No. 24A1122

IN THE

Supreme Court of the United States

IN RE UNITED STATES DOGE SERVICE, ET AL.

RESPONSE IN OPPOSITION TO APPLICATION FOR A STAY OF 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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INTRODUCTION

The government's stay application makes clear that what it is really seeking is not relief from the district court's narrowly-tailored discovery order, but rather a ruling on the merits of whether the United States DOGE Service ("DOGE"), a new component of the Executive Office of the President ("EOP"), is operating as an "agency" subject to the Freedom of Information Act ("FOIA"). *See generally* Appl. (arguing repeatedly that DOGE is a "purely advisory" body exempt from FOIA). But that is the central merits question in this case, and the sole focus of the government's pending motion for summary judgment. At issue here is a far narrower antecedent question: whether the court of appeals clearly and indisputably erred in refusing to disturb a district court order *allowing limited discovery* to ascertain DOGE's agency status. Because the government improperly seeks "review of a discovery order to serve in effect as a vehicle for interlocutory review of the underlying merits of the lawsuit," *Pac. Union Conf. of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305, 1309 (1977) (Rehnquist, J., in chambers), its stay application should be summarily denied.

Even if the government were not improperly seeking a merits adjudication via review of a discovery order, its stay application falls far short of carrying the "heavy burden" for the "extraordinary" relief it seeks. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers); *see also Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (holding that where court of appeals already "denied a motion for a stay, the applicant seeking an overriding stay

from this Court bears 'an especially heavy burden.'" (quoting *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers))).

First, the government is highly unlikely to succeed on the merits. The government's position contravenes longstanding precedent holding that "determining whether an entity fits the agency definition under FOIA" demands a "fact-specific functional approach," *Cotton v. Heyman*, 63 F.3d 1115, 1121 (D.C. Cir. 1995), for which courts have "previously endorsed limited discovery," App. 3a; *see CREW v. Off. of Admin.*, 566 F.3d 219, 225 (D.C. Cir. 2009) (discovery to determine agency status included 1,300 pages of documents and deposition of EOP unit director); *Armstrong v. EOP*, 90 F.3d 553, 561 (D.C. Cir. 1996) (citing EOP official's deposition testimony). The government's proposed formalist test—which would require courts to blindly yield to the Executive's characterization of an EOP component's authority and operations—would effect a sweeping reversal of that precedent. And adopting that test risks stripping other EOP components of their FOIA-agency status,[1] and giving the President free reign to create new EOP entities that functionally wield substantial independent authority but are exempt from critical transparency laws. That result, not the district court's discovery order, would "turn[] FOIA on its head." Appl. 2.

Equally likely to fail is the government's argument that the discovery order violates the separation of powers as articulated in *Cheney v. U.S. Dist. Ct.*, 542 U.S.

[1] *Compare, e.g.*, 42 U.S.C. § 6613(b) (stating director of Office of Science and Technology shall "advise the President"), *with Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971) (holding Office of Science and Technology is subject to FOIA).

367 (2004). As the court of appeals correctly held, "the government forfeited * * * that argument" by "failing to raise" it in the district court, and "*Cheney* is distinguishable in numerous respects," including because the "discovery here is modest in scope and does not target the President or any close adviser personally." App. 2a.

Second, any purported harm to the government is not irreparable and indeed readily avoidable, as the government can assert the full array of objections and privileges available to it in the normal course of discovery. *See* App. 2a.

Third, the equities tip steeply in favor of affording Respondent Citizens for Responsibility and Ethics in Washington ("CREW") limited discovery so that it can meaningfully oppose the government's pending motion for summary judgment on DOGE's agency status. *See* App. 3a. At bottom, the government seeks emergency relief to avoid the consequences of its own litigation decisions. The government never moved to dismiss the complaint, despite now arguing that DOGE's agency status presents a pure question of law. *See* Appl. 1-2. And after the district court issued a preliminary injunction holding that CREW is likely to succeed in establishing that DOGE is subject to FOIA, the government chose not to appeal that ruling. Instead, the government filed a failed motion for reconsideration asserting arguments it could have raised earlier and relying on a declaration that the district court cautioned "appear[s] to be called into question by contradictory evidence in the record" and "to be subject to factual disputes that may provide a basis for CREW to seek discovery under Rule 56(d)." Supp. App. 47a. Despite that warning, the government chose to

submit materially identical evidence in support of its motion for summary judgment, and now seeks to quash a discovery order it knew or should have known would result.

From the procedural posture, to the government's inversion of blackletter law and forfeiture of arguments, to its strategic miscalculations below, this case is paradigmatically unworthy of a stay, mandamus, or certiorari. The government's stay application (and ultimately any petition for mandamus or certiorari) should be denied.

STATEMENT

I. Factual Background

On January 20, 2025, President Trump signed Executive Order 14,158, renaming the former United States Digital Service, previously housed in the Office of Management and Budget, the "United States DOGE Service." *Establishing and Implementing the President's "Department of Government Efficiency,"* 90 Fed. Reg. 8441 (Jan. 29, 2025). The order established DOGE as a freestanding entity in the EOP, headed by an Administrator who reports to the White House Chief of Staff. *Id*. It also established, under 5 U.S.C. § 3161, "a temporary organization known as 'the U.S. DOGE Service Temporary Organization'" within DOGE that is headed by the Administrator and "dedicated to advancing the President's 18-month DOGE agenda." *Id*. The order does not define the term "DOGE agenda." *See id.*

The order broadly empowers DOGE "to implement the President's" undefined "DOGE Agenda" by "modernizing Federal technology and software to maximize governmental efficiency and productivity." *Id.* It further requires the installation of "DOGE Teams" at agencies, appointed by each agency head in consultation with the

DOGE Administrator. *Id.* Agency heads are required to "ensure that DOGE Team Leads coordinate their work with [DOGE] and advise their respective Agency Heads on implementing the President's DOGE Agenda." *Id.* Agency Heads must also "take all necessary steps, in coordination with the [DOGE] Administrator and to the maximum extent consistent with law, to ensure [DOGE] has full and prompt access to all unclassified agency records, software systems, and IT systems." *Id.*

Other executive orders and presidential memoranda vest DOGE and its Administrator with a host of responsibilities that go beyond advising and assisting the President. For example, executive orders and presidential memoranda:

- Provide that a government-wide hiring freeze shall remain in effect with respect to the Internal Revenue Service "until the Secretary of the Treasury, in consultation with the Director of OMB and the Administrator of [DOGE], determines that it is in the national interest to lift the freeze." *Hiring Freeze*, Presidential Mem., 90 Fed. Reg. 8247 (Jan. 28, 2025).

- Empower "DOGE Team Lead[s]" at each agency—who are required to "coordinate their work" with DOGE, 90 Fed. Reg. 8441—to keep vacant career positions across the government, unless an agency head overrides their decision. *Implementing the President's "Department of Government Efficiency" Workforce Optimization Initiative*, Exec. Order No. 14,210, 90 Fed. Reg. 9669 (Feb. 11, 2025).

- Direct that "the Department of Homeland Security, in coordination with the DOGE Administrator, shall review each State's publicly available voter registration list and available records concerning voter list maintenance activities as required by 52 U.S.C. § 20507, alongside Federal immigration databases and State records requested, including through subpoena where necessary and authorized by law, for consistency with Federal requirements." *Preserving and Protecting the Integrity of American Elections*, Exec. Order No. 14,248, 90 Fed. Reg. 14005 (Mar. 28, 2025).

- Require agency DOGE teams to provide regular reports to the DOGE Administrator. *See, e.g.*, 90 Fed. Reg. 9669 (monthly hiring report for each agency); *Implementing the President's "Department of Government Efficiency" Cost Efficiency Initiative*, Exec. Order 14,222, 90 Fed. Reg. 11095 (Mar. 3,

2025) (monthly reports on "contracting activities" and "each agency's justifications for non-essential travel").

II. Procedural Background

Immediately after President Trump took office on January 20, 2025, DOGE reportedly began "spearhead[ing] efforts to terminate federal workers, programs, and contracts across the federal government." App. 6a. Public statements by the Administration and extensive reporting indicated the new entity was wielding "unprecedented" control over "vast swathes" of the government at a "remarkably swift[]" pace, and with "unusual secrecy." Supp. App. 18a, 25a, 33a, 36a.

To help shed light on the new entity's secretive structure and operations, CREW submitted an expedited FOIA request to DOGE on January 24, 2025. Supp. App. 55a-64a. After DOGE failed to timely respond, CREW filed suit and moved for a preliminary injunction on February 20, seeking to expedite processing of its FOIA request. D. Ct. Doc. 2-1, at 1-12, 17-38 (Feb. 20, 2025). CREW's motion argued at length that DOGE is wielding "substantial independent authority," making it a *de facto* "agency" subject to FOIA and the Federal Records Act ("FRA"). D. Ct. Doc. 2-1, at 18-25.

In opposing CREW's preliminary injunction motion, DOGE chose to make only cursory assertions—buried in two footnotes—that it was exempt from FOIA, and insisted that whether FOIA applied to it was "a question for the merits * * * once Defendants have had an opportunity to answer the complaint in the ordinary course" that "should not be decided in the context of a preliminary-injunction motion." D. Ct.

Doc. 10, at 8 n.2, 20 n.4 (Feb. 27, 2025). In its reply, CREW narrowed the requests for which it sought relief. D. Ct. Doc. 13, at 6-20 (Mar. 4, 2025).

On March 10, the district court issued a preliminary injunction ordering expedited processing of CREW's narrowed request to DOGE. D. Ct. Doc. 17 (Mar. 10, 2025). The district court held that CREW was likely to establish that FOIA applies to DOGE because it "is likely exercising substantial independent authority much greater than other EOP components held to be covered by FOIA." Supp. App. 27a.

The government moved for reconsideration and for a stay of the preliminary injunction pending resolution of a then-forthcoming summary judgment motion on DOGE's agency status. *See* Supp. App. 45a-46a. Only then did the government argue, for the first time, that DOGE does not wield substantial independent authority, *see* Supp. App. 43a, 51a, despite acknowledging that this was an "important threshold legal issue" that CREW had briefed "at length in [the] preliminary injunction motion," D. Ct. Doc. 20-1, at 3, 10-21 (Mar. 14, 2025). The reconsideration motion relied on a declaration from Acting DOGE Administrator Amy Gleason attesting that she is a full-time DOGE employee and its Acting Administrator (omitting her start date) and stating in conclusory terms that DOGE does not wield substantial independent authority and merely advises the President. *See generally* Supp. App. 65a-69a. Gleason did not claim to provide any advice to the President.

The district court denied the government's motion for reconsideration because, among other reasons, its arguments were ones "it deliberately chose to forego" when it opposed the preliminary injunction. Supp. App. 43a. The district court added that

Gleason's declaration did not establish DOGE's agency status and her assertions about DOGE's operations and her role were "called into question by contradictory evidence in the record." Supp. App. 47a (quoting *Jud. Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013)). The district court twice repeated that it would entertain a Rule 56(d) motion if the government filed its early summary judgment motion, Supp. App. 41a-42a, 52a, and previewed that Gleason's "declaration appears to be subject to factual disputes that may provide a basis for CREW to seek discovery under Rule 56(d)," Supp. App. 46a-47a.

The government appealed neither the district court's preliminary injunction order nor the denial of reconsideration. Instead, the government moved for partial summary judgment solely on DOGE's agency status. *See generally* D. Ct. Doc. 24-1 (Mar. 19, 2025). Its only evidence of DOGE's operations was a second Gleason declaration, which repeated her contradicted assertions and revised the description of her role to omit the sworn statement from her first declaration that she was a full-time DOGE employee. *Compare* Supp. App. 65a-69a, *with* 70a-74a. That revision was necessary because her first declaration had omitted that she had previously accepted an appointment at the Department of Health and Human Services, which only came to light through disclosures—which the government attempted to file under seal—in another case. Supp. App. 65a-74a.

CREW promptly moved for expedited discovery pursuant to Federal Rules of Civil Procedure 56(d) and 26, identifying specific factual issues relating to DOGE's substantial independent authority, including numerous inconsistencies between

Gleason's second declaration and the public record. Supp. App. 84a-90a. CREW sought only limited discovery, tailored to determining whether DOGE is exercising substantial independent authority, including deposing Gleason to address her sworn statements.

In opposing CREW's motion, the government principally argued that discovery was unnecessary because—contrary to decades of D.C. Circuit precedent requiring a functional, fact-specific analysis of EOP components' agency status—it believed DOGE's agency status could be resolved solely on the text of DOGE's charter documents. Supp. App. 97a-103a. The government did not argue that the requested discovery violated the separation of powers or *Cheney*, 542 U.S. 367. Rather, it only cited *Cheney* once, for the uncontroversial proposition that any discovery ordered must take into account the "'high respect that is owed to the office of the Chief Executive,'" and "should be fashioned to be as unobtrusive as possible," Supp. App. 103a (quoting *Cheney*, 542 U.S. at 385). The government did not propose any narrowing of the requested discovery based on *Cheney*. *See* App. 2a.

The district court partially granted CREW's motion, narrowing the written discovery and authorizing only two depositions: a Rule 30(b)(6) deposition of DOGE and a deposition of Gleason. App. 12a. The court explained that, "[a]s the government acknowledges, courts in this district have permitted limited discovery in just these circumstances—to ascertain whether an entity is wielding independent authority sufficient to bring it within FOIA's ambit." App. 8a (citing cases). And the court reasoned that Gleason's deposition was appropriate because her "declaration is the

only factual evidence offered in support of [DOGE's] summary judgment motion," and "parts of Gleason's declaration appear to be 'called into question by contradictory evidence in the record.'" App. 12a (citation omitted).

On April 17, the government moved to stay the discovery order pending disposition of a forthcoming mandamus petition in the court of appeals. D. Ct. Doc. 39 (Apr. 17, 2025). Without waiting for a ruling, on April 18, the government filed in the court of appeals its mandamus petition to quash the discovery order, *see generally* Gov't C.A. Pet., and a motion for an administrative stay and a stay pending its resolution, *see generally* Gov't C.A. Stay Mot. The court of appeals administratively stayed the discovery order that day.

The government's petition rested almost entirely on a new argument that the ordered discovery violated *Cheney* and the separation of powers. *See* Gov't C.A. Pet. at 13-39. That new argument hinged on the incorrect factual premise that the "Office of the President" referenced in *Cheney*—a "distinct" and "smaller unit" of the EOP "comprised of such immediate advisers [to the President] as the Chief of Staff and the White House Counsel," *Jud. Watch, Inc. v. Dep't of Just.*, 365 F.3d 1108, 1109 n.1 (D.C. Cir. 2004)—was the same as the broader EOP. *See* Gov't C.A. Pet. at 13-16. Flowing from that flawed premise, the government argued that the question of DOGE's agency status had to be answered solely by reference to its charter documents, that any discovery had to be limited to assessing DOGE's formal authority, and that the ordered discovery constituted an overly burdensome intrusion

into the separate "Office of the President," Gov't C.A. Pet. at. 16-40, of which DOGE is not a part.

On May 14, the court of appeals unanimously denied the mandamus petition and dissolved its administrative stay of the discovery order. App. 1a. It held that "the government forfeited its primary objection to the district court's order under *Cheney* by failing to raise that argument below," including by failing to "argue that the requested discovery posed a separation-of-powers issue or risked intruding into the core functions of the presidency." App. 2a.

In finding that the government failed to show that it lacked other adequate means of relief, the court of appeals distinguished *Cheney* based both on DOGE's lack of close proximity to the President and the "modest" scope of discovery here, which "does not target the President or any close adviser personally" and "is a far cry from the sweeping discovery at issue in *Cheney*." App. 2a. It added that "[t]he government retains every conventional tool to raise privilege objections" and rejected the government's blanket claim that responding to the discovery "would pose an unbearable burden." App. 2a.

The court of appeals also held the government did not have a "clear and indisputable right" to mandamus. App. 3a. The court explained that, under longstanding circuit precedent, determining an EOP component's agency status "turns on a functional analysis: whether it 'exercises substantial independent authority' or instead exists solely 'to advise and assist the President.'" App. 2a (citing *CREW*, 566 F.3d at 224; *Soucie v. David*, 448 F.2d 1067, 1073-75 (D.C. Cir. 1971)).

"That inquiry, by its nature, depends on the practical realities of the entity's role, not merely on its formal placement or authority within the [EOP]." App. 2a. The court added that even "the government concedes, as it must" that the D.C. Circuit has "endorsed limited discovery to determine" EOP components' "agency status under FOIA." App. 3a. (citing *Armstrong*, 90 F.3d at 560-61; *CREW*, 566 F.3d at 224-26). Thus, the government's position was not "clearly mandated" by governing "case law." App. 3a. (quoting *In re Al Baluchi*, 952 F.3d 363, 369 (D.C. Cir. 2020)).

On May 19, CREW moved in the district court to modify the discovery schedule and to deny as moot the government's motion to stay the discovery order pending its mandamus petition in the court of appeals. D. Ct. Doc. 41 (May 19, 2025). The government opposed the motion "only insofar as it propose[d] that discovery go forward before Supreme Court resolution of its forthcoming application for relief from discovery," but chose not to file a response. D. Ct. Doc. 41., at 1. On May 20, the district court granted CREW's motion. App. 32a-33a. The government never moved the district court to stay the discovery order pending review in this Court. *See* Sup. Ct. R. 23.

ARGUMENT

"To obtain a stay pending the filing and disposition of a petition for a writ of mandamus, [the government] must show a fair prospect that a majority of the Court will vote to grant mandamus and a likelihood that irreparable harm will result from denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). To obtain a stay pending the disposition of a petition for a writ of certiorari, the

government bears the burden to establish (1) "a reasonable probability" of certiorari on the question presented in the stay application, (2) "a fair prospect that the Court will reverse the decision below," and (3) a likelihood of irreparable harm. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301 (2014) (Roberts, C.J., in chambers) (citation omitted); *see also, e.g., Hollingsworth,* 558 U.S. at 190.

The Court grants such relief "only in extraordinary circumstances" and only when all of the factors above "counsel in favor of a stay." *Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers) (internal quotation marks omitted); *see also Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1304 (1991) (stating "conditions that are *necessary* for issuance of a stay are not necessarily *sufficient*") (Scalia, J., in chambers). The burden is especially high where, as here, the court of appeals has refused to issue a writ of mandamus. *See Marshall*, 434 U.S. at 1306.

The government falls far short of this demanding burden. The Court rarely intervenes in ongoing discovery disputes, and it appears that it has never done so in the FOIA context. There is no basis for such extraordinary intervention here. The government's arguments suffer from the same maladies that caused the court of appeals to unanimously deny its mandamus petition, it offers no coherent theory on how responding to modest discovery will cause it irreparable harm, and the equities weigh heavily against granting a stay. The stay application should be denied.

I. The government is unlikely to succeed on the merits of its forthcoming petition.

In the specific context of a "District Court's authorization of discovery," this Court is more deferential to an "order of the Court of Appeals denying mandamus"

than it otherwise would be to "a final order or decision of the District Court affirmed by the Court of Appeals." *Marshall*, 434 U.S. at 1306. And, critically, the Court does not "permit an application for review of a discovery order to serve in effect as a vehicle for interlocutory review of the underlying merits of the lawsuit." *Id.* at 1309; *see id.* at 1308 (denying stay where "Applicants' objection to the discovery orders is * * * impossible to separate from their underlying claim"). Yet that is precisely what the government seeks to do here: through mandamus review of a discovery order, it improperly invites this Court to resolve the ultimate merits question of whether DOGE is purely an "advisory body" exempt from FOIA. *See* Appl. 1-2, 12-13. But that "underlying merits" question is not before this Court. *See Marshall*, 434 U.S. at 1309. Instead, the Court's review should be confined to the propriety of *discovery* to enable adjudication of that question. The court of appeals correctly determined—based on decades of precedent—that limited discovery is appropriate to evaluate DOGE's agency status, and that determination is entitled to maximum deference here.

Even absent the extreme deference owed to the court of appeals' denial of mandamus, there is no fair prospect that the government has met the extraordinarily exacting requirements for a writ of mandamus. Mandamus is "a 'drastic and extraordinary' remedy 'reserved for really extraordinary cases.'" *Cheney*, 542 U.S. at 380 (quoting *Ex Parte Fahey*, 332 U.S. 258, 259-60 (1947). "[I]nvocation of this extraordinary remedy" will be justified "only in exceptional circumstances amounting to a judicial 'usurpation of power,'" *id.* (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)), "or a 'clear abuse of discretion,'" *id.* (quoting *Bankers Life & Cas. Co. v.*

Holland, 346 U.S. 379, 383 (1953)). To overcome this exceptionally high bar, the government must establish that "(1) 'no other adequate means [exist] to attain the relief it desires,' (2) the [government's] 'right to issuance of the writ is "clear and indisputable,"' and (3) the writ is appropriate under the circumstances.'" *Hollingsworth*, 558 U.S. at 190 (quoting *Cheney*, 542 U.S. at 380-81). As the court of appeals rightly concluded, the government cannot meet any of these requirements.

A. The court of appeals correctly held that the government does not have a clear and indisputable right to mandamus relief from the district court's reasonably-scoped discovery order.

The government comes nowhere close to establishing a clear and indisputable right to relief. To do so, a movant must show that the challenged action is "plainly and palpably wrong as a matter of law." *U.S. ex rel. Chicago Great W. R. Co. v. Interstate Com. Comm'n.*, 294 U.S. 50, 61 (1935). "Accordingly, [courts] will deny mandamus even if a petitioner's argument, though 'packing substantial force,' is not clearly mandated by statutory authority or case law." *Illinois v. Ferriero*, 60 F.4th 704, 714 (D.C. Cir. 2023) (quoting *In re Al Baluchi*, 952 F.3d at 369) (brackets omitted). Likewise, "[w]here a matter is committed to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665-66 (1978).

1. Longstanding FOIA precedent establishes that determining an EOP component's agency status is a functional analysis that may require discovery.

i. The government is wrong about the standard courts apply to determine whether an EOP component is an "agency" covered by FOIA. As the court of appeals rightly concluded, "[i]n the FOIA context, whether an entity is an 'agency' turns on a

functional analysis: whether it 'exercises substantial independent authority' or instead exists solely 'to advise and assist the President.'" App. 2a (quoting *CREW*, 566 F.3d at 224). Since *Soucie v. David* in 1971, courts have answered that question by analyzing "the origin *and functions*" of the entity to assess if it exercises "substantial independent authority" from the President. 448 F.2d. at 1071, 1073 (emphasis added); *see also Cotton*, 63 F.3d at 1121 ("We first employed this functional approach in *Soucie v. David*[.]"). Even the government concedes, as it must, that *Soucie* is the seminal case concerning whether an agency is subject to FOIA. Appl. 14.

Case after case reaffirms *Soucie*'s functional approach. In *CREW v. Office of Administration*, the D.C. Circuit analyzed "everything the Office of Administration does," 566 F.3d at 224, because "an understanding" of OA's "authority *and operations* * * * [wa]s critical for determining whether OA is subject to FOIA." *Id.* at 225 (emphasis added). Based in part on discovery consisting of "more than 1300 pages of records about [OA's] responsibilities," a deposition of OA's director, and "a sworn declaration by its general counsel," *id.* at 221, the court concluded OA was not subject to FOIA because "nothing in the record indicate[d] that OA [1] *performs* or [2] is authorized to perform tasks other than operational and administrative support for the President and his staff," *id.* at 224 (emphasis added).

Similarly, in *Armstrong v. EOP*, the D.C. Circuit examined both whether the National Security Council ("NSC") "could exercise substantial independent authority" and "does *in fact* exercise such authority." 90 F.3d at 560 (emphasis added). The court

of appeals considered various aspects of the NSC's actual operations, including the extent to which the National Security Adviser works closely with the President and controls NSC staff, whether "the record suggest[ed] that the President has empowered the NSC staff to direct the [Director of Central Intelligence] in any way." *Id.* at 560-61. The court of appeals also considered an NSC staff member's deposition testimony about his "ability to issue instructions or directions to agencies." *Id.*

Underscoring its functional approach, *Armstrong* also examined how ambiguous delegations of authority to the NSC were implemented in practice. For example, although the plaintiff claimed that an executive order gave the NSC authority to resolve "disputes between agencies concerning the protection and declassification of classified information," the court observed that the NSC's declassification reviews were in practice "really nothing more than the internal management of the information that the NSC generates in advising the President." *Id.* at 561-62. The court of appeals similarly refused to credit another directive creating the Senior Interagency Group ("SIG") because, although the directive authorized the SIG to "oversee the implementation of the goals and principles," there was "nothing before [the court] to confirm that the SIG *in fact* oversees anything or anyone." *Id.* at 563 (emphasis added).

The government disclaims this functional approach and asserts that the court of appeals unanimously misapplied its own precedent. Appl. 31; *see also* Appl. 13-19. It argues that, even under *Soucie*, if the government claims that a unit's charter documents suggest that it advises the president, the entity is *per se* exempt from

FOIA and immune from discovery. Appl. 1-2. The government tries to balance this seismic shift in the law on the pinhead of *Cotton v. Heyman*, arguing that case establishes a bright line rule that an "entity's legal authority under the governing statutes, regulations, or executive orders" is the single dispositive factor in deciding whether an entity is subject to FOIA. Appl. 14-15 (citing *Cotton*, 63 F.3d at 1121). But *Cotton* says the opposite: "In determining whether an entity fits the agency definition under FOIA, [courts] have never developed bright line rules. Rather, [courts] have generally employed a *fact-specific functional approach*." 63 F.3d at 1121-23 (emphasis added). Unsurprisingly, *Cotton* in turn applied that functional approach. *See id.* at 1122-23.

The other cases on which the government relies also refute its position. The court in *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993), looked beyond the Executive Order establishing the President's Task Force on Regulatory Relief and analyzed its operations in fact, determining there was "no indication that [it] * * * directed anyone, including OMB, to do anything." 981 F.2d at 1294. The court underscored that the Task Force was not independent, and that it "operated out of the Vice President's office without a separate staff[.]" *Id.* at 1296.

The government also cherry-picks language from *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), to suggest that any entity that advises the President is categorically exempt from FOIA. Appl. 14. But *Kissinger* says no such thing. That case is inapposite here, and, insofar as it is relevant at all,

confirms that this Court takes a functional approach in evaluating an EOP units' agency status.

Kissinger involved a completely different scenario in which a FOIA plaintiff sued to obtain records created by Henry Kissinger when he was National Security Adviser, who directly advises the President, 445 U.S. at 139-40, 156-57, and who heads an EOP component the D.C. Circuit later determined—*after discovery into its operations*—was not subject to FOIA, *supra* 17-18 (discussing *Armstrong*, 90 F.3d at 560). *Kissinger* turned not on FOIA's definition of agency, but whether the requested documents were "records" of the NSC or State. *See* 445 U.S. at 155.

In determining that the documents were NSC records not subject to FOIA, the Court reaffirmed that FOIA generally applies to EOP components, and that its only exempted components are the "Office of the President," *i.e.*, "the President's immediate personal staff or units in the Executive Office whose *sole function* is to advise and assist the President." *Id.* at 156 (citations omitted) (emphasis added). The Court determined that production of the documents could not be compelled under FOIA, not because the NSC advises the President, and certainly not because any entity that does so is exempt as the government claims, but because they concerned a specific activity that exempted them from FOIA—Kissinger's discussions of "information leaks which threatened the internal secrecy of White House policymaking, * * * conversations in which Kissinger had acted in his capacity as a Presidential adviser, only." *Id.*

Kissinger has no bearing here other than to highlight the drastic differences between the staff and functions that satisfy its "sole function" test and DOGE, an entity tasked with implementing an ambiguous "DOGE agenda" at every executive branch agency. *Supra* 4-6. It also is yet another example of a functional rather than formalist approach to applying FOIA. *Supra* 16-18. In fact, "Congress derived th[is] standard quoted in *Kissinger* from *Soucie*[.]" *Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542, 547 (2d Cir. 2016).[2] *Kissinger* also exposes the absurdity of the government's position because if *Kissinger* meant what the government says it does, the courts would have never had to resort to discovery about EOP components—including the NSC—in the first place. *Supra* 17-18.

The government's suggestion that the lower courts adopted a new test, rather than following the long line of cases applying a functional approach, is flatly incorrect. Each court faithfully applied the D.C. Circuit case law discussed above that holds that for FOIA to apply to a unit, it must exercise "substantial independent authority" rather than merely "advise and assist the president." *See* App. 2a, 7a-11a. The government is simply wrong when it states the lower courts here ignored the substantial independence requirement, Appl. 16, or that they adopted a rule resting entirely on a unit's purported "influence." Appl. 16-17.[3]

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[2] The government also cites without explanation to *Main St.,* Appl. 14, but there, the court explicitly adopted the D.C. Circuit's functional approach from *Soucie*. *See* 811 F.3d at 547-49.

[3] The government's other criticisms of the discovery order are similarly unavailing, as they merely second guess the district court's discretionary judgments on the need for discovery. Appl. 17-18. "Mandamus, it must be remembered, does not 'run the gauntlet of reversible errors.' Its office is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power." *Will*, 389 U.S. at 104; *see* also *In re U.S. Dep't of Def.*, 848 F.2d 232, 238 (D.C. Cir. 1988) (holding that courts do not grant mandamus "to second-guess trial judges"). The district

Accepting the government's formalist approach would give the Executive free reign to insulate EOP units from critical transparency and accountability laws, so long as they did so under cover of ambiguous executive orders. *See* 90 Fed. Reg. 8441 (empowering DOGE to "implement" an undefined "DOGE Agenda"). Courts would be forced to blindly accept the government's representations about an EOP unit's real-world operations, unable to test those representations through even limited discovery. It is that extreme position, not the discovery order, that would "turn[] FOIA on its head." Appl. 2.

ii. The district court did not abuse its significant discretion under Federal Rules of Civil Procedure 56(d) when it held that discovery is necessary for CREW to oppose the government's summary judgment argument that DOGE does not exercise substantial independent authority. App. 7a-10a. "District courts have 'broad discretion to manage the scope of discovery' in FOIA cases," and a court of appeals "will overturn the exercise of that discretion 'only in unusual circumstances.'" *Hall & Assocs. v. Env't Prot. Agency*, 956 F.3d 621, 629 (D.C. Cir. 2020) (quoting *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). That discretion is at its apex where a party opposing summary judgment "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition[.]" Fed. R. Civ. P. 56(d)(2). In

court acted well within its significant discretion in relying on the Administration's public statements, media reports, and ambiguities in Executive Orders as grounds for discovery. *See* App. 9a-11a; *see also Simas v. First Citizens' Fed. Credit Union,* 170 F.3d 37, 46 (1st Cir. 1999) (Rule 56(d) "proffer need not be presented in a form suitable for admission as evidence at trial, so long as it rises sufficiently above mere speculation")); *accord* C*arney v. Dep't of Just.*, 19 F.3d 807, 813 (2d Cir. 1994); *Jeffries v. Barr*, 965 F.3d 843, 858 (D.C. Cir. 2020).

the D.C. Circuit, Rule 56(d) motions "should be granted 'almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence.'" *Convertino v. Dep't of Just.*, 684 F.3d 93, 99, & n.12 (D.C. Cir. 2012).

It follows that "this Court's long-settled practice has been to leave these sorts of burden and discovery-related procedural disputes to the district courts, with occasional court of appeals intervention." *In re United States*, 138 S. Ct. 371, 375 (2017) (Breyer, J., dissenting from grant of stay). The Court has stayed discovery orders only twice in recent history, in readily distinguishable cases. *See id.*; *In re Dep't of Com.*, 586 U.S. 956 (2018). First, each case concerned "extra-record" discovery in the Administrative Procedure Act ("APA") context, where judicial review is typically confined to the administrative record.[4] Second, both cases involved depositions of cabinet-level executive officials to probe their subjective motivations and mental processes.[5]

Here, the district court ordered discovery to ascertain DOGE's agency status under FOIA, not to review agency action under the APA. Additionally, the district court ordered only a deposition under Federal Rule of Civil Procedure 30(b)(6) and

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[4] *See In re United States*, 138 S. Ct. at 371 (staying discovery order "to the extent they require discovery and addition to the administrative record filed by the Government"); *In re Dep't of Com.*, 586 U.S. at 957 (Gorsuch, J., concurring in part) ("Normally, judicial review of an agency action like this is limited to the record the agency has compiled to support its decision. But in the case before us the district court held that the plaintiffs * * * had made a 'strong showing' that Secretary Ross acted in 'bad faith' and were thus entitled to explore his subjective motivations through 'extra-record discovery[.]'").

[5] *See* Appl. Stay Pending Disposition of Pet. Writ Mandamus at 6-7, *In re United States*, 138 S. Ct. 371 (2017) (No. 17A570) (arguing for stay because discovery requests "included demands upon multiple senior government officials, including the Acting Secretary herself, to sit for depositions designed to probe the mental processes informing the Acting Secretary's decision"); *In re Dep't of Com.*, 586 U.S. at 958 (2018) (Gorsuch, J., concurring in part) (arguing that the Court should stay all depositions, not just that of the Secretary of Commerce, because "each stems from the same doubtful bad faith ruling, and each seeks to explore [the official's] motives").

the deposition of Acting DOGE Administrator Gleason, after the government chose to submit her declaration in support of its motion for summary judgment knowing it raised factual issues. *Supra* 8. Gleason is neither a cabinet-level executive official nor a close adviser to the President; indeed she has a second job as an HHS consultant. *Supra* 8-9. CREW sought her deposition not to probe her subjective motivations or mental processes, but to test the *only* factual evidence in support of the government's summary judgment motion, *see generally* Supp. App. 70a-74a; D. Ct. Doc. 24-1, which the district court found was "called into question by contradictory evidence in the record." Supp. App. 47a (citation omitted).

A wealth of authority also supports the reasonableness of the discovery order. As the lower courts rightly observed, the D.C Circuit has "permitted limited discovery in just these circumstances—to ascertain whether an entity is wielding independent authority sufficient to bring it within FOIA's ambit." App. 8a (collecting cases); *accord* App. 3a (collecting cases). And the district court reasonably tailored the already limited discovery by further narrowing its scope. *See* App. 12a-13a, 15a-16a (denying deposition of Steven Davis, discovery regarding DOGE's document preservation practices and visitor access requests, and interrogatory regarding identities and hiring processes for DOGE's administrators); App. 2a (referring to the discovery as "modest in scope," "limited by both time and reach," and "a far cry from the sweeping discovery at issue in *Cheney*"). The Court is thus unlikely to intervene in the denial of mandamus relief, and a stay is not warranted.

2. The government's argument that *Cheney* and the separation of powers bar the limited discovery ordered here is both forfeited and meritless.

i. The court of appeals correctly determined that the government forfeited its separation of powers argument by failing to raise it in the district court. *See* App. 2a. "Forfeiture is the failure to make the timely assertion of a right," *Hamer v. Neighborhood Hous. Servs. Of Chi.*, 583 U.S. 17, 20 n.1 (2017) (cleaned up). "Forfeiture is 'not a mere technicality and is essential to the orderly administration of justice,'" *Freytag v. Comm'r*, 501 U.S. 868, 894-95 (1991) (Scalia, J., concurring in part) (citations omitted), for good reason: "in cases involving structural [constitutional] claims as in all others * * * [w]ithout that incentive to raise legal objections as soon as they are available, the time of lower court judges and of juries would frequently be expended uselessly, and appellate consideration of difficult questions would be less informed and less complete." *Id.* at 900.

The government's explicit concessions at the district court constitute a clear forfeiture of its (incorrect) argument that *Cheney* prohibits or otherwise requires narrowing of the discovery order, and there is no reason for the Court to depart from its "normal course of declining to consider forfeited arguments." *Ohio v. Env't Prot. Agency*, 603 U.S. 279, 299 (2024). As the court of appeals noted, "[a]t no point during the summary judgment briefing, or in opposing CREW's discovery motion, did the government argue that the requested discovery posed a separation-of-powers issue or risked intruding into the core functions of the presidency." App. 2a. In fact, neither of those filings even use the term "separation of powers." *See generally* Supp. App. 96a-116a; D. Ct. Doc. 24.

And far from arguing, as it did before the court of appeals, that *Cheney per se* prohibited discovery of DOGE, Supp. App. 103a (citing *Cheney*, 542 U.S. at 385), "[t]he government never discussed *Cheney* in its motion for summary judgment and, in its opposition to the discovery order, it merely cited *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. 2a (quoting Supp. App. 103a (quoting *Cheney*, 542 U.S. at 385)). Nor did the government "request protective narrowing of the discovery on constitutional grounds" and its opposition instead relied on "assertions of burden and relevance." App. 2a. The government further conceded that "*if* the Court concludes that depositions are needed, *Defendants do not object to the Court's approval of a single 30(b)(6) deposition*." Supp. App. 103a-105a (second emphasis added).

"[O]nly after the judge ruled against them" to order discovery did the government "[develop] their current concern over" the separation of powers, raised "for the first time" before the court of appeals. *Freytag*, 501 U.S. at 892-93 (Scalia, J., concurring in part and concurring in the judgment). In seeking mandamus at the court of appeals, the government made its "primary objection to the district court's order," App. 2a, the newfound argument that "grave separation-of-powers concerns" raised in *Cheney* bar discovery in its entirety, *see generally* Gov't C.A. Pet. (citing *Cheney* 41 times to support quashing the discovery order). On this record, the court of appeals was plainly correct to deem the government's separation of powers and *Cheney* arguments forfeited. *See* App. 2a.

The government nevertheless chastises the court of appeals by recasting its straightforward decision as an imposition of a "magic-words" requirement. Appl. 22. But requiring the Executive Branch to affirmatively argue that the separation of powers bars *all discovery*, particularly within the context of Fed. R. of Civ. Pro. 56(d), is far from "demand[ing] the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000); *see also In re Abbott Lab'ys*, 96 F.4th 371, 382-84 (3d Cir. 2024) (holding that where "argument was raised for the first time in the filing of the Petition" for writ of mandamus, "[b]ecause the argument was not raised in the District Court, Petitioners have forfeited it"); *United States v. All Assets Held at Credit Suisse (Guernsey) Ltd.*, 45 F.4th 426, 433-34 (D.C. Cir. 2022) (cursory argument, "merely stated in a footnote, without further elaboration" resulted in forfeiture). The government simply did not provide such notice when it raised *Cheney* only once at the district court for the anodyne proposition that discovery should account for the high respect of the executive, rather than arguing, as it did at the court of appeals, that *Cheney* creates a bar on all discovery.

ii. On the merits, the court of appeals correctly concluded that *Cheney* does not apply to DOGE. The court explained that this case is readily distinguishable from *Cheney* because, among other reasons, in *Cheney* "the Vice President himself was subject to a wide-ranging third-party subpoena and the asserted intrusion implicated the mental processes of the President's advisers." App. 2a. Indeed, *Cheney* itself recognized the Court's outcome may have been different "[w]ere the Vice President

not a party." 542 U.S. at 381; *see also CREW v. Dep't of Homeland Sec.*, 532 F.3d 860, 865-66 (D.C. Cir. 2008) (distinguishing *Cheney* by noting that discovery request was directed at the Vice President himself and the Court was especially concerned with "forcing the Vice President to assert executive privilege"). Further, the Court emphasized that its decision "safeguard[ed] against unnecessary intrusion into the operation of the Office of the President" and the Office of the Vice President. *Cheney*, 542 U.S. at 387. But the Office of the President (also known as the White House Office) is a "distinct" and "smaller unit" of the EOP "comprised of such immediate advisers as the Chief of Staff and the White House Counsel." *Jud. Watch, Inc. v. Dep't of Just.*, 365 F.3d at 1109 n.1; *see also Kissinger*, 445 U.S. at 156 (stating the Office of the President includes "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President").

The discovery here does not implicate *Cheney* because it is directed solely at DOGE—not the President, Vice President, or their immediate staff. Although DOGE is housed within the EOP, it is not part of the White House Office (or, in *Cheney*'s terms, "the Office of the President"), and DOGE's Administrator does not report directly to the President. 90 Fed. Reg. 8441. Because DOGE and its Administrator are not among "those in closest operational proximity to the President," *Cheney*, 542 U.S. at 381, *Cheney's* discovery restrictions do not apply.[6]

[6] Other cases cited by the government involved damages claims against *the President himself*, *see Clinton v. Jones*, 520 U.S. 681, 684 (1997); *Nixon v. Fitzgerald*, 457 U.S. 731, 748 (1982), and thus have even less relevance. And the government's reliance on the unpublished order in *In re Musk*, No. 25-5072, 2025 WL 926608 (D.C. Cir. Mar. 26, 2025), is misleading at best. There, the court of appeals cited *Cheney* for the proposition that the district court was "required to decide [the government's] motion to dismiss before allowing discovery." *Id.* at *1. The court did *not*, as the government claims

Indeed, a contrary rule would effectively nullify *Soucie's* functional test for determining EOP units' agency status by forbidding even targeted discovery to aid that fact-intensive analysis. Such a novel and extreme position—which runs headlong into decades of precedent—provides no basis for the extraordinary mandamus remedy. *See In re Al Baluchi*, 952 F.3d at 369 (mandamus petitioner must show its position is "*clearly mandated* by statutory authority or case law") (emphasis added); App. 3a ("Open legal questions do not present a clear and indisputable right to mandamus relief." (citing *In re Al-Nashiri*, 791 F.3d 71, 85-86 (D.C. Cir. 2015))).

iii. *Cheney* is distinguishable in another critical respect: the posture in which the government chose to raise the separation of powers. In *Cheney*, the government promptly raised the defense in a motion to dismiss as a threshold ground for dismissal. 542 U.S. at 375. *Cheney* thus "stand[s] for the general principle that mandamus may be warranted where valid threshold grounds for dismissal, denied by the district court, would obviate the need for intrusive discovery against the Vice President." *In re Cheney*, 544 F.3d 311, 313 (D.C. Cir. 2008). Here we are in a far different "litigation posture." *Id.* at 313-14. The government did not raise *Cheney* or the separation of powers as a threshold defense in a motion to dismiss. To the contrary, the government failed to raise the defense at all. *Supra* 24-26. Meanwhile, it was *the government's* decision to move for partial summary judgment and introduce contradictory evidence on DOGE's agency status that triggered the need for limited discovery.

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here, base the stay of discovery on a determination that discovery directed to DOGE is "intrusive" in the same vein as the discovery directed to the Vice President in *Cheney*. *See* Appl. 24.

This case's posture is materially identical to *In re Cheney*, where the D.C. Circuit refused after the motion to dismiss stage in litigation regarding the Presidential Records Act, to categorically apply *Cheney* and the separation of powers "to vacate [a] district court's discovery order" because to do so would be "an 'unprecedented' intrusion." 544 F.3d at 312. There, as here, the government did not file a motion to dismiss or raise any threshold legal defenses. *Id.* at 313. Instead, in both cases the government chose to submit evidence to support a factual argument that it was complying with federal law. *See id.* at 312. Further, as here, in *In re Cheney* the government waited until after the district court ordered discovery to "argue that the entire factual inquiry—which *it* raised—should be set aside in view of" its interpretation of precedent. *Id.* at 313. And in both this case and *In re Cheney*, the district court held that this "litigation posture necessitate[d] limited discovery to permit timely adjudication of the factual defense" that the government "has itself raised." *Id.* Like the court of appeals in *In re Cheney*, this Court should find that *Cheney* does not prohibit discovery because of "the procedural record in the district court" and "the deference [this Court] owe[s] trial courts in the management of their cases." *Id.* (citation omitted).

B. The court of appeals correctly held that the government has other adequate and less intrusive means to obtain relief.

Mandamus is not proper here because the government cannot meet its burden to establish that "no other adequate means [exist] to attain the relief [it] desires." *Hollingsworth*, 558 U.S. at 190 (quoting *Cheney*, 542 U.S. at 380). The "drastic and extraordinary" remedy of mandamus is justified "only [in] exceptional circumstances

amounting to a judicial usurpation of power." *Cheney*, 542 U.S. at 380 (citations omitted). It cannot be used as the government is deploying it here—to save a litigant from the consequences of its own strategic choices. *Supra* Part I.A.2. Nor can it be used where, as here, there remain alternative paths for the petitioner to secure its requested relief.

1. The government can obtain adequate relief through the normal discovery process.

The court of appeals comprehensively refuted the government's claim that under *Cheney*, "line-by-line assertions of executive privilege were not an adequate alternative means of relief." App. 2a. It distinguished *Cheney* from this case, where the discovery "is modest in scope and does not target the President or any close adviser personally" and is "a far cry from the sweeping discovery at issue in *Cheney*." App. 2a. In responding to that modest discovery, "[t]he government retains every conventional tool to raise privilege objections on the limited question-by-question basis foreseen here on a narrow and discrete ground." App. 2a.

The court of appeals is correct. *None* of the discovery ordered here seeks communications between DOGE and the White House Office, it explicitly excludes any communications with the President, and it does not call for the production of any privileged information. *See* App. 18a-31a. The discovery seeks only limited information about DOGE's structure and operations and the manner in which it interacts with agencies and DOGE Teams *outside of* the White House. *See* App. 18a-31a, *see* App. 11a-17a (limiting requested discovery and addressing government's objections). Denying the stay here would merely require the government to, in the

first instance, follow the normal course of discovery by providing responsive information not subject to a valid objection (based on privilege or otherwise) and raising particularized objections when appropriate. *See* App. 2a. The government seeks to short-circuit that process and allow EOP components to assert an insurmountable bar to discovery in the name of the separation of powers, as *any* discovery of EOP components in *any* context would justify mandamus under its theory. In this case, its argument would also strip the district court of its substantial discretion to manage discovery. *Supra* Part I.A.1.ii.

The court of appeals also correctly held that the government's sweeping burden claims—repeated here—were ill-defined. It noted that the government "does not provide any specific details as to why accessing its own records or submitting to two depositions would pose an unbearable burden," particularly when "the only identified burdens are limited both by time and reach, covering as they do records within USDS's control generated since January 20." App. 2a. The same is true here. The government's vague assertions that the typical discovery process provides inadequate relief remains tethered to its forfeited and meritless invocation of *Cheney* and the separation of powers. App. 2a; *supra* Part I.A.2. Because DOGE is not entitled to special treatment under *Cheney*, the government's generalized burden claims ring hollow.

Indeed, the government's doomsday characterization of routine discovery is belied by the fact that EOP units—including DOGE itself—have responded to discovery in similar disputes, including over their agency status. *See, e.g.*, *CREW*, 566

F.3d at 221 (D.C. Cir. 2009) (FOIA case involving Office of Administration); *Armstrong*, 90 F.3d at 561 (FOIA case involving NSC); *Competitive Enter. Inst. v. Off. of Sci. & Tech. Pol'y*, 185 F. Supp. 3d 26, 27 (D.D.C. 2016) (Office of Science and Technology Policy); *EPIC v. Off. of Homeland Sec.*, No. 02-cv-00620, Doc. No. 11 (D.D.C. Dec. 26, 2002) (FOIA case involving Office of Homeland Security); *AFL-CIO v. Dep't of Lab.*, No. 25-cv-339, 2025 WL 1129202, at *8 n.17 (D.D.C. Mar. 19, 2025) (ordering discovery from DOGE to determine its agency status under the Economy Act).

The government's few objections to specific aspects of discovery fare no better. With respect to Acting DOGE Administrator Gleason's deposition, the government's one-line invocation of the apex doctrine should be rejected out of hand. Appl. 27. The government raised this argument at neither district court nor the court of appeals and thus forfeited it. *Supra* Part I.A.2.i. In any event, the government fails to demonstrate why a single deposition of Gleason would inhibit DOGE's operations, let alone justify mandamus. Gleason is not even a full-time DOGE employee, *supra* 8-9, and the government fails to identify any specific duties of hers that would be disrupted by sitting for one deposition.

Moreover, as a matter of basic fairness, the government should not be permitted to use Gleason's position and testimony as a sword on summary judgment and then invoke that position as a shield against cross-examination. *Cf. In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982) (a "privileged person . . . cannot be allowed, after disclosing as much as he pleases, to withhold the remainder."). Rather, as the

court of appeals correctly held, "limited discovery can be used to follow up on factual questions put at issue by [Gleason's] declarations." App. 3a (citing *In re Cheney*, 544 F.3d at 312 (requiring deposition of Vice President's Deputy Chief of Staff and National Archives official "to follow up on factual questions that [they] had put at issue in [their] declarations")).

The government's complaints about two interrogatories regarding DOGE's purported "recommendations" to agencies and whether they were followed are also, as they were at the court of appeals, unavailing. Appl. 25-26. First, the government can assert privilege objections when responding to these interrogatories. *Supra* 11. Second, the district court in its discretion deemed this information—over the government's objection—necessary to ascertain the true nature of DOGE's authority over the operations of other agencies. App. 11a-12a. Finally, the government's burden objection is undermined by DOGE's official government website, which includes a detailed "Wall of Receipts" where DOGE continuously publishes its purported actions (or "recommendations") to slash federal agency leases, contracts, grants, and other spending.[7] Responding to discovery relating to this already-compiled information should pose little burden to DOGE. The remainder of the government's burden objections are even less articulated and come nowhere close to demonstrating irreparable harm. *See Nken v. Holder*, 556 U.S. 418, 427 (2009); *infra* Part II.

[7] *See* DOGE, *Savings*, https://www.doge.gov/savings.

2. The discovery order does not grant CREW full relief on the merits.

The court of appeals also correctly rejected the government's argument that the discovery order would give CREW complete relief on the merits. App. 2a-3a. That claim is wrong for three reasons. First, the primary relief sought in CREW's complaint is for a declaratory judgment that DOGE is an agency subject to FOIA and the FRA. D. Ct. Doc. 1, at 34 (Feb. 20, 2025). That relief would subject DOGE to FOIA and the FRA on a forward-going basis—relief far broader than the mere disclosure of documents responsive to CREW's discovery and FOIA requests. In identical circumstances, the D.C. Circuit previously held that the discovery did "not itself provide the relief sought in the complaint" because the "ultimate relief plaintiffs" sought was "a declaration on whether [the Office of the Vice President's] classification policy is consistent with the [Presidential Records Act]—relief far beyond" the discovery ordered by the district court. *In re Cheney*, 544 F.3d at 314.

Second, the discovery will provide CREW no relief on its FRA claim seeking to initiate an enforcement action to recover unlawfully destroyed federal records. *See* D. Ct. Doc. 1, at 34. Finally, the discovery order does not cover all documents sought in CREW's FOIA request. The discovery seeks more limited records on DOGE's composition and communications, while CREW's FOIA request seeks memoranda, directives, and policies regarding DOGE operations, ethics pledges and waivers, financial disclosures, and a larger set of communications within DOGE and with federal agencies. *Compare* Supp. App. 75a-95a, *with* Supp. App. 55a-64a.

C. The government cannot show a reasonable probability of obtaining certiorari.

The government suggests that this case will ultimately be worthy of certiorari because the court of appeals "resolved [an] 'important federal question in a way that conflicts with relevant decisions of this Court,'" Appl. 31 (quoting Sup. Ct. R. 10(c)), and because the discovery order "so far departs from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's supervisory power," Appl. 32 (quoting Sup. Ct. R. 10(a)). Neither contention is true, and the Court does not disturb a court of appeals decision denying mandamus relief unless it is "beyond peradventure clear" that the lower court erred. *Interstate Com. Comm'n.*, 294 U.S. at 63.[8] This case does not meet that high bar for several reasons.

First, for the reasons discussed *supra* Part I.A.1, the government mischaracterizes the governing precedents on determining EOP units' agency status. The government has at most identified a purported "misapplication of a properly stated rule of law," Sup. Ct. R. 10, which is insufficient to grant certiorari.

Second, to grant certiorari on the government's separation of powers argument, the Court would need to excuse its forfeiture of that issue. *See* App. 2a; *supra* Part I.A.2.i. Yet foregoing development of that issue in the lower courts would make "appellate consideration" of that question "less informed and less complete." *Freytag*, 501 U.S. at 900 (Scalia, J., concurring in part).

[8] This Court has previously denied certiorari in similar contexts. *See, e.g.*, *In Re Warren Petersen*, No. 24-219 (U.S. Nov. 4, 2024) (denying mandamus regarding deposition of state legislators); *Judicial Watch, Inc. v. Clinton*, 141 S.Ct. 1740 (2021) (denying mandamus regarding deposition of former Secretary of State); *Armstrong v. EOP*, 520 U.S. 1239 (1997) (denying mandamus as to whether the NSC is an "agency" under the Federal Records Act).

Third, there is no conflict with this Court's decisions or the decision of any other court of appeals. The issues raised in this application have generated no opinion from any court of appeals other than the D.C. Circuit. Defendants wrongly claim that the discovery order here is in "tension" with *Main Street*. Appl. 31-32 (citing *Main St.*, 811 F.3d at 543-44). That is not true: *Main Street* explicitly adopted the D.C. Circuit's functional approach from *Soucie*, s*ee Main St.*, 811 F.3d at 547-49, and did not hold that discovery concerning EOP components' agency status is *per se* inappropriate. *Id.* Rather, the Second Circuit held that the district court did not abuse its discretion in denying that plaintiff's alternative request for discovery before it granted a motion to dismiss on the ground that the plaintiff had failed to plausibly allege that the NSC was an agency subject to FOIA. *See id.* Here, by contrast, the district court deemed CREW's arguments about DOGE's agency status more than plausible; in issuing a preliminary injunction it held that CREW was likely to succeed on the merits of that claim, and later exercised its broad discretion to order limited discovery on that question. *Main Street* is therefore inapposite.

Fourth, the discovery order does not "depart from the accepted and usual course of judicial proceedings." Appl. 32 (quoting Sup. Ct. R. 10(a)). Far from it, the lower courts' approval of discovery conformed with several circuit and district court cases. *See* App. 3a (citing cases); App. 8a (same).

Fifth, to the extent the government intends to seek certiorari on the underlying merits question of whether DOGE exercises "substantial independent authority" and is thus an agency under FOIA, the present posture makes this case a poor vehicle for

the Court's review. No court below has rendered final judgment on that question. The government did not brief the issue when opposing CREW's preliminary injunction motion, *see* Supp. App. 41a, 43a, and it did not appeal the preliminary injunction. Instead, the question before the court of appeals was only whether the district court committed "clear abuse of discretion" in ordering discovery so that it could decide the question of DOGE's agency status in the first instance. App. 3a (quoting *Cheney*, 542 U.S. at 380).

Finally, even if the government raises questions worthy of certiorari at this juncture, 28 U.S.C. § 2101(f) authorizes this Court to "stay[]" the "execution and enforcement" of "final judgments" only. Because there is no final judgment from the district court, the Court lacks jurisdiction to issue a stay except pursuant to its mandamus authority under 28 U.S.C. § 1651(a), which fails for reasons discussed *supra* Part I.A & I.B.

II. The government fails to show irreparable harm.

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken*, 556 U.S. at 433 (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). Nor is "simply showing some possibility of irreparable injury" sufficient to justify one. *Id.* (internal quotation marks omitted). The government's case for irreparable harm fails for the same reasons the court of appeals unanimously held that compliance with the discovery order provided the government with adequate relief and denied the government's first petition for mandamus. *Supra* Part I.B. Namely, the conventional discovery process is wholly adequate to avoid the government's claimed harm, the government's sweeping and premature burden

objections do not render that standard process inadequate, and the discovery order falls far short of providing CREW full relief on the merits. *Supra* Part I.B. *Cheney*'s special considerations for the "Office of the President" do not apply to DOGE, *supra* Part I.B, and the government offers no theory by which the mere burden of responding to modest discovery itself constitutes irreparable harm.

Further, any burden associated with the expedited nature of the ordered discovery is a problem of the government's own making and a consequence of its actions to resolve this case on a highly expedited timeframe. *Supra* Part I.B. The district court's discovery order was an inevitable result of the government's litigation strategy. *Supra* Part I.B. Even in opposing discovery, the government made the strategic choice not to propose more limited discovery or, if the district court granted CREW's motion, an alternative discovery schedule. *See generally* Supp. App. 96a-116a. A litigant is not entitled to the extraordinary remedy of a stay to prevent such self-inflicted harm.

III. The equities weigh heavily against granting a stay.

The balance of the "relative harms to applicant and respondent, as well as the interests of the public at large" weigh strongly against granting a stay. *Barnes*, 501 U.S. at 1305 (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980)).

The government's application comes more than 10 weeks after the district court granted a preliminary injunction requiring DOGE to begin processing CREW's FOIA request, which the government did not appeal. *See* Supp. App. 37a. That order was issued to address CREW's and the public's urgent need for information about DOGE's "unprecedented" operations as it continues to exercise its "substantial

authority over vast swathes of the federal government" with "unusual secrecy." Supp. App. 8a, 25a, 34a, 36a. And yet, production of documents is stalled until the resolution of the government's motion for summary judgment, which the government continues to delay. *Supra* Part I.A.1.ii.

The government's application is the latest step in a pattern of delay. The district court has already denied a baseless motion for reconsideration and a stay that resulted in a one week delay in DOGE's disclosure of the estimated volume of documents responsive to CREW's FOIA request, Supp. App. 54a, and had to clarify an already clear order to DOGE so that it actually processes documents to be produced when the Court denies its summary judgment motion. *See* D. Ct. Min. Order (Apr. 10, 2025) ("[T]he Court ordered USDS to begin processing records because 'if USDS does not even begin processing the request until after the question of whether it is subject to FOIA is litigated on the merits, a decision in CREW's favor will likely be followed by additional processing delays' * * * USDS, along with OMB, must begin processing responsive records now."). The Court should not allow the government to continue to deny CREW the injunctive relief it won 10 weeks ago, this time by recycling a failed mandamus petition to quash a discovery order it knew would result from prematurely seeking summary judgment. *Supra* 7-8. The government has raised a fact-intensive legal issue supported by unreliable evidence, did so in a manner it was explicitly told would lead to discovery, and now needs to respond.

The government's tactics are contrary not only to the public interests outlined in the preliminary injunction, but also those embodied by FOIA. *See Dep't of Just. v.*

Reps. Comm. For Freedom of the Press, 489 U.S. 749, 773 (1989) (describing "citizens' right to be informed about 'what their government is up to'").

CONCLUSION

The government's stay application should be denied.

Respectfully submitted,

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