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

No. 20-5056

IN RE HILLARY RODHAM CLINTON AND CHERYL MILLS, *PETITIONERS*

On Petition for Writ of Mandamus to the
United States District Court for the District of Columbia
(Civ. Case No. 14-1242)

PLAINTIFF-RESPONDENT JUDICIAL WATCH, INC.'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

Paul J. Orfanedes
Ramona R. Cotca
Lauren M. Burke
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
Tel.: (202) 646-5172
Email: porfanedes@judicialwatch.org
rcotca@judicialwatch.org
lburke@judicialwatch.org

Dated: October 15, 2020

Attorneys for Plaintiff-Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

* Authorities upon which Plaintiff-Respondent chiefly relies are marked with asterisks.

Statutes

INTRODUCTION AND STATEMENT OF THE ISSUES

In an August 31, 2020 opinion ("Op."), a panel of this Court granted mandamus relief to former Secretary of State Hillary Rodham Clinton, an intervenor in Plaintiff's Freedom of Information Act ("FOIA") lawsuit against the U.S. Department of State ("State"), after the district court issued an order authorizing Plaintiff to take Clinton's deposition. The panel found that Clinton could be granted mandamus relief because, as an intervenor, she was a party-litigant even though no FOIA claim had been or could have been brought against her. Accordingly, the panel concluded, the ordinary "disobedience and contempt" route to appeal the order was not available to Clinton, at least not if she were held in civil contempt. The panel also found that the order was a "clear and indisputable" abuse of discretion. The panel's decision granting Clinton mandamus relief in this discovery dispute marks a dramatic break from the Court's precedent and Supreme Court precedent and presents questions of exceptional importance that require panel rehearing and rehearing *en banc.*

First, the panel misapplied *In re Sealed Case No. 98-3077*, 151 F.3d 1059 (D.C. Cir. 1998) ("*In re Sealed Case*"), finding that "the disobedience and contempt route to appeal cannot be labeled an adequate means of relief" for Clinton as a party-litigant even though her only interest in the case was avoiding being questioned under oath. Op., 7. The panel also held that Cheryl Mills, a

nonparty whose deposition also had been ordered, was not entitled to mandamus relief because she could disobey the order, then immediately appeal any contempt ruling. The panel's differing treatment of Clinton and Mills – when their identical interests in this case began and ended with avoiding being deposed – misapplies circuit precedent.

Second, the panel created a new path for any nonparty witness objecting to discovery to seek mandamus: permissive intervention. Op., 8-9. Although Clinton's interest was limited to avoiding a deposition, the panel granted her mandamus relief because the district court previously granted her permissive intervention. In doing so, the panel extended to Clinton more rights than are afforded to ordinary party-litigants. It treated Clinton as a party-litigant without considering the adequacy of post-judgment remedies available to her as a party-litigant. Not only is this new path at odds with longstanding precedent, but it involves a question of exceptional importance. *See U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988); *Alexander v. United States*, 201 U.S. 117 (1906); *Cobbledick v. United States*, 309 U.S. 323 (1940).

Third, the panel's holding cannot be reconciled with this Court's recent *en banc* opinion denying mandamus to Lt. Gen. Michael Flynn because Flynn was found to have adequate, post-judgment appellate remedies. *In re Flynn*, No. 20-5143, 2020 U.S. App. LEXIS 27670 (D.C. Cir. Aug. 31, 2020) ("*Flynn*"). The

panel never explained why, if Clinton were an ordinary party-litigant, the post-judgment appellate remedies available to her were inadequate but were not inadequate for Flynn and all other party-litigants.

Fourth, the panel's decision erroneously limited the scope of district courts' authority to order discovery in FOIA cases by holding that a "bad-faith inquiry in a FOIA context is only relevant as it goes to the actions of the individuals who conducted the search." Op., 14. Although discovery is rare in FOIA cases, the panel's decision is directly at odds with decades-old precedent, including previous instances in which the Court authorized discovery beyond this extraordinarily narrow scope. *See Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974); *Schaffer v. Kissinger*, 505 F.2d 389 (D.C. Cir. 1974) (per curiam); *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). Like the new path to mandamus, the panel's decision limiting discovery in FOIA cases also involves a question of exceptional importance.

BACKGROUND

This case arises out of Plaintiff's FOIA request for records related to talking points given to Ambassador Susan Rice about the September 11, 2012 attack on the U.S. consulate in Benghazi, Libya. ECF 1, ¶ 5. The request was made to the Office of the Secretary specifically and sought copies of both the talking points and

any communications about the talking points. Plaintiff sued on July 21, 2014, when State failed to respond. *Id.*, ¶¶ 5-9.

The record in the district court demonstrates two overarching concerns: (1) the unprecedented nature of Clinton's use of a "private" email account to conduct official business; and (2) incomplete, if not false or misleading, representations to Plaintiff and the court by State and its Justice Department attorneys about their knowledge of Clinton's email practices. *See e.g.*, ECF 39, 54, 65, 131, 135, and 161. Accordingly, the court authorized limited discovery into (1) whether Clinton used private email to stymie FOIA, (2) whether State's attempts to settle the case before Clinton's private email practices became publicly known amounted to bad faith, and (3) whether State's searches were adequate under the circumstances. ECF 161 at 1, 4-5, and 9. After initial discovery raised more questions than it answered, the court held it was time to hear from Clinton and her chief of staff, Mills, directly. *Id.*

Clinton and Mills sought mandamus review. The panel granted mandamus as to Clinton but denied it as to Mills.

REASONS FOR GRANTING REHEARING & REHEARING *EN BANC*

1. The Panel Misapplied *In re Sealed Case*.

The panel misapplied *In re Sealed Case* by equating Clinton's status as an intervenor – her sole purpose in appearing in Plaintiff's lawsuit was to argue

against being deposed – with that of a party-litigant having an equitable stake in the case's outcome. *In re Sealed Case*, 151 F.3d 1059. Before a court can determine whether mandamus is warranted, a petitioner must establish that she has no other adequate means of relief. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam). The panel seized on the party-litigant label it attached to Clinton rather than considering the only interest she expressly asserted – being deposed. It then treated this label as dispositive, granting mandamus relief to Clinton but not to Mills, who also sought to avoid being deposed but appeared and objected without intervening. ECF 128, 143, and 147 (Clinton); ECF 142 (Mills). By extending mandamus to Clinton, the panel went beyond *In re Sealed Case*'s holding. Op., 7-9. Rehearing and rehearing *en banc* is necessary to correct this error. Fed. R. App. 35(1)(A) and 40(a)(2).

In *In re Sealed Case*, Independent Counsel ("IC") Kenneth W. Starr sought mandamus relief to vacate an order authorizing discovery of him and his staff. The order arose out of a motion for order to show cause why the IC should not be held in contempt for allegedly disclosing grand jury material to the media. *In re Sealed Case*, 151 F.3d at 1061-62. The Court looked to the Supreme Court's rulings in *Doyle v. London Guard. & Accident Co.*, 204 U.S. 599 (1907) and *Fox v. Capital Co.*, 299 U.S. 105 (1936), among others, to address conflicting circuit caselaw on

the immediate appealability of civil contempt orders. *Id.* at 1064. The Supreme Court precedent justified treating party-litigants and nonparties differently because, in the case of nonparties, "the proceeding is entirely independent and its prosecution does not delay the conduct of the action between the parties." *Doyle*, 204 U.S. at 605.

Although the Court in *In re Sealed Case* determined that it "need not definitively resolve the apparent conflict in our cases" regarding the distinction between party-litigant and non-party contempt appeals, it extended this distinction to the IC because it found the show cause proceeding was ancillary to the grand jury investigation, the IC was properly characterized as a party-litigant *to that ancillary proceeding*, and the risk of inadvertent disclosure of grand jury matters and potential harm to the grand jury process made a contempt appeal an inadequate remedy. 151 F.3d at 1063-65, 1072-73. It was this final point – the inadequacy of a contempt appeal – that appears to have determined the outcome of *In re Sealed Case* rather than the IC's purported status as a "party-litigant." The IC was no more a party to the grand jury investigation than Clinton or Mills are parties to Plaintiff's FOIA lawsuit. Clinton and Mills may be involved in the suit as witnesses just like the IC and his staff were involved in the grand jury investigation as prosecutors, but in neither instance were they asserting or defending themselves against any legal claim.

The panel nonetheless applied *In re Sealed Case*'s disparate treatment of party-litigants and nonparties to Clinton and Mills by contrasting Clinton's status as an intervenor with Mills' status as a non-party while ignoring that their interests were identical. Both were witnesses whose sole interest was avoiding being deposed. As a non-party witness, Mills undoubtedly had (and has) the option of refusing to appear for her deposition and immediately appealing any contempt order, civil or criminal. *See U.S. Catholic Conf.*, 487 U.S. at 76. The panel found Clinton's status an intervenor did not afford her the same option, however, because as a party-litigant, she could only appeal a criminal contempt order. Op., 7-8. Obviously, Clinton could refuse to appear and be held in contempt, but according to the panel she would have to wait until entry of a final judgment in Plaintiff's FOIA lawsuit to appeal any civil contempt order. *Id.*

The panel's application of *In re Sealed Case* misreads the reasons for that case's holding. As will be addressed in more detail below, it also fails to address why having Clinton wait until the end of the case, once a final judgment is entered, would be an inadequate remedy. While it is true Clinton intervened, she, like Mills, did so solely to oppose Plaintiff's request to take her deposition. ECF 128, 143, and 147. Unlike a party-litigant, Clinton's interest in the underlying lawsuit begins and ends with the district court's order authorizing her deposition. She has no further interest in the underlying FOIA lawsuit. She is no different from Mills

in this regard. *See* ECF 142. Treating Clinton differently from Mills places form over substance and ignores the two witnesses' identical underlying interests.

Plaintiff does not and cannot seek a final judgment against Clinton. No final judgment will ever be entered on any claim or defense asserted by Clinton because she did not assert any claims or defenses. It was understood by all parties and the district court that Clinton's involvement in the litigation was limited to her objection to Plaintiff's request to depose her. ECF 128, p. 1, n.1. Clinton also only sought permissive intervention, not intervention as a matter of right. *Id*. at 1. She also never filed the requisite pleading setting forth the "claim or defense for which intervention is sought," obviously because she had none. *Id.*; Fed.R.Civ.P. 24(c); LCvR 7(j). Clinton did not make a FOIA request to State, and FOIA only creates a cause of action against agencies, not individuals. Clinton is not a "party-litigant," and, contrary to the panel's misapplication of *In re Sealed Case*, the availability of an immediate appeal of any civil contempt order is just as viable for Clinton as it is for Mills.

2. The Panel Misapplied Precedent and Raised an Issue of Exceptional Importance by Creating a New Path for Review.

If the panel's decision is permitted to stand, future nonparties will be granted mandamus review of discovery orders simply by intervening. They need not even show that a post-judgment appeal of a civil contempt order is an inadequate remedy, an issue the panel did not address. The panel's new path for mandamus

review conflicts with longstanding Supreme Court precedent. "The right of a nonparty to appeal an adjudication of contempt cannot be questioned. The order finding a nonparty witness in contempt is appealable notwithstanding the absence of a final judgment in the underlying action." *U.S. Catholic Conf.*, 487 U.S. at 76; (*citing United States v. Ryan*, 402 U.S. 530, 532 (1971)); *see also Alexander*, 201 U.S. at 121-22; *Cobbledick*, 309 U.S. at 328. Mills' petition for mandamus was correctly denied for this reason. Her adequate remedy is to go into contempt, then immediately appeal. Op., 8. Clinton, on the other hand, is permitted to bypass the contempt remedy because she has been labeled a party even though her stated interest in avoiding a deposition is identical to Mills' interest. If mandamus is to remain the extraordinary remedy the Supreme Court intended, the panel's decision must be reheard by the panel and *en banc*. *Allied Chemical Corp.*, 449 U.S. at 36; *Doyle*, 204 U.S. at 604.

3. The Panel's Decision Directly Conflicts with *In re Flynn* and Fails to Consider the "Other Adequate Means of Relief" Available to Clinton Once It Treated Her as a Party-Litigant.

"In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires …." *Allied Chemical Corp.*, 449 U.S. at 35 (citations omitted). The panel's failure to consider this admonition directly conflicts with longstanding precedent of both the Supreme Court and this Court,

warranting review for this additional reason. *Id.*; *Cheney*, 542 U.S. at 380; *In re Cheney*, 544 F.3d 311, 312-13 (D.C. Cir. 2008) (per curiam); *Nat'l Ass'n of Crim. Def. Lawyers v. U.S. Dep't of Justice*, 182 F.3d 981 (D.C. Cir. 1999). It also is at odds with this Court's recent *en banc* decision denying mandamus to U.S. Army Lieutenant General Michael T. Flynn because an "adequate alternative remedy exists." *Flynn*, 2020 U.S. App. LEXIS 27670 at *7 (citations omitted). A rehearing is necessary "to secure and maintain uniformity of the court's decisions." Fed. R. App. 35(b)(1)(A) and 40(a)(2).

If, as the panel found, Clinton is correctly characterized as a party-litigant, then she may appeal the district court's order authorizing her deposition once final judgment is entered. "An intervenor, once allowed to become a party, is treated in the same way as any other party." *Waymo LLC v. Uber Techs., Inc.*, 870 F.3d 1350, 1358-59 (Fed. Cir. 2017); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76 (1987); *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 110 (2009). Even if the original parties do not follow suit, an intervenor is not precluded from appealing a final judgment. *Waymo LLC*, 870 F.3d at 1357-58 (*quoting Mohawk Indus.*, 558 U.S. at 109 and *Stringfellow*, 480 U.S. at 375-76). Discovery orders are not normally appealed on an interlocutory basis because "postjudgment appeals generally suffice to protect the rights of litigants." *Mohawk Indus.*, 558 U.S. at 109. Mandamus relief should not have been granted to Clinton

because "[w]hatever may be done without the writ may not be done with it." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953) (citations omitted).

The panel's decision in this case cannot be reconciled with *Flynn* for two reasons. First, while Mills and Flynn were denied mandamus for similar reasons, it is wrong to claim that the *en banc* decision in *Flynn* and the panel's decision here are consistent. The panel overlooked the most obvious "adequate alternate remedy" available to Clinton – a post-judgment appeal. By contrast, the *en banc* decision in *Flynn* highlighted the existence of an "adequate alternate remedy" in denying Flynn relief. *Flynn*, *supra*, at *7. If Clinton is properly characterized as a party, then a post-judgment appeal is an adequate remedy and mandamus must be denied to her just as it was denied to Flynn.

Second, the *en banc*'s analysis of the adequacy of a post-judgment appeal available to Flynn cannot be reconciled with this panel's decision that mandamus is available to Clinton. *Flynn*, *supra*, at *43-45, *65-66. The dissenting opinion by Judge Rao in *Flynn* appropriately compared the harms at stake in these two cases to highlight the contradiction in the analyses. Judge Rao noted that "[th]e majority maintains that appeal is an adequate alternative remedy only by disregarding the harms to the Executive Branch" and that the mandamus standard "treats the harm and adequate remedy as two sides of the same coin." *Id.* at *59.

The panel's decision here did not identify any harm to Clinton that would render a post-judgment appeal inadequate. Even if the district court's order authorizing Clinton's deposition is erroneous, which Plaintiff contests, it can be remedied on a post-judgment appeal.

In the discovery context, the Supreme Court has found post-judgment appeals adequate even to "ensure the vitality of attorney-client privilege," "one of the oldest recognized privileges for confidential communications." *Mohawk Indus.*, 558 U.S. at 108-09 (citations omitted). A post-judgment appeal also is sufficient to remedy discovery orders authorizing the disclosure of confidential information subject to the attorney work-product doctrine. *Waymo LLC*, 870 F.3d at 1357-59. If a post-judgment appeal can remedy the disclosure of confidential attorney-client or work-product information, surely a post-judgment appeal is an adequate remedy for a discovery order that is not even claimed to raise such issues. *Allied Chemical Corp.*, 449 U.S. at 35 ("[a]lthough a simple showing of error may suffice to obtain a reversal on direct appeal, to issue a writ of mandamus under such circumstances 'would undermine the settled limitations upon the power of an appellate court to review interlocutory orders'" (*quoting Will v. United States*, 389 U.S. 90, 98, n.6 (1967))).

Neither does the discovery order raise other exceptional issues that have historically triggered mandamus. It does not create an occasion for inter-branch

confrontation. *Cheney*, 542 U.S. at 382-90. The panel explicitly declined to address Clinton's argument that her deposition is shielded by her status as a former high-ranking government official. Op., 9-10. It also does not concern issues of grand jury secrecy as in *In re Sealed Case*, *supra*, or the issue of sovereign immunity. *In re Papandreau*, 139 F.3d 247, 251 (D.C. Cir. 1998). Nor does it concern a novel issue or case of first impression that warrants emergency appellate intervention. *Schlangenhauf v. Holder*, 379 U.S. 104, 110-12 (1964).

While raising Clinton to the equivalent of a party-litigant, the panel employed mandamus as a substitute for post-judgment appeal. Clinton invoked mandamus as a first resort, not a last resort.[1] The panel's failure to consider Clinton's available remedies when it labeled her a party-litigant has, in effect, extended more rights to Clinton than to ordinary parties, including Plaintiff, the Government, and most recently Flynn. Panel rehearing and rehearing *en banc* is necessary for this additional reason.

[1] Also unlike other mandamus petitioners, Clinton never moved to certify the court's order authorizing her deposition. *See e.g.*, *In re Kellogg Brown v. Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014); 28 U.S.C. § 1292(b). She also did not seek a protective order or file a motion to quash, then appeal from any adverse determination. Fed. R. Civ. P. 26(c)(1) and 45(d)(3).

4. The Panel's Decision Limiting the District Court's Equitable Powers Under FOIA Conflicts with Supreme Court and D.C. Circuit Precedent.

A district court may order limited discovery in FOIA cases where there is evidence that an agency acted in bad faith. *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006). A district court also has "broad discretion to manage the scope of discovery" in FOIA cases. *SafeCard Servs. Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). The panel nonetheless found that discovery in FOIA is limited to "the actions of the individuals who conducted the search" for records responsive to a request. Op., 14. The panel's finding is a radical departure from what Congress intended, the Supreme Court's interpretation of FOIA, and this Court's precedent. *Id.* In effect, it eliminates any discovery into the actions of agency officials or employees other than FOIA officers, walling off from any inquiry officials or employees who may be less than honest with FOIA officers or who might seek to conceal agency records from FOIA officers to prevent their disclosure to the public, among other matters plainly relevant to an agency's good faith in responding to FOIA requests.

Congress granted district courts broad, equitable powers under FOIA. *Bannercraft*, 415 U.S. at 19-20. "Congress knows how to deprive a court of broad equitable power when it chooses to do so," and it did not do so here when it explicitly made "the district courts the enforcement arm of [FOIA]." *Id.* (*citing*

Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 17 (1942) and 5 U.S.C. § 552(a)(3)). "With the express vesting of equitable jurisdiction in the district court by [FOIA]," Congress in no way limited district courts' inherent equity powers in FOIA cases. *Id.* at 20 (*citing* 5 U.S.C. § 552(a)).

The panel did not reject or even challenge the district court's findings that led it to authorize Clinton's and Mills' depositions and the other ordered discovery. Rather, the panel found the district court "clearly abused its discretion" when it authorized discovery beyond "the actions of the individuals who conducted the search." Op., 14, 17 (*citing Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771-72 (D.C. Cir. 1981)). But *Ground Saucer Watch* stands for no such proposition. The plaintiff there could not point to any evidence that put the agency's good faith in doubt. *Id.* Nowhere did *Ground Saucer Watch* hold that discovery was limited to "the actions of the individuals who conducted the search," as the panel found. Op., 14, 17. *Ground Saucer Watch* also did not limit district courts' inherent equitable powers in FOIA cases. Indeed, this Court has allowed discovery in FOIA cases beyond inquiry into "the actions of the individuals who conducted the search." *See Schaffer*, 505 F.2d at 391(allowing FOIA discovery into facts regarding the classification of reports); *Phillippi*, 546 F.2d at 1014 n.12 (permitting FOIA discovery into the "relationship between confirmation or denial of the existence of records" and the process used by officials to issue *Glomar* responses).

Clearly then, it is within a district court's authority to inquire into whether an agency head routed agency records outside the agency in order to flout FOIA. *See*, *e.g.*, *Competitive Enter. Inst. v. Office of Science and Technology*, 827 F.3d 145, 149 (D.C. Cir. 2016); *Kissinger v. Reporters Comm. For Freedom of Press*, 445 U.S. 136, 155 n.9 (1980).

It is especially important that this misapplication of longstanding Supreme Court and circuit precedent be corrected because the panel's far reaching decision is already taking effect. State has moved to vacate all remaining discovery based on the panel's decision. ECF 170 at 2. State even seeks to vacate the depositions of two officials who may not have been involved in searching for responsive records but are expected to have knowledge about State's efforts to shield Clinton's email practices from its own FOIA officials. *Id.* at 5; ECF 161 at 2-3. Under the panel's decision, such obviously important, relevant discovery would be disallowed. Rehearing and rehearing *en banc* therefore is necessary to maintain uniformity of both this Court's precedent and Supreme Court precedent, and to resolve the question of exceptional importance about the scope of a district court's equitable authority to order discovery under FOIA.

CONCLUSION

For the foregoing reasons, the petition for panel rehearing and rehearing *en banc* should be granted.

Dated: October 15, 2020

Respectfully submitted,

By: */s/ Ramona R. Cotca*
Paul J. Orfanedes
Ramona R. Cotca
Lauren M. Burke
JUDICIAL WATCH, INC.
425 Third Street SW, Suite 800
Washington, DC 20024
Tel.: (202) 646-5172
Email: porfanedes@judicialwatch.org
rcotca@judicialwatch.org
lburke@judicialwatch.org

Attorneys for Plaintiff-Respondent

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(f) and 35(b)(2)(A). The brief, excluding exempted portions, contains 3,851 words, and has been prepared in a proportional Times New Roman, 14-point font.

Dated: October 15, 2020

/s/ *Ramona R. Cotca*
Ramona R. Cotca

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Page

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued June 2, 2020 Decided August 31, 2020

No. 20-5056

IN RE: HILLARY RODHAM CLINTON AND CHERYL MILLS,
PETITIONERS

On Panel Rehearing
Of Petition for Writ of Mandamus
(No. 1:14-cv-01242)

David E. Kendall argued the cause for petitioners. With him on the petition for writ of mandamus and the reply were *Katherine M. Turner*, *Stephen L. Wohlgemuth*, *Suraj Kumar*, and *Beth A. Wilkinson*.

Ramona R. Cotca argued the cause for respondent Judicial Watch, Inc. With her on the response to the petition for writ of mandamus were *Lauren M. Burke* and *Paul J. Orfanedes*. *Michael Bekesha* entered an appearance.

Mark R. Freeman, Attorney, U.S. Department of Justice, argued the cause for respondent United States Department of State. With him on the response to the petition for writ of mandamus were *Hashim M. Mooppan*, Deputy Assistant Attorney General, and *Mark B. Stern*, Attorney.

Before: GRIFFITH, PILLARD and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKINS.

WILKINS, *Circuit Judge*: This petition arises from a Freedom of Information Act ("FOIA") case brought by Judicial Watch, Inc. against the U.S. Department of State. *See Judicial Watch, Inc. v. Dep't of State*, No. 1:14-cv-1242 (D.D.C. filed July 21, 2014). Petitioners are former Secretary of State Hillary Rodham Clinton (a third-party intervenor in the case), and Secretary Clinton's former Chief of Staff, Cheryl Mills (a nonparty respondent in the case). On March 2, 2020, the District Court granted Judicial Watch's request to depose each Petitioner on a limited set of topics. On March 13, 2020, Secretary Clinton and Ms. Mills petitioned this Court for a writ of mandamus to prevent the ordered depositions. For the reasons detailed herein, we grant the petition in part and deny it in part – finding that although Secretary Clinton meets all three requirements for mandamus, Ms. Mills does not. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004).

I.

On May 13, 2014, Judicial Watch submitted a FOIA request to the State Department for records in the Office of the Secretary regarding Ambassador Susan Rice's September 16, 2012 television appearances. The request sought:

> Copies of any updates and/or talking points given to Ambassador Rice by the White House or any federal agency concerning, regarding, or related to the September 11, 2012 attack on the U.S. consulate in Benghazi, Libya.

> Any and all records or communications concerning, regarding, or relating to talking points or updates on the Benghazi attack given to Ambassador Rice by the White House or any federal agency.

Complaint at 2 ¶ 5, No. 1:14-cv-1242, ECF No. 1 (July 21, 2014) (lettering omitted). After the State Department failed to timely respond, Judicial Watch filed suit in the United States District Court for the District of Columbia on July 21, 2014, and the case was assigned to Judge Lamberth. *See id*. at ¶¶ 5-9. The State Department produced four responsive documents to Judicial Watch in November 2014 and provided a draft *Vaughn* Index in December 2014, Pl.'s Mot. for Status Conf. at 4 ¶ 5, No. 1:14-cv-1242, ECF No. 12 (Mar. 16, 2015). Judicial Watch subsequently requested a declaration describing the Department's search. S*ee* Third Joint Status Rep. at 2 ¶ 3(c), No. 1:14-cv-1242, ECF No. 16 (May 1, 2015). In joint status reports filed on December 31, 2014 and February 2, 2015, the parties informed the court that they might be able to settle the case or narrow the issues before the court, but that the State Department would first conduct additional searches for responsive documents by April 2015. *See* Joint Status Rep., No. 1:14-cv-1242, ECF No. 10 (Dec. 31, 2014); Joint Status Rep., No. 1:14-cv-1242, ECF No. 11 (Feb. 2, 2015).

In early March 2015, Judicial Watch learned that Secretary Clinton had used a private email server to conduct official government business during her tenure as Secretary of State. *See* Emergency Mot. at 3 ¶ 3, No. 1:14-cv-1242, ECF No. 13 (Mar. 16, 2015). And on August 21, 2015, it moved for limited discovery related to the State Department's record-keeping system during Secretary Clinton's tenure. *See* Mot. for Discovery at 6, No. 1:14-cv-1242, ECF No. 22 (Aug. 21,

2015). Contemporaneously, another district court judge, Judge Sullivan, was supervising a separate FOIA case between the same parties and considering similar discovery requests. *Judicial Watch, Inc. v. Dep't of State*, No. 1:13-cv-1363 (D.D.C. filed Sept. 10, 2013). In addition, the State Department's Inspector General, the FBI, and the House Select Committee on Benghazi were conducting independent investigations of Secretary Clinton's use of a private email server. As a result, Judge Lamberth delayed consideration of Judicial Watch's discovery request. Mem. and Order at 2-3, No. 1:14-cv-1242, ECF No. 39 (Mar. 29, 2016). Judge Sullivan ultimately granted Judicial Watch's request for discovery on the use of the private email server, ordered the disclosure of federal records from Ms. Mills and Huma Abedin (Secretary Clinton's former Deputy Chief of Staff), and authorized Judicial Watch to send interrogatories to Secretary Clinton and to depose Ms. Mills, among others. Mem. Order at 13-14, No. 13-cv-1363, ECF No. 73 (May 4, 2016).

On December 6, 2018, after the parties substantially completed discovery before Judge Sullivan and the government investigations had concluded, Judge Lamberth ordered additional discovery in this case. Mem. Op. at 1, 4-5, 9, No. 1:14-cv-1242, ECF No. 54 (Dec. 6, 2018). Although discovery in FOIA cases is rare, Judge Lamberth ordered the parties to develop a discovery plan regarding whether Secretary Clinton's "use of a private email [server] while Secretary of State was an intentional attempt to evade FOIA," "whether the State Department's attempts to settle this case in late 2014 and early 2015 amounted to bad faith," and "whether State ha[d] adequately searched for records responsive to Judicial Watch's request." Order, No. 1:14-cv-1242, ECF No. 55 (Dec. 6, 2018). On January 15, 2019, the District Court entered a discovery plan permitting Judicial

Watch to: depose "the State Department," several former government officials and employees, and a former Clinton Foundation employee; serve interrogatories on several other government officials; obtain via interrogatories the identities of individuals who conducted the search of the records; and discover unredacted copies of various relevant documents and any records related to the State Department's conclusion about the need to continue searching for responsive records. Mem. Op. and Order, No. 1:14-cv-1242, ECF No. 65 (Jan. 15, 2019). The District Court reserved a decision on whether to permit Judicial Watch to depose Petitioners, *id.* at 2, and Secretary Clinton subsequently intervened, Mot. to Intervene, No. 1:14-cv-1242, ECF No. 128 (Aug. 20, 2019); *see also* Order, No. 1:14-cv-1242, ECF No. 129 (Aug. 21, 2019) (granting the unopposed motion to intervene).

On March 2, 2020, after the January 15, 2019 round of discovery was substantially complete, the District Court authorized yet another round of discovery, including the depositions of Petitioners. *See* Mem. Order, No. 1:14-cv-1242, ECF No. 161 (Mar. 2, 2020). Although Judicial Watch had proposed a broader inquiry, *see* Status Rep. at 13-15, No. 1:14-cv-1242, ECF No. 131 (Aug. 21, 2019), the court limited the scope of Secretary Clinton's deposition to her reasons for using a private server and her understanding of the State Department's records-management obligations, Mem. Order at 6-10, ECF No. 161. The court also limited the scope of questions regarding the 2012 attack in Benghazi to both Petitioners' knowledge of the existence of any emails, documents, or text messages related to the attack. *Id.* at 10-11.

On March 13, 2020, Secretary Clinton and Ms. Mills filed a petition for writ of mandamus in this Court, requesting an order "directing the district court to deny Judicial Watch's

request to depose" them. Pet. at 4. Pursuant to this Court's order, Judicial Watch and the State Department each filed responses.[1]

II.

The common-law writ of mandamus, codified at 28 U.S.C. § 1651(a), is one of "the most potent weapons in the judicial arsenal," *see Will v. United States*, 389 U.S. 90, 107 (1967), and mandamus against a lower court is a "drastic" remedy reserved for "extraordinary causes," *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). Mandamus lies only where the familiar tripartite standard is met: (1) the petitioner has "no other adequate means to attain the relief"; (2) the petitioner has demonstrated a "clear and indisputable" right to issuance of the writ; and (3) the Court finds, "in the exercise of its discretion," that issuance of the writ is "appropriate under the circumstances." *Cheney*, 542 U.S. at 380-81. Although these hurdles are demanding, they are "not insuperable," *id.* at 381, and a "clear abuse of discretion" by a lower court can certainly justify mandamus, *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953).

Applying this standard, we find the petition as to Secretary Clinton satisfies all three prongs, while the petition as to Ms. Mills fails to satisfy the first. Since the "three conditions must be satisfied before [mandamus] may issue,"

[1] Although the State Department does not support the petition for mandamus before this Court, it opposed the motions to grant discovery below, in relevant part. *See* Mem. in Opp., No. 1:14-cv-1242, ECF No. 27 (Sept. 18, 2015); Tr. of Proc. at 19-37, No. 1:14-cv-1242, ECF No. 53 (Oct. 16, 2018); Status Rep., No. 1:14-cv-1242, ECF No. 133 (Aug. 21, 2019); Tr. of Proc. at 28-39, No. 1:14-cv-1242, ECF No. 137 (Aug. 22, 2019); Status Rep., No. 1:14-cv-1242, ECF No. 154 (Dec. 18, 2019); and Tr. of Proc. at 21-31, No. 1:14-cv-1242, ECF No. 156 (Dec. 19, 2019).

regardless of Ms. Mills' petition's merit on the other two inquiries, we are bound to deny the writ and dismiss her petition. *See Cheney*, 542 U.S. at 380 (citing *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)).

A.

Under the first prong of *Cheney*, Secretary Clinton and Ms. Mills must each have "no other adequate means to attain the relief" they request on mandamus. 542 U.S. at 380. Judicial Watch argues that the appropriate way for both Petitioners to garner review of the discovery order is to disobey it, be held in contempt, and then appeal that final order. *See* Judicial Watch Resp. at 12-14. However, while this is presently a viable path for Ms. Mills, a nonparty respondent, it is not for Secretary Clinton who has intervened and is a party in the case. *See* Mot. to Intervene, ECF No. 128; Order, ECF No. 129.

It is true that "in the ordinary case, a litigant dissatisfied with a district court's discovery order must disobey the order, be held in contempt of court, and then appeal that contempt order on the ground that the discovery order was an abuse of discretion." *In re Kessler*, 100 F.3d 1015, 1016 (D.C. Cir. 1996); *see also Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992); *In re Papandreou*, 139 F.3d 247, 250 (D.C. Cir. 1998). However, as we explained in *In re Sealed Case No. 98-3077*, "the disobedience and contempt route to appeal cannot be labeled an adequate means of relief *for a party-litigant*." 151 F.3d 1059, 1065 (D.C. Cir. 1998) (emphasis added); *see also In re City of New York*, 607 F.3d 923, 934 (2d Cir. 2010) (same). *In re Sealed Case No. 98-3077* raised the concern – elided in cases cited by Judicial Watch such as *Kessler* and *Papandreau* – that "[w]hile a criminal contempt order issued against a party is considered a

final order and thus appealable forthwith under 28 U.S.C. § 1291 . . . a civil contempt order issued against a party is typically deemed interlocutory and thus not appealable under 28 U.S.C. § 1291[.]" 151 F.3d at 1064 (citations omitted); *see also Byrd v. Reno*, 180 F.3d 298, 302 (D.C. Cir. 1999) (noting that unlike a criminal contempt order, a civil contempt order is not an appealable final order). Where, as here, a district court has broad discretion to hold a party refusing to comply with a discovery order in either civil or criminal contempt, "'a party who wishes to pursue the disobedience and contempt path to appeal cannot know whether the resulting contempt order will [in fact] be appealable.'" *In re Sealed Case No. 98-3077*, 151 F.3d at 1065 (quoting 15B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914.23 (2d ed. 1992)). And since, in this case, potential contempt charges against Secretary Clinton would arise during ongoing litigation and not at the conclusion of the proceedings when a civil contempt adjudication might be appealable, this uncertainty is crucial. The discovery order at issue arises out of a civil FOIA proceeding. *See* Compl., ECF No. 1. Secretary Clinton, who is properly characterized as a party in that civil proceeding, simply cannot know *ex ante* whether refusal to comply will result in a non-appealable civil contempt order or an appealable criminal contempt order. Thus, "forcing a party to go into contempt is not an 'adequate' means of relief in these circumstances." *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014).

The same regime, however, does not apply to Ms. Mills, a nonparty respondent in the case. It is well settled that "a nonparty can appeal an adjudication of civil contempt[.]" 15B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3917 (2d ed. 1992); *see also U.S. Catholic Conference v.*

Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988) ("The right of a nonparty to appeal an adjudication of contempt cannot be questioned. The order finding a nonparty witness in contempt is appealable notwithstanding the absence of a final judgment in the underlying action.") (quoting *United States v. Ryan*, 402 U.S. 530, 532 (1971) and *Cobbledick v. United States*, 309 U.S. 323, 328 (1940)); *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 398 (5th Cir. 1987); *United States v. Columbia Broad. Sys.*, 666 F.2d 364, 367 n.2 (9th Cir. 1982) (compiling cases). Since Ms. Mills could appeal either a civil or a criminal contempt adjudication, unlike Secretary Clinton she does have available an "adequate means to attain the relief" and as such her petition fails at prong one. *Cheney*, 542 U.S. at 380.

Petitioners argue that given the "congruence of interests" between Ms. Mills and Secretary Clinton, Ms. Mills might also somehow be prevented from appealing a civil contempt adjudication. Pet'r Reply at 3 n.1. However, this concern arises primarily in cases where sanctions are imposed jointly and severally upon both a party and a nonparty, requiring the court to evaluate whether the nonparty can appeal in a way that does not implicate the rights of the party. *See, e.g.*, *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 926 F.3d 534, 538-39 (9th Cir. 2019); *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 747 F.2d 1303, 1305 (9th Cir. 1984). But here, we are not faced with uncleavable interests. Ms. Mills could directly appeal a civil contempt citation and obtain relief without impacting whether Secretary Clinton must sit for her separate deposition.

Finally, considering the burden the depositions would place on Petitioners given their scope and complete irrelevance to this FOIA proceeding (discussed in further detail *infra* at subsections B and C), we need not reach

Petitioners' and Respondent's arguments regarding how Secretary Clinton and Ms. Mills' status as former Executive Branch officials might play into our analysis. *See* Pet. at 23-32; Judicial Watch Resp. at 12-14.

B.

Next, we turn to the second prong of the *Cheney* test, asking whether the District Court's Order granting Judicial Watch's request to depose Petitioners constituted a "clear and indisputable" error. 542 U.S. at 381. Petitioners can carry their burden in this inquiry if the challenged order constitutes a "clear abuse of discretion." *Id.* at 380. Although a district court has "broad discretion to manage the scope of discovery" in FOIA cases, *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), we find the District Court clearly abused its discretion by failing to meet its obligations under Rule 26 of the Federal Rules of Civil Procedure, by improperly engaging in a Federal Records Act-like inquiry in this FOIA case, and by ordering further discovery without addressing this Court's recent precedent potentially foreclosing any rationale for said discovery.

In the vast majority of FOIA cases, after providing responsive documents, the agency establishes the adequacy of its search by submitting a detailed and nonconclusory affidavit on a motion for summary judgment. *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 527 (D.C. Cir. 2011); *see also SafeCard Servs.*, 926 F.2d at 1200. These affidavits are to be accorded a presumption of good faith and cannot be rebutted by "purely speculative claims about the existence and discoverability of other documents." *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981). Although, as a general rule, discovery in a FOIA case is "rare," *Baker & Hostetler LLP v. U.S. Dep't of*

Commerce, 473 F.3d 312, 318 (D.C. Cir. 2006) (quoting *Schrecker v. U.S. Dep't of Justice*, 217 F. Supp. 2d 29, 35 (D.D.C. 2002)), courts may order limited discovery where there is evidence – either at the affidavit stage or (in rarer cases) before – that the agency acted in bad faith in conducting the search, *see Goland v. CIA*, 607 F.2d 339, 355 (D.C. Cir. 1978) (affirming the district court's finding that plaintiff had not made a sufficient showing of bad faith, so summary judgment without discovery was warranted).

It is this bad-faith hook that the District Court used to justify several rounds of discovery in this case. In March 2016 the District Court authorized discovery into whether the State Department's attempts to settle the FOIA case in late 2014 and early 2015 – before Secretary Clinton's use of a private server became public knowledge – amounted to bad faith. Memo. and Order at 1-2, ECF No. 39; *see also* Memo. and Order at 7, ECF No. 65. Judge Lamberth explained that given recent developments, the case had "expanded to question the motives behind Clinton's private email use while Secretary, and behind the government's conduct in this litigation." Memo. and Order at 1, ECF No. 65. In its March 2, 2020 order authorizing yet more discovery – including the depositions at issue here – the District Court again acknowledged that discovery in FOIA cases is "rare" but reminded the parties of its view that "it was State's mishandling of this case – which was either the result of bureaucratic incompetence or motivated by bad faith – that opened discovery in the first place." Memo. Order at 12, ECF No. 161.

However, in finding suspicions of bad faith by the State Department opened the door for these far-reaching depositions of Petitioners, the District Court clearly abused its discretion in at least three ways. First, the District Court

abused its discretion by failing to "satisfy[] its Rule 26 obligation." *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 995 (D.C. Cir. 2014). The mere suspicion of bad faith on the part of the government cannot be used as a dragnet to authorize voluminous discovery that is irrelevant to the remaining issues in a case. A district court's discretion to order discovery, although broad, is clearly "cabined by Rule 26(b)(1)'s general requirements," *id. at* 994, which allow parties to discover "any nonprivileged matter that is relevant to [a] claim or defense and proportional to the needs of the case,"[2] FED. R. CIV. P. 26(b)(1); *see also Food Lion v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1012 (D.C. Cir. 1997) ("[N]o one would suggest that discovery should be allowed of information that has no conceivable bearing on the case." (internal quotation marks omitted)); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352, n.17 (1978) (concluding that plaintiffs sought information without "any bearing . . . on issues in the case" and noting that "when the purpose of a discovery request is to

[2] At the time *AF Holdings* was decided, Rule 26 required "a discovery order be '[f]or good cause' and relate to a 'matter relevant to the subject matter involved in the action.'" 752 F.3d at 995 (quoting FED. R. CIV. P. 26(b)(1) (2000)). However, in the 2015 Amendments, those portions of Rule 26 were removed and the Rule was narrowed to only allow discovery of any "nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case*[.]" FED. R. CIV. P. 26(b)(1) (2015) (emphasis added); *see also id.* advisory committee's note to the 2015 amendment ("The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action."). Explaining that the "for good cause" and "any matter relevant to the subject matter" language was "rarely invoked," the Committee noted that these and other changes were made to "guard against redundant or disproportionate discovery." *Id.* This change only strengthens Petitioners' argument that the District Court abused its discretion in ordering these depositions.

gather information for use in proceedings other than the pending suit, discovery properly is denied").

Here, the District Court ordered Secretary Clinton's deposition primarily to probe her motives for using a private email server and her understanding of the State Department's records-management obligations. *See* Mem. Order at 10, ECF No. 161. However, neither of these topics is relevant to the only outstanding issue in this FOIA litigation – whether the State Department has conducted an adequate search for talking points provided to Ambassador Rice following the September 11, 2012 attack in Benghazi, or for any communications or records related to those specific talking points. *See* Compl. at ¶ 5, ECF No. 1. The proposed inquiries are not, as Judicial Watch insists, "vital to determining the adequacy of the search for records at issue in [its] FOIA request," Pl.'s Reply at 10, No. 1:14-cv-1242, ECF No. 144 (Oct. 3, 2019), and we find there is little reason to believe that the information sought will be relevant to a claim or defense as required by Rule 26. *See AF Holdings*, 752 F.3d at 995 (finding discovery improper where the information sought would not meet the Rule 26 standard and would "be of little use" in the lawsuit).

The District Court has impermissibly ballooned the scope of its inquiry into allegations of bad faith to encompass a continued probe of Secretary Clinton's state of mind surrounding actions taken years before the at-issue searches were conducted by the State Department. Secretary Clinton has already answered interrogatories from Judicial Watch on these very questions in the case before Judge Sullivan, explaining the sole reason she used the private account was for "convenience." Resp. to Order at 3, No. 1:14-cv-1242,

ECF No. 143 (Sept. 23, 2019).[3] But more importantly, even if a deposition of Secretary Clinton were to somehow shake some novel explanation loose after all these years, this new information simply would have no effect on the rights of the parties in this FOIA case, making it "an inappropriate avenue for additional discovery." Status Rep. at 5, ECF No. 133. As the Department of Justice argued below:

> Even if this Court found that Secretary Clinton used private email with the specific intent of evading FOIA obligations, Plaintiff has already received the only relief such a finding would (arguably) make available: State's recovery, search, and processing of any records held by the former Secretary, including records that were not in the possession, custody, or control of State at the time the FOIA request was filed or the original searches were conducted.

Id. Discovery in FOIA cases is not a punishment, and the district court has no basis to order further inquiry into Secretary Clinton's state of mind, which could only conceivably result in relief Judicial Watch has already received – discovery. *See Baker & Hostetler*, 473 F.3d at 318. Furthermore, a bad-faith inquiry in a FOIA context is only relevant as it goes to the actions of the individuals who conducted the search. *See, e.g.*, *Ground Saucer Watch*, 692 F.2d at 771-72 (reviewing accusations of bad faith on the part of the CIA stemming from how officials instructed employees

[3] *See* Pet. at 27-28 (citing Resp. to Order at Ex. A, ECF No. 143 (Interrogatory 7, inquiring about the reasons why Secretary Clinton used a private email account; Interrogatories 4, 5, 6, and 20 asking about the process by which she made this decision; and Interrogatories 7, 8, and 9, inquiring whether FOIA or other recordkeeping laws played any role in her decision to use a private server)).

to conduct searches, how they construed the nature and scope of the FOIA request, and the failure to produce certain later-uncovered documents). Since there is no evidence Secretary Clinton was involved in running the instant searches – conducted years after she left the State Department – and since she has turned over all records in her possession, *see* Status Rep. at 6, ECF No. 133, the proposed deposition topics are completely attenuated from any relevant issue in this case.

As to Ms. Mills, who already testified for seven hours in the case before Judge Sullivan, including on Secretary Clinton's use of a private email and FOIA, Resp. to Order at 1, No. 1:14-cv-1242, ECF No. 142 (Sept. 23, 2019), there is no new information that justifies a duplicative inquiry that is also irrelevant to the remaining issues in the case. *See* Mot. for Discovery at 4, ECF No. 22 (Judicial Watch noting, nine months before Ms. Mills' deposition, its awareness of some 31,830 emails deemed private by Secretary Clinton). Ms. Mills was no longer employed by the State Department when these FOIA searches were conducted, and the District Court's general belief that discovery was appropriate because the State Department "mishandl[ed] this case," Mem. Order at 1, ECF No. 161, has no link to a far-reaching deposition of Ms. Mills.

Second, the District Court abused its discretion by misapplying the relevant legal standard for a FOIA search. It is elementary that an agency responding to a FOIA request is simply required to "conduct[] a 'search *reasonably calculated* to uncover all *relevant documents*.'" *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)) (emphasis added). Unlike the Federal Records Act – which requires federal agencies to protect against the removal or loss of records, 44 U.S.C. § 3105, and allows certain

parties to bring suit to compel enforcement action to recover unlawfully removed or destroyed documents, *id.* § 3106(a); *see also Judicial Watch, Inc. v. Pompeo*, 744 F. App'x 3 (D.C. Cir. 2018) – the appropriate inquiry under FOIA is much more limited. In a FOIA case, a district court is not tasked with uncovering "whether there might exist any other documents possibly responsive to the request," but instead, asks only whether "the *search* for [the requested] documents was *adequate*." *Weisberg*, 745 F.2d at 1485 (citations omitted).

Here, rather than evaluating whether the State Department's search for documents related to Ambassador Rice's Benghazi talking points was adequate, the District Court has instead authorized an improper Federal Records Act-like inquiry to uncover purely hypothetical emails or communications. *Ground Saucer Watch*, 692 F.2d at 772 (explaining that "unadorned speculation" cannot compel further discovery). The District Court attempted to justify the instant depositions, in part, because approximately thirty "previously undisclosed" emails were produced by the FBI in unrelated litigation and because it felt the State Department "failed to fully explain the new emails' origins[.]" Memo. Order at 1-2, ECF No. 161. However, these documents – all of which Judicial Watch has conceded are nonresponsive to its FOIA request, *see* Tr. of Proc. at 35, ECF No. 156, and which it seems were in fact in the State Department's possession but were simply not searched in response to this narrow FOIA request, Oral Arg. Tr. at 52-53, – do not call into question the adequacy of the search or justify this wide-ranging and intrusive discovery.

It is well established that the reasonableness of a FOIA search does not turn on "whether it actually uncovered every document extant," *SafeCard Servs.*, 926 F.2d at 1201, and that

the failure of an agency to turn up a specific document does not alone render a search inadequate, *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). In fact, this Court has stated that the belated disclosure of even *responsive* documents does not necessarily undermine the adequacy of an agency's search. *See, e.g.*, *Goland*, 607 F.2d at 374; *Ground Saucer Watch*, 692 F.2d at 772. But here, the District Court determined that the discovery of nearly thirty *nonresponsive* documents that were already in the State Department's possession justified the depositions of persons who were not even involved in the search. We disagree and point the District Court back to the sole, narrow inquiry before it – whether the State Department made "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (quotation marks omitted).

Third, the District Court failed to properly consider the central factor in this FOIA case – whether the agency's search was reasonably calculated to discover the requested documents – by disregarding this Court's recent decision in *Pompeo*, 744 F. App'x at 4. The District Court premised its approval of Petitioners' depositions partially on its belief that the State Department had "failed to persuade the Court that all of Secretary Clinton's recoverable emails have been located." Mem. Order at 2, ECF 161. However, it made this proclamation without addressing this Court's decision in a recent Federal Records Act case between the same parties affirming that the State Department "ha[d] already taken every reasonable action to retrieve any remaining [Clinton] emails." *Pompeo*, 744 F. App'x at 4. In *Pompeo*, we found that "no imaginable enforcement action" could turn up additional emails and stated that it was "both fanciful and unpersuasive" to claim that the State Department had not

done enough to retrieve emails from persons outside the agency with whom the Secretary may have corresponded. *Id*. Although *Pompeo* did not address this specific search for Ambassador Rice's Benghazi talking points, its language is clear – the State Department has exhausted every reasonable means to retrieve *all* of Secretary Clinton's recoverable emails. *Id.* Although we decline to adopt Petitioners' characterization of this as a "mootness" issue, *see* Pet. at 19-22, we find the District Court did err by failing to address our findings in *Pompeo* and simply insisting Petitioners' depositions would somehow squeeze water out of the rock. If a search for additional Clinton emails has been exhausted in a Federal Records Act case – under a statutory scheme that does provide a process for the recovery or uncovering of removed records – the grounds for continued foraging in the more limited context of a FOIA case are fatally unclear.

C.

This brings us to the third prong of the *Cheney* standard, which asks if the Court, "in the exercise of its discretion, [is] satisfied" that issuance of the writ "is appropriate under the circumstances." 542 U.S. at 381. Applying this "relatively broad and amorphous" standard, *In re Kellogg Brown & Root, Inc.*, 756 F.3d at 762, we find the totality of circumstances merits granting the writ.

We observe, at the outset, that although Judicial Watch devotes considerable attention to the first two prongs of *Cheney*, *see* Judicial Watch Resp. at 11-24, it "offers no reason, nor can we detect one, why we should withhold issuance of the writ if [Secretary Clinton] is otherwise entitled to it." *In re Mohammad*, 866 F.3d 473, 475 (D.C. Cir. 2017) (per curiam); *see generally* Judicial Watch Resp. Because the mandamus prongs "must be satisfied before [the writ] may

issue," *Cheney*, 542 U.S. at 380 (citing *Kerr*, 426 U.S. at 403), Judicial Watch's failure to address the third prong is not dispositive. *See id.* at 381 ("[E]ven if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.") (citing *Kerr*, 426 U.S. at 403). Our own review of the issue leads us to conclude that *Cheney*'s third prong is satisfied. In light of the importance of the congressional aims animating FOIA, and in order to forestall future, similar errors by district courts that would hamper the achievement of those aims, we find that the totality of the circumstances counsels us to hold, in the exercise of our discretion, that mandamus is appropriate under these circumstances.

While "[i]n the 'normal course, mandamus is not available to review a discovery order', ... [m]andamus *is* appropriate [] where review of an order 'after final judgment is obviously not adequate.'" *In re Al Baluchi*, 952 F.3d 363, 368 (D.C. Cir. 2020) (quoting *In re Executive Office of President*, 215 F.3d 20, 23 (D.C. Cir. 2000)) (emphasis added) (alteration omitted). In this vein, courts have found mandamus appropriate in the discovery context where necessary to correct an error with potentially far-reaching consequences. *See, e.g.*, *In re Kellogg Brown & Root, Inc.*, 756 F.3d at 763 ("This Court has long recognized that mandamus can be appropriate to 'forestall future error in trial courts' and 'eliminate uncertainty' in important areas of law." (quoting *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975)); *In re Sims*, 534 F.3d 117, 128-29 (2d Cir. 2008) (mandamus may be appropriate to review discovery orders involving privilege where "immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege"); *Colonial Times, Inc.*, 509 F.2d at 524 (mandamus may be appropriate where resolution of

discovery issue will "add importantly to the efficient administration of justice"); *Sanderson v. Winner*, 507 F.2d 477, 479 (10th Cir. 1974) (per curiam) (granting mandamus to vacate discovery order where district court's "decision [w]as an unwarranted extension" of Supreme Court precedent, "which extension would limit and curtail" a federal rule "in a manner never contemplated").

These considerations counsel the issuance of the writ in the instant circumstances. As already noted, the District Court's Order reflects a deeply flawed view of both FOIA and Rule 26, with the result that the contemplated discovery has traveled far afield from the narrow issue in this FOIA case – the adequacy of the State Department's search for documents relating to talking points *given to Ambassador Rice for a single day's television appearances*. Compl. at ¶ 5, ECF No. 1 (emphasis added); *see also Iturralde*, 315 F.3d at 315 (emphasizing that, under FOIA, the adequacy of the search is measured "by the appropriateness of the methods used," "not by the fruits of the search"). While the first rounds of discovery may have, as the District Court stated, prompted "more questions than answers," Mem. Order at 1, ECF No. 161, a court may not order discovery to probe any subject that piques curiosity, *see* FED. R. CIV. P. 26(b)(1), especially in the circumscribed posture of a FOIA case. Here, the FOIA request is for Benghazi-related documents actually given to Ambassador Rice, but the depositions were to ask why Secretary Clinton set up a private server years earlier and with whom she generally corresponded. None of this bears on the question of what documents, if any, were given to Ambassador Rice about the Benghazi attack.

Illustrating the inappropriateness of the ordered discovery, the District Court authorized Judicial Watch to depose Secretary Clinton and Ms. Mills about "their

knowledge of the existence of any emails, documents, or text messages related to the Benghazi attack." Mem. Order at 10, ECF No. 161. However, the only basis for this request that Judicial Watch now points to is a passage in one of the nearly thirty nonresponsive emails discussed above, which suggests that Huma Abedin sent Secretary Clinton texts about the latter's schedule. *See* Judicial Watch App'x at 15. These unrelated text messages, although potentially piquing the court's curiosity, simply cannot justify the requested depositions. First, during the events in question, electronic messages (such as text messages), were not considered federal agency records under the Federal Records Act. *See* 44 U.S.C. § 2911(c)(1) (amending the Act in November 2014 to include "electronic messages" or "electronic messaging systems that are used for purposes of communicating between individuals[]"); *see also Guidance on Managing Electronic Messages*, Bulletin 2015-02 (July 29, 2015) (setting forth new records management requirements that apply to electronic messages, including text messaging), https://www.archives.gov/records-mgmt/bulletins/2015/2015-02.html. While this quirk of timing may not bar the State Department from searching for pre-2014 text message records in response to another FOIA request, Judicial Watch's "mere speculation" about the existence of relevant text messages in this case is certainly insufficient to compel further discovery here. *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004) (per curiam) ("[M]ere speculation that as yet uncovered documents might exist[] does not undermine the determination that the agency [has] conducted an adequate search for the requested records.").

Second, this is not a case of a government agency refusing to provide records from a personal email that is the subject of a direct FOIA request, *see, e.g.*, *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 146-47

(D.C. Cir. 2016), or arguing that certain records are not in its control and as such cannot be produced, *see, e.g.*, *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 151-57 (1980). Judicial Watch has conceded that it is not alleging a "cover-up" by either Secretary Clinton or Ms. Mills, *see* Oral Arg. Tr. at 46, and there is no evidence or even an accusation that Secretary Clinton or Ms. Mills communicated about the specific issue at hand – Ambassador Rice's talking points or their creation – in a method that would not have been captured by the State Department's search to date. For example, in opposing the State Department's motion for summary judgment, Judicial Watch filed a Rule 56(d) declaration specifying the additional discovery it sought and made no mention of the prospect of outstanding text messages or other electronic communications. Mot. for Discovery at 8, ECF No. 22. Instead, Judicial Watch specified that it sought "limited" discovery, focusing exclusively on email records. *Id.* at 1. The closest Judicial Watch came to raising the prospect of text messages was to request "[i]nformation about what electronic and computing devices (BlackBerrys, iPhones, iPads, laptops, desktops, etc.) were used by key officials, their locations and Defendant's ability to search for potentially responsive records" – devices that have already been turned over to the State Department and examined. *Id.* at 8; *see also Pompeo*, 744 F. App'x at 4 (detailing the FBI's search of Secretary Clinton's devices). Again focusing on email records, Judicial Watch elaborated that it sought those devices because it believed that Secretary Clinton may have used "a Blackberry and iPad as Secretary for her government email." Mot. for Discovery at 8 n. 15, ECF No. 22.

"To be sure, there are limits to the impact of a single district court ruling . . . . But prudent counsel monitor court decisions closely and adapt their practices in response." *In re*

Kellogg Brown & Root, Inc., 756 F.3d at 762-63. If left unchecked, the premise that such wide-ranging discovery should and will be countenanced under FOIA "would extend the FOIA to an essentially limitless number of materials . . . . The Act was not intended to be accorded such a reach." *Wolfe v. Dep't of Health & Human Servs.*, 711 F.2d 1077, 1081 (D.C. Cir. 1983). Such an "unwarranted extension" of FOIA, certainly "never contemplated" by Congress, *see Sanderson*, 507 F.2d at 479, would threaten an exponential increase in putative FOIA suits seeking commensurate levels of irrelevant and potentially harassing discovery.

FOIA represents a "congressional commitment to transparency," *Judicial Watch, Inc. v. Dep't of Defense*, 913 F.3d 1106, 1109 (D.C. Cir. 2019) – a commitment whose fulfillment would be substantially hampered were judicial and other governmental resources devoted not to the iterated topics of FOIA requests and suits, but to free-ranging and perpetually evolving inquiries for which FOIA requests served as mere jumping-off points. The important aims at the core of FOIA therefore counsel us not to let the instant error lie. *Cf. Colonial Times, Inc.*, 509 F.2d at 524 (mandamus may be appropriate to "add importantly to the efficient administration of justice"). In the face of the District Court's "clear abuse of discretion" in ordering this discovery, we find the writ is "appropriately issued," *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964), to "forestall future error in trial courts" considering similarly attenuated discovery requests under FOIA, *see Colonial Times, Inc.*, 509 F.2d at 524.

The circumstances under which this particular discovery order arises only buttress our finding of the appropriateness of mandamus. Judicial Watch does not in fact want for the information it purports to seek and has already been afforded extensive discovery related to the proposed deposition topics.

In this FOIA case alone, it has taken eighteen depositions and propounded more than four times the presumptive maximum number of interrogatories. *See* Status Rep. at 1-3, No. 154; FED. R. CIV. P. 33(a)(1) ("Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories[.]"). In its parallel FOIA case before Judge Sullivan, Judicial Watch received sworn interrogatories from Secretary Clinton herself as well as a lengthy deposition of Ms. Mills and seven other witnesses, traversing the proposed deposition topics and resulting in the identification of no additional records responsive to the instant FOIA request. Mem. Order at 13-14, No. 13-cv-1363, ECF No. 73 (May 4, 2016). As discovery progressed, Judge Sullivan invited Judicial Watch to seek leave to serve even more interrogatories if there were "follow up questions" it had been "unable to anticipate," Mem. Op. at 18-19, No. 1:13-cv-1363, ECF No. 124 (Aug. 19, 2016), an avenue Judicial Watch did not pursue.

Judicial Watch also has available to it a voluminous public record about the proposed deposition topics. As noted, several executive agencies and a House Select Committee have conducted inquiries into Secretary Clinton's use of a private email server and made their findings public.[4]

[4] *See* Pet. at 26 n.5 (citing U.S. Department of State, Office of Inspector General, *Evaluation of the Department of State's FOIA Processes for Requests Involving the Office of the Secretary* (Jan. 2016), https://www.stateoig.gov/system/files/esp-16-01.pdf; U.S. Department of State, Office of Inspector General, *Office of the Secretary: Evaluation of Email Records Management and Cybersecurity Requirements* (May 2016), https://fas.org/sgp/othergov/state-oig-email.pdf; U.S. Department of Justice, Office of Inspector General, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* (June 2018), https://www.justice.gov/file/1071991/download; House of Representatives Select Committee on Benghazi, *Final Report of the Select Committee on*

Secretary Clinton also provided eleven hours of public testimony before the House Select Committee, *see* The Select Committee on Benghazi, *Hearing 4 – Former Secretary of State Hillary Clinton* (Oct. 22, 2015), https://archives-benghazi-republicans-oversight.house.gov/hearings/hearing-4, and has answered countless media inquiries on the matter. These facts underscore both the impropriety of the District Court's Order and the appropriateness of turning the page on the issue.[5]

CONCLUSION

For the reasons set forth above, we grant the petition for mandamus as to Secretary Clinton, deny it as to Ms. Mills and dismiss Ms. Mills' petition.

So ordered.

---

the Events Surrounding the 2012 Terrorist Attack in Benghazi, H.R. Rep. No. 114-848 (2016), https://www.congress.gov/congressional-report/114th-congress/house-report/848/1).

[5] Especially in light of Judicial Watch's present access to extensive information responsive to its proposed deposition topics, the deposition of Secretary Clinton, if allowed to proceed, at best seems likely to stray into topics utterly unconnected with the instant FOIA suit, and at worst could be used as a vehicle for harassment or embarrassment. We refrain from opining further on these topics except to observe that neither path can be squared with the dictates of either FOIA or Rule 26.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Cir. R. 28 and 35, counsel provides the following information as to parties, rulings, and related cases:

(A) Parties and Amici

The parties appearing before the district court are Plaintiff-Respondent Judicial Watch, Inc. and Defendant-Respondent U.S. Department of State. Petitioner Hillary Rodham Clinton is an intervenor in the district court. Petitioner Cheryl Mills is a nonparty witness in the district court. No amici appeared in the district court or before this Court.

(B) Ruling Under Review

The rulings at issue in this proceeding are:

(1) The district court's March 2, 2020 order authorizing the depositions of Petitioners Hillary Rodham Clinton and Cheryl Mills. ECF 161.

(2) This Court's August 31, 2020 order granting Petitioner Hillary Rodham Clinton's petition for a writ of mandamus and vacating the district court's March 2, 2020 order as to Secretary Clinton's deposition. 973 F.3d 106.

(C) Related Cases

Judicial Watch, Inc. does not believe that there are any related cases within the meaning of Local R. 28(a)(1)(C).

/s/ Ramona R. Cotca
Ramona R. Cotca

CORPORATE DISCLOSURE STATEMENT

Respondent Judicial Watch, Inc. is a not-for-profit, public interest organization that has no parent company, and no publicly held corporation has a 10% or greater ownership interest in Judicial Watch, Inc.

Dated: October 15, 2020

/s/ *Ramona R. Cotca*
Ramona R. Cotca

Counsel for Plaintiff-Respondent Judicial Watch, Inc.

CERTIFICATE OF SERVICE

I hereby certify that the attached Plaintiff-Respondent Judicial Watch, Inc.'s Petition for Panel Rehearing and Rehearing *En Banc* was electronically filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the Appellate CM/ECF system on October 15, 2020.

All participants in the case are registered CM/ECF users and service will be accomplished by the Appellate CM/ECF system.

/s/ *Ramona R. Cotca*
Ramona R. Cotca