No. 20-5143

In the United States Court of Appeals for the District of Columbia Circuit

IN RE MICHAEL T. FLYNN,
Petitioner

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (CRIM. NO. 17-232) (THE HONORABLE EMMET G. SULLIVAN)

PETITION FOR REHEARING EN BANC BY JUDGE EMMET G. SULLIVAN

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INTRODUCTION AND RULE 35(b)(1) STATEMENT

The panel majority granted the extraordinary writ of mandamus to prevent the district court from receiving adversarial briefing and argument on a pending motion. The opinion is couched as a fact-bound ruling based on "the record before the district court." Op. 7. It in fact marks a dramatic break from precedent that threatens the orderly administration of justice.

First, the majority undermined this Court's consistent interpretation of the mandamus standard by forcing the district court to grant a motion it had not yet resolved, based on alleged harms to a party that did not seek mandamus, and in reliance on arguments never presented to the district court. Any one of these rulings would constitute an unwarranted dilution of the requirement that a petitioner lack adequate alternative remedies. Taken together, they threaten to turn mandamus into an ordinary litigation tool.

Second, the panel undercut Supreme Court and Circuit precedent in holding that the separation of powers precluded the district court from inquiring into the government's Rule 48 motion. The Supreme Court's decision in *Rinaldi v. United States*, 434 U.S. 22 (1977) (per curiam), recognized a district court's ability to hear an unopposed Rule 48 motion. Moreover, no Circuit precedent establishes the type of clear and indisputable

right necessary to authorize the panel's resolution of that constitutional question. That is especially so given the Supreme Court's recent admonition that separation-of-powers questions are fact- and context-specific. *See Seila Law LLC v. CFPB*, ___ S. Ct. __, slip op. 2, 16–18 (June 29, 2020). Mandamus is not the place to make new law.

Third, the panel contravened Supreme Court and Circuit precedent in precluding the district court from appointing an amicus and scheduling a hearing. The Supreme Court and this Court have employed those practices to resolve cases where the parties agreed and the ultimate outcome was predictable. The panel cited no law precluding district courts from similarly considering both sides of an issue before deciding it.

The panel's decision threatens to turn ordinary judicial process upside down. It is the district court's job to consider and rule on pending motions, even ones that seem straightforward. This Court, if called upon, reviews those decisions—it does not preempt them. This case satisfies the requirements of Rule 35, and en banc review should be granted.

BACKGROUND

1. On December 1, 2017, Mr. Flynn pleaded guilty before Judge Contreras to a one-count information charging him with violating 18 U.S.C.

§ 1001. Dkts. 1, 16.[1] The case was then randomly reassigned to Judge Sullivan, who accepted Mr. Flynn's plea a second time. Dkt. 103 at 15–16.

In June 2019, Mr. Flynn moved to dismiss based on purported *Brady* violations. Dkts. 111, 129-2. The government opposed. Dkts. 131, 132. After substantial briefing, Judge Sullivan denied the motions. Dkt. 144.

2. On May 7, 2020, the government sought "leave of court" to dismiss the information under Federal Rule of Criminal Procedure 48(a). Dkt. 198. Mr. Flynn consented. Dkt. 202.

Given the case history and the absence of adversarial briefing, the district court appointed retired federal judge John Gleeson as amicus to present arguments in opposition to the government's motion and advise whether contempt proceedings should be initiated. Dkt. 205. The court set a briefing schedule and a hearing. Minute Order (May 19, 2020). Neither the government nor Mr. Flynn challenged those actions in the district court.

Instead, on May 21, Mr. Flynn filed a mandamus petition seeking an order directing that the government's motion be granted, vacating the amicus appointment, and reassigning the case. Pet. 2. The government did not seek mandamus. The panel ordered Judge Sullivan to respond and allowed the

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

government to respond as well. In its brief, the government indicated for the first time that it supported mandamus.

3. On June 24, a divided panel granted the petition in substantial part.

a. Judge Rao, joined by Judge Henderson, concluded that *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016), "directly foreclose[d]" the district court from "order[ing] briefing and schedul[ing] a hearing." Op. 16; *see also id.* at 7. According to the majority, "[w]hatever the precise scope of Rule 48's 'leave of court' requirement, this is plainly not the rare case where further judicial inquiry is warranted." *Id.* at 6. "[T]he record before the district court" lacked "clear evidence" to "rebut the presumption of regularity." *Id.* at 7. The district court's actions thus constituted "the judicial usurpation of executive power." *Id.* at 8.

The majority deemed mandamus necessary to forestall potential harm to the government, even though the government had not petitioned for mandamus. *Id.* at 8–9. Specifically, the "contemplated hearing could require the government to defend its charging decision" in response to the district court and the amicus. *Id.* at 9. The majority thus ordered the district court to

grant the government's motion. *Id.* at 19. It vacated the amicus appointment "as moot," but denied reassignment. *Id.* at 11–12, 19.

b. Judge Wilkins dissented, concluding that the majority "grievously overstep[ped]" its jurisdiction by granting mandamus "without first giving the lower court a reasonable opportunity to issue its own ruling" or "even hold[] a hearing." Dissent 1. He observed that *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973), "clearly points in the opposite direction" by "entitl[ing] the judge to obtain and *evaluate* the prosecutor's reasons." Dissent 3 (alteration in original) (quoting 497 F.2d at 622). Further, the Supreme Court's decision in *Rinaldi* rejected the proposition that the "presumption of regularity" and the separation of powers precluded such inquiry. *Id.* at 10.

Judge Wilkins added that this Court had never before granted mandamus "based on the absence of alternative avenues of relief for a *different party* that did not petition the court." *Id.* at 8. Even if harms to the government were relevant, "it is not inconsistent with the separation of powers for a district court to conduct regular proceedings and afford consideration to a motion, even if the eventual grant or denial of the motion might intrude on the Executive's exercise of his prosecutorial discretion." *Id.* at 11.

Judge Wilkins also observed that the amicus appointment was consistent with the practice of "this Court and the Supreme Court," and the "foundational premise[] of our judicial system" that "adverse presentation of the relevant issues aids courts in their decisionmaking." *Id.* at 16–17.

4. Upon receipt of the panel's order, the district court stayed its briefing schedule and the hearing. Minute Order (June 24, 2020). This petition followed. *See, e.g.*, *Will v. United States*, 389 U.S. 90, 91 (1967).

REASONS FOR GRANTING REHEARING

I. THE PANEL OPINION CONFLICTS WITH THE SUPREME COURT'S DECISION IN *RINALDI v. UNITED STATES*.

The panel majority created a "conflict[] with a decision of the United States Supreme Court," Fed. R. App. P. 35(b)(1)(A), in holding that the separation of powers "foreclose[d] the district court's proposed scrutiny of the government's motion to dismiss." Op. 7. In *Rinaldi*, the Supreme Court concluded that a district court abused its discretion in denying an unopposed Rule 48 motion. But not a single Justice questioned the district court's discretion to consider and rule on the motion in the first instance.

Contrary to the panel majority's suggestion, the district court in *Rinaldi* "develop[ed] its own record of the prosecution's charging decisions." Op. 14–15 n.4. The defendant argued that his conviction violated a DOJ policy

precluding multiple prosecutions for the same act. 434 U.S. at 24. The government agreed and moved to dismiss. *Id.* at 24–25. The district court held a hearing on the unopposed motion, noting that Rule 48(a) "allows a dismissal only 'by leave of court.'" *United States v. Washington*, 390 F. Supp. 842, 842 (S.D. Fla. 1975). At that hearing, "Judge King confronted government attorneys" with their "statements during trial" that undermined their motion to dismiss. *In re Washington*, 531 F.2d 1297, 1301 n.7 (5th Cir. 1976). The government attempted to explain its reversal. *Washington*, 390 F. Supp. at 843. After a "full hearing and careful consideration of the entire record," the district court denied the motion. *Id.* at 844.

Unlike the panel here, the Supreme Court did not question the district court's "scrutiny of the government's motion" or inquiry into "the prosecution's charging decisions"—let alone suggest that the district court's proceedings violated the Constitution. Op. 7. Nor did the Court suggest that, going forward, unopposed Rule 48 motions must be granted as a matter of course. Instead, after describing the proceedings in the lower court, *see Rinaldi*, 434 U.S. at 23–27, the majority concluded, based on its "independent evaluation of the unusual circumstances disclosed by this record," *id.* at 23, that the government's motion should have been granted. The dissent, written

by then-Justice Rehnquist, would have *affirmed* the district court, and likewise did not question its decisionmaking process. *See id.* at 34 (Rule 48 "seem[s] clearly directed toward an independent judicial assessment of the public interest in dismissing the indictment").

The panel's decision preventing the district court from hearing the motion to dismiss thus conflicts with *Rinaldi* and warrants en banc review.

II. THE PANEL OPINION CONFLICTS WITH THIS COURT'S MANDAMUS PRECEDENTS.

A. The Panel Opinion Departs From This Court's Consistent Interpretation Of The "Adequate Alternative Remedies" Requirement.

To ensure that mandamus remains "reserved for really extraordinary causes," *Cheney v. U.S. District Court*, 542 U.S. 367, 380 (2004) (quotation omitted), a petitioner must have "no other adequate means to attain the relief he desires," Dissent 1 (quoting *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) ("*KBR*")). The majority opinion creates multiple conflicts with this Court's interpretation of that standard, necessitating the full court's intervention "to secure and maintain uniformity of the court's decisions." Fed. R. App. P. 35(b)(1)(A).

First, this Court has consistently found mandamus inappropriate in "the absence of any district-court ruling on the motion at issue." Dissent 2; *see, e.g.*,

In re Stone, 940 F.3d 1332, 1341 (D.C. Cir. 2019); *Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192, 198 (D.C. Cir. 2002); *United States v. Hubbard*, 650 F.2d 293, 309 (D.C. Cir. 1980). That is because the district court could rule in favor of the petitioner and grant "the relief he desires." *KBR*, 754 F.3d at 760 (quotation omitted). This Court has adhered to that principle even where—unlike here—the party awaiting a final decision remains incarcerated. *See In re al-Nashiri*, 791 F.3d 71, 80–81 (D.C. Cir. 2015). The panel majority identified no contrary decision "grant[ing] mandamus so precipitously." Dissent 2.

Second, this Court's cases require a showing of irremediable harm to the party seeking mandamus. "*[T]he mandamus petitioner* must have 'no other adequate means to attain the relief he desires.'" *KBR*, 756 F.3d at 760 (emphasis added) (quoting *Cheney*, 542 U.S. at 380); *see also* Dissent 8. This Court has also rejected the idea of granting "mandamus for which the executive has not prayed." *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 356 (D.C. Cir. 2007) (foreclosing consideration of government's interests where it "did not intervene to seek this mandamus, nor join the petition for mandamus").

Here, Mr. Flynn sought mandamus and the government chose not to. The panel identified no irremediable harm to Mr. Flynn and cited no precedent

supporting its consideration only of harm to the government. *See* Op. 17. This Court's opinion in *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003), is inapposite because it merely observed that the government need not file a "separate petition for mandamus" on top of its interlocutory appeal. *Id.* at 1140 n.*. This case is fundamentally different because the only party that sought immediate review was Mr. Flynn. Likewise, *Ex parte Peru*, 318 U.S. 578 (1943), does not support the panel's exclusive focus on the government because the Supreme Court expressly considered harms to Peru, the party that actually sought mandamus. *See id.* at 586–87; Dissent 8 n.2.

Third, this Court has held that parties cannot obtain mandamus based on arguments that were not presented to the district court in the first instance. In *Stone*, this Court denied mandamus where the petitioners had failed to ask the district court to reconsider orders imposing certain restrictions on their speech, holding that their challenges should have been presented to the district court first. 940 F.3d at 1340–41. Here, the majority granted mandamus based on the district court's amicus appointment and decision to hold a hearing. Op. 8. But neither Mr. Flynn nor the government asked the district court to reconsider those actions, notwithstanding the district court's express reminder that they could do so. *See* Minute Order (May 19, 2020)

("The following schedule shall govern the proceedings in this case *subject to a motion for reconsideration*." (emphasis added)). Instead, Mr. Flynn—like the petitioners in *Stone*—asked this Court to "engage in the initial consideration of the interests at stake," 940 F.3d at 1341 (quotation omitted), and the government joined the proceeding only when invited to file a response by this Court.

Each of these departures from precedent threatens to expand mandamus beyond its properly circumscribed role, and to invite the use of mandamus as forum shopping, where parties ask this Court to decide issues in the first instance. The full Court's review is necessary.

B. The Panel Opinion Dilutes The Requirement Of A "Clear And Indisputable" Right To Relief.

A mandamus petitioner must also demonstrate a "clear and indisputable" right to relief. *In re Al Baluchi*, 952 F.3d 363, 369 (D.C. Cir. 2020). Though a petitioner need not produce a case addressing "the precise factual circumstances or statutory provision at issue," *Fokker*, 818 F.3d at 749–50, this Court has required authority "involving like issues and comparable circumstances," and interpreted that requirement strictly, *Exxon*, 473 F.3d at 355; *see also Al Baluchi*, 952 F.3d at 369 (relief must be "clearly mandated by statutory authority or case law"); *al-Nashiri*, 791 F.3d at 82 (same).

This requirement ensures that novel legal questions—even ones with potentially straightforward answers—are resolved deliberately, on a developed factual record, rather than in abbreviated mandamus proceedings. But the panel's decision encourages just the opposite, by granting the parties' request for novel rulings precluding the district court's consideration of the government's Rule 48 motion. This "conflict[]" with prior precedent warrants en banc review. Fed. R. App. P. 35(b)(1)(A).

1. Precedent Does Not Clearly Foreclose The District Court's Consideration Of An Unopposed Rule 48 Motion.

Every day, district courts across the country exercise a core Article III function in deciding how to decide motions pending before them. The panel relied heavily on *Fokker* in foreclosing the district court's exercise of that authority, *see, e.g.*, Op. 5–11, but that decision did not address—let alone limit—the procedures a district court can employ in evaluating a Rule 48 motion. *Fokker* granted mandamus because a district court *denied* a motion to exclude time under the Speedy Trial Act, interfering with the government's effort to defer a criminal prosecution. 818 F.3d at 746–47. But as in *Rinaldi*, *see* pp. 6–8, *supra*, *Fokker* did not question the *process* the district court employed in reaching that erroneous decision, which involved extensive

scrutiny of the "reasoning and motives" of the government, Op. 8, that went well beyond what is contemplated here. *See* 818 F.3d at 740 (district court conducted "a series of status conferences" over several months, "requested several additional written submissions from the government," and asked the government "to explain why the interests of justice supported the court's approval of the deal embodied by the DPA").[2]

Nor does *Fokker*'s analysis of the separation of powers create a clear and indisputable right to the relief sought in this particular case. *See* Op. 6. Separation-of-powers questions are fact- and context-specific. *See Seila Law*, slip op. 2, 16–18. *Fokker* involved a district judge's *ruling* on a Speedy Trial Act motion that countermanded the Executive's decision not to criminally charge a company. 818 F.3d at 737–38. Because those decisions implicate only the "Executive's exercise of discretion" and "involve[] no formal judicial

[2] A district court's authority to consider an unopposed Rule 48 motion should be indisputable. Even the panel majority contemplated some circumstances, including "malfeasance such as bribery," in which a district court may "scrutinize a motion to dismiss." Op. 12; *see also id.* at 7 (agreeing "a hearing may sometimes be appropriate"). But it is hard to imagine that such "malfeasance" would be apparent on the face of the government's motion. As Rule 48 contemplates, the only way to address such circumstances is to allow district judges to duly consider and rule on motions to dismiss, including by holding hearings and asking questions. *See* Dissent 9–11.

action," courts must play a limited role, provided there is no "clear evidence" overcoming "the presumption of regularity." *Id.* at 741, 746.

This case, by contrast, involves a district judge's effort to *consider* a Rule 48 motion seeking the dissolution of multiple "formal judicial action[s]," including two separate "judgment[s] of conviction." *Id.* at 746. *Fokker* said nothing about the fundamentally different separation-of-powers considerations presented by these facts. *Cf. Young v. United States*, 315 U.S. 257, 259 (1942) ("[O]ur judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of the parties."). Confirming the point, *Fokker* expressly declined to analogize to scenarios involving even less "formal judicial action," namely "a court's review of a proposed plea agreement." 818 F.3d at 745–46. Those situations, *Fokker* observed, involve a different interbranch dynamic because, unlike with DPAs, the court must "review[] the defendant's admitted conduct and enter[] a judgment of *conviction*." *Id.* at 746.[3] Because *Fokker* did not involve or

[3] The distinctions between this case and *Fokker* are not overcome by the panel's observation that "the same standard" governs a Rule 48 motion before and after a judgment of conviction. Op. 6 n.1 (citing 3B Charles A. Wright et al., *Federal Practice & Procedure* § 802 (4th ed. 2013) ("Wright & Miller")). Even setting aside the different separation-of-powers context in *Fokker*, the source the panel cited explains that the Rule 48 "standard" may include

purport to address "like issues and comparable circumstances," there was no basis for relying on it to grant mandamus. *See, e.g.*, *Exxon*, 473 F.3d at 355.

But the majority did not just overread one of this Court's decisions—it also expressly contradicted another. In *Ammidown*, this Court concluded that it is appropriate for judges to inquire about Rule 48 motions, even where "the defendant concurs in the dismissal." 497 F.3d at 620; *see also* Dissent 3 ("The requirement of judicial approval entitles the judge to obtain and *evaluate* the prosecutor's reasons." (quoting *Ammidown*, 497 F.2d at 622)). That extends to inquiry into whether the proposed disposition serves "due and legitimate prosecutorial interests," and thus the "public interest." *Ammidown*, 497 F.2d at 622. *Fokker* quoted *Ammidown* with approval, *see* 818 F.3d at 745–46, 750,

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inquiry into whether granting the motion is "clearly contrary to manifest public interest." Wright & Miller § 802; *see also Ammidown*, 497 F.2d at 622 ("[T]he judge should be satisfied that the agreement adequately protects the public interest." (quotation omitted)). That analysis may turn on the facts and circumstances of the case, including whether the motion is filed before or after conviction. Wright & Miller further explains that the court "must have sufficient factual information supporting the recommendation" so that it can "exercise sound judicial discretion." § 802. The panel's decision precluded the district court from asking a single factual question or exercising any judicial discretion.

and it remains good law. Even if there are questions about *Ammidown*'s reasoning, mandamus is not the place to resolve them.[4]

The panel's analogy to the grant of mandamus in *Fokker* (Op. 15–16), thus fails. Unlike in *Fokker*, *see* 818 F.3d at 750, multiple decisions of the Supreme Court and this Court expressly or implicitly support the district court's consideration of an unopposed Rule 48 motion, and no precedent forecloses it. Holding that there is a "clear and indisputable" right to relief here would render that standard toothless.

2. Precedent Does Not Clearly Foreclose The District Court's Decisions To Appoint An Amicus And Schedule A Hearing.

The panel similarly undercut the "clear and indisputable" requirement in concluding that the district court committed "clear legal error" by "appointing an amicus" and "scheduling the proposed hearing." Op. 7. The Supreme Court routinely takes those steps in criminal cases where the government has confessed error or otherwise agrees with the defendant. *See*

[4] Decisions from other circuits likewise support a district court's consideration of a Rule 48 motion. *See, e.g.*, *In re Richards*, 213 F.3d 773, 787 (3d Cir. 2000); *United States v. Carrigan*, 778 F.2d 1454, 1463 (10th Cir. 1985); *United States v. Hamm*, 659 F.2d 624, 628–30 (5th Cir. Unit A Oct. 1981) (en banc). This inter-circuit conflict provides yet another justification for en banc review. Fed. R. App. P. 35(b)(1)(B).

United States v. Sineneng-Smith, 140 S. Ct. 1575, 1582–83 (2020) (collecting examples). This Court did the same thing in *Fokker*, where the parties were aligned in support of reversal. 818 F.3d at 740; *see also Ammidown*, 497 F.2d at 618 (same). And the panel took the same approach here, ordering Judge Sullivan to file a response to the mandamus petition and granting numerous amicus requests, presumably because fulsome briefing leads to better decisions. The panel identified no authority questioning this common practice or suggesting that it is the exclusive province of appellate courts. Indeed, Mr. Flynn and the government conceded that district court amicus appointments may be appropriate in some criminal cases. Oral Arg. Tr. 19–21, 26.

Contrary to the panel majority's reasoning (Op. 9), the particular factual circumstances of this amicus appointment do not justify mandamus. It has never been deemed enough for mandamus to simply distinguish authorities supporting the district court's actions—there must instead be clear law foreclosing them. If the law were otherwise, mandamus would become commonplace.

The majority's reasoning also fails on its own terms. The district court's appointment of a "private citizen," Op. 16, does not distinguish this amicus appointment from the above examples. And the fact that the district court

requested arguments "*in opposition to* the government's motion," Op. 9 (quoting Dkt. 205), simply reflects the procedural posture of the case. The commonly-used phrase in confession of error cases (appointing an amicus "to defend the judgment below," *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 765 (2020)) is, in substance, identical—the amicus is presenting arguments "in opposition to" the position of the parties. It is therefore unsurprising that the panel majority cited no precedent even suggesting that these distinctions matter.

CONCLUSION

Judicial decisions are supposed to be based on the record before the court, not speculation about what the future may hold. All the district court has done is ensure adversarial briefing and an opportunity to ask questions about a pending motion. Outside the panel opinion, those actions have not been considered inappropriate—much less an extreme separation-of-powers violation justifying mandamus.

Considering both sides of an issue before ruling is not *ultra vires*—it is sound judicial practice. The petition for rehearing en banc should be granted.

Respectfully submitted.

By: /s/ Beth A. Wilkinson

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CERTIFICATION OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies as follows:

1. Exclusive of the exempted portions provided in Fed. R. App. P. 32(f) and Cir. R. 32(e)(1), this petition contains 3,877 words in compliance with the length limitation in Fed. R. App. P. 35(b)(2)(A).

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Century font.

/s/ Beth A. Wilkinson
BETH A. WILKINSON

DATED: JULY 9, 2020

CERTIFICATE OF SERVICE

I, Beth A. Wilkinson, counsel for the Hon. Emmet G. Sullivan and a member of the Bar of this Court, certify that, on July 9, 2020, I electronically filed the foregoing with the Clerk using the Court's electronic filing system. As all participants in the case are registered with the Court's electronic filing system, electronic filing constitutes service on the participants. *See* Fed. R. App. P. 25(c)(2)(A); Cir. R. 25(f).

I further certify that all parties required to be served have been served.

/s/ Beth A. Wilkinson
BETH A. WILKINSON

DATED: JULY 9, 2020