectly contends that district courts only have a "ministerial" role under Federal Rule of Criminal Procedure 48(a), and cannot even *inquire* into the prosecution's reasons for dismissal in deciding whether to grant leave of court. Petitioner's argument is contrary to the experience of *amici*, and is also refuted by the legislative history of Rule 48(a), and this Court's seminal analysis of it in *United States v. Ammidown*, 497 F.2d 615, 620–22 (D.C. Cir. 1973).

In his attempt to diminish the district court's vital and independent role, Petitioner also fails to acknowledge that what he challenges—the district court's ruling that Petitioner's admitted misrepresentations were material—is the law of the case. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). That is what

the district court did in ruling in the government's favor on the issue of materiality. That the government has now changed its position does not, by itself, overturn the law of the case, much less make the district court's role merely "ministerial."

In an effort to explain its dramatic change in position, the government has raised, and Petitioner reiterates, serious questions about prosecutorial bad faith. Those questions should be addressed by the district court in the first instance. To hold otherwise would deprive "courts on the front lines of litigation" of the essential "ability to control the litigants before them." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990).

Furthermore, because of the government's change of heart, there is an unusual lack of adversity here. Yet the "very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). Thus, it was appropriate for the district court to appoint an *amicus* (the Honorable John Gleeson (Ret.)) to fill the gap left by the government's abandonment of its former position.

In any event, Petitioner's right to a writ of mandamus is not "clear and indisputable." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978). Mandamus is a "drastic and extraordinary" remedy that has "the unfortunate consequence of making the judge a litigant," and "should be resorted to only where appeal is a

clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947). Here, Petitioner has not carried his heavy burden to prove his clear, indisputable, and present entitlement to a writ of mandamus.

III. ARGUMENT

Rule 48(a) requires "leave of court" for dismissal of criminal charges on the government's motion, even when the defendant concurs in the proposed dismissal. Fed. R. Crim. P. 48(a); *see*, *e.g.*, *Ammidown*, 497 F.2d at 620–22. Yet Petitioner contends that district courts only have a "ministerial" role under Rule 48(a), and that the district court in this case "lacks authority to do anything but grant the Motion to Dismiss." Pet. at 9, 25. Indeed, Petitioner maintains that the district court lacks authority even to *inquire* about the basis for the dismissal. *See id.*

Petitioner's argument is refuted by the plain language of Rule 48(a), its legislative history, and the cases interpreting it—including *Ammidown*, which Petitioner ignores. Petitioner's attempt to reduce district courts to a "ministerial" role, or something even more perfunctory—mere scriveners of whatever dismissal the government places before them—is also contrary to the established practice of federal district courts under Rule 48(a), as *amici* can attest.

A. Rule 48(a) gives district courts the authority to inquire into the prosecution's reasons for dismissal, and to deny leave of court if unsatisfied with those reasons, in order to protect the public interest.

The experience of the district court in *United States v. Woody*, 2 F.2d 262 (D. Mont. 1924), illustrates why Rule 48(a) gives district courts more than merely ministerial authority over dismissals. *See* Thomas Ward Frampton, *Why Do Rule 48(a) Dismissals Require "Leave of Court"?*, 73 Stan. L. Rev. Online (forthcoming 2020), https://bit.ly/3brIn4X. Before Rule 48(a) added its "leave of court" requirement, the government's authority to dismiss a criminal case in federal court was "absolute." *Woody*, 2 F.2d at 262. In *Woody*, the government moved to dismiss for reasons that "savor[ed] altogether too much of some variety of prestige and influence (family, friends, or money) that too often enables their possessors to violate the laws with impunity; whereas persons lacking them must suffer all the penalties." *Id.* Nevertheless, the district court was compelled to dismiss the case: "No leave of court [was then] necessary." *Id.* The court recognized, however, that dismissal would "incite," if "not justify, the too common reproach that criminal law is for none but the poor, friendless, and uninfluential; that in proportion to numbers the [influential] are prosecuted, convicted, and punished in less degree," and "their offenses are ignored, condoned, or pardoned in greater degree." *Id.*

Amici empathize with the district court's *cri de cœur* in *Woody*, and with the district court in this case. There is "little that is more harmful to society, government, courts, law, and order" than the "belief in disparity in treatment of offenders." *Id.* To the extent that belief "is well founded, the basis of it is a pernicious evil, and abhorrent to justice." *Id.*

Federal judges take an oath to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all the duties incumbent upon" them "under the Constitution and laws of the United States." 28 U.S.C. § 453. That oath is not merely an obligation; the desire to uphold it is the very reason most judges seek appointment in the first place. To require a district court to simply dismiss a criminal case, without further inquiry, when the judge believes or suspects that doing so may undermine public confidence in the equal and impartial administration of justice, would be "abhorrent" indeed. *Woody*, 2 F.2d at 262.

Rule 48(a), however, solved the "dilemma faced by the district judge in *Woody*." Frampton, *supra*, at 4. Rule 48(a) adds *exactly* what the district court in *Woody* lacked at the time: the requirement of "leave of court." *Woody*, 2 F.2d at 262; *see* Fed. R. Crim. P. 48(a); *Ammidown*, 497 F.2d at 620–22 & n.6 (noting that Rule 48(a) abrogated the "common law rule" that constrained the district court in *Woody*); *United States v. Cowan*, 524 F.2d 504, 509 (5th Cir. 1975) (same).

Thus, as this Court held in *Ammidown*, Rule 48(a) gives district courts the authority to deny leave of court, and certainly to *inquire*, "when the defendant concurs in the dismissal but the court is concerned whether the action sufficiently protects the public." *Ammidown*, 497 F.2d at 620. In such a case—namely, in *this* case—"to prevent abuse of the uncontrolled power of dismissal previously enjoyed by prosecutors," the district court "should be satisfied that the reasons advanced for the proposed dismissal are substantial." *Id.* (citation omitted). The purpose of Rule 48(a) is not for "the trial court to serve merely as a rubber stamp for the prosecutor's decision," even when the prosecution and defense agree. *Id.* at 622. Instead, "the judge should be satisfied that the agreement adequately protects the public interest." *Id.* (citation omitted). "The judge may withhold approval if he finds that the prosecutor has failed to give consideration to factors that must be given consideration in the public interest, factors such as the deterrent aspects of the criminal law." *Id.* The district court also may withhold approval in "protection of the sentencing authority reserved to the judge." *Id.* The prosecution and defense should not be allowed to "manipulate this traditional power of the judge without any recourse by the judge permitting him to forestall gross abuses of prosecutorial discretion." *Id.* at 621.

In *Rinaldi v. United States*, 434 U.S. 22 (1977), the Supreme Court surmised that the "principal object of the 'leave of court' requirement is apparently to protect

a defendant against prosecutorial harassment." *Id.* at 30 n.15. In fact, however, the legislative history of Rule 48(a) shows far more concern about "dismissals motivated by corrupt purposes," as in *Woody*, than concern about "protection of the accused." Frampton, *supra*, at 6. In any event, as this Court made clear in *Ammidown*, even assuming that the "primary concern" underlying Rule 48(a) "was that of protecting a defendant from harassment," the district court *also* has the authority to inquire into the reasons for dismissal, and to withhold leave of court, where, as here, "the defendant concurs in the dismissal but the court is concerned whether the action sufficiently protects the public." 497 F.2d.at 620. *Ammidown* established "the appropriate doctrines governing trial judges in considering whether to deny approval" under Rule 48(a), *id.* at 622, which have not changed.[2]

B. The district court also has ample authority based on the separation of powers and the law of the case.

Furthermore, nothing is more "deeply rooted in our law" than the rule that it is the "'province and duty'" of the courts "'to say what the law is' in particular cases and controversies." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *Marbury*, 1 Cranch at 177). The Supreme Court, therefore, has

[2] The *dicta* in *United States v. Fokker Servs. B.V.*, 818 F.3d 733 (D.C. Cir. 2016), neither compels nor supports any contrary conclusion. *Amici* expect that other briefs will discuss *Fokker* in detail, and thus will simply note that it only refers to Rule 48(a) by analogy, and neither indicates any disagreement with, nor any intent to overrule, this Court's seminal analysis of Rule 48(a) in *Ammidown*.

rejected attempts by the other branches of government to interfere with this basic judicial function, particularly when such interference may appear to be motivated by "favour and partiality." *Id.* at 221 (quoting Report of the Committee of the Council of Censors 6 (Bailey ed. 1784)).

The parties here seek, in effect, to overturn the district court's ruling that Petitioner's statements were material. *See United States v. Flynn*, 411 F. Supp. 3d 15, 40–42 (D.D.C. 2019). But the district court is not required to simply accept, without scrutiny, the government's extraordinary contention that it should have lost a battle it already won. *See*, *e.g.*, *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005) ("The district court's discretion to reconsider a non-final ruling is, however, limited by the law of the case doctrine and subject to the caveat that where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.") (citation and internal quotation marks omitted).

The district court has already held what the law is in this "*very case*," *Plaut*, 514 U.S. at 227 (emphasis in original), on the *very issue* of materiality. *See Flynn*, 411 F. Supp. 3d at 40–42. Thus, Petitioner is wrong to suggest that the district court was required to simply "rubber stamp" the government's contradiction, not only of the government's own prior position, but of the law of the case.

C. Judicial inquiry is especially justified where, as here, the government alleges prior bad faith, and Petitioner alleges he was framed.

Courts often hesitate to countenance allegations of prosecutorial bad faith. Here, however, the government *itself* has invited such an inquiry by asserting that its own agents previously acted in bad faith. The Petition is also replete with such allegations, asserting that Petitioner was "frame[d]," "coerced," and made "the target of a vendetta by politically motivated officials at the highest levels of the FBI" in a "Kafkaesque nightmare." Pet. at 22, 26–30.

Like the "question whether the Government has taken a 'substantially justified' position under all the circumstances," or whether a litigant has a good-faith basis for its contentions, *Cooter*, 496 U.S. at 404, the questions of bad faith raised by both the government and Petitioner should be answered, in the first instance, by the district court. "Deference to the determination of courts on the front lines of litigation will enhance these courts' ability to control the litigants before them," and "streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court." *Id.*

Just as the district court has the authority "to make whatever inquiry it deems necessary in its sound discretion to assure itself the defendant is not being pressured to offer a plea for which there is no factual basis," *Mitchell v. United States*, 526 U.S. 314, 324 (1999), it must have the authority to inquire whether it

should grant dismissal under Rule 48(a), which is "intended to allow the courts to consider the public interest, fair administration of criminal justice and preservation of judicial integrity," *United States v. James*, 861 F. Supp. 151, 155 (D.D.C. 1994) (quoting *U.S. v. Strayer*, 846 F.2d 1262, 1265 (10th Cir. 1988)) (internal quotation marks omitted). In particular, district courts have the authority and discretion to inquire whether the prosecution acted "in bad faith," or whether its motion to dismiss was "prompted by considerations clearly contrary to the public interest." *Id.* at 156. To hold otherwise would undercut the district court's independent responsibility to defend the public interest, and would allow the government to "insulate itself from review by a district court," which, "in turn, precludes appellate review" on a complete record. *Id.*

D. District courts have authority to appoint *amici curiae* in criminal cases.

Petitioner also contends that the district court here had no authority to appoint an *amicus* to assist in the district court's evaluation of whether to grant leave of court for dismissal. Petitioner is, again, incorrect. Because the former adversaries on the "front lines," *Cooter*, 496 U.S. at 404, in this case have now joined forces, it was appropriate for the district court to ask an *amicus* to step into the breach.

Indeed, in *Fokker*, on which Petitioner relies, this Court "appointed an amicus curiae to present arguments defending the district court's action" because

"both parties" sought to overturn it. *Fokker*, 818 F.3d at 740; *see also*, *e.g.*, *Ammidown*, 497 F.2d at 618 (appointing *amicus* because the government "decided that it could not in good conscience oppose the appellant"). And in *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020), on which Petitioner also relies, the Court noted that it is appropriate to appoint an *amicus* "when a prevailing party has declined to defend the lower court's decision or an aspect of it." *Id.* at 1583.

Petitioner contends that the authority to appoint an *amicus* depends on rules of court, Pet. at 17, but this Court's own Rule 29 "applies *only* to the brief for an amicus curiae *not* appointed by the court." D.C. Cir. R. 29 (emphases added). Likewise, a district court's authority to appoint an *amicus* in a criminal case is independent of local rules governing the briefs of unappointed *amici*.

Indeed, some of the *amici* here, when presiding over criminal cases in district court, would often invite *amicus* briefing on unsettled areas of criminal law. If defense counsel was unable to adequately respond to a judicial concern about sentencing, for example, the district court might ask the federal public defender to brief the issue. Although "our adversary system of criminal justice" usually serves "the ultimate objective that the guilty be convicted and the innocent go free," *Herring*, 422 U.S. at 862, where, as here, the prosecution has abandoned its adversarial role, or for some other reason there are "institutional interests that

the parties cannot be expected to protect," *Commodity Futures*, 478 U.S. at 851, an *amicus* may play an important role in promoting the public interest.

E. In any event, mandamus is inappropriate here.

Finally, mandamus is a drastic and extraordinary remedy that is proper only where the petitioner has no other means for obtaining relief, his right to issuance of the writ is clear and indisputable, and the Court is satisfied that the writ is appropriate under the circumstances. *See*, *e.g.*, *In re al-Nashiri*, 791 F.3d 71, 78 (D.C. Cir. 2015). The writ cannot be used as a substitute for the regular appellate process, which "emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial," and which preserves "the independence of the district judge, as well as the special role that individual plays in our judicial system." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *see also*, *e.g.*, *Fahey*, 332 U.S. at 259–60 (noting the "unfortunate consequence of making the judge a litigant").

Furthermore, mandamus is especially inappropriate where, as here, it is premature. The question currently before this Court "is not whether petitioner can obtain review" of whatever ruling the district court *ultimately* makes about whether to grant leave to dismiss, "but whether he can do so now. Should petitioner's defensive efforts in the District Court prove to be ultimately unsuccessful, he can

litigate that ruling, if unchanged, on an appeal from the final judgment." *Donnelly v. Parker*, 486 F.2d 402, 409 (D.C. Cir. 1973). This Court should not interfere with the district court's decision whether to grant "leave of court" under Rule 48(a) *before the district court has even made that decision*.

To grant the Petition, at this stage, would amount to mandating that the district court must "serve merely as a rubber stamp for the prosecutor's decision." *Ammidown*, 497 F.2d at 622. That would contravene this Court's jurisprudence, as well as Rule 48(a) itself. Again, Rule 48(a) "entitles the judge to obtain and evaluate the prosecutor's reasons" for dismissal. *Id.* The judge may "withhold approval if he finds that the prosecutor has failed to give consideration to factors that must be given consideration in the public interest," including "the deterrent aspects of the criminal law," and the "protection of the sentencing authority reserved to the judge." *Id.*

Even if this Court disagrees with its own prior analysis in *Ammidown*, or otherwise questions the district court's approach here, the Court should not grant the premature Petition. To find that the district court somehow abused discretion before exercising it would deviate from established practice and procedure to a degree that *amici* have never encountered. Whatever this Court may ultimately decide, hearing this case prematurely would undermine "necessary confidence in the criminal justice system." *Marinello*, 138 S. Ct. at 1109.

IV. CONCLUSION

Accordingly, *amici* respectfully urge this Court to deny the Petition.

Respectfully submitted,

Dated: May 29, 2020

KEKER, VAN NEST & PETERS LLP

By: /s/ Dan Jackson
Dan Jackson
Attorneys for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3,752 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Respectfully submitted,

Dated: May 29, 2020

KEKER, VAN NEST & PETERS LLP

By: /s/ Dan Jackson
Dan Jackson
Attorneys for *Amici Curiae*

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 D.C. Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Dan Jackson
Dan Jackson