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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE MARY FERRELL FOUNDATION, INC.; JOSIAH THOMPSON; and GARY AGUILAR, Plaintiffs, v. JOSEPH R. BIDEN, in his official capacity as President of the United States; and NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, Defendants.	No. 3:22-cv-06176-RS **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT** Hearing Date: April, 27 2023 Time: 1:30 p.m. Judge: Hon. Richard Seeborg

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INTRODUCTION

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

The President of the United States has determined that temporarily postponing full public disclosure of the remaining redactions is necessary to protect against harm to "the military defense, intelligence operations, law enforcement, or the conduct of foreign relations." 12/15/2022 Memo §§ 3,4. Plaintiffs challenge the President's determination and seek an injunction requiring the President to "issue a new memo explaining how he complied" with the JFK Act. Pl.'s Opp. at 20. But the Supreme Court has long recognized that federal courts lack jurisdiction to impose declaratory or injunctive relief against the President himself. Plaintiffs cite cases involving injunctions against the President's *subordinate* officials, but that is fundamentally different from the extraordinary relief that Plaintiffs seek against the President himself. And even if the Court had jurisdiction to issue such an injunction, Plaintiffs have not shown that the President exceeded his statutory authority under the JFK Act.

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

ARGUMENT

I. PLAINTIFFS' CLAIMS AGAINST THE PRESIDENT SHOULD BE DISMISSED

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

No federal court has ever issued injunctive or declaratory relief against the President. Rather, federal courts have repeatedly recognized, since at least *Mississippi v. Johnson*, 71 U.S. 475 (1866), that "[w]ith regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief." *Newdow v. Roberts*, 603 F.3d 1002, 1003 (D.C. Cir. 2010); *see* Defs.' Mot. to Dismiss 10–11 (collecting cases).

The cases that Plaintiffs cite are (with one exception discussed below) all distinguishable because they involve injunctions against the President's *subordinates*, not the President himself. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court upheld an injunction "restraining the Secretary [of Commerce]" on the ground that the President had exceeded his constitutional authority in directing the seizure of steel production facilities. *Id.* at 584. In *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), the D.C. Circuit held that the plaintiff could proceed with its claims "directed at a subordinate executive official," the Secretary of Labor. *Id.* at 1331 n.4. And in *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. 2019), the district court issued an injunction against subordinate officials but concluded "that an injunction against the President personally is not warranted." *Id.* at 928 n.23. The Ninth Circuit did not address the issue on appeal. *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020), *vacated*, 142 S. Ct. 46 (2021); *see also Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (holding that plaintiffs had standing because their injuries could be redressed "by declaratory relief against the Secretary [of Commerce]," a subordinate official, but Court in general "has no jurisdiction . . . to enjoin the President").

Here, Plaintiffs in Counts One and Two are seeking injunctive and declaratory relief against the President himself, not his subordinate officials. That distinction is critical. "The reasons why courts should be hesitant to grant . . . relief [against the President] are painfully

obvious; the President, like Congress, is a coequal branch of government, and for the President to 'be ordered to perform particular executive . . . acts at the behest of the Judiciary,' at best creates an unseemly appearance of constitutional tension and at worst risks a violation of the constitutional separation of powers." *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (quoting *Franklin*, 505 U.S. at 827 (Scalia, J., concurring)); *see also Ctr. for Democracy & Tech. v. Trump*, 507 F. Supp. 3d 213, 226 (D.D.C. 2020) ("There are powerful reasons why courts should refrain from subjecting the President to declaratory relief."). Thus, "in general," courts have "no jurisdiction . . . to enjoin the President in the performance of his official duties."[1] *Franklin*, 505 U.S. at 802–03 (quoting *Johnson*, 71 U.S. at 501).

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

NTEU also dealt only with an alleged "ministerial" duty of the President. 492 F.2d at 616. While the Supreme Court has not definitively held that the President cannot be subject to an injunction requiring the performance of a "purely 'ministerial' duty," *Franklin*, 505 U.S. at 802

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

(quoting *Johnson*, 71 U.S. at 498–99), it remains the case that no court has ever actually entered injunctive or declaratory relief against the President, even for a ministerial duty.

Moreover, Plaintiffs do not seek to enforce a purely "ministerial" duty here. A ministerial duty is one "to which nothing is left to discretion"; it is a "simple, definite duty" to perform "a single[,] specific act," such as delivering an officer's commission *Johnson*, 71 U.S. at 498–99 (citing *Marbury v. Madison*, 5 U.S. 137 (1803)). Here, by contrast, Plaintiffs seek an injunction broadly requiring the President to "comply with the procedural requirements of the" JFK Act, including requiring him to "issue a new memo explaining how he complied" with the Act. Opp. at 1, 20. Plaintiffs thus do not seek to compel the President to take actions that are purely "ministerial," but rather seek to compel him to take actions that are committed to his discretion. *See* Mot. 11–12; *Franklin*, 505 U.S. at 800 (President's sending of census apportionment results to Congress is not "ministerial"); *Ctr. for Democracy & Tech.*, 507 F. Supp. 3d at 225 (President's issuance of executive order was an "exercise of the President's official duties," not a "ministerial act"). Thus, even if *NTEU* were good law, it is inapposite. *See, e.g.*, *Page v. Biden*, No. 20-CV-104, 2021 WL 311002, at *4 (D.D.C. Jan. 29, 2021) (distinguishing *NTEU* on this basis); *Ctr. for Democracy & Tech.*, 507 F. Supp. 3d at 226 n.6 (same).

Because the President's decision whether to postpone the disclosure of assassination records is by statute discretionary, Plaintiffs' challenge to that decision is also independently barred under *Dalton v. Specter*, 511 U.S. 462, 747 (1994) ("[R]eview is not available when the statute in question commits the decision to the discretion of the President."); *see* Mot. 11–12. Plaintiffs assert that *Dalton* "found that 'some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA,'" Opp. 15 (quoting *Dalton*, 511 U.S. at 474), but that is incorrect. *Dalton* "assume[d] for the sake of argument" that some claims that the President has violated a statutory mandate are judicially reviewable, but held that in *no* event are Presidential decisions reviewable where, as here, the decision at issue is discretionary. *Dalton*, 511 U.S. at 474. And even assuming that some statutory claims challenging

Presidential decisionmaking are judicially reviewable, those claims could only be brought against the President's subordinates, as explained above. *See id.* at 464 (noting that the plaintiffs sought to enjoin the Secretary of Defense, not the President).

Plaintiffs also contend that section 11(c) of the JFK Act provides for judicial review of their claims against the President. Opp. 10–11, 16. Not so. Section 11(c) provides that "[n]othing in this Act shall be construed to preclude judicial review, under chapter 7 of title 5, United States Code, of final actions taken or required to be taken under this Act"—*i.e.*, the Act does not preclude review under the Administrative Procedure Act ("APA"). But the APA provides for judicial review only of "agency" action, and the President is not an "agency" within the meaning of the APA. *Franklin*, 505 U.S. at 796, 801. Plaintiffs thus cannot rely on section 11 to assert claims against the President directly. This does not render the JFK Act "[un]enforceable," as Plaintiffs contend. Opp. 3. The APA authorizes challenges to final *agency* action on the grounds that it is arbitrary-and-capricious or contrary to law, 5 U.S.C. § 706, and Plaintiffs could seek to bring claims (and, indeed, have brought claims) against NARA on that basis. But such a challenge must be brought against an "agency" such as NARA, not the President himself. *Franklin*, 505 U.S. at 801. Accordingly, Counts One and Two should be dismissed.

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

For the reasons explained above, Plaintiffs cannot proceed with their *ultra* vires claim against the President. But even assuming *arguendo* that they could proceed with such a claim, Plaintiffs' claim would fail because the President did not act *ultra vires*. Even where an *ultra vires* claim does not involve presidential action, a plaintiff must show that the challenged agency action contravened "clear and mandatory" statutory language. *Pac. Mar. Ass'n v. Nat'l Lab. Rels. Bd.*, 827 F.3d 1203, 1208 (9th Cir. 2016) (citation omitted). Plaintiffs contend that the Biden Memoranda are deficient in six separate respects, *see* Opp. 17–23, but none of these allegations comes close to stating an *ultra vires* claim.

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

Contrary to Plaintiffs' contention, the President was not required to articulate the harms from potential disclosure on a "record-by-record" basis. Mot. 14–15. In contending otherwise, Plaintiffs principally rely on Congress's use of the word "each" in Section 5(g)(2)(D) of the JFK Act. Opp. 17. But the word "each" in Section 5(g)(2)(D) specifies *which* records must be publicly disclosed if the President does not issue the certification under that section—*i.e.*, "each" withheld record must be publicly disclosed if the President does not make the certification. But that does not mean that the President must articulate an individualized harm on a record-by-record basis. Rather, the statute provides only that the President need certify that "continued postponement is made necessary by an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations," which is precisely what the President certified here. JFK Act § 5(g)(2)(D).

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

[2] NARA has not taken a contrary view. Plaintiffs cite a 2012 letter from NARA's general counsel suggesting that the President must "certif[y] on a document by document basis that continued postponement is necessary" and contend that this "interpretation . . . [is] entitled to *Chevron* deference." Opp. 18–19. As an initial matter, it is not even clear that this statement that the President must "certif[y]" that continued postponement is necessary on a document-by-document basis is inconsistent with the government's position that the President need not articulate an individualized, record-by-record justification when he issues the certification. In any event, the Court should not resort to *Chevron* because the statute is unambiguous. And even if it were not, *Chevron* deference would not be warranted because the letter "lack[s] the force of law" and so "do[es] not warrant *Chevron*-style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

Plaintiffs' contrary argument assumes that Congress intended to require the President to personally identify an individualized harm for each postponed record and explain why that harm outweighs the interest in disclosure. Such a requirement would impose an extraordinary burden on the President. While millions of pages of records have been disclosed under the JFK Act, and no documents subject to section 5 remains withheld in full, there still remain thousands of redactions that have been postponed for disclosure for national security reasons. Mot. 5–7. If Congress had intended to require the President—with all of his other responsibilities—to personally articulate an individualized harm associated with each record, it would have said so explicitly. But the statute Congress enacted requires only that the President certify that continued postponement is necessary by *an* identifiable harm; not that the President articulate an individualized harm for each record.

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

2. <u>The President was not required to provide an unclassified written description of the reason for continued postponement</u>

Plaintiffs also incorrectly interpret Section 5(g)(2)(B) as requiring the President to provide an unclassified written description for each record of the reasons for continued postponement. Section 5(g)(2)(B) concerns the "periodic" review of records "by the originating agency," not the President's decision whether to postpone the global deadline for disclosure under Section 5(g)(2)(D). Mot. 15–16. As explained above, in order to postpone the 25-year deadline in Section

5(g)(2)(D), the President need only make the certification specified in that section, which does not entail providing a justification for continued postponement on a record-by-record basis. Moreover, Section 5(g)(2)(B) at most imposes requirements on federal *agencies* conducting periodic reviews; it does not impose requirements on the President.

Plaintiffs contend that the government's interpretation ignores statutory "context," but they do not explain how context supports their view. It is perfectly sensible for Congress to impose different statutory requirements on administrative agencies than it imposes on the President himself. Nor does the fact that both provisions refer to "continued postponement" suggest that Congress intended that the same requirements apply to each provision. *See* Opp. 21. Only Section 5(g)(2)(D) addresses a determination by the President, and Congress did not require that the President provide an "unclassified written description of the reasons for . . . continued postponement" in that section. In any event, as Defendants have explained, the President *did* provide an unclassified description of his reasons for postponing the deadline, and that description was published in the Federal Register. Mot. 16.

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

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

The President's decision whether to postpone the 25-year deadline of Section 5(g)(2)(D) involves a different determination of harm. In that context, the Act provides that the 25-year deadline will be postponed if the President certifies that "continued postponement is made necessary by an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations" and that harm "outweighs the public interest in disclosure." Plaintiffs contend that this determination "fits neatly" with the exceptions listed in Section 6, but there are important differences. For example, an unwarranted invasion of personal privacy is sufficient to postpone the disclosure of a record under Section 6(3), but not to postpone the 25-year deadline of Section 5(g)(2)(D).

In any event, Congress used different language in Sections 5(g)(2)(D) and 6, omitting any "clear and convincing standard" from Section 5(g)(2)(D). Courts "generally presume[e] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (quoting *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 537 (1994)). Thus, it is Plaintiffs' interpretation that views sections of the Act "in isolation," Opp. 22, ignoring key differences between the two sections.

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

Plaintiffs contend that the President "violated the JFK Act when he directed government agencies to implement Transparency Plans that use non-statutory criteria." Opp. 22–23. As an initial matter, Plaintiffs did not plead this claim in their amended complaint, which says nothing at all about Transparency Plans. *See* Am. Compl., ECF No. 21. Plaintiffs cannot use their opposition brief to amend their complaint to add such a claim. *Strome v. DBMK Enters., Inc.*, No. C 14-2398 SI, 2014 WL 4437777, at *4 (N.D. Cal. Sept. 9, 2014) ("[I]t is axiomatic that the complaint may not be amended by briefs in opposition to a motion to dismiss." (citation omitted)).

Even if Plaintiffs had included these allegations in their amended complaint, they would fail to state a claim as a matter of law. Plaintiffs assert that the Transparency Plans "use non-

statutory criteria for continued postponement of assassination records." Opp. 22. But Plaintiffs do not identify any criteria that they believe run afoul of the statute, and so they have not plausibly stated a claim that the President's direction to use the Transparency Plans violates the Act. *See Strome*, 2014 WL 4437777, at *4 (court may not "supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf" (citation omitted)).

More fundamentally, Plaintiffs misunderstand the role of the Transparency Plans. The plans themselves do not "continue[] [the] postponement of assassination records," as Plaintiffs contend. Opp. 22. Rather, it was the President's December 2022 memorandum that postponed the 25-year deadline to disclose all records. That memorandum also directed that the agencies' Transparency Plans be used "by the [National Declassification Center at NARA] to conduct future reviews of any information that has been postponed from public disclosure." 87 Fed. Reg. at 77,969. But that intended use is entirely consistent with the Act. Plaintiffs object that the Transparency Plans do not expressly incorporate the standards of Section 6 of the Act, Opp. 22–23, but, as explained above, the standards of Section 6 apply only when agencies are requesting postponement in the first instance, not when the President has already certified that continued postponement is necessary under Section 5(g)(2)(D).

Plaintiffs also object that the President "appears to have delegated final postponement decisions to the [National Declassification Center] in contravention of . . . section 9(d)(1)," Opp. 23, but again, that is incorrect. Section 9(d)(1) concerns Presidential authority over "review board determination[s]" concerning the initial decision whether to disclose or postpone disclosure, not reviews conducted after the President has already certified that postponement under Section 5(g)(2)(D) is necessary. And, as to many of the records that have not yet been released in full (those records referenced in Section 2(c) of the December 2022 memorandum), the President has issued only a temporary certification postponing disclosure until June 30, 2023. 87 Fed. Reg. at

77,968. As to the remaining records, the President retains authority to direct that information be disclosed if continued postponement is no longer necessary.

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

In their opposition brief, Plaintiffs suggest for the first time that the President did not comply with Executive Branch regulations requiring that executive orders be reviewed by the Department of Justice before issuance. Opp. 23. Again, Plaintiffs did not include this claim in their amended complaint, and so the claim is not properly before the Court. *See Strome*, 2014 WL 4437777, at *4. Moreover, Plaintiffs' sole support for this assertion in their opposition brief is that Defendants "have proffered no evidence" that the Department of Justice reviewed the executive orders before they were issued. Defendants, of course, were not required to "proffer[] . . . evidence" in their motion to dismiss to refute an unpled claim. Absent any factual allegations that the Department of Justice did not in fact review the executive orders, Plaintiffs cannot plausibly state a claim that the President violated Executive Branch regulations, even if they had included such a claim in their amended complaint.[3]

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

Also for the first time in their opposition brief, Plaintiffs assert that the "President has no right to withhold legislative branch records." Opp. 23. Plaintiffs concede that they did not plead this claim in their amended complaint, but "seek to amend [their] complaint" to add this claim. *Id.* The claim is thus not properly before the Court. If Plaintiffs wish to file a second amended complaint, they must file a motion seeking leave to do so. Fed. R. Civ. P. 15(a)(2).

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

For the same reasons that Plaintiffs fail to state an *ultra vires* claim against the President, Plaintiffs fail to state a mandamus claim against him. Mot. 16–18. Plaintiffs' mandamus claim alleges four violations of the JFK Act, three of which are addressed above. *See* Am. Compl. ¶ 87

[3] In any event, undersigned counsel represents that the Department of Justice did, in fact, review the Biden Memoranda to ensure they comply with applicable law.

(alleging failure to use "clear and convincing standard," failure to provide unclassified written description, and failure to ensure description is published in Federal Register).

Plaintiffs also alleged in their mandamus claim that the President violated the JFK Act by "[f]ailing to ensure periodic review of the postponed releases." Am. Compl. ¶ 87(d). Defendants explained in their motion to dismiss that this claim fails because the Act states only that the "originating agency and the Archivist"—not the President—are to periodically review postponed or redacted records. Mot. 18 (quoting JFK Act § 5(g)(1)). Plaintiffs fail to address this argument in their opposition. "Such a failure in an opposition brief constitutes abandonment of the claim." *Moore v. Apple, Inc.*, 73 F. Supp. 3d 1191, 1205 (N.D. Cal. 2014).

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

Count Three of the Amended Complaint seeks to assert a claim under Section 706(2)(a) of the APA that NARA has taken agency action that is "arbitrary, capricious, and contrary to law." Am. Compl. ¶ 96 n.99. To state a claim under Section 706(2), Plaintiffs must challenge a discrete "final agency action," *Franklin*, 505 U.S. at 796 (quoting 5 U.S.C. § 704); they cannot bring a "broad programmatic attack" on agency practices, *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (alleged agency action must be "discrete"). If Plaintiffs demonstrate that a discrete final agency action is arbitrary, capricious, or contrary to law, the Court may "hold [the action] unlawful and set [it] aside." 5 U.S.C. § 706(2)(a). This is in contrast to a claim under Section 706(1), which seeks to "compel agency action unlawfully withheld or unreasonably delayed" and is subject to a different standard (discussed below).

In their amended complaint, Plaintiffs alleged that NARA's "implementation of the Biden Memoranda" was arbitrary, capricious, and contrary to law, in violation of Section 706(2)(a) of the APA, "because the Biden Memoranda violated the express terms of the [JFK] Act." Am. Compl. ¶ 98. In moving to dismiss, Defendants explained that the amended complaint fails to state a Section 706(2)(a) claim because Defendants have shown that the President's postponement

certifications were not at odds with the JFK Act, for the reasons explained above and in Defendants' motion to dismiss. Mot. 18–19.

Plaintiffs now contend that Defendants have "tr[ied] to redefine Plaintiffs' case" and that their "core contention" is not that NARA acted arbitrarily and capriciously in implementing the Biden memoranda, but that NARA "must engage in a serious effort to identify documents as 'assassination records' . . . and follow up with prompt transmission and release of assassination records." Opp. 29–30. They contend that NARA has a "custom" of "refusing to look for documents" and request that the Court order NARA to "halt its practice of arbitrary and capricious conduct." *Id.* at 29–31; *see also id.* at 28 (alleging a "pattern and practice" of suggesting that researchers file FOIA requests).

But the APA does not authorize Plaintiffs to bring a broad programmatic attack on an alleged "pattern and practice" of arbitrary and capricious agency conduct. *Norton*, 542 U.S. at 62. Rather, Plaintiffs must identify "some *particular* 'agency action' that causes [them] harm." *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1010 (9th Cir. 2021) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990)). "This limitation on judicial review precludes 'broad programmatic attack[s],' whether couched as a challenge to an agency's action or 'failure to act.'" *Id.* (quoting *Norton*, 542 U.S. at 64–65). If a plaintiff wishes to bring a "systemic challenge[]" seeking "wholesale improvement," such a challenge must be pursued in the political branches, not an Article III court. *Id.* at 1011 (noting "separation of powers" concerns with broad, programmatic challenges given that the APA "does not give federal courts general supervisory authority over executive agencies").

Here, Plaintiffs' opposition brief makes clear that they are not challenging any discrete final agency taken by NARA, but are instead asserting a broad programmatic challenge to NARA's alleged practice of not sufficiently following up on various requests from researchers. Opp. 29–30. Plaintiffs cannot bring such a challenge under Section 706(2) of the APA. *Whitewater Draw Nat. Res. Conservation Dist.*, 5 F.4th at 1010, 1012 (affirming dismissal of broad challenge to

DHS "programs" because plaintiffs did not identify "a particular action by DHS" that they wished to challenge). To the extent Plaintiffs seek to compel *future* action by NARA that they believe has been action "unlawfully withheld or unreasonably delayed," that is a claim under Section 706(1) of the APA and is discussed below.

Accordingly, for the reasons explained in Defendants' motion to dismiss, and because Plaintiffs' opposition brief confirms that Plaintiffs are not challenging any discrete final agency action of NARA, Count Three should be dismissed.

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

Plaintiffs' claim seeking to compel NARA to act under § 706(1) of the APA or mandamus statute also fails as a matter of law. To state such a claim under § 706(1), Plaintiffs must allege that NARA failed to comply with an "unequivocal command" to "take a discrete agency action" that is "so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Plaskett v. Wormuth*, 18 F.4th 1072, 1081 (9th Cir. 2021) (citation omitted). To state a mandamus claim, Plaintiffs must allege these same elements and also that "no other adequate remedy is available." *Id.* Plaintiffs contend that NARA failed to comply with the Act in four ways, but, as explained below, none of Plaintiffs' allegations states a claim under either § 706(1) or the mandamus statute.

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

Plaintiffs' amended complaint alleges, on information and belief, that NARA failed to comply with an alleged "ministerial non-discretionary duty" to "complete the ARRB Compliance Program by seeking Final Declarations of Compliance from agencies." Am. Compl. ¶ 105(f). But, as Defendants explained in their motion to dismiss, the JFK Act contains no provision requiring any entity (let alone NARA specifically) to seek or obtain such declarations. Mot. 20. Plaintiffs' opposition brief does not identify any provision of the JFK Act requiring NARA or any other entity to secure such declarations. Plaintiffs' only discussion of this issue is to assert that the Secret Service and DEA, who are nonparties to this case, "failed to complete the Declarations of

Compliance." Opp. 26. Because no statutory provision requires NARA to seek final declarations of compliance, Plaintiffs cannot state a claim seeking to compel NARA to seek such declarations.

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

Nor does the JFK Act impose on NARA any ministerial, non-discretionary duty to "follow up" on outstanding search requests. *See* Mot. 20–21; Am. Compl. ¶ 105(g). Plaintiffs cite Section 7(j)(1)(C) of the Act, but that provision states that the "*Review Board* shall *have the authority* to" "obtain access to assassination records that have been identified and organized by a Government office" and "direct a Government Office to make available to the Review Board, and if necessary investigate the facts surrounding, additional information, records, or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under this Act." (emphasis added). Plaintiffs cannot rely on this provision to state an APA failure-to-act or mandamus claim for at least two reasons.

First, Section 7(j)(1)(C) does not "unequivocal[ly] command" the Review Board (or NARA) to take any "discrete agency action." *Plaskett*, 18 F.4th at 1082. Rather, the provision confers on the Review Board the *authority* to obtain access to records and direct government offices to make information available. The Act does not require the Review Board to request searches, to "follow up" on search requests, or to "refer[] [search] request[s]" to federal agencies, as Plaintiffs suggest. Opp. 25–27. Rather, the Act confers on the Review Board the *discretion* to exercise its power under Section 7(j)(1) to make requests of federal agencies as it believes are appropriate. Such a power-conferring, discretionary provision cannot support an APA failure-to-act or mandamus claim.

Second, even if Section 7(j)(1) imposed an "unequivocal command" on the Review Board, that command would not extend to *NARA*, a separate legal entity. Plaintiffs assert that NARA has "assumed the duties and responsibilities of the Board," Opp. 24, but that is incorrect. Plaintiffs' only support for their assertion is the preamble to a June 2000 final rule in which NARA stated that it was the "successor in function" to the Review Board. 65 Fed. Reg. at 39,550. When read

in context, however, it is clear that NARA was simply referring to the fact that it "continues to maintain and supplement the collection under the . . . Act" to explain why it was appropriate for NARA to issue the final rule (which transferred regulations from one chapter of the Code of Federal Regulations to another). *Id.* NARA did not suggest—in the preamble or anywhere else—that it had assumed all of the duties and responsibilities of the Review Board.

Plaintiffs' suggestion that the JFK Act's provisions concerning the Review Board somehow remain binding on NARA is also inconsistent with Section 12 of the Act, which provides that "[t]he provisions of this Act that pertain to the appointment and operation of the Review Board shall cease to be effective when the Review Board and the terms of its members have terminated." JFK Act § 12(a). The Review Board was terminated in 1998, *see* Am. Compl. ¶ 46, and so the provisions of the Act pertaining to the "operation of the Review Board," including Section 7(j)'s provisions concerning the "powers" of the Review Board, have "cease[d] to be effective" for more than twenty years. Accordingly, Plaintiffs cannot rely on these provisions to assert a claim against NARA.

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

Plaintiffs contend that NARA has also "failed to perform other ministerial nondiscretionary duties under the JFK Records Act, including but not limited to: identifying and maintaining an accurate subject guidebook and index to the Records Collection . . . and failing to properly maintain its central directory of Identification Aids." Opp. 29.

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

Nor can Plaintiffs state such a claim with respect to NARA's central directory of identification aids. Opp. 29. The JFK Act provides only that "[t]he Collection shall include . . . a

central directory comprised of identification aids created for each record transmitted to the Archivist under section 5." JFK Act § 4(a)(2)(B). There is no dispute that NARA has compiled a central directory of identification aids, which is available at NARA's website. *See* JFK Assassination Collection Reference System, https://www.archives.gov/research/jfk/search. Plaintiffs contend that NARA has failed to "properly maintain" this directory in certain ways, but they do not identify any "specific, unequivocal command" to take a "discrete agency action"—"clearly set forth" in the statute—that NARA failed to take. *Plaskett*, 18 F.4th at 1081. Accordingly, Plaintiffs' cannot state a claim with respect to the central directory of identification aids.

4. Plaintiffs cannot compel NARA to conduct "periodic reviews"

Plaintiffs assert that NARA failed to conduct the "periodic reviews" contemplated by Section 5(g)(1) of the JFK Act "for many years." Opp. 27; *see* Am. Compl. ¶ 5. But, once again, the amended complaint does not allege any facts explaining *how* NARA allegedly violated the Act.

Moreover, Plaintiff's amended complaint does not seek any relief based on this alleged violation. *See* Am. Compl., Prayer for Relief. Nor could it. Both of President Trump's memoranda directed re-reviews of all records that had not been withheld in full. *See* 82 Fed. Reg. at 50,307 ("I am also ordering agencies to re-review each and every one of those redactions over the next 180 days"); 83 Fed. Reg. at 19,157 (ordering re-review of redactions over next 3 years). The Biden Memoranda ordered similar re-reviews. 86 Fed. Reg. at 59,600 ("Over the next year, agencies proposing continued postponement and NARA shall conduct an intensive review of each remaining redaction . . . ."); 87 Fed. Reg. at 77,968–69 (directing re-review until May 1, 2023). Plaintiffs do not allege that NARA has not complied with these Presidential directives. Thus, even assuming *arguendo* that periodic reviews did not take place "for many years" in the past, that contention cannot support a claim seeking to compel NARA to perform such reviews *now*, when

the President has, since 2016, directed NARA to undertake re-reviews, and there is no allegation that NARA has not complied with that direction.[4]

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

Defendants explained that Plaintiffs cannot state a claim against NARA under the Federal Records Act because they had not alleged that any records have been "unlawfully removed." Mot. 23–27; *Citizens for Resp. & Ethics in Wash.* ("*CREW*") *v. SEC*, 916 F. Supp. 2d 141, 146 (D.D.C. 2013) ("[T]he only time an agency has a mandatory enforcement duty is when records have been unlawfully removed—but not when they have been unlawfully destroyed.").

Plaintiffs contend that "Section 11(a) [of the JFK Act] is a legislative override of the case law cited by Defendants," Opp. 35, but Section 11(a) has nothing to do with the Federal Records Act. Rather, Section 11(a) provides that "[w]hen this Act"—*i.e.*, the JFK Act—"requires transmission of a record to the Archivist or public disclosure, it shall take precedence over any other law." Thus, Section 11(a) cannot "override" case law interpreting the Federal Records Act.

Plaintiffs further assert that "[c]ontrary to Defendants' arguments, 'removed' can mean both missing and destroyed," Opp. 35, but the cases construing the Federal Records Act hold otherwise. Mot. 23–24; *CREW*, 916 F. Supp. 2d at 146. Plaintiffs state that "[i]f the court disagrees, Plaintiffs seek leave to amend to refine the argument," Opp. 35, but Plaintiffs must file a motion if they seek leave to file a second amended complaint. Fed. R. Civ. P. 15(a)(2).

CONCLUSION

The Court should dismiss Plaintiffs' amended complaint.

[4] In their amended complaint, Plaintiffs also alleged that NARA "failed to ensure that all postponed Assassination Records . . . have an unclassified written description of the reasons for such continued postponement. Am. Compl. ¶ 107(b). That claim fails as a matter of law for the reasons explained in Defendants' motion to dismiss. Mot. 21–22. Because Plaintiffs did not respond to Defendants' arguments in their opposition brief, the claim is also abandoned. *Moore*, 73 F. Supp. 3d at 1205.

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Respectfully submitted,

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