

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF)
AMERICA)
)
)
v.) Criminal No. 17-CR-00232-EGS
)
MICHAEL T. FLYNN,) **MOTION FOR LEAVE TO FILE**
) **BRIEF OF AMICUS CURIAE**
 Defendant.) **IN OPPOSITION TO**
) **DEPARTMENT OF JUSTICE'S**
) **MOTION TO DISMISS**

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In accordance with Local Rule 7(o), and consistent with this Court's minute orders of May 12 and May 19, 2020, Free Speech For People respectfully moves this Court for leave to file a brief of amicus curiae. As grounds for this motion, amicus states:

1. Free Speech For People ("FSFP") is a national non-partisan 501(c)(3) organization working to renew our democracy and our Constitution for we, the people. FSFP has filed amicus briefs in constitutional cases in federal district courts across the country, including in this Court. FSFP's interest in this matter is to provide the Court with a perspective on the Department of Justice's motion to dismiss based on recent scholarship on the original meaning of the Constitution as it applies to the pardon power.

2. FSFP seeks to advise the Court of issues that are not likely to be raised by either the Department of Justice or by the defendant. In particular, FSFP seeks to advise the Court of reasons why the "Executive Grant of Clemency" executed by President Donald John Trump with respect to the defendant in this matter, *see* ECF No. 308-1, is or may not be constitutionally valid. This position is adverse to that of the defendant, but the Department of Justice will not adequately

represent FSFP's interest in presenting these issues because the Department will not question the validity of an executive grant of clemency issued by the president.

3. The matters to be discussed in the proposed brief are relevant because, if the pardon of Mr. Flynn was constitutionally infirm, or if this Court determines that further proceedings are necessary to consider the question of whether the pardon was constitutionally infirm, then denial of the Department of Justice's motion to dismiss, ECF No. 308 (Nov. 30, 2020), may be appropriate.

4. This court has discretion to accept amicus briefs. *See* Minute Order (May 12, 2020) (noting circumstances under which amicus participation is appropriate). "Court have permitted parties to file amicus briefs where 'the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs.'" *In re Search of Info. Associated with [redacted]@mac.com that is Stored at Premises Controlled by Apple, Inc.*, No. 14-228, 2014 WL 4094565, *7 (D.D.C. Aug. 8, 2014) (quoting *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003)); *Hard Drive Prods., Inc. v. Does 1-1*, 495, 892 F. Supp. 2d 334, 337

(D.D.C. 2012) (internal quotation marks and citations omitted)

“Amicus participation is normally appropriate when (a) a party is not represented competently or is not represented at all, (b) the amicus has an interest in some other case that may be affected by the decision in the present case, or (c) when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.”).

5. Mr. Flynn’s counsel has stated that he opposes this amicus participation. The Department of Justice has advised undersigned counsel that it takes no position regarding amicus filings.

6. This motion and the proposed brief are timely. Although the brief is filed after the dates specified in this Court’s Minute Order of May 19, 2020, amicus did not seek to present briefing with respect to the matters then pending before the Court—only with respect to the pardon and the Department of Justice’s motion to dismiss based on that pardon. This motion is filed just one day after that motion to dismiss (which contains the first public revelation of the actual Executive Grant of Clemency) that is the subject of the proposed amicus brief.

7. The proposed brief and a proposed order are attached.

CONCLUSION

For the foregoing reasons, amicus respectfully request that the Court grant this motion and permit its participation in this case as amicus curiae.

Respectfully submitted,

/s/ Ronald A. Fein

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DATED: December 1, 2020

* Mr. Fein is a member in good standing of the bar of this Court. Ms. Hostetler, Mr. Bonifaz and Mr. Clements are members in good standing of the bar of the Supreme Judicial Court of Massachusetts who do not practice at an address in the District of Columbia. Their participation in this motion is appropriate under Local Criminal Rule 44.1(c).

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2020, I served a copy of the foregoing upon all registered counsel by filing it electronically through the Court's CM/ECF system.

/s/ Ronald A. Fein

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