No. _____

In The
Supreme Court of the United States

PATRICIA SMITH, et al.,

Petitioners,

v.

HILLARY CLINTON, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the U.S. Court of Appeals for the District of Columbia Circuit ("DC Circuit") err by affirming the order of the U.S. District Court for the District of Columbia ("District Court") substituting the United States as a Defendant for Respondent Hillary Clinton ("Ms. Clinton")? App. 1-App. 14.

2. Did the DC Circuit Err by affirming the order of the District Court dismissing Petitioners' claims for lack of subject matter jurisdiction or failure to state a claim? App. 1-App. 14.

PARTIES TO THE PROCEEDINGS

I. Petitioner Patricia Smith

Petitioner Patricia Smith ("Petitioner Smith") is the equivalent of a "Gold Star parent," and the mother of Sean Smith, who was tragically killed during the September 11, 2012 attack on the American Consulate in Benghazi, Libya.

II. Petitioner Charles Woods

Petitioner Charles Woods ("Petitioner Woods") is a Gold Star parent, and the father of Tyrone Woods, who was tragically killed during the September 11, 2012 attack on the American Consulate in Benghazi, Libya.

III. Respondent Hillary Clinton

Respondent Hillary Clinton ("Respondent") was the Secretary of State during the September 11, 2012 Benghazi attack, and a private citizen who ran for President during the 2016 elections.

IV. The United States of America

The United States of America was substituted in for Respondent by the District Court under the Westfall Act for claims that occurred while Respondent was Secretary of State.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state that no parties are corporations.

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OPINIONS AND ORDERS ENTERED

I. June 1, 2018 Order of the DC Circuit denying Petitioners' Petition for Rehearing En Banc.

II. February 9, 2018 order of the DC Circuit affirming the judgment of the District Court and accompanying opinion.

III. May 26, 2017 order of the District Court granting the United States' Motion for Partial Substitution and Motion to Dismiss and accompanying opinion.

JURISDICTION

Petitioner seeks this Court's review of the order entered on February 9, 2018 by the DC Circuit, by a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. § 1254(1). This petition is timely filed because it was mailed within ninety days of June 1, 2018, the date the DC Circuit denied Petitioners' Petition for Rehearing En Banc.

RELEVANT LEGAL PROVISIONS

Westfall Act, 28 U.S.C. § 2679. *See* App. 91.

STATEMENT OF THE CASE

Former President John Adams famously wrote about the rule of law in his Constitution for the

Commonwealth of Massachusetts, "In the government of this commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: ***to the end it may be a government of laws and not of men***." The DC Circuit's ruling has placed this fundamental principle in grave jeopardy.

Petitioners are the Gold Star parents of Sean Smith and Tyrone Woods, both of whom were tragically killed on September 11, 2012 at the U.S. Consulate in Benghazi, Libya ("Benghazi Attack") by Islamic terrorists. Respondent, who was at the time in office of U.S. Secretary of State, acted far outside the scope of her employment and utilized a private email server to send and receive top secret, confidential information, including the "location of Ambassador Christopher Stevens, and thus the U.S. Department of State and the covert Central Intelligence Agency ("CIA") and other government operations in Benghazi, Libya." These transmissions were hacked, as later confirmed by the Federal Bureau of Investigation and intelligence agencies, by virtue of their unsecured nature, by foreign powers and terrorist designated states and directly led to the Benghazi Attack.

After the tragic attack, Respondent met with Petitioners at Joint Base Andrews and told them each that the Benghazi Attack was a result of an Internet video criticizing the "prophet" Muhammad. App. 68, 77.

Respondent told this story to Petitioners, despite fully knowing at the time that her statements were false.

To make matters worse, during her subsequent campaign for U.S. president, Respondent negligently, recklessly and maliciously defamed Petitioners in order to deflect harsh criticism and protect herself from public scrutiny while on the campaign trail by branding them as liars.

First, on December 6, 2015, during an interview with ABC's George Stephanopoulos, Respondent flat out falsely denied telling the families of Benghazi victims that the YouTube video caused the attack. After George Stephanopoulos asked Respondent, "Did you tell them it was about the film?". Respondent responded:

> ***No***. I can't – I can't help it the people think there has to be something else there. I said very clearly there had been a terrorist group, uh, that had taken responsibility on Facebook, um, between the time that, uh, I – you know, when I talked to my daughter, that was the latest information; we were, uh, giving it credibility. And then we learned the next day it wasn't true. In fact, they retracted it. This was a fast-moving series of events in the fog of war and I think most Americans understand that.

Second, on December 30, 2015, during the Conway Daily Sun Editorial Board Meeting, Respondent directly branded Petitioners as liars. After Conway Daily Sun columnist Tom McLaughlin pointed out discrepancies in Respondent's private and public comments

about the cause of the Benghazi attack, and referenced her interview with George Stephanopoulos where she denies telling Plaintiffs-Appellants that the attack was caused by a YouTube video, McLaughlin asks, "Somebody is lying. Who is it?" Respondent responded, "Not me, that's all I can tell you."

Third, on March 9, 2016, during the Democratic Presidential Debate, when asked about Petitioner Smith's allegation that Respondent lied to her by blaming the Benghazi attack on a YouTube video, Respondent responded by saying, "I feel a great deal of sympathy for the families of the four brave Americans that we lost at Benghazi, and I certainly can't even imagine the grief that she has for losing her son, but she's wrong. She's absolutely wrong."

Fourth, on July 31, 2016, during an interview with Chris Wallace of FOX News Sunday, Respondent stated, "Chris, my heart goes out to both of them. Losing a child under any circumstances, especially in this case, two State Department employees, extraordinary men both of them, two CIA contractors gave their lives protecting our country, our values. I understand the grief and the incredible sense of loss that can motivate that. As other members of families who lost loved ones have said, that's not what they hear, I don't hold any ill feeling for someone who in that moment may not fully recall everything that was or wasn't said."

The Honorable Amy Berman Jackson of the District Court precipitously dismissed Petitioners' claims on the eve of Memorial Day, the hallow day set aside

for Petitioners (and all Americans) to remember and grieve for the tragic loss of their sons. The timing could not have been coincidental, and creates the appearance that the District Court made a political decision.

Furthermore, the DC Circuit's order has resulted in a clear denial of due process and equal protection for Petitioners – who are both Gold Star parents – and who deserve their day in Court. As set forth in detail below, the DC Circuit has essentially ruled that Respondent, and others in positions of great power and authority, are above the law and free to commit crimes for their own gain simply due to their elevated status. This creates a dual system of justice, where those who hold influence are immune to any repercussions for their illegal misconduct, while those who are merely commoners suffer and are denied their basic constitutional rights. It is incumbent upon this Court, respectfully, to remedy this clearly inappropriate precedent and set the legal and justice system in the right direction before it collapses entirely, particularly in light of recent events in the public's present discourse. What the citizenry clamors for is an equal system rather than what is perceived to be a dual system of justice, one for establishment elites and the other for the masses. This case is thus of great constitutional importance.

REASONS FOR GRANTING THE WRIT

I. The DC Circuit and the District Court's Interpretation of the Westfall Act Allows, if not Promotes, Illegal Criminal Activity

The Westfall Act, codified at 28 U.S.C. § 2679(d), was enacted in response to the U.S. Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), which "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229 (2007). "When a federal employee is sued for wrongful or negligent conduct," the Attorney General or his delegate may certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." *Osborn*, 549 U.S. at 229-30, quoting 28 U.S.C. § 2679(d)(1)-(2). "Upon the Attorney General's certification, the employee is dismissed from the action, and the United States is substituted as the defendant in place of the employee." *Id*. at 230. However, "the government's certification is not conclusive because it is the Court that makes the final determination as to the scope of employment issue." *Kalil v. Johanns*, 407 F. Supp. 94, 97 (D.D.C. 2005). The U.S. Supreme Court has expressly recognized the conflicts of interest that arise should such certification not be subject to judicial review. *See Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 436 (1995) ("The local United States Attorney, whose conflict of interest is apparent, would be authorized to make final and binding decisions insulating both the United States and federal

employees like Lamagno from liability while depriving plaintiffs of potentially meritorious tort claims."). *Id*.

In this instance, the rulings of the DC Circuit and the District Court have allowed, if not actively encouraged, federal employees to skirt their employer's rule and procedures as well as commit what amounts to criminal and illegal acts for their own personal gain. This removes *all* accountability for federal employees for their acts of misconduct, and creates a disastrous precedent that must be addressed and reversed by this Court. Indeed, it simply makes no sense that the drafters of the Westfall Act intended such a wide meaning to the "scope of employment" as to encourage illegal and criminal behavior by federal employees.

Generally, the District of Columbia courts "look[] to the Restatement (Second) of Agency" in determining whether an employee's actions fall within the scope of employment. *Rasul v. Myers*, 512 F.3d 644, 655 (D.C. Cir. 2008).

> The Restatement provides [that]: "(1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master[;] and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master. (2) **Conduct of a servant is not within the scope of employment if it is**

> **different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.**"

Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 663 (D.C. Cir. 2006) (per curiam) (quoting Restatement (Second) of Agency § 228 (1958)) (emphasis added).

A. Respondent's Criminal Behavior

This Court has already held that criminal conduct generally falls outside the scope of employment. "In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered: . . . whether or not the act is seriously criminal." *Rasul*, 512 F.3d at 659 (internal quotations omitted). "If conduct is seriously criminal, the Restatement explains that it is generally less likely that the conduct comes within the scope of employment." *Id*. at 660. Despite this precedent, the DC Circuit has erroneously found that Respondent's criminal behavior fell within the scope of her employment.

Indeed, leading experts in the legal field, such as former U.S. Attorney General Michael Mukasey, have publicly stated that criminal charges were justified for Respondent's wrongful acts.[1] Former Associate

[1] Michael Mukasey, *Clinton's Emails: A Criminal Charge is Justified*, Wall Street Journal, Jan. 21, 2016, available at:

Attorney General and current attorney to the President, Donald Trump, Rudy Giuilani spoke of "16 crimes he believes the evidence suggests [Respondent] is already guilty of," including (1) 18 U.S.C. § 201 (bribery); (2) 18 U.S.C. § 208 (acts affecting a personal financial interest); (3) 18 U.S.C. § 371 (conspiracy); (4) 18 U.S.C. § 1001 (false statements); (5) 18 U.S.C. § 1341 (frauds and swindles); (6) 18 U.S.C. § 1343 (fraud by wire); (7) 18 U.S.C. § 1349 (attempt and conspiracy to commit fraud); (8) 18 U.S.C. § 1505 (obstruction of justice); (9) 18 U.S.C. § 1519 (destruction [alteration or falsification] of records in federal investigations and/or bankruptcy); (10) 18 U.S.C. § 1621 (perjury); (11) 18 U.S.C. § 1905 (disclosure of confidential information); (12) 18 U.S.C. § 1924 (unauthorized removal and retention of classified documents or material); (13) 18 U.S.C. § 2071 (concealment [removal or mutilation] of government records); (14) 18 U.S.C. § 7201 (attempt to evade or defeat a tax [use of Clinton Foundation funds for personal or political purposes]); (15) 18 U.S.C. § 7212 (attempts to interfere with administration of internal revenue laws).[2] Even the former Director of the FBI, James Comey, publicly stated that his agency found that Respondent was "extremely careless in [her]

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https://www.wsj.com/articles/clintons-emails-a-criminal-charge-is-justified-1453419158.

[2] TruthFeed News, *Rudy Giuliani Believes Hillary Is Guilty of These 16 Crimes*, TruthFeed, Oct. 29, 2016, available at: http://truthfeed.com/rudy-giuliani-believes-hillary-is-guilty-of-these-16-crimes/32605/

handling of very sensitive, highly classified information."[3] Furthermore, Judge Andrew Napolitano publicly stated, "It is well known that the FBI agents on the ground, the human being who did the investigative work, had built an extremely strong case against Hillary Clinton and were furious when the case did not move forward . . . [t]hey believe the decision not to prosecute came from the White House."[4]

It is therefore evident that Respondent acted in a criminal fashion. The DC Circuit essentially concedes as much in its opinion, writing that, "alleging a federal employee violated policy or even laws in the course of her employment – including specific allegations of defamation or of potentially criminal activities – does not take that conduct outside the scope of employment." App. 7. This not only contravenes *Rasul* and the Restatement, but clearly creates a disastrous precedent whereby a federal employee, such as Respondent, is given free rein to commit *criminal acts* – for their own personal gain – and is still able to hide behind the shield of Westfall immunity when their victims seek

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[3] Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System, FBI, July 5, 2016, available at: https://www.fbi.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system.

[4] Matt Zimmerman, Adam Housley, *FBI, DOJ roiled by Comey, Lynch Decision to Let Clinton Slide by on Emails, Says Insider*, Fox News, Oct. 13, 2016, available at: http://www.foxnews.com/politics/2016/10/13/fbi-doj-roiled-by-comey-lynch-decision-to-let-clinton-slide-by-on-emails-says-insider.html.

justice. This is unjust, unfair, and contravenes all notions of equity and justice.

B. Respondent's Other Misconduct

In addition to criminal behavior being allowed, if not encouraged, by the precedent created by the DC Circuit, it has also allowed federal employees to completely disregard the rules and procedures set by their employers in order to obtain individual gain. The U.S. Department of State's own rules clearly and unequivocally provide that:

> It is the Department's general policy that normal day-to-day operations be conducted on an authorized [Automated Information System], which has the proper level of security control to provide nonrepudiation, authentication and encryption, to ensure confidentiality, integrity, and availability of the resident information.[5]

A ruling that states Respondent's violation of U.S. Department of State's own rules was done within the scope of her employment is frankly, nonsensical. Indeed, "conduct of a servant is not within the scope of employment if it is different in kind from that authorized." Restatement (Second) of Agency § 228 (1958). The point of any organization establishing internal

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[5] Josh Gerstein, *Clinton Private Email Violated "Clear-Cut" State Dept. Rules*, Politico, Mar. 5, 2015, available at: https://www.politico.com/story/2015/03/state-department-email-rule-hillary-clinton-115804.

rules and procedures is for its employees to follow them – attempts to skirt such rules cannot be said to be done in the course of employment. Intentionally disregarding one's employer's internal rules and procedures is conduct "different in kind from that authorized" and therefore not within the scope of one's employment, as set forth above. Much like the argument set forth in the previous section, the DC Circuit's sets a disastrous precedent that makes it perfectly allowable for federal employees to severely harm others while ignoring the rules and procedures implemented by their employers. This defies all logic and reason, not to mention any standard of accountability for the most critical figures in our federal government. This Court, respectfully, must step in.

II. Petitioners' Defamation Claim Should Have Gone to a Jury

Generally, defamation law – particularly on deciding whether to grant a motion to dismiss – is not that stringent. The court "must assume, as the complaint alleges, the falsity of any express or implied factual statements made in the article [or publication]." *Weyrich v. New Republic, Inc*., 235 F.3d 617, 623 (D.C. Cir. 2001). It must also assume that the defamatory statements were made "with knowledge of their falsity or reckless disregard for their truth." *Id*. Additionally, in situations where resolution is necessarily fact intensive, like defamation, the U.S. Supreme Court has held that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in

our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). The DC Circuit and District Court mistakenly took Petitioners' viable causes of action away from a jury.

Crucially, moreover, when a litigant requests a jury trial, it is not for the lower court to decide whether a statement is defamatory or not. "It is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense that it can rule as a matter of law, that it was not libelous." *Levy v. American Mut. Ins. Co*., 196 A.2d 475, 476 (D.C. 1964); *Weyrich*, 235 F.3d at 627. "[I]f the language is capable of two meanings, one actionable and the other not, it is for the jury to determine which of the two meanings would be attributed to it by persons of ordinary understanding under the circumstances." *Levy*, 196 A.2d at 476. "[A] jury must determine whether these impressions were actually conveyed, whether they were false, and whether the letters were motivated by actual malice."[6] *White*, 909 F.2d at 525; *see also Dunn v. Gannett New York Newspapers, Inc*., 833 F.2d 446, 449 (3d Cir. 1987) ("if the language at issue is capable of both a defamatory and nondefamatory meaning, there exists a question of fact for the jury.").

[6] Plaintiffs-Appellants are not public figures and the malice standard cannot apply. Thus, the legal threshold for defamation is quite low.

Indeed, recognizing the role of the jury, the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") held:

> We must attempt to discharge our constitutional responsibility to protect First Amendment values without unduly trenching on the fact-finding role of the jury and trial judge. We are mindful that in *New York Times*, *Bose*, and *Harte-Hands*, the Supreme Court was fashioning a process for reviewing the evidence which permits judicial protection of First Amendment values while still paying due deference to the fact-finding role of juries, and particularly the jury's opportunity to observe the demeanor of the witnesses.

Newton v. National Broadcasting Co., 930 F.2d 662, 672 (9th Cir. 1990). Thus, the DC Circuit's ruling implicates constitutional due process concerns, as Petitioners were effectively denied a right to a jury trial. This Court must, respectfully, intervene to protect Petitioners' constitutional and other rights.

CONCLUSION

No one is or should be above the law. Unfortunately, the precedent created by the DC Circuit directly contravenes this basic and widely accepted notion and turns our Constitution on its head to favor establishment elites at the expense, in this case, of two dead war heroes and their aggrieved Gold Star parents and families.

Indeed, even with just a cursory glance, it is evident that Respondent could not possibly have been acting within the scope of her employment so as to immunize her under the Westfall Act. How could the use of a private, personal email server in the furtherance of illegal, criminal behavior, not to mention in clear violation of the Department of State's own internal operating rules and procedures, constitute acting in the scope of Respondent's employment? Such a holding rewards federal employees – by the sole nature of their employment – free rein to commit criminal acts in furtherance of their own interests while at the same time denying their victims a fair shot at justice. This creates a dual system of justice, where those in power are above the law and their victims must simply bear the weight of their misconduct. This simply cannot be what the American legal system and in particular our Constitution should stand for. This Court must, respectfully, intervene.

Respectfully submitted,

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