No. 25-1103

In the Supreme Court of the United States

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

v.

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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This Court has already intervened once in this case to correct an intrusive discovery order that ignored the separation-of-powers concerns inherent in probing high-level executive-branch communications. Yet on remand, the court of appeals largely reinstated that discovery order in two sentences of cursory analysis that again sidestepped the separation of powers. Indeed, the court did not even mention, let alone justify, its authorizing the deposition of a high-level presidential advisor, U.S. DOGE Service (USDS) Administrator Amy Gleason. That contravention of this Court's decision and the separation of powers warrants summary reversal or, if necessary, plenary review.

If the Court does not summarily reverse, it should also grant plenary review to resolve whether broad discovery is ever appropriate to determine if an advisory body in the Executive Office of the President is subject to the Freedom of Information Act (FOIA), 5 U.S.C. 552. Permitting discovery into sensitive presidential advice to determine whether that advice is exempt from FOIA would inflict the very separation-of-powers harms that the exemption is meant to avoid. Certiorari is particularly warranted to address those important separation-of-powers issues given the proliferation of similar lawsuits in the last year.

A. The Court Of Appeals Disregarded This Court's Remand Order And *Cheney*

1. In largely reinstating its prior decision, the court of appeals ignored the separation-of-powers concerns that this Court directed it to consider. Pet. 14-19. Respondent's contrary argument rests on an implausibly cramped reading of this Court's order.

This Court's prior decision made three key holdings: First, the discovery order was "not appropriately tailored" insofar as it required the disclosure of USDS recommendations. Pet. App. 1a. Second, whether an entity is subject to FOIA cannot turn on its "ability to persuade." *Ibid.* And third, "separation of powers concerns counsel judicial deference and restraint in the context of discovery regarding internal Executive Branch communications." *Ibid.*

Respondent reads (Br. in Opp. 18-20) the first holding to narrow the latter two, such that the court of appeals was free to ignore the separation of powers except with respect to respondent's now-withdrawn request for USDS recommendations. But this Court introduced its separation-of-powers holding with "[f]urthermore," signaling that it was making a new point. Pet. App. 1a.

Regardless, the separation of powers is not relevant solely to recommendations and irrelevant to everything else. "[S]pecial considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 385 (2004). Those interests apply to *all* of respondent's requests, which include other "internal Executive Branch communications," Pet. App. 1a, like USDS's "directives" to its employees, *id.* at 48a. It makes no logical sense to interpret this Court's order as invoking the separation of powers to reject one aspect of discovery while implicitly blessing the rest, notwithstanding those same separation-of-powers concerns.

The best reading of the Court's order is that it identified one particularly problematic aspect of the district court's decision—the disclosure of USDS's recommendations—while remanding for the court of appeals to "narrow" the rest of discovery "consistent with this order." Pet. App. 2a. Were this Court inclined to permit the remaining discovery, it would have had no reason to stay that discovery in its entirety. Pet. 19. Respondent does not address that point, treating this Court's order as facially incoherent with no logical connection between the scope of remand and the stay.

2. Because the court of appeals failed to consider the separation-of-powers principles articulated in *Cheney*, it unsurprisingly reached an incorrect result. Pet. 18-25.

a. Respondent rehashes (Br. in Opp. 22) the court of appeals' claim in its initial opinion that *Cheney* is irrelevant because the discovery here is purportedly more "modest." Pet. App. 9a. But this Court already rejected that argument by citing *Cheney* to counsel "judicial deference and restraint." *Id.* at 1a. The purported modesty of discovery might bear on whether it is sufficiently tailored to avoid an "unwarranted" intrusion on the separation of powers. See *Cheney*, 542 U.S. at 390. But here, as in *Cheney*, the D.C. Circuit erred by "fail[ing] to ask th[e] question" of whether discovery implicated the separation of powers in the first place. *Id.* at 391. That basic failure alone warrants summary reversal.

Respondent also seeks (Br. in Opp. 24-25) to distinguish *Cheney* on the theory that success on its FOIA claim would entitle it to some information not available via discovery. But here as in *Cheney*, discovery would give respondent "much more" than it could obtain on the merits, 542 U.S. at 388, including information about USDS's data access and a deposition of USDS's head. See Pet. App. 48a, 51a. While respondent highlights (Br. in Opp. 24-25) a handful of categories of information that it sought under FOIA but not in discovery, the substantial overlap between respondent's FOIA claim and its discovery requests confirms that those requests are "anything but appropriate." *Cheney*, 542 U.S. at 388; see Pet. 25.

b. The aspects of the discovery order that the court of appeals summarily reinstated confirm the separation-of-powers problem. Pet. 19-25.

Internal Communications. The court of appeals approved the disclosure of USDS's "directives," including to its own employees. Pet. App. 48a-49a. Revealing such "internal Executive Branch communications" plainly implicates the separation of powers. *Id.* at 1a.

Respondent does not deny the separation-of-powers implications but insists (Br. in Opp. 26) that such directives are "highly relevant to determining whether USDS exercised substantial independent authority." Even on that telling, respondent's request is overbroad because it encompasses USDS's directives to its own employees and directives from non-USDS DOGE Team members who report to agency leadership, not USDS. Those requests are irrelevant to whether *USDS* exercises substantial authority within the Executive Branch. USDS has already made clear that it has issued no binding directives to agencies because it lacks the legal authority to do so. Pet. 20. In continuing to demand that null set, respondent appears determined to obtain the very USDS recommendations that this Court already rejected and respondent now disclaims.

Respondent falsely suggests (Br. in Opp. 26) that the government acquiesced to disclosing directives below. The government said only that USDS could reaffirm that it issues no agency directives "[i]f required to do so," Gov't C.A. Resp. to Mot. for Summ. Disposition 14—underscoring the pointlessness of the discovery respondent demands. On remand, the government categorically opposed summary disposition and underscored that any order would need to address "separation of powers concerns." *Id.* at 15. And the government has consistently opposed any discovery in this litigation. See Gov't C.A. Mandamus Pet. 4 ("No discovery is required."); D. Ct. Doc. 34, at 8 (Apr. 8, 2025) ("USDS maintains that no discovery is necessary or appropriate.").

Data Access. The court of appeals also approved discovery into USDS's access to classified or sensitive systems, even though such information is clearly privileged and irrelevant to whether USDS is subject to FOIA. Pet. 21-22. Respondent implies (Br. in Opp. 23, 27) that the discovery order reaches only data access "over the objections of agency employees," which, respondent says, would be "a telling indication" of USDS's "independent authority." Respondent does not explain why staff-level disagreements with the President's decision to grant USDS such access would prove that USDS's functions go beyond the purely advisory. Regardless, the discovery order covers "any" access, whether or not anyone objected. Pet. App. 43a-44a. Respondent's need to rewrite the order underscores its breadth and the court of appeals' failure to undertake the required narrowing.

Respondent also accuses (Br. in Opp. 27) the government of forfeiting this objection by focusing on the burdens of discovery, not the separation of powers specifically. But the government made clear that any "burdensome discovery" would transgress the "separation of powers." C.A. Resp. to Mot. for Summ. Disposition 15. Regardless, parties forfeit claims, not arguments, and the government's top-line separation-of-powers objection is clearly preserved. See p. 12, *infra*.

Gleason Deposition. Perhaps most dramatically, the court of appeals summarily approved the deposition of a high-level presidential advisor—USDS Administrator Amy Gleason—without even acknowledging that it was doing so. Pet. 22-24. Other courts of appeals have recently blocked similar compelled testimony by high-ranking officials, and the same result should have followed here. See *In re Musk*, 169 F.4th 445 (4th Cir. 2026); *In re United States*, No. 2026-144 (Fed. Cir. June 4, 2026) (en banc) (per curiam).

Respondent dismisses (Br. in Opp. 30 n.6) *Musk* in a footnote on the basis that, here, the government provided affidavits from Administrator Gleason regarding USDS's authority. As explained (Pet. 8, 23-24), those affidavits largely summarize the executive orders establishing USDS. Respondent has not identified the kind of "extraordinary circumstances" that might justify the deposition of a "high-ranking government official[]." *Musk*, 169 F.4th at 448.

Respondent claims that Gleason's affidavits were the only source for the "key assertions" that "Elon Musk did 'not work at USDS,' that DOGE Teams 'report to the agency heads,' and that USDS exercises no authority." Br. in Opp. 30 n.5 (quoting D. Ct. Doc. 24-2, at 1-2 (Mar. 19, 2025)). But the latter two propositions come from the executive order establishing USDS, not Administrator Gleason's unique personal knowledge. See Exec. Order No. 14,158, § 3(b) and (c), 90 Fed. Reg. 8441 (Jan. 29, 2025). And respondent cannot seriously claim that it needs to depose USDS's top official to test the uncontroverted fact that Elon Musk was not employed by USDS—a fact that, in any event, is irrelevant to USDS's agency status.

Respondent insists (Br. in Opp. 29) that a deposition would not be burdensome because Administrator Gleason need not address the topics that respondent identified for a Federal Rule of Civil Procedure 30(b)(6) witness. But the discovery order specifies *no* topics for Administrator Gleason, so if her testimony is not limited to those topics, respondent apparently thinks that anything is fair game. See Pet. App. 51a. Such an intrusive deposition of a high-level presidential advisor is not consistent with the "judicial deference and restraint" that this Court's order and *Cheney* demand. Pet. App. 1a.

Internal Documents and Employee Records. The discovery order also covers numerous internal USDS documents, including USDS employees' names, timesheets, and worksites. See Pet. App. 42a, 48a. Respondent does not acknowledge the intrusive employee-related requests, which have no bearing on USDS's status but risk subjecting the employees to harassment or worse and chilling their confidential advice within the Executive Branch.

Respondent instead recasts (Br. in Opp. 27) these requests as targeting "USDS's structure." But demands like one to "[i]dentify all current and former employees of DOGE" and supply the "dates of their employment, their positions, whether they are paid"; "under whose authority they were hired"; and "whether they have independent access to DOGE office space," Pet. App. 42a, are not fairly described as a "modest" "inquiry into USDS's structure," Br. in Opp. 27. Yet the court of appeals summarily approved such overbroad requests without considering their necessity or separation-of-powers implications. That basic failure to grapple with the key question is the fundamental flaw in the court's cursory analysis.

B. The Court Of Appeals Erred In Permitting Broad Discovery To Assess Whether FOIA Applies

The court of appeals further erred in treating discovery into USDS's practical influence as relevant to whether it is an agency under FOIA. Pet. 26-32.

1. Respondent casts aspersions (Br. in Opp. 2, 7, 32-33) on this Court's precedent exempting from FOIA purely advisory bodies in the Executive Office of the President. But respondent ultimately accepts the relevant legal framework: FOIA does not cover entities that lack "substantial independent authority, and instead solely advise and assist the President." *Id.* at 2.

Under that framework, this case should have been straightforward. No statute, regulation, or executive order delegates any independent authority to USDS, which was established as a purely advisory body. Pet. 6-7. The court of appeals therefore erred in looking beyond USDS's "formal" authority to permit constitutionally problematic discovery probing whether "practical realities" make USDS an agency. Pet. App. 8a. The court further erred in failing to reconsider that conclusion after this Court directed it to disregard USDS's "ability to persuade," *id.* at 1a—*i.e.*, its informal influence in practice.

2. Although respondent accuses (Br. in Opp. 32) the government of seeking to "demolish" the test for identifying an agency under FOIA, respondent ignores the wall of precedent answering that question based on an entity's formal authority, not its informal influence. See Pet. 27. That includes the Second Circuit's decision in *Main Street Legal Services* v. *National Security Council*, 811 F.3d 542 (2016), which rejected a discovery request where "the text of" the entity's organic statute established that it was purely advisory. *Id.* at 553; see *id.* at 567.

Instead, respondent emphasizes (Br. in Opp. 31-32) two D.C. Circuit cases in which discovery occurred. As explained (Pet. 31 n.2), in both, discovery occurred *before* appeal, so the court had no reason to address its propriety. While one decision described the completed discovery as having "shed light on [the entity's] authority and operations," *CREW* v. *Office of Admin.*, 566 F.3d 219, 225 (D.C. Cir. 2009), that statement was made in the context of *rejecting* additional discovery. The court's actual analysis turned on the entity's "charter documents," not its informal influence. *Id.* at 224. Regardless, even if respondent were correct that D.C. Circuit precedent permits routine discovery, that would only confirm a conflict with the Second Circuit warranting this Court's review.

Respondent claims (Br. in Opp. 32) that the Office of Legal Counsel endorses a functionalist approach considering the "practical realities" of an entity's operations. While the cited opinion noted the entity's day-to-day distance from the President, it rested its "ultimate[]" conclusion on "the nature of [the entity's] delegated authority." 31 Op. O.L.C. 200, 204-205 (2007). Formal authority, not informal influence, is what matters.

Respondent asserts (Br. in Opp. 32) that the government agreed below that discovery is sometimes appropriate. That misreads the government's briefing, which made clear that courts should "solely" consider "the formal authorities—like executive orders, statutes, or charter documents—that created the entity." Gov't C.A. Mandamus Pet. 22. The government merely acknowledged the two D.C. Circuit cases discussed above that considered extralegal materials where formal authorities were unclear. *Ibid.*

Respondent also claims (Br. in Opp. 34-35) that executive orders vest USDS with substantial independent authority, so practical influence is ultimately irrelevant. One wonders then why respondent is fighting so hard for discovery. Regardless, the district-court decisions on which respondent relies erroneously conflate USDS (the advisory body at issue) with agency DOGE Teams (which are part of the agencies they serve). Pet. App. 19a; 769 F. Supp. 3d 8, 23; see Gov't C.A. Mandamus Pet. 26; see also Br. in Opp. 28-29, 33 (making same error). Whether or not DOGE Teams possess substantial independent authority, *USDS* is a purely advisory body not subject to FOIA.

C. This Case Warrants Review

This Court found this case cert-worthy last year when it directed the court of appeals to narrow discovery consistent with separation-of-powers principles. The court of appeals' failure to acknowledge those principles on remand warrants this Court's renewed intervention, particularly given the recent surge of similar cases seeking high-level discovery into executive-branch operations. Pet. 32-34; see p. 6, *supra*.

Respondent's limited arguments against certiorari lack merit. Respondent downplays (Br. in Opp. 35) this case's importance by claiming that discovery will represent only a "targeted backward-looking inquiry into DOGE's past operations." Most discovery is inherently backward-looking—yet discovery into sensitive inter-branch communications risks chilling future communications by presidential advisors who will have to fear having their advice disclosed in litigation. In *Cheney*, the advisory group had "terminated all operations," yet this Court found the separation-of-powers concerns obvious. 542 U.S. at 373. The threat to an ongoing entity like USDS is even clearer.

Respondent notes (Br. in Opp. 35) a handful of decisions permitting discovery involving DOGE and suggests that discovery here would be cumulative. But the cited cases involve discrete actions at specific agencies. One court permitted plaintiffs challenging grant terminations at the National Endowment for the Humanities to depose officials involved in those terminations. *American Council of Learned Societies* v. *National Endowment for the Humanities*, No. 25-cv-3657, 2026 WL 1256545, at *14 (S.D.N.Y. May 7, 2026). Another permitted plaintiffs challenging USDS's data access at three agencies to obtain discovery about that access. *AFL-CIO* v. *Department of Labor*, 349 F.R.D. 243, 247 (D.D.C. 2025). Whether or not those orders were correct, those lesser intrusions into USDS's operations do not justify the categorical, USDS-wide order here.

Respondent emphasizes (Br. in Opp. 34) that the decision below is unpublished and arises on mandamus. But discovery orders are generally challenged via mandamus, and courts of appeals often resolve discovery disputes in unpublished decisions. When those orders threaten the separation of powers, this Court has not hesitated to intervene, including in this very case. Pet. 33-34; see, *e.g.*, *In re Department of Commerce*, 586 U.S. 1018 (2018) (granting certiorari from unpublished order denying mandamus); Pet. App. 1a (same).

Finally, respondent repeatedly claims (Br. in Opp. 17, 25 & n.3, 27, 34) that the government forfeited its separation-of-powers arguments. That issue was thoroughly aired at the stay stage. See Stay Appl. 22-23; Stay Opp. 24-26; Stay Reply Br. 9. This Court necessarily rejected the baseless forfeiture accusation by granting a stay and directing the court of appeals to weigh "separation of powers concerns." Pet. App. 1a. The government has been crystal clear since its district-court opposition that "the Court should not order any discovery at all" and that "'[t]he high respect that is owed to the office of the Chief Executive'" should inform "'the timing and scope'" of any discovery. D. Ct. Doc. 34, at 2, 8 (quoting *Cheney*, 542 U.S. at 385) (brackets in original). Certainly after this Court's order, the court of appeals had ample notice that it needed to weigh the separation of powers before permitting discovery. The court's cursory analysis fell well short of that obligation.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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