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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