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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' COMBINED REPLY IN SUPPORT OF MOTION TO DISMISS THIRD AMENDED COMPLAINT AND OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF, OR MANDAMUS

Hearing Date: January 18, 2024
Time: 1:30 p.m.
Judge: Hon. Richard Seeborg

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INTRODUCTION

The Court should deny Plaintiffs' attempt to expand and complicate this case through (1) a Third Amended Complaint that recycles the failed theories the Court already saw fit to reject, and (2) a motion for injunctive relief, declaratory relief, and mandamus that also suffers from a lack of legal merit, not to mention an absence of any showing of irreparable harm. Much as Plaintiffs may dislike the Transparency Plans approved for use by the President in his December 2022 Memorandum and June 2023 Memorandum, and much as Plaintiffs may believe the National Archives and Records Administration should conduct additional searches for records they believe can be located, there is no basis in the John F. Kennedy Assassination Records Collection Act for such claims.

As Defendants have now explained several times, the President's postponement of the 25-year deadline to release all assassination records was taken under the specific authority conferred by Congress in Section 5(g)(2)(D) of the Act. That authority is not constrained by other, inapplicable provisions of the Act that govern different actions in different situations by different actors from the President. Contrary to Plaintiffs' contentions, those inapplicable provisions include Sections 5(g)(1) and 9(d)(2), which set forth the "periodic review" process that NARA and originating agencies were to undertake following a postponement decision on a specific record by the Assassination Records and Review Board (or, potentially, the President). When, however, the President acts under Section 5(g)(2)(D) as he did in the 2022 and 2023 Memoranda, and postpones the deadline to release all withheld information, he acts under what this Court correctly understood is "a separate authority" that is "a power seemingly meant to conclude the periodic review process." Order Granting in Part & Den. in Part Mot. to Dismiss & Den. Prelim. Inj. ("Order") at 7 n. 4, 14, ECF No. 68. Both Plaintiffs' first cause of action and, except for the claims this Court has held survive dismissal, their second cause of action should be dismissed.

In their third cause of action, Plaintiffs sought to repackage their failed effort to compel NARA to conduct additional searches by repleading it as a Federal Records Act claim under 44

U.S.C. § 2905 regarding "destroyed" or "missing" records. For assassination records that have been destroyed, however, there is no way to redress Plaintiffs' injury, and they have presented no allegation that some mechanism exists by which to undo destruction that occurred decades ago. "Missing" records, meanwhile, are not covered by the Federal Records Act, and Plaintiffs cannot use that statute—which provides a limited remedy of referral to the Attorney General—in an attempt to obtain broad, court-ordered searches by NARA for a long list of documents. Plaintiffs' third cause of action should be dismissed in its entirety.

Finally, Plaintiffs' motion for injunctive and declaratory relief should be denied just as their prior one was. *See* Plaintiffs' Mot. for Inj. Relief, Declaratory Relief, or Mandamus ("Pls.' Mot."), ECF No. 79; Order at 16-17 (denying Plaintiffs' first motion for injunctive relief). Their legal arguments have all been rightly rejected by this Court, and Plaintiffs offer no showing of irreparable harm after waiting months to file their motion. Despite Plaintiffs' invocation of one media report on one alleged assassination witness, nothing has changed since this Court previously concluded that Plaintiff "failed to demonstrate either a likelihood of irreparable harm or that they are likely to succeed on the merits." Order at 17. Defendants' motion to dismiss should be granted, and Plaintiffs' motion for injunctive and declaratory relief denied.

ARGUMENT

I. DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED.

A. Plaintiffs' first cause of action should be dismissed.

In their Motion, Defendants explained that Plaintiffs' first cause of action—an APA claim that NARA's "implementation" of the President's 2022 and 2023 Memoranda is arbitrary and capricious—relied on erroneous legal theories and interpretations of the JFK Act that this Court had already rejected. Defs.' Mot. to Dismiss Third Am. Compl. ("Defs.' Mot.") at 5-6, ECF No. 78. In response, Plaintiffs do little more than reiterate those failed theories and interpretations, and insist that the President's Section 5(g)(2)(D) postponement was required to use the standards set forth in Section 6 of the Act. Pls.' Opp'n to Defs.' Mot. to Dismiss ("Pls.' Opp.") at 3-8, ECF No. 87. But regardless of how many times Plaintiffs espouse their preferred interpretation of the

JFK Act, the Court was correct when it concluded that Sections 6 and 9(d) "apply to postponement after an initial determination by the ARRB" and that "Section 5(g)(2)(D) is a separate authority that applies after the end of the 25-year deadline." Order at 7 n.4.

Plaintiffs' only attempt to rescue this claim from dismissal is their argument that NARA and the originating agencies "used watered-down and non-statutory standards" when they reviewed documents for potential disclosure or postponement by the President. Pls.' Opp. at 11. Yet Plaintiffs also concede that this allegedly unlawful reliance on non-statutory standards resulted merely in "NARA's recommendations to the President" in advance of the President's certifications under Section 5(g)(2)(D). *Id.* As this Court has already held, such a recommendation by NARA is not a cognizable final agency action under the APA: "Even if NARA's 'tentative recommendation[s]' informed the President's decision, it was ultimately the President who possessed the authority to postpone disclosure—and the President's decision, not NARA's recommendations, created the legal consequences of postponing the release of the records at issue." Order at 9 (citation omitted); *see also Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992) (holding that Commerce Secretary's report to the President was not "final" agency action because it "carrie[d] no direct consequences for . . . reapportionment" and was "more like a tentative recommendation than a final and binding determination").

And even assuming that NARA's recommendations were actionable under the APA, Plaintiffs' claim lacks legal merit for the reasons this Court has already explained. Sections 6 and 9(d), on which Plaintiffs rely in their (renewed) effort to impugn the President's certifications, do not apply when the President acts under Section 5(g)(2)(D). *See* Order at 7 n.4. And the President enjoys "substantial discretion in determining whether continued postponement of records disclosure is appropriate" under Section 5(g)(2)(D), *id.* at 10. Further, the President's approval of the Transparency Plans is not an impermissible delegation of authority to NARA and originating agencies, *see* Third Am. Compl. ¶ 154a, ECF No. 77. The Court already rejected this argument, recognizing that "the President's approval of the Transparency Plans is not, as Plaintiffs claim, a

delegation of the President's authority to postpone the release of records." Order at 7. Rather, the Court explained, "it is the Biden Memoranda themselves that postponed the release of each record," and the "Transparency Plans merely set forth when that postponement will end." *Id.*

Plaintiffs have offered no basis for their first cause of action to proceed, and it should accordingly be dismissed.

B. Plaintiffs' second cause of action should be dismissed in part.

Plaintiffs' second cause of action, other than the claim that NARA failed "to maintain accurate reference aids and to release the legislative records," Order at 14, should also be dismissed because it no more than recasts their arbitrary-and-capricious APA claim of the first cause of action as an alleged failure to act under § 706(1) of the APA. For reasons already discussed above and in Defendants' Motion, *see* Defs.' Mot. at 7, that claim lacks merit and should be dismissed.

In response, Plaintiffs focus exclusively on the argument that Section 9(d) of the Act continues to impose on NARA a duty to conduct "periodic reviews" of the assassination records postponed by the President. Pls.' Opp. at 16-20. Setting aside that such a claim that NARA failed to conduct periodic review was not squarely pled in the second cause of action, this attempt to manufacture an ongoing duty for NARA from the provisions of Section 9(d) fails.

This Court has already observed that the President's postponement authority under Section 5(g)(2)(D) is "a power seemingly meant to conclude the periodic review process described in Sections 5(g)(2)(A)–(C)." Order at 14. That periodic review process was one that Congress prescribed following postponement determinations by the ARRB (and, potentially, by the President if he were to review the ARRB determination), but not Presidential postponements under Section 5(g)(2)(D). *See* JFK Act, Pub. L. No. 102-526, §§ 5(g)(1), 9(d)(2), 106 Stat. 3443 (1992). Yet Plaintiffs seize on the Court's use of the word "seemingly" and insist that Section 9(d) continues to require NARA to conduct periodic review, even "decades after" any initial postponement determination by the Board. Pls.' Opp. at 15, 16 (citations omitted). Because the Transparency Plans do not contemplate a "periodic review" as defined in the Act, Plaintiffs argue, NARA has failed to fulfill a statutory duty.

But, as Defendants previously explained, Section 9(d) concerns only the President's authority to deviate from "review board determination[s]" concerning postponement or disclosure of particular records. JFK Act § 9(d); *see* Defs.' Mot. to Dismiss Sec. Am. Compl. at 15, ECF No. 46. Section 9(d)(2)'s reference to the "requirements of periodic review" thus applies only when the President exercises his authority to postpone release of an individual record after the Board's "formal determination concerning the public disclosure or postponement of disclosure." JFK Act § 9(d)(1). That type of postponement decision is not at issue in this case, and is different from the Presidential postponement contemplated in Section 5(g)(2)(D).

Similarly, the periodic reviews of "postponed or redacted records" called for by Section 5(g)(1) likewise do not include postponements certified by the President under Section 5(g)(2)(D). That is evident from the face of Section 5(g)(1), which states that periodic reviews shall occur "consistent with the recommendations of the Review Board under section 9(c)(3)(B)." *Id.* § 5(g)(1). Section 9(c)(3) in turn, governs assassination records "the public disclosure of which is postponed *pursuant to section 6*." *Id.* § 9(c)(3) (emphasis added). For such records that have been postponed under Section 6 (and for which periodic reviews are accordingly required), Subsection 9(c)(3)(B) then directs the Board to recommend to NARA a "specified time at which or a specified occurrence following which the material may be appropriately disclosed to the public under this Act." *Id.* § 9(c)(3)(B).

In the event that the President exercised his authority under Section 9(d) to postpone (or disclose) an individual record following a determination by the Board, Congress prescribed that periodic review should occur as well. *See Id.* § 9(d)(2). In that scenario, the Act provides for NARA and the originating agency to consider the President's written "justification for the . . . decision, including the applicable grounds for postponement *under section 6*." *Id.* § 9(d)(1) (emphasis added). A record postponed by the President under Section 6 would thus be subject to periodic review just the same as a record postponed by the Board under Section 6. But the common thread for any periodic review is the existence of a Section 6 postponement.

Under the JFK Act, then, periodic reviews are required only for Section 6 postponements, which necessarily occur before the 25-year deadline for disclosure of all assassination records. When, on the other hand, the President certifies a postponement of that 25-year deadline under Section 5(g)(2)(D), Congress did not provide for periodic review. This Court was therefore correct when it stated that the President's Section 5(g)(2)(D) postponement power was "seemingly meant to conclude the periodic review process described in Section 5(g)(2)(A)–(C)." Order at 14. Concluding otherwise would result in the untenable scenario where, following the President's Section 5(g)(2)(D) postponement, NARA and the originating agency would be obligated to conduct a periodic review in which they could determine, contrary to the President's certification, that a record should be released. The Court recognized this same anomaly in Plaintiffs' argument when it explained that it would "make little sense for Section 5(g)(2)(A)–(C) to modify the President's power under Section 5(g)(2)(D)." *Id.* at 14.[1] Even assuming a claim against NARA for failure to conduct periodic reviews is squarely pled in the second cause of action, that claim fails because it rests on Plaintiffs' erroneous interpretation of the Act.

Also incorrect is Plaintiffs' assertion that the reviews NARA conducted between 2017 and 2023 were in fact "periodic reviews" under Section 5(g)(1). Pls.' Opp. at 12, 18.[2] Those reviews were undertaken pursuant to the President's direction in the various Memoranda issued between 2017 and 2022. *See* 82 Fed. Reg. 50,307 (Oct. 26, 2017) ("I hereby direct all agencies that have

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[1] Plaintiffs themselves appear to recognize that a Section 5(g)(2)(D) postponement by the President is different in kind from postponements under Section 6. They acknowledge "two separate paths to continued postponement of assassination records: A Section 5(g)(2)(D) certification by the President that certain records must continue to be postponed; or Section 6 periodic review by the originating agencies and the Archivist, with 9(d)(1) imposing on the President a 'sole and nondelegable duty to require...postponement of such record or information under the standards set forth in Section 6.'" Pls.' Opp. at 16 (citation omitted).

[2] Plaintiffs' reliance on Exhibit C to the Amended Declaration of William Simpich, ECF No. 36, Ex. C at 18, likewise does not support a continuing duty on NARA to conduct periodic reviews following a postponement by the President under Section 5(g)(2)(D). That document states only that records postponed by the Board (or by the President) under Section 6 standards will still be subject to periodic review after the Board terminates. *Id.*

proposed postponement of full disclosure to review the information subject to this certification and identify as much as possible that may be publicly disclosed without harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations."); 83 Fed. Reg. 19,157 (Apr. 26, 2018) ("I am also ordering agencies to re-review each of those redactions over the next 3 years."); 86 Fed. Reg. 59,599, 59,600 at § 5 (Oct. 22, 2021) (directing agencies and NARA to "conduct an intensive review of each remaining redaction to ensure that the United States Government maximizes transparency"); 87 Fed. Reg. 77,967, 77,968-69 at § 6 (Dec. 15, 2022) ("Dec. 2022 Memo") (directing agencies and NARA to "jointly review the remaining redactions in the records addressed in sections 2(d) and 4 of this memorandum with a view to maximizing transparency and disclosing all information in records concerning the assassination, except when the strongest possible reasons counsel otherwise"); *see also* 88 Fed. Reg. 43,247, 43,248 at § 5 (June 30, 2023) ("June 2023 Memo") ("I direct the NDC to continue to use the Transparency Plans to conduct future reviews of any information covered by the Act that has been postponed from public disclosure."). And even assuming *arguendo* that the reviews NARA conducted at the President's direction between 2017 and 2023 were instead "periodic reviews," that nonetheless would not create any "continuing duty" for NARA to conduct additional periodic reviews as would be required to sustain Plaintiffs' failure-to-act claim.

Finally, it bears noting that in his Memorandum of June 2023, the President "direct[ed] the [National Declassification Center at NARA] to continue to use the Transparency Plans to conduct future reviews of any information covered by the Act that has been postponed from public disclosure." As a practical matter, therefore, ongoing review of the postponed documents will take place, even if they are not the "periodic reviews" contemplated in Section 5(g)(1) of the Act.

Apart from the claims challenging NARA's alleged failure to maintain accurate reference aids and to release legislative records, Plaintiffs' second cause of action should be dismissed.

C. Plaintiffs' third cause of action under the Federal Records Act should be dismissed.

Proceeding under the Federal Records Act, 44 U.S.C. § 2905(a), Plaintiffs' third cause of action seeks to compel NARA to refer to the Attorney General a laundry list of assassination records that have been "destroyed" or which are allegedly "missing." *See* Third Am. Compl. ¶¶ 167-76. This Court previously ruled that the narrower version of this claim, as pled in the Second Amended Complaint, ECF No. 44, could proceed. Plaintiffs, however, expanded this claim to records that are allegedly "missing," a category not mentioned in Section 2905(a). Further, Plaintiffs lack standing to obtain any relief for destroyed records because they have not alleged that any mechanism exists by which such records could be recovered. The third cause of action should be dismissed.

1. Plaintiffs lack standing to pursue a Federal Records Act claim for destroyed records.

Part of Plaintiffs' Federal Record Act claim rests on allegations that certain assassination records have been "destroyed." Third Am. Compl. ¶¶ 169, 172, 174. But Plaintiffs lack standing to pursue this portion of their claim because a favorable order from this Court to refer the matter to the Attorney General would provide no redress. Defs.' Mot. at 8-9. That is because Plaintiffs failed to allege the existence of any means to undo the alleged destruction of records, and any referral would serve no purpose. *See, e.g.*, *Cause of Action Inst. v. Pompeo*, 319 F. Supp. 3d 230, 235-36 (D.D.C. 2018) (Federal Records Act claim seeking to compel defendants to refer case to Attorney General became moot because records were "fatal[ly] los[t]"); *Citizens for Resp. & Ethics in Wash. v. SEC*, 916 F. Supp. 2d 141, 148 (D.D.C. 2013) ("*CREW*") (lawsuit seeking recovery of "destroyed" records would become moot if records were "permanently unrecoverable").

In response, Plaintiffs still fail to identify a particular mechanism for the recovery of destroyed records, either in their memorandum or in the November 30, 2023 Declaration of William Simpich ("Simpich Decl."), ECF No. 89. Instead, Plaintiffs speculate about ways that allegedly destroyed documents "could be found" or various searches that could be performed. *Id.*

¶¶ 3-4. But gesturing toward potential search methods or repositories implies that the allegedly destroyed documents were not destroyed at all, but are instead "missing" from the JFK Act collection. At bottom, even if the Court could consider assertions in Plaintiffs' memorandum or the Simpich Declaration on a motion to dismiss, *see, e.g.*, *Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1145 (N.D. Cal. 2010) ("It is axiomatic that the complaint may not be amended by briefs in opposition to a motion to dismiss." (citations omitted)), Plaintiffs have failed to allege that the documents they claim are destroyed are not "permanently unrecoverable," and that their injury is therefore redressable. *CREW*, 916 F.2d at 148.

The cases on which Plaintiffs rely also do not support their claim to standing. *Citizens for Responsibility and Ethics in Washington v. Executive Office of the President* involved "deleted" emails, but there is no suggestion in the court's opinion that the emails in question had been "destroy[ed]." 587 F. Supp. 2d 48, 53-54 (D.D.C. 2008). Indeed, the records (emails) that had been deleted were recoverable from "back-up tapes," and the plaintiff specifically asserted that restoration of those emails was possible "before they become irrecoverable." *Id.* at 54 (citation omitted). Plaintiffs have no similar allegation about the records at issue here, all of which were evidently destroyed decades ago. *See* Third Am. Compl. ¶ 61(f) & n.79 (alleging that the "ARRB Final report reported CIA, FBI, Secret Service, and other organizations intentionally destroyed documents"). *Armstrong v. Bush*, meanwhile, did not address redressability at all, and the cause of action it authorized was one to seek Attorney General intervention "to *prevent an agency official from destroying records* in contravention of the agency's recordkeeping guidelines or to recover records unlawfully removed from an agency." 924 F.2d 282, 297 (D.C. Cir. 1991) (emphasis added). To the extent *Armstrong* is relevant here, it supports Defendants' argument that a plaintiff cannot sue under the PRA to obtain redress for records that have *already* been destroyed.

Because Plaintiffs' injuries from lack of access to destroyed documents cannot be redressed by a referral to the Attorney General, their Federal Records Act claim must be dismissed insofar as it seeks relief for allegedly destroyed records.[3]

2. Plaintiffs' allegations regarding "missing" records are insufficient to state a Federal Records Act claim.

Defendants' motion to dismiss argued that Plaintiffs could not replead their failed claim to compel NARA to conduct searches for assassination records, as one under the Federal Records Act for a failure to make a referral to the Attorney General for allegedly "missing" records. Defs.' Mot. at 9-11; *see* Order at 16 & n.11 (dismissing claim challenging "NARA's failure to pursue outstanding record searches" and stating that "the Federal Records Act imposes no independent obligation on NARA to complete . . . searches [of the ARRB]"). Plaintiffs cannot now repackage a request to have NARA conduct additional searches, which are not required by the JFK Act, under a theory that particular records are "missing" and therefore subject to the Federal Records Act.

Plaintiffs' response and the Simpich Declaration simply confirm that what Plaintiffs are seeking in their Federal Records Act claim regarding "missing" records is to have NARA conduct new searches. Simpich Decl. ¶¶ 3-5 (asserting that "none of the databases listed below have been fully searched"). Indeed, Plaintiffs attempt to prescribe what these searches should entail, making clear that the relief they ultimately seek is additional searches to be undertaken, and not the more limited relief of a referral to the Attorney General. But the Federal Records Act is not a proper recourse when a plaintiff alleges that a record is "missing." Section 2905 applies only where there is "actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency" that has "come to the Archivist's attention." 44 U.S.C. § 2905(a). A "missing" document is beyond the scope of this provision.

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[3] Plaintiffs should not be given leave to amend as they request, *see* Pls.' Opp. at 26, because they have not identified any reason why such an amendment would not be futile (let alone filed a motion for leave). *See Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008) (finding it proper to deny leave to amend for "repeated failure to cure deficiencies by amendments previously allowed" (citation omitted)).

The lone legal argument Plaintiffs muster in response to Defendants' motion on this point is the summary statement that "[a] reasonable interpretation of the statute is that a 'removed' document is a document 'missing' from the file." Pls.' Opp. at 22. Setting aside the self-serving and unsupported nature of this statement, it also gets the analysis backwards—Defendants did not contend that a "removed" documents is not "missing." Rather, Defendants contended that a "missing" document cannot be considered "removed" *per se*, and is therefore not within the scope of Section 2905. Defs.' Mot. at 10-11. For this reason, Plaintiffs' attempt to amend their allegations—improperly by way of their opposition brief—by now characterizing the Joannides documents as "removed." Pls. Opp. at 22 (citation omitted). But there is no such allegation in the Third Amended Complaint, where Plaintiff instead alleged that "44 Joannides documents . . . should have been transferred to the ARRB to determine if they should be disclosed." Third. Am. Compl. ¶ 61(a). As for certain audio tapes of Carlos Marcello, Plaintiffs make no effort to demonstrate why their claim should proceed, instead complaining that "most of [the tapes] remain sealed," which is not a basis for relief under the Federal Records Act. Pls.' Opp. at 22.

Plaintiffs have failed to state a claim for relief under the Federal Records Act for documents that they allege are merely "missing," and the third cause of action should be dismissed.

D. The President should be dismissed as a Defendant.

Plaintiffs named the President as a Defendant in the caption of the Third Amended Complaint and purport to sue him "in his official capacity as President of the United States." Third Am. Compl. ¶ 19. But Plaintiffs have asserted no claims against the President. Further, as Defendants recounted in their motion, Defs.' Mot. at 11, this Court has already dismissed "without leave to amend" the claims against the President that Plaintiffs previously asserted in the Second Amended Complaint, Order at 8. Plaintiffs' opposition brief fails to respond to these arguments and is devoid of any attempt to justify their purported naming of the President as a Defendant, and he should accordingly be dismissed from this action. *See Silva v. City of San Leandro*, 744 F. Supp. 2d 1036, 1050 (N.D. Cal. 2010) ("Plaintiffs do not address this argument in their Opposition brief, implicitly conceding that these claims fail."); *Qureshi v. Countrywide Home Loans, Inc.*,

2010 WL 841669, at *6 n. 2 (N.D. Cal. Mar. 10, 2010) (deeming plaintiff's failure to address, in opposition brief, claims challenged in a motion to dismiss, an "abandonment of those claims" and "dismiss[ing] without leave to amend as to those particular allegations"); *see also, e.g.*, *Doe v. Trump*, 319 F. Supp. 3d 539, 544 (D.D.C. 2018) (dismissing the "President as a party to this case").

II. PLAINTIFFS' MOTION FOR INJUNCTIVE AND DECLARATORY RELIEF SHOULD BE DENIED.

On the same day Defendants moved to dismiss Plaintiffs' Third Amended Complaint, Plaintiffs filed a motion for injunctive and declaratory relief. In their motion, Plaintiffs ask this Court to set aside the Biden Memoranda and order NARA to conduct a re-review of the remaining redacted assassination under Plaintiffs' preferred standards.

This motion does no more than rehash and repackage a number of Plaintiffs' already failed claims and, in any event, they fail to make any showing of irreparable harm sufficient to warrant the "extraordinary and drastic remedy" of preliminary equitable relief. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). To obtain such relief, a plaintiff bears the burden of establishing "[i] that he is likely to succeed on the merits, [ii] that he is likely to suffer irreparable harm in the absence of preliminary relief, [iii] that the balance of equities tips in his favor, [iv] and that an injunction is in the public interest." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Because Plaintiffs have not and cannot carry that burden, their motion should be denied.

A. Plaintiffs have not demonstrated irreparable harm.

A showing of irreparable injury is "[a]n essential prerequisite" to granting a preliminary injunction, *Dollar Rent A Car of Washington, Inc. v. Travelers Indemnity Co.*, 774 F.2d 1371, 1375 (9th Cir. 1985). Plaintiffs rely on hypotheses about what information the redacted documents might contain, but a "[s]peculative injury does not constitute irreparable injury," and "a plaintiff must *demonstrate* immediate threatened injury." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016). Moreover, a plaintiff's "long delay before seeking a preliminary injunction

implies a lack of urgency and irreparable harm." *Oakland Trib., Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985).

When Plaintiffs first sought preliminary relief in this case, the Court denied the request, concluding that "Plaintiffs have failed to demonstrate . . . a likelihood of irreparable harm." Order at 17. Since then, nothing has occurred that would call for a different analysis or conclusion. Indeed, the two pages Plaintiffs devote to irreparable harm, Pls.' Mot. at 20-22, essentially restate the failed argument from their first motion for preliminary injunction. Namely, Plaintiffs assert that witnesses are aging and "dying every day" and speculate that these unspecified witnesses' "memories could also lead to other important witnesses and documents." *Id.* at 20.

Plaintiff also fail to tie their speculative contentions about witnesses to the relief they are seeking regarding the Transparency Plans approved by the President. They do not explain why "halt[ing] implementation of Section 6(1) of the 2022 Biden Memo" or "halt[ing] implementation of 2(a)(ii)(2) in the NARA Guidance Document" has any connection to their speculative quest for information from aging witnesses. *Id.* at 25 ¶¶ 1, 2. As in their first failed motion for injunctive relief, Plaintiffs' theory operates on a series of unadorned speculations: that (i) these witnesses would make themselves available to be interviewed, (ii) information learned in that interview would lead to other assassination records that are not already in NARA's possession, and (iii) absent an injunction "halt[ing] the implementation of Section 6(1) of the 2022 Biden Memo," one or more of these hypothetical witnesses will die before they can provide the hypothetical information. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (plaintiff cannot establish standing—let alone irreparable injury—by relying on a "highly attenuated chain of possibilities").

Aside from the wholly speculative nature of their harm, Plaintiffs have also waited too long to justify an award of preliminary injunctive relief. To begin, as Plaintiffs admit, the documents at issue in this case are several decades old, Pls.' Mot. at 20, and witnesses have been aging and dying of old age throughout that long period. Moreover, the President issued his 2022

Memorandum—the principal target of Plaintiffs' arguments—in December 2022, and Plaintiffs waited ten months before filing this motion. Indeed, Plaintiffs filed their first motion for injunctive relief in June 2023, some six months after the President's December 2022 Memorandum. Pls.' Mot. for Inj. Relief, Declaratory Relief, or Mandamus, ECF No. 59. Their failure to include in that motion their most recent variations on the same argument cuts sharply against any purported emergency warranting intervention here. Courts have held that far more modest delays weighed against a finding of irreparable harm. *See, e.g.*, *Playboy Enters. v. Netscape Commc'ns Corp.*, 55 F. Supp. 2d 1070, 1080, 1090 (C.D. Cal. 1999) (five-month delay "in seeking injunctive relief further demonstrate[d] the lack of any irreparable harm); *Valeo Intellectual Prop., Inc. v. Data Depth Corp.*, 368 F. Supp. 2d 1121, 1128 (W.D. Wash. 2005) ("A three-month delay in seeking injunctive relief is inconsistent with [the plaintiff's] insistence that it faces irreparable harm."); *Hanginout, Inc. v. Google, Inc.*, 54 F. Supp. 3d 1109, 1132–33 (S.D. Cal. 2014) (seven-month delay weighed against a finding of irreparable harm).

Finally, Plaintiffs rely on the same declarations, *see* Pls.' Mot. at 21 (citing previously-filed declarations) that the Court has already found inadequate to sustain an equitable remedy: "Plaintiffs waited years after President Trump's first postponement memorandum in 2017 to file suit and did not move for a preliminary injunction until several months later." Order at 17. Preliminary relief should be denied on this ground alone. *Dollar Rent A Car*, 774 F.2d at 1375.

B. Plaintiffs have shown no likelihood of success on the merits.

In the event that Plaintiffs' motion is not denied for a lack of irreparable harm, Plaintiffs have failed to show a likelihood of success on the merits. Plaintiffs advance a number of arguments challenging the President's use of Transparency Plans in his postponement decisions, as well as NARA's role in preparing recommendations for the President. None of their arguments have merit.

1. Section 6(a) of the 2022 Biden Memo is not unlawful.

Plaintiffs are mistaken that Section 6(a) of the December 2022 Memo "water[s] down the 'public interest' aspect of the JFK Act." Pls.' Mot. at 8. In Section 6(a) of his December 2022

Memo, the President gave instructions to agencies reviewing assassination records to "accord substantial weight to the public interest in transparency and full disclosure of any record that falls within the scope of the Act." Plaintiffs point to no statutory provision that requires the agencies to adopt some different standard when conducting such a review. They point only to the statutory *definition* of "public interest," which recites that the public interest is itself a "compelling interest." JFK Act § 3(10). But just because Congress deemed the public interest in disclosure a "compelling interest" does not mean the President was wrong to instruct agencies, when conducting a review for potential postponement under Section 5(g)(2)(D), to accord that interest substantial weight. Plaintiffs' argument hinges on the erroneous premise that Section 6(a) of the December 2022 Memo was intended as a "substitute" for the Act's own definition of "public interest." Pls.' Mot. at 7. The December 2022 Memo nowhere purported to modify the statutory definition, and there was nothing unlawful about the President's directive that agencies afford substantial weight to that interest.

2. Section 7 of the December 2022 Memo is not unlawful.

In his 2022 and 2023 Memos, the President adopted transparency plans that "detail[] the event-based or circumstance-based conditions that will trigger the public disclosure of currently postponed information." Dec. 2022 Memo § 7; June 2023 Memo § 5. In their Transparency Plans, the CIA and Department of Defense have included as triggering events for removing certain redactions the date of an individual's death or when they turn 100 years old. *See, e.g.*, CIA Transparency Plan (Dec. 8, 2022), https://perma.cc/R5LW-KRYK; Dep't of Defense Transparency Plan (Dec. 9, 2022), https://perma.cc/38CL-58AZ. The President, in turn, determined that those triggers satisfied the standard set forth by Congress in Section 5(g)(2)(D). Dec. 2022 Memo § 3; June 2023 Memo § 3.

Plaintiffs contend that the President lacked authority under Section 5(g)(2)(D) to postpone certain information in assassination records until particular individuals' dates of death, Pls.' Mot. at 9-12, because it was improper for the President to consider individuals' privacy interests

"standing alone," *id.* at 10. But in adopting the Transparency Plans, the President did not postpone release of information based solely on individual privacy interests. Rather, the President expressly stated that continued postponement "is necessary to protect against identifiable harms to the military defense, intelligence operations, law enforcement, and the conduct of foreign relations that are of such gravity that they outweigh the public interest in disclosure." June 2023 Memo § 3; Dec. 2022 Memo §§ 3, 4. That is what the JFK Act requires in Section 5(g)(2)(D), and that is what the President certified.[4]

3. Defendants are not required to conduct "periodic review" under Section 9(d)(2) of the Act.

Plaintiffs next contend that the periodic review process set forth in Section 9(d)(2) of the Act must continue, notwithstanding the President's final certification in the 2023 Biden Memo. Pls.' Mot. at 13-15. But, as explained above and by this Court, Section 9(d) "appl[ies] to postponement after an initial determination by the ARRB," while "Section 5(g)(2)(D) is a separate authority that applies after the end of the 25-year deadline." Order at 7 n.4. Plaintiffs point to no determination by the ARRB—which has been defunct for 25 years—that would necessitate a periodic review, and their attempt to foist such an obligation on Defendants lacks any basis in the Act. Nor do Defendants' recent actions "belie [their] legal argument." Pls.' Mot. at 14. As explained *supra*, since the 2017 Trump Memo, the agencies and NARA have not engaged in the "periodic review" process set forth in Section 9(d)(2) of the Act, but have rather reviewed records in order to make recommendations to the President for potential postponement under Section 5(g)(2)(D). Now that the President has made his final certification under the Act, there is no longer any need to conduct those reviews, let alone any "periodic review" that Plaintiffs errantly maintain are required by Section 9(d)(2). NARA will, however, continue to "conduct future reviews of any

[4] Plaintiffs also criticize NARA for including in its February 2017 guidance to agencies a directive that agencies submit to the President documentation showing "the impact of disclosure on current agency/department operations." Pls.' Mot. at 11-12 (quoting Third Am. Compl. ¶¶ 68-69). But this internal direction from NARA to agencies played no apparent role in the President's eventual certification decision under Section 5(g)(2)(D). Plaintiffs' complaint that NARA's directive reflects a "non-statutory criterion," Pls.' Mot. at 12, is therefore immaterial.

information covered by the Act that has been postponed from public disclosure," as it was directed to do by the President. June 2023 Memo § 5.

4. NARA's recommendations regarding the Transparency Plans did not violate the APA.

Plaintiffs argue that NARA's "approval" of the Transparency Plans was arbitrary and capricious. Pls.' Mot. at 15-18. But it was not NARA that "approved" the Transparency Plans—the President did so. *See* Dec. 2022 Memo § 7; June 2023 Memo § 5. As this Court has already recognized, Plaintiffs cannot obtain injunctive relief against the President for the non-ministerial act of postponing release under Section 5(g)(2)(D). Order at 6-7. And Plaintiffs are just as incapable of obtaining relief against NARA for purported agency action that it did not even take. As noted above, this Court already observed that this recommendation by NARA is not a cognizable final agency action under the APA: "Even if NARA's 'tentative recommendation[s]' informed the President's decision, it was ultimately the President who possessed the authority to postpone disclosure—and the President's decision, not NARA's recommendations, created the legal consequences of postponing the release of the records at issue." Order at 9 (citation omitted); *see also Franklin*, 505 U.S. at 798.

Even assuming NARA's recommendation to the President were cognizable final agency action, that recommendation was not arbitrary and capricious as Plaintiffs contend. Plaintiffs rely solely on a 2017 Memorandum from NARA to the FBI focusing on a specific set of documents for which the FBI intended to request postponement by the President. *See* ECF No. 79-2. That NARA questioned the FBI's request to postpone release of names and identifying information says nothing about the *President's* decision to accept postponement triggers for *different* documents from *different* agencies. Plaintiffs have identified no basis to invalidate the President's acceptance of the Transparency Plans.

C. The balance of harms and public interest weigh strongly against a preliminary injunction.

The third and fourth requirements for issuance of a preliminary injunction—the balance of harms and the public interest—"merge when the Government is the opposing party." *Nken v.*

Holder, 556 U.S. 418, 435 (2009). Granting Plaintiffs' request to enjoin the President's implementation of the Transparency Plans would cut directly against the public interest. The President has determined that postponement subject to the Transparency Plans is necessary to protect "the military defense, intelligence operations, law enforcement, or the conduct of foreign relations," and that the harm from disclosure is "of such gravity that it outweighs the public interest in disclosure." Dec. 2022 Memo §§ 3, 4; June 2023 Memo § 3. Congress expressly conferred on the President—and the President alone—the authority to determine whether the harm from disclosure of this information outweighs the public interest in disclosure. JFK Act § 5(g)(2)(D).

Plaintiffs' attempt to overturn the President's determinations is also directly contrary to the deference owed the Executive Branch when it comes to matters of national security. "The judiciary does not have a license to intrude into the authority, powers and functions of the executive branch, for judges are not executive officers, vested with discretion over law enforcement policy and decisions." *United States v. Jennings*, 960 F.2d 1488, 1491 (9th Cir. 1992) (quotation and alterations omitted). "[W]hen dealing with properly classified information in the national security context," courts are "mindful of [their] limited institutional expertise on intelligence matters, as compared with the executive branch." *Hamdan v. U.S. Dep't of Just.*, 797 F.3d 759, 770 (9th Cir. 2015).

Plaintiffs assert without elaboration that they have "made the case on 'public interest,'" citing only the JFK Act's definitional provision generally recognizing a "compelling interest" in the disclosure of assassination records. Pls.' Mot. at 22. Yet within the same Act, Congress contemplated that there would be some records whose disclosure would harm the nation's defense, intelligence operations, law enforcement, or foreign relations, even *after* 25 years had elapsed. *See* JFK Act § 5(g)(2)(D). Congress expressly authorized the President to effectuate such a postponement, and the public interest favors deferring to that judgment here.

Plaintiffs' motion for injunctive and declaratory relief should be denied.

CONCLUSION

The Court should grant Defendants' motion to dismiss, and deny Plaintiffs' motion for injunctive relief, declaratory relief, or mandamus.

Dated: December 14, 2023

Respectfully submitted,

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