No. 24A-325

IN THE
Supreme Court of the United States

SOUTH CAROLINA DEPARTMENT OF PARKS,
RECREATION AND TOURISM,

Petitioner,

v.

GOOGLE LLC,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF APPLICATION TO STAY MANDATE

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INTRODUCTION

Throughout its opposition, Google LLC's arguments against a stay of the Fourth Circuit's mandate become increasingly implausible. From the start, Google ignores substantial parts of the Department's application, most notably that the South Carolina Attorney General has no authority under state law to waive the Department's immunity from federal court subpoenas and how binding precedent requires that law be respected. As a result, Google's straw man argument is self-fulfilling. Only by sidestepping this threshold issue, just as the Fourth Circuit did, can Google comfortably argue that the Attorney General waived the Department's immunity. But no less than three lines of cases from this Court and the decisions of two other circuits demand that this issue be addressed. Google cannot avoid it just because it does not like the answer.

Google's refusal to consider state law infects every argument it makes. Take Google's claim (at 9–10, 19–20) that fairness compels a finding of waiver because a state cannot sue in federal court but then shield its agencies from discovery. That concern evaporates when, as here, the state official who sued is not acting on behalf of or seeking recovery for any other state agency. Or consider Google's argument (at 19) that Eleventh Amendment immunity is indivisible because states generally act through agencies and agency immunity derives from the state. States are not monoliths, and individual agencies do not exercise plenary power over the entirety of state government. Instead, states may limit the scope and extent of any agency's power. And when state law limits one agency's authority to act on behalf of another,

as South Carolina law does, it naturally follows that one agency's ability to waive another's immunity is limited.

Worse still, Google takes the Fourth Circuit's holding that such state law restrictions "do[] not matter" (Pet. App. 13a) to new heights. For example, Google claims (at 18) that the Department can simply "urge" the Attorney General to drop his suit against Google to avoid this issue. This would come as news to both the Attorney General and the Department were it true—but of course it is not. Google's presumption underscores how much the decision below and the reasoning which supports it disregards a state's right to order its internal affairs.

The Fourth Circuit's decision threatens the state-federal balance and erodes foundational principles of federalism. The Court is likely to grant review and reverse because the decision below presents an exceptionally important question, conflicts with this Court's precedent, and creates a circuit split. And if the Department must respond to Google's subpoena while the Department's petition remains pending, that incursion upon its sovereignty can never be undone. On the other hand, Google will suffer no prejudice from a stay. While it argues it needs the Department's records for a summary judgment motion (at 18–19), it never explains why it needs *these* records from *this* agency—one of 70 it subpoenaed.

The Court therefore should grant the Department's application to stay the Fourth Circuit's mandate pending resolution of the Department's petition for a writ of certiorari.

ARGUMENT

I. Google's Opposition Disregards a State's Constitutional Authority to Structure its Own Government.

Google largely parrots the lower court's reasoning to oppose a stay. But Google's regurgitation of the Fourth Circuit's opinion which declares that state law limits on agency power "do[] not matter" and are "immaterial" (Pet. App. 13a & n.3) does little to assuage the risks the decision below poses to our nation's federalist system.

A. Google does not dispute that the Attorney General has no authority under state law to waive the Department's immunity from Google's subpoena.

The Department's application concerns South Carolina's decision to restrict the Attorney General's power to act on behalf of the Department in the underlying case. This restriction comes from legislation[1] and the constitutional structure of state government.[2] Google does not dispute that the Attorney General lacks authority under state law to waive the Department's immunity. It therefore is uncontested that the decision below gives the Attorney General power which he does not have, and takes power away from the Department, to be "fair" to Google.

And so the question becomes, does this matter? Google does not deny the importance of this question. It instead focuses on how to answer it. But Google's

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[1] When the Attorney General "acts in the public interest of the State of South Carolina and not as the legal representative or attorney of any department or agency of state government, including the executive, legislative, or judicial branches, or boards. Departments, agencies, or boards are not parties to these actions, and the documents or electronically-stored information of such departments, agencies, or boards are not in the possession, custody, or control of the Attorney General. 2024–2025 South Carolina Appropriation Act, H.B. 5100, Part 1B, § 59.16, 125th Gen. Assemb. (2024).

[2] See Appl. 3–4 (collecting authorities).

arguments falter for a common reason—Google brushes aside this Court's federalism caselaw to paint a legal landscape which does not exist. See *Gonzalez-Servin* v. *Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) ("The ostrich is a noble animal, but not a proper model for an appellate advocate."). Properly considered, the cases which Google does not confront confirm that a denigration of state autonomy by a federal court *does* matter, and they show why this Court should and is likely to grant review and reverse the Fourth Circuit.

B. Google's rote invocation of *Lapides* ignores the Court's holding which precludes the Fourth Circuit's brightline rule.

Google cites *Lapides* v. *Board of Regents*, 535 U.S. 613 (2002), more than any other case as supporting—and even compelling—the Fourth Circuit's decision below. But Google's and the Fourth Circuit's reading of *Lapides* makes the extraordinary leap from this Court's "limited" holding that an attorney general's act of removal waives the *removing agency's* immunity, to a brightline federal rule that an attorney general suing in federal court waives *every agency's* immunity without regard to state law or the capacity in which the attorney acted. See *id.* at 617 ("[W]e must limit our answer to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings."); see also *ibid.* ("We possess the legal power here to answer that question as limited to the state-law context just described."). However, *Lapides*' command to "focus on the litigation act the State takes that creates the waiver" forecloses this leap. *Id.* at 620.

1. The question in *Lapides* was whether the University of Georgia waived its Eleventh Amendment immunity when an attorney with the state attorney

general's office removed a case against the University to federal court. *Lapides*, 535 U.S. at 617–618. The answer to that narrow question is "yes." *Id*. at 619–620. While the state argued that the attorney there had authority to remove the case but not the authority to waive immunity, the Court declined to draw that line. *Id*. at 622–623. The rule *Lapides* announced simply was "that removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive" immunity. *Id*. at 624. *Lapides* did not concern the issue here—a state attorney general suing in the public's interest, without alleging harm to the state or representing any individual state agencies, and without custody or control over individual agencies' records. While the Fourth Circuit observed that "*Lapides* drew no such distinction" (Pet. App. 13a n.3), this is unremarkable. *Lapides* did not draw a distinction along these lines because they were not presented. It instead accounted for differences in future cases by directing courts to "focus on the litigation act the State takes which creates the waiver." *Lapides*, 535 U.S. at 620.

As discussed below (at 17), the interests of one agency are not always (or even usually) the same as another independent agency. That is why "within wide constitutional bounds, States are free to structure themselves as they wish." *Berger* v. *N.C. State Conference of the NAACP*, 597 U.S. 179, 183 (2022). Yet the Fourth Circuit, and Google through its blind recitation, disregard a state's autonomy by adopting a brightline rule where state law bends to a federal court's waiver analysis. Google offers nothing to counter the grave impact this novel rule has on state sovereignty and power.

2. Google's argument that the Fourth Circuit's decision follows *Lapides* because it avoids "inconsistency, anomaly, and unfairness" also ignores the record here. Opp. 11 (quoting *Lapides*, 535 U.S. at 620). Unlike *Lapides* where the attorney general removed on the University's behalf, the Attorney General here is not acting or seeking recovery on the Department's (or any agency's) behalf. There is nothing unfair about protecting a non-party's records. Cf. *Va. Dep't of Corrs.* v. *Jordan*, 921 F.3d 180, 189 (4th Cir. 2019) (holding that subpoenas to non-parties require an "an even more demanding and sensitive inquiry than the one governing discovery generally") (citation and quotation omitted). So Google's categorical claim that it is unfair for a *party* to withhold documents is irrelevant because the records here are not in the *party's* possession, custody, or control.

Nor is there any unfairness in allowing the Department "to invoke Eleventh Amendment immunity in response to a subpoena the State itself told Google was the proper channel for seeking documents pertinent to the company's defense." Opp. 11 (cleaned up). When a party does not have or control records sought in discovery, standard practice is to direct the requesting party to obtain the records by subpoena. Just as a court would not strip the subpoenaed party's right to object in that instance, the Department should not be stripped of its right to object. That each state may exercise its right to order its government differently does not give federal courts the right to elevate judicial consistency over respect for a state's autonomy. As this Court has recognized, the diffusion of governmental powers within and across institutions as a state sees fit is "an everyday feature of American life." *Berger*, 597 U.S. at 184.

Also, there is no unfettered right to obtain discovery out of a sense of "fairness." Our laws have long recognized that a party's desire to obtain evidence often yields to constitutional and other protections. For example, "judicial subpoena power * * * is subject to specific constitutional limitations." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642 (1950). The Fourth Amendment confirmed "that a man's house was his castle, and not to be invaded by any general authority to search and seize his goods and papers." *Weeks* v. *United States*, 232 U.S. 383, 390 (1914), *overruled on other grounds*, *Elkins* v. *United States*, 364 U.S. 206 (1960). The Fifth Amendment grants those in custodial interrogation the right to remain silent. *Miranda* v. *Arizona*, 384 U.S. 436, 467–468 (1966). Custodial interrogation must also stop if the subject wants an attorney present. *Id.* at 474. The Speech and Debate Clause, U.S. Const. Art. I, § 6, prevents legislators from being forced to testify regarding matters of legislative conduct. *Gravel* v. *United States*, 408 U.S. 606, 616 (1972). At common law, "the attorney-client privilege is the oldest of the privileges for confidential communications known." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). Voters cannot be compelled to testify as to whom they voted for, which would be "a kind of inquisitorial power unknown to the principles of our government and constitution, and might be highly injurious to the suffrages of a free people." *Johnston* v. *Charleston*, 1 S.C.L. (1 Bay) 441, 437 (S.C. 1795). And while it exists in a narrowed form today, the adverse spousal testimonial privilege "has ancient roots." *Trammel* v. *United States*, 445 U.S. 40, 43 (1980).

3. Google's argument further confirms that the Fourth Circuit did not focus on the litigation act, as *Lapides* requires. Google submits (at 12) that the relevant act "was a state attorney general's invocation of federal court jurisdiction." It believes the Fourth Circuit did not need to consider anything else, such as whether the Attorney General represented or acted on behalf of the Department, because such matters are immaterial. Opp. 12. Google thus admits there are facts pertinent to the litigation act which the Fourth Circuit did not consider—the debate is just whether those facts are relevant.

But these facts are highly relevant. If the Attorney General does not represent the Department, act on its behalf, or have possession, custody, or control over its records, how can the Attorney General waive the Department's immunity from subpoenas? Google and the Fourth Circuit studiously avoid answering this question. Because *Lapides* requires that it be answered, this Court should and is likely to grant review and reverse the decision below.

C. Google's cursory analysis of *Berger* and *Alden* ignores the federalism principles which dictated their outcomes and are controlling here.

Google's brevity on *Berger* and *Alden* v. *Maine*, 527 U.S. 706 (1999), speaks volumes. These foundational cases detail the immutable principles of federalism and sovereignty which compelled the results there and control here. Yet Google does not address their substance. A review of them reveals why.

At the outset, the Court should reject Google's claim that the Department did not cite *Berger* below. In its reply brief, at oral argument, and in its Fed. R. App. P.

Rule 28(j) letter regarding the 2024-2025 Appropriation Act quoted in note 1 above, the Department cited the Fourth Circuit's own decision in *Bacon* v. *City of Richmond*, 475 F.3d 633 (4th Cir. 2007), which stands for the same proposition that *Berger* does.[3] *Bacon* held that a state's "power to structure its internal government is among those reserved * * * by the Tenth Amendment" and federal courts must "respect a State's division of responsibility." *Id.* at 641. The Department therefore raised the issue before the Fourth Circuit.

Berger did not merely "address[] the prerequisites for intervention," as Google claims. Opp. 12. Rather, *Berger* confirmed the breadth of a state's right to order its internal affairs—the very thing which the Fourth Circuit deemed irrelevant—in sweeping terms. The Court's powerful statements informed, and were not limited by, the intervention question that was raised. Google's myopic view of *Berger* causes it to once again miss the mark.

For example, *Berger* explained that

> [w]ithin wide constitutional bounds, States are free to structure themselves as they wish. Often, they choose to conduct their affairs through a variety of branches, agencies, and elected and appointed officials. These constituent pieces sometimes work together to achieve shared goals; other times they reach very different judgments about important policy questions and act accordingly. This diffusion of governmental powers within and across institutions may be an everyday feature of American life.

Berger, 597 U.S. at 183–184. "[I]t is through the power to 'structure . . . its government, and the character of those who exercise government authority, [that] a

[3] See Pet. C.A. Reply Br. 20; Oral Argument at 15:47–16:21, *In re S.C. Dep't of Parks, Recreation & Tourism*, 103 F.4th 287 (No. 23-1849), https://www.ca4.uscourts.gov/OAarchive/mp3/23-1849-20240508.mp3; 5/14/24 Pet. C.A. Rule 28(j) Letter.

State defines itself as a sovereign.'" *Id.* at 191 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991)). "[W]hen a State chooses to allocate authority among different officials who do not answer to one another, different interests and perspectives, all important to the administration of state government, may emerge." *Ibid*. (citing *Brnovich* v. *Democratic Nat'l Comm.*, 594 U.S. 67 (2021)). Letting federal courts question a state's interests "evince[s] disrespect for a State's chosen means of diffusing its sovereign powers among various branches and officials" and "turns a deaf federal ear to the voices the State has deemed crucial to understanding the full range of its interests." *Ibid.* "For a federal court to presume a full overlap of interests when state law more nearly presumes the opposite would make little sense and do much violence to our system of cooperative federalism." *Id.* at 197.

The Court made clear that "where a State chooses to divide its sovereign authority among different officials and authorize their participation in a suit challenging state law, a full consideration of the State's practical interests may require the involvement of different voices with different perspectives." *Berger*, 597 U.S. at 195; see also *Hawaii Hous. Auth.* v. *Midkiff*, 463 U.S. 1323, 1325 (1983) (recognizing that our "national government functions best if state institutions are unfettered in performing their separate functions in their separate ways"). Neither the Fourth Circuit nor Google gave any consideration to South Carolina's governmental structure or the authority it conferred on its agencies by state law. In fact, the Fourth Circuit held these concerns are "immaterial" and "do[] not matter." Pet. App. 13a & n.3. The lower court's decision therefore directly conflicts with *Berger*.

Google's passing discussion of *Alden* (at 13) is similarly flawed. *Alden* is a landmark decision cementing the states' role in our federal system. *Alden*'s final holding was that Congress acting under Article I cannot subject nonconsenting states to private suits for damages in their own courts. *Alden*, 527 U.S. at 712. But as with *Berger*, it is how the Court arrived at that conclusion which matters here. *Alden* explained how and why states are equal sovereigns with the federal government. *E.g.*, *id.* at 712–714, 732, 748–751. For those reasons, Congress cannot force states into their own courts. And for those same reasons, federal courts cannot grant a state official power to waive immunity which he does not have—just as state courts cannot ignore limits on a federal official's power to waive immunity. *E.g.*, *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947) (holding that federal officials cannot waive federal sovereign immunity). Google cannot cabin the Court's detailed analysis of the relationship between the federal and state governments to suits allowed under Article I.

In the end, Google never addresses the substance of *Berger* or *Alden* or explains how the Fourth Circuit adhered to them. And so Google cannot counter the Department's position that the decision below irreconcilably conflicts with these cases, which requires this Court's review.

D. Google ignores that the Second and Tenth Circuits performed the analysis which the Fourth Circuit held "does not matter" and is "immaterial."

The Department cited cases from the Second and Tenth Circuits to show that the Fourth Circuit's complete disregard of a state's structure in determining waiver

creates a circuit split, thus requiring review, because no other court has blindly bound one agency to the acts act of another. Appl. 9–10. Google argues there is no split because these courts reached the same *conclusion* as the Fourth Circuit did here—that one agency's actions waived the immunity of another. See Opp. 14–15. Once again, Google misses the point.

Both the Second and Tenth Circuits delved into each state's allocation of authority before concluding that under their respective structures, waiver could be imputed. For example, in *Ossen* v. *Department of Social Services (In re Charter Oak Associates)*, 361 F.3d 760 (2d Cir. 2004), the Second Circuit held that the Connecticut Department of Revenue Services, which had filed a proof of claim, was a unitary creditor with the state Department of Social Services, which owed the debtor money. *Id.* at 772. It reached this result by comparing Connecticut's structure to the federal government's. *Ibid.* And the court even recognized that the result could be different if "state governments * * * operate differently than the federal government." *Ibid.* Google overlooks the Second Circuit's examination of Connecticut's government structure in reaching its conclusion—the exact analysis the Fourth Circuit deemed immaterial.

And Google's disregard of the Tenth Circuit's analysis further stresses the need for review here. Google ignores that in *Wyoming Department of Transportation* v. *Straight (In re Straight)*, 143 F.3d 1387 (10th Cir. 1998) and *Innes* v. *Kansas State University (In re Innes)*, 184 F.3d 1275 (10th Cir. 1999), the Tenth Circuit looked at the authority of the agencies at issue before reaching its conclusions—which again is

the analysis the Fourth Circuit said does not matter. While Google recognizes that the *Innes* v. *Kansas State University (In re Innes)*, 184 F.3d 1275 (10th Cir. 1999), "noted that 'the entire record and all the facts' 'should be examined to determine whether a waiver exists,'" Google summarily declares that "nothing about that conclusion conflicts with the panel's decision below." Opp. 15 (quoting *Innes*, 184 F.3d at 1280). Whether Google is referring to the conclusion which *Innes* reached or the analysis it said must be employed when undertaking a waiver analysis is unclear. Either way, the statement is wrong because the Fourth Circuit held that the entire record before it does not matter.

As to *Green* v. *Graham*, 906 F.3d 955 (11th Cir. 2018), the Department agrees it supports the Fourth Circuit's decision, thereby deepening the split and justifying this Court's review. Still, Google incorrectly asserts (at 15–16) that Eleventh Amendment immunity was before the court and therefore a proper alternative ruling. At oral argument in *Green*, the new state defendant disclaimed any reliance on Eleventh Amendment immunity. *Id.* at 962; see also Oral Argument at 7:54–8:12, *Green*, 906 F.3d 955 (No. 17-14704), https://www.ca11.uscourts.gov/sites/default/files/oral_argument_recordings/17-14704.mp3. Her argument instead was that Alabama's constitution immunized her from liability. *Green*, 906 F.3d at 963. Why the Eleventh Circuit still answered the question is unclear. But an issue which was not raised by the parties and conceded away cannot become binding authority.

II. The Balance of Equities Favor a Stay.

A. Denying a stay will irreparably harm the Department because the invasion into its sovereign immunity will be complete.

1. Google does not dispute that, without a stay, this case may become moot if the Department must respond to the subpoena before this Court can decide whether to hear the case. Eleventh Amendment immunity protects states from coercive judicial *process*. *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 58 (1996). It is not a matter of what *relief* is sought. *Ibid.* Forcing the Department to respond to Google's subpoena at this stage will complete the violation of the Department's immunity, and it cannot be undone.

This is the exact irreparable harm that provides the "'most compelling'" basis for a stay. *John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (quotation omitted); see also *Chafin* v. *Chafin*, 568 U.S. 165, 178 (2013) ("If these cases were to become moot upon return, courts would be more likely to grant stays as a matter of course, to prevent the loss of any right to appeal."); *Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers) ("When the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted.") (cleaned up); *In re Roche*, 448 U.S. 1312, 1316 (1980) ("Without such a stay, applicant must either surrender his secrets (and moot his claim of right to protect them) or face commitment to jail."); *Eastland* v. *U. S. Servicemen's Fund*, 421 U.S. 491, 496 (1975) (noting "the enforcement of the subpoena was stayed in order to avoid mootness and to prevent possible irreparable injury"). Google also does not dispute that the Department's right to be free from federal suits hangs in the balance

while the harm to Google is, at most, delay in receiving discovery it only actively sought after the Department sought Google's consent to a stay in the Fourth Circuit. See *New York Nat. Res. Def. Council, Inc.* v. *Kleppe*, 429 U.S. 1307 (1976) (Marshall, J., in chambers) (a stay is more likely if it is necessary "to preserve the rights of the parties pending final determination of the cause") (quotation omitted).

2. Google incorrectly claims (at 16) that the Department's "application to this Court is styled as a motion to stay the mandate, [but] it in fact is a motion to recall the mandate," which requires a higher showing. Opp. at 16. But the power to recall a mandate is only exercised by the *issuing* court. *Hawaii Hous. Auth.*, 463 U.S. at 1324; see also 16 Fed. Prac. & Proc. Juris. § 3938 (3d ed.) ("Most efforts to win recall of an appellate mandate arise after an appellate decision has finally disposed of the case and the time has passed for keeping the case alive by rehearing *or review in a higher court*.") (emphasis added). And this Court has "greater latitude than the inferior courts" to issue a stay. *Meredith* v. *Fair*, 306 F.2d 374, 376 (5th Cir. 1962). Because parties typically must unsuccessfully seek a stay in the circuit court before applying to this Court, the circuit court's mandate usually has issued by this point. And still, the Department is unaware of this Court requiring a separate analysis for whether to recall a circuit court mandate. Accord *John Doe Agency*, 488 U.S. at 1308 (noting that even though the Solicitor General seeks a recall and stay pending the disposition of the petition for writ of certiorari, the "obligation as Circuit Justice is to determine whether four Justices would vote to grant certiorari, to balance the so-

called stay equities, and to give some consideration as to predicting the final outcome of the case in this Court.") (quotation omitted).

Google also argues (at 16) that the Department's claim of irreparable injury is "fatally undermined by its failure to ask the Fourth Circuit to stay the mandate before the mandate issued." Google, however, offers no support for this claim. And any "delay" in seeking a recall and stay with the Fourth Circuit does not reduce the irreparable, case-mooting harm the Department will suffer without a stay here. The Department delayed seeking a recall and stay of the Fourth Circuit's mandate because the Department had not determined whether it would seek a writ of certiorari in the eight days between the Fourth Circuit's denial of its petition for rehearing and the automatic issuance of the mandate under Rule 41(b). Google scoffs at this "excuse," saying it is "unconvincing" because the Department had no difficulty deciding to seek rehearing within fifteen days of the panel's decision. Opp. 17. But the monetary and policy considerations for deciding whether to seek certiorari are far greater and more complex than those for seeking rehearing. And once that eight-day window was closed, the Department had every incentive to thoroughly develop its arguments before seeking relief because Google had not yet tried to enforce the mandate.

3. For many reasons, Google's argument (at 17–18) that the Department will not be harmed because Google "served subpoenas on dozens of other state agencies, and no other state agency took the extraordinary position that immunity

entitled it to withhold documents from Google in a case where the State of which it is one component affirmatively sued Google" is wrong.

First, it assumes the exact proposition which this Court rejected in *Berger*—that all state agencies share the same interests. Eleventh Amendment immunity is "a personal privilege which [a state] may waive at pleasure." *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (quoting *Clark* v. *Barnard*, 108 U.S. 436, 447 (1883)). An agency may waive its subpoena immunity for many reasons, including, say, if compliance would be no more burdensome than complying with a request under the Freedom of Information Act. On the other hand, an agency may choose not to comply with a subpoena when doing so would require disclosing highly confidential and proprietary business information, as here.[4] These differing agency interests must be respected, not disregarded. *Berger*, 597 U.S. at 197.

Second, Google's argument disregards the autonomy of states to order their government as they see fit. South Carolina law expressly limits the Attorney General's authority to waive any immunity regarding the Department's records. Appl. 3–4; Pet. 13–16. For the reasons stated here and in the Department's petition (Appl. 7–12; Pet. 8–26), federal courts must afford South Carolina's law its due

[4] Recall that Google's subpoena contains 119 defined terms and seeks 27 broad categories (excluding subparts) of records detailing the Department's digital marketing activities. C.A. App. 36–63. These records are protected trade secrets under state law. See S.C. Code Ann. § 30-4-40(a)(1) (exempting trade secrets from disclosure under FOIA); S.C. Code Ann. § 39-8-30(B) (requiring employees to safeguard trade secrets); S.C. Code Ann. § 39-8-60(B) (imposing a heightened burden before trade secrets can be disclosed in discovery). Because the Attorney General is only redressing harm to South Carolina consumers and not to the state or the Department (C.A. App. 431–432, 445–446), the Department has an independent obligation to protect this information from disclosure.

respect in finding that the Attorney General cannot waive the Department's claim of sovereign immunity from a federal court subpoena in this case.

And the problem with Google's position goes beyond the other state entities which voluntarily responded to Google's subpoena. Taking things further, Google believes that "[i]f compliance with a subpoena is especially problematic for SCPRT, it has a remedy—it can urge the South Carolina attorney general to withdraw from the case." Opp. 18 (citing *United States* v. *Burr*, 25 F. Cas. 30, 33–34 (C.C.D. Va. 1807) (discussing the power of the President to drop a federal criminal prosecution to avoid a subpoena)). Google predictably cites no state law to support this gross expansion of the Department's power, for none exists. The Department had no role in bringing the lawsuit, let alone has any meaningful authority to "urge" the Attorney General to drop it. But this is where the logic behind the Fourth Circuit's opinion leads. This Court's review is needed to restore order.

Finally, Google inaccurately portrays the Department's immunity claim as meritless. For one, Google represented to the district court that certain "agencies in Texas * * * had initially raised arguments about immunity" from document subpoenas. C.A. App. 141. Thus, its assertion (at 17–18) that "no other state agency took the extraordinary position that immunity entitled it to withhold documents" is false. For another, while the Eastern District of Texas more recently denied three Texas state agencies' immunity claims for later-issued deposition subpoenas, it did so on a special master's report and recommendation that heavily relied on the South Carolina district court's opinion below. 4/15/24 Report and Recommendation at 5, No.

4:20-cv-00957-SDJ (N.D. Tex.), Dkt. 368 ("The Special Master concurs with the South Carolina Court."). Just like the courts here, the Eastern District of Texas did not undertake an independent review of those agencies' immunity claim or examine Texas' state structure. This decision in fact supports review because it shows how courts across the country have license to disregard state governance. And for one more, the Department provided detailed citations and arguments supporting its position. Appl. 7–13; Pet. 8–24. Google may disagree, but that does not render the Department's claim meritless. If anything, the disagreement on this undisputedly important question heightens the need for review.

B. Any harm to Google from granting a stay is de minimis at most.

Google's claim that it will be "substantially injure[d]" if this Court grants a stay is purely illusory. This Court has rejected an argument that a delay in obtaining information is an "irreparable harm." See *John Doe Agency*, 488 U.S. at 1309 ("Conversely, the Corporation's interest in receiving this information immediately, while significant if the Corporation's interpretation of the FOIA is correct, poses no threat of irreparable harm."). Further, as explained above (at 7–8), a party does not have an unfettered right to discovery—certain constitutional and other protections are paramount to a party's ability to obtain even relevant evidence.

Moreover, the record here contradicts Google's unsupported claim that the documents sought "are highly relevant to [its] defense." Opp. 18. Google did not try to enforce the mandate until 65 days it issued—and only after the Department asked Google if it would consent to a stay. And of the 70 state agencies which Google

subpoenaed (C.A. App. 76, 139–140), only 57 complied (Opp. 5). That means the Department is 1 of 13 state agencies which have not complied with Google's subpoenas. And there is no evidence that Google tried to compel production from the remaining 12 agencies. Even though Google notes (at 18) that motions for summary judgment in the underlying litigation are due on November 18, it does not try to explain how the Department's documents are needed for its motion.

Google therefore cannot show it will suffer prejudice from a stay. The insignificant impact the Department's production would have on Google's defense contrasts with the significant, irreversible harm to the Department if forced to forgo its sovereign immunity pending its petition for a writ of certiorari. Balancing these equities supports the grant of a stay. See *Karcher* v. *Daggett*, 455 U.S. 1303, 1305–1306 (1982) (Brennan, J., in chambers).

C. A stay best promotes the public interest.

A stay here promotes the public interest because it preserves the Department's right to seek appellate review of the denial of its constitutional right to be free from the compulsion of federal process. See *United States* v. *Loud Hawk*, 474 U.S. 302, 313 (1986) ("[T]here are important public interests in the process of appellate review."). When the "entire case is essentially 'involved in the appeal,'" such as here, a stay should be issued. *Coinbase, Inc.* v. *Bielski*, 599 U.S. 736, 741 (2023). Otherwise, without a stay, the Department's right to appeal the denial of its sovereign immunity claim is "like a lock without a key, a bat without a ball, a computer without a keyboard—in other words, not especially sensible." *Id.* at 743.

The Court should also reject Google's characterization (at 19) of this case as "a prime example of the mischief [the Department's] proposed rule would produce." There can be no "mischief" in letting the Department claim its immunity if the Attorney General does not represent the Department, act on its behalf, or have possession, custody, or control of its records. But mischief will occur if federal courts can disregard state governance as the Fourth Circuit allowed. For example, if two state agencies are named as defendants in a lawsuit, can one agency now force the other into federal court by removing over the other's objection? Can one agency sue on behalf of another without consent? If a plaintiff names the wrong agency in a lawsuit, can that agency still defend the case on the merits and bind the correct agency? Can one agency settle a case on behalf of another, thereby requiring money to be spent from the second agency's budget? What if one agency responds to a federal court subpoena—does that waive every other agency's immunity? Google believes that to be true (at 18), even as unbelievable as it seems.

And lastly, Google's claim (at 9–10, 19–20) that fairness compels a finding of waiver because a state cannot sue in federal court and then shield its agencies from discovery falls flat. Just as with Google's "mischief" argument, there is no concern about unfairness when the state official who sued is not acting on behalf of or seeking recovery for any other state agency. Similarly, there is no "unfairness" for the Department to assert immunity when the state plaintiffs generically wrote to Google that subpoenas are the "proper channels" to obtain agency records. This letter begs the question presented here—if the Attorney General does not have possession,

custody, or control of the Department's records and does not represent the Department, can he waive the Department's immunity by "expressly endors[ing]" (Pet. App. 11a) a subpoena? As is undisputed here, the Attorney General cannot waive it. The states' letter to Google therefore does not support the decision below; if anything, reliance on it to prove waiver underscores the need for review.

Federal courts cannot presume every state acts as an indivisible mass, where individual officials, agencies, and departments have no independent identity or interests. States instead may limit the scope and extent of an agency's power. And when state law limits one agency's authority to act on behalf of another, as South Carolina law does, fairness commands that this limit be honored rather than disregarded to serve the interests of private litigant in federal court.

CONCLUSION

The Court should grant the Department's application for a stay of the Fourth Circuit's mandate pending its consideration of the Department's petition for certiorari.

Respectfully submitted,

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