

No. 24-1606

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE MARY FERRELL FOUNDATION, INC; JOSIAH THOMPSON, and GARY AGUILAR, Plaintiffs-Appellants,

v.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, Defendant-Appellee.

On Appeal from the United States District Court

For the Northern District of California

No. 22-cv-06176-RS

Hon. Richard Seeborg

APPELLANTS' REPLY BRIEF

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I. DEFENDANT HAS MANDATORY DUTIES TO REVIEW, IDENTIFY, TRANSMIT AND RELEASE ADDITIONAL RECORDS TO THE JFK COLLECTION

This Reply Brief emphasizes certain aspects of Plaintiffs' argument in response to Defendant's Answering Brief. Plaintiffs ask the court to consider all aspects of their Opening Brief with the same weight as this Reply.

The purpose of this brief is to remind this court that the District Court did not address many aspects of the case.

None of the District Court's orders provided any reference to the remedial nature of the JFK Records Act. For that matter, NARA's brief to this court never used the word "remedial" in any context. The entire reason for the passage of the JFK Records Act is that FOIA had been remarkably unsuccessful in getting the assassination records to the public.

The District Court never addressed the nature of the powers and duties that dissolved when the ARRB was terminated pursuant to Section 12(a) which states that 'the provisions of this Act are pertain to the appointment and operation of the Review Board' terminate with the ARRB's dissolution. Nor did the District Court address the nature of the powers and duties that were vested in NARA pursuant to Section 12(b). (For more, see Plaintiffs' Opening Brief, pp. 30-34.)

For that matter, the aforementioned issues were methodically ignored in NARA's Answering Brief.

Plaintiffs maintain that the only sections of the Act that were terminated are Sections 7(a)-(h) which address the appointment of the Board, and Sections 7(k)-(m) and 8 which address the operation of the Board.

Similarly, the District Court ignored Plaintiffs' 2(a)(5) argument about NARA's tendency to refer researchers to FOIA rather than conduct a search pursuant to the JFK Records Act.

The District Court ignored Plaintiffs' 11(a) argument that the JFK Records Act supersedes most of Defendant's defenses that are not based on the US Constitution or the Act itself.

Continuing in this vein, Plaintiffs ask the court to engage in a statutory analysis of the key aspects of the Complaint and the arguments made in this case about Defendant's mandatory duties to review, identify, transmit and release additional assassination records to the JFK Collection. These duties were either not addressed by the Court or the Defendant, or only addressed in the most perfunctory manner.

These aforementioned duties include the NARA/FOIA problem as addressed in Section 2(a)(5), the "outstanding records" that were the subject of the NARA/ARRB/CIA MOU, the failure to obtain "statements of compliance" from the offending agencies, and other refusals to add other possible records to the JFK

Collection.

The problem can be summed up as follows:

A. The District Court did not construe the JFK Act as a remedial statute

In construing a statute, the court's task is to establish and effectuate the intent of the Legislature by examining the language, nature, and object of the statute. Reading laws to carry out their legislative purpose has an ancient pedigree in the American legal tradition. *United States v American Trucking Associations*, 310 US 534, 543-44 (1940) "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. When [plain] meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act."

The Supreme Court has found that judges may deviate from even the clearest statutory text when a given application would otherwise produce "absurd" results. John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2388 (2003). The absurdity doctrine instructs courts that when the plain import of a statutory text does not correspond to available evidence about the law's purposes, principles of legislative supremacy required judges to enforce the "spirit" rather than the "letter" of the law. *Green v Bock Laundry Mach. Co*, 490 U.S. 504, 509 (1989).

The JFK Act is a remedial statute intended to curb the problem of excessive government secrecy concerning records related to the assassination of President

Kennedy. The legislative history and text demonstrates that the JFK Act was enacted to override existing disclosure laws and executive orders that operated to withhold disclosure of records pertaining to the assassination. (See §§ 2(a)(5) and (6); 11(a)). The solution was legislation that required the government to disclose whatever information it had concerning the assassination. *Final Report of the Assassinations Records Review Board*, page 1 (1998).

A background principle of statutory construction is that remedial statutes are to be broadly construed and liberally construed to effectuate their remedial purpose and address the evil or mischief the law was intended to address. *Mitchell v Lubin*, 358 U.S. 207, 247 (1959). Where the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, the intention of the drafters, rather than the strict language, must be controlling. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

The Supreme Court has also found that courts should narrowly construe exemptions to remedial statutes and should be limited to circumstances or people that unmistakably fall within their terms and spirit of the law. *AH Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *McKeen-Chaplin v. Provident Sav. Bank*, 862 F.3d 847 (9th Cir. 2017). As seen *infra*, the District Court failed to narrowly construe the exceptions to the duty to disclose assassination records contained in Sections 5 and 6.

Most recently, the Supreme Court held that statutory scheme compelled it to ignore statutory text that it termed inartful drafting to avoid negating the stated purposes of the legislation. *King v Burwell*, 576 U.S. 473, 498 (2015): “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter”) *King* stands for the proposition that where a court is to choose between reading a remedial statute literally or broadly to carry out its apparent purpose, it should favor the latter course.

The legislative history is replete with the mischief that Congress wanted to address. For example, one of the sponsors of the legislation, Senator David L Boren, said:

“The whole point of this legislation was to create new criteria and new procedures to maximize the release of information hitherto withheld by the Government. The old laws and old procedures have been tried for the last 30 years, and have not produced the type of disclosure needed to restore the confidence of the American people are simply not the procedures to follow in this case.”

Testimony of Senator David L. Boren, pages 14-21, U.S. Congress, Senate Committee on Governmental Affairs, The Assassination Materials Disclosure Act of 1992 Hearing, 102nd Cong., 2nd sess., May 12, 1992 (Washington: GPO, 1992).

Senator John Glenn, the chair of the Senate Committee on Government Affairs that was holding the hearing, said in his opening statement:

“This bill is the result of a climate of suspicion and distrust that has

grown over the years regarding the official explanation of the assassination of President Kennedy...Disclosure of information is the only reliable way to maintain the public trust and to dispel distrust. Id. at page 4.

In *King*, the Supreme Court said “We cannot interpret federal statutes to negate their own stated purposes”. 576 US at 493. Judges must strive to adopt an interpretation that “does the least violence to the text.” The District Court’s distorted reading of the JFK Act did violence to congressional intent. It allows assassination records to be postponed beyond the original 2029 date that had caused Congress to enact the law. It placed decision-making authority back into the hands of the Executive Branch who had been identified by Congress as the cause of the unnecessary secrecy.

The District Court’s rulings have eviscerated the JFK Records Act. The rulings return the situation to the conditions that existed prior to 1992 when the only remedy that American citizens had to learn about the assassination was to file FOIA requests – a task that which Congress recognized in section 2(a)(5) was futile.

B. The court's findings and orders insulated NARA from responsibility for failing to engage in periodic review prior to 2017

The District Court never addressed NARA's failure to engage in Section 5 & 9-mandated periodic review to include additional records in the Collection between 2000 and 2016. What the court did was to insulate NARA from shirking its responsibility for this extended period:

"Plaintiffs rely on the language in Section 9(d)(2), specifically, which states that any executive branch record postponed by the President shall be subject to periodic review..."

*"Section 5(g)(2)(D) is a **distinct authority** the President may invoke to postpone assassination records, which need not be based on the Section 6 standards...so long as the criteria in Section 5(g)(2)(D) are met, which they are... the periodic review procedure outlined in Section 9(d)(2) does not apply to the President's Section 5(g)(2)(D) authority. (Emphasis added.)"*

Section 5(g) is also inapplicable as a means to compel NARA to conduct periodic reviews. Section 5(g)(1) imposes on the "originating agency" and the Archivist the duty to conduct periodic reviews of the postponed releases "consistent with the recommendations of the Review Board under section 9(c)(3)." JFK Act § 9(g)(1). Section 9(c)(3), in turn, applies to records postponed pursuant to the standards in Section 6, which is inapplicable here."

ECF 107 at 8:8-19.

Thus, the impact of the District Court's ruling is that NARA had – at a minimum - a 5(g) duty to conduct periodic review for additional assassination records from 2000 to 2016, even in the face of Defendant's argument that Section 5(g)(2)(D) came into effect and allegedly made Section 6 inapplicable.

Furthermore, Plaintiffs maintain their position that Section 5(g)(2)(D) and Section 6 must be read in harmony, and that there is no "distinct authority" that permits the President to apply Section 5(g)(2)(d) and ignore Section 6. See Section IIA, *infra*.

Whether or not this court finds that Section 5(g)(2)(D) and Section 6 are harmonious or distinct, it is plain from the District Court's findings and orders that NARA's Archivist had the duty to conduct periodic reviews from 1998 to 2017.

Plaintiffs have stated repeatedly that NARA should not be excused for dodging its duties during the 2000-2016 period, conducting virtually no periodic reviews. ER 149-150; 157-158. After 1999, NARA stopped complying with its duty to ensure compliance with ARRB's directive to obtain additional documents from the CIA. ER 150. During this 2000-2016 period, virtually no documents were transmitted to the JFK Collection or released to the public, except for a brief spike of documents in 2003-2004. This court should not let NARA off the hook for this dereliction of duty.

As a result of this dereliction of duty, President Trump was able to utilize 5(g)(2)(D) for his own purposes in 2017 and claim that he was now justified in withholding documents without being subject to the limitations of Section 6.

Plaintiffs sought relief in the Second Cause of Action, (ECF 73-2, para 162d): "The JFK Act provides for periodic review for "additional assassination records." It also cites JFK Records Act Section 5(g)(2)(A): "*A periodic review shall address the public disclosure of additional assassination records in the Collection under the standards of this Act.*"

C. The District Court ignored the remedial impetus of the JFK Records Act that mandates NARA to search for "all" assassination records

Plaintiffs' Opposition to Dismiss (ECF 87, 3:22-4:7) emphasized that

"Plaintiffs seek court findings and orders regarding theories mostly unaddressed in Defendant's motion":

"...that *NARA has a mandate to obtain "all" assassination records* pursuant to Sections 2(a)(1) and 12(b)...

"...that Sections 5 and 7 establish NARA's *duty to review possible assassination records when brought to their attention, and to direct government offices to identify and review potential assassination records.*

"...that NARA has a mandatory *duty to search for additional assassination records* pursuant to the "*any uncertainty*" standard in 5(c)(2)(F), the "*reason to believe*" standard in 5(c)(2)(H) and 7(j)(1)(C)(ii) and 12(b)."

"...Plaintiffs seek an order for NARA *to search for the "outstanding assassination record requests" and "final declaration of compliance requests" based on the above statutory scheme, the Memorandum of Understanding and the Federal Records Act.*" (Emphases added.)

The District Court never addressed the threshold question of exactly who then is responsible for the work Congress envisioned remaining when the Board closed in 1998, if it was not NARA.

However, it was clearly the intent of the Congress to get all documents to the public as quickly as possible and not after October 2017 except in the face of an "identifiable harm that is of such gravity that it outweighs the public interest in disclosure." § 5(g)(2)(D)(ii). "Public interest" is defined at § 3(10) as:

"(T)he **compelling interest** in the **prompt** public disclosure of assassination records for historical and governmental purposes and for the purpose of **fully**

informing the American people about the history surrounding the assassination of President John F. Kennedy.” (Emphasis added)

The District Court gave short shrift to these requests in its 1/18/24 order (ECF 107, 7:15-21), stating:

"Section 12(b) of the JFK Act states that, other than the provisions of the JFK Act pertaining to appointment and operation of the ARRB, “[t]he remaining provisions of this Act shall continue in effect until such time as the Archivist certifies to the President and the Congress that all assassination records have been made available to the public in accordance with this Act.” According to Plaintiffs, this imposes on NARA the duty to complete any outstanding search requests and to conduct new searches for assassination records. **However, the JFK Act levies no command on NARA to conduct such a search.**" (Emphasis added)

The District Court’s finding that “the JFK Act levies no command on NARA to conduct such a search” marked a shift from its 7/14/23 order (ECF 68, 10:2-10), which stated:

"NARA’s pattern and practice of refusing to look for documents under the JFK Act, is not a discrete agency action. An APA claim cannot seek the “wholesale improvement of [a] program by court decree.” *Lujan*, 497 U.S. at 891. For this reason, averring a pattern and practice is generally insufficient to state a claim under the APA. See, e.g., *Californians for Renewable Energy v. United States Env’t Prot. Agency*, No. C 15-3292 SBA, 2018 WL 1586211, at *19–*20 (N.D. Cal. Mar. 30, 2018).

"While Plaintiffs outline examples of NARA failing to search for documents under the JFK Act, Plaintiffs make" clear that they are challenging a **pattern and practice** of NARA, not NARA’s actions in any individual instance. Therefore, Plaintiffs are not challenging a discrete agency action." (Emphasis added)

In response to the 7/14/23 order, Plaintiffs amended the complaint to make it clear that there was **no "pattern and practice"** and that NARA's actions by refusing to look for documents in several "**individual instances**" constituted

several discrete agency actions that were incoherent and chaotic, not coherent or methodical. Plaintiffs described the approach used by NARA officer Gene Morris, who accepted recommendations to conduct further searches pursuant to the JFK Records Act, and contrasted it to the actions of NARA officer Martha Murphy, who stated that items found in a NARA index might be sought under the JFK Act, but that items not in the NARA index “fall under FOIA, rather than the JFK Act.” A third approach was exemplified by NARA general counsel Gary Stern, who simply refused to respond to any such inquiries and failed to submit researchers’ requests directly to the agencies. See Appellants’ Opening Brief, pp. 34-40.

D. Plaintiffs challenge the court's finding that "the JFK Act levies no command on NARA to conduct such a search."

In the Opening Brief to the 9th Circuit, Plaintiffs raised a number of issues. The immediate focus is on those cited below:

At page 44:

"The Court has interpreted the JFK Act so that NARA has no duty to seek more records 'in accordance with the Act'.

"(However, p)ublic transmission of “additional records” cannot be delayed without compliance with §2(a)(5) ’s finding on FOIA’s negative impact on records releases; the postponement standards of § 6, the mandate to transmit all assassination records 'to the Archivist' in 9(c)(1), the approval of postponements in § 9(c)(2), the requirements of periodic review in § 9(d)(2), and to apply the 'remaining provisions of the Act' as stated in § 12(b) – not mere compliance with § 5(g)(2)(D)."

The “Joannides documents” were requested by researcher Jefferson Morley pursuant to FOIA. Even though the actions of Joannides in relation to Lee Harvey

Oswald (were) hidden from the public until 2003 by the actions of Joannides and his superiors (see infra, as well as Morley v. CIA, 508 F.3d 1108, 1118 (D.C. Cir. 2007)), the Joannides documents have been hidden from the public in a Vaughn index for twenty years despite the protestations of three of the five former ARRB members stating that the Joannides files met the board's criteria of "assassination-related" and should be released. ER-77:22-23.

At page 46:

"The Act's mechanisms are designed to collect 'all assassination records' to provide the full history for the American people. §§ 2(a)(1), 2(a)(2), 12(b). But NARA has unreasonably delayed and unlawfully withheld responses to requests, for example, by MFF member Larry Schnapf, as well as researchers Dan Alcorn and Roger Odisio.

"The 'Joannides documents' remain unavailable due to the use by NARA and the CIA of FOIA, rather than consistent use of the JFK Records Act. NARA has refused to comply with the Memorandum of Understanding (MOU), a key tool recommended by ARRB to obtain additional assassination records."

E. The claims were not only argued thoroughly, but pled properly in Plaintiffs' Complaint.

As stated in Plaintiffs' 3rd Amended Complaint (ECF 73-2), at Paragraph 116:

"NARA is required by sections 5 and 7 of the JFK Act to undertake mandatory duties and obligations to review possible additional assassination records brought to its attention, follow up with the outstanding search requests tendered by the ARRB to certain government office, determine if such documents constitute assassination record pursuant to 36 CFR 1290 if there is any uncertainty, and then determine if the records must be disclosed.

NARA general counsel Gary Stern advised researchers to inform NARA of any assassination records that are not in the collection.

From 1998 to the present, NARA violated these mandatory duties and obligations...

And paragraph 119:

"In 2000, NARA moved the former Review Board definition of assassination records to a new subpart H (36 CFR 1290) to provide guidance for processing assassination records. 65 Fed. Reg. 39550 (June 27, 2000).

"...instead of applying the assassination records definition to such requests, NARA improperly advises citizens to use FOIA to find "assassination records" that are not in the JFK Collection; of failing to advise citizens seeking to make additional assassination records public to invoke the JFK Records Act rather to file an action based on FOIA or MDR (mandatory declassification of records), and that NARA has also failed to respond to their requests to take action to include and/or review additional assassination records to the JFK Collection.

The result has been a 25-year delay in obtaining additional assassination records from 1998 to the present, and an equivalent delay in properly advising citizens of the best way to obtain the release of additional assassination records, despite NARA's assurance to the public in 65 FR 39550 that NARA would maintain and supplement the assassination records.

This constitutes arbitrary and capricious action pursuant to 5 U.S.C. 706(2)(A)...

F. Even if this court finds no express "unequivocal commands", the text, legislative history, goals of the JFK Records Act reveal an implied delegation to NARA

As stated above, Plaintiffs contend there are "specific, unequivocal requirements" imposed on NARA that constitute final agency action.

Even if this court finds for some reason that no express unequivocal commands are imposed on NARA, Plaintiffs argue that the text, legislature history and statutory goals reveal an implied delegation to NARA. Contrary to the court's assertion, the claim that *NARA was the successor in function of the ARRB* was simply NARA carrying out responsibilities and duties impliedly delegated to NARA by Congress to implement the goals of the Act. This exercise of power was

ratified by Congress when it failed to object to NARA's carrying out these duties in the ensuing 25 years or NARA's statement that it was the successor in function in 2000.

The Supreme Court has long found that statutory silence is often a proxy for Congress authorizing an agency to fill in the details. *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019); *City of Arlington v. FCC*, 569 U.S. 290 (2013).

Evidence of an ambiguity or a gap in the statute that support an implied delegation to NARA and that the Court should have deferred to NARA's 2000 interpretation is set forth as follows:

Congress did not speak about what happens if ARRB does not complete work. Thus there is a gap or ambiguity in the statutes.

When the ARRB requested an extension of its term in 1997, Congress extended the term of the ARRB for one year, based on testimony of chair Judge John Tunheim. 143 Cong. Rec. H4137 (1997), Prepared Testimony of Judge John R. Tunheim In Support of H.R.1553 Before the National Security, International Affairs and Criminal Justice Subcommittee, House Government Reform and Oversight Committee (June 4, 1997). However, even this extension proved to be insufficient time for the ARRB to complete its work.

Because Congress had not directly spoken to the precise question at issue, the court should have recognized that there was an implied delegation to NARA. Having

given NARA numerous important roles in the declassification process, Congress would also have given the other duties of the ARRB to NARA had it been aware that the work could not be completed.

The Court should have afforded respect to NARA's interpretation of the JFK Act that it was the "successor in function" pursuant to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) that aligns with the goals of this unique statute. Factors that can support this implied delegation of authority under *Skidmore* include:

1. Congress did not know the extent of the problem when enacted. The bill sponsors received estimates of 3 to 10 years. In his statement supporting the House version of the bill (HR 454), the Archivist said NARA would be "the agency that will ultimately have to implement the joint resolution after the Board has expired." Committee on Governmental Affairs. The President John F. Kennedy Assassination Records Collection Act of 1992. S. Hrg. 102-721, 102nd Cong., 2d Sess., at 285 (1992). Congress extended the term of the ARRB. In his oversight hearing testimony, Tunheim said the ARRB would complete its work. This turned out to be wrong.

2. The ARRB final report recommendation 7 said that negotiation of a memorandum of understanding among NARA, ARRB and CIA would establish a common agreement on how to resolve the inevitable issues concerning the extensive assassination records of these two agencies. This

was particularly necessary since additional records will be sent to NARA and additional releases of documents are scheduled to take place after the termination of the Review Board. This is a *contemporary interpretation* that NARA would assume responsibilities and duties of ARRB to search and collect records. Congress did not object.

3. In the face of this statutory gap, NARA entered into a MOU with the CIA and the ARRB to address certain outstanding assassination records searches and shifted the ARRB regulations to its section of the CFR because NARA was continuing to supplement the Collection. The MOU is evidence of NARA's obligations under the Act. If NARA did not have such authority, it would have been unnecessary for NARA to be signatory. The MOU could have been between CIA and ARRB.

4. The preamble to NARA's 2000 regulation stated that NARA is continuing to supplement the Collection as successor in function to the ARRB. This was another contemporaneous interpretation that NARA would assume responsibilities and duties of ARRB to search and collect records.

5. The action of the government agencies during the Trump and Biden postponements reflect that NARA had assumed the roles performed by ARRB to the point of Archivist informing agencies that it objected to

grounds for postponement.

6. Congress assigned the Archivist the post-ARRB role to certify compliance. How can it certify without being involved in the process?

7. The congressional failure to repudiate NARA's express construction of the Act should be viewed as congressional acquiescence in that interpretation AND is evidence that Congress implicitly adopted NARA's interpretation when it passed the statute, and later extended the ARRB's existence.

8. NARA made this statement in formal rulemaking, which should be given deference pursuant to *United States v. Mead Corporation*, 533 US 18 (2001).

9. Under *Loper Bright Enters v. Raimondo*, 144 S. Ct. 2244, 2266 (2024), courts are to give the "best" reading of a statute. The District Court's ruling violated the purpose and goal of the statute, which was for NARA to absorb the ARRB's obligations.

G. The court failed to address the portion of the injunction calling a halt to NARA's incoherent approach by advising researchers to file FOIA actions rather than JFK Act requests

The court failed to address the portion of the injunction calling a halt to NARA's practice of advising researchers to file FOIA actions rather than JFK Act

requests. ER-13-14; ER-23; ER-100.

As shown below, FOIA places the burden on the government to prove its defenses to FOIA.

The JFK Act was drafted to address the inadequacies of FOIA. JFK Records Act, 2(a)(5) states:

“The Congress finds and declares that...legislation is necessary because the Freedom of Information Act, as implemented by the executive branch, has prevented the timely public disclosure of records relating to the assassination of President John F. Kennedy.”

The JFK Act was passed to address the weaknesses in FOIA, even though FOIA places the burden of proof on the defendant agency unlike other areas of administrative law. The [DOJ’s FOIA Guide: Litigation Considerations](#) states that standards and procedures that apply to FOIA lawsuits are atypical within the field of administrative law. First, the usual "substantial evidence" standard of review of agency action is replaced in the FOIA by a *de novo* review standard. *ACLU v. DOD*, 543 F.3d 59, 66 (2nd Cir. 2008). Second, the burden of proof is on the defendant agency, which must justify its decision to withhold any information. 5 U.S.C. § 552(a)(4)(B); *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991) (explaining that it is agency's burden "to justify the withholding of any requested documents").

Thus, even though FOIA is “atypical within the field of administrative law”, it was deemed to having *prevented* the timely disclosure of records relating to the

assassination of President Kennedy. FOIA must be treated as a floor when analyzing the disclosure of JFK assassination records, not a ceiling.

NARA chief executive officer William Bosanko responded to an FBI request to protect the identities of foreign law enforcement agencies by stating: “The application of this standard runs counter to the ‘clear and convincing evidence’ standard and ignores the balancing test written into JFK Act Section 6(4), which concerns the relationship between government agents and cooperating foreign governments...**In any event, the weight is on showing harm that outweighs the public interest, not the other way around.**” ER-50. (Emphasis added)

II. REBUTTAL OF DEFENDANT'S THREE MAIN POINTS

The court is asked to review Defendant's three main points in its summary of argument at its Answering Brief, pp. 12-15.

A. NARA argues that the President's certification plainly satisfied the standards of 5(g)(2)(D), despite the remedial nature of the JFK Records Act

NARA argues that the President's certification plainly satisfied the standards of 5(g)(2)(D). Answering Brief, p. 13.

It is one thing for the President to "certify" that an *identifiable harm* exists. But the very notion of an *identifiable harm* means that the harm must be identified to the public in a reasonable fashion.

In this instance, the President merely recited the language of the statute to the public, while not revealing the identity of the "identifiable harm".

The JFK Records Act is a remedial statute, and must be construed in that vein. See Section IA, above. Section 6 is designed to ensure that Section 5(g)(2)(D) would be used in conjunction with it upon the arrival of the 2017 date. It was anticipated that by 2017, virtually all the documents would have already been released. Instead, from 2000-2016, very few documents were released. ER 149-150, 157-158. Between 2017-2023, NARA released more than 76,000 documents with new information. Defendant's Answering Brief, pp. 8-10.

The Act is designed to expose secrets, not continue their existence. See the case-by-case analysis of "*identifiable harm*" in *United States Sec. & Exch. Comm'n v. Heartland Group Ventures, LLC*, 2023 U.S. Dist. LEXIS 157335 (N.D. Texas, 2023). In all instances, the underlying facts of the "identifiable harm" are revealed, so that the public receives a meaningful analysis rather than an empty ceremony.

At a minimum, the President's certification must "identify" what the harm is, using these standards that reveal to the public the "identifiable" nature of the harm:

- Section 6(1) (a threat to the US that would reveal an (A) intelligence agent, (B) intelligence source or (C) otherwise impair national security);
- Section 6(2) (substantial risk of harm to a living person who provided confidential information);

- Section 6(3) (substantial and unwarranted invasion of personal privacy);
- Section 6(4) (an understanding of confidentiality currently requiring protection between a government agent and a cooperating individual or a foreign government); or
- Section 6(5) (revelation of a security or protective procedure currently used or expected to be used).

Each of these standards align with the language of 5(g)(2)(D), and illustrate that the phrase “as required by this Act” is not mere surplusage.

Note that Section 5(g)(2)(D) states that the certification by the President must be done “as required by this Act”. The language “as required by this Act” is not referring to sections (i) or (ii), as seen below:

*"Each assassination record shall be publicly disclosed in full, and available in the Collection no later than the date that is 25 years after the date of enactment of this Act [Oct. 26, 1992], unless the President certifies, **as required by this Act**, that-*

"(i) continued postponement is made necessary by an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations; and

"(ii) the identifiable harm is of such gravity that it outweighs the public interest in disclosure.

It is clear that “**as required by this Act**” is referring to Section 6 and other

sections that must be read in harmony in order to achieve the goals of this remedial statute.

Section 6 is unambiguous on this point. It states:

*"Disclosure of assassination records or particular information in assassination records to the public may be postponed **subject to the limitations of this Act** if there is clear and convincing evidence..."*

This section does not exclude the President. Like everyone else, the President is "subject to the limitations of this Act". The plain meaning of this remedial statute? If the President does not adhere to Section 6, public disclosure may not be postponed.

One example would be that the exposure of a witness' identity will cause a substantial risk to his or her safety. This situation would be an exemption pursuant to Section 6(2). Another example would be the exposure of a location that would damage intelligence interests in keeping the location secret. This situation would be an exemption pursuant to Section 6(1)(C).

In either instance, the public is entitled to have the harm "identified" and not "buried" in language designed to hide the nature of the harm. The purpose of the statute is clear: No one can be given a blank check to redact whatever is desired. There must be accountability for any redactions. That is the purpose of Section 6. If the President won't obey it, then NARA has to "be the adult in the room" and ensure that the President does not engage in *ultra vires* conduct. If NARA won't

obey it, then it is the role of the courts to step in and protect this remedial statute.

Any other interpretation would not align with 5(g)(2)(D), which states that that the President must certify "*an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations...of such gravity that it **outweighs** the public interest in disclosure.*" 5(g)(2)(D) mandates not only that the President and NARA must move forward "*as required by the Act*", but also state the *identifiable harm of such gravity that it outweighs the public interest.*

B. NARA argues that Plaintiffs have not identified any specific, unequivocal requirement to compel agency action unlawfully withheld under the APA

1. The District Court never addressed Plaintiffs' argument that JFK Act Section 11(a) supersedes all statutory law and case law, including the APA

The JFK Records Act prevents NARA from raising any defense to "transmission of documents or public disclosure of documents" based on APA. Section 11(a) supersedes all statutory law and case law -an argument unaddressed by the District Court (Opening Brief, pp. 49-50)

The District Court never addressed Plaintiffs' 11(a) argument in its orders and findings. NARA only addressed it in a footnote at page 30 in the Answering Brief to this court, arguing that "the APA has nothing to do with the disclosure of government records. Rather, it provides a cause of action for plaintiffs who seek to challenge final agency action."

Plaintiffs' argument is different. While the APA acts as a "sword" to provide a cause of action for the Plaintiffs, it cannot be used as a "shield" for the narrow purpose of preventing transmission of documents to the Archivist or public disclosure of documents" This is because 11(a) states that "*when this Act requires transmission of a record to the Archivist or public disclosure, it shall take precedence over any other law...judicial decision construing such law, or common law doctrine that would otherwise prohibit such...disclosure...*".

2. Even if Section 11(a) is somehow inapplicable to the APA, Plaintiffs' Opening Brief cited three "specific, unequivocal requirements" pursuant to the APA

Plaintiffs' Opening Brief cited three specific, unequivocal requirements pursuant to the APA:

(1) Section 12(b) mandates that NARA is "specifically commanded" to undertake the "remaining averred duties" and obtain the additional assassination records that have been identified by the ARRB. (Opening Brief, pp. 46-49)

(2) 65 FR 39550 (6/27/00) in the Federal Register states: "NARA continues to maintain and supplement the collection under the provisions of the Act. NARA is, therefore, the successor in function to this defunct independent agency...agencies continue to identify records that may qualify as assassination records and need to have this guidance available." (Opening Brief, pp. 50-53)

(3) Researcher requests for JFK documents cannot be handled in an

incoherent or chaotic manner, vacillating between referral to JFK Act, referral to FOIA, and/or no response at all. (Opening Brief, pp. 34-40, 44-49)

3. NARA argues that the death of witnesses during the pendency of this litigation does not constitute irreparable harm

NARA claims that MFF claims only one irreparable harm - that unspecified witnesses might die during the pendency of this litigation (Answering Brief, p. 14)

First off, there are many living witnesses we could have specified, but the statements of all of them boil down to one essential point: The fundamental purpose of the JFK Act was to preserve the history of the assassination. To preserve the history of the assassination, their statements should be obtained before they die. These names should have been provided by 1998, before falling into a prolonged period of inaction by NARA between 2000-2016 that culminated with a "hurry-up-and-wait" set of partial disclosures in 2017. ER 149-150; 157-158.

Why would anyone let the last remaining witnesses die - who are in their 80s and 90s - and lose the last first-hand witnesses to the history of the assassination?

To provide one example instead of hundreds, Plaintiffs specified three witnesses: "the identity of the CIA asset NIEXIT-3 has still not been revealed – he had two Dallas contacts stating that JFK was killed due to a joint operation by the Chinese Communists and Castro." (Opening Brief, pp. 50-53) These three witnesses illustrate how many more are out there. Why should researchers be

forced to interview second-hand witnesses - such as family members - when the original sources are elderly but still alive?

The most charitable way to rebut the government's argument is that it simply illogical. Waiting until these witnesses die is not a reasonable path of interpreting a remedial statute designed to preserve the history of the JFK assassination.

III. REVIEW OF THE CASES OF *NORBET* AND *CUNNINGHAM* REVEALS THAT THE FULL TEXT OF *CUNNINGHAM* PROVIDES THE PERSUASIVE AUTHORITY FOR PENDENT JURISDICTION IN THIS CASE

In Plaintiffs' Opening Brief (pp. 11-12), Plaintiffs argued that the operative law on pendent jurisdiction was set forth in the latest 9th Circuit case of *Dominguez v. Better Mortg. Corp.*, 88 F.4th 782, 794-795 (9th Cir. 2023):

“We may find an additional issue to be inextricably intertwined only if ‘we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal....(or) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue.’ *Cunningham v. Gates*, 229 F. 3d 1271, 1285 (9th Cir. 2000).

“In this case, both aspects of the test are applicable. The court must decide the issues of the motions to dismiss of July 2023 and January 2024 in order to review the claims of injunctive relief and mandamus properly raised on interlocutory appeal. At the same time, resolution of the claims of injunctive...relief will necessarily resolve the matters dismissed by the district court.”

NARA's Answering Brief states in response:

“The court's decision to grant in part Defendants' motion to dismiss is not inextricably linked with the court's decision to deny Plaintiffs' requests for

preliminary injunction. ‘Whether two issues are “inextricably intertwined” is ‘narrowly construed’’. Norbet v. City & County of San Francisco, 10 F.4th 918, 937 (9th Cir. 2021) (quoting Meredith v. Oregon, 321 F.3d 807, 813 (9th Cir. 2003)). ‘Two issues are not “inextricably intertwined” if we must apply different legal standards to each issue.’ Meredith, 321 F.3d at 814 (quoting Cunningham v. Gates, 229 F.3d 1271, 1285 (9th Cir. 2000)). The legal standard for evaluating a motion for preliminary injunction is distinct from the legal standard governing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See Norbet, 10 F. 4th at 937.’”

The above-described findings within *Cunningham* appear to be contradictory, until the reader reviews the full text of the *Cunningham* passage within the full text of the *Norbet* passage, *id.*, at 937:

*“Pendent appellate jurisdiction permits us to review certain interlocutory orders, not otherwise appealable, if the issues are either “inextricably intertwined” with or ‘necessary to ensure meaningful review of’ decisions over which we have jurisdiction.” Meredith v. Oregon, 321 F.3d 807, 812 (9th Cir. 2003), amended, 326 F.3d 1030 (9th Cir. 2003) (quoting Swint v. Chambers Cnty. Comm’n, 514 U.S. 35, 51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)). Whether two issues are “inextricably intertwined” is “narrowly construed.” Meredith, 321 F.3d at 813. We have held that “[t]wo issues are not ‘inextricably intertwined’ if we must apply different legal standards to each issue.” Id. at 814 (quoting Cunningham v. Gates, 229 F.3d 1271, 1285 (9th Cir. 2000)). Instead, “the legal theories on which the issues advance must either (a) be so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue.” Id. (quoting Cunningham, 321 F.3d at 1285); see [**46] also Puente Arizona v. Arpaio, 821 F.3d 1098, 1109 (9th Cir. 2016).*

“The requirements for pendent appellate jurisdiction are not met here. Whether the Sheriff’s Department is a separate legal entity has no legal or factual commonalities with the preliminary injunction. Similarly, the legal standard and some of the relevant facts governing qualified immunity are different from the analysis we perform in determining whether plaintiffs are entitled to a preliminary injunction. In neither case do we need to decide these pendent issues to consider plaintiffs’ cross-appeal of the preliminary injunction order, nor does our

resolution of that cross-appeal necessarily resolve the allegedly pendent issues. Meredith, 321 F.3d at 814. It is also not necessary to decide the pendent issues in order meaningfully to review the preliminary injunction order. Id.

“We therefore lack appellate jurisdiction to consider the merits of the district court's order dismissing the Sheriff's Department and the individual defendants.”

When the *Cunningham* passage is read in its entirety, it is clear that the requisite standard is met when the interlocutory appeal issue must be resolved to reach the pendent issue, or the pendent issue must be resolved in order to reach the interlocutory appeal issue. The *Norbet* passage provides added context.

In the instant case, the issues surrounding the Plaintiffs' request for equitable relief cannot be addressed unless the propriety of the motion to dismiss is addressed. Or, to look at it in the other way, this court must find the motion to dismiss was improper in order to review the propriety of the District Court's refusal to grant equitable relief.

CONCLUSION

For the reasons stated, the court should reverse the Order granting in part and denying in part Defendant's Motion to Dismiss, and issue an order that the Plaintiffs may proceed on all three causes of action as stated in the Third Amended Complaint.

For the same reasons, the equitable relief sought by Plaintiffs should be granted.

Respectfully submitted,

Dated: August 13, 2024

s/ William M. Simpich

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Attorney for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,977 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6). I certify that this brief complies with the word limit of Cir. R. 32-1

s/ William M. Simpich

William M. Simpich

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ William M. Simpich

William M. Simpich