No. 24A1122

In the Supreme Court of the United States

In re U.S. DOGE Service, *et al.*,

BRIEF OF GOVERNMENT TRANSPARENCY SCHOLARS IN OPPOSITION TO APPLICATION TO STAY THE ORDERS OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA PENDING CERTIORARI OR MANDAMUS AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

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STATEMENT OF INTEREST

Amici[1] are professors of law across the country whose research, teaching, and writing focus on information and transparency law, including media law, congressional oversight, government secrecy, executive privilege, government accountability, the First Amendment, freedom of speech and association, and separation powers, among many other topics. *Amici* have an interest in the outcome of this case and the important issues facing the Court, as well as the potential effects of any decision on the interpretation and enforcement of the Freedom of Information Act, 5 U.S.C. § 552 and the law of government information and transparency, as well as the Constitutional separation of powers. *Amici* include:

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no party's counsel authored this brief in whole or in part, and that no one other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

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None of the *amici* is a corporation, association, joint venture, partnership, syndicate, or other similar entity.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Freedom of Information Act ("FOIA") is the cornerstone of the United States's commitment to open and transparent governance. Both as originally enacted, and as amended in the wake of Watergate and in the face of expanding presidential power, FOIA enables members of the public to access government information and stands as a bulwark against corruption and abuse. To achieve these goals, and to avoid the gamesmanship that would result if the executive were able to determine without review which aspects of the federal government are subject to the law, courts have consistently applied the type of functional approach reflected in the lower courts' analysis in this case. The Applicants (hereinafter the "Government"), however, would have this Court adopt a strictly formalist test, looking only to the "President's executive orders" delineating the "responsibilities that the President has assigned to" the U.S. DOGE Service ("DOGE") and not its actual functions in the government. Appl. at 5, 14-15. Such an approach would undermine the purposes of FOIA and other transparency laws and incentivize gamesmanship to evade the public's expectation of open governance. Furthermore, the Government's heavy reliance on this Court's opinion in *Cheney v. U.S. District Court*, 542 U.S. 367 (2004) is profoundly misplaced and does not reflect the narrow circumstances of that case.

ARGUMENT

I. The Government's formalistic position is contrary to the text and purpose of the Freedom of Information Act and would permit the executive branch to create exemptions from FOIA at will.

The Government asserts that the sole basis on which courts may rely to determine whether DOGE—or any other entity established by the Executive—is an agency subject to the Freedom of Information Act is the language of the order establishing the entity. *See* Appl. at 14-15, 18. The Government's interpretation would enable the President to carve out exceptions to statutory transparency mandates by the mere stroke of his pen whenever he wished. Such unfettered presidential power over the scope of statutorily mandated transparency is antithetical to FOIA.

A. The text, history, and purpose of FOIA demonstrate Congress did not envision unilateral presidential authority to exempt certain entities.

FOIA represents not only a turning point in legislatively mandated transparency, but also the culmination of a hard-fought campaign to vindicate core principles of self-governance. The United States "led the modern movement in favor of transparency laws" when it enacted FOIA in 1966 and, at the time, was only the second country to have such a legal regime.[2] FOIA represents Congress's response to "dramatic government abuses" and the work of "widespread social movements."[3] In the lead-up to its passage, members of the news media in particular[4] successfully

[2] Margaret B. Kwoka, *FOIA, Inc.*, 65 Duke L.J. 1361, 1367 (2016).
[3] David E. Pozen, *Deep Secrecy*, 62 Stan. L. Rev. 257, 314 (2010).
[4] Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. Pitt. L. Rev. 443, 451 (2012).

attached the concept of a "free press as an American ideal" and the media's duty to "present information to allow for informed political participation" to that of public access to the government.[5] This public campaigning aligned with influential academic theories regarding the importance of access to government information as a tool "to improve democratic governance."[6] Congressional statements regarding FOIA reflected this understanding, with the House of Representatives Report stating: "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies." H.R. Rep. No. 89-1497, at 12 (1966). This Court has long recognized that Congress's intent in passing FOIA was to "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citations omitted).

FOIA's second goal—transparency as a bulwark against corruption and abuse—is a concept which dates back to the framers, who envisioned "popular oversight" of the President by an informed electorate, as well as Congress.[7] This was also particularly important to Congress when it expanded the law in 1974 in the wake of the Watergate scandal, "the most notable American example of secrecy's capacity to enable and shield executive misconduct."[8] *See Rojas v. Fed. Aviation Admin.*, 989

[5] *Kwoka*, *supra* note 2, at 1369.
[6] *Id.* at 1368.
[7] Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 Iowa L.R. 489, 525-526 (2007); *see also* Jenny-Brooke Condon, *Illegal Secrets*, 91 Wash. Univ. L.R. 1099, 1109-10 (2014).
[8] Condon, *supra* note 7, at 1110.

F.3d 666, 687 (9th Cir. 2021). The 1974 amendments included adding the Executive Office of the President ("EOP"), excluding only certain staff and units, to the list of agencies FOIA covers. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980). By expanding the meaning of "agency," Congress specifically sought to "broaden applicability" of FOIA. H.R. Conf. Rep. No. 93–1380, p. 15 (1974). The post-Watergate, "modern form" of FOIA "has commanded deep public loyalty, taken on a quasi-constitutional valence, and spawned a vast network of imitator laws at all levels of United States government and in democracies around the world."[9]

Congress passed the 1974 amendments against the backdrop of not only Watergate, but a growing EOP—growth that has only accelerated in the five decades since. The EOP was initially created by President Franklin D. Roosevelt pursuant to the Reorganization Act of 1939. Pub. L. No. 76-19, 53 Stat. 561 (authorizing reorganization plans); 4 Fed. Reg. 2727, 53 Stat. 1423. President Roosevelt's implementing executive order made clear that the President's core cadre of assistants, those within the "White House Office," "shall have no authority over anyone in any department or agency" and "[i]n no event shall . . . be interposed between the President and the head of any department or agency." Exec. Order No. 8248, 4 Fed. Reg. 3864, 3864 (Sept. 8, 1939). The order also created four additional divisions outside the White House Office. *Id.* In the next decade, Congress created two more advisory bodies within the EOP: the Council of Economic Advisers, *see*

[9] David E. Pozen, *Deep Secrecy*, 62 Stan. L. Rev. 257, 314 n.204 (2010); *see also Elec. Priv. Info. Ctr. v. Internal Revenue Serv.*, 261 F. Supp. 3d 1, 6 (D.D.C. 2017), aff'd, 910 F.3d 1232 (D.C. Cir. 2018) (quotations omitted) ("Congress enacted FOIA with a 'broadly conceived' purpose 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'").

Employment Act of 1946, Pub. L. No. 79-304, 60 Stat. 23, and the National Security Council, *see* National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495.[10]

Over time, the EOP grew to include not only advisory bodies that provided recommendations to the President, but also implementation entities that provided direction to agencies. In 1976, Congress created the precursor to today's Office of Science and Technology Policy. National Science and Technology Policy, Organization, and Priorities Act of 1976, Pub. L. No. 94-282, 90 Stat. 459. Its functions included not only "advis[ing] and assist[ing] the President" but also "evaluating federal programs." *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971). In recent decades, executive orders, rather than acts of Congress, have been the primary mechanism expanding the EOP's reach. President Biden issued an executive order creating, within the EOP, the White House Competition Council and charged it with "implement[ing] the administrative actions identified in [the] order" and "identify[ing] and advance[ing] any additional administrative actions necessary to further the policies set forth [in the order]." Exec. Order No. 14036, 86 Fed. Reg. 36987, 36990 (July 9, 2021). President Biden similarly created the Infrastructure Implementation Task Force within the EOP and tasked it with "coordinat[ing] effective implementation of the Infrastructure Investment and Jobs Act and other related significant infrastructure programs." Exec. Order No. 14052, 86 Fed. Reg. 64335, 64335 (Nov. 15, 2021).

[10] Congress also appended to the EOP the Office of the U.S. Trade Representative, *see* Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, and the Council on Environmental Quality, *see* National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852.

Meanwhile, existing offices like the Office of Management and Budget—whose precursor, the Bureau of the Budget, was part of President Roosevelt's original EOP, Exec. Order No. 8248, 4 Fed. Reg. 3864—have taken on new roles and powers. At the beginning of his presidency, President Reagan issued an executive order requiring agencies to submit major rules to OMB for review, greatly expanding the EOP's control over agency decision-making. *See* Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981). Subsequent administrations continued such muscular exercises of supervision, in one form or another.[11]

The accumulation of power within the EOP is not without potential advantages,[12] but "[a] strong presidential role," standing alone, "does not ensure strong accountability."[13] Rather, "the degree to which the public can understand the sources and levers of bureaucratic action" is "a fundamental precondition of accountability in administration."[14] The Government's approach in this case would grant the executive a forceful means to stymie this precondition. Specifically, it would enable the President simply to draft orders that define EOP entities in ways that remove them from the reach of FOIA and other transparency measures. Such a system carries all the ills of concentrated power, with none of the accountability advantages that transparent administration provides. Indeed, it runs directly counter to a major goal underlying FOIA's 1974 extension to the EOP:

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[11] *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2277-82 (2001).
[12] Nor is the EOP the only way in which presidents have expanded executive power in ways that create transparency concerns. *See generally* Mitchel A. Sollenberger & Mark J. Rozell, *The President's Czars: Undermining Congress and the Constitution* (2012).
[13] Kagan, *supra* note 11, at 2332.
[14] *Id.*

counterbalancing the dangers that EOP's growth poses to executive transparency and accountability.

B. The Government's argument, if accepted, would fundamentally undermine FOIA.

The Government's argument in support of its Application, if accepted, would be in fundamental opposition to FOIA's role as a "remarkably, even radically, potent tool for transparency"[15] and against abuse. If courts and parties could look only at the "plain text of the executive order governing [DOGE]," Appl. at 34, as the sole basis for determining whether DOGE—or any similar entity—is an agency subject to FOIA, it would permit the President to authorize an end-run around FOIA at will. Yet this is the position the Government continually presses, arguing that FOIA litigants and courts may only review the "governing statutes, regulations, or executive orders." Appl. at 14; *see also id.* at 18 (quoting Gov't C.A. Mandamus Reply at 8-9) ("whether FOIA applies to an entity in the Executive Office of the President is determined by interpretation of the orders, statutes, and documents that created the entity or specified its responsibilities"). Were this true, the President could escape transparency law by claiming that, on paper, all bodies within the EOP are "presidential advisory bod[ies] within the Executive Office of the President"—and by *creating* new entities with extraordinary power, locating them within the EOP, and casting them as "advisory." *Id.* at 1, 19.

Instead of unquestioningly accepting the government's determination as to whether DOGE is an agency for purposes of FOIA, the district court appropriately

[15] Pozen *supra* note 9, at 313.

applied the relevant precedent to determine that, given the substantial questions regarding the nature of the entity's authority, discovery was appropriate. App. 7a-10a. Resolving this question requires looking not only at whether an entity "could exercise substantial independent authority" but also whether it "does *in fact exercise such authority*." *Armstong v. Exec. Off. of the President*, 90 F.3d 553, 560 (D.C. Cir. 1996) (emphasis added); *see also* App. 7a (same). The D.C. Circuit accordingly rejected a formalist analysis in answering this question, instead employing the "fact-specific functional approach" which predates even the 1974 amendments. *See Cotton v. Heyman*, 63 F.3d 1115, 1121 (D.C. Cir. 1995); *Soucie*, 448 F.2d at 1073.

The Government's attempts to avoid this framework are unavailing. Appl. at 14-19. While a responding entity's legal authority is an "important consideration" in determining agency status under FOIA, it is not the only consideration, and courts have looked well beyond an entity's stated authority. *See Soucie*, 448 F.2d at 1076 (noting in FOIA analysis that the Office of Science and Technology published information in the Federal Register, indicating agency status); *see also Rocap v. Indiek*, 539 F.2d 174, 177 (D.C. Cir. 1976) (looking past "mere presence of a federal charter" to whether there was "substantial federal control over its day-to-day operations."); *Ryan v. Dep't of Just.*, 617 F.2d 781, 788 (D.C. Cir. 1980) ("The logical conclusion from the FOIA language and from *Soucie* is that, depending on its general nature and functions, a particular unit is either an agency or it is not."). *Meyer v. Bush*, on which the Government relied below, *see* Gov't Mandamus Pet. at 3, 22, 28, supports rather than undermines this functional approach. *See* 981 F.2d 1288, 1301

(D.C. Cir. 1993) ("These cases teach us that whether an establishment is an 'agency' for FOIA purposes hinges primarily on its functions."); *id.* ("determining whether the Task Force is an agency requires a careful examination of *both its authorized and actual functions*.") (emphasis added). The D.C. Circuit's long-standing and more searching functional approach is consistent with decisions of this Court rejecting strictly formalistic arguments in FOIA litigation. As this Court has explained, citizens' rights "to know what their Government is up to . . . should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 172 (2004) (internal quotations omitted); *see also Jud. Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 218 (D.C. Cir. 2013) (four-part test for determining whether an agency was "in control" of a document"). The Government's position, however, reads "functional" to mean what the President says the function of any given part of the EOP will be, regardless of the actual activities of the entity. As such, it asks courts and the public to accept, without recourse, the President's decision as to whether such an entity is subject to FOIA.

Courts must look at the actual functioning of the entity, which is precisely what the district court's order granting discovery permits. Faced with *prima facie* evidence that DOGE is and was wielding substantial authority "across vast areas of the federal government," App. 10a, as well as ambiguity from the executive orders on which the Government heavily relies, the district court appropriately assessed that limited discovery was needed to resolve the critical questions regarding DOGE's role. App. 10a-11a. The district court's approach accords with FOIA's purposes of

promoting an informed public and protecting against abuses, *Robbins Tire & Rubber Co.*, 437 U.S. at 242, by not permitting the President to establish *de facto* exemptions by fiat, simply through the formulation of executive orders. It is the only way that the Court, litigants, and public can be assured that parts of the EOP established by executive order—like DOGE[16]—are actually advisory in nature and not carrying out other roles in the federal government without the transparency that Congress, through FOIA, required. It is also consistent with how courts address other FOIA questions—deferring to agencies under limited circumstances but permitting discovery to probe agency representations where there is "some tangible evidence" to the contrary. *See, e.g.*, *Carney v. U.S. Dep't of Just.*, 19 F.3d 807, 812 (2d Cir. 1994); *Porter v. U.S. Dep't of Justice*, 717 F.2d 787, 791-93 (3d Cir. 1983) (affidavits included conflicting information); *Schaffer v. Kissinger*, 505 F.2d 389, 390-91 (D.C. Cir. 1974) (per curiam) (inadequate reasons stated for application of national security exemption). This Court should affirm the district court's approach to these questions.

[16] The nature of DOGE, as revealed through public reporting, underscores the importance of a more searching inquiry. While courts may generally accept that entities are operating within their legal remit, that does not appear to be the case with DOGE. Nor do the executive orders seem to limit DOGE to advice, rather establishing that DOGE will do things like "moderniz[e] Federal technology and software" and provide advice to agency heads. Appl. at 4-5 (quoting 90 Fed. Reg. 8441, 8441 (Jan. 29, 2025) and 90 Fed. Reg. 8621, 8621-8622 (Jan. 30, 2025)); *see also id.* at 4 (describing DOGE's "mission of identifying and eliminating fraud, waste, and abuse in the federal government."). DOGE's activities, many of which appear to be well outside of the scope of the executive orders, have given rise to several cases arguing that DOGE is acting *ultra vires*. *See* Compl., ¶¶362-368, *Am. Fed. of Gov't Empl., AFL-CIO v. Trump*, No. 3:25-cv-03698 (N.D. Cal. Apr. 28, 2025), ECF No. 1; Compl., ¶¶264-271, 322-325, *Japanese Am. Citizens League v. Musk*, No 1:25-cv-00643 (D.D.C. Mar. 5, 2025), ECF No. 1; Compl., ¶¶261-272, *New Mexico v. Musk*, No. 1:25-cv-00429 (D.D.C. Feb. 13, 2025), ECF No. 2. Given substantial reporting that DOGE operates well outside its authority, and the ambiguity in that authority described by the district court, looking beyond the mere wording of the executive orders is all the more appropriate.

C. The Government's position would upend the separation of powers.

Despite the Government's protestations, it is their argument, not the district court's order, that would disrupt the separation of powers. FOIA embodies and reflects Congress's prerogative in ensuring the operations of the federal government remain open, both as a public transparency mechanism and to avoid executive abuses. *See Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (Congress's intent in enacting FOIA "reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.'") (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)).

> Congress passed the Freedom of Information Act in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives.

Soucie, 448 F.2d at 1080. Given that broad purpose, the "touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests." *Id.* Disclosure must be read broadly, and "the exemptions narrowly." *Id.* And, of course, Congress did not exempt the EOP, but specifically included it in within FOIA's scope, excluding only the Office of the President. *Kissinger*, 445 U.S. at 156. In 2016, Congress codified a presumption of openness, meaning an agency may withhold information requested under FOIA only when it "reasonably foresees that disclosure would harm an interest protected by [a FOIA]

exemption" or "prohibited by law." 5 U.S.C. § 552(a)(8)(A). In other words, agencies may not withhold information simply because it technically falls within one of FOIA's exemptions. *Id.*[17]

By permitting the President to create at-will exemptions within an expanding EOP through the language of executive orders, without normal judicial oversight aided, where appropriate, by discovery, the Government's formulation would upend Congress's intent, relying instead on the President's determination over which parts of EOP are subject to FOIA. *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, on which the Government chiefly relies, requires nothing of the sort. *Cheney* specifically acknowledged that access to information could implicate the interests of the other branches of government, but that the statute in question—the Federal Advisory Committee Act—did not raise such concerns. 542 U.S. 367, 385-86 (2004). But FOIA very much does, as the entire point of the Act and its amendments is to guarantee access for both the public and their representatives in the legislative branch, subject only to narrow exemptions.

Moreover, the Government's position encroaches on the authority of the judiciary. Ensuring compliance with FOIA, like other statutes that regulate the conduct of executive branch officials, is well within the authority of the courts. *See Wash. Post Co. v. U.S. Dep't of State*, 840 F.2d 26, 31-32 (D.C. Cir. 1988), *reh'g granted*, *judgment vacated sub nom. Wash. Post Co. v. Dep't of State*, 898 F.2d 793

[17] *See also* Mike Karpman, *The FOIA Improvement Act of 2016: A New Era of Government Openness?*, Media Freedom & Info. Access Clinic, Yale L.S. (Nov. 14, 2017), https://perma.cc/6CN4-46T7.

(D.C. Cir. 1990) ("When FOIA was originally enacted in 1967, Congress foresaw the need for de novo judicial review in order that the ultimate decision as to the propriety of the agency's action is made by the court and to prevent the proceeding from becoming meaningless judicial sanctioning of agency discretion.") (cleaned up). And there is no structural concern that would require courts to defer to the Executive as to what agencies are, or are not, covered by the law. *Cf. Trump v. Hawaii*, 585 U.S. 667, 703 (2018).

The long-standing functional approach including, where appropriate, discovery on the nature of an entity's authority, preserves the core protections of FOIA, and courts' roles in ensuring that the law is being followed, while according appropriate deference to coordinate branches of government.

II. There is no adequate substitute for the transparency and accountability mandated by FOIA.

Other records laws and transparency tools—the Presidential Records Act, the Federal Records Act, congressional oversight, and newsgathering—have significant limitations that make them poor stand-ins for the robust requirements of FOIA.

The Presidential Records Act ("PRA")—primarily a document preservation law—is no substitute for FOIA. While the PRA requires the "maintain[ence] and preserv[ation] [of] Presidential records," it prohibits their disclosure "until the conclusion of a President's term of office" "except under direction of the President." 44 U.S.C. § 2203(f). As a result, Citizens for Responsibility and Ethics in Washington ("CREW") cannot secure disclosure of DOGE-related documents or any others under the PRA within a reasonable time frame without the President's assent. Nor can the

public be sure that such documents are being properly preserved for future disclosure because, as the D.C. Circuit has previously held, the PRA "precludes judicial review of the President's recordkeeping practices and decisions." *Armstrong v. Bush*, 924 F.2d 282, 291 (D.C. Cir. 1991). Enforcement of the PRA's records-preservation requirements is instead left to the Archivist of the United States, 44 U.S.C. § 2905(a), a role ultimately below the President. Indeed, within weeks of taking office, President Trump fired the Senate-confirmed Archivist and installed his own Secretary of State in her place. In so doing, President Trump ignored the only statutory protection on the independence of the role: that "[t]he President shall communicate the reasons for . . . removal [of the Archivist] to each House of the Congress." 44 U.S.C. § 2103(a). An Archivist who seeks to document records the President would prefer destroyed may well be fired without a word. That exact story has also played out with respect to the Librarian of Congress, whom President Trump recently purported to fire and replace.[18] The PRA, then, is a relatively minor obstacle to a President determined to shield records from disclosure—now or ever.

The Federal Records Act similarly concerns document preservation rather than disclosure. It requires that "[t]he head of each Federal agency shall make and preserve [certain] records," 44 U.S.C. § 3101, but it creates no right for the public to seek those records. And like the PRA, the Federal Records Act does not "authorize private litigants to invoke federal courts to prevent an agency official from improperly

[18] Hillel Italie & Seung Min Kim, *Deputy attorney general who defended Trump in hush money trial is named acting librarian of Congress*, Associated Press (May 12, 2025), https://apnews.com/article/trump-library-congress-todd-blanche-carla-hayden-cc2154fa8644a5c29d196e505e4faa51.

destroying or removing records." *Armstrong*, 924 F.2d at 294. Enforcement is left to the individual agency heads in conjunction with the Archivist. *See* 44 U.S.C. § 3106. While plaintiffs *can* seek judicial review of nonenforcement decisions by the Archivist when an agency head fails to "initiate action . . . for the recovery of records," the Archivist's statutory duty—and therefore the limit of what a court can compel—is only to "request the Attorney General to initiate such an action, and [] notify the Congress when such a request has been made." *Id.*; *see Armstrong*, 924 F.2d at 295.

Congress's ability to compel disclosure through its oversight authority is also inadequate to ensure transparency. As an initial matter, Congress rarely conducts White House oversight when controlled by the same party as the President.[19] Moreover, although Congress does have broad authority to conduct investigations and issue subpoenas in furtherance of its legislative authority, *see Trump v. Mazars USA, LLP*, 591 U.S. 848, 863 (2020); *Watkins v. United States*, 354 U.S. 178, 197 (1957), recent decades have made clear the limitations of that authority. Faced with congressional inquiries, "the executive branch has developed a comprehensive constitutional theory of executive privilege" that grants it "virtually unlimited ability to . . . retain any information it does not want to provide to Congress."[20] And the Department of Justice has questioned the legitimacy of congressional oversight into the White House as a whole, claiming that "[c]ongressional oversight of the White House is subject to greater constitutional limitations" than normal oversight and that

[19] *See* Jonathan David Shaub, *White House Inspection*, 103 Wash. Univ. L. Rev. __ (forthcoming 2026) (discussing the "inadequacy" of congressional investigative authority for White House accountability), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5152566.
[20] Jonathan David Shaub, *The Executive's Privilege*, 70 Duke L.J. 1, 8-10 (2020).

Congress lacks *any* oversight authority to seek information "from White House staff concerning the decision-making process in connection with the President's performance of [constitutional] functions in particular matters." *Congressional Oversight of the White House*, 45 Op. O.L.C. __, 1, 16 (Jan. 8, 2021).

On the basis of these constitutional positions, the executive branch has aggressively resisted congressional oversight efforts, refusing to comply with subpoenas or cooperate with requests for information.[21] Officials have refused to testify or provide documents on the basis of "prophylactic executive privilege," the idea that the mere potential that privilege might one day be asserted and the need to protect the President's authority to do so itself shields information from disclosure—regardless of whether privilege is ever invoked, let alone justified.[22] And like the President, "[l]ower executive branch officials refuse to disclose information by shielding themselves" in this prophylactic privilege.[23] As a result, "[e]xecutive privilege's very existence, and political branch actors' awareness of the same, can cast strong shadows on those oversight disputes in which the privilege is not formally invoked."[24] Congressional oversight, then, is no substitute for transparency laws.

In addition to the limitations described in these various statutes, and the reality of political inaction during periods of one-party control, the executive branch is also curtailing access and transparency in other ways. For example, a recent memo

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[21] *See* Heidi Kitrosser, *Like "Nobody Has Ever Seen Before": Precedent and Privilege in the Trump Era*, 95 Chi.-Kent L. Rev. 519, 529-34 (2021).
[22] Shaub, *The Executive's Privilege*, 70 Duke L.J. at 55; *see, e.g.*, Letter from Pat A. Cipollone, Counsel for President Donald Trump, to Members of Congress 7 (Oct. 8, 2019), https://perma.cc/6X43-28FF.
[23] Shaub, *supra* note 22, at 56.
[24] Heidi Kitrosser, *The Shadow of Executive Privilege*, 15 Forum 547, 565 (2017).

from the Attorney General instructs Department of Justice employees to pursue "the use of subpoenas, court orders, and search warrants to compel production of information and testimony by and relating to members of the news media." Memorandum from Attorney General Pam Bondi for All Department Employees, Updated Policy Regarding Obtaining Information From, or Records of, Members of the News Media (Apr. 25, 2025), https://perma.cc/PFG9-GYXM. The memo rescinded the previous policy, which "recognize[d] the important national interest in protecting journalists from compelled disclosure of information revealing their sources" and, accordingly, curtailed the authority of Department employees to pursue compulsory disclosure of journalistic sources. 28 C.F.R. § 50.10 (2022); *see* Memorandum from Attorney General Pam Bondi at 1 & n.1. The government has also retaliated against newsgathering organizations for disfavored reporting. A court recently enjoined the government's attempt to bar the Associated Press from certain government spaces on the basis of its editorial choices, though, in so doing, it acknowledged "the various permissible reasons the Government may have for excluding journalists from limited-access events." *Associated Press v. Budowich*, No. 1:25-cv-00532-TNM, 2025 WL 1039572, at *1 (D.D.C. Apr. 8, 2025). In these and other ways, and whether lawful or not, the ability of journalists to uncover what FOIA cannot is under strain.

III. The Government's position, if accepted, would further enable shell games to avoid transparency laws.

The combined effect of the Government's reading of the 1974 amendments to FOIA, *Cheney*, and the lack of alternative safeguards would permit a never-ending shell game to escape all transparency laws. In this shell game, "accountability is the

palmed object and potential accountability mechanisms are the shells."[25] "If the game is well played, the public will . . . be told that accountability does not lie under one shell for exclusivist reasons, but that it may lie under the next shell, only for the process to repeat *ad infinitum*."[26] The logical extension of the Government's proposed rule would allow—and incentivize—presidents to create entities similar to DOGE within the EOP that can operate within a black box and avoid transparency laws.

The Government's actions illustrate how this shell game would operate. Here, they argue that DOGE is an "advisory body," and thus excluded from FOIA. Appl. at 2-5. This seems to imply that DOGE is an advisory committee subject to the Federal Advisory Committee Act ("FACA"), which requires the disclosure of certain records from any "committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . that is established or utilized to obtain advice or recommendations for the President or one or more agencies or officers of the Federal Government." 5 U.S.C. § 1001(2)(A). Indeed, prior to his inauguration, President-Elect Trump explicitly contemplated DOGE as an advisory committee "outside of government" and thus squarely within the ambit of FACA.[27]

But following public reporting that DOGE would likely be subject to FACA and letters from watchdog organizations calling on DOGE to comply with FACA,[28]

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[25] Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 Const. Comment. 483 (2010).
[26] *Id.*
[27] Statement by President-elect Trump Announcing That Elon Musk and Vivek Ramaswamy Will Lead the Department of Government Efficiency (Nov. 12, 2024), https://perma.cc/6YHF-37UN.
[28] *See* David A. Fahrenthold, *Two Watchdogs Were Rebuffed from Joining Trump's Cost-Cutting Effort*, N.Y. Times (Jan. 16, 2025), https://www.nytimes.com/2025/01/16/us/doge-trump-watchdogs.html?searchResultPosition=2.

President Trump created DOGE as an EOP entity tasked with updating governmental software and technology, by repurposing and renaming an existing entity with a similar mission.[29] Now, the Government contends that DOGE is not an advisory committee because it includes only federal employees, *see* Memorandum in Support of Motion to Dismiss at 12, *Public Citizen v. Trump* (1:25-cv-00164) (D.D.C. Apr. 11, 2025), ECF No. 33-1 ("USDS's structure is incompatible with the definition of an advisory committee under FACA") but simultaneously exempt from FOIA for the sole reason that it is housed within the Executive Office of the President.

Having attempted to shirk both FOIA and FACA, one shell remains: the PRA which, despite many of the limitations described above, *supra* Section II, does seek to protect executive branch records. But DOGE operates to avoid accountability there too. According to public reporting, DOGE has relied on the Signal application to communicate, likely thwarting the PRA's record retention and preservation requirements since Signal automatically deletes messages after a set time.[30] Such extreme secrecy forms part of a pattern of actions from recent administrations geared at—and having the effect of—avoiding the PRA, which is dependent on the norm of presidential lawfulness and fidelity to records laws. Yet in the past ten years alone, EOP staff and presidents have allegedly conducted important government affairs on

[29] Exec. Order No. 8441, 90 Fed. Reg. 8441 (Jan. 20, 2025).
[30] Alexandra Ulmer, Marisa Taylor, Jeffrey Dastin, and Alexandra Alper, *Exclusive: Musk's DOGE Using AI to Snoop on U.S. Federal Workers, Sources Say*, Reuters (Apr. 8, 2025), https://www.reuters.com/technology/artificial-intelligence/musks-doge-using-ai-snoop-us-federal-workers-sources-say-2025-04-08.

Signal,[31] destroyed classified documents by flushing them down a toilet,[32] and stored classified documents in a personal garage.[33]

The Government's attempts to avoid accountability elide Congress' intent to achieve greater democratic accountability through transparency laws in the aftermath of the Watergate scandal. Faced with a president who operated in the shadows and destroyed his records, Congress embraced maximum transparency by strengthening FOIA and enacting the PRA.[34] Far from intending government officials to evade accountability at every turn, these laws were aimed at combating abuses seen in the past. *See supra* Section I.A. This would create an end run around Congress's careful work and harm the transparency checks put in place by an independent branch of government determined to foster executive accountability.

IV. The Government's Reliance on *Cheney* is misplaced.

The Government's sweeping arguments in support of the executive branch's ability to unilaterally shield portions of the EOP from FOIA rely heavily on *Cheney*. But *Cheney* addressed a very different set of circumstances and equities, and the Government's heavy reliance is misplaced. As the D.C. Circuit recognized in *CREW v. DHS*, *Cheney*'s holding was fact-specific, 532 F.3d 860, 865-66 (D.C. Cir. 2008)—

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[31] Jeffrey Goldberg, *The Trump Administration Accidentally Texted Me Its War Plans*, Atlantic (Mar. 24, 2025), https://perma.cc/6R9K-MLM3.
[32] Alan Feuer, *Judge Orders F.B.I. to Disclose Some Materials in Trump Classified Documents Case*, N.Y. Times (Feb. 10, 2025), https://www.nytimes.com/2025/02/10/us/politics/trump-classified-documents.html.
[33] Charlie Savage, *Additional Documents Found at Biden's Wilmington Home, White House Says,* N.Y. Times (Jan. 14, 2023), https://www.nytimes.com/2023/01/14/us/biden-classified-documents-delaware.html.
[34] *See* Margaret Kwoka & Bridget DuPey, *Targeted Transparency as Regulation*, 48 F.S.U. L. Rev, 385, 389 (2021).

including in ways distinguishable from this case: "To begin with, the discovery request in *Cheney* was directed at the Vice President himself. Indeed, the Court explained that '[w]ere the Vice President not a party in the case'" there might be "'different considerations.'" *Id.* (quoting *Cheney*, 542 U.S. at 381). And as CREW described below, *Cheney* does not shield the entire EOP from normal discovery demands, but only "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 (emphasis added)." Mandamus Pet. Resp. at 2, *In re U.S. DOGE Service* (No. 25-5130) (D.C. Cir. Apr. 25, 2025). The Government's sweeping claim that any information from "the Office of the President" is subject to a heightened burden is therefore inconsistent with the limited holding of *Cheney*, and with the ordinary practice of Freedom of Information Act (FOIA) requests. *Cheney* is also inapposite for at least two additional reasons.

First, *Cheney* concerned a different legal question—whether President George W. Bush's National Energy Policy Group, which included agency heads and assistants, as well as the Vice President and whatever "other officers of the Federal Government" he deemed appropriate, 542 U.S. at 373, was subject to FACA. The discovery at issue included broad requests directed at, among others, Vice President Cheney "to ascertain the NEPDG's structure and membership, and thus to determine whether the *de facto* membership doctrine applies." *Id.* at 375. The district court's discovery order in that case, accordingly, authorized discovery directed at defendants including the Vice President, but "explained that the Government could assert

executive privilege to protect sensitive materials from disclosure." *Id.* The court did so without having resolved the Government's separation-of-powers argument regarding FACA. *Id.* FOIA, however, already addresses such separation-of-powers concerns, particularly through Exemption 5, which applies to "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 is understood as "incorporating the privileges which the government enjoys under the relevant statutory and case law in the pretrial discovery context." *Am. First Legal Found. v. U.S. Dep't of Agric.*, 126 F.4th 691, 694 (D.C. Cir. 2025) (cleaned up). By incorporating those privileges and protections the Government already enjoys, FOIA already accommodates the separation-of-powers concerns that motivated the Court, and on which the Government now relies, in *Cheney*.

Second, the discovery requests at issue in *Cheney* were far broader than the targeted discovery ordered by the district court here. In *Cheney,* the litigants sought "everything under the sky" and "all the disclosure to which they would be entitled in the event they prevail on the merits, and much more besides." *Cheney*, 542 U.S. at 387-88. *Cheney* emphasized the overbreadth of the requests, comparing them to the "narrow subpoena orders" deemed permissible in *United States v. Nixon*, 418 U.S. 683 (1974). *Cheney*, 542 U.S. at 388. Those narrow orders, the Court opined, "[stood] on an altogether different footing from the overly broad discovery requests" since the "very specificity of the subpoena requests serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President." *Id.*

Unlike in *Cheney,* the district court here ordered targeted discovery appropriate to this early stage of the litigation. While the discovery requests at issue in *Cheney* were "unbounded in scope," *Id.*, the discovery ordered here is tailored to determine "whether [DOGE] is wielding independent authority sufficient to bring it within FOIA's ambit." App. at 8a. To that end, it narrowed Plaintiffs' requested written discovery and granted only two depositions. *Cheney* does not stand for the proposition that separation of powers bars such limited discovery.

CONCLUSION

For the foregoing reasons, this Court should deny the Government's 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.

Respectfully Submitted,

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