[ORAL ARGUMENT NOT SCHEDULED]

No. 20-5056

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re: HILLARY RODHAM CLINTON and CHERYL MILLS,

Petitioners.

On Petition for a Writ of Mandamus to the United States District Court for the District of Columbia, No. 1:14-cv-1242

RESPONSE OF U.S. DEPARTMENT OF STATE TO THE PETITION FOR A WRIT OF MANDAMUS

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Pursuant to this Court's Order of March 20, 2020, the Department of State respectfully submits this response to the petition for a writ of mandamus. The government did not seek and thus does not support the extraordinary relief of mandamus due to the unique circumstances of this case.

1. This case arises from a FOIA request for certain "talking points" about the events in Benghazi, Libya. Dkt. 1, at 2. The government searched various electronic records systems, state.gov email accounts, and emails recovered from the private accounts of Secretary Clinton and former staffers. Dkt. 19-2, at 4-9. In 2015, the district court granted wide-ranging discovery. Dkt. 39. Discovery has so far involved 18 depositions, scores of interrogatories, and requests for many thousands of documents. Dkt. 154, at 1. On March 2, 2020, the court authorized a third wave of discovery, with four more depositions, including the depositions of former Secretary Clinton and her chief of staff, Cheryl Mills (petitioners here). *See* Dkt. 161. Secretary Clinton's deposition was limited to her reasons for using a private server, her understanding of State's record-keeping obligations, and her knowledge of the existence of records related to the Benghazi attack. *See id.* at 6, 10.

2. In district court, the government opposed each of these discovery orders, *see* Dkt. 27, 53, 133, 137, 154, 156, arguing that the only relevant questions in this FOIA suit are whether the State Department had (1) conducted an adequate search for responsive records, and (2) produced the non-exempt portions of the responsive records. The government urged that no basis existed for departing from the general

rule that discovery is inappropriate in FOIA cases. *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006). The district court queried whether former Secretary Clinton used private email to evade FOIA. In response, the government explained that the most that might follow is that the State Department's FOIA obligations would extend to searching for responsive records outside the Department's custody, *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 155 n.9 (1980), and this Court already had concluded in a Federal Records Act case—between the same parties—that "the Government has already taken every reasonable action to retrieve any remaining [Clinton] emails," *Judicial Watch, Inc. v. Pompeo*, 744 Fed. App'x 3, 4 (D.C. Cir. 2018), which the State Department already had searched.[1]

3. The issue at this stage is not the merits of the discovery orders but the appropriateness of mandamus. As with previous orders of the district court in this case, the government did not seek that "extraordinary remedy" here. *In re Cheney*, 544 F.3d 311, 312 (D.C. Cir. 2008). Whether or not the foregoing errors in the district court's discovery orders are sufficient to meet the mandamus threshold, it is a separate question whether mandamus is "appropriate under the circumstances," *id.* at 313—

[1] The government further observed that plaintiff had obtained extensive discovery in another FOIA case about Secretary Clinton's emails (including sworn interrogatories from Secretary Clinton and depositions of Cheryl Mills and seven others), resulting in the identification of no additional records responsive to the specific request here. *Judicial Watch, Inc. v. Dep't of State*, No. 1:13-cv-1363 (D.D.C.). The government also noted that the reasonableness of a FOIA search does not turn on "whether it actually uncovered every document extant." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991).

and even more so whether the government will seek that extraordinary remedy to begin with. This is the rare situation in which discovery of a former Cabinet Secretary was not authorized for the impermissible purpose of probing internal government decisionmaking regarding official policy, *United States v. Morgan*, 313 U.S. 409, 421-22 (1941), but rather to focus on the impact on FOIA compliance of a former official's unusual decision to use a private email server to systematically conduct large volumes of official business. The government's decision not to seek mandamus here—after each of the discovery orders, not only the most recent—reflects the government's consideration of the totality of the circumstances in this unique case.

4. One aspect of the district court's rulings, although not central to the pending petition, is of particular concern to the government: assertions that the government acted in bad faith in litigating this FOIA request are wholly without basis. The primary ground offered by the court for these aspersions (Dkt. 54, at 2-4, 9) is a joint status report filed on December 31, 2014, which noted that a search had been performed but did not note that the State Department had recently received about 55,000 printed pages of Clinton emails that had not yet been searched. Dkt. 10. But despite years of discovery—including such extraordinary discovery as sworn interrogatory responses from DOJ litigation counsel and depositions of two State Department attorney advisors—this theory finds no support in the record. It is undisputed that when DOJ litigation counsel first became aware of the Clinton emails in mid-January, counsel *proactively called* plaintiff's counsel, *before the emails were public*

knowledge, to explain that additional searches were needed—and memorialized that update in a joint status report filed with the Court. Dkt. 53, at 14-15; Dkt. 11.

Indeed, the conduct of government counsel was forthright at every turn. The parties agreed to the exchange of certain information that might assist in settlement discussions, but no such discussions occurred before the government began its search of Clinton emails. Dkt. 8, at 2; Dkt. 10, at 1. The timeline by which the government searched the returned emails (on its own initiative) was reasonable and suggests no bad faith of any kind. Dkt. 137, at 46. Counsel informed plaintiff that more searches were required, and specified that those searches "involved emails that were not addressed during the initial" search. Dkt. 16, at 8. Consistent with typical practice, neither that discussion nor the next status report (which also informed the court about the need for more searches) provided further details about the searches to be conducted, as the government generally describes a FOIA search with particularity in a draft declaration or summary judgment briefing, not a status report. Dkt. 53, at 41. The district court's suggestion that the government may have hoped to avoid scrutiny of the Clinton emails is belied not only by the government's conduct in this case, but by its conduct in producing those emails in many other FOIA cases, including cases brought by plaintiff. *E.g.*, *Judicial Watch, Inc. v. Dep't of State*, No. 1:13-cv-1363 (D.D.C.) (Dkt. 73) (voluntarily reopening closed FOIA case to search Clinton emails).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify this response complies with the requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that it complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A), because it contains 1,103 words, according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2020, I electronically filed this response with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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