No. 18-1393

In the Supreme Court of the United States

WILLIAM T. WALTERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to dismissal of the indictment in the circumstances of this case, based on an FBI agent's disclosure of grand jury material to the press in violation of Federal Rule of Criminal Procedure 6(e).

2. Whether the district court abused its discretion in denying petitioner's motion for an evidentiary hearing and discovery on his motion to dismiss the indictment.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y):

United States v. *Walters*, No. 16-cr-338 (July 27, 2017)

United States v. *Davis*, No. 16-cr-338 (Nov. 2, 2017)

United States Court of Appeals (2d Cir.):

United States v. *Davis*, No. 17-3657 (Dec. 6, 2017)

United States v. *Walters*, Nos. 17-2373, 17-3169, 17-3425 (Dec. 4, 2018)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-42) is reported at 910 F.3d 11. The order of the district court (Pet. App. 43-68) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2018. On February 7, 2019, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 3, 2019. On March 26, 2019, Justice Ginsburg further extended the time within which to file a petition for a writ of certiorari to and including May 3, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371; conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349; four counts of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff; and four counts of wire fraud, in violation of 18 U.S.C. 1343. Judgment 1-2. He was sentenced to 60 months of imprisonment, to be followed by one year of supervised release. Judgment 3-4. The court of appeals affirmed the conviction and the portions of the sentence other than the restitution order, but it vacated the restitution order and remanded the case for further proceedings. Pet. App. 1-42.

1. a. In July 2011, the Federal Bureau of Investigation (FBI) and the U.S. Attorney's Office for the Southern District of New York (USAO) opened an investigation into petitioner "for suspicious trading in shares of the Clorox Company." Pet. App. 3. Special Agent Matthew Thoresen led the investigation for the FBI. His supervisor was Special Agent David Chaves. *Id.* at 3-4.

In April 2013, the Financial Industry Regulatory Authority (FINRA) informed the Securities and Exchange Commission (SEC) of suspicious trading activity by petitioner that occurred in August 2012 involving shares of Dean Foods. The trading took place shortly before an announcement that Dean Foods intended to spin off its dairy business, WhiteWave. Pet. App. 4. The SEC informed the USAO, which subsequently learned that petitioner had a "close relationship" with Thomas Davis, who served on Dean Foods's board of directors. *Ibid.* The USAO broadened its investigation of petitioner to include his Dean Foods trades. *Ibid.* In April

2014, and then again in May 2014, the government obtained judicial authorizations to intercept calls on petitioner's cellphone for 30 days as part of its investigation. *Ibid.*

In early May 2014, a reporter for the *Wall Street Journal* told J. Peter Donald, then a media representative in the FBI New York Field Office, "that she planned to publish a piece on the investigation." Pet. App. 6-7.[1] After Donald spoke with others at the *Journal*, the *Journal* agreed not to publish the story until at least May 22. *Id.* at 7. Individuals at the FBI and USAO discussed how to persuade the *Journal* and the *New York Times* to continue to hold stories on the investigation, and on May 27, Chaves, Donald, and other FBI agents met with representatives from the *Journal*. *Ibid.*[2]

The following day, Special Agent Thoresen emailed Chaves expressing concern that leaks were occurring and stating that such leaks would harm the investigation. Thoresen wrote that the leaker appeared to be seeking "to derail this investigation." Pet. App. 7 (citation omitted).

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[1] The decision below identifies the reporter as from the *New York Times*, but it is the government's understanding that the reporter was from the *Journal*. See Gov't C.A. Br. 7 n.5 (citing C.A. App. 340).

[2] Chaves and another agent later stated that individuals other than Chaves disclosed "various aspects of the investigation in exchange for the *Journal* agreeing to hold publication" and that "one *Times* reporter told the USAO that he had multiple 'sources' about the investigation." Pet. App. 7 (citation and internal quotation marks omitted). But the remaining three agents at the meeting denied that they had disclosed aspects of the investigation in exchange for forestalling publication. *Ibid.*

On May 30, 2014, the *Journal* published an article stating that the government was investigating possible insider trading activity involving petitioner, Carl Icahn, and professional golfer Phil Mickelson. Pet. App. 5. The *Times* ran a similar story the same day. That day, George Venizelos, the Assistant Director in Charge of the FBI's New York Field Office, emailed Donald, Chaves, and others "asking how the reporter had learned certain information and instructing FBI personnel to cease any contact with the reporter." *Id.* at 7-8. Venizelos stated that "if he found out anyone continued to speak to the reporter, 'there will be reassignments immediately.'" *Id.* at 8 (citation omitted).

The *Times* and *Journal* ran additional stories on May 31 and June 1, respectively. Pet. App. 5. The stories "contained detailed confidential information about the investigation and attributed the information to people briefed on the matter who spoke anonymously because they were not authorized to discuss the investigation." *Ibid.* (citation and internal quotation marks omitted). After the publication of the *Journal*'s May 31 article, Thoresen emailed the Assistant United States Attorney (AUSA) overseeing the investigation and described the article as "deplorable and reprehensible." *Id.* at 8 (brackets and citation omitted). On June 1, then-United States Attorney Preet Bharara emailed Venizelos, included a link to a *Journal* article, and wrote: "I know you agree these leaks are outrageous and harmful." *Ibid.* (citation omitted). Venizelos then emailed Donald, Chaves, and others, saying that the articles were "'an embarrassement [sic] to this office,' and instructing them to meet with him to discuss the issue the next morning." *Ibid.* (citation omitted).

On June 2, 2014, Venizelos "met with various FBI personnel, expressed anger over the leaks, and again instructed agents to cease contact with the media." Pet. App. 8. Nevertheless, in June 2014, the *Journal* and *Times* published additional articles "discuss[ing] ongoing details of the investigation into [petitioner], including information about subpoenas issued to Dean Foods." *Id.* at 5. They attributed information they reported to "people briefed on the probe." *Id.* at 6 (citation omitted). The last relevant article, which was published in the *Journal* on August 12, 2015, identified Davis "as a target of the investigation." *Ibid.*

2. a. In February 2016, Davis informed the government that he wished to cooperate with its investigation. Davis "quickly implicated" petitioner. Pet. App. 9. On May 16, 2016, Davis pleaded guilty to a 12-count information and agreed to cooperate with the government. *Ibid.*

The next day, the government presented evidence to a grand jury showing that petitioner "had communicated with and received inside information from Davis prior to his purchase or sale of large quantities of Dean Foods stock and those trades resulted in significant profits or avoided losses when news about the company later became public." Pet. App. 9. The evidence included "a summary of Davis's expected trial testimony," along with "summaries of [petitioner's] trading and phone records," and "information drawn from contemporaneous Dean Foods board meeting minutes and earnings announcements." *Ibid.* The grand jury returned a ten-count indictment charging petitioner with conspiracy and substantive insider-trading and wire-fraud offenses. *Id.* at 10.

b. Petitioner filed a motion in district court requesting a hearing "on the issue of the news leaks." Pet. App. 10. He argued that "the content of the news articles made clear that the Government must have improperly leaked grand jury information to reporters in violation of the grand jury secrecy provision, Federal Rule of Criminal Procedure 6(e)." *Ibid.* The government argued that, to the contrary, "the articles did not necessarily include 'matters occurring before the grand jury'" and petitioner "could not show that the source of the information was a Government agent or attorney." *Id.* at 11 (citation omitted). The government wrote that "'[n]one of the articles linked a source directly to the Government,'" noted that "Government representatives [had] declined to comment," and stated that "civil regulators and others—who are not bound by Rule 6(e)—also had access to the information contained in the articles." *Ibid.* (citation omitted). The government accordingly maintained that the "natural and logical inference[]" was "that the source was not a Government official." *Ibid.* (citation omitted).[3]

The district court ordered an evidentiary hearing "to determine whether there had been communications between FBI agents or AUSAs involved in the investigation and reporters or employees of the *Journal* and *Times* from April 1 to June 30, 2014." Pet. App. 11. In

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[3] In June 2014, a prosecutor at the USAO had "received information * * * from a *Times* reporter suggesting that an unidentified person at the FBI was providing information to the press." Gov't C.A. Br. 21. But the AUSA who spoke to the reporter had left the USAO by the time that petitioner filed his 2016 motion regarding the leaks, and "no one responsible for responding to the motion recalled, in preparing the response, having learned of the June 2014 communication." *Ibid.*

preparation for the hearing, the government conducted its own investigation of whether agents or prosecutors had engaged in impermissible communications. The government interviewed agents and prosecutors and "obtained emails, cell phone logs, and text messages for those individuals for the time period specified by the court." *Ibid.*; see 12/16/16 Letter 2-3. The government determined through that investigation that Special Agent Chaves had been "the media's source of confidential information about the investigation." Pet. App. 12. It advised the court that "contrary to its earlier position," an FBI agent—Chaves—had been the media's source. *Ibid.*; see *id.* at 12 nn.5, 7; 12/16/16 Letter 1-12; Gov't C.A. Br. 21-22.

The government's letter provided "a detailed chronology, summary of findings, and contemporaneous internal emails relating to the leaks." Pet. App. 13. The letter explained that between April 2013 and June 2014, Chaves "had provided information about the investigation to as many as four reporters from the *Times* and the *Journal*." *Id.* at 6. In April 2013, Chaves had dinner with two *Times* reporters and "discussed the investigation into Clorox, mentioning [petitioner] by name." *Ibid.* Chaves also met with a *Journal* reporter in late 2013 "and asked her to let him know if she came across any information regarding" petitioner. *Ibid.* (citation and internal quotation marks omitted). In addition, in April 2014, Chaves discussed the investigation over dinner with three *Times* reporters and told them about "the expansion of the investigation to trading in stocks other than Clorox." *Ibid.* Chaves "appears to have communicated with reporters about the investigation sometime between June 2 and June 11, 2014," despite having been directly instructed not to do so. *Id.* at 8.

The letter noted that Chaves "admitted to providing confidential information about the investigation to the *Journal* and *Times*" over the course of several interviews, but then retained counsel and "informed the Government that he would no longer meet and would assert his Fifth Amendment privilege against self-incrimination." Pet. App. 12 n.7. The government stated that it was "now an incontrovertible fact that FBI leaks occurred, and that such leaks resulted in confidential law enforcement information about the Investigation being given to reporters." *Id.* at 12 (citation omitted). It further stated that "because 'much about the scope and content of the information that Chaves leaked to reporters remains unclear * * * the appropriate course is for the Court to assume that a Rule 6(e) violation occurred and proceed to consider the issue of remedy.'" *Id.* at 13 (citation omitted); see 12/16/16 Letter 2. The government also informed the court that Chaves had been referred to the FBI's Office of Professional Responsibility (OPR) and to the Office of the Inspector General (OIG) for the U.S. Department of Justice (DOJ). Pet. App. 12.[4]

The district court stated that it would presume a Rule 6(e) violation and cancelled the evidentiary hearing. Pet. App. 12; see 12/19/16 Order 1-2.

c. Petitioner moved to dismiss the indictment. As relevant here, petitioner argued that the indictment

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[4] The USAO and FBI have also "taken steps since learning of Agent Chaves's leaks to strengthen their practices aimed at preventing and responding to potential leaks," and "senior leadership in both offices have forcefully reminded employees of their critical obligation to keep investigations secret and the severe consequences (to themselves, their investigations, and the public) of failing to do so." Gov't Opp. to Mot. to Dismiss 42.

should be dismissed because "he was prejudiced by the leaks" on the theory that "they caused Davis to cooperate against him," or, in the alternative, that "even absent a showing of prejudice, the indictment should be dismissed because the leaks involved 'systematic and pervasive' prosecutorial misconduct." Pet. App. 13.[5]

The district court declined to dismiss the indictment. Pet. App. 43-68. The court determined that petitioner's claim of prejudice was "sheer speculation," finding no basis to conclude that the leaks "had any impact whatsoever on the grand jury's decision to indict" petitioner. *Id.* at 59-60. The court also rejected petitioner's suggestion that the indictment should be dismissed even without a showing of prejudice. It stated that it was "not aware of any case in which an indictment was dismissed" based on "'systematic and pervasive'" misconduct that did not prejudice the defendant. *Id.* at 63 (citation omitted). And it wrote that even if petitioner were correct in asserting "a pattern of illegal leaks by the FBI, that pattern would not raise such serious questions about the fundamental fairness of the process that resulted in *this* indictment as to warrant dismissal." *Id.* at 64.

The district court further concluded that an evidentiary hearing was unnecessary because Chaves had "indicated that he will refuse to answer questions pursuant to his Fifth Amendment privilege against self-incrimination" and because the court had "been provided sufficient evidence by the parties in order to make

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[5] Petitioner also argued that "the Government's conduct was so 'outrageous' that it violated the Due Process Clause of the Fifth Amendment." Pet. App. 13 (citation omitted). The district court and court of appeals each rejected that claim, and petitioner does not renew it in this Court.

a ruling." Pet. App. 62. The court ordered the government to submit quarterly updates on the investigation of Chaves. See *id.* at 14, 29.[6]

d. Petitioner's case proceeded to a jury trial that lasted about three weeks. Pet. App. 14. The government's trial evidence, which "included documents and testimony that established that [petitioner] had repeatedly conspired with Davis to commit insider trading from 2008 through 2014," showed that "Davis would receive material nonpublic information about Dean Foods, closely followed by a phone call from Davis to [petitioner], closely followed by [petitioner] initiating purchases or sales of Dean Foods stock." *Id.* at 14-15. The trial evidence also established "that, in exchange for Davis's tips, [petitioner] provided Davis with nearly $1 million in personal loans, which Davis never fully repaid." *Id.* at 15.

The jury found petitioner guilty on all counts, and the district court denied petitioner's motion for a new trial. Pet. App. 15-16. The court sentenced petitioner to 60 months of imprisonment, to be followed by one year of supervised release. The court also ordered petitioner to pay a $10 million fine, to forfeit about $25.3 million, and to pay nearly $9 million in restitution. *Id.* at 15; see Judgment 3-4.

3. a. The court of appeals affirmed petitioner's conviction and all aspects of the sentence other than the

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[6] The district court directed the USAO to provide the updates, but after the USAO advised the court that it was recused from the investigation of Chaves and that the DOJ's Public Integrity Section (PIN) was overseeing that investigation, the court authorized PIN to file the updates. See 3/13/17 Letter 1-2. The court authorized PIN to file the updates ex parte and under seal, but directed that PIN file redacted versions on the public docket. See *ibid.*

restitution order, but it vacated the restitution order and remanded the case for further proceedings. Pet. App. 1-42. As relevant here, the court affirmed the denial of petitioner's motion to dismiss the indictment. *Id.* at 1-33. The court stated that "[i]t is undisputed that Chaves's leaks to reporters violated the grand jury secrecy provision of" Rule 6(e). *Id.* at 17. "The principal question," the court wrote, was "whether dismissal of the indictment" was the appropriate remedy in this case. *Ibid.*

Relying on this Court's decision in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), the court of appeals explained that a district court may "dismiss an indictment for Rule 6(e) violations" based on its supervisory powers only if the violations prejudiced the defendant. That inquiry, it explained, turned on whether "any violations had an effect on the grand jury's decision to indict." Pet. App. 19 (quoting *Bank of Nova Scotia*, 487 U.S. at 255). Here, the court of appeals determined that petitioner's "claims of prejudice—that the news leaks revived a 'dormant investigation' and precipitated Davis's cooperation—[we]re contravened by the record or wholly speculative." *Id.* at 21. The court determined that the investigation of petitioner was "active and ongoing," rather than "dormant," when Chaves began leaking information. *Ibid.* It also "agree[d] with the district court that attributing Davis's cooperation to the news leaks" was "'sheer speculation'" and that there was "'not any basis to conclude that the newspaper articles had any impact whatsoever on the grand jury's decision to indict.'" *Id.* at 21-22 (citation and ellipsis omitted). It observed that Davis did not decide to cooperate until about six months after the last of the articles that petitioner asserted contained leaked information.

Id. at 22. Further, the court noted, Davis had testified during "extensive[]" cross-examination at trial that he cooperated because "'it was pretty clear, based on advice from counsel, that he was highly likely to get indicted in the next couple of months' because of evidence uncovered during the investigation." *Ibid.* (brackets and citation omitted). The court wrote that the lack of prejudice to petitioner was "further underscored by the fact that [petitioner] received a full and fair trial in which there was overwhelming evidence to support his conviction." *Ibid.*

The court of appeals then rejected petitioner's argument that the Fifth Amendment's Due Process Clause required that the judgment be vacated even though petitioner had not established prejudice. Pet. App. 23-32. The court acknowledged that in *Bank of Nova Scotia*, this Court "recognized a class of cases in which indictments may be dismissed 'without a particular assessment of the prejudicial impact of the errors'" because "'the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair.'" *Id.* at 23-24 (quoting *Bank of Nova Scotia*, 487 U.S. at 256-257). The court also viewed *Bank of Nova Scotia* to leave open the possibility of prosecutorial misconduct "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 24 (quoting *Bank of Nova Scotia*, 487 U.S. at 259). But it found unclear whether *Bank of Nova Scotia* "created a stand-alone exception to the prejudice requirement for cases involving systematic and pervasive prosecutorial misconduct." *Id.* at 25. And it noted that it was "not aware of any court" that had applied *Bank of Nova Scotia* in that way. *Ibid.*

The court of appeals nevertheless "assum[ed] an indictment could be dismissed" based on such misconduct, and then determined that, even if that were so, dismissal would be unwarranted under that standard on the facts of petitioner's case. Pet. App. 25. In reaching that conclusion, the court determined that "the violations in this case do not raise a substantial and serious question about the fundamental fairness of the process that resulted in [petitioner's] indictment." *Id.* at 27. The court emphasized that no evidence had been put forward "indicating that others besides Chaves were illegally sharing information with the press." *Ibid.* (citation omitted). And while the court concluded that "with the benefit of hindsight, it [wa]s evident that the Government should have conducted a more thorough investigation" before filing its opposition to petitioner's motion for an evidentiary hearing regarding the press leaks, the court rejected petitioner's argument that the government had misled the district court in its filing. *Id.* at 27-28. The court also emphasized that the government had, after the filing, conducted "a more thorough investigation and determined—and promptly disclosed—that Chaves 'was a significant source of confidential information regarding the Investigation for the *Times* and *Journal*.'" *Id.* at 28 (citation omitted).

The court of appeals stated that its conclusion that dismissal of the indictment was not warranted on the facts of this case was "reinforced by the availability of remedial measures short of dismissal." Pet. App. 28. It noted that Chaves had been referred to the FBI's OPR and to DOJ's OIG, the latter of which had opened a criminal investigation into his misconduct. *Id.* at 29. It further noted that Chaves had been "publicly identified

as the leaker" and that the government had been submitting quarterly updates to the district court on the status of the investigation. *Id.* at 28-29. The court of appeals concluded that the district court did not err in favoring these remedies over a dismissal that would "result in a 'windfall' to" petitioner. *Ibid.* (citation omitted).

Finally, the court of appeals found that the district court did not abuse its discretion in denying an evidentiary hearing, after concluding "that a further hearing would not assist in the resolution of the issues raised by [petitioner's] motion to dismiss." Pet. App. 32. The court determined that "the district court had a sufficient record on which to make its rulings" in light of the government's investigation and the "detailed summary of its findings, which included documents and a chronology of events," that the government submitted to the district court. *Id.* at 33. The court of appeals also emphasized that petitioner had "submitted multiple briefs and a declaration in response to the Government's letter and thus had a fair opportunity to challenge the Government's reported findings." *Ibid.* The court further observed that "the district court [had] disclosed the grand jury minutes and Chaves has refused to answer questions." *Ibid.* Under these circumstances, the court of appeals wrote, it was "not persuaded that a hearing could have further developed the record in any meaningful way." *Ibid.*

b. Judge Jacobs concurred. Pet. App. 42. He agreed with the court of appeals' analysis of the law and facts, but described Chaves's apparent misconduct as "in some respects more egregious than anything [petitioner] did," and emphasized that "[t]he FBI depends

on the confidence of the public, jurors and judges" to execute its mission. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 21-29) that this Court should grant review to address 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," Pet. i, and whether the district court abused its discretion in denying an evidentiary hearing or discovery in this case (Pet. 29-34). The petition should be denied. Petitioner's case does not present the first question on which he seeks review, because the court of appeals assumed that systematic and pervasive misconduct under Rule 6(e) could justify dismissal of the indictment even without proof of prejudice, but determined that dismissal under that standard would not be warranted in the circumstances of petitioner's case. And the court of appeals' fact-bound determination that the district court did not abuse its discretion in declining to order an evidentiary hearing or discovery does not conflict with any decision of this Court or another court of appeals or otherwise merit review. Further review is unwarranted.

1. a. The court of appeals correctly determined that petitioner was not entitled to the dismissal of the indictment based on violations of Rule 6(e). In *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), this Court "h[e]ld that, as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendant[]." *Id.* at 254; see *id.* at 263 ("We conclude that the District Court had no authority to dismiss the indictment on the basis of prosecutorial misconduct absent a

finding that [the defendants] were prejudiced by such misconduct."). It further determined that the record in *Bank of Nova Scotia*, which involved violations of Rule 6(e) (about grand-jury secrecy) and 6(d) (about outsiders at grand-jury proceedings), did not establish prejudice. *Id.* at 257; see *id.* at 258-263. In holding that a showing of prejudice was required under the harmless-error principles embodied in Rule 52, this Court stated that "[t]o be distinguished from the cases before us are 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 fundamental." *Id.* at 256. It described cases involving exclusion of a race or gender from the grand jury as exemplars, and stated that such cases were ones "in which 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.

The court of appeals properly determined that petitioner was not entitled to dismissal of the charges against him under *Bank of Nova Scotia*. In a determination that petitioner does not now challenge, the court of appeals agreed with the district court that petitioner had not shown prejudice because petitioner's prejudice claims were "contravened by the record or wholly speculative." Pet. App. 21; see *id.* at 21-23. The court of appeals then determined that it need not resolve whether *Bank of Nova Scotia* establishes "a stand-alone exception to the prejudice requirement for cases involving systematic and pervasive prosecutorial misconduct," because even "assuming an indictment could

be dismissed on this basis," the court was "not persuaded that dismissal would be appropriate" on that basis in the case at hand. *Id.* at 25.

In reaching that conclusion, the court of appeals correctly found that "the violations in this case do not raise a substantial and serious question about the fundamental fairness of the process that resulted in [petitioner's] indictment." Pet. App. 27. It emphasized that no evidence had been put forward "'indicating that others besides Chaves were illegally sharing information with the press'" and that the U.S. Attorney had "immediately emailed the Assistant Director of the FBI's New York Field Office to express concern" when the articles were published. *Ibid.* (citation omitted). It relied on the factual finding of the district court—the court closest to the events—that the government made no affirmative misrepresentations, and further relied on the government's actions in investigating the leaks and disclosing the evidence of Chaves's misconduct in advance of the evidentiary hearing. *Id.* at 27-28.

The court of appeals added that its rejection of petitioner's argument was "reinforced by the availability of remedial measures short of dismissal"—a drastic remedy that would confer a windfall benefit on a defendant who had not been harmed by the challenged misconduct. Pet. App. 28. The court appropriately noted that those measures included the public identification of Chaves as having engaged in misconduct, *ibid.*; see *id.* at 66 ("[T]he outing of the leaker may serve to deter other faithless federal agents."); cf. *United States* v. *Modica*, 663 F.2d 1173, 1185 (2d Cir. 1981) (per curiam) ("A reprimand in a published opinion that names the prosecutor is not without deterrent effect."), cert. denied, 456 U.S. 989 (1982), and referrals to OPR and

DOJ's OIG for possible disciplinary action or criminal prosecution, Pet. App. 29.

Taking into account the scope of Chaves's misconduct, the government's responses to the misconduct, and the alternative remedial measures available, the court of appeals did not err in concluding that petitioner had failed to establish systematic and pervasive misconduct warranting dismissal of the indictment, even assuming *arguendo* that such misconduct can justify that remedy in the absence of prejudice.

b. No further review is warranted of the court of appeals' circumstance-specific determination that this case does not involve systematic and pervasive misconduct warranting dismissal. Petitioner principally argues that this Court should grant review of the antecedent question "whether systematic and pervasive grand jury leaks can constitute structural error requiring dismissal without a showing of prejudice." Pet. 21 (capitalization altered; emphasis omitted); see Pet. i (presenting question "[w]hether 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"). But this case would not be a suitable vehicle for review of that question—on which, as petitioner acknowledges (Pet. 29), no circuit conflict exists in any event. The court of appeals assumed that petitioner was correct that systematic and pervasive leaks can constitute structural error warranting dismissal even absent a showing of prejudice. It simply rejected petitioner's claim on the ground that, even if petitioner were correct about the relevant legal standard, dismissal would still be unwarranted in the circumstances of this case. Pet. App. 23-29.

Petitioner does not directly address the court of appeals' determination that dismissal was not justified in his case even under the legal standard he advocates. To the extent that he suggests that his case did indeed involve pervasive and systemic misconduct, see Pet. 26 (asserting that "[i]t is hard to imagine a more pervasive pattern of grand jury leaks"), his arguments are contrary to the factual determinations of the courts below. For example, although petitioner asserts (*e.g.*, Pet. 27, 29) that the misconduct in this case reflected a "*de facto* FBI policy" and that the USAO "obfuscat[ed] before the district court," the court of appeals was "[un]persuaded that representatives of the USAO or other members of the FBI were complicit"; the district court found that "'[n]o evidence has been presented indicating that others besides Chaves were illegally sharing information with the press'"; and both courts found that even if the USAO's initial submission to the district court concerning the leaks was "'artful,'" the USAO made no false representations and subsequently conducted a thorough inquiry, uncovered Chaves's wrongdoing, and reported it to the court. Pet. App. 27 (citations omitted; second set of brackets in original).[7] The lower courts'

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[7] Petitioner errs in contending (Pet. 27), in reliance on *United States* v. *Nordlicht*, No. 16-cr-640, 2018 WL 6106707 (E.D.N.Y. Nov. 21, 2018), and *United States* v. *Skelos*, No. 15-cr-317, 2015 WL 6159326 (S.D.N.Y. Oct. 20, 2015), that "there are multiple other federal cases in New York in which defendants have raised credible allegations of improper grand jury leaks to the press." In *Nordlicht*, the court found that the defendants "failed to show that a 'matter occurring before the grand jury' was disclosed," or that any disclosure was made by "a government attorney or agent." 2018 WL 6106707, at *3,*5 (capitalization and emphasis omitted); see *id.* at *7 (describing defendant's contentions as "nothing more than frivolous speculation"). Similarly, in *Skelos*, the district court found no need

analysis of the record in this case does not warrant this Court's review. See Sup. Ct. R. 10.

3. Review is similarly unwarranted of petitioner's alternative contention (Pet. 29-34) that the district court abused its discretion in declining to hold an evidentiary hearing or order discovery regarding his Rule 6(e) claim. That contention lacks merit. Trial courts have considerable discretion in deciding whether to hold an evidentiary hearing or allow discovery. See, *e.g.*, Pet. App. 32; *In re Grand Jury Subpoena*, 274 F.3d 563, 576 (1st Cir. 2001). Here, the district court reasonably exercised its discretion to decide petitioner's motion on the record before it, after the government "conducted an internal inquiry in which it interviewed the 14 individuals connected to the investigation and collected relevant phone records, emails and text messages" and "provided the court with a detailed summary of its findings," including "documents and a chronology of events"; the court "disclosed the grand jury minutes" and gave petitioner "a fair opportunity to challenge the Government's reported findings"; and Chaves indicated he would refuse to answer questions based on Fifth Amendment privilege. Pet. App. 33; see *id.* at 62.

The court of appeals' fact-bound determination that the district court did not abuse its discretion does not conflict with any decision of this court or another court of appeals or otherwise warrant this Court's review. In particular, contrary to petitioner's suggestion (Pet. 29-30), the court of appeals' decision does not conflict with

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for a hearing on alleged Rule 6(e) violations because the defendants "failed to make a prima facie showing that the information they cite reflected a breach of grand jury secrecy or that the information was divulged by a Government agent or employee." 2015 WL 6159326, at *8.

Barry v. *United States*, 865 F.2d 1317 (D.C. Cir. 1989), which concluded that an evidentiary hearing is sometimes necessary to determine *whether* a violation of Rule 6(e) occurred. Specifically, the court in *Barry* stated that when a defendant makes out a prima facie violation of Rule 6(e)—for example, by showing that "media reports disclosed information about 'matters occurring before the grand jury' and indicated that the sources of the information included attorneys and agents of the Government"—the court "must conduct a 'show cause' hearing to determine whether the Government was responsible for the pre-indictment publicity and whether any information disclosed by the Government concerned matters occurring before the grand jury." *Id.* at 1321 (citation omitted); see *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1067 (D.C. Cir. 1998) (per curiam) (describing *Barry* as setting forth "a two-step analysis" in which the plaintiff must make a *prima facie* showing of a Rule 6(e) violation and, if he succeeds, an evidentiary hearing "will be employed to determine *whether a violation of Rule 6(e)(2) has occurred*") (emphasis added). *Barry* did not hold that a court must hold an evidentiary hearing in a case in which a Rule 6(e) violation was undisputed. Accordingly, the decision below does not conflict with *Barry*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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