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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 OPPOSITION TO (1) PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF TO ORDER NARA TO COLLECT ALL ASSASSINATION RECORDS AND TO HALT ADVISING RESEARCHERS TO FILE FOIA ACTIONS RATHER THAN JFK ACT REQUESTS [ECF No. 91]; AND (2) PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF ORDERING NARA TO PUBLICLY DISLOCSE LEGISLATIVE RECORDS [ECF No. 92]

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

INTRODUCTION

In its July 14, 2023 Order, this Court summarily rejected Plaintiffs' first attempt to obtain preliminary injunctive relief in this case. *See* Order Granting in Part & Den. in Part Mot. to Dismiss & Den. Prelim. Inj. ("Order") at 16-17, ECF No. 68. Undeterred, Plaintiffs responded with a Third Amended Complaint and another preliminary-injunction motion. *See* Third Am. Compl., ECF No. 77; Pls.' Mot. for Inj. Relief, Declaratory Relief, or Mandamus, ECF No. 79. Now, even before briefing is complete on their second preliminary-injunction motion, Plaintiffs have burdened the Court with *two more* preliminary-injunction motions, their third and fourth such requests. *See* Pls.' Mot. for Inj. Relief, Declaratory Relief, or Mandamus ("Pls.' Third PI Mot."), ECF No. 91; Pls.' Mot. for Inj. Relief, Declaratory Relief, or Mandamus ("Pls.' Fourth PI Mot."), ECF No. 92. In their Third PI Motion, Plaintiffs demand that NARA be ordered to conduct a government-wide search for allegedly outstanding assassination records. And in their Fourth PI Motion, Plaintiffs demand the immediate release of information contained in legislative records that the President specifically found would jeopardize national security if disclosed. These requests for injunctive relief this time around are just as deficient as their first two: Plaintiffs fail to demonstrate irreparable harm, rely on meritless legal theories this Court has already rejected, and seek relief that would cut sharply against the public interest.

Further, Plaintiffs' choice to litigate this case in serial, piecemeal fashion is contrary to "secur[ing] the just, speedy, and inexpensive determination" of this case, Fed. R. Civ. P. 1, as well as "the general policy of avoiding piecemeal litigation." *Cont'l Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1373 (9th Cir. 1991), *overruled on other grounds by Gov't Emps. Ins. Co. v. Dizol*, 133 F.3d 1220 (9th Cir. 1998). Indeed, Plaintiffs' drumbeat of requests for the extraordinary remedy of a preliminary injunction mires the Court and the parties in repeat litigation of issues that should already have been put to rest. Nonetheless, Defendants are eager to bring this case to a close through a dispositive motion, and intend to do so once the pleadings are closed by a ruling from the Court on Defendants' pending Motion to Dismiss. Litigating these issues haphazardly and

prematurely through baseless preliminary-injunction motions disserves judicial economy and hinders Plaintiffs' professed desire to resolve the disputes they have presented to the Court.

Plaintiffs' latest two latest preliminary-injunction motions should be denied.

ARGUMENT

A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948, pp. 129-30 (2d ed. 1995)). A plaintiff must establish "[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 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)). Plaintiffs bear the burden of demonstrating that each of these four factors is met. *DISH Network Corp. v. FCC*, 653 F.3d 771, 776-77 (9th Cir. 2011). They have not met their burden.

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE IRREPARABLE HARM.

Legislative Records. In support of their Fourth PI Motion's request for emergency relief on the legislative records, Plaintiffs make no showing of irreparable harm absent the immediate release of this information. According to Plaintiffs, "NARA should have released these documents more than six years ago on its own initiative." Pls.' Fourth PI Mot. at 4. From this logic, it follows that Plaintiffs could have immediately sought injunctive relief back in October 2017. Yet Plaintiffs chose to wait more than six years to petition this Court for relief on this purported emergency. In this very case, Plaintiffs saw fit to pursue (unsuccessfully) a variety of other forms of purported immediate relief before coming to the Court for immediate disclosure of the legislative records.

Plaintiffs' irrefutable six-year delay, coupled with the procedural history in this case alone, forecloses any claim of irreparable harm. As the Ninth Circuit has explained, 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). And courts have rejected claims of irreparable harm when facing far more modest delays of mere months, rather than six full years. *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). When confronted with such delays by Plaintiffs earlier in this case, this Court denied preliminary relief, noting that "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, and it should do the same here.

Meanwhile, the barebones assertion of harm that Plaintiffs do muster—claiming generically that "[w]itnesses are dying, and their stories will be lost forever," Pls.' Fourth PI Mot. at 5—is no different from the one this Court previously rejected. *See* Order at 17 (concluding that Plaintiffs "failed to demonstrate . . . a likelihood of irreparable harm"). Moreover, Plaintiffs fail to tie this summary assertion of harm to any particular information that is likely to be disclosed in the legislative records, leaving only guesswork that some disclosure in the legislative records will prevent some unnamed witness's unspecified "story" to be lost. Indeed, Plaintiffs themselves admit that whatever "leads" they might obtain from such records are merely "potential" ones. Pls.' Fourth PI Mot. at 5. At most, Plaintiffs' attempt to articulate some harm is the barest speculation, far from the demanding showing required for equitable relief. *See Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (stressing that a "[s]peculative injury does not constitute irreparable injury," and that "a plaintiff must *demonstrate* immediate threatened injury"); *see also 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").

NARA Searches and FOIA Requests. Plaintiffs also fail to demonstrate irreparable harm with respect to their Third PI Motion's request for an order requiring NARA to "collect all remaining assassination records" and "prevent[ing]" NARA from referring researchers to the Freedom of Information Act. *See* Pls.' Third PI Mot. at 2, 18-19. Initially, as with their request for legislative records, Plaintiffs have impermissibly delayed this request for the extraordinary relief of an injunction. By their own telling, "Plaintiffs and the public have been waiting since 1998 for NARA to obtain the last of the assassination records." Pls.' Third PI Mot. at 1. But this statement admits that Plaintiffs waited 25 years before seeking to invoke this Court's equitable powers. Due to this delay, the relief sought in Plaintiffs' motion would upset the status quo that has persisted for the better part of three decades. Plaintiffs' concession of such a lengthy delay amply demonstrates the absence of any imminent and irreparable harm. *See Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1330 (9th Cir. 1994) (motion to alter status quo is "particularly disfavored" and should be denied "unless the facts and law clearly favor the moving party").

Plaintiffs also muster no more than a conclusory assertion of irreparable harm that bears little connection to the searches that they seek to have NARA perform. Merely stating, again, that "[w]itnesses are dying" falls far short of meeting Plaintiffs' burden to "*demonstrate* immediate threatened injury." *Boardman*, 822 F.3d at 1022. Plaintiffs' claim of harm is no more than an expression of displeasure that, in their view, "very few additional assassination records were included into the JFK Collection between 2000-2023." *Id.* at 18. But mere subjective disappointment is insufficient to meet their burden of showing an immediate and irreparable harm. Plaintiffs fail to make the required showing that they are "likely to suffer irreparable harm before a decision on the merits can be rendered." *Boardman*, 822 F.3d at 1023 (9th Cir. 2016) (quoting *Winter*, 555 U.S. at 22). Defendants intend to seek dispositive relief on all claims following the Court's decision on their Motion to Dismiss certain claims in the Third Amended Complaint. *See* ECF No. 78. That modest measure of additional time pales in comparison to the 25 years Plaintiffs have waited before claiming a purported need for an injunction.

As for Plaintiffs' request that NARA stop directing other researchers to rely on FOIA requests, there is no conceivable harm at all—let alone irreparable harm—from this alleged practice by NARA. If a researcher prefers not to submit a FOIA request, that is entirely his or her choice, as Plaintiffs nowhere allege that NARA is *forcing* researchers to submit FOIA requests. A researcher who dislikes such a suggestion can simply ignore it, and thereby avoid whatever alleged "harm" it supposedly causes.

Even assuming there were some irreparable harm associated with merely hearing a NARA employee suggest submitting a FOIA request, Plaintiffs have failed to show that there is some imminent risk that NARA will make such a suggestion to them imminently in the future. The fact that Plaintiffs can point to one specific instance in 2016 where a NARA official merely "suggested that Mr. Alcorn file a FOIA request," Third Am. Compl. ¶ 84, ECF No. 77, is wholly insufficient. Instead, Plaintiffs "must establish that irreparable harm is *likely,* not just possible, in order to obtain a preliminary injunction," and they have failed to do so. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Moreover, it is entirely unclear whether Plaintiffs themselves have suffered such harm in the past or whether it is Plaintiffs who, absent relief, will suffer such harm imminently in the future. Plaintiffs refer generally only to "JFK researchers" and "other individuals" but do not articulate any imminent, concrete harm to themselves, belying any need for judicial intervention. Pls.' Third PI Mot. at 8, 9.

In both of their motions, Plaintiffs have failed to meet their burden to demonstrate irreparable harm.

II. PLAINTIFFS HAVE FAILED TO SHOW ANY LIKELIHOOD OF SUCCESS ON THE MERITS.

Even if Plaintiffs were able to demonstrate irreparable harm for either of their requests for injunctive relief, which they cannot do, the motions should nonetheless be denied because their underlying claims are meritless.

Plaintiffs' Third PI Motion simply recycles their failed argument that NARA is obligated to conduct searches for assassination records under the JFK Act. This Court already concluded

that this claim lacks merit and dismissed it, and Plaintiffs *a fortiori* cannot obtain the extraordinary remedy of an injunction on this meritless claim. "NARA's [alleged] pattern and practice of refusing to look for documents under the JFK Act, is not a discrete agency action," the Court ruled. Order at 10. For that reason, the claim was "neither reviewable under the APA nor arbitrary and capricious," and the Court dismissed it. *Id.* Plaintiffs cannot obtain emergency equitable relief on a claim that has already been dismissed. That Plaintiffs now ask the Court to "analyze this case through the lens of [JFK Act] § 12(b)" makes no difference. Pls.' Third PI Mot. at 2. That provision imposes no stand-alone obligation on NARA to search for assassination records elsewhere in the federal government. Instead, it simply makes clear that the other provisions of the Act continue in effect even after the Assassination Records Review Board has terminated, a proposition that NARA has never disputed. *See* JFK Act § 12(b).

Likewise meritless is Plaintiffs' attempt to rely on a failure-to-act claim under 5 U.S.C. § 706(1) to force NARA to conduct a government-wide search for assassination records. *See* Pls.' Third PI Mot. at 10-12. As this Court recognized, *see* Order at 13-14, there is no statutory duty for NARA to "obtain the last of the assassination records." Pls.' Third PI Mot. at 11. Absent such a duty, there is no basis to compel NARA to act under § 706(1). *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is *required* to take.").

As for the merits of Plaintiffs' demand that NARA stop advising researchers to rely on FOIA requests, no such claim was pled in the operative Third Amended Complaint. "When a plaintiff seeks injunctive relief based on claims not pled in the complaint, the court does not have the authority to issue an injunction." *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 633 (9th Cir. 2015); *see also, e.g.*, *Kaimowitz v. Orlando*, 122 F.3d 41, 43 (11th Cir. 1997) (per curiam) (affirming the denial of a preliminary injunction motion when the relief sought involved matters not pleaded in the complaint); *Steele v. United States*, 2020 WL 7123100, at *7 (D.D.C. Dec. 4, 2020) ("Accordingly, the Court must deny plaintiffs' preliminary injunction motion because it cannot grant preliminary relief on claims not pleaded in the complaint.").

Even if such a "claim" had been pled, Plaintiffs muster no case law in support of the proposition that an agency's suggestion to rely on the Freedom of Information Act is a cognizable "final agency action" under the APA. And, insofar as Plaintiffs imply that there is some other basis—for example, in the JFK Act itself—for members of the public to obtain assassination records, they fail to identify it. (And, of course, if such a mechanism existed in the JFK Act, NARA would take no issue with Plaintiffs or anyone else availing themselves of it.)

Plaintiffs' Fourth PI Motion likewise lacks any chance of success on the merits. According to Plaintiffs, "NARA should have released these [legislative] documents more than six years ago on its own initiative." Pls.' Fourth PI Mot. at 4.[1] But, as the agencies' Transparency Plans show and as Defendants intend to demonstrate in a dispositive motion at the appropriate time, the information that has been withheld in legislative records contains Executive Branch equities, which the President is authorized to postpone under Section 5(g)(2)(D). *See* National Archives, *JFK Assassination Records*, *Agency Postponement Documentation*, https://perma.cc/7PDV-V436. As this Court recognized, "basic separation of powers principles" support a reading of the President's postponement power to include "records originated by the executive branch." Order at 12 (emphasis added). Because Defendants intend to show that the information in the legislative records that has been postponed by the President is information that originated in the Executive Branch, that postponement is consistent with the JFK Act, and Plaintiffs' request for injunctive relief is accordingly meritless.[2]

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[1] Plaintiffs also appear to misunderstand the import of the Court's ruling on the legislative records. *See* Pls.' Fourth PI Mot. at 5 (asserting that NARA "fail[ed] to act a prompt manner [*sic*] to take action to release these documents to the public in the aftermath of the court's decision"). The Court did not order NARA to release the legislative records. It determined only that Plaintiffs' *allegation* of a failure to release such records survived a motion to dismiss. Order at 12, 14.

[2] Defendants expressly preserve their right to argue that Section 5(g)(2)(D) extends further than the Court appeared willing to accept in its July 14 Order, and includes the power to postpone any assassination records, not just Executive Branch records or information. *See* JFK Act § 5(g)(2)(D) (granting to the President the power to postpone the release of "[e]ach assassination record"). It is not necessary for the Court to reach this issue in order to deny Plaintiffs' motions.

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST WEIGH HEAVILY AGAINST PLAINTIFFS.

The third and fourth requirements for issuance of a preliminary injunction—the balance of harms and public interest— "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, those factors weigh overwhelmingly against the requested injunctions.

With respect to the legislative records, the President has determined that continuing to postpone full disclosure of information in a limited number of records is necessary to protect "the military defense, intelligence operations, law enforcement, or the conduct of foreign relations." June 2023 Memorandum, *Certification Regarding Disclosure of Information in Certain Records Related to the Assassination of President John F. Kennedy*, 88 Fed. Reg. 43,247, 43,248 (June 30, 2023) at § 3. He has further determined that the harms from disclosure are "of such gravity that they outweigh the public interest in disclosure." *Id.* To second-guess the President's determination and compel the release of the legislative records would undermine the national security concerns that led him to postpone their release, as Congress specifically empowered the President to do. JFK Act § 5(g)(2)(D). When such matters of national security are at issue, courts have afforded the Executive Branch significant deference. *See United States v. Jennings*, 960 F.2d 1488, 1491 (9th Cir. 1992) ("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." (quotation and alterations omitted)); *Hamdan v. U.S. Dep't of Just.*, 797 F.3d 759, 770 (9th Cir. 2015) (noting that courts are "mindful of [their] limited institutional expertise on intelligence matters, as compared with the executive branch" "when dealing with properly classified information in the national security context").

Plaintiffs, citing the Act's general definition of "public interest," *see* JFK Act § 3(10), advance only a summary statement that they have "made the case on 'public interest.'" Pls.' Fourth PI Mot. at 6. Beyond that, Plaintiffs do not argue, let alone show, that there is some overriding public interest in the legislative records specifically that warrants their immediate release. With no evidence of any public interest in immediate release of the legislative records, Plaintiffs offer

no basis for this Court to award the extraordinary remedy of an injunction, in lieu of deciding the issue with the benefit of full briefing on a dispositive motion.

With respect to their request for NARA to "collect all remaining assassination records," Pls.' Third PI Mot. at 2, Plaintiffs offer the same self-serving, summary statement that they have simply "made the case," *id.* at 19. Again, Plaintiffs offer no argument, let alone evidence, that the public stands to benefit from an order that NARA immediately collect all assassination records. Even if there were some basis in the Act for such an order—and the Court has concluded there is not, *see* Order at 10—Plaintiffs have failed to show how such a collection effort would redound to the public's benefit. Indeed, because all assassination records have already been transmitted to NARA, and any obligation to do so falls on agencies themselves, such an order would have little, if any, benefit to anyone at all.

The public interest lies not in granting Plaintiffs' latest request for injunctive relief, but in hearing the surviving claims in this case in an orderly fashion. Defendants are committed to proceeding to dispositive motion practice in a timely and efficient manner following a ruling by the Court on their pending Motion to Dismiss.[3]

CONCLUSION

Plaintiffs' Motions for Injunctive Relief, ECF Nos. 91, 92, should both be denied.

Dated: December 21, 2023

Respectfully submitted,

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/s/ M. Andrew Zee

[3] In their motions, Plaintiffs also assert that they seek declaratory relief and mandamus relief in the alternative to injunctive relief. *See* Pls.' Third PI Mot. at 20-21; Pls.' Fourth PI Mot. at 6-8. Those requests should likewise be denied, for all the same reasons Plaintiffs lack any grounds to obtain injunctive relief.

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