UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM T. WALTERS,

Plaintiff,

-against-

PREETINDER BHARARA, DAVID CHAVES, GEORGE VENIZELOS, RICHARD ZABEL, TELEMACHUS KASULIS, DANIEL GOLDMAN, and DOES 1-50, INCLUSIVE,

Defendants.

Case No. 1:20-cv-08803-AKH

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

Defendants Preetinder Bharara ("Bharara"), David Chaves ("Chaves"), George Venizelos ("Venizelos"), Richard Zabel ("Zabel"), Telemachus Kasulis ("Kasulis"), and Daniel Goldman ("Goldman") (collectively, "Defendants") were each instrumental in the concerted campaign by the Department of Justice, U.S. Attorney's Office, and FBI to illegally leak confidential grand jury information about Plaintiff William Walters ("Walters") and subsequently cover up and refuse to investigate those leaks. Each of these violations was a direct derogation of Walters' constitutional rights, including his due process rights to a fair and impartial grand jury and criminal investigation. Both the District Court and the Court of Appeal for the Second Circuit agreed that Defendants' conduct was egregious, but found that the violations were not so pervasive and severe as to infect and invalidate Walters' indictment and conviction. Walters does not seek to challenge those findings in this action.

Instead, Walters seeks civil redress for the undisputed violations of his constitutional rights. Walters is entitled to this remedy even if his damages are difficult to quantify—a wrong deserves a remedy. In spite of this clear wrongdoing, Defendants move to dismiss on a host of grounds that essentially seek to insulate Defendants from any liability, no matter how egregious their conduct.[1] As set forth in greater detail below, Defendants are not entitled to escape liability as a matter of law. First, Walters' claims are not barred by the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994) because he does not collaterally attack or otherwise seek to impugn his underlying indictment and conviction. Second, Walters' claims are not time barred since they

[1] Because the legal issues raised in the separate motions to dismiss brought by, on the one hand, Defendants Bharara, Venizelos, Zabel, Kasulis, and Goldman, and Chaves, on the other hand, are identical, this opposition responds to both.

did not begin to accrue (and/or were tolled) during the pendency of the Government's purported investigation into its wrongdoing, which induced Walters to delay bringing any civil claims. Third, Walters' claims are not barred by collateral estoppel since the specific constitutional issues raised in this action were never before litigated. Fourth, no special factors preclude Walters' *Bivens* claim because Walters himself has no alternative remedies, neither FBI agents nor prosecutors have discretion to leak confidential grand jury material to the media, and courts are more than well-suited to manage the claims arising out of the illegal law enforcement activities alleged here. Finally, the Defendants are not insulated from suit by the doctrine of qualified immunity because they violated clearly established law. The Court should afford Walters an opportunity to prove the constitutional harm done to him by each of the Defendants.

II. FACTUAL BACKGROUND[2]

A. Federal Law Enforcement and its Duty to Ensure Fair and Secret Investigations.

In the federal judicial system, the United States Department of Justice ("DOJ") is entrusted with investigating and prosecuting federal crimes. Complaint, Dkt. No. 1 ("Compl.") at ¶ 31. For each of the nation's 94 federal judicial districts, the President appoints a United States Attorney ("USA") whose responsibility is to represent the United States in all criminal proceedings. *Id.* The USA has plenary authority regarding criminal matters. *Id.* The USA hires attorneys and other staff to carry out his duties. *Id.* ¶ 32. The USA is responsible for the acts of his/her subordinates. *Id.*

One of the USA's primary duties is the investigation of suspected criminal conduct. *Id.* ¶ 33. A United States Attorney's Office ("USAO") has a Criminal Division managed by a Chief

[2] The facts described in this motion are taken from Walters' Complaint, which well-pleaded allegations are presumed true for purposes of Defendants' motion to dismiss.

and a Deputy Chief. *Id.* Within the Criminal Division, individual prosecuting attorneys are responsible for specific investigations and presenting evidence to the grand jury to obtain an indictment. *Id.*

While the USA delegates authority to these subordinates, the USA remains ultimately responsible for their conduct. *Id.* ¶ 34. When the USA receives any credible information that misconduct in the administration of criminal justice within the USAO has occurred, he/she must promptly and thoroughly investigate. *Id.* Failure to do so is actionable. *Id.*

In connection with conducting criminal investigations, the USAO is assisted by numerous federal law enforcement agencies such as the FBI. *Id.* ¶ 35. In major metropolitan regions such as New York City, the FBI operates a Field Office managed by the Assistant Director in Charge ("ADC") who is assisted by five or more Special Agents in Charge who supervise several hundred Special Agents. *Id.* Like the USA, the ADC is responsible for the actions of subordinates and is charged with the legal duty to investigate possible unlawful conduct by them. *Id.*

If the USAO seeks to charge a suspect with a felony, the Fifth Amendment requires that a grand jury must issue an indictment. *Id.* ¶ 37. The USAO functions as the attorney for the grand jury. *Id.* Thus, the presentation of evidence to the grand jury and furnishing of legal advice is done by the USAO. *Id.* Typically, FBI agents testify before the grand jury about the results of their investigation, and they are privy to all of the evidence presented to the grand jury. *Id.*

By longstanding law and custom, as required by Rule 6(e) of the Federal Rules of Criminal Procedure, the proceedings of a federal grand jury are secret. *Id.* ¶ 38. Secrecy is designed to protect several compelling interests. *Id.* This includes encouraging full disclosure by witnesses, preventing those under investigation from fleeing or tampering with grand jurors,

and protecting the innocent from unwarranted prosecution and reputational damage, among other reasons. *Id.* Typically, a violation of Rule 6(e) is treated as an obstruction of justice and is prosecutable under 18 U.S.C. § 1503. *Id.*

With only limited exceptions, evidence presented to, and the deliberations of, the grand jury are strictly confidential. *Id.* ¶ 39. Unauthorized disclosure of secret grand jury information is punishable as a felony with a prison sentence of up to five years. *Id.* If the leaker is employed by the USAO or FBI, that law enforcement official is also subject to criminal contempt, investigation by the DOJ's Offices of Professional Responsibility (if a DOJ attorney) and/or Inspector General or by the FBI's Office of Professional Responsibility (if an FBI employee), and the imposition of administrative discipline, including potential termination. *Id.* The leaker, if an attorney, also is subject to discipline by the bar, including license suspension or disbarment, for such unethical and unlawful conduct. *Id.*

In the event of any leaking of grand jury information to the media or anyone else, the USAO is obligated to investigate promptly and thoroughly to determine the source of the leaks and prevent future unauthorized disclosures. *Id.* ¶ 40. This is not a discretionary obligation. *Id.* The viability of the grand jury process—and the public's confidence in its deliberations—mandate that wrongdoers be identified and prosecuted. *Id.*

B. A Stalled Investigation Prompts an Unlawful Campaign to Violate Walters' Rights.

The Government began to target Walters for investigation as early as November 4, 2011. *Id.* ¶ 41. In the early stages, the investigation pertained to certain stock purchases and allegations of insider trading involving Clorox stock, investor Carl Icahn, and Walters. *Id.* At or around

that time, the Government obtained the first in a series of pen registers and "trap and trace" devices for Walters' phone to capture phone numbers for all incoming and outgoing calls. *Id.*

After several years, however, the Government's investigation had grown cold, with no evidence of wrongdoing by Walters. *Id.* ¶ 42. Chaves, the then-FBI Supervisory Special Agent ("SSA") in charge of the investigation, would later admit that the investigation was "dormant." *Id.*

The USAO then broadened the investigation to include suspected insider trading of Dean Foods stock, Dean Foods chairman Tom Davis, professional golfer Phil Mickelson, and Walters. *Id.* ¶ 43.

In April 2013, Chaves arranged a dinner meeting with *The New York Times* reporters Matthew Goldstein and Ben Protess to illegally divulge confidential information about the Walters investigation and the grand jury. *Id.* ¶ 45. Chaves then met with reporter Susan Pulliam of *The Wall Street Journal* and informed her that the FBI was investigating Walters. *Id.* To this day, Walters does not know whether this was the first such meeting, or if Chaves and the other Defendants' conspiracy to violate his rights had begun even earlier. *Id.*

The purpose of the media disclosures was, at least in part, to establish a *quid pro quo* whereby Chaves would provide confidential investigative information for the reporters to use in stories, while the reporters would, in turn, provide investigative leads. *Id.* ¶ 46. Chaves specifically asked the reporters to notify him if they came across information regarding Walters. *Id.*

This *quid pro quo* was ultimately consummated. *Id.* ¶ 47. For example, Pulliam would call Chaves from time to time to describe what she had learned about Walters. *Id.* Chaves, for

his part, not only discussed confidential details of the investigation, but at times would also indicate to reporters when *their* sources had turned up false or incorrect information. *Id.*

Another purpose of the leaking was to obtain incriminating evidence that Walters was engaging in insider trading. *Id.* ¶ 48. The Government had secured court authorization to tap Walters' phone. *Id.* Chaves hoped that the publication of leaked information about the investigation would "tickle the wire" by causing associates or the media to call Walters to elicit incriminating statements. *Id.* But months of electronic surveillance yielded nothing. *Id.*

In mid-April 2014, Chaves dined with three reporters from *The New York Times* and leaked additional details about the investigation, telling *The Times* reporters about specific securities trades the FBI was purportedly investigating. *Id.* ¶ 50.

While most of the incriminating evidence has been withheld by the Government, text messages and phone logs indicate multiple calls between Chaves and *The Times'* Ben Protess, including an approximately 21-minute call on April 20, 2014. *Id.* ¶ 51. The content of those text messages and phone calls—and all other confidential information Chaves illegally conveyed to the press—remains unknown outside the DOJ and the recipients. *Id.*

C. The FBI and USAO Learn of the Leaks Almost Immediately.

Each of Defendants Bharara, Zabel, Kasulis, and Venizelos learned of the illegal leaking almost *a month before* the first leaked story appeared and were aware that a *Wall Street Journal* reporter was receiving confidential information about the investigation. *Id.* ¶ 52. Yet these Defendants did nothing to investigate the source of the leaks, and instead cooperated with journalists from *The New York Times* and *The Wall Street Journal*, thereby facilitating the deluge of ensuing leaks. *Id.*

On May 6, 2014, J. Peter Donald, the FBI's New York Field Office media representative, invited Chaves to a coffee meeting with Susan Pulliam of *The Wall Street Journal*. *Id.* ¶ 53. At that meeting, the three discussed the Walters investigation (which, at that point, was still supposed to be confidential). *Id.* Donald would later recall that Pulliam already had a high level of detailed knowledge about the investigation, including specific information about the subjects and securities involved. *Id.* Chaves had previously given Pulliam this information. *Id.*

Chaves would later admit that, at this meeting, Donald and he (illegally) confirmed the scope of the Walters investigation. *Id.* ¶ 55. After Pulliam revealed that she intended to publish an article about the investigation, Donald asked her to wait to allow the USAO to first discuss it internally. *Id.*

After that coffee meeting, the FBI alerted the USAO to the discussion with Pulliam and the impending article about the investigation. *Id.* ¶ 56. At this point, *more than three weeks before the first article*, both the FBI and the USAO were put on notice that someone had leaked confidential grand jury information about the Walters investigation to the media. *Id.* But no internal investigation was conducted. *Id.*

According to after-the-fact testimony by AUSA Kasulis, the FBI throughout this period kept the USAO apprised of its ongoing communications with *The Journal*. *Id.* ¶ 58. On May 22 and 23, 2014, *The Journal* asked to meet again with the FBI to discuss its upcoming story on the Walters investigation. *Id.* ¶ 59. The FBI and the USAO internally discussed whether to take the meeting. *Id.* The details of that discussion have been concealed from Walters, but the result is that the meeting took place between several FBI agents (including Chaves) and *Journal* staffers. *Id.*

On Tuesday, May 27, 2014, five members of the FBI agreed to meet with Pulliam, Michael Rothfeld, and an editor from *The Wall Street Journal*. *Id.* ¶ 60. Those individuals included Chaves. *Id.* Multiple FBI agents in attendance confirmed various aspects of the investigation, including a discussion of surveillance techniques used by the FBI.[3] *Id.* ¶ 61.

The evening after the meeting with *The Journal*, Chaves informed his supervisor that *The New York Times* also was inquiring about the confidential investigation and was likewise preparing to publish a story. *Id.* ¶ 63. The FBI and the USAO continued to communicate about the planned news articles and immediately alerted *The Journal*. *Id.* ¶ 64.

D. The FBI and USAO Accelerate Their Investigation In Coordination with the Media.

On May 29, 2014, after learning about the pending publicity regarding the investigation, the Chief Public Information Officer at the USAO (James Margolin) emailed six AUSAs, including Zabel and Kasulis, with an update about the USAO's contacts with the media. *Id.* ¶ 67.

The same day, Zabel responded that he, too, had been contacted by *The Journal* and confirmed that the newspaper had detailed, confidential information about the Walters investigation. *Id.* ¶ 68.

On May 29, 2014, the FBI approached two subjects of the investigation. *Id.* ¶ 70. Agents met with Tom Davis, Chair of Dean Foods, at his home in Texas and with Phil Mickelson at a golf tournament in Ohio. *Id.* Davis denied any wrongdoing and confirmed that

[3] Defendants dispute this fact in their memorandum. Def. Mem. at 8 n. 5. However, this factual dispute cannot be resolved on a motion to dismiss and Walters' allegation must be taken as true.

he never gave insider information to Walters. *Id.* Likewise, Mickelson denied any wrongdoing. *Id.*

E. The Media Publishes Articles Divulging Confidential Information About the Investigation.

Shortly after learning that it might get scooped by *The Times*, *The Journal* broke a story on May 30, 2014, by reporting that "federal investigators are pursuing a major insider-trading probe involving finance, gambling and sports." *Id.* ¶ 71. The article was headlined "*FBI, SEC Probe Trading of Carl Icahn, Billy Walters, Phil Mickelson; Insider Trading Investigation Began in 2011 with Unusual Trades in Clorox.*" *Id.* ¶ 72. It repeatedly referred to unidentified sources who were familiar with the investigation, and provided detailed information concerning the investigations into stock trading involving both Dean Foods and Clorox. *Id.* The following passages revealed key details of the ongoing investigation:

> "Federal investigators are pursuing a major insider-trading probe involving finance, gambling and sports, examining the trading of investor Carl Icahn, golfer Phil Mickelson and Las Vegas bettor William "Billy" Walters. The Federal Bureau of Investigation and the Securities and Exchange Commission are examining whether Mr. Mickelson and Mr. Walters traded illicitly on nonpublic information from Mr. Icahn about his investments in public companies, people briefed on the probe said."
>
> "The FBI and SEC are examining whether Mr. Walters on at least one occasion passed a tip on to Mr. Mickelson, these people said, and are studying the two men's trading patterns."
>
> "The government investigation began three years ago after Mr. Icahn accumulated a 9.1% stake in Clorox Co. in February 2011, said the people briefed on the probe. On July 15, 2011, he made a $10.2 billion offer for Clorox that caused the stock to jump. Well-timed trading around the time of his bid caught the attention of investigators, who began digging into the suspicious trading in Clorox stock, the people familiar with the probe said."
>
> "The investigators expanded their probe to look at trading patterns by Mr. Walters and Mr. Mickelson relating to Dean Foods Co.,

> said the people briefed on the probe. The FBI, following its approach to Mr. Mickelson on Thursday, expressed an interest in his trading in Dean Foods, a person familiar with the situation said."

Id.

Hours after *The Journal* article broke, Matthew Goldstein and Ben Protess wrote a story that ran in *The New York Times* with substantially the same information (but specifically highlighting the leading role that federal prosecutors in Manhattan were playing in the investigation). *Id.* ¶ 73. The article was headlined "*Investor, Bettor, Golfer: Insider Trading Inquiry Includes Mickelson, Icahn and William T. Walters.*" *Id.* It also revealed the length of the investigation (which no one outside the Government could have known) and disclosed information from telephone and trading records that were obtained using grand jury subpoenas. *Id.* Relevant passages include:

> "Federal authorities, whose investigation has dragged on for more than two years without yielding definitive evidence of insider trading, are also examining phone records to see whether Mr. Walters spoke to Mr. Icahn shortly before the trades."

> "In a separate strand of the investigation, federal authorities are looking into trading in Dean Foods that has no apparent connection to Mr. Icahn, the people briefed on the matter said. Mr. Walters and Mr. Mickelson placed the trades around August 2012, according to the people, just before the food and beverage company announced its quarterly earnings and a public offering of stock for one of its subsidiaries. The authorities are investigating whether Mr. Walters had a source inside the company itself— and whether others who know Mr. Walters may have traded on the information as well."

Id.

The media blitz continued during the next several days, with articles in *The Times* on May 31, and in *The Journal* on June 2. *Id.* ¶ 74. In addition to the many confidential details

obtained from the illegal leaks, the articles also provided a window into why the FBI and USAO were leaking the information:

> "A recounting of the government's tactics, described in interviews with people briefed on the matter, provides a case study in the hurdles of building an insider trading investigation. . . . [A] case can wither without a smoking-gun email, a loose-lipped cooperating witness or wiretapped conversations. In recent months, authorities have pored over phone records, the people briefed on the matter said, . . . [b]ut phone records provide only circumstantial leads."
>
> "While the publicity is likely to damage the government's ability to conduct covert surveillance, ***investigators can sometimes use publicity to their advantage. After news reports, the subjects of investigations will often discuss the reports or take actions to avoid being caught, and those maneuvers can cause them to get caught***, law enforcement officials have said." (Emphasis added.)

Id.

Indeed, at the time these articles were appearing, the investigators had installed a live wiretap on Walters' phone that they hoped would capture exactly these kinds of incriminating statements. *Id.* ¶ 75. For example, there was an immediate "tickle on the wire" in the form of calls to Walters' cell phone from *Journal* reporter Michael Rothfeld and *Times* reporter Matthew Goldstein. *Id.* Ultimately, *Walters did not make any incriminating statements*, and the Government never introduced any of the recordings at his trial. *Id.*

Details of this surveillance were disclosed in a *Wall Street Journal* article on June 1, 2014, headlined, "*Trade Probe Hits Snag as Surveillance is Derailed.*" *Id.* ¶ 76. The story revealed that the reporters were briefed about the Government's earlier use of pen registers and other surveillance techniques. *Id.* The article stated:

> "Authorities were considering the use of wiretaps in the investigation of the financier, gambler and golfer, people briefed on the probe said. Meantime, investigators were using other types of electronic and human surveillance in the probe, the people said. ***In recent weeks, potentially promising surveillance through such***

> ***methods had picked up in activity, the people said***." (Emphasis added.)
>
> "Even before the probe became public, investigators confronted roadblocks particular to the unusual nature of the people under scrutiny, according to the people briefed on the probe. As they considered whether they could wiretap Mr. Icahn, one of the people said, they learned that it could be hard to do so without him finding out because he owned a stake in a telecommunications company through which surveillance might have to be conducted."

Id.

F. Defendants Knew of the Leaks But Did Nothing to Stop Them.

When the *Journal* article was published on May 30, FBI New York Field Office media representative Donald circulated it via email to others, including Venizelos. *Id.* ¶ 77. Venizelos replied about an hour later to Donald and others (including Chaves), asking "[h]ow did [the reporter] find out about agent approaching PM [Phil Mickelson] on thursday [sic]. I don't buy that he [Mickelson] told them." *Id.* Venizelos instructed his staff to "not speak to this reporter again for now." *Id.*

Perhaps most significantly, Venizelos confirmed to his subordinates that the case against Walters was doomed. *Id.* ¶ 79. "If we don't have enough evidence by now its [sic] over," Venizelos wrote. *Id.* In other words, in addition to realizing that the leaks were being used to revive an investigation going nowhere, the senior-most FBI official in New York confirmed his clear understanding that one or more agents within his office were illegally leaking secrets to the media to jumpstart the investigation. *Id.*

Not only did Venizelos know that one of his own agents was leaking, but Bharara and Zabel knew as well. *Id.* ¶ 80. Bharara and Zabel had contemporaneously seen all the articles. *Id.* ¶ 81. Bharara sent Venizelos a link to the June 1 *Journal* article and made clear that they fully understood the source of the leaks came from within the DOJ. *Id.*

Despite knowledge of the leaks, the two highest DOJ officials in the Southern District of New York did absolutely nothing *for a full 30 months* to investigate and stop the flood of leaks. *Id.* ¶ 82. All Venizelos did was email various FBI agents, including Chaves, stating the obvious—the leaking "is now an embarrassment to this office." *Id.*

All information that has come to light since the leaks became public confirms that *neither the USAO nor the FBI did anything at this point to investigate or stop the leaks* aside from issuing rote directives "not to speak to any of the reporters involved." *Id.* ¶ 84. In fact, on or about June 12, 2014, an "astonish[ed]" Zabel, in a damning email, reported to Bharara and others that Zabel had spoken with *Times* reporter Protess. *Id.* ¶ 85. Zabel stated that Protess "was quite upset" that *The Times* had to issue corrections to his stories about the investigation and "blame[d] an FBI person (and it sounds like an agent) whom he [says] they have confirmed lied to the NYT and some other news orgs." *Id.*

According to Zabel, Protess disclosed that his FBI source "did not like being called out for lying or the story being walked back and was a bit threatening saying Ben [Protess] and the NYT are 'on the radar.'" *Id.* ¶ 86. Yet notwithstanding this confirmation that someone within the Department of Justice was leaking false narratives and ***had even threatened The Times with retribution***, Zabel recommended: "I don't think this should be discussed generally right now for a number of reasons but obviously we need to discuss and will need to address this with the FBI." *Id.*

Bharara and Zabel, therefore, had notice no later than June 12, 2014, that the FBI was engaged in a pervasive campaign of leaking—and even threatening journalists—relating to the investigation into Walters and others. *Id.* ¶ 87. But Zabel's conclusion—in which Bharara acquiesced—was that *nothing should be done. Id.*

In the absence of any meaningful effort by Venizelos, Bharara, Zabel, and Kasulis to halt the leaking, Chaves was emboldened and continued to unabashedly share confidential grand jury information with his media contacts. *Id.* ¶ 88.

Realizing the increased awareness within the DOJ and the FBI about his activities, Chaves switched to a personal cellphone to conduct and conceal his illegal operations. *Id.* ¶ 89. Chaves would later admit that he spoke with *The Times* reporters on his personal cellphone, on or about sometime between June 2 and June 11, 2014. *Id.* Chaves also admitted that, around that same time, he deleted a personal email account in an effort to cover up his communications with *The Times* reporters. *Id.* ¶ 90.

On June 10, 2014, the FBI approached Walters for the first time, but he declined to speak with them. *Id.* ¶ 91. The very next day, *The New York Times* ran another story that contained new details about the investigation, including the specific dollar amounts that Walters allegedly earned in the stock trades under scrutiny. *Id.* The timing of the article—one day after Walters invoked his constitutional right to counsel and declined to speak to the Government without his attorney present—further illustrates the Department's deliberate use of leaks to the media as a weapon against an investigative target. *Id.*

There can be no doubt that Bharara, Zabel, Kasulis, and Venizelos knew that an FBI agent was the leaker. *Id.* ¶ 92. In a telephone conversation on July 15, 2014, Walters' attorneys Jim Sanders and Richard Wright complained to Kasulis and AUSA Matthew Schwartz about the leaks of confidential information. *Id.* When Walters' lawyers pressed them about what the DOJ was doing to halt the outrageous leaking, Kasulis replied: "We completely hear what you are saying. We take very seriously the coverage in the press. We'll take all precautions we believe

are appropriate." *Id.* Yet, once again, Defendants Venizelos, Kasulis, Bharara, Zabel did nothing. *Id.* ¶ 93.

All told, *The New York Times* published five articles between May 30 and June 23, 2014, revealing confidential details of the investigation. *Id.* ¶ 94. *The Wall Street Journal* published eight articles between May 30 and August 12, 2015. *Id.* All of the above occurred while Defendants either actively participated in the illegal leaking or deliberately turned a blind eye to it. *Id.*

G. The Defendants Continue Their Cover-Up In District Court.

Walters was ultimately indicted on insider trading charges in May 2016 in the Southern District of New York. *Id.* ¶ 95. After his indictment, Walters brought the high likelihood, if not certainty, of illegal leaking by DOJ personnel to the District Court's attention. *Id.* On September 23, 2016, he filed a motion requesting a hearing to address possible Government misconduct relating to the leaks in the 13 articles. *Id.*

On October 21, 2016, the USAO filed an opposition in which it adamantly denied what it knew to be true for years: one or more Government agents were the source of the leaks. *Id.* ¶ 96. In this memorandum, approved by Bharara, Zabel, and Kasulis and submitted by Goldman and others, the USAO denied the allegations and deceived the District Court by arguing that Walters' claims were "baseless accusations [] undermined by the facts" and that "the source was not a Government official." *Id.* The DOJ derided a request by Walters' attorneys for an evidentiary hearing as "a fishing expedition," claiming unequivocally that there was no leak of grand jury information by a Government source. *Id.* The cover-up was in full bloom.

Kasulis submitted a declaration, under oath, stating that neither he nor the case agent leading the investigation day-to-day was the source of the leaks. *Id.* ¶ 97. But he conveniently

neglected to disclose to the District Court that, more than two years earlier, he, Kasulis, Bharara, and Venizelos had full knowledge and had been told expressly that someone within the DOJ (specifically, an FBI agent) was a source of the leaks. *Id.* This was a blatant attempt to mislead the District Court and to shut down any investigation.

On November 17, 2016, U.S. District Judge P. Kevin Castel ordered an evidentiary hearing into the alleged leaking by the FBI and/or USAO, finding that the newspaper articles in question were at the very least "suggestive of a government leak." *Id.* ¶ 100. It was **only after** the District Court ordered this evidentiary hearing that the USAO finally publicly acknowledged what it knew all along: there was at least one leaker in their midst. *Id.* ¶ 101.

On December 19, Judge Castel ordered the Government to give Walters the Government's internal report regarding the leaks, which document was approved by Bharara, Zabel, and Kasulis, and submitted by Goldman and others. *Id.* ¶ 106. In that letter, Bharara admitted what he had known for a long time, that ***"[i]t is 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.* ¶ 107.

Bharara's letter stated that Chaves had admitted to the leaks on December 6, 2016. *Id.* ¶ 108. Bharara claimed that Chaves and his admission of gross misconduct had been referred by the FBI to its Office of Professional Responsibility and by the USAO to the DOJ's Office of Inspector General. *Id.*

H. The District Court and the Court of Appeals Condemn the Illegal Actions of Defendant Chaves, But Provide No Remedy.

Walters sought to have his indictment dismissed and conviction overturned based upon Defendants' illegal conduct. *Id.* ¶ 112. While the conviction was ultimately upheld, both the

District Court for the Southern District of New York and the Second Circuit Court of Appeals condemned the illegal actions of Defendant Chaves. *Id.*

In a hearing on December 21, 2016, after the illegal Government leaks came to light, District Judge Castel candidly admitted:

> "I wasn't cynical enough to think that I was going to learn of deliberate disclosures by a special agent of the FBI and deliberate disclosures after the fact of leaks became known within the bureau and the U.S. Attorney's Office and a warning, a strongly-worded warning, was issued by a person within the bureau in a supervisory capacity. Human nature being what it is, I could certainly understand if an agent found themselves in communication with a member of the press and somehow a conversation got out of hand and went beyond where it should have, and the agent, without any real thought ahead of time, misspoke. *That is not what happened here.* This included dinner meetings and the like. I am a wiser person today for having been exposed to this. *To say I was shocked would be an accurate statement."* (Emphasis added.)

Id. ¶ 113.

During the hearing, Judge Castel expressed his deep skepticism about the Government's lack of candor. *Id.* ¶ 114. He concluded the hearing by cautioning that no one should "brush . . . under the carpet" what might be the USAO's "willful blindness" "where an office doesn't press too hard because they would prefer not to create friction with an agency that is so important to the success of the office." *Id.*

Judge Castel referred the matter to the USAO to review for possible prosecution for criminal contempt and/or obstruction of justice. *Id.* ¶ 119. Judge Castel even noted that, because members of the USAO may be "fact witnesses to aspects of" the illegal leaking, the USAO could refer the matter to an independent office or agency to investigate. *Id.*

Instead of referring the matter to an independent investigator, the FBI on December 8, 2016, referred Chaves' conduct to OPR, the internal division within the FBI responsible for investigating allegations of misconduct. *Id.* ¶ 120. On December 15, 2016, the USAO referred

Chaves' conduct to the OIG, an investigative body within the DOJ that conducts full-fledged criminal investigations into the conduct of DOJ employees. *Id.* On or about December 20, 2016, the OIG opened a criminal investigation into the leaks at issue here, including but not limited to Chaves' conduct. *Id.* Supposedly, DOJ's Public Integrity Section ("PIN") would oversee the OIG investigation. *Id.* All in all, no fewer than three governmental units were charged with investigating Chaves' admitted crimes. *Id.*

Nothing happened.

No known punishment has come from these internal investigations. *Id.* ¶ 121. Neither Walters nor the public knows the nature of the supposed criminal investigation, the outcome, or the reasons for taking no action after Chaves confessed. *Id.* Nor is there any public reporting of whether Chaves was disciplined in any manner for his admitted wrongdoing. *Id.* His retirement with full benefits in 2017 strongly suggests that he got away scot-free. *Id.*

Judge Castel also requested quarterly updates on the status of the investigations into Chaves and the illegal leaks. *Id.* ¶ 122. Such quarterly reports were provided to the District Court only until September 13, 2019. *Id.* Their substantive content was wholly redacted at DOJ's insistence, and no discipline or redress ever came from them. *Id.* Walters waited patiently for the results of the court-ordered investigation to redress the constitutional wrongs against him, but no redress ever came. *Id.* To this day, Walters has no idea what further misconduct may have been uncovered as a result of this court-ordered investigation or the results of the multiple probes. In short, the cover-up has never ended. *Id.*

In an Order dated March 1, 2017, denying Walters's motion to dismiss the indictment for Government misconduct, Judge Castel found that misconduct had occurred. *Id.* ¶ 123. Judge Castel concluded that Chaves had violated Rule 6(e) by illegally leaking grand jury information

to the media. *Id.* He further noted that "the government's artful opposition" to Walters' request for a hearing into the alleged leaks was misleading, at least to the extent "it confined itself to denials from limited sources and never disclosed high-level concerns over FBI leaks." *Id.*

In its decision on December 4, 2018, the Second Circuit Court of Appeals also acknowledged that ***Chaves' conduct "was highly improper."*** *Id.* ¶ 124. The Court explained: "The leaking of confidential grand jury information to members of the press, whether to satisfy public interest in high profile criminal prosecutions or to generate evidentiary leads, is ***serious misconduct and, indeed, likely criminal.***" *Id.* (emphasis added).

Despite the clear illegality of Chaves' conduct and the concerted efforts by the other Defendants to cover up his misdeeds, the Court of Appeals agreed with Judge Castel and concluded that the misconduct was not prejudicial to Walters and declined to overturn his conviction. *Id.* ¶ 125. In so deciding, the appellate panel acknowledged that "Chaves's misconduct is deeply troubling, and the decision to forgo a[n evidentiary] hearing prevents us from understanding if there were other cases like this one." *Id.*

In declining to overturn the conviction of Walters, however, the Court of Appeals in no way precluded a determination that Chaves' unlawful conduct—and the actions of the other Defendants in concealing it—violated Walters' due process rights, including his right to a fair, just and impartial investigation, grand jury proceeding, and trial. *Id.* ¶ 126.

In a concurring opinion, Senior Circuit Judge Dennis Jacobs poignantly observed: "The arresting feature of this case is that the supervisor of the FBI investigation [Chaves] was likewise involved in the illegal leaking of confidential information; and ***the leak of grand jury testimony is in some respects more egregious than anything Walters did***. . . . [W]ithout a hearing, ***it is unknown how far or where the abuse reached***. The FBI depends on the confidence of the

public, jurors and judges. That confidence is critical to its mission; so this kind of thing is very bad for business." *Id.* ¶ 127.

Shortly after the cessation of the ongoing investigation in the District Court, Walters brought the instant action.

III. LEGAL STANDARD

In order to satisfy Federal Rule of Civil Procedure 8, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Palin v. New York Times Co.*, 940 F.3d 804, 810 (2d Cir. 2019) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). "A claim is plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* The Court must "accept[] all factual claims in the complaint as true, and draw[] all reasonable inferences in the plaintiff's favor." *Rayner v. ETRADE Fin. Corp.*, 899 F.3d 117, 119 (2d Cir. 2018).

IV. WALTERS' CLAIMS ARE NOT FORECLOSED BY *HECK V. HUMPHREY*

Walters' claims are not a collateral attack on his underlying criminal indictment and conviction, and so the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994) does not apply. Walters does not dispute the basic premise that a civil tort claim cannot be used as a collateral attack on a criminal judgment. But that is not what is happening here.

"[I]f the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Heck*, 512 U.S. at 487. In the oft-cited footnote seven, the Supreme Court clarified that its ruling would not foreclose all suits for damages relating to a criminal judgment. The Court explained that "a suit

for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in [a criminal] conviction," because of, for example, "doctrines like independent source and inevitable discovery, . . . ***and especially harmless error***." *Id.* at 487 n.7 (emphasis added). As a result of those doctrines, a finding that a constitutional wrong occurred will not necessarily invalidate—or even impugn—a criminal conviction. *Id.* If the constitutional violation would not have necessarily overturned the conviction, there is no bar to a plaintiff pursuing civil damages. *Id.*; *see also Nelson v. Campbell*, 541 U.S. 637, 647 (2004) (noting that the Court was "careful in *Heck* to stress the importance of the term 'necessarily'").

In light of these controlling exceptions, the Second Circuit interprets the *Heck* doctrine narrowly. *See, e.g.*, *McKithen v. Brown*, 481 F.3d 89, 102 (2d Cir. 2007). In *McKithen*, which Defendants fail to cite in their brief, the Second Circuit—adhering to *Nelson*—emphasized that the "governing standard" for applying the *Heck* doctrine is whether prevailing in a civil suit "would *necessarily demonstrate* the invalidity of [plaintiff's] conviction or sentence; that a prisoner's success might be merely helpful or *potentially* demonstrative of illegal confinement is, under this standard, irrelevant." *Id.* (emphasis in original). Here, a finding in favor of Walters in this civil action would not *necessarily invalidate* his criminal conviction.

If the Defendants engaged in constitutional wrongdoing, but that wrongdoing amounted to harmless error in light of the other evidence warranting Walters' indictment and conviction, then *Heck* is no bar to this action. Importantly, this is exactly what the Second Circuit found in connection with Walters' underlying conviction. The issue before the Second Circuit was whether Walters had established "a due process violation" that was "so outrageous that common notions of fairness and decency would be offended were judicial process invoked to obtain a

conviction." *United States v. Walters*, 910 F.3d 11, 27 (2d Cir. 2018). The Second Circuit ultimately held that, while the "***misconduct at issue is deeply disturbing and perhaps even criminal***, it simply is not commensurate with the conduct in those cases where indictments were dismissed for coercion or violations of bodily integrity." *Id.* at 28 (emphasis added). Instead, the Court held that the injury to Walters was harmless error and non-prejudicial. *Id.*

Accordingly, the challenge raised in this action falls squarely within the *Heck* exception for constitutional violations that would not necessarily invalidate an underlying criminal conviction where those violations constitute harmless error. *Cf. Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 762 (9th Cir. 1991) (finding that a plaintiff's "civil rights claim would not be totally defeated even if the officers' misconduct was harmless in his criminal trial").

Importantly, the fact that the constitutional injury here may have been "harmless" vis-à-vis Walters' indictment and conviction does not make it harmless in the sense that no injury occurred. To the contrary, the Supreme Court has held that a plaintiff who has suffered a deprivation of due process rights may bring an action "for nominal damages without proof of actual injury." *Carey v. Piphus*, 435 U.S. 247, 266–67 (1978); *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) ("Carey obligates a court to award nominal damages when a plaintiff establishes the violation of his right to procedural due process but cannot prove actual injury."); *accord Kerman v. City of New York*, 374 F.3d 93, 123 (2d Cir. 2004) ("[W]hen a defendant has deprived the plaintiff of liberty or property without affording him a hearing as required by the Due Process Clause, but the defendant proves that the adverse action would have been taken even if a proper and timely hearing had been held, the plaintiff has not proved compensable injury and is entitled only to nominal damages."); *Robinson v. Cattaraugus Cty.*, 147 F.3d 153, 162 (2d Cir. 1998) ("If a jury finds that a constitutional violation has been proven but that the plaintiff has not shown

injury sufficient to warrant an award of compensatory damages, the plaintiff is entitled to an award of at least nominal damages as a matter of law.").

Nor is the authority cited by Defendants to the contrary. Instead, Defendants repeatedly cite cases in which the collateral attack on the underlying conviction is based on claims that, for example, key evidence in an underlying criminal conviction was wrongfully obtained. When the sole evidence that supports a criminal conviction is being attacked, it hardly bears explaining why such claims are indeed collateral attacks on a conviction—there can be no "harmless error" if a prosecutor's only evidentiary basis for an indictment and conviction is tossed out as wrongfully obtained. *E.g.*, *Warren v. Fischl*, 674 F. App'x 71, 73 (2d Cir. 2017) ("The very premise of Appellant's claims is that the defendants conspired to fabricate evidence and testimony against him and introduced such fabricated evidence and perjury at trial. Such claims, if proved, would demonstrate the invalidity of his conviction.").[4] That is not what is happening in this case, particularly given that the Second Circuit already ruled that any constitutional violation Walters may be able to prove would have been harmless error.

While Walters' underlying indictment and conviction may have been unjust in the colloquial sense of the word, the Second Circuit's determination that any constitutional injury to Walters was "harmless error" is not being challenged by this action. Instead, Walters seeks to

[4] To the same effect are the three other cases cited by Defendants. *See* Def. Mem. at 22. In *Peay v. Ajello*, 470 F.3d 65, 68 (2d Cir. 2006), the Second Circuit upheld the *Heck* bar where the alleged constitutional violation—conspiracy to fabricate evidence by the prosecutor and defense attorney—left "no doubt that plaintiff's allegations . . . would render the conviction invalid if proved." In *Walker v. Kim*, 2020 WL 7685100 at 6 (S.D.N.Y. Apr. 24, 2020), the District Court applied *Heck* because "'the entire evidentiary basis for the charged offense derives from . . . a single search now being questioned.'" And in *Perez v. Cuomo*, 2009 WL 1046137 at 2–3, 7 (E.D.N.Y. Apr. 17, 2009), as in *Peay* and *Warren*, *supra,* the barred claim was that the police had fabricated the only evidence presented against the defendant.

vindicate his constitutional rights *even though* the redress he seeks will do nothing to impugn or invalidate his conviction. *Heck* is no bar to such claims.

V. WALTERS' CLAIMS ARE NOT TIME BARRED

Defendants improperly seek to use their own obfuscation and delay as a sword to bar Walters from asserting his claims. Those efforts should not be rewarded. Instead, the Court should find that Walters' claims accrued no earlier than September 2019 (or were tolled up to that point) as a result of Defendants' purported investigation into the unconstitutional leaks, which investigation induced Walters to refrain from asserting civil claims any sooner.

"The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense." *Zumpano v. Quinn*, 6 N.Y.3d 666, 673–74 (2006). New York law, which governs the applicable statute of limitations, affords courts with the power "both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding." *Gen. Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125, 128 (1966). Equally important, whether equitable estoppel applies so as to either deem Walters' claims to have accrued no earlier than September 2019 or toll the limitations period up to that point are factual issues that cannot be resolved on a Rule 12(b)(6) motion to dismiss. *See, e.g.*, *Pesnell v. Arsenaault,* 543 F.3d 1038, 1163 (9th Cir. 2008); *Gen. Stencils, Inc.*, 18 N.Y. 2d at 128 (claim of equitable estoppel raises "issues of fact to be resolved" at trial).

In this case, Walters' ability to assert claims for the violations of his constitutional rights has been stymied by the Defendants' concerted efforts to hide from Walters the full scope of their wrongdoing. While the first hints of Defendant Chaves's leaks began to emerge at the end

of 2016, it was a laborious process over several years of court-supervised investigations that started to shed light on the fuller picture of how Defendants infringed his rights.

Once the Government was forced to acknowledge that one of its own was the culprit of the leaking, a multi-year internal investigation purportedly began that was to be supervised by U.S. District Judge Castel. Specifically, after Defendants Bharara, Zabel, Kasulis, and Goldman, through the U.S. Attorney's Office, were forced to make their about-face, cease the cover-up, and acknowledge the government leaks in December 2016, Judge Castel ordered the Department of Justice to furnish quarterly reports about the government's ongoing investigation. The purpose of these reports was, ostensibly, to identify all of the culprits and co-conspirators who assisted in leaking the confidential grand jury information and, most importantly, covering up the leaks. *But the substantive content of those quarterly reports has been redacted and hidden from Walters.* Compl. at ¶ 122. To this day, Walters does not know the full scope of what the government's own internal investigation uncovered.

Nonetheless, Walters waited patiently for the results of this investigation, expecting that, once all the information was presented to Judge Castel, Walters would obtain some redress for the violation of his rights. But the reports abruptly stopped in September 2019, and no remedy, punishment, or resolution came from them. Compl. at ¶ 122. Defendants Bharara, Zabel, Kasulis, and Goldman deliberately and concertedly refused to investigate or otherwise redress the wrongdoing committed by Defendant Chaves, despite their express representations to the Court that they would do so. Walters had been induced throughout the entire pendency of that investigation to "wait and see" what Defendants' investigation would turn up. The results of that investigation would have clarified the full scope and nature of any potential civil claims—or,

perhaps, resulted in such punishment and compensation as to obviate any civil claims based on the availability of alternative remedies.

But it is now clear that this "investigation" was a sham, little more than a ruse to delay any repercussions for the Defendants' cover-up. When the investigation abruptly halted without any resolution, Walters was left without any remedy and without a full picture of the government's wrongdoing. Walters' only remaining recourse became a civil cause of action under *Bivens* for the constitutional violations as he then understood them.

It would be manifestly unjust to conclude that Walters' cause of action accrued while the government was purportedly investigating the circumstances under which Walters' rights were violated. Indeed, if Walters had filed a damages complaint during this period, the government would likely have argued that Walters' complaint was premature and speculative. In order to avoid this unjust result allowing the Defendants to escape accountability due to continuing unlawful conduct, the Court should use its equitable powers to find that the rights to relief raised in the Complaint did not accrue and were equitably tolled through at least September 2019, and that Defendants are equitably estopped from asserting a statute of limitations defense in this action.

VI. WALTERS' CLAIMS ARE NOT BARRED BY COLLATERAL ESTOPPEL.

The claims asserted by Walters in this action are not barred by collateral estoppel because they were never previously asserted, much less actually litigated. Defendants argue that Walters "filed a motion to dismiss the indictment on the same grounds raised in this suit." Memorandum of Law in Support of the Motion to Dismiss and to Stay Discovery by Defendants Bharara, Venizelos, Zabel, Kasulis, and Goldman (Dkt. No. 48) ("Def. Mem.") at 27. Defendants go on to argue that the District Court rejected this claim and found that Walters was not prejudiced. *Id.*

But that characterization fundamentally misrepresents what was actually decided by the District Court and the Second Circuit in Walters' criminal case.

In both cases, the reviewing court considered whether the illegal leaks and purported unfairness of the investigation was so pervasive and prejudicial as to undermine the validity of the indictment and conviction themselves. *Walters*, 910 F.3d at 27 ("To meet the 'very heavy' burden of establishing a due process violation to dismiss an indictment for outrageous governmental misconduct, a defendant must show that the Government's conduct was "so outrageous that common notions of fairness and decency would be offended were judicial process invoked to obtain a conviction.").

Neither the District Court nor the Second Circuit considered the separate question of whether there was a constitutional violation that may not have risen to a level that warranted overturning the conviction. *See Walters*, 910 F.3d at 27 (finding that the leaks did not constitute "outrageous conduct sufficient to warrant dismissal" and did not "shock[] the conscience"). This heightened "shock the conscience" standard is not at issue in this action.

To apply collateral estoppel, Defendants must show that "the identical issue was raised in a previous proceeding" and that "the issue was actually litigated and decided in the previous proceeding" (among other requirements). *Bouchard Transportation Co. v. Long Island Lighting Co.*, 807 F. App'x 40, 42 (2d Cir. 2020); *Levy v. Kosher Overseers Ass'n of Am., Inc.*, 104 F.3d 38, 41 (2d Cir. 1997) ("For collateral estoppel to apply, the issue in the earlier proceeding must be identical to the issue in the later one.").

No prior court has ever adjudicated whether Walters suffered a constitutional injury. The prior courts reviewing his criminal conviction *necessarily assumed a constitutional violation* but considered only whether any purported constitutional violation was so pervasive as to invalidate

the criminal proceedings against Walters altogether. Since that heightened standard is not at issue in this action, it cannot form the basis of any estoppel. *See Bouchard Transportation Co.*, 807 F. App'x at 42 ("[I]ssues are 'not identical if the second action involves application of a different legal standard.'") (*citing and quoting B & B Hardware, Inc. v. Hargis Industries, Inc.,* 575 U.S. 138. 154 (2015)); *see also* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 4417, p. 449 (2d ed. 2002) ("[I]ssues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits may be the same").[5]

VII. THE COURT SHOULD RECOGNIZE A *BIVENS* REMEDY FOR WALTERS.

Pursuant to the Supreme Court's landmark decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and its progeny, this Court has the power to imply a damages claim for a constitutional violation that is otherwise not provided for by statute. In *Bivens*, the Supreme Court allowed a claim for damages to proceed to compensate persons injured by federal officers who violated the Fourth Amendment and conducted an unreasonable search and seizure. 403 U.S. at 397. In subsequent cases, the Court has afforded a

[5] Nor does the authority cited by Defendants warrant a different conclusion. *See* Def. Mem. at 30. In *Walker*, *supra*, and *Pou v. DEA*, 923 F. Supp. 573 (S.D.N.Y. 1996), the criminal court decided there had been no illegal search and the civil court therefore barred relitigation of the legality of the search in the later *Bivens* case. In *Abdul-Whab v. Orthopedic Assn of Dutchess*, 415 F. Supp. 2d 293 (S.D.N.Y. 2006), factual claims as to the voluntariness of plaintiff's statements and racial profiling had been previously denied in the criminal trial. And in *Schmidt v. Ladd*, 1997 WL 188123 at 3 (S.D.N.Y.), the court estopped the *Bivens* claim only "to the extent" it affected the underlying criminal conviction. Here, in contrast, there has been no factual determination that Chaves did not violate Rule 6(e) and illegally provide investigative information and secret grand jury material to the press. Indeed, both the District Court and the Second Circuit assumed he had. In addition, no court has absolved the other Defendants of any constitutional violations. And, of course, Walters in this case is not using a civil damages claim to attack his underlying conviction.

remedy for a plaintiff suing a Congressman for gender discrimination in staff hiring, relying on the Fifth Amendment's equal protection guarantee (*Davis v. Passman*, 442 U.S. 228 (1979)) as well as a remedy for a prisoner's wrongful death suit after federal jailers failed to treat the prisoner's asthma under the Eighth Amendment (*Carlson v. Green*, 446 U.S. 14 (1980)).

While this case may present a new context for the *Bivens* remedy, for the reasons discussed below, it is ripe for civil redress. The basic constitutional right underpinning Walters' claims arises from the Supreme Court's recognition "that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. of California v. Petrol Stops Nw.*, 441 U.S. 211, 218–19 (1979). The constitutional importance of the grand jury is expressed in the Fifth Amendment itself: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. Const., Amend. V. These constitutional norms have been further codified by Rule 6(e) of the Federal Rules of Criminal Procedure, which tightly regulates how and when grand jury information may be disclosed.

Grand jury secrecy—and the scrupulous enforcement of that secrecy by federal law enforcement agents—serves several critical purposes, best articulated by the Supreme Court in *Douglas Oil*:

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings,

> we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Importantly, this requirement of secrecy also benefits indicted individuals, and therefore implicitly confers on them some inherent rights to protect and enforce that secrecy. *Id.* at 219 n.9 ("[T]he purpose for grand jury secrecy originally was protection of the criminally accused . . . ."). Indeed, the tradition of grand jury secrecy is long-standing and well-established. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1150 (D.C. Cir. 2006) (describing grand jury secrecy as "the persistent rule for grand jury proceedings for at least four hundred years").

Here, the question before this Court is whether Defendant Chaves's deliberate and repeated leaking of confidential grand jury information in order to materially impact a criminal investigation into Walters—and the remaining Defendants' willful decision to cover up and not investigate that leaking—gives rise to a civil damages remedy for violation of the constitutional right to a confidential and impartial grand jury investigation. While no court in the Second Circuit has yet been confronted with that specific question, the principles of *Bivens* counsel in favor of recognizing such a remedy.

When considering whether to imply a *Bivens* remedy, the Supreme Court has identified a number of key factors. Among those factors is "whether the Judiciary is well suited . . . to consider and weigh the costs and benefits of allowing a damages action to proceed." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017). Given that the substantive right at issue here (the right to a secret grand jury) is operationalized by Rule 6(e) of the Federal Rules of Criminal Procedure, the violation here is something that the judiciary is uniquely well suited to enforce. *See, e.g.*, *Powell v. United States*, 2020 WL 5126392 at 11 (S.D.N.Y.) ("'[F]ederal courts have an obligation to set their face against enforcement of the law by lawless means'"). Indeed, federal

courts routinely enforce violations of the Federal Rules in contempt actions. *See, e.g.*, *United States v. Eisenberg*, 711 F.2d 959, 964 (11th Cir. 1983) ("A prima facie showing of a Rule 6(e) violation requires the district court to entertain the petition and order the government to take steps to stop any publicity emanating from its employees."); *United States v. Ellerman*, No. 07-cr-00080-JSW (N.D. Cal. July 13, 2007) (sentencing defendant for contempt, making a false declaration, and obstruction of justice for leaking grand jury information to the press); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983) ("[G]overnment attorneys and their assistants[ ] and other personnel attached to the grand jury are forbidden to disclose matters occurring before the grand jury."); *United States v. Girardi*, 62 F.3d 943, 944 (7th Cir. 1995) (affirming criminal conviction for grand juror who leaked grand jury information). There is no reason to believe that a civil suit enforcing the constitutional principle that underlies those federal rules would present a meaningfully different inquiry.

Federal courts further consider whether an alternative remedy (other than an implied *Bivens* remedy) exists. *Ziglar*, 137 S. Ct. at 1858. Here, a contempt action against the federal officials who violated Rule 6(e) cannot constitute an adequate remedy for numerous reasons. First, because the underlying criminal action has concluded, there is no other court with jurisdiction to take any remedial action resulting from the illegal leaks. Second, at least Defendants Bharara and Chaves are no longer employed by the Government, and so alternative disciplinary measures are unlikely to be available. Third, a plaintiff in an ordinary Rule 6(e) contempt action is not "entitled to seek monetary damages or attorneys' fees and costs from an errant prosecutor, even though such damages are commonly awarded in [other] civil contempt actions." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1070 (D.C. Cir. 1998).

The remedies that Defendants point to as alternatives are not only inadequate, but entirely unrelated to the injury alleged in this action. In particular, Defendants point to "remedies that include monetary compensation for certain criminal defendants," including suits against the government for damages arising from a wrongful conviction under 28 U.S.C. §§ 1495, 2513 and under the Hyde Amendment for vexatious litigation. Def. Mem. at 45. *But each of these purported remedies arise from claims of wrongful conviction or bad faith prosecution.* They in no way relate to the injury caused by violations of Rule 6(e) and the intentional, prolonged disclosure of confidential grand jury information. The undeniable reality is that there is no remedy—adequate or otherwise—aside from a *Bivens* action for damages arising from the Defendants' wrongful conduct.

Many other factors counsel in favor of implying a *Bivens* claim here. The action would primarily target individual actors (the leaker and those who enabled him) and is not seeking to change agency policy. On the contrary, the stated policy of the Government is that such leaks are illegal and extremely disfavored. Criminal Resource Manual, U.S. Department of Justice, at 156 (available at https://www.justice.gov/archives/jm/criminal-resource-manual-156-disclosure-matters-occurring-grand-jury-department-justice-attys) ("The unauthorized disclosure of grand jury information can also be punished under other criminal statutes as well as pursuant to a district court's contempt powers."). Indeed, both the trial court and appellate judges all roundly condemned the leaks based on applicable law. Nor will this case result in a "wide-ranging inquiry into . . . discretionary judgments . . . about . . . response[s] to media reporting about a pending criminal investigation." Def. Mem. at 37. To the contrary, the inquiry will be about responses to illegal leaks and whether that illegal conduct must be investigated or can simply be

covered-up, none of which involves the exercise of legitimate discretion. *Cf. Powell*, *supra* at 10 (prosecutor does not have discretion to engage in illegal conduct).[6]

Finally, discovery in this action would not be materially different from the sort of discovery that is specifically authorized in an evidentiary hearing in connection with an alleged Rule 6(e) violation. Defendants object that such discovery would be unduly invasive given that no Rule 6(e) hearing ever took place and given the highly sensitive nature of the grand jury information. The failure of the District Court to conduct an evidentiary hearing—as criticized by the Second Circuit—is the reason why discovery is warranted here. Furthermore, it would be ironic indeed if Defendants could avoid discovery into the massive, sustained, and wrongful leaking of confidential grand jury information here by pointing out that the subject matter of that discovery is confidential. Of course, because the federal judiciary has ample means of maintaining confidentiality within litigation, the sensitivity of the underlying grand jury material should be no bar to discovery in litigation.

This Court may cabin discovery as it sees fit to best protect the confidentiality interests and the ordinary functioning of the Department of Justice. The fact that Defendants engaged in wide-ranging violations of Walters' rights in a way that specifically touched on sensitive and confidential information should not give them *de facto* immunity from a *Bivens* action. Defendants cannot be allowed to escape accountability by pointing to the enormity of their egregious unlawful conduct.

[6] As in *Powell*, moreover, and unlike in *Zigler*, the claim here "challenges the same species of run-of-the-mill low level law enforcement behavior at issue in *Bivens*," not acts like those in *Zigler* that implicated national security. *Powell*, supra at 10.

VIII. DEFENDANTS ARE NOT IMMUNE FROM SUIT.

In attempting to invoke qualified immunity, Defendants once again misconstrue the nature of the constitutional harm at issue in this case. Defendants argue that in order to show that Defendants violated a "clearly established" constitutional right, Walters must plausibly allege not only that there were improper leaks, but also that those leaks were the direct cause of a deprivation of the right to a fair trial. Def. Mem. at 40–41 (citing *Powers v. Coe*, 728 F.2d 97, 105–06 (2d Cir. 1984)). That standard applies, however, only when a plaintiff alleges an injury to his or her ***right to a fair trial*** and seeks to overturn a conviction. But Walters is not challenging the fairness of his trial in this action—indeed, this case is not an attack on the propriety of his indictment or conviction.

Instead, the gravamen of the constitutional injury here is in the leaks themselves (along with the cover up and failure to investigate those leaks), irrespective of any impact they may have had on his ultimate conviction. The importance of grand jury confidentiality to a criminal defendant's due process rights is so paramount that it is a constitutional interest worth protecting even when it does not result in the deprivation of a fair trial. As such, the Court in this action need not reach the question of whether the Defendants' actions deprived Walters of a fair trial, and that inquiry is irrelevant for purposes of a qualified immunity analysis.

In determining whether Defendants are immune from suit, the Court must consider whether, in light of preexisting law, the unlawfulness of the officer's conduct is "apparent." *Ziglar*, 137 S. Ct. at 1866–67. "It is not necessary, of course, that 'the very action in question has previously been held unlawful,'" nor that there be a reported case "directly on point." *Id.* Qualified immunity is no help to those government officials who are "plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Here, as alleged in the Complaint, it is indisputable that Chaves himself acted in knowing and flagrant violation of the law.[7] Federal Rule of Criminal Procedure 6(e) expressly provides that government agents "must not disclose a matter occurring before the grand jury." Fed. R. Crim. P. 6(e)(2)(B)(vi), 6(e)(2)(B) (vii) and 6(e)(3)(a) (ii). The Second Circuit previously determined that Chaves' actions were "serious misconduct and, indeed, likely criminal." *Walters*, 910 F.3d at 23. Such leaks may constitute obstruction of justice under 18 U.S.C. § 1503 or civil contempt. *Id.* Any willful leaker knowingly violates the law. *See, e.g.*, *Sec. & Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1382 n. 36 (D.C. Cir. 1980) ("The rationales for grand jury secrecy are well established."). Defendant Chaves cannot be deemed immune for his willful violation of the rules and norms enshrining grand jury secrecy.

By the same token, those who cover up, enable, and fail to investigate an intentional leaker can reasonably anticipate that their conduct is unlawful. It is clearly established in the Second Circuit that a supervisor may be liable for "failure to inquire," when the supervisor is on notice that a subordinate is engaged in wrongdoing. *Poe v. Leonard*, 282 F.3d 123, 141 (2d Cir. 2002). "Such notice could be actual (for example, awareness of prior deprivations in a related context), or it could be constructive (for instance, notice arising from a preexisting duty)." *Id*.

Here, Walters has plausibly alleged that each of Defendants Bharara, Zabel, Kasulis, and Venizelos learned of the existence of the government leaks long before they became public (and that Goldman learned of them before disclosure to the District Court) and yet took no

[7] Walters expressly alleges that Chaves deliberately and willfully divulged confidential information pertaining to an ongoing secret grand jury investigation to the media in knowing violation of his duties and obligations as a federal law enforcement agent. Compl. at ¶ 165.

investigative actions whatsoever to stem the tide of leaks. Compl. at ¶ 166.[8] On these facts, the Defendants cannot be held to be immune from suit for their failure to investigate or otherwise remedy the ongoing leaking by Defendant Chaves. Otherwise, no citizen is safe from federal prosecutors creating a culture of official criminality by turning a blind eye and willfully ignoring their duties to supervise and discipline wayward FBI agents for violating fundamental constitutional rights.

IX. CONCLUSION

The Complaint alleges facts indisputably demonstrating that Defendants engaged in wrongful conduct. The question for this Court is whether that wrongful conduct merits a civil remedy. For the foregoing reasons, Walters respectfully requests that the Court deny Defendants' motions to dismiss and allow Walters to seek judicial redress for Defendants' flagrant abuse of the grand jury process.

[8] Walters explicitly alleges that Defendants Bharara, Zabel, Kasulis, Venizelos, and Goldman knowingly infringed Walters' constitutional rights and understood that their conduct was unlawful. *E.g.*, Compl. at ¶ 168.

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Respectfully submitted,

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