IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERITAGE FOUNDATION &
MIKE HOWELL

Plaintiffs,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY

Defendants.

Case No. 24-cv-2343 (RDM)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

(Oral Argument Requested)

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

LEGAL STANDARD 5

ARGUMENT 8

I. PRELIMINARY INJUNCTIONS IN FOIA CASES. 10

II. PLAINTIFFS HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS. . 11

A. Plaintiffs Are Entitled to Expedited Processing 11

1. Construction of 6 C.F.R. § 5.5(e)(1)(iv). 11

2. Whether Vice President Harris Was Border Czar and Other Related Questions Are a "Matter of Widespread and Exceptional Media Interest." 14

3. Questions as to Whether Vice President Harris Was Border Czar and Related Questions Raise "Possible Questions About the Integrity of the Government that Affect Public Confidence." 15

B. Plaintiffs Are Entitled to Production of All Non-Exempt Responsive Records By September 21, 2024. 17

1. FOIA Requires Production "as Soon as Practicable." 17

2. Whether Vice President Harris was Border Czar, and Her Roll as Such, Are Central Questions/Issues in the 2024 Presidential Election. 19

3. A Significant Amount of Voting Will Have Commenced On September 21, 2024. 21

4. FOIA Requires Production by September 21, 2024. 23

C. Defendant Should Not be Heard to Claim the Responsive Records Are Exempt at this Stage. 24

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION. 26

A. Plaintiff Will Suffer Irreparable Harm to Their Statutory Entitlement to Expedited Processing. 26

B. Plaintiffs Will Suffer Irreparable Harm if the Records are Not Produced By September 21 2024. 32

III. THE EQUITIES FAVOR GRANTING A PRELIMINARY INJUNCTION. 34

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

ACLU v. DOJ, 321 F.Supp.2d 24 (D.D.C. 2004) 7, 12, 13, 14, 16

Aguilera v. FBI, 941 F.Supp. 144 (D.D.C. 1996) 10

Al-Fayed v. CIA, 254 F.3d 300 (D.C. Cir. 2001) 6

**Am. Immigr. Council v. DHS*, 470 F.Supp.3d 32 (D.D.C. 2020) 10, 18, 19, 33

**Am. Oversight v. Dep't of State*, 414 F.Supp.3d 182 (D.D.C. 2019) 10, 18, 19, 23, 24, 25, 33

Am. Oversight v. DOJ, 292 F.Supp.3d 501 (D.D.C. 2018) 12, 13, 14, 15, 16

Amoco Prod. Co. v. Vill. of Gambell, AK, 480 U.S. 531 (1987) 29

Apotex. Inc. v. FDA, No. 06-cv-627 (JDB), 2006 WL 1030151 (D.D.C. Apr. 19, 2023) 30

**Brennan Ctr. v. Dep't of Com.*, 498 F.Supp.3d 87 (D.D.C. 2020) 5, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 23, 26, 32, 33, 34, 35

**CREW v. DOJ*, 436 F.Supp.3d 354 (D.D.C. 2020) 6, 7, 13, 16, 17

CREW v. DOJ, 820 F.Supp.2d 39 (D.D.C. 2011) 14

CREW v. DOJ, 870 F.Supp.2d 70 (D.D.C. 2012) 12, 14, 17

**Ctr. for Pub. Integrity v. DOD*, 411 F.Supp.3d 5 (D.D.C. 2019) 10, 23, 24, 26, 33, 34

Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288 (D.C. Cir. 2009) 5

Edmonds v. FBI, 417 F.3d 1319 (D.C. Cir. 2005) 27, 28

Edmonds v. FBI, No. 02-cv-1294 (ESH), 2002 WL 32539613 (D.D.C. Dec. 3, 2002) .. 11, 12, 13, 16, 17, 35

Elec. Frontier Found. v. DOJ, 563 F.Supp.2d 188 (D.D.C. 2008) 14

Elec. Frontier Found. v. ODNI, 542 F.Supp.2d 1181 (N.D. Cal. 2008) 10, 33

Elec. Frontier Found. v. ODNI, No. 07-cv-5278 (SI), 2007 WL 4208311 (N.D. Cal. Nov. 27, 2007) 10, 18, 33

EPIC v. DOJ, 15 F.Supp.3d 32 (D.D.C. 2014) 24, 25

EPIC v. DOJ, 322 F.Supp.2d 1 (D.D.C. 2003).. 6

**EPIC v. DOJ*, 416 F.Supp.2d 30 (D.D.C. 2006)... 10, 18, 24, 30, 34

FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009)... 7

Gerstein v. CIA, No. 06-cv-4643 (MMC), 2006 WL 3462659 (N.D. Cal. Nov. 29, 2006).......... 18

Heritage Found. et al. v. DOJ, No. 23-cv-1854 (DLF), 2023 WL 4678763 (D.D.C July 19, 2023) 18, 25

Heritage Foundation v. EPA, No. 23-cv-748 (JEB), 2023 WL 2954418 (D.D.C. Apr. 14, 2023) 31, 32

Jasperson v. Fed. Bureau of Prisons, 460 F.Supp.2d 76 (D.D.C 2006)...................................... 30

Lewis v. Dep't of Treas., No. 17-cv-943 (DLF), 2020 WL 1667656 (D.D.C Apr. 3, 2020)........ 26

Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024) 6

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Ins. Co., 463 U.S. 29 (1983)................ 7

Muttitt v. Dep't of State, 926 F.Supp.2d 284 (D.D.C. 2013) 28

Nken v. Holder, 556 U.S. 418 (2009) 34

Payne Enter., Inc. v. United States, 837 F.2d 486 (D.C. Cir. 1988).. 27

Prot. Democracy Project v. DOJ, 498 F.Supp.3d 132 (D.D.C. 2020) 10, 23, 33

Prot. Democracy Project, Inc. v. DOD, 263 F.Supp.3d 293 (D.D.C. 2017) 8, 10

Sherley v. Sebelius, 644 F.3d 388 (D.C. Cir. 2011).. 5

Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).. 29

Tenn. Valley Authority v. Hill, 437 U.S. 153 (1978) 30

**Wash. Post v. Dep't Homeland Sec.*, 459 F.Supp.2d 61 (D.D.C. 2006). 10, 23, 29, 31, 33, 34, 35

Weinberger v. Romero-Barcelo, 456 U.S. 305, 314 (1982) 29

White v. DOJ, 16 F.4th 539 (7th Cir. 2021)... 17

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008) 5

Statutes

15 Del. C. § 5504 21

25 P.S. § 3146.2a 21

5 U.S.C. § 552(a)(6)(D) 28

*5 U.S.C. § 552(a)(6)(E)... 6, 7, 8, 9, 17, 18, 23, 27, 28, 35

*5 U.S.C. § 552(a)(6)(E)(iii).. 7, 8, 17, 18, 23

A.C.A. § 7-5-407 21

M.S.A. § 203B.081 21

M.S.A. § 203B.085 21

N.C.G.S.A. § 163-227.10.. 21

S.D.C.L. § 12-19-1.2... 21

S.D.C.L. §12-19-21... 21

T.C.A. § 2-6-202.. 21

VA Code Ann. §25.2-701.1 22

W. Va. Code, § 3-3-5(e)(1).. 21

W.S.A. § 7.15... 21

Other Authorities

H.R. 1371, 118th Cong (2024).. 20

James Cirrone, *Trump Fans Spot MAJOR Flaw in Kamala Harris' Latest TV Campaign Ad, Mail Online*, Daily Mail (Aug. 24, 2024), https://www.dailymail.co.uk/news/article-13776667/donald-trump-kamala-harris-tv-ad-president.html (last visited Aug 30, 2024).. 1

Trans., *Heritage Found. et al. v. DOJ*, NO. 23-cv-1854 (DLF) (Oct. 30, 2023)......................... 18

Trans. of Status Conf., *Brennan Ctr. v. Dep't of Com.*, No. 20-cv-2674 (TJK) (Oct. 8, 2020) 5

Rules

LCvR 65.1(d) 4

Regulations

28 C.F.R. § 16.5(e)(1)(iv) 11, 13, 17

28 C.F.R. § 16.5(e)(3) 12

6 C.F.R. § 5.5(b) 28

*6 C.F.R. § 5.5(e)(1)(iv) 2, 7, 9, 11, 17, 27, 28, 35

6 C.F.R. § 5.5(e)(3) 12

See 6 C.F.R. § 5.5(e)(4) 28

* Authorities on which we principally rely are marked with asterisks.

INTRODUCTION

The underlying case is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel the production of certain records related to Vice President Kamala Harris and her role as "Border Czar" for the Biden-Harris Administration. *See* Plaintiffs' FOIA Request, No. 2024-HQFO-02146 (July 30, 2024) ("Request" or "Plaintiffs' FOIA Request") (ECF No. 1-5).

On April 14, 2021, President Joseph R. Biden announced that Vice President Harris would be appointed—in the words of the press—the "Border Czar." Request at 4 n.8. Effectively, this meant Vice President Harris would be responsible for overseeing and coordinating border security policies and operations.

However, there has been considerable confusion on whether or not Vice President Harris was actually the Border Czar, and conversely, whether the massive failure of the Biden-Harris Administration's immigration policies was Harris's fault. The Biden-Harris Administration's open-border policies have led to a porous and dangerous border and a broader immigration crisis. There is widespread acknowledgement that the Biden-Harris Administration's border policy is a major failure—according to some press accounts the Vice President *herself* has acknowledged this failure. *See* James Cirrone, *Trump Fans Spot MAJOR Flaw in Kamala Harris' Latest TV Campaign Ad, Mail Online*, Daily Mail (Aug. 24, 2024), https://www.dailymail.co.uk/news/article-13776667/donald-trump-kamala-harris-tv-ad-president.html (last visited Aug 30, 2024).

On July 21, 2024, President Biden suspended his presidential campaign and endorsed Vice President Harris. Vice President Harris is now her Party's Candidate for President. Vice President Harris's responsibility in Office for the border crisis is a central issue in the 2024 General Election.

The FOIA Request sought expedited processing because it concerned "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 6 C.F.R. § 5.5(e)(1)(iv). *See* Request at 4–7.

Whether Vice President Harris is in fact the Border Czar raises possible questions about the government's integrity which affect public confidence in both the Biden-Harris Administration and thereby the American voter's assessment of Vice President Harris' fitness for Office. These questions have been the subjects of "widespread and exceptional" media interest. That interest is profound considering allies of the Biden-Harris Administration have tried to downplay Vice President Harris's responsibilities over border security and immigration enforcement since she became her Party's Presidential Nominee. Indeed, there has even been press coverage of *this* lawsuit.

The requested information is of immense public interest as it concerns DHS' conduct in a high-profile case. Plaintiffs seek to answer three questions surfaced by widespread and continuous media coverage that go directly to Government Integrity and are at the forefront of the minds of the American People—particularly as concerns the 2024 General Election.

- Is Vice President Harris in fact the Border Czar and what was her role in creating the Biden-Harris Administration's systemic border policy failures?

- If Vice President Harris *is* the Border Czar, is she fit for current Office or for elevation to the Presidency given the Biden Harris Administration's systemic border policy failures?
- If Vice President Harris is not the Border Czar, who is in charge of the failure at the Border and why was the Biden-Harris Administration—including the Vice President—less than transparent about the Vice President's role in border policy?

The Request goes directly to the core of the issue seeking all records containing the term "Border Czar" and Harris. These questions are of vital importance to the American People; they have a right to know who was responsible for the universally criticized Biden-Harris Administration border policy. These questions are also receiving congressional scrutiny. *See* Request. *See* Apps. B & C.[1] The question concerning who is responsible for the Biden Administration's failed border policies created "widespread and exceptional" media interest. And the question of responsibility for the Biden-Harris Administration's border policy is replete with questions about the Government's integrity.

Plaintiffs' entitlement to injunctive relief could not be more clear. They are being denied a statutory right entirely about timing and priority. And at its core, this case is about one thing. The requested records go to an important issue in the 2024 General Election, and therefore, the American People should be able to see them prior to the commencement of voting. By September 21, 2024, significant amounts of voting will be underway. Without an order compelling

[1] Citations to the expedited processing records are in the form of "App. __" to cite to the relevant expedited processing appendix.

production of all non-exempt records, Plaintiffs—and by extension the American People—will suffer egregious irreparable harm.

Plaintiffs attempted to get answers to these questions via the DHS FOIA process. But they got nowhere. The Government failed to make any determination on the Request. *See* Compl. at ¶ 14. At the Administrative level, Plaintiffs engaged with the Department in good faith, providing narrowing terms and narrowed the Request to certain DHS components. *See* Compl. at ¶¶ 15–17. (All this despite the fact the Request is proper as drafted). But Defendant's responses ignored FOIA's statutory requirements and appeared to be dilatory. *Id.* On the issue of expedited processing, Defendant ignored the statutory 10-calendar-day deadline for making a decision. *Id.* at ¶ 18.

Plaintiffs filed their Original Complaint in this action challenging the denial of expedited processing on August 12, 2024. Plaintiffs contacted the Government on August 18, shortly after the Complaint was served to alert the Government of the possibility of this Motion. Plaintiffs have since engaged with the Government and made further accommodations at the Government's request to limit the search of hard-copy records to custodians with the grade of SES and above. The Parties have discussed timing repeatedly but have been unable to reach an agreement; thus, Plaintiffs bring this Motion. The Government has represented a search is being run for electronic files. But given the extreme exigency of the moment, Plaintiffs could not further delay filing this Motion.[2] That said, Plaintiffs will continue to confer during the briefing of this Motion as has

[2] Plaintiffs will consent to a reasonable extension under LCvR 65.1(d) for Defendant's Opposition to this Motion if Defendant agrees to a stipulated and so ordered schedule for production of detailed search term results for the search currently being run. Plaintiffs additionally will not file a Reply and will orally argue any issues in reply at the hearing on this Motion unless directed otherwise by the Court.

been done in other similar cases. *See, e.g.*, Trans. of Status Conf., *Brennan Ctr. v. Dep't of Com.*, No. 20-cv-2674 (TJK) (Oct. 8, 2020) (Exhibit 1 to the Declaration of Samuel Everett Dewey (Aug. 30, 2024) ("Dewey Decl.")). Defendant opposes this Motion.

Plaintiffs filed an Amended Complaint on August 30, 2024, to add substantive withholding and fee claims as the Government failed to provide a determination on the Request in the required 20 working days. *See* Am. Compl. (ECF No. 7).

LEGAL STANDARD

1. A plaintiff "seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). It is unclear whether the D.C. Circuit still follows the "sliding scale" approach such that "if the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor" (*Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009)), or reads *Winter* as requiring a showing of both a likelihood of success on the merits and irreparable harm. *Compare Davis*, 571 F.3d at 1292 (reserving) *with Davis*, 571 F.3d at 1288 (Kavanaugh, J., concurring) (*Winter* requires showing "*both* a likelihood of success *and* a likelihood of irreparable harm, among other things"); *Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011) (suggesting the *Davis* concurrence may be correct, but ultimately reserving while noting a Circuit

split on the issue). Regardless, the issue is academic here because Plaintiffs prevail under either standard.

2. Review of a denial of expedited processing under FOIA generally is *de novo*. *See Al-Fayed v. CIA*, 254 F.3d 300, 308 (D.C. Cir. 2001) (Garland, J.). But when the ground for expedition arises under a regulation promogulated by an agency pursuant to its authority under FOIA (5 U.S.C. § 552(a)(6)(E)(i)(II)) to create grounds for expedited processing in addition to the statutory "compelling need" ground, a different standard of review governs:

> A regulation promulgated in response to such an express delegation of authority to an individual agency is entitled to judicial deference, *see United States v. Mead Corp.*, 533 U.S. 218,___, 121 S.Ct. 2164, 2171, 150 L.Ed.2d 292,___(2001), as is each agency's reasonable interpretation of its own such regulations, *see United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, ___, 121 S.Ct. 1433, 1444–45, 149 L.Ed.2d 401 (2001).

Id. at 307 n.7. Therefore, the *Al-Fayed* Court analyzed whether "the agencies reasonably determined" that the expedited processing requests "did not meet the expanded criteria." *Id.*[3]

Courts have not agreed on the application of *Al-Fayed*'s standard for non-statutory expedited processing to a particular case. But that dispute is not in issue here, because Plaintiffs easily succeed under the view most deferential to the Agency which reads *Al-Fayed* to require a *State Farm* reasonableness review of the agency's action as well as deference to the agency's construction of its own regulation. *See, e.g.*, *CREW v. DOJ*, 436 F.Supp.3d 354, 359–60 (D.D.C. 2020) ("*CREW II*"); *EPIC v. DOJ*, 322 F.Supp.2d 1, 5 n.1 (D.D.C. 2003) ("*EPIC I*"), *vacated as*

[3] Plaintiffs expressly reserve and preserve the right to argue to the appropriate Court that the *Al-Fayed* Court's administrative deference should be re-assed in light of *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

moot, No. 04-5063, 2004 WL 2713119 (D.C. Cir. Nov. 24, 2004); *see also ACLU v. DOJ*, 321 F.Supp.2d 24, 31 (D.D.C. 2004) (applying "the reasonableness test").

The *State Farm* reasonableness standard, while deferential, requires "that an agency provide [a] reasoned explanation for its action." *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009). If an agency changes course, it must "ordinarily . . . display awareness that it *is* changing position," as well as "that there are good reasons for the new policy. *Id.*; *see also Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 52 (1983). Applying these principles to the specific context of entitlement to expedited processing under 6 C.F.R. § 5.5(e)(1)(iv), an agency receives little-to-no deference when it fails to provide a basis for its denial of expedited processing. Under such circumstances, there simply is no agency decision to which to defer. *See CREW II*, 436 F.Supp.3d at 361 ("Since the agency did nothing more than parrot its own regulatory language, and offered no reasoning or analysis, its decision, as in the APA context, is entitled to little deference."). *Post hoc* justifications are not to be heard; what matters is the agency rationale (or lack thereof) at the time of decision. *Id.* at 361 n. 2 ("Since the agency did not identify any deficiency in this regard as a basis for its decision, it cannot argue now that its decision was appropriate based on some newly developed theory that was not stated in the record before the Court for review.").

3. Judicial review of an expedited processing determination is "based on the record before the agency at the time of the determination." 5 U.S.C. § 552(a)(6)(E)(iii). As there is no determination on expedited processing at issue here, Plaintiffs view the relevant record as that before DHS at the time of this motion.

4. The question is whether the Department is processing quickly enough—*i.e.*, "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii). That question is separate and apart from the determination of entitlement to expedition and accordingly is reviewable on the Motion record. *Cf. Prot. Democracy v. U.S. Dep't of Def.*, 263 F.Supp.3d 293, 300 (D.D.C. 2017) ("*Prot. Democracy I*") (considering evidence outside of that submitted to the agency in support of expedited processing on irreparable harm analysis on motion for preliminary injunction to compel an agency to grant expedited processing).

ARGUMENT

Plaintiffs are entitled to a preliminary injunction. Courts in this District have regularly granted preliminary injunctions to enforce the timing provisions of FOIA's expedited processing provisions as well as to order production by a date certain to ensure information is made available to the American people prior to a critical event—in this case the 2024 General Election—after which the records would lose much of their value and saliency. Plaintiffs have a clear likelihood of success on the merits.

Plaintiffs have presented overwhelming evidence that the Request concerns a matter of "widespread and exceptional media interest." These articles go directly to the key questions described above. Extensive reporting of questions concerning whether Vice President Harris is the Border Czar raises "possible questions about the government's integrity which affect public confidence." The Southern Border is—by everyone's account—a disaster. August Polling by the Economist and YouGov found that 87% of voters considered immigration important, with only jobs and the economy considered more important. *See* Dewey Decl. Ex. 2 at 35. There is

overwhelming public interest in understanding the role Vice President Harris plays in this issue and release of agency records resolves profound questions regarding government integrity.

Plaintiffs will suffer irreparable harm absent a preliminary injunction.

First, Plaintiffs have a statutory entitlement concerning *timing*—they have a statutory right to have their request processed *more quickly* than other requests. That statutory right is exclusively about time and priority in a set temporal window; if lost it cannot be remedied by other relief and thus it is the entire game. Because that right originates from a statute that *requires* entry of injunctive relief upon proof of Plaintiffs' case on the merits, denial of that right yields irreparable harm. And in cases where a preliminary injunction is sought to compel expedited processing, the public interest and the equities largely merge with the merits. Accordingly, those equities weigh in favor of granting Plaintiffs' motion for a preliminary injunction.

Second, absent production by September 21 Plaintiffs will be irreparably harmed. The records sought by Plaintiffs go directly to a major issue in the 2024 General Election. And under current election law a substantial number of states will have significant voting commencing shortly before September 21, 2024. The value of the records sought by the Request will plummet if not produced by September 21, 2024. Simply put the American People are entitled to view these records *before* casting a vote.

In sum, Plaintiffs are entitled to a preliminary injunction compelling DHS to: (1) process the Request on an expedited basis pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(e)(1)(iv); and (2) produce all non-exempt responsive records by September 21, 2024.

I. PRELIMINARY INJUNCTIONS IN FOIA CASES.

To be sure, a motion for a preliminary injunction does not typically arise in the garden-variety FOIA case. But motions for preliminary injunctions *are* regularly brought in the procedural sub-set of FOIA cases where the requestor seeks but is denied expedited processing or seeks production by a date certain. Numerous courts—including in this District—have entered preliminary injunctions to compel expedited processing and production by a date certain:

- *Brennan Ctr. v. Dep't of Com.*, 498 F.Supp.3d 87 (D.D.C. 2020) (Kelly, J.) (date certain);
- *Prot. Democracy Project v. DOJ*, 498 F.Supp.3d 132 (D.D.C. 2020) (Sullivan, J.) ("*Prot. Democracy II*") (date certain);
- *Am. Immigr. Council v. DHS*, 470 F.Supp.3d 32 (D.D.C. 2020) (Hogan, J.) (date certain);
- *Am. Oversight v. Dep't of State*, 414 F.Supp.3d 182 (D.D.C. 2019) ("*Am. Oversight II*") (Cooper, J.) (date certain);
- *Ctr. for Pub. Integrity v. DOD*, 411 F.Supp.3d 5 (D.D.C. 2019) (Kollar-Kotelly, J.);
- *Prot. Democracy Project, Inc. v. DOD*, 263 F.Supp.3d 293 (D.D.C. 2017) (Cooper, J.) ("*Prot. Democracy I*");
- *Elec. Frontier Found. v. ODNI*, 542 F.Supp.2d 1181 (N.D. Cal. 2008) ("*EFF II*") (date certain);
- *Elec. Frontier Found. v. ODNI*, No. 07-cv-5278 (SI), 2007 WL 4208311 (N.D. Cal. Nov. 27, 2007) ("*EFF I*") (date certain);
- *EPIC v. DOJ*, 416 F.Supp.2d 30 (D.D.C. 2006) (Kennedy, J.) ("*EPIC II*") (date certain); and
- *Wash. Post v. Dep't Homeland Sec.*, 459 F.Supp.2d 61 (D.D.C. 2006) (Urbina, J.) (date certain).
- *Aguilera v. FBI*, 941 F.Supp. 144 (D.D.C. 1996) (Sullivan, J.) (date certain).

Based on the first principles set forth in the statute, this makes sense—a plaintiff with a statutory entitlement to expedited processing has a statutory right to expedition, *i.e.*, to have their request processed *more quickly*. Additionally, that right can include production of relevant records prior to an impending event of critical public importance after the records would lose much of their significance. Preserving the statutory right under FOIA to *actual* expedition in both instances can only be vindicated by preliminary relief.

II. PLAINTIFFS HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS.

A. Plaintiffs Are Entitled to Expedited Processing.

In this posture, Plaintiffs must demonstrate that they are "'entitled to expedited processing and not just whether [they are] entitled to a response.'" *Ctr. For Pub. Integrity*, 411 F.Supp.3d at 11 (quoting *Landmark Legal Found. v. EPA*, 910 F.Supp.2d 270, 274 (D.D.C. 2012)); *accord* Brennan Ctr., 498 F.Supp.3d at 96. Plaintiffs easily do so.

1. Construction of 6 C.F.R. § 5.5(e)(1)(iv).

DHS's regulation provides that expedited processing shall be granted as to a request concerning "[a] matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence." 6 C.F.R. § 5.5(e)(1)(iv). While there is no judicial construction of this regulation, the Department of Justice's identical regulatory expedited processing standard has been judicially construed. *See* 28 C.F.R. § 16.5(e)(1)(iv) ("DOJ Regulation").

Courts have held that the DOJ Regulation requires the requester to show: (1) that the request involves a "matter of widespread and exceptional media interest"; and (2) that the matter is one "in which there exists possible questions about the integrity of the government that affect public confidence." *Id.*; s*ee also Brennan Ctr.*, 498 F.Supp.3d at 97; *Edmonds v. FBI*, No. 02-cv-1294 (ESH), 2002 WL 32539613, *3 (D.D.C. Dec. 3, 2002). There is no "third" prong of this test requiring Plaintiffs to show "prejudice or a matter of current exigency to the American public" to satisfy the DOJ Regulation. *Edmonds*, 2002 WL 32539613, at *3.

Part 1 of the Test. The DOJ Regulation requires showing that the relevant questions concerning government integrity are also the subject of widespread national media attention.

See Am. Oversight v. DOJ, 292 F.Supp.3d 501, 507–08 (D.D.C. 2018) ("*Am. Oversight I*") (denying motion for expedited processing because general media interest in Solicitor General's nomination is insufficient to show media interest in possible ethics questions concerning the nomination). There need not be a showing that the disclosure would shed considerable light on agency operations; only that there is "exceptional" and "widespread" media interest. *See Edmonds*, 2002 WL 32539613, at *3; *cf. CREW v. DOJ*, 870 F.Supp.2d 70, 81 n.14 (D.D.C. 2012) ("*CREW I*"), *rev'd on other grounds*, 746 F.3d 1082 (D.C. Cir. 2014). While the media interest needs to be "widespread" and "exceptional," it need not be overwhelming. *See, e.g.*, *Brennan Ctr.*, 498 F.Supp.3d at 97 (test met by requestor's citation to "more than fifty recent articles" on the subject of the request, which was "considerably more than has sufficed in other cases"); *ACLU*, 321 F.Supp.2d at 31–32 (rejecting DOJ's position that requester's citation to what the court described as "only a handful of articles" was insufficient to show "widespread and exceptional media interest" because those articles "were published in a variety of publications and repeatedly reference the ongoing national discussion about the Patriot Act and Section 215" (second quotation added)); *Edmonds*, 2002 WL 32539613, at *3 (numerous national newspaper and network television broadcasts concerning a whistleblower's allegations of security lapses in FBI translator program met test).[4]

The fit between the call of the request and the matter of "widespread and exceptional" media interest need not be exact—mere reasonableness suffices. *See Brennan Ctr.*, 498 F.Supp.3d at 98.

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[4] *Cf.* 6 C.F.R. § 5.5(e)(3) ("The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an 'urgency to inform' the public on the topic."); 28 C.F.R. § 16.5(e)(3) (same).

Part 2 of the Test. The DOJ Regulation requires showing that "'there exists *possible* questions about the government's integrity that affect public confidence.'" *CREW II*, 436 F.Supp.3d at 361 (quoting 28 C.F.R. § 16.5(e)(1)(iv)). It does not "require the requester to prove wrongdoing by the government in order to obtain documents on an expedited basis." *Id.* Nor does it require "suggest[ing] any dishonesty." *Brennan Ctr.*, 498 F.Supp.3d at 97. Merely raising questions as to the "soundness" of a high-profile government decision suffices. *Id.* at 97 ("*see* Integrity, Black's Law Dictionary (11th ed. 2019) (defining 'integrity' to include 'soundness'); Integrity, American Heritage Dictionary (5th ed. 2018) (same)").

"The primary way to determine whether such possible questions exist is by examining the state of public coverage of the matter at issue, and whether that coverage surfaces possible ethics issues so potentially significant as to reduce public confidence in governmental institutions." *Am. Oversight I*, 292 F.Supp.3d at 508. This is not a high bar. *See, e.g.*, *Brennan Ctr.*, 498 F.Supp.3d at 97 (possible questions regarding accuracy or legality of census calculations implicate "government integrity"); *CREW II*, 436 F.Supp.3d at 361 (complaint sufficient to survive a motion to dismiss where it alleged Attorney General's action regarding disclosure of Mueller Report "supported an inference that at best, the Attorney General undertook to frame the public discussion on his own terms while the report itself remained under wraps, and at worst, that he distorted the truth"); *ACLU*, 321 F.Supp.2d at 32 (allegations in press that Section 215 of the Patriot Act *may* be unconstitutional, was subject to proposed repeal, and reports that Members of Congress were concerned about *potential* abuses of Section 215 even though that statute apparently "'had never been used'" "implicate[] government integrity" and hence are sufficient to meet test despite appearing to be necessarily speculative (internal citation omitted)); *Edmonds*, 2002 WL 32539613,

at *3–4 (test met where plaintiff sought records about their whistleblower disclosures regarding allegations of security lapses in FBI translators program, national news covered the issue, and two Senators expressed concern regarding "the significant security issues raised by plaintiff's allegations and the integrity of the FBI").[5]

2. Whether Vice President Harris Was Border Czar and Other Related Questions Are a "Matter of Widespread and Exceptional Media Interest."

Start and end with a review of the media coverage. *See Am. Oversight I*, 292 F.Supp.3d at 508. As detailed in the Complaint, Plaintiffs' expedited processing request records *immense* press interest in whether Vice President Harris is the Border Czar. *See* Compl. ¶¶ 11–12. Recall that only a "handful" of articles suffices (*Brennan Ctr,* 498 F.Supp.3d at 97 (internal citations and quotation omitted); *ACLU*, 321 F.Supp.2d at 32), and "more than fifty" is more than sufficient. *Brennan Ctr.*, 498 F.Supp.3d at 97. Plaintiffs initially provided 1,321 pages of news articles discussing Vice President Harris as the Border Czar which included articles within the past few months, not to mention the litany of articles discussing Vice President Harris's role as Border Czar

[5] Judicial reports indicate that DOJ grants expedition under the DOJ Regulation in many circumstances. *See, e.g.*, *CREW I*, 870 F.Supp.2d at 81 n. 14 (expedition granted to request seeking records on FBI's closed investigation of Congressman Tom DeLay for misconduct which did not result in charges, but received considerable media attention); *CREW v. DOJ*, 820 F.Supp.2d 39, 42, 46 (D.D.C. 2011) (expedition granted to request seeking information concerning possible deletion of Office of Legal Counsel emails where the possible deletion was flagged as a hindrance in an internal investigation, covered in the media, and was the subject of Congressional concerns); *Elec. Frontier Found. v. DOJ*, 563 F.Supp.2d 188, 189–91 (D.D.C. 2008) (expedition granted to request seeking information regarding storage of information obtained by National Security Letters in FBI's Data Warehouse); *CREW v. DOJ*, No. 05-cv-2078 (EGS), 2006 WL 1518964, *1 (D.D.C. June 1, 2006) (expedition granted to request concerning government's decision to seek a reduced penalty in tobacco litigation where government's decision was subject to intensive news coverage and prompted concern from "several Congressman" which caused a request for an Inspector General investigation of "improper political interference" with the decision).

when it was first announced. On August 19, 2024, Plaintiffs supplemented their expedited processing application with an additional 1,013 pages of news articles discussing "Vice President Harris's role as border czar and the confusion associated with those claims" dated *after* August 12, 2024. *See* App. D. These supplemental materials include articles about this action. *See id.*

There is no doubt that the coverage directly raises "possible questions about the government's integrity." *Cf. Brennan Ctr.*, 498 F.Supp.3d at 98 (nexus required between extensive media coverage and "possible questions about the government's integrity"); *Am. Oversight I*, 292 F.Supp.3d at 507–08 (similar). Moreover, when Plaintiffs filed their Original Complaint, Fox News reported on *this* case and that story was republished by a number of media outlets. *See* ECF No. 7-6. There was also considerable attention paid to this case on social media as exemplified by Elon Musk's declaring "!" in response to Plaintiffs' tweet announcing the Original Complaint to his 195 million some followers. *See* App. H. Plaintiffs have provided the most direct possible evidence of "widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence"—the underlying questions and this case received press coverage.

3. Questions as to Whether Vice President Harris Was Border Czar and Related Questions Raise "Possible Questions About the Integrity of the Government that Affect Public Confidence."

Plaintiffs have consistently started by asking one simple question in this matter concerning Defendant's actions in a high-profile case: Is Vice President Harris the Border Czar? All related issues flow directly from the answer to this question. If yes, she bears responsibility for what all agree is a disastrous situation on the border. If not, that raises the profound question of who was actually in charge of Biden-Harris Administration border policy and whether the Biden-Harris

Administration was honest with the American People. The answers to these questions have direct and profound electoral salience to the American people in the 2024 General Election.

These questions and the attendant "widespread and exceptional" media coverage plainly raise *possible* questions about the government's integrity which affect public confidence. *See* Compl. at ¶12. Indeed, that the same questions above are repeatedly raised in media reports is itself largely dispositive on this issue. *See Am. Oversight I*, 292 F.Supp.3d at 508.

To be sure, these questions do not focus on a specific allegation of illegality or criminality. But that is not required. Mere allegations of *possible* improper exercises of discretion are all that is required. Obfuscating who is responsible for the Biden-Harris Administration's failed border policies meet that test. So too, determining who is actually responsible for failures at the Border. *See, e.g.*, *Brennan Ctr.*, 498 F.Supp.3d at 97 (standard met by reports that census calculation methods may produce inaccurate request); *id.* (media coverage "need not suggest any dishonesty or intentional wrongdoing on Defendants' part"); *id.* (questioning wisdom of government action suffices); *CREW II*, 436 F.Supp.3d at 361 ("CREW's submission supported an inference that at best, the Attorney General undertook to frame the public discussion on his own terms while the report itself remained under wraps, and at worst, that he distorted the truth."); *ACLU*, 321 F.Supp.2d at 32 (standard met by *potential* abuses of statute).

That these questions concern Defendant's actions as concerns the Vice President, a discrete individual, does not alter the analysis. What matters is the *profile* of DHS' actions in that case. *Edmonds*, 2002 WL 32539613, at *3 (records concerning whistleblowers' allegations of FBI wrongdoing met test where they received extensive coverage: "This flurry of articles and television coverage, which has continued at least until last month, cannot be cast aside by a sleight-

of-hand as defendant attempts to do by categorizing plaintiff's requests as being merely 'personal to her' and of no 'wider public concern.'"); *cf. White v. DOJ*, 16 F.4th 539, 544 (7th Cir. 2021) (expedited processing properly denied because prisoner's attack on his conviction did not meet expedition criteria); *CREW I*, 870 F.Supp.2d at 75 n.1, 81 n.14 (DOJ granted expedited processing concerning high profile criminal investigation of a Congressman that resulted in no political charges).

Again, that the widespread media reports only raise questions (supported by a robust factual basis) and do not provide *proof* of misconduct does not undermine Plaintiffs' case. "'*[P]ossible* questions about the government's integrity that affect public confidence'" are sufficient. *CREW II*, 436 F.Supp.3d at 361 (quoting 28 C.F.R. § 16.5(e)(1)(iv)); *accord Brennan Ctr.*, 498 F.Supp.3d at 97 (articles that "raise questions" going to "'the government's integrity' that 'affect public confidence'" and then report on those issues are sufficient (quoting 28 C.F.R. § 16.5(e)(1)(iv)); *Edmonds*, 2002 WL 32539613, at *3 (widely reported whistleblower *allegations* meet standard).

B. Plaintiffs Are Entitled to Production of All Non-Exempt Responsive Records By September 21, 2024.

1. FOIA Requires Production "as Soon as Practicable."

As explained *supra*, the law requires that Defendant grant expedited processing to the Request because it concerns ""[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence." 6 C.F.R. § 5.5(e)(1)(iv). When expedited processing has been granted, "an agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph." 5 U.S.C. § 552(a)(6)(E)(iii). Courts have rejected

government submissions that expedited processing is merely an agency ordering mechanism and does not require *actual* expedition. *See EFF I*, 2007 WL 4208311 *4; *EPIC II*, 416 F.Supp.2d at 37–38. Rather, courts have repeatedly held that they have ample authority to enforce the "as soon as practicable" provision and that what matters under that provision is not the administrative classification of the request, but whether the agency is *actually* processing the request "as soon as practicable." *See EFF I*, 2007 WL 4208311 *4 ("Here, defendant has already determined that plaintiffs' request is entitled to expedited processing. Thus, the only question remaining is whether defendant is actually processing the request 'as soon as practicable.'"); *EPIC II*, 416 F.Supp.2d at 41 (question is whether the agency has "*actually* expedit[ed] its processing."); *see also*, *Brennan Ctr.*, 498 F.Supp.3d at 100–101; *Am. Immigr. Council*, 470 F.Supp.3d at 36–37; *Gerstein v. CIA*, No. 06-cv-4643 (MMC), 2006 WL 3462659, at *3 (N.D. Cal. Nov. 29, 2006). Courts also have inherent power to control timing in FOIA responses. *See Am. Oversight II*, 414 F.Supp.3d at 186.[6]

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[6] *Heritage Found. et al. v. DOJ*, No. 23-cv-1854 (DLF), 2023 WL 4678763 (D.D.C July 19, 2023), *vacatur denied*, 2023 WL 8880337 (D.D.C Dec. 22, 2023) is not to the contrary. True, there, Judge Friedrich wrote:

> But all the statute requires is that, once a request is expedited, the agency process it as soon as practicable. The plaintiffs provide no authority for the proposition that *within* the category of expedited requests, DOJ has an obligation to prioritize productions based on their "gravity and urgency." To the contrary, an agency faces the same obligation for "*any*" expedited request: namely, to process it "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii) (emphasis added).

Heritage Found., 2023 WL 4678763, at *5. But that is not the whole story. Judge Friedrich made clear in a hearing on whether to vacate her opinion under the *Munsingwear* doctrine that "I can envision a situation, I will tell you now, where an exigent request would jump the queue. But on this FOIA request, I didn't see it." Trans. at 7:6–8, *Heritage Found. et al. v. DOJ*, NO. 23-cv-1854 (DLF) (Oct. 30, 2023); *see also id.* at 9:7–12.

In applying this test, courts have been less than clear on the precise contours of the statutory phrase "as soon as practicable." But that is of no moment here because of the extreme gravity and urgency of this case. Whatever the outer limits of that phrase, its core meaning clearly encompasses cases like this one where production by a date certain is essential to avoid the records becoming stale and being "of little value" to "inform the public of ongoing proceedings of national importance." *Brennan Ctr.*, 498 F.Supp.3d at 99 (internal citations omitted) (collecting authorities). (Here a key issue in the 2024 General Election.) "[U]nder those circumstances, a plaintiff may demonstrate a likelihood that it is entitled to have processing completed quickly enough so that 'the value of the information would not be lessened or lost.'" *Brennan Ctr.*, 498 F.Supp.2d at 99 (quoting *Ctr. for Public Integrity*, 411 F. Supp. 3d at 12); *see also*, *Am. Immigr. Council*, 470 F.Supp.3d at 37. ("Plaintiffs' request concerns a serious and time-sensitive matter, and it is entitled to an order requiring Defendants to process and produce responsive documents on a more expeditious timeline than that proposed by Defendants."); *Am. Oversight II*, 414 F.Supp.3d at 186–87.

2. Whether Vice President Harris was Border Czar, and Her Roll as Such, Are Central Questions/Issues in the 2024 Presidential Election.

It is clear from the record that whether Vice President Harris was the Border Czar—and thus bears responsibility for the Biden's failed border policy—is a central issue in the upcoming 2024 General Election. Simply put, the American People deserve as much information as possible to answer the questions posed by Plaintiffs prior to casting their ballots.

That is borne out by widespread news coverage every day. *See, e.g.*, App. E at E000121 ("And while 44 percent of Americans said immigration mattered 'a great deal' in their decisions of whom to vote for in the presidential election, 69 percent of Republicans said it mattered a great

deal."); App A at 000469 ("TAPPER: But let's single in on the immigration issue underneath all that chaff, which is, that's a pretty potent issue . . . TAPPER: [Vice President Harris] was reaching out to the south and central American countries to stem the immigration."); App A at 000506 (BLITZER: She wasn't appointed the border czar. Immigration was part of her portfolio as vice president of the United States."); App. E at E000209 ("The July border numbers were released as immigration remains a central issue in the presidential election, which is less than three months away . . . [Vice President Harris] held a narrower role that sought to improve conditions in northern Central America so that would-be migrants would stay home."); App. E at E000817 ("Two new recent polls support this trend, although polls have consistently shown that Americans overwhelmingly disapprove of Vice President Kamala Harris' job as 'border czar.' A new Napolitan News Service poll found that 84% of registered voters believe "illegal immigration is bad for the United States . . . .").

That coverage even extended to *this* lawsuit and could not be more clear that the same questions asked by this case are central issues in the 2024 General Election. *See, e.g.*, App. D at 1 ("The term [Border Czar] has become a cornerstone of GOP attacks on Harris as she continues her White House bid. The Biden administration has rejected 'border czar' as an unofficial title for Harris's role, but the term was used by her critics and even embraced by multiple news organizations until she ascended to the top of the presidential ticket."). Indeed, as discussed *supra*, at p. 1, Vice President Harris *herself* seems to have acknowledged this fact.

Moreover, this Court can take notice that the House of Representatives—which has conducted an exhaustive (and on-going) study of the Biden-Harris Administration's border policy passed H.R. 1371, 118th Cong (2024) as amended which expressly found that "on March 24, 2021,

President Biden tasked Vice President Kamala Harris with working to address illegal immigration into the United States, including ‘‘root causes’’, and came to be known colloquially as the Biden administration’s ‘border czar’’” *Id.* at First Whereas. H.R. 1371 continues with 17 detailed factual whereas clauses condemning Vice President Harris’s conduct regarding the border while in Office. It concludes by: “(1) strongly condemn[ing[] the Biden Administration and its Border Czar, Kamala Harris’s, failure to secure the United States border” (*id*. at (1)); and then (2) making clear that the Vice President’s Harris’s role with the Border and the Biden-Harris Administration’s Border policy is a central issue in the 2024 Presidential Election. *Id.* at (2)–(3).

3. A Significant Amount of Voting Will Have Commenced On September 21, 2024.

In recent times, changes in voting laws have seen voting by mail or voting in-person commence ever earlier. Accordingly, information going directly to key issues in the 2024 Presidential Election must be made public far before November 5, 2024. The Delaware Department of Elections may begin mailing absentee ballots to voters as early as September 6. 15 Del. C. § 5504. Nine other states—Arkansas, Kentucky, Minnesota, North Carolina, Pennsylvania, South Dakota, Tennessee, West Virginia, and Wisconsin—begin mailing ballots more than 45 days before the election. *See* A.C.A. § 7-5-407; M.S.A. §§ 203B.081 & 203B.085; N.C.G.S.A. § 163-227.10; 25 P.S. § 3146.2a; S.D.C.L. §§ 12-19-1.2 & 12-19-21; T.C.A. § 2-6-202; W. Va. Code, § 3-3-5(e)(1); W.S.A. § 7.15. Processing begins in Delaware thirty days prior to Election Day. 15 Del. C. § 5510.

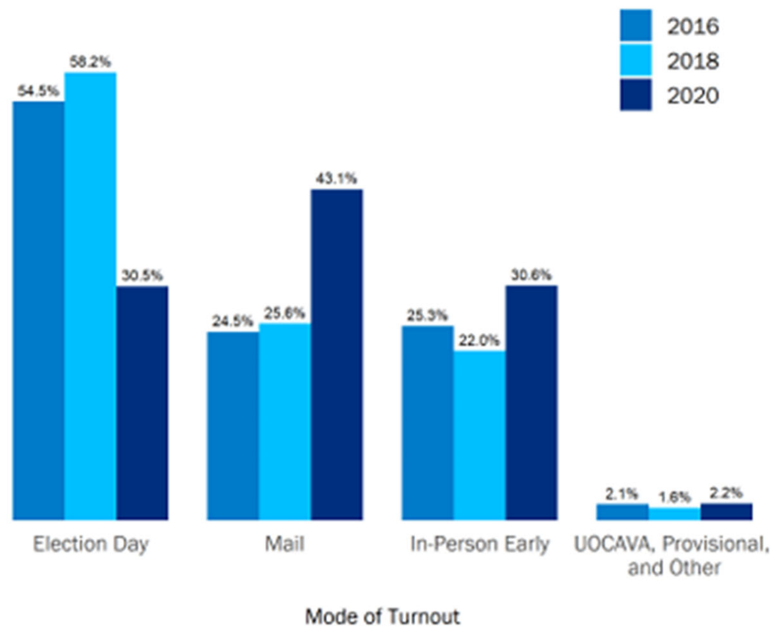
In person absentee voting commences in Pennsylvania 50 days prior to the election. *See* 25 P.S. § 3146.2a. Early voting starts in Virginia 45 days before the election. *See* VA Code

Ann. §25.2-701.1. In person absentee voting starts in Maine when ballots are ready, which typically is 30 to 45 days before the election. *See* App. G at 6.

These states are not insignificant, Pennsylvania and Wisconsin are widely considered key swing states in the 2024 General Election. North Carolina, Virginia, and Maine's 2d Congressional District are all minor swing states.

Moreover, early voting or voting by mail is not the rarity or novelty it once was. Witness the Election Assistance Commission's 2020 Report to Congress:

Figure 3. Mail Voting Was the Most Common Way for Voters to Cast Their Ballots in 2020



App. F at 10.

There is no reason to believe that the general trend of increased participation outside of the traditional in-person Election Day voting will wane in 2024; it may well increase.

4. FOIA Requires Production by September 21, 2024.

Again, under 5 U.S.C. § 552(a)(6)(E)(iii) a Court has broad discretion to conclude "as soon as practicable" means "under the circumstances" production by a date certain. *Brennan Ctr.*, 498 F.Supp.3d at 99. As Judge Kelly has noted, [t]he Court's analysis on this point tracks closely with its evaluation of irreparable harm." *Id.* .

Courts have granted preliminary injunctions requiring production by a date certain "so to avoid the records requested becoming stale after that date, and thus being 'of little value' to 'inform the public of ongoing proceedings of national importance.'" *Brennan Ctr.*, 498 F.Supp.3d at 99 (quoting *Ctr. for Public Integrity*, 411 F. Supp. 3d at 12 (in turn quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988))). In such a case "a plaintiff may demonstrate a likelihood that it is entitled to have processing completed quickly enough so that 'the value of the information would not be lessened or lost.'" *Brennan Ctr*., 498 F.Supp.3d at 99 (quoting *Ctr. for Public Integrity*, 411 F. Supp. 3d at 12).

Here the urgency is obvious. Whether Vice President Harris was Border Czar—and her role in the Biden Harris's Administration's border policy—is a central issue in the 2024 General election. Courts have been clear that the need for information before an Election (or significant legislative event) requires production prior to the Election. *See, e.g.*, *Brennan Ctr.,* 498 F.Supp.3d at 100 (2020 Census reapportionment); *Prot. Democracy II*, 498 F.Supp.3d 132, 142 (D.D.C. 2020) (records relating to the United States Postal Service's involvement in Department of Justice's voting fraud task force before 2020 election); *Am. Oversight II*, 414 F.Supp.3d at 188 (impeachment inquiry); *Ctr. for Pub.*, 411 F.Supp.3d at 15 (same); *Wash. Post*, 459 F.Supp.2d at

74 (records of visitors to White House Complex and Vice President's residence prior to 2006 elections).

C. Defendant Should Not be Heard to Claim the Responsive Records Are Exempt at this Stage.

To be sure, some courts have concluded that whether the records are likely subject to withholding is relevant to whether to grant a preliminary injunction. *See, e.g.*, *Am. Oversight II*, 414 F.Supp.3d at 187; *Ctr. Public Integrity*, 411 F.Supp.3d at 13; *EPIC II*, 15 F.Supp.3d at 46. But those cases have set a high threshold for invoking this consideration, requiring a showing that most (if not all of the records) are exempt. *Compare Am. Oversight II*, 414 F.Supp.3d at 187 ("State rightly points out that American Oversight will not be irreparably harmed by further delay if the documents it seeks can be lawfully withheld from disclosure under FOIA's exemptions. Certain categories of the requested documents may well meet that description. Others, however, would not appear to be subject to any FOIA exemptions. This is especially true for communications between Department officials and Mr. Giuliani, who is not a government employee. Accordingly, the Court finds that the harm of delay beyond the anticipated timeline of the impeachment inquiry would be irreparable, especially with respect to those categories of requested records that are unlikely to be subject to FOIA exemptions."); *Ctr. for Pub. Integrity*, 411 F.Supp.3d at 13 ("While some of the requested information may very well be exempt from disclosure, Plaintiff's Motion requests only non-exempt information. And, at this point in the litigation, knowing nothing about the content of the responsive documents, the Court is not prepared to find that all of the requested information is exempt from FOIA"), *with EPIC v. DOJ*, 15 F.Supp.3d 32, 46 (D.D.C. 2014) ("*EPIC III*") ("most if not all" of an entire category of records

sought by Plaintiff were "classified").[7] Put different all Plaintiffs need to show at this preliminary posture is that they can make *some* significant use of records—or segregable portions thereof—that are likely non-exempt.

This test makes eminent sense because at the end of the day the question is rightly viewed through a lens of irreparable harm and redressability. *See, e.g.*, *Am. Oversight II*, 414 F.Supp.3d at 187 ("State rightly points out that American Oversight will not be irreparably harmed by further delay if the documents it seeks can be lawfully withheld from disclosure under FOIA's exemptions"); *EPIC III*, 15 F.Supp.3d at 46 ("EPIC cannot claim to be injured—much less "irreparably" so—if the NSD withholds documents that EPIC is not entitled to access in the first instance"). The denial of significant non-exempt responsive documents is fully cognizable harm even if other documents are withheld; the harm is absent only if there are likely no (or but a

[7] *EPIC III* actually cuts in favor of this test despite a preliminary injunction being denied in that case. In *EPIC III*, Plaintiffs sought Attorney General reports to certain Congressional Committees on certain surveillance tools; information provided to certain Congressional Committees on those tools; and records used to prepare the foregoing. 15 F.Supp.3d at 36. "[M]ost if not all" of the Attorney General reports were classified. *Id.* at 46. (An open and shut case of exemption unlike the exemptions asserted here). Accordingly, the *EPIC III* Court wrote "certain documents in all of the requested categories are likely to fall under FOIA Exemptions." *Id.* Then, critically, the *EPIC III* Court concluded that on those facts, EPIC's claim of irreparable harm fell as the very records it needed "so that the public can participate fully in the ongoing debate" were clearly subject to withholding. *Id.* The *EPIC III* Court noted that EPIC appeared to acknowledge that the usefulness of the records was limited (noting EPIC requested expedited production of a *Vaughn* Index). *Id.* at 46 n.9. In other words, the touchstone of the analysis was whether the non-exempt records would further the public debate.

Heritage Foundation charted a different course and adopted a test more deferential to the Government concluding that "[a]t least at this stage, however, it appears to the Court that the documents most likely to vindicate the plaintiffs' asserted interests justifying injunctive relief are those that are also most likely to be exempt from disclosure under FOIA." *Heritage Found.*, 2023 WL 4678763. That opinion is against the weight of authority and should be rejected for the reasons previously explained. Moreover, even under that deferential test, Defendant fails here. The key records are *not* likely to be exempt.

handful) of non-exempt responsive records.

Moreover, nothing negates the fact that "[t]he *agency* bears the burden of justifying the application of any exemptions, 'which are exclusive and must be narrowly construed.'" *Lewis v. Dep't of Treas.*, No. 17-cv-943 (DLF), 2020 WL 1667656, at *2 (D.D.C Apr. 3, 2020) (quoting *Mobley v. CIA*, 806 F.3d 568, 580 (D.C. Cir. 2015) (emphasis added)). The Defendant must meet *some* form of that burden even in the preliminary injunction context. *Cf. Ctr. for Pub. Integrity*, 411 F.Supp.3d at 13 ("And, at this point in the litigation, knowing nothing about the content of the responsive documents, the Court is not prepared to find that all of the requested information is exempt from FOIA.").

Defendant cannot make such a showing here. The request may of course include *some* exempt records, but it also will almost certainly include many non-exempt records. A classic category of non-exempt records are those which demonstrate who was in charge—at the highest possible levels of the Executive Branch—of a major set of Government actions.

Finally, as the court in *Center for Public Integrity* observed, at the end of the day this Court knows "nothing about the content of the responsive documents" (411 F.Supp.3d at 13) and given its delay, neither does the Government.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION.

A. Plaintiff Will Suffer Irreparable Harm to Their Statutory Entitlement to Expedited Processing.

Plaintiffs have demonstrated a likelihood of success on the merits, *i.e.*, that they have demonstrated a statutory right to *expedited* processing. *See, e.g.*, *Brennan Ctr.*, 498 F.Supp.3d at 96; *Ctr. For Pub. Integrity*, 411 F.Supp.3d at 11. That statutory right to expedited processing is

entirely focused on *time*: Plaintiffs are statutorily entitled to receive their documents *more quickly* than garden variety requestors. *Timing* is the fundamental basis of the statutory right. *See* 5 U.S.C. § 552(a)(6)(E) (entire section of FOIA providing "[e]ach agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records" and establishing statutory framework for regulatory implementation of the same."); *see also, e.g., Edmonds v. FBI*, 417 F.3d 1319, 1324 (D.C. Cir. 2005) (Garland, J.) ("The 1996 FOIA amendments underlined Congress' recognition of the value in hastening release of certain information, by creating a statutory right to expedited processing and providing for judicial review of its denial."). That timing decision is made by Congress and DHS through 6 C.F.R. § 5.5(e)(1)(iv). DHS concluded that there is substantial public interest in having information about "a matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence" produced *more quickly*. That decision necessarily reflects a judgement that this category of information is most useful to the public *now* rather than later. *See Edmonds*, 417 F.3d at 1324 ("We reject the government's further suggestion that whatever benefit Edmonds obtained from expedited processing was too insubstantial to entitle her to a fee award. . . . Plainly, there is value to obtaining something earlier than one otherwise would. That is why people commonly pay—and delivery services commonly charge—a premium for next-day delivery of important documents."); *cf. Payne Enter., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) ("stale information is of little value").

Because this statutory right turns *entirely* on timing, it cannot be remedied *post hoc*. FOIA records improperly withheld in a run-of-the-mill FOIA case can always be produced after adjudication down the road. FOIA records produced slowly are eventually produced so there is a

complete remedy: the requestor may obtain the records he is entitled to. But here, the *entire* candle is time; the statutory entitlement to expedition only matters while the records are being processed, after that finite temporal window the point is moot. *See* 5 U.S.C. § 552(a)(6)(E)(iv) ("[a] district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request."); *see also, e.g.*, *Edmonds*, 417 F.3d at 1324 ("When, pursuant to court order, the FBI finished processing Edmonds' request two months earlier than it would have in the absence of the order, she vindicated that statutory right."); *Muttitt v. Dep't of State*, 926 F.Supp.2d 284, 296–97 (D.D.C. 2013) (expedited processing claim mooted by final production). Thus, a failure to expedite effectively destroys the entire statutory right.

Expedited processing is also a right of relative priority assigned via statute and regulatory determinations of which FOIA requests are more important. DHS multitracks their FOIA requests. Under FOIA "[e]ach agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests." 5 U.S.C. § 552(a)(6)(D). DHS has done so. *See* 6 C.F.R. § 5.5(b). And an expedited request takes priority. *Id.* at § 5.5(e)(4) ("If expedited processing is granted, the request shall be given priority, placed in the processing track for expedited requests, and shall be processed as soon as practicable."). Thus, denying expedited processing denies priority—an entitlement pointedly provided by statute and regulation that is, again, *entirely* time based and cannot be restored when lost.

Moreover, the decision on timing embodied in 6 C.F.R. § 5.5(e)(1)(iv) is a decision made against the background of FOIA's unusual requirement that generally a court must grant equitable

relief if plaintiffs prevail. *See, e.g.*, *Wash. Post v. Dep't of State*, 685 F.2d 698, 704 (D.C. Cir. 1982) (holding court lacks equitable discretion to refuse to order disclosure of non-exempt documents regardless of how grave the potential consequences of disclosure and explaining "[t]he most that a court could do in such a situation would be, in response to a strong showing of imminent and demonstrable danger to a compelling national interest, to stay its judgment for a time to give Congress an opportunity to correct its oversight, if such it be."), *vacated as moot*, 464 U.S. 979 (1983) (mem.); *Soucie v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971) ("Congress clearly has the power to eliminate ordinary discretionary barriers to injunctive relief, and we believe that Congress intended to do so here").

Accordingly, a wrongful denial of a statutory right to expedited processing necessarily causes irreparable harm because the statutory right is solely one of relative timing and the clock cannot be wound back to restore to Plaintiffs the time lost each day the Request is not expedited. The statutory right concerns timing in a limited temporal window; effective relief cannot come via another mechanism or *post hoc*. Put differently, as to a claim of expedited processing "only an injunction could vindicate the objectives of [FOIA]" *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982); *see also Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542–43 (1987). That an injunction is the only effective relief here means that the harm is irreparable.

Plaintiffs' submission on this point is narrow—it applies only where Plaintiffs have shown they *are* entitled to expedited processing. Thus, a holding that an improper denial of expedited processing is itself (absent some extraordinary circumstance) irreparable harm would have no application in the vast majority of FOIA cases. Again, Plaintiffs freely admit that this submission collapses the likelihood of success on the merits with a showing of irreparable harm, but there is

nothing new in such an analysis where only an injunction can effectively remedy the statutory violation. *See, e.g.*, *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 193–94 (1978) (under statutory scheme violation of the statute required entry of injunction per Congress' balancing of the equities itself in the statutory scheme).[8] It is the correct analysis in this context as is demonstrated by several FOIA opinions in the district.

Take *EPIC II*. There DOJ argued as to "Irreparable Injury" that because DOJ had granted EPIC expedited processing, EPIC had received full relief and was not entitled to an order compelling production by a date certain. 416 F.Supp.2d at 40–41. The Court rejected this argument, writing that "[a]s EPIC contends, 'merely paying lip service' to EPIC's statutory right does not negate 'the harm that results from the agency's failure to *actually* expedite its processing.' Pl.'s Reply at 7 (emphasis in original). Unless the requests are processed without delay, EPIC's right to expedition will be lost." *Id.* at 41. *EPIC II* did not involve any claim that records would lose saliency by a date certain. The court again linked the merits of the expedited processing claim to irreparable harm. *See id.* ("Moreover, DOJ's arguments challenging the irreparable nature of the harm sustained by EPIC as a result of DOJ's delay is severely undermined by its determination

[8] There is nothing improper about a court largely collapsing the questions of success on the merits on a statutory violation and irreparable harm where the statutory violation concerned a question of timing. *See, e.g.*, *Jasperson v. Fed. Bureau of Prisons*, 460 F.Supp.2d 76, 90–91 (D.D.C 2006) (failure to provide a prisoner with legally required individualized assessment as to suitability for placement in a halfway house prior to incarceration would constitute irreparable harm "from the moment he surrenders to BOP custody"); *Apotex. Inc. v. FDA*, No. 06-cv-627 (JDB), 2006 WL 1030151, at *17 (D.D.C. Apr. 19, 2023) ("But unlike the harm that Apotex allegedly faces, the potential injury that the intervenor-defendants face is not 'merely economic.' Rather, they stand to lose a statutory entitlement [(180 day generic exclusivity period)], which is a harm that has been recognized as sufficiently irreparable. *See, e.g.*, *Mova [Pharm. Corp. v. Shalala]*, 140 F.3d [1060,][] 1067 n. 6 [(D.C. Cir. 1998)]. Once the statutory entitlement has been lost, it cannot be recaptured.").

that EPIC's FOIA requests merit expedition. Such a determination necessarily required DOJ to find that there was an '*urgency* to inform the public' about the warrantless surveillance program. Pl.'s Mot., Exhs. 12, 13 (emphasis added). Given this concession, the court finds it hard to accept DOJ's current argument that disclosure is not urgent and that further delay will not harm EPIC."). Removing any doubt, the court then wrote "[b]eyond losing its right to expedited processing, EPIC will *also* be precluded, absent a preliminary injunction, from obtaining in a timely fashion information vital to the current and ongoing debate surrounding the legality of the Administration's warrantless surveillance program", *i.e.*, the nature of the asserted right was a separate ground of irreparable harm. *Id.* (emphasis added).

Wash. Post v. DHS, to be sure, cites the nature of the asserted "urgency," (459 F.Supp.2d at 74–75) but it *also* quite clearly holds: "Turning to the irreparable injury component of the preliminary injunction analysis, the plaintiff argues that the 'very nature of the right that plaintiff seeks to vindicate in this action—expedited processing—depends on timeliness.' Pl's Mot. at 15. The court agrees." *Id.* at 74. The court reinforced this point, writing "[w]ithout a preliminary injunction directing the Secret Service to process the plaintiff's FOIA request in an expedited fashion, the plaintiff would lose out on its statutory right to expedited processing *and* on the time-sensitive public interests which underlay the request." *Id.* at 75 (emphasis added). Plainly by using a conjunctive, the *Wash. Post* court recognized the denial of the statutory right can cause irreparable harm in this context. *Wash. Post* thus contains two alternative holdings. If the decision rises or falls on urgency, then the conjunctive is unnecessary.

Heritage Foundation v. EPA is not to the contrary. No. 23-cv-748 (JEB), 2023 WL 2954418 (D.D.C. Apr. 14, 2023). There, the court addressed an argument Plaintiffs did not

make—that "they will suffer irreparable harm because '[t]ime cannot be wound back,' and so '[t]he time lost to Plaintiffs . . . is thus irreparable.'" *Id.* at *5 (internal citation omitted). But Plaintiffs' argument was the same as it makes here—where Plaintiffs have shown they are entitled to expedited processing a denial of that expedition is irreparable because it is a statutory right that is entirely about time that cannot be restored. The opinion in *Heritage Foundation v. EPA* says nothing about *this* statutory argument because the court there did not consider it.

B. Plaintiffs Will Suffer Irreparable Harm if the Records are Not Produced By September 21 2024.

The irreparable informational injury here is as simple as it is obvious. The records sought by the Request go directly to the questions asked by Plaintiffs, which in turn are core issues in the forthcoming Presidential Election. If the records are produced after voting is well underway the American People who have voted cannot use those to inform their votes on an important issue. Definitionally then, they will be "stale after that date, and thus being 'of little value' to 'inform the public of ongoing proceedings of national importance.'" *Brennan Ctr.*, 498 F.Supp.3d at 99 (quoting *Ctr. for Public Integrity*, 411 F. Supp. 3d at 12 (in turn quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988))). Put differently their value will be lessened or lost.'" *Brennan Ctr.*, 498 F.Supp.3d at 99 (quoting *Ctr. for Public Integrity*, 411 F. Supp. 3d at 12).

Courts in this District have not hesitated to find that these circumstances constitute irreparable harm. As Judge Sullivan put it in a case seeking information regarding the Postal Service and voting fraud:

> The Court finds Protect Democracy has established a likelihood of irreparable harm absent a preliminary injunction. As stated above, the Court has concluded that the subject matter of Protect Democracy's FOIA request is time sensitive due to the impending election, in

> which voting is already underway. . . . Plaintiff has established that the American public has a need to know information regarding investigations into matters potentially affecting voting rights while the inquiries are still ongoing.

Prot. Democracy II, 498 F.Supp.3d at 142; *accord Wash. Post*, 459 F.Supp.2d at 75 ("Because the urgency with which the plaintiff makes its FOIA request is predicated on a matter of current national debate, due to the impending election, a likelihood for irreparable harm exists if the plaintiff's FOIA request does not receive expedited treatment."). Courts have routinely granted preliminary injunctions requiring production of relevant records prior to legislative votes on measures of great importance under the same rationale. *See, e.g.*, *Brennan Ctr.*, 498 F.Supp.3d at 101 (re-apportionment per 2020 census); *Am. Oversight II*, 414 F.Supp.3d at 186–87 (impeachment); *Ctr. for Pub. Integirty*, 411 F.Supp.3d at 13 (impeachment); *EFF II*, 542 F.Supp.2d at 1187 (FISA Amendments); *EFF I*, 2007 WL 4208311, at * 7 (Protect America Act and FISA).[9]

This conclusion is not altered by the fact that the elections today are a fluid months long event and in theory records produced say October 1 would have *some* salience to *some* component of the electorate thereafter. *Protect Democracy II* itself answers that point as there the injunction was granted in part because "voting is already underway." *Prot. Democracy II*, 498 F.Supp.3d at 142. What matters is that the harm has occurred in a significant way and is on-going every day. *Cf. e.g.*, *Am. Immigr. Council*, 470 F.Supp.3d at 38 ("Defendants attempt to downplay the urgency of Plaintiff's request, asserting that Plaintiff 'cannot point to any concrete deadline by which it needs the records' because '[t]he COVID-19 pandemic continues.' Opp'n at 16. But the fact that

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[9] Moreover, there is an added harm here because Congress has sought to Act (*see* H.R. 1371), but has had little success in obtaining transparency from the Biden-Harris Administration (Apps. B & C). *See Am. Oversight II*, 414 F.Supp.3d at 187 (fact that Congress subpoenaed records but may not receive the records, and in any event may not make subpoena returns public underscores Plaintiff's showing of irreparable harm); *Ctr. for Pub. Integrity*, 411 F.Supp.3d at 13–14 (similar).

the COVID-19 pandemic is an ongoing public health crisis only bolsters Plaintiff's claim of irreparable harm."); Ctr. for *Pub. Integrity*, 411 F.Supp.3d at 13 ("The Court finds that the lack of a precise end-date for the impeachment proceedings is not detrimental to Plaintiff's claim of irreparable harm. The impeachment proceedings are ongoing. And, in order to ensure informed public participation in the proceedings, the public needs access to relevant information. As such, irreparable harm is already occurring each day the impeachment proceedings move forward without an informed public able to access relevant information.").

There is irreparable harm here.

III. THE EQUITIES FAVOR GRANTING A PRELIMINARY INJUNCTION.

Where the government is a party, the equities and the public interest merge. *See, e.g.*, *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Brennan Ctr.*, 498 F.Supp.3d at 103.

The public interest expects faithful enforcement of FOIA and Department Regulations. *See, e.g.*, *Wash. Post*, 459 F.Supp.2d at 76 ("If anything, the public's interest in this case is best assessed through the statutory provisions passed by the public's elected representatives."); *EPIC II,* 416 F.Supp.2d at 42 ("The public interest prong is met because 'there is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate.'" (internal citation omitted)). There is also a public interest that is "best 'served by the expedited release of the requested documents because it furthers FOIA's core purpose of ''shed[ding] light on an agency's performance of its statutory duties.''" *Protect Democracy II*, 498 F.Supp.3d at 144 (quoting *Elec. Privacy Info. Ctr.*, 416 F.Supp.2d at 42 (alteration in original) (citation omitted)). This is especially so when the topic of the request—as here—has received "great public and media attention." *See, e.g.*, *EPIC II*, 416 F.Supp.2d at 42.

Accordingly, in the context of a motion for a preliminary injunction seeking to compel expedited processing of a FOIA request, the public interest largely merges with the merits. *See, e.g.*, *Brennan Ctr.*, 498 F.Supp.3d at 103 (finding that expedition is warranted leads directly to conclusion that the public interest favors a preliminary injunction).

As to harm, to be sure, the expedition of Plaintiffs' FOIA request will place some burden on limited DHS resources and will disfavor other requestors by placing Plaintiffs' FOIA Request ahead of theirs. But the entire point of expedited processing under FOIA and the DHS' own regulations is a judgement by both Congress and the agency that these harms and burdens are outweighed by the need to process certain requests on an expedited basis to ensure transparency into salient and time-sensitive issues of the day. *See, e.g.*, *Edmonds*, 2002 WL 32539613, at *4 ("While defendant could justifiably argue that the Court's application of the relevant regulation will result in an even greater burden on its already strained resources and will disadvantage other FOIA requesters, the Court is constrained to enforce the regulation as written."). Part of the statutory entitlement *is* priority. Accordingly, Plaintiffs have shown a likelihood of success on the merits under the existing statutory and regulatory judgement that expedition is required. *See, e.g.*, *Wash. Post*, 459 F.Supp.2d at 76 ("pursuant to the statutory provision mandating expedited treatment, the public's interest in expedited processing of the plaintiff's request outweighs any general interest that it has in first-in-first-out processing of FOIA requests.").

CONCLUSION

This Court should enter a preliminary injunction compelling DHS to: (1)process Plaintiff's FOIA Request on an expedited basis pursuant to 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(e)(1)(iv); and (2) produce all non-exempt responsive records by September 21, 2024.

Dated: August 30, 2024

Respectfully submitted,

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