No. 18-1393

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

REPLY BRIEF FOR PETITIONER

ALEXANDRA A.E. SHAPIRO
Counsel of Record
ERIC S. OLNEY
JACOB S. WOLF
SHAPIRO ARATO BACH LLP
500 FIFTH AVENUE
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Petitioner

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This case is an excellent vehicle for this Court to address whether courts can stem the tide of illegal grand jury leaks flowing out of the FBI. The Department of Justice's own Office of Inspector General documented the "culture of unauthorized media contacts" pervading "all levels" of the FBI. These leaks often lead to extensive media coverage about secret grand jury investigations—risking tainted grand jury proceedings and petit jury pools, and jeopardizing defendants' fair trial rights. Yet defendants who suspect improper grand jury leaks typically face an insurmountable hurdle: They cannot prove the leaks unless the government voluntarily discloses them, which it will almost never do. This is the rare case in which the government admitted the leaks, but it selectively disclosed only a few crumbs of information in order to avoid a hearing that would have exposed the full story. Both the district court and the Second Circuit sanctioned this strategy, even though the government never disputed that the leaks were part of a pattern of similar violations of grand jury secrecy across multiple cases.

In opposing certiorari, the government once again deploys its carefully selected trickle of disclosures to evade further scrutiny. It contends that the decision below does not raise the first question presented—whether systematic and pervasive government misconduct violating Rule 6(e) is structural error warranting dismissal of an indictment—because the Second Circuit found that even if the answer to that question is yes, Walters was not entitled to relief. But the opinion below shows exactly why this is an

excellent vehicle to resolve the question: The Circuit relied solely on the government's cherry-picked disclosures, even though the full facts about this case (and other similar ones) are unknown because the hearing was denied. And the court below never conducted the analysis this Court's precedents require to determine whether the misconduct was structural error obviating the need to establish specific prejudice. If this Court does not intervene, the government will continue to sweep similar misconduct under the rug by deliberately concealing the information needed to show systematic and pervasive misconduct.

If prejudice must be shown, the government's opposition to permitting discovery and an evidentiary hearing that could establish such prejudice is specious. A district court's refusal to hold a hearing ordinarily receives deference. But establishing a *prima facie* case of grand jury leaks is extraordinary, and many courts have held that it *requires* a hearing. The government has total control over what is divulged and can readily withhold evidence that would demonstrate prejudice. That is what it did here, first by misleading the district court with its "artful" denials, and then by strategically limiting its disclosures and conducting a sham investigation which, three years later, has held no one accountable.

Defendants cannot show prejudice without a hearing, but if the decision below stands, they will be denied a hearing precisely because they cannot demonstrate prejudice, as happened here. This Court should intervene to prevent this whipsaw from precluding any remedy for systematic and pervasive government misconduct.

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

1. This case is an ideal vehicle to address pervasive grand jury leaks. *See* Pet.34-35. In claiming otherwise, the government largely ignores what makes its misconduct so egregious. Opp.18-20. For at least two years, FBI supervisor David Chaves regularly communicated investigative secrets to four reporters in meetings, telephone conversations, emails, and text messages. C.A.App.220-21, 224-25; App.6. The government conceded below that the "FBI" wrongfully disclosed "a significant amount of confidential information" about the investigation, "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. And it does not dispute that Chaves did so in exchange for investigative tips from reporters, to pressure targets to cooperate, and to spur conversations on the wiretap. C.A.App.220-21, 318, 324.[1]

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[1] The government used similar tactics to induce its star witness, Tom Davis, to cooperate. He insisted for 21 months that Walters had done nothing wrong, including in sworn SEC testimony. C.A.App.735-38. Davis changed his story when the government confronted him with his extensive unrelated criminal conduct, including his theft of $125,000 from a battered women's charity and falsification of tax records. C.A.App.413-14.

There is also no dispute that the USAO and FBI uncovered the leaks by May 2014 but did nothing to identify the source or hold anyone accountable. C.A.App.231-37. And the government has no explanation for the email exchange among the USAO brass agreeing to keep the leaks under wraps, the communications with *Wall Street Journal* and *New York Times* reporters after the leaks were uncovered, or that no one stopped the leaks for another year. C.A.App.225, 229, 235, 237, 278-79.

When Walters first sought a hearing about potential Rule 6(e) violations, the government denigrated his request as a "fishing expedition" and claimed he could not show "that the source of the information was an attorney or agent for the Government." C.A.App.186, 206-07. The government sets a disturbingly low bar for itself in emphasizing the absence of a finding that it made "affirmative statements that were false." (App.27; *see* Opp.13, 17, 19). In fact, the district court charitably described its representations, which can only have been intended to mislead the court, as "artful." C.A.App.391. And the government misleads again when suggesting that the prosecutors who made these misrepresentations were unaware of the leaks. Opp.6. The presentation to the district court was spearheaded by the same "prosecutor principally responsible for the investigation in May and June 2014" who was copied on 2014 emails describing the leaks as "[d]eplorable" and "reprehensible." C.A.App.209-10, 225, 230, 235.

When the government finally took responsibility for the leaks, it singled out Chaves and promised to investigate him. C.A.App.220-28. The government

appears to suggest that this "investigation," and the "quarterly updates" the district court demanded, illustrate that it has taken the leaks seriously. Opp.10, 13-14. But nothing has come of the supposed investigation, prompting the district court to admonish the government for its recalcitrance and its submission of boilerplate status updates that "contain virtually no substance." Dkt.264.

The misconduct here was part of an extensive pattern of leaks spanning numerous SDNY investigations. *See* Pet.14-17. The government conceded below, and does not dispute here, that grand jury leaks occurred in at least five other insider-trading cases in the SDNY. C.A.App.281-85. Instead of addressing these cases, the government identifies two unrelated prosecutions that supposedly adhered to Rule 6(e). Opp.19 n.7. And the government ignores OIG's findings that "all levels" of the New York FBI office are "in frequent contact with reporters" in violation of "FBI policy and Department ethics rules." Pet.15-16. Indeed, the government's brief creates the impression that virtually none of the admitted misconduct in this case actually occurred.

The government also mischaracterizes the Second Circuit's opinion when claiming that it found no "systematic and pervasive misconduct." Opp.18. The court not only never said that, but lamented that the district court's "decision to forgo a hearing prevent[ed it] from understanding if there were other cases like this one." App.26-27.

2. The government claims that this case does not implicate the first question presented "because the court of appeals assumed that systematic and

pervasive misconduct under Rule 6(e) could justify dismissal even without proof of prejudice, but determined that dismissal under that standard would not be warranted" here. Opp.15. This argument is fundamentally flawed in two respects.

First, the Circuit's conclusions about structural error were based entirely on the incomplete record resulting from the government's concealment of information. The government sent a single letter admitting to leaks but withholding the information needed to ascertain their true scope. It searched only three months' worth of documents, even though the leaks occurred over a two-year period, and produced only six of the "thousands" of relevant documents it uncovered. C.A.App.218-19. The government also pretended Chaves acted alone, ignoring the *New York Times* reporter's reference to multiple government "sources," the news articles attributed to "people" briefed on the probe, and the FBI agents who told the USAO that others were complicit. C.A.App.79, 83, 220, 223, 227, 232, 322-24. And the government withheld records that would have enabled Walters to test its one-sided account of the interviews it conducted or learn what specific information Chaves exchanged with reporters pursuant to their illicit *quid pro quo*. C.A.App.218-19, 226. The government downplays the need for additional discovery, claiming that Chaves would plead the Fifth Amendment at a hearing, but ignores the troves of evidence it withheld. Opp.20.

The government even conceded below that "much about the scope and content" of the leaks "remains unclear." C.A.App.219. Despite these gaping holes in

the record, the government avoided an evidentiary hearing by urging the district court to "assume" there had been "a Rule 6(e) violation" and to "proceed to the question of remedy." C.A.App.228. Then the government successfully opposed Walters' motion to dismiss by claiming he had failed to show prejudice, even though it concealed the evidence needed to make such a showing. C.A.App.368, 370-71; App.63-64.

And the government prevailed on appeal because the Second Circuit deemed the record—which the government unilaterally circumscribed—insufficient to establish structural error. The court found "no evidence…that others besides Chaves" were culpable or "that representatives of the USAO or other members of the FBI were complicit." App.27. But this was all based on the government's cherry-picked disclosures, ignoring that even the government's self-serving letter revealed the involvement of other FBI agents. C,A.App.220, 223, 227, 232. Likewise, the court of appeals took Bharara's May 2014 email at face value even though no one knows what was in the "thousands" of other relevant e-mails, and neither the U.S. Attorney's Office nor the FBI did anything further to stop the leaks or punish the leaker. App.27. Finally, the court limited its analysis to the misconduct here, despite acknowledging that Chaves' conduct was "deeply troubling," and that "the decision to forgo a hearing" had deprived it of the evidence about misconduct in other cases. App.26.

If Walters did not show systematic and pervasive misconduct, that was only because the government concealed the essential facts. The truth about grand jury leaks rarely comes to light, Roma W. Theus, II,

"Leaks" in Federal Grand Jury Proceedings, 10 St. Thomas L. Rev. 551, 551 (1998), and when it does, the government alone controls what is revealed. If the decision below stands, there will be virtually no case in which the defendant can prove systematic and pervasive misconduct. That would render the question presented—whether such misconduct is structural error—effectively unreviewable. What *was* revealed in this case provides ample basis for the Court to reach this question.

Second, the Second Circuit applied the wrong legal standard for determining whether there was structural error. It even cited cases analyzing whether there was prejudice, even though structural error dispenses with the need to establish prejudice.

The "defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). Error is structural where (1) it "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." *Weaver*, 137 S. Ct. at 1908. "These categories are not rigid," and multiple "rationales may be part of the explanation for why an error is deemed to be structural." *Id.*; *see also* Pet.24.

The Second Circuit never applied the *Weaver* framework, and instead considered only *Weaver*'s third factor—whether "inquiry into prejudice would

have required unguided speculation." App.26. It ignored the first two *Weaver* factors and this Court's teachings that the three *Weaver* categories are "not rigid," because "the precise reason why" error is structural "varies in a significant way from error to error." *Weaver*, 137 S. Ct. at 1908.

The Second Circuit's myopic focus on whether prejudice is too difficult to measure led it to the wrong conclusion. For instance, the court failed to consider the second *Weaver* factor, whether "the right at issue…protect[s]" an "interest" other than the defendant's. *Id*. That factor weighs heavily in favor of finding systematic and pervasive Rule 6(e) violations structural error. Grand jury secrecy safeguards the integrity of the grand jury's investigative and charging functions. *See* Pet.25 (citing *Rehberg v. Paulk*, 566 U.S. 356, 374 (2012); *United States v. John Doe, Inc. I*, 481 U.S. 102, 114 (1987); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 424 (1983); *Douglas Oil Co. v. Petrol Stops N.W.*, 441 U.S. 211, 219 (1979)). The Second Circuit acknowledged that the violations were "serious," "troubling," "highly improper," "likely criminal," and "more egregious than anything Walters did." App.19-20, 26, 42. But it made no effort to assess whether these "egregious" violations of grand jury secrecy—an "essential" component of the "criminal process"—render the error "structural" as this Court has defined that term. *Puckett v. United States*, 556 U.S. 129, 141 (2009); *accord Sells*, 463 U.S. at 424 (Court has "consistently…recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings").

Moreover, although the court of appeals paid lip service to the structural error inquiry, its opinion suggests that it was not looking for structural error at all. Courts determine whether an error is structural "without a particular assessment of the prejudicial impact" of the error in the case at hand. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988). That is what distinguishes structural error from ordinary error, subject to "harmlessness" review under Federal Rule of Criminal Procedure 52(a). *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). Yet, in support of its holding that the misconduct here was not structural, the Circuit first concluded (somewhat circularly) that it could not find prejudice without "unguided speculation" based on its earlier conclusion that Walters had not established prejudice. App.26. And it cited *United States v. Friedman*, 854 F.2d 535, 582 (2d Cir. 1988), for the proposition that "violations [do] not warrant dismissal absent a showing of prejudice"; and *United States v. Silver*, 103 F. Supp. 3d 370, 380 (S.D.N.Y. 2015), for the proposition that grand jury leaks to the "media" are not actionable "absent a showing of prejudice." App.26. This suggests that in reality the Circuit considered only whether the error was prejudicial, and never independently assessed whether the government committed structural error.

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Defendants are rarely able to establish Rule 6(e) violations, and rarer still are cases like this one where the government admits to widespread misconduct. If this case is not an appropriate vehicle to determine

whether such misconduct is structural, it is hard to imagine one.

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

If defendants must establish prejudice to obtain a remedy, they cannot rely on the government to volunteer the requisite evidentiary support. They need discovery and/or an evidentiary hearing. *See* Pet.29-34. Here, the government withheld the information that would have enabled Walters to show prejudice but, in Kafka-esque fashion, the district court deprived him of the opportunity to obtain the necessary information precisely because he didn't already have it. C.A.App.370-71, 383-87. The Second Circuit held that "a further hearing would not assist" the defendant in establishing prejudice, without explaining how else a defendant could possibly do so. App.32. Its decision effectively insulates the government from scrutiny in future cases. The government can simply concede a violation, refuse to disclose the details about its misconduct, as it did here, and thereby deprive defendants of the information they need to show prejudice.

The government ignores this problem and downplays the question as merely one of whether the district court abused its discretion. Opp.20. District courts do *ordinarily* have discretion to decide whether to allow discovery or hold an evidentiary hearing, but the question presented is whether defendants are *entitled* to a hearing upon a *prima facie* showing of a Rule 6(e) violation. The government does not dispute

that the decision below simultaneously requires defendants to establish prejudice and deprives them of the means to do so. That is why district courts should *not* have discretion to deny a hearing when a *prima facie* showing is made.

The need for a hearing and discovery is reflected in numerous decisions holding that "[o]nce a *prima facie* case" of a Rule 6(e) violation "is shown, the district court *must* conduct a 'show cause' hearing." *See Barry v. United States,* 865 F.2d 1317, 1321 (D.C. Cir. 1989) (emphasis supplied); *accord, e.g.*, *United States v. Nordlicht*, 2018 WL 6106707, at *3 (E.D.N.Y. Nov. 21, 2018); *United States v. Skelos*, 2015 WL 6159326, at *9 (S.D.N.Y. Oct. 20, 2015); *United States v. Flemmi*, 233 F. Supp. 2d 75, 81 (D. Mass. 2000). The government argues that these cases addressed whether a hearing "is…necessary to determine *whether* a violation of Rule 6(e) occurred," whereas here the government conceded such a violation. Opp.21. But the point is that many lower courts have acknowledged that a *prima facie* case of Rule 6(e) violations should automatically trigger a hearing because such violations are atypical. The government did not admit a violation in the cited cases. But that does not mean it should be permitted to shield its misconduct from judicial review by making a concession in order to conceal the full truth from defendants, as it did here. This Court should intervene to ensure that defendants have the tools they need to root out pervasive misconduct and prevent the government from escaping the consequences by hiding it.

CONCLUSION

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

Respectfully submitted,

ALEXANDRA A.E. SHAPIRO
Counsel of Record
ERIC S. OLNEY
JACOB S. WOLF
SHAPIRO ARATO BACH LLP
500 FIFTH AVENUE
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Petitioner

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