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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE MARY FERRELL FOUNDATION, INC.; JOSIAH THOMPSON; and GARY AGUILAR, Plaintiffs, v. JOSEPH R. BIDEN, in his official capacity as President of the United States; and NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, Defendants.	No. 3:22-cv-06176-RS **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT** Hearing Date: July 13, 2023 Time: 1:30 p.m. Judge: Richard Seeborg

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INTRODUCTION

In accordance with the John F. Kennedy Assassination Records Collection Act of 1992, the federal government has disclosed millions of pages of records relating to the Kennedy assassination. From 1994 to 1998, an independent federal agency—the Assassination Records Review Board—worked to disclose tens of thousands of additional records and issued a comprehensive final report. By December 2021, all records in the possession of the National Archives had been disclosed in full or in part, with only around 16,000 records released with redactions. By December 2022, the government disclosed more than 13,000 of these records in full.

The President has determined that postponing full public disclosure of the remaining redactions is necessary to protect against harm to "the military defense, intelligence operations, law enforcement, or the conduct of foreign relations." 12/15/2022 Memo §§ 3,4. Plaintiffs challenge the President's determination and seek an injunction requiring the President to issue a new memorandum explaining how he complied with the JFK Act. But the Supreme Court has long recognized that federal courts lack jurisdiction to impose declaratory or injunctive relief against the President himself. Plaintiffs cite cases involving injunctions against the President's *subordinate* officials, but that is fundamentally different from the extraordinary relief that Plaintiffs seek against the President himself. And even if the Court had jurisdiction to issue such an injunction, Plaintiffs have not shown that the President exceeded his statutory authority under the JFK Act.

Plaintiffs' claims against NARA fare no better. Plaintiffs allege that NARA has not complied with certain "ministerial" duties under the JFK Act, such as obtaining "declarations of compliance" from agencies, but the Act imposes no such duties on NARA. Plaintiffs cannot rely on duties of the Review Board, as NARA is a separate legal entity from the Board, and the JFK Act makes clear that its provisions relating to the Board terminated when the Board itself terminated in 1998. Defendants' motion to dismiss should be granted.

ARGUMENT

I. PLAINTIFFS' CLAIMS AGAINST THE PRESIDENT SHOULD BE DISMISSED

A. The Court Lacks Jurisdiction Over Plaintiffs' Claims Against the President

Federal courts have repeatedly recognized, since at least *Mississippi v. Johnson*, 71 U.S. 475 (1866), that "[w]ith regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief." *Newdow v. Roberts*, 603 F.3d 1002, 1003 (D.C. Cir. 2010); *see also Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017) ("[W]e find that the district court erred in issuing an injunction against the President himself."), *vacated and remanded on other grounds*, 138 S. Ct. 353 (2017); Defs.' Mot. to Dismiss ("Mot.") 9–10 (collecting cases). This Court therefore lacks jurisdiction over Plaintiffs' claims against the President himself.

Plaintiffs contend that the "cases indicate otherwise," Opp. 12, but nearly all of the cases that Plaintiffs cite are distinguishable because they involve injunctions against the President's *subordinates*, not the President himself. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court upheld an injunction "restraining the Secretary [of Commerce]" on the ground that the President had exceeded his constitutional authority in directing the seizure of steel production facilities. *Id.* at 584. In *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), the D.C. Circuit held that the plaintiff could proceed with its claims "directed at a subordinate executive official," the Secretary of Labor. *Id.* at 1331 n.4. And in *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. 2019), the district court issued an injunction against subordinate officials but concluded "that an injunction against the President personally is not warranted." *Id.* at 928 n.23. The Ninth Circuit did not address the issue on appeal. *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020), *vacated*, 142 S. Ct. 46 (2021); *see also Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (holding that plaintiffs had standing because their injuries could be redressed "by declaratory relief against the Secretary [of Commerce]," a subordinate official).

Here, Plaintiffs in Counts One and Two are seeking injunctive and declaratory relief against the President himself, not his subordinate officials. That distinction is critical. "[I]n general," courts have "no jurisdiction . . . to enjoin the President in the performance of his official duties."[1] *Franklin*, 505 U.S. at 802–03 (quoting *Johnson*, 71 U.S. at 501); *see also Newdow*, 603 F.3d at 1003; *Int'l Refugee Assistance Project*, 857 F.3d at 605.

The other cases on which Plaintiffs rely are likewise distinguishable. Plaintiffs cite *Nat'l Treasury Emps. Union ("NTEU") v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974), in which the D.C. Circuit reversed the dismissal of a mandamus action against the President and suggested that, on remand, the district court would have authority to issue declaratory relief against the President. *Id.* at 616. But since the Supreme Court's decision in *Franklin*, the D.C. Circuit has questioned "whether, and to what extent, [*NTEU*]"—which would not be binding on this Court in any event—"remain[s] good law." *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996); *see also Ctr. for Democracy & Tech. v. Trump*, 507 F. Supp. 3d 213, 226 n.6 (D.D.C. 2020) ("[I]t is not clear that *NTEU* remains good law.").

Moreover, *NTEU* dealt only with an alleged "ministerial" duty of the President, 492 F.2d at 616, and Plaintiffs do not seek to enforce a "ministerial" duty here. *See Johnson*, 71 U.S. at 498–99 ("ministerial duty" is one "to which nothing is left to discretion" and is a "simple, definite duty" to perform "a single[,] specific act"). By contrast, Plaintiffs seek an injunction broadly requiring the President to issue a new memorandum explaining how he complied with the JFK Act. *See* Second Am. Compl., Prayer for Relief ¶¶ 5(a)–(b). These are not purely "ministerial" actions, but are discretionary determinations that Congress has entrusted to the President. *See,*

[1] Plaintiffs suggest that this statement in *Franklin* is "*dicta*" because the Court did not ultimately reach the issue, holding instead that plaintiffs' injuries could be redressed by declaratory relief against the Secretary alone. Opp. 13. But *Franklin* was quoting the *holding* of *Johnson*, which remains binding precedent. In any event, "considered Supreme Court dictum is special," and courts "do not treat [it] lightly" but rather "accord it appropriate deference." *United States v. Augustine*, 712 F.3d 1290, 1295 (9th Cir. 2013) (quoting *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000)).

e.g., *Franklin*, 505 U.S. at 800 (President's sending of census apportionment results to Congress is not "ministerial"); *Ctr. for Democracy & Tech.*, 507 F. Supp. 3d at 225 (President's issuance of executive order was an "exercise of the President's official duties," not a "ministerial act"). Thus, even if *NTEU* were good law, it is inapposite. *See, e.g.*, *Page v. Biden*, No. 20-CV-104, 2021 WL 311002, at *4 (D.D.C. Jan. 29, 2021) (distinguishing *NTEU* on this basis); *Ctr. for Democracy & Tech.*, 507 F. Supp. 3d at 226 n.6 (same).

Plaintiffs also cite *Stone v. Trump*, 400 F. Supp. 3d 317 (D. Md. 2019), in which a district court declined to dismiss a claim for declaratory relief against the President. *Id.* at 359–60. To support that conclusion, the district court cited *Clinton v. New York*, 524 U.S. 417 (1998), where the Supreme Court stated in a footnote that the plaintiffs' injuries caused by the President's line-item veto "would be redressed by a declaratory judgment that the [veto was] invalid." *Id.* at 433 n.22. But *Clinton* did not address the propriety of issuing injunctive relief against the President himself. As in *Youngstown*, *Franklin*, and *Reich*, the plaintiffs in *Clinton* also named "other federal officials" subordinate to the President against whom declaratory relief could run. *Id.* at 424. Thus, the Court's statement in *Clinton* that the plaintiffs' injuries could be "redressed by a declaratory judgment" does not suggest that the court would have jurisdiction to enter a declaratory judgment against the President himself. To the contrary, "caselaw strongly suggests that [declaratory] relief [against the President] is inappropriate." *Ctr. for Democracy & Tech.*, 507 F. Supp. 3d at 225; *see also Newdow*, 603 F.3d at 1003; *Page v. Biden*, No. 20-CV-104 (CRC), 2021 WL 311002, at *4 (D.D.C. Jan. 29, 2021), *aff'd*, 2021 WL 4767945 (D.C. Cir. Oct. 1, 2021).[2]

Plaintiffs also contend that section 11(c) of the JFK Act provides for judicial review of their claims against the President. Opp. 2. Not so. Section 11(c) provides that "[n]othing in this

[2] *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), is distinguishable for the same reason. *See* Opp. 14. In that case, the district court granted an emergency motion for a temporary restraining order against all "Federal Defendants," which included the President and a number of other federal officials. 2017 WL 462040, at *2. In that emergency posture, the district court did not analyze the propriety of entering injunctive relief against the President himself. *Id.* at *1.

Act shall be construed to preclude judicial review, under chapter 7 of title 5, United States Code, of final actions taken or required to be taken under this Act"—*i.e.*, the Act does not preclude review under the Administrative Procedure Act ("APA"). But the APA provides for judicial review only of "agency" action, and the President is not an "agency" within the meaning of the APA. *Franklin*, 505 U.S. at 796, 801. Plaintiffs thus cannot rely on section 11 to assert claims against the President directly. This does not render the JFK Act "[un]enforceable," as Plaintiffs contend. Opp. 3. The APA authorizes challenges to final *agency* action on the grounds that it is arbitrary-and-capricious or contrary to law, 5 U.S.C. § 706, and Plaintiffs could seek to bring claims (and have brought claims) against NARA on that basis. But such a challenge must be brought against an "agency" such as NARA, not the President himself. *Franklin*, 505 U.S. at 801. Accordingly, Counts One and Two should be dismissed.

B. Plaintiffs Fail to State a Claim that the President Acted *Ultra Vires*

Even if the Court had jurisdiction over Plaintiffs' claims against the President, those claims fail as a matter of law. Even where an *ultra vires* claim does not involve presidential action, a plaintiff must show that the challenged agency action contravened "clear and mandatory" statutory language. *Pac. Mar. Ass'n v. Nat'l Lab. Rels. Bd.*, 827 F.3d 1203, 1208 (9th Cir. 2016) (citation omitted). Plaintiffs contend that the Biden Memoranda are deficient in five separate respects, *see* Opp. 15–21, but none of these allegations comes close to stating an *ultra vires* claim.

1. <u>The President was not required to articulate harms on a record-by-record basis</u>

Contrary to Plaintiffs' contention, the President was not required to articulate the harms from potential disclosure on a "record-by-record" basis. Mot. 12–13. In contending otherwise, Plaintiffs principally rely on Congress's use of the word "each" in Section 5(g)(2)(D) of the JFK Act. Opp. 20. But the word "each" in Section 5(g)(2)(D) specifies *which* records must be publicly disclosed if the President does not issue the certification under that section—*i.e.*, "each" withheld record must be publicly disclosed if the President does not make the certification. But that does not mean that the President must articulate an individualized harm on a record-by-record basis.

Rather, the statute provides only that the President need certify that "continued postponement is made necessary by an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations," which is precisely what the President certified here. JFK Act § 5(g)(2)(D).

The statute's structure further refutes Plaintiffs' interpretation. Section 5(g) concerns "Periodic Review of Postponed Assassination Records" and generally requires agencies to conduct periodic assessments as to whether records should continue to be postponed. Section 5(g)(2) then provides a deadline by which all such periodic reviews would come to a close, and all records would be released in full, *unless* the President postpones the deadline. The structure of the statute thus underscores that the deadline in Section 5(g)(2) is a global deadline pertaining to the release of all records, and that the President could postpone that deadline by making the requisite certification.[3]

Plaintiffs' contrary argument assumes that Congress intended to require the President to personally identify an individualized harm for each postponed record and explain why that harm outweighs the interest in disclosure. Such a requirement would impose an extraordinary burden on the President. While millions of pages of records have been disclosed under the JFK Act, and no documents in NARA's possession remain withheld in full, there still remain thousands of redactions that have been postponed for disclosure for national security reasons. Mot. 4–8. If Congress had intended to require the President to personally articulate an individualized harm associated with each record, it would have said so expressly. But the statute Congress enacted

[3] NARA has not taken a contrary view. Plaintiffs cite a 2012 letter from NARA's general counsel suggesting that the President must "certif[y] on a document by document basis that continued postponement is necessary" and contend that this "interpretation . . . [is] entitled to deference under *Chevron*." Opp. 20. As an initial matter, it is not even clear that this statement that the President must "certif[y]" that continued postponement is necessary on a document-by-document basis is inconsistent with the government's position that the President need not articulate an individualized, record-by-record justification when he issues the certification. In any event, the Court should not resort to *Chevron* because the statute is unambiguous. And even if it were not, *Chevron* deference would not be warranted because the letter "lack[s] the force of law" and so "do[es] not warrant *Chevron*-style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

requires only that the President certify that continued postponement is necessary by *an* identifiable harm, not that the President articulate an individualized harm for each record.

It is also unclear what purpose such a requirement would serve. Each agency requesting further postponement of records has provided a letter describing the types of information proposed for postponement and an index listing the relevant records and the reasons for postponement. *See* NARA, Agency Postponement Documentation, https://www.archives.gov/research/jfk/agency-doc-2022. Those letters and indices are publicly available on NARA's website. *Id.* The President made his Section 5(g)(2)(d) certification in light of the agencies' proposals and the Archivist's recommendation. 87 Fed. Reg. at 77,968. Plaintiffs do not explain what would be gained by requiring the President to restate the document-by-document reasons that the agencies themselves identified when they requested postponement.

2. Plaintiffs cannot state a claim based on Section 6 of the JFK Act

The President did not violate Section 6 of the JFK Act in issuing the postponement memoranda. Section 6 sets forth the standards that federal *agencies* must apply to determine whether records meet the standard for postponement of public disclosure under the Act. *See* Mot. 15; JFK Act § 5(c)(2)(D) (directing Government offices to specify "the applicable postponement provision contained in section 6" within 300 days after passage of the Act). In that context, federal agencies must determine whether there is "clear and convincing evidence" that one of five statutory exceptions applies, including whether disclosure would "reveal the name or identity of a living person who provided confidential information," "constitute an unwarranted invasion of personal privacy," or "compromise the existence of an understanding of confidentiality" with a cooperating witness or a foreign government. JFK Act § 6.

The President's decision whether to postpone the 25-year deadline of Section 5(g)(2)(D) involves a different determination of harm. In that context, the Act provides that the 25-year deadline will be postponed if the President certifies that "continued postponement is made necessary by an identifiable harm to the military defense, intelligence operations, law enforcement,

or conduct of foreign relations" and that harm "outweighs the public interest in disclosure." Plaintiffs contend that this determination "fit[s] neatly" with the exceptions listed in Section 6, Opp. 19, but there are important differences. For example, an unwarranted invasion of personal privacy is sufficient to postpone the disclosure of a record under Section 6(3), but not to postpone the 25-year deadline of Section 5(g)(2)(D).

In any event, Congress used different language in Sections 5(g)(2)(D) and 6, omitting any "clear and convincing standard" from Section 5(g)(2)(D). Courts "generally presume[e] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (quoting *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 537 (1994)). Plaintiffs' interpretation fails to take account of these key differences between the two sections.

3. The President did not violate the JFK Act in directing that Transparency Plans be used to conduct future reviews

Plaintiffs identify no "clear and mandatory" statutory provision that prevents the President from directing agencies to use the Transparency Plans to conduct future reviews. *Pac. Mar. Ass'n*, 827 F.3d at 1208 (9th Cir. 2016). Plaintiffs contend that the Transparency Plans are "unauthorized" because they "use . . . non-statutory criteria," Opp. 17, but the plans are fully consistent with the JFK Act. The Act authorizes the President to postpone the disclosure of assassination records if he makes the required certification under Section 5(g)(2)(D), which the President has done. Nothing in the Act prohibits the President from using Transparency Plans to conduct future reviews of records whose disclosure has been postponed under Section 5(g)(2)(D).

Plaintiffs object that some of the Transparency Plan's "event-based" triggers for disclosure are not found in the JFK Act itself. Opp. 18. For example, Plaintiffs note that one Department of Defense document has been redacted to "protect[] yields of current nuclear weapon system; disclosure of which would violate the Atomic Energy Act of 1954 and hinder current U.S. nuclear war planning and civil defense." *See* Simpich Decl. Ex. F at 39, ECF No. 51. The Department of Defense Transparency Plan explains that this document will be disclosed in full when "the nuclear

weapons system is no longer part of the U.S. nuclear arsenal, when any harm from the release of weapons yields of nuclear weapons systems impacting U.S. nuclear war planning and civil defense no longer outweighs the public interest in access to [the] information." *Id.* at 40; *see also* Opp. at 40. But this is entirely consistent with the JFK Act, which expressly authorizes the President to postpone disclosure when doing so is necessary to prevent harm to the military defense. JFK Act § 5(g)(2)(D).

Plaintiffs also object that under the Transparency Plans, some records "will remain withheld indefinitely," beyond the 2017 "sunset clause." Opp. 17. But, again, the Act expressly authorizes the President to postpone the disclosure of records on national security grounds, and nothing in the Act limits the duration of the postponement. There are sound reasons why Congress entrusted the President to postpone the disclosure of documents that threaten the national defense until the risk has abated. The JFK Act did not require that all records be disclosed within 25 years; it expressly carved out an exception for documents that the President determines would harm national security if disclosed.

Plaintiffs also contend that the Transparency Plans "ignore the 'clear and convincing standard' for review in § 9(c)(1)" of the JFK Act. But Section 9(c)(1) addresses only the standard that the "Assassination Records Review Board" shall direct agencies to apply. The Review Board was terminated twenty-five years ago, and Section 9(c)(1) does not address the standard that the President is to apply in postponing the disclosure of records under Section 5(g)(2)(D).

4. Plaintiffs have not stated a claim that the President violated Executive Branch regulations

Plaintiffs do not respond to Defendants' three arguments why their claim that the President violated "1 CFR Part 19" fails as a matter of law. *See* Mot. 15–16. Plaintiffs do not explain how they have standing to challenge the Biden Memoranda on this basis. *Compare* Mot. 15 *with* Opp. 21. Nor do they identify any clear and mandatory statutory language that the President allegedly contravened. Plaintiffs' only response is to say that "Defendants supplied no evidence that the President complied with th[e] procedural requirement" that the Department of Justice review

executive orders, Opp. 21, but of course Defendants were not required to "suppl[y] evidence" to refute a claim that is not plausibly alleged. In any event, undersigned counsel has represented that the Department of Justice did, in fact, review the Biden Memorandum to ensure that they comply with applicable law. Mot. 15, ECF No. 40 at 11.

5. Plaintiffs have not stated a claim that the President unlawfully postponed the disclosure of Legislative Branch records

As Defendants explained in their motion, Section 5(g)(2)(D) grants the President the power to postpone the 25-year deadline that applies to all "assassination record[s]," and does not distinguish between Legislative and Executive Branch records. Mot. 22–23.

Plaintiffs do not dispute that Section 5(g)(2)(D) grants the President this power, but contend that the power "is modified by §§ 9(c)(4)(B), 9(d)(1), and 9(d)(2)." Opp. 17. But none of these provisions says that the President cannot postpone the disclosure of Legislative Branch records. Section 9(c)(4)(B) simply states that once the Review Board determines that an assassination record shall be publicly disclosed, it shall provide notice to the President for determinations regarding Executive Branch records and to congressional oversight committees as to Legislative Branch records. This provision has nothing to do with presidential postponement under Section 5(g)(2)(D).

Sections 9(d)(1) and 9(d)(2) are similarly inapposite. Section 9(d)(1) provides that after the Review Board has made a determination concerning disclosure of an Executive Branch assassination record, the President shall have authority to require the disclosure or postponement of such record. Again, the provision says nothing about the President's postponement authority under Section 5(g)(2)(D) or suggests in any way that the President lacks authority to postpone that deadline as to Legislative Branch records. Section 9(d)(2) simply says that any Executive Branch assassination record postponed by the President shall be subject to the requirements of periodic review set forth in Section 4. Again, the provision says nothing to suggest that the President lacks

authority under Section 5(g)(2)(D) to postpone the 25-year deadline as to Legislative Branch records.[4]

C. Plaintiffs Fail to State a Mandamus Claim Against the President

For the same reasons that Plaintiffs fail to state an *ultra vires* claim against the President, Plaintiffs fail to state a mandamus claim against him. Mot. 16–17. Plaintiffs' mandamus claim alleges four violations of the JFK Act, three of which are addressed above. *See* Compl. ¶ 144 (alleging failure to use "clear and convincing standard," failure to provide unclassified written description, and failure to ensure description is published in Federal Register).

Plaintiffs also alleged in their mandamus claim that the President violated the JFK Act by "[f]ailing to ensure periodic review of the postponed releases." Compl. ¶ 144(d). Defendants explained in their motion to dismiss that this claim fails because the Act states only that the "originating agency and the Archivist"—not the President—are to periodically review postponed or redacted records. Mot. 17 (quoting JFK Act § 5(g)(1)). Plaintiffs fail to address this argument in their opposition, and have therefore "abandon[ed] the claim." *Moore*, 73 F. Supp. 3d at 1205.

II. PLAINTIFFS CANNOT STATE AN ARBITRARY-AND-CAPRICIOUS CLAIM AGAINST NARA

Plaintiffs identify no discrete, final agency action that could support an arbitrary-and-capricious claim against NARA under Section 706(2)(A) of the Administrative Procedure Act. *See* Mot. 17–19. Plaintiffs generally complain that NARA has not "engage[d] in a serious effort to identify documents as 'assassination records'" and has a "custom" of recommending that researchers requests records through FOIA. Opp. 28. But nowhere do Plaintiffs identify "some *particular* 'agency action' that causes [them] harm." *Whitewater Draw Nat. Res. Conservation*

[4] Plaintiffs' Complaint also alleged that the President was required to provide an "unclassified written description" for each record of the reasons for continued postponement. *See* Compl. ¶ 133(c). Defendants explained in their motion to dismiss that this claim fails as a matter of law because the JFK Act imposes no such requirement on the President. Mot. 13–14. Plaintiffs fail to address this argument in their opposition. "Such a failure in an opposition brief constitutes abandonment of the claim." *Moore v. Apple, Inc.*, 73 F. Supp. 3d 1191, 1205 (N.D. Cal. 2014).

Dist. v. Mayorkas, 5 F.4th 997, 1010 (9th Cir. 2021) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)).

Plaintiffs contend that the "final agency action" requirement is "pragmatic," citing the Supreme Court's decision in *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590 (2016). In that case, the Court held that a U.S. Army Corps of Engineers "jurisdictional determination" was a "final agency action" reviewable under the APA. *Id.* at 597–600. The determination was "issued after extensive factfinding by the Corps," and "mark[ed] the consummation of the Corps' decisionmaking process." *Id.* at 597. The definitive nature of the decision also gave rise to "direct and appreciable legal consequences" that "b[ou]nd" the federal government and determined whether property holders could rely on a "safe harbor" against civil enforcement proceedings. *Id.* at 598–99.

Plaintiffs allege nothing like that here. Plaintiffs say that they challenge "five actions" allegedly taken by NARA: "(1) [t]he Transparency Plans; (2) [t]he President's refusal to comply with Section 6; (3) [t]he President's refusal to comply with 1 CFR 19; (4) [t]he failure to release the legislative branch records; and (5) NARA's practice of either referring researchers . . . to FOIA or failing to respond to their queries." Opp. 24–25. As an initial matter, three of these five actions were not even taken by NARA. The Transparency Plans were prepared by other federal agencies and approved by the President. And "the President's" alleged refusal to comply with Section 6 of the JFK Act and 1 C.F.R. Part 19 is an alleged action taken by the President, not NARA.

Plaintiffs' challenge to NARA's alleged "practice" of referring researchers to FOIA or failing to respond to their queries is likewise not a "discrete" final agency action that is challengeable under the APA. Such a generalized challenge to an alleged agency pattern and practice does not satisfy the APA's requirement that a plaintiff identify a *discrete*, final agency action that affects a party's rights or legal obligations. *Whitewater Draw Nat. Res. Conservation Dist.*, 5 F.4th at 1012. And while an agency's alleged failure to release specific Legislative Branch records in the face of a mandatory and binding congressional deadline might satisfy the "final

agency action" requirement, as explained above, the President has (lawfully) postponed the disclosure of those records. NARA did not act arbitrarily and capriciously in following that Presidential direction.

Plaintiffs also observe that agency "policy statements" can constitute final agency action. Opp. 32 (citing *Gill v. DOJ*, 913 F.3d 1179 (9th Cir. 2019)). But the policy statement must still "mark the consummative of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (holding that the promulgation of a "functional standard" that governed sharing of terrorism-related information was final agency action). In any event, plaintiffs do not identify any "policy statement" promulgated by NARA that they believe is arbitrary and capricious. *See* Opp. 32.

Even if Plaintiffs had alleged some discrete final agency action that caused them harm, their arbitrary-and-capricious claim would fail as a matter of law. Mot. 19. NARA has acted in accordance with the Biden Memoranda and, as explained above, those Memoranda are lawful. *See supra*, Section I.B. Accordingly, Count Three should be dismissed.

III. PLAINTIFFS CANNOT STATE A CLAIM TO COMPEL NARA TO ACT UNDER THE APA OR MANDAMUS STATUTE

Plaintiffs' claim seeking to compel NARA to act under Section 706(1) of the APA or mandamus statute also fails as a matter of law. To state such a claim under Section 706(1), Plaintiffs must allege that NARA failed to comply with an "unequivocal command" to "take a discrete agency action" that is "so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Plaskett v. Wormuth*, 18 F.4th 1072, 1081 (9th Cir. 2021) (citation omitted). To state a mandamus claim, Plaintiffs must allege these same elements and also that "no other adequate remedy is available." *Id.*

Plaintiffs contend that "[u]nreasonable delay is an exception to the final agency action requirement." Opp. 25. But Plaintiffs must still "identify[] a discrete agency action" that NARA was required to—but did not—take. *Whitewater Draw Nat. Res. Conservation Dist.*, 5 F.4th at 1011 n.6. "[I]n *Southern Utah Wilderness Alliance*, the Court made clear that a plaintiff cannot

obtain judicial review by simply recasting his or her challenge 'in terms of 'agency action unlawfully withheld' under § 706(1), rather than agency action 'not in accordance with law' under § 706(2)." *Id.* (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64–65 (2004)).

Plaintiffs contend that NARA failed to comply with the Act in three ways, but, as explained below, none of Plaintiffs' allegations states a claim under either § 706(1) or the mandamus statute.

1. The JFK Act does not require NARA to secure declarations of compliance from federal agencies

Plaintiffs' complaint alleges, on information and belief, that NARA failed to comply with an alleged "ministerial non-discretionary duty" to "complete the ARRB Compliance Program by seeking Final Declarations of Compliance from agencies." Compl. ¶ 162(f). But, as Defendants explained in their motion to dismiss, the JFK Act contains no provision requiring any entity (let alone NARA specifically) to seek or obtain such declarations. Mot. 20–21. Plaintiffs' opposition brief does not identify any provision of the JFK Act requiring NARA or any other entity to secure such declarations. Plaintiffs' only reference to this issue is an assertion that the Secret Service and DEA, which are not parties to this case, "failed to complete the Declarations of Compliance." Opp. 22. Because no statutory provision requires NARA to seek final declarations of compliance, Plaintiffs cannot state a claim seeking to compel NARA to seek such declarations.

2. The JFK Act does not require NARA to "follow up" on outstanding search requests

Nor does the JFK Act impose on NARA any ministerial, non-discretionary duty to "follow up" on outstanding search requests. *See* Mot. 21; Compl. ¶ 162(g). Plaintiffs cite Section 5(c)(2)(H) of the Act, but that provision states simply that in identifying assassination records for the Review Board, federal agencies shall "make available to the Review Board any additional information and records that the Review Board has reason to believe it requires for conducting a review under this Act." Plaintiffs cannot rely on this provision to state an APA failure-to-act or mandamus claim against NARA for at least three reasons.

First, Section 7(j)(1)(C) does not "unequivocal[ly] command" the Review Board (or NARA) to take any "discrete agency action." *Plaskett*, 18 F.4th at 1082. Rather, the provision

requires other federal agencies to provide information to the Review Board if it would be helpful to the Review Board's review of the record. The Act does not require the Review Board to request searches, to "follow up" on search requests, or to "refer[] [search] request[s]" to federal agencies, as Plaintiffs suggest. Opp. 22–23. Rather, the Act confers on the Review Board the *discretion* to exercise its power to make requests of federal agencies as it believes are appropriate. Such power-conferring, discretionary provisions cannot support an APA failure-to-act or mandamus claim.

Second, even if the JFK Act imposed some "unequivocal command" on the Review Board, that command would not extend to *NARA*, a separate legal entity. Plaintiffs assert that NARA has "assumed the obligations and responsibilities of the Board," Opp. 24, but that is incorrect. Plaintiffs' only support for their assertion is the preamble to a June 2000 final rule in which NARA stated that it was the "successor in function" to the Review Board. 65 Fed. Reg. at 39,550. When read in context, however, it is clear that NARA was simply referring to the fact that it "continues to maintain and supplement the collection under the . . . Act" to explain why it was appropriate for NARA to issue the final rule (which transferred regulations from one chapter of the Code of Federal Regulations to another). *Id.* NARA did not suggest—in the preamble or anywhere else—that it had assumed all of the duties and responsibilities of the Review Board.

Third, Plaintiffs' suggestion that the JFK Act's provisions concerning the Review Board somehow remain binding on NARA is also inconsistent with Section 12 of the Act, which provides that "[t]he provisions of this Act that pertain to the appointment and operation of the Review Board shall cease to be effective when the Review Board and the terms of its members have terminated." JFK Act § 12(a). The Review Board was terminated in 1998, *see* Compl. ¶ 46, and so the provisions of the Act pertaining to the "operation of the Review Board" have "cease[d] to be effective" for more than twenty years. And there is no suggestion in the JFK Act that Congress intended to authorize NARA somehow to assume the duties the statute expressly assigns to the Review Board.

3. Plaintiffs cannot compel NARA to "properly maintain" the central directory of identification

Plaintiffs contend that NARA has also "failed to perform other ministerial nondiscretionary duties under the JFK Records Act, including but not limited to: identifying and maintaining an accurate subject guidebook and index to the Records Collection . . . and failing to properly maintain its central directory of Identification Aids." Opp. 27.

Neither Plaintiffs' complaint nor their opposition brief identifies any way in which NARA has failed to identify and maintain an "accurate" subject guidebook and index. Nor does the complaint or Plaintiffs' brief identify any "unequivocal command" to take a "discrete agency action" that it believes is "clearly set forth" in the statute. Accordingly, Plaintiffs cannot state an APA failure-to-act or mandamus claim with respect to the subject guidebook and index.

Nor can Plaintiffs state such a claim with respect to NARA's central directory of identification aids. Opp. 27. The JFK Act provides only that "[t]he Collection shall include . . . a central directory comprised of identification aids created for each record transmitted to the Archivist under section 5." JFK Act § 4(a)(2)(B). There is no dispute that NARA has compiled a central directory of identification aids, which is available at NARA's website. Plaintiffs contend that NARA has failed to "properly maintain" this directory in certain ways, but they do not identify any "specific, unequivocal command" to take a "discrete agency action"— "clearly set forth" in the statute—that NARA failed to take. *Plaskett*, 18 F.4th at 1081.[5]

IV. PLAINTIFFS CANNOT STATE A CLAIM THAT NARA FAILED TO ACT UNDER THE FEDERAL RECORDS ACT

Defendants explained that Plaintiffs cannot state a claim against NARA under the Federal Records Act because they had not alleged that any records have been "unlawfully removed." Mot. 23–25; *Citizens for Resp. & Ethics in Wash.* ("*CREW*") *v. SEC*, 916 F. Supp. 2d 141, 146 (D.D.C.

[5] In their complaint, Plaintiffs also alleged that NARA "failed to ensure that all postponed Assassination Records . . . have an unclassified written description of the reasons for such continued postponement." Am. Compl. ¶ 164(b). That claim fails as a matter of law for the reasons explained in Defendants' motion to dismiss. Mot. 22. Because Plaintiffs did not respond to Defendants' arguments in their opposition brief, the claim is also abandoned. *Moore*, 73 F. Supp. 3d at 1205.

2013) ("[T]he only time an agency has a mandatory enforcement duty is when records have been unlawfully removed—but not when they have been unlawfully destroyed.").

Plaintiffs contend that "Section 11(a) [of the JFK Act] is a legislative override of the case law cited by Defendants," Opp. 34, but Section 11(a) has nothing to do with the Federal Records Act. Rather, Section 11(a) provides that "[w]hen this Act"—*i.e.*, the JFK Act—"requires transmission of a record to the Archivist or public disclosure, it shall take precedence over any other law." Thus, Section 11(a) cannot "override" case law interpreting the Federal Records Act.

Plaintiffs further assert that "[c]ontrary to Defendants' arguments, 'removed' can mean both missing and destroyed," Opp. 34, but the cases construing the Federal Records Act hold otherwise. Mot. 24–25; *CREW*, 916 F. Supp. 2d at 146. Plaintiffs state that "[i]f the court disagrees, Plaintiffs seek leave to amend to refine the argument." Opp. 34. Not only is such a request made in passing improper— Plaintiffs must instead file a motion if they seek leave to file a third amended complaint, Fed. R. Civ. P. 15(a)(2)—but an amendment "refin[ing] the argument" would be futile because, as Defendants have explained, the relevant provisions of the Federal Records Act apply only when records have been "unlawfully removed," which is absent here.

CONCLUSION

The Court should dismiss Plaintiffs' second amended complaint.

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Respectfully submitted,

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