No. 24A

In the Supreme Court of the United States

IN RE U.S. DOGE SERVICE, ET AL.

APPLICATION TO STAY THE ORDERS OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA PENDING CERTIORARI OR MANDAMUS AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

Applicants (defendants-petitioners below) are the U.S. DOGE Service; Amy Gleason in her official capacity as Acting Administrator of the U.S. DOGE Service; Elon R. Musk in his official capacity; the Office of Management and Budget; Russell Vought in his official capacity as Director, Office of Management and Budget; the National Archives and Records Administration; and Marco A. Rubio in his official capacity as Acting Archivist of the United States.

Respondent (plaintiff-respondent below) is Citizens for Responsibility and Ethics in Washington.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Citizens for Responsibility and Ethics in Washington v. *U.S. DOGE Service*, No. 25-cv-511 (Apr. 15, 2025) (granting discovery)

Citizens for Responsibility and Ethics in Washington v. *U.S. DOGE Service*, No. 25-cv-511 (May 20, 2025) (scheduling discovery)

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

In re U.S. DOGE Service, No. 25-5130 (May 14, 2025) (denying mandamus and dismissing stay motion as moot)

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General—on behalf of applicants U.S. DOGE Service, *et al.*—respectfully applies for a stay of the orders issued by the United States District Court for the District of Columbia on April 15, 2025 and May 20, 2025 (App., *infra*, 5a-17a, 32a-33a), pending the expeditious filing and disposition of a petition for a writ of certiorari (or in the alternative, mandamus) and any further proceedings in this Court. In addition, the Solicitor General respectfully requests an immediate administrative stay of the discovery order and subsequent scheduling order pending consideration of this application. Absent a stay, the deadline for responses and objections to the discovery that the district court ordered is May 27, 2025, followed by document production by June 3, 2025, and the deposition of the Administrator of the U.S. DOGE Service by June 13, 2025.

The U.S. DOGE Service (USDS) is a presidential advisory body within the Executive Office of the President. The President, in various executive orders, has tasked USDS with providing recommendations to him and to federal agencies on policy matters that the President has deemed important to his agenda. Given those advisory functions, USDS is exempt from the Freedom of Information Act (FOIA), 5 U.S.C.

552, as a matter of law under the longstanding test for "agency" status. Yet the district court below ordered USDS to submit to sweeping, intrusive discovery just to determine if USDS is subject to FOIA in the first place. That order turns FOIA on its head, effectively giving respondent a win on the merits of its FOIA suit under the guise of figuring out whether FOIA even applies. And that order clearly violates the separation of powers, subjecting a presidential advisory body to intrusive discovery and threatening the confidentiality and candor of its advice, putatively to address a legal question that never should have necessitated discovery in this case at all.

To begin, it is long settled that presidential advisory bodies are not "establishments" that fall within FOIA's definition of "agency." *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980). And it is equally well settled that whether presidential advisory bodies are, in fact, advisory and thus excluded from FOIA depends on the contours of their legal authority—namely, whether they are authorized only to make recommendations—not on the degree of their practical influence. Otherwise, the offices of the Chief of Staff, National Security Advisor, and a host of other close presidential advisors would all be subject to FOIA, simply on the theory that those advisors' recommendations tend to be taken very seriously. That untenable result would compromise the provision of candid, confidential advice to the President and disrupt the inner workings of the Executive Branch. Yet, in the decisions below, the court of appeals and district court treated a presidential advisory body as a potential "agency" based on the persuasive force of its recommendations—threatening opening season for FOIA requests on the President's advisors.

That deeply flawed legal theory prompted the district court to order intrusive, expedited discovery of swaths of internal USDS documents; details about USDS employees and how they spend their time; and USDS's nonpublic "plans" to access gov-

ernment information, App., *infra*, 15a-16a—all to decide the threshold question whether USDS is exempt from FOIA. The order further requires a deposition of the presidential advisory body's head, Acting Administrator Amy Gleason. On top of all that, the order invades the heartland of USDS's deliberative process by requiring USDS to produce all "recommendation[s]" that it has made to agencies on various topics—including those that are "purely advisory"—and to disclose whether agencies *took* those recommendations. *Id.* at 15a, 25a. In other words, the district court effectively granted respondent's FOIA requests—providing them with USDS's documents—to resolve whether USDS is even an "agency" subject to FOIA. That approach would permit litigants to end-run FOIA's limits and strip every presidential administration of long-established protections for the President's advisors.

Nullifying FOIA's solicitude for presidential advisors and ordering roving discovery into their recommendations and advice represents an untenable affront to the separation of powers. This Court has held that discovery against a presidential advisory body "should be avoided whenever possible" and that saddling such advisors with the obligation of asserting privileges "line by line" is itself an impermissible burden. *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 388, 389-390 (2004). Yet the district court approved discovery against a presidential advisory body, much of which involves pre-decisional, deliberative, and privileged information. Further, much of that discovery serves no legitimate purpose. Instead, it imposes the same constitutionally problematic burdens that Congress and this Court sought to avoid by excluding such bodies from FOIA's reach.

The discovery ordered is also extraordinarily overbroad and intrusive. As noted, it reaches the substance of USDS's recommendations—the core of a presidential advisory body's most sensitive workings. By requiring a deposition of USDS's

head and much more besides, it will significantly distract from USDS's mission of identifying and eliminating fraud, waste, and abuse in the federal government. And the order's broad reach requires USDS to bear the onus of raising privileges as to large portions of its communications and activities.

The D.C. Circuit initially issued an administrative stay of the order. Yet a separate panel of the D.C. Circuit then lifted that stay, finding that the separation-of-powers issues were supposedly forfeited and characterizing the sweeping discovery ordered as "modest in scope." App., *infra*, 2a. Pursuant to the district court's subsequent scheduling order on May 20, 2025, petitioners must now respond to the discovery requests within a week, by May 27, 2025; produce documents within two weeks, by June 3, 2025; and provide a deposition of USDS's Administrator by June 13, 2025. *Id.* at 32a. Compliance will hamstring USDS in carrying out its mission, and the burdens of responding to these roving requests, forcing Administrator Gleason to be deposed, and intruding upon sensitive communications of advisors within the Executive Office of the President are quintessentially irreparable. This Court has rejected similar fishing expeditions into sensitive executive-branch functions, and it should not allow this one to proceed.

STATEMENT

1. On January 20, 2025, President Trump signed Executive Order No. 14,158, creating USDS as an entity in the Executive Office of the President to further the President's agenda by "modernizing Federal technology and software to maximize governmental efficiency and productivity." 90 Fed. Reg. 8441, 8441 (Jan. 29, 2025). The Order states that USDS is led by the USDS Administrator, who reports to the White House Chief of Staff. *Ibid.* The Order additionally creates the "U.S. DOGE Service Temporary Organization" as a temporary organization within USDS under

5 U.S.C. 3161, also led by the USDS Administrator, and scheduled to expire on July 4, 2026. 90 Fed. Reg. at 8441. And the Order requires USDS to coordinate on the President's efficiency goals with "DOGE Teams," which are created by agency heads and composed of employees of those agencies who report to agency leadership. *Ibid.* USDS, therefore, is an advisory body within the Executive Office of the President. And it is distinct from the Agency DOGE Teams, which comprise personnel within each relevant agency who report to agency heads.

Other executive orders place advisory responsibilities on USDS or its administrator. For example, Executive Order No. 14,210 directs the USDS Administrator to submit a report and various recommendations to the President regarding "waste, bloat, and insularity" in federal hiring. 90 Fed. Reg. 9669, 9669-9670 (Feb. 14, 2025). Executive Order No. 14,218 directs the USDS Administrator (among others) to evaluate "sources of Federal funding for illegal aliens" and "recommend additional agency actions." 90 Fed. Reg. 10,581, 10,581 (Feb. 25, 2025). And Executive Order No. 14,170 requires the USDS Administrator to "consult[]" with the Assistant to the President for Domestic Policy to develop a federal hiring plan, "which each agency head shall implement, with advice and recommendations as appropriate from" USDS. 90 Fed. Reg. 8621, 8621-8622 (Jan. 30, 2025).

The President's executive orders delineate the responsibilities that the President has assigned to USDS. See D. Ct. Doc. 24-1, at 25-26 (Mar. 19, 2025) (listing USDS responsibilities under such orders). USDS has no organic statute and is not created by Congress. Other executive orders provide directions to DOGE Team leads at agencies, who function under the authority of their agencies; those orders do not assign duties to USDS or its administrator. See Exec. Order No. 14,219, 90 Fed. Reg. 10,583 (Feb. 25, 2025); Exec. Order No. 14,222, 90 Fed. Reg. 11,095 (Mar. 3, 2025).

2. On January 24, 2025—four days after the U.S. DOGE Service was created—respondent Citizens for Responsibility and Ethics in Washington submitted a FOIA request. The request seeks numerous broad categories of information, including "[a]ll communications between the USDS Administrator and USDS staff," "[a]ll communications between USDS personnel and personnel of any federal agency," and all financial disclosures or ethics pledges executed by USDS personnel. D. Ct. Doc. 2-6, at 2-3 (Feb. 20, 2025). Less than a month later, on February 20, respondent filed suit based on that request and two similar requests to the Office of Management and Budget (OMB). Respondent filed a motion for a preliminary injunction the same day, asking the district court to require USDS to process and produce all non-exempt responsive documents by March 10, 2025, so that respondent would have them before Congress passed a bill to fund the federal government. D. Ct. Doc. 2-1, at 1-4 (Feb. 20, 2025).

The district court held that respondent was not entitled to the requested preliminary injunction and rejected respondent's only theory of irreparable harm—that respondent would purportedly lack access to USDS's information during the congressional appropriation process. See D. Ct. Doc. 18, at 15-16 (Mar. 10, 2025). The court nevertheless predicted that USDS was likely an agency subject to FOIA, recast respondent's motion as one for expedited processing, and ordered "USDS to process the request on an expedited basis." *Id.* at 22-28.

In response, USDS filed a motion for summary judgment to fully brief the threshold legal issue whether it is an "agency" subject to FOIA. See D. Ct. Doc. 24 (Mar. 19, 2025). Respondent then moved for the expedited discovery at issue here under Federal Rule of Civil Procedure 56(d). See D. Ct. Doc. 27 (Mar. 27, 2025).

Respondent's discovery requests covered large categories of information en-

compassing USDS's activities since January 20—including vast swaths of the information sought in respondent's FOIA requests, and information that has no plausible bearing on the congressional appropriations process for USDS. See App., *infra*, 24a-31a. Those requests included:

- a deposition of USDS's head, Administrator Amy Gleason, *id.* at 31a;
- identification of "each federal agency contract, grant, lease or similar instrument that any DOGE employee or DOGE Team member recommended that federal agencies cancel or rescind" and "whether that recommendation was followed," *id.* at 25a;
- identification of "each federal agency employee or position that any DOGE employee or DOGE Team member recommended federal agencies terminate or place on administrative leave" and "whether that recommendation was followed," *ibid.*;
- identification of "all current and former employees of DOGE and members of DOGE Teams," details regarding their employment, who oversees them, and what recurring reports they are required to submit, *id.* at 24a; and
- identification of "each federal agency database or data management system to which" "any DOGE employee has attempted to gain, has planned to gain, or plans to gain access, and whether access was obtained," *id.* at 25a.

3. The district court granted respondent's motion for expedited discovery in significant part. App., *infra*, 5a-17a. The court recognized that the dispositive inquiry on summary judgment is whether USDS is an agency under FOIA's applicable definition, which turns on whether USDS "could exercise substantial independent authority" or whether its "sole function is to advise and assist the President." *Id.* at 7a (citations omitted). But the court stated that the inquiry could not be resolved just

by examining the executive orders that created USDS and defined its duties, because, in the court's view, two provisions in those executive orders rendered USDS's authority potentially "unclear." *Id.* at 10a; see *id.* at 9a-10a.

In particular, the district court deemed ambiguous a purpose provision in one executive order stating that the "Department of Government Efficiency" would "implement" the President's agenda, 90 Fed. Reg. at 8441; see App., *infra*, 9a, and language in another executive order providing that "DOGE Team Lead[s]" could keep certain agency positions unfilled subject to the views of their agency heads, 90 Fed. Reg. at 9670; see App., *infra*, 9a. The court acknowledged that the government was "[p]erhaps" correct that those provisions do not give USDS any authority beyond advising, particularly because the provisions refer not to USDS, but to the "Department of Government Efficiency" (an umbrella term that includes those Agency DOGE Teams) and the "DOGE Team Leads" (who are agency employees). App., *infra*, 9a. The court nonetheless held that discovery was appropriate because "the record" did not confirm the executive orders' language establishing that USDS lacks formal independent authority. *Ibid.* The court also relied on press accounts that the court interpreted to indicate that USDS was "leading the charge" on various government initiatives, while ignoring the government's explanation that those accounts referred to non-USDS entities. See *id.* at 10a (citation omitted); see also D. Ct. Doc. 24, at 24.

The district court therefore granted most of respondent's discovery requests, including the request to depose USDS Administrator Gleason. App., *infra*, 12a. The court deemed that deposition appropriate because Administrator Gleason had submitted two materially similar declarations—one in support of the government's previous motion for reconsideration of the district court's March 10 preliminary injunction, and one in support of the summary-judgment motion—describing USDS's struc-

ture and operations under the relevant executive orders. *Ibid.*; see D. Ct. Doc. 20-2 (Mar. 14, 2025); D. Ct. Doc. 24-2 (Mar. 19, 2025). The court did not explain why Administrator Gleason's testimony was specifically necessary or contest that another witness could testify as to those subjects under Federal Rule of Civil Procedure 30(b)(6). App., *infra*, 12a.

The district court also granted respondent's request for interrogatories that require USDS to identify every "recommendation" that any DOGE employee or DOGE Team member has made with respect to certain actions regarding grants, contracts, or employment. App., *infra*, 14a-15a. The court acknowledged that merely "advisory" recommendations "need not always be followed," and stated that the government could "assert privilege in its discovery responses." *Id.* at 15a. Although the government had explained that Agency DOGE Teams are agency employees who function under their agencies' authority, the court also granted respondent's requests for extensive information about Agency DOGE Teams—including their identities, titles, tenure, data access, and the types of reports they submit—thus requiring USDS to scour all its advisory communications for such information in case it has come up in USDS's interactions with agencies or their Agency DOGE Teams. *Id.* at 14a.

Despite granting those broad discovery requests (and requiring USDS to begin processing the underlying FOIA request before the district court has even resolved whether USDS is subject to FOIA), the court stated that "the burden on the defendants * * * will not be onerous." App., *infra*, 11a. The court denied certain of respondent's requests, including their demand for the deposition of USDS official Steven Davis and requests regarding USDS's record-keeping policies, prior USDS Administrators, and certain "visitor access requests." *Id.* at 12a-13a, 15a-16a.

The district court ordered that discovery must proceed rapidly, requiring

USDS to provide responses or objections within 7 days, provide all responsive documents within 14 days, and allow the completion of depositions within 10 days after the document production. App., *infra*, 17a. The government filed a motion for a stay of the discovery order pending a petition for a writ of mandamus in the D.C. Circuit. D. Ct. Doc. 39 (Apr. 17, 2025).

4. On April 18, the government filed a petition for a writ of mandamus in the D.C. Circuit and moved for a stay pending the D.C. Circuit's ruling on the petition. The court of appeals issued an administrative stay, App., *infra*, 4a, but on May 14 a different panel denied the government's mandamus petition and stay motion in an unpublished order, *id.* at 1a-3a.

Characterizing the ordered discovery as "narrow" and "modest," the court of appeals found that mandamus was unwarranted. App., *infra*, 2a. The court determined that discovery was appropriate because, in its view, the threshold inquiry whether a presidential advisory body is subject to FOIA is a "functional analysis" that "depends on the practical realities of the entity's role, not merely on its formal placement or authority within the Executive Office of the President." *Ibid.* The court further reasoned that relief was not warranted because it believed that the government had "forfeited" the "separation-of-powers issue" in the district court. *Ibid.*

"On the merits" of the mandamus standard, the court of appeals held that the government had "not shown that it has no other adequate means of relief" aside from mandamus because "[t]he government retains every conventional tool to raise privilege objections." App., *infra*, 2a. The court acknowledged "*Cheney*'s holding that line-by-line assertions of executive privilege were not an adequate alternative means of relief," but stated that "*Cheney* is distinguishable" because the discovery in *Cheney* involved "the Vice President himself" and "implicated the mental processes of the

President's advisers." *Ibid.* The court of appeals also found it significant that this Court in *Cheney* had "declined to issue a writ" and instead remanded for the lower court to consider issuance of the writ in light of the Court's instructions. *Ibid.*

As for the burdens on the government, the court of appeals concluded that the discovery here into the operations and recommendations of a presidential advisory body is "a far cry from the sweeping discovery at issue in *Cheney*." App., *infra*, 2a. The court stated that it lacked "specific details as to why accessing [USDS's] own records or submitting to two depositions would pose an unbearable burden," and asserted that "unlike *Cheney*, the information sought here does not provide [respondent] 'all the disclosure to which it would be entitled' if it prevails on the merits." *Id.* at 2a-3a (quoting *Cheney*, 542 U.S. at 388).

The court of appeals also found that the government had not "asserted a clear and indisputable right" to relief because it had not "point[ed] to cases in which a federal court has held that relief is warranted in a matter involving like issues." App., *infra*, 3a (citation and internal quotation marks omitted). And in the court's view, circuit precedent had "previously endorsed limited discovery to determine agency status under FOIA" and established that "limited discovery can be used to follow up on factual questions put at issue by the government's declarations." *Ibid.*

5. Respondent subsequently filed a motion asking the district court to modify the discovery deadlines following the court of appeals' decision and to deny as moot the government's prior motion for a stay pending its petition for a writ of mandamus in the court of appeals. D. Ct. Doc. 42, at 1 (May 19, 2025). The government opposed the motion "insofar as it proposes that discovery go forward before" this Court's "resolution of [the government's] forthcoming application for relief from discovery." *Ibid.*

On May 20, 2025, the district court granted respondent's motion. App., *infra*,

32a. "[I]n accordance with the Court's Opinion and Order of April 15, 2025," the court ordered USDS to serve responses and objections to respondent's discovery requests "within 7 days," produce all responsive documents "within 14 days," and complete "all depositions * * * within 10 days from the deadline for producing documents." *Ibid.* Accordingly, the deadline for responses and objections is May 27, 2025; the deadline for document production is June 3, 2025; and the deadline for the completion of Administrator Gleason's deposition is June 13, 2025.

ARGUMENT

To obtain a stay pending the disposition of a petition for a writ of certiorari, an applicant must show a likelihood of success on the merits, a reasonable probability of obtaining certiorari, and a likelihood of irreparable harm. See *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). In "close cases," "the Court will balance the equities and weigh the relative harms." *Ibid.* To obtain a stay pending the disposition of a petition for a writ of mandamus, an applicant must show that there is "a fair prospect that a majority of the Court will vote to grant mandamus" and "a likelihood that irreparable harm will result from the denial of a stay." *Ibid.* Both standards are satisfied here.

A. The Government Is Likely To Succeed On The Merits

The district court granted expedited, intrusive discovery into a presidential advisory body to address whether that advisory body is exempt from FOIA. That backwards ruling gives respondent a significant part of the information it would obtain were it to prevail on the merits of its FOIA arguments. And the ruling offends the separation of powers by compromising the "necessity" for confidentiality that allows presidential advisors to provide "candid, objective" advice and communication. *United States* v. *Nixon*, 418 U.S. 683, 708 (1974). The discovery order compels disclo-

sure of the substance of the presidential advisory body's recommendations to agencies across the entirety of the Executive Branch on a slew of topics, requiring presidential advisors to collect and evaluate vast amounts of their sensitive communications with agencies and to make specific assertions of privilege. The order further requires the body's head to undergo a deposition and to produce numerous internal documents and details regarding the body's activities, its personnel, and even non-USDS personnel with whom its own personnel interact. That invasive approach to discovery against the President's advisors, untethered to any relevant legal inquiry, constitutes a "clear abuse of discretion" in violation of established precedent. See *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 380 (2004) (quoting *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953)). There is more than a fair prospect that this Court would grant relief.

1. **The discovery order seriously misinterprets FOIA**

The discovery order's disconnect from the relevant legal question in this case—whether USDS is an "agency" under FOIA's statutory definition—constitutes a "clear abuse of discretion" and shows that discovery never should have been granted. *Cheney*, 542 U.S. at 380 (citation omitted). The lower courts reasoned that whether USDS is an "agency" for FOIA purposes necessitates disclosing the innermost deliberative processes of the President's advisors. But it cannot possibly be the case that answering the threshold question whether USDS is subject to FOIA involves supplying the plaintiff with the very information that the plaintiff seeks under FOIA (and more). That approach would eviscerate FOIA's limitations and allow plaintiffs to obtain sensitive disclosures from presidential advisors without first establishing FOIA's applicability.

a. In 1974, Congress amended FOIA's definition of "agency" to include any

"*establishment* in the executive branch of the Government (including the Executive Office of the President)." 5 U.S.C. 552(f) (emphasis added). That language codified *Soucie* v. *David*, 448 F.2d 1067 (D.C. Cir. 1971), which held that FOIA applied only to entities with "substantial independent authority" and not to merely advisory bodies that are "part of the President's staff." *Id.* at 1073, 1075; see *Armstrong* v. *Executive Office of the President*, 90 F.3d, 553, 558 (D.C. Cir. 1996). "Congress exempted" the records of such entities from FOIA partly "to avoid the serious separation-of-powers questions that too expansive a reading of FOIA would engender." *Judicial Watch, Inc.* v. *U.S. Secret Service*, 726 F.3d 208, 216, 227 (D.C. Cir. 2013). That exemption was likewise necessary to protect the Executive's "'constitutional prerogative' to 'maintain the autonomy of its office and safeguard the confidentiality of its communications.'" *Id.* at 224 (quoting *Cheney*, 542 U.S. at 385) (brackets omitted).

Consistent with those principles, this Court long ago settled that FOIA's reference to establishments in the "'Executive Office' does not include the Office of the President," meaning that FOIA excluded "the President's immediate personal staff" and those "units in the Executive Office whose sole function is to advise and assist the President." *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980). Since then, courts have determined whether an entity in the Executive Office of the President is an "establishment" that qualifies as an "agency" for FOIA purposes by focusing on one question: whether the entity's responsibility goes "beyond advising" and instead amounts to "substantial independent authority." *E.g.*, *Meyer* v. *Bush*, 981 F.2d 1288, 1292 (D.C. Cir. 1993) (emphasis omitted); *Main St. Legal Servs., Inc.* v. *National Sec. Council*, 811 F.3d 542, 547 (2d Cir. 2016). Courts answer that question by discerning the entity's legal authority under the governing statutes, regulations, or executive orders and thereby identifying the functions that the entity

"[i]s authorized" to perform. *Cotton* v. *Heyman*, 63 F.3d 1115, 1121 (D.C. Cir. 1995); see *id.* at 1122 (the "important consideration regarding agency status" is "whether the relevant entity had 'any authority in law to make decisions'") (citation omitted).

Here, the answer is straightforward: USDS is obviously not an "agency" for FOIA purposes, because its authority is purely advisory, as various presidential documents outlining USDS's responsibilities establish. Those executive orders and memoranda instruct USDS to, for example:

- "consult" with the Assistant to the President for Domestic Policy in developing a federal hiring plan and providing "advice and recommendations as appropriate," 90 Fed. Reg. at 8621-8622;
- identify "sources of Federal funding for illegal aliens" and make recommendations in coordination with the OMB Director and the Assistant to the President for Domestic Policy, 90 Fed. Reg. at 10,581;
- consult with the OMB Director on a plan to reduce the size of the federal workforce and regarding the IRS hiring freeze, see The White House, Hiring Freeze (Jan. 20, 2025), https://perma.cc/WK5Y-DE7Z;
- "coordinate" with Agency DOGE Teams, which consist of agency employees who "advise their respective Agency Heads on implementing the President's DOGE Agenda," 90 Fed. Reg. at 8441;
- "work with Agency Heads to promote inter-operability between agency networks and systems, ensure data integrity, and facilitate responsible data collection and synchronization," *ibid.*;
- access various data systems, *id.* at 8442; and
- receive various kinds of informational reports, 90 Fed. Reg. at 9670; see *id.* at 11,096.

None of those advisory functions (or functions in support of them) constitute the kind of independent authority that could render a presidential advisory body an "agency" under FOIA.

b. The district court and court of appeals instead embraced a test whereby a body that advises the President and formally lacks independent authority might nonetheless qualify as an "agency" for FOIA purposes based on purported "practical realities" regarding how the body performs its work, App., *infra*, 2a, or the degree of its "influence over * * * federal agencies," *id.* at 14a; see *id.* at 8a, 16a. Those interpretations fundamentally misapprehend FOIA. A presidential advisory body's ability to persuade—no matter how compelling—does not render that body an "agency." And an entity that is established as merely advisory cannot, simply through its own conduct, accrete authority beyond what Congress and the President have conferred. Cf. *Louisiana Pub. Serv. Comm'n* v. *Federal Communications Comm'n*, 476 U.S. 355, 374 (1986) (a government body "may not confer power upon itself"). Yet, on the lower courts' theory, an entity's status as an "establishment" could ebb and flow depending on its degree of practical influence at any particular moment in time. USDS could be an "establishment" for FOIA purposes today but not tomorrow, depending on whether agencies start or stop following its recommendations. Neither court below provided any support for that basic misunderstanding of FOIA.

Moreover, FOIA's definition of "agency" cannot reach "all those who" informally "direct others in the executive branch," because "under that approach the White House staff would be an agency." *Meyer*, 981 F.2d at 1293. Every advisory body makes recommendations. And predictably, many advisory bodies within the Executive Office of the President are effective in persuading others to follow their advice. See *Association of Am. Physicians & Surgeons, Inc.* v. *Clinton*, 997 F.2d 898, 908 (D.C.

Cir. 1993) (describing historical examples of influential advisors). Of course, "senior White House officials close to the President[] often give ad hoc directions to executive branch personnel," but "it is assumed that they merely are passing on the President's wishes." *Meyer*, 981 F.2d at 1293-1294 (emphasis omitted). The decisions below could transform all manner of advisory bodies within the Executive Office of the President into FOIA "agencies" and expose them to intrusive FOIA disclosures, contrary to Congress's plain intent in enacting 5 U.S.C. 552(f).

The district court's heavy reliance on media reports characterizing alleged DOGE entities as "leading the charge" on policy initiatives was similarly misguided. App., *infra*, 10a (citation omitted). Senior advisors frequently spearhead the President's policy agenda in collaboration with relevant agency officials without exercising any independent legal authority. In any event, the court did not address the government's explanation that the cited press reports do not refer to USDS activities; they mention Elon Musk (a White House advisor, who is not part of USDS), agency activities (which would be activities of Agency DOGE Teams or Team Leads, not of USDS), or refer generally to "DOGE," an umbrella term for the executive-wide initiative and not USDS specifically. D. Ct. Doc. 24-1, at 24.

The district court also incorrectly held that, "even if" the presidential orders and memoranda "could be read to suggest a more advisory role," they were rendered "unclear" by two purported ambiguities that the court declined to resolve. App., *infra*, 9a-10a. Those supposed ambiguities are facially implausible. First, the court cited (*id.* at 9a) a "[p]urpose" provision in the executive order creating USDS, which states that the "Department of Government Efficiency" as a whole would "implement the President's DOGE Agenda." 90 Fed. Reg. at 8441. It is difficult to see how that purpose provision's use of the word "implement" would provide USDS with any more

authority than that provided by the order's subsequent, far-more-specific provisions governing USDS's responsibilities, particularly since advising and coordination is clearly a part of implementing the President's agenda. In any event, that purpose provision does not refer to USDS exclusively, but to the umbrella term "Department of Government Efficiency," which includes Agency DOGE Teams that are not part of USDS. *Ibid.*; see *id.* at 8441-8442 (defining "DOGE Structure" to include USDS, the USDS temporary organization, and Agency DOGE Teams).

The other supposedly ambiguous provision the district court identified (App., *infra*, 9a) refers to activities of "DOGE Team Leads," who unambiguously do *not* function under USDS pursuant to the governing orders; they are employees of particular agencies and report to their agency heads. See 90 Fed. Reg. at 9670; see also *id.* at 8441-8442. That the executive orders instruct USDS to coordinate with Agency DOGE Teams in no way grants USDS additional authority or somehow makes USDS indistinguishable from those teams.

In ruling on mandamus, the court of appeals mistakenly described the government's position as conceding that "discovery is sometimes appropriate" to assess an advisory body's authority. App., *infra*, 3a. The government acknowledged that two prior circuit cases had "discussed" evidence introduced in the district court. Gov't C.A. Mandamus Reply 12; see also Gov't C.A. Mandamus Pet. 22-23. But the government argued that "no discovery" is appropriate when "the legal question whether FOIA applies to an entity in the Executive Office of the President is determined by interpretation of the orders, statutes, and documents that created the entity or specified its responsibilities," and the government likewise emphasized that the D.C. Circuit had "never held that discovery was required to decide an entity's authority." Gov't C.A. Mandamus Reply 8-9, 12.

The alarming consequences of the lower courts' approach call for this Court's intervention. Forcing advisory bodies to disclose their communications and other documents in discovery triggers the very concerns that Congress sought to avoid by excluding presidential advisory bodies from FOIA's reach. Cf. *Judicial Watch*, 726 F.3d at 225-226 (noting concerns about "end runs" around Congress's exclusion of an entity from FOIA when "separation-of-powers concerns" are implicated).

This Court has already repudiated that paradoxical approach to discovery in a suit seeking government disclosures about an advisory body in the Executive Office of the President via the Federal Advisory Committee Act (FACA), 5 U.S.C. 1001 *et seq.* See *Cheney*, 542 U.S. at 373. There, a discovery order was "anything but appropriate" because it purportedly sought information to assess whether FACA applied at all, but in the process gave the plaintiffs "all the disclosure to which they would be entitled in the event they prevail on the merits." *Id.* at 388. So, too, it is entirely inappropriate to grant a FOIA plaintiff, via discovery, the same—or, here, in some respects greater—disclosure as that plaintiff would receive by prevailing on the merits of its FOIA request. Congress did not declare open season on presidential advisory bodies by excluding advisory bodies from FOIA but leaving the Executive Branch to guess what types of functional influence might nonetheless bring such bodies within FOIA.

2. The discovery order violates the separation of powers

a. Relief is all the more warranted because the discovery here contravenes "[t]he high respect that is owed to the office of the Chief Executive," which "should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Clinton* v. *Jones*, 520 U.S. 681, 707 (1997). The President's "unique position in the constitutional scheme" "counsel[s] judicial deference and restraint." *Nixon* v.

Fitzgerald, 457 U.S. 731, 749, 753 (1982). In particular, "the public interest requires that a coequal branch of Government 'afford Presidential confidentiality the greatest protection consistent with the fair administration of justice'" because of the "paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." *Cheney*, 542 U.S. at 382 (quoting *Nixon*, 418 U.S. at 715). And because discovery against advisory bodies in the Executive Office of the President raises the prospect of a "'constitutional confrontation'" between the Executive and Judiciary, such discovery is reserved for exceptional circumstances and "should be avoided whenever possible." *Id.* at 389-390 (quoting *Nixon*, 418 U.S. at 692).

Thus, in *Cheney*, this Court ordered the court of appeals to reconsider the government's mandamus petition regarding a discovery order against a presidential advisory body located within the Executive Office of the President and headed by the Vice President. 542 U.S. at 373-374. That body was charged with providing recommendations on energy policy, and the plaintiffs sought extensive disclosures based on allegations that the body was subject to FACA's disclosure requirements. *Ibid.* Despite the government's threshold legal arguments that the disclosure requirements did not apply, the district court ordered broad discovery into the body's activities to assess the plaintiffs' theory that private persons were *de facto* members whose presence triggered FACA. *Id.* at 375-376.

This Court held that the district court's order ignored the "special considerations" that "control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Cheney*, 542 U.S. at 385. The Court faulted the district court for failing to narrow its "overly broad" order, neglecting to "explore" alternatives, and providing

the plaintiffs with disclosures of the very information that they had sought "on the merits"—purportedly "to ascertain whether" the "disclosure requirements even appl[ied] * * * in the first place." *Id.* at 384, 386, 388, 390. And this Court rejected the notion that the Executive Branch could adequately protect its interests by asserting privileges "line by line," since the need to "winnow the discovery orders by asserting specific claims of privilege and making more particular objections" was itself a constitutionally problematic burden. *Id.* at 388-389.

Here, USDS is a presidential advisory body located in the Executive Office of the President, just like the body in *Cheney*. 90 Fed. Reg. at 8441. USDS's head reports directly to the President's Chief of Staff. *Ibid.* And the President has expressly required USDS to provide advice and recommendations to him and to federal agencies regarding policies that the President has deemed important to his agenda. See pp. 4-5, 15, *supra*. Discovery into USDS's activities thus unquestionably intrudes on the inner workings of advisors in the Executive Office of the President.

Despite the manifest need to proceed with caution and with respect for the inherent separation-of-powers concerns, the district court's order mandates far-reaching discovery that will provide respondent much of the information sought in its FOIA request (and more)—*before* any court has classified USDS as an agency subject to FOIA, and purportedly in the course of resolving whether FOIA even applies. As in *Cheney*, such a discovery order is "anything but appropriate." 542 U.S. at 388.

Like the "everything under the sky" discovery ordered in *Cheney*, the breadth of discovery here also triggers constitutional concerns. 542 U.S. at 387. The order covers a multitude of USDS's activities since the body was created at the start of this Administration. The order compels USDS to recount the specific recommendations it has provided to federal agencies and its knowledge about whether those agencies

implemented those recommendations, and it requires the deposition of USDS's head. Such sprawling disclosures violate the separation of powers. Those intrusions into the most sensitive areas of USDS's work strike at the heart of the advisory body's autonomy and confidentiality, chilling the necessary "candor and objectivity" of advice within the Executive Branch. See *Nixon*, 418 U.S. at 706. And the order's burdensome depositions, broad disclosures, and the consequent need to make specific assertions of privilege will distract from USDS's function of providing advice to the President and agencies on some of the President's top policy priorities.

b. The court of appeals disregarded those separation-of-powers problems for two principal reasons, but neither has merit.

First, the court of appeals reasoned that the government "forfeited" its "objection to the district court's order under *Cheney*" by purportedly failing to argue before the district court "that the requested discovery posed a separation-of-powers issue or risked intruding into those core functions of the presidency." App., *infra*, 2a. The court also asserted that the government supposedly "did not request protective narrowing of discovery on constitutional grounds." *Ibid.*

That forfeiture rationale effectively imposes a magic-words requirement on district court briefing that more than adequately made those points. As the court of appeals acknowledged, the government's opposition to the discovery order explicitly invoked *Cheney* "for the proposition that courts should accord respect to the 'office of the Chief Executive' and that any discovery 'should be fashioned to be as unobtrusive

as possible.'" App., *infra*, 2a (quoting D. Ct. Doc. 34, at 8 (Apr. 8, 2025)).* And as the court further acknowledged, the government's "opposition to discovery [in the district court] rested" on "assertions of burden and relevance"—the same arguments made throughout the government's mandamus petition in the court of appeals. *Ibid.*; see D. Ct. Doc. 34, at 1-5, 7-9, 12-20; see also pp. 13-22, *supra*; pp. 24-29, *infra*. Further, the government requested that the discovery be "narrow[ed]," App., *infra*, 2a, based in part on "the general principle that discovery into" a component of the Executive Office of the President "should be as unobtrusive as possible." D. Ct. Doc. 34, at 12; see *id.* at 8-21 (arguing in the alternative for narrower discovery, including by limiting depositions and excluding information about USDS's recommendations). In making those arguments, the government did not somehow forfeit reliance on the separation-of-powers rationales that *Cheney* embodies, least of all because the separation-of-powers overlay is central to whether a presidential advisory body is subject to FOIA in the first place. See pp. 13-15, 19, *supra*; accord *Egbert* v. *Boule*, 596 U.S. 482, 497 n.3 (2022) (raising general argument suffices and parties are "not limited to the precise arguments [they] made below").

Second, the court of appeals reasoned that *Cheney* is "distinguishable" because *Cheney* involved "the Vice President himself" and "implicated the mental processes of the President's advisers." App., *infra*, 2a. But *Cheney* does not apply to Vice Presidents alone. The problem in *Cheney* was the same as here: discovery against an

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* Specifically, the government argued as follows:

> The Supreme Court has recognized that "[t]he high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Cheney* v. *United States District Court*, 542 U.S. 367, 385 (2004) (quotation marks omitted). Thus, discovery on the Executive Office of the President should be fashioned to be as unobtrusive as possible. See also *id.* at 387-88.

D. Ct. Doc. 34, at 8-9.

advisory body in the Executive Office of the President triggers particularly acute separation-of-powers concerns by disrupting the individuals upon whom the President depends to provide confidential, candid advice and relay his wishes to the rest of the Executive Branch.

The court of appeals here cited no authority limiting *Cheney* to advisory bodies that include the Vice President as a member. Indeed, less than two months ago, a different panel of the D.C. Circuit relied on *Cheney* to stay a similarly intrusive discovery order against USDS and presidential advisor Elon Musk after the government petitioned for mandamus. See *In re Musk*, No. 25-5072, 2025 WL 926608, at *1 (D.C. Cir. Mar. 26, 2025). Yet the panel in this case offered no explanation for the implausible conclusion that discovery of the substance of a presidential advisory body's recommendations and a deposition of the body's head would not also trigger separation-of-powers concerns. See *Cheney*, 542 U.S. at 382 ("[T]he public interest requires that a coequal branch of Government * * * give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties."); cf. *Kissinger*, 445 U.S. at 156 (finding that the exception from FOIA for those who advise and assist the President applied to Henry Kissinger when he "was serving as an Assistant to the President").

3. The overbroad discovery order places unwarranted burdens on advisors in the Executive Office of the President

a. Relief from this Court is especially warranted in light of the discovery order's overbreadth, its lack of meaningful tailoring, and its imposition of intrusive burdens on an advisory body within the Executive Office of the President. Far from remaining "mindful of the burdens imposed on the Executive Branch" by narrowing

discovery only to that which is strictly necessary and by "explor[ing] other avenues," *Cheney*, 542 U.S. at 390-391, the lower courts maximized the burdens imposed on the Executive Branch while implausibly minimizing their significance.

The district court's requirement that USDS turn over the substance of its recommendations—even when the recommendations were "purely advisory"—epitomizes the order's overbreadth and intrusiveness. App., *infra*, 15a; see *id.* at 25a. The court's order compels USDS to identify every "federal agency contract, grant, lease or similar instrument that any DOGE employee or DOGE Team member recommended that federal agencies cancel or rescind," and every "federal agency employee or position that any DOGE employee or DOGE team member recommended" for termination or placement on administrative leave. *Id.* at 25a. Further, USDS must state "whether [each] recommendation was followed." *Ibid.*

It is difficult to imagine a more grievous intrusion and burden on a presidential advisory body. Providing recommendations is the core of what USDS does. See, *e.g.*, 90 Fed. Reg. at 8622; 90 Fed. Reg. at 10,581. Because USDS coordinates with agencies across the Executive Branch on an ongoing basis, that request requires USDS to review multitudes of discussions that USDS has had every day since the start of this Administration. And such information likely falls within the deliberative-process privilege almost by definition, as internal executive-branch recommendations are inherently "pre-decisional" and "deliberative." See *United States Fish & Wildlife Serv.* v. *Sierra Club, Inc.*, 592 U.S. 261, 267 (2021) ("[T]he deliberative process privilege shields from disclosure 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'") (citation omitted). The district court's order would thus require USDS to search through its most sensitive communications for any "recom-

mendations," App., *infra*, 15a—a vague and as-yet-undefined term in this litigation—and then "bear the burden of invoking executive privilege with sufficient specificity and of making particularized objections," *Cheney*, 542 U.S. at 388 (citation and internal quotation marks omitted).

Worse, that intrusive discovery serves no legitimate purpose. It is unnecessary to answer the legal question whether USDS qualifies as an "agency" that is subject to FOIA. See pp. 14-19, *supra*. The requests thus constitute a fishing expedition into USDS's advisory activities under the guise of determining whether USDS engages in *non*-advisory activities—an approach to discovery that would be improper in any circumstance.

The district court defended this intrusive approach as necessary to understand whether USDS has authority to issue binding "directives" because "the line between a recommendation and directive is a blurry one" and because USDS might still "assert privilege." App., *infra*, 15a. But that reasoning would at most support discovery that is "precisely identified" and no broader than necessary to serve its purpose—as *Cheney* requires. 542 U.S. at 387 (citation omitted). And *Cheney* held that compelling the Executive Office of the President to assert privileges "line by line" itself imposes an unconstitutional burden. *Id.* at 388-389. Such assertions of privilege set the Executive and Judicial Branches on a course for "constitutional confrontation"—which is all the more reason to avoid discovery, not to grant it. *Id.* at 389 (citation omitted). "[R]epeated and essentially head-on confrontations between the life-tenured and the representative branches of government" should not be courted. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982) (citation omitted).

The district court also failed to conduct the required tailoring and disregarded

the burdens on the Executive Office of the President by ordering the deposition of USDS's head. Depositions of high-ranking government officials and presidential advisors are inappropriate except under extraordinary circumstances. See, *e.g.*, *United States* v. *Morgan*, 313 U.S. 409, 421-422 (1941); *In re U.S. Dep't of Educ.*, 25 F.4th 692, 701 (9th Cir. 2022) (collecting cases). Here, Administrator Gleason is the head of an advisory body within the Executive Office of the President, reports directly to the White House Chief of Staff, and is tasked with providing advice and recommendations for various key presidential policy initiatives, including providing recommendations to the President. See, *e.g.*, 90 Fed. Reg. at 9670. She is analogous to "a Deputy Assistant to the President, two levels removed from the chief executive," and thus falls squarely within the apex doctrine. *In re Murthy*, No. 22-30697, Order, at 2-3 (5th Cir. Nov. 21, 2022) (per curiam). Yet the district court did not even attempt to show necessity, much less extraordinary circumstances, to justify deposing her.

The district court emphasized that Administrator Gleason has been a declarant in the case. App., *infra*, 12a. But the only relevant subject discussed in her two materially similar declarations is USDS's organizational structure and its responsibilities under the governing orders (as well as the distinct status of DOGE Team Leads under those orders). See, *e.g.*, D. Ct. Doc. 24-2, at 2-4. The court never explained why another declarant could not testify on those general topics under Federal Rule of Civil Procedure 30(b)(6). Respondent itself told the district court that one declaration was "cursory" and that the government "only cite[d]" it "a handful of times," mainly to refer to the "executive orders." D. Ct. Doc. 27, at 2, 18 n.3 (Mar. 27, 2025). The government did not submit the declaration to prove any disputed facts; indeed, respondent asked the government to furnish a USDS representative (not Administrator Gleason specifically) to address those topics under Rule 30(b)(6). See

App., *infra*, 31a. Yet the court required Administrator Gleason's deposition without giving any meaningful consideration to alternatives and despite the principle that "[t]he duties of high-ranking executive officers should not be interrupted by judicial demands for information that could be obtained elsewhere." *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (per curiam).

Other parts of the district court's discovery order are similarly unnecessary and burdensome. For example, the governing executive orders make clear that Agency DOGE Teams are *not* part of USDS, but are instead employees within the relevant agencies who answer to their agency heads. See 90 Fed. Reg. at 8441-8442 ("In consultation with USDS, each Agency Head shall establish within their respective Agencies a DOGE Team of at least four employees," and "DOGE Team Leads" shall "advise their respective Agency Heads on implementing the President's DOGE Agenda"). Those teams' activities therefore have no bearing on whether USDS is vested with non-advisory authority so as to qualify as an "agency" under FOIA. The district court nonetheless ordered USDS to turn over any details it possesses about Agency DOGE Teams on certain subjects, including those team members' identities and tenure, and the kinds of reports they file. App., *infra*, 14a; see *id.* at 24a-26a. Because USDS frequently interacts with those teams in an advisory capacity, the court's order effectively requires USDS to flyspeck its records for responsive information that it may have picked up in piecemeal fashion based on its interactions with the rest of the Executive Branch. There is no reason why USDS could conceivably need to shoulder that burden to answer the question of its agency status.

Many of the remaining discovery requests resemble the "everything under the sky" requests in *Cheney*, reaching all manner of internal details about USDS's activities. 542 U.S. at 387; see App., *infra*, 24a-31a. For example, the order requires pro-

duction of extensive information about USDS employees, who hired them, how they spend their time, and any "recurring reports" they compile. App., *infra*, 24a. The order also calls for production of all agreements that USDS has with agencies across the Executive Branch, information about USDS "attempt[s]" or "plan[s]" to gain access to classified information, and much more. *Id.* at 25a. And for all of those requests, the order will "require the Executive Branch to bear the onus of" analyzing potential ambiguities or privilege issues "line by line." *Cheney*, 542 U.S. at 388. None of those intrusive requests is necessary to answer whether USDS is an establishment with independent authority.

b. The court of appeals improperly discounted the serious burdens that such broad discovery imposes on USDS.

The court of appeals asserted that the discovery here is "modest in scope" and "a far cry from the sweeping discovery at issue in *Cheney*." App., *infra*, at 2a. But compelling USDS to turn over vast categories of information, reveal the substance of USDS's pre-decisional advice to entities across the entire Executive Branch, and submit to a deposition of the head of a presidential advisory body is hardly modest. Indeed, the court of appeals did not even acknowledge that the district court is requiring disclosure of the substance of USDS's recommendations across the entirety of the federal government.

The court of appeals similarly erred in disregarding *Cheney* on the ground that the "burdens" in the present case "are limited both by time and reach" because they cover only information within the entity's control and only over a period of months. App., *infra*, 2a. That was true in *Cheney* as well; there, the discovery targeted documents within the advisory body's control and that body had met for only five months before disbanding. See 542 U.S. at 373, 387. Regardless, the order here is broader

than the one in *Cheney*, not least because this one is directed at an office that is still active and will disrupt its ongoing, time-limited work.

Similarly, the court of appeals erred in reasoning that discovery is appropriate here because it "does not provide" respondent with "'all the disclosure to which [it] would be entitled' if it prevails on the merits." App., *infra*, 2a-3a (quoting *Cheney*, 542 U.S. at 388) (brackets in original). The discovery order's call for myriad categories of information regarding USDS interactions with agencies significantly overlaps with the broad FOIA requests for communications between USDS and federal agencies. See pp. 6-7, *supra*. For example, respondent's FOIA requests seek "[a]ll communications between USDS personnel and personnel of any federal agency," "[a]ll communications between the USDS Administrator and USDS staff," and "[m]emoranda, directives, and policies regarding the scope of USDS's work with other federal agencies outside of the Executive Office of the President." D. Ct. Doc. 2-6, at 2-3. Those requests mirror the discovery order's compulsion of information on "directives" and recommendations provided to federal agencies on a slew of topics, and various internal "announcements" to USDS employees. App., *infra*, 25a, 29a. And although the FOIA requests seek some additional information (such as financial disclosures or ethics pledges by USDS employees, D. Ct. Doc. 2-6, at 2), the discovery order in other ways provides even *greater* disclosure, such as information on various kinds of agreements with agencies, information regarding access of classified data, and a deposition of USDS's head. App.,*infra*, 16a, 25a, 29a, 31a.

The court of appeals further misread *Cheney* by suggesting that the fact that this Court "declined to issue a writ" in that case weighs against a writ of mandamus or other relief here. App., *infra*, 2a. *Cheney* ultimately *vacated* the court of appeals' decision denying mandamus because of the lower court's "mistaken reading" of prec-

edent and remanded for the court of appeals to reconsider issuance of the writ in light of the Court's instructions. 542 U.S. at 391. This Court declined to issue a writ of mandamus itself only because it was "not presented with an original writ of mandamus" and because the court of appeals' error had "prematurely terminated its inquiry * * * without even reaching the weighty separation-of-powers objections raised." *Ibid.* That procedural aspect of *Cheney* in no way lessens the need for relief here to quash a discovery order that violates the separation of powers.

B. The Other Factors Support Relief From The District Court's Order

In deciding whether to grant emergency relief pending certiorari or mandamus, this Court also considers whether the underlying issues warrant its review, whether the applicant likely faces irreparable harm, and, in close cases, the balance of equities. See *Hollingsworth*, 558 U.S. at 190. Those factors overwhelmingly support relief here.

1. The issues raised by this case warrant this Court's review

As explained, the district court's discovery order rests on the mistaken premise that an entity's status as an "establishment" under FOIA depends on functional power, not formal authority—a proposition that could open the door for litigants to circumvent FOIA's exclusion of advisory components across the Executive Office of the President. See pp. 13-19, *supra*. The order also imposes sweeping and burdensome discovery on a presidential advisory body that cannot be reconciled with this Court's decision in *Cheney* and that violates the separation of powers. See pp. 19-31, *supra*.

The court of appeals' refusal to issue a writ of mandamus thus resolved "important federal question[s] in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The court of appeals' and district court's approach to dis-

covery here is also in tension with that of the Second Circuit, which, when considering whether an advisory entity fell within FOIA's reach, rejected a plaintiff's request for "sweeping discovery" when "publicly available materials * * * d[id] not admit a plausible claim" that the entity is an agency. *Main St. Legal Servs.*, 811 F.3d at 543-544, 567. Relatedly, the Court's intervention is warranted because "the order[] threaten[s] 'substantial intrusions on the process'" by which the President's advisors counsel the President and convey White House policy guidance across the federal government. *Cheney*, 542 U.S. at 381 (citation omitted). That result "so far depart[s] from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

Compliance with the district court's sweeping order on a highly expedited basis, see pp. 11-12, *supra*, would also unavoidably distract USDS "from the energetic performance" of its presidentially assigned duties. *Cheney*, 542 U.S. at 382. USDS has fewer than 100 employees and is fully engaged in high-priority policy initiatives on behalf of the President. Forcing Administrator Gleason to sit for a deposition and requiring USDS to comply with respondent's demands for broad and vague categories of information about numerous facets of USDS's activities—including by asserting and litigating privilege claims regarding discrete aspects of those requests—would thwart USDS's performance of its time-limited mission no less than compliance with the underlying FOIA request itself.

This Court has previously granted certiorari in similar circumstances involving extraordinarily intrusive discovery orders that threaten to disrupt the Executive Branch's functioning. See *In re United States*, 583 U.S. 29, 30-31 (2017) (per curiam) (granting certiorari and vacating the court of appeals' judgment denying mandamus relief to halt discovery to supplement the administrative record); *In re Department of*

Commerce, 586 U.S. 1018 (2018) (granting certiorari to review district court's order requiring deposition of high-ranking executive-branch official). The Court should do the same here.

2. Compliance with the district court's order would cause irreparable harm to the Executive Branch

Absent a stay, the government will be irreparably harmed. Once documents are produced and Administrator Gleason is deposed, all of the threatened harms—the intrusion upon the autonomy of the Executive Office of the President, the substantial lost time and resources during a crucial period for the President's government-efficiency and modernization initiative, and the threat to the confidentiality of USDS's communications—will have occurred and will be irremediable. See *Cheney*, 542 U.S. at 385.

3. The balance of equities strongly favors the government

The balance of the equities also weighs strongly in favor of the government. Respondent has not identified any imminent harm from not obtaining discovery during the pendency of proceedings in this Court. Indeed, the district court's preliminary-injunction decision rejected respondent's claims of irreparable harm requiring imminent production of documents under FOIA during the congressional appropriation process—claims that the court observed "mostly sound[ed] in generalities." D. Ct. Doc. 18, at 16.

In the court of appeals, respondent asserted that it will be harmed because it will not be able to respond to the government's summary-judgment motion arguing that USDS is not an agency under FOIA because its responsibilities are purely advisory. Resp. C.A. Stay Opp. 3. That claim of harm has no bearing on whether a stay is warranted, particularly since the district court stayed summary-judgment briefing

pending discovery. 25-cv-511 Docket entry (Apr. 2, 2025). In any event, the government's summary-judgment motion raises a pure issue of law regarding the plain text of the executive orders governing USDS. Resolution of that motion does not require discovery. See pp. 14-19, *supra*. Respondent's assertion of harm assumes the mistaken view that discovery is necessary to determine USDS's authority and betrays its failure to mount any plausible interpretation of the applicable executive orders to support its position.

The public interest and equities likewise favor a stay of the discovery order here, which on its face intrudes on sensitive activities of a presidential advisory body. See *Nken* v. *Holder*, 556 U.S. 418, 435 (2009) (explaining that the public-interest factor merges with the government's interest). Those constitutionally based interests overshadow any generalized interest in disclosure of information under FOIA, which could still be fully vindicated if respondent were ultimately to prevail.

C. This Court Should Grant An Administrative Stay

The Solicitor General respectfully requests that the Court grant an administrative stay tolling the discovery order's imminent deadlines, to ensure that USDS is not required to take additional steps to comply with the district court's orders while the Court considers this application. The district court ordered USDS to provide responses and objections to respondent's broad requests within a week, on May 27, 2025; to produce all required documents (or raise privileges) within two weeks, on June 3, 2025; and to complete Administrator Gleason's deposition by June 13, 2025. This Court has already made clear that requiring the government to assess privileges "line by line" for discovery into the Executive Office of the President and close presidential advisors is itself a heavy burden. *Cheney*, 542 U.S. at 388. An administrative stay tolling those fast-approaching discovery deadlines is accordingly necessary to

avoid the unnecessary and intrusive undertaking that this discovery order requires.

CONCLUSION

This Court should stay the orders issued by the district court on April 15, 2025 and May 20, 2025 pending resolution of the government's forthcoming petition for a writ of certiorari (or, in the alternative, mandamus). In the alternative, the Court could construe this stay application as a petition for a writ of certiorari (or, in the alternative, mandamus) to direct the district court to halt discovery and grant that petition. In addition, the Solicitor General requests an immediate administrative stay of the district court's discovery order and subsequent scheduling order pending the Court's consideration of this application.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

MAY 2025