No. 20-___

IN THE
Supreme Court of the United States

IN RE HILLARY RODHAM CLINTON AND CHERYL MILLS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a witness can seek a writ of mandamus and bypass the "disobedience and contempt route to appeal a discovery order" by becoming an intervenor for the sole purpose of objecting to the discovery order.

2. Whether a post-judgment appeal is insufficient to remedy a deposition order where the court of appeals found no claims of privilege, the apex doctrine, or any of the exceptional issues that have historically triggered mandamus.

3. Whether a district court's bad-faith inquiry in Freedom of Information Act ("FOIA") cases is limited solely to the actions of the FOIA officers who conducted the search.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner, Judicial Watch, Inc. is plaintiff in the district court and was respondent in the U.S. Court of Appeals for the District of Columbia (D.C. Circuit"). Judicial Watch is a not-for profit educational foundation organized under the laws of the District of Columbia, whose mission is to promote transparency, accountability, and integrity in government, politics, and the law.

Respondents are Defendant U.S. Department of State, Intervenor Hillary Rodham Clinton and non-party witness Cheryl Mills.

Pursuant to Supreme Court Rule 29.6, Petitioner Judicial Watch, Inc. certifies that it is not a publicly owned corporation, it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court (D.C.):

Judicial Watch, Inc. v. U.S. Dep't of State, No. 14-cv-1242 (March 2, 2020)

Judicial Watch, Inc. v. U.S. Dep't of State, No. 14-cv-1242 (Aug. 21, 2019)

Judicial Watch, Inc. v. U.S. Dep't of State, No. 14-cv-1242 (Aug. 14, 2019)

Judicial Watch, Inc. v. U.S. Dep't of State, No. 14-cv-1242 (Aug. 7, 2019)

Judicial Watch, Inc. v. U.S. Dep't of State, No. 14-cv-1242 (Jan. 15, 2019)

Judicial Watch, Inc. v. U.S. Dep't of State, No. 14-cv-1242 (Dec. 6, 2018)

Judicial Watch, Inc. v. U.S. Dep't of State, No. 14-cv-1242 (March 29, 2016)

United States Court of Appeals (D.C.):

In re Hillary Rodham Clinton and Cheryl Mills, No. 20-5056 (Oct. 28, 2020)

In re Hillary Rodham Clinton and Cheryl Mills, No. 20-5056 (Aug. 31, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Judicial Watch, Inc. ("Judicial Watch") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia.

DECISIONS BELOW

The D.C. Circuit issued a new opinion on August 31, 2020 and it is reported at 973 F.3d 106. A copy of the August 31, 2020 opinion and orders are reproduced at App. 1a-33a. The D.C. Circuit's denial of Judicial Watch's petition for rehearing and rehearing *en banc*, entered on October 28, 2020, is reproduced at App. 49a-50a.

The district court's March 2, 2020 memorandum opinion is unreported and is reproduced at App. 34a-48a.

JURISDICTION

The court of appeals issued its final opinion on August 31, 2020 and its denial of the petition for rehearing and rehearing *en banc* was entered on October 28, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Excerpts from the Freedom of Information Act

5 U.S.C. § 552

> **(a)** Each agency shall make available to the public information as follows:
>
> ….
>
> **(a)(4)(B)** On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo…In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit…

Excerpts from the All Writs Act

28 U.S.C. § 1651. Writs

> **(a)** The Supreme Court and all courts established by Act of Congress may issue

> all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law.

STATEMENT

I. Statement of the Issues.

This case concerns the power of an appeals court to issue the extraordinary relief of mandamus, as a first resort, to overturn a trial court's discovery order that did not involve privilege or the exceptional issues ordinarily required for such relief.

In an August 31, 2020 opinion, the D.C. Circuit granted mandamus relief to former Secretary of State Hillary Rodham Clinton, an intervenor in Judicial Watch's Freedom of Information Act ("FOIA") lawsuit filed against the U.S. Department of State ("State"), to set aside the district court's order authorizing Judicial Watch to depose former Secretary Clinton and her former Chief of Staff, Cheryl Mills. The panel's decision is wrong for several reasons.

First, the D.C. Circuit permitted mandamus as a first resort, rather than a last. In doing so, the D.C. Circuit disregarded this Court's analysis in *Doyle v. London Guarantee & Accident Co.*, 204 U.S. 599 (1907), to find that the "disobedience and contempt route to appeal cannot be labeled an adequate means of relief" for Secretary Clinton as a party litigant, even though her only interest in the case pertained to her deposition. App. 8a-9a. Conversely, the panel

found that nonparty witness Cheryl Mills, who was also permitted to be deposed by the trial court, was *not* entitled to mandamus relief because she could disobey the order. The panel's differing treatment of Secretary Clinton and Mills – two otherwise identical parties with identical interests (*e.g.*, avoiding discovery orders) – is at odds with the Court's precedent and longstanding cases.

Further, once the D.C. Circuit recognized Secretary Clinton as a party litigant, it never explained why the post-judgment appellate remedies available to her are inadequate. The court of appeal's failure on this front, has in effect, extended more rights to Secretary Clinton than this Court extends to party litigants.

Second, the D.C. Circuit's decision is a stark departure from the rigorous standard employed by the Court and other courts of appeal to avoid piecemeal appeals by overturning discovery orders through mandamus. The Court and other circuits have repeatedly held that post-judgment appeals are adequate to "ensure the vitality of the attorney-client privilege," "one of the oldest recognized privileges for confidential communications," as well as other privileges, to deny mandamus as the appropriate relief. *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 108-109 (2009) (citation omitted); *Waymo LLC v. Uber Techs., Inc.*, 870 F.3d 1350 (Fed. Cir. 2017). If the post-judgment appeals can remedy the disclosure of confidential information, certainly it can remedy a discovery order for a deposition about use of personal email for government business and the existence of

FOIA records – particularly when, as here, the panel did not disturb the district court's finding that the traditional protections afforded to government officials under the apex doctrine do not apply to Secretary Clinton in this case. Neither does this case concern other exceptional issues that have historically triggered emergency intervention through mandamus, such as unwarranted impairment of another branch in the performance of its duties, grand jury secrecy, or novel issues or cases of first impression.

Third, the D.C. Circuit's decision erroneously found "clear abuse of discretion" by limiting the scope of the district courts' broad equitable authority to order discovery in FOIA cases and 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." App. 16a-17a. 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). The sole concern for Secretary Clinton's and Ms. Mills' limited deposition is the practice and preservation of email records for official government business at the State Department – all information relevant to FOIA.

Fourth, the D.C. Circuit's decision created a new path for any nonparty witness objecting to a discovery

order to seek mandamus through permissive intervention. App. 6a-11a. Although Secretary Clinton's interest was limited to avoiding a deposition, the panel granted her mandamus relief because the district court previously granted her permissive intervention to object to the discovery order. This places form over substance. By providing this new avenue for piecemeal litigation appeals, the panel's decision raises issues of exceptional importance relevant to mandamus review. *See Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35-36 (1980); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953); *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).

II. Factual Background.

This case arises out of Judicial Watch'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. App. 79a, 87a. The request was made to the U.S. Department of State's Office of the Secretary, seeking copies of both the talking points and any communications about the talking points related to the September 11, 2012 attack. *Id.* Judicial Watch sued on July 21, 2014, when State failed to respond.

The record in the district court demonstrates two overarching concerns: (1) the unprecedented nature of Secretary Clinton's use of a "private" email account to conduct official business; and (2) incomplete, if not

false or misleading, representations to Judicial Watch and the court by State and its Justice Department attorneys about their knowledge of Secretary Clinton's email practices. *See e.g.*, App. 90a-93a (March 29, 2016 Memo. and Order), App.77a-89a (Dec. 6, 2018 Memo. Opinion), App. 57a-76a (Jan. 15, 2019 Memo. Order), and App. 34a-48a (March 2, 2020 Memo. Order).

On September 15, 2014, the district court ordered State to produce all non-exempt, responsive records and a draft *Vaughn* Index by November 12 and December 5, 2014, respectively. App. 80a-82a. Pursuant to State's representations, the district court's order anticipated that the draft *Vaughn* Index would enable the parties to "confer in an attempt to resolve this matter without further litigation." *Id.*

On November 12, 2014, State made its final production to Judicial Watch. *Id.* It produced four records, all of which had been provided to Judicial Watch in response to an earlier lawsuit for records in Ambassador Rice's office. *Id.* State then produced its draft *Vaughn* index on December 5, 2014, the same day Secretary Clinton returned approximately 30,000 work-related emails to the agency. *Id.* Neither State nor its Justice Department attorneys advised Judicial Watch or the court that the agency's search, production, and draft *Vaughn* Index did not include Secretary Clinton's emails. *Id.* at 80a-83a. Judicial Watch and the district court only learned of these facts through subsequent public media reports. *Id.*

III. Judicial Watch's Motion for Discovery and Relevant Proceedings.

On March 2, 2015, The New York Times reported that Secretary Clinton had used a personal email account and server to carry out official government business while she was Secretary of State. *Id*. According to the report, the server was located in the basement of Secretary Clinton's Chappaqua, New York home. *Id.* On February 1, 2013, Secretary Clinton left office without ensuring that the State Department had access to her work-related emails. *Id.*

In a March 10, 2015 statement, Secretary Clinton announced that, after communications with the State Department in October 2014, she had instructed her attorneys, including Mills, to review the emails on the server to determine which were federal records. According to the statement, Secretary Clinton's attorneys had determined that 30,490 emails on the server were federal records and 31,830 emails were personal. *Id*. at 80a. On December 5, 2014, Secretary Clinton's attorneys had delivered to State twelve bankers boxes containing approximately 55,000 pages of her work-related emails. *Id.* at 79a-83a. Of course, none of these facts had been known publicly until the March 2015 reports. Also not known at the time was that Mills had used a personal Gmail account to communicate with Secretary Clinton and other government officials during Secretary Clinton's tenure at State. *Id.*

Nevertheless, State moved for summary judgment on July 7, 2015. Judicial Watch opposed under Rule 56(d) and requested limited discovery concerning the adequacy of State's search and whether the failure to advise Judicial Watch and the district court about Secretary Clinton's emails constituted bad faith. *Id.* at 90a-93a.

The district court granted Judicial Watch's discovery motion on March 29, 2016. *Id.* It found it necessary to develop a record "surrounding Secretary Clinton's extraordinary and exclusive use" of personal email to conduct official business, "as well as other officials' use of this account" for "government business." *Id.* at 91a. In ordering discovery, the court noted that Judicial Watch is not relying on "speculation" or "surmise," but rather is relying on "constantly shifting admissions by the Government and the former government officials." *Id.* The court ultimately held: "[w]hether the State Department's actions will ultimately be determined by the Court to not be 'acting in good faith' remains to be seen at this time, but [Judicial Watch] is clearly entitled to discovery and a record before this Court rules on that issue." *Id.*

After temporarily delaying ordering discovery due to ongoing discovery in a separate FOIA case and various government investigations, on December 6, 2018, the court authorized Judicial Watch to take discovery to "rule out egregious government misconduct and vindicate the public's faith in the State and Justice Department." *Id.* at 85a, 89a, 92a. Specifically, it authorized discovery into (1) whether

Secretary Clinton used a private email to stymie FOIA, (2) whether State's attempts to settle the case in late 2014 and early 2015 amounted to bad faith, and (3) whether State's subsequent searches have been adequate. *Id*. at 89a. By further order entered on January 15, 2019, the court specified particular discovery Judicial Watch was initially authorized to undertake. *See id. generally* at 57a-76a.

Upon completion of the initial discovery, the district court ordered the parties to appear before it on August 22, 2019 to "determine if Judicial Watch needs to depose additional witnesses (including Hillary Clinton and her former Chief of Staff Cheryl Mills)." *Id*. at 54a-56a. As discovery raised more questions than it answered, Judicial Watch requested additional discovery, including the depositions of Secretary Clinton and Mills. *Id*. at 40a-47a. On August 20, 2019, Secretary Clinton requested to intervene, without opposition, pending the court's consideration of her discovery deposition. The court granted the request on August 21, 2019. *Id*. at 51a-53a.

On March 2, 2020, the district court held it was time to hear directly from Secretary Clinton and her chief of staff, Mills, and ordered their depositions. *Id*. at 41a-47a. The district court found the following new evidence compelling to order their depositions: newly discovered evidence about active steps taken to prevent others at State from learning about Secretary Clinton's email use, specific briefings Secretary Clinton received about records management obligations, and newly identified emails not

previously produced by the State Department. *Id.* at 41a-47a. The court carefully limited the scope of Secretary Clinton's deposition to "whether [Secretary Clinton] used a private server to evade FOIA and, as a corollary to that, what she understood about State's records management obligations, and the existence of Benghazi related documents and emails." *Id.* at 41a, 46a-47a.

On March 13, 2020, Secretary Clinton and Mills sought mandamus review of the district court's discovery order before the D.C. Circuit. The panel granted mandamus as to Secretary Clinton but denied it as to Mills in its August 31, 2020 opinion and order.[1] *Id.* at 1a-33a.

REASONS FOR GRANTING THE PETITION

This petition should be granted because the D.C. Circuit's ruling conflicts with precedent of both this Court and other courts of appeal and involves important federal questions about the avenues for mandamus review and the scope of FOIA.

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[1] On August 14, 2020, the D.C. Circuit initially granted the mandamus petition with respect to Secretary Clinton but denied it with respect to Mills. *See In re Clinton*, 970 F.3d 357 (D.C. Cir. 2020). Later, on August 31, 2020, the D.C. Circuit vacated its August 14, 2020 opinion and order and issued a new opinion and order. App. 30a-31a. Like the earlier opinion and order, the August 31, 2020 opinion and order granted the petition with respect to Secretary Clinton but denied it with respect to Mills. The only differences appear to concern language surrounding the D.C. Circuit's jurisdiction. *Id.* at 7a, 21a.

I. The D.C. Circuit's Decision Is Wrong Because It Permitted Mandamus as a First, Not Last, Resort.

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (*quoting* 28 U.S.C. § 1651 (a)). Accordingly, a writ of mandamus may only be issued if all three requirements are met: (1) "the party seeking issuance of the writ [has] no other adequate means to attain the relief he desires;" (2) "the petitioner [has satisfied] the burden of showing that his right to issuance of the writ is clear and indisputable;" and (3) "the issuing court, in the exercise of its discretion, [has been] satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 380-81 (citations and internal quotations omitted).

The remedy of mandamus is one of the "most potent weapons in the judicial arsenal," *Cheney*, 542 U.S. at 380, to be invoked only in extraordinary situations and "may never be employed as a substitute for appeal." *Will v. United States*, 389 U.S. 90, 95 (1967) (citations omitted). "[T]o ensure that the writ will not be used as a substitute for the regular appeals process," *Cheney*, 542 U.S. at 381 (citations omitted), and "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 (citation omitted).

A. Similar to Mills, the "disobedience and contempt route" is an adequate means of relief for Secretary Clinton.

The Court has long established that a nonparty witness has the option to disobey a discovery order and appeal any contempt order, civil or criminal. *U.S. Catholic Conf.*, 487 U.S. at 76. This option may differ for a party litigant, who has an equitable stake in the outcome of the litigation and can wait to appeal a discovery order until the entry of a final judgment. The Court has justified treating party litigants and nonparties differently in such cases by looking where their interests lie in connection with the underlying action. In the case of nonparty witnesses, they do not have a claim in the lawsuit and an immediate appeal of any contempt order would not delay the adjudication of the underlying litigation. *Doyle*, 204 U.S. at 605 (1907); *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1064 (D.C. Cir. 1998) ("*In re Sealed Case*").

The D.C. Circuit's decision disregards the Court's analysis in *Doyle* and misapplies its own precedent, *In re Sealed Case*, by equating Secretary Clinton's status as an intervenor – whose sole purpose in appearing in Judicial Watch's lawsuit was to avoid being deposed – with that of a party litigant having an equitable stake in the case's outcome. The panel seized on the party litigant label it attached to Secretary Clinton rather than examining the purpose of her appearance. It then treated this label as dispositive, granting mandamus relief to Secretary Clinton but not to Mills, who also has the same limited purpose in this FOIA litigation. App. 6a-10a.

The only difference in the two parties is one sought to intervene for the limited purpose to oppose discovery, while the other did not. *Id.* at 6a-10a, 53a n.1, 55a-56a.

In *In re Sealed Case*, Independent Counsel Kenneth W. Starr sought mandamus relief to vacate an order authorizing discovery of him and his staff. The discovery order arose out of a motion for order to show cause why the Independent Counsel 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 of appeals looked to the Court's rulings in *Doyle*, 204 U.S. at 601 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. 151 F.3d at 1064. The 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.

The court of appeals erroneously extended the disparate treatment of party litigants and nonparties to Secretary Clinton and Mills by contrasting Secretary 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's finding that Secretary Clinton's status as an intervenor did not afford her the same option because as a party litigant, she could only appeal a criminal contempt order is wrong.[2] App. 6a-10a.

Neither Secretary Clinton nor Mills have an equitable stake in the outcome of the litigation. Judicial Watch does not seek a final judgment against Secretary Clinton in this FOIA action. Nor could it. FOIA only creates a cause of action against federal agencies, not government officials or individuals. 5 U.S.C. § 552(a)(4)(B). No final judgment will ever be entered on any claim or defense asserted by Secretary Clinton because she did not assert any claims or

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[2] Although the D.C. Circuit in *In re Sealed Case* ultimately 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 Independent Counsel because it found the show cause proceeding was ancillary to the grand jury investigation, the Independent Counsel 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. However, 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 Independent Counsel's purported status as a "party-litigant." The Independent Counsel was no more a party to the grand jury investigation than Secretary Clinton or Mills are parties to Judicial Watch's FOIA lawsuit. Secretary Clinton and Mills may be involved in the suit as witnesses just like the Independent Counsel 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.

defenses. It was understood by all parties and the district court that Secretary Clinton's involvement in the litigation was limited to her objection to Judicial Watch's request to depose her. App. 51a, 53a n1, 55a-56a. 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); D.C. LCvR 7(j). Secretary Clinton is not a "party litigant" for purposes of mandamus and the availability of an immediate appeal of any contempt order, civil or criminal, is just as viable for Secretary Clinton as it is for Mills. Treating the two parties differently, as the D.C. Circuit did here, places form over substance and ignores this Court's guidance in *Doyle*.

B. Once the Panel treated Secretary Clinton as a party, it failed to consider the most obvious remedy available: a post-judgment appeal.

Once the panel recognized Secretary Clinton as a party, the panel overlooked the most obvious "adequate alternate remedy" available to Secretary Clinton: a post-judgment appeal. Assuming Secretary Clinton was correctly characterized as a party litigant, she may appeal the district court's order authorizing her deposition once final judgment is entered. *Fox*, 299 U.S. at 107; *United States v. Ryan*, 402 US. 530, 532 (1971). Once a nonparty witness is recognized to share a claim or defense in the action and is appropriately permitted as an intervenor, the intervening party normally has the right to appeal an adverse final judgment by a trial

court. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76 (1987); *Mohawk Indus.*, 558 U.S. at 110. Even if the original parties do not follow suit, an intervenor is not precluded from appealing a final judgment. *Mohawk Indus.*, 558 U.S. at 109; *Stringfellow*, 480 U.S. at 375-76. The D.C. Circuit is completely silent on the issue and does not provide any rationale why an appeal upon entry of final judgment is not an adequate remedy for Secretary Clinton. Mandamus relief was erroneously granted to Secretary Clinton because it was permitted as a substitute for appeal – regardless of her status as a non-party witness or party litigant. *Cheney*, 542 U.S. at 380-81; *Will*, 389 U.S. at 95; *Bankers Life & Casualty Co.*, 346 U.S. at 383 ("[w]hatever may be done without the writ may not be done with it") (citations omitted).

The D.C. Circuit most recently highlighted the post-judgment appeal as an "adequate alternate remedy" to deny mandamus in the case of U.S. Army Lieutenant General Michael T. Flynn. *In re Flynn*, 973 F.3d 74 (D.C. Cir. 2020). The dissenting opinion by Judge Rao appropriately noted that the mandamus standard "treats the harm and adequate remedy as two sides of the same coin." *Id.* at 94-95, 101, 104. While "[th]e majority maintains that appeal is an adequate alternative remedy only by disregarding the harms to the Executive Branch;" *id.* at 101, the panel's decision in the case of Secretary Clinton did not identify any harm to the former Secretary of State that would render a post-judgment appeal inadequate. Even if the district court's order authorizing Secretary Clinton's deposition were

erroneous, which Judicial Watch contends it is not, there is no reason why it cannot be remedied on a post-judgment appeal. *See Bankers Life & Casualty Co.*, 346 U.S. at 383 (citations omitted).

Also, unlike other mandamus petitioners, Secretary Clinton never moved to certify the court's order authorizing her deposition. *See Mohawk Indus.*, 558 U.S. at 104-106; 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. *See* Fed. R. Civ. P. 26(c)(1) and 45(d)(3). In other words, Secretary Clinton used mandamus relief as a first resort, rather than a last.

While raising Secretary Clinton to the equivalent of a party litigant, the panel employed mandamus as a substitute for post-judgment appeal. The panel's failure to consider Secretary Clinton's available remedies when it labeled her a party litigant has, in effect, extended more rights to Secretary Clinton than to ordinary parties, including Judicial Watch, the Government, and petitioners like General Flynn.

II. The D.C. Circuit's Decision Conflicts with Decisions by This Court and Other Circuits That Employ a Strict Standard to Overturn Discovery Orders Through Mandamus.

In the discovery context, this Court has found post-judgment appeals adequate even to "ensure the vitality of the attorney-client privilege," "one of the oldest recognized privileges for confidential

communications." *Mohawk Indus.*, 558 U.S. at 108-09 (citations omitted).

Like this Court, several courts of appeal have found that a post-judgment appeal is sufficient to remedy discovery orders authorizing the disclosure of confidential information subject to the attorney work-product doctrine and other privileges, refusing to issue a writ. *See Waymo*, 870 F.3d at 1357-59; *American Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 278-79 (2d Cir. 1967); *In re State & County Mut. Fire Ins. Co.*, 138 F. Appx. 539, 540 (4th Cir. 2005).

If post-judgment appeals 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 authorizing the deposition of a former head of an agency about her use of personal email for government business and where the extraordinary concerns that have historically triggered mandamus are not present.

The panel did not disturb the district court's finding that the traditional protections afforded to government officials under the apex doctrine do not apply to the former Secretary of State in this case. App. 11a, 42a, 45a n. 4. The deposition does not concern the internal government decision-making process regarding official government policy. *See United States v. Morgan*, 313 U.S. 409, 421-22 (1941). In fact, the Government also opposed Secretary Clinton's petition for the writ before the D.C. Circuit for this very reason – noting that this is a rare case

where the deposition of a former Cabinet member was not authorized for the impermissible purpose of probing into the mental processes of the government official regarding official government policy, *Morgan*, 313 U.S. at 421-22, "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." *See* Response of U.S. Department of State at 3, *In re Hillary Rodham Clinton*, No. 20-5056, (D.C. Cir. April 3, 2020); *see also 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*, 389 U.S. at 98, n.6)).

The discovery order also does not raise other types of exceptional issues this Court and other courts of appeal have addressed through mandamus relief. Secretary Clinton's deposition does not create an occasion for constitutional confrontation between the executive branches. *Cheney*, 542 U.S. at 382-90; *Flynn*, 973 F.3d at 103 (Rao, J., dissenting). It also does not concern issues of grand jury secrecy as in *In re Sealed Case*, 151 F.3d at 1063-65, or the issue of sovereign immunity, as in *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998). Nor does her deposition concern a novel issue or case of first impression the Court has held to warrant emergency appellate intervention through mandamus. *Schlangenhauf v. Holder*, 379 U.S. 104, 110-12 (1964). To issue the writ, the D.C. Circuit strayed far from the high bar

the Court has set for mandamus relief and which other court of appeals have appropriately followed.

III. The D.C. Circuit's Decision to Limit Bad Faith Inquiries in FOIA Cases Disregards the Court's Interpretation of FOIA and Raises an Important Issue About the Scope of Trial Courts' Equitable Powers Under FOIA.

District courts have "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) (citation omitted). The D.C. Circuit has found that 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). The panel nonetheless found clear abuse of discretion because discovery in the FOIA context, in its view, is limited to only "the actions of the individuals who conducted the search" for responsive records. App. 16a-17a. The panel's finding is a radical departure from what Congress intended and this Court's interpretation of FOIA. *See Bannercraft*, 415 U.S. at 19-20. 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 disclosure to the public, among other matters plainly relevant to an agency's good faith in responding to FOIA requests.

The D.C. Circuit's decision raises an important issue about the equitable powers entrusted to the district courts under FOIA. Contrary to the panel's decision, 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 so to do," 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)).[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 disturb the district court's factual findings that led it to authorize Secretary Clinton's and Mills' respective depositions. 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." App. 16a-17a (*citing Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771-72 (D.C. Cir. 1981)). This is wrong. *Ground Saucer Watch*, which the appellate court cites to support this novel position, stands for no such proposition. The plaintiff there could not point to any evidence that put the agency's good faith in doubt. 692 F.2d at 771. Nowhere did *Ground Saucer Watch* hold that discovery was limited to "the actions of the individuals who conducted the search," as the

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[3] The FOIA has since been amended and Section 552(a)(3) of the Act as discussed by the Court in *Bannercraft*, 415 U.S. at 19-20, is now codified under 5 U.S.C. § 552(a)(4).

D.C. Circuit held in this case. App. 16a-17a. *Ground Saucer Watch* also did not limit district courts' inherent equitable powers in FOIA cases, as it could not have under the Court's analysis in *Bannercraft*.

Indeed, courts have 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 and the existence of agency records. *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). Although the issue of bad faith and purposeful evasion of FOIA was not before the *Kissinger* Court, it is squarely before the district court here.

It is especially important that this misapplication of longstanding precedent be corrected because the D.C. Circuit's far-reaching decision will nullify the "citizens' right to be informed about 'what their government is up to'" and for all intents and purposes, it will eradicate the district courts' role as the enforcement arm of FOIA, as Congress intended. *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 746, 773 (1989). Indeed, the panel's

flawed analysis is already taking effect. The Government has already moved to vacate all remaining discovery based on the panel's decision. This includes a request to vacate the depositions of two State officials who may not have been involved in the search for responsive records but are likely to have knowledge about State's efforts to shield Secretary Clinton's emails from FOIA and whether the agency acted in bad faith. App. 36a-37a. Under the panel's decision, such obviously important, relevant discovery, where questions of agency bad faith and candor to the court have arisen, would be disallowed. The Court should grant this petition to address the question of exceptional importance about the scope of a district court's equitable authority to order discovery under FOIA.

IV. The Panel's Decision Creates a New Path For Mandamus and Warrants Review.

If the D.C. Circuit's decision is permitted to stand, future nonparties will be granted mandamus review of discovery orders simply by intervening. Similar to Secretary Clinton here, limited purpose intervenors need not even show that a post-judgment appeal of a civil contempt order is an inadequate remedy – an issue the panel entirely ignored, *supra*. The D.C. Circuit's new path for mandamus is in tension with longstanding precedent that mandamus is reserved for only the most "exceptional circumstances" as one of "the most potent weapons in the judicial arsenal," and never to be "used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380-81.

This Court held "[t]he 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 Ryan*, 402 U.S. at 532); *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. App. 9a-10a. Secretary 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 – nothing less, nothing more. If mandamus is to remain the extraordinary remedy the Court intended, the Court should grant Judicial Watch's petition to examine the detrimental consequences of the D.C. Court's decision. *Allied Chemical Corp.*, 449 U.S. at 36; *Doyle*, 204 U.S. at 604.

CONCLUSION

For the foregoing reasons, Judicial Watch, Inc. respectfully requests that the Court grant this petition for certiorari.

Respectfully submitted,

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APPENDIX A

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)

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 recordkeeping 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

[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).

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," 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*

[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

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 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

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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.

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

[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

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

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recordkeeping laws played any role in her decision to use a private server)).

(reviewing accusations of bad faith on the part of the CIA stemming from how officials instructed employees 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. S*ee* 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] Secretary Clinton also provided eleven hours of public testimony before the House Select Committee, *see* The

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

Select Committee on Benghazi, *Hearing 4 – Former Secretary of State Hillary Clinton* (Oct. 22, 2015), https://archives-benghazirepublicans-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.

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[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.

United States Court of Appeals
for the District of Columbia Circuit

No. 20-5056 September Term, 2019

Filed On: August 31, 2020

IN RE: HILLARY RODHAM CLINTON AND CHERYL MILLS,

PETITIONERS

Before: GRIFFITH, PILLARD and WILKINS, Circuit Judges.

ORDER

On the court's own motion, it is

ORDERED that this case be reheard by the panel. It is

FURTHER ORDERED that the opinion and order issued on August 14, 2020, be vacated. It is

FURTHER ORDERED that the Clerk be directed to issue a new opinion and order.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

United States Court of Appeals
for the District of Columbia Circuit

No. 20-5056 September Term, 2019

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IN RE: HILLARY RODHAM CLINTON AND CHERYL MILLS,

PETITIONERS

Before: GRIFFITH, PILLARD and WILKINS, Circuit Judges.

ORDER

Upon consideration of the petition for writ of mandamus, the responses thereto, the reply, and the argument by counsel, it is

ORDERED that the petition for writ of mandamus be granted as to Secretary Clinton, be denied as to Ms. Mills, and Ms. Mills' petition is hereby dismissed, for the reasons stated in the opinion issued herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

Opinion for the court filed by Circuit Judge Wilkins.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 14-1242

Judicial Watch, Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
U.S. Department of State,	)
	)
Defendant.	)
	)

MEMORANDUM ORDER

On December 6, 2018, the Court ordered discovery into three main areas: (a) whether Secretary Clinton's use of a private email while Secretary of State was an intentional attempt to evade FOIA; (b) whether the State Department's attempts to settle this case in late 2014 and early 2015 amounted to bad faith; and (c) whether State has adequately searched for records responsive to Judicial Watch's request. Although discovery in FOIA cases is rare, the Court again reminds the government 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.

Discovery up until this point has brought to light

a noteworthy amount of relevant information, but Judicial Watch requests an additional round of discovery, and understandably so. With each passing round of discovery, the Court is left with more questions than answers. What's more, during the December 19, 2019, status conference, Judicial Watch disclosed that the FBI recently produced approximately thirty previously undisclosed Clinton emails. State failed to fully explain the new emails' origins when the Court directly questioned where they came from.[6]

Furthermore, State has not represented to the Court that the private emails of State's former employees who corresponded with Secretary Clinton have been searched for additional Clinton emails. State has thus failed to persuade the Court that all of Secretary Clinton's recoverable emails have been located. This is unacceptable.

State asks the Court to close discovery and to move this case towards dispositive motions and an eventual resolution. But there is still more to learn. Even though many important questions remain

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[6] On February 12, 2020, Judicial Watch informed the Court that a recently obtained Clinton email-produced in an unrelated FOIA case involving State-strongly suggests that Secretary Clinton and her Deputy Chief of Staff, Huma Abedin, conducted State Department business via text messaging as well. Pl.'s Notice Suppl. Information 1, ECF No. 160. The government has not provided any information about whether such text messages were searched pursuant to FOIA.

unanswered, the Justice Department inexplicably still takes the position that the Court should close discovery and rule on dispositive motions. The Court is especially troubled by this. To argue that the Court now has enough information to determine whether State conducted an adequate search is preposterous, especially when considering State's deficient representations regarding the existence of additional Clinton emails. Instead, the Court will authorize a new round of discovery as follows.

Brett Gittleson and Yvette Jacks

Mr. Gittleson was the Director of the Office of the Secretary, the Executive Secretariat's Information Resource Management (hereinafter "S/ES-IRM") in 2013 and 2014. Pl.'s Status Report 2, ECF No. 152. That office was charged with providing technical support-including email management-to the Office of the Secretary during Secretary Clinton's years at the helm. S/ES-IRMOfficialDep.11:17-12:6; 14:1-16:16,ECFNo.152-1. In late 2012 or early 2013, Mr. Gittleson became the director of S/ES-IRM, and in April or May 2013, he discussed Secretary Clinton's email use with Gene Smilansky, an attorney in the Office of the Legal Advisor. Pl.'s Status Report 2. Mr. Smilansky had experience working on FOIA lawsuits, including one related to Secretary Clinton's emails. *Id.* at 3.

Ms. Jacks was a Deputy Director of S/ES-IRM from 2010 to 2015 and assisted with the troubleshooting of Secretary Clinton's private server while in that role. *Id* at 3--4; S/ES-IRM Official Dep.

93:5-13. During Tasha Thian's deposition, Ms. Thian identified Ms. Jacks as an employee who maintained the list of gatekeepers for Secretary Clinton's communications. Thian Dep. 125: 17-126:2, ECF No. 152-3. Ms. Thian also testified to something troubling–that several S/ES-IRM employees may have intentionally withheld information about Secretary Clinton's email arrangements. *Id* at 151:18-152:15.

Judicial Watch seeks to depose Mr. Gittleson and Ms. Jacks because they may have relevant knowledge of Secretary Clinton's email use. *See* Pl.'s Status Report 2-4. State argues that any further discovery would be cumulative or irrelevant. *See* Def.'s Status Report 5-7, ECF No. 154. The Court agrees with Judicial Watch and believes these two former employees may offer new and relevant testimony. Mr. Gittleson and Ms. Jacks may be questioned-within the parameters set forth in the Court's December 6, 2018, memorandum opinion and order authorizing discovery-about their knowledge of Secretary Clinton's email use and any other non-privileged conversations pertaining to her email use. Accordingly, the Court **GRANTS** Judicial Watch's requests to depose Mr. Gittleson and Ms. Jacks.

Paul Combetta

Mr. Combetta is an IT specialist who was involved with the transfer and deletion of Secretary Clinton's emails. *See* Pl.'s Status Report 4-5. Judicial Watch seeks to depose Mr. Combetta to learn more about the archiving, existence, and deletion of any of Secretary

Clinton's emails. *Id.* at 5. Additionally, Judicial Watch asks the Court to require Mr. Combetta to bring to his deposition all records in his possession relating to Secretary Clinton's emails from her time at State. *Id.* On December 30, 2019, Judicial Watch informed the Court that Mr. Combetta would assert his Fifth Amendment privilege against self-incrimination if Judicial Watch served a subpoena on him.[2] Status Report Regarding Combetta Dep. 1, ECF No. 155. The Court sees no reason to authorize what would be an exercise in futility. Accordingly, the Court **DENIES** Judicial Watch's request to depose Mr. Combetta.

State Department Interrogatories

Judicial Watch seeks to serve two additional interrogatories on State. First, Judicial Watch asks State to "[i]dentify the number of FOIA lawsuits pending in 2014 that sought records relevant to Secretary Clinton's emails from her tenure at the State Department." Pl.'s Status Report 5. Of the total number of those lawsuits, Judicial Watch asks State to "identify the number of lawsuits the State Department attempted to settle from January 2014 through February 2015." *Id.* The Court agrees with State and holds that the first request is ambiguous and therefore inherently burdensome. The information Judicial Watch seeks is likely also

[2] The Justice Department gave Mr. Combetta only limited-use immunity during the FBI's investigation into Secretary Clinton's private server. Status Report Regarding Combetta Dep. I, ECF No. 155.

publicly available. The Court **DENIES** the first request.

The second request is similarly ambiguous, unduly burdensome, and disproportionate to the needs of the case. Additionally, the request seeks information related to internal settlement discussions, which likely would be protected by the work-product doctrine. The likelihood of receiving relevant, non-privileged information does not warrant the search, so the Court **DENIES** the second request.

Subpoena/or Documents

Judicial Watch seeks to subpoena Google for relevant documents and records associated with Secretary Clinton's emails during her tenure at State. *Id.* at 5-6. The subpoena seeks to discover new emails, so it certainly relates to whether State conducted an adequate search. But State points out that Judicial Watch fails to explain how this search would be any more fruitful than the FBI's extensive investigation into Secretary Clinton's missing emails. *See* Def.'s Status Report 8-9. According to State, the request is disproportionate to the needs of the case because it is highly unlikely that Judicial Watch would receive any relevant information or emails that the FBI or DOJ Inspector General failed to uncover. *See id.*

The Court is not confident that State currently possesses every Clinton email recovered by the FBI; even years after the FBI investigation, the slow trickle of new emails has yet to be explained. For this

reason, the Court believes the subpoena would be worthwhile and may even uncover additional previously undisclosed emails. Accordingly, the Court **GRANTS** this request.

Cheryl Mills

Judicial Watch seeks to depose Ms. Mills on all areas of discovery. Ms. Mills-appearing as a non-party in this case-opposes this request because Judicial Watch already deposed her in Judicial Watch's FOIA case before Judge Sullivan, *Judicial Watch, Inc. v. U.S. Dep 't of State,* Case No. 13-cv-1363 (D.D.C.). *See* Mills Obj. Dep. 1-2, ECF No. 142. According to Ms. Mills, any further discovery would be duplicative because she already testified for seven hours during her previous deposition to all relevant issues in this case. *See id.*

Judicial Watch argues that it should be able to depose Ms. Mills in this case because it knows more information now than it did when it deposed her in 2016. *See* Pl.'s Combined Reply 10-12, ECF No. 144. The Court sympathizes with this argument-now that Judicial Watch has a better understanding of what happened, it should have an opportunity to craft new questions derived from newly discovered facts. When Ms. Mills was deposed, Judicial Watch was not aware of the 30,000 deleted Clinton emails or that a Congressional subpoena had already been served on Secretary Clinton for her Benghazi records. *Id.* at 12. Furthermore, State's mishandling of this case opened up discovery in the first place, and Judicial Watch should not be prohibited from asking Ms. Mills about

what it learned from discovery just because she was deposed over three years ago in Judicial Watch's case before Judge Sullivan.

To the extent that Judicial Watch tailors relevant, non-duplicative questions-and those questions fall within the parameters set forth in the Court's December 6, 2018, memorandum opinion and order authorizing discovery-the Court **GRANTS** Judicial Watch's request to depose her on all areas of discovery.

Secretary Hillary Clinton

Judicial Watch believes it is now necessary to depose Secretary Clinton because significant questions pertaining to her state of mind remain that only she can answer. *See* Pl.'s Combined Reply 1-2. Secretary Clinton-appearing as an intervenor in this case--disagrees. She argues that the only relevant information she would have knowledge of is whether she used a private server to evade FOIA. *See* Clinton Opp. Dep. 5-6, ECF No. 143. State's settlement attempts and its search for records in response to Judicial Watch's FOIA request occurred well after Secretary Clinton's departure. *See id.* The Court mostly agrees with Secretary Clinton here-any further discovery should focus on whether she used a private server to evade FOIA and, as a corollary to that, what she understandood about State's records management obligations.[3]

[3] The sole exception to these limitations pertains to records of the Benghazi attack, which will be explored further in the next section of this order.

But Secretary Clinton maintains that she has already testified extensively and in multiple settings about her reasons for using a private server, so any additional discovery would be duplicative. *See id.* at 6-12. She reminds the Court that the findings of the Benghazi Select Committee, the State Department Inspector General, and the FBI all relate to her use of a private server and that they are all publicly available. *Id.* at 7. Additionally, Secretary Clinton answered several questions related to her reasons for using a private server through interrogatories in Judicial Watch's case before Judge Sullivan. *See id.* at 7-8. Secretary Clinton specifically highlights the interrogatories that focus on how, when, and why she set up and used a private server. *See id.* Furthermore, because Secretary Clinton was a high-ranking government official, she argues that the apex doctrine requires Judicial Watch to demonstrate that "extraordinary circumstances" justify this discovery request. *Id.* at 6-7 (quoting *Judicial Watch* v. *U.S. Dep't of State,* No. 13-cv-1363, 2016 WL 10770466, at *6 (D.D.C. Aug. 19, 2016)). According to Secretary Clinton, Judicial Watch cannot meet that burden because her existing, publicly available testimony already answers Judicial Watch's questions. *See id.* at 7.

For its part, Judicial Watch argues that Secretary Clinton's existing testimony has only scratched the surface of the inquiry into her motives for setting up and using a private server. Pl.'s Combined Reply 2-3. Secretary Clinton has repeatedly stated that

convenience was the main reason for using a private server, *see, e.g.,* Clinton Interrog. 5, ECF No. 143-1, but Judicial Watch justifiably seeks to explore that explanation further.

Judicial Watch also requests permission to question Secretary Clinton in greater detail about her understanding of State's records management obligations-including questions about her various trainings and briefings regarding these obligations. *See* Pl.'s Combined Reply 3-9. Judicial Watch correctly points out that many questions regarding her understanding of these obligations still remain unanswered. *See id.* at 6-7. For example, how did she arrive at her belief that her private server emails would be preserved by normal State Department processes for email retention? Who told her that-if anyone-and when? Did she realize State was giving "no records" responses to FOIA requests for her emails? If so, did she suspect that she had any obligation to disclose the existence of her private server to those at State handling the FOIA requests? When did she first learn that State's records management employees were unaware of the existence of her private server? And why did she think that using a private server to conduct State Department business was permissible under the law in the first place? Again, who told her that-if anyone-and when? These areas of inquiry have not been explored in nearly enough detail to convince the Court that Secretary Clinton does not have any new testimony to offer.

The Court also needs to know whether Secretary

Clinton was aware of the active steps taken to prevent others at State-especially those who worked in records management-from learning about her private server. In a December 24, 2010, email exchange, one State Department official accidently sent an email which listed Secretary Clinton's private email address to other employees who did not already have that information, prompting a second State Department official to reply, "Be careful, you just gave the secretary's personal email address to a bunch of folks ... [.]" Pl.'s Combined Reply Ex. D, ECF No. 144-4. The first official responded, "Should I say don't forward? Did not notice[.]" *Id.* The second official replied, "Yeah-I just know that she guards it pretty closely[.]" *Id.* How could Secretary Clinton possibly believe that everyone at State knew about her private server if her subordinates took pains to ensure that her email address would not be widely disseminated? Was she aware of this attempt-or any other attempts-to keep other State Department employees in the dark? Secretary Clinton's answers to these questions directly relate to her understanding of her records management obligations.

As extensive as the existing record is, it does not sufficiently explain Secretary Clinton's state of mind when she decided it would be an acceptable practice to set up and use a private server to conduct State Department business. Even Huma Abedin, one of Secretary Clinton's closest confidants, testified that Judicial Watch "would have to ask [Secretary Clinton]" herself to ascertain whether the Secretary knew if her use of a private server satisfied her FOIA obligations. Abedin Dep. 115:17-116:3, *Judicial*

Watch, Inc. v. US. Dep't of State, Case No. 13-cv-1363, ECF No. 129. The Court authorizes Judicial Watch to do so. And, contrary to Secretary Clinton's assertion, the apex doctrine does not shield her from testifying.[4]

Because Judicial Watch has convinced the Court of the need for further discovery from Secretary Clinton, the only remaining issue is whether the Court should authorize additional interrogatories or a deposition of Secretary Clinton. As the parties point out, Secretary Clinton already answered interrogatories in Judicial Watch's case before Judge Sullivan. But after carefully considering the discovery materials uncovered in this case and Judge Sullivan's case, including Secretary Clinton's responses, the Court believes those responses were either incomplete, unhelpful, or cursory at best. Simply put,

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[4] It is true that high-raking government officials "should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941)). But the only person who can speak to Secretary Clinton's reasons for setting up and using a private server and her understanding of State's records management obligations is Secretary Clinton herself. Secretary Clinton unquestionably has unique first-hand knowledge of these matters, so Judicial Watch has demonstrated "extraordinary circumstances." *See FDIC v. Galan-Alvarez,* No. 15-mc-752 (CRC), 2015 U.S. Dist. LEXIS 130545, at *12 (D.D.C. Sept. 4, 2015) (explaining that a party may depose a high-raking government official if the official has "unique first-hand knowledge related to the litigated Claims") (quoting *Lederman v. N.Y.C. Dep't of Parks and Recreation,* 731 F.3d 199,203 (2d Cir. 2013)).

her responses left many more questions than answers.

The Court expects that additional interrogatories will only muddle any understanding of Secretary Clinton's state of mind and fail to capture the full picture, thus delaying the final disposition of this case even further. The Court has considered the numerous times in which Secretary Clinton said she could not recall or remember certain details in her prior interrogatory answers. In a deposition, it is more likely that plaintiff's counsel could use documents and other testimony to attempt to refresh her recollection. And so, to avoid the unsatisfying and inefficient outcome of multiple rounds of fruitless interrogatories and move this almost six-year-old case closer to its conclusion, Judicial Watch will be permitted to clarify and further explore Secretary Clinton's answers in person and immediately after she gives them. The Court agrees with Judicial Watch-it is time to hear directly from Secretary Clinton.

Accordingly, the Court **GRANTS** Judicial Watch's request to depose Secretary Clinton on matters concerning her reasons for using a private server and her understanding of State's records management obligations, but **DENIES** its request to depose her on all other matters-with one exception outlined in the next section of this order.

Benghazi Attack Records

Finally, Judicial Watch seeks to question both Secretary Clinton and Ms. Mills about "the

preparation of talking points for former U.N. Ambassador Susan Rice's September 16, 2012 media appearances, the advance dissemination or discussion of those talking points, the aftermath of Rice's appearances, and the Department's evolving understanding of the Benghazi attack." Pl.'s Combined Reply 12-13. Judicial Watch argues that their answers will provide more information regarding the adequacy of State's search. *Id.* at 13.

Secretary Clinton specifically opposes this request. She argues that questioning her about the government's response to the Benghazi attack has no relevance to the underlying FOIA request and falls outside the parameters set forth in the Court's December 6, 2018, memorandum opinion and order authorizing discovery. Clinton Opp. Dep. 6. Additionally, she highlights the request as proof that Judicial Watch might seek to improperly expand the parameters of discovery if the Court permits Judicial Watch to depose her. *Id.* at 12-13 n.5.

The Court holds that Secretary Clinton and Ms. Mills cannot be questioned about the underlying actions taken after the Benghazi attack, but they may be questioned about their knowledge of the existence of any emails, documents, or text messages related to the Benghazi attack. Such inquiries would go to the adequacy of the search without expanding the parameters of discovery to include the substance of the government's response to the attack. Accordingly, the Court **GRANTS IN PART AND DENIES IN PART** this request.

****

The parties shall complete this round of discovery within seventy-five (75) days, unless they seek additional time. The Court will hold a post-discovery hearing to set a further schedule herein.

It is **SO ORDERED.**

Date: March 2, 2020

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

United States Court of Appeals
for the District of Columbia Circuit

No. 20-5056 September Term, 2019

Filed On: October 28, 2020

IN RE: HILLARY RODHAM CLINTON AND CHERYL MILLS,

PETITIONERS

Before: Srinivasan, Chief Judge; Henderson, Rogers, Tatel*, Garland, Millett, Pillard, Wilkins, Katsas, Rao, and Walker, Circuit Judges.

ORDER

Upon consideration of respondent's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

*Circuit Judge Tatel did not participate in this matter.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 14-1242

Judicial Watch, Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
U.S. Department of State,	)
	)
Defendant.	)
	)

Order

Upon consideration of former Secretary of State Hillary Rodham Clinton's unopposed motion to intervene in this action, it is hereby ordered that the motion to intervene is GRANTED, and Secretary Clinton may participate in this action.

SO ORDERED this **21st day of August** 2019.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 14-1242

Judicial Watch, Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
U.S. Department of State,	)
	)
Defendant.	)
	)

NON-PARTY SECRETARY OF STATE
HILLARY RODHAM CLINTON'S
UNOPPOSED MOTION TO INTERVENE

Former Secretary of State Hillary Rodham Clinton, by undersigned counsel, respectfully moves to intervene as a party in this case pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. Undersigned counsel has complied with Local Civil Rule 7(m), and counsel for Judicial Watch and counsel for the State Department do not oppose Secretary Clinton's intervention.

As the former Secretary of State and a non-party from whom Judicial Watch seeks discovery, Secretary Clinton shares a "claim or defense that shares with the main action a common question of law or fact."

Fed. R. Civ. P. 24(b)(1)(B).[1] This Court has permitted intervention under Rule 24(b) where, as here, the defendant and potential intervenor hold similar legal positions. *100ReportersLLC v. DOJ*, 307 F.R.D. 269, 286 (D.D.C. 2014). Because Secretary Clinton is no longer a government official, it would be appropriate for personal counsel to represent her in this matter.

Secretary Clinton's intervention at this time would not prejudice Judicial Watch or the State Department, as indicated by both parties' consent to this motion. *See* Fed. R. Civ. P. 24(b)(3).

Dated: August 20, 2019

/s/ *David E. Kendall*
David E. Kendall (D.C. Bar No. 252890)
Katherine Turner (D.C. Bar No. 495528)
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Attorneys for Secretary Clinton

[1] Specifically, the Court has permitted discovery into Secretary Clinton's use of a private email server. Jan. 15, 2019 Mem. & Order at 1, ECF No. 64.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 14-1242

Judicial Watch, Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
U.S. Department of State,	)
	)
Defendant.	)
	)

ORDER

The Court, having considered Defendant's Motion to Modify Scheduling Order (ECF No. 123), Plaintiff's Response thereto, Defendant's reply, and the entire record herein, hereby orders that Defendant's Motion to Modify Scheduling Order is GRANTED in part and DENIED in part. The hearing set for August 26 at 10 AM is moved to August 22 at 2:00 PM. August 21 at 5:00 PM will be the deadline for any status report(s).

ORDERED this 14th day of August, 2019.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 14-1242

Judicial Watch, Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
U.S. Department of State,	)
	)
Defendant.	)
	)

ORDER

According to the docket, the initial discovery authorized by this Court's January 15, 2019 order ended on June 19, 2019. At that time, the Court contemplated "a post-discovery hearing to ascertain the adequacy of State's searches, to determine if Judicial Watch needs to depose additional witnesses (including Hillary Clinton or her former Chief of Staff Cheryl Mills), and to schedule dispositive motions." Mem. & Order 2, ECF No. 65. So the Court **ORDERS** the parties to appear for that hearing on August 26, 2019 at 10:00 AM. In the meantime, the Court **ORDERS** the parties to meet and confer, and to submit by August 21, 2019 a status report – joint if possible; separately if necessary – proposing a plan and schedule for further proceedings in this case.

August 7, 2019

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 14-1242

Judicial Watch, Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
U.S. Department of State,	)
	)
Defendant.	)
	)

MEMORANDUM ORDER

When this case began, Judicial Watch sought to verify the State Department's search for records from former Secretary Hillary Clinton and her aides concerning the talking points former U.N. Ambassador Susan Rice used to respond to the attack on the U.S. Embassy in Benghazi, Libya. But the case has since expanded to question the motives behind Clinton's private email use while Secretary, and behind the government's conduct in this litigation.

Last month, this Court ordered the parties to meet and confer to plan discovery [55]. Judicial Watch submitted a proposed plan [62]; the government responded and countered with its proposal [63]; Judicial Watch replied [64]. This Memorandum & Order maps the path forward.

* * *

I. Scope & Schedule. Discovery shall be limited to three issues: (1) whether Clinton intentionally attempted to evade FOIA by using a private email while Secretary of State; (2) whether State's efforts to settle this case in late 2014 and early 2015 amounted to bad faith; and (3) whether State adequately searched for records responsive to Judicial Watch's FOIA request. Either side must obtain permission to conduct discovery beyond the depositions, interrogatories, and document requests described herein.

The Court recognizes Judicial Watch took related discovery in *Judicial Watch, Inc. v. Department of State*, No. 13-1363 (D.D.C.) (Sullivan, J.). Yet the Court declines to expressly curtail discovery in this case as a result, especially since Judicial Watch does not propose deposing witnesses also deposed in that case. Consistent with the parties' demonstrated respect for the discovery process there, *see* Transcript of Motion Hearing Proceedings at 21:3-19, *Judicial Watch, Inc. v. Dep't of State*, No. 13-1363 (D.D.C. July 18, 2016), ECF No. 159, the Court hopes the parties avoid unnecessarily duplicative discovery here.

The parties shall complete discovery within 120 days, unless they seek additional time. The Court will hold a post-discovery hearing to ascertain the adequacy of State's searches, to determine if Judicial Watch needs to depose additional witnesses

(including Hillary Clinton or her former Chief of Staff Cheryl Mills), and to schedule dispositive motions.

II. Procedure. The parties shall conduct discovery pursuant to the Federal Rules of Civil Procedure and of Evidence, subject to these limitations:

A. Time to Respond to Interrogatories & Document Requests. Absent contrary order, Federal Rules of Civil Procedure 33(b)(2) and 34(b)(2)(A) give parties thirty days to respond to interrogatories and document requests. This default limit will apply to interrogatories and document requests propounded on private citizens. For interrogatories and document requests propounded on the government, Judicial Watch wants to shorten the limits to fourteen days; the government asks for the standard thirty-day periods. Recognizing Judicial Watch's need to obtain preliminary discovery before taking depositions, but mindful of overburdening the government, the Court gives the government twenty days to respond to interrogatories and document requests.

B. Number of Depositions. The government wants to limit Judicial Watch to Rule 30(a)(2)(A)(i)'s ten-deposition ceiling. But consistent with Rule 26(b)(2)(A), the Court allows Judicial Watch to depose all witnesses enumerated herein.

C. Privilege Claims & Objections. Neither side waives any privileges or specific objections. As the government notes, the parties may agree pursuant to Federal Rule of Evidence 502(e) to disclose information without waiving attorney-client or work-

product privileges. But absent agreement, the government proposes producing its privilege log after discovery ends. That is insufficient. To facilitate meaningful document production, the government must produce a rolling privilege log, concurrent with its timely responses to document requests. And to facilitate prompt resolution of disputes, the Court will require any opposition be filed within five business days of a motion for judicial intervention, with replies due three business days after the opposition's filing.

D. Government Review of Deposition Transcripts or Recordings. The government may, in its sole discretion, embargo a deposition's contents for three business days after production of the transcript or recording-provided that it does so in good faith and that it declared its intent to do so on the record at the deposition-to review the transcript or recording for classified information, for information specifically exempted from disclosure by statute, or for information concerning a pending law enforcement investigation, and to seek an order precluding the information's public release.

III. Discovery into Hillary Clinton's Private Email Use.

A. Depositions. On whether Clinton's private email use while Secretary of State was an intentional attempt to evade FOIA, Judicial Watch may depose:[1]

1. Eric Boswell, the former Assistant Secretary for Diplomatic Security. The government argues Boswell does not have information relevant to the purpose behind Clinton's private email use, claiming he merely responded to her staff's inquiries regarding Blackberry use in her private office suite. But existing evidence contradicts this claim: Boswell's March 2009 memo to Mills (available at ECF No. 64-1) discusses security risks Clinton's Blackberry use posed more generally. And Boswell personally discussed the memo with Clinton. So he plainly has relevant information about that conversation and about his general knowledge of Clinton's email use. Judicial Watch may depose Boswell.
2. Justin Cooper, the Clinton Foundation employee who created the clintonemail.com server. In its proposal, Judicial Watch noted Cooper's prior congressional testimony "appears to contradict portions of the testimony provided by Huma Abedin in the case

[1] If these individuals also appear in subsections IV.A or V.A of this Order, Judicial Watch may only depose each witness once.

before Judge Sullivan." Pl.'s Prop. Disc. Plan 2, ECF No. 62. The government opposed Judicial Watch's request because Judicial Watch "offer[ed] no [further] explanation" or citation. Def.'s Prop. Disc. Plan & Sched. 18-19, ECF No. 63. But Judicial Watch provided one in its response: Cooper repeatedly told Congress that Abedin helped set-up the Clintons' private server, *e.g.*, *Examining Preservation of State Department Federal Records: Hearing Before the H Comm. on Oversight & Gov't Reform*, 114th Cong. 40 (2016); Abedin testified under oath she did not know about the server until six years later. *See* Transcript of Huma Abedin Deposition at 19:16-20:14, *Judicial Watch, Inc. v. Dep't of State*, No. 13-1363 (D.D.C. June 28, 2016), ECF No. 129. Judicial Watch may depose Cooper.

3. Clarence Finney. the former deputy director of State's Executive Secretariat staff. The government opposes Finney's deposition on two grounds. First, the government argues Finney's testimony would be more efficiently covered through State's Rule 30(b)(6) deposition. But this case's questions hinge on what specific State employees knew and when they knew it. As the principal advisor and records management expert responsible for controlling Clinton's official correspondence and records, Finney's knowledge is particularly relevant. And

especially given the concerns about government misconduct that prompted this discovery, Judicial Watch's ability to take his direct testimony and ask follow-up questions is critical.

Second, the government opposes Finney's deposition because he testified publicly before Congress on similar issues, and because Judicial Watch unsuccessfully sought his deposition in *Judicial Watch v. Department of State*, No. 13-1363 (D.D.C.). True enough, Judge Sullivan did not allow Finney's deposition, thinking it would unnecessarily duplicate State's 30(6)(6) deposition in that case. *See* Mem. Op. 21-23, *Judicial Watch v. Dep't of State*, No. 13-1363 (D.D.C. Aug. 19, 2016), ECF No. 124. But here, Judicial Watch seeks to go beyond cursory, second-hand testimony and directly ask Finney what he knew about Clinton's email use. This includes asking about emails suggesting he knew about her private email use in 2014, and emails he received concerning a December 2012 FOIA request from Citizens for Responsible Ethics in Washington (CREW) regarding senior officials' personal email use-topics State's 30(6)(6) deposition in Judge Sullivan's case never addressed. Judicial Watch may depose Finney.

4. Heather Samuelson, the former State Department senior advisor who helped

facilitate State's receipt of Hillary Clinton's emails. The government argues Samuelson's testimony would be more efficiently covered through State's Rule 30(6)(6) deposition. But as explained in subsection III.A.3, this case turns on what specific government employees knew and when they knew it. Judicial Watch must be able to take their direct testimony and ask them follow-up questions. Judicial Watch may depose Samuelson.

5. Jacob Sullivan, Secretary Clinton's former senior advisor and deputy Chief of Staff. The government does not oppose Sullivan's deposition.

B. Interrogatories. Judicial Watch may discover through interrogatory the identities of the individuals referenced in the first full paragraph on the fourth page of the Federal Bureau of Investigation's December 30, 2015 report (available at ECF No. 62-1) describing its December 22, 2015 interview of Bryan Pagliano. The government does not oppose this interrogatory.

IV. Discovery into the State Department's Settlement Conduct.

A. Depositions. On whether State's settlement attempts in late 2014 and early 2015 amounted to bad faith, Judicial Watch may depose:[2]

[2] If these individuals also appear in subsections III.A or V.A of this Order, Judicial Watch may only depose each witness once.

1. The State Department. Judicial Watch may depose the State Department under Rule 30(b)(6) about
   - this FOIA request;
   - CREW's December 2012 FOIA request;
   - its initial discovery of, and reaction to, Hillary Clinton's private email use;
   - its November 12, 2014 letter to Judicial Watch regarding this litigation;
   - the December 31, 2014 Joint Status Report, ECF No. 10; and
   - the February 2, 2015 Joint Status Report, ECF No. 11.

   The government does not oppose this deposition.

2. Finney. *See supra* subsection III.A.3.
3. John Hackett, the former deputy director of State's Office of Information Programs & Services. The government argues Hackett's testimony would be more efficiently elicited through State's Rule 30(b)(6) deposition. But as explained in subsection III.A.3, this case depends on what specific government employees knew and when they knew it. Judicial Watch must be able to take their direct testimony and ask them follow-up questions. Judicial Watch may depose Hackett.

4. Gene Smilansky, an attorney-advisor within State's Office of the Legal Advisor. The government opposes Smilansky's deposition, calling it an "extraordinary request" because "Smilansky has provided [State with] legal advice regarding requests for emails from Secretary Clinton, FOIA litigation concerning the Benghazi attacks and the talking points at issue in this case, and because virtually all of his knowledge (if any) about the relevant facts would have come to him in his role as an attorney advising a client." Def.'s Prop. Disc. Plan & Sched. 20-21. It also claims "Smilansky is unlikely to have any relevant, non-privileged information that is unavailable from other sources," including the Department's 30(b)(6) deposition or the State Department Inspector General's public report.

To be sure, it is rare for a party to depose his opponent's attorney. But this is rare case. Judicial Watch adequately justifies this exceptional step by establishing Smilansky's involvement in processing FOIA requests for Secretary Clinton's email from 2012 to 2014, including CREW's 2012 request. And in this case about what government officials knew and when they knew it, Smilansky's experience-documented through emails he sent and received in 2013 and 2014, *see* ECF No. 50-1-is highly relevant and

critical to Judicial Watch's case. Moreover, his first-hand knowledge is what's critical, not inforn1ation filtered tlu ough a 30(b)(6) deposition or through the Inspector General's report. *See also supra* subsection III.A.3. Judicial Watch may depose Smilansky.

5. Samuelson. *See supra* subsection III.A.4.
6. Sheryl Walter, former director of State's Office of Information Programs & Services. The government argues Walter's testimony would be more efficiently covered through State's Rule 30(b)(6) deposition. But as explained in subsection III.A.3, this case involves what specific government employees knew and when they knew it. Judicial Watch must be able to take their direct testimony and ask them follow-up questions. Judicial Watch may depose Walter.
7. Jonathon Wasser, a management analyst for the Executive Secretariat staff. The government argues that Wasser's testimony unnecessarily duplicates State's 30(b)(6) deposition in *Judicial Watch v. Department of State*, No. 13-1363 (D.D.C.) (Sullivan, J.), and-in any event-that his testimony would be more efficiently covered through State's Rule 30(b)(6) deposition. But both arguments miss Judicial Watch's need to take his direct testimony and ask him follow-up questions, particularly regarding emails suggesting he knew about Clinton's

private email use in 2014. *See also supra* subsection III.A.3. Judicial Watch may depose Wasser.

8. The Office of Information Program & Services analysts assigned to this case. The government argues these individuals' testimony would be more efficiently elicited through State's Rule 30(b)(6) deposition. But as explained in subsection III.A.3, this case turns on what specific government employees knew and when they knew it. Judicial Watch must be able to take their direct testimony and ask them follow-up questions. Judicial Watch may depose these analysts.
9. The unidentified Officer of Information Program & Services official whose August 17, 2015 FBI interview is memorialized in the August 18, 2015 report available at ECF No. 62-2. The government argues this person's testimony would be more efficiently covered through State's Rule 30(b)(6) deposition. But as explained in subsection III.A.3, this case concerns what specific government employees knew and when they knew it. Judicial Watch must be able to take their direct testimony and ask them follow-up questions. Judicial Watch may depose this unidentified official.

B. Interrogatories. Judicial Watch may also obtain via interrogatory the identity of the analysts who searched the Office of the Secretary records on

September 23, 2014, and of any people who performed the search described in paragraph seventeen of John F. Hackett's July 7, 2015 declaration (available at ECF No. 19-2), as well as the dates they searched. The government does not oppose these interrogatories.

C. Document Requests. Finally, Judicial Watch may request the following documents:

1. an unredacted copy of an August 8, 2014 email exchange between Finney, Wasser, James Blair, Andrew Keller, and Smilansky (a redacted copy is available at ECF No. 50-1, p. 37);
2. an unredacted copy of a May 1, 2013 email exchange between Smilansky, Brett Gittleson, Walter, and others (a redacted copy is available at ECF No. 50-1, pp. 23-29);
3. a copy of the email exchanges available at ECF No. 62-3 with the Exemption 5 redactions removed; and
4. records concerning the Department's pre-February 2, 2015 awareness of the need to continue searching for records responsive to this FOIA request, as well as those records' locations.

The government does not oppose these document requests.

V. Discovery into the Adequacy of the State Department's Search.

A. Depositions. On whether State adequately searched for responsive records, Judicial Watch may depose:[3]

1. The State Department. Judicial Watch may depose the Department under Rule 30(b)(6) about
   - this FOIA request;
   - preparing talking points for former U.N. Ambassador Susan Rice's September 16, 2012 media appearances;
   - the advance dissemination or discussion of those talking points;
   - the aftermath of Rice's appearances; and
   - the Department's evolving understanding of the Benghazi attack.

   The government does not oppose deposing the Department on the first point. But the government does oppose deposing the Department on the latter four points, arguing they "ha[ve] nothing to do with the adequacy of State's response to the narrow FOIA request at issue in this litigation." Def.'s Prop. Disc. Plan & Sched. 2.

   Yet Rice's talking points and State's understanding of the attack play an unavoidably central role in this case: information about the points' development

[3] If these individuals also appear in subsections III.A or IV.A of this Order, Judicial Watch may only depose each witness once.

and content, as well as their discussion and dissemination before and after Rice's appearances could reveal extant unsearched, relevant records; State's role in the points' content and development could shed light on Clinton's motives for shielding her emails from FOIA requesters or on State's reluctance to search her emails. *See also* Mem. Op. 7-8, ECF No. 54 ("Did State know Clinton deemed the Benghazi attack terrorism hours after it happened, contradicting the Obama Administration's subsequent claim of a protest-gone-awry? ... Did the Department merely fear what might be found? Or was State's bungling just the unfortunate result of bureaucratic redtape and a failure to communicate?"). The government correctly notes Judicial Watch cannot "appoint itself as a freelance Inspector General" into the Obama Administration's response to the Benghazi attack. Def.'s Prop. Disc. Plan & Sched. 11. But that's not what Judicial Watch does here. Though Judicial Watch cannot helm a fishing expedition trawling anything and everything concerning the Benghazi attack, Judicial Watch may depose State on these topics to the extent helpful to answer the questions underlying this discovery.

2. Cooper. As Clinton's email server's initial creator and manager, Cooper may have relevant insight on whether additional

emails still exist and where they may be located. *See also supra* subsection III.A.2. Judicial Watch may depose Cooper.

3. Finney. *See supra* subsection III.A.3.
4. Samuelson. *See supra* subsection III.A.4.
5. Sullivan. The government does not oppose Sullivan's deposition.
6. Wasser. *See supra* subsection IV.A.7.

B. Interrogatories.

i. Judicial Watch may serve interrogatories on Rice and on Benjamin Rhodes, President Obama's former Deputy National Security Advisor who helped develop Rice's talking points. Judicial Watch actually wants to depose Rice and Rhodes. But the government opposes the depositions, casting them as "an attempt to get at the underlying issues about Benghazi, rather than issues relating to this FOIA case." Def.'s Prop. Disc. Plan & Sched. 12.

Of course, that is not entirely true. Just as the State Department's testimony on the Benghazi attack and Rice's talking points may help answer the questions underpinning this discovery, *see supra* subsection V.A.I, so too may Rice and Rhodes's testimony. But neither Rice nor Rhodes worked in the Office of the Secretary; neither has ties to Hillary Clinton's private email use or to the government's conduct in this case. And if Judicial Watch wants to discover who Rice communicated with on the day of the attack and the following weeks, it already has all her emails, thanks to its identically worded, long-resolved FOIA request to the U.S. Mission to the

United Nations. *See Judicial Watch v. US. Dep't of State*, No. 13-951 (D.D.C. Sept. 12, 2014) (Sullivan, J.). So to the extent Judicial Watch will sail unchartered waterfront with Rice and Rhodes, it has not justified deposing them; interrogatories would seemingly suffice to verify State's search in this case. So for now, Judicial Watch may only serve interrogatories on Rice and Rhodes.

ii. Judicial Watch may serve interrogatories on E.W. Priestap, the assistant director of the FBI's counterintelligence division who supervised the investigation into Clinton's private email use. Judicial Watch's proposal goes further, seeking to depose Priestap on "the nature [and] extent of the FBI's efforts, such as who the FBI attempted to contact, who the FBI actually talked to, who the FBI requested records from, who actually provided records, and whether the FBI believes those that they requested records from actually returned all of the requested records." Pl.'s Resp. 6, ECF No. 64. To be sure, "[t]his information could shed additional light on the adequacy of the State Department's search and other sources from which it might yet obtain records." *Id.*

But the government notes "Priestap has already provided declarations [in another case] recounting the 'FBI's extensive efforts to locate all potentially work-related' emails." *See* Def.'s Prop. Disc. Plan & Sched. 18-19 (quoting Mem. Op. at 13, *Judicial Watch v. Tillerson*, No. 15- 785 (D.D.C. Nov. 9, 2017) (Boasberg, J.)). And those declarations rule out further stores of Clinton's emails. *See* Mem. Op.

at 4, *Judicial Watch v. Tillerson*, No. 15-785 (D.D.C. Nov. 9, 2017), ECF No. 58. The FBI's final report echoes this testimony, U.S. Dep't of Justice, Clinton E-Mail Investigation, https://vault.fbi.gov/hillary-r.-clinton/Hillary%20R.%20Clinton %20Prui% 2001%20of%2028, as does the FBI Inspector General's report. U.S. Dep't of Justice, A Review of Various Actions by the Federal Bureau of lnvestigation and Department of Justice in Advance of the 2016 Election (2018), https://,vww.oversight.gov/sites/default/files/oig-repmis/2016_ election_final_report_06-14-l 8_0.pdf.

To the extent Judicial Watch will cover unexplored terrain with Priestap, it has not justified saddling this high-ranking law enforcement official with a deposition. The Court does not see why Judicial Watch cannot adequately discover the information more efficiently through interrogatories. So Judicial Watch may only serve interrogatories on Priestap.

iii. Judicial Watch may serve interrogatories on Monica Hanley, a former staff member in State's Office of the Secretary, and on Lauren Jiloty, Clinton's former special assistant. The government does not oppose these interrogatories.

Judicial Watch's proposal goes further, seeking to depose Hanley and Jiloty to elicit their recollection of Clinton's frequent email correspondents. On one hand, their testimony matters: Hanley was a key Clinton assistant, and Jiloty maintained Clinton's Blackberry contacts, so their knowledge of Clinton's email practices will help

ensure State turned over every stone to search for Clinton's emails. But the Court does not see why such a limited purpose necessitates an expensive and burdensome deposition. Nor does Judicial Watch adequately justify why it cannot discover what it needs from Hanley and Jiloty with equal effect and greater economy through interrogatories. So for now, the Court only allows Judicial Watch to serve interrogatories on Hanley and Jiloty.

iv. Judicial Watch may also obtain through interrogatory the number of emails within Department records sent to or from the clintonemail.com domain name-including the "carbon copy" and "blind carbon copy" functions-between September 11, 2012 and February 2, 2013 including Alice Wells, Andrew Shapiro, Anne-Marie Slaughter, Caroline Adler, Mills, Claire Coleman, Dan Schwerin, Abedin, Sullivan, Joseph MacManus, Judith McHale, Jiloty, Lona Valmoro, Maria Sand, Melanne Verveer, Hanley, Patrick Kennedy, Philippe Reines, Richard Verma, Robert Russo, Rice, Victoria Nuland, Wendy Sherman, and William Bums. The government does not oppose this interrogatory.

Judicial Watch's proposal goes further, seeking this information for Clinton's entire turn as Secretary, starting January 20, 2009. But the Court does not see how information from before September 11, 2012 helps Judicial Watch verify State's search for documents necessarily created on or after that date. And neither Judicial Watch's proposal nor its response defends the earlier date. So Judicial Watch

may only discover this information for emails sent between September 11, 2012 and February 2, 2013.

C. Document Requests. Judicial Watch may request the following documents:

1. all records-including internal communications-concerning this FOIA request;
2. all records relating to the Department's practices, policies, and actions accounting for Office of the Secretary records, including the emails of Hillary Clinton, Cheryl Mills, Huma Abedin, Jacob Sulliv an, and other staff, during and after their employment.

The government does not oppose these document requests.

* * *

It is SO ORDERED.

Date: January 15, 2019

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 14-1242

Judicial Watch, Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
U.S. Department of State,	)
	)
Defendant.	)
	)

MEMORANDUM OPINION

On his first full day in office, President Obama set a worthy standard for his administration's compliance with the Freedom of lnformation Act:

> A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of lnformation Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open government. At the heart of that commitment is the idea that

> accountability is in the interest of the Government and the citizenry alike.
>
> [FOIA] should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are
> supposed to serve. In responding to requests under the FOIA, executive branch agencies ... should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.
>
> All agencies should adopt a presumption in favor of disclosure to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

Freedom oflnformation Act Memorandum, 74 Fed. Reg. 4683 (Jan. 21, 2009).

But in this case, faced with one of the gravest modem offenses to government transparency, his State and Justice Departments fell far short. So far short that the Court questions, even now, whether they are acting in good faith. Did Hillary Clinton use her private email as Secretary of State to thwart this lofty goal? Was the State Department's attempt to settle this FOIA case in 2014 an effort to avoid searching-and disclosing the existence of-Clinton's missing emails? And has State ever adequately searched for records in this case?

In July 2014, six months after Clinton resigned as Secretary of State, Judicial Watch filed this FOIA suit seeking emails from Clinton and her aides concerning the talking points former U.N. Ambassador Susan Rice used to defend the Obama Administration's response to the attack on the U.S. Embassy in Benghazi, Libya. Compl. ¶ 5, ECF No. 1. And although it would take more than six months for the public to learn Clinton exclusively used a private email account as Secretary, *see* Michael.S. Schmidt, *Hillary Clinton Used Personal Email Account at State Dept. 1 Possibly Breaking Rules,* N.Y. Times (Mar. 2, 2015), https://www.nytimes.com/2015 /03 /0 3 /us/politics/hillary-clintons-use-of-private-email-at-state-department-raisesflags.html, department officials already knew Clinton's emails were missing from its records. *See* Rachel Bade, *State Made Earlier Request for Clinton to Hand Over Emails,* Politico (Feb. 16, 2016, 5:32 PM), https://www.politico.com/story /2016/02/hillary-clinton-emails-state-219341.

State played this card close to its chest. In November 2014, State told Judicial Watch it performed a legally adequate search and concluded settlement was appropriate, despite knowing Clinton's emails were missing and unsearched. 10/12/18 Tr. 14:2-7, ECF No. 53. In December 2014-the same day Clinton quietly turned over 55,000 pages of her missing emails-State gave Judicial Watch a draft *Vaughn* index making no mention of the unsearched records. *See* 5/1/15 Status Report ¶ 3, ECF No. 16. Judicial Watch declined to take State's word for it, requesting a search declaration. *See* 5/1/15 Status Report ¶ 3. A few weeks later, State filed a status report with this Court that failed to acknowledge the unsearched emails but suggested it was "possible to ... settle this case." 12/31/14 Status Report ¶ 3, ECF No. 10. After another month of radio silence-by then, at least three months after State realized it never searched Clinton's emails, and two months after Clinton gave the Department 30,490 of the 62,320 emails recovered from her private server (she deleted the rest)-State filed another status report admitting "additional searches for documents potentially responsive to the FOIA must be conducted" and asking for two months to conduct these searches. 2/2/15 Status Report ¶ 3, ECF No. 11. A month later, Judicial Watch read the *New York Times* and realized what State was talking about. *See* Pl.'s Mot. Status Conf. ¶ 3, ECF No. 13. That story, along with reporting that Clinton's former Chief of Staff Cheryl Mills and former Deputy Chiefs of Staff Huma Abedin and Jake Sullivan also used personal email to conduct government business, *see* Pl.'s Mot. Status Conf. ¶ 3; Michael S. Schmidt, *In Clinton*

Emails on Benghazi, Rare Glimpse at Her Concerns, N.Y. Times (Mar. 23, 2015), https://www.nytimes.com/2015/03/23/us/politics/in-clinton-emails-on-benghazi-a-rareglimpse-at-her-concems.html, exposed State's deceit in this case.

At best, State's attempt to pass-off its deficient search as legally adequate during settlement negotiations was negligence born out of incompetence. At worst, career employees in the State and Justice Departments colluded to scuttle public scrutiny of Clinton, skirt FOIA, and hoodwink this Court.

The current Justice Department made things worse. When the government last appeared before the Court, counsel claimed "it's [not] true to say we misled either Judicial Watch or the Court." 10/12/18 Tr. 15:6-8. When accused of "doublespeak," counsel denied vehemently, feigned offense, and averred complete candor. 10/12/18 Tr. 16-17. When asked why State masked the inadequacy of its initial search, counsel claimed that the officials who initially responded to Judicial Watch's request didn't realize Clinton's emails were missing, and that it took them two months to "figure[] out what was going on" after the former-Secretary-tumed-presumptive-presidential-candidate delivered twelve bankers boxes of emails. 10/12/18 Tr. 14:7-11. When asked why it took so long for State to own-up to the missing emails and to its initial search's deficiency, counsel cited "normal FOIA practice." 10/12/18 Tr. 41:21-22; *see also* 5/1/15 Status Report at 6, ECF No. 16 (calling this "a run-of-the-mill FOIA dispute").

Counsel's responses strain credulity. And even before this recent chicanery, the Court found enough signs of government wrongdoing to justify discovery, including into whether Clinton used her private email to intentionally flout FOIA. *See* 3/29/16 Mem. & Order, ECF No. 39. But the Court put-off setting a specific discovery order, mindful of parallel proceedings before Judge Sullivan, *see Judicial Watch, Inc. v. Dep't of State,* No. 13-1363, and ongoing investigations by State's Inspector General, the Federal Bureau of lnvestigation, and the House Select Committee on Benghazi. Since those inquiries concluded, the Court now orders the parties to meet and confer to develop a discovery plan into whether Clinton used a private email to stymie FOIA, whether State's attempts to settle the case despite knowing its initial search was inadequate amounted to bad faith, and whether State's subsequent searches have been adequate.

I. DISCUSSION

With the government investigations concluded and discovery before Judge Sullivan winding down, Judicial Watch sought to verify the adequacy and good-faith of State's search in this case with requests for production and depositions bearing on States responses to other inquiries. *See* Pl.'s Notice, ECF No. 50. For its part, State argued discovery is unnecessary because of the discovery before Judge Sullivan and the additional information made public since March 2016. *See* Def.'s Notice, ECF No. 51. Today the Court orders the parties to develop a discovery plan limited

to three issues: whether Clinton used a private email to evade FOIA, whether State's attempts to settle the case despite knowing the inadequacy of its initial search constituted bad faith, and whether State's subsequent searches for responsive records have been adequate.

Although "[d]iscovery in FOIA is rare," *Baker & Hostetler LLP v. Dep't of Commerce,* 473 F.3d 312,318 (D.C. Cir. 2006), "[t]he major exception ... is when the plaintiff raises a sufficient question as to the agency's good faith in processing documents." *Landmark Legal Found. v. E.P.A.,* 959 F. Supp. 2d 175, 184 (D.D.C. 2013) (quoting U.S. Dep't of Justice, Guide to the Freedom of lnformation Act 812 (2009)). In these cases, discovery verifies the government adequately searched for responsive records. *See Weisberg v. Webster,* 749 F.2d 864, 868 (D.C. Cir. 1984).

But in an even rarer subset of these cases, the government's response to a FOIA request smacks of outrageous misconduct. And these cases merit additional discovery into the government's motives. *E.g., Judicial Watch, Inc. v. Dep't of Commerce,* 34 F. Supp. 2d 28, 41 (D.D.C. 1998); *see DiBacco v. U.S. Army,* 795 F.3d 178, 192-93 (D.C. Cir. 2015); *cf Flowers v. IR.S. ,* 307 F. Supp. 2d 60, 71 (D.D.C. 2004).

This is one of those cases. The Court takes no pleasure questioning the intentions of the nation's most august executive departments. But it still remains unknown whether Clinton used a private email to duck FOIA requests. Indeed, that is the focus of the remaining discovery before Judge Sullivan. *See*

Mem & Order, *Judicial Watch v. U.S. Dep't of State,* No. 13-1363, at 12 (D.D.C. May 4, 2016), ECF No. 73. State makes much of former FBI Director James Comey's response when Congressman Ron DeSantis asked if Clinton used her private email to flout FOIA: "I can't say that. Our best information is she set it up as a matter of convenience." *See* Def.'s Notice Prop. Order 10, ECF No. 51 (citing *Oversight of the State Department: Hearing Before the H Comm. on Oversight & Gov't Reform,* 114th Cong. 20 (2016)). But that's not quite the full-throated refutation State makes it out to be. Rather, telling Congress-under penalty of perjury-what he couldn't say for sure was an understandably equivocal assessment of the evidence at the time. It was not a conclusive repudiation of what many people familiar with the Presidential Records Act have long wondered. Take the very first public story about Clinton using a private email for official business, long before the public knew its extent: When an easily overlooked March 2013 hack of Clinton-confidante Sidney Blumenthal's AOL account exposed an official email from Clinton's private account, a *Gawker* article speculated it was a one-off "attempt to shield her communications with Blumenthal from the prying eyes of FOIA requesters." John Cook, *Hacked Emails Show Hillary Clinton Was Receiving Advice at a Private Email Account/ram Banned, Obama-Hating Former Staffer,* Gawker (Mar. 20, 2013, 3:39 PM), http://gawker.com/5991563/hacked-emails-show-hillary-clinton-was-receiving-advice-at-aprivate-email-account-from-banned-obama-hating-former-staffer. Or take Abedin's response when State's Executive Secretary suggested Clinton use a

government Blackberry so her email "would be subject to FOIA requests": "doesn't make a whole lot of sense." E-mail from Huma Abedin to Stephen D. Mull & Cheryl D. Mills (Aug. 30, 2012, 5: 17 PM), *appended to* Pl. Judicial Watch's Reply Supp. Mot. Disc., *Judicial Watch, Inc. v. US. Dep 't of State,* No. 13-1363 (D.D.C. Jan. 22, 2016), ECF No. 51-3. Even more telling is the State Department Inspector General's conclusion that although dozens of department officials emailed Clinton's personal account, the employees responsible for FOIA compliance didn't know the account existed. Office of lnspector Gen., Evaluation of the Department of State's FOIA Processes for Requests Involving the Office of the Secretary 14-15 (2016), https://www.stateoig.gov/system/files/esp-16-01.pdf.

Nor can the Court blame Judicial Watch for questioning whether State's attempts to settle the case while knowing it had not searched Clinton's missing emails-and continuing after State recovered the emails-was an intentional effort to block their release. Especially since State's counsel came close to admitting as much at the Court's last hearing. Counsel averred there was nothing wrong with State's attempt to pass-off its initial search as legally adequate since, "at the time," the Department believed "items not in State's possession d[id] not need to be searched." 10/12/18 Tr. 16:11-16. That admission is significant for two reasons: Factually, it implies State thought settling this case would absolve the Department of any duty to search Clinton's missing emails in response to this request. And legally, it is wrong. Though agencies need not

retrospectively search records they failed to retain, *e.g., SafeCard Servs., Inc.* v. *S.E.C.,* 926 F.2d 1197, 1201 (D.C. Cir. 1991), agencies violate FOIA when they fail to search records an employee improperly secreted from the agency's control. *Judicial Watch, Inc. v. US. Dep't of Commerce,* 34 F. Supp. 2d 28, 42-44 (D.D.C. 1998); *see also Kissinger v. Reporters Comm.for Freedom of the Press,* 445 U.S. 136, 159 (1980) (Brennan, J., concurring in part and dissenting in part) (noting the majority's suggestion "that an agency would be improperly withholding documents if it failed to take steps to recover papers removed from its custody deliberately to evade an [sic] FOIA request").

Did State know Clinton deemed the Benghazi attack terrorism hours after it happened, contradicting the Obama Administration's subsequent claim of a protest-gone-awry? *See* E-mail from H, hrod17@clintonemail.com, to Diane Reynolds (Sept. 11, 2012, 11:12 PM), https://benghazi.house.gov/sites/republicans.benghazi.house.gov/files/documents/Tab%2050.pdf; *see also* Nick Gass, *Chelsea Clinton's Secret Identity,* Politico (Mar. 5, 2015, 7:57 AM), https://www.politico.com/story/2015/03/chelsea-clinton-diarie-reynolds-secret-email-115786 (establishing Diane Reynolds as an email pseudonym for Chelsea Clinton). Did State know Clinton sent or received top-secret information through her private email? *See* Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System (July 5, 2016),

https://www.fbi.gov/news/pressrel/pressreleases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillaryclinton2019s-use-of-a-personal-e-mail-system (noting the FBI recovered eight email chains from Clinton's server containing top-secret information). Did the Department merely fear what might be found? Or was State's bungling just the unfortunate result of bureaucratic redtape and a failure to communicate? To preserve the Department's integrity, and to reassure the American people their government remains committed to transparency and the rule of law, this suspicion cannot be allowed to fester.

Nor is the government correct that Judicial Watch's proposal mimics information already made public. As the government acknowledged at the recent hearing, Judicial Watch's request extends to all Office of the Secretary employees. *See* 10/12/18 Tr. 19:3-6, 36:22-24. And according to State's Obama-era website, that includes not only the Secretary, her chief of staff, and her deputy chief of staff, but also her secretary, executive assistant, two special assistants, scheduler, staff assistant, and two personal assistants. *See Bureaus/Offices Reporting Directly to the Secretary,* U.S. Dep't St., https://2009-2017.state.gov/s/. To be sure, the government's investigations and scores of lawsuits examined the emails Clinton turned over to State, *e.g., Leopold v. Dep't of State,* No. 15-123 (Contreras, J.), the thousands more the FBI resurrected by forensically searching Clinton's private server, *e.g., Leopold v. Dep't of Justice,* No. 15-2117 (Moss, J.), and the thousands more the FBI recovered during an

unrelated investigation into Anthony Weiner. *E.g., Judicial Watch, Inc. v. Dep't of State,* No. 15-684 (Howell, J.).[1] But State does not identify any comparable examination of records from other Office of the Secretary members. In fact, State even concedes it has yet to search emails Mills, Abedin, and Sullivan turned over in August 2015. *See* Def.'s Notice Prop. Order 2.n.l. Moreover, the Court is unaware of any public information shedding light on State's attempts to settle this case in late 2014 and early 2015. And though the parties must avoid duplicating the discovery already taken before Judge Sullivan into Clinton's motives, prior discovery before another judge does not per se preclude additional evidence discoverable under this Court's independent judgment.

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[1] The FBI's efforts were imperfect, since the FBI could not recover all the emails Clinton deleted. When last appearing before the Court, State strained to transplant into this case another court's conclusion under the Federal Records Act "that the FBI has exhausted all imaginable investigative avenues" to recover still-missing emails. *Judicial Watch, Inc. et al. v. Tillerson,* 293 F. Supp. 3d 33, 31 (D.D.C. 2017) (Boasberg, J.). Taking no position on the merits of that conclusion, the Court notes first that the Federal Records Act employs a very different standard than FOIA, requiring agencies take only more-than-minimal action to remedy federal record removal or destruction, *see Judicial Watch, Inc. et al. v. Tillerson,* 156 F. Supp. 3d 69, 76 (O.O.C.) (Boasberg, J.) (citing *Armstrong v. Bush,* 924 F .2d 282,296 (D.C. Cir. 1991)), *rev'd & remanded on other grounds,* 844 F.3d 952 (D.C. Cir. 2016), and second that Judicial Watch appealed the decision to the D.C. Circuit, which heard argument last month. *Judicial Watch, Inc. v. Pompeo,* No. 17-5275.

II. CONCLUSION

To see if it can rule out egregious government misconduct and vindicate the public's faith in the State and Justice Departments, the Court orders the parties to meet and confer to plan discovery into whether Clinton used a private email to stymie FOIA, whether State's attempts to settle the case in late 2014 and early 2015 amounted to bad faith, and whether State's subsequent searches have been adequate. The parties are to submit a proposed plan and schedule for discovery within ten days. Once discovery ends, the Court will determine the adequacy of State's searches and set a further schedule for the submission of *Vaughn* affidavits and dispositive motions. An accompanying order follows.

Date: December 6, 2018

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 14-1242

Judicial Watch, Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
U.S. Department of State,	)
	)
Defendant.	)
	)

MEMORANDUM AND ORDER

This matter comes before the Court on plaintiff's motion for limited discovery regarding the adequacy of the State Department's search for responsive documents in this Freedom of Information Act case.

The Court set forth the proper legal standards for such discovery in a prior case in which the Environmental Protection Agency had excluded its Administrator from a search of "senior official" files in response to a FOIA request, did not search personal e-mail accounts where official government business was being conducted, and ultimately disclosed that the Administrator was sending and receiving e-mails in her dog's name-which was not subject to the FOIA search. *See Landmark Legal Found. v. Envtl. Prot. Agency,* 959 F. Supp. 2d 175 (D.D.C. 2013). Where

there is evidence of government wrong-doing and bad faith, as here, limited discovery is appropriate, even though it is exceedingly rare in FOIA cases.

An understanding of the facts and circumstances surrounding Secretary Clinton's extraordinary and exclusive use of her "clintonemail.com" account to conduct official government business, as well as other officials' use of this account and their own personal e-mail accounts to conduct official government business is required before the Court can determine whether the search conducted here reasonably produced all responsive documents. Plaintiff is certainly entitled to dispute the State Department's position that it has no obligation to produce these documents because it did not "possess" or "control" them at the time the FOIA request was made. The State Department's willingness to now search documents voluntarily turned over to the Department by Secretary Clinton and other officials hardly transforms such a search into an "adequate" or "reasonable" one. Plaintiff is not relying on "speculation" or "surmise" as the State Department claims. Plaintiff is relying on constantly shifting admissions by the Government and the former government officials. Whether the State Department's actions will ultimately be determined by the Court to not be "acting in good faith" remains to be seen at this time, but plaintiff is clearly entitled to discovery and a record before this Court rules on that issue.

The Court must observe that the Government argues in its opposition memorandum (page 9) that "the fact that State did not note that it had not

searched Secretary Clinton's e-mails when it responded to Plaintiffs FOIA request ... was neither a misrepresentation nor material omission, because these documents were not in its possession and control when the original search was completed." The Government argues that this does not show a lack of good faith, but that is what remains to be seen, and the factual record must be developed appropriately in order for this Court to make that determination.

The Court does understand the Government's argument that the sheer volume of pending cases involving these issues is a burden and the Court is aware that Judge Sullivan has already ruled in another case brought by this plaintiff against this defendant-regarding other requested documents-that he will authorize limited discovery. *See Judicial Watch* v. *Dept. of State,* Civil Action No. 13-1363-EGS (filed Sept. 10, 2013). Briefing is ongoing before Judge Sullivan. When Judge Sullivan issues a discovery order, the plaintiff shall-within ten days thereafter-file its specific proposed order detailing what additional proposed discovery, tailored to this case, it seeks to have this Court order. Defendant shall respond ten days after plaintiff's submission.

Plaintiff's motion for limited discovery is **GRANTED.**

Defendant's motion for summary judgment is **DENIED,** without prejudice to filing a new motion after authorized discovery is concluded.

It is so **ORDERED.**

Date: March 29, 2016

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge