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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' NOTICE OF MOTION TO DISMISS AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: March, 30 2023
Time: 1:30 p.m.
Judge: Hon. Richard Seeborg

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NOTICE OF MOTION

PLEASE TAKE NOTICE that Defendants, by and through their counsel, hereby move to dismiss Plaintiffs' Amended Complaint for the reasons set forth below. Defendants respectfully request that this motion be heard on March, 30 2023 at 1:30 pm, or as soon thereafter as the matter may be heard.

INTRODUCTION

The John F. Kennedy Assassination Records Collection Act of 1992 ("JFK Act") authorizes the President of the United States to postpone the public disclosure of records relating to the Kennedy assassination if the President determines that such postponement is "made necessary by an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations" and "the identifiable harm is of such gravity that it outweighs the public interest in disclosure." Pub. L. No. 102-526, § 5(g)(2)(D). Consistent with that authority, then-President Trump twice postponed temporarily the full public disclosure of a subset of assassination records, to allow federal agencies and the National Archives and Records Administration ("NARA") time to review the remaining records and make a recommendation regarding further postponement. In connection with that process, the government publicly disclosed in full tens of thousands of assassination records that had previously been redacted in some form.

President Biden has also twice exercised his authority under the JFK Act to postpone temporarily full public disclosure of a subset of assassination records to allow federal agencies and NARA time to complete their review. The most recent postponement, issued as part of a Presidential Memorandum dated December 15, 2022, directs the relevant agencies and NARA to complete their review of remaining redactions by May 1, 2023. It further directs that a limited number of records be postponed from public disclosure until certain events or circumstances—set forth in publicly available "Transparency Plans"—trigger public disclosure.

Plaintiffs The Mary Ferrell Foundation, Inc. and two individuals bring this action against President Biden and the National Archives and Records Administration ("NARA"), contending that President Biden's two memoranda temporarily postponing the full public disclosure of certain assassination records are unlawful. They seek an order declaring the Biden memoranda illegal and compelling the President and NARA to perform various actions, including describing, on a record-by-record basis, the particular harm posed by potential disclosure of the record. As explained below, however, each of Plaintiffs' claims fails as a matter of law for several reasons.

First, the Supreme Court has long recognized that federal courts lack jurisdiction to impose declaratory or injunctive relief against the President himself. Accordingly, Plaintiff's claims against President Biden must be dismissed for lack of subject matter jurisdiction.

Second, even if Plaintiffs' claims concerning the Biden Memoranda were judicially reviewable, "longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President." *Dalton v. Specter*, 511 U.S. 462, 474 (1994). But that is precisely what the JFK Act does, as it commits to the President's sole discretion the determination whether to postpone disclosure of records in order to prevent an identifiable harm to military defense, intelligence operations, law enforcement, or the conduct of foreign relations. Nothing in the JFK Act authorizes federal courts to second-guess the President's determinations in that regard.

Third, even if the Court were to reach the merits, Plaintiffs' claims that the Biden Memoranda are unlawful fail as a matter of law. Contrary to Plaintiffs' suggestion, the President did not rely on criteria outside of the JFK Act in making his postponement determination, but rather expressly cited the Act and applied its criteria. And nothing in the JFK Act requires the President to explain his postponement decision on a "record-by-record" basis, as Plaintiffs wrongly contend. Nor does the Act require the President to provide an unclassified written description of his reasons with respect to each record.

Fourth, Plaintiffs' mandamus claims against NARA likewise fail as a matter of law. Mandamus relief is an extraordinary remedy that is available only when an agency violates a clear and certain duty. Plaintiffs maintain that NARA has failed to perform various duties, such as seeking "declarations of compliance" from agencies, but the JFK Act imposes no such duties on NARA—let alone clear and certain duties.

Fifth, Plaintiffs cannot state a claim that NARA violated the Federal Records Act. Plaintiffs contend that NARA failed to request that the Attorney General initiate an action to recover assassination records that were allegedly destroyed, but again, the Federal Records Act imposes no such duty on NARA. Instead, the Federal Records Act requires NARA only to request that the Attorney General initiate an action to recover records that were "unlawfully removed," and Plaintiffs do not allege that any assassination records were removed unlawfully.

Accordingly, Plaintiffs' amended complaint should be dismissed.

BACKGROUND

A. The President John F. Kennedy Assassination Records Collection Act

The President John F. Kennedy Assassination Records Collection Act of 1992 reflects the determination by Congress that the government's records related to the assassination of President Kennedy "should be eventually disclosed to enable the public to become fully informed about the history surrounding the assassination." Pub. L. No. 102-526, § 2(a)(2) (codified at 44 U.S.C. § 2107 note). To that end, the Act required all federal government offices—defined to include, among other entities, all executive agencies, *id.* § 3(5)—to provide any "assassination records" in their possession to NARA, where the Archivist of the United States would establish an "Assassination Records Collection" to be made available to the public. *Id.* §§ 4(a), 5(a).[1]

If, however, a government office believed that disclosure of an assassination record (or part of a record) posed one of several enumerated risks of harm, it could seek to postpone release of

[1] The Act defines an "assassination record" as "a record that is related to the assassination of President John F. Kennedy, that was created or made available for use by, obtained by, or otherwise came into the possession of" specified entities, such as the Warren Commission, the Church Committee, or the House Select Committee on Assassinations, among others. JFK Act § 3(2).

that record (or part of it) under the standards Congress set forth in Section 6 of the Act. *Id.* § 6. The harms that could qualify a record for postponed disclosure by an agency include threats to the Nation's military or defense operations, or its foreign relations conduct; revealing the identity of a living person who provided confidential information to the United States; unwarranted invasions of personal privacy that outweighs the public interest; or disclosure of a security procedure utilized by an agency charged with protecting government officials. *Id.* § 6(1)-(5). Agency postponement requests were decided by the Assassination Records Review Board, an entity created by the Act. The Act empowered the Board to approve an agency's request to postpone disclosure of a record, or to require its disclosure in the Collection. *Id.* § 9(c). The JFK Act also granted the President "sole and nondelegable" authority over the Board's disclosure or postponement decisions regarding particular assassination records, meaning that the President could part ways with a "formal determination" by the Board and require either disclosure or postponement of a record (or part of it). *Id.* § 9(d).

Section 5 of the Act requires that all assassination records, even those whose disclosure has been postponed, be "publicly disclosed in full, and available in the Collection no later than the date that is 25 years after the date of enactment", that is, by no later than October 26, 2017. *Id.* § 5(g)(2)(D). But that same section of the Act also provides that the President may extend the 25-year deadline if he

> certifies, as required by this Act, that— (i) continued postponement is made necessary by an identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations; and (ii) the identifiable harm is of such gravity that it outweighs the public interest in disclosure.

Id. § 5(g)(2)(D)(i)-(ii). Notably, the criteria and process for a presidential postponement of the 25-year deadline applicable to all assassination records under Section 5 of the Act are different from the criteria and process for postponing the disclosure of particular records by government offices under Section 6. Other than setting forth the required criteria the President must find satisfied, the

Act does not limit the President's authority to postpone the 25-year deadline for disclosing all assassination records.

B. The Government's Implementation of the JFK Act

The JFK Act has led to the addition of millions of pages and over 300,000 individual records to the Assassination Records Collection. *See* Final Report of the Assassination Records Review Board ("ARRB Report"), https://perma.cc/F42P-DP7G. The Board processed over 60,000 assassination records for release, which included voting on more than 27,000 records whose disclosure agencies had sought to postpone. *Id.* at 38, 39 n.4. Following the Board's prescribed dissolution in 1998, *see* JFK Act § 7(o)(1), the duties of the Archivist under the Act continued in effect, and will remain effective "until 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," *id.* § 12(b). Since 1998, agencies have continued to add assassination records to the Collection, which consists of approximately five million pages. *See* National Archives Releases New Group of JFK Assassination Documents, Dec. 15, 2022, https://perma.cc/QH6L-4LB3.

C. Presidential Postponements of the JFK Act's 25-Year Deadline

As noted, Section 5 of the JFK Act provides that all assassination records be publicly disclosed in full no later than 25 years after enactment of the Act (*i.e.*, by October 26, 2017), unless the President certifies that continued postponement is made necessary by an identifiable harm that outweighs the public interest in disclosure. JFK Act § 5(g)(2)(D). On October 26, 2017, then-President Trump issued a memorandum certifying that temporary continued postponement of certain limited assassination records was necessary to protect against harm to the military defense, intelligence operations, law enforcement, or the conduct of foreign relations. *See Temporary Certification for Certain Records Related to the Assassination of President John F. Kennedy*, 82 Fed. Reg. 50,307 (Oct. 26, 2017). The President determined that such records should be temporarily withheld from public disclosure until no later than April 26, 2018, to allow sufficient time to determine whether such information warrants continued postponement under the Act. *Id.*

Between President Trump's October 26, 2017, memorandum and April 26, 2018, the government disclosed over 45,000 assassination records, which were added to the Assassination Records Collection. *See* JFK Assassination Records – 2018 Additional Documents Release, https://perma.cc/MB5H-B62J. On April 26, 2018, President Trump issued a second memorandum. *See Certification for Certain Records Related to the Assassination of President John F. Kennedy*, 83 Fed. Reg. 19,157 (Apr. 26, 2018). After noting that federal agencies had again recommended the continued redaction of certain information in assassination records, President Trump accepted the Archivist's "recommendation that the continued withholdings are necessary to protect against identifiable harm to national security, law enforcement, or foreign affairs that is of such gravity that it outweighs the public interest in immediate disclosure." *Id.* Accordingly, President Trump "certif[ied] that all information within records that agencies have proposed for continued postponement under section 5(g)(2)(D) of the Act shall be withheld from full public disclosure until no later than October 26, 2021." *Id.* The President also ordered agencies to re-review all redactions over the next three years. *Id.*

In accordance with President Trump's second memorandum, federal agencies re-reviewed each redaction they proposed that would result in the continued postponement of full public disclosure. *See Temporary Certification Regarding Disclosure of Information in Certain Records Related to the Assassination of President John F. Kennedy*, 86 Fed. Reg. 59,599 (Oct. 22, 2021). NARA then reviewed whether it agreed that each redaction continued to meet the statutory standard. *Id.* at 59,599. "[U]nfortunately," however, the COVID-19 pandemic "had a significant impact on the agencies and NARA," and NARA "require[d] additional time to engage with the agencies and to conduct research within the larger collection to maximize the amount of information released." *Id.*

Accordingly, on October 22, 2021, President Biden issued a memorandum certifying that continued postponement was necessary under Section 5(g)(2)(D) and extending the deadline for disclosure of all assassination records to December 15, 2022. President Biden also ordered that an

interim release of assassination records occur on December 15, 2021. *Id.* at 59,600. On that date, 1,491 records were disclosed and added to the Collection. *See* JFK Assassination Records – 2021 Additional Documents Release, https://perma.cc/2YFT-GQFJ. As of the December 15, 2021 release, all documents subject to section 5 of the JFK Act had been released in their entirety or in part, and no documents subject to section 5 of the Act remain withheld in their entirety. *See* National Archives Releases New Group of JFK Assassination Documents, https://perma.cc/4YEA-KQ4P. The President directed that "[o]ver the next year, agencies proposing continued postponements and NARA shall conduct an intensive review of each remaining redaction to ensure that the United States Government maximizes transparency, disclosing all information in records concerning the assassination, except when the strongest possible reasons counsel otherwise." 86 Fed. Reg. at 59,600.

On December 15, 2022, President Biden issued a second memorandum regarding the disclosure of assassination records. *See Certifications Regarding Disclosure of Information in Certain Records Related to the Assassination of President John F. Kennedy*, 87 Fed. Reg. 77,967 (Dec. 15, 2022). The memorandum noted that, since the October 2021 memorandum, federal agencies had undertaken a comprehensive review of the full set of almost 16,000 records that had previously been released in redacted form. *Id.* 77,967 (Dec. 15, 2022). The agencies determined that more than 70 percent of those records may be released in full. *Id.* at 77,967. President Biden directed that those records be released in full by December 15, 2022, and, on that date, NARA released 13,251 records in full. *See* JFK Assassination Records – 2022 Additional Documents Release, https://perma.cc/6SW5-KQJG.

The December 2022 memorandum further noted that federal agencies, in the course of their review, "identified a limited number of records containing information for continued postponement of public disclosure." 87 Fed. Reg. at 77,968. The Archivist recommended that the President certify these records—identified in "Section 2(c)" of the December 2022 memorandum—for continued postponement of public disclosure. *Id.* Each agency also prepared

a plan for the eventual release of this information—known as a "Transparency Plan"—to "ensure that information would continue to be disclosed over time as the identified harm associated with release of the information dissipates." *Id.* at 77,969. 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." *Id.*[2]

The Archivist also indicated that additional work remained to be done with respect to a limited number of other reviewed records that were the subject of agency proposals for continued postponement. *Id.* The Archivist believed that such additional work could further reduce the amount of redacted information. *Id.* The Archivist therefore recommended that the President temporarily certify the continued postponement of public disclosure of redacted information in these records—identified in "Section 2(d)" of the December 2022 memorandum—to provide additional time for review and to ensure that information from the records is disclosed to the maximum extent possible. *Id.*

President Biden accepted the Archivist's recommendations. With respect to the records identified in Section 2(c) of the memorandum, the President certified that continued postponement was necessary under Section 5(g)(2)(D) of the JFK Act and directed that further release of the information in these records occur in a manner "consistent with the Transparency Plans" the agencies had submitted. *Id.* at 77,968. With respect to the records identified in Section 2(d) of the memorandum, the President certified that continued postponement was necessary under Section 5(g)(2)(D) of the JFK Act and directed that further release of the information in these records be withheld from public disclosure until June 30, 2023. *Id.* The memorandum also sets forth a process for federal agencies and NARA to jointly review the remaining redactions in these records "with a view to maximizing transparency and disclosing all information in records concerning the assassination, except when the strongest possible reasons counsel otherwise." *Id.* at 77,968–69.

[2] The Transparency Plans are available on NARA's website: https://www.archives.gov/research/jfk/agency-doc-2022.

D. Plaintiffs' Complaint

On October 19, 2022, the Mary Ferrell Foundation ("MFF"), a nonprofit corporation that maintains a searchable electronic collection of JFK assassination records, and two of its members, filed a complaint against President Biden and NARA challenging the President's October 22, 2021, memorandum. ECF No. 1. On January 5, 2023, Plaintiffs amended their complaint to challenge the President's December 2022 memorandum. Am. Compl., ECF No. 21. The amended complaint refers to these two memoranda collectively as the "Biden Memoranda." *Id.* ¶ 3.

Plaintiffs assert five claims in their Complaint. They claim first that the President acted *ultra vires* when, in the Biden Memoranda, he postponed the 25-year deadline for disclosure of assassination records by allegedly "using criteria that do not appear in the Act," failing to describe "identifiable harms" from disclosure on a "record-by-record basis," and failing to provide a "description of the reason for such continued postponement for each assassination record." *Id.* ¶ 76. Second, Plaintiffs assert a mandamus claim against President Biden, contending that he had a "ministerial non-discretionary duty" to comply with the procedural requirements of the JFK Records Act and that his alleged failure to do so entitles them to mandamus relief against the President. *Id.* ¶¶ 87–88, 92. Third, Plaintiffs allege that NARA violated the Administrative Procedure Act by its "implementation of the Biden Memoranda" and continued withholding of postponed assassination records because, Plaintiffs allege, the Biden Memoranda "violated the express terms of the Act." *Id.* ¶ 98. Fourth, Plaintiffs seek mandamus relief against NARA for its alleged violation of two "ministerial non-discretionary duties": to "properly maintain the 'central directory' of identification aids"; and to ensure that a reason for the postponement of any postponed assassination record is published in the Federal Register. *Id.* ¶ 107. Plaintiffs' final claim is that NARA has violated the Federal Records Act by failing to request that the Attorney General "initiate action, or otherwise seek legal redress" for documents that Plaintiffs alleges have not been searched for or are "missing." *Id.* ¶ 117.

ARGUMENT

I. PLAINTIFFS' *ULTRA VIRES* CLAIMS AGAINST THE PRESIDENT SHOULD BE DISMISSED

A. The Court Lacks Jurisdiction Over Plaintiffs' *Ultra Vires* Claim Against the President

In Count One, Plaintiffs assert a claim for "non-statutory review of *ultra vires* action" against the President for certifying postponement of public disclosure in the Biden Memoranda allegedly "in violation of the statutory criteria set forth in sections 5, 6, an 9 of the JFK Records Act." Am. Compl. ¶ 76. Specifically, Plaintiffs allege that the President violated the JFK Act by "using criteria that do not appear in the Act," "[f]ailing to certify the existence of identifiable harms . . . on a record-by-record basis," and "[f]ailing to provide an unclassified written description of the reason for such continued postponement for each assassination record." *Id.* Plaintiffs seek an order "[d]eclar[ing] that the Biden Memoranda" violate the JFK Records and were issued *ultra vires*, "[d]eclar[ing] that . . . President Biden acted arbitrarily and capriciously when he certified the postponement of the Assassination Records," and "compelling . . . President Biden" to take various official actions, including "issu[ing] an unclassified explanation certification that specifies the reasons for continued postponement," and "demonstrat[ing] using clear and convincing evidence the identifiable harm posed by the potential disclosure of [each postponed] Assassination Record." *Id.* Prayer for Relief ¶¶ 1–3, 5(a), (b). For at least two reasons, the Court lacks jurisdiction over this claim.

First, the Supreme Court recognized over 150 years ago that federal courts have "no jurisdiction . . . to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866). The Supreme Court reaffirmed this principle more recently in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), where the Court noted that entry of injunctive relief against the President was "extraordinary" and "should have raised judicial eyebrows." *Id.* at 802; *see also id.* at 827 (Scalia, J., concurring) ("apparently unbroken historical tradition supports the view" that courts may not order the President to "perform particular executive . . . acts").

In accordance with this well-established authority, federal courts have repeatedly declined to impose declaratory or injunctive relief against the President for his official conduct. *See, e.g.*, *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief."); *Doe 2 v. Trump*, 319 F. Supp. 3d 539, 541 (D.D.C. 2018) (dismissing "the President as a party to this case"); *City of San Jose, California v. Trump*, 497 F. Supp. 3d 680, 744 (N.D. Cal. 2020) (enjoining all defendants "other than the President"), *vacated and remanded on other grounds*, 141 S. Ct. 1231. Consistent with these authorities, the Court should dismiss Count One—which seeks only declaratory and injunctive relief against the President himself—for lack of jurisdiction.

Second, the Supreme Court has held that even "assum[ing] for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the [Administrative Procedure Act]," "longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President." *Dalton v. Specter*, 511 U.S. 462, 474 (1994). Thus, in *Dalton*, the Court held that plaintiff's claim that the President exceeded his statutory authority in deciding to close a naval base was "not a matter for [the Court's] review," as "[n]o question of law is raised when the exercise of the President's discretion is challenged." *Id.* at 476 (alterations omitted) (quoting *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940)).

Here, as in *Dalton*, the JFK Act commits to the exclusive discretion of the President the decision whether to postpone the public disclosure of all assassination records otherwise required to be disclosed within 25 years. *See* JFK Act § 5(g)(2)(D) (requiring all assassination records to be released within 25 years "unless the President certifies" the harms prescribed by the statute). The statute does not require that the President take any particular action under Section 5(g)(2)(D); his decision is entirely discretionary. And if the President does decide to postpone the deadline, the underlying basis for that decision is also left entirely to the President's discretion. It is for the

President to decide, first, whether there is an "identifiable harm to the military defense, intelligence operations, law enforcement, or conduct of foreign relations," and, second, if there is such a harm, whether it is of "such gravity that it outweighs the public interest in disclosure." *Id.* § 5(g)(2)(D)(i)-(ii). The Act thus confers on the President broad latitude to balance the "harm" he has identified to the specified government interests against the "public interest in disclosure," and entrusts to his judgment whether the former outweighs the latter. This type of judgment call is a quintessentially discretionary decision. *See F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1314 (9th Cir. 1989) (explaining that a duty is discretionary if "an official is required to exercise his judgment, even if rarely or to a small degree"); *Beatty v. Wash. Metro. Area Transit Auth.*, 860 F.2d 1117, 1127 (D.C. Cir. 1988) ("Generally speaking, a duty is discretionary if it involves judgment, planning, or policy decisions.").

Furthermore, the determination whether release would cause harm to "the military defense, intelligence operations, law enforcement, or conduct of foreign relations," JFK Act § 5(g)(2)(D)(i), involves policy conclusions on a subject matter where courts traditionally defer to the Executive Branch. *See, e.g.*, *Hamdan v. U.S. Dep't of Just.*, 797 F.3d 759, 770 (9th Cir. 2015) ("[W]hen dealing with properly classified information in the national security context, we are mindful of our limited institutional expertise on intelligence matters, as compared with the executive branch."); *United States v. Jennings*, 960 F.2d 1488, 1491 (9th Cir. 1992) ("The judiciary does not have a license to intrude into the authority, powers and functions of the executive branch, for judges are not . . . executive officers, vested with discretion over law enforcement policy and decisions . . . ." (quotation and alterations omitted)); *Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 32 (D.D.C. 2020) (holding that court lacked jurisdiction over *ultra vires* challenges to President's declaration of national emergency at the southern border because they presented non-justiciable political questions). Subjecting to second-guessing in this Court the President's considered conclusions in the areas of foreign affairs, law enforcement and national security, as Plaintiffs request, would undercut the very reasons that the Supreme Court in *Dalton* held that "[h]ow the

President chooses to exercise the discretion Congress has granted him is not a matter for [judicial] review." 511 U.S. at 474.

Accordingly, the Court should dismiss Plaintiffs' first claim asserting an *ultra vires* claim against the President for lack of jurisdiction.

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

Even assuming Plaintiffs could proceed with an *ultra vires* claim against the President, the scope of the Court's review would be limited. 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) (quoting *Leedom v. Kyne*, 358 U.S. 184, 188 (1958)); *see also SurvJustice Inc. v. DeVos*, No. 18-CV-00535-JSC, 2018 WL 4770741, at *12 (N.D. Cal. Oct. 1, 2018) (plaintiff must show violation of "unambiguous and mandatory legal requirement"). Courts have compared attempts to challenge agency action under the *ultra vires* doctrine to "a Hail Mary pass" that "rarely succeed," even where the challenged action did not involve the President. *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009).

Plaintiffs' allegations here do not come close to demonstrating that the President acted *ultra vires* in issuing the Biden Memoranda. Plaintiffs contend that the President violated the requirements of the JFK Act because he (i) relied on "criteria that do not appear in the Act," (ii) failed to certify the existence of an identifiable harm on a "record-by-record basis," and (iii) failed to provide an unclassified written description of the reason for continuing the postponement of public disclosure for each assassination record. Am. Compl. ¶ 76(a)-(c). These contentions are all incorrect.

First, contrary to what Plaintiffs claim, the criteria contained in the Biden Memoranda appear quite evidently in the Act—indeed, the President expressly referenced the very same criteria that appear in Sections 5(g)(2)(D)(i) and (ii) of the Act. *See* 10/21/2021 Memorandum § 3 (citing "section 5(g)(2)(D) of the Act" and certifying that "[t]emporary continued postponement is

necessary to protect against identifiable harm to the military defense, intelligence operations, law enforcement, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in immediate disclosure"); 12/15/2022 Memorandum §§ 3–4 (same). Far from relying on "non-statutory criteria" as Plaintiffs allege, *see* Am. Compl. ¶ 82, the President made his determination by measuring the harms from potential disclosure of the remaining assassination records against the precise criteria Congress prescribed.

Second, nothing in Section 5(g)(2)(D) requires the President to articulate the harms from potential disclosure on a "record-by-record" basis, as Plaintiffs contend. Rather, the text of the statute makes clear that the "postponement" contemplated by Section 5(g)(2)(D) is not addressed to individual records, but to the "date" by which *all* records are otherwise required to be publicly disclosed. JFK Act § 5(g)(2)(D). Moreover, the structure of this provision confirms that a postponement under Section 5(g)(2)(D) is one that is effective for all records (or parts of records) which remain undisclosed, and postponement does not need to be made on an individual, record-by-record basis. Subsection (g) of Section 5 concerns "Periodic Review of Postponed Assassination Records" and generally requires agencies to conduct periodic assessments of whether previously postponed records should continue to be postponed. *Id.* § 5(g)(1) ("All postponed or redacted records shall be reviewed periodically by the originating agency and the Archivist consistent with the recommendations of the Review Board under section 9(c)(3)(B)."). The 25-year deadline in Section 5(g)(2)(D) was thus intended to mark the point at which such periodic reviews would come to a close, and all assassination records would be released in full. The exception, however, carved explicitly into subsection (g), is that the President may elect to postpone the full release of *all* records that Congress contemplated would be disclosed by making the specified harm determination as Congress prescribed. *See* JFK Act § 5(g)(2)(D). There is no requirement in that provision that when the President postpones the 25-year deadline, he is obligated to make any determinations about individual records that have yet to be fully released.

Plaintiffs are also mistaken when they suggest that the President has deviated from Section 6 of the JFK Act. *See* Am. Compl. ¶¶ 73, 87. Notably, the determination of harm reserved to the President in Section 5(g)(2)(D) for postponing the 25-year deadline for full and final disclosure differs from the grounds for postponement set forth in Section 6, which are to be used by individual agencies requesting postponement in the first instance (and presumably well in advance of the 25-year deadline). *See* JFK Act § 5(c)(2)(D) (directing all Government offices, not later than 300 days after passage of the Act, to determine whether its assassination records meet the "standard for postponement of public disclosure under this Act" and to specify "the applicable postponement provision contained in section 6"). For example, Section 5(g)(2)(D) refers to harms to "the military defense, intelligence operations, law enforcement, or conduct of foreign relations," while Section 6 permits postponement of records for additional reasons. *See, e.g.*, *id.* §§ 6(2) (name or identity of confidential informant), (3) (invasion of personal privacy), 5 (security or protective procedure).

Plaintiffs are thus incorrect when they assert that the President had a duty "to apply the postponement standards of section 6" and to "provide an explanation [of his postponement decision] under the stringent '*clear and convincing*' evidence standard." Am. Compl. ¶¶ 41–42. Section 6 sets forth the standard *agencies* must meet to postpone individual records, and that provision does not obligate the President to do anything at all, let alone anything to effectuate a postponement of the 25-year deadline contained in Section 5(g)(2)(D). The JFK Act does not require the President to reach conclusions about individual records whenever he decides to postpone the Act's 25-year release deadline, and Plaintiffs' claim to the contrary lacks any support in the statute.

Third, Plaintiffs are incorrect that the President is required by Section 5 to "provide an unclassified written description of the reason" why records are postponed "for each assassination record." *See* Am. Compl. ¶ 76(c). In support of this contention, Plaintiffs appear to rely on Section 5(g)(2)(B) of the Act, which provides that "[a]ll postponed assassination records determined to require continued postponement shall require an unclassified written description of the reason for

such continued postponement." *See* Am. Compl. ¶ 105(e) & n.105 (citing JFK Act § 5(g)(2)(B)). That requirement, however, does not appear in the part of Section 5(g) that addresses postponement by the President, but rather in the part addressing records that are postponed as a result of "periodic reviews" conducted "by the originating agency and the Archivist." JFK Act § 5(g)(1). When, by contrast, Congress set forth in Section 5(g)(2)(D)(i) and (ii) the criteria for a presidential postponement of the 25-year overall release deadline, it included no separate requirement that the President provide an unclassified written description of his reasons, let alone any requirement that he do so on an individual record basis. Lacking any statutory basis for their contention, Plaintiffs' claim fails. In any event, the President in the Biden Memo, which was published in the Federal Register, *did* provide an unclassified statement of his reasons for postponing the deadline for releasing all records—namely, because a postponement was "necessary to protect against identifiable harm to the military defense, intelligence operations, law enforcement, or the conduct of foreign relations" and because of "the Archivist's request for an extension of time to engage with the agencies, and the need for an appropriate review and disclosure process." Biden Memo § 3.

Each of Plaintiffs' asserted bases for contending that the President acted *ultra vires* in issuing the Biden Memoranda therefore fails as a matter of law. Accordingly, Count One should be dismissed.

II. PLAINTIFFS CANNOT STATE A MANDAMUS CLAIM AGAINST THE PRESIDENT

For similar reasons, Plaintiffs cannot state a mandamus claim against the President. *See* Am. Compl. ¶¶ 86–92 (Count Two).

"[M]andamus is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)). "[O]nly exceptional circumstances . . . will justify the invocation of this . . . remedy." *Id.* (alteration omitted) (quoting *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004)). The Ninth Circuit has held that an order pursuant to the mandamus statute

is available only if "(1) the claim is clear and certain; (2) the official's or agency's 'duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt'; and (3) no other adequate remedy is available." *Plaskett v. Wormuth*, 18 F.4th 1072, 1081 (9th Cir. 2021) (quoting *Agua Caliente Tribe of Cupeño Indians of Pala Rsrv. v. Sweeney*, 932 F.3d 1207, 1216 (9th Cir. 2019)).

Here, Plaintiffs' mandamus claim against the President fails for the same reason their *ultra vires* claim fails. The Court lacks jurisdiction to enter mandamus relief against the President himself. *See supra* Section I.A; *Mississippi v. Johnson*, 71 U.S. at 501. And even if review were hypothetically available in some cases, it would not be available here because the JFK Act commits the decision whether to extend the 25-year deadline to the President's discretion. *See supra,* Section I.A; *Dalton*, 511 U.S. 474. Accordingly, Plaintiffs lack any basis to allege that the President violated a "nondiscretionary" and "ministerial" duty, as is required to state a mandamus claim. *See Plaskett*, 18 F.4th at 1081; *see also Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996) ("[C]ourts do not have authority under the mandamus statute to order *any* government official to perform a discretionary duty." (citing *Heckler v. Ringer*, 466 U.S. 602, 616 (1984)).

Moreover, even if Plaintiffs could show that JFK Act imposed nondiscretionary and ministerial duties on the President, which it does not, they could not show that the President violated any such duty here. As with Count One, Plaintiff contends in Count Two that the President violated nondiscretionary and ministerial duties by (i) failing to certify the existence of identifiable harms on a "record-by-record" basis using a "clear and convincing standard"; (ii) failing to provide an unclassified written description of the reasons for continued postponement for each assassination record, and (iii) failing to ensure that this description is provided to the Archivist and published in the Federal Register. As explained above, however, Plaintiffs' interpretation of the JFK Act is incorrect, and the President did not violate any alleged duties under the Act. *See supra* Section I.B.

Plaintiffs additionally allege (in Count Two only) that the President violated a non-discretionary and ministerial duty to "ensure the periodic review of postponed releases." But the JFK Act imposes no such duty on the President. Rather, Section 5(g)(1) states that "the *originating agency* and the *Archivist*" are to periodically review postponed or redacted records. (emphasis added).

Even if the President were required to "ensure" a periodic review as Plaintiffs allege, the Biden Memoranda do, in fact, direct federal agencies and NARA to conduct such a review. Specifically, Section 5 of the October 2021 memorandum directs an "Intensive 1-Year Review" and requires the agencies and NARA to "conduct an intensive review of each remaining redaction to ensure that the United States Government maximizes transparency, disclosing all information in records concerning the assassination, except when the strongest possible reasons counsel otherwise." 10/22/2021 Memo § 5. The December 2022 memorandum likewise directs the agencies and NARA to engage in a six-month review of the remaining redactions. 12/15/2022 Memo § 6. Accordingly, even if the JFK Act imposed a duty on the President to ensure periodic reviews, the Biden Memoranda satisfy that duty.

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

In Count Three, Plaintiffs allege that NARA's "implementation of the Biden Memo by withholding Assassination Records from disclosure is arbitrary, capricious and contrary to law because the Biden Memo violated the express terms of the [JFK] Act and the redaction or withholding of Assassination Records in full is based on non-statutory criteria." Am. Compl. ¶ 98. As explained above, however, the President's certification in the Biden Memo of a postponement of the 25-year release deadline was wholly consistent with the JFK Act, and any alleged "implementation" by NARA of the Biden Memo is therefore not unlawful. *See supra*, Section I.B.

Plaintiffs' core contention appears to be that NARA is continuing to withhold assassination records (or parts of records) by following the postponement certified by the President, and—due to the alleged illegality of the Biden Memo itself—NARA's conduct amounts to arbitrary and

capricious action in violation of the Administrative Procedure Act ("APA"). *See* Am. Compl. ¶¶ 95, 99-100. But Defendants have shown that the President's postponement certification is not at odds with the JFK Act, and Plaintiffs do not allege any separate conduct by NARA apart from following the directives that the President set forth in the Biden Memo. Although Plaintiffs evidently disagree, as a policy matter, with the President's decision to postpone the 25-year release deadline, that "is *not* a reason to overturn [NARA's] determinations" when the agency has done no more than "act[] in accordance with the substantive and procedural mandates of" the Biden Memo. *WildEarth Guardians v. Steele*, No. CV 19-56-M-DWM, 2021 WL 2590143 (D. Mont. June 24, 2021); *see also Odiye v. U.S. Citizenship & Immigr. Servs., Dist. Dir.*, No. 14-MC-80276-JST, 2015 WL 1300031, at *3 (N.D. Cal. Mar. 18, 2015) (finding no viable APA claim for arbitrary and capricious conduct when "the agency acted in accordance with applicable regulations"). Accordingly, Plaintiffs fail to state an APA claim against NARA.

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

In Count Four, Plaintiffs contend that NARA failed to perform various "ministerial non-discretionary duties," including failing to "properly maintain [a] 'central directory' of identification aids" and failing to "ensure that all postponed Assassination Records . . . have an unclassified written description of the reasons for such continued postponement." Am. Compl ¶ 107. Plaintiffs seek an order compelling NARA to perform various actions, including "initiat[ing] and completing a search for other Assassination Records whose identification aids do not appear in the central directory," "remov[ing] all unjustified redactions from the Identification Aids in the central directory," and "conduct[ing] a new search . . . for the missing Assassination Records identified in th[e] complaint and to complete the outstanding requests of the Assassination Records Review Board. *Id.* Prayer for Relief ¶¶ 1(c)–(e); *see also id.* ¶¶ 1(f)–(k). Plaintiffs seek to bring this claim under the APA, 5 U.S.C. § 701 *et seq*., and the mandamus statute, 28 U.S.C. § 1361. *See* Am. Compl. at 35.

The APA authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). "A claim under § 706(1) can proceed," however, "only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). The APA "does not give [courts] license to 'compel agency action' whenever the agency is withholding or delaying an action [courts] think it should take." *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). Instead, a court "can compel agency action under § 706(1) only if there is a specific, unequivocal command placed on the agency to take a discrete agency action, . . . the agency has failed to take that action, [and] the agency action [is] pursuant to a legal obligation so clearly set forth that it could traditionally have been enforced through a write of mandamus." *Plaskett*, 18 F.4th at 1082 (quoting *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1075–76 (9th Cir. 2016)).

Here, Plaintiffs identify four alleged duties that, according to them, NARA has failed to meet. None of these, however, amounts to actual duties of NARA that are sufficient to support relief under § 706(1) of the APA .

First, Plaintiffs assert that NARA "has failed to complete the ARRB Compliance Program by seeking Final Declarations of Compliance from agencies that had not submitted these sworn statements to the ARRB." Am. Compl. ¶ 105(f). But nothing in the JFK Act imposes any duty on NARA to seek such final declarations. Plaintiffs do not cite any provision of the JFK Act that imposes such a duty. Instead, Plaintiffs simply note that the ARRB "initiated a compliance program," which "included obtaining 'Final Declarations of Compliance' from all agencies with Assassination Records." Am. Compl. ¶ 43. But that does not mean that *NARA*—a completely separate entity—has a statutory duty to seek such declarations. Without any basis in the JFK Act to support Plaintiffs' asserted duty, Plaintiffs cannot maintain a mandamus claim against NARA.

Second, Plaintiffs assert that NARA has not "follow[ed] up with the outstanding Assassination Records search requests of the ARRB." Am. Compl. ¶ 105(g). But again, the JFK

Act imposes no such obligation on NARA. To the extent that the JFK Act creates any duty to search for records, the Act squarely places that obligation on agencies, not on NARA or the ARRB. *See, e.g.*, JFK Act § 5(a)(1) (requiring agencies to "identify and organize" their assassination records); *id.* § 5(c)(1) (requiring agencies to "review, identify, and organize each assassination record in its custody or possession for disclosure to the public, review by the Review Board, and transmission to the Archivist").

Third, Plaintiffs assert that NARA has failed to "properly maintain the 'central directory' of identification aids." Am. Compl. ¶ 107(a). To support this claim, Plaintiffs rely on Section 4(a)(2)(B) of the JFK Act, which provides that "[t]he Collection shall include . . . a central directory comprised of identification aids created for each record transmitted to the Archivist under section 5 [of the Act]." Am. Compl. ¶ 56 & n.63. Section 5(d), in turn, provides that the Archivist "shall prepare and make available to all Government offices a standard form of identification or finding aid" for agencies' use, JFK Act § 5(d)(1)(A); and "[u]pon completion of an identification aid, a Government office shall . . . attach a printed copy to each assassination record it describes when it is transmitted to the Archivist" for inclusion the Collection, JFK Act § 5(d)(2). Nothing in the Act, however, requires the Archivist or NARA to "properly maintain" the directory of identification aids as Plaintiffs allege. *See* Am. Compl. ¶ 107(a); 57 (listing certain alleged "deficiencies"). Thus, Plaintiffs have not identified any "unequivocal command . . . to take a discrete agency action" that NARA has allegedly violated with respect to the central directory, as is required to state a claim under § 706(1). *Plaskett*, 18 F.4th at 1082.

Fourth, Plaintiffs assert that NARA has "failed to ensure that all postponed Assassination Records . . . have an unclassified written description of the reason for such continued postponement" published in the Federal Register. Am. Compl. ¶ 107(b). Plaintiffs rely on Section 5(g)(2)(B), maintaining that whenever the ARRB approved a postponement request by an agency, "the Act requires that an unclassified written description of the reason for such continued postponement be provided to NARA and published in the Federal Register upon determination."

Compl. ¶ 36 & n.36. But Section 5(g)(2)(B) applies only to "continued postponement" of a record following a "periodic review," and Plaintiffs do not identify any such periodic review or continued postponement, or even any particular record that allegedly lacks the "unclassified written description." Moreover, Section 5(g)(2)(B) again imposes no obligation—let alone a "clear and certain" duty—on the Archivist or NARA to generate an unclassified written description if a record does undergo a continued postponement. Rather, that provision obligates an agency to "provide[] *to the Archivist*" such a written description. JFK Act § 5(g)(2)(B) (emphasis added). Even if there has been a determination of continued postponement for one or more assassination records under Section 5(g) following a periodic review—a point not clearly alleged in the Complaint—it is not NARA's responsibility to create an unclassified written description of the reason for that postponement.

Because Plaintiffs cannot state a claim under § 706(1) of the APA, their mandamus claim also necessarily fails. Mandamus relief is available only where "no other adequate remedy is available," *Plaskett*, 18 F.4th at 1081, and because the APA provides an adequate remedy for an alleged failure to act, Plaintiffs cannot pursue a mandamus claim against NARA. *See, e.g.*, *Nova Stylings, Inc. v. Ladd*, 695 F.2d 1179, 1180 (9th Cir. 1983) ("The availability of review through the Administrative Procedure Act . . . is an adequate remedy precluding mandamus jurisdiction."); *Baptist Mem'l Hosp. v. Sebelius*, 603 F.3d 57, 64 (D.C. Cir. 2010) (affirming dismissal of mandamus claim because plaintiff had adequate alternative remedy). And even if Plaintiffs could pursue a mandamus claim, that claim would fail as a matter of law for the same reasons that their claim fails under § 706(1) of the APA. *See Plaskett*, 18 F.4th at 1082 n.5 (noting that even though Ninth Circuit has suggested that jurisdiction under the Mandamus Act "may not be proper when . . . [plaintiff] would have an adequate remedy under § 706(1) of the APA," the Court did not need to address the issue because plaintiff's claim "fail[ed] under either the APA or the Mandamus Act given that he lacks any clear right to relief"). Accordingly, Count Four should be dismissed.

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

In Count Five, Plaintiffs allege a violation of the Federal Records Act. The provision of the FRA on which Plaintiffs rely, 44 U.S.C. § 2905(a) provides, in pertinent part:

> The Archivist shall notify the head of a Federal agency of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency that shall come to the Archivist's attention, and assist the head of the agency in initiating action through the Attorney General for the recovery of records unlawfully removed and for other redress provided by law. In any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.

Plaintiffs contend that NARA "has not referred to the Attorney General for enforcement the destruction of Assassination Records by certain agencies identified by the ARRB." Am. Compl. ¶ 114; *see also id.* ¶ 61(f) (alleging that the "ARRB Final report reported CIA, FBI, Secret Service and other organizations intentionally destroyed documents").

A referral to the Attorney General, however, is required under the Federal Records Act only "for the recovery of records *unlawfully removed*." 44 U.S.C. § 2905(a) (emphasis added); *see also Bioscience Advisors, Inc. v. SEC*, No. 21-cv-00866, 2023 WL 163144, at *6 (N.D. Cal. Jan. 11, 2023) (noting that, under related provision concerning duties of federal agencies, "[a] duty to involve the Attorney General is triggered only when the 'agency knows or has reason to believe' the records in question have been *removed* unlawfully" (emphasis in original) (quoting 44 U.S.C. § 3106(a)). A referral to the Attorney General is *not* required for cases in which records have already been destroyed, as Plaintiffs allege here.[3] *See Citizens for Resp. & Ethics in Wash.*

[3] While Plaintiffs refer to "CIA, FBI, [and the] Secret Service" in paragraph 61 of the Amended Complaint, the only agency that Plaintiffs allege has destroyed records is the Secret Service. Am. Compl. ¶ 61(f) & n.81. They cite the ARRB Final Report at page 149, which states that, "in January 1995, the Secret Service destroyed presidential protection survey reports for some of President Kennedy's trips in the fall of 1963." ARRB Report at 149. The Board also stated that after it "requested the Secret Service to explain the circumstances surrounding the destruction,

("CREW") v. SEC, 916 F. Supp. 2d 141, 146 (D.D.C. 2013) (agreeing with the government that "the only time an agency has a mandatory enforcement duty is when records have been unlawfully removed—but not when they have ben unlawfully destroyed" (alterations omitted)); *Slockish v. U.S. Fed. Highway Admin.*, No. 3:08-CV-1169-ST, 2015 WL 13667112, at *4 (D. Or. Dec. 17, 2015) ("The mandatory enforcement duty under [the analogous provision for agencies,] 44 U.S.C. § 3106[,] is 'only triggered by the *removal* of documents.'" (quoting *CREW*, 916 F. Supp. 2d at 146)). When documents have been destroyed, there is nothing for the government to "recover," and an action by the Attorney General thus would make little sense. *See CREW*, 916 F. Supp. 2d at 146–48; *see also Armstrong v. Bush*, 924 F.2d 282, 294 (D.C. Cir. 1991) (noting that Federal Records Act "requires the agency head, in the first instance, and then the Archivist to request that the Attorney General initiate an action to *prevent the destruction* of documents" (emphasis added)). Thus, where, as here, plaintiffs fail to allege that the Archivist is aware that federal agencies "have unlawfully removed any documents" or that the Archivist "kn[ows] of any imminent unlawful destruction," Plaintiffs' claim must be dismissed. *Bioscience Advisors*, 2023 WL 163144, at *6.

Plaintiffs also contend that the Federal Records Act requires NARA to "request[] the assistance of the Attorney General to complete [the outstanding ARRB] Assassination Record Searches." Am. Compl. ¶ 114. But Plaintiffs identify no provision of the FRA that imposes such an obligation. As explained above, NARA's obligation under 44 U.S.C. § 2905(a) to request assistance from the Attorney General extends only to situations where NARA assesses that records have been "unlawfully removed" from a federal agency. *See CREW*, 916 F. Supp. 2d at 146–48. Neither that provision nor any other of the Federal Records Act is implicated when searches for records have allegedly not been undertaken. Accordingly, Count Five should be dismissed.

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after passage of the JFK Act," the "Secret Service formally explained the circumstances of this destruction in correspondence and an oral briefing to the Review Board." *Id.* at 149.

CONCLUSION

The Court should dismiss Plaintiffs' Amended Complaint.

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Respectfully submitted,

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