UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA * * * * * * * * * * * * * * NAOISE CONNOLLY RYAN, et al.) Civil Action Plaintiffs,) No. 23-3815 vs.) UNITED STATES) March 1, 2024) 11:04 a.m. DEPARTMENT of JUSTICE, Defendant.) Washington, D.C.) * * * * * * * * * * * * * * TRANSCRIPT OF MOTION HEARING BEFORE THE HONORABLE BERYL A. HOWELL, UNITED STATES DISTRICT COURT JUDGE **APPEARANCES:** FOR THE PLAINTIFFS: GREGORY M. LIPPER LEGRAND LAW PLLC 1100 H Street NW Suite 1220 Washington, DC 20005 (202) 996-0919 Email: glipper@legrandpllc.com FOR THE DEFENSE: ANNA DAVIS WALKER JOHN TRUONG DOJ-USAO Civil Division 601 D Street, NW Washington, DC 20530 (202) 252-2544 Email: anna.Walker@usdoj.gov ALSO PRESENT: TRACY BRAMMEIER, Court-Appointed Liaison Court Reporter: Elizabeth Saint-Loth, RPR, FCRR Official Court Reporter Proceedings reported by machine shorthand. Transcript produced by computer-aided transcription.

1	PROCEEDINGS
2	THE COURTROOM DEPUTY: Your Honor, this is Civil
3	Action 23-3815. Naoise Connolly Ryan, et al., versus
4	United States Department of Justice.
5	Would the parties please come forward to the
6	lectern and identify yourselves for the record. We'll start
7	with plaintiffs' counsel first this morning.
8	MR. LIPPER: Good morning, Your Honor.
9	My name is Greg Lipper, I represent the plaintiffs
10	in this case. I am joined at counsel table by Tracy
11	Brammeier, who is the court-appointed liaison to the victims
12	of the Ethiopian flight, including many of my clients in
13	this case.
14	THE COURT: All right. Thank you. Good morning.
15	MS. WALKER: Good morning, Your Honor.
16	Anna Walker, Assistant United States Attorney,
17	representing the U.S. Department of Justice.
18	THE COURT: Yes. Good morning.
19	All right. So the plaintiffs have asked for a
20	hearing on their motion for preliminary injunction that was
21	filed on January 23, 2024, seeking an order requiring DOJ,
22	the Department of Justice, to, within 30 days of an order by
23	this Court, to process and produce all responsive documents
24	to their FOIA request the operative FOIA request that was
25	filed in August 2022, and produce a Vaughn index identifying

1 any documents withheld of redacted documents, and the 2 exemption being asserted. 3 MR. LIPPER: Your Honor, may I clarify? THE COURT: No, you may not. 4 5 I am going to be asking a whole series of 6 questions. Please, why don't you step forward to the 7 podium. 8 MR. LIPPER: Absolutely. 9 THE COURT: And all through the plaintiffs' 10 papers, it refers to their FOIA request as filed on April 26, 2022, as I understand the record, that was not 11 12 perfected because the Department of Justice Criminal 13 Division said it needed some more documentation to, I quess, 14 verify the representation of Judge Cassell of the plaintiffs 15 for whom he was asserting it -- presenting the FOIA request. 16 And when that didn't happen within 30 days, DOJ closed the 17 FOIA request and another person filed, I guess, the same request on August 9, 2022, with all of the necessary 18 19 documentation; and that's when that FOIA request was 20 perfected. So that's my understanding of the facts here. 21 MR. LIPPER: That is my understanding now. 22 I apologize. That was not my understanding at the 23 time. And I had actually not seen that interim 24 communication. So I have clarified with the relevant 25 submitters that those interim events that the government

1 described -- you are correct about that. 2 THE COURT: Right. So all of the plaintiffs' 3 papers refer to an April 22, FOIA request. You are going to 4 hear me referring to it as the August 2022 --5 MR. LIPPER: August, understood. 6 THE COURT: -- FOIA request because that's the 7 operative request. MR. LIPPER: Understood. 8 9 THE COURT: Okay. So now the government says that 10 the search is going to be completed by April 1, and an interim disclosure determination will be made around 11 12 June 1st, 2024, which is about four months from now. I am 13 not exactly sure what an interim disclosure determination 14 actually means and what that encompasses, and we're going to 15 find out from the government about that. 16 But I just want to be clear that if that includes 17 some production of documents or if it just means production of a Vaughn index by June 1, I want to be clear about what 18 19 the plaintiffs are asking for. 20 You want within 30 days of today, let's say 21 April 1, which is a couple months in advance of June 1, this 22 interim disclosure determination or -- whatever that means, 23 you want production of documents and you want production of 24 a Vaughn index? 25 MR. LIPPER: Correct, with the clarification I

1	wanted to make. I actually wanted to make two
2	clarifications. The first was the operative FOIA request
3	the August 22 operative FOIA request requests I believe
4	it's 34 or 36 categories of documents. For our preliminary
5	injunction motion, we are seeking a subset, a category
6	seven categories of documents, six of which relate to
7	Department of Justice communications with Boeing's attorneys
8	during the investigation. So that's what we are seeking
9	THE COURT: And the seventh request asked for?
10	MR. LIPPER: The seventh was documents relating to
11	representations that the Department of Justice had made to
12	the victims during the investigation.
13	THE COURT: For that you want all emails, all
14	records reflecting any of those discussions?
15	What's the scope of that seventh request?
16	MR. LIPPER: Well, the request itself is sort
17	of I guess the request itself includes both the
18	discussions about those discussions and also and there
19	was concern, obviously, about the accuracy of the
20	information that had been provided to the victims about the
21	status of the investigation at the time, and so part of what
22	we're asking for is sort of the documents underlying those
23	disclosures.
24	I recognize that that part is a little less
25	discrete and so I would say, in terms of order of priority,

1	the six requests related to the communications with Boeing
2	are definitely, I think, what in my clients' view is the
3	most urgent.
4	And then, within that seventh request, I would say
5	there are discussions about the discussions with the victims
6	to the extent those aren't reflected in the discussions with
7	Boeing are the top priority within that seventh request.
8	THE COURT: Well, I hope the Department of Justice
9	understands what you just said because
10	MR. LIPPER: I am happy to
11	THE COURT: I found it confusing.
12	Okay. Let me just turn to likelihood of success.
13	Yes. So the parties talk about likelihood of
14	success, both of them, but neither one of them actually say
15	in the FOIA context in this context what does it mean
16	to show a likelihood of success?
17	What is it that the plaintiffs have to show for a
18	likelihood of success on the merits because, generally, that
19	means a likelihood of success on your claims in the original
20	complaint. And in most FOIA cases where there are
21	preliminary injunction motions filed and they are very
22	rare
23	MR. LIPPER: Yes.
24	THE COURT: and even more rarely granted, the
25	usual request for the preliminary injunction relief is, "We

1 want expedited processing and we have been denied it." 2 Here the government has -- the Department of 3 Justice has granted you expedited processing. So you are 4 not asking for me to ensure your FOIA request is treated 5 with expedition because you are already getting expedited 6 processing from the Department of Justice. 7 So as I look at -- what do you have to show for the likelihood of success factor to get the preliminary 8 9 injunctive relief you are seeking, you have to show me --10 just like any other person seeking a preliminary injunction -- likelihood of success on your underlying 11 12 claims in your complaint, which is: Give me all of the 13 responsive documents. 14 What do you think you have to show for likelihood 15 of success on the merits? 16 MR. LIPPER: So I will say that I agree with you 17 that the precise contours are not as -- it was not as clear, 18 I think, that that precise question isn't -- I agree with 19 you, isn't as clear in the cases. 20 But the way I see it, I think it's a couple of 21 things. The first thing is, we certainly have not 22 received -- we believe we are certainly entitled to have our 23 request processed, and we have not yet received --24 THE COURT: And you are having your request 25 processed now. They are searching for records now.

1 MR. LIPPER: Yes. 2 THE COURT: So to the extent that you are asking 3 me for that relief, I think you would have to concede that 4 part of your relief to have your request processed is moot 5 because the Department of Justice is doing that. 6 So what else do you think you are entitled to to 7 show -- and that's important for assessing whether or not you have a likelihood of success. 8 9 MR. LIPPER: Right. But I think ultimately we're 10 entitled to have the processing of that request completed; 11 that has not happened yet. We all, I think, agree at some 12 point in time that has to happen. 13 THE COURT: So you think that your likelihood of 14 success showing is that -- not just that your request is 15 being processed, which it is, but that it is processed on 16 your timetable? 17 MR. LIPPER: Well, no. I think the timetable 18 aspect is what is accelerated in the preliminary injunction 19 context; and I think that that is addressed by the imminent 20 irreparable harm requirement. 21 THE COURT: Well, you are not saying that the likelihood of success factor in the FOIA context essentially 22 23 merges with the irreparable harm factor, are you? Or are 24 you? 25 MR. LIPPER: Well, I guess yes and no. I will say

	I
1	that, I think, in the I agree with you, there aren't that
2	many cases granting preliminary injunction in the FOIA
3	context; and I have read, I believe, most if not all of
4	them.
5	I believe in one of your opinions denying a
6	preliminary injunction sort of synthesizes them and
7	ultimately, as a practical matter, the inquiry the
8	various inquiries do seem, in practice, to collapse along
9	the lines of: Is there an imminent need that requires
10	processing to be sped up beyond what otherwise happened
11	absent, sort of, court intervention and imminent relief?
12	THE COURT: Well, I can't say that my prior
13	decisions in these issues has been perfect.
14	I think it's easy, in the FOIA context,
15	preliminary injunction motions when the issue for the PI is:
16	Does the plaintiff deserve expedition or not when it was
17	denied by the agency? That's sort of a thing you can get
18	your hands around in terms of assessing the public interest,
19	the need, and so on.
20	MR. LIPPER: Yes, but
21	THE COURT: But it's very rare that in any of
22	those cases where expedition has already been granted by the
23	agency, like here. So what am I assessing on the likelihood
24	of success factor?
25	MR. LIPPER: But I will say in those cases, even

1	in the cases in which expedited processing hasn't been
2	granted, several of those cases the order has been not just
3	to put it in the expedited processing box, but that it is to
4	provide documents and/or, in some cases, a Vaughn index by a
5	certain amount of time. So I think that reflects that
6	expedited processing is, I think, necessary but not
7	sufficient because well, for two reasons: One, there is
8	still the question of is it being is the expedited
9	processing standard being met sort of reasonable as
10	promptly as reasonably practical, number one; but then,
11	number two, you know, in practice: Is it being expedited in
12	a way that, in rare cases, plaintiffs receive it by the time
13	they actually need it?
14	So I think it is I guess I would say I will
15	offer sort of two arguments in the alternative. I think the
16	main point is: If we are likely to show that we are
17	entitled either to a response an actual response a
18	production and Vaughn index at some point, then that would
19	suffice; and now we're just asking for that relief to be
20	sped up.
21	But in any event, I think we, secondarily here,
22	have an argument that because the government points out
23	in its opposition that they are on track to meet the
24	original nonexpedited estimate that was provided in early
25	2023 of 12 to 18 months, which means that the expedited

1	processing doesn't seem to have actually been speeding up
2	the processing. And again, I sort of then I don't know
3	that the inquiry formally collapses, but ultimately we are
4	entitled to these documents, you know, by some point
5	anything that is responsive and not exempt we are entitled
6	to receive by some point. And here we're entitled to
7	receive them as soon as is reasonably practicable and, in
8	this case, A, that timetable needs to be sped up and, B, in
9	any event and especially in light of the imminent
10	deadlines the "as soon as reasonably practicable
11	standard" isn't being met.
12	I do want to clarify one recent factual
13	development; I am happy to do it now or later on in a
14	colloquy, but
15	THE COURT: You can do that now. But I have a
16	question on my mind that I really want to ask, which is
17	the first time you have proposed prioritization of the seven
18	categories of information you have asked for in your
19	preliminary injunction is not when you filed your motion, I
20	would hope. You had conferrals with the Department of
21	Justice about that before you filed your preliminary
22	injunction motion?
23	MR. LIPPER: We tried to have conferrals with the
24	Department of Justice but we are not able to we are not
25	able to get through, quite frankly. Some of this is

1	detailed in Professor Cassell's declaration which is
2	attached to the preliminary injunction motion.
3	THE COURT: When you say you weren't able to get
4	through
5	MR. LIPPER: In other words, I will this is
6	laid out in his declaration. Literally, the same day he
7	received notification that the expedited processing had been
8	granted
9	THE COURT: Wait, wait, wait. You filed this
10	complaint in December of 2023
11	MR. LIPPER: Yes.
12	THE COURT: You filed your preliminary injunction
13	motion a few weeks later, January 2024.
14	MR. LIPPER: Yes.
15	THE COURT: So you had a filed complaint and you
16	are then, under the rules of this court and we generally
17	ask for conferral between the parties. So between the time
18	you filed this complaint and the time you filed your
19	preliminary injunction motion, did you confer with the
20	government like the representative from the U.S.
21	Attorney's Office here representing the government saying
22	"could you prioritize all of these things," before you
23	walked into court with a PI motion?
24	MR. LIPPER: The government did not assign the
25	U.S. Attorney's Office did not assign an attorney to this

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1	case until shortly before if you recall, there was that
2	parties' joint scheduling motion a few weeks ago. It was
3	earlier that week that we which was several weeks after
4	our I forget exactly, but after our preliminary it
5	wasn't until that point that the U.S. Attorney's Office had
6	even assigned an attorney.
7	Before that, I have a general email address in
8	which I can serve you know, send service copies. But I
9	had no I had no legal representative to contact during
10	that time.
11	THE COURT: What about the victims' representative
12	that the plaintiffs as a group, plus other plaintiffs
13	other victims of these two airplane crashes? They're in
14	contact with the victims' representative.
15	Have they conferred with that contact that they
16	have within the Department of Justice to say: Here is some
17	prioritization to work this out short of litigation where
18	all sides have to dig in their heels?
19	MR. LIPPER: Right. So I actually let me
20	address that, and then I want to just address
21	THE COURT: In other words, what are we doing here
22	if you haven't conferred?
23	MR. LIPPER: Well, I think we have we have done
24	as much conferring as we reasonably could have under the
25	circumstances.

1 So with respect to the -- the branch of the 2 Department of Justice that is responsible for conferring 3 with victims is not the FOIA office, of course. They can't -- they have been -- as far as I --4 5 THE COURT: But they have a phone. They can call 6 and contact other people within the Department of Justice. 7 MR. LIPPER: They do. There are right now discussions -- so, basically, 8 9 when the appeal was decided in -- sorry -- when the Fifth 10 Circuit decided the appeal in the criminal case in December, at that point the Department of Justice victims' office sent 11 12 a letter to the victims say- -- they sent a letter in early 13 January: As you know, the Fifth Circuit has ruled and we 14 are now in the six-month review period, and we're going to 15 be setting up a conferral opportunity. 16 Just this morning, actually, the DOJ victims' 17 office sent another email to the victims basically saying --18 reserving between April 22nd and April 24th for a two-part 19 meeting that's going to constitute the conferral session. And I understand from Ms. Brammeier that that has now been 20 scheduled to take place on April 24th; so that is the 21 22 conferral. That will be the conferral. 23 There has not been a sort of free-flowing 24 opportunity to confer, you know, where we can pick up the 25 phone and say: Hey, we have this FOIA request; can you do

something about it? Anything like that.

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THE COURT: Okay. Well, after you filed your PI motion and the government assigned Ms. Walker to the case, have you conferred with Ms. Walker about prioritization or has she been too busy responding to your PI motion?

6 MR. LIPPER: Ms. Walker and I did speak briefly. 7 We spoke actually a few times before we submitted 8 scheduling. I did say to Ms. Walker -- I forget my exact 9 words, but it was something -- this is after the motion was 10 filed. I said something along the lines of: Ms. Walker, we can avoid this entire -- I said something along the lines 11 12 of: It will probably take all of us longer to finish this 13 briefing than it would for the FOIA office to, you know, 14 find and produce the plea communications with Boeing. And 15 she said she would, you know, I think -- I believe something 16 along the lines that she would discuss it with her client.

So I certainly made -- you know, I certainly made it clear what our priority was, and I certainly expressed that I still do think it would be faster for the FOIA office to find that, I think, relatively discrete set of communications and produce it than it would be to litigate this case. But we have not -- that offer has not been taken up as far as I know.

THE COURT: Okay. Ms. Walker, be prepared toaddress that quite thoroughly.

1 MS. WALKER: Okay. 2 MR. LIPPER: The final point I do want to make 3 because Professor Cassell and some of the other --THE COURT: I call him "Judge Cassell." He goes 4 5 by "Professor Cassell" now? 6 MR. LIPPER: I actually asked him --7 THE COURT: I first met him as a judge. MR. LIPPER: Right. I asked him: How would you 8 9 like to be described in the court papers? And I think he 10 did not want to be described as a judge, I am assuming, because he doesn't want to be suggesting he is entitled to 11 12 some judicial -- he doesn't want to be pulling judge rank, I 13 suppose. So I refer --14 THE COURT: He can't avoid the fact that he was a 15 respected jurist. 16 MR. LIPPER: Certainly no dispute about that. We 17 discussed it and he, I think, preferred to be referred to as 18 "Professor Cassell" as a party in this case. I am sure he 19 doesn't object to you calling him "Judge." 20 In any event, he has been -- in his various communications with the FOIA office -- first of all, he 21 22 said: Please contact me if there is anything I can do to 23 help you identify or speed this up. 24 But then -- when he received notification in 25 October of 2023 that expedited processing had been granted,

1 later that day he left a voicemail for the FOIA office; and 2 then it was this series of voicemails in which he was both asking about the status and also offering any information or 3 4 help he could provide. Back and -- it took many voicemails 5 to even get calls back. When he did get calls back, he was 6 told by the person: I don't have information for you, I 7 will talk to my supervisor. It was just this ongoing thing. He left many 8 9 voicemails, sent many emails. There was then follow-up to 10 Mr. Murphy, one of the other lawyers, some of that. 11 THE COURT: All right. I really want to move on. 12 MR. LIPPER: So I feel like there have been many 13 attempts made to many different entities. 14 THE COURT: Okay. The FOIA requests, including 15 the six at issue or seven at issue in the PI, all regard a 16 criminal investigation of the criminal case that is still 17 pending, so it's absolutely no surprise at all that the 18 Department of Justice has said that they're likely going to 19 invoke Section 7 and its various subparts, possibly 20 Exemption 6, to withhold a number of documents. This is no 21 surprise, I would take it, to the plaintiffs. 22 MR. LIPPER: Certainly not that they are asserting 23 it, no. 24 THE COURT: Okay. So my question is: If you --25 all you get -- if all you get, whenever they finish

1	processing whether it's on the plaintiffs' timetable or
2	the regular expedited processing schedule of DOJ is a
3	Vaughn index, because they're going to say: All of this is
4	subject to Exemption 7(A) and other various subparts of
5	Exemption 7 or others, will a Vaughn Index help the
6	plaintiffs here?
7	MR. LIPPER: I suppose it depends how informative
8	it is. But I think, at the very least, a Vaughn index would
9	enable us to get some information about what is being
10	withheld, what their justification is, and then we can
11	challenge it.
12	I mean, we do think that, again, especially with
13	respect to the communications with Boeing and Boeing's
14	lawyers', that those communications do not sort of at
15	least within the
16	THE COURT: I am going to get to that in a second.
17	MR. LIPPER: Okay.
18	THE COURT: So it will give you an indication of
19	what's withheld.
20	Then you say something that gives me heart
21	palpitations, that you will be able to litigate all of those
22	withholdings. And are you expecting to do that litigation
23	over the appropriateness of application of any exemption on
24	a plaintiffs' timetable?
25	MR. LIPPER: We will of course

1 THE COURT: Am I going to be seeing one PI motion after another from these plaintiffs about what is a simple 2 3 straightforward FOIA case? MR. LIPPER: I hope it wouldn't require successive 4 5 motions. What I would --6 THE COURT: That's what you are intending, to 7 litigate -- once you get a Vaughn index, if it's on the plaintiffs' timetable, let's say you got your Vaughn index 8 9 within 30 days if I grant this PI, and that's all you get; 10 that's April 1. And then you still think you need it by 11 July 7, which I am going to get to; so you are going to 12 litigate on an expedited basis. The only way to do that is, 13 I would say, is by yet another TRO or PI saying you need a 14 decision on of all these withholdings by -- I don't know 15 when, before July 7; and then you need the production before 16 July 7. 17 So you are going to want this Court, basically, to 18 put aside all other pending matters, just like you want the 19 Department of Justice to put aside all other expedited 20 requests it has. You are going to want me then to put aside 21 all of my other pending matters to focus only on your PI 22 litigation over the withholdings in this case; is that what 23 you are anticipating? 24 That's what I am seeing buried under your 25 otherwise opaque language about litigating the Vaughn index;

1	that's all you get.
2	MR. LIPPER: I would not expect that anyone would
3	put aside all of their other pending matters to focus on any
4	case, mine or otherwise. It is ultimately, and I think what
5	is
6	THE COURT: Is that what you are expecting,
7	though, to file TROs or PIs to litigate all of the
8	withholdings on the Vaughn index order to meet your
9	timetable?
10	MR. LIPPER: If we think from the Vaughn index
11	that there are documents that are being improperly withheld,
12	then yes, I expect we would seek expedited relief. Whether
13	we would every obviously, we don't know how many
14	documents are going to be on the Vaughn index how many
15	documents there are; how many are going to be on the Vaughn
16	index; you know, if there are details of the exemptions that
17	were not what we anticipated. So I can't say right here
18	that every item on the Vaughn index we're going to come to
19	court on. We're certainly going to look at it.
20	If we think there are documents or categories of
21	documents that are being improperly withheld, we would take
22	reasonable steps to get them in time. Now, I also again,
23	I don't know
24	THE COURT: So my heart palpitations are well
25	placed.

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1 MR. LIPPER: Well, the only thing I will say, and 2 this may kind of bleed over into the merits --3 THE COURT: Yet more rushed litigation if all you 4 get is the Vaughn index -- or any Vaughn index, because I am 5 confident you are going to get some Vaughn index with some 6 documents on it given the nature of the documents being 7 requested in this FOIA request about an ongoing pending criminal matter, you will get a Vaughn index. 8 9 And so what you are alerting me to is that this is 10 only the first of, perhaps, multiple PIs to follow, once you 11 get a Vaughn index, of expedited litigation over 12 withholdings by the Department of Justice to meet what the 13 plaintiffs view is a hard deadline of July 7, 2024; is that 14 right? 15 MR. LIPPER: I don't know that it is "multiple," 16 but --17 THE COURT: At least one? 18 MR. LIPPER: If there are -- again, I can't --19 it's hard for me to say without seeing the Vaughn index; it 20 is certainly possible. I think, obviously, we will recognize both the 21 22 time constraints and the court constraints -- I mean, that's 23 why we didn't seek a PI on 34 categories of documents --24 right --? recognizing there are reasonable limitations here? 25 THE COURT: Or reasonable exemptions that may

1 apply? 2 MR. LIPPER: Right. If we think some exemptions 3 are stronger than others. If there are some that can be 4 addressed categorically or more categorically, we will 5 certainly -- both for our time, the Court's time --6 THE COURT: Let's talk about the exemptions 7 because I appreciate the plaintiffs' view like: How can an exemption apply to communications between the Department of 8 9 Justice and Boeing? 10 How can any exemption apply? 11 And you cite -- unless I have missed any, you cite 12 two cases for that: American Oversight v. U.S. Department 13 of State, and Doe No. 1 v. United States, which is an 14 Eleventh Circuit case from 2014 dealing with the Jeffrey 15 Epstein case. 16 MR. LIPPER: Right. And that is cited by analogy 17 because that was a civil discovery dispute, not a FOIA case. 18 THE COURT: Right. 19 But correct me if I'm wrong. Having looked at 20 those cases, neither of those cases involved FOIA requests 21 for active ongoing criminal cases, right? 22 I looked. They did not. No. 23 MR. LIPPER: Epstein. Right. Epstein had been a 24 nonprosecution --25 THE COURT: Right.

1 And neither one of those cases involved the scope 2 of Exemption 7; and neither one involved a pending criminal 3 case. MR. LIPPER: That is correct. And again, I will 4 5 say it again, it is hard for me to -- without knowing what's 6 on the Vaughn index --7 THE COURT: Let me just say: From where I sit, that's a lot of confidence that -- from the point of view of 8 9 the plaintiffs that there is no exemption that can 10 appropriately apply to communications between the Department 11 of Justice and the target of a criminal investigation in an 12 ongoing investigation in a pending criminal case without --13 with citations to two cases that don't involve this fact 14 pattern at all nor the exemptions that the government has 15 alerted both the Court and plaintiffs that may apply here, 16 which is Exemption 7, and its various subparts. 17 MR. LIPPER: So I was not intending to sort of 18 brief -- officially brief the exemptions in the PI motions. 19 So you know I am clear, that's not --20 THE COURT: Let me ask you. I saw you didn't do 21 that, and neither did the government. 22 But when I am assessing the likelihood of success 23 on the merits -- let me go back to the first factor. 24 MR. LIPPER: Yes. 25 THE COURT: I am still on the first factor here,

1 just in case you want to know where I am in my thinking. 2 Likelihood of success on the merits, are you going to get 3 responsive records in response to all of your FOIA requests? 4 And I look at the context of this and I look at 5 the fact that it's on ongoing criminal investigation, 6 pending criminal case, Exemption 7 is a clear red flashing 7 light; I look at *Bagwell*, a D.D.C. case from 2016, which found that Exemption 7 was found to properly be applied to 8 9 withhold agency communications with outside law firms, 10 consulting firms, and associated individuals since -- and I 11 quote, "emails discuss record requests and subpoena requests 12 related to an ongoing" -- in that case -- "OIG criminal 13 investigation." "As such, the production of this 14 information would reveal targets of the investigation who 15 are not publicly known, the nature of matters currently 16 under investigation, and investigatory techniques which 17 could reasonably be expected to interfere with law 18 enforcement proceedings." 19 So if I'm looking at likelihood of success on the 20 merits given the context of this FOIA request and the nature 21 of what the information and records being targeted are, I 22 look at *Bagwell*, and I cite: How can they show a likelihood 23 of success that they are going to get all of these 24 documents? 25 Exemption 7 has a likelihood -- a strong

1	possibility of barring them from getting a lot of these
2	documents. How can you show likelihood of success even on
3	your underlying claim?
4	MR. LIPPER: Well, I think first of all, there
5	are a couple of layers here. Ultimately, the likelihood of
6	success
7	THE COURT: I mean, neither party mentioned or
8	cites Bagwell. Neither party really talked about and really
9	wanted to studiously avoid talking about potential
10	application of Exemption 7, and I understand why. But that
11	leaves me, where expedited process has already been
12	granted what am I looking at in evaluating and assessing
13	likelihood of success on the merits?
14	I think I have to look at how successful are they
15	going to be in getting the actual documents in hand that
16	they're requesting. And I don't see it any other way but to
17	look at how Exemption 7 likely or might apply here.
18	MR. LIPPER: I am not sure that I would say in
19	terms of requiring us, as part of the likelihood of success
20	inquiry to without knowing what has been found and what
21	is being withheld to show that unknown set is not exempt is
22	not I don't think that is part of the requirement.
23	THE COURT: But you argued that it likely was not
24	going to be exempt so you did argue it. You invited the
25	analysis of whether an exemption would likely apply here by

arguing it likely would not --

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2 MR. LIPPER: The context in which we argued it 3 was, it reinforces -- we do think -- again, even Bagwell, I 4 mean, here we're talking about a case in which -- I 5 understand the case is formally open. But there was an 6 investigation -- a multiyear investigation which was 7 concluded with at least a public preliminary outcome in which there was a public filing in which the Department of 8 9 Justice issued a press release in which there have been 10 court proceedings and in which a deferred prosecution 11 agreement was reached. 12 There have separately been -- I mean, there was 13 one individual Boeing employee who the government attempted 14 to prosecute a few years ago unsuccessfully. 15 THE COURT: Unsuccessfully? 16 MR. LIPPER: So one Boeing engineer was prosecuted 17 in federal court, I believe it was Texas, and was acquitted. 18 And that -- it was a few years ago. 19 As I understand it -- I am obviously not the 20 definitive authority. But my understanding is there isn't 21 anything going on with respect to the 737 max crashes other 22 than DOJ's review right now as to Boeing's 23 self-certification -- that there isn't anything else. That 24 all other -- again, if there is something going on that I am 25 unaware of, I am sure the government will tell me or tell

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1	you.
2	But this is not a case where in the early stages
3	the DOJ is figuring out what crimes were committed and who
4	to charge.
5	The issue that my clients have as victims is that
6	the Department of Justice did all of that without consulting
7	them as was required. And so they didn't find out about it
8	until the game was not over, but in the bottom of the 8th
9	inning.
10	THE COURT: And you litigated that up in the Fifth
11	Circuit. And I am sure the presiding judge in the
12	MR. LIPPER: Right. Northern District of Texas.
13	THE COURT: Northern District of Texas is
14	taking all appropriate steps to ensure
15	MR. LIPPER: Right.
16	THE COURT: that the Crime Victims Rights Act
17	is fully, fully implemented.
18	MR. LIPPER: Right. But I think what they have
19	said is: It's not over; but we're I don't want to mix my
20	metaphors here but we're in the top or bottom of the 9th.
21	All of which is to say especially with respect
22	to plea communications, communications with outside
23	attorneys.
24	We're not in a situation where plea communications
25	with Boeing is going to alert Airline 2 and Airline 3 and

1 Airline 4's CFO that: Oh, shoot, I am secretly being 2 investigated as well, and I had no idea. 3 THE COURT: But you don't know that. MR. LIPPER: I don't know that and I can't know 4 5 that until I see it on a Vaughn index, which is why I resist 6 definitively saying none of these documents are going to be 7 exempt. THE COURT: I am going to say I am going to move 8 9 on from the likelihood of success on the merits. 10 MR. LIPPER: Okay. 11 THE COURT: I am going to move on now to 12 irreparable harm, and all of the questions I have about 13 that. 14 MR. LIPPER: Okay. 15 THE COURT: But you can tell, I have a lot of 16 doubts about your likelihood of success on the merits. 17 MR. LIPPER: I will say if it is going to be 18 important to your analysis, we are happy to -- again, at 19 least based on the information -- if you would prefer -- if 20 you need more information from us or more analysis from us 21 on the exemptions, we're happy to provide it. Because I do 22 think --23 THE COURT: I am going to resolve this PI today. 24 MR. LIPPER: Okay. 25 THE COURT: I am a very, very busy district court

1 judge. MR. LIPPER: Understood. 2 3 THE COURT: Let's move on to irreparable harm. MR. LIPPER: Okay. 4 5 THE COURT: Plaintiffs say -- and I quote -- they 6 "will have just one chance to persuade the district court to 7 reject the DPA" when the government files its anticipated motion to dismiss on July 24. And if the charges are 8 9 dismissed, quote: "The families apparently will be unable 10 to reopen the criminal case"; the charges will have been dismissed "with prejudice." That's at the plaintiffs' 11 12 motion at page 19. 13 So am I correct that the plaintiffs want these 14 responsive records only to influence the court's decision in 15 resolving the motion to dismiss anticipated to be filed by 16 July 24 -- is it July 24? MR. LIPPER: July 7, 2024. 17 18 THE COURT: July 7. 19 And you have given up on trying to influence the 20 government's decision on whether to file the motion to dismiss? 21 22 Because I was a little confused, from reading the 23 plaintiffs' papers -- like, you are demanding conferral with 24 the victims' rights representative from the Department of 25 Justice; you have this deadline of July 7. So are you just

1	pointing at the presiding judge or are you also wanting
2	records to influence the Department of Justice on the motion
3	to dismiss?
4	What are we doing here?
5	MR. LIPPER: So until this morning we had no
6	reason to think that we had every reason to think, based
7	on my clients' sort of years of experience in this case
8	our assumption and our understanding was that Department of
9	Justice would schedule a meeting with the victims; we
10	assumed it would be towards the end of the review process;
11	that we wouldn't have an opportunity to submit documents; we
12	would sit down and have a discussion.
13	THE COURT: Meaning the end of the review process
14	on whether or not to file a motion to dismiss?
15	MR. LIPPER: Correct.
16	THE COURT: So a review process of Boeing's
17	compliance?
18	MR. LIPPER: That's correct.
19	THE COURT: Okay.
20	MR. LIPPER: That's correct.
21	So this morning the communication from this
22	morning that I mentioned earlier has clarified in terms
23	of that conferral, it is all right to confer, but we're
24	essentially at the mercy of the Victims' Rights office. We
25	don't have the ability to just sort of call them up and

1	chat, right?
2	It's conferral, sort of: Here is when the
3	conferral will happen, come confer with us; not, you know,
4	here is my phone number, call me whenever you have concerns.
5	So as of this morning, when we received the
6	email and there have been some scheduling emails that
7	conferral will take place on April 24th. There will be a
8	sort of morning meeting and an after meeting in Washington,
9	D.C.
10	In that email today the Victims' Rights office
11	clarified that we are welcome to submit documents either
12	before or after that conferral. So certainly it would be
13	optimal, certainly, for my clients to have documents in
14	their hands that they can submit to the Victims' Rights
15	office before April 24th.
16	THE COURT: So the July 7 date is now moved up to
17	April 24?
18	MR. LIPPER: Is it's not as I don't want to say
19	it's as hard a deadline as July 7. Obviously, if there were
20	documents that could be or are ordered to be produced and we
21	have them by April 24th, those would be very important to
22	have. It's not a I don't want to say it's as drop dead
23	as July 7.
24	The review process goes on for six months. So in
25	theory, any documents that my clients receive could be

1	submitted to the Department of Justice before July 7, and
2	that would be helpful. I think we're focusing on the July 7
3	deadline because the Department of Justice has its own
4	documents. And so although certainly having the ability to
5	emphasize certain documents in communications with DOJ would
6	be helpful, potentially quite helpful, it is ultimately
7	July 7 has been the topic of our investigation because that
8	is when DOJ is reviewing a narrower question of
9	compliance with the DPA, whereas and the standard and it
10	is a demanding standard, to be clear.
11	What the Fifth Circuit said was: Upon a filing of
12	a motion to dismiss by DOJ, the families will have the
13	opportunity to show that, you know, dismissal of the
14	criminal case sort of clearly violates the public interest.
15	And so it is a high bar, but it is a bar that is at least
16	available and that encompasses
17	THE COURT: Okay. Let me just ask you this
18	because clearly
19	MR. LIPPER: Yes.
20	THE COURT: I see this July 7 date, and I am
21	like and I read the Fifth Circuit decision. First of
22	all, you can talk you can pose questions to the judge
23	now, presiding over that case, you have raised a whole bunch
24	of a series of very serious questions in your motion.
25	At page 20: Why did Boeing belatedly agree to

1	cooperate with the criminal investigation?
2	To what extent did Boeing's lawyers draft the
3	DPA's statement of facts?
4	Why did the DPA fail to recognize the causal
5	connection between Boeing's crimes and the deadly crashes?
6	Why did it fail to address the conduct and
7	culpability of the company's leadership?
8	Was the DPA negotiated or approved by DOJ
9	officials with ties to Boeing's law firm?
10	Why did the parties rush to complete the DPA
11	before President Biden was inaugurated?
12	Why was the case filed in the Northern District of
13	Texas?
14	To what extent did Boeing urge DOJ to exclude the
15	victims' families from the process and otherwise violate the
16	CVRA?
17	All very interesting questions.
18	What is stopping the plaintiffs now from alerting
19	the court, unless you already have, that these are important
20	questions to ask of the Department of Justice?
21	And if the court believes that the answers are
22	necessary in consideration of what it's going to do about
23	the DPA, if there is a motion to dismiss, whether the court
24	should resolve that motion to dismiss in one way or the
25	other, can't you bring those questions to the court? And

1	then the court if the court thinks those are legitimate
2	questions, the court can demand answers from the Department
3	of Justice about it.
4	What is stopping the plaintiffs from doing that now?
5	MR. LIPPER: Well, a few things.
6	The first thing is: There is certainly in
7	the briefing the victims have, one, the right to
8	participate eventually in the proceeding over the
9	Department of Justice's and Boeing's objections.
10	There was a series of motions that were litigated;
11	many of these questions were, in fact, raised; and all of
12	that is what led and some additional hearings and
13	whatnot led the district court to recognize that my
14	clients are relatives of victims, had that status; and so
15	they were granted the right to participate in the case.
16	The district judge believed this is what the
17	subject of the Fifth Circuit appeal is. The district judge
18	believed ultimately that
19	THE COURT: You are not answering my question.
20	Really just
21	MR. LIPPER: I am trying.
22	THE COURT: listen to the question.
23	Have you already raised these questions with the
24	district court judge who will have to be resolving a motion
25	to dismiss?

1	MR. LIPPER: We have raised many if not all of
2	them, yes.
3	THE COURT: Okay. You have raised them.
4	If that district court judge thinks that these are
5	legitimate questions, have you asked the district court
6	judge to get answers to those questions from the government
7	and/or Boeing or both, and to do so now in order to be
8	prepared for the anticipated motion to dismiss?
9	MR. LIPPER: What the Fifth Circuit order said and
10	what it contemplated not yet.
11	THE COURT: But you could do that today?
12	MR. LIPPER: I am not sure that we can.
13	So we have already we did ask the district
14	court for document discovery under the CVRA. The district
15	court held that that discovery was not available.
16	The Fifth Circuit's order said the victims will be
17	entitled to participate at all stages of the proceeding and
18	that the next stage is the dismissal motion, at which point
19	the victims will have the right to be heard and, if there is
20	a hearing, to participate.
21	THE COURT: So just because the court found that
22	the plaintiffs weren't entitled to discovery which, okay,
23	sounds perfectly reasonable to me in the middle of a
24	criminal case; but that doesn't mean that the court itself,
25	if confronted with a motion to dismiss, can't pose questions

1	to the Department of Justice in considering the motion to
2	dismiss.
3	So why there is nothing stopping the plaintiffs
4	from asking the court to do that and to consider those
5	issues with or without any responsive documents to the FOIA
6	requests, right?
7	MR. LIPPER: We certainly in response to a
8	motion to dismiss, if we received zero documents we will
9	raise those questions; but we have a limited public record
10	at a very high standard.
11	If the standard were: There exists significant
12	questions about whether dismissing this case would be
13	contrary to the public interest, that would probably
14	suffice.
15	Our burden, however, is much higher and certainly
16	looking at the way
17	THE COURT: Where is that burden written?
18	MR. LIPPER: That burden is written in the Fifth
19	Circuit's we quote it in our preliminary injunction
20	motion. But it was ultimately written in the Fifth
21	Circuit's December mandamus order; and the Fifth Circuit, in
22	turn, I believe was quoting prior precedent.
23	But we refer to it in our quote the Fifth
24	Circuit's articulation of the standard in our preliminary
25	injunction motion, I believe, both in the background section

and in our irreparable harm section.

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In my haste to come up here, I did not bring a
copy of my preliminary injunction motion, but I can...

4 THE COURT: All right. Let me just -- now, when 5 the motion to dismiss is filed on July 7, if that's -- I 6 quess that's the latest date, but let's say it is filed; and 7 the Fifth Circuit has made clear that the district court judge should give everybody an opportunity -- not just these 8 9 plaintiffs in front of me, but other victims of the crashes 10 or other people who want to be heard about this DPA -- why 11 can't the plaintiffs then just ask the district court judge 12 to set a briefing schedule that gives the plaintiffs time to 13 collect any appropriate records because, quite frankly, you 14 say the plaintiffs have asked the presiding judge -- it's 15 not clear to me.

You say: This is the normal schedule, which is the normal schedule under the federal rules, and every local rule of most federal courts. You file a motion, you have 14 days to respond and 7 days for a reply, but that is just the default rule. Judges control their own dockets, they control their own schedule. You basically seem like that is, like, bound in stone.

Have the plaintiffs asked -- let's start with the Department of Justice. Have you conferred with the Department of Justice to say: Will you jointly go in with

1	us to ask the district court judge to set a briefing
2	schedule that is sufficiently gives us enough time to get
3	a Vaughn index or to get some documents in response to our
4	FOIA requests and ask the judge to set a briefing schedule
5	that gives you time to get documents?
6	MR. LIPPER: I have not. Although, I don't know
7	that the civil division of the U.S. Attorney's Office in the
8	District of Columbia would have the authority to agree to
9	that.
10	THE COURT: But they can pick up the phone.
11	MR. LIPPER: They can.
12	But there are two additional obstacles maybe
13	three, actually. The first is this is actually one of
14	the earliest questions I had when I was getting up to speed
15	on the case with my clients. It was something along the
16	lines of: Can we just file a complaint and then tell the
17	district judge, hey, we have this FOIA lawsuit pending?
18	There is a specific statutory provision in the
19	CVRA we cite this in both our motion and in our reply
20	brief that limits the ability to stay proceedings.
21	THE COURT: I read it, 18 U.S.C. Section
22	3771(d)(3). Although that language has been called somewhat
23	ambiguous by a number of courts, and it is fairly ambiguous.
24	But that language basically says: "In no event
25	shall proceedings be stayed or subject to a continuance of

1 more than five days." Asking for a briefing schedule is neither a stay 2 nor continuance. So what are you talking about? 3 That has zero application to asking for a briefing 4 5 schedule, perhaps jointly with the Department of Justice, 6 that gives you time on the motion to dismiss to wait and get documents. 7 MR. LIPPER: I don't think it's --8 9 THE COURT: That's not an obstacle. 10 What's your other obstacle? 11 MR. LIPPER: The only thing I would say about it 12 is in a sense that we can't ask for the district judge to 13 stay the proceedings pending a FOIA response. 14 THE COURT: Yes. But in asking for a briefing 15 schedule on the motion to dismiss, it is not asking for a 16 stay and it is not asking for a continuance. 17 MR. LIPPER: That's true. But unless and until --18 at best we can ask for a briefing schedule that predicts we 19 will have responses by certain dates without knowing, in 20 fact -- without an order -- without a court order we still 21 won't be able to provide a date certain, number one. 22 Number two, even if the Department of Justice 23 jointly agrees to that, and I have my significant doubts as 24 to whether they will, Boeing, I am almost certain, will 25 oppose that, and they are a party to the case as well.

1 THE COURT: Let me just ask you, is Boeing a 2 government contractor? 3 MR. LIPPER: I believe they are. THE COURT: And if Boeing is actually charged in a 4 5 criminal case, let alone convicted, what happens to its 6 government contracts? 7 MR. LIPPER: I do not know the answer to that. THE COURT: Would that be one of the reasons for a 8 9 DPA here? 10 MR. LIPPER: I mean, it's possible. We have 11 not -- that's not what we have -- I mean, certainly there 12 has been all sorts of speculation, articles analyzing why it 13 might have happened. We just don't know. We haven't seen 14 the plea communications. 15 THE COURT: Okay. Let me just say, there are lots 16 of -- if the plaintiffs think that -- if they get responsive 17 records they are going to find records that are going to be 18 demonstrative, confirmatory of the nefarious reasons that 19 your questions suggest; but aren't there a lot of other good 20 reasons for a DPA in this case that have nothing to do with 21 the nefarious issues that you have raised? 22 MR. LIPPER: Again, it's just -- if I had to, I 23 can certainly perhaps articulate some, but I don't know if 24 those are the reasons. Certainly, all I can say is --25 THE COURT: So you really -- you admit that there

1 is absolutely no guarantee that you are going to find the 2 smoking gun, nefarious demonstratives in these responsive 3 records that you are just hoping -- you think that there might be, maybe even hoping there might be, to prove the 4 5 plaintiffs' position that the DPA somehow needs to be put 6 aside or not confirmed, but it is sort of speculative at 7 this point that you are going to find anything in these responsive records that proves your point. 8 9 MR. LIPPER: So let me -- I want to answer that 10 question -- well, let me answer that in two ways. 11 The first is, I think it is fair to say right now 12 there is a lot of smoke, whether there is fire or -- maybe 13 there isn't. 14 Obviously -- and again, we have the *Epstein* case. 15 There was actually a lot of fire in those documents, I don't 16 know if there is here or not. But the same sort of 17 questions are being raised in the Boeing case not just by my 18 clients, by all sorts of independent academics, journalists, 19 commentators about --20 THE COURT: Well, I wouldn't know anything about 21 that. What I know about this case is what I read in these 22 papers, and just using common sense. 23 MR. LIPPER: Right. But, I mean, we have cited a 24 lot of those questions -- those people raising those 25 questions, I think, in our papers.

There is a lot of smoke.

Whether the documents have some fire, medium fire, hot fire, like the *Epstein* ones, we don't know. I don't know that smoking guns are the only thing that is helpful or relevant to us. But, right now, we have certainly reason to believe those documents are going to illuminate what actually happened and how this got put together.

8 THE COURT: Well, let me just say this. I look at 9 this and I see these alternative mechanisms for plaintiffs 10 to make their points about the smoke, about the DPA, okay?

11 They can ask the court to pose the questions to 12 the government and get answers to those questions with 13 underlying documentation.

They can ask the court for a briefing schedule on any anticipated motion to dismiss that gives the plaintiffs time to examine this issue more closely with documents or a Vaughn index that may be produced during the course of a longer briefing schedule.

They could ask the government to join them in seeking such a request if Boeing is going to object to it, particularly if the court thinks that these are, with the direction from the Fifth Circuit, about the court's power in evaluating and assessing a DPA. The court may say this is part of my obligation.

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So with all of these alternative mechanisms to get

1 access to figure out whether this is pure smoke or whether 2 there are other really legitimate national security reasons 3 for DPA here because a government contract is at stake with Boeing and flesh that out -- with alternative mechanisms, 4 5 how can the plaintiffs show irreparable harm here if I don't 6 grant this 30-day processing production Vaughn index 7 generating schedule? MR. LIPPER: So the case that we relied on the 8 9 most heavily in our briefing -- I think the closest on point 10 involved a parallel criminal proceeding, and it was -- with 11 the Court's indulgence, I am just going to get my notes so I 12 can be more precise about it. 13 In that case -- the defendant in that criminal 14 case in New York, he wanted the FOIA documents because he 15 thought there was -- those documents might show information 16 about his relationship as a confidential informant, or 17 source of some sort, of the government, and that those 18 documents might help him in a hearing -- in a motions 19 hearing in his case in New York that might help him reopen 20 or defend against his criminal case. 21 I think -- that plaintiffs' argument, I think, was 22 more -- far more speculative than the one we're presenting 23 here, A, because we didn't really have any real reason to 24 know what those documents were going to show or whether they 25 were going to show anything helpful; B, implicating at least

1	simpler, if not greater concerns about investigation and
2	sources, and whatnot for the government; and C, that
3	plaintiff in the FOIA case, who was a criminal defendant in
4	New York, had far stronger under had far stronger
5	arguments under the Due Process Clause to pause or to get
6	discovery through his criminal case. Yet, the court, in
7	granting that preliminary injunction, still found that the
8	imminent and still theoretically had the ability to
9	postpone that hearing. The district court there still held
10	that he had satisfied the irreparable harm standard.
11	There have been other cases I mean, there have
12	been preliminary injunctions granted in one or two of the
13	cases in which documents were requested by not even by
14	not by litigants, by reporters or advocacy organizations to
15	have in time for impeachment proceedings, presidential
16	impeachment proceedings.
17	When we didn't have a hard stop date, it was only
18	a "probably going to be done by Christmas," and in which
19	those documents had been separately subpoenaed by Congress.
20	But there were at least
21	THE COURT: Let me just ask you.
22	MR. LIPPER: Yes.
23	THE COURT: Plaintiffs acknowledge, and I quote:
24	"The slim chance that the government will revoke the DPA."
25	MR. LIPPER: Yes.

1 THE COURT: In support of that, you cite the 2 historical record of the 534 corporate and 3 deferred-prosecution agreements and nonprosecution 4 agreements --5 MR. LIPPER: Yes. 6 THE COURT: -- only seven were extended or revoked 7 due to noncompliance. And you even say: "Even where companies committed new crimes during the term of the 8 9 DPA/NPA, they got to keep the agreement." 10 I read that. How does this help you? 11 This only shows it doesn't matter what you do, 12 what you find -- doesn't that record undercut your ability 13 to show irreparable harm by not getting these documents 14 because even if you got the documents the DPA would stand? 15 MR. LIPPER: No, no, no. I'm sorry if that wasn't 16 clear. 17 THE COURT: It was clear why you were making this 18 argument. But I read it as: If nothing is going to help 19 you nudge this DPA, how are you going to show irreparable 20 harm? 21 MR. LIPPER: But in the court proceedings, we 22 don't have to persuade the DOJ; we have to persuade the 23 district court. 24 So we were offering that point because the 25 government was arguing that it is -- the government said

1 it's speculative as to whether you are going to even need to 2 respond to a motion to dismiss because DOJ might revoke or 3 extend the DPA. We cited those statistics to show there is a vanishing slim likelihood of DOJ on its own revoking or 4 5 extending the DPA, which is why it is exceedingly likely 6 that we are going to have to make the case in court. 7 THE COURT: Which brings me back to the point that you can raise all of these issues with the court. And if 8 9 the court finds that they are all sufficiently troubling 10 because of the smoke, the judge can demand documents, 11 records, and answers from the Department of Justice in 12 considering the motion to dismiss, right? 13 MR. LIPPER: What I can say in the history of this 14 case because -- and we talked about this a little in our 15 reply brief. When my clients moved in the criminal case to 16 participate arguing that they were representatives of 17 victims and they were opposed, my clients asked for a 18 hearing as to whether the victims of the plane crashes were 19 CVRA victims which ultimately collapsed to: Was Boeing's 20 fraud a proximate cause of those crashes? 21 And there was -- a hearing was held. But in the 22 district court's order granting the hearing, the district 23 court relied on and specifically said: I am granting a 24 hearing because you have already presented me with documents 25 and declarations that if credited or substantiated at the

1 hearing would lead me to a certain result. All of which is 2 to say in this posture and especially given this standard, 3 it is likely that the district court is going to -- the 4 district court is unlikely to proceed or go down that path 5 unless we can show him with documents or substantiate with 6 documents the questions we're raising. 7 Obviously, I don't know exactly how he is going to But historically in this case the district court 8 proceed. 9 is going to want to see our documents and our evidence in 10 writing before deciding --THE COURT: Well, why can't you -- have you 11 12 explained to the court that you have made a FOIA request and 13 this is what they're saying and you have talked to the 14 Department of Justice and the FOIA office, and the FOIA 15 office is resisting doing even a limited search for the six 16 or seven categories; so, Judge, you think these are 17 substantial questions, you think there is smoke here, you 18 get the information from the Department of Justice. And, 19 believe me, the Department of Justice will do what the court 20 asks. 21 MR. LIPPER: We certainly -- if we do not have the 22 documents we will certainly do that. 23 THE COURT: Okay. 24 MR. LIPPER: But I think we are --25 THE COURT: Or the court may say: There are all

1	of these other reasons for this DPA here, so maybe there is
2	smoke; and for all of these other good reasons for the DPA,
3	I am going to approve it. That may be what the court finds
4	also; I have no idea about that underlying litigation. So
5	that would mean it doesn't matter what these documents
6	say
7	MR. LIPPER: But I think this is what I would
8	say.
9	THE COURT: so no irreparable harm.
10	MR. LIPPER: But I think there is.
11	First of all, I think certainly a motion or an
12	opposition will be far stronger or dispositively stronger
13	with the documents already. A party always wants
14	THE COURT: Absolutely. You think. You think.
15	But it might actually provide a lot if they got
16	the documents, it might provide a lot of assurance and
17	reassurance to the plaintiffs that all of the nefarious
18	smoke that they're seeing is nonexistent.
19	MR. LIPPER: Even then even then, especially
20	the way the information has been held, that would be a
21	benefit because if they don't have the documents and the
22	case is dismissed, they are now going to always wonder if we
23	had been consulted so even that, the really strongly
24	suspecting and not knowing and not having an opportunity to
25	find out at a meaningful time in time to act on an

1	information is itself I mean, I don't if they see the
2	documents, at least they get that comfort. If they don't,
3	all they have all they see is the smoke and they have had
4	no opportunity to explore it, and now it's too late. So
5	that's the first thing.
6	But the second thing I want to say is certainly
7	any litigant prefers to, in their written submission,
8	already have the documents or some documents. The more you
9	have to ask questions that you don't already have clear
10	definitive answers to, the more you are sort of dependent on
11	persuading someone to even let you look, the more you are
12	vulnerable to accusations of fishing, or what do you expect
13	to find; all of those things.
14	Certainly, my clients are in a much and I would
15	say a potentially dispositively stronger position with these
16	documents, that's the first thing.
17	The second thing is the irreparable harm analysis
18	in the FOIA cases I have read from this district court that
19	have granted FOIA requests so even in a case in which
20	there is an imminent litigation deadline, the analysis
21	hasn't the standards haven't collapsed. In other words,
22	the plaintiff hasn't been told: Go see what you can get
23	from the court in that case, and if you can't get it from
24	the court in that case, then you have no right to it anyway,
25	right? That is not what the cases have said.

1 If we would get more from the FOIA response than 2 we would from the district court, which I think is quite 3 probable if not almost certain, then that is an irreparable 4 In other words, it's not a -- there isn't sort of an harm. 5 issue for a claim or issue preclusion thing here where: Ιf 6 the district court won't give them to you as part of his 7 proceeding, then you are not -- then your irreparable harm 8 is somehow delegitimized. That is the first thing I would 9 say.

10 In fact, to reinforce that, the second point I would make is that: Most of even the PI cases involve far 11 12 more amorphous proceedings: There is an election coming up, 13 impeachment coming up, and documents which could be 14 available to other entities or from other requests in fact 15 are being subpoenaed by Congress or elsewhere. Nonetheless, 16 the reporters or the advocacy organizations are deemed to 17 suffer irreparable harm if they can't get those documents, even if there isn't a decision-maker who they will 18 19 ultimately be able to take them to.

All of which is to say: Certainly, we will do everything we can in front of the district court to get the information we think is out there that we don't have. But the mere theoretical possibility of that does not take away, A, the fact that FOIA may and probably does give us -entitle us to more documents than we might get in the

1 criminal case; and, B --2 THE COURT: Yes. But FOIA does not require a 3 timetable for production of documents --MR. LIPPER: I understand. 4 5 THE COURT: -- and that's your big problem on 6 likelihood of success on the merits --7 MR. LIPPER: I understand. But I think --THE COURT: And that's why PIs are so rare in FOIA 8 9 cases, because FOIA does entitle you at some point to a 10 response, Vaughn index -- under our law that has been 11 adopted, most other circuits -- listing what's been withheld 12 and why, responsive documents at some point, as soon as 13 practicable. And that leads me to all of the details the 14 government has provided about its backlog and how fast it's 15 processing; and that's the timetable, as soon as 16 practicable. It is not a timetable set by the plaintiffs --17 MR. LIPPER: I understand. I do think in reading 18 the cases that I have read --19 THE COURT: -- particularly when you have all of 20 these alternative mechanisms to have other people who can 21 get the documents more quickly -- not "other people" --22 "lots of other people," both the department and the judge. 23 MR. LIPPER: Right. I guess what I am attempting 24 to -- and let me try and see if I can be a little more 25 concise on it; that the theoretical availability of

1 alternative mechanics does not defeat a showing of 2 irreparable harm if there is no strong or good reason to 3 think those alternative mechanisms are going to bear fruit. 4 In other words, the fact that we could ask --5 THE COURT: You haven't tried, so how do you know 6 they are not going to get them --7 MR. LIPPER: We have tried every chance we have We won't have an opportunity to try again until we 8 had. 9 have to respond to the department's motion in July. 10 THE COURT: Wrong. I think that's wrong. 11 Why can't you -- I am not going to litigate that 12 case for you. 13 MR. LIPPER: We have already asked --14 THE COURT: Judges sit in their chambers every day 15 and they get mail, they get motions. You can file anything 16 you want at any time in front of a judge to get their 17 attention just like you do here and like you are planning 18 with your Vaughn index, I guess, to file multiple -- other 19 emergency motions to have me resolve withholdings on an 20 emergency basis. I just think saying you have to wait until 21 July 7 to communicate with the judge in Northern District of 22 Texas -- I don't know why that is, but that's up to you. 23 MR. LIPPER: We have already asked for documents 24 and have already been denied documents. So it's not just --25 we have already --

1 THE COURT: Yes. You want documents produced to 2 you. But raising questions and asking the judge to ask for 3 them, have you done that? MR. LIPPER: But I don't see any basis -- I mean, 4 5 yes, in theory we can always send anything. But without 6 anything pending -- there is no motion pending in front of 7 the judge right now. For us to send a letter saying -- or a motion 8 9 saying: Dear Judge, we have the following questions that we 10 think are going to come up when the Department files its 11 motion in July -- I mean, we could do that, but I don't see 12 that -- again, looking at the practice and the history --13 THE COURT: I don't know who the judge is in the 14 Northern District of Texas but he is going to hate these 15 suggestions from me, but that's --16 MR. LIPPER: It's Judge O'Connor. 17 He has set very tight schedules. I do not get the 18 impression, from looking at the documents in that case and 19 talking to people involved, that the judge is interested in 20 kind of freewheeling sort of suggestions or questions when 21 there is a motion pending. There is going to be a motion 22 pending until July 7. And when there is a motion pending on 23 July 7 -- again, we can try to slow it down -- unless and 24 until we can get a judge who has been very hesitant to 25 extend things by more than a few days at a time -- unless we

1	can get that extended, it's a July 7 motion, two weeks to
2	respond; and that is our one chance. I take your point.
3	All I am saying is, on the irreparable harm, the
4	availability of sort of theoretical but ultimately not
5	practical alternatives is not in the PI cases in which an
6	injunction has been granted, not defeated the irreparable
7	harm.
8	There is one additional point, though, I do want
9	to make on likelihood of success on the merits, which is
10	that the government's declaration which, I understand, talks
11	about the statistics on the number of pending requests, and
12	all of that, but in that declaration and in the government's
13	opposition, when they're discussing the burdens they face or
14	providing the timetables, they are assuming, without any
15	explanation, that it is impossible to focus on, for
16	instance
17	THE COURT: I am going to talk to them about that.
18	Mr. Lipper, please sit down. I need to move on.
19	MR. LIPPER: All right.
20	THE COURT: Ms. Walker.
21	The government says that it estimates it will
22	complete its searches for responsive records by April 1,
23	2024, and then make its initial disclosure determination
24	within 60 days after the searches are completed by
25	approximately June 1, 2024.

1	What does that mean?
2	MS. WALKER: Yes, Your Honor.
3	So right now the Department of Justice, the
4	Criminal Division, has submitted the full scope of the
5	search to the Information Technology Management Unit.
6	They're conducting a search right now for all of the records
7	that should be completed by April 1st. It usually takes
8	about six weeks. But because of the fact that they
9	understand that this is a case that has been granted
10	expedited processing in October of 2023, as soon as they
11	complete the scope of the search, they're asking for
12	expedited completion of that search.
13	With regard to the June 1st, 2024, deadline, right
14	now
15	THE COURT: No.
16	MS. WALKER: I'm sorry.
17	THE COURT: So by April 1 the searchers will have
18	completed the searches for responsive records?
19	MS. WALKER: Yes.
20	THE COURT: And then what does this mean: Initial
21	disclosure determination within 60 days after that? Then
22	what happens?
23	MS. WALKER: After let me just explain.
24	After the results of the search come in, they get
25	uploaded to Relativity, and the FOIA and Privacy Act

1	reviewers will review the information on Relativity to
2	exclude all duplication, to do a preliminary responsiveness
3	review, and then to start going through and to review the
4	material for exemptions, and also, too, in the process,
5	categorize the records by particular detailed-enough
6	categories to support their exemptions on a Vaughn index.
7	So they want to do all of this at the front end.
8	This means that it takes a little bit of time to make an
9	initial disclosure determination, meaning that they will be
10	able to make an initial determination as to what exemptions
11	they're likely to apply to the material. They cannot commit
12	to making an actual production because of the fact that
13	there is a significant likelihood that Exemption 7(A) will
14	apply and that there will not [sic] actually be any
15	production so they use the terms "disclosure determination"
16	to at least indicate that they will make a determination.
17	THE COURT: What are the plaintiffs going to get?
18	What is your status report that's going to be due on June 1
19	going to say to me?
20	"We have made an initial disclosure
21	determination." That means what do the plaintiffs get in
22	their hands in terms of either documents, Vaughn index, or
23	information?
24	MS. WALKER: I believe it will include at least
25	more information about the number of records that they have

1	received, and the page number. It will include any
2	determination as to what information is going to be withheld
3	for exemptions for a particular subset of the number of
4	pages that they have processed; meaning, that they have
5	reviewed, say, 500 of a thousand, and they have determined
6	that all 500 are under Exemption 7(A), so it will provide
7	information about what exemptions will apply. And if there
8	is still more pages to process, it will we will be able
9	to let plaintiffs know how many further interim disclosure
10	determinations must be made before all records are
11	completely processed.
12	THE COURT: So it's really the initial
13	disclosure determination will just be information; no
14	documents in hand and no Vaughn index, is that correct?
15	MS. WALKER: At this
16	THE COURT: Yes or no?
17	MS. WALKER: Most likely yes, Your Honor.
18	THE COURT: Okay. And that initial disclosure
19	determination will be only the number of responsive
20	documents identified as a whole, that total number?
21	MS. WALKER: Yes, Your Honor.
22	THE COURT: And then out of that total number how
23	many have been reviewed and what exemptions have been found
24	to be properly invoked by the Department of Justice as to
25	those numbers reviewed?

1	MS. WALKER: I believe so.
2	THE COURT: And as to those numbers reviewed not
3	only which exemptions will likely apply and to what number,
4	but how many documents might be subject to release, will
5	that be part of the initial disclosure determination too?
6	MS. WALKER: It might be subject to release.
7	So I think
8	THE COURT: Or at the time of the initial
9	disclosure determination, June 1, you are not going to have
10	that information at all?
11	MS. WALKER: No. We should have that information,
12	Your Honor.
13	I'm sorry. I know that the agency will have a lot
14	more insight as to the scope of records it's gathered on
15	April 1st
16	THE COURT: Do you have an idea about that now?
17	MS. WALKER: I don't, Your Honor, because they
18	have to take a look at the records once it's gathered and
19	uploaded to Relativity.
20	THE COURT: Okay. So we are going to get this
21	initial determination disclosure by June 1, which is about
22	60 days after the search is completed. And then how much
23	longer after June 1 before the plaintiffs get a Vaughn
24	index?
25	MS. WALKER: It depends on whether that initial

1 disclosure determination is complete or not. But usually 2 the government -- and this is in Ms. O'Keefe's declaration 3 as well -- needs to complete all of -- its review of all of the documents gathered before it does a Vaughn. 4 5 THE COURT: I know that's how they like to do it, 6 but the plaintiffs raise a very good question, don't they? 7 They are asking -- in this PI they're focused on communications between the Department of Justice and Boeing, 8 9 and Boeing's counsel -- and some other internal records, but 10 let's just focus on the Boeing communications. 11 The government says that -- let's see how you 12 exactly put it -- it will not be possible for the Criminal 13 Division to separate in such a short time frame the records 14 responsive to certain portions of plaintiffs' FOIA requests 15 from the entire corpus of records returned from searches; 16 citing the O'Keefe declaration, at paragraph 28. 17 So I look at -- because it makes no sense to me --18 why can't you -- you are doing electronic searches. Why 19 can't you just look for electronic searches with the Boeing 20 representatives? 21 That seems pretty darn simple. Really simple. 22 So I look at the O'Keefe declaration at paragraph 23 28; it's not helpful at all. It doesn't say -- it's not at 24 all helpful. Why? 25 Why can't they just do a search for the

1	communications with outside counsel?
2	Not internal email, external email, external
3	drafts with attachments, why is that not possible?
4	MS. WALKER: Because the subset of documents that
5	plaintiffs have requested are far from discrete. They're
6	asking for even if they are seeking only records I'm
7	sorry. Even if they're only seeking on 6 of the 7 subparts
8	communications between Boeing's attorneys and the
9	government's attorneys, they nonetheless seek categories of
10	communications that are broad enough to encompass the
11	subject matter of all of the other requests that they have
12	included in their 32, 34-paragraph FOIA request.
13	So in order to actually go so those
14	communications that they call from the large results of
15	their search will not only be communications that are
16	potentially responsive to a subset but be responsive to a
17	lot of other document requests as well contained in this
18	FOIA request. So it is not efficient at this point to do
19	in addition to the reviews that I have already discussed
20	previously about
21	THE COURT: Do you have the number of
22	communications between the department what are the number
23	of pages, the number of records of between the Department
24	of Justice and Boeing counsel?
25	MS. WALKER: I don't have that number, Your Honor.

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1	I will have that number after the search is complete
2	THE COURT: So you won't have that until April 1?
3	MS. WALKER: We won't have that until sometime
4	after April 1, April 15th possibly, because of the fact that
5	it takes time to have the document uploaded and then they
6	can start reviewing it. Though, I will at least have I'm
7	sorry, I should qualify that. I will at least have a number
8	of total pages. They might
9	THE COURT: I'm sorry, Ms. Walker, this makes so
10	little sense to me at all. I really don't understand what
11	Ms. O'Keefe is saying in this.
12	I am looking at paragraph 28. Plaintiffs seek an
13	order directing the unit to produce all responsive records,
14	including a Vaughn index, within 30 days.
15	The FOIA unit can't meet that deadline without
16	significantly compromising its responsibilities. Okay.
17	That has zero to do with the six categories of information
18	with Boeing communications.
19	"As explained above, many of the FOIA unit
20	litigation matters are on established schedules and subject
21	to court ordered deadlines." Got it.
22	Nothing to do with these six and isolating these
23	six communications with Boeing.
24	Then it says: "Although in certain parts of
25	plaintiffs' motions for a PI, plaintiffs suggest they would

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1 request only a subset of records responsive to their FOIA 2 requests within 30 days of the court's order, it is not 3 possible for the FOIA unit to separate, in such a short time 4 frame, the records responsive to certain portions of 5 plaintiffs' FOIA request from the entire corpus of records 6 returned from searches." Why? 7 That doesn't explain why. It just says it. Their FOIA requests have only a portion of records 8 9 responsive to plaintiffs' FOIA request produced in 30 days 10 is, operationally, the same as requesting a disclosure determination on all responsive records in 30 days. 11 12 Is it just because it throws off their process and 13 that's not how they do things? That's what it sounds like. 14 MS. WALKER: Two reasons actually. I apologize 15 that it's not completely clear. 16 THE COURT: It is not at all, at all. 17 MS. WALKER: The search has been ongoing since --18 I'm sorry. 19 The government's effort to form a scope of search 20 that will reasonably collect all responsive records has 21 started once the request was perfected and submitted in 22 August of 2022. It's a lengthy process that requires a lot 23 of back-and-forth between subject matter experts. 24 So initially the thought process was that -- you 25 know, we became aware of plaintiffs --

1 THE COURT: You want to collect in one search in 2 order to save time -- because you have a lot of other 3 matters pending, everything that the plaintiffs have asked for in all 45 categories -- and that's not counting the 4 5 subparts of their categories. 6 MS. WALKER: That's correct. 7 THE COURT: So the plaintiffs have sort of shot themselves in both feet by -- if they really were just 8 9 interested in the communications with Boeing, that's what 10 they should have asked for in the FOIA request. But because 11 they asked for 34 categories -- including all of the 12 subparts, not even counting how many those might be --13 that's how you crafted your search -- to have an adequate 14 search? 15 So what you are saying is, actually, to go back in 16 now to do a subpart, you would have to create a whole new 17 search? 18 MS. WALKER: That's one possible solution for 19 getting the subset of records that plaintiffs are seeking. 20 That was the initial thought process of including that 21 statement in this declaration, was that: We're going to 22 have to start over again to gather just this subset of 23 records, and that is a lengthy process. We cannot start it 24 over at this point. We cannot do it in 30 days at this 25 point either. So that's one.

1 The second was that: In the reply brief that 2 plaintiffs filed, the plaintiff suggested, well, can't you take the records that you have already gathered and cull 3 4 through them and pull out the subset? 5 And the reality is: After the plaintiffs filed 6 their reply brief, I was able to talk to the FOIA MPA unit 7 and ask them, Is this doable? It's absolutely possible. Will it be efficient in this case? No. 8 9 It will not get to plaintiffs the documents any 10 faster than if they allow the division to continue its efforts it's doing now diligently to review the records and 11 12 make a disclosure determination on the records as a whole. 13 But at this point it's not possible to run a subset of 14 searches to capture only the communications or the 16 15 subparts of materials or records that touch on statements 16 that the government may have said to the victims in the 17 Boeing criminal case. 18 THE COURT: So that's the Category 7, which has 16 19 subparts? 20 MS. WALKER: 16 subparts. And they are very 21 wide-ranging, including statements regarding to the 22 underlying investigation, statements regarding -- statements 23 to victims, statements regarding reasons for entering into 24 the deferred-prosecution agreement. 25 I just want to point out, too, that at one point

1 my colleague here has mentioned that one of the purposes of 2 having these documents is to seek records relating to the 3 underlying communications and determinations that the 4 Department of Justice has currently ongoing to determine 5 whether Boeing has complied with the terms of the 6 deferred-prosecution agreement. 7 But none of the -- I did a quick skim. I didn't see any -- that particular subject matter addressed in any 8 9 of the FOIA requests at issue in the subparts that they have 10 identified for purposes of this preliminary injunction, but 11 that would be yet another subcategory of documents that they 12 potentially are seeking. 13 The reason why we didn't have that second 14 explanation is because I had only seen that in the reply 15 brief. But the first thought process was that we cannot 16 redo our search now that it has -- we have gotten the wheels 17 turning, and it's near completion. 18 THE COURT: Okay. So let's say the court in the 19 Northern District of Texas, given the clear direction from 20 the Fifth Circuit, that before they -- in considering the 21 motion to dismiss that's anticipated to be filed by July 7, 22 wants to get to the bottom of these questions generating 23 smoke about the DPA, the government is going to want to 24 answer those questions, right? 25 MS. WALKER: I would assume so, yes. Yes.

1 THE COURT: So if the government, in order to 2 answer those questions, joins with the plaintiff for a 3 briefing schedule that gives the government time to review 4 all of these documents that have been collected because it 5 was a different administration, so they may not -- people 6 have gone who may have been involved in those negotiations, the fraud team in charge of the Boeing prosecution now and 7 the DPA now is probably going to want to look at those to 8 9 answer questions posed by the court. 10 So you can see a scenario where the government 11 might join with the plaintiffs in asking for a briefing 12 schedule that gives the government time to fully respond to 13 all of those questions to put -- to clear up the smoke. 14 Can you see that possibility? 15 MS. WALKER: I can see that possibility, Your 16 But I would like to just say that I don't want to Honor. 17 speak for the attorneys that are on the prosecution team. 18 THE COURT: Maybe they should have been here. 19 MS. WALKER: Your Honor. 20 THE COURT: But you can talk to them about that, 21 right? I could talk to them about that. 22 MS. WALKER: But 23 my focus today is on the merits of the relief that plaintiff 24 is seeking in this case, which is I think -- you know, what 25 I understood was a complete processing of all records

1	requested in the FOIA request with a Vaughn index.
2	And if I may
3	THE COURT: Well, can I just say this July 7 date
4	that is, I guess, pursuant to the DPA paragraph 25 that says
5	that six months after the agreement's expiration the fraud
6	section shall seek dismissal with prejudice of the
7	information filed against the company, so that's why July 7
8	has become such a key date here.
9	Is it possible for the fraud team in charge of
10	this DPA to file a motion to dismiss prior to the six
11	months or so that is July 7 only the latest date
12	possible, but it could be filed earlier?
13	MS. WALKER: I believe by the language in the
14	deferred-prosecution agreement that's possible. But I do
15	know that the Speedy Trial Act stay has extended that to
16	July 7. So essentially the Speedy Trial Act stay applies
17	until July 7th, so they're using that six months
18	specifically to perform a complete comprehensive review, so
19	I don't think that they would want to necessarily rush that.
20	THE COURT: So the government, in talking about
21	why there is no irreparable harm here, basically says one
22	reason why there is no irreparable harm is that even if they
23	had the records they wouldn't be able to convince the
24	district court overseeing the deferred-prosecution agreement
25	to alter that agreement's terms since the district court has

1	no power to alter the DPA. It says that in the government's
2	opposition on page 20.
3	Is that one of the government's reasons for
4	finding no irreparable harm here?
5	MS. WALKER: Because it was unclear what the
6	purpose of the records that the plaintiffs were seeking
7	because it was unclear what purpose the plaintiffs were
8	going to use these records for, one of the arguments is
9	that: To the extent that they are using these records to
10	convince the district court in the Northern District of
11	Texas to reject the deferred-prosecution agreement and
12	reopen criminal proceedings, the Fifth Circuit has made that
13	clear that that would not be feasible.
14	And so
15	THE COURT: I am not so sure about that.
16	I mean, it's not that the district court can in
17	resolving a motion to dismiss can't say I mean, the
18	district court, in resolving a motion to dismiss, can say
19	yes or no. But if the district court says: No, I am not
20	going to grant the motion to dismiss, that would probably be
21	for a reason that he's finding some deficiency perhaps in
22	the DPA. So it's not that the district court would be
23	rewriting the DPA because that is an executive branch
24	function, but it could give pretty clear signals about what
25	needs to be what the district court judge would think

1 would be needed in the DPA. 2 I mean, what happens if the court says no to the 3 motion to dismiss? 4 MS. WALKER: Then the criminal -- I mean, this is 5 an area outside of my expertise, criminal law. But I 6 mean --7 THE COURT: It might prompt -- just like if a court rejects an 11(c)(1)(C) plea, the parties go back to 8 9 the bargaining table and make alterations. 10 MS. WALKER: I believe the deferred-prosecution agreement -- in terms of what would happen if the government 11 12 decides -- finds that Boeing has not complied, it leaves the 13 government available to determine what course of action to 14 pursue next. 15 So what I am trying to say is: The government 16 is -- has the responsibility to bring criminal charges and can then determine the course of action after the 17 deferred-prosecution agreements hypothetically were for some 18 reason found invalid. I am not sure how that works in 19 20 criminal law. I apologize if I say anything that seems 21 incorrect. But, essentially, the plaintiffs would like for the criminal case to be reopened. And that -- my expertise 22 here is to focus on the FOIA case. 23 24 THE COURT: Yes. But you made the argument in 25 your briefing that no irreparable harm -- because the

1	plaintiffs even if they found some smoking guns, the
2	district court has no power to alter the DPA and it does no
3	good, as I understood your argument.
4	You opened the door to this.
5	Well, that's not how I read the Fifth Circuit
6	decision in any event because, as I read the Fifth Circuit
7	decision, while the district court in Texas may not have the
8	power to alter the terms of the DPA, the Fifth Circuit, to
9	my mind, made it very clear that and I quote: "The
10	district court will assess the public interest according to
11	case law as well as the CVRA, including violations already
12	admitted to, as well as any other circumstances brought to
13	its attention by the victims' families."
14	It then goes on to cite a series of cases holding
15	that: District judges are empowered to deny dismissal when
16	"clearly contrary to manifest public interest" as assessed
17	"at the time of the decision to dismiss."
18	And then it drops a footnote, as if that wasn't
19	enough, to say that the district court has power to and
20	must has an obligation to "assess the public interest"; a
21	long Footnote 12 reiterating the power of the court in
22	considering Rule 48 under the Federal Rules of Criminal
23	Procedure motion to dismiss, to ascertain whether it's
24	clearly contrary to the public interest; which indicates to
25	me that the Texas district court not only has the power to

1	deny any government motion to dismiss but has the obligation
2	to consider the public interest.
3	So, I mean, isn't that a correct reading of the
4	Fifth Circuit?
5	MS. WALKER: Your Honor, my understanding is, as
6	we included in the extent that we included in our reply
7	brief was that the Fifth Circuit stated that the district
8	court in Texas could not substantially revise the deferred
9	prosecution agreement. What happens beyond that and what
10	the court reviews, I just what the court
11	THE COURT: You didn't read Footnote 12.
12	MS. WALKER: I did, Your Honor. I'm sorry.
13	I am saying that the hypothetical of what might
14	happen is just something that I don't I can't answer
15	today.
16	THE COURT: Well, you would agree, wouldn't you,
17	that if the plaintiffs have access to the records they're
18	requesting, they would that would make their position
19	stronger in terms of their critiques of the DPA.
20	MS. WALKER: I mean, it's not something that
21	that's another hypothetical, Your Honor, that I don't think
22	is realistic in this case because of a lot of what was
23	discussed earlier with my colleague is that most of these
24	records are likely to be protected by Exemption 7(A).
25	So it seems that at the end of the day the

1	plaintiffs even acknowledged that by insisting that they
2	would like the Vaughn index to be provided as well because
3	with the Vaughn index they are assuming that they can at
4	least get enough information to use to support any response
5	to the motion to dismiss.
6	THE COURT: Can I just ask you something? Just
7	step back.
8	The Department of Justice as an institution, how
9	is Merrick Garland going to feel if the fraud section is
10	resisting providing information?
11	They have already blown the victims' rights under
12	the CVRA so the Fifth Circuit had to say: Do better,
13	district court judge.
14	There is all this smoke according to the
15	plaintiffs. I don't know.
16	According to the plaintiffs there is a lot of
17	smoke generated in the press and other places beyond just
18	the questions that they have raised here that a year from
19	now, when they finally get documents in hand, there are some
20	smoking guns and the justice department didn't inquire,
21	didn't look, didn't try and find that out.
22	How I mean, doesn't the justice department want
23	to get to the bottom and find the documents and show that
24	this is just smoke and, in fact, there is no smoking guns
25	and there are really good reasons for this DPA?

1 MS. WALKER: I mean, Your Honor --2 THE COURT: Just step back for a moment 3 representing the Department of Justice as you are. 4 MS. WALKER: We are in the lane of FOIA, and so 5 we're working diligently --6 THE COURT: And you are not going to get out of 7 that lane? MS. WALKER: The Criminal Division is operating 8 9 under FOIA which includes exemptions that protect certain 10 interests. Exemption 7(A) is one of them that protects certain interests. 11 12 There is an interest here which is that there is 13 an ongoing criminal proceeding. So long as the criminal 14 proceeding is still ongoing, there is an interest to protect 15 documents that might compromise that criminal procedure. 16 THE COURT: Who are your colleagues sitting back 17 here giving you notes? 18 MS. WALKER: My deputy John Truong is sitting here 19 with me. 20 THE COURT: You are from which section of the 21 Department of Justice? 22 MS. WALKER: We are with the U.S. Attorney's 23 Office. 24 THE COURT: The U.S. Attorney's Office. 25 MS. WALKER: Yes, in the civil division.

THE COURT: Okay. Well, as a component of the 1 2 Department of Justice, it just seems to me like resisting --3 that you would be communicating with the fraud section about 4 all of this smoke that's being generated not just in the 5 Northern District of Texas but in this FOIA litigation. And 6 wouldn't they want to get to the bottom of it somehow and 7 address it, as opposed to just taking sort of as a reputational thing for both the fraud section and the 8 9 Department of Justice, as a whole, over a matter involving a 10 major U.S. company and over 350 deaths at hand? I mean, 11 this is something that, to me, should be taking a broader 12 picture than just a purely legalistic one on what's expected 13 in the FOIA. And I would have hoped that you would have 14 conferred with the fraud section before you got here on a 15 hearing that I rarely have on FOIA matters which should have 16 demonstrated the importance I give to this matter. 17 MS. WALKER: Yes, Your Honor. I conferred --18 THE COURT: And conferred with them to say: Are 19 you going to join with the plaintiffs? Are you going to 20 take the plaintiffs' phone calls about how to clear up the smoke here? 21 22 But that hasn't happened, has it? 23 MS. WALKER: Your Honor, I conferred with agency 24 counsel and they are my liaison with the fraud --25 THE COURT: Agency counsel.

1 MS. WALKER: -- division; agency counsel with the 2 FOIA Privacy Act unit of the Criminal Division which is 3 responsible for responding to FOIA requests to the 37 other 4 divisions in the Criminal Division, including one of which 5 is the fraud section. They are my point of contact, and 6 they are the ones that have been communicating with the 7 fraud section and relating that information to me. 8 So, yes, in some way I have been conferring with 9 them -- not directly, but through agency counsel which is my 10 appropriate point of contact. And I have stressed -- we 11 have talked about it today and appearing today. And it was 12 stressed to them that they appear, Your Honor, but they have 13 spent a lot of time with me this week to prepare. And I am 14 here to address as many questions as possible. If there are 15 others that --16 THE COURT: What are the good reasons for the DPA 17 with the Boeing company? 18 Let's say all of the smoke and all of the 19 questions are true. Are there still good reasons for this 20 DPA? 21 MS. WALKER: Your Honor, that is not something 22 that I am prepared to address today and it is not, with all 23 due respect, a part of the issues here, that we are 24 addressing here with the FOIA case and the relief that 25 plaintiffs are seeking.

1 I would also like to -- this wasn't mentioned in 2 the brief, but I would also -- one, would like to, I guess, 3 ask perhaps through the court whether or not some of the requests that are at issue, especially two in the subset 4 5 that the plaintiffs have identified, were requests that were 6 similarly included in discovery requests that the plaintiffs here -- and are plaintiffs in a civil action pending in the 7 Northern District of Illinois -- could have posed to Boeing 8 9 and may also have had access to responsive documents. 10 So there are multiple ways in which, I think as 11 you have addressed before -- that plaintiff is able to 12 either access records that they are --13 THE COURT: I don't know what case you are talking 14 about in the Northern District of Illinois. 15 MS. WALKER: There is a civil action pending in 16 the Northern District of Illinois in front of Judge Durkin 17 that involves the civil claims against Boeing related to at 18 least the --19 THE COURT: By the same plaintiffs? 20 MS. WALKER: Yes, Your Honor, some of the same 21 plaintiffs; many of the same plaintiffs. 22 And so discovery in that case has been ongoing 23 since 2019. It's possible -- I am not involved in that 24 case, but that's why I would inquire through the court 25 whether or not similar requests for communications between

1	Boeing and the government may have come up in discovery
2	requests in that case as well.
3	But there is a difference here, which this is a
4	FOIA case where FOIA controls, and there are exemptions that
5	apply and that the release of documents under FOIA is not
6	specifically to a particular party where there might be a
7	protective order in place or some other order from the court
8	that guides further disclosure of the documents.
9	This is FOIA where the release would involve a
10	release to all, and so we do have to look at the application
11	of exemptions under FOIA. And within the context of FOIA,
12	the government has been acting diligently to respond to this
13	request.
14	Some of the reasons, as I understood in reading
15	plaintiffs' motion for preliminary injunction for why the
16	department didn't return initial phone calls was because of
17	the same issues that they had with making sure that there
18	were sufficient records in place that to release the
19	documents to counsel I'm sorry, I am misspeaking.
20	I believe at one point they said that all
21	communications needed to be directed to the attorney
22	representing the clients that were seeking the FOIA
23	requests. So they have responded.
24	The division, as I laid out in as we laid out
25	in our brief, has seven people reviewing 1100 FOIA cases

1	that are currently pending at the administrative process.
2	THE COURT: I have read all of those statistics.
3	MS. WALKER: Okay.
4	THE COURT: Is there anything else you want to
5	add?
6	MS. WALKER: If the Court has no further
7	questions, there is nothing else.
8	THE COURT: I just think the Department of Justice
9	needs to take a much more macro look at this whole
10	litigation because, you know, everything it seems like
11	you are all very stovepiped over there at the Department of
12	Justice and this could be more communication with the
13	plaintiffs might have forestalled a preliminary injunction,
14	and so on, and protected the reputation of the Department of
15	Justice, the Attorney General, in a major piece of
16	litigation a lot better than what I see going on right now,
17	which is just legalistic resistance.
18	All right. You may be seated.
19	Plaintiffs want to respond?
20	MR. LIPPER: Yes, Your Honor.
21	THE COURT: Tell me about the Northern District of
22	Illinois case. 2019 it was filed?
23	MR. LIPPER: My understanding is that there is a
24	consumer fraud lawsuit in the Northern District of Illinois,
25	but any of the civil litigation is necessarily looking at

1	Boeing's conduct.
2	THE COURT: You are not involved in that
3	litigation?
4	MR. LIPPER: I am doing this FOIA case pro bono.
5	I have not been involved in the case at all before this.
6	THE COURT: But is it the same plaintiffs as in
7	this case?
8	MR. LIPPER: I believe that it's the
9	government's understanding that it's some of the same
10	plaintiffs, but it's not perfect there is overlapping
11	there is a Venn diagram that overlaps.
12	THE COURT: Is there discovery being requested?
13	If it was pending from 2019, I would expect that there will
14	be discovery in that case.
15	MR. LIPPER: I assume so. I don't know anything
16	beyond that other than the civil litigation is going to be
17	aimed at what Boeing knew or did before the crashes
18	happened. Whether it's consumer fraud litigation or
19	wrongful death litigation, it's going to be focusing on
20	retrospective conduct. These requests are looking at a
21	different window, which is after the crashes, between the
22	crashes, and the announcement of the deferred-prosecution
23	agreement. So we're looking at a different window of time
24	here. That's the first thing.
25	The second thing is that I agree with the Court on

1 the Fifth Circuit's ruling. I agree that we do not have the 2 authority to ask the district judge to amend the DPA, to 3 draw lines through it, to add provisions. The Fifth Circuit 4 has held that we don't have the authority -- we do have the 5 authority, as the Fifth Circuit said and in the language of 6 the footnote that you quoted, which is -- as well as on page 7 13 of our motion, is that if we can make this showing of -contrary to the manifest public interest, then the district 8 9 court has the authority to deny the motion to dismiss. 10 What DOJ does after that is up to them, obviously, 11 with their obligation to consult us. But dismissal is --12 denying the motion to dismiss is on the table; that is what 13 the district court thought it didn't have the authority to 14 do and what the Fifth Circuit clarified he does have -- the 15 Court does have the authority to do. 16 I do want to talk a little further about the 17 segregating of requests because I understand sort of 18 conceptually what the government is saying. But I still 19 don't understand why, if there is a sort of corpus in place, 20 why there can't be further, more targeted searches within 21 that corpus. Certainly --22 THE COURT: I understand you don't understand; I 23 do. Do you want to go on? 24 Anything else before I take a break? 25 MR. LIPPER: The only thing I further wanted to

1 clarify there is that I believe most of the examples the 2 government gave was relating to the seventh of seven of the 3 categories that we're seeking in the PI, and that is the one 4 with the subparts; but the other six are, I think, much more 5 discrete. And so the concerns the government identified 6 with the seven requests with the subparts I don't think 7 would prevent them from doing that subset of searches with 8 the other six which are really sort of just communications 9 with outside counsel. 10 And then -- I am looking through my notes here. 11 The final -- I'm sorry. 12 The final point the government said -- I think the 13 government suggested -- at least I understood it suggested 14 the reason we want the Vaughn index is that we would somehow 15 try to use the contents of the Vaughn index as substantive 16 evidence in opposing the motion to dismiss. That's not our 17 intent. 18 Obviously, I don't know -- I wouldn't expect there 19 to be -- I would not expect there to be enough meaningful 20 information in a Vaughn index to use the substantive 21 evidence to oppose the motion to dismiss. 22 The reason we want the Vaughn index is because we 23 want to know how many documents there are, how many are

24 being withheld, what are the grounds for withholding. And 25 if we think some of those exemptions that are being

1	improperly asserted with respect to discussions with outside
2	counsel
3	THE COURT: Well, you are going to get some of
4	that information if all you want is the number and the
5	exemptions that are going to be invoked.
6	MR. LIPPER: Right.
7	THE COURT: You are going to get some of that
8	information by June 1 when their initial determination
9	that's part of the information they are going to be giving
10	you
11	MR. LIPPER: Right.
12	THE COURT: although not in a formal Vaughn
13	index.
14	MR. LIPPER: But even the June 1st as I read
15	the declaration in the opposition, it was: The department
16	expects to be done with its search by April 1st. When it is
17	done with its search, it expects to have that initial
18	interim determination within 60 days. Even there it seemed
19	like there are two contingencies. It still seems possible
20	the search may go beyond April 1st. And it seems like the
21	initial interim determination may be more than 60 days after
22	that. So even from reading the affidavit it wasn't clear
23	even from that that we would receive it by June 1st.
24	THE COURT: That's right.
25	All right. I am going to take a half an hour

1	break and then we're going to come back, and I will issue my
2	ruling.
3	(Whereupon, a recess was taken.)
4	THE COURT: I am going to issue my ruling on the
5	pending motion for preliminary injunction that was filed on
6	January 23 by the plaintiffs.
7	For the reasons I will explain, plaintiffs' motion
8	is denied. I am going to start with a brief summary of the
9	facts.
10	The matter arises from plaintiffs' FOIA request,
11	which was initially submitted to DOJ's Criminal Division on
12	April 26, 2022, seeking, on an expedited processing
13	timeline, 34 categories of records with multiple subparts to
14	many of those related to the department's investigation and
15	prosecution of the Boeing company following the tragic
16	crashes of two Boeing 737 Max aircrafts that killed
17	everybody on board.
18	Among other requested records, plaintiffs sought
19	records regarding communications with victims' families, the
20	status of the DOJ investigation in 2020, and discussions
21	with Boeing's attorneys.
22	After plaintiffs' counsel failed to timely perfect
23	the FOIA request by submitting verification of the
24	plaintiffs' identities and the representation as required
25	for DOJ to begin searching for the responsive records, the

1	FOIA unit administratively closed the plaintiffs' request.
2	On August 9, 2022, the FOIA unit received a new
3	FOIA request dated August 5, 2022, with, essentially, the
4	same requests for records from plaintiffs seeking the same
5	records and, again, requesting processing on an expedited
6	basis. That record was, as I said, perfected with all of
7	the necessary documentation. So by letter dated
8	November 15, 2022, DOJ denied plaintiffs' request for
9	expedited treatment and proceeded to start processing the
10	request.
11	It was being processed on a complex track for
12	which the average processing time, as communicated by the
13	Department of Justice, was roughly 28 months or 853 days for
14	completion. Although, plaintiffs' request was estimated to
15	be completed within 12 to 18 months, about half that time.
16	Plaintiffs administratively appealed.
17	On October 17, 2023, DOJ's Office of Public
18	Affairs granted plaintiffs' request for expedited processing
19	as a matter of widespread and exceptional media interest in
20	which there exists possible questions about the government's
21	integrity that affect public confidence. So that has all
22	been recognized by the Department of Justice about this
23	pending FOIA request.
24	DOJ then did not produce a single public record
25	responsive to the family's request, nearly as they said,

1	20 months, but that's based on their April 2022 date as
2	opposed to the correct August 2022 date, since plaintiffs
3	have submitted their FOIA requests.
4	So plaintiff has, as is their right, filed on
5	December 23, 2023, a five-count complaint against DOJ
6	alleging violations of FOIA arising from DOJ's handling of
7	plaintiffs' FOIA request.
8	Shortly thereafter, on January 2, 2024, plaintiffs
9	received a letter from DOJ's Criminal Division victim
10	witness unit explaining that the three-year term of the DPA
11	was set to expire on January 7, 2024, and the government has
12	a six-month time period during which it will evaluate
13	Boeing's compliance, and that DOJ would hold a conferral
14	session with the crash victim families and their
15	representatives to solicit input and collect any information
16	they wish to present; and after which point, if DOJ
17	concludes that Boeing has complied, DOJ will be obligated to
18	file a motion to dismiss the case.
19	In late breaking news this morning, plaintiffs'
20	counsel advised that that conferral meeting will take place
21	on April 24th.
22	On January 23, 2024, plaintiffs filed the pending
23	motion for a preliminary injunction requesting that this
24	Court issue an order requiring DOJ, within 30 days of the
25	court order, to: One, process and produce all responsive

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1	documents; and, two, produce a Vaughn index identifying any
2	documents withheld or redacted, and the exemption being
3	asserted; and three, an expedited hearing under Local Civil
4	Rule 65(d).
5	Pursuant to this Court's January 26, 2024, minute
6	order, the parties jointly proposed a briefing schedule
7	contemplating that briefing would not be ripe until after an
8	expedited PI hearing, as the plaintiffs had originally
9	requested would have been held under Local Civil
10	Rule 65.1(d) and, thus, plaintiffs' request for an expedited
11	hearing under that rule was denied.
12	On February 23, the briefing on plaintiffs' PI
13	motion became ripe; and on February 26 the Court scheduled
14	this hearing that we have held today on the motion.
15	Turning to the legal standard, the Supreme Court
16	has called a preliminary injunction an "extraordinary
17	remedy"; Winter v. National Resource Defense Council,
18	555 U.S. 7, jump cite 22, from 2008. This is a remedy that,
19	quote: "Should be granted only when the parties seeking the
20	relief, by a clear showing, carries the burden or
21	persuasion" on each of the four factors.
22	To obtain relief, plaintiffs seeking preliminary
23	injunction must establish: One, they're likely to succeed
24	on the merits; two, they're likely to suffer irreparable
25	harm in the absence of preliminary relief; three, the

1	balance of equities is in their favor; and four, an
2	injunction is in the public interest. See Winter, 555 U.S.
3	7, at jump cite 20. See also Cobell v. Norton, 391 F.3d
4	251, jump cite 258, D.C. Circuit 2004; and League of Women
5	Voters of the U.S. v. Newby, 838 F.3d 1, jump cite 6, D.C.
6	Circuit 2016.
7	At the same time, the D.C. Circuit has called the
8	first factor, the likelihood of success on the merits, the
9	most important factor; the second factor, irreparable harm,
10	has also been viewed <i>sine qua non</i> for preliminary injunctive
11	relief.
12	The D.C. Circuit has cautioned that a preliminary
13	injunction generally "should not work to give a party
14	essentially the full relief it seeks on the merits,"
15	Dorfmann v. Boozer, 414 F.2d, 1168, jump cite 1173, note 13,
16	D.C. Circuit from 1969; and that this equitable power
17	"should not be exercised unless it is manifest that the
18	normal legal avenues are inadequate and that there is a
19	compelling need to give the plaintiff the relief he seeks";
20	jump cite of <i>Dorfmann</i> at 1174.
21	The parties agree that plaintiffs seek a mandatory
22	injunction; that is, an injunction whose "terms would alter,
23	rather than preserve, the status quo by commanding some
24	positive act" because plaintiffs request an order for DOJ to
25	take action to produce responsive records and a Vaughn index

1	on a timetable that is not otherwise required under the FOIA
2	statute.
3	For such a mandatory injunction, plaintiffs must
4	"meet a higher standard than in the ordinary case by showing
5	clearly that they are entitled to relief or that extreme or
6	very serious damage will result from the denial of the
7	injunction." See Daily Caller v. U.S. Department of State,
8	152 F. Supp. 3d 1, jump cite 6, D.D.C. 2015.
9	Even under a comparatively lower standard
10	applicable to nonmandatory preliminary injunctions, however,
11	plaintiffs have failed to demonstrate that preliminary
12	relief is warranted.
13	Starting with likelihood of success on the merits.
14	This factor generally looks to plaintiffs'
15	likelihood of success on the actual claim asserted in the
16	complaint. This means, in the FOIA context, looking at the
17	FOIA request itself and ascertaining whether this request
18	may very well trigger withholding under the FOIA exemptions.
19	Plaintiffs' request asks for documents from DOJ
20	about an ongoing criminal investigation in a pending
21	criminal case.
22	FOIA Exemption 7(A) protects, quote: "Records or
23	information compiled for law enforcement purposes" in
24	relevant part "to the extent that the production of such
25	law enforcement records or information can reasonably be

1	expected to interfere with enforcement proceedings." See 5
2	U.S.C. Section 552(b)(7)(A). That exemption protects
3	against interference with enforcement proceedings that are
4	"pending or reasonably anticipated." See Mapother v. DOJ,
5	3 F.3d 1533, jump cite 1540, D.C. Circuit from 1993.
6	Moreover, an agency may: Broadly assert
7	Exemption 7(A) over an entire criminal file to satisfy its
8	burden of proof under Exemption 7(A) by grouping documents
9	in categories and offering generic reasons for withholding
10	the documents in each category rather than detailing them
11	document by document by document, as a normal Vaughn
12	indexes. See Sarno v. DOJ, 278 F. Supp. 3d 112, jump cite
13	124, D.D.C. from 2017, quoting Maydak, 2018 F.3d, jump cite
14	765.
15	I am not going to prejudge what response DOJ will
16	ultimately give to plaintiffs in its FOIA request or even
17	the seven categories that they have put at issue in this
18	preliminary injunction. But given the nature and context of
19	plaintiffs' FOIA request, invocation of Exemption 7(A) and
20	possibly other subparts of Exemption 7 and Exemption 6 are
21	likely. Therefore, plaintiffs have a challenging road to
22	show a likelihood of success on getting every record
23	responsive to their request produced to them. Indeed, the
24	fact that plaintiffs have requested a Vaughn index
25	demonstrates that they are very well aware of this fact. On

1	this reason alone, plaintiffs have failed to show a
2	likelihood of success.
3	Focusing just on the requested issue in the
4	preliminary injunction, plaintiffs seek an order directing
5	DOJ to produce all records responsive to 7 of the 34
6	requested category of records and a Vaughn index indicating
7	the records withheld and the exemptions asserted within 30
8	days of an order from this Court.
9	As noted, DOJ is already processing plaintiffs'
10	request on an expedited basis, which requires processing as
11	soon as practicable. See 5 U.S.C. Section 552(A)(6)(E)(iii).
12	Even if the likelihood of success in this FOIA
13	context is measured only against what plaintiffs have asked
14	for in the PI, that is: Are they entitled to having
15	responsive records in a Vaughn index as to seven parts of
16	the FOIA request produced by a date certain 30 days from
17	now, i.e., that is, April 1 they are not so entitled.
18	So, again, they don't show a likelihood of success
19	on the merits either for their full FOIA request in their
20	complaint nor even on the PI.
21	As DOJ correctly points out, the law does not
22	entitle plaintiffs to production of records in response to a
23	FOIA request on a particular timetable.
24	As DOJ explains, FOIA does not dictate a specific
25	truncated schedule for processing even expedited requests.

1	See the defendant's opposition at page 15.
2	DOJ is required to produce the responsive records
3	on an "as soon as practicable" processing schedule.
4	"If exceptional circumstances exist, then so long
5	as the agency is exercising due diligence in responding to
6	the request, the court may retain jurisdiction and allow the
7	agency additional time to complete its review of the
8	records." See Citizens For Responsibility & Ethics in
9	Washington versus Federal Election Commission, 711 F.3d 180,
10	jump cite 185, D.C. Circuit 2013. See, also, New York Times
11	Company versus Defense Health Agency, No. 21-cv-566, 2021
12	Westlaw 1614817, at *6, D.D.C. April 25, 2021.
13	DOJ has demonstrated that it is processing the
14	plaintiffs' FOIA request on an expedited basis. It is
15	demonstrating exceptional circumstances here that it is
16	doing it as soon as practicable within the terms and
17	requirements of the FOIA statute, citing data demonstrating
18	that the Criminal Division has "experienced a significant
19	increase in the number of FOIA requests" received in recent
20	years specifically, 35 percent increase from '20 to 2022,
21	"with the number of FOIA requests assigned to the complex
22	processing track" to which plaintiffs' request was
23	originally assigned increasing by 57 percent from 2018 to
24	2022.
25	The DOJ's Criminal Division "has approximately

1 1100 open administrative requests" which include FOIA and 2 Privacy Act requests, referrals from other agencies 3 regarding their requests of which 22 have already been "granted expedited processing and placed on an expedited 4 5 processing track." 6 The Criminal Division has further been inundated 7 by FOIA litigation matters, not just this one. It has 148 open litigation matters in its litigation queue in 51 of 8 9 which the Criminal Division is a named defendant. These 10 administrative requests and litigation matters are all 11 processed by a staff of seven individuals and three final 12 reviewers. See the O'Keefe declaration submitted in 13 connection with DOJ's opposition, at paragraph 24. 14 To its credit, DOJ avers that it is "diligently 15 working to respond to plaintiffs' FOIA request as soon as 16 practicable" and that it is making considerable progress in 17 reducing its backlog though it continues to face increased 18 workload. 19 DOJ says it would not actually be practicable to 20 produce all responsive nonexempt records within 30 days of 21 this Court's order since DOJ has not even completed its 22 search record for responsive records, and the FOIA unit 23 estimates it will not make its initial disclosure 24 determination before June 2024. 25 In that initial disclosure determination, as

1	clarified at the hearing today, they will have they will
2	be able to provide information to the plaintiffs about the
3	total number of responsive documents recovered in response
4	to the entire FOIA request, which has 34 major categories
5	and multiple, multiple subcategories. It will also be able
6	to determine how many of those responsive records have been
7	searched so far, and to which how many of those records
8	might be subject to exemption and what those exemptions may
9	be up to the point that they have been able to do a detailed
10	search by that point of June beginning of June 2024.
11	DOJ avers that although plaintiffs request in
12	their PI, preliminary injunction, only a subset of the
13	requested records, that narrowed request does not make
14	processing any more practicable because DOJ would need to
15	separate the records responsive to any subsets of
16	plaintiffs' FOIA requests from all records gathered which it
17	cannot do with such little time.
18	As further clarified at the hearing today because,
19	as the Court indicated during the hearing, the Court, along
20	with the plaintiffs, found that government's explanation of
21	that to be unclear; but given the clarification, the Court
22	better understands what the problem is.
23	When the Department of Justice and the FOIA unit
24	obtain a FOIA request they use a number expertise, a lot

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of analysis to figure out exactly what search terms to

1 execute in order to respond to the entire FOIA request. 2 Stopping now, in completing that search, to go through that 3 same process that requires some expertise to detail exactly 4 what they need to be searching for to encompass the six or 5 seven categories that are at issue in this preliminary 6 injunction motion would both stop that search, require an 7 entire new search; it would complicate the response to this entire FOIA request because they would then have two 8 9 separate searches going that they would then have to figure 10 out the overlap between them; it would actually slow down 11 the ultimate final response to plaintiffs' entire FOIA 12 request.

13 Even assuming that it wouldn't slow down the 14 process, that it wouldn't overcomplicate the process by 15 processing and searching for a narrowed subset of requested 16 documents, DOJ has persuasively demonstrated that its 17 present strained resources and heavy case load, coupled with 18 the complexity of plaintiffs' FOIA request and the need to 19 apply Exemption 7 carefully, are circumstances that require 20 accommodation to the agency with downside risk -- given the 21 downside risk to important law enforcement interests if 22 rushed on a timetable of plaintiffs' choice. 23 For these reasons, at this stage in the

For these reasons, at this stage in the
litigation, plaintiffs have failed to demonstrate a
substantial likelihood that it will prevail on the merits of

1 its claim in its original complaint against DOJ to get all 2 responsive documents to all parts of their request without 3 any withholding or that the requested time frame of 30 days 4 for a subset is practicable.

5 Turning to irreparable harm, this showing is a 6 "nonnegotiable hurdle" for preliminary injunctive relief. 7 See California Association of Private Postsecondary Schools versus Devos, 344 F. Supp. 3d, 158, jump cite 167, 8 9 D.D.C. from 2018. "A movant's failure to show any 10 irreparable harm is grounds for refusing to issue a preliminary injunction, even if the other three factors 11 12 entering the calculus merit such relief." See Chaplaincy of 13 Full Gospel Churches versus England, 454 F.3d 290, jump cite 14 297, D.C. Circuit from 2006.

To show irreparable harm, a plaintiff must demonstrate that it faces an injury that is: Both certain and great; actual, not theoretical; and of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm. See Wisconsin Gas Company versus Federal Energy Regulatory Commission, 758 F.2d 669, jump cite 674, D.C. Circuit 1985.

Further, plaintiff must show that the alleged harm will directly result from not issuing the requested injunction; meaning, the Court must decide whether the harm will in fact occur. See, also, *Wisconsin Gas Company*. See

1 also Winter, 555 U.S. at 22, rejecting a possibility 2 standard as too lenient, and explaining that our frequently 3 reiterated standard requires plaintiffs seeking preliminary 4 relief to demonstrate that irreparable injury is likely in 5 the absence of an injunction. 6 To make this showing, plaintiffs argue that the 7 requested records are essential to the integrity of an imminent event; here, any forthcoming motion to dismiss 8 9 Boeing's criminal charge by July 7, which plaintiffs, quote: 10 "Will need to be ready to oppose"; and after which point, 11 quote, "the utility of the records would be lessened or 12 lost." See the plaintiffs' motion at pages 18 through 19. 13 Plaintiffs claim that they will suffer extreme or 14 very serious damage absent their preliminary injunctive 15 relief. But this does not withstand scrutiny for at least 16 four reasons, some of which are overlapping. 17 First, even if the injunctive relief were granted, 18 this does not mean plaintiffs would get responsive records 19 that would help them persuade the district court to deny 20 DOJ's anticipated motion to dismiss. No matter how quickly 21 the Department of Justice processes the responsive records, 22 there is simply no guarantee that plaintiffs will get any 23 records -- which may all be exempt, so all the plaintiffs 24 may get in hand is a Vaughn index. 25 This Vaughn index alone, the plaintiffs say might

1 be somewhat helpful, at least they will see how many 2 documents are at issue and what exemptions are at issue. But what their plan is, as clarified during this hearing, is 3 4 that they will then, as promptly as possible, litigate the 5 application of the exemptions most likely with another 6 preliminary injunction or emergency motion for this Court to 7 resolve all of the withholdings. The Vaughn index alone will simply lead to 8 9 additional litigation on an emergency basis in this case. 10 Plaintiffs plainly believe that the responsive 11 records will show problems with the process leading up to 12 the DPA warranting setting aside that plea agreement that 13 the Department of Justice reached with Boeing, but that may 14 not be the case. There is no guarantee that the records 15 responsive to plaintiffs' request will, in fact, show the 16 nefarious conduct that would support plaintiffs' concerns 17 about the DPA and implicate the public interest. There 18 simply may be no smoking gun documents sitting in DOJ's 19 files. Plaintiffs think they may find a smoking gun in the 20 responsive records, but they may just be wishful thinking. 21 That is not clear or persuasive. And despite the fact that 22 there is a lot of smoke, as the plaintiffs say, and 23 plaintiffs allege based on press and other people who have 24 looked at this issue in far more detail than this court has; 25 but, as I said, that may be just wishful thinking. And the

1 records that they obtain, even if their preliminary 2 injunctive relief was granted, may not help them at all 3 prove that the smoke that they're seeing is anything more 4 than ephemeral.

5 Of course, the Department of Justice has done not 6 much in this case. They have stayed in their lane on the 7 FOIA litigation to deny or say that there are lots of other reasons for a DPA in this case, but that's the Department of 8 9 Justice's choice. It's the Department of Justice's 10 reputation and the fraud section's reputation at stake here 11 in how well they're protecting the public interest with this 12 DPA. But standing before me are only representatives of the 13 Department of Justice who want to stay in their lane 14 sticking solely to the FOIA case.

There will be another forum in the Northern District of Texas where the Department of Justice may be called upon to clear the smoke that the plaintiffs have raised about this DPA; and that leads me to the second reason they have failed to show irreparable harm.

Plaintiffs contend that only through disclosure of the requested records with sufficient time to oppose any date DOJ motion to dismiss the criminal charges against Boeing can questions "raised by the public record" be answered. See their motion at pages 19 through 20; and can plaintiffs, quote: "Present their complete factual

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1	contentions" in opposition to any DOJ motion. See their
2	reply at page 4.
3	According to plaintiffs, if the requested
4	documents are produced after the charges against Boeing have
5	been dismissed, plaintiffs will be unable to reopen the
6	criminal case; the charges will have been dismissed with
7	prejudice.
8	As support for the documents' utility, plaintiffs
9	cite a Southern District of Florida district court opinion
10	holding that the government had violated the CVRA rights of
11	victims of sex crimes perpetrated by Jeffrey Epstein, which
12	opinion cited documents that had been produced during
13	discovery in the plaintiffs' CVRA suit long after the
14	Epstein criminal case was closed. See Doe No. 1 v. United
15	States, 749 F.3d 999, jump cite 1002, Eleventh Circuit from
16	2014. Also, see Doe 1 v. United States, 359 F. Supp 3d,
17	1201, jump cite 1217, Southern District of Florida from
18	2019, and plaintiffs' motion at pages 21 through 22.
19	This case hurts rather than helps the plaintiffs
20	since all it suggests in fact more than suggests shows
21	that plaintiffs' requested documents would not lose all
22	utility following July 7 since those cases occurred long
23	after the Epstein criminal case had been closed.
24	But the fact is nothing is stopping plaintiffs
25	from raising all of their questions about the process

1	leading up to the DPA now and before the judge who will
2	ultimately have the obligation to resolve any anticipated
3	motion to dismiss.
4	If the court presiding over the criminal case
5	against Boeing deems those questions sufficiently troubling,
6	that judge can make further inquiry and demand answers from

7 DOJ before ruling on the motion to dismiss. Put another 8 way: Persuading the court presiding over the Boeing 9 criminal matter to ask questions is not necessarily 10 dependent on the plaintiffs getting responsive records to 11 its FOIA request even if those records might be helpful.

12 Third, as DOJ suggests: "The purported time limit 13 on the usefulness of the information after July 7, 2024, is 14 not certain."

DOJ cites two reasons for this uncertainty about why this deadline of July 7 is really not as critical of a deadline as plaintiffs say. I am skeptical about one of those reasons, while agreeing with the other.

One reason DOJ gives for the July 7 date not being certain is that DOJ may decide not to move to dismiss the case. See the defendant's opposition at 19. This is not really persuasive since DOJ has made no indication that Boeing has failed to comply sufficiently with the terms of the DPA; and plaintiffs cite that as showing that DOJ rarely revokes deferred-prosecution agreements even after learning

1 that the corporate defendant has committed new crimes during 2 the term of the agreement. Thus, assuming DOJ finds that 3 Boeing has complied with DPA's terms, as is highly likely; 4 DOJ shall, according to the DPA's terms, seek dismissal of 5 the criminal proceeding against Boeing by the July 7, 2024, 6 motion to dismiss deadline. See the DPA at paragraph 25. 7 In this context, DOJ's argument as to the 8 uncertainty of the July 7, 2024, date because DOJ may not 9 move to dismiss is unpersuasive. 10 A second reason DOJ gives that July 7, 2024, is 11 not the date of significance that plaintiffs rely on for 12 their irreparable harm argument is that the timeline for 13 resolving any motion to dismiss in the Boeing prosecution 14 will likely extend far beyond July 7. 15 DOJ anticipates, quote: "Several parties would 16 file additional briefing concerning the merits of that 17 motion and the district court will then hold a hearing." 18 See the defendant's opposition at pages 20 through 21. This 19 argument carries greater weight. 20 Plaintiff responds, to counter this argument, 21 that: Per local rules, they must file any opposition motion 22 within 14 days of the DOJ's motion; that even assuming the 23 court holds a hearing, plaintiffs are unlikely to have the 24 opportunity to introduce the documents for the first time 25 then; and that, in any event, any hearing is unlikely to

1	extend the schedule by more than a few days. See
2	plaintiffs' reply at pages 3 through 4.
3	As support for the asserted rigidity of the
4	district court proceedings, plaintiffs cite the CVRA
5	provision providing that proceedings shall be not stayed or
6	subject to a continuance of more than five days. See 18
7	U.S.C. Section 3771(d)(3).
8	But this provision regarding granting a stay or
9	continuance has no relevance whatsoever to a district
10	court's inherent authority to set a briefing schedule or
11	reserve a decision while considering papers submitted by the
12	parties. See Dellinger v. Mitchell, 442 F.2d 782, jump cite
13	786, D.C. Circuit 1971, particularly when the district court
14	must, as instructed by the Fifth Circuit, meaningfully
15	"assess the public interest" when considering any DOJ motion
16	to dismiss. See In re Ryan, 88 F.4th at 627, which is the
17	Fifth Circuit case involving these same plaintiffs.
18	More to the point, there is nothing stopping
19	plaintiffs or as discussed during the hearing today, the
20	plaintiffs, together with the Department of Justice from
21	requesting a modified briefing schedule to afford both of
22	them more than the 14 days contemplated by the local rules
23	in the Northern District of Texas to oppose DOJ's motion to
24	dismiss, or even to reserve a decision until plaintiffs gain
25	access to the responsive records.

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1 Fourth, and finally: Even if plaintiffs were able to obtain responsive documents with sufficient time to 2 oppose DOJ's motion to dismiss, plaintiffs themselves 3 concede, as already noted, that DOJ rarely revokes 4 5 deferred-prosecution agreements even after learning that the 6 corporate defendant has committed new crimes during the term of the agreement, and that revocation is especially unlikely 7 here because the DPA did not subject Boeing to oversight by 8 9 a special monitor.

10 To be sure, plaintiffs' motion, citing public reports, raises serious questions about the terms of the 11 12 DPA, including "the use of special tactics, such as forum 13 shopping" -- that's a quote from the plaintiffs' motion at 14 page 20 -- quote, "the prospect that the Statement of Facts 15 was 'ghostwritten' by defense counsel"; and "the 16 high-ranking justice department positions held by alumni of 17 Kirkland & Ellis, which represented Boeing."

And as plaintiffs concede, plaintiffs can present these concerns now to the district court which must "assess the public interest" when considering any DOJ motion to dismiss, including by considering, quote: "Any other circumstances brought to its attention by the victims' families," as the Fifth Circuit directed. And this distinguishes this instant case from

others cited by the plaintiffs, where the movement was able

1	to make the critical showing that the requested records were
2	time sensitive and highly probative, or even essential to
3	the integrity of an imminent event, after which the event
4	the utility of the records would be lessened or lost.
5	The Court is not persuaded that plaintiffs'
6	requested records are "time sensitive" in the sense of
7	losing value vis-à-vis any date certain, and that plaintiffs
8	have demonstrated irreparable harm "based on an actual,
9	impending deadline" because they have alternative ways
10	through the court, through conferring with DOJ to respond
11	to the questions of raising smoke about nefarious reasons
12	for this DPA.
13	One final point that DOJ argues merits addressing.
14	DOJ argues that even if plaintiffs were able to
15	obtain records to persuade the court to reject the DPA and
16	reopen the criminal case by their requested deadline, the
17	records would, in essence, have no impact on any event
18	because the district court cannot substantively revise the
19	DPA.
20	The Fifth Circuit case In re Ryan, cited by DOJ
21	for this point makes clear that: While the district court
22	lacks authority to exercise substantive review over DPAs, it
23	has an obligation consistent with Federal Rule of Criminal
24	Procedure 48(a) when considering a motion to dismiss the
25	criminal proceedings to "assess the public interest

1 according to case law as well as the CVRA, " and that 2 includes violations already admitted to and, as I have 3 already quoted, other circumstances brought to its attention 4 by the victims' families; and these circumstances brought to 5 the attention by the victims' families could include records 6 pertaining to the DPA that plaintiffs seek here. 7 The Fifth Circuit distinguished as inapt the D.C. Circuit's decision in U.S. v Fokker that is cited by DOJ. 8 9 And in fact, Fokker is a Speedy Trial Act case, not a 10 Rule 48 case and is, therefore, as the Fifth Circuit said, inapt to the situation which the Northern District of Texas 11 12 judge is finding himself. 13 Under Rule 48(a) of the Federal Rules of Criminal 14 Procedure, the government may, with leave of court, dismiss 15 an indictment. And in that context, "the public interest, 16 especially that of crime victims, rests crucially on court 17 approval." And in Ryan, the court cited a series of cases 18 holding that "district judges are empowered to deny 19 dismissal when clearly contrary to manifest public interest 20 as assessed at the time of the decision to dismiss." See 88 21 F.4th, at jump cite 627. 22 So that while DOJ is correct that the decisions to 23 charge or dismiss charges once brought -- the questions of 24 what the terms of the DPA should be lie with the executive 25 branch not with the judiciary, it does err in suggesting

1	that the requested records could have no impact on DOJ's
2	motion to dismiss.
3	But insofar as plaintiffs seek their requested
4	records to dissuade the district court from granting such a
5	motion and those records could conceivably impact the
6	district court in its consideration of the "public
7	interest," which the Fifth Circuit has instructed the
8	district court to do.
9	At the same time, the degree of any such impact
10	and, in turn, the irreparable harm that may be suffered by
11	plaintiffs without prompt receipt of the requested documents
12	is not at all assured.
13	The Court is mindful of plaintiffs significant
14	interest in receiving timely access to documents regarding
15	the company responsible for the death of their family
16	members. I agree that this involves a matter of widespread
17	and exceptional media interest with potential bearing on the
18	public interest. In fact, DOJ doesn't even dispute this
19	fact, which is why plaintiffs were ultimately granted
20	expedited processing of the FOIA request. Nonetheless, the
21	Court is not persuaded that any injury plaintiffs will
22	experience absent the requested injunction will irreparably
23	hinder their ability to raise concerns in opposition to any
24	DOJ motion to dismiss.
25	So plaintiffs' failure to show a likelihood of

1	success on the merits or irreparable harm are insufficient
2	to deny their request for preliminary injunction.
3	Finally, where the federal government is the
4	opposing party, the third and fourth factors requiring
5	consideration of the balance of equities and public interest
6	factors merge. See Nken v. Holder, 556 U.S. 418, jump cite
7	435, 2009.
8	Plaintiffs have not shown that the balance of
9	hardships and the public interest weigh in favor of
10	injunctive relief. These factors require courts to balance
11	the competing claims of injury of not just the parties
12	before them but other parties, consider the effect of
13	granting or withholding the requested relief, in addition to
14	paying particular regard for the public consequences and
15	employing the extraordinary remedy of an injunction. See
16	Winter, 555 U.S. at 24.
17	Plaintiffs contend that the imminent litigation
18	deadline, in a criminal case of unusual public interest and
19	importance, overrides the government's concerns about
20	allowing one requester to move ahead in line or otherwise
21	taxing agency resources, and if there is a strong public
22	interest in "the approval and supervision of DPAs by federal
23	judges" and of the Boeing DPA in particular, given the
24	latest safety scare in which a door-sized section of a 737
25	Max 9 blew off the aircraft ten minutes after it took off

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1	which is, indeed, quite scary. And to be sure, plaintiffs'
2	motion leaves no doubt as to the importance of assuring
3	their full participation in opposing any DOJ motion to
4	dismiss, and the public's interest in scrutinizing the
5	Boeing DPA.
6	I certainly hope that DOJ despite the
7	performance here today at this hearing, does take seriously
8	the reputation to the Department of Justice in scrutinizing
9	this DPA carefully in responding to all of the smoke that
10	has been generated about this DPA, although there was nobody
11	from the fraud section here today to even hear this.
12	I am not at all clear about the communication
13	between the people handling the FOIA requests and the people
14	in the fraud section at DOJ. But as I have already
15	explained, such scrutiny is not dependent on the prompt
16	disclosure of plaintiffs' requested records and a Vaughn index.
17	Plaintiffs' effort to jump ahead of the FOIA
18	processing line not even the FOIA processing line
19	generally, but the FOIA processing line of all other pending
20	expedited requests the Court is very concerned that this
21	will put a significant burden on DOJ and adversely affect,
22	clearly, the other people with pending expedited requests in
23	queue.
24	DOJ already faces a challenge in keeping up with
25	FOIA requests in litigation with approximately 1100 open

1 administrative requests, 148 open litigation matters, and 2 expedited processing of a number of other requests, some of which are ahead of this plaintiffs' request; but it is -- to 3 4 grant this preliminary injunction motion would most 5 definitely harm all the people -- the 20-plus expedited 6 processing requests ahead of plaintiffs' request in the queue. 7 In processing all outstanding FOIA requests as quickly as possible, DOJ has a responsibility to balance the 8 9 public's interest and disclosure with equally important 10 public and private interest in safeguarding potentially sensitive information. With all of this in mind, DOJ 11 12 asserts that it would simply be impracticable to produce all 13 responsive nonexempt records under plaintiffs' requested 14 timeline in light of the resources currently committed to 15 other pending and equally time-sensitive requests. 16 Although plaintiffs contend that DOJ exaggerates 17 the burdens of redaction and production given that they seek 18 only a subset of their underlying motion, most of which --19 not all of which, but most of which involves communications 20 with an adversarial third party representing a corporate 21 defendant, plaintiffs think that that would not be subject 22 to exemptions. But as other cases have pointed out, that is 23 not at all correct.

24The plaintiff has relied on cases for that25position that are inapposite; none of those involved cases

1 that would trigger application of Exemption 7, and all of 2 its various subparts, as the government has said that the request here will most definitely trigger, and such 3 4 information compiled for law enforcement purposes that could 5 reasonably expect it to interfere with enforcement 6 proceedings are particularly sensitive and have to be 7 carefully reviewed to ensure that those government interests at stake are not put at risk of inadvertent disclosure by 8 9 rushing through a search and processing request. 10 In short, forcing DOJ to produce all requested records on an impractically brief deadline raises a 11 12 significant risk of harm to the public and private interests 13 served by the thorough processing of responsive agency 14 records prior to their ultimate production and also out of 15 concern for displacing other expedited requests currently 16 being processed by DOJ. 17 So these considerations all militate against grant 18 of a preliminary injunction. 19 So having failed to demonstrate any of the four 20 factors governing review of the plaintiffs' instant motion point in their favor, plaintiffs cannot meet their burden to 21 22 show that issuance of a preliminary injunction is warranted. 23 Accordingly, plaintiffs' request for immediate 24 relief on the merits of its underlying action and the entry 25 of an order requiring DOJ to process and produce all

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1	nonexempt requested records in a Vaughn index within 30 days
2	is denied.
3	Plaintiffs' claim will, therefore, proceed to the
4	merits, with the Court exercising its authority to supervise
5	DOJ's progress in processing plaintiffs' request while
6	ensuring that DOJ continues to exercise due diligence in
7	doing so.
8	Consistent with the scheduling order and standing
9	order issued in this case, DOJ shall answer or otherwise
10	respond to plaintiffs' complaint by March 13, 2024.
11	Plaintiffs shall parties shall jointly prepare
12	and submit a report to the Court by March 27, including an
13	estimate provided by DOJ of when a final determination of
14	plaintiffs' FOIA request is expected to be made, a proposed
15	schedule for production of responsive records, and for the
16	filing of dispositive motions. See the standing order at
17	paragraph 3(b)(ii), which is already docketed at ECF No. 3
18	and the minute order at January 30, 2024.
19	All right. With that, is there anything further
20	today from the plaintiffs?
21	MR. LIPPER: I'm sorry?
22	THE COURT: Anything further from the plaintiffs?
23	MR. LIPPER: I actually just have a logistical
24	question. Will the Court be
25	THE COURT: You have to speak into the microphone.

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1 MR. LIPPER: I'm sorry. 2 Will the Court be filing its opinion as a written 3 order? 4 Basically, I am just asking do I need to order a 5 transcript to get the full text of your order. 6 THE COURT: Yes. 7 I am not issuing a written opinion, I simply don't 8 have time. This is all you are getting. 9 MR. LIPPER: Thank you. 10 THE COURT: Anything more from the government? 11 MS. WALKER: No, Your Honor. 12 THE COURT: All right. You are all excused. 13 (Whereupon, the proceeding concludes, 2:09 p.m.) * * * * * CERTIFICATE I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings to the best of my ability. This certificate shall be considered null and void if the transcript is disassembled and/or photocopied in any manner by any party without authorization of the signatory below. Dated this 5th day of March, 2024. /s/ Elizabeth Saint-Loth, RPR, FCRR Official Court Reporter

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