No. 24A1122

In the Supreme Court of the United States

U.S. DOGE SERVICE, ET AL., APPLICANTS

v.

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON

REPLY IN SUPPORT OF APPLICATION TO STAY THE ORDERS OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA PENDING CERTIORARI OR MANDAMUS

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Presidential advisory bodies are not "agenc[ies]" subject to the Freedom of Information Act (FOIA) when they are responsible for making recommendations, not exercising significant independent powers of their own. See 5 U.S.C. 552; *Meyer* v. *Bush*, 981 F.2d 1288, 1292 (D.C. Cir. 1993). Congress did not exclude presidential advisory bodies from FOIA's disclosure requirements only to allow district courts to circumvent that exclusion by ordering extensive discovery into what kind of recommendations such bodies make and how closely those recommendations are followed, let alone by requiring those bodies' heads to spend time in depositions. Presidential advisors "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). Otherwise "the White House staff would be an agency," *id.* at 1293, presidential advisors would be deluged with FOIA requests, and candid confidences within the Executive Office of the President would be at constant risk of disclosure.

Those are not just basic tenets of FOIA. Those separation-of-powers concerns have prompted this Court to hold more broadly that discovery against presidential advisory bodies is reserved for last-resort, extraordinary circumstances and must be as minimally intrusive as possible. *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 388-390 (2004). When district courts order discovery that defies those bedrock principles, this Court's intervention—whether in the form of mandamus or certiorari—is abundantly warranted. If district courts can order USDS—a presidential advisory body created by the President to give recommendations and recommendations only—to turn over large categories of its recommendations and subject its head to a deposition just to figure out whether USDS is in fact an advisory body that gives recommendations, then no presidential advisory body is safe.

Certainly, respondent offers no limiting principle. Respondent downplays (Opp. 1) the discovery here as "narrowly-tailored," accusing the government of "improperly seeking a merits adjudication via review of a discovery order." Respondent insists that request-specific assertions of privilege will afford adequate protections for presidential advisors, Opp. 30-31, and treats the district court's sweeping, aggressively paced order as the product of the government's litigation choices, Opp. 3. In respondent's view, the separation of powers has nothing to say about such intrusions, so long as the discovery does not seek advice given directly to the President or reach the Vice President and the White House Office.

This Court rejected most of those arguments in *Cheney*; the rest are unconvincing. They fail to justify respondent's novel position or to disprove the lack of any discernible harm to respondent if the district court's sweeping discovery order is stayed. Contrary to respondent's portrayals, the D.C. Circuit does not routinely authorize fact-specific discovery requests into what presidential advisors' day-to-day ad-

vice entails. This Court should not allow lower courts to order intrusive discovery targeting every presidential advisor whose functions are defined by statute or executive order but whose persuasive influence purportedly sways agencies.

A. The Government Is Likely To Succeed On The Merits

The district court's discovery order constitutes a "clear abuse of discretion" as to which mandamus is warranted. *Cheney*, 542 U.S. at 380 (citation omitted). The order turns the threshold question whether USDS is even subject to FOIA-disclosure obligations into a vehicle to compel the same sorts of disclosures (and more) through discovery. That order violates the separation of powers by compromising the confidentiality of a presidential advisory body's innermost deliberations and activities. And the order imposes patently unnecessary burdens on presidential advisors.

1. The discovery order circumvents FOIA's exclusion of presidential advisory bodies

The district court ordered broad discovery into USDS operations based on the mistaken premise that a presidential advisory body qualifies as a FOIA "agency" whenever its advice translates into significant practical influence. Appl. App. 8a, 14a, 16a. But this Court has long held that "the term 'agency' under the FOIA" does "not include[]" "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). Applying that holding, courts simply ask whether an entity has been conferred significant independent *authority* that goes beyond advising—an inquiry into the functions the agency is legally empowered to undertake. See Appl. 13-14. Courts assess those questions by interpreting applicable law. See, *e.g.*, *Main St. Legal Servs., Inc.* v. *National Sec. Council*, 811 F.3d 542, 543-544 (2d Cir. 2016) ("[W]e construe the 'agency' provision of the FOIA, the 'function' provisions of the [National

Security Council's] statute, * * * among other available legal sources, and we conclude that the NSC is not an agency subject to the FOIA.").[1]

The district court thus clearly abused its discretion by instead asking whether USDS exerts practical influence, then leveraging that test to perversely order USDS to turn over much of the material at issue in respondent's FOIA requests—plus additional discovery in the form of a deposition of USDS's head and requests regarding subjects like data access and agreements with agencies, see Appl. 30—just to decide whether USDS is indeed a presidential advisory body exempt from FOIA. That cart-before-the-horse approach triggers all the "serious separation-of-powers concerns" that would arise from "mandating disclosure"—concerns that FOIA's "agency" definition is supposed to screen out. *Judicial Watch, Inc.* v. *U.S. Secret Serv.*, 726 F.3d 208, 216 (D.C. Cir. 2013).

Respondent accuses the government (Opp. 1, 14, 36) of confusing the threshold discovery question with the ultimate merits. But respondent and the courts below primarily justified the purported need for discovery by contending that FOIA's application depends on factual development as to the extent of an advisory body's *practical* influence, not its functional legal authority. Appl. App. 2a, 8a-9a; D. Ct. Doc. 27, at 1-2 (Mar. 27, 2025). It is thus respondent and the lower courts who conflated the merits and discovery; the overbroad order stems directly from that error. Appl. 13-19.

When it comes to *why* FOIA would allow roving discovery to address threshold questions about agency status, respondent notably does not defend the district court's reasoning. The district court mischaracterized isolated provisions in executive orders

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[1] Respondent calls *Kissinger* "inapposite," Opp. 18-20, yet respondent's authorities invoke *Kissinger*'s holding that FOIA's definition of "agency" excludes units in the Executive Office whose sole function is advising the President. See, *e.g.*, *Meyer*, 981 F.2d at 1292; *Judicial Watch, Inc.* v. *U.S. Secret Service*, 726 F.3d 208, 216 (D.C. Cir. 2013); *Main St. Legal Servs., Inc.*, 811 F.3d at 549.

as ambiguous to justify inquiring into USDS's practical authority. Appl. App. 9a-10a. Respondent does not contest the implausibility of that reading. That should end the matter. When the executive orders (or other sources of law) defining a body's functions authorize solely advisory functions, and there is no contention that the President has authorized any other functions any other way, courts take those authorizations at their word. See Appl. 15-16.[2]

Respondent instead reads "[l]ongstanding" D.C. Circuit precedent to mean that whether USDS is a presidential advisory body exempt from FOIA turns on a "fact-specific analysis" into the entity's actual activities and operations. Opp. 28; see Opp. 15-23. Under that approach, an entity's "agency" status could apparently toggle on or off as the influence of its particular leadership waxes or wanes. An entity that is especially influential in one administration would cease to be an "agency" if its influence waned in a later administration. Respondent misreads the D.C. Circuit's cases, which have not required that unworkable approach and do not define whether an agency exercises "substantial independent authority" by assessing day-to-day soft power. See *Meyer*, 981 F.2d at 1292.

For example, respondent misunderstands (Opp. 16) references to an entity's "functions" in *Soucie* v. *David*, 448 F.2d 1067, 1071, 1073 (D.C. Cir. 1971), where the D.C. Circuit held the Office of Science and Technology was an agency under FOIA by interpreting the "executive reorganization plan" that created it, *id.* at 1073. The plan

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[2] Accord, *e.g.*, *Meyer*, 981 F.2d at 1289 (holding that President Reagan's "Task Force on Regulatory Relief" was not an "agency"); *Rushforth* v. *Council of Econ. Advisers*, 762 F.2d 1038, 1041-43 (D.C. Cir. 1985) (similar for Council of Economic Advisers where "enumerated statutory duties [were] directed at providing such advice and assistance to the President"); *Sweetland* v. *Walters*, 60 F.3d 852, 854 (D.C. Cir. 1995) (per curiam) (similar for the Executive Residence where statutory "provisions [did] not empower the Executive Residence staff" with independent authority); 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").

had assigned that Office a "function of evaluating federal programs" transferred from a different entity and based on Congress's "own broad power of inquiry." *Id.* at 1074-1075. "By virtue of [that] independent function of evaluating federal programs," the court deemed the Office "an agency subject to * * * the Freedom of Information Act." *Id.* at 1075. By "function," *Soucie* thus meant *legally assigned* function.

Respondent's reading (Opp. 16) of *Cotton* v. *Heyman*, 63 F.3d 1115 (D.C. Cir. 1995), is similarly flawed. *Cotton* addressed whether the Smithsonian's "position regarding its agency status under FOIA is reasonable" by considering the different functions assigned to the Smithsonian under "federal law." *Id.* at 1122-1123. *Cotton* described the agency-status test under FOIA as a "functionalist framework" in which the "important consideration" is "whether the relevant entity had 'any authority in law to make decisions.'" *Id.* at 1122 (citation omitted). That language in no way condoned a factual investigation into persuasive influence. Again, an advisory body's legally assigned "function" is what controls.

So too, *Meyer* considered whether President Reagan's Task Force on Regulatory Relief was an agency by asking whether it was advisory or instead "substantially independent" based on the group's "[p]roximity" to the President, its "delegation" of authority, and its "structure." 981 F.2d at 1293. After "[a] careful reading of the Executive Order[s]," the D.C. Circuit held that the Task Force was not an agency because its members were "the functional equivalents of assistants to the President." *Id.* at 1294. The court rejected the plaintiff's "proffer of press releases—which [were] not reliable evidence" because there was "no indication that the Task Force, *qua* Task Force, directed anyone." *Ibid.* Far from investigating practical influence, the court emphasized that advisors "often give *ad hoc* directions to executive branch personnel," but that such directions do not trigger agency status. *Id.* at 1293-1294.

Respondent similarly portrays (Opp. 16-17) the D.C. Circuit as having embraced discovery for the threshold FOIA inquiry into agency status. But neither of the cited cases decided whether discovery was necessary to resolve agency status. See *Armstrong* v. *Executive Office of the President*, 90 F.3d 553, 560-561 (D.C. Cir. 1996); *Citizens for Responsibility & Ethics in Washington* v. *Office of Admin.*, 566 F.3d 219, 224-225 (D.C. Cir. 2009). In *Armstrong*, discovery happened *before* the government raised FOIA's applicability. *Armstrong* v. *Executive Office of the President*, 877 F. Supp. 690, 696-697 & n.8 (D.D.C.1995). In the other case, the D.C. Circuit rejected CREW's request for discovery of "a variety of records, including documents disclosing * * * organizational structure." *Office of Admin.*, 566 F.3d at 225. As the Second Circuit has noted, those cases do not support "sweeping discovery" to assess whether FOIA applies. *Main St. Legal Servs.*, 811 F.3d at 567-568. And such "discovery into the complete scope of the [entity's] current powers and responsibilities" is inappropriate when a plaintiff's claims are "implausible" based on "publicly available materials." *Id.* at 567-568.

Respondent's other cases do not show the discovery here is "routine." Contra Opp. 32. One of those cases involved the Office of Science and Technology Policy, which the D.C. Circuit had already held to be an agency. See *Competitive Enter. Inst.* v. *Office of Sci. & Tech. Policy*, 185 F. Supp. 3d 26, 27 (D.D.C. 2016). The district court in another case granted discovery to determine a body's agency status under FOIA based in part on the government's failure to provide an affidavit confirming that no other legal authorities defined that body's functions. See *EPIC* v. *Office of Homeland Security*, No. 02-cv-00620, Doc. 11, at 9 (D.D.C. Dec. 26, 2002). And the recent district court decision granting expedited discovery against USDS under the Economy Act made many of the same errors present here. See *American Fed'n of*

Lab. & Congress of Indus. Orgs. v. *Department of Labor*, No. 25-cv-339, 2025 WL 1129202, at *1 (D.D.C. Mar. 19, 2025).

Elsewhere, respondent sometimes backs away (Opp. 20) from an influence-based practical test. But respondent insisted all the way below that discovery is necessary to assess USDS's "influence." Appl. App. 8a, 14a, 16a; D. Ct. Doc. 35, at 3, 16 (Apr. 10, 2025) (seeking discovery to uncover USDS's "influence" on federal agencies).

Respondent defends (Opp. 21) its discovery-heavy approach as necessary to avoid "giv[ing] the Executive free reign [*sic*] to insulate" executive-branch bodies "from critical transparency and accountability laws." But the government's test does not reflexively shield the Executive Office of the President. *Soucie* held that an Executive Office entity was an agency under that test. 448 F.2d at 1075; see *Pacific Legal Found.* v. *Council on Envtl. Quality*, 636 F.2d 1259, 1262-1263 (D.C. Cir. 1980) (Council on Environmental Quality is an agency). That test simply shields presidential advisory bodies from discovery—as FOIA requires—when their legal authority solely entails "advis[ing] and assist[ing] the President." *Kissinger*, 445 U.S. at 156.

2. The discovery order contravenes the separation of powers

This discovery order compels far-reaching discovery into a body within the Executive Office of the President—where the President turns for confidential, candid advice and aid in crafting his agenda—and thus significantly aggravates the unlawfulness of the order. As this Court held in *Cheney*, "the public interest" requires courts to "protect[] the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." 542 U.S. at 382 (quoting *United States* v. *Nixon*, 418 U.S. 683, 715 (1974)); Appl. 20-24.

Respondent's rejoinders are meritless. Respondent invokes district courts' ordinary "discretion" in discovery matters, Opp. 21, but that discretion does not extend

to riding roughshod over the separation of powers to intrude into what particular presidential advisory bodies recommend to which agencies and to what effect.

Respondent describes (Opp. 24-26) any separation-of-powers objections as "forfeited." But the government argued in district court that no discovery was appropriate, that the discovery sought was "highly burdensome" and overbroad, and that, under *Cheney*, "discovery on the Executive Office of the President should be fashioned to be as unobtrusive as possible." D. Ct. Doc. 34, at 1-2, 8-10 (Apr. 8, 2025); see, *e.g.*, *id.* at 10-12 (addressing Gleason's deposition); *id* at 17-19 (addressing requests for recommendations). Those are the same basic points that the government has raised before the court of appeals and this Court. See Gov't C.A. Mandamus Pet. 1-5. Respondent faults the government for only quoting *Cheney*'s insistence on narrow, unobtrusive discovery to avoid burdening the Executive Office of the President in lieu of "the term 'separation of powers.'" Opp. 24. But respondent never explains how invoking the leading case about separation-of-powers concerns arising from such discovery fails to make a separation-of-powers objection.[3]

Notably, respondent does not deny that the discovery in this case could chill the "candor and objectivity" of presidential advisors within USDS. *Nixon*, 418 U.S. at 706; Appl. 21-22. Instead, respondent remarkably maintains (Opp. 27) that sepa-

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[3] Respondent's inconsistent assertions (Opp. 25) that the government failed to oppose discovery writ large while also failing to request narrower discovery are incorrect. The government argued that, under *Cheney*, discovery should be "as unobtrusive as possible," and also that "there is no need for discovery" at all. D. Ct. Doc. 34, at 1, 8. The government added that, "even if" the district court "were to order some discovery," it should be narrowed to omit the most "overly burdensome" aspects. *Id.* at 8-21. The government did not "concede[]" that a deposition under Federal Rule of Civil Procedure 30(b)(6) would be appropriate, contra Opp. 35. Rather, the government argued that *no* depositions were appropriate, but "*if* the [district court] conclude[d] that depositions [were] needed," "Defendants [would] not object to * * * a single 30(b)(6) deposition" rather than a deposition of USDS Administrator Gleason. D. Ct. Doc. 34, at 10 (emphasis in original).

ration-of-powers concerns "do not apply." But USDS reports to the President's Chief of Staff and is charged with advising the President and federal agencies on some of the administration's highest priorities. Wide-ranging, judicially ordered discovery into those communications obviously raises separation-of-powers concerns about interfering with core executive-branch activities.

Respondent seeks (Opp. 27) to limit *Cheney* to discovery that targets "the President, Vice President, or their immediate staff." But *Cheney*'s principles regarding the "special considerations" owed to "the Executive Branch's interests" in the context of discovery are not so narrow. 542 U.S. at 385. While *Cheney* emphasized the intrusion against the Vice President in that case, *id.* at 381, the Court disapproved of discovery against the advisory body as a whole, *id.* at 387-388. *Cheney* also refutes respondent's attempt (Opp. 27 n.6) to limit this Court's other precedents on the conduct of litigation against the Chief Executive, since it explains that those precedents establish broader principles. 542 U.S. at 385 (discussing *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), and *Clinton* v. *Jones*, 520 U.S. 681 (1997)).

Respondent contends (Opp. 27) that USDS is not part of "the Office of the President" that *Cheney* described. But *Cheney* concerned, as here, a body "established to give advice and make policy recommendations to the President," 542 U.S. at 372, that was located "within the Executive Office of the President," *In re Cheney*, 406 F.3d 723, 725 (D.C. Cir. 2005). The Court did not, as respondent suggests (Opp. 27), use the shortened phrase "Office of the President" to refer to the "White House Office"—an entity that does not include either the Vice President or the agency heads who served on the task force at issue. See The United States Government Manual, https://perma.cc/4NT5-467E. Rather, the Court "collectively referred" to all "units in the Executive Office whose sole function is to advise and assist the President" as "the

Office of the President," as other courts sometimes have. *Judicial Watch*, 726 F.3d at 216 (quotation marks omitted); see also *Kissinger*, 445 U.S. at 156 (using the term "Office of the President" to include advisors in the Executive Office of the President).

Respondent also distinguishes *Cheney* based on its posture: there, the government had moved to dismiss the case on a "threshold ground." Opp. 28. But here too, after the district court's preliminary injunction, the government moved for summary judgment to resolve, as a matter of law, the dispositive threshold question of whether USDS is subject to FOIA. And, as in *Cheney*, that "threshold groun[d]" for decision "would obviate the need for intrusive discovery." Opp. 28 (citation omitted).

Respondent seeks (Opp. 28) to distinguish this case from *Cheney* because "the government did not raise" a threshold argument in a "motion to dismiss" and "introduce[d] contradictory evidence on [USDS's] agency status." But the government's summary-judgment motion here presented a clean legal argument—that FOIA is inapplicable since USDS is not an agency—which the district court could decide without discovery by interpreting USDS's authorities under "settled" law. See D. Ct. Doc. 24-1, at 1 (Mar. 19, 2025). And to describe the government as submitting "evidence" (Opp. 28) on that legal question is an overstatement; the government filed a declaration from the USDS Administrator generally describing USDS and the executive orders that assigned it advisory responsibilities. See D. Ct. Doc. 24-2.

Respondent similarly errs in contending (Opp. 29) that "[t]his case's posture is materially identical" to the D.C. Circuit's 2008 decision in *In re Cheney*, 544 F.3d 311. There, the Office of the Vice President had "fully developed its factual argument that it was complying with the" Presidential Records Act, but raised a threshold legal argument that the factual dispute was irrelevant when the Office moved for a stay of discovery. *Id.* at 313-314. The D.C. Circuit partially denied mandamus as to deposi-

tions "intended to allow follow-up questioning on facts" that the Office had "itself put in evidence." *Id.* at 314. But here, the government raised a threshold legal argument *before* discovery, and put no facts at issue in doing so.

Because this case concerns a presidential advisory body in the Executive Office of the President, constitutional concerns required the district court to tread carefully. Instead, the district court's order gives respondent much of the information sought under its FOIA request (and more), before any determination that USDS is even subject to FOIA. Appl. 23. The discovery order demands extensive information on so-called "directives" and recommendations provided to federal agencies on a slew of topics, as well as internal "announcements" to USDS employees. Appl. App. 25a, 29a. Those requests would reveal much of what respondent's FOIA suit requests: "[a]ll communications between USDS personnel and personnel of any federal agency" and "[a]ll communications between the USDS Administrator and USDS staff." D. Ct. Doc. 2-6, at 2-3 (Feb. 20, 2025).

Respondent objects (Opp. 34) that it may submit more FOIA requests if it prevails, and that respondent's FOIA requests are in some respects broader (such as by seeking financial disclosures or ethics pledges by USDS employees, D. Ct. Doc. 2-6, at 2). Those contentions merely underscore the separation-of-powers problem. See Opp. 34. The discovery's breadth intrudes into the most sensitive aspects of a presidential advisory body's work and will hamper the "candid" communications necessary in the upper echelons of the Executive Branch. See *Nixon*, 418 U.S. at 708.

3. The manifold burdens that this intrusive discovery order imposes on presidential advisors warrant relief

A stay is especially warranted because of the order's clear burdens on the government, lack of tailoring, and failure to consider "other avenues." *Cheney*, 542 U.S.

at 390-391. The order not only seeks multitudes of internal details (such as USDS's employees, hiring, timesheets, agreements with agencies, and access of certain data), but requires the distraction of deposing Administrator Gleason and invasive requests for USDS to divulge specific advice it has provided on numerous topics. Appl. 25-31.

Respondent dismisses the government as alleging only "generalized burden[s]," Opp. 31, but ignores the severe burdens that the discovery order imposes. Requiring disclosure of USDS's "recommendations," for example, targets the heartland of a presidential advisory body's deliberative process—yet is irrelevant to the legal question whether FOIA applies. That part of the discovery order alone threatens a logistical morass in apparently requiring USDS to compile, review, and assess for privileges countless ad-hoc discussions over the past months. This Court has already held that the "onus" of raising privileges presents a constitutionally significant burden that the Executive Branch is not required to bear. *Cheney*, 542 U.S. at 388. Yet respondent passes the buck to the district court, stating that "the district court in its discretion deemed this information * * * necessary to ascertain the true nature of [USDS's] authority." Appl. 33. But a "recommendation" is, by definition, advisory. Burdensome discovery into USDS's recommendations will just confirm that USDS supplies advice—while impeding USDS in discharging that function. Appl. 25-27.

Respondent also points (Opp. 33) to the government website for the Department of Government Efficiency (DOGE) as a whole, which reports agency actions that further cost-cutting policy initiatives. Respondent argues that disclosing USDS's recommendations "should pose little burden" because that website has "already compiled" the relevant information. *Ibid.* If respondent truly believes the government can comply with the discovery request related to recommendations to cancel grants merely by citing the website, then the government agrees the burden is somewhat

reduced, at least as to that request. But on its face the discovery order involves a vastly greater burden, compelling USDS to compile and raise privilege regarding all confidential advisory discussions it has had on multiple topics, including terminations of personnel, grants, and contracts.

As to Administrator Gleason's deposition, respondent argues (Opp. 32) that the government has not "identif[ied] any specific duties that would be disrupted by sitting for one deposition." But it is respondent who must demonstrate "extraordinary circumstances" warranting a deposition of a high-level advisor. See, *e.g.*, *Simplex Time Recorder Co.* v. *Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). Respondent says (Opp. 32) that "basic fairness" requires a deposition because Administrator Gleason filed two materially similar declarations in district court. But as respondent told the district court, the declaration was "cursory" and the government "only cite[d]" it "a handful of times," mainly to refer to the "executive orders" and not to prove disputed facts. D. Ct. Doc. 27, at 2, 18 n.3; see Appl. 27-28. Respondent contends that the district court found the declaration to be "called into question" by the record, Opp. 23, but that rested on the court's mistaken reliance on "ambiguities" and media accounts to second-guess the operative legal text of the executive orders. See Appl. 8.[4]

Respondent argues (Opp. 30-31) that the government has an alternative remedy because it can invoke "particularized objections" and privileges. But "the onus of" raising privilege issues is an impermissible burden under *Cheney*, not a fix. 542 U.S. at 388. Respondent downplays (Opp. 30) the government's burdens because the discovery excludes communications with "the White House Office" and the President.

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[4] Respondent's assertion (Opp. 32) that the government "forfeited" those objections lacks merit. The government raised the same arguments in the court of appeals, see Gov't C.A. Mandamus Pet. 32-33, and "strongly object[ed]" to Administrator Gleason's deposition in the district court, D. Ct. Doc. 34, at 9 (Apr. 8, 2025); see *id.* at 9-11.

But requiring a presidential advisory body to segregate its confidential communications by sender or recipient, with some exclusions mixed in, only compounds the burdens while overlooking the need for broader confidentiality across the rest of the Executive Branch.

B. The Other Factors Support Relief

1. ***Certworthiness.*** This Court has repeatedly intervened when lower-court discovery orders have threatened the workings of the Executive Branch and trampled critical confidentiality protections. Appl. 32-33. Respondent's counter-arguments (Opp. 35-36) incorrectly assume that respondent is right on the merits and that the discovery here is vastly more cabined. In respondent's telling, virtually no discovery order governing the Executive Office of the President would warrant relief, no matter how egregiously intrusive or disruptive; any discovery order could be passed off as too *sui generis*, agency-specific, or litigation-choice-driven to merit this Court's notice. The only limit would be the creativity of plaintiffs' FOIA requests, and that is no way for the Executive Office of the President to function.

Respondent throws in a jurisdictional objection, claiming that no final judgment exists "on the underlying merits question." Opp. 36. That will typically be true of discovery cases, but it does not preclude this Court's review of discovery orders that constitute a "clear abuse of discretion." *Cheney*, 542 U.S. at 380 (citation omitted). Otherwise such questions could never be reviewed.[5]

2. ***Irreparable Harm.*** Absent a stay, the discovery order will inflict obvious, irreparable harm on the government. USDS would be forced to divert attention

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[5] Respondent's argument (Opp. 37) that 28 U.S.C. 2101(f) would not authorize a stay of a discovery order is beside the point. As respondent acknowledges, the Court has mandamus authority under 28 U.S.C. 1651(a) to stay such orders and has exercised that authority in the past. *Ibid.*; see *id.* at 22.

and resources to responding to copious requests, undercutting its time-sensitive efforts to combat government waste and fraud. Vast swaths of USDS recommendations would have to be gathered and potentially disclosed, compromising presidential advisors' ability to give and receive candid, confidential advice. Those are quintessential irreparable harms, not just "some possibility of irreparable injury." Opp. 37 (citation omitted). And, as noted, pp. 14-15, *supra*, *Cheney* forecloses respondent's claim (Opp. 37) that "the conventional discovery process is wholly adequate to avoid" those harms.

Respondent faults (Opp. 38, 39) the government's litigation strategy and expedition for the ensuing discovery burdens. But the government's effort "to resolve this case" by swiftly filing a summary-judgment motion hardly invited the discovery order's burdens, contra Opp. 38. The government raised purely legal arguments about FOIA's threshold application so as to resolve the case *without* discovery. See D. Ct. Doc. 24-1, at 1. Contrary to respondent's assertion, when respondent sought discovery as to that motion, the government both opposed discovery as a whole *and* sought in the alternative to "narrow" discovery, including to exclude USDS recommendations and Administrator Gleason's deposition, see D. Ct. Doc. 34, at 8-21, but "[i]ts arguments were ignored." *Cheney*, 542 U.S. at 388.[6]

3. ***Remaining Equities.*** Finally, the public interest and remaining equities likewise favor a stay of the discovery order. Whereas the government faces irremediable intrusions on sensitive activities of a presidential advisory body, respondent

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[6] Respondent suggests (Opp. 12) that the government should have moved "to stay" the district court's scheduling order after the court of appeals denied mandamus. That is incorrect. That scheduling order merely reset the compliance deadlines at respondent's suggestion after the court of appeals denied mandamus. See Appl. App. 32a-33a. In any event, the government conveyed to the district court that discovery should not "go forward before" this Court's "resolution of its forthcoming application for relief from discovery." D. Ct. Doc. 42, at 1 (May 19, 2025).

has little or no need to obtain this discovery right now. The discovery here invades the same constitutionally protected confidentiality that FOIA preserves. And discovery will not even be relevant to the government's pure legal arguments on summary judgment—namely, that USDS is not vested with independent authority under the text of governing executive orders and cannot be a FOIA "agency." D. Ct. Doc. 24-1.

Respondent raises procedural quibbles (Opp. 38-39), objecting that it obtained injunctive relief ten weeks ago yet has still not been able to obtain discovery. But as respondent acknowledges (Opp. 38), that preliminary injunction required only that USDS "process" respondent's FOIA requests during this litigation, D. Ct. Doc. 18, at 37 (Mar. 10, 2025); it did not require production of information. And in granting that injunction, the district court contemplated that the "[t]he time it would take to litigate that question on the merits" would be lengthy. *Id.* at 31.

Finally, respondent blames the government for a "pattern of delay," yet elsewhere condemns the government for wanting "to resolve this case on a highly expedited timeframe" at summary judgment. Opp. 38-39. The government sought reconsideration and filed a motion for summary judgment to resolve this case without discovery. When respondent nonetheless served its broad discovery requests, the government opposed them all and alternatively asked the district court for less burdensome options. The district court then "ignored" the government's repeated requests for a more cautious approach to discovery tethered to the arguments at issue despite the "real burden[s]" placed upon presidential advisors. See *Cheney*, 542 U.S. at 388-89. Respondent notes that "10 weeks" (Opp. 38) have elapsed since the district court granted the preliminary injunction (including almost four during which an administrative stay was in place). That only underscores the needless rush to discovery despite pending arguments to resolve the case without it.

* * *

This Court should stay the district court's discovery order and subsequent scheduling order. In the alternative, the Court could construe the 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.

Respectfully submitted.

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Solicitor General

MAY 2025