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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA	:	**Case No. 2026 CF2 010237**
	:	
v.	:	**Hon. Todd E. Edelman**
	:	
DAVID CARTER HEARN,	:	**Motions Hearing: September 4, 2026**
	:	
Defendant.	:	

DEFENDANT'S SURREPLY IN SUPPORT OF DISMISSAL WITH PREJUDICE

Defendant David Carter Hearn respectfully submits this surreply in support of his request that the dismissal of the indictment in this matter be *with* prejudice. In its Reply, the government simply ignores its own admissions and the record of politicization that has plagued this case from the very beginning to continue to press for dismissal without prejudice. *See* Government's Reply to Defendant's Response to Government's Motion to Dismiss the Indictment Without Prejudice (filed Aug. 18, 2026) ("Gov't Reply" or "Reply"). Yet the undeniable effect of a dismissal without prejudice is exactly what we have seen since this case was dismissed: the continued harassment of Mr. Hearn through the prospect of future reindictment. That daily torment is an intolerable state of affairs given the record here and should be brought to an end. Indeed, if ever the government should be foreclosed from again bringing charges against a defendant, this is the case.

The government's Reply confirms, rather than refutes, the grounds for dismissal with prejudice. In general, the government appears to agree that the standard in determining whether a Rule 48(a) dismissal should be with or without prejudice is (1) "the purpose sought to be achieved by the government" and (2) "its effect on the accused," including whether such a dismissal "would result in harassment of the defendant or would otherwise be contrary to the manifest public interest." *United States v. Poindexter*, 719 F. Supp. 6, 10 (D.D.C. 1989); *accord Workman v.*

United States, 255 A.3d 971, 975–79 (D.C. 2021). Thus, in seeking dismissal without prejudice, the government asks the Court to take its word for it that its "request for leave of court to dismiss the indictment was very much made in good faith." Gov't Reply at 2. But the Court should not ignore that this case was brought hastily, without a sufficient factual basis, and to achieve a result dictated by political pressures rather than the facts and the law. That history is highly relevant as evidence of the purpose and the likely consequences for Mr. Hearn of the option to re-prosecute for which the government asks the Court. Indeed, the government's treatment of Mr. Hearn and of this case as a political football is ongoing and extraordinary. Under the law and the facts of this case, the government should not have any opportunity to engage in further unlawful or improper behavior by holding out the possibility that charges could be brought against Mr. Hearn again.

The dismissal should be with prejudice.

I. THE GOVERNMENT'S REPLY CONFUSES THE QUESTION BEFORE THE COURT.

As a threshold matter, the government's Reply confuses the question before the Court. That question is not whether the case should be dismissed at all, but only whether it should be dismissed with or without prejudice. Yet, much of the Reply is devoted to establishing that the government had a legitimate reason to abandon the prosecution (specifically, a lack of evidence), which Mr. Hearn does not contest and which request the Court has already granted. *See* Aug. 6, 2026, Order (dismissing the case but holding in abeyance the prejudice determination).

The government cites *Rinaldi v. United States*, 434 U.S. 22 (1977), to assert that the Court may consider only whether the government's effort to terminate the prosecution was made in good faith, and not the government's reasons for charging. Gov't Reply at 2–3. But *Rinaldi* is ultimately irrelevant to the central question now before this court: whether a case *already* dismissed with leave of the court should be dismissed with or without prejudice. *Rinaldi* addressed only whether the government should be permitted to dismiss a case at all, not the central question here: whether, once appropriate permission for dismissal has been granted, the government should be afforded the opportunity to reindict the same case in the future once permission for dismissal has been granted.

Earlier this month, the U.S. District Court for the District of Columbia rejected similar government efforts to cabin a "with prejudice" inquiry. In *United States v. Thompson*, the government moved under Rule 48(a) to dismiss an indictment without prejudice and, as here, argued that *Rinaldi*, as well as *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016), confined the prejudice inquiry to a narrow definition of prosecutorial harassment. No. 25-cr-31 (BAH), 2026 WL 2364303, at *12 (D.D.C. Aug. 14, 2026). The court disagreed. It held that the assessment of the public interest and fairness can serve as an independent ground for dismissal with prejudice, and that the government there "dr[ew] too fine a line between prosecutorial advantage and prosecutorial harassment." *Id.* The court also read *Workman* as Mr. Hearn does, explaining that *Workman* "did no more than decline to enact a 'flat rule'" against later reindictment, and that "what matters is not just *what* the government seeks . . . but *why*." *Id.* at *13 (quoting *Workman*, 255 A.3d at 975).

Accordingly, the question now before the Court is whether the government should retain the ability to prosecute Mr. Hearn again for the same underlying events. That question—whether to dismiss with or without prejudice—is answered, as outlined in *Poindexter* and *Workman*, by the government's purpose and the effect on the accused. Both require dismissal with prejudice here.

II. DISMISSAL WITHOUT PREJUDICE WOULD SERVE NO LEGITIMATE PURPOSE AND FURTHER HARASS MR. HEARN.

The government's filings fail to establish a legitimate purpose supporting its request for dismissal without prejudice. It defends that request as the ordinary condition that accompanies a dismissal and permitted any time the government hopes to prosecute a defendant "later under more favorable circumstances." Gov't Reply at 6–7 (quoting *Workman*, 255 A.3d at 976). In other words, the government appears to countenance that it might attempt to prosecute Mr. Hearn again—but only if conditions it never squarely identifies seem "more favorable" to the government at some future time. But the cases cited by the government do not support its blank-check approach to future prosecution; rather, in each, the government identified a concrete and legitimate path back to a viable prosecution, such as adding defendants and charges; curing a technically defective indictment; or reevaluating evidence following a suppression ruling. *Id.* In every instance, dismissal without prejudice preserved a case the government could properly and realistically reindict.

Here, the government has not identified any evidence that could support a legitimate future prosecution. It has instead told the Court, repeatedly, that the evidence negates guilt: that the damage was "contractor error," that the material Mr. Hearn allegedly touched was valueless, and that "widespread damage" throughout the Pool cannot be attributed to vandalism. *See* Gov't Mot. Dismiss Indictment at 19 (filed July 31, 2026). In fact, the Reply itself forecloses the possibility of proper future prosecution. The government concedes that "[t]he only question relevant to charges was the economic loss." Gov't Reply at 4. It concedes that its own eyewitness accounts establish that "[a]t no time was the defendant seen removing anything from the pool." *Id.* It concedes that the National Park Service estimate it received on July 1, 2026—the day before the indictment—"did not assess what if any economic loss was attendant to the defendant's actions when he pulled on the lining." *Id.* And it concedes that the material Mr. Hearn is alleged to have touched was "overspray, of little or no value." *Id.* at 6. While the government invokes the Principles of Federal Prosecution, Justice Manual 9-27.220, and Rule 3.8 of the D.C. Rules of

Professional Conduct, Gov't Reply at 3, those authorities require that the evidence reasonably support a conviction—that is, proof beyond a reasonable doubt. Yet, the government's own filings in this case establish the opposite: that the evidence affirmatively disproves the charge.

A potential reindictment cannot rest on the prospect that the government will later carry a burden its own evidence defeats. The government assures the Court that it understands that any reindictment would be proper only if "based on newly discovered evidence" supported by "probable cause." *Id.* at 7–8. On these facts, that circumstance is inconceivable. Even putting aside the egregious facts indicating the underlying political motivations in prosecuting this case, if the government cannot articulate a realistic future prosecution, then seeking the power to reindict preserves only the malignant threat of a prosecution and constitutes genuine harassment.

Nor is the broad notion of "deterrence" invoked by the government a legitimate purpose warranting dismissal without prejudice in this matter. To defend its rush to seek the baseless indictment in this case, the government offers the explanation that "a prompt indictment is intended to deter others who might be inclined to engage in the same conduct at the Reflecting Pool." *Id.* at 3 n.1. To be sure, the Principles of Federal Prosecution require prosecutors to consider whether a particular prosecution would further the goal of "[d]eterrence of criminal conduct," Justice Manual 9-27.230 (Comment), but here the government can identify no criminal conduct it could even prove. Where there is no criminal conduct to deter, dismissal without prejudice is wholly unsupportable.

The second prong of the *Poindexter* inquiry—the "effect on the accused"—strongly favors dismissal with prejudice. Mr. Hearn has borne the cost and the stigma of defending a felony charge, long identified by the Supreme Court as an "incalculable" "harm," "impact[ing] . . . reputation or liberty." *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950) (noting harm from "indictment" and "mere institution of proceedings"). Yet, the government's conduct here has wrought much greater damage on Mr. Hearn's rights than even an indictment standing alone. Within hours of returning a grand jury indictment, the United States Attorney herself convened an extraordinarily improper press conference where she publicly condemned Mr. Hearn, accusing him of a felony the government now concedes it could never have proved beyond a reasonable doubt. And even following the dismissal of this case, senior Executive Branch officials, including the President of the United States, called for the re-prosecution of Mr. Hearn and baselessly accused him of criminal conduct. *See* Def. Suppl. Resp. Mot. Dismiss (filed Aug. 13, 2026). A dismissal without prejudice would only prolong the anguish Mr. Hearn has experienced at the hands of the government—and allow for the possibility that the government could bring a case against him again, however meritless such a prosecution would be.

Indeed, although the government claims that Mr. Hearn has "sensationalize[d] the process," Gov't Reply at 8, it is the government that did that—through repeated public statements by senior government officials, which the government has utterly failed to acknowledge in its filings. In a transparent effort to justify its aberrant conduct, the government claims that Mr. Hearn's case is neither "exceptional" nor "extraordinary," asserting off-handedly that it "often dismisses indictments pursuant to Rule 48(a) without prejudice upon learning additional information after the grand jury indicts." Gov't Reply at 8–9. These assertions are untenable. The government does not "often" accuse ordinary citizens of felonies in inaccurate televised press conferences by the United States Attorney raising profound ethical concerns[1] and in social media posts by the President. Nor does the government "often" move for dismissal in such a case by

[1] *See* D.C. Rules of Professional Conduct 3.6, 3.8(f) (discussing public statements and special prosecutorial duties).

conceding that the charge cannot be proved and that one of its components failed to disclose critical exculpatory evidence prior to indictment. There are few if any precedents for this prosecution and its collapse for want of evidence. Far from unremarkable—and unfortunately for Mr. Hearn—this case is unique and unprecedented.

Yet, notwithstanding the pre- and post-dismissal conduct of these most senior government officials, the government asks the Court to presume it will exercise a reserved power to re-charge Mr. Hearn responsibly. To that end, the government opines that "the grand-jury process provides extensive protection to the defendant." Gov't Reply at 8. But the government fails to recognize that the grand-jury process did not protect Mr. Hearn from the government's flawed indictment of him in this case. The government further argues that "the statute of limitations also provides a finite limit to a defendant's potential exposure to criminal charges" while failing to state its view of what that statute of limitations actually is. *Id*. Based on the government's previously selected charge, it is no fewer than six years. *See* D.C. Code § 23-113(a)(4). Accordingly, a dismissal without prejudice would leave Mr. Hearn subject to the continuing threat of re-prosecution for well over five more years.

That is precisely the harm against which Rule 48(a) guards. The purpose of the leave-of-court requirement is "to protect a defendant from the government's harassing him." *Ferrell v. United States*, 990 A.2d 1015, 1020 n.4 (D.C. 2010) (quoting *In re United States*, 345 F.3d 450, 452–53 (7th Cir. 2003). The government has already demonstrated a course of harassment and unacceptable conduct against Mr. Hearn—including the sprint to indict, the failure to provide *Brady* material and other discovery, and public attacks from senior officials—that together deprive the government of any benefit of the doubt.[2]

III. DISMISSAL WITHOUT PREJUDICE WOULD BE CONTRARY TO THE MANIFEST PUBLIC INTEREST.

As previously stated, a dismissal without prejudice is inappropriate in any case in which it "would result in harassment of the defendant *or* would otherwise be contrary to the manifest public interest." *Poindexter*, 719 F. Supp. at 10 (emphasis added). Independent of harassment, the public interest here weighs against reserving the power to reindict. That "public interest inquiry turns, among other things, on a question of fairness to the defense and the prosecution." *Thompson*, 2026 WL 2364303, at *8 (citation modified).

The public-interest ground for dismissal with prejudice is neither abstract nor novel. As mentioned above, less than two weeks ago, a federal court in the District of Columbia applied that principle to dismiss an indictment with prejudice over the government's objection. *Id.* at *13. The option the government seeks here is a version of the same maneuver it used in that matter: The government abandons a case it concedes it cannot prove, while asking to keep the charge available for reuse against Mr. Hearn. The public interest is not served by preserving that leverage. In fact, quite the opposite is true.

Given the government's prior and ongoing conduct and public statements, dismissal without prejudice would unfairly and improperly lend credence to allegations against Mr. Hearn which the government itself has already acknowledged are false. As the government now admits, it brought an indictment unsupported by legal and factual support, and the United States Attorney proceeded to make further public, extra-judicial accusations contradicted by the government's own

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[2] As the defense has previously noted, federal courts in the District of Columbia have recently declined to extend the presumption of regularity to the federal government, and with good reason. *See Fed. Educ. Ass'n v. Trump*, 795 F. Supp. 3d 74, 90–92 (D.D.C. 2025); *United States v. Stewart*, No. 25-MJ-225 (ZMF), 2025 WL 2754480, at *1 (D.D.C. Sept. 29, 2025).

evidence. For example, as the defense previously explained, the United States Attorney's public statement that Mr. Hearn "damaged approximately two square feet of sealant from the bottom of the pool" was incorrect based on the government's own presentation to the grand jury shortly before the press conference where the statement was made. *See* Def. Mot. Disclosure Grand Jury Minutes at 9 n.4 (filed July 27, 2026). Even after moving to dismiss the indictment, senior government officials continue to attack Mr. Hearn and amplify allegations disproven by the government's own motion to dismiss. By seeking to reserve the power to re-charge Mr. Hearn, and keep a discredited felony charge suspended over the head of an innocent person, the government acts directly contrary to the public interest.

IV. THE GOVERNMENT'S REFUSAL TO PRODUCE RELEVANT MATERIALS FURTHER SUPPORTS WITH-PREJUDICE DISMISSAL.

The government's position is internally inconsistent: It simultaneously asks the Court to preserve its ability to reindict while refusing to produce discovery on the ground that the case has been dismissed. *See* Def. Mot. Compel at 3–5 (filed Aug. 18, 2026). The government cannot have it both ways. If the prosecution is truly over, there is no basis to reserve the power to revive it. If the government seeks to keep that power, then the materials related to whether a renewed prosecution is realistic, and on the government's purpose in reserving it, are directly relevant to the Court's Rule 48(a) determination.

Those materials include the 695 megabytes of installation records the government has described but withheld; the backup to the June 30, 2026, Damage Assessment; and the data extracted from Mr. Hearn's seized telephone, which, as set forth in prior defense motions, would demonstrate Mr. Hearn's innocence. Def. Mot. Compel, Ex. A. In its own Motion to Dismiss, the government admits the installation records are documents that "refute the government's arguments that the defendant committed the crime charged." Def. Mot. Compel at 5. The refusal to produce them supports a reasonable inference that continued litigation would have revealed government misconduct, or, at a minimum, conduct that it prefers not to disclose. Should the Court be inclined not to dismiss with prejudice on the present record, Mr. Hearn respectfully requests that the Court defer ruling on the question of prejudice until Defendant's pending Motion to Compel is resolved and any ordered production is complete. In the alternative, if the government persists in withholding these materials, the Court should draw the inference that the withheld materials would not support the dismissal without prejudice the government seeks.

V. CONCLUSION

The government has conceded that it cannot prove the crime it charged, and its requested dismissal without prejudice would not preserve a viable prosecution. Instead, it preserves only the threat of prosecution, however meritless, against an ordinary citizen the government has no chance of convicting at a fair trial. For the foregoing reasons, and those set forth in Mr. Hearn's Response, the Court should dismiss the indictment *with* prejudice. In the alternative, Mr. Hearn respectfully requests that the Court defer ruling on the question of prejudice until his pending Motion to Compel can be resolved and any ordered production is complete.

Respectfully submitted,

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