12-240

In the
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

v.

STAVROS M. GANIAS,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Connecticut

REPLY BRIEF OF DEFENDANT-APPELLANT STAVROS M. GANIAS

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I. The Seizure and Two-and-a-Half Year Retention of Ganias's Personal Financial Records Was Unreasonable and Requires Suppression.

A. Settled Fourth Amendment Doctrine Compels Suppression of Documents Seized and Indefinitely Retained Outside the November 2003 Warrant's Scope.

Mr. Ganias and the Government disagree on many points, but on one key issue there is common ground: All agree that the crucial evidence used to convict Ganias of tax evasion—his personal QuickBooks file—was seized outside the scope of a November 2003 warrant and then retained by the Government for two-and-a-half years without judicial approval. The District Court expressly found as much in its "24-page detailed opinion." Gov. Br. at 12; *see* SA22, SA27. The Government has conceded as much in its brief. Gov. Br. at 32–33 (acknowledging that "the November 2003[] warrant" did not extend to "the accounting data of Taxes International and Ganias's personal spreadsheets"). And the federal agents who worked on this case recognized throughout their investigation that Ganias's personal financial records were not among the "items" that the November 2003 warrant authorized "to be seized." *See* JA348. The agents nonetheless decided to retain those records indefinitely, along with millions of other files on Ganias's computers, because (as one agent put it) "you never know what data you may need

in the future," *see* JA122, especially in an "evolving," "multi-agency" investigation, *see* Gov. Br. at 30.

There is no evolving-investigation exception to the warrant requirement, and this Court should not create one now. Courts have long held that the seizure of "papers" outside the "scope of [a] warrant[]" violates the Fourth Amendment and requires "suppress[ion]." *See Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976); *United States v. Matias*, 836 F.2d 744, 747 (2d Cir. 1988) ("when items outside the scope of a valid warrant are seized, the normal remedy is suppression and return of those items"). It may be that where the records to be reviewed are unusually "volum[inous]," agents may sometimes need to extract all of the files from a hard drive (or, for that matter, seize all of the papers in a "file cabinet") for later offsite review and "sorting." Gov. Br. at 21–22; *see* Opening Br. at 25–27 (discussing cases). But even then, courts have uniformly held that the Government must expeditiously complete its offsite search and "promptly return[]" the files seized outside the warrant's scope. *United States v. Santarelli*, 778 F.2d 609, 615–16 (11th Cir. 1985); *see* Opening Br. at 25–26 & n.25 (discussing cases). Thus, as the Ninth Circuit concluded more than 30 years ago, when federal agents executing a warrant indiscriminately seize boxes full of documents and retain them for "months" even *after* the responsive files have been identified, this long-term

retention of private papers constitutes "an unreasonable and therefore unconstitutional manner of executing the warrant." *United States v. Tamura*, 694 F.2d 591, 596–97 (9th Cir. 1982), *see United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1169 (9th Cir. 2010) (en banc) (*Tamura* "disapproved the wholesale seizure of the documents and particularly the government's failure to return the materials that were not the object of the search once they had been segregated").

The same constitutional infirmity is present here. In November of 2003, Army officials investigating allegations of procurement fraud by two of Ganias's accounting clients came to Ganias's office and executed a warrant for "data . . . relating" to the "operations" of those two companies. SA27; *see* JA433. The "confidential source" that tipped the Army off had not alleged that Ganias himself was in any way complicit in his clients' fraud, *see* JA440–45, and the agents had no warrant to seize any other files from Ganias's computers. Nonetheless, because the agents believed that onsite review of Ganias's electronic files was infeasible, they "ma[d]e mirror image" copies of every file on the computers and spent 13 months identifying and segregating the responsive records. SA9–10, SA15–17. Once that process was complete, the agents elected to retain the millions of non-responsive files found on Ganias's computers for another *16 months*, at which

point agents from the IRS targeted Ganias for evasion of his income taxes and sought a second warrant to search preserved images of Ganias's personal financial records. *Id.*; *see* Opening Br. at 6–12, 37. No less than the mass retention of non-responsive documents in *Tamura*, the retention of Ganias's private files for more than a year after the responsive records had been identified amounted to an "unreasonable and . . . unconstitutional manner of executing" the November 2003 warrant. *See Tamura*, 694 F.2d at 596–97.[1]

B. The Government Has No Power to Seize and Retain Private Records Beyond the Scope of a Warrant and "Without Temporal Limitation."

Undeterred by the November 2003 warrant's limited scope, the Government claims that the Fourth Amendment permits agents to retain data seized from Ganias's computers "indefinitely and 'without temporal limitation.'" Gov. Br. at

[1] The Government's sole ground for distinguishing *Tamura* is that the Ninth Circuit did not order suppression of evidence in that case. Gov. Br. at 37–38. What the Government does not mention is that "[a]ll of the documents introduced at trial" in *Tamura* were "described in and . . . taken pursuant to" the warrant. 694 F.2d at 597 (seizure of "items outside the scope of [a] warrant" does not generally necessitate "suppression of evidence within the scope of a warrant"). Here, by contrast, all agree that the November 2003 warrant did not extend to the key pieces of evidence at Ganias's trial—his personal QuickBooks records. JA433; *see* SA22 & SA27 (District Court's opinion); Gov. Br. at 32–33; JA348 (Agent Hosney). The "normal remedy" for seizure of items "outside the scope of a valid warrant" has always been "suppression and return of those items," *see Matias*, 836 F.2d at 747, and this normal remedy is fully applicable here. *See infra* at 16–18; Opening Br. at 45–48.

30. The Government, in other words, claims a right to unilaterally convert its narrow warrant into a blanket license to take permanent custody of all of Ganias's electronic records, without ever having to relinquish "even one bit of data that is clearly outside the scope of the warrant." *See United States v. Collins*, no. 11-00471, 2012 U.S. Dist. LEXIS 111583, *4–*5 (N.D. Cal. Aug. 8, 2012). For the rest of Ganias's life, images of his web-browsing history, his email correspondence, and all of his other private records may remain preserved for future review in the Government's "evidence room," *see* JA122, and "Ganias cannot impose a[ny]" limits on this massive data-retention program. Gov. Br. at 30–31.

The Government offers no sound reason to invest federal agents with this new authority to effect general, unbounded seizures of private records.

1. The Magistrate Judge's Omission of an Express Deadline for Return or Destruction of Non-Responsive Files Does Not Insulate the Government's Execution of the Warrant from Judicial Review.

The Government's lead argument in favor of this new power is that, unless the issuing magistrate judge includes an express deadline for completing offsite review and returning non-responsive files, this Court "cannot impose a time limit on" the execution of a computer warrant "after the fact." Gov. Br. at 30–31. This has it exactly backwards. The "manner in which a warrant is executed" has always

been "subject to later judicial review as to its reasonableness." *Dalia v. United States*, 441 U.S. 238, 258 (1979); *see, e.g.*, *Tamura*, 694 F.2d at 596–97; *Matias*, 836 F.2d at 747. By its very nature, Fourth Amendment analysis turns heavily on the particular "factual circumstances" in a given case, and an informed assessment must take place "after th[e] circumstances unfold, not before." *Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008) (en banc). The decision of a magistrate judge to include (or not to include) an *ex ante* restriction in a warrant is thus no substitute for later judicial review. This Court must reach its own decision on whether indefinite retention of files outside of a warrant's scope amounts to an "unconstitutional manner of executing the warrant." *See Tamura*, 694 F.2d at 596–97.

The need for this Court's review is particularly urgent in light of the extremely narrow role that magistrate judges play in this area. To be sure, a number of magistrate judges have in recent years begun to include express directives in computer warrants regarding the time for completing off-site searches and for returning files not covered by the warrant. *E.g.*, *In re Search of the Premises Known as 1406 N. 2nd Avenue*, No. 2:05-MJ-28, 2006 WL 709036, at *7 (W.D. Mich. March 17, 2006) (90-day deadline for off-site search); Opening Br. at 40 & n.20 (discussing additional cases). This nascent trend, however, is both

controversial and uneven. Some commentators have argued that *ex ante* restrictions on the execution of "computer warrants [are] both constitutionally unauthorized and unwise." Orin S. Kerr, *Ex Ante Regulation of Computer Search & Seizure*, 96 Va. L. Rev. 1241, 1246–47 (2010) ("whatever limitations courts impose on the execution of computer warrants, those limits should be developed and identified in *ex post* challenges"). Many magistrate judges, as well, have been reluctant to impose such restrictions. Given these variations in practice, it would make little sense to hold that magistrate judges have now ousted Article III courts from their traditional role of reviewing the "manner in which a warrant is executed." *See Dalia*, 441 U.S. at 258.

In fact, not even the Government really believes that magistrate judges should take on this new role. Notwithstanding the arguments in its brief, the Government has long instructed its "prosecutors" to "oppose" attempts by magistrate judges to set *ex ante* "time limits on law enforcement's examination of seized evidence." Exec. Office for U.S. Attorneys, *Searching and Seizing Computers and Obtaining Evidence in Criminal Investigations* 93–94 (2009) ("DOJ Manual").[2] The Government's position has been that the magistrate judge

[2] Available at http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf.

should simply issue the warrant and then "permit the parties to litigate the constitutional issues afterwards." DOJ Manual, *supra*, at 93. That is exactly what Ganias is seeking to do here. The time to litigate the "constitutional issues" raised by the Government's indefinite retention of computer records is now.

Nothing in *United States v. Anson*, 304 Fed. App'x 1 (2d Cir. 2008), is to the contrary. *See* Gov Br. at 30–31. In *Anson*, the computer seized by federal agents contained child pornography, *see* 304 Fed. App'x at 3, which meant that the computer hardware was itself contraband subject to seizure and forfeiture. *See United States v. Hay*, 231 F.3d 630, 637 (9th Cir. 2000) (upholding seizure of entire computer as contraband in child pornography case). The object of the warrant in *Anson* was thus the computer hardware itself. 304 Fed. App'x at 3 ("the August 2, 2004 Order Amending Search Warrant . . . permitted the government to retain the 'computers and computer-related equipment' without temporal limitation"); *see* DOJ Manual, *supra*, at 61–62, 70–72 ("If computer hardware is contraband, . . . the warrant should describe the hardware itself"). Here, by contrast, Ganias's computer and the files stored within it are not contraband, and the warrant only authorizes seizure of particular files relating to IPM and American Boiler. SA27; *see United States v. Carey*, 172 F.3d 1268, 1275 (10th Cir. 1999) (warrant to seize evidence stored on computer must specify "which type of files are

sought"); DOJ Manual, *supra*, at 72 ("[i]n cases where the computer is merely a storage device for evidence," warrant must "focus on the relevant files"). Unlike *Anson*, then, the warrant in this case simply does not support the Government's seizure and indefinite retention of every file from Ganias's computer.

2. The Government's Desire to "Maintain . . . Evidentiary Integrity" Does Not Justify Retention of Data Outside of a Warrant's Scope.

The Government's purported need "to maintain the evidentiary integrity" of its "mirror image," *see* Gov. Br. at 34–35, also does nothing to justify indefinite retention of files beyond a warrant's scope. It may be true that matching "the 'hash value'" of Ganias's computer with "the 'hash value' of the mirror image" is one possible way of "authenticat[ing] [the] evidence" at trial. *Id.* at 34. Other means of authentication are also available, however, and those alternatives have the benefit of avoiding the constitutional prohibition of indefinite seizures outside a warrant's scope. To take one example, the Government could authenticate files from Ganias's computer the same way that it authenticates paper records seized from filing cabinets or other containers—by introducing testimony from agents that establishes the chain of custody. *See Tamura*, 694 F.3d at 597 ("The Government did not need the master volumes to authenticate the documents

introduced at trial," because "the testimony of the agents who removed the documents from their master volumes would have sufficed.").

The Government's authentication concerns are also at odds with the standard practice of courts and law-enforcement officials. The FBI, for example, seems not to share the Government's current litigating position on "evidentiary integrity." When FBI computer personnel search imaged computer files, they engage in a "culling process" that "eliminate[s] files . . . unlikely to contain material within the warrants' scope." *United States v. Khanani*, 502 F.3d 1281, 1290–91 (11th Cir. 2007) ("The culling process winnowed down the files seized from approximately three million to approximately 270,000.").

In addition, a number of courts have also required return or deletion of imaged electronic files not covered by warrants. *E.g.*, *United States v. Metter*, 860 F. Supp. 2d 205 (E.D.N.Y. 2012); *see also CDT*, 621 F.3d at 1180 (Kozinski, J., concurring) ("The government must destroy or, if the recipient may lawfully possess it, return non-responsive data."). In several of these decisions, courts have considered, and specifically rejected, claims that the Government needed to retain "data outside the scope of the warrant for identification, authentication or chain-of-custody purposes." *Collins*, 2012 U.S. Dist. LEXIS 35980, *23–*24; *In re Application of the United States For a Search Warrant for [Business Premises]*,

No. 05-mj-03113-KRS, GA136 (M.D. Fla. Jan. 30, 2006) (rejecting claim that "the United States must retain the mirror images in order to authenticate data seized therefrom.").[3] "[E]videntiary integrity" provides no basis for indefinite retention of files outside the scope of the November 2003 warrant.[4]

3. The Government's Claim that it "Pinpoint[ed] Relevant Files" within a Reasonable Time is Beside the Point.

The Government's attempt to justify its indefinite retention by citing its "limited resources" and diligent efforts to review files, *see* Gov. Br. at 31–32, is similarly unavailing. It may well take significant time "to pinpoint relevant files amongst thousands" that may be located on "seized computers." *Id.* at 31. And the Court may also assume that the "diligent" agents working on this case needed

[3] The Government asserts that a "forensic analyst" who testified in *Application of the United States* claimed "that if any data on the image was changed, . . . the data could not be authenticated." Gov. Br. at 35. Actually, the analyst's testimony in that case was precisely the opposite. *See Application of the United States*, *supra*, at GA131, GA136 ("Inspector Bachman testified that the United States would *not* need to retain the mirror images in order to authenticate seized documents.") (emphasis added).

[4] Even if "evidentiary integrity" were implicated by the return of the files outside the warrant's scope, that concern hardly trumps Mr. Ganias's Fourth Amendment rights.

"more than a year" to locate "Turbo Tax" and "QuickBooks" software. *Id.* at 14, 31, citing SA11.[5] Even if all of this is true, it is beside the point.

Whatever difficulties the agents encountered, the fact remains that these agents *finished* "pinpoint[ing]" and segregating the files that appeared within the scope of the warrant about 10 ½ months after the initial seizure. SA15. By 13 months post-seizure, the agents had also secured all necessary software. SA16. Had the agents returned or destroyed the non-responsive files at that point, this would have been a borderline case. *Compare United States v. Gorrell*, 360 F. Supp. 2d 48, 55 n.5 (D.D.C. 2004) (10-month delay was "lengthy," but constitutional), *with United States v. Metter*, 860 F. Supp. 2d 205, 215 (E.D.N.Y. 2012) (15-month delay in beginning review and isolation of responsive files was "blatant[ly]" unconstitutional). But instead, the agents decided to retain the non-responsive files indefinitely, on hope of future probable cause. No amount of "diligen[ce]" or "limited resources," *see* Gov. Br. at 31, can excuse that conscious decision to retain files outside the November 2003 warrant's scope *after* the responsive files had been located. *See Tamura*, 694 F.2d at 596.

[5] *But cf.* Amazon.com, http://www.amazon.com/Intuit-Software/b?ie=UTF8&node=497488 (free shipping available for both TurboTax and QuickBooks software within 5 to 8 business days).

4. The April 2006 Warrant Cannot Cure the Government's Unconstitutional Seizure.

It is also irrelevant that the agents "avoided viewing" the unconstitutionally seized files for another 16 months until they secured the April 2006 warrant. Gov. Br. at 32–33. The earlier, unreasonable *seizure* is what gave the agents continuing and indefinite access to the preserved images of Ganias's QuickBooks records. *See* Gov. Br. at 19, 33 (agents would not have gained access to the evidence if they had stayed within the scope of the November 2003 warrant). As a result, the April 2006 warrant does nothing to cure the earlier constitutional violation. *Compare Segura v. United States*, 468 U.S. 796, 814 (1984) ("independent source" needed to purge taint of illegal seizure).

The Government also notes that, after agents imaged his hard drives, Ganias edited his personal QuickBooks records. *See* Gov. Br. at 33. The Government views this as vindication of its over-seizure and indefinite retention, *see id.* ("data . . . would have been lost forever"), but it is no such thing. Abiding by the terms of a warrant can undoubtedly result in the Government "los[ing]" access to papers that it might someday wish it had collected. A generalized desire to achieve maximum evidence preservation, however, does not give the Government any power to "retain information . . . beyond the scope of [a] warrant" on "hope that,

someday, it may have probable cause to support another search." *Application of the United States*, *supra*, GA137.

Indeed, the fact that Ganias edited his personal QuickBooks file only underscores the serious constitutional harm that he has suffered. The basic premise of the Fourth Amendment is that a person's "papers are his dearest property." *See Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 Eng. Rep. 807 (K.B. 1765). Among the most basic "rights and benefits of property ownership" is the right to modify or "even destroy" one's property. *Almeida v. Holder*, 588 F.3d 778, 788 (2d Cir. 2009); *see generally* Paul Ohm, *The Fourth Amendment Right to Delete*, 119 Harv. L. Rev. F. 10, 14 (2005) ("without the . . . ability to change, delete, or destroy, virtually nothing will be left of the rights of dominion and control"). By seizing and retaining mirror images of every file on Ganias's computers, the Government denied Ganias this basic freedom to control and edit the content of his most private and sensitive records.

5. A Rule 41(g) Motion Is Not a Prerequisite to a Motion to Suppress.

The Government's waiver claim also lacks merit. As the Government notes, Ganias first "learned that" agents had gone beyond the scope of their warrant and "retained" his personal QuickBooks files in February 2006, when the Government called Ganias in for a proffer session. Gov. Br. at 41. At that point, no reasonable

person in Ganias's position would have thought it either necessary or worthwhile to file a Rule 41(g) motion, and this Court should not spring a new waiver rule on Ganias for his objectively reasonable decision forego that filing.

As of February of 2006, no court had ever held that a motion for return of property is necessary to preserve one's right to seek suppression. Moreover, had Ganias filed a Ru1e 41(g) motion at that time, the court almost certainly would have declined to address the merits. In response to any motion, the Government would have immediately claimed "interference with an ongoing grand jury investigation," and would have sought to "defer[]" the issue to a post-indictment motion to suppress. *E.g., In re Madison*, Misc. No. 09-647, Government's Letter Brief at 4 (E.D.N.Y. Oct. 9. 2009).[6] The District Court, consistent with the longstanding majority approach throughout this Circuit, likely would have agreed and held that a post-indictment "Rule 12 motion" provided Ganias with "an adequate remedy at law." *E.g., United States v. Douleh*, 220 F.R.D. 391, 397 (W.D.N.Y. 2003). Faced with this legal landscape, Ganias reasonably elected to stand pat and to await his opportunity to seek suppression under Rule 12. To hold

[6] Available at http://www.wired.com/images_blogs/threatlevel/2009/10/brief-with-all-exhibits.pdf.

that, by doing so, Ganias forfeited his Fourth Amendment rights under a heretofore unannounced waiver rule would be grossly unfair.

C. The Government's Unconstitutional Seizure Warrants Suppression.

Contrary to the Government's claims, the seizure and indefinite retention of every file on Ganias's computers is precisely the sort of culpable police conduct that the exclusionary rule was designed to deter.

Although a violation of the Fourth Amendment does "not trigger automatic application of the exclusionary rule," suppression is appropriate in any case where the deterrence benefits of exclusion outweigh the costs. *United States v. Julius*, 610 F.3d 60, 66 (2d Cir. 2010). A key question in conducting this cost-benefit analysis is whether the police conduct at issue is "sufficiently culpable" to yield appreciable deterrence. *Herring v. United States*, 555 U.S. 135, 143–44 (2009). Thus, in cases where the police act in reasonable reliance on a warrant, *see United States v. Leon*, 468 U.S. 897, 908 (1984), or on a statute, *see Illinois v. Krull*, 480 U.S. 340 (1987), or on binding appellate precedent, *Davis v. United States*, 131 S. Ct. 2419 (2011), the exclusionary rule does not apply. On the other hand, in cases involving truly culpable conduct, including instances of "recurring or systemic" negligence, suppression remains an essential tool to deter police misconduct. *Herring*, 555 U.S. at 143; *Julius*, 610 F.3d at 66.

Under these standards, the Government's conduct in this case warrants application of the exclusionary rule. As discussed above, the November 2003 warrant expressly "limit[ed] the . . . data authorized to be seized to" files that related to the "operations" of IPM and American Boiler. SA27. The agents who executed this warrant fully understood its limited scope. *See* JA348 (acknowledging that Ganias's personal financial records not within the scope of the warrant). Yet, notwithstanding their knowledge and understanding of the warrant's terms, the agents elected to indefinitely retain *all* of the files from Ganias's computers, even after they had sorted and identified responsive files. That sort of conscious disregard for the clear scope of the November 2003 warrant is "flagrant" enough to justify blanket suppression of all the files seized. *See* Opening Br. at 46–47. At the very least, this culpable conduct demands the "normal remedy" of "suppression and return" of the items seized outside the warrant's scope. *See Matias*, 836 F.2d at 747–48.

Moreover, the mass seizure and retention of computer files that took place in this case also involves a form of "recurring or systemic negligence" that independently demands suppression. *See Herring*, 555 U.S. at 144. As other courts have noted, "for the last several years" a number of "United States Attorneys' Offices" have been in the practice of "copy[ing] the hard drives of

computers taken during searches and[] keep[ing] these images throughout the investigation or prosecution of the case.'" *In re Application for a Search Warrant*, *supra*, GA137–38. Other courts have chastised the Government for engaging in this over-seizure and indefinite retention, but, as this case illustrates, the Government "continue[s] to take the cavalier attitude that it may retain" over-seized images indefinitely. *See id.*, GA138. At the very least, suppression is needed to deter this recurring and systemic disregard for basic Fourth Amendment rights. *See Herring*, 555 U.S. at 144.

II. Juror Misconduct Violated Ganias's Sixth Amendment Rights and Requires a New Trial.

A. This Court Should Not Accept the District Court's Credibility Determination, and It Should Hold that Juror X's Improper Communications Warrant a New Trial.

As explained in Ganias's opening brief, Juror X's disturbing boasts about "hang[ing]" Ganias, combined with his friend's suggestion to "[t]or[ture] first, then hang," *see* JA550, provide clear evidence of bias and extraneous influence that should have prompted a new trial. In an effort to avoid this result, the Government relies heavily on the District Court's acceptance of Juror X's claim that these inflammatory comments were just "jok[es]." Gov. Br. at 53–57. That finding, the Government repeatedly states, does not amount to clear error and must be accepted by this Court on appeal. *See id.* But, as the Government acknowledges, the

District Court's credibility finding was based at least in part on a "presumpt[ion]" of "honesty" which the District Court applied to Juror X's testimony. SA35–36; *see United States v. Cox*, 324 F.3d 77, 87 (2d Cir. 2003). No such presumption should have applied here, however, and the District Court's reliance on it fatally infects its credibility determination.

Instead of a presumption of honesty, the District Court should have applied a presumption of prejudice. In *Remmer v. United States*, 347 U.S. 227 (1954), the Court held that "[a]ny private communication" or "contact" with a juror about a pending matter must be "deemed presumptively prejudicial," and the "burden rests heavily upon the Government to establish" that the extraneous influence "was harmless to the defendant." *Id.* at 229. The extraneous influence of Juror X's Facebook friends should have triggered this presumption here. The Government should have thus been required to bear the heavy burden of establishing that no prejudice occurred. By giving Juror X the benefit of the doubt, and by presuming his honesty, the District Court applied the wrong standard.

The Government attempts to distinguish *Remmer* away by claiming that the decision there had "more extreme" facts than this one. Gov. Br. at 57. The language of *Remmer*, however, is unequivocal and should be applied according to

its terms: "*Any* private communication" or "contact" with a juror should be "deemed presumptively prejudicial." 347 U.S. at 229.

The Government also asks this Court to create an exception to *Remmer* where the District Court has made a finding of impartiality. Gov. Br. at 57–58. Again, it is not for this Court to carve out new exceptions to *Remmer*. And even if it were, the District Court's finding of impartiality was, as mentioned above, based on a "presumption of honesty" that should not have applied here. Because a presumption of prejudice applies here, rather than a presumption of honesty, this Court should not accept the District Court's legally flawed findings with respect to Juror X's testimony. Without the benefit of those findings, the Government cannot overcome the presumption of prejudice, and a new trial is warranted.

B. At the Very Least, the Court Should Order a Broader and More Exhaustive Hearing.

As explained in Ganias's opening brief, even if the Court does not reverse outright, a full hearing on the effects of juror misconduct in this case is needed. A record that leaves open "too many unanswered questions and too much room" for interpretation demands further inquiry. *See United States v. Vitale*, 459 F.3d 190, 197–98 (2d Cir. 2006); *United States v. Moten*, 582 F.2d 654, 667 (2d Cir. 1978). Here, numerous uncertainties remain outstanding with respect to the interactions between Juror X and Juror Y, including Juror Y's access to Juror X's improper

Facebook posts, the influence those posts may have had on Juror Y, and what Juror Y may have posted in her own Facebook records.

The Government claims that no inquiry is needed into these outstanding issues because the cases requiring further inquiry are generally those in which the "trial courts" "failed to hold any hearing." Gov. Br. at 54–56. That may be so, but the District Court here has yet to conduct any meaningful hearing into Juror Y specifically. The fact that the Court has heard from Juror X in a limited hearing (and applied the wrong presumption while doing so) provides no basis to truncate the Court's assessment of the "unanswered questions and . . . room" for surprise with respect to the conduct of Juror Y. *Vitale*, 459 F.3d at 197–98. A full and complete hearing into the conduct of Juror Y should be ordered.

CONCLUSION

The Court should reverse the order denying Ganias's motion to suppress, vacate his conviction, and remand the case for further proceedings.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,823 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ John W. Cerreta
John W. Cerreta

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