No. 24-1606

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**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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

v.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, Defendant-Appellee.

On Appeal from the United States District Court

For the Northern District of California

No. 22-cv-06176-RS

Hon. Richard Seeborg

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# APPELLANTS' OPENING BRIEF

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**DISCLOSURE STATEMENT**

Plaintiff-Appellant The Mary Ferrell Foundation, Inc. is a nongovernmental corporate entity. The Plaintiff-Appellant has no parent corporation and no publicly held corporation that holds 10% or more of its stock.

Dated: May 27, 2024

/s/
_____
William M. Simpich
Attorney for Appellant
The Mary Ferrell Foundation, Inc.

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## INTRODUCTION

Plaintiffs-Appellants have filed this interlocutory appeal because the district court judge issued rulings that wrongly interpret the JFK Records Act.

The JFK Records Act is a remedial statute designed to ensure that the documents that provide the history of the JFK assassination are collected, reviewed and publicly released. The first sentence of the ARRB Final Report describes it as a "unique solution to the problem of government secrecy."

The Act created an Assassination Records Review Board (ARRB) that collected, reviewed, and publicly released these documents until the end of 1998. The Act stipulated that only in the "rarest" cases would these documents not be publicly released by the time of the dissolution of the ARRB. When the ARRB dissolved in 1998, the statute passed on the duties of continued collection, review, and release to Defendant-Appellee NARA. 65 FR 39550, enacted in 2000, described this transfer of duties to NARA as the "successor in function" to the ARRB.

Section 5(g)(2)(D) of the JFK Records Act provides that if any documents were withheld, an "identifiable basis" would be provided. Section 6 provides these identifiable bases. Instead, documents were withheld by NARA based on the President's invocation of the words of the statute – not an identifiable basis.

Similarly, documents were withheld by NARA based on agency-created exceptions that ignored the statutory definition of "public interest" in the JFK Records Act.

The court also excused NARA and the agencies from having any continuing duty under the JFK Records Act for "periodic review" of the basis for continued withholding of these documents, although periodic review had been conducted right up to 2022.

Many documents were not selected for inclusion in the JFK Collection due to the strictures of the FOIA, despite the statute's warning that the JFK Records Act was created because FOIA was preventing the documents from being collected.

Other documents were not collected even though ARRB, NARA and the CIA signed a Memorandum of Understanding, referred to as the 1998 MOU, to complete all outstanding assassination record searches.

NARA also had a statutory duty under JFK Records Act, Section 12 and a regulatory duty under 65 FR 39550 to collect all assassination records after the ARRB dissolved in 1998.

The Appellants sought injunctive relief and mandamus based on the claims above. However, the court not only denied such relief, but granted Defendant-

Appellee NARA's motion to dismiss related claims from the case. Appellants also seek review of these dismissed claims.

## JURISDICTIONAL STATEMENT

The U.S. District Court for the Northern District of California has federal question jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States) and the Administrative Procedure Act, 5 U.S.C. §§ 701, et seq.. It has the authority to grant injunctive relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201; the APA, and can issue writs of mandamus pursuant to the Mandamus and Venue Act, 28 U.S.C. § 1361; and the All Writs Act, 28 U.S.C. § 1651.

The Court of Appeals for the Ninth Circuit has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) and FRCP 54(a) because the Plaintiffs-Appellants seek review of the 1/18/24 order of the United States District Court for the Northern District of California denying motions for preliminary injunctions and a writ of mandamus pursuant to 5 U.S.C. § 706(1). ER-4. The order was entered the same day and the Plaintiffs-Appellants' notice of petition for review was filed on March 17, 2024, within the sixty-day period for such a petition in a suit involving the United States government pursuant to FRAP 4(a)(1)(b). ER-226.

## SUMMARY OF THE ISSUES PRESENTED IN THIS APPEAL

The court order of 1/18/24 erred when it:

1. Denied Appellants' initial motion for injunctive relief and mandamus, alleging that the Biden memoranda must be set aside and the documents re-reviewed based on the proper statutory and regulatory standards. (ER-13; ER-8); that the "NARA Guidance Document" must be set aside (ER-13; ER-8); that the agencies and NARA must continue to engage in periodic review (ER-13; ER-11), and the President cannot ignore his continuing duty to certify the postponement of records (ER-8-9).

2. Denied Appellants' second motion for injunctive relief and mandamus, alleging that NARA had a duty to collect all assassination records. ER-13-14. The court failed to address the portion of the injunction calling of a halt to NARA's practice of advising researchers to file actions rather than JFK Act requests. ER-13-14. Cited by Appellants at ER-23; ER-100.

3. Granted Appellee's motion to dismiss regarding Appellants' claims for APA/mandamus claims and arbitrary and capricious decision-making, contending that the agency acted unlawfully by not releasing certain information to the public, including the names of living witnesses. ER-6-9.

4. Granted Appellee's motion to dismiss of Appellants' claim regarding NARA's duty to complete outstanding record searches. ER-6-7. Appellants alleged that the Biden Memos expressly violate the JFK Records Act and the withholding of records is based on less stringent and non-statutory criteria such as the Transparency Plans in the 2022 Biden Memo (ER-86:14-89:10) not appearing in the Act. ER-109:3-6.

Appellants alleged that NARA has a Section 6 duty to release the names and identities of individuals and a Section 12 duty to continue to collect records until "all assassination records have been obtained". ER-10.

**ADDENDUM**

A separate addendum is filed simultaneously with this brief that submits the following pertinent authorities: The JFK Records Act; 5 U.S.C. Section 706(1)-(2); 2022 Biden Memo; 2023 Biden Memo; Transparency Plans; 65 FR 39550; 36 CFR 1290 et seq., the "NARA Guidance Document", & the 1998 MOU.

**STATEMENT OF THE CASE**

Plaintiffs-Appellants The Mary Ferrell Foundation, Inc. (referred to as MFF), Josiah Thompson and Gary Aguilar filed this action on October 19, 2022. ER-52. MFF maintains an archive of the largest non-governmental collection of documents related to the JFK assassination available to the public over the Internet.

Mr. Thompson and Mr. Aguilar are authors and researchers who rely on MFF's archive of primary documents on a regular basis. ER-58, paras. 17-18. The purpose of this suit is to invoke the protections of the JFK Records Act and the APA. Passed after the furor created by Oliver Stone's movie JFK, it is described as a unique statute designed for NARA to collect all the documents related to the history of the assassination and to review and release them by 2017. ER-65, para. 39. § 12(b) of the Act states that it will not expire until the Archivist certifies that all of the relevant documents have been collected and released.

From the inception of the Act until 1998, a five-person independent body known as the Assassination Archives Review Board collected, reviewed and released these documents. ER-66, para 43; ER-100, para 120. As time was nearing for the ARRB's dissolution in 1998, a number of agencies "waited out" the ARRB and failed to sign "declarations of compliance" stating that all of the required documents had been submitted. ER-67; para. 46. The ARRB, NARA and the CIA signed a Memorandum of Understanding assuring that NARA would collect any remaining documents from the CIA. ER-147; ER-150-156; ER-100:26-101:3.

When the ARRB was dissolved in 1998, NARA continued to collect, review and release documents pursuant to their powers under Section 12(b) of the JFK

Records Act and other sections of the statute, albeit at a much slower rate. ER-168, paras. 4-6; ER-176-177; ER-71:7-10. 65 FR 39500, adopted in 2000, states that NARA is the "successor in function" to the ARRB. The torrent of collected documents was reduced to a trickle, while the backlog of un-released documents sat in limbo. ER-97:7-27.

When the unreleased documents were scheduled to be released in 2017, President Donald Trump issued orders stating that his administration was continuing to review the documents and barred the wholesale release. ER-120:2-5. In consultation with Defendant-Appellee NARA, President Joseph Biden created "Transparency Plans" that modified the procedure for the release of the remaining documents with standards weaker that the standards set forth in the JFK Records Act. ER-120:5-10. DoD and CIA's Transparency Plans create a path for many documents to be publicly withheld for many generations to come. ER-157-166.

In response to Appellants' suit to complete the collection of documents and to release the unreleased backlog, Appellees Joseph R. Biden and NARA filed a motion to dismiss the suit. ER-6:14-15. Appellants filed a motion for injunctive relief, declaratory relief and mandamus, which was denied. ER-6:16. During July 2023, the court issued an order granting Appellants' claims to seek improved finding aids, the release of legislative records and for destroyed records, while

denying their other claims without prejudice and dismissing President Biden with prejudice. ER-6:16-18; ER-125:15-18; ER 134:13-16.

In response, Appellants filed their 3rd Amended Complaint, adding additional facts to buttress their renewed claims. ER-52. In the face of a renewed round of motions to dismiss by Appellee NARA and motions for equitable relief by Appellants, the court denied Appellants' renewed claims with prejudice (ER-14:18-20):

1. The Biden Transparency Plans must be set aside and the documents re-reviewed based on the proper statutory and regulatory standards (ER:18-27; ER-8:10-20); that the NARA Guidance Document must be set aside (ER:13-18-27; ER-8:17-20); that the agencies and NARA must continue to engage in periodic review, and the President cannot ignore his continuing duty to certify the postponement of records (ER-8:27-9:6; ER-11:2-8).

2. NARA has a duty to collect all assassination records (ER-13:21-23) and to halt advising researchers to file FOIA actions rather than JFK Act requests - the duty to halt advising FOIA actions was ignored by the court in its ruling. ER-10:11-20; ER-11; ER-24:2-28; ER 35:13-23; ER 39:16-21; ER 40:18-ER-41:3.

3. Section 11(a) of the JFK Act was ignored by the court in its ruling – it states that "when the Act requires transmission of a record to the Archivist or

public disclosure, it shall take precedence over any other law, judicial decision construing such law, or common law doctrine that would otherwise prohibit such transmission or disclosure of an assassination record." ER-14:11-15; ER-25:21-26:6. NARA cannot rely on the APA or other statutes or judicial decisions in challenging the viability of Section 11(a).

Furthermore, the court granted Appellee's related motion to dismiss:

1. The court granted Appellee's motion to dismiss (ER-8) of Appellants' claim against NARA for arbitrary and capricious decision-making, also brought to compel NARA to act under the APA and the mandamus statute, contending that the agency acted unlawfully by not releasing certain information to the public, including the names of living witnesses. ER-8-11.

2. The court also granted Appellee's motion to dismiss Appellants' claim regarding NARA's duty to complete outstanding record searches. ER-9-10. Appellants properly alleged that the Biden Memos expressly violate the JFK Act and that the withholding of records is based on less stringent and non-statutory criteria such as the procedure for the Transparency Plans in the 2022 Biden Memo (ER-86:20-89:10) not appearing in the Act. ER-66:18-22; ER-109:3-7.

3. Under the JFK Act, NARA has a § 6 duty to release the names and identities of individuals and a § 12 duty to collect records until "all assassination records have been obtained". ER-9:17-11:1; ER-62:15-18; ER-66:1-3.

This appeal followed.

**STANDARD OF REVIEW**

The standard of review for a district court's grant or denial of a preliminary injunction is abuse of discretion. *Earth Island Inst. v. U.S. Forest Serv.,* 442 F.3d 1147, 1156 (9th Cir. 2006). "The district court necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Rodde v. Bonta*, 357 F.3d 988, 994 (9th Cir. 2004) (citations and internal quotation marks omitted).

The district court, however, 'necessarily abuses its discretion' when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1298 (9th Cir. 2003). When the district court bases its decision on an erroneous legal standard or on clearly erroneous findings of fact, we review the underlying issues of law *de novo*. *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.,* 654 F.3d 989, 994 (9th Cir. 2011) (*per curiam*).

A district court's decision to grant or deny a motion to dismiss under Rule 12(b)(6) for failure to state a claim is reviewed *de novo*. *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F. 4th 885, 889 (9th Cir. 2021).

**ARGUMENT**

**I. Review of the appealable issues regarding the motions for injunctive relief can only receive "meaningful review" if the otherwise-unappealable motions to dismiss are also reviewed**

The court has pendent appellate jurisdiction to review the district court's previous orders to dismiss portions of this case as well as the order to dismiss injunctive relief and deny mandamus. See *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50 (1995): "…we have not universally required courts of appeals to confine review to the precise decision independently subject to appeal. See…*Deckert v. Independence Shares Corp*., 311 U.S. 282, 287… (Court of Appeals reviewing order granting preliminary injunction also had jurisdiction to review order denying motions to dismiss.)" The *Swint* court indicated that pendent jurisdiction was proper for issues "inextricably intertwined" with an appealable issue or if a court needs to review the unappealable issue to give "meaningful review" to the appealable one. 514 U.S. at 51.

The latest 9th Circuit case, *Dominguez v. Better Mortg. Corp.*, 88 F.4th 782, 794-795 (9th Cir. 2023), states:

"…precedents establish that more is required for pendent appellate jurisdiction than just having separate issues rest on common facts. E.g., *United States v. Decinces*, 808 F.3d 785, 792-93 (9th Cir. 2015) (declining to find pendent appellate jurisdiction over issues beyond scope of proper interlocutory appeal). We have exercised pendent appellate jurisdiction over issues that are "inextricably intertwined" with proper issues for an interlocutory appeal, but that is a demanding standard. *See, e.g., Streit v. County of Los Angeles*, 236 F.3d 552, 559 (9th Cir. 2001) (finding denial of motion to dismiss and denial of summary judgment inextricably intertwined). We may find an additional issue to be inextricably intertwined **only if "we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal ... [or] resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue.**" *Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000)…"

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

An order need not be labeled "injunction" to be covered by 1292(a)(1). Review is authorized by 1292(a)(1) "(w)hen an order, although not expressly denying or granting an injunction, has the practical effect of doing so." *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir. 1989).

Unlike orders that explicitly grant or deny injunctive relief, orders that have the practical effect of granting or denying injunctive relief are appealable under 1292(a)(1) only if a would-be appellant can show that an order "might have a serious, perhaps irreparable consequence, and that the order can be effectually challenged only by immediate appeal." *Carson v. Am. Brands, Inc*., 450 U.S. 79, 84 (1981) (internal quotation marks omitted). That is precisely the case here, as the two challenged orders granting partial motion to dismiss impact Appellants' motions for equitable relief.

## II. The order granting portions of the motion to dismiss the Third Amended Complaint must be set aside, and the Appellants' request for equitable relief must be granted

### A. Section 6(a) of the 2022 Biden Memo must be set aside

Appellants ask the court to set aside Section 6(a) of the 2022 Biden Memo for rewriting the definition of "public interest" rather than using the definition of "public interest" used in the JFK Records Act. The proper remedy is a re-review of

the remaining documents - also known as a "periodic review" as set forth in JFK Records Act Section 9(d)(2).

§ 6(a) of the 2022 Biden Memo states that "*in applying the statutory standard, agencies shall (1) accord* ***substantial weight*** *to the public interest in transparency and full disclosure of any record that falls within the scope of the Act." [emphasis added]*

§ 6(a) substitutes itself as the definition of "public interest" - but "public interest" is defined in § 3(10) of the Act as "the compelling interest in the prompt public disclosure of assassination records for historical and governmental purposes and for the purpose of fully informing the American people about the history surrounding the assassination of President John F. Kennedy."

The agencies used Biden 2022 Memo § 6(a) as the standard by the agencies and NARA to give ***"substantial weight***" to the public interest - not *"the compelling public interest in the prompt public disclosure*" cited in the JFK Records Act § 3(10).

The President can only exercise the statutory authority granted to him by Congress. This means the President cannot rewrite the law to use less stringent standards than those established by Congress.

The Transparency Plans described in the Biden 2022 Memo do not establish events that provide for automatic declassification. Instead, they only identify events or circumstances that will trigger review by the relevant agency and the NDC. There is no longer any role for the President in these future postponement decisions. Indeed, the President could not have been clearer that this was his decision when he wrote in paragraph 1 that the order was the final certification required under the Act. Given § 9(d)(2)'s mandate for "periodic review, downgrading and declassification", this statement and the delegation of future postponement decisions was *ultra vires* for which the Appellants are entitled to request review by this Court.

Nor can the President water down the "public interest" aspect of the JFK Act, as he did in the 2022 Biden Memo, § 6(a).

This Court has the duty to curb the President's *ultra vires* actions.

The President asked NARA to review the Transparency Plans and authorized the use of Transparency Plans to govern future postponement decisions based on NARA's review. NARA approved the Transparency Plans despite their use of criteria that violate the express terms of the statute was arbitrary and capricious. The Court has a duty to review NARA's unlawful actions under the APA.

The Court should strike those portions of the Transparency Plans that do not comply with the JFK Records Act's standards set forth in §§ 3(10) and 9(d)(2).

B. **NARA's Guidance Document must be set aside**

Section 7 of the 2022 Biden Memo states that "event-based or circumstance-based conditions" will trigger the public disclosure of currently postponed information" by the National Declassification Center. The DoD and the CIA use "the date of death of a living person" as a triggering event pursuant to § 7 of the 2022 Biden Memo. Also see ER-148-149; ER-158-163 (re CIA Transparency Plan); ER-165-166 (re DoD 9/28/22 letter). Such an event is not allowed by the JFK Records Act and NARA cannot use it as a postponement standard.

§ 7 of the 2022 Biden Memo states that "each agency prepared a plan for the eventual release of information (Transparency Plan) to ensure that information would continue to be disclosed over time as the identified harm associated with release of information dissipates. Each Transparency Plan details the event-based or circumstance-based conditions that will trigger the public disclosure of currently postponed information by the National Declassification Center (NDC) at NARA." This statement is repeated in § 5 of the 2023 Biden Memo.

The President is free to cite "triggering events" or a "triggering circumstance", but these triggering events or circumstances are limited by the

statute which establishes the grounds for postponement.

In other words, the President may not approve triggering events or circumstances that are less stringent than the statute. § 5(g)(2)(D) of the Act states that the President must certify "an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations...of such gravity that it outweighs the public interest in disclosure." The court accepted NARA's contention that once the President issues such a certification, the "broad discretion under Section 5(g)(2)(D) allows (the President) to use any criteria for postponement, as long as the 5(g)(2)(D) statutory criteria are included in his certification, which they were." ER-10:7-9.

§ 5(g)(2)(D) does not cite the name and identity of a living person or waiting for this person's death as a basis for postponement. § 6(2) addresses this issue, but the court has determined that "Section 6 and Section 5(g)(2)(d) are distinct statutory grounds for postponement. Appellants' repeated attempts to blur the lines between the two are unavailing." ER-10:6-7.

The 2022 Biden Memo relies, as it must, on Section 5(g)(2)(D). However, the name and identity of a living person - standing alone - is a non-statutory criterion that cannot be used to justify continued postponement. It is the information held by that person, or the threat caused by the exposure of that person

that determines whether there is "an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations." Privacy – standing alone - cannot be a factor. Nor can the impact on agency operations – see the problem with the "NARA Guidance Document" below.

The allegations in the Third Amended Complaint explain this violation. ER-81:20-82:17:

"67. On or about February 2017, NARA sent letters to all agencies and departments with equities in the withheld assassination records to inform them that NARA would be releasing the remaining records by October 2017 unless further postponements were requested and certified by the president. To assist with this process, NARA helped develop a guidance document titled "*Procedures for Processing Remaining Postponed Records in the President John F. Kennedy Assassination Records Collection Act of 1992*"… For previously postponed records for which agencies/departments intend to request continued postponement from the President, paragraph 2(a)(ii) of this guidance document provides that each agency/department had to submit "(ii) supporting documentation indicating (I) the rationale for such postponement, consistent with the criteria for postponement specified in section 5(g)(2)(D) of the Act; **(2) the impact of disclosure on current agency/department operations**; and (3) when possible, a specific proposed date

or an independently verifiable event when the record(s) can be released". [emphasis added]…

"69. **It should be noted that (2)(a)(ii)(2) requiring disclosure on "impact of disclosure on current agency/department operations" is a non-statutory criterion.** NARA acted arbitrarily and capriciously by approving and implementing the guidance document JFK records using nonstatutory criteria in violation of 5 U.S.C. § 706(2)(A)." [emphasis added]

2(a)(ii)(2)'s "impact of disclosure" is a non-statutory criterion not included in the JFK Records Act. 2(a)(ii)(1)'s "rationale…consistent with the criteria for postponement specified in section 5(g)(2)(D)" completely covers the ground. This aspect must be removed as a criterion and the names reviewed once more.

C. **The agencies and NARA must continue to engage in periodic review, and the portion of the 2023 Biden Memo stating that the President's duty to certify the postponement of records is no longer required must be set aside.**

The court's order of 7/14/23 states that "the JFK Act imposes a duty on the "originating agency" and the Archivist to perform periodic reviews of the postponed releases. 5(g)(1)". ER-124:7-8.

The July 2023 order also states that "The President's power further to postpone record releases is described in a subsequent provision, JFK Act § 5(g)(2)(D), which was a power **seemingly meant to conclude the periodic review**

**process...**It would therefore make little sense for Sections 5(g)(2)(A)– (C) to modify the President's power under Section 5(g)(2)(D)." ER-131:1-5. emphasis added.

Appellants maintain that although the court did state that the President's power to postpone record releases under 5(g)(2)(D) is not modified by the periodic review process, the court posed a question as to whether the 5(g) periodic review process between the Archivist and the agencies was concluded.

Section 9(d)(2) is unequivocal that the review process was not concluded with the invocation of 5(g)(2)(D) in 2017 and thereafter: "Any executive branch assassination record postponed by the President shall be subject to the requirements of periodic review, downgrading and declassification of classified information, and public disclosure in the collection set forth in section 4."

The periodic review process between these two entities is not concluded, and the President acted in an *ultra vires* manner by stating that his duties under the Act are concluded. Although the President does not participate in a periodic review, the President has a duty to engage in a 5(g)(2)(D) certification if the agencies and NARA seek to continue to postpone records once the periodic review is concluded.

Indeed, the actions of the Appellee over the past six years belie its legal argument. The procedure used by the Appellee since 2017 replicates the statutory period review process with NARA serving the same role as the ARRB. In the summer of 2017, NARA contacted the agencies with postponed records and told them the records would be disclosed unless the agencies provided support for further postponement much in the same manner that the ARRB informed the agencies when it decided to disclose records.

If the agencies sought postponement, they provided grounds for postponement. If NARA disagreed with the grounds for postponement (which it did in memos in August of 2017), the agencies then sought review by the President just like the process provided in section 9(d) of the statute.

This same process was followed for each presidential postponement certification ***after*** the statutory deadline expired on October 26, 2017. Having followed the same periodic review process in 2018, 2021, 2022 and 2023, the Appellee cannot logically claim that the statutory periodic review requirements ceased on October 26, 2017.

Accordingly, NARA must be ordered to halt this *ultra vires* conduct by the President. Future periodic reviews must be conducted, and the President may have

to issue a new 5(g)(2)(D) order after the periodic review is completed - as the President has repeatedly done during the 2017-2023 period.

Section 1 of the 2023 Biden Memo states his certification in this memorandum is "the last required under the Act". This portion of this Memo should be stricken.

D. **The court has misconstrued 5(g)(2)(D) of the JFK Records Act, and the "Section 6 statements" filed in the 1990s illustrate the proper construction of the statutory provision**

The court misconstrued Section 5(g)(2)(D) to provide discretion to the President "to use any criteria for postponement, as long as the 5(g)(2)(D) criteria are identified in his certification, which they were." ER 10:7-9. The operative criteria of 5(g)(2)(D) focuses on an "identifiable harm". The nature of the alleged "identifiable harm" remains hidden - and hence unidentifiable - to this day.

Plaintiffs maintain that Section 6 provides the "grounds for postponement of public disclosure of records", as stated in the subtitle of Section 6 itself. The court maintains that Section 6 was rendered inoperable after the 10/26/17 deadline but provides no convincing rationale for such a contorted statutory construction of a remedial statute.

Appellants discovered that although "Section 6 statements" stating the reasons for the continued postponements made by NARA and the agencies

frequently occurred in a haphazard manner during 1994-1998 and afterwards, there were no publications in the Federal Register that stated the "***reason for the continued postponement***" of each of those documents during the 1994-1998 period. See ER-16:3-17, ER:17-19; ER 22. This practice – going back to the 1990s – violated the mandate for publication of ***"each ground for postponement"*** as mandated by Section 9(e) and "***the reason for such continued postponement***" as mandated by Section 5(g)(2)(B).

E. **NARA acted arbitrarily and capriciously in approving the Transparency Plans.**

In the 2022 Biden Memo, the President directed that the Transparency Plans be used by the NDC to conduct future reviews of information that had been postponed under his order. He made this decision because "*These Transparency Plans have been reviewed by NARA, and the Acting Archivist has advised that use of the Transparency Plans by the NDC will ensure appropriate continued release of information covered by the Act."* 2022 Biden Memo at § 7.

The Transparency Plans approved by NARA allowed for the postponement of names of persons until their death. However, NARA previously concluded that such an approach was inconsistent with the standards of the JFK Act. Adopting inconsistent interpretations of the statute is the very essence of arbitrary and capricious action. See ER-48.

For example, when the FBI sought to postpone release of names of living persons who were mentioned in, subject to investigation or who provided information to the FBI, NARA chief executive officer William Bosanko concluded:

*"As justification for each of these, the FBI relies on broad statements concerning possible stigmatization, harassment, or even violent retribution. As the information is concerning events more than 50 years ago, while there may be a residual privacy interest by the individuals named, it is difficult to imagine circumstances under which an individual could be harmed by the release of their name in a file in the JFK Collection.* ***The standard set by the JFK Act and the Assassination Records Review Board during their deliberations is a high one: there has to be "clear and convincing evidence" of a "substantial risk of harm," and any invasion of privacy is "so substantial that it outweighs the public interest."*** *Bosanko Memo, ER-48. [emphasis added]*

With respect to names of confidential sources that the FBI sought to withhold from disclosure, NARA determined:

"*…Some of the sources being protected, however, are in the main investigative case files for Jack Ruby, Oswald, and the JFK investigation. Because the intent of the Act was to release information concerning the assassination, and these events are 50 or more years old, and these files clearly relate directly to the assassination,* ***NARA opposes the continued postponement of any confidential source information in these files, barring clear and convincing evidence of a substantial risk of harm.*** *NARA otherwise has no objection to the continued postponement of source information in other files, with the exception of documents in the [La Cosa Nostra] bucket." Bosanko Memo, ER-49. [emphasis added]*

In response to the FBI's request to continue to protect information about the identities of foreign law enforcement agencies that appear in the records, and

specific named foreign law enforcement and other foreign government sources, NARA concluded:

**"The application of this standard runs counter to the "clear and convincing evidence" standard** and ignores the balancing test written into JFK Act Section 6(4), which concerns the relationship between government agents and cooperating foreign governments. The FBI's assertion that the information would do little to further the public's understanding of the assassination, because 'in nearly all instances, the foreign government information at issue concerns a specific investigation of an individual and does not speak directly or indirectly about the assassination,' ignores the Review Board's broad view of what constitutes an assassination record. In many instances, the foreign government information at issue concerns a now-deceased critic of the Warren Commission, a subject clearly related to the assassination. In any event, **the weight is on showing harm that outweighs the public interest, not the other way around."** ER-50 [emphasis added]

Whether or not § 6(4) is applicable, it is powerful evidence of the public interest as defined by Congress. When the FBI also sought to withhold 6,097 files involving members of organized crime or La Cosa Nostra (LCN), NARA found:

"In justifying the continued postponement of postponed LCN documents, **the FBI's appeal justification relies on broad statements of potential harms, instead of the "clear and convincing evidence" standard of the JFK Act.** Because we can find no indication that the FBI made any attempt to determine if additional information could be released, NARA cannot support the continued postponement of these records absent additional work by FBI." Bosanko Memo, ER-50. [emphasis added]

In first rejecting proposed postponements but then approving Transparency Plans that contained standards that contradicted NARA's interpretation as reflected in the Bosanko Memo, NARA adopted different interpretations of the same

statutory duties. Differing interpretations without any explanation - much less a rational explanation - constitutes arbitrary and capricious decision-making.

In declining to enjoin the Transparency Plans, the court said that it was the Biden Memos that postponed the records, not the Transparency Plans. This denial was based on fundamental misunderstanding or ignoring on how the plans were developed and approved.

In paragraph 7 of his 2022 Memo, the President wrote "These Transparency Plans have been reviewed by NARA, and the Acting Archivist has advised that "use of the Transparency Plans by the NDC will ensure appropriate continued release of information covered by the Act." Section 5 of the 2023 order states: "These Transparency Plans were reviewed by NARA, and the Acting Archivist previously advised me that use of the Transparency Plans by the NDC will ensure appropriate continued release of information covered by the Act." The President then instructed National Declassification Center (NDC) and not the originating agencies to use the Transparency Plans for further reviews.

Contrary to the Court's conclusion, the agencies had already agreed to implement the Transparency Plans at the time of the Biden Memo. The President simply instructed the National Declassification Center to use the Transparency

Plans "to conduct future reviews of any information that has been postponed from public disclosure".

The approval of the Transparency Plans by NARA was the consummation of multi-year process that began when the Archivist informed the agencies in August 2017 that their requests for postponements did not comply with the requirements of the JFK Act. It continued when NARA, in response to the improper postponement requests, issued its binding yet flawed guidance ("Procedures for Processing Remaining Postponed Records in the President John F. Kennedy Assassination Records Collection Act of 1992" to the agencies in September 2017 that set forth "The following procedures will be followed by all affected Federal agencies/departments on how and when those records will be processed." ER-81:20-82:17.

This process proceeded through 4 postponements of two presidents until NARA finally advised President Biden as he stated in paragraph 7 of his 2022 Memo that "These Transparency Plans have been reviewed by NARA, and the Acting Archivist has advised (did not recommend to the President) that "use of the Transparency Plans by the NDC will ensure appropriate continued release of information covered by the Act."

The approval of the Transparency Plans by NARA meet the two-part test of *Bennett v. Spear*, 520 U.S. 154 (1997) since they represent the consummation of a deliberative process and result in legal consequences both to the agencies and the plaintiff members who are unable to review the records due to the approval of the flawed Transparency Plans not only in the short term but for many of them forever since they will have passed away before the records are eligible for review.

NARA approved Transparency Plans that contained non-statutory, less stringent standards than the Act and that violate the Act by removing any role of the president from the future reviews. President Biden confirmed this fact when his June 2023 memo stated that this certification was the last required under the act. Thus, the approval as final agency action pursuant to the *Bennett v. Spear* test and NARA's approval of Transparency Plans that violate the express terms of the Act constitute arbitrary and capacious behavior that is subject to judicial review.

NARA's approving of the Transparency Plans using non-statutory criteria is one in which "rights or obligations have been determined," or from which "legal consequences will flow" *Bennett*, 520 U.S. at 177-78. Plaintiffs have been deprived of their rights under §2(a)(2) of the JFK Records Act to review assassination records and to become fully informed about the history surrounding the assassination.

In *Bennett*, the Court held that "unlike the reports in *Franklin* and *Dalton*, which were purely advisory and in no way affected the legal rights of the relevant actors, the Biological Opinion at issue here has direct and appreciable legal consequence." The Transparency Plans also were not advisory or recommendations as the Defendants claim but were binding on the agencies when NARA approved them (before the Biden 2022 Memo was issued) and therefore had direct and appreciable legal consequences on agencies and the plaintiffs. NARA's approval of Transparency Plans that violate the express terms of the JFK Act upon the Appellants is sufficiently direct and immediate to render the issue appropriate for judicial review immediately.

Since the President relied on this unlawful decision-making by NARA in approving the Transparency Plans, the President acted *ultra vires*. The Court should conduct a review of the grounds for postponement in the Transparency Plans and enjoin the agencies from using the Transparency Plans until the Court evaluates the lawfulness of the Transparency Plans. If the Court agrees with the Appellants that the Transparency Plans violate the standards of the JFK Act, the Court should order the agencies to revise the Transparency Plans. The Appellants request that the Court retain jurisdiction over the Transparency Plans so it can

determine if the revised Transparency Plans comply with the "high" standards of the JFK Act.

### F. Section 12(b) Mandates that the Remaining Provisions of the JFK Records Act Shall Continue in Effect, Other than Portions of Section 7 and All of Section 8

#### 1. Introduction

When does the JFK Act require transmission of a record to the Archivist?

The court's 7/14/23 ruling did not address the impact of Section 12(b) of the Act, which states: "The remaining provisions of this Act shall continue in effect to such time as the Archivist certifies to the President and the Congress that all assassination records have been made available to the public in accordance with this Act."

What provisions of the Act continue in effect since the termination of the Review Board, pursuant to 12(b)? The answer is revealed by studying the sections terminated pursuant to 12(a).

Section 12(a) states "the provisions of this Act that pertain to the **appointment and operation** of the Review Board" terminate with the ARRB's dissolution.

In reviewing the sections of the Act, Appellants contend that the only sections that have terminated are §§ 7(a)-(h) which addresses the appointment of

the Board, and §§ 7(k)-(m) and § 8 which address the operation of the Board. The Merriam-Webster definition of "operation" is "the quality or state of being able to work or function". Thus, "ARRB operations" must be defined as the **administrative** functions of the Board.

All other sections of the JFK Records Act remain in full force and effect. This is why the ARRB entered into the Memorandum of Understanding with CIA and NARA. ER-147; ER-150-156. The ARRB expected NARA would assume these responsibilities. For example, §§ 5(b), 5(c)(2)(F) and § 9(a) require government offices to transfer assassination records to the Review Board – these transfers have been made to NARA from 1998 to the present. These are powers and duties of the Board, not "operations" or administrative functions.

For an enumeration of the ARRB's powers and duties, see the analysis by ARRB counsel Jeremy Gunn. ER 189-190. The facts in this case show that NARA has assumed several of these duties between 1998 to the present, such as:

- "Direct Government offices to complete identification aids and organize assassination records. Sec. 7(j)(1)(A)."
- "Direct Government offices to transmit to the Archivist assassination records. Sec. 7(j)(1)(B); see also Sec. 9(1)."

- "Obtain access to assassination records that have been identified and organized by a Government office. Sec. 7(j)(1)(C)(i)."
- "Direct a Government office to…make available additional information, records or testimony from individuals. Sec. 7(j)(1)(C)(ii)."
- "Issue interpretive regulations. Sec. 7(n)."

Note that §§ 7(i)-(j), (n) and (o) and 7(j) address the powers and duties of the Board, not the **administrative** functions of the Board.

Thus, NARA accepts some ARRB duties, but rejects the notion that it has any duties.

**2. NARA adopted regulations assuming many ARRB duties and powers in 2000**

In 2000, NARA adopted as its own the regulations issued by the ARRB by transferring the former ARRB regulations to chapter XII of Title 36 of the Code of Federal Regulations.. In doing so, NARA expressly assumed many of the duties and powers of the ARRB. NARA said it undertook this regulatory action because it was "the successor in function" to the ARRB. See, e.g., 65 FR 39550 (NARA's role is to maintain and supplement the Collection and provide guidance to agencies; 36 CFR 1290.1 (scope of assassination records); 36 CFR 1290.3 (sources of assassination records and additional records and information); 36 CFR 1290.5

(requirement that assassination records be released in their entirety); and 36 CFR 1290.8 (implementing the JFK Act – notice of Assassination Record designation).

Section 5(c)(2)(F) mandates any government office in possession of assassination records to review, identify, and transmit possible Assassination Records to the JFK Collection when any office of the federal government such as NARA has *any uncertainty* as to whether a document is an assassination record". NARA is a "government office" pursuant to § 3(c)(5), and it assumed the duty to provide guidance to the other agencies pursuant to 65 FR 39550.

Two similar statutes are also applicable, as §§ 5(c)(2)(H) and 7(j)(1)(C) mandate such action when the "Review Board" has "*reason to believe*" that a document must be reviewed. Note that procedures established by both the Trump Administration and the Biden Administration to review assassination records assign roles played by the ARRB to NARA.

Appellee NARA has ignored the finding in § 2(a)(1) that "all Government records (related to the JFK assassination) should be preserved for historical and governmental purposes"; the mandate in § 4(a)(1) that "the Collection shall consist of all Government records relating to the assassination of President John F. Kennedy"; that NARA has a duty to determine if it has "uncertainty" about whether a record is an assassination record governed by the JFK Records Act

pursuant to § 5(c)(2)(F); that NARA has "reason to believe" that additional documents from the agencies should be reviewed pursuant to §§ 5(c)(2)(H) and 7(j)(1)(C)(ii); and the aforementioned mandate in § 12(b) to obtain "all" assassination records.

36 CFR 1290.7(d) states that the terms "any" and "all" shall be understood in their broadest and most inclusive sense. 36 CFR 1290 states that although the ARRB terminated in 1998, "NARA has determined that these regulations are still required to provide guidance to agencies." Also see 65 FR 39550, *supra*, stating that this guidance is necessary because NARA continues to "supplement the collection" and that agencies "continue to identify records that may qualify as assassination records and need to have this guidance available."

### G. The § 706(2) "arbitrary and capricious" challenges to NARA actions involve several discrete agency actions that are incoherent and chaotic, not coherent or methodical

The Appellants contend that facts illustrate that the § 706(2) "arbitrary and capricious" challenges to NARA's actions involve several discrete agency actions, as set forth below.

Appellants recognize the court's ruling that "an APA claim cannot seek the 'wholesale improvement of (a) program by court decree'. *Lujan*, 497 U.S. at 891.

For this reason, averring a pattern and practice is generally insufficient to state a claim under the APA." ECF 68, 10:3-5.

Appellants have alleged several discrete agency actions in the Third Amended Complaint. Courts can compel agency action in "carefully circumscribed…situations where an agency has ignored a specific legislative command." *Hells Canyon Pres. Council v. U.S. Forest Service*, 593 F.3d 923, 932 (9th Cir. 2010). A claim under 5 U.S.C. § 706(1) can proceed when a plaintiff "asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 64 (2004).

These actions illustrate that NARA had no coherent or methodical approach about how to address the requests of researchers seeking to obtain "additional assassination records".

1. In 2000, NARA issued regulations in the Federal Register stating that it was continuing to exercise authority over searches for additional assassination records. "NARA continues to maintain and *supplement* the collection under the Provisions of the Act…*Agencies continue to identify records* that may qualify as assassination records and *need to have this guidance available*." 65 FR 39550.

Between 2000-2023, JFK researchers and the American public relied on NARA's regulatory scheme and the representations it made to the American

people in the Federal Register that agencies were continuing to identify possible additional assassination records and that NARA was providing guidance and *supplementing* the JFK Collection.

The discrete events below chronicle researchers who relied on NARA's guidance.

2. Some NARA officers like Gene Morris provide guidance to researchers. Mr. Morris obtained additional assassination records when researcher Bill Kelly alerted him that Secret Service officer Gerald Blaine was keeping some of the records allegedly destroyed in 1995 under his bed. ER-95:4-13; also see ER-137.

The destruction of these records caused a scandal when the Secret Service reported that it had intentionally destroyed them after the JFK Records Act was passed. Appellants continue to seek these records to this day. ER-79, fn. 79.

Mr. Morris also told researcher Roger Odisio that NARA did accept recommendations for matters to be added to the Collection, and to provide the details of any possible assassination record to NARA general counsel Gary Stern. ER-96:1-12.

Despite Mr. Morris' guidance that researchers should contact NARA counsel Stern if they became aware of assassination records not in the JFK Collection, Mr. Stern failed to respond to such inquiries or failed to submit the

researchers' requests directly to the agencies. Because Mr. Stern failed to take action, the searches would not go any further. Mr. Odisio followed up with Mr. Stern and received no response. ER-96:13-16.

Relying on discussion resulting from Morris' statement to Odisio, researcher Dan Alcorn also contacted counsel Stern and asked him to conduct a search pursuant to the JFK Records Act for certain records. Mr. Stern provided no response to Mr. Alcorn's request. ER-90:8-12. Mr. Schnapf also received no response from Mr. Stern when he submitted a search request pursuant to the JFK Records Act. ER-94:16-95:27. Mr. Stern's failure to respond to these requests are discrete actions in the form of inaction that illustrate NARA's incoherent and chaotic approach to obtaining new records.

4. A third approach towards obtaining additional assassination records is provided by yet another NARA officer: Mr. Alcorn was informed by NARA officer Martha Murphy that items found in an index might be sought under the JFK Records Act, but that items not in the index "fall under FOIA, rather than the JFK Act" in direct contradiction to Section 2(a)(5) of the Act. ER-84:18-85:2; ER-194-195, para. 10; ER-220-223.

5. William Simpich has spoken with other individuals who told him that

they were advised by NARA to file FOIA requests rather than JFK Records Act requests. ER-96:19-21.

Each of these events illustrate "discrete agency actions", not "a wholesale improvement of the program by joint decree". These events show that if a researcher requests records under the JFK Records Act, the response will vary depending on "who you talk to". This inconsistent handling of record search requests is the very definition of arbitrary and capricious behavior, and contrary to law pursuant to § 706(2). These examples also illustrate "unreasonable delay" pursuant to § 706(1).

As stated above, the Third Amended Complaint alleges that the Appellants have properly alleged that NARA has an incoherent and chaotic approach to the use of the JFK Records Act to obtain additional assassination records. ER-29-32.

From 2000-2023, NARA has operated pursuant to 65 FR 39550 which states that NARA is responsible for providing guidance to the agencies on the application of the JFK Records Act. NARA cannot abandon its duty to the countless researchers who have turned to NARA rather than the agencies to obtain these records. Nor should NARA undermine the efforts of researchers like Jefferson Morley who obtained some of the "Joannides documents" pursuant to FOIA, and

then saw the rest of the Joannides documents buried in a *Vaughn* index from 2003 to the present. See the discussion re the Joannides documents below.

To summarize:

If a researcher such as Kelly or Odisio contacts NARA official Gene Morris, Morris is willing to use the JFK Records Act to obtain records. Morris also recommends that researchers contact NARA counsel Gary Stern and request its use.

On the other hand, when Alcorn or Schnapf directly contacted Gary Stern, the result was no response.

A third approach is illustrated by Alcorn's contacts with official Martha Murphy. She indicated that she was willing to use the JFK Records Act to find records, but only if the name in question could be found in the JFK Collection index. Upon learning that a record was not in the index, she instructed the researcher to use FOIA instead of forwarding the request to the relevant agency so the agency could comply with its continuing duty to search for assassination records. Mr. Simpich reported similar events as those reported by Mr. Alcorn.

§ 5(c)(2)(F) mandates action when any government office has "*any uncertainty as to whether the record is an assassination record governed by this Act*". § 3(c)(5) defines a "government office" as "any office of the federal

government that has possession or control of assassination records", specifically including NARA. The above discrete events provide the Appellants with a strong case based on "arbitrary and capricious" conduct that violates the law.

This inconsistent treatment of researcher requests constitutes arbitrary and capricious behavior. *Formula v. Heckler*, 779 F.2d 743 (D.C. Cir. 1985) (Agency is required to justify departure from earlier regulatory approach under arbitrary and capricious standard, and to meet standard must provide reasoned basis for departure); *Farmers Union Cent. Exchange, Inc. v. Federal Energy Regulatory Com.*, 734 F.2d 1486 (D.C. Cir. 1984) (Arbitrary and capricious" standard demands that agency give reasoned justification for its decision to alter existing regulatory scheme; changed circumstances may justify revision of regulatory standards over time but change in circumstances does not eliminate burden of agency to set forth reasoned analysis in support of particular changes finally adopted.)

### H.The above-described events show that Appellants also meet the § 706(1) requirements for unreasonable delay

An agency's delay in completing a pending action as to which there is no statutory deadline may not be withheld when such delay is unreasonable when weighing such considerations as the agency's need to set priorities among lawful

objectives, the challenger's interest in prompt action, and any relevant indications of legislative intent. Administrative Law & Regulatory Practice, American Bar Ass'n, *A Blackletter Statement of Federal Administrative Law*, 54 Admin L. Rev. 1, 44 (2002).

These factors weigh in favor of the Appellants. It does not aid NARA's priorities to provide confusing and contradictory advice to researchers who seek the release of additional assassination records. The challenger's interest in prompt action and the legislative intent in favor of transmission and release is consistently stated throughout the JFK Records Act. As stated in § 2(a)(7) of the Act, only in the "rarest" cases should there be any delay in transmission and release of all of the records.

*See Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77–78 (D.C. Cir. 1984) ("TRAC") *("[S]ection 706(1) coupled with section 555(b) does indicate a congressional view that agencies should act within reasonable time frames and that courts designated by statute to review agency actions may play an important role in compelling agency action that has been improperly withheld or unreasonably delayed."*). Section 555(b) states that agencies should conclude matters "within a reasonable time," and Section 706(1) states that courts "shall ...

compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. §§555(b), 706(1).

In this case, Appellants and the public have been waiting since 1998 for NARA to obtain the last of the assassination records. However, NARA has stated that it has no duty to obtain any more records in its previous filings.

Similarly, Appellants maintain that NARA's use of the JFK Records Act has been intermittent since 1998, and the public is entitled to have NARA enjoined from directing the public towards FOIA when seeking JFK assassination records – the very procedure Congress concluded was ineffective and sought to replace when it passed the JFK Act ("the Freedom of Information Act… has prevented the timely public disclosure of records related to President John F. Kennedy.") § 2(a)(5).

Also see, e.g. *Gordon v. Norton*, 322 F.3d 1213, 1220 (10th Cir. 2003) ("An agency's failure to act ... can become a final agency action if the agency delays unreasonably in responding to a request for action (or if) if the agency delays in responding until the requested action would be ineffective."). The absence of an absolute deadline does not give an agency the right to postpone a decision indefinitely. *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001). Under both the Mandamus Act and the APA, courts measure delay in circumstances where

there is no absolute deadline under a reasonableness standard. *Kim v. USCIS*, 551 F. Supp. 2d 1258, 1264-1265 (D. Colo. 2008)

Two of the TRAC factors always tend to receive ample discussion from the courts. First, statutory deadlines are a significant factor in determining a case of unreasonable delay. *When Congress signifies that it wants an agency to prioritize an action, the courts are more willing to enforce that priority. We have that time-based urgency stated by Congress in the JFK Records Act.* Second, courts appear to be more willing to compel an agency to act when the action involves the public interest such as the JFK documents, compared to mere economic interests.

It should be added that courts more readily compel agencies to act in cases where there is a statutory deadline imposed on an agency. The Supreme Court declared, in *Norton v. SUWA,* 542 U.S. at 65, that "when an agency is compelled by law to act within a certain time period ... a court can compel the agency to act." The entire impetus of the JFK Records Act was to release all available records by 1998 except for the "rarest cases" pursuant to Section 2(a)(7), and to obtain and release the rest of the records by 2017 absent a finding by the President of "identifiable harm…of such gravity that it outweighs the public interest in disclosure" for "each assassination record" pursuant to 5(g)(2)(D) that harmonizes

with the applicable portions of §§ 6 (grounds for postponement of public disclosure) and 9 (review of records).

## I. It violates § 2(a)(5) for NARA to advise researchers to file FOIA requests for assassination records

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

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

The "Joannides documents" were requested by researcher Jefferson Morley pursuant to FOIA. Even though the actions of Joannides in relation to Lee Harvey Oswald was hidden from the public until 2003 by the actions of Joannides and his superiors (see *infra,* as well as *Morley v. CIA,* 508 F.3d 1108, 1118 (D.C. Cir. 2007)), the Joannides documents have been hidden from the public in a *Vaughn* index for twenty years despite the protestations of three of the five former ARRB

members stating that the Joannides files met the board's criteria of "assassination-related" and should be released. ER-77:22-23. ARRB member Anna Nelson stated that "the Freedom of Information Act, as implemented by the executive branch, has prevented the timely disclosure of records relating to the assassination of President John F. Kennedy." ER-77:23-25.

ARRB chair Judge John Tunheim stated:

***"By its actions, the CIA has thus destroyed the integrity of the probe made by Congress and cast additional doubt upon itself. It is imperative that all additional information which bears upon the CIA's conduct regarding both the congressional investigation and the Kennedy assassination itself be made public as soon as possible."*** ER-77:26-28.

This is a case where NARA should have collected, reviewed and released the rest of the documents by October 2017. NARA is now more than six years late. It was clearly the intent of the Congress to get all documents to the public as quickly as possible and not after October 2017 except in the face of an "*identifiable harm that is of such gravity that it outweighs the public interest in disclosure*." § 5(g)(2)(D)(ii). "Public interest" is defined at § 3(10) as:

***"(T)he compelling interest in the prompt public disclosure of assassination records for historical and governmental purposes and for the purpose of fully informing the American people about the history surrounding the assassination of President John F. Kennedy."***

The JFK Records Act expressly stated at the time of passage in 1992 that: "most of the records related to the assassination…are almost 30 years old, and only

in the rarest cases is there any legitimate need for continued protection of such records." § 2(a)(7). The Act's mechanisms are designed to collect "all assassination records" to provide the full history for the American people. §§ 2(a)(1), 2(a)(2), 12(b). But NARA has unreasonably delayed and unlawfully withheld responses to requests, for example, by MFF member Larry Schnapf, as well as researchers Dan Alcorn and Roger Odisio.

The "Joannides documents" remain unavailable due to the use by NARA and the CIA of FOIA, rather than consistent use of the JFK Records Act. NARA has refused to comply with the Memorandum of Understanding (MOU), a key tool recommended by ARRB to obtain additional assassination records. NARA's approval of the Transparency Plans is the latest method that results in delay of the disclosure of any additional records.

### J. As the ARRB identified "additional assassination records", NARA has a mandatory duty under Section 12(b) and related sections of the Act to obtain these records for the American people

The district court held that "the JFK Act imposes 'no specific, unequivocal command' to undertake the *remaining averred duties* ('seeking 'Final Declarations of Compliance', following up on outstanding search requests…)", stating that it was *a "voluntary program" designed to aid the ARRB to "(carry) out its obligation to 'direct that all assassination records be transmitted to the*

*Archivist'. JFK Act Section 9(c)(1). The ARRB accordingly could not have been 'specifically commanded' to implement this voluntary program.*" ER-130:13-21.

Appellants respectfully respond that if the court agrees that § 12(b) and its related sections of the Act regarding the search for "additional assassination records" remain in full force and effect, then § 12(b) mandates that NARA is "specifically commanded" to undertake the "remaining averred duties" and obtain the additional assassination records that have been identified by the ARRB.

These records include:

- ARRB requests to search for additional designated assassination-related records made to certain agencies including the CIA, Department of Defense and FBI remain outstanding. ER-67:9-12.
- In addition, the ARRB was also working with the JFK Library and the RFK Donor Committee at the time of the final report to release certain papers of Robert F. Kennedy. These records remain outstanding. ER-67:12-14.
- Upon information and belief, additional Assassination Records exist that have not been transmitted to Appellee NARA and that are not currently part of the Collection. Also, on information and belief, Appellee NARA has not followed up on the outstanding ARRB records search requests

nor have several agencies submitted sworn Final Declarations of Compliance. ER-76:15-20.

- Mr. George Joannides served as chief of covert action at the CIA station in Miami and served as case officer for a New Orleans-based CIA-funded exile group that had a series of encounters with Lee Oswald in 1963. Joannides was then appointed the CIA's documents gatekeeper and prevented HSCA investigators from obtaining important documents, including any discovery of Joannides' own role with the CIA-funded exile group that repeatedly interacted with Oswald in 1963. According to former ARRB board members, 44 Joannides documents from 1962-64 and 1978-81 constitute Assassination Records entitled to "the presumption of immediate disclosure" and should have been transferred to the ARRB to determine if they should be disclosed. Instead, the CIA withheld the Joannides files from the ARRB and continues to withhold these files. The CIA should be ordered to transfer these materials to NARA. ER-77:4-13.
- NARA has failed to request the assistance of the Department of Justice to unseal all tape recordings of Louisiana Mafia boss Carlos Marcello in

violation of its ministerial non-discretionary duty. See §§ 10(b)(1) and 10(b)(3). ER:77:14-78:14.

- NARA did virtually nothing since 1999 to continue the ARRB's work to recover assassination records that are believed to be held by government agencies. ER 97:19-98:7. This includes the records enumerated in the Memorandum of Understanding signed by ARRB, NARA and CIA. ER 97:7-98:7; 100:5-101:7.
- Appellants allege that if any of the acts alleged in this complaint are determined by the court to be discretionary rather than mandatory, that such action constitutes an abuse of discretion. ER-99:3-21.

**K. Section 11(a) of the Act takes precedence over any other law**

Appellants also rely on § 11 of the JFK Records Act, which makes it clear that "when this Act requires…public disclosure, it shall take precedence over any other law…judicial decision construing such law, or common law doctrine that would otherwise prohibit such…disclosure…" This extraordinarily powerful section of the Act is sweeping in its impact. Taken to its zenith, the Appellee cannot cite the APA, case law, or common law as a basis to bar public disclosure.

Although this portion of the statute was emphasized to the court in Appellants' briefs to rebut Appellee NARA's APA arguments, the court simply refused to address it in its rulings. See ER 10:17-24; 25:20-26:6; 40:7-15; 65:1-5.

L. **NARA's Role as the Successor in Function to the ARRB**

Appellants sought a ruling that NARA had a mandatory duty to conduct reviews for additional Assassination Records as required by the JFK Records Act.

Appellants initially premised this relief on statements appearing in the preamble to the 6/27/00 regulation published by NARA in the Federal Register that it was the "successor in function" to the defunct ARRB. "NARA continues to maintain and supplement the collection under the provisions of the Act. NARA is, therefore, the successor in function to this defunct independent agency… Agencies continue to identify records that may qualify as assassination records and need to have this guidance available." 65 FR 39550.

The 1998 Memorandum of Understanding signed by ARRB, the CIA and NARA ("CIA MOU") displays NARA commitment to ensure that the CIA completed its "continuing obligations under the JFK Act in a timely manner". ER 151-156. The work continued into 1999, even as CIA admitted that deadlines

were being blown and that it was reluctant to adhere to the entire agreement. ER-179-181.

After the court rejected Appellants' argument that NARA was the successor in function to the ARRB, the Appellants then focused on NARA's unreasonable non-compliance with Section 12(b) of the Act due to its chaotic approach by usually refusing to conduct additional assassination record searches. This conduct was arbitrary and capricious and contrary to law. 5 U.S.C § 706(1) and § 706(2).

The court's final response in its January 2024 order: "According to Plaintiffs, this imposes on NARA the duty to complete any outstanding search requests and to conduct new searches for assassination records. However, the JFK Act levies no command on NARA to conduct such a search. Plaintiff argues that NARA is a successor in function to the ARRB, which dissolved in September 1998 following the issuance of its Final Report. The July 14, 2023, Order already explained that NARA and the ARRB are two distinct entities and any legal duties formerly tasked to the ARRB cannot be legally assumed by NARA or any other executive agency." ER-10:19-11:1.

Thus, the court reiterated its prior ruling that the "JFK Act imposes no specific, unequivocal command" to "undertake…outstanding search requests" and the other approaches, stating that "the compliance program was one of many ways

the ARRB could have carried out its obligation to direct that all assassination records be transmitted to the Archivist." JFK Records Act Section 9(c)(1)." ER-130:13-20.

However, the JFK Records Act does not provide that its relevant portions ended when the ARRB dissolved in 1998. Congress passed the Act as a remedial statute because the agencies were not releasing information in the absence of an enforcement mechanism. For the same reasons, this is why the ARRB entered into the MOU with CIA and NARA, concluding that NARA had the authority to enforce the unique powers conferred by the statute.

The ARRB expected NARA would assume these responsibilities, including the ones contained in Sections 5(c)(2)(F), 5(c)(2)(H) and 7(j), which mandate the Review Board or the agencies in possession of assassination records to review, identify and transmit possible assassination records to the JFK Collection when 'an office has any uncertainty as to whether a document is an assassination record" or when the "Review Board" has "reason to believe" that a document must be reviewed. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984), the court should have deferred to the interpretation of the statute by ARRB - the agency conferred with the power to implement the Act -

and to NARA – responsible to "continue to maintain and supplement the collection under the provisions of the Act."

When NARA published its proposed and final rule in the Federal Register that it was the successor in function to the ARRB, no government agency objected to that exercise of authority. The process used by NARA following the dissolution of the ARRB both before and after October 24, 2017, deadline replicated the ARRB review process. Agencies made recommendations to NARA for postponement, instead of the ARRB. NARA – instead of the ARRB – informed the agencies if it agreed. If the agencies did not agree with NARA, they appealed to the President.

The procedures established by the Trump and Biden Administration to review assassination records assign the ARRB's former role to NARA.

The court should have halted the Defendant from making a legal argument that belied the actual process of review that was used for thirty years.

## III. ALL FOUR ELEMENTS OF THE TEST FOR INJUNCTIVE RELIEF STRONGLY TILT IN APPELLANTS' FAVOR

*Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken*, 556 U.S. at 434) sets forth a four-element test for injunctive relief.

### A. Appellants are likely to succeed on the merits

On element (1), "whether the applicant has made a strong showing that it is likely to succeed on the merits", the Appellants' statutory interpretation regarding the way the Transparency Plans and the NARA Guidance Document are being used by NARA to violate the JFK Records Act are well-nigh invulnerable to attack in any hearing.

Appellants have made a strong case that § 5(g)(2)(D) of the Act does not allow the names and identities of individuals to be withheld from the public unless they are inextricably tied to the four identifiable bases of § 5(g)(2)(D). NARA and the agencies used the wrong standards when they relied on the Transparency Plans and the NARA Guidance Document to permit postponements based on an individual's name and identity alone, the impact on agency operations, and a watered-down definition of public interest. A new review of these documents is mandatory.

Appellants have also made a strong record that NARA has a duty to collect all assassination records; and that NARA has a duty to refrain from advising researchers to use FOIA when seeking JFK records.

Appellants also rely on § 11(a) of the JFK Records Act, which makes it clear that "when this Act requires…public disclosure, it shall take precedence over any other law…judicial decision construing such law, or common law doctrine that

would otherwise prohibit such…disclosure…" This extraordinarily powerful section of the Act is sweeping in its impact. Taken to its zenith, the Appellee cannot cite the APA, case law, or common law as a basis to bar public disclosure.

As stated by this court, "Plaintiffs have sued both the President and NARA, but an injunction on NARA alone would suffice in redressing the averred injuries caused by the implementation of the Biden Memoranda." ER-123:13-15. *Juliana v. United States*, 339 F. Supp. 3d 1062, 1079 (D. Or. 2018), *rev'd and remanded on other grounds*, 947 F.3d 1159 (9th Cir. 2020).

B. **Appellants face irreparable injury if relief is denied**

On element (2), "whether the applicant will be irreparably injured absent a stay": Witnesses in this 60-year-old case are dying every day. Witnesses who were 30 years old in 1963 are now 90, if they are still alive. Many key witnesses were in their twenties during the 1960s. When one of these witnesses die, their memories are lost. These memories could also lead to other important witnesses and documents. Film and photo evidence also need to be in controlled conditions. Time is of the essence in a case that is based on the preservation of history.

Common sense also tells us that individuals in the documents are now at least 80 or even 90 years old and at that age the risk of death and dementia exponentially accelerates.

Appellants know first-hand that these are very real and actual concerns because MFF members have unfortunately encountered these situations since NARA began releasing assassination records in 2017. 2nd Declaration. of Lawrence Schnapf (ER-143, paras. 3-5) and Declaration of William E. Kelly, Jr. (ER-136, paras. 2-3). The Schnapf Declaration (ER-144, para. 8) recounts the story of CIA officer Donald Heath, who passed away in 2019 while living here in the San Francisco Bay Area. Mr. Heath's name was not released until December 15, 2022.

The document containing Mr. Heath's name confirmed that CIA had tasked the Miami CIA station to interview pro-Castro and anti-Castro activists in Miami the weekend of the assassination to determine if they had been involved in the assassination. The CIA had previously denied that such an investigation existed.

Mr. Heath could have answered a multitude of questions about the investigation of the Cubans. His knowledge will never be known.

The Kelly Declaration (ER-136, para. 4; ER-138-141) recounts that the identity of the CIA asset NIEXIT-3 has still not been revealed – he had two Dallas

contacts stating that JFK was killed due to a joint operation by the Chinese Communists and Castro. There was also discussion that the Soviets made up the rumor to "make it rough" on the Chinese Communists and Castro.

### C. Relief will not substantially injure any other interested parties

On element (3), "whether issuance of the relief will substantially injure the other parties interested in the proceeding", it is hard to conceive of any reason that would injure either NARA, other agencies, or the President. There is no fear of physical injury or institutional damage. Nor is there any fear of monetary loss.

### D. The public interest is best served by fully informing the American people about the history surrounding the Kennedy assassination

On element (4), "where the public interest lies.": See *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken*, 556 U.S. at 434). This element is in the Act's definition of "public interest" at § 3(10): "the compelling interest in the prompt public disclosure of assassination records for historical and governmental purposes and for the purpose of fully informing the American people about the history surrounding the assassination of President John F. Kennedy."

Appellants made the case on "public interest". Appellants have no interest in challenging the Appellee's rationale for withholding documents - what the Appellants are calling for is compliance with the statute by utilizing the proper standard of review of the documents still withheld at this very late date.

**IV. Appellants seek mandamus, if necessary**

If the court believes that injunctive relief is unavailable to Appellants, then a writ of mandamus would be the only adequate remedy available. See *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1120 (9th Cir. 2001) (holding mandamus is appropriate where Appellants have no other adequate remedy).

§ 706(1) relief and mandamus relief are considered to "mirror" each other. *Plaskett v. Wormuth*, 18 F. 4th 1072, 1081 (9th Cir. 2021).

If the Court finds appellate jurisdiction lacking, the Court should grant mandamus. 28 U.S.C. §1651; *Miller v. Gammie*, 335 F.3d 889, 895 (9th Cir. 2003) (*en banc*) (after finding no appealable order: "We can, however, as we have done in past similar situations, treat the notice of appeal as a petition for a writ of mandamus and consider the issues under the factors set forth in *Bauman*.").

Mandamus is evaluated under what are known as the *Bauman* factors: (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. . . (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft repeated error or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

*Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654–55 (9th Cir. 1977) (citations omitted).

The third *Bauman* factor—clear error—"is the most important." *In re Swift Transp. Co. Inc.*, 830 F.3d 913, 916 (9th Cir. 2016). Clear error is the issue here. All five *Bauman* factors are clearly applicable in this case. Note that factor number (2) is applicable because of the sixty-year passage of time since the JFK Assassination and the thirty-year passage of time since the establishment of the JFK Records Act and the ARRB. Not all factors must be present. See, e.g., *In re Kirkland*, 75 F.4th 1030, 1048 (9th Cir. 2023) (granting mandamus based on third and fifth factors alone); *Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010) (finding appeal invalid as a collateral order but treating it as a request for mandamus and granting mandamus even when factors four and five were not present).

**CONCLUSION**

For these reasons stated above, the January 18, 2024, order of the court should be reversed, the court's collateral order of July 2023 should also be reversed, and the case remanded for consideration of Appellants' claims in compliance with the order of this court.

Dated: May 28, 2024

_____/s/_____
WILLIAM M. SIMPICH

Attorney for Appellants

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**9th Cir. Case No. 24-1606**

The undersigned attorney states the following:

I am unaware of any related cases currently pending in this court.

Signature _____s/ William M. Simpich _____

Date: May 27, 2024

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

9TH Cir. Case Number: 24-1606

I am an attorney for the parties.

This brief contains 12,417 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Signature___/s/William M. Simpich_____

Date: May 28, 2024