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INTRODUCTION

In August 2018, Plaintiff Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”), the nation’s oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and everyone living with HIV, submitted a Freedom of Information Act (“FOIA”) request to the U.S. Department of Health and Human Services (“HHS”). This request sought records relating to the career of Judge Brett Kavanaugh, who has been nominated to the United States Supreme Court and whose confirmation hearings were held from September 4, 2018 through September 7, 2018. Specifically, Lambda Legal seeks records related to Judge Kavanaugh’s potential involvement in payments by HHS during the George W. Bush Administration to columnists, in exchange for those columnists writing media pieces in support of conservative positions on marriage, including opposition to marriage of same-sex couples. The records Lambda Legal seeks are essential for it to advance its mission of advancing civil rights through advocacy and litigation, as the shifting composition of the Supreme Court will directly affect the future of recent, key precedents protecting LGBTQ people and shape jurisprudence on these issues for decades. Disclosure of these records is also critical to inform the public regarding a pivotal lifetime appointment to the nation’s highest court.

Judge Kavanaugh brings to his nomination a lengthy career demanding thorough public scrutiny, and the non-public record of his activities before his appointment to the federal bench holds high value to the public. With regard to LGBTQ issues, Judge Kavanaugh’s nomination to replace Justice Anthony Kennedy is particularly important, because Justice Kennedy drafted the

majority opinion in key Supreme Court cases protecting civil rights of LGBTQ people.¹ The justice who replaces him will inherit and could threaten that legacy. Between the significance of Judge Kavanaugh's nomination and the rapid pace with which the Senate is considering it, there is an urgent need to inform the public regarding Judge Kavanaugh's history and views regarding civil rights and equal protection for LGBTQ people. His nomination has also provoked extensive media interest, and the circumstances surrounding his selection and the Senate's accelerated consideration of it raise questions affecting the public's confidence in the government's integrity. Given these concerns and rapidly approaching confirmation proceedings, Lambda Legal seek to compel HHS to process Lambda Legal's request promptly and to produce all responsive, non-exempt material. As a key advocate for LGBTQ civil rights, Lambda Legal has only one brief opportunity to sift through Judge Kavanaugh's record, to develop its views of Judge Kavanaugh's nomination, and to inform the American public of the consequences Judge Kavanaugh's confirmation would have for LGBTQ rights. Lambda Legal seeks immediate injunctive relief to protect its vital interests and the interests of the public.

STATEMENT OF FACTS

On August 10, 2018, Lambda Legal submitted by electronic mail a FOIA request to HHS seeking:

All records reflecting communications (including emails, email attachments, text messages, instant messages (such as AOL Instant Messenger), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, informational material, draft legislation, talking points, any handwritten or electronic notes taken during any oral communications, summaries of any oral communications, or other materials) between Brett Kavanaugh and Secretary Tommy Thompson, Secretary Michael Leavitt, or Assistant Secretary Wade Horn regarding media stories by Margaret (Maggie) Gallagher or Michael McManus. In addition to communications regarding published media stories,

¹ These include *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 570 U.S. 744 (2013); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

this request encompasses communications discussing proposals for media stories, solicitation of media stories, consultation on media stories, and actual or potential payment for writing media stories, regardless of whether each story was ultimately published.

Compl. ¶ 8, ECF No. 1; Ex. A; Declaration of Sasha Buchert (“Buchert Decl.”) ¶ 5.²

Lambda Legal also sought expedited processing of its request. Lambda Legal certified that the requested records are needed quickly based on an “urgency to inform the public about an actual or alleged federal government activity.” 5 U.S.C. 552(a)(6)(E)(1); 45 C.F.R. § 5.27(b)(2). In support of its requests for expedited processing, Lambda Legal noted that Senate Majority Leader Mitch McConnell had previously stated that the Senate would move quickly to confirm Judge Kavanaugh; that the public had a vested interest in examining Judge Kavanaugh’s lengthy record before he was confirmed to a lifetime appointment; and that an alternative avenue for obtaining information about key portions of Judge Kavanaugh’s career in the executive branch—relying on the Senate Judiciary Committee to request and review all relevant material as part of its constitutional responsibility to provide advice and consent—had been foreclosed by the Committee chairman’s omission of critical periods of Judge Kavanaugh’s career from the Committee’s request for records. Ex. A at 6; Buchert Decl. ¶ 5. As Lambda Legal further described, during that critical window of Judge Kavanaugh’s service in the Bush Administration, that Administration took significant positions and actions affecting LGBTQ rights. Ex. A at 7; Buchert Decl. ¶ 5. These included advocating for a constitutional amendment banning gay marriage and announcing an intention to veto LGBTQ hate crime legislation under consideration in Congress. *Id.*

In further support of its requests for expedited processing, Lambda Legal certified that it is “primarily engaged in disseminating information to the public.” 5 C.F.R. § 1303.10(d)(ii); 45

² Lettered exhibits referenced herein are attached to the Complaint, ECF. No. 1.

C.F.R. § 5.27(b)(2). Lambda Legal provided several facts in support of this certification, including that it has a history of filing FOIA requests to ensure government accountability, that it analyzes the material received and uses it to create reports, press releases, and other content that it distributes through its website and social media accounts, which have hundreds of thousands of followers. Ex. A at 7-8; Buchert Decl. ¶ 5. Lambda Legal also referenced its Fair Courts project, a public advocacy and education initiative to “ensure that courts afford LGBTQ rights due consideration based on constitutional and legal principles,” and provided a link reflecting the many publications and resources available, including a curriculum for judges, attorneys, and other legal professionals; a “Know Your Rights” document for the public; an advocacy toolkit; and many blog posts containing analysis and advocacy. Ex. A at 6; Buchert Decl. at ¶ 3.³

As of the date of this filing, HHS has not communicated to Lambda Legal any determinations with regard to Lambda Legal’s request for records or its request for expedited processing.

ARGUMENT

Judge Kavanaugh was nominated to replace Justice Anthony Kennedy on the Supreme Court of the United States on July 9, 2018, and Senate Republicans have moved rapidly toward confirmation, completing hearings between September 4, 2018, and September 7, 2018.⁴ The Chairman of the Judiciary Committee reportedly plans to schedule a Committee vote on Judge

³See also Fair Courts Project, Lambda Legal, <https://www.lambdalegal.org/issues/fair-courts-project> (last visited September 11, 2018).

⁴See, e.g., Charlie Savage & Sheryl Gay Stolberg, *As Hearings End, Democrats Accuse Supreme Court Nominee of Dissembling*, N.Y. Times, Sept. 7, 2018, <https://www.nytimes.com/2018/09/07/us/politics/brett-kavanaugh-confirmation-hearings.html>.

Kavanaugh's nomination as soon as the week of September 17, 2018.⁵ Lambda Legal's FOIA request seek records concerning Judge Kavanaugh's past public service as it relates to watershed moments affecting LGBTQ rights during the George W. Bush Administration, which will cast considerable light on the impact of his potential appointment to the Supreme Court on the future of jurisprudence affecting LGBTQ equality.

Judicial opinions reflecting Judge Kavanaugh's tenure as a federal judge are readily available, but equally important records reflecting his credentials and conduct prior to his appointment to the federal bench are not. Senator Grassley, the Chairman of the Judiciary Committee, has declined to request Judge Kavanaugh's full record, conspicuously omitting Judge Kavanaugh's time as Staff Secretary to President George W. Bush.⁶ With regard to LGBTQ issues, this omission is glaring. Judge Kavanaugh's time in the Bush Administration overlapped with several important moments and policy determinations in the movement to protect the civil rights of LGBTQ people, and his views and actions regarding them are highly relevant to assessing how he could be expected to handle issues affecting LGBTQ people as a Supreme Court Justice.

Given the exigency of this nomination; its direct relevance to Lambda Legal's public education and advocacy work, including through its Fair Courts Project; the widespread media interest in the nomination; and the clear concerns for the LGBTQ community stemming both from Judge Kavanaugh's past government service and from the Senate's and the White House's

⁵ Jordain Carney, *Grassley Moves to Set up Committee Vote on Kavanaugh Nomination*, The Hill (Sept. 10, 2018, 5:29 PM), <http://thehill.com/homenews/senate/405963-grassley-moves-to-set-up-committee-vote-on-kavanaugh-nomination>.

⁶ Jordain Carney, *Grassley Requests Some But Not All of Kavanaugh Papers at Bush White House*, The Hill (July 27, 2018, 6:57 PM), <http://thehill.com/blogs/floor-action/senate/399296-grassley-request-some-but-not-all-of-kavanaugh-papers-at-bush-white>.

rushed handling of his nomination and confirmation, Lambda Legal is entitled to prompt processing of its request and disclosure of the records it seeks. Faced with a rapidly advancing confirmation process, Lambda Legal now asks the Court to enjoin HHS from irreparably harming both Lambda Legal and the public interest through ongoing failure to make the determination on its request as required by law and the resulting wrongful withholding of records.

Lambda Legal meets the requirements for a temporary restraining order, or in the alternative, preliminary injunctive relief. It is likely to succeed in establishing that it is entitled to expedited processing of its requests. Moreover, anything less than immediate relief requiring Defendant to process Lambda Legal's FOIA request and produce the requested records as soon as practicable would irreparably harm Lambda Legal's ability to obtain and use the requested records to inform the public debate regarding Judge Kavanaugh and the impact his confirmation would have on protections for LGBTQ rights by the federal courts. The requested injunction would not harm HHS's interests or the interests of the general public; in fact, it is entirely consistent with their statutory obligations in light of the urgency surrounding Judge Kavanaugh's nomination and would bolster the public interest by dramatically enhancing the public's ability to evaluate a nominee for the Supreme Court, convey opinions to their senators, and to empower their senators to represent them accurately in the confirmation process. Because all four of the relevant factors weigh in Lambda Legal's favor, this Court should grant the requested injunctive relief compelling HHS to process the request promptly and produce non-exempt, responsive records on an expedited basis.

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.” 5 U.S.C. § 552(a)(6)(C)(i); *see also Oglesby v. Dep’t of 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)). The Court’s power to review also extends to an agency’s denial or inaction on a request for expedited processing: FOIA states that “[a]gency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4).” 5 U.S.C. § 552(a)(6)(E)(iii); *see also Al-Fayed v. CIA*, 254 F.3d 300, 308 (D.C. Cir. 2001) (“a district court must review *de novo* an agency’s denial of a request for expedition under FOIA”). Lambda Legal has therefore exhausted all applicable administrative remedies, and this claim is ripe for adjudication.

II. PLAINTIFF IS ENTITLED TO A TEMPORARY RESTRAINING ORDER, OR IN THE ALTERNATIVE, 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*, 254 F.3d at 303; *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998); *see also Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 120 (D.D.C. 2013) (“In determining whether to issue a temporary restraining order, the Court must apply the same standard that is applied to preliminary injunctions.”).

A. Lambda Legal Is Likely to Succeed on the Merits.

Lambda Legal is entitled to prompt processing of its FOIA request and production of non-exempt responsive records as soon as practicable. 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). As an initial matter, the material Lambda Legal seeks—correspondence between Judge Kavanaugh and HHS personnel—undoubtedly falls 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, 144-45 (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 request “reasonably described” the records sought (specifying a small number of individuals at HHS whose records are sought and clearly describing a concrete subject matter and types of records sought) and complied with all necessary procedures. *See Ex. A at 2; Buchert Decl.* ¶ 5.

Moreover, HHS has clearly not satisfied FOIA’s requirement that HHS comply “promptly” with Lambda Legal’s request. Once Lambda Legal submitted its initial FOIA request to HHS on August 10, 2018, it was entitled to a determination by the agency within twenty working days as to the scope of the records it intends to produce or withhold and the reasons for any withholdings. 5 U.S.C. § 552(a)(6)(A)(i); *Citizens for Responsibility and Ethics in Wash. v. Fed. Elec. 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.”). More than twenty working days have elapsed, but Lambda Legal has received no determination and no records.

Lambda Legal meets the requirements for a valid FOIA request, which is all that is required to entitle it to prompt determination and disclosure. However, Lambda Legal further meets the requirements to trigger expedited processing and production of records “as soon as practicable.” 5 U.S.C. § 552(a)(6)(E)(iii). FOIA requires agencies to “promulgate regulations . . . providing for expedited processing of requests for records (I) in cases in which the [requester] demonstrates a compelling need; and (II) in other cases determined by the agency.” 5 U.S.C. § 552(a)(6)(E)(i)(I)-(II). FOIA further provides that “compelling need” exists when there is “urgency to inform the public concerning actual or alleged Federal Government activity,” when the requester is a “person primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v). Accordingly, HHS has promulgated a regulation providing for expedited processing under these circumstances. 45 C.F.R. § 5.27(b)(2).

Judge Kavanaugh’s nomination presents clear “urgency to inform the public concerning actual or alleged Federal Government activity,” namely the Senate confirmation process and the future composition and direction of the U.S. Supreme Court. The nomination is urgent both because of the gravity of any change in the composition of the Supreme Court and because the confirmation process is hurtling toward completion. Judge Kavanaugh’s views and advice concerning LGBTQ issues during his time at the White House have direct relevance to the public’s understanding of his prospective treatment of similar issues likely to come before the Court in coming years. Justice Kennedy, whose seat Judge Kavanaugh has been nominated to fill, has been the author of a number of crucial decisions advancing and defending LGBTQ

rights.⁷ Judge Kavanaugh's record, in contrast, has been criticized (by Lambda Legal and others) as hostile to LGBTQ and other civil rights.⁸ Therefore, the requested records are vitally important to provide a robust picture of Judge Kavanaugh's positions on cases implicating LGBTQ issues that he is likely to encounter as a Supreme Court Justice. Yet the Chairman of the Senate Judiciary Committee has declined to request records from Judge Kavanaugh's tenure as President Bush's staff secretary,⁹ despite the facts that Judge Kavanaugh has admitted that those years were "in many ways among the most instructive' for his career as a judge."¹⁰

Finally, Lambda Legal made this request as part of its Fair Courts Project, which works to ensure that courts afford LGBTQ rights due consideration based on constitutional and legal principles. The webpage for this project, a link to which was included in Lambda Legal's request, shows Lambda Legal's commitment to publicizing information regarding the intersection of the court system and LGBTQ rights. The Fair Courts Project is a public education and advocacy project providing tools and information to counter attacks on the courts that threaten LGBTQ and HIV-related civil rights and jeopardize the courts' ability to base decisions

⁷ Ex. A at n.26 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)); Buchert Decl. ¶ 5. See also *Romer v. Evans*, 517 U.S. 620 (1996).

⁸ See, e.g., *We Reviewed All of Judge Kavanaugh's Record. Here's What We Found*, LAMBDA LEGAL, July 9, 2018, https://www.lambdalegal.org/blog/20180709_brett-kavanaugh-record; Charlotte Clymer, *HRC Opposes Kavanaugh, Trump's Pick to Undermine LGBTQ Rights, Reproductive Rights, and Health Care*, Human Rights Campaign, July 9, 2018, <https://www.hrc.org/blog/hrc-opposes-trumps-Supreme-Court-pick-brett-kavanaugh>.

⁹ Melissa Quinn, *Chuck Grassley Formally Requests Kavanaugh White House Records Amid Document Battle*, Wash. Examiner (July 27, 2018, 7:51 PM), <https://www.washingtonexaminer.com/policy/courts/grassley-formally-requests-kavanaugh-white-house-records-amid-document-battle>

¹⁰ See Jennifer Rubin, *The Senate Must Prevent Kavanaugh's Nomination from Corrupting the Supreme Court*, Wash. Post, July 30, 2018, https://www.washingtonpost.com/blogs/right-turn/wp/2018/07/30/the-senate-must-prevent-kavanaughs-nomination-from-corrupting-the-supreme-court/?utm_term=.8a1e391a074f.

in constitutional and legal principles, rather than in political moods or popular opinions. This project disseminates content regarding the courts, including “Know Your Rights” materials, an advocacy toolkit, reports, and editorial content.¹¹ Lambda Legal’s request, and the Fair Courts Project of which it is a part, advance Lambda Legal’s mission to achieve equality for LGBTQ and HIV-positive individuals and integrates with Lambda Legal’s regular filing of FOIA requests to ensure the accountability of government officials.¹² Lambda Legal uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media, as promoted on its website and social media platforms, such as Facebook and Twitter, which together have more than half a million followers. Buchert Decl. ¶ 4.

To advance its public education and advocacy mission—including education and advocacy specific to the relationship between the courts and LGBTQ rights—Lambda Legal urgently needs HHS to fulfill its obligations. Only prompt processing of the request and disclosure of the records to which Lambda Legal is entitled will preserve their value to Lambda Legal and to the public it seeks to educate. Judge Kavanaugh has been nominated. Confirmation hearings have passed and votes approach rapidly. Time is of the essence.

B. Plaintiff Will Be Irreparably Harmed Absent the Requested Relief.

Lambda Legal will be harmed irreparably if HHS does not promptly process its request, especially if further delays prevent disclosure of these records until after the Senate has voted on Judge Kavanaugh’s nomination. Only preliminary injunctive relief ensuring that the requests are processed and records are disclosed promptly can stave off the harm that neither Lambda Legal

¹¹ *Fair Courts Project*, Lambda Legal, <https://www.lambdalegal.org/issues/fair-courts-project> (last visited Aug. 29, 2018).

¹² *See, e.g., Lambda Legal Files FOIA Request After Trump Administration Restricts Use of Seven Words at CDC*, Lambda Legal, Dec. 20, 2017, https://www.lambdalegal.org/blog/dc_20171220_language-restrictions.

nor the public will receive the requested information until it is too late to make use of it. 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).

Judge Kavanaugh’s nomination has triggered the exigency Congress envisioned in crafting FOIA’s expedition provisions. Only accelerated review by this Court can ensure that Lambda Legal’s requests are promptly processed, preserving the opportunity for Lambda Legal to obtain requested records while their value to Lambda Legal and to the public remains high. 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; *see also Elec. Privacy Info. Ctr. v. U.S. Dep’t of Justice (“EPIC”)*, 416 F. Supp. 2d 30, 40-41 (D.D.C. 2006) (“[T]he statutory right to expedition in certain cases underlined Congress’ recognition of the value in hastening release of certain information. As [the plaintiff] correctly notes, the loss of that value constitutes a cognizable harm. As time is necessarily of the essence in cases like this, such harm will likely be irreparable.” (internal citations and quotation marks omitted)). Failure to process the request promptly and to disclose non-exempt records responsive to the request will irrevocably deprive Lambda Legal of the ability to probe Judge Kavanaugh’s record regarding issues at the core of its mission; to educate the public regarding Judge Kavanaugh’s professional history and likely impact on the Supreme Court; and to advocate for a court system—including the nation’s highest court—that faithfully and equally protects the rights of everyone, including LGBTQ people and people living with HIV. The records Lambda Legal seeks possess unique value while Judge Kavanaugh’s nomination is pending and is a subject of widespread public debate, and that value

will deteriorate when the Senate makes its decision on Judge Kavanaugh's nomination and the public debate ends.

Our system of representative democracy depends upon an informed citizenry. That principle animates FOIA. *NLRB 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.”). A healthy confirmation process requires public access to relevant information, which constituents regularly use to form opinions about nominees and convey those opinions to their senators. Members of the public cannot reliably fulfill their roles or meaningfully participate in the process without adequate information on which to base their opinions, and this deficit undermines senators' ability to represent their constituents faithfully in Washington. In light of the Senate Majority Leader's announced commitment to fast-track a decision on Judge Kavanaugh's nomination, Court intervention to expedite processing is necessary to ensure that the public is equipped for an informed discourse—now—about his legal career and qualifications for a lifetime appointment to the nation's highest court. As the nation's vanguard LGBTQ civil rights advocacy and litigation organization, Lambda Legal possesses the knowledge and skills to assess and contextualize the requested information and a unique platform to disseminate the records, and Lambda's analysis of them, to the LGBTQ community, to its allies, and to the general public. Were Lambda Legal to wait at the end of the queue, forgoing its statutory right to prompt processing and disclosure, it would irreparably lose its ability to influence public discussion of the intersection between Judge Kavanaugh's potential appointment and the future of LGBTQ rights in this country.

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 the Senate rushing to vote on Judge Kavanaugh’s nomination before the upcoming midterm elections in November. The nomination has attracted widespread media and public interest and general recognition that the Senate’s decision on his nomination has the potential to alter the balance of the Supreme Court and the future of its jurisprudence on fundamental constitutional questions for decades.¹⁴ The window for public education and

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 v. U.S. Secret Service*, 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.*, Stephen Jessee & Neil Malhotra, *The Chart That Shows the Supreme Court Will Be Out of Step With the Country*, N.Y. Times, July 12, 2018, <https://www.nytimes.com/2018/07/12/opinion/kavanaugh-supreme-court-right.html> (arguing that “[i]f Judge Brett Kavanaugh joins the Supreme Court, it will mark a sharp move to the right”); Oliver Roeder & Amelia Thomson-DeVeaux, *How Brett Kavanaugh Would Change The Supreme Court*, FiveThirtyEight (July 9, 2018, 9:34 PM), <https://fivethirtyeight.com/features/how-brett-kavanaugh-would-change-the-supreme-court/>; Brian Bennett, *How Brett Kavanaugh Could Change the Supreme Court—and America*, Time, July 12, 2018, <http://time.com/5336621/brett-kavanaugh-supreme-court/>.

discussion will be open only briefly, and it is imperative that Lambda Legal 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))).

Indeed, by now it is almost axiomatic that “stale information is of little value.” *Payne*, 837 F.2d at 494; *accord Calderon v. U.S. Dep’t of Ag.*, 236 F. Supp. 3d 96, 114 (D.D.C. 2017); *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*, 416 F. Supp. 2d at 41)). 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 Conf. on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005) (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)).

As in many of those cases, Lambda Legal’s ability to enhance the public’s understanding of the history and views of a Supreme Court nominee regarding fundamental rights of and protections for LGBTQ Americans will be irreparably harmed if HHS is not required to process Lambda Legal’s request with due speed. Lambda Legal seeks judicial intervention to ensure HHS will comply with its obligations to expedite processing and disclosure.

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

Lambda Legal, the public, and the agencies are aligned in their mutual strong interest in the disclosure and review of Judge Kavanaugh’s record.

HHS itself cannot claim to be harmed by an order compelling it to comply with its statutory obligations. Nor would granting Lambda Legal relief unduly burden other FOIA requesters. FOIA itself recognizes that need to prioritize some requests when there is an urgent need for information—as reflected by the addition of FOIA’s expedition provisions. *See EPIC*, 416 F. Supp. 2d at 36 (explaining 1996 amendment adding expedited processing requirements). Thus, Congress itself contemplated that in cases of compelling need—as Lambda Legal has demonstrated in this instance—certain requesters would go to the head of the queue. Thus, an

order from this Court that HHS process Lambda Legal's request promptly and provide the requested records as soon as practicable will not harm the interests of the non-moving party or any other entity.

D. The Public Interest Favors the Requested Relief.

A temporary restraining order or preliminary injunction is indispensable to protect the public's right to government transparency and its essential interest in informed and meaningful participation in the Senate confirmation process. 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 FOIA 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) ("There 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.”). There are few moments of public debate with urgency equal to that surrounding selection of a new justice to serve on the nation’s highest court.

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. The public’s need is arguably stronger in advance of a Supreme Court confirmation, because the public will not have an opportunity to revisit this decision post-confirmation with the benefit of either hindsight or belated disclosures. Congress and the Executive Branch comprise myriad individuals and face regular elections that afford the public regular opportunities to affirm or disavow their actions and to shape their priorities; while each election is significant, there are natural limits on the effects of each individual election and frequent opportunities for the public to redress errors or reverse course. Not so for the third branch of government. Vacancies on the Supreme Court are relatively rare, and lifetime appointments render the decisions on how to fill them all but irrevocable.

Although the public enjoys far less ability to influence its highest court than it wields over the political branches, the Supreme Court, and each of its justices, exerts acute influence over the day-to-day lives of the American public. As one of only nine justices on a court that has been, of late, sharply divided, Judge Kavanaugh would be in a position to have significant impact for a generation with regard to fundamental rights and equal protection of the laws. This is particularly true with regard to the progress made in clarifying that fundamental rights and the equal protection of the laws extend to all, regardless of sexual orientation or gender identity. Justice Kennedy—whom Judge Kavanaugh would replace—has been a leading voice on these issues on the Supreme Court. The public has only one opportunity to assess Judge Kavanaugh’s fitness to assume that legacy and to convey its views and concerns to the senators entrusted with

weighing his nomination. A temporary restraining order or preliminary injunction ensuring timely processing and disclosure of records reflecting Judge Kavanaugh's record of government service, and in particular his role in major policies and events affecting the rights of LGBTQ people during the George W. Bush administration, maximizes the public's ability to avail itself of that opportunity.

CONCLUSION

For the foregoing reasons, Plaintiff Lambda Legal respectfully requests that this Court grant a temporary restraining order or, in the alternative, a preliminary injunction requiring HHS to process its FOIA requests on an expedited basis and to make a determination promptly and produce records as soon as practicable.

Dated: September 13, 2018

Respectfully submitted,

/s/ Elizabeth France

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2018, I caused a copy of the foregoing Memorandum in Support of Plaintiff's Motion for a Temporary Restraining Order or Preliminary Injunction, including notice that the application was made at approximately 1:30 PM on September 13, along with copies of the Complaint and exhibits thereto, to be hand-delivered to defendant at the following addresses:

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
200 Independence Avenue SW
Washington, DC 20201

In addition, a courtesy copy has been delivered to:

Jessie K. Liu
U.S. Attorney for the District of Columbia
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Dated: September 13, 2018

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