

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
AMERICAN OVERSIGHT,)	
)	
)	
)	<i>Plaintiff,</i>
)	
v.)	Case No. 19-cv-2934 (CRC)
)	
U.S. DEPARTMENT OF STATE,)	
)	
)	
)	<i>Defendant.</i>
_____)	

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION
FOR A PRELIMINARY INJUNCTION**

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INTRODUCTION

On September 24, 2019, Speaker of the House of Representatives Nancy Pelosi announced that the House of Representatives would initiate a formal impeachment inquiry against President Trump in light of allegations that the president had sought to use the power of the U.S. government to pressure a foreign government to initiate an investigation of President Trump's potential political opponent, former Vice President Joe Biden, and his son. On September 25, 2019, the White House released a memorandum reflecting the content of President Trump's July 25, 2019 call with Ukraine's president, which confirmed that President Trump had asked the president of Ukraine to initiate an investigation of Biden and his son. Members of the House of Representatives have now indicated that they intend to conduct an impeachment inquiry expeditiously, which may result in a vote on whether President Trump will be impeached within the next two months.

Over four months before these extraordinary developments, on May 21, 2019, American Oversight submitted two Freedom of Information Act ("FOIA") requests to the U.S. Department of State ("State") seeking public records with the potential to shed light on whether and to what extent the Trump administration was undertaking actions intended to encourage or coerce the Ukrainian government to initiate an investigation of one of the president's political opponents for the purpose of conferring an electoral advantage on the president. American Oversight submitted these requests, in conformance with its organizational mission, to gain information of great public importance and to disseminate the requested information to the public.

American Oversight's requests sought records that go to the heart of the impeachment inquiry the House of Representatives has now initiated. Specifically, American Oversight requested records reflecting communications between senior State Department officials and the president's purported personal attorney, Rudolph Giuliani (who has reportedly been involved in

efforts to pressure the Ukrainian government to investigate one of the president's political opponents); records concerning the former U.S. Ambassador to Ukraine, who was abruptly removed from her post around the time that the efforts to pressure Ukraine appear to have commenced; and other records that may concern any administration efforts to inappropriately or illegally use the power of the U.S. government to pressure a foreign nation to start an investigation of a political opponent of the president for his electoral advantage. Among other important matters, these requests—which specifically ask for the responsive records of high-ranking officials including Secretary of State Pompeo and Counselor Thomas U. Brechbuhl—would capture records reflecting communications memorializing or discussing the content of, or administration actions following, President Trump's July 25, 2019 call with the president of Ukraine. Congressional committees involved in the impeachment inquiry have requested a subset of these records, and other records concerning these topics, to further that inquiry. These committees have also sought to interview State officials—including Ambassador Yovaovitch and Counselor Brechbuhl—whose communications American Oversight has requested.

Despite American Oversight's diligence and the over four months since the submission of its requests and the clear statutory requirements of FOIA, the organization has been unable to obtain even a single record from State in response to its FOIA requests for records concerning this matter of extraordinary public importance, or even a determination whether to grant or deny the request. State's failure to meet its statutory obligations under FOIA threatens to deprive American Oversight and the American public—both the general public and members of Congress—of information essential to an informed debate on the merits of impeachment, an inquiry currently pending before the House of Representatives. American Oversight and the American public will have only a brief opportunity to consider all the relevant information

related to the allegations against the president and his administration as the impeachment inquiry takes place in the coming months, and to participate in an informed manner to petition their representatives with their views. American Oversight seeks immediate injunctive relief to protect its vital interests and those of the public it serves.

BACKGROUND

On May 21, 2019, American Oversight submitted two FOIA requests to State in light of public reports that the president's personal attorney had undertaken an effort to pressure Ukraine to investigate presidential candidate and former Vice President Joe Biden, a political opponent of the president, around the time the U.S. Ambassador to Ukraine was being recalled. American Oversight's first request sought all records reflecting communications of specified State Department officials—including Secretary Pompeo and Counselor to the Secretary Thomas U. Brechbuhl—with Mr. Giuliani or the president's other personal attorneys, about any attempts by the president's personal attorneys to communicate with Ukrainian government officials, or regarding any other effort to encourage the Ukrainian government to investigate candidate Biden or his son. Compl. ¶¶ 7–8, ECF No. 1. American Oversight's second request sought all records reflecting communications between State officials and the White House regarding the recall of U.S. Ambassador to Ukraine Marie Yovanovitch, records reflecting communications of specified high-ranking officials regarding Ambassador Yovanovitch, and Ambassador Yovanovitch's cables and communications from her last two weeks serving in Ukraine. *Id.* ¶ 15. American Oversight's first request sought records from March 1, 2019, through the date State conducts a search for responsive records, and the second request sought records from April 1, 2019, through the date State conducts its search (with the exception of one item seeking records from a narrow, two week period). *Id.* ¶¶ 9, 15.

American Oversight sought the records at issue to shed light on whether and to what extent the president and his administration were using the power and resources of the federal government to pressure a foreign government to open an investigation of one of the president's political opponents in order to gain an electoral advantage. McGrath Decl. ¶ 12; *see also* Compl. Ex. A, ECF No. 1-1. Obtaining the requested records and disseminating the information in those records is vital to fulfilling American Oversight's core organizational mission to ensure transparency into government actions of public concern, promote accountability for government officials, and disseminate information about the government's actions to the public. American Oversight is a non-partisan, nonprofit organization primarily engaged in disseminating information to the public and committed to ensuring transparency in government and promoting accountability for government officials. Compl. ¶ 5; McGrath Decl. ¶ 2. American Oversight typically posts all records it receives from public records requests for public view on its website. *Id.* ¶ 3. American Oversight also analyzes the records it receives and creates explanatory and editorial content on the basis of its findings, and the organization highlights its findings for other media to ensure wide public dissemination. *Id.* American Oversight disseminates the information it receives in order to facilitate the informed participation of the American public in self-government, including by ensuring the public has the information it needs to effectively petition its representatives in Congress. *Id.* American Oversight intends to rapidly disseminate the information it receives in response to these requests to the public. *Id.* ¶ 4.

On September 20, 2019, American Oversight requested that State process American Oversight's requests on an expedited basis due to public reporting suggesting that an intelligence community whistleblower complaint contained information concerning the continued efforts of the president and his personal attorney to pressure Ukraine to investigate a political opponent of

the president, as well as the diminishing period of time before voting commenced in the 2020 presidential election. *See* Compl. Ex. A.

Since the time of American Oversight’s request for expedited processing, the need to disseminate the information in the requested records to the public has grown even more urgent. Most importantly, on September 24, 2019, Speaker of the House of Representatives Nancy Pelosi announced that the House would undertake a formal impeachment inquiry focused on the president’s efforts to pressure Ukraine to investigate one of his political opponents.¹ McGrath Decl. ¶ 5. Following Speaker Pelosi’s announcement, the White House released a call memorandum from President Trump’s July 25, 2019 call with the president of Ukraine, which demonstrated that President Trump requested that Ukraine open an investigation into the president’s potential political opponent former Vice President Joe Biden and his son.² McGrath Decl. ¶ 6. On that call President Trump also repeatedly stated that his personal attorney—Mr. Giuliani (a subject of American Oversight’s first request)—would contact the Ukrainian government in concert with the U.S. Attorney General.³ *Id.* Later reports confirmed that Secretary Pompeo and Counselor Brechbuhl (officials whose records are the subject of American Oversight’s requests) were on President Trump’s July 25, 2019 call.⁴ McGrath Decl. ¶ 7.

¹ Nicholas Fandos, *Nancy Pelosi Announces Formal Impeachment Inquiry of Trump*, N.Y. Times, Sept. 24, 2019, <https://www.nytimes.com/2019/09/24/us/politics/democrats-impeachment-trump.html> (including video of Speaker Pelosi’s statement).

² The White House, Memorandum of Telephone Conversation with President Zelenskyy of Ukraine, July 25, 2019, <https://www.whitehouse.gov/wp-content/uploads/2019/09/Unclassified-09.2019.pdf>.

³ *Id.*

⁴ *WATCH: Pompeo Confirms He Was on Trump-Ukraine Phone Call*, PBS Newshour (Oct. 2, 2019, 9:19 AM), <https://www.pbs.org/newshour/politics/pompeo-confirms-he-was-on-trump-ukraine-phone-call>.

Leaders of the House of Representatives have reportedly stated that the impeachment process is likely to move quickly, potentially concluding before late November.⁵ McGrath Decl. ¶ 8. Senate Majority Leader Mitch McConnell has also stated that he would move to hold a trial if the president is impeached in accordance with the Senate parliamentarian’s guidance that the Senate must reach a “rapid disposition of any impeachment trial.”⁶ *Id.*

The records American Oversight has requested concern matters that are central to Congress’s impeachment inquiry. Indeed, the congressional committees investigating the president’s actions in furtherance of the impeachment inquiry have focused their requests on many of the same records American Oversight has requested, as well as other records related to the records that American Oversight seeks.⁷ McGrath Decl. ¶ 9. The witnesses Congress is seeking to interview, further, are officials whose communications are the subject of American Oversight’s requests—including former Ambassador Yovanovitch and Counselor Brechbuhl.⁸

⁵ Mike DeBonis & Rachael Bade, *Democrats Eye Quick Impeachment Probe of Trump as Freshman Push for Focus on Ukraine*, Wash. Post (Sept. 26, 2019, 7:31 PM), https://www.washingtonpost.com/powerpost/democrats-eye-quick-impeachment-probe-of-trump-as-freshmen-push-for-focus-on-ukraine/2019/09/26/66f50b20-e089-11e9-8dc8-498eabc129a0_story.html.

⁶ Seung Min Kim, *McConnell Says If House Impeaches Trump, Senate Rules Would Force Him to Start a Trial*, Wash. Post (Sept. 30, 2019, 7:51 PM), https://www.washingtonpost.com/politics/mcconnell-says-if-house-impeaches-trump-senate-rules-would-force-him-to-start-a-trial/2019/09/30/4d58c2d6-e3b5-11e9-b7da-053c79b03db8_story.html.

⁷ See Ltr. from Rep. Engel, Rep. Schiff, & Rep. Cummings, Chairs of U.S. House of Reps. Committees on Foreign Affairs, Intelligence, & Oversight, to Mike Pompeo, Sec’y of State, (Sept. 9, 2019), https://foreignaffairs.house.gov/_cache/files/a/d/ad1e0561-2252-4f7c-97ad-f649db558c83/1F587BDDA9087BEDDEE8D45A8F92C370.test.ele-schiff-cummings-letter-to-sec-pompeo-on-ukraine-002-.pdf; Sarah D. Wire & Chris Megerian, *Democrats Threaten to Subpoena White House for Documents About Trump’s Ukraine Call*, L.A. Times (Oct. 2, 2019, 8:34 AM), <https://www.latimes.com/politics/story/2019-10-02/schiff-pelosi-trump-impeachment-inquiry>.

⁸ See Rebecca Balhaus et al., *State Department Draws More Scrutiny in Trump Impeachment Probe*, Wall St. J. (Oct. 1, 2019, 10:15 PM), <https://www.wsj.com/articles/pompeo-vows-to-block-efforts-to-bully-state-department-officials-to-testify-about-ukraine-11569940841>.

Id.; Compl. ¶¶ 8, 15. The State Department is resisting the requests of congressional committees for documents related to and including records responsive to American Oversight’s requests, which concern efforts by the president’s administration and the president’s personal lawyer to pressure Ukraine to initiate an investigation of candidate Biden.⁹ McGrath Decl. ¶ 10.

State has not produced any records responsive to American Oversight American Oversight’s requests or provided any other determination regarding the requests. Compl. ¶¶ 14, 20. State has also failed to grant or deny American Oversight’s request for expedited processing of the requests. *Id.* American Oversight here seeks to compel State to comply with the requirements of FOIA, make a determination, and promptly produce all non-exempt portions of the records American Oversight has requested, which are urgently needed to inform the public—as well as, potentially, members of Congress—in the coming weeks as Congress considers the monumental decisions of whether to impeach and remove the president.

ARGUMENT

American Oversight is entitled to preliminary injunctive relief in this extraordinary case, which involves lawful requests for public records with the potential to inform American Oversight and the public about matters of the greatest importance. The records American Oversight has lawfully requested concern the actions the president’s administration has undertaken that have prompted Congress to take the momentous step of opening an impeachment inquiry. Given American Oversight’s unquestionable entitlement to the non-exempt portions of the requested records and its therefore near-certain likelihood of succeeding on the merits, the

⁹ See *supra* note 4; Ltr. from Mike Pompeo, Sec’y of State, to Rep. Engel, Chair of U.S. House of Reps. Comm. on Foreign Affairs (Oct. 1, 2019), <https://twitter.com/SecPompeo/status/1179040126032367616>; Secretary Pompeo (@SecPompeo), Twitter, <https://twitter.com/SecPompeo/status/1179040126032367616> (last visited Oct. 3, 2019) (characterizing requests as “an attempt to intimidate, bully, [and] treat improperly” State officials).

plainly urgent need to inform the public about the matters that are subjects of the records American Oversight has requested resulting in the prospect of irreparable harm if determination and subsequent release are delayed, and the likely benefit to the public and other FOIA requesters of relief here, American Oversight plainly meets the requirements for preliminary injunctive relief in this matter.

This Court is empowered to grant American Oversight's request that State be ordered to comply with its statutory obligations in this matter of urgent national concern. American Oversight asks that this Court use that power to prevent irreparable harm to Plaintiff and the public it seeks to serve.

I. THIS COURT HAS JURISDICTION TO GRANT THE REQUESTED RELIEF.

The FOIA statute itself provides jurisdiction for this Court to consider this matter and grant all necessary injunctive relief. It states:

On complaint, the district court of the United States . . . in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo

5 U.S.C. § 552(a)(4)(B). When an agency fails to comply with the applicable time-limit provisions in the FOIA statute, a requester "shall be deemed to have exhausted his administrative remedies with respect to such request." *Id.* § 552(a)(6)(C)(i); *see also Oglesby v. Dep't of the Army*, 920 F.2d 57, 62 (D.C. Cir. 1990) (holding that a requester may bring suit if an agency fails to comply with statutory time limits). This includes a failure to respond to a FOIA request within the statutorily imposed timeframe. *See Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 74 (D.D.C. 2006) ("failure to process FOIA requests in a timely fashion is 'tantamount to denial.'" (quoting H.R. Rep. No. 93-876, at 6 (1974))). American Oversight has therefore exhausted all applicable administrative remedies, and this claim is ripe for adjudication.

II. AMERICAN OVERSIGHT IS ENTITLED TO A PRELIMINARY INJUNCTION.

In considering a plaintiff's request for injunctive relief, a court must weigh four factors: (1) whether the plaintiff has a substantial likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury absent injunctive relief; (3) whether an injunction would substantially injure other interested parties; and (4) whether the grant of an injunction would further the public interest. *Al-Fayed v. CIA*, 254 F.3d 300, 303 (D.C. Cir. 2001); *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317–18 (D.C. Cir. 1998). Consideration of these factors here demonstrates American Oversight's manifest entitlement to preliminary injunctive relief in this extraordinary case.

A. American Oversight Is Likely to Succeed on the Merits.

As a clear matter of established law, American Oversight is entitled to a prompt determination on its FOIA requests and the timely processing and production of non-exempt responsive records. FOIA clearly and unambiguously provides that federal agencies must make records "promptly available to any person" who reasonably describes the records they seek in accordance with established procedures. 5 U.S.C. § 552(a)(3)(A); *see also id.* § 552(a)(6)(A)(i) (requiring a determination whether to comply with a FOIA request within 20 working days). American Oversight is also entitled by law to a determination on its request for expedited processing within 10 calendar days, as well as expedited processing of its request once granted. *Id.* § 552(a)(6)(E). State has failed to meet these clear statutory obligations here.

As an initial matter, the records American Oversight seeks—communications of high-ranking State officials concerning official matters including, broadly speaking, any efforts to pressure the government of Ukraine to investigate former Vice President Biden—undoubtedly fall within the statutory category of agency records that an agency must produce under FOIA. *See U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 146 (1989) (defining "agency records"

as materials “create[d] or obtain[ed]” by the agency and within the agency’s control at the time the request is made). In addition, the requests reasonably described the records sought (specifying timeframes, the names or positions of high-ranking State officials about whom records were requested, and specific subject matters¹⁰) and complied with all necessary procedures. *See* Compl. ¶¶ 7–9, 15. American Oversight is therefore more than likely to succeed in establishing its entitlement to the requested records.

American Oversight is also plainly entitled to expedited processing of its requests, as there is a compelling need for the information requested. 5 U.S.C. § 552(a)(6)(E)(v)(II). There is a self-evident “urgency to inform the public concerning” the federal government activities that are the subject of American Oversight’s requests in light of both the impeachment inquiry that Congress has initiated and the fast-approaching 2020 presidential primary elections. *Id.*; *see also Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005). And American Oversight is primarily engaged in disseminating information to the public. 5 U.S.C. § 552(a)(6)(E)(v)(II); Compl. ¶ 5, Ex A; McGrath Decl. ¶¶ 2, 3. Courts have found that expedited processing is warranted even in cases where the records requested were needed far less urgently and concerned matters less momentous than an impeachment inquiry concerning the president. *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (finding expedited processing warranted where records requested concerned legislation that was set to expire over a year from the time of the court’s decision).

¹⁰ Only one item of American Oversight’s second FOIA request does not limit the request to a subject matter, but that item seeks records of communications by a single high-ranking official—the former Ambassador to Ukraine—from a short, two-week period before her recall from her position. Compl. ¶ 15. This narrowly tailored aspect of this request is plainly reasonably described.

Despite the plainly urgent public need for the information contained in the records American Oversight has requested, State has still failed to comply with its obligation to timely make a determination as to the scope of the records it intends to produce or withhold and the reasons for any withholdings. *See* 5 U.S.C. § 552(a)(6)(A)(i); *Citizens for Responsibility and Ethics in Wash. v. Fed. Election Comm’n*, 711 F.3d 180, 182–83 (D.C. Cir. 2013) (“[T]he agency must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents.”).

American Oversight will ultimately prevail in demonstrating its entitlement to expedited processing of its FOIA requests, prompt determinations on the requests, and prompt disclosure of any non-exempt responsive records. FOIA provides clear statutory directives to agencies in responding to FOIA requests, and State has violated them. In the meantime, American Oversight urgently needs State to fulfill its clear statutory obligations. Congress’s impeachment inquiry into the actions of the president—and the actions taken by members of his administration and his personal attorney at his behest—is underway and is likely to move forward rapidly.¹¹ American Oversight, and the public to whom American Oversight will disseminate information in the requested records, need the requested information promptly in order to make informed judgments about the impeachment process and to petition elected representatives in Congress on the merits of potential impeachment of the president in an informed manner.

B. American Oversight Will Be Irreparably Harmed Absent the Requested Relief.

American Oversight will be harmed irreparably if State does not grant expedited processing, promptly process American Oversight’s FOIA requests, make timely determinations on those requests, and promptly produce non-exempt records, especially if further delays prevent

¹¹ *See* DeBonis & Bade, *supra* note 5.

disclosure of the non-exempt portion of these records until after Congress has concluded its impeachment inquiry, and, potentially, has voted on whether the president should be removed from office. Likewise, American Oversight will be harmed irreparably by the Defendant's failure to timely consider and grant American Oversight's request for expedited processing. Only preliminary injunctive relief can address this urgent need and the specter of irretrievably losing American Oversight's rights under FOIA. As this Circuit has long held, "stale information is of little value." *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988).

Accelerated review by this Court can ensure that unchecked delays do not irrevocably deprive American Oversight of the prompt determinations regarding its requests and the prompt disclosure of the non-exempt responsive records to which it is entitled under FOIA. As this Court has previously noted, "[t]o afford the plaintiff less than expedited judicial review would all but guarantee that the plaintiff would not receive expedited agency review of its FOIA request." *Wash. Post*, 459 F. Supp. 2d at 66. Further unlawful delay in processing the request will irreparably harm the ability of American Oversight—and the public—to receive the determinations and prompt production of materials it is entitled to by law in time to carry out its core mission by informing the public of matters of great importance that relate to Congress's impeachment inquiry regarding the president's efforts to use the federal government and his personal attorney to pressure a foreign government to investigate a domestic political opponent, seemingly in an effort to gain an electoral advantage.

Losing the ability to gain prompt access to the non-exempt portions of the requested records would be particularly harmful to American Oversight, whose mission is to ensure public transparency into government actions, promote accountability for government officials, and disseminate information obtained on matters of public importance to the public. McGrath Decl.

¶¶ 2, 3, 12. American Oversight's entire purpose is to use government transparency to help it, and the public, monitor the activities of government officials and agencies. *Id.* ¶¶ 2, 3, 11. Prompt determinations and timely production of non-exempt records will equip American Oversight to enhance the public debate on the merits of the president's potential impeachment, and the charges that he used the power of his administration to inappropriately, and perhaps illegally, coerce a foreign government into taking actions to disadvantage a political opponent of the president and harm the integrity of the fast-approaching U.S. presidential election. *Id.* ¶ 12. American Oversight would also use the information gained from the requested records, in accordance with the organization's core mission, to promote accountability for government officials who may have undertaken actions at the president's behest that undermine the integrity of our nation's electoral process. *Id.* ¶¶ 11, 12. These records therefore possess unique value while Congress is conducting investigations of the conduct of the president and his administration concerning the subject matters of American Oversight's requests and considering the immensely important question of whether impeachment of the president is warranted. Delay will deprive the public of information it needs to participate in these momentous issues in an informed manner. As the presidential election approaches and Congress's impeachment inquiry rapidly proceeds (and ultimately concludes) the value of the requested information will greatly diminish. American Oversight and the public need the non-exempt information contained in the requested records promptly, as is required by the statute.

Our system of representative democracy depends upon an informed citizenry. That principle animates FOIA. *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (“[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the

governors accountable to the governed.”). American Oversight’s work and mission embody that principle. American Oversight strives to provide the public with important information about the activities and operations of the federal government, including inappropriate or illegal actions undertaken by government officials. McGrath Decl. ¶¶ 2, 3, 12. This case goes to the heart of American Oversight’s mission because it involves an effort to provide the public with information regarding a matter of the most weighty public importance. The public can, in turn, use the information that American Oversight receives, analyzes, disseminates, and posts publicly to participate in robust public debate and to influence the impeachment inquiry, impeachment votes by congressional representatives, and potential votes on the president’s removal from office. The actions of the members of Congress who will carry out the impeachment inquiry and make the critical decisions about whether the president and his administration have undertaken actions that warrant the president’s impeachment and removal will likely be shaped by constituents’ communications to the members of Congress that represent them and the broad opinions of the general public about whether impeachment and removal is warranted.

Members of the public cannot reliably fulfill their roles or meaningfully participate in petitioning their elected representatives without adequate information on which to base their opinions, and organizations like American Oversight cannot inform and participate in the public discourse about these critical matters without access to the requested information about government activities. In light of the intention of the House of Representatives to carry out the impeachment inquiry quickly and Senate Majority Leader McConnell’s indication that the Senate would reach a rapid disposition in any subsequent trial,¹² there is an urgent need to inform the public—now—about the administration’s efforts to pressure the Ukrainian government to

¹² See Fandos, *supra* note 1; Kim, *supra* note 6.

investigate a political opponent of the president in order to give the president an electoral advantage. American Oversight's requests seek records that go to the center of the alleged efforts to carry out this pressure campaign, including records reflecting communications by high-ranking State officials with or about the president's personal attorney—Mr. Giuliani—who reportedly sought State's assistance in this matter, records reflecting communications regarding the recall of the career diplomat U.S. Ambassador to Ukraine at the beginning of the efforts to pressure the Ukrainian government, and other records regarding any efforts to pressure the Ukrainian government to investigate a political opponent of the president. Compl. ¶¶ 7–8, 15.

If State is allowed to drag its feet even further in processing American Oversight's requests and the Congress makes a decision whether to impeach and remove the president without the public having the benefit of the insight contained in the records sought by these requests, the public's ability to participate meaningfully in the debate will have been irreparably harmed, as will American Oversight's interest in obtaining its statutorily-guaranteed access to these records and using those records in support of its government transparency and accountability mission.

This case is therefore much like *Washington Post v. Department of Homeland Security*, in which the plaintiff sought visitor logs for the Vice President's office and residence, which the plaintiff asserted would "assist the public in the degree to which lobbyists and special interest representatives may have influenced policy decisions of the Bush administration." 459 F. Supp. 2d at 65 (internal quotation marks omitted). The plaintiff explained that "[w]ith the midterm elections looming, any delay in processing this request would deprive the public of its ability to make its views known in a timely fashion." *Id.* Issuing its opinion in October of 2006, this Court concluded that "[b]ecause 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.” *Id.* at 75.¹³

The same is true here, with Congress rapidly undertaking an impeachment inquiry that, based on current reporting, is likely to result in a vote in the House of Representatives before the end of November. The impeachment inquiry undertaken by the House of Representatives, and the actions of the president and his administration that prompted the inquiry (and which concern the subject matter of American Oversight’s requests) have attracted exceptionally widespread media and public interest.¹⁴ There is plainly a public recognition that the impeachment inquiry is a matter of immense public importance, as it may result in the trial and removal of the president of the United States. The matter that has prompted the impeachment inquiry—administration efforts to pressure the Ukrainian government to investigate a political opponent of the president—has accordingly also received very widespread media and public attention and is related to matters of intense public concern: the integrity of the fast-approaching presidential election and the merits of impeachment and removal of the president.¹⁵ The window for public education and discussion will be open only briefly, and it is imperative that American Oversight

¹³ In subsequent, unrelated litigation, the D.C. Circuit held that White House visitor logs are not “agency records” for purposes of FOIA. *See Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 228–29 (D.C. Cir. 2013). However, nothing in that decision affects this Court’s analysis regarding irreparable harm in *Washington Post v. Department of Homeland Security*, 459 F. Supp. 2d 61 (D.D.C. 2006).

¹⁴ *See, e.g.*, Fandos, *supra* note 1; DeBonis & Bade, *supra* note 5; Kim, *supra* note 6; Shannon Pettypiece & Adam Edelman, *Trump Explodes as Democrats Ratchet Up Impeachment Push*, NBC News (Oct. 2, 2019, 9:12 AM), <https://www.nbcnews.com/politics/white-house/trump-explodes-democrats-ratchet-impeachment-push-n1061281>; Steven Shepard, *Support for Impeaching Trump Hits New High*, Politico (Oct. 2, 2019, 5:00 AM), <https://www.politico.com/news/2019/10/02/trump-impeachment-poll-support-016403>.

¹⁵ *See* Fandos, *supra* note 1.

receive the records it seeks before that window closes. *See Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 542 F. Supp. 2d 1181, 1187 (N.D. Cal. 2008) (“Although, and perhaps because, the Court cannot predict the timing of passage of the legislation in light of the ongoing debate in the legislature and with the Administration, the Court finds that delayed disclosure of the requested materials may cause irreparable harm to a vested constitutional interest in ‘the uninhibited, robust, and wide-open debate about matters of public importance that secures an informed citizenry.’”) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Members of Congress, too, have an intense interest in gaining the information that is the subject of American Oversight’s requests within the brief window in which Congress will be considering impeachment and certainly before any vote on impeachment or removal.¹⁶ Members of Congress would, consequently, also clearly suffer irreparable harm if State is not ordered to promptly comply with its statutory obligations. American Oversight would suffer this irreparable harm through its inability to achieve its core mission of ensuring transparency and promoting accountability by informing the public, including the Members of Congress and congressional staff, about government activities. McGrath Decl. ¶ 12.

¹⁶ This Court should not find irreparable harm is unlikely to occur on the assumption that Congress will be able to effectively obtain and make public all records relevant to its impeachment inquiry in the timely manner required for public consideration of the merits of impeachment or removal from office. The State Department is already aggressively resisting the witness and document requests of congressional committees on these matters. *See supra* note 9 (Ltr. from Sec’y Pompeo). And even if State does ultimately produce some of the requested records to Congress, Congress regularly receives documents from the executive branch on the condition that those documents not be shared broadly. *See, e.g., Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 604 (D.C. Cir. 2001) (noting documents were shared with congressional investigators only on express condition that they not be made public). The public’s need for information may therefore not be satisfied by any subsequent production to Congress, should it even occur.

By now it is almost axiomatic that “stale information is of little value.” *Payne*, 837 F.2d at 494; *see also Dunlap v. Presidential Advisory Comm’n on Election Integrity*, 286 F. Supp. 3d 96, 110 (D.D.C. 2017) (“District courts in this circuit have recognized that, where an obligation to disclose exists, plaintiffs may suffer irreparable harm if they are denied access to information that is highly relevant to an ongoing public debate.” (citing *Wash. Post*, 459 F. Supp. 2d at 75; *EPIC v. U.S. Dep’t of Justice*, 416 F. Supp. 2d 30, 41 (D.D.C. 2006))). Thus, “failure to process FOIA requests in a timely fashion is ‘tantamount to denial.’” *Wash. Post*, 459 F. Supp. 2d at 74 (quoting H.R. Rep. No. 93-876, at 6 (1974)). That is no doubt why courts in this jurisdiction have repeatedly issued preliminary injunctions in FOIA cases where the requester seeks information urgently needed to inform a pending or developing situation. *See, e.g., id.* at 74–75 (finding irreparable harm where requested records could inform public opinion in advance of upcoming election); *EPIC*, 416 F. Supp. 2d at 40–41 (finding irreparable harm where requested records related to “current and ongoing debate surrounding the legality of the Administration’s warrantless surveillance program”); *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260 (finding urgency requirement for expedition satisfied based on “upcoming expiration of the special provisions of the Voting Rights Act in 2007”); *Aguilera v. FBI*, 941 F. Supp. 144, 151–52 (D.D.C. 1996) (finding irreparable harm where requested records related to prisoner’s challenge to conviction while already serving prison sentence); *Cleaver v. Kelley*, 427 F. Supp. 80, 81–82 (D.D.C. 1976) (granting preliminary injunction for records needed for upcoming criminal trial); *cf. Sai v. Transp. Sec. Admin.*, 54 F. Supp. 3d 5, 10–11 (D.D.C. 2014) (finding no irreparable harm because plaintiff offered no evidence that requested records would be of “vital public interest for an upcoming congressional election or congressional or agency decision-making process requiring public input” (internal citations and quotation marks omitted)).

The rapidly proceeding impeachment inquiry, moreover, clearly presents the type of “potential for irreparable harm” that courts find in FOIA cases where the documents sought by a requester concern “ongoing public and congressional debates about issues of vital national importance [that] cannot be restarted or wound back.” *Protect Democracy Project, Inc. v. U.S. Dep't of Def.*, 263 F. Supp. 3d 293, 301 (D.D.C. 2017) (Cooper, J.) (quoting *Elec. Frontier Found. v. Office of Dir. of Nat'l Intelligence*, 2007 WL 4208311, at *7 (N.D. Cal. 2007)). The monumental decisions to impeach or remove the president from office “cannot be undone.” *Id.*

As in many of the cases above, American Oversight’s ability to inform the public about the federal government’s actions in matters related to any efforts to coerce a foreign nation into undertaking an investigation to affect the outcome of a U.S. presidential election while an impeachment inquiry and potential removal process is ongoing will be irreparably harmed if State is not required to make timely determinations, promptly process American Oversight’s FOIA requests on an expedited basis and produce all non-exempt, responsive documents on an accelerated schedule. American Oversight seeks judicial intervention to ensure State will comply with its obligations.

C. The Requested Relief Will Not Burden Others’ Interests.

No other interests would be harmed by granting American Oversight its requested relief. State itself cannot claim to be harmed by an order compelling it to comply with its statutory obligations. Nor would granting American Oversight’s relief unduly burden other FOIA requesters. The FOIA statute recognizes that requests should be processed on an expedited basis when there is an urgent need to inform the public about an actual or alleged federal government activity. 5 U.S.C § 552(a)(6)(E)(v)(II). Compelling State to make the statutorily required determination and promptly process the requested records upon a showing that the requested information is urgently needed to inform the public is exactly what Congress contemplated in

adding a provision providing for expedited processing. See *EPIC*, 416 F. Supp. 2d at 36–37 (explaining 1996 amendment adding expedited processing requirements to FOIA). Given the extraordinary importance of the records American Oversight has requested, and the public’s time sensitive need for the information contained in those records, there can be little doubt that these requests are the type Congress envisioned being processed ahead of other FOIA requests. An order from this Court that State promptly process American Oversight’s requests and provide all non-exempt responsive records on an accelerated schedule set by this Court would be entirely consistent with the policy enacted by Congress and will not harm the interests of the non-moving party or any other entity.

Moreover, American Oversight submitted these requests to State more than four months ago and the statutory deadline for providing determinations or responses also passed months ago. To the extent State argues that resources will have to be pulled away from processing the requests of other requestors, that is due to the State Department’s failure to allocate sufficient resources and make necessary systematic changes to process FOIA requests in compliance with its statutory obligations. Additionally, many other FOIA requestors are likely seeking the records that American Oversight has requested, or a subset thereof.¹⁷ Ordering State to rapidly search for, process, and produce records responsive to American Oversight’s request will likely actually *aid* many other FOIA requestors who have sought records on the vital subject matter of American Oversight’s requests.

¹⁷ See, e.g., *CREW Requests Documents on Giuliani’s Role in Ukraine Investigation*, Citizens for Responsibility and Ethics in Washington (Sept. 25, 2019), <https://www.citizensforethics.org/foia/crew-requests-documents-giuliani-role-ukraine-investigation/>; *FOIA Request Seeking Communications Between Rudy Giuliani and U.S. Embassy in Ukraine*, Protect Democracy (Sept. 24, 2019), <https://protectdemocracy.org/resource-library/document/foia-request-seeking-communications-between-rudy-giuliani-and-u-s-embassy-in-ukraine/>.

D. The Public Interest Favors the Requested Relief.

A preliminary injunction is indispensable to protect the public's right to government transparency and essential interest in informed and meaningful participation in the impeachment inquiry and process, as well as any potential removal trial. Consequently, the requested relief clearly serves the public interest.

First, courts in this jurisdiction have long recognized that “there is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate.” *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977); accord *Wash. Post*, 459 F. Supp. 2d at 76. The very existence of the Freedom of Information Act is rooted in the self-evident premise that transparency and disclosure are a public benefit in a participatory democracy. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772–73 (1989); see also *Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury*, 49 F. Supp. 2d 3, 5 (D.D.C. 1999) (noting that “[t]here is public benefit in the release of information that adds to citizens' knowledge” of government activities).

But the public benefit of injunctive relief here extends far beyond the general public interest in transparency and faithful adherence to FOIA. Congress enacted FOIA to ensure that citizens are able to participate in public debate in an informed manner, and this interest grows with the gravity of public decisions at hand. See *Robbins Tire*, 437 U.S. at 242 (“The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”). It is hard to imagine any matter of greater gravity than the debate over whether the actions of the president and those in his administration acting at his direction merit the president's impeachment and removal from office. American Oversight's FOIA requests seek records that will shed light on this administration's actions in pressuring the Ukrainian

government to open an investigation into one of the president's political opponents—actions at the heart of Congress's impeachment inquiry.

Courts have recognized the importance of timely disclosure when information is relevant to elections. *See, e.g., Wash. Post*, 459 F. Supp. 2d at 74–75. American Oversight's requests do seek records that are highly relevant to quickly approaching elections—voting in the 2020 presidential primary elections begins in just under four months, on February 3, 2020, and the records sought here will shed light on whether and to what extent the power of the federal government has been used to undermine the integrity of those elections. *See* Compl. Ex. A. But the public's need for the requested information is even stronger during an impeachment process, because the public will have only a limited weeks or months-long window to petition their representatives on whether they believe impeachment and removal are warranted before congressional votes on these matters of immense national significance. Congress is engaged in a process of such monumental significance—the consideration of impeachment and removal of the president—that it has only undertaken such actions a handful of times in our nation's history.

It is essential that the public has as much relevant information as possible while Congress engages in the extraordinary process of considering impeachment and removal of the president. The public will have only a brief opportunity to assess the merits of whether the president and his administration's actions merit impeachment and removal before the public's elected representatives in Congress vote on those grave matters. A preliminary injunction ensuring timely processing and disclosure of records concerning the administration's efforts, in conjunction with the president's personal attorney, to pressure Ukraine to investigate one of the president's political opponents is crucial to serving the public's interest.

CONCLUSION

For the foregoing reasons, Plaintiff American Oversight respectfully requests that this Court grant a preliminary injunction requiring State to make timely determinations on American Oversight's FOIA requests and promptly process those requests on an expedited basis and produce all non-exempt responsive records and an index justifying the withholding of any withheld records by November 15, 2019, or such other date as the Court deems appropriate.

Dated: October 4, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2019, I caused a copy of the foregoing Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction to be hand-delivered to defendant at the following address:

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In addition, copies have been hand-delivered to:

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