No. _____

In the

Supreme Court of the United States

WILLIAM T. WALTERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988), this Court held that, "as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." At the same time, the Court recognized an exception to this general rule for "a class of cases in which indictments are dismissed, without a particular assessment of the prejudicial impact of the errors in each case" because the errors are deemed "structural." *Id*. at 256–57. But *Bank of Nova Scotia* did not fit within this exception because it did not present "a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process which resulted in the indictment." *Id*. at 259.

The questions presented are:

1. Whether systematic and pervasive government misconduct that violates Federal Rule of Criminal Procedure 6(e) is structural error giving rise to a presumption of prejudice warranting dismissal of an indictment.

2. If the answer to the first question is no, whether a criminal defendant who makes a *prima facie* showing that the government has violated Rule 6(e) but necessarily lacks access to the information required to establish prejudice is entitled to discovery or an evidentiary hearing that would assist the district court in assessing prejudice and fashioning a remedy.

PARTIES TO THE PROCEEDING

William T. Walters is the petitioner here and was the defendant-appellant below. The United States is the respondent here and was the appellee below.

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PETITION FOR WRIT OF CERTIORARI

William T. Walters petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The district court's opinion denying Petitioner's motion to dismiss the indictment is unreported and is reprinted at App.43-68. The Second Circuit's opinion is reported at 910 F.3d 11 and is reprinted at App.1-42.

JURISDICTION

The Second Circuit had jurisdiction under 28 U.S.C. §1291 and issued its opinion on December 4, 2018. On February 7, 2019, Justice Ginsburg extended the time within which to file a petition for certiorari to April 3, 2019. On March 26, 2019, Justice Ginsburg further extended the time within which to file the petition to May 3, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 6(e)(2)(B) provides, in relevant part, that "the following persons must not disclose a matter occurring before the grand jury: (i) a grand juror; (ii) an interpreter; (iii) a court reporter; (iv) an operator of a recording device; (v) a person who transcribes recorded testimony; (vi) an

attorney for the government; or (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii)." Federal Rule of Criminal Procedure 6(e)(3)(A)(ii) includes "any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law."

INTRODUCTION

This insider trading prosecution raises exceedingly important and pressing questions concerning the ability of courts to fashion a remedy that will deter what the United States Department of Justice's Office of Inspector General ("OIG") describes as the "culture of unauthorized media contacts" pervading "all levels" of the FBI. The government did not dispute below that the FBI embarked upon a deliberate and systematic campaign to violate grand jury secrecy in this case and a number of other high-profile investigations. After the U.S. Attorney for the Southern District of New York and the head of the FBI's New York Office discovered the leaks, they deliberately turned a blind eye in order to take advantage of the leakers' misconduct and use it to resuscitate a dormant investigation. Years later, the government prosecuted Petitioner William Walters and, to avoid the hearing he sought on the suspected leaks, affirmatively misled the district court. The government denigrated his request for a hearing as "a fishing expedition" supposedly based upon "false" and "baseless accusations," even though the U.S. Attorney's Office knew full well that the FBI itself had perpetrated the leaks.

The government only did an about-face and acknowledged the leaks after the district court ordered a hearing. Even then, the government disclosed only six of what it described as thousands of documents that bore directly upon a pattern of wrongdoing the government admitted was "reprehensible," "deplorable," "astonishing" and "outrageous." Yet the government convinced the

district court to call off the hearing by claiming OIG would thoroughly investigate—which it never actually did. Five years after the leaks were uncovered, nothing has come of this supposed investigation and no one has been punished.

Walters received no relief. Despite these egregious abuses of the grand jury proceedings, the district court denied his motion to dismiss the indictment for violations of Federal Rule of Criminal Procedure 6(e), which implements the requirement of grand jury secrecy. Walters was not even permitted discovery or an evidentiary hearing that would have shed light on how the misconduct impacted the investigation and prejudiced him, and that would have allowed the district court to fashion an appropriate remedy. The Second Circuit affirmed. It declined to hold that the pattern of "serious" and "indeed, likely criminal" misconduct was structural error compelling dismissal and refused to remand for a hearing.

That decision renders Rule 6(e) toothless to prevent abusive government leaks, invites even more egregious violations and effectively sanctions this sort of systemic and pervasive pattern of outrageous misconduct by allowing it to proceed unremedied. This Court should intervene and overturn the decision for two reasons. First, the violations of grand jury secrecy were criminal acts, perpetrated and sanctioned by law enforcement itself, from the rank and file to the top brass, across numerous cases, which the government first covered up, then concealed from the judiciary, and then pretended to investigate in order to stymie further inquiry, all supposedly to justify the government's law enforcement goals. This

goes beyond ordinary error; it turns the justice system on its head, compromising the appearance and the reality of impartial justice, as well as the integrity of law enforcement and the public's respect for the law. It epitomizes "structural" error that undermines the entire process, requiring dismissal to rectify the injustice and to prevent a recurrence.

Second, the lower courts' refusal to allow discovery or an evidentiary hearing also merits this Court's review. The government has been whittling away at Rule 6(e) since *Bank of Nova Scotia* was decided, spawning an atmosphere in which federal law enforcement officers are undeterred from leaking secret investigative information to the media. For instance, as the OIG documented in its recent report about the investigations preceding the 2016 election, New York FBI employees "at all levels" "widely ignored" non-disclosure rules and had "frequent contact with reporters" regarding ongoing investigations. Here, the government conceded that grand jury leaks occurred, but concealed the troves of information that would have enabled the defendant to show prejudice and obtain an appropriate remedy. This effectively eviscerated the Rule. The rampant culture of leaking at the FBI is law enforcement's worst kept secret. Defendants are presently powerless to stop it, and they need discovery as a tool to hold the government accountable.

The government initiated this prosecution and won this conviction through blatant misconduct that undermines the rule of law. Today, the Attorney General of the United States insists that grand jury secrecy is so sacred that some information in an

investigative report on a matter of great public importance cannot be shared even with Congress. Yet in this case, his Department of Justice demanded that its own employees' deliberate, unlawful disclosure of such information to the media be insulated from any meaningful review. The Second Circuit acceded, and the message sent by its refusal to award any relief is clear: the ends justify the means, and the government is free to violate the very laws it is supposed to be enforcing. Without a remedy for such misconduct, the public can have no confidence in the integrity of the criminal justice system. No other Circuit has recognized that *Bank of Nova Scotia*'s structural error exception applies to "systemic and pervasive" grand jury leaks. There is no realistic prospect for any remedy for such pervasive misconduct absent this Court's review.

STATEMENT OF THE CASE

A. The FBI Leaked Grand Jury Secrets Related To This Case To Reporters For At Least Two Years

1. The government began investigating Walters for suspected insider trading in approximately July 2011. Two years later, lacking evidence of a crime, the FBI agent in charge of the investigation, David Chaves, labeled it "dormant." C.A.App.220. As the *New York Times* reported in May 2014, in an article sourced to "people briefed on the matter who…were not authorized to discuss the investigation," "a case has yet to materialize." C.A.App.318-20. In an effort to jumpstart the investigation, Chaves began

strategically leaking secret grand jury information to the press.[1] C.A.App.220. As the government now concedes, "it is…an incontrovertible fact that FBI leaks occurred" and that "a significant amount of confidential information" about the investigation was wrongfully disclosed, "including its subjects, particular stock trades and tipping chains under investigation, potential illegal trading profits, and…particular investigative techniques." C.A.App.217-18, 226.

Chaves maintained a social relationship with reporters from the *New York Times* and *Wall Street Journal*. In 2013 and 2014, he arranged "coffee," "lunch" and "dinner[s]" where he leaked information about the investigation to these reporters. C.A.App.220-21. Chaves also regularly communicated investigative secrets to as many as four reporters via telephone, email, and text message. C.A.App.221; App.6.

These leaks generated numerous articles between 2014 and 2015. The articles provided detailed information concerning the investigation attributed to "people briefed on the matter" who "spoke anonymously because they were not authorized

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[1] Because Walters' requests for discovery and an evidentiary hearing were denied, what is known about the prosecutorial misconduct in this case—while undeniably extensive and criminal—comes from a single self-serving letter the government volunteered to the district court. C.A.App.217-37. The description of the misconduct below is therefore based solely upon the government's one-sided account, which is woefully incomplete and raises more questions than it answers.

to discuss the investigation." App.5. The articles revealed, among other things, when the investigation began, who the targets were and other detailed information about them, what stocks they traded, specific trades being investigated, when those trades occurred, that the FBI, SEC and U.S. Attorney's Office for the Southern District of New York ("USAO") were working in tandem, what evidence they were examining, the investigative techniques they were considering (such as "electronic and human surveillance"), and which "theor[ies]" the government was "exploring." C.A.App.78-99, 321-24.

One reason Chaves leaked this information was to illegally obtain investigative leads from the *Wall Street Journal*. Chaves maintained an illicit *quid pro quo* with at least one *Journal* reporter, Susan Pulliam, to exchange grand jury secrets for information that would assist the investigation. He asked her "to let him know if she came across information regarding Walters," and she subsequently called him "from time to time" to "describe what she was learning." C.A.App.221. Chaves had a similar relationship with "*Times* reporters," though the government has not disclosed the identity of those reporters or what they told Chaves. *Id.*

Chaves apparently perpetrated the leaks in a hunt for "a loose-lipped cooperating witness" who might spur the investigation. C.A.App.318. One of the government's tactics was to "scare [targets] into cooperating" and to induce the targets to attempt "maneuvers [that] c[ould] cause them to get caught," including by "destroy[ing] evidence." C.A.App.318, 324. In addition, Chaves hoped articles resulting from

the leaks would "tickle the wire," *i.e.*, spur conversations recorded on wiretap that might be used against targets. C.A.App.220. These violations of grand jury secrecy likely constitute multiple criminal offenses, including obstruction of justice (18 U.S.C. §1503(a)) and unlawful disclosure of a sealed wiretap (18 U.S.C. §§2518(8)(a)-(c), 2517(2) and 2520(g)).

Although the government has disclosed only Chaves' role in these leaks, the evidence overwhelmingly suggests that he did not act alone. For instance, Chaves and at least one other FBI agent identified other government leakers, but the government refused to identify them; the information in the articles was attributed to "*people* briefed on the probe"; and one *New York Times* reporter told the USAO that he had multiple "sources" within the government. C.A.App.79, 83, 220, 223, 227, 232, 322-24 (emphasis added).

2. Government emails demonstrate that, no later than May 2014, the officials leading the FBI's New York Office and the USAO became aware that the FBI was leaking grand jury secrets to the press. C.A.App.223. Acknowledging how "reprehensible," "deplorable" and "astonishing" the leaks were, the rank-and-file who uncovered them immediately elevated the matter to the highest ranks of both offices. C.A.App.223, 235, 237.

The brass clearly understood the impropriety of the leaks and could have taken immediate action to stop them. But that is not what happened. On May 27, 2014, with the USAO's knowledge, various FBI agents had yet another meeting with the *Wall Street Journal* during which investigative details were

discussed. C.A.App.222. Four days later, then-U.S. Attorney for the Southern District of New York ("SDNY") Preet Bharara sent a bizarre, self-serving email in which he characterized the "leaks" as "outrageous," despite having permitted the May 27 meeting at which additional leaks occurred to go forward. C.A.App.222, 236.

Then the USAO itself contacted the press. On June 12, 2014, the Deputy U.S. Attorney wrote an email to Bharara and other USAO higher-ups recounting his "good but astonishing conversation" with *New York Times* reporter Ben Protess. C.A.App.237. Among other things, they talked about a "story" Protess (a *Times* reporter who likely had a *quid pro quo* arrangement with Chaves) had written and how the reporter had "corroborated" it using an "FBI" source. *Id.*

The Deputy U.S. Attorney ended the email by stating, "I don't think this should be discussed generally right now for a number of reasons…." *Id.* No one misunderstood what this meant; the unspoken agreement between the USAO and FBI was that nothing should forestall the investigation, and that both agencies would look the other way as FBI agents continued to break the very laws they were sworn to uphold. And that is precisely what happened. The government did nothing to punish the leakers or bring them to justice, and the FBI continued to "speak to the *Journal*" and the "*Times*" for at least another year. C.A.App.225. The last article at issue appeared in August 2015. App.6. Meanwhile, in late-2014 Chaves received a promotion, while another agent who

complained about the leaks was transferred out of the New York office. C.A.App.229, 235, 342.

3. The government used the fruits of its illegal leaks to procure an indictment charging Walters with conspiracy, wire fraud, and securities fraud, principally related to certain trades in Dean Foods stock that the government alleged were based on material nonpublic information tipped by Dean Foods director Tom Davis. Specifically, the last article based on government leaks, in August 2015, publicly identified Davis as a target of the investigation. C.A.App.278-79. Before that, Davis had steadfastly maintained his innocence for 21 months, insisting in interviews with the government and sworn SEC testimony that he never tipped Walters. After the publication of the article, however, Davis and his family were "hounded by reporters," he lost his lucrative job on the Dean Foods board, and ultimately changed his story and agreed to cooperate. C.A.App.439. The government's presentation to the grand jury was based largely upon Davis' statements, and also relied on conduct that Davis undertook because of the publication in May 2014 of a *Wall Street Journal* article stemming from the leaks. C.A.App.231-35, 1258-86, 1305-06, 1401. Davis was also the star witness at Walters' trial, and his testimony was critical to the government's ability to obtain a conviction.

B. The Government Concealed Its Leaks From The District Court

In September 2016, before his trial, Walters raised suspicions about the grand jury leaks and moved for a hearing regarding potential Rule 6(e)

violations. C.A.App.125. Walters alleged that "the government engaged in a pattern of improper conduct, including...leaking grand jury information to the press, as part of a concerted effort to breathe life into a flagging investigation." C.A.App.108.

The government opposed the hearing. Despite knowing full well that the FBI was responsible for the leaks, the government repeatedly claimed that Walters "cannot show that the source of the information contained in the articles was an agent or attorney for the Government." C.A.App.206-07; *accord* C.A.App.186 (Walters "cannot support a finding that the source of the information was an attorney or agent for the Government"). It further misled the district court by denigrating Walters' allegations as "baseless," "undermined by the facts," and "a fishing expedition." C.A.App.186; *accord* C.A.App.198-99, 201, 209. Later, the district court charitably described the government's submission as an "artful opposition" that "never disclosed" the USAO's "high level" knowledge about the "FBI leaks." C.A.App.391.

On November 17, 2016, over the government's objection, the district court granted an evidentiary hearing. C.A.App.214-15. On the eve of the hearing, after concealing the leaks for over two years, the government did an about-face and filed a letter admitting that there had been "FBI leaks" that "contained a significant amount of confidential information about the [i]nvestigation." C.A.App.217-18, 226. But even this *mea culpa* was deficient in numerous respects. First, the government selectively disclosed only a handful of the relevant facts. The

letter attached only six of the "thousands of emails and text messages" related to the leaks. C.A.App.218. And although the government interviewed numerous witnesses, it neither produced any witness statements nor explained what occurred at the interviews. *Id.* Moreover, the government limited its inquiry to a three-month period in 2014 even though the leaks were carried out over the course of two years from 2013 to 2015. *Id.*

Second, the government pretended Chaves was the sole perpetrator and refused to investigate the substantial evidence implicating others. *See, e.g.*, C.A.App.220, 223, 227, 322-24. Even as to Chaves, the government falsely assured the district court that he would be "investigat[ed]" by the Justice Department's Public Integrity Section ("PIN") and OIG. App.12, 44. Two and a half years later, nothing has happened in that investigation. No one has been arrested or indicted, and there is nothing to suggest that anyone will ever be held accountable for what the U.S. Attorney himself described as "outrageous" acts of government misconduct.[2] C.A.App.236.

Finally, even though the government collected Chaves' emails and texts and spoke with him at length

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[2] PIN-OIG have sent eight one-page "status updates" to the district court, the substance of which is entirely redacted. C.A.App.392, 882, 1191; Dkt.258, 263, 267, 271, 274. Indeed, in April 2018, "over a year" after the district court "imposed a reporting requirement on the government in its investigation of leaks of grand jury material to the press," the district court issued an order chastising the government for "submitting…report[s]…contain[ing] virtually no substance." Dkt.264. Despite this rebuke, there has apparently been no progress in the investigation.

on multiple occasions, it disclosed nothing about the specific information that he and the reporters exchanged with one another. C.A.App.218-19, 226. This information—along with everything else that was omitted from the government's presentation—would have shed significant light on how the scheme impacted the grand jury's investigation and the trial. Without it, Walters had no way of knowing whether, how, and to what extent he was prejudiced by the grand jury leaks.

C. The Leaks Were Part Of A Systematic Government Effort To Violate Grand Jury Secrecy In Numerous SDNY Cases

The government misconduct here was part of an extensive pattern of leaks spanning numerous SDNY investigations, including at least five other cases overseen by Chaves in which grand jury secrets were disclosed to the exact same *Journal* and *Times* reporters. C.A.App.281-85, 326. The resulting articles were published over the course of an eight-year period from 2009 to 2016, and cover some of Bharara's most touted insider trading prosecutions. *Id*. These include *United States v. Rajaratnam*, in which copious information was leaked to the *Wall Street Journal* during 2010, and the investigation of Level Global, in which false accusations wiped out an investment firm, led numerous innocent individuals to lose their jobs, and destroyed the reputation of a portfolio manager who fought false insider trading charges for years until the Second Circuit ultimately reversed his conviction for insufficient evidence in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014),

abrogated on other grounds, *Salman v. United States,* 137 S. Ct. 420 (2016). C.A.App.281-82.

Overall, the articles revealed vast quantities of information concerning grand jury investigations, including: "the names of unindicted co-conspirators," which individuals would be "named or charged," nonpublic "subpoena[s]," whether a "probe" was "at an advanced stage," details concerning the "prosecutors[']…alleg[ations]," how the government was "preparing to present evidence to [the] grand jury," the nature of "pending grand jury presentation[s]," and the expected timing of the "charges." C.A.App.281-85, 326. In the proceedings below, there was no dispute that grand jury leaks occurred in at least five other insider trading investigations led by Chaves. *See id*., C.A.App.329-71; Appellant Br.13-14, 42-44; Appellee Br.20-25, 36-47.

Additionally, in June 2018, OIG published a blistering 500-page critique of the FBI's handling of investigations affecting the 2016 presidential election which focused on, among other things, the "culture of unauthorized media contacts" at the Bureau's New York Office. Office of the Inspector Gen., U.S. Dep't of Justice, No. 18-04, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* xii (2018) ("OIG Report"). The report concluded that non-disclosure protocols were "widely ignored" by "numerous [New York] FBI employees…at all levels of the organization," who were "in frequent contact with reporters." OIG Report at 430. Not only had there been a "significant number of communications" with "journalists," but OIG also "identified social

interactions between FBI employees and journalists that were, at a minimum, inconsistent with FBI policy and Department ethics rules." *Id*. In some instances, the FBI employees accepted improper benefits from the journalists, potentially implicating a variety of federal criminal offenses and civil violations.[3] For example, "FBI employees received tickets to sporting events from journalists, went on golfing outings with media representatives, were treated to drinks and meals after work by reporters, and were the guests of journalists at nonpublic social events." *Id*. One former prosecutor summed up the problem succinctly: the "New York [FBI office] leaks like a sieve." Bethany McLean, *The True Story of the Comey Letter Debacle*, Vanity Fair (Mar. 2017), https://www.vanityfair.com/news/2017/02/james-comey-fbi-director-letter (last visited Apr.29, 2019).

These conclusions ring true in light of the undisputed pattern of misconduct in this case. Yet when given the chance to remediate the misconduct here, OIG did absolutely nothing. Five years after the misconduct was first uncovered, we are no closer to learning the true scope of the wrongdoing, including who was involved, what they did, and what the consequences were. There have been no convictions, arrests, reprimands, or reprisals of any kind. Nor has there been any discernible progress in the single so-

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[3] *See*, *e.g.*, 18 U.S.C. §201(b)(2)(C) (prohibiting federal employees from accepting something of value in return for "being induced to do or omit to do any act in violation of…official duty"); 5 C.F.R. §2635.202(b)(2) (prohibiting executive-branch employees from accepting gifts "given because of the employee's official position").

called "investigation" that OIG allegedly commenced in 2016. Agent Chaves, whose leaks were discovered in May 2014, and who remains the only agent to be publicly identified among the "numerous FBI employees" who were "in frequent contact with reporters," OIG Report at 430, was never reprimanded—instead, he was *promoted* soon after the leaks came to light. C.A.App. 342. What is more, he eventually left the FBI, apparently to found a lucrative private consulting business called "Tone at the Top Advisors," where he touts—without a hint of irony—his ability to help firms "protect your brand and reputation by fostering a culture of compliance." National Society of Compliance Professionals, *David Chaves*, https://national.nscpconferences.org/speakers/david-chaves/ (last visited Apr. 29, 2019).

D. Proceedings Below

Following the government's selective disclosures of the FBI leaks, Walters moved to dismiss the indictment based on the government's misconduct and, in the alternative, requested discovery and an evidentiary hearing to determine the full extent of the misconduct and how the grand jury leaks may have prejudiced him. The district court denied the motion without even holding the hearing it had previously ordered. It held that Walters was not entitled to the hearing unless he could first establish prejudice. App.62, 68.

Following that ruling, the case proceeded to trial. The evidence showed that Walters was an experienced and "very, very sophisticated" investor with an "intellectual" approach who conducted extensive and detailed research to understand the companies he

invested in, and their industries. C.A.App.469, 481-84. The only direct evidence supporting the government's allegations that the trades at issue were based on inside information came from Davis, who, as noted, consistently denied having tipped Walters for 21 months before flipping after the publication of the leaked information identifying him as a target of the government's investigation. C.A.App.278-79, 430-32, 735-38.

Walters was convicted on all counts and sentenced to five years' imprisonment, a $10 million fine, more than $25 million in forfeiture, and more than $8 million in restitution. App.15.

The Second Circuit affirmed the conviction, including the district court's refusal to hold a hearing on the grand jury leaks.[4] It recognized that the government's "misconduct" was "serious," "highly improper," and "likely criminal." App.19-20. Like the district court, however, it held that "dismissal of the indictment is not appropriate" because "Walters has not demonstrated that he was prejudiced." App.20.

The Court of Appeals rejected Walters' argument that this matter falls within the "class of cases in which indictments may be dismissed without a particular assessment of the prejudicial impact of the errors." App.23-24. As noted, the government did not dispute that leaks had occurred in various other investigations overseen by Chaves. C.A.App.281-85, 329-71; Appellant Br.13-14, 42-44; Appellee Br.20-25,

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[4] The Second Circuit vacated the restitution order and remanded for further proceedings in light of this Court's decision in *Lagos v. United States*, 138 S.Ct. 1684 (2018).

36-47. But the Second Circuit did not agree that "the Supreme Court created a stand-alone exception to the prejudice requirement for cases involving systematic and pervasive prosecutorial misconduct." App.25. The court also found that the district court's "decision to forgo a hearing prevents us from understanding if there were other cases like this one" in which leaks occurred, even though it was undisputed that there were. App.26-27.

Finally, the Court of Appeals held that the district court did not abuse its discretion in refusing to hold a hearing. App.32.

Judge Jacobs filed a concurring opinion. He concluded that the FBI was "involved in the illegal leaking of confidential information" which "in some respects" was "more egregious than anything Walters did," because government agents take "an oath to uphold the law." App.42. He further acknowledged that without a hearing, "it is unknown how far or where the abuse reached," and that abuses here undermined "the confidence of the public, jurors and judges." *Id.* Yet, for unstated reasons, Judge Jacobs concurred with the majority's refusal even to remand the case to the district court for discovery and a hearing.

REASONS FOR GRANTING THE PETITION

The rule of grand jury secrecy dates back to the 17th century and provides a critical protection for the integrity of criminal investigations. *See Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 218 n.9 (1979). The "purpose for grand jury secrecy originally was protection of the criminally accused against an

overreaching Crown," and "with time it came to be viewed as necessary for the proper functioning of the grand jury." *Id*. It is hard to conceive of an error more fundamental than a widespread campaign by government officials conducting a grand jury investigation to leak its secrets to the media.

Under this Court's precedents, such a systematic and pervasive violation of grand jury secrecy is a structural error requiring dismissal of the indictment, regardless of prejudice. However, if a defendant who makes a *prima facie* showing that the government has violated Rule 6(e) must show prejudice to obtain some remedy, there must be discovery and/or an evidentiary hearing, so that the district court has sufficient information to assess whether there has been prejudice, and if so, what the appropriate remedy is. Otherwise, as a practical matter, there will be *no* remedy for such violations, and the government will have every incentive to violate this Rule as egregiously as it did here.

Given the unscrupulous misconduct the government admitted committing in this case, the undisputed similar violations in numerous other insider trading investigations overseen by Chaves, the OIG's broader findings about the pattern of similar leaks by the FBI in New York, and the importance of grand jury secrecy to other current investigations dominating the news, this is an issue of national importance. The Second Circuit's decision effectively sanctions what it recognized to be "criminal" leaks of grand jury secrets by at least one government official who, as Judge Jacobs observed, "took an oath to uphold the law" and was "acting in a supervisory

capacity to discharge an important public function." App.42. In the 30 years since *Bank of Nova Scotia*, no other Court of Appeals has held that a systematic and pervasive pattern of such misconduct is a structural error requiring a presumption of prejudice in a criminal case. This Court's intervention is therefore critical to ensuring that the United States Department of Justice complies with the laws it is charged with enforcing.

I. This Case Presents Exceptionally Important Questions About The Integrity Of Federal Grand Jury Investigations

A. Whether Systematic And Pervasive Grand Jury Leaks Can Constitute Structural Error Requiring Dismissal Without A Showing Of Prejudice

In *Bank of Nova Scotia*, this Court addressed whether a district court could dismiss an indictment for "violations of Federal Rule of Criminal Procedure 6" where there was no prejudice to the defendant. 487 U.S. at 252-53. After conducting "10 days of hearings," the district court had dismissed the indictment in the exercise of its supervisory authority, but the Tenth Circuit reversed. *Id* at 253-54.

This Court affirmed, holding that "a federal court may not invoke its supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)." *Id*. at 254. The Court held that, "as a general matter, a district court may not dismiss an indictment" for prosecutorial misconduct absent "prejudice[] [to] the defendants." *Id*. But the Court also recognized that there are

"exceptions" to this general rule, in "a class of cases in which indictments are dismissed, without a particular assessment of the prejudicial impact of the errors in each case, because the errors are deemed fundamental." *Id.* at 256.

In such cases, "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Id.* at 257. Structural errors "require reversal without regard" to whether "the evidence in the particular case" causes prejudice. *Rose v. Clark*, 478 U.S. 570, 577 (1986); *accord United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

Although structural errors are "the exception and not the rule," *Rose*, 478 U.S. at 578, this Court has recognized a number of circumstances in which they occur. Examples include: courts usurping the jury's role in a criminal case, because even if the evidence supports the conviction, fundamental fairness does not allow "the wrong entity [to] judge the defendant['s] guilt[]," *id*; "racial" and gender "discrimination" in grand jury selection, *Vasquez v. Hillery*, 474 U.S. 254, 260-64 (1986); *Ballard v. United States*, 329 U.S. 187, 195-96 (1946), and petit jury selection, *Batson v. Kentucky*, 476 U.S. 79, 100 (1986); *J.E.B. v. Alabama ex. rel, T.B.*, 511 U.S. 127, 145-46 (1994); failure of a judge to recuse from a multimember court reviewing a defendant's conviction or sentence, *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016); denial of defendant's right to self-representation, *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984); denial of the right to select counsel of one's choice, *Gonzalez-Lopez*, 548 U.S. at 152; an erroneous reasonable doubt

instruction that lowers the government's burden of proof, *Sullivan v. Louisiana*, 508 U.S. 275, 278-82 (1993); violation of the *Anders* standards governing the withdrawal of appointed appellate counsel, *Penson v. Ohio*, 488 U.S. 75, 88-89 (1988); and denial of a defendant's right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 48-50 (1984).

In *Bank of Nova Scotia*, this Court held that dismissal of an indictment for non-structural error is not an appropriate remedy absent a showing of prejudice to the defendant, but expressly distinguished cases involving structural error. 487 U.S. at 256-57. The Court applied the general rule barring dismissal absent a showing of prejudice to the case before it, which involved mere technical violations of Rules 6(d) and 6(e),[5] but not leaks to the press, much less the systemic and concerted campaign at issue here. *Id.* at 257-58.

However, the Court emphasized that it was not "faced with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process." *Id.* at 259. This language suggests that "systematic and pervasive" government misconduct is structural error requiring dismissal of the indictment. That would be fully consistent with this Court's other

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[5] The violations included "disclos[ure] [of] grand jury materials to Internal Revenue Service employees," improperly instructing grand jury witnesses that they were not to reveal "that they had testified before the grand jury," and "allowing joint appearances by IRS agents before the grand jury." *Id.* at 257-58.

decisions defining structural error, which have adopted "at least three broad rationales" for identifying errors that are so fundamental that prejudice is presumed. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). Specifically, "an error has been deemed structural" if (1) "the error always results in fundamental unfairness," (2) "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," and (3) "the effects of the error are simply too hard to measure." *Id.* "These categories are not rigid," and "[i]n a particular case, more than one of the[] rationales may be part of the explanation for why an error is deemed to be structural." *Id.*

All three *Weaver* rationales squarely apply to pervasive grand jury leaks. *First*, such deliberate leaks are fundamentally unfair. Grand jury proceedings "have been kept from the public eye" "[s]ince the 17th century" and, since then, their secrecy has been "an integral part of our criminal justice system." *Douglas Oil Co.*, 441 U.S. at 218 n.9. "Both Congress and this Court have consistently stood ready to defend [grand jury secrecy] against unwarranted intrusion." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983). One reason is that these disclosures imperil the defendant's right to a fair trial through prejudicial publicity. *See, e.g.*, *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976). This Court therefore has "'consistently…recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'" *Rehberg, v. Paulk*, 566 U.S. 356, 374 (2012) (quoting *Douglas Oil Co.*, 441 U.S. at 218).

Because grand jury proceedings "would be totally frustrated if conducted openly," *Press-Enter. Co. v. Super. Ct. of Cal. for Riverside Cty.*, 478 U.S. 1, 9 (1986), it is hard to conceive of misconduct more "fundamental," or aimed more precisely at the "structural protections" afforded by the grand jury, than the systematic and pervasive violation of grand jury secrecy. That is particularly true where the misconduct is as egregious as it was here. The FBI's widespread "culture" of leaking, the subsequent cover up, the government's misrepresentations to the district court, and the failure to conduct any meaningful investigation compromise both "the appearance and reality of impartial justice" and "the public legitimacy" of this prosecution. *Williams*, 136 S. Ct. at 1909. In other words, the "structure" of the proceeding is itself compromised, requiring dismissal.

Second, the purpose of grand jury secrecy is not to protect defendants from erroneous conviction. Rather, it is primarily intended to help safeguard the integrity of the grand jury's investigative and charging functions by ensuring that grand jury witnesses testify "fully," "frankly," and "voluntarily." *Douglas Oil Co.*, 441 U.S. at 219; *see also Rehberg*, 566 U.S. at 374; *United States v. John Doe, Inc. I*, 481 U.S. 102, 114 (1987); *accord Sells*, 463 U.S. at 424 (grand jury secrecy is "important for the protection of the innocent"). These are "essential" and "highly desirable" aspects of the "criminal process" that also render the error "structural." *Puckett v. United States*, 556 U.S. 129, 141 (2009).

Third, the impact of Rule 6(e) violations is extremely difficult, if not impossible, to measure.

That is particularly true in cases like this, where the government admits to widespread disclosure of grand jury secrets but refuses to say what was disclosed, to whom and when. Here, the government disclosed only six of the "thousands of emails and text messages" related to the leaks. C.A.App.218-19. A defendant like Walters cannot be expected to demonstrate the impact of illicit grand jury disclosures when the government conceals the very information showing how it tainted the grand jury process. *See, e.g.*, *Gonzalez-Lopez*, 548 U.S. at 150 (prejudice presumed where consequences are "unquantifiable and indeterminate").

Moreover, if systematic and pervasive Rule 6(e) violations are not treated as structural errors, Rule 6(e) will become a dead letter. *Puckett*, 556 U.S. at 141 (taking account of "policy interest" in determining whether error was "structural"). "[A]lthough there are, *theoretically*, mechanisms to identify and stop 'leaks,' in practice, they are seldom, if ever, effective." Roma W. Theus, II, *'Leaks' in Federal Grand Jury Proceedings*, 10 St. Thomas L. Rev. 551, 551 (1998). That is in no small part due to the "culture of unauthorized media contacts" at the FBI, which has existed "at all levels of the organization," and which OIG refuses to meaningfully investigate. OIG Report at 430.

This case confirms why this Court must intervene to stop the problem. It is hard to imagine a more pervasive pattern of grand jury leaks than those perpetrated by the FBI's New York Office over the past decade, including in this case. The FBI's longstanding pattern of illegal grand jury leaks across

numerous investigations, the USAO's years-long complicity in this misconduct, and its obfuscation before the district court are not even in dispute. As the government conceded below, "it is…an incontrovertible fact that FBI leaks occurred," "that such leaks resulted in confidential law enforcement information about the [i]nvestigation being given to reporters," and that the resulting articles "contained a significant amount of confidential information about the [i]nvestigation." C.A.App.217, 226. These repeated acts of government misconduct are, in the government's own words, "reprehensible," "deplorable," "astonishing" and "outrageous." C.A.App.235-37. And there is no dispute that in numerous other cases, all overseen by Chaves, the government leaked investigative secrets to the exact same *Wall Street Journal* and *New York Times* reporters, including "subpoena[s]," how the government was "preparing to present evidence to [the] grand jury," and the nature of "pending grand jury presentation[s]." C.A.App.281-85.

Indeed, there are multiple other federal cases in New York in which defendants have raised credible allegations of improper grand jury leaks to the press. *See, e.g.*, *United States v. Nordlicht*, No. 16-CR-640, 2018 WL 6106707 (E.D.N.Y. Nov. 11, 2018); *United States v. Skelos*, No. 15-CR-317, 2015 WL 6159326 (S.D.N.Y. Oct. 20, 2015).[6]

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[6] New York federal courts have also criticized the former U.S. Attorney who brought this case and the other cases involving leaks that Chaves supervised for inappropriate and arguably unethical public remarks that fed the media

The government simply refuses to police the misconduct being perpetrated from within its own ranks. Chaves acted with the tacit consent of the FBI and the USAO, and the FBI even promoted him after discovering the leaks. Moreover, when Walters presented his suspicions to the district court, the USAO—knowing full well what had occurred—misled the district court about the source of the leaks. "[T]he government's unwillingness to own up to [the misconduct] was more serious still," which "make[s] it clear" that "steps must be taken to avoid a recurrence." *United States v. Kojayan*, 8 F.3d 1315, 1325 (9th Cir. 1993) (reversing convictions with instructions to consider dismissal of indictment in light of *Brady* violations). The government now professes to agree that "[t]here should be serious consequences" for the "improper and inexcusable leaking of information to the media." C.A.App.334-36. But it discovered the leaks in 2014 and has done nothing to punish the leakers.

Over the past 30 years, several lower courts—including the Second Circuit before this case—have suggested in dicta that that "systematic and pervasive prosecutorial misconduct" may constitute structural error. *United States v. Restrepo*, 547 F. App'x 34, 44 (2d Cir. 2013); *accord United States v. Anderson*, 61 F.3d 1290, 1296 n.4 (7th Cir. 1995); *United States v.*

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frenzy surrounding other cases and may have tainted the jury pool. One court observed that he "strayed so close to the edge of" the ethical rules that he engaged in "brinksmanship relative to the Defendant's fair trial rights." *United States v. Silver*, 103 F. Supp. 3d 370, 373, 378-81 (S.D.N.Y. 2015).

Larrazolo, 869 F.2d 1354, 1358 (9th Cir. 1989); *United States v. Vasquez*, No. 3:11-CR-00026-BR, 2012 WL 512208, at *2 (D. Or. Feb. 15, 2012); *United States v. Felton*, 755 F. Supp. 72, 74-76 (S.D.N.Y. 1991). But no lower court has ever adopted such a rule. Unless this Court does so, there will be no meaningful remedy for egregious government grand jury leaks, and no meaningful deterrent to FBI agents and prosecutors intent on improperly using the media as an investigative tool and a means of tainting the grand jury and petit jury pools. Structural error was designed as a "prophylactic tool to discourage further misconduct" like the systematic violations that occurred here, *United States v. Giorgi,* 840 F.2d 1022, 1030 (1st Cir. 1988), and this case plainly warrants such prophylactic relief. Otherwise, the government will continue violating Rule 6(e) to taint the jury pool, "tickle" the wire, and impose its will on potential cooperators—just like it did here—all pursuant to the same *de facto* FBI policy that encourages agents to commit these criminal acts in violation of the very laws they are bound to uphold.

B. Whether A *Prima Facie* Showing Of Government Rule 6(e) Violations Entitles Defendants To Discovery Or An Evidentiary Hearing

If a defendant must show prejudice from illegal grand jury leaks to obtain a remedy, he or she cannot do so without access to information about the extent of the leaks and their impact on the investigation and prosecution. The publicly-available information, such as press reports disclosing leaked information, will almost never be sufficient to establish prejudice. For

this reason, some courts have held that "[o]nce a *prima facie* case" of a Rule 6(e) violation "is shown, the district court must conduct a 'show cause' hearing." *Barry v. United States,* 865 F.2d 1317, 1321 (D.C. Cir. 1989); *accord, e.g.*, *Nordlicht*, 2018 WL 6106707, at *3; *Skelos*, 2015 WL 6159326, at *9; *United States v. Flemmi*, 233 F. Supp. 2d 75, 81 (D. Mass. 2000). Following the hearing, the district court "must provide whatever relief is necessary to remedy the problem." *Barry*, 865 F.2d at 1326.

The government should not be able to prevent the defendant from demonstrating prejudice by acknowledging the leaks and offering only limited and self-serving disclosures to evade a hearing and bury the details and extent of its misconduct. Yet that is precisely what the Second Circuit permitted to happen here. The government concealed the grand jury leaks for over two years and attempted to mislead the district court about them. First, it opposed a hearing by denigrating the allegations as baseless and a "fishing expedition" and relied on a sworn declaration by the lead AUSA that neither he nor the lead FBI agent had "disclose[d] any information…related to the investigation…to any member of the press," even though it turned out that a "significant amount" of information related to the investigation had been leaked. Dkt.44 at 6-7; C.A.App.156, 226. Then, when these evasive maneuvers in its "artful opposition" failed to deceive the district court, which ordered a hearing, the government doubled-down on its efforts to conceal the details and extent of its illegal leaks campaign. On the eve of the scheduled hearing, the government suddenly conceded that it could not rebut Walters' *prima facie* case of a Rule 6(e) violation and

asked the court to "assume such a violation has occurred on these facts and proceed to the question of remedy" *without any discovery or hearing*. C.A.App.218, 227-28. In other words, despite conceding that the leaks occurred, the government (1) withheld all discovery that would enable Walters to show prejudice, and simultaneously (2) argued that "because of the lack of prejudice, no further factual hearing is necessary." C.A.App.370-71.

The end result was that the government deprived Walters of the tools necessary to establish that he was harmed by the government's illegal conduct. Once the district court refused to permit further discovery and called off the hearing it had previously scheduled, it was impossible for Walters to show prejudice, and thus obtain a remedy, despite his clear showing of "serious" and "likely criminal" grand jury leaks. App.20. The Court of Appeals not only sanctioned these unfair maneuvers to evade discovery and a hearing on the extraordinary facts of this case, but, incredibly, held that "a further hearing would not assist in the resolution of the issues raised by Walter[s]." App.32. Thus, in the Second Circuit, as a practical matter, no defendant who establishes a *prima facie* case of illegal grand jury leaks will ever be able to obtain a remedy: the government can simply bury the issue by conceding a violation and refusing to disclose the details about the misconduct that might enable the defendant to show prejudice.

Nor, under the Second Circuit's standard, can there be any assurance that there will be any remedy at all, or any deterrence of such government misconduct. In this case, for instance, the government

also used the false promise that PIN-OIG would investigate and punish the leakers to convince the district court to cancel the hearing. Yet nearly five years after the USAO was apprised of the leaks, no one has been punished. To the contrary, OIG has confirmed that the "culture of unauthorized media contacts" at the FBI's New York Office continues unabated. OIG Report at 430.

Only the government knows what is happening behind the scenes of its investigations. A defendant cannot be expected to divine from a handful of public news articles whether and to what extent the government's own misconduct has prejudiced him or her. To require a defendant to show prejudice, without first affording him discovery and an evidentiary hearing, puts the cart before the horse and places an unfair and impossible burden on the defense. *See, e.g.*, *Bank of Nova Scotia*, 487 U.S. at 252-53 (factual record developed over ten days of evidentiary hearings); *United States v. Busch*, 795 F. Supp. 866, 868 (N.D. Ill. 1992) (ordering evidentiary hearing on *Bank of Nova Scotia* prejudice).

The misconduct described here is based entirely on *the government's* version of what happened, contained in a single letter supported by a handpicked set of redacted emails. C.A.App.217-36. The Court of Appeals accepted this rote, App.33, but even the government conceded that "much about the scope and content" of the leaks "remains unclear." C.A.App.219. The government's minimal disclosures were patently deficient. It purportedly reviewed "thousands of emails[,] text messages, and records of phone calls" related to the leaks, but volunteered only six of them.

C.A.App.218, 229-37. The government reviewed documents from only a three-month period, even though the leaks in this case spanned over two years. C.A.App.218-19. The government admits it only interviewed FBI and USAO employees it says were "likely to have had contact with the press" during that same three-month period. C.A.App.218. The government produced no interview recordings or witness statements. It is unclear how the government determined who was "likely to have had contact with the press"—and disturbing that *any* FBI or USAO personnel were in contact with the media about a confidential investigation at all. And it remains a mystery exactly who was interviewed and whether other potential witnesses outside the three-month window exist.

Furthermore, it remains unclear exactly what was leaked and what information the reporters supplied to Chaves to aid the investigation. The identity of leakers other than Chaves remains unknown. Though it is clear that leaks occurred in other cases, little is known about who perpetrated them and how pervasive the misconduct truly is.

In cases like these, a hearing could also show that a remedy short of dismissal is warranted, such as suppression of tainted evidence, preclusion of government arguments relying on such evidence, instructions to the jury, and/or permitting the defense to elicit evidence of the government's misconduct. But it is impossible to say what remedy might be appropriate if the government withholds critical information about the leaks and their impact on the case. Now, with the Second Circuit's imprimatur, the

government is free to withhold whatever information is required to prevent the defendant from establishing prejudice or obtaining a remedy. This Court should intervene to ensure that these tactics do not render Rule 6(e) a nullity.

C. This Is An Excellent Vehicle For Resolving The Questions Presented

This case is an ideal vehicle to address whether (1) systematic and pervasive government violations of Rule 6(e) create a presumption of prejudice warranting dismissal of an indictment and, (2) if not, whether a *prima facie* showing of such violations entitles a defendant to discovery and a hearing to determine whether there was prejudice and enable the district court to fashion an appropriate remedy.

The government took the extraordinary step of conceding that "Rule 6(e) violation[s]…ha[d] occurred" and did not dispute that grand jury secrecy was violated across multiple high-profile cases. *See* C.A.App.228, 281-85, 326, 329-71. Thus, unlike in run-of-the-mill cases with bare allegations of Rule 6(e) violations, a pattern of such misconduct in this case as well as numerous others is undisputed. Accordingly, if the Court were to grant certiorari and reverse the Second Circuit's decision refusing to adopt a "stand-alone exception to the prejudice requirement for cases involving systematic and pervasive prosecutorial misconduct," App.25, Walters would plainly be entitled to either reversal and dismissal of the indictment, or, at a minimum, a remand to the district court for a hearing to ascertain the full extent of the misconduct. *See Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1268 (2015) ("remand is required

when the District Court failed to make a finding because of an erroneous view of the law").

This is also an excellent vehicle to address whether, if the defendant must show prejudice, a *prima facie* showing of Rule 6(e) violations triggers the right to discovery and an evidentiary hearing. Again, the government conceded that Walters made such a *prima facie* showing, but used that concession to deprive Walters of the tools he needed to ascertain the extent of the leaks and how he was prejudiced. Despite the *prima facie* showing, the district court denied discovery and a hearing. App.66-68. Indeed, Walters received no relief at all, despite the far-reaching and egregious nature of the misconduct. If the government's misconduct escapes consequence here, the government will never have an incentive to comply with Rule 6(e), and this case illustrates why there will be no remedy for the violations that will undoubtedly ensue. This Court should intervene to ensure that there are meaningful penalties for systematic and pervasive violations of such "an integral part of our criminal justice system." *Douglas Oil*, 441 U.S. at 218 n.9.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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