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Via Online Portal and Email

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Freedom of Information Act Request: DOJ's Assault on America's School Parents

Dear FOIA Officers:

America First Legal Foundation ("AFL") is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, ensure due process and equal protection for all Americans, and promote knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

Americans have a fundamental liberty interest in, and the Constitutional right to control and direct, the education of their own children.¹ Accordingly, parents across the nation are speaking out against Critical Race Theory and other forms of anti-religious, anti-family public school indoctrination. They want schools open and teaching children in-person without politically driven curricula and universal mask mandates.² Consequently, radical leftist teacher unions, public school administrators, school board members, and politicians have targeted them for cancellation, lawfare, and intimidation.³ As Terry McAuliffe, a political operative substantially funded by the National Education Association and American Federation of Teachers put it, “I don’t think parents should be telling [public] schools what they should teach.”⁴ Nevertheless, parents continue to exercise their right to direct the upbringing and education of their children, and to fight the idea that their children are teacher union property.⁵

On September 29, 2021, the partisan “National School Boards Association” made public a “letter” demanding federal action under the PATRIOT ACT to stop parents from

¹ *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (O’Connor, J.); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 – 35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

² Jon Levine, *Powerful Teachers Union Influenced CDC on School Reopenings, Emails Show*, NEW YORK POST (May 1, 2021) <https://nypost.com/2021/05/01/teachers-union-collaborated-with-cdc-on-school-reopening-emails/>.

³ See Harold Hutchinson, *‘Expose These People Publicly’: Parents Against Critical Race Curriculum Listed By Teachers Attempting To ‘Infiltrate’ Them*, DAILY CALLER (March 17, 2021) <https://dailycaller.com/2021/03/17/virginia-parents-targeted-for-opposing-critical-race-theory/>; Luke Rosiak, *‘Let Them Die,’ Top PTA, NAACP Official Says In Tirade About Anti-Critical Race Theory Parents*, DAILY WIRE (July 16, 2021) <https://www.dailywire.com/news/pta-naacp-official-let-them-die-critical-race-theory>; Jonathan Turley, *GoFundMe Shuts Down Fundraiser Of Parents Opposing Critical Race Theory In Loudoun County*, RES IPSA LOQUITUR – THE THING ITSELF SPEAKS (Mar. 31, 2021) <https://jonathanturley.org/2021/03/31/gofundme-shuts-down-fundraiser-of-parents-opposing-critical-race-theory-in-loudoun-county/>; *Nasty Nightline Accuses Parents Protesting CRT of Enabling Racism, Whitewashing History* (July 16, 2021) <https://www.cybernistas.com/2021/07/16/nasty-nightline-accuses-parents-protesting-crt-of-enabling-racism-whitewashing-history/>; William A. Jacobson, *Union-Linked Coalition Scripts ‘Messaging’ To Counter Parental Pushback Against Critical Race Theory*, LEGAL INSURRECTION (Jul. 5, 2021) <https://legalinsurrection.com/2021/07/union-linked-coalition-scripts-messaging-to-counter-parental-pushback-against-critical-race-theory/>; Samuel Chamberlin, *Teachers Union Sues Rhode Island Mom Over Requests for CRT Curriculum Info*, NEW YORK POST (Aug. 5, 2021) <https://nypost.com/2021/08/05/teachers-union-sues-mom-over-requests-for-crt-curriculum-info/>; Emma Colton, *Kansas Math Teacher Resigns Over CRT Training and Renewed Mask Mandates, Gets Fined, Kansas School Reportedly Spends \$400,000 on Critical Race Theory Training for Teachers*, FOX NEWS (Aug. 14, 2021) <https://www.foxnews.com/us/kansas-math-teacher-resigns-crt-mask-mandate-fined>.

⁴ Michael Lee, *McAuliffe Says He Doesn’t Believe Parents Should Tell Schools What to Teach*, FOX NEWS (Sept. 28, 2021) <https://www.foxnews.com/politics/mcauliffe-says-he-doesnt-believe-parents-should-control-what-schools-teach>. In 2021, teacher unions have given McAuliffe over \$600,000 for his political campaign. Vpap.org, *Top Donors, Terry McAuliffe, Democrat* (Oct. 10, 2021) https://www.vpap.org/candidates/11897/top_donors/?start_year=2021&end_year=2021. See also Josh Gerstein, *Chinese Investors Sue McAuliffe, Rodham over Green-car Investments, The Suit is the Latest Headache for the Virginia Governor as He Mulls a Presidential Bid*, POLITICO (Nov. 8, 2017) <https://www.politico.com/story/2017/11/28/greentech-automotive-lawsuit-terry-mcauliffe-262771>.

⁵ *Pierce*, 268 U.S. at 535.

objecting to mask mandates and Critical Race Theory.⁶ Federal action was demanded because, *inter alia*, parents were engaged in First Amendment activities including “posting watchlists against school boards and spreading misinformation that boards are adopting critical race theory curriculum and working to maintain online learning by haphazardly attributing it to COVID-19.”⁷

On October 4, 2021, the Attorney General issued a Memorandum to the Federal Bureau of Investigation, the Executive Office for U.S. Attorneys, the Assistant Attorney General of the Criminal Division, and all United States Attorneys purporting to address a “disturbing spike in harassment, intimidation, and threats of violence against school administrators, board members, teachers, and staff who participate in the vital work of running our nation's public schools.” He promised the Department would “protect all people in the United States from violence, threats of violence, and *other forms of intimidation and harassment*.”⁸

⁶ National School Board Ass’n, *Letter to Joseph R. Biden Re: Federal Assistance to Stop Threats and Acts of Violence Against Public Schoolchildren, Public School Board Members, and Other Public School District Officials and Educators* (sic) (Sept. 29, 2021) <https://nsba.org/-/media/NSBA/File/nsba-letter-to-president-biden-concerning-threats-to-public-schools-and-school-board-members-92921.pdf>. This letter repeated union-approved talking points, including the fatuous claim “critical race theory is not taught in public schools...” *Id.* at 1; William A. Jacobson, *supra* note 3; Jessica Anderson, *Reading, Writing, and Racism: the NEA’s Campaign to Gaslight Parents*, NATIONAL REVIEW ONLINE (July 10, 2021) <https://www.nationalreview.com/2021/07/reading-writing-and-racism-the-neas-campaign-to-gaslight-parents/>

⁷ National School Board Ass’n, *supra* note 6 at 5. Labeling First Amendment protected political speech “hate” the letter also claimed as grounds for federal action the following:

In Ohio, an individual mailed a letter to a school board member labeling the return address on the envelope from a local neighborhood association and then enclosing threatening hate mail from another entity. This correspondence states that, “We are coming after you and all the members on the ... BoE [Board of Education].” This hate mail continues by stating, “You are forcing them to wear mask—for no reason in this world other than control. And for that you will pay dearly.” Among other incendiaries, this same threat also calls the school board member a “filthy traitor,” implies loss of pension funds, and labels the school board as Marxist. Earlier this month, a student in Tennessee was mocked during a board meeting for advocating masks in schools after testifying that his grandmother, who was an educator, died because of COVID-19. These threats and acts of violence are affecting our nation’s democracy at the very foundational levels, causing school board members – many who are not paid – to resign immediately and/or discontinue their service after their respective terms. Further, this increasing violence is a clear and present danger to civic participation, in which other citizens who have been contemplating service as either an elected or appointed school board member have reconsidered their decision.

Citations omitted.

⁸ Memorandum from the Attorney General, October 4, 2021, to the Director of the Federal Bureau of Investigation, the Director of the Executive Office for U.S. Attorneys, the Assistant Attorney General for the Criminal Division, and the United States Attorneys, titled, “Partnership among federal, state, local, tribal, and territorial law enforcement to address threats against school administrators, board members, teachers, and staff” available at <https://www.justice.gov/ag/page/file/1438986/download>.

AFL’s mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and media, including social media platforms, to educate the public and to keep government officials accountable for their duty to faithfully execute, protect, and defend the Constitution and laws of the United States. The evidence suggests the Attorney General’s October 4 Memorandum is the byproduct of and/or a key Biden Administration “deliverable” in a collusive scheme to injure, oppress, threaten, or intimidate parents in the free exercise or enjoyment of their rights or privileges secured by the Constitution or laws of the United States. Especially in the context of the Attorney General’s promise, memorialized both in his June 11 policy address and in the Biden Administration’s “first-ever” National Strategy for Countering Domestic Terrorism,⁹ to use the Department’s criminal and other authorities to target American citizens in “combat” against domestic “misinformation” and “disinformation”, the October 4 Memorandum is of grave concern. Violent crime is exploding, and the U.S. southern border is open to criminal aliens and terrorist infiltration, but the Department, at the behest of leftist partisans, has instead chosen to threaten American parents for exercising their Constitutional rights.¹⁰

Therefore, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, AFL hereby requests the following department records. For the purposes of 5 U.S.C. § 552(a)(6)(E)(vi) and 28 C.F.R. § 16.5(e), AFL certifies it has a compelling need for expedited processing of its requests.

I. Special Definitions

“Department” means the U.S. Department of Justice and its components.

“Garland Memorandum” means the Memorandum from the Attorney General, dated October 4, 2021, addressed to the Director of the Federal Bureau of Investigation, the Director of the Executive Office for U.S. Attorneys, the Assistant Attorney General for the Criminal Division, and the United States Attorneys, with the Subject line titled, “Partnership among federal, state, local, tribal, and territorial law enforcement

⁹ U.S. Dep’t of Justice, *Attorney General Merrick Garland Delivered a Policy Address Regarding Voting Rights* (June 11, 2021) <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivered-policy-address-regarding-voting-rights>; Nat’l Sec. Council, *National Strategy for Countering Domestic Terrorism* at 9, 18, 20, 29 (June 2021) <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf>.

¹⁰ Jeff Asher, *Murder Rose by Almost 30% in 2020. It’s Rising at a Slower Rate in 2021*, NEW YORK TIMES (Sept. 22, 2021) <https://www.nytimes.com/2021/09/22/upshot/murder-rise-2020.html>; Ryan Lucas, *FBI Data Shows an Unprecedented Spike in Murders Nationwide in 2020*, NPR (Sept. 27, 2021) <https://www.npr.org/2021/09/27/1040904770/fbi-data-murder-increase-2020>; Matt Masterson, *Chicago Outpacing 2020 Shooting, Homicide Totals Through End of August*, WTTW (Sept. 1, 2021) <https://news.wttw.com/2021/09/01/chicago-outpacing-2020-shooting-homicide-totals-through-end-august>; *See generally*, Southwest Border Land Encounters, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (last visited October 6, 2021).

to address threats against school administrators, board members, teachers, and staff” found at <https://www.justice.gov/ag/page/file/1438986/download>.

“NSBA” means the National School Board Association

“NSBA Letter” means the document found at <https://nsba.org/-/media/NSBA/File/nsba-letter-to-president-biden-concerning-threats-to-public-schools-and-school-board-members-92921.pdf>

“Person” means any legal or natural person.

II. Custodians

Relevant custodians include:

1. Attorney General Merrick B. Garland
2. The Attorney General’s Chief of Staff
3. The Office of the Attorney General
4. The Office of the Deputy Attorney General
5. The Office of the Associate Attorney General
6. The Department of Justice White House Liaison
7. The Office of Public Affairs
8. The Office of the Assistant Attorney General for the Criminal Division
9. The Office of the Assistant Attorney General for the Civil Rights Division
10. The Office of the Director of the FBI
11. The Executive Office for U.S. Attorneys
12. The Office of Legal Counsel

II. Requested Records

The timeframe for all requests is September 15, 2021, to the date this request is processed.

A) All records of, concerning, or regarding (1) the Garland Memorandum and/or (2) the NSBA Letter.

B) All records sufficient to show each person within the Department who reviewed (1) the Garland Memorandum and/or (2) the NSBA Letter.

C) All records created by the Department showing the “disturbing spike in harassment, intimidation, and threats of violence” referenced in the Garland Memorandum.

D) All records the Department relied upon to support the Garland Memorandum statement “there has been a disturbing spike in harassment, intimidation, and threats of violence against school administrators, board members, teachers, and staff who participate in the vital work of running our nation's public schools.”

E) All records created by the Department showing “the rise in criminal conduct directed toward school personnel” referenced in the Garland Memorandum.

F) All records the Department relied upon to support the Garland Memorandum statement there has been “a rise in criminal conduct directed toward school personnel.”

G) All records sufficient to show the Department’s understanding and interpretation of the term “intimidation and harassment” used in the Garland Memorandum.

H) All communications from, with, or regarding any person employed by the National Education Association and/or the American Federation of Teachers.

I) All communications with any person having an email address including eop.gov regarding (1) the Garland Memorandum, (2) the NSBA, (3) the NSBA Letter, (4) the National Education Association and/or the American Federation of Teachers and/or (5) any person employed by the National Education Association and/or the American Federation of Teachers.

IV. Redactions

FOIA requires the Department to disclose records freely and promptly. The department must liberally construe AFL’s requests and make a good faith effort to search for requested records using methods “which can be reasonably expected to produce the information requested.” At all times, FOIA must be construed to carry out Congress’s open government mandate according to the ordinary public meaning of its terms at the time of its enactment.¹¹

Redactions are disfavored as the FOIA’s exemptions are exclusive and must be narrowly construed. If a record contains information responsive to a FOIA request, then the department must disclose the entire record; a single record cannot be split into responsive and non-responsive bits. Consequently, the department should produce email attachments.

In connection with this request, and to comply with your legal obligations:

¹¹ 5 U.S.C. §§ 552(a)(3)(A), 552(a)(6)(A); *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989); *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- In conducting your search, please construe the term “record” in the broadest possible sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek all records, including electronic records, audiotapes, videotapes, and photographs, as well as texts, letters, emails, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions.
- Our request includes any attachments to those records or other materials enclosed with a record when transmitted. If an email is responsive to our request, then our request includes all prior messages sent or received in that email chain, as well as any attachments.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA. It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; AFL has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to governmentwide requirements to manage agency information electronically, and many agencies have adopted the National Archives and Records Administration (“NARA”) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; you may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.

- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

V. Fee Waiver Request

Per 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10, AFL requests a waiver of all search and duplication fees.

First, AFL is a qualified non-commercial public education and news media requester. AFL is a new organization, but it has already demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive analyses posted to its website. For example, its officials routinely appear on national television and use social media platforms to disseminate the information it has obtained about federal government activities. In this case, AFL will make your records and your responses publicly available for the benefit of citizens, scholars, and others. The public's understanding of your policies and practices will be enhanced through AFL's analysis and publication of the requested records. As a nonprofit organization, AFL does not have a commercial purpose and the release of the information requested is not in AFL's financial interest. This has previously been recognized by this department and by the Departments of Defense Education, Energy, Interior, Health and Human Services, and Homeland Security, and the Office of the Director of National Intelligence.

Second, waiver is proper as disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government." The disclosure of records bearing on the department's fidelity to the rule of law and the apparent use of its law enforcement authorities to chill parents from contesting critical race theory and mask mandates in their children's public schools will plainly contribute to public understanding of the federal government's activities.

VI. Expedited Processing

AFL certifies "compelling need" for expedited processing under 5 U.S.C. § 552(a)(6)(E).

First, as multiple federal agencies (including this department) have acknowledged, AFL is primarily "engaged in disseminating information." Second, the Garland Memorandum, as well as the department's plan to "protect all people" from "intimidation

and harassment” are assuredly matters of “actual or alleged Federal Government activity.” Third, the common public meaning of “urgency” at the time of § 552(a)(6)(E)(v)(II)’s enactment was “the quality or state of being urgent.” The common public meaning of “urgent”, in turn, was “requiring or compelling speedy action or attention.” The department obviously believes the Garland Memorandum and its subject matter require or compel speedy action and attention, as evidenced by his direction for the FBI and the U.S Attorneys to meet with school leaders in each federal judicial district within the next 30 days. Accordingly, AFL should be granted expedited processing.

In the alternative, 28 C.F.R. § 16.5(e) is the department’s expedited processing regulation. 28 C.F.R. § 16.5(e)(ii) repeats the statutory factors. Therefore, as explained above, AFL is entitled to expedited processing here as well. But as permitted by statute, the department has expanded expedited processing to include requests for records involving the loss of substantial due process rights or matters of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence. Chilling parents’ exercise of their Constitutional rights, as the Garland Memorandum arguably does, facially threatens the “loss of substantial due process rights” under 28 C.F.R. § 16.5(e)(1)(iii). Additionally, the Garland Memorandum and its subject matter are self-evidently of urgent and intense public interest and concern in which there are possible questions about the government’s integrity that affect public confidence under 28 C.F.R. § 16.5(e)(1)(iv).

Also in the alternative, the Circuit test for expedited processing requires weighing three main factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.¹² AFL meets this test as well. Respecting factor one, as noted above, the Garland Memorandum and its subject matter are assuredly matters of public concern and media interest and central to a pressing issue of the day. Respecting factor two, if production is delayed, then both AFL and the public at large will be precluded from obtaining in a timely fashion information vital to the current and ongoing debate surrounding election integrity, voting rights, and, critically, the Biden Administration’s unprecedented decision to use the department’s massive coercive powers against American parents. Being closed off from the opportunity to debate the department’s conduct here itself is a harm in an open democracy.¹³ And the

¹² *Al-Fayed v. Central Intelligence Agency*, 254 F.3d 300, 309-10 (D.C. Cir. 2001).

¹³ In *Protect Democracy Project*, the District Court reasoned:

But do the requests touch on ‘a matter of current exigency to the American public,’ and would ‘delaying a response...compromise a significant recognized interest,’ *Al-Fayed*, 254 F.3d at 310? Likely, the answer to both questions is yes. Regarding nationwide ‘exigency’: In its requests, submitted the day after the April 6 missile strikes against Syria, Protect Democracy explained that ‘the President’s decision to initiate military action is of the utmost importance to the public,’ and that ‘whether the President has

possibility exists that extra-legal law enforcement action may be taken by the department against parents who oppose the indoctrination of their children. Disclosing relevant records months or even years from now will be of academic interest only—any damage will have been done and stale information is of little value.¹⁴ Respecting factor three, AFL’s requests manifestly concern “federal government activity.”

Any concerns the department or other requesters may raise about granting AFL expedited processing have been weighed by Congress, and Congress has concluded them to be of subsidiary importance to compelling and time-sensitive cases, such as this. Practically speaking, AFL believes it is difficult for the department to credibly argue expedited processing in this case would cause much delay to other requesters given the very specific nature of AFL’s FOIA requests and the extremely limited time window.

VII. Production

To accelerate release of responsive records, AFL welcomes production on an agreed rolling basis. If possible, please provide responsive records in an electronic format by email. Alternatively, records in native format or in PDF format on a USB drive. Please send any responsive records being transmitted by mail to America First Legal Foundation, 600 14th Street NW, 5th Floor, Washington, D.C. 20005.

VIII. Conclusion

Please contact me at FOIA@aflegal.org if you have questions about this request, believe additional discussion of search and processing will facilitate more efficient and timely production, or if the fee waiver and expedited processing demands are not granted in full. Thank you in advance for your cooperation.

Thank you,

Reed D. Rubinstein
America First Legal Foundation

the legal authority to launch [such] a military strike’ is similarly critical. Few would take issue with these assertions. But as evidence that they were justified, one need look no further than the widespread media attention—including by some of the nation’s most prominent news outlets—paid both to the April 6 strike and its legality, as early as the date of Protect Democracy’s requests.

Protect Democracy Project, Inc. v. U.S. Dep’t of Def., 263 F. Supp. 3d 293, 299-300 (D.D.C. 2017). If the one or two news cycles worth of attention given to one missile strike is sufficient to constitute “urgent” then certainly, then the Garland Memorandum and its subject matter are urgent as well.

¹⁴ See *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988).