IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENERGY POLICY ADVOCATES	)	
Plaintiff,	)	
v.	)	C.A. No. 19 - 3307
	)	
UNITED STATES DEPARTMENT OF STATE	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff Energy Policy Advocates, a non-profit organization dedicated to obtaining and disseminating public information concerning energy and environmental policy, brings this Motion for a Preliminary Injunction to expedite the defendant's processing of their request and compel production of records responsive to a request filed over fourteen months ago under the Freedom of Information Act (hereinafter "FOIA"), 5 U.S.C. §552 *et seq*., and on which request Plaintiff sued over nine months ago. Defendant United States Department of State (hereinafter "State or "State Department") recently informed Plaintiff and this Court that, although State is processing other requests, it is no longer processing Plaintiff's. Dkt. No. 17 at 2. Although Plaintiff's request sought information on a matter of increasingly time-sensitive public interest, the records State is continuing to not process for release will be "stale" when they finally emerge absent an order of this Court. By withholding the information beyond the point that it would be of any use in the *sole* public policy debate of relevance that will occur, State will have prevailed in this lawsuit even if information is eventually released pursuant to FOIA. The debate the

records in this case can shed light on is now unfolding; it concludes, likely forever, in just eleven weeks; and is of tremendous and inarguable importance.

This case arises because Plaintiff sought information relating to the December 2015 Paris Climate Agreement (hereafter, "Paris" or "Paris Agreement") and specifically the Circular 175 Memorandum of Law prepared for Paris and some related records. The "Circular 175" analysis sets forth whether the relevant agreement is a treaty requiring Article II, Section 2 Senate "advice and consent" and why, or why not.[1] On information and belief, the State Department, in one of the records it refuses by its actions to release for public scrutiny, declared that "the United States may join the Agreement as an executive agreement (as opposed to a treaty requiring the Senate's advice and consent) as a matter of domestic legal form." Thus, the records at issue in this case would inform the public of the State Department's "working law" leading the Obama Administration to declare, remarkably, that Paris was not a treaty but a mere "agreement," despite the agreement's level of detail and commitment, degree of formality and proposed duration, past U.S. and international practice as to similar agreements, the agreement's lineage and legislative history ("the preference of Congress as to a particular type of agreement"), and other factors used by the State Department,[2] all of which inform a conclusion that Paris is a

---

[1] 11 FAM 723.4 Questions as to Type of Agreement to Be Used; Consultation with Congress, "All legal memoranda accompanying Circular 175 requests (see 11 FAM 724.3, paragraph h) will discuss thoroughly the legal authorities underlying the type of agreement recommended." https://fam.state.gov/FAM/11FAM/11FAM0720.html#M723_4

[2] 11 FAM 723.3 Considerations for Selecting Among Constitutionally Authorized Procedures. https://fam.state.gov/FAM/11FAM/11FAM0720.html#M723_3

treaty — as affirmed by the other major parties to the pact, each of whom manifested their own subsequent legislative ratification of Paris *as a treaty*.[3]

That is to say, the records at issue in this case will inform a decision the voters are now being asked to make, specifically, the propriety of a promise by one candidate to "re-enter" the Paris Agreement. Whether intentionally or otherwise, the State Department's decision to toll its processing of Plaintiff's request ensures that the information at issue in this case will become stale before State releases it. The public now confronts its *one* chance to examine this action, and the same State Department that declared under a previous administration that the constitutional ratification requirements did not apply to the Paris Agreement has declared that it will no longer process Plaintiff's request for records illuminating that remarkable claim, until the information sought is stale.

Plaintiff submitted its FOIA request on June 7, 2019 and filed this action on November 3, 2019. Defendant State Department, in the August 3, 2020 Joint Status Report, declared that it has identified slightly more than 10,000 pages of responsive records. Dkt. No. 17 at 1. To date, and before tolling its processing, State has provided 11 records in full and 57 in part, totaling fewer

---

[3] Among the eight Circular 175 factors determining whether a document is a treaty is international practice; most other covered parties' legislatures (e.g., Germany, Japan, Spain, France, the United Kingdom) ratified the agreement as a treaty, under their systems supposedly less zealous about such matters than ours with its two-thirds supermajority requirement. The United States plainly intends its treaty-level commitments to be less promiscuous than other nations'. However, then-Secretary of State John Kerry claimed — with demonstrable inaccuracy given that the Senate had just ratified a treaty — that "it has become physically impossible… you can't pass a treaty anymore." Tim Haines, "John Kerry Explains Why Iran Deal Is Not Legally a Treaty: 'You Can't Pass a Treaty Anymore," Real Clear Politics, July 29, 2015,https://www.realclearpolitics.com/video/2015/07/29/john_kerry_explains_why_iran_deal_is_not_a_treaty_you_cant_pass_a_treaty_anymore.html (video of July 28, 2015 testimony before the House Foreign Affairs Committee). It seems that, perversely, the constitutional supermajority requirement was invoked as a reason to *avoid* Senate advice and consent of Paris, rather than give the requirement heightened seriousness — *treaties being difficult, and Paris not having political support, we will not call Paris a treaty*.

than 200 pages. As such, and intentionally or otherwise, State's decision to toll its processing of Plaintiff's request ensures that the information will become stale before State releases it.

President Trump ran for office promising to withdraw the U.S. from Paris, and has initiated that process, with the withdrawal taking effect on November 4, 2020.[4] In response, President Trump's likely opponent in the upcoming election, former Vice President Joe Biden, has promised to "re-enter" Paris in January, 2021, making this information of critical and timely importance.[5] Also important, Mr. Biden combined the vow to re-enter Paris with an incompatible promise to spend $2 trillion on infrastructure projects, which projects are not permissible under the Paris treaty, as, e.g., the United Kingdom Court of Appeals just this February held[6] — an argument and possibly ruling that will soon proliferate in our own courts to block projects if the U.S. "re-enters" Paris.

---

[4] Paris Article 28 reads, in pertinent part, "2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal." https://unfccc.int/sites/default/files/english_paris_agreement.pdf. See also, https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/, https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/.

[5] "Joe Biden announces $2 trillion climate plan, vows to rejoin Paris deal," Times of India, July 15, 2020, https://timesofindia.indiatimes.com/world/us/joe-biden-announces-2-trillion-climate-plan-vows-to-rejoin-paris-deal/articleshow/76977673.cms. Mr. Biden's apparent running mate has made the same promise, such that there can be no doubt that these records are of extraordinarily timely importance to the public who won them, who also will be deprived of them by State's actions until the information has no further use to the public. "[O]n on day one as president, I will reenter us into the Paris Agreement."Robinson Meyer, "The Green New Deal Finally Makes a Debate Appearance", The Atlantic, June 27, 2019, https://www.theatlantic.com/science/archive/2019/06/kamala-harris-first-mention-green-new-deal/592915/.

[6] *R (on the application of Spurrier) v. Secretary of State for Transport,* [2020] EWCA Civ 214. See, eg., Mark Clarke, Tallat Hussain, Gwen Wackwitz, "Court of Appeal declares Heathrow expansion unlawful on climate change grounds," White & Case, March 12, 2020, https://www.whitecase.com/publications/alert/court-appeal-declares-heathrow-expansion-unlawful-climate-change-grounds. Although the UK court also cited the UK's own Climate Change Act and European Union Strategic Environmental Assessment (SEA) Directive, the judges ruled that the failure to account for the UK's promised emission reductions under Paris was "legally fatal". Any expansion plan must satisfy both domestic law and the UK's Paris agreement promise which, like the U.S.'s promise, was to reduce carbon dioxide emissions inherent in transportation.

After the first week of November, it appears almost certain that the information that State now says it is no longer processing will be legally "stale," depriving the public of this information until after the one, solitary debate in which it would be useful has passed.

Defendant State must not be allowed to withhold this information further until it is of no use to the public, and Plaintiff seeks this Court to enjoin State from impeding the public's access to this information as it has informed Plaintiff — and this Court — that it is doing.

BACKGROUND

The Paris Climate "Agreement"

The Obama Administration declared the December 2015 Paris Climate Agreement the "most ambitious climate change agreement in history"[7] — therefore more ambitious than all other climate pacts including such acknowledged treaties as the 1997 Kyoto Protocol and the 1992 United Nations Framework Convention (UNFCCC) which Paris amends. Clearly, the title — protocol, convention, agreement — does not dictate what constitutes a treaty. That is determined by its content, when considering the above-cited factors.

Paris was to serve as the next generation of international emission reduction promises succeeding the 1997 Kyoto Protocol, which the Senate did not approve but voted in advance, 95-0, to "advise" the Clinton administration to not enter.[8] That administration did so anyway, but

[7] The White House, Office of the Press Secretary, "U.S. Leadership and the Historic Paris Agreement to Combat Climate Change," December 12, 2015, https://obamawhitehouse.archives.gov/the-press-office/2015/12/12/us-leadership-and-historic-paris-agreement-combat-climate-change.

[8] S. Res.98, 105th Cong., July 25, 1997, https://www.congress.gov/bill/105th-congress/senate-resolution/98.

elected to not seek Senate approval.[9] The lesson learned from Kyoto was that the United States Senate will not approve such commitments.

Two weeks before the December 2015 Paris Climate Summit, then-Secretary of State John Kerry told the *Financial Times* that the resulting agreement is "definitively not going to be a treaty."[10] The negotiation's hosts, specifically both Laurence Tubiana, the French climate change ambassador to the United Nations, and President of the Paris talks (the "Conference of the Parties, or "COP") Laurent Fabius, were quoted in the *New York Times* and *Guardian*, respectively, affirming their awareness that the pact must not be called a treaty in the U.S. as that would mean facing Senate "advice and consent".[11]

Lacking the requisite political support, rather than seek Senate approval for, and face the likely rejection, of the "most ambitious climate change agreement in history," the Obama Administration declared Paris was not a treaty and purported to enter it through executive agreement.[12]

Plaintiff's FOIA request sought records that will shed light on how and why the State Department misrepresented key facts about the UNFCCC in, at minimum, the Memorandum of Law about Paris, which is among the records responsive to this request which State will not

---

[9] https://1997-2001.state.gov/global/global_issues/climate/fs-us_sign_kyoto_981112.html.

[10] Demetri Sevastopulo, "Paris climate deal will not be a legally binding treaty," Financial Times, November 11, 2015, https://www.ft.com/content/79daf872-8894-11e5-90de-f44762bf9896.

[11] See, e.g., Coral Davenport, "Obama Pursuing Climate Accord in Lieu of Treaty", New York Times, August 26, 2014, https://www.nytimes.com/2014/08/27/us/politics/obama-pursuing-climate-accord-in-lieu-of-treaty.html, and "Climate deal must avoid US Congress approval, French minister says," Associated Press, June 1, 2015, https://www.theguardian.com/world/2015/jun/01/un-climate-talks-deal-us-congress, respectively.

[12] The White House, Office of the Press Secretary, "U.S. Leadership and the Historic Paris Agreement to Combat Climate Change," December 12, 2015.

release. That document, Plaintiff states on information and belief, asserts that "the United States may join the Agreement as an executive agreement (as opposed to a treaty requiring the Senate's advice and consent) as a matter of domestic legal form" in its Conclusion at page 14. The document also contains statements (or mis-statements) in support of this conclusion including, *inter alia*, "During the [UNFCCC] ratification process, the Executive Branch stated, in response to a question whether it would submit a 'protocol' with 'targets and timetables' (understood in that context to mean legally binding targets) to the Senate, that it 'expected' to send to the Senate any future agreement with such targets and timetables (S. HRG. 102-973 , p. 106)."[13] While sophisticated, this assertion is also demonstrably untrue.

Plaintiff states on information and belief that the Paris Circular 175 Memorandum of Law also asserts, "The fact that the Agreement does not contain legally binding targets — and this does not appear to be contested, even by those advocating Senate approval — supports the appropriateness of concluding the Agreement as an executive agreement." This claim is a straw-man, because whether Paris's terms purport the targets and timetable to be "legally binding" is not disputed for the simple reason that it is not an issue. The relevant fact, which State keeps from the public by refusing to release the relevant records, is that in exercising its express constitutional "advice and consent" role on UNFCCC, the Senate very deliberately used – and

---

[13] The Memorandum invokes the 1992 Senate conditions on ratifying the UNFCCC because Paris contains emission-reduction targets and timetableAt the Paris "COP 21" meeting, the parties made a decision to adopt targets and timetables in the form of "Nationally Determined Contributions", or NDCs. The first U.S. NDC, for example, is a pledge to reduce U.S. emissions by 26 to 28 percent below 2005 levels by 2025. USA First NDC Submission, UNFCCC, https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf. Indeed it contains a provision requiring certain countries, the United States included, to revise these targets to be more ambitious on the timetable of every five years. Paris Agreement, Art. 4.9; each successive commitment "will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition" (Art. 4.3).

elsewhere deliberately avoided using – the qualifier "legally binding" to describe *two separate and distinct hypothetical agreements with "targets and timetables."* Only one of these scenarios is relevant to Paris, and it is not the scenario involving a claim of some promise being "legally binding."

Specifically, in 1992 the Senate Foreign Relations Committee articulated the conditions under which ratifying UNFCCC. The first hypothetical was any future decision, via a climate pact, to "adopt *targets and timetables* would have to be submitted to the Senate for its advice and consent before the United States could deposit its instruments of ratification for such an agreement."[14] (emphasis added) In this first hypothetical, this Senate report eschewed the use of "*legally binding* targets and timetables" not because the term was understood by contemporary *bien pensants* to, really, mean the same thing as other "targets and timetables," as State tells itself in the April 2016 Cir. 175 Memo[15] enabling a conclusion the Secretary of State had already publicly insisted upon five months prior. The reason this report did not use "legally binding targets and timetables" in this scenario was because it did not mean that; demonstrating not only that the terms were not interchangeable but that the Senate knew to distinguish the terms when it intended to do so, in the very next paragraph the report then discussed "legally binding targets and timetables," in a different scenario.

The first scenario describes the Paris Agreement; the second scenario, set forth in that next paragraph, is irrelevant to Paris. This condition represents a prophylactic reminder of sorts by the Senate of what they were agreeing to that day on September 30, 1992, with noted

---

[14] S. Exec. Rept. 102-55, "Report to Accompany Treaty Doc. 102-38", 102d Cong., 2d Sess. (1992) at 14.

[15] Emails released in *Competitive Enterprise Institute v. State*, D.D.C. CA 17-2032 (APM), indicate that the Circular 175 memo was completed on April 18, 2016.

environmental activist and author Sen. Al Gore on the ballot in the presidential and vice presidential contest to occur a mere six weeks hence:

> "The committee notes further that a decision by the executive branch to reinterpret the Convention to apply legally binding targets and timetables for reducing emissions of greenhouse gases to the United States would alter the 'shared understanding' of the Convention between the Senate and the executive branch and would therefore require the Senate's advice and consent."[16]

This caution that a *reinterpretation* by some unnamed future executive in the next eight years[17] that the target and timetable of the UNFCCC — to return parties' emissions to 1990 levels "by the end of the present decade"[18] — was *upon further consideration* in fact "legally binding" would abandon the understanding of UNFCCC, and would also require ratification.

That scenario has nothing to do with Paris. It simply is not credible to claim that the 2015 Paris Agreement, a new instrument numbering 25 pages[19] and signed by nearly every nation is actually the hypothesized "decision by the executive branch to reinterpret the Convention" of 1992, whose express ambition extended to the end of the 1990s, concluding it was legally binding after all. This specific condition is plainly irrelevant to Paris, yet is the scenario whose language State imported to its analysis of the Paris Agreement to declare Paris *not a treaty*.

The State Department's apparent decision to paraphrase, and only very selectively quote the cited authority is troubling. Regardless, this conclusion supposedly liberated the Obama

---

[16] S. Exec. Rept. 102-55, "Report to Accompany Treaty Doc. 102-38", 102d Cong., 2d Sess. (1992) at 14.

[17] UNFCCC extended to "by the end of the present decade" or the year 2000. UNFCC Art. 4.2(a), also cited in 12.2(a) and (b)).

[18] Ibid.

[19] https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

Administration to enter Paris as an executive agreement and unilaterally "ratify" it on September 3, 2016,[20] claiming to commit the United States to Paris's terms. These terms include a promise of ever-tightening constraints, every five years, in perpetuity or until the U.S. withdraws. Now courts are holding parties to the Paris agreement to its terms.[21] The U.S. faces the real prospect of being subjected to these terms which, this evidence indicates, were improperly committed to on a false premise. Plaintiff states, on information and belief, that the records at issue in this matter are directly relevant to, and are imperative to an informed decision about, the immediate promise before them that one candidate for the presidency, if they vote for him, will "re-enter" the Paris Agreement. Indeed, these records appear to be the only source of such information possibly available to the public, at this, the sole and fleeting moment when the public is at long last asked to consider that position as well as its gravity.

The FOIA Request

On June 7, 2019, Plaintiff submitted the FOIA request at issue in this matter to State. The initial request sought expedited processing under the State Department FOIA Procedures. Plaintiff, having received no response to the request from State, filed this action on November 4, 2019. November 4, 2019 was a full year prior to the date by which this information loses much of its value to the public who own it.

---

[20] https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement.

[21] For example, the United Kingdom Court of Appeal in *R (on the application of Spurrier) v. Secretary of State for Transport,* [2020] EWCA Civ 214. See, eg., Mark Clarke, Tallat Hussain, Gwen Wackwitz, "Court of Appeal declares Heathrow expansion unlawful on climate change grounds," White & Case, March 12, 2020, https://www.whitecase.com/publications/alert/court-appeal-declares-heathrow-expansion-unlawful-climate-change-grounds. Although the UK court also cited the UK's own Climate Change Act and European Union Strategic Environmental Assessment (SEA) Directive, the judges ruled that the failure to account for the UK's promised emission reductions under Paris was "legally fatal". Any expansion plan must satisfy both domestic law and the UK's Paris agreement promise which, like the U.S.'s promise, was to reduce carbon dioxide emissions inherent in transportation.

State responded only after this action was filed and has thus far provided fewer than 200 pages of responsive records in two productions dated February 21, 2020 and March 23, 2020. On July 31, 2020, State informed Plaintiff through counsel that as a result of COVID-19 operating restrictions, only some of State FOIA processing staff were working on site and no staff assigned to Plaintiff's request were among those working on site. State thereby puts at the back of the line a request whose importance and timeliness indicates should be a priority. Transparency delayed in this case will amount to transparency denied, and State's recently adopted posture on this request is intolerable under the FOIA, and the facts and circumstances particular to this request.

State's sidelining of Plaintiff's request and its failure to differentiate between the readily accessible and easily identified records responsive to Plaintiff's request and the more voluminous portions necessitates this Court's intervention. Plaintiff respectfully requests that this Court order State to begin expedited processing and to produce records responsive to subparts 2-6 of Plaintiff's request no later than October 15, 2020.

ARGUMENT

FOIA grants this Court the power to provide the requested injunctive relief, stating "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." 5 U.S.C. § 552(a)(4)(B). This Court has granted preliminary injunctions in FOIA cases where the records have been requested to inform an imminent public debate. See *Center for Public Integrity v. U.S. Dep't of Defense* 411 F.Supp.3d 5, 10 (D.D.C. 2019). The facts in this matter warrant such relief.

This Court must evaluate four factors in deciding whether to grant the Motion for a Preliminary Injunction: the movant's likelihood of success on the merits, potential irreparable harm, the balance of the hardships of the parties, and the public interest. See *Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 555 U.S. 7 (2008). "The first two factors of the traditional standard [i.e. , likelihood of success on the merits and irreparable injury] are the most critical." *Guedes v. Bureau Of Alcohol, Tobacco, Firearms*, 920 F.3d 1 (D.C. Cir. 2019), citing *Nken v. Holder*, 556 U.S. 418, 434 (2009). "A court must balance these factors, and [i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." *Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007) (internal citations omitted). In this case, the assessment of these factors clearly favors the grant of a preliminary injunction requiring State to expedite processing and production of these records.

A. Energy Policy Advocates is Likely to Succeed on the Merits.

The D.C. Circuit has suggested, but not held "that a likelihood of success is an independent, free-standing requirement for a preliminary injunction," See *Sherley v. Sebelius*, 644 F.3d 388, 396 (D.C. Cir. 2011), citing *Davis v. Pension Benefit Guaranty Corp*., 571 F.3d 1288, 1296 (2009), accord *Guedes v. Bureau Of Alcohol, Tobacco, Firearms*, 920 F.3d 1, 10 (D.C. Cir. 2019). "While the probability of success on the merits is a factor to be considered on a motion for preliminary injunction, such an application does not involve a final determination of the merits, but rather the exercise of a sound judicial discretion on the need for interim relief." See *Industrial Bank of Washington v. Tobriner*, 405 F.2d 1321, 1324 (D.C. Cir. 1968), citing *Public Service Commission of Wisconsin v. Wisconsin Telephone Co.*, 289 U.S. 67, 70, 53 S.Ct. 514, 515, 77 L.Ed. 1036 (1933).

The FOIA provides that "reasonably describe[d]" records shall be made promptly available to any requester. 5 U.S.C. § 552(a)(3)(A). Agencies are required to determine within 20 days of receipt of a request whether to comply with the request and must notify the requester of that decision. Plaintiff was entitled to a decision for expedited processing within 10 days of submitting the request. 5. U.S.C. § 552(a)(6)(E)(ii)(2). State's's failure to timely issue a determination on both the request for expedited processing and the FOIA request itself led to the filing of this action on November 3, 2019.

The FOIA further requires an agency to provide expedited processing "in cases in which the person requesting the records demonstrates a compelling need." 5 U.S.C. § 552(a)(6)(E)(i)(I). A compelling need exists "with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II). Plaintiff is primarily engaged in disseminating information related to energy and environmental policy and, for the reasons stated, *supra*, there is an urgency to inform the public concerning actual Federal Government policy.

Agencies responding to an expedited request are required to process those requests "as soon as practicable." 5 U.S.C. § 552(a)(6)(E)(iii). Defendant's failure to respond to this request within the twenty-day deadline applicable to standard FOIA requests creates a presumption that it has failed to respond to a expedited request "as soon as practicable." *EPIC v. Dep't. of Justice* 416 F. Supp. 2d 30, 39 (D.D.C. 2006). Defendant's acknowledgment that it is continuing to process some FOIA requests is an admission that it is capable of expedited processing of this request, thought it has chosen not to do so. Dkt. No. 17 at 2.

Plaintiff is likely to succeed on the merits of this case, but a success on the merits that comes too late will ring hollow. Plaintiff is entitled to expedited processing as it is primarily engaged in disseminating information and the records requested are urgently needed to inform the public. Further, Defendant's continued processing of other requests, while failing to make a decision on expedited processing or to produce the requested information within the twenty-day deadline applicable to standard FOIA requests, demonstrates that it is practicable for Defendant to produce the requested records though it has chosen not to shelve responding to this request.

B. Energy Policy Advocates Will Be Irreparably Harmed by Continued Withholding.

Both Energy Policy Advocates and the public will be irreparably harmed without the requested preliminary injunction. It is well-settled in this Circuit that the loss or abridgment of constitutionally-protected rights for even minimal periods of time constitutes irreparable harm *per se*. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 299 (D.C. Cir. 2006), citing *Elrod v. Burns*, 427 U.S. 347 (1976). Although the D.C. Circuit has differentiated statutory rights arising under FOIA from First Amendment rights arising under the Constitution, there is no basis for believing that the loss of statutory rights is any less of a *per se* irreparable injury than the loss of Constitutional rights. *Center for Nat. Sec. Studies v. Dept. of Justice*, 331 F.3d 918 (D.C. Cir. 2003). Even assuming the loss or abridgment of a statutory right under FOIA was not an irreparable injury per se, the D.C. Circuit has suggested that a "clear threat to a statutory right… can easily be categorized as an impending irreparable injury." *Bannercraft Clothing Company v. Renegotiation Board*, 466 F.2d 345, 356 (D.C. Cir. 1972).

The records at issue in this case are directly linked to the United States' entry into — and more importantly, its looming re-entry into — the Paris Agreement without ever confronting the cConstitutional requirement for Senate ratification. There is urgency to this matter, as the public are set to vote on candidates insisting on the importance of the Paris Agreement as an issue for the public's consideration and promising different outcomes on this agreement. One party's nominees for president and vice president are both vowing to immediately recommit the U.S. to Paris in their first week in office if elected — again without Senate consideration. They are running on this as a reason to elect them; it is, by their own urging, a key issue, one which they request voters use as a basis to grant their support. It is inarguably a matter of timely importance and consideration. Yet, rather than acknowledge the importance of the issue even in a difficult situation, State has instead shelved further processing. Given the tremendous potential impact that purported re-entry into Paris will have on both national environmental, energy, natural resource, transportation and infrastructure policy as well as the overall economy, it is essential the public be allowed to know the facts behind how these candidates for high office claim they can make this commitment if elected.

Production of these records later will be too late. Release of the records after November 4, 2020 renders the information valuable only as historical information, as it will no longer be available to influence voters' decisions on this issue over which candidates are asking for their votes; there is not likely any plaintiff who would have standing to challenge re-entry into Paris. *Goldwater v. Carter*, 444 U.S. 996 (1979). Because the upcoming election is likely to be the public's only opportunity to examine or challenge either candidate's position on the Paris Agreement, the information's usefulness in informing policy after the election will have for all

intents and purposes expired. "[S]tale information is of little value." *Payne Enterprises, Inc. v. United States*, 837 F. 2d 486, 494 (D.D.C. 1988). Failure to timely release the information causes irreparable harm to both the Plaintiff and to the public.

C. The Balance of the Hardships and the Public Interest Favor the Plaintiff

The balance of the hardships and the public interest merge in actions where the Government is the opposing party. *Guedes*, 920 F.3d at 10 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009). Although "courts in this Circuit have considered the effect of other FOIA requests when analyzing the burden on an agency of meeting deadlines for review and production of FOIA material in a given case," *Middle East Forum v. U.S. Dep't of Homeland Sec.*, 297 F.Supp.3d 183 (D. D.C. 2018), the D.C. Circuit has specifically held in the context of upcoming elections that "there is always a strong public interest in the exercise of free speech rights." *Pursuing America's Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016).

Both of the "merged" factors listed above favor Plaintiff in this action. Although the defendant has faced the same difficulties relating to COVID-19 that numerous other agencies have faced, State has reported to this Court that it has resumed processing *other* FOIA requests. Dkt. No. 17 at 2. State faces no discernible hardship by being compelled to at long last satisfy *this* FOIA request, with sufficient timeliness to assist *the sole* public debate over the property of committing the United States to the Paris Agreement *by pen-and-phone* that will ever occur.

By this Motion, Plaintiff seeks the expedited processing and production of five categories of readily accessible and most urgent responsive records.[22] Plaintiff does not seek expedited processing of its entire request, given the exigencies caused by COVID-19. The Plaintiff's request is supported by the statutory text. The FOIA clearly contemplates that an expedited request may delay the processing of other records and such delays are justified where there is a "compelling need." 5 U.S.C. § 552(a)(6)(v)(II). Further, the tremendous importance of the requested records and the relative ease with which State can perform the limited expedition requested warrant expedited processing and production.

The public interest uniquely favors Plaintiff here as "[t]here is public benefit in the release of information that adds to citizens' knowledge" of government operations. *Ctr. To Prevent Gun Handgun Violence v. U.S. Dep't of Treasury*, 49 F.Supp.2d 3, 5 (D.D.C. 1999). The Supreme Court acknowledges "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the function of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978). Plaintiff's request concerns a matter of potentially transformative importance, one that the State Department quite clearly does not wish the public to be informed on if one that the leading contender to assume the presidency in a very short time insists the voters consider in voting for him. The information is useful for this *sole*, if inchoate, extant policy debate, and the public is entitled to a full accounting of the mechanics of the United States' entry into and

[22] Specifically, Plaintiff requests expedited processing and production of a Memorandum of Law regarding Circular 175, Subject: Request for authority to sign and accept the Paris Agreement; any cover memo(s) transmitting Memorandum of Law re: Circular 175; Request for authority to sign and accept the Paris Agreement; a document titled C-175 Procedure.docx, and a Document titled Points on Joining Paris Agreement - One Pager.

supposedly looming re-entry in the Paris Agreement. State deciding to shelve this request until some later date, rather than ensure it is at long last and particularly, now, processed, is a thoroughly unjust outcome which this Court must remedy.

CONCLUSION

For the foregoing reasons, Plaintiff asks the Court to order that State produce all records responsive to parts 2-6 of Plaintiff's request by October 15, 2020, or by such date as the Court deems appropriate but with sufficient time for the public to evaluate the information before it becomes stale.

Respectfully submitted this the 18th day of August, 2020,

/s/Matthew D. Hardin___
Matthew D. Hardin, D.C. Bar # 1032711
324 Logtrac Rd.
Stanardsville, VA 22973
(434) 202-4224
MatthewDHardin@gmail.com

Certificate of Service

I hereby certify that on this the 17th day of August, 2020, I will file the foregoing with the Court's CM/ECFG system, which will electronically provide notice to all counsel of record.

/s/Matthew D. Hardin
Matthew D. Hardin