

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

THE STATE OF TEXAS and	§	
KEN PAXTON, in his official capacity at	§	
Attorney General of Texas,	§	
<i>Plaintiffs,</i>	§	
v.	§	
MERRICK GARLAND, in his official	§	CIVIL ACTION NO. 2:24-CV-00240-Z
capacity as Attorney General of the United	§	
States; DEPARTMENT OF JUSTICE,	§	
<i>Defendants.</i>	§	

REPLY IN SUPPORT OF EMERGENCY MOTION FOR PRESERVATION ORDER
OR,
IN THE ALTERNATIVE, TEMPORARY RESTRAINING ORDER

Defendants urge this Court to trust their assurances that critical records will be preserved. *See generally* ECF No. 8 at 10–17. But recent history tells a very different story. Plaintiffs do not approach this Court lightly. Plaintiffs request a preservation order because, in light of Defendants’ past conduct it is a necessary, and modest, enforceable safeguard to ensure that Defendants comply with their legal obligations and avoid subjecting Plaintiffs to irreparable harm.

Importantly, this case is not just a relitigation of the past—Defendants are acting in multiple ways *right now* that raise a serious risk of document destruction. Just days ago, widely shared¹ photos showed a paper shredding truck parked outside DOJ headquarters. Supp. Appx. 040.² While Defendants claim they are committed to preserving records, the public sees a truck

¹ Wendell Husebo, *Paper shredding truck appears outside DOJ after Gaetz nomination* BREITBART (2024), <https://www.breitbart.com/2024-election/2024/11/19/paper-shredding-truck-appears-outside-doj-after-gaetz-nomination/> (last visited Nov 21, 2024).

² Image available at Oversight Project [[@OversightPR](https://x.com/OversightPR)], “Paper Shredding Truck at DOJ,” X, November 19, 2024, <https://x.com/OversightPR/status/1858939565194535293>.

seemingly ready to destroy them. What's more, this image comes at a time when current DOJ officials have been vocal about fears of being investigated by the incoming administration.³

Meanwhile, Defendants remain evasive in this case. They have made no clear commitment to Plaintiffs or the Court to preserve the requested records, including those from Special Counsel Jack Smith's investigation. Instead, they hide behind boilerplate assurances: "DOJ is committed to preserving its records and following the law." ECF No. 8 at 13. For Plaintiffs, who know Defendants' history of mishandling critical records, Supp. Appx. 036–39, such platitudes offer cold comfort.

This Court has the authority to protect public trust by ensuring transparency. Jack Smith's investigation was a political and legal abomination; the public must be able to learn what actually happened. And Jack Smith's team must not be permitted to avoid accountability. Plaintiffs seek only a modest and practical safeguard: a preservation order that ensures critical records remain intact. This measure imposes no meaningful burden on Defendants but prevents irreparable harm to Plaintiffs and the public.

ARGUMENT

I. The Risk of Document Destruction by Defendants is Significant.

Plaintiffs do not need to show that Defendants "will" destroy documents here. *Contra* ECF No. 8 at 10. Rather, they must show there is a significant risk of document destruction. Showing there is a "significant risk," *Matthews v. Exec. Off. for U.S. Atty's*, 2020 WL 10354076, at *1 (W.D. Tex. Oct. 6, 2020), that documents will be destroyed in the future is "often met by demonstrating that the opposing party *has lost or destroyed evidence in the past* or has inadequate retention procedures in place." *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006) (quoting *Pueblo of Laguna*, 60 Fed. Cl. at 138.) (emphasis added.). In other words, regardless which test is used by

³ *DOJ and FBI officials reach out to lawyers as potential Trump Revenge Prosecutions Loom*, NBCNEWS.COM (2024), <https://www.nbcnews.com/politics/justice-department/doj-fbi-officials-reach-lawyers-potential-trump-revenge-prosecutions-l-rcna179737> (last visited Nov 21, 2024).

Courts in assessing preservation orders, “[a] necessary component in the determination whether to grant or deny a preservation order. . . [is] the absence of any *significant past*, present or future threat to the continuing integrity or existence of the evidence[.]” *Capricorn Power Co.*, 220 F.R.D. 429, 434 (W.D. Pa. 2004) (emphasis added).

Defendants claim that their existing “obligations” to preserve documents render a preservation order unnecessary. ECF No. 8 at 11. But Defendants assurances are no match for their record. Senator Chuck Grassley’s November 12, 2024, letter to the DOJ—issued after Plaintiffs initiated this suit—underscores the point. Supp. Appx. 036–39. Previous letters from Senator Grassley have been found persuasive by courts in revealing a “pattern of partisan behavior” by Defendants in other cases regarding government transparency. *See, e.g., Heritage Found. v. U.S. Dept. of J.*, No. CV 2323-1148 (JEB), 2024 WL 1856418, at *11–12 (D.D.C. Apr. 29, 2024). And Grassley’s letter highlights several troubling incidents that call into question Defendants’ ability to preserve critical records. For example, during the Mueller investigation, several members of the Special Counsel’s team wiped data from their government-issued phones. Supp. Appx. 036. In some cases, devices were wiped “accidentally” after multiple incorrect password entries. *Id.* Out of the 96 phones used during the investigation, only 74 were ever reviewed for official records. *Id.*

These events didn’t occur in isolation. They coincided with the DOJ Office of the Inspector General’s inquiry into the Crossfire Hurricane investigation, raising legitimate concerns about whether records were deliberately destroyed to avoid scrutiny. Supp. Appx. 036–37. Nor was this the only instance. During the FBI’s investigation into Hillary Clinton’s handling of classified information, the Bureau went so far as to agree to destroy laptops belonging to Clinton’s staff—devices almost certain to contain evidence relevant to congressional oversight. Supp. Appx. 037.

This is the same kind of past behavior by defendants courts have looked to when deciding to issue preservation orders. *See, e.g., Haraburda v. Arcelor Mittal USA, Inc.*, 2011 WL 2600756, at *3 (N.D. Ind. June 28, 2011) (granting a preservation order where defendant deleted emails during a prior investigation and failed to show that it had implemented any steps to preserve potential evidence); *Hypro, LLC v. Reser*, 2004 WL 2905321, at *6 (D. Minn. Dec. 10, 2004) (granting a

preservation order where plaintiff alleged that one defendant “previously attempted to destroy computer files regarding his involvement with the other Defendants”).

This evasiveness is particularly troubling given the historic significance here. Jack Smith’s investigation involves now President-elect Donald Trump, an inquiry rooted in partisanship. For example, Senator Grassley’s letter highlights concerns about Timothy Thibault, an FBI official who was “deeply involved in the decision to open and pursue the investigation that ultimately became one of Special Counsel Smith’s cases against” President-elect Trump. Supp. Appx. 037. Thibault was later found to have violated the Hatch Act for overt anti-Trump partisanship. *Id.* All of this, combined with the fact that this is a transitional period in administrations, makes the situation even more urgent. *See, e.g., Citizens For Resp. & Ethics In Washington v. Off. of Admin.*, 593 F. Supp. 2d 156, 164 n. 4 (D.D.C. 2009); ECF No. 2 at 7.

In short, the stakes are too high to rely on Defendants’ vague assurances; this Court’s urgent intervention is essential to ensure critical records are preserved, and public confidence in our institutions safeguarded.

II. A Preservation Order is Not Burdensome.

“One seeking a preservation order [must] demonstrate that it is necessary and not unduly burdensome.” *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 (Fed. Cl. 2004). Defendants insists that a preservation order is not necessary since they are already bound by the presumption of good faith and the Federal Records Act (FRA). *See* ECF No. 8 at 10–15. But the presumption of good faith is not implicated in assessing a preservation order. *Competitive Enter. Inst.*, 2016 WL 10676292, at *3. And while Defendants dismiss Congressman Jim Jordan’s investigatory efforts, *Contra* ECF No. 8 at 14–15, Chairman Jordan’s factual statements (including that he has a basis for concern) are part of a detailed on-going Committee investigation and thus are *themselves* entitled to a presumption of good faith. *See Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978);

Ashland Oil v. FTC, 548 F.2d 977, 979 (D.C. Cir. 1977). And Chairman Jordan’s concerns are representative of the entire House majority’s.⁴

Even setting that aside, Defendants’ argument ignores the reality: statutory and ethical obligations alone have proven insufficient to ensure compliance with document preservation by Defendants in the past. Beyond that, this argument cuts against any “burden” a preservation order may cause Defendants. Indeed, if Defendants are already “bound by. . . the [FRA] and a specific records schedule that governs the *preservation* and disposition of the records of special investigations,” ECF No. 8 at 12, it is hard to see what additional burden would be imposed by an order from this court requiring Defendants to preserve the requested documents from Special Counsel Jack Smith’s investigation. This argument also discounts the fact that the FRA may be used by DOJ to *justify* destroying the requested documents. Indeed, one of the key objectives of the FRA is the “. . . [j]udicious preservation and *disposal* of records.”⁴⁴ U.S.C. § 2902(5) (emphasis added). Beyond the serious risk that these documents could be routinely purged under the FRA, Defendants have a troubling record when it comes to preserving evidence in politically motivated prosecutions like this one.

Given these circumstances, a preservation order would ensure clarity and accountability where both are desperately needed. *See, e.g., Citizens for Resp. and Ethics in Wash. v. Office of Admin.*, 593 F. Supp. 2d 156, 162 (D.D.C. 2009) (“[A]bsent a court order punishable by contempt requiring the maintenance and preservation of the records here at issue . . . [the FOIA requester] would have no resource if the documents were not so maintained and preserved.”).

Beyond that, the irreparability of any harm here cannot be overstated. If a preservation order is not entered, “valuable federal records could be lost forever.” *Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999).

⁴ *House Republican leadership, Committee Chairs demand Biden cabinet secretaries preserve all documents and communications* - SPEAKER OF THE HOUSE MIKE JOHNSON - LEADERSHIP FOR A STRONG AMERICA (2024), <https://www.speaker.gov/2024/11/12/house-republican-leadership-committee-chairs-demand-biden-cabinet-secretaries-preserve-all-documents-and-communications/> (last visited Nov 21, 2024).

III. CONCLUSION

Defendants' history of document destruction coupled with their evasiveness about retention of the requested records here make judicial intervention essential. A preservation order imposes no undue burden but provides critical safeguards to ensure compliance, maintain public trust, and prevent irreparable harm to Plaintiffs. Plaintiffs request that the Court grant the motion and direct Defendants to preserve all records related to Special Counsel Jack Smith's investigation so that the "improper conduct of the past cannot be repeated in this matter." Supp. Appx. 038.

Date: November 21, 2024

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 21, 2024, this document was filed through the Court's CM/ECF system, which served it upon all counsel of record.

/s/ Ryan S. Baasch

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