INTEREST OF AMICUS CURIAE

Amicus has a strong professional interest in educating and inspiring the public about the rule of law and principles of justice, fairness, and integrity in our legal system.

Opening Arguments Media, LLC ("Opening Arguments") is a Maryland limited liability company wholly owned by P. Andrew Torrez, an attorney who has practiced in this district with distinction for over 20 years.[1] Mr. Torrez is a 1997 graduate of Harvard Law School *cum laude*, a member of the Board of Governors of the Maryland Chapter of the Federal Bar Association, a Fellow of the American Bar Foundation, and has received numerous other honors. Opening Arguments Media, LLC produces the award-winning "Opening Arguments" podcast, which has had over eleven million downloads since launching in August of 2016.

The Opening Arguments podcast explains popular legal stories in the news with a particular focus on corruption in politics and law. It is co-hosted by Mr. Torrez and Thomas Smith, an inquisitive interviewer and non-attorney who asks questions and provides commentary on the news from a layperson's perspective. One of the most popular segments on Opening Arguments is "Thomas Takes the Bar Exam," in which Mr. Smith attempts to answer bar exam questions by applying common sense despite not having attended law school; the point of the segment – and the show in general – is to de-mystify and encourage a love of the law.

This "love of the law" is what motivated Opening Arguments to file the instant brief. The Opening Arguments podcast is aimed at the general public, with a diverse audience of listeners that includes many law students and prospective law students, along with prosecutors, public

[1] *See, e.g., Direct Opportunities Group, LLC v. Center for Popular Democracy Action, et al.*, Case No. 1:19-cv-01407-TJK (counsel for defendant in pending case before this Court).

defenders, and practicing and non-practicing attorneys.[2] In fact, over the past four years, Opening Arguments has received dozens of emails from listeners who have said that the podcast inspired them to attend law school. Opening Arguments believes that its unwavering faith in the rule of law has been critical to inspiring others to join the legal profession.

Although Opening Arguments encourages listeners to trust in the justice system, that system only inspires trust when the underlying principles of justice, fairness, and integrity are maintained. Accordingly, *amicus* brings a unique perspective as well as rigorous legal research to the question pending before this Court. In particular, *amicus* suggests the government's "Legal Background" section of the Motion (pp. 10-11) is misleading at best, and does not prevent this Court from denying relief or deferring judgment under Rule 48(a) until the Court is convinced that no unfair collusion has taken place here. Because the Defendant (obviously) has not objected to the government's legal sleight-of-hand, *amicus* believes that its brief is useful in ensuring that Defendant and his allies at the Department of Justice do not misreperesent the law to serve their own interests and schemes. Therefore, to preserve trust in the justice system and its principles of justice, fairness, and integrity, *amicus* respectfully submits this brief.[3]

Pursuant to Fed. R. App. P. 29(a)(4) and L.Cv.R. 7(o)(5), counsel for *amicus* state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed

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[2] This brief *amicus curiae* and all of the arguments contained herein are made by and on behalf of Opening Arguments Media, LLC, and not by Mr. Torrez in his individual capacity and/or the Law Offices of P. Andrew Torrez as a legal representative of any other entity, public or private.

[3] Counsel for *amicus* wishes to acknowledge their appreciation of the research and drafting assistance of legal intern Rich Gilliland, Washington and Lee University School of Law (J.D. expected 2022).

money that was intended to fund preparing or submitting the brief; and no person contributed money that was intended to fund preparing or submitting this brief.[4]

INTRODUCTION AND FACTUAL BACKGROUND

Amicus submits this brief out of a concern that the bedrock principles of justice, fairness, and integrity are in danger of being compromised with the filing of the government's Motion to Dismiss pursuant to Fed. R. Crim P. 48(a) [Doc. 198] (the "Motion") and the accompanying consent by the Defendant, Lt. Gen. Michael T. Flynn.[5]

Mr. Flynn is a highly politically-connected Defendant, "a high-ranking government official who committed a crime while on the premises of and in the West Wing of the White House."[6] Indeed, this Court frankly admonished Mr. Flynn that the "aggravating circumstances"[7] surrounding his criminal activities were "serious,"[8] explaining:

> Not only did you lie to the FBI, but you lied to senior officials in the Trump Transition Team and Administration. Those lies caused the then-Vice President-Elect, incoming Chief of Staff, and then-Press Secretary to lie to the American people. Moreover, you lied to the FBI about three different topics, and you made those false statements while you were serving as the National Security Advisor, the President[-elect] of the United States' most senior national security aid[e]. I can't minimize that.

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[4] Opening Arguments is funded primarily via advertising and listener donations at www.patreon.com/law. Opening Arguments disclosed that it intended to prepare and file an *amicus* brief in this case on May 14, 2020, *see* https://openargs.com/oa386-the-opening-arguments-amicus-brief/, and shared information about that brief prior to filing, but did not solicit any funds for the preparation or submission of this brief.

[5] *See* Notice of Consent to Government's Motion to Dismiss by Michael T. Flynn, filed May 12, 2020 [Doc. 202].

[6] August 20, 2019 Transcript of Proceedings [Doc. 103] at 42:19-21.

[7] *Id.* at 32:22-23.

[8] *Id.* at 32:23.

> Two months later you again made false statements in multiple documents filed pursuant to the Foreign Agents Registration Act. So, all along you were an unregistered agent of a foreign country, while serving as the National Security Advisor to the President[-elect] of the United States.[9]

Despite Mr. Flynn's having arguably "sold out" his country,[10] the government offered Mr. Flynn a proverbial "sweetheart" deal from the outset, charging him solely with a single count of making a false statement under 18 U.S.C. § 1001, and recommending a low-end Guidelines sentence of zero to six months of incarceration even before Mr. Flynn's cooperation and assistance obligations to the government were completed.[11] As this Court noted, this sweetheart deal saved Mr. Flynn from potentially "grave" exposure to additional charges that could have resulted in spending more than a decade in prison.[12]

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[9] *Id.* at 32:23-33:11. Bracketed language reflects a minor technical correction made by this Court later in that oral argument in that Mr. Flynn's conduct occurred after the election of President Trump but prior to Mr. Trump's inauguration; i.e., when Mr. Trump was President-elect. *See id.* at 39:20-40:1.

[10] *Id.* at 33:12-14 (this Court noting that "[A]rguably, that undermines everything this flag over here stands for [indicating]. Arguably, you sold your country out.").

[11] *Id.* at 37:1-13 (prosecutor Van Grack recommending sentence "at the low end of the Guideline range"); *id.* at 17:8-10 (Court explaining that such sentence would be zero to six months); *see also* Sentencing Memorandum by USA as to Michael T. Flynn [Doc. 46], filed December 4, 2018 (recommending low end of the Guidelines sentence for Mr. Flynn). *See infra* at 8 (discussing Mr. Flynn's failure to fulfill his obligations to the government).

[12] August 20, 2019 Transcript of Proceedings [Doc. 103] at 29:3-5; *see id*. at 22:6-23:5 (noting that Mr. Flynn could have been charged with violating FARA); *id.* at 27:16-28:5 (noting that Mr. Flynn could have been charged in the Bijan Rafiekian indictment in the Eastern District of Virginia); *id.* at 28:15-29:17 (noting that such charge could have carried a ten-year prison term to run consecutively with the charges in this matter).

One of the only conditions of this deal was that Mr. Flynn cooperate fully, truthfully, and forthrightly, as well as assist the government in its ongoing investigations.[13] By 2019, however, Mr. Flynn had largely ceased rendering any assistance; indeed, when questioned by this Court under oath, the most the line prosecutor would concede at that time was that "it remains a possibility" that Mr. Flynn might cooperate with the government's investigations in the future.[14]

Nevertheless, to give Mr. Flynn the maximum potential benefit of the doubt – and to permit him to render the most fulsome and complete assistance to the government as possible – this Court continued to defer Mr. Flynn's sentencing.[15] Thus, instead of potentially sending Mr. Flynn to prison nearly a year ago, this Court instead allowed him to retain his freedom, trusting that he would use that time to serve his country by helping to right the wrongs he had committed.

Sadly, Mr. Flynn abused this Court's and the public's trust. In January of this year, the government reported – with considerable understatement – that Mr. Flynn had "not substantially assisted" it in any matter.[16] Instead, Mr. Flynn acquired new counsel,[17] immediately

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[13] *See* Plea Agreement as to Michael T. Flynn, entered December 1, 2017, at 5-6 ¶ (detailing the requirements of Mr. Flynn's duty to cooperate).

[14] August 20, 2019 Transcript of Proceedings [Doc. 103] at 25:18-24.

[15] *See, e.g., id.* at 32:6-8 ("In other words, the Court likes to be in a position to say there's nothing else this defendant can do to help the United States of America. He's done everything that he can do."); *see also generally discussion* at 25-26.

[16] Supplemental Sentencing Memorandum by USA, filed January 7, 2020 [Doc. 150] at 22.

[17] After Mr. Flynn fired Covington & Burling – one of the most respected law firms in the world – and hired his present counsel, the President of the United States tweeted, "General Michael Flynn, the 33 year war hero who has served with distinction, has not retained a good lawyer, he has retained a GREAT LAWYER, Sidney Powell. Best Wishes and Good Luck to them both!" https://twitter.com/realDonaldTrump/status/1139115655532298240

changed his story, both publicly and in this court,[18] began denying responsibility for his actions, and ultimately moved to withdraw his voluntarily-entered guilty plea.[19] In doing so, Mr. Flynn began to express an entirely new version of events that contradicted both his earlier, sworn grand jury testimony as well as statements he had made to the FBI on multiple occasions.[20] Moreover, these newly (and loudly) articulated views undermined the testimony of other witnesses the government intended to call in its prosecution of Bijan Rafiekian[21] – the case in which the government had eagerly anticipated that Mr. Flynn would render the *most* assistance.[22]

Needless to say, Mr. Flynn's brand-new story and inconsistent statements rendered him useless as a witness for the prosecution,[23] depriving the government of what it anticipated would be "the best and most direct evidence" of the most crucial contested issue at trial over the "most serious charge" against Mr. Rafiekian.[24] Worse, not only was the government unable to call Mr. Flynn as a witness for the prosecution,[25] but Mr. Flynn actually intervened *on behalf of the*

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18 Supplemental Sentencing Memorandum [Doc. 150] at 20.

19 *Id.*; *see also* Supplemental Motion to Withdraw Plea of Guilty by Michael T. Flynn, filed January 29, 2020 [Doc. 160-2].

20 Supplemental Sentencing Memorandum [Doc. 150] at 23.

21 *United States v. Bijan Rafiekian*, No. 18-cr-457 (E.D. Va July 8, 2019).

22 *See* Supplemental Sentencing Memorandum by USA, filed January 7, 2020 [Doc. 150] at 22-25.

23 *Id.* at 23 ("In light of that view, the *Rafiekian* prosecutors made a rational, strategic decision not to call the defendant as a witness, and promptly disclosed the proffered new version of events to Rafiekian's counsel.").

24 *Id.* at 23-24.

25 *Id.* at 23.

defendant[26] – an action the government described not only as "remarkable"[27] but "wholly inconsistent with the defendant assisting (let alone substantially assisting) or cooperating with the government in that case."[28]

One might expect that the government would not look particularly kindly upon a defendant who not only failed to render the kind of cooperation and assistance required by his plea deal, but *actively undermined another criminal prosecution*. Incredibly, that has not happened here. Instead, as this Court is well aware, the government has subsequently moved to drop all charges against Mr. Flynn with prejudice,[29] despite the fact that Mr. Flynn voluntarily pled guilty on December 1, 2017[30] and repeatedly reaffirmed that plea under oath before this Court.[31] In what this Court has politely described as an "unusual"[32] turn of events, the government's motion was

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[26] *Id.* at 24 ("Remarkably, the defendant, through his counsel, then affirmatively intervened in the *Rafiekian* case and filed a memorandum opposing the government's theory of admissibility on the grounds that the defendant was not charged or alleged as a coconspirator.")

[27] *Id.*

[28] *Id.* at 24-25.

[29] *See* Motion [Doc. 198] at 1.

[30] *See* Information as to Michael T. Flynn [Doc. 1] (waiving indictment and pleading guilty); January 16, 2018 Transcript of Proceedings [Doc. 16] at 6-14 (exhaustively interrogating Mr. Flynn to ensure that his plea was voluntary).

[31] *See* August 20, 2019 Transcript of Proceedings [Doc. 103] at 8:1-9:7 ("THE COURT: Do you seek an opportunity to withdraw your plea in light of those revelations? THE DEFENDANT: I do not, Your Honor."); *id.* at 16:5-7 ("THE COURT: All right. Because you are guilty of this offense? THE DEFENDANT: Yes, Your Honor.").

[32] *See* Brief for Judge Emmet G. Sullivan in Response to May 21, 2020 Order, filed June 1, 2020 in the United States Court of Appeals for the District of Columbia Circuit (No. 20-5143) at 28.

signed only by an acting political appointee and not by any of the line prosecutors in this case,[33] and *on the same day that motion was filed*, the lead prosecutor, Special Assistant U.S. Attorney Brandon L. Van Grack, withdrew from this case.[34] To date, this Court has not requested that the government produce Mr. Van Grack or documents related to his withdrawal, which might aid in the evaluation of the pending Motion.

Amicus's argument is that this Court retains the discretion under Rule 48(a) to infer that a politically-connected defendant may be colluding with high-ranking officials in the Department of Justice to evade the consequences of his having broken the law and is therefore not required to dismiss this case. Instead, this Court can either deny the government's Rule 48(a) motion or hold it *sub curia* pending additional evidentiary hearing(s).

ARGUMENT

I. Rule 48(a) Does Not Require This Court to Dismiss the Case Against Mr. Flynn.

This is a case of first impression. For the first time in our nation's history, the government has moved to dismiss all charges with prejudice against a defendant who has already pled guilty.[35] The government's Motion cites exactly **zero** cases in which a court has ever done what it is now asking this Court to do; and *amicus* – after exhaustive research – similarly knows of no cases in any jurisdiction, at any level, from any court, at any time that have *ever* granted such relief.

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33 *Id.*

34 *See* Notice of Withdrawal of Appearance by USA as to Michael T. Flynn of Brandon Van Grack, Entered May 7, 2020 [Doc. 197].

35 *See* Motion [Doc. 198].

A. As a Threshold Matter, The Government Has Not Established That This District Recognizes a Rule 48(a) Motion to Dismiss After a Defendant Has Pled Guilty.

Rule 48(a) of the Federal Rules of Criminal Procedure contains two short, straightforward sentences. The first permits a prosecutor to dismiss "an indictment, information, or complaint" with leave of court. Fed. R. Crim. P. 48(a). The second – restricting the first – requires that when such request for dismissal comes "during trial," the defendant must also consent. *Id.* Rule 48(a) was enacted three-quarters of a century ago as a check on prosecutorial discretion; it replaced the prior rule which had no constraints on the entry of a *nolle prosequi* in the federal courts with one that "will permit the filing of a *nolle prosequi* only by leave of court."[36]

Here, of course, the government does not seek to file a *nolle prosequi*, because Mr. Flynn has already pled guilty. Nor does the government seek to dismiss "an indictment, information, or complaint" – rather, in its own words, it seeks to overturn the *conviction* of Mr. Flynn. Motion at 10. Under a straightforward reading of the plain language of the text, Rule 48(a) simply does not permit such a filing, and no case in this Circuit has construed Rule 48(a) as doing so.

To overcome the plain language of Rule 48(a), the government must show that Rule 48(a)'s use of the word "complaint" should be judicially construed as also implicitly including the word "conviction" – and, in particular, a conviction arising due to a defendant's voluntary plea of guilty that was accepted by the court nearly two years ago where all that remains is for the Court to sentence the defendant. To advance this rather challenging argument, the government curiously cites a Ninth Circuit decision, *United States v. Hector*, 577 F.3d 1099 (9th Cir. 2009) for the proposition that "[i]t is also 'well established that the Government may move to dismiss even after

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[36] *See id.*, Notes of Advisory Committee on Rules (1944) (emphasis added); *see also U.S. v. Ammidown*, 497 F.2d 615, 619-20 (D.C. Cir. 1973) (discussing history and applicability of Rule 48(a)).

a complaint has turned into a conviction because of a guilty plea,'" Motion at 10. *Hector*, as shown *immediately infra* at Part I.B., is of no help to the government on the merits, as it requires a court evaluating whether to dismiss a conviction under Rule 48(a) to conduct precisely the kind of independent judicial analysis that the government eschews (and *amicus* encourages). As a threshold matter, however, far from expressing a "well established" rule, it is not clear that *Hector* applies at all in this Circuit.

The government's argument that *Hector* applies here is ostensibly supported by two lines of authority: (a) a "collecting cases" parenthetical in its citation to *Hector*; and (b) a "*see also*" citation to the Supreme Court's 1977 *per curiam* opinion in *Rinaldi v. United States.*[37] Upon closer examination, neither of these lines hold water. *Rinaldi*, as this Court is well aware, did not involve a guilty plea, and thus is of no help to the government.[38] That leaves only *Hector* – a Ninth Circuit decision – and the cases "collected" therein, which consist only of other Ninth Circuit cases (and *Rinaldi*). *Hector*, 577 F.3d at 1101.[39] In other words, the judicially-created rule permitting Rule

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[37] 434 U.S. 22, 31 (1977).

[38] Nor did *Rinaldi* involve dismissal of *all* charges against a guilty defendant; the petitioner in *Rinaldi* had been convicted and was serving a six-year prison sentence for participating in a robbery plot that violated both state and federal law, and was subsequently charged, tried, and convicted in federal court for the same offense, *id.* at 23-24, despite the longstanding policy against multiple prosecutions set forth in *Petite v. United States*, 316 U.S. 529 (1960). *Id*. The government subsequently moved to dismiss the federal indictment against *Rinaldi* pursuant to Rule 48(a), *id.* at 29-30, to which the trial court refused to grant leave due to other allegations of prosecutorial misconduct. *Id.* at 30. Ultimately, the Supreme Court determined that dismissal of the federal charges was appropriate. *Id.* at 30-31. *See discussion infra* at Part I.B. (arguing that dismissal here is not in the public interest).

[39] *United States v. Gonzalez*, 58 F.3d 459 (9th Cir. 1995), *United States v. Garcia-Valenzuela*, 232, F.3d 1003 (9th Cir. 2000), and *Vazquez-Ramirez v. United States Dis. Court*, 443 F.3d 692 (9th Cir. 2006). *See discussion infra* at Part I.B.

48(a) motions to be filed in cases in which the defendant has already pled guilty appears to be limited to the Ninth Circuit.

There is good reason for this Court to suspect that this Circuit would not adopt the Ninth Circuit's reasoning in *Hector*. In *U.S. v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973), the petitioner asked the D.C. Circuit to vacate his ewconviction and reinstate his previously-proffered guilty plea to a lesser offense – relief virtually identical[40] to that which the government seeks here. *Ammidown,* 497 F.2d at 618. Before ultimately granting the petitioner's relief on other grounds, the *Ammidown* Court first considered whether Rule 48(a) applied. Because Rule 48(a) "requires the prosecutor to terminate a prosecution by dismissal of an **indictment**," *id.* at 619 (emphasis added), the D.C. Circuit concluded that "Rule 48(a) does not apply as such to the case at bar," *id.* at 619-20. *Ammidown* thus strongly suggests that the D.C. Circuit would not adopt the Ninth Circuit's reasoning in *Hector* and judicially expand the definition of the word "indictment" to include "conviction." If this Court agrees, it can simply deny the Motion.

B. If the *Hector* Rule Applies in This Circuit, it Requires This Court Independently to Determine Whether Granting Such Relief is in the Public Interest; This Court May Not Simply Defer to Prosecutorial Discretion.

Assuming *arguendo* that this Circuit would adopt the Ninth Circuit's reading of Rule 48(a) (the "*Hector* Rule"), this Court nevertheless retains – and is, in fact, required to exercise – substantial discretion to either deny the Motion or hold it *sub curia* pending additional fact-finding. *Hector* and the cases upon which it relies clearly require that any court must rely on its own independent judgment as to whether a Rule 48(a) dismissal would be in the public interest and may not merely defer to the prosecutor's discretion.

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[40] But less extreme. As in *Rinaldi*, the petitioner in *Ammidown* did not seek to escape *all* punishment, but merely to substitute a greater sentence for a lesser one. *See Ammidown*, 497 F.2d at 618 (seeking to reinstate plea to second degree murder), at 624 (granting same). *See discussion infra* at Part I.B. (arguing that dismissal here is not in the public interest).

In *Hector*, the defendant pled guilty to both receipt and possession of child pornography. *Hector*, 577 F3.d at 1100. Almost immediately afterwards, the Ninth Circuit ruled that due to the overlap in the elements of those two crimes, convicting a defendant on both counts would violate double jeopardy.[41] *Id.* As a result, the defendant moved to dismiss the receipt count because that count carried a higher base offense level and a statutory mandatory minimum sentence. *Id.* Instead of granting the defendant's motion, the trial court left it to the prosecutor to determine which one to dismiss. *Id.* at 1100-01.[42] On appeal, the Ninth Circuit reversed, holding that the district court had abused its discretion by deferring to the prosecutor and failing to exercise its own independent judgment, *id.* at 1103, and ordering the district court "to hold a hearing and then to make a discretionary determination as to which conviction should be vacated." *Id.* at 1104. In other words: under the *Hector* rule, this Court must always use its independent judgment to determine whether granting relief under Rule 48(a) would be in the public interest. *See, e.g., United States v. Gonzalez*, 58 F.3d 459, 460 (9th Cir. 1995); *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975) (same). **[[Ordinarily, such language means that the Court must do more than just "rubber stamp" a motion; and the Court's judgment must be guided by concern for the public good and the interests of justice. [insert string cite]. That should guide this court's analysis of 48(a) here.]]**[43]

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41 *See United States v. Davenport*, 519 F.3d 940 (9th Cir. 2008).

42 *Hector*, 577 F.3d at 1100("After the prosecution argued for its preferred sentence, the court noted that the prosecutor had not moved to vacate either conviction. The prosecutor responded that she would do so after Hector was sentenced on Count I. 'Then I'll sentence him on Count II,' the court replied. 'But I have to sentence him, and I can only sentence him on one count. And if that's your choice, I'm going to sentence him under the count that I believe is appropriate.' The prosecution then moved to vacate the possession conviction, and the court granted that motion.").

43 Once again, the plain language of Rule 48(a) confirms this analysis. Rule 48(a) requires "leave of court," and such language typically indicates a more than ministerial role for the Court.

Read charitably, the government's argument seems to be that it is always in the public interest when the defendant has consented to a Rule 48(a) dismissal; *see, e.g.,* Motion at 10-11. Not so.[44] Every court to consider this question – including those cited by the government in its Motion – has concluded that the District Court may deny an unopposed Rule 48(a) motion if it would be "clearly contrary" to the public interest.[45]

There are ample reasons to suspect that the instant Motion is the product of collusion and therefore "clearly contrary" to the public interest, *see infra* at Part II. But this Court need not go that far. The public has an obvious interest in seeing that criminals are punished **[cite]**, particularly those who have "arguably sold out their country" and committed serious crimes, *see supra* at pp. 3-4. Indeed, even the authorities cited by the government reaffirm this principle; in those cases,

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Thus, for example, even Rule 15(a)(2) of the Federal Rules of Civil Procedure – which contains additional language requiring that such leave be "freely give[n]," Fed. R. Civ. P. 15(a)(2), still requires an independent judicial determination regarding the public interest. Accordingly, a court may deny Rule 15(a)(2) motions to amend as long as the court gives a sufficient reason, such as futility of amendment, undue delay, bad faith, dilatory move, undue prejudice, or repeated failure to cure deficiencies by previous amendments. *See, e.g., Forman v. Davis*, 371 U.S. 178, 182 (1962); *see also Liberty Mut. Ins. Co. v. Hurricane Logistics Co.* 216 F.R.D. 14, 16 (D.D.C. 2003) (citing *Forman,* 371 U.S. at 182); *Caribbean Broad. Sys. Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080, 1083 (D.C. Cir. 1998)). Here, Rule 48(a) requires only "leave of the court" with no further instructions to this Court as to how to make that determination. It would be nonsensical to adopt the interpretation the government is urging that would read Rule 48(a) more narrowly than a similar procedural rule (Rule 15) that contains additional constraints on judicial discretion.

[44] In *Rinaldi,* the Supreme Court specifically reserved judgment as to whether the district court has discretion under Rule 48(a) to deny an uncontested motion to dismiss, endorsing the "public interest" test articulated by *amicus* here. *Rinaldi*, 434 U.S. 22, 29 n.15 ("But the Rule has also been held to permit the court to deny a Government dismissal motion to which the defendant has consented if the motion is prompted by considerations clearly contrary to the public interest.") (internal citations omitted).

[45] *See supra* n. 44 (discussing *Rinaldi*); *see also Gonzalez*, 58 F.3d at 462; *United States v. Garcia-Valenzuela*, 232 F.3d 1003, 1007-08 (9th Cir. 2000); *United States v. Welborn*, 849 F.2d 980, 983 n. 2 (5th Cir.1988).

defendants had sentences reduced or additional charges dropped but nevertheless continued to serve at least some time in prison for their crimes.[46]

Here, by contrast, the government seeks to allow Mr. Flynn to go scot free with literally no consequences – and, of course, to dismiss the charges with prejudice so that no future prosecutor can ever seek justice against Mr. Flynn. Motion at 11. This Court can (and should) determine that such a result would be clearly contrary to the public interest in justice and the rule of law.

C. The Separation of Powers Argument and Public Policy Rationales Articulated in *Dicta* in *Fokker* Strongly Favors Denying the Government's Rule 48(a) Motion.

The government has cited superficially appealing but misleading *dicta* from *United States v. Fokker Services, B.V.*, 818 F.3d 733, 742 (D.C. Cir. 2016) as if it were dispositive in this case, *see* Mot. at 10-11.[47] It is not. Indeed, properly understood, *Fokker* supports denying the government's Motion for at least three reasons.

1. *In This Case, Separation of Powers Compels Deference to the Judiciary's Power Over Sentencing, and Not the Executive Branch's Power to Charge.*

The core principle underlying the D.C. Circuit's holding in *Fokker* is the doctrine of separation of powers. As that court explained, it is well-settled that the executive branch is supreme when it comes to determining *whether* to charge a criminal defendant,[48] whereas the

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[46] *See Rinaldi*, 434 U.S. at 23-24 (cited at Mot. 10) (defendant to serve six-year prison term on state charges); *In re United States*, 345 F.3d 450, 451-52 (cited repeatedly at Mot. 10) (defendant to serve sixteen-month prison term for obstruction of justice); *Hector*, 577 F.3d at 1103-04 (cited at Mot. 10) (requiring district court to choose whether to sentence defendant for receipt or possession of child pornography); *see also Wayte v. United States*, 470 U.S. 598, 603, 614 (1985) (cited at Mot. 11) (upholding indictment against claims of selective prosecution). *See also infra* at Part I.C.3 (discussing *Fokker*).

[47] *See* Motion at 10-11 (arguing that "the role of courts for addressing Rule 48(a) motions is 'narrow.'") (quoting *Fokker*, 818 F.3d at 742).

[48] *Fokker*, 818 F.3d at 742 ("Those settled principles counsel against interpreting statutes and rules in a manner that would impinge on the Executive's constitutionally rooted primacy over

judiciary is supreme when it comes to *sentencing* that defendant after conviction.[49] In the ordinary course, then, this separation-of-powers principle suggests that the trial court ought to defer to the prosecutor's decision to dismiss an "indictment, information, or complaint" as a corollary of the general principle that charging decisions belong to the prosecutor.[50]

Here, however, the government admits that the balance of power has shifted from the executive to the judiciary because the "complaint has turned into a conviction." Motion at 10. Had this Court utilized its discretion to sentence Mr. Flynn back in August of 2019, it is obvious that the executive could not have filed a Rule 48(a) motion to dismiss in the event that it disagreed with that sentence; to do so would impermissibly allow the executive branch to usurp "the Judiciary's traditional authority over sentencing decisions."[51] Obviously, the government did not disclose at that time that it might later seek to undo its prosecution of Mr. Flynn, and neither this Court nor any party had any reason to suspect such a bizarre turn of events.

It is not remotely plausible to view the Court's 2019 deferral as somehow "handing off" this Court's primary authority over sentencing to the executive branch. To adopt the rule urged

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criminal charging decisions. … The authority to make such determinations remains with the Executive.").

[49] *Id.* at 745 ("a district court's authority to "accept" or "reject" a proposed plea agreement under Rule 11 is rooted in the Judiciary's traditional power over criminal *sentencing*") (emphasis in original).

[50] Which, in turn, explains the result in *Fokker*: the D.C. Circuit cautioned against a court substituting its judgment for the prosecutor in determining *whether to offer a deferred prosecution agreement* to the defendant in the first place. *See id.* at 743-44 ("As with conventional charging decisions, a DPA's provisions manifest the Executive's consideration of factors such as the strength of the government's evidence, the deterrence value of a prosecution, and the enforcement priorities of an agency, subjects that are ill-suited to substantial judicial oversight.").

[51] *See supra* at p. 5 & n.15 (discussing this Court's rationale for delaying sentencing in 2019).

by the government would not only penalize the Court for demonstrating mercy in 2019,[52] it would disincentivize every future judge from giving criminal defendants additional time to cooperate and render assistance pursuant to their plea deals. Such an outcome would reach an absurd result and undermine the very separation-of-powers rationale so clearly articulated by the D.C. Circuit in *Fokker*.

IF A 48(a) MOTION WAS OFF THE TABLE IN AUGUST 2019, HOW IS IT BACK ON THE TABLE IN JUNE OF 2020??

2. *Deferred Prosecution Agreements, By Their Nature, Incorporate the Same Concern for the Public Interest Required By Rule 48(a).*

Fokker, as this Court is well aware, was not a Rule 48(a) case, but rather one that involved an (arguably) analogous provision regarding the application of the Speedy Trial Act, 18 U.S.C. § 3161(h)(2)[53] to deferred prosecution agreements.[54] Deferred prosecution agreements by their very nature incorporate precisely the kind of concern for the public interest urged by *amicus* here. In a deferred prosecution agreement, the government brings charges against a defendant but defers prosecution while the defendant complies with certain conditions.[55] If the defendant fulfills those conditions, the government agrees to drop the charges; if not, the defendant is prosecuted.[56]

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52 *Fokker*, 818 F.3d at 746 ("In light of the Executive's traditional power over charging decisions and the Judiciary's traditional authority over sentencing decisions") (citing *Ammidown*, *supra*, 497 F.2d. at 619).

53 *Fokker*, 818 F.3d at 739.

54 *See supra* at p. 5 & n.15 (discussing this Court's rationale for delaying sentencing in 2019).

55 *Fokker*, 818 F.3d at 737.

56 *Id*.

That is, of course, far more protection to the public than the government urges in this case. Indeed, in *Fokker*, the company defendant was required to abide by the terms of its deferred prosecution agreement, which included payment of $21 million in fines, cooperating with the government, and implementing a new compliance policy.[57] Here, by contrast, the uncontestsed evidence *introduced by the government itself* is that Mr. Flynn failed to render substantial assistance and did not cooperate with the government in its prosecution of Bijan Rafiekian. *See supra* at pp. 5-7 & nn. 16 - 28.

[57] *Id.* at 739.