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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

PLAINTIFFS' FINAL CONFORMING BRIEF IN OPPOSITION TO MOTION TO DISMISS

Date: April 27, 2023
Time: 1:30 pm
Dept: Hon. Richard Seeborg

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INTRODUCTION

The Mary Ferrell Foundation, Inc., Josiah Thompson, and Gary Aguilar (hereinafter "Plaintiffs") seek an order for the Motion to Dismiss to be denied in all respects.

The operative complaint seeks an order for the President to comply with the procedural requirements of the President John F. Kennedy Assassination Records Collection Act of 1992 (the "JFK Records Act" or "JFK Act") when he certifies that information contained in an assassination record poses a "threat" of "identifiable harm" that is of "such gravity that it outweighs the public interest" in disclosure that disclosure of the particular assassination may be postponed beyond the due date of 2017. See § 5(g)(2)(D) and § 6 of the Act.

Plaintiffs also seek an order for NARA to take action to comply with the Act, the APA and the Federal Records Act to ensure that "all assassination records" are obtained before the Archivist certifies that "all assassination records have been made available to the public". See § 2(a)(1) and § 12(b) of the Act, and 36 CFR 1290.1 for the "assassination records" definition.

Plaintiffs are not asking the court to substitute its judgment for President Biden, nor second-guess the President's "considered conclusions in the areas of foreign affairs, law enforcement and national security". Defendants' Motion to Dismiss, hereinafter "MTD," 12:24. Nor is the dispute a policy disagreement between the Plaintiffs and the President. MTD, 19.4-8.

Unlike in the cases cited by the Defendants in their motion to dismiss, the President does not have unfettered discretion under the JFK Act. He must apply statutory criteria when making disclosure and postponement decisions. He is not allowed to assert attorney-client or executive privilege or even the deliberative process exemption as grounds to withhold disclosure of assassination records. JFK Act, § 11(a). Nor did he have the normal discretion to appoint or fire

members of the Record Review Board, § 7. His decisions to postpone full disclosure are subject to judicial review. § 11(c)

Rather, the plain language of § 5(g)(2)(D) of the Act provides that for "each assassination record" postponed, the President is required to provide to the American people an unclassified explanation of the enumerated "identified harms" posed by each record and why the harm is of such gravity that it outweighs the public interest in disclosure.

The President simply issued a blanket certification that "all" the postponed records posed identifiable harm. He did not describe the "identifiable harm" defined in section 6 of the Act for "each assassination record", nor explain how such harm was of "such gravity" outweighed the public interest for "each assassination record".

Defendants' Motion to Dismiss asserts that Plaintiffs failed to allege ministerial duties of NARA under the Act pursuant to APA § 706. MTD at 20-22. Defendants failed to state that NARA expressly assumed the mandatory duties of the Assassination Records Review Board (hereinafter "Board") in 2000 when it transferred the defunct Board regulations to a new subpart H of 36 CFR 1290. AC 2:10-11; 3:16-19; 19:5-10; 23:18-28:2.

"NARA continues to maintain and supplement the collection under the provisions of the Act. NARA is, therefore, the successor in function to this defunct independent agency." 65 Fed. Reg. 39550 (June 27, 2000). AC 19:5-10. The "functions" of the Board assumed by NARA included mandatory duties, either carried out or not carried out in an arbitrary and capricious manner (AC 35:1-14; 36:6-37:20); and/or not in accordance with law (AC 3:7-4:19; 35:1-14; 36:8-38:8); and with unreasonable delay (AC 13:19-14:22; 17:1-19:11, 35:15-24).

A fundamental goal of Congress when it passed the JFK Records Act was to create an

"*enforceable, independent and accountable process*" for the disclosure of public records. § 2(a)(3). The legislative history is replete with statements about the need to have an independent review that the American people can trust. This intent was expressed by representative Christopher Hays: "We want the bill so that we get all the information and more than we need so there is as little doubt as possible as to whether some higher authority was preventing us from getting this information because maybe this information was embarrassing to somebody." See also 138 Cong. Rec. H7887, H7988 (8/11/92) ("We are in a climate of cynicism, and if information is withheld it only adds to that cynicism and lack of trust in government." Two Presidents have postponed the release of these decades-old assassination records four times. AC 15:18-19:2. This track record reinforces doubts that the President is willing to hold accountable the agencies cited in this brief to comply with the Act's plain language requirements.

If the court adopts the cramped interpretation of the Act proffered by the Defendants, Plaintiffs and the American people will have no "enforceable" or "accountable" mechanism to assure full public disclosure.

> There must be a genuine desire on the part of such agencies to release information to the maximum extent possible. Otherwise this legislation will replicate *the sad history of FOIA*." (1992) Assassination Materials Disclosure Act of 1992, p. 440.

Such a reading could have significant implications for the implementation and enforcement of the Civil Rights Cold Case Records Collection Act of 2018 which was modeled after the JFK Act. See 44 U.S.C. 2107 note.

Defendants ask the court to refrain from reviewing the President's decisions under the JFK Records Act. MTD at 12-13. The original House bill provided that decisions by the President and the Board were not to be judicially reviewable. House Report, pp. 11 and 19.

However, in response to objections to these provisions, Congress added section 11(c) that specifically provides for judicial review. JFK Records Act §11(c).

The harm suffered by Plaintiffs - and to the public - when the Defendants continue to redact assassination records is not limited to the inability to read the documents. By redacting names of participants or witnesses until the individuals die, researchers are prevented from interviewing these historical witnesses to obtain information that may not appear in documents. When these individuals die, their memories pass with them, thereby creating irreparable harm to American history. Historians of the case are left with speculation, not facts.

An example from the December 15, 2022 release of document 104-10103-10024 illustrates this point. This memo describes the secret investigation conducted by the CIA the weekend after the assassination of the Cuban community in Miami to determine if any Cuban exiles or Castro supporters had been involved in the assassination. The memo's author was previously unknown. It was only after he died in 2017 that his name was released. What he could have provided about a little-known investigation of the Dallas tragedy is now lost to history.

The purpose of the Act was to enable "*the public to become fully informed about the history surrounding the assassination.*" § (2)(a)(2). This sentiment was best expressed by Senator David Boren, co-sponsor of the Senate bill that became the JFK Act when he said at a hearing: "The American people have a right to assure themselves to the greatest degree possible of the accuracy of the historical record of our Government." 138 Cong. Rec. S4391, S4392 (1992).

At a hearing for the House bill, representative Lee Hamilton, a co-sponsor of the House bill, said "We need to make as much information public as we can, and then let the journalists,

the scholars and the historians try to resolve the questions that remain, based on all the available information." 138 Cong. Rec. H7887, H7988 (1992).

The remaining witnesses to this historical event are now in their 80s or 90s. With each passing year, the facts that they could add to the nation's understanding of this tragic event are gone forever.

SUMMARY OF ARGUMENT

Defendants' motion ignores these fundamental issues:

1) The President violated the statutory scheme of the JFK Records Act, designed to ensure that if documents could not be released within the 25 year limit set in 1992, the American people would know the reasons why.

2) The JFK Records Act is a remedial statute that must be broadly construed to effectuate the beneficial purpose created by Congress.

3) Section 11 of the Act overrides judicial decisions and other statutes in order to ensure the prompt transmission and disclosure of assassination records under the Act.

4) Defendants failed to supply evidence that the President obtained Department of Justice concurrence for the Biden Memos as required by 1 CFR Part 19.

5) NARA is the "successor in function" to the Board. Thus, NARA has mandatory duties to review possible additional assassination records when brought to their attention, direct government offices to identify, review and organize potential assassination records, and make assassination record determinations under sections 5(c) and 7(j) of the Act.. From 1998 to the present, NARA violated its mandatory duties and unreasonably delayed compliance with the Act.

6) Neither the President nor NARA has the power to withhold the legislative branch records described in Section 9(c)(4)(B) of the Act. The Defendants have a mandatory, non-discretionary duty to release them immediately.

7) Defendants' motion fails to cite the proper definition of "assassination records" found at 36 CFR 1290.1. Besides NARA's duty to conduct new searches, Plaintiffs provide declarations stating that NARA has advised citizens to use FOIA to obtain "assassination records" that are not in the JFK Collection, and that NARA has also failed to respond to their requests to take action to include additional assassination records to the Collection.

STANDARD OF REVIEW

"(FRCP 8) does not require that pleadings allege all material facts or the exact articulation of the legal theories upon which the case will be based." *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) A plaintiff need not recite "detailed factual allegations" but must provide more than "an unadorned, the-defendant-unlawfully-harmed-me accusation". *Ashcroft v. Iqbal,* 556 US 672, 678 (2009). Ordinarily, both the motion and opposition are limited to the four corners of the complaint, judicially noticeable material, and matters in the public record. Plaintiffs include additional declarations and documents that buttress their request for leave to amend the complaint if necessary to illustrate additional violations of law by the Defendants.

Defendants' MTD is silent on its legal basis, but it can be assumed that it is based on 12(b)(1) (lack of jurisdiction) and 12(b)(6) (failure to state a claim). Dismissal under FRCP 12(b)(6) may be based on either the "lack of a cognizable legal theory" or on "the absence of sufficient facts alleged under a cognizable legal theory. When evaluating such a motion, the court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130, 1140

(9th Cir. 2017). It must also "draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987)

I. ARGUMENT

A. DEFENDANTS' INTERPRETATION OF THE JFK RECORDS ACT IS INCONSISTENT WITH THE GOALS AND TEXT OF THE ACT

1. The JFK Records Act is a remedial statute that should be construed to promote the goal of expeditious and full disclosure of assassination records

A canon of statutory construction that is firmly established in the Anglo-American legal system is that remedial statutes should be liberally construed to effectuate the beneficial purpose for which is was enacted by Congress. *SEC v. CM Joiner Leasing Corp.*, 320 US 344, 353 (1943). Sutherland, Statutory Construction, § 60.01 (8th ed. 2018).

This canon grew from the "mischief rule" that calls on courts to identify the mischiefs and defects that the legislature identified when it enacted legislation, and then construe the statute in a manner that would suppress the mischief and advance the remedy. See L.H. LaRue, *Statutory Interpretation: Lord Coke Revisited*, 48 U. Pitt. L. Rev. 733 (1987).

Black's Law Dictionary defines a "remedial statute" to mean (1) "[a]ny statute other than a private bill; a law providing a means to enforce rights or redress injuries" or (2) "(a) statute enacted to correct one or more defects, mistakes, or omissions."

The JFK Records Act should be construed as a remedial statute based on its intrinsic remedial nature, its text and contextual structure, and the legislative history. The Act was a "unique solution" to the problem of government secrecy. *Assassinations Records Review Board Final Report*, September 30, 1998 (Final Report") at page 1.

The **problem** Congress sought to address was that 30 years of government secrecy relating to the assassination of President John F. Kennedy had led the American public to believe

that the government had something to hide. The **solution** was the JFK Records Act which required the government to disclose whatever information it had concerning the assassination so that all Americans would have access to the facts surrounding the assassination. Id.

Section 2 of the Act sets forth the specific problems that the Act was intended to remedy. Congress found that the law was necessary, *inter alia*, because (1) the Freedom of Information Act ("FOIA"), 5 USCS § 552, had been implemented by the executive branch in a way that prevented timely disclosure of assassination records and (2) Executive Order No. 12356 (50 USCS § 401 note)("EO 12356") had eliminated the declassification and downgrading schedules relating to classified information across government which had the effect of preventing the timely public disclosure of records relating to the JFK assassination. JFK Act §§ 2(5) and (6).

To achieve the goals of the Act, Congress said it was necessary to "create an enforceable, independent, and accountable process for the public disclosure of such records." Id. at § 2(a)(3). To backstop this goal, Congress included a legislative override in § 11(a) to ensure the Act has precedence over any other law, judicial decision or common law doctrine that would operate to prohibit disclosure of assassination records, as well as a judicial review provision in § 11(c).

Congress instructed the Board to adopt a "broad and encompassing" definition of "assassination records" "to achieve the goal of assembling the fullest historical record on this tragic event in American history." Senate Report 102–328, 102d Cong., 2d Sess. (1992) at 18.

The Board published its definition of "assassination records" in 1995. 60 Fed. Reg. 33345 (June 28, 1995). The new regulation defined the scope of an assassination record:

> "includes but is not limited to all records, public and private, regardless of how labeled or identified, that document, describe, report on, analyze or interpret activities, persons, or events **reasonably related to the assassination** of President John F. Kennedy and investigations of or inquiries into the assassination." 36 CFR 1401(a). [emphasis added]

Subparagraph (b) included additional categories of assassination records, including:

> (1)All records as defined in Section 3(2) of the JFK Act;
> (2)All records collected by or segregated by all Federal, state, and local government agencies in conjunction with any investigation or analysis of or inquiry into the assassination of President Kennedy(for example, any intra-agency investigation or analysis of or inquiry into the assassination; any interagency communication regarding the assassination; any request by the House Select Committee on Assassinations to collect documents and other materials; or any inter- or intra-agency collection or segregation of documents and other materials);
> (3) Other records or groups of records listed in the Notice of Assassination Record Designation, as described in § 1290.8 of this chapter. 36 CFR 1401(b)(1)-(3)

The remedial findings of § 2(a), the statutory purposes in § 2(b), the initial definition of "assassination record" in § 3(1), the limited exceptions to the presumption of disclosure set forth in § 5(g)(2)(D), § 6, and § 9(d)(1), the legislative override in section 11(a), and the legislative history all demonstrate that Congress enacted a remedial statute that it intended to be liberally construed "to enable the public to become fully informed about the history surrounding President Kennedy's assassination" as described in § 2(a)(2).

A corollary to this remedial statute canon is that courts should narrowly construe exemptions to remedial statutes. *AH Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). In the legislative history, the section 6 grounds for postponement in section 6 were analogized to the exemptions as used in FOIA. The section six postponement grounds were to operate as exemptions to the overriding presumption of full and expeditious disclosure. As exemptions, they are to be narrowly construed. Indeed, in the Senate hearings, Senator David Boren who introduced the bill into the Senate assured Senator Joseph Lieberman that the exemptions were intended to be extremely unlikely. Senate Hearing at page 40. Senator John Glenn also said that the exemptions "must be kept to a minimum." Senate Hearing at page 33.

Thirty years after Congress said thirty years had been enough time, the Congressional goals have not yet been achieved. Thousands of redacted assassination records remain in the JFK Collection, as well as undetermined number of additional assassination records that have yet to be transmitted to the Archivist in violation of section 5(e) of the Act.

Despite the express Congressional statutory directives and the legislative history, the Defendants adopt a restrictive interpretation of the Act that would render the Act a nullity. The Defendants argue that judicial review is not available for Presidential certifications of postponement and that NARA has no APA duty to continue outstanding search requests from the Board or aid new searches. Defendants contend there is no role for the judiciary.

To support their truncated reading of the Act, the Defendants selectively parse the statutory language. Defendants cite Section 2(a)(2) for the proposition that Congress determined that assassination records "should be eventually disclosed." MTD 3. However, the beginning of this section states "*all Government records concerning the assassination of President John F. Kennedy should carry a* ***presumption of immediate disclosure***." Id. § 2(a)(2).[emphasis added]

2. The Defendants ignore the legislative override of Section 11(a) taking precedence over any other law or judicial decisions prohibiting disclosure of an assassination record

Section 11(a) demonstrates the remedial purposes of the JFK Records Act. It provides:

> (a) Precedence over other Law. When this Act requires transmission of a record to the Archivist or public disclosure, it shall take precedence over any other law (except section 6103 of the Internal Revenue Code [26 USCS § 6103]) , judicial decision construing such law, or common law doctrine that would otherwise prohibit such transmission or disclosure of an assassination record, with the exception of deeds governing access to or transfer or release of gifts and donations of records to the United States Government."

In any conflict between a particular term of the JFK Act and statutory or common law and related judicial decisions, section 11(a) requires the declassification procedures of the JFK Records Act prevail. Neither the President or an agency may rely on the more stringent

disclosure standards of EO 12356 and FOIA or judicial opinions interpreting those statutes or common law principles to withhold disclosure of assassination records.

This rule of construction overrides all of Defendants' arguments that would prohibit transmission or disclosure of the assassination records in the Collection based on any other legal theory other than those based on the Act itself or the US Constitution. Therefore, it is not surprising that the Defendants ignored this powerful Congressional remedy.

B. PLAINTIFFS HAVE ADEQUATELY STATED A NONSTATUTORY REVIEW CLAIM AGAINST THE PRESIDENT

. **1. The Court has jurisdiction over Plaintiffs Nonstatutory Review Claim**

Defendants assert that the federal courts have no jurisdiction to enjoin the President in the performance of his duties or otherwise impose declaratory or injunctive relief against the President. (MTD at pages 10-13.) The cases indicate otherwise.

Nonstatutory review of executive action has existed since the founding of the Republic. As early as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), courts have created remedies against unlawful government action. The Supreme Court has exercised its power to declare Presidential action unlawful or enjoined Presidential orders.

The Supreme Court famously enjoined President Truman's wartime order against the steel industry in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The government argued that the order was based on findings by the President in his capacity as the Nation's Chief Executive and the Commander in Chief that the national defense would be imperiled during the war in Korea. The District Court issued a preliminary injunction restraining the Secretary from implementing the order. The Supreme Court affirmed, holding that neither the relevant statute

nor any other act of Congress granted the President the explicit or implicit power that he sought to exercise in the order. 343 U.S. at 585-589.

Justice Frankfurter's concurring opinion is particularly relevant to the case at hand. He noted that Congress had at that time authorized 16 seizures of facilities. Each of these instances were qualified grants of power with limitations and safeguards. 343 U.S. at 598. As discussed below [in section 2], the JFK Act was such a qualified grant of power to the President.

In *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974), the court the court issued a declaration requiring the President to implement a pay increase. The court concluded that while it had the authority to issue an injunction or writ of mandamus, it would first issue a declaration and would reconsider mandamus if the President failed to take the required action. This proved unnecessary since the President complied with the declaratory judgment. Id. at 616.

In *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), the court reviewed an executive order of President Clinton prohibiting the administration to contract with certain companies. The court found the Presidential directive *ultra vires* and enjoined its implementation under a non-statutory review. 74 F.3d at 1328.

In support of their argument that this court has no jurisdiction to hear this case, Defendants principally rely on *Franklin v Massachusetts,* 505 U.S. 788 and *Dalton v Specter,* 511 U.S. 462 (1994). However, these opinions are not as sweeping as Defendants suggest and are distinguishable from the case at hand.

In *Franklin,* the plaintiffs challenged the way that Department of Commerce had calculated the 1990 reapportionment. The district court ruled apportionment purposes was arbitrary and capricious under the APA and entered an injunction directing the President to

recalculate the number of representatives. The Supreme Court reversed on the grounds that President was not an "agency" under the APA and was not subject to review under it for abuse of discretion was calculated.

It is true the *Franklin* Court said that *"generally this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties."* 505 U.S. at 803. But this followed the statement "*We have left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty*." Id. at 802.

In any event, these statements amount to *dicta* because the plurality opinion did not reach this issue. "*We need not decide whether injunctive relief against the President was appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone.*." Id at 803.

Thus, *Franklin* not only does not stand for the proposition cited by the Defendants but instead resembles *Nixon*, supra, in declining to issue an injunction because of the availability of declaratory relief.

The defendants excerpt a pithy statement from Justice Scalia's concurring opinion that the entry of injunctive relief against the President "should have raised eyebrows". MTD 10. Note that Justice Scalia also said that "*review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.*". 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment).

Indeed, injunctive relief was granted against a President Trump executive order even when his actions touched on matters of national security. *Washington v. Trump*, 847 F.3d 1151, 1162-1163 (9th Cir. 2017) ("courts are not powerless to review the political branches actions with respect to matters of national security").

Likewise, this court addressed the duties of the judiciary in *Sierra Club v Trump,* 379 F. Supp. 3d 883 (N.D.CA. 2019) involving reallocation of appropriated funds to construct a border barrier. Plaintiffs sought to enjoin the President's emergency proclamation and to prevent the defense secretary from re-allocating the funds.

The court granted a preliminary injunction because it found there was a likelihood of success on the argument that the transfer of the funds for border barrier construction was unlawful and exceeded the Executive Branch's lawful authority under the Constitution and a number of statutes duly enacted by Congress. In so holding, the court said:

> "It is emphatically the province and duty of the judicial department to say what the law is. In determining what the law is, the Court has a duty to determine whether executive officers invoking statutory authority exceed their statutory power." 379 F. Supp. 3d at 909.. "Once a case or controversy is properly before a court, in most instances that court may grant injunctive relief against executive officers to enjoin both **ultra vires acts**—that is, acts exceeding the officers' purported statutory authority—and unconstitutional acts. The Supreme Court recently reaffirmed this **core equitable power."** Id. [emphasis added].
> "…The very nature of an **ultra vires** action posits that an executive officer has gone beyond what the statute permits, and thus beyond what Congress contemplated….. 379 F. Supp. 3d at 910. [emphasis added].

The Ninth Circuit found that the plaintiffs had an implied equitable action for *ultra vires* and unconstitutional violations. *Sierra Club v. Trump*, 963 F.3d 874, 879, 887 (9th Cir. 2020) (holding that there was no "clear and convincing evidence" of congressional intent "to foreclose a remedy for a constitutional violation").

Defendants suggest the court lacks jurisdiction because it touches on the President's "*considered conclusions in the area of foreign affairs, law enforcement and national security.*" MTD at page 12. The 9th Circuit has recognized that even with national security concerns, the public interest is served by "*curtailing unlawful executive action so it is the responsibility of a*

court to ensure that a President exercises the executive power granted under a statute lawfully." *Hawaii v Trump*, 859 F.3d 741, 784 (9th Cir. 2017)

Where an executive official has discretion within limits, a court can order the official to remain within those limits. W*ork v. United States ex rel. Rives,* 267 U.S. 175, 177 (1925). There is a distinction between exercising such discretion and refusing to carry out obligations that Congress has imposed on the executive.

2. **The JFK Act was a limited grant of authority to the President**

Defendants cite *Dalton v. Specter*, 511 U.S. 462 (1994) for the proposition that review is unavailable when a statute in question commits a decision to the discretion of the President. While the Court denied judicial review of the President's decision to close the Philadelphia Naval Yard, it also found that "*some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA*."511 U.S. at 474.

But *Dalton* involved a statute that conferred unfettered power to the President to approve or disapprove a base closing recommendation report. The *Dalton* Court concluded that:

> "where a statute, such as the 1990 Act, commits decision making to the discretion of the President, judicial review of the President's decision is not available." 511 U.S. at 510. The Dalton emphasized that "our conclusion that judicial review is not available for respondents' claim follows from our interpretation of [the] Act." Id.

Chamber of Commerce, 74 F.3d 1322 (D.C. Cir. 1996), found that:

> "Dalton's holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available." 74 F.3d at 1331. "(Dalton) does not at all limit the President's discretion in approving or disapproving the Commission's recommendations … nothing in [the statute] prevents the President from approving or disapproving the recommendations for whatever reason he sees fit.
>
> "Dalton is inapposite where the claim instead is that the Presidential action…violates...a statute that delegates no authority to the President to interfere

> with an employer's right to hire permanent replacements during a lawful strike… we think it untenable to conclude that there are no judicially enforceable limitations on Presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions… Yet this is what the government would have us do. Its position would permit the President to bypass scores of statutory limitations on governmental authority, and we therefore reject it. 74 F.3d at 1332.

Sections 5, 6, 9 and 11 of the JFK Act impose guardrails on the President's exercise of his executive power. Congress wrote the Act to ensure the President could not act as he pleases. Instead, the President may only postpone certain assassination records after determining that one or more of the enumerated threats of "identifiable harm" set forth in sections 5 and 6 exist. JFK Records Act §6(1)-(5). Then, the President must balance those identified harms against the strong public interest in disclosure. Id. at § 5(g)(D)(2)(i)-(ii).

Except for these statutory criteria, the President has no right to cite additional grounds to object to the transmission or disclosure of assassination records, such as the deliberative process exemption, the attorney-client privilege or executive privilege. Id. at §11(a).

The JFK Act cabins the President's authority in additional ways, i.e., while the President has the right to approve determinations for disclosing or withholding records, the President's shall only apply the statutory postponement criteria set forth in section in deciding to require disclosure or postponement. Id. at § 6; 9(d)(1). Presidential determinations for disclosure or postponement are subject to judicial review. Id. at § 11(c).

The foregoing demonstrates that the President does not have unfettered discretion under the JFK Record Act. Given the limited discretion granted the President under the JFK Act, the Defendants' caselaw is inapposite. Judicial review is appropriate and necessary to determine if the President has complied with the stringent commands of Congress.

The APA does not displace all equitable causes of action. *Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017) ("*This cause of action, which exists outside of the APA, allows courts to review ultra vires actions by the President that go beyond the scope of the President's statutory authority.*"), *E.V. v. Robinson*, 906 F.3d 1082, 1090–96 (9th Cir. 2018) (discussing the ultra vires right of action that exists outside of the APA).

Where an executive official has discretion within limits, a court can order the official to remain within those limits. *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925). There is a distinction between exercising such discretion and refusing to carry out obligations that Congress has imposed on the executive..

For the foregoing reasons, the Defendants' Motion to Dismiss claiming that the court lacks jurisdiction to hear Plaintiffs' first cause of action should be denied.

3. **Plaintiffs have adequately pled a claim that President Biden's Memos violated the requirements of the JFK Records Act**

The Defendants argue that Plaintiffs' allegations do not demonstrate that the President acted ultra vires in issuing the Biden Memoranda and fail as a matter of law. Defendants reach this conclusion based on a tortured interpretation of the Act that strains credulity, is contrary to the plain text and structure of the Act and ignores the legislative history. Defendants may wish for a different statute, but they must confront the reality of the statute that Congress enacted.

(a) Plaintiffs have adequately pled that Section 5(g)(2)(D) requires the President to make postponement determinations on a record-by-record basis.

This text of section 5(g)(2)(D) is as follows:

> "(D) **Each assassination record** shall be publicly disclosed in full, and available in the Collection no later than the date that is 25 years after the date of enactment of this Act, unless the President 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. [emphasis added]

The text of section 5(g)(2)(D) cannot be any clearer. It begins with the phrase "**Each assassination record** shall be publicly disclosed". This phrase modifies and applies to the rest of the section. This means that "**each assassination record**" shall be publicly disclosed unless the President certifies for "**each assassination record**" slated to be disclosed that continued postponement is necessary because of an identifiable harm (subsection "i") and he certifies that the identifiable harm is of such gravity that it outweighs the public interest (subsection ii).

The word "shall" is strong evidence of "clear and mandatory statutory language." Instead of making certifications for "**each assassination record**", President Biden issued a sweeping single certification that applies to **all assassination records**. Thus, his certification contravened the "clear and mandatory statutory language."

Defendants try to evade this congressional mandate by claiming that the certification for "continued postponement" somehow does not apply to "**each assassination record**" but to the postponement date (i.e., October 26, 2017). This contorted view is not a reasonable interpretation of the statutory mandate. There is absolutely no support for this position under a reasonable reading of the statute nor does the legislative history evince such an intention.

The general counsel of NARA has agreed with Plaintiffs' analysis that § 5(g)(2)(D) mandates that the President must make a record-by-record certification. In 2012, the Assassination Records Review Center asked NARA general counsel Gary Stern to review and release the CIA records by 2013. Mr. Stern replied, in part: "As previously mentioned, the 1171 remaining postponed documents will be released in 2017, **unless the President personally**

certifies on a document by document basis that continued postponement is necessary." Alcorn Declaration, Exhibit A. [emphasis added]

As the general counsel to the government body tasked with administering the JFK Records Act, Mr. Stern's interpretation of President's obligations under the JFK Act are entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837(1984)

Each assassination record that had been postponed in the 1990s was because the Board determined that a particular assassination record had information that implicated one of the statutory postponement criteria that Congress said constitute an "identifiable harm". To determine the need to continue postponement of such assassination record, section 5(g)(2)(D)(i) requires the President to review the statutory criteria for which "**each assassination record**" had been withheld and determine if those statutory criteria grounds **still exist**. If the President determines that the identifiable harm that prompted the original postponement **still exists**, then section 5(g)(2)(D)(ii) requires the President to determine if despite the passage of time that the identified harm continues to be of such gravity that it outweighs the strong public interest in disclosure.

Congress was concerned about the expeditious disclosure of assassination records. Section 2(a)(2) states that assassination records carry a presumption of immediate disclosure. The October 26, 2017 date referred to in § 5(g)(2)(D) was a sunset date for each assassination record postponed from disclosure by the Board to be released unless the President certified it was necessary to further postpone a particular assassination record.

What the Act does not allow is for the President to simply postpone the date for disclosure for thousands of assassination records without performing the required analysis set forth in subsections §§ 5(g)(2)(D)(i)-(ii). The two Biden memos do not indicate that the

President complied with this "clear and mandatory statutory language." Based on § 5(g)(2)(D) alone, the Biden Memos should be enjoined and the President required to issue a new memo explaining how he complied with the "clear and mandatory statutory language" of § 5(g)(2)(D).

President Biden cannot evade the "clear and mandatory statutory language" of § 5(g)(2)(D) with a bare statement that an identifiable harm exists for "all assassination records" – no such phrase exists within Section 5(g)(2)(D). He was required to perform the §§ 5(g)(2)(D)(i)-(ii) analysis for "each assassination record".

When interpretating statutes, courts are *to "examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy.*" *Children's Hosp. & Health Center v. Belshe*, 188 F.3d 1090, 1096 (9th Cir. 1999).

Moreover, the main body of Section 5(g)(2)(D) provides the President certifies for "continued postponement" under subsections (i) and (ii) must be done "*as required by this Act*." This means the certification authorized by section 5(g)(2)(D) must be harmonized with other relevant sections of the Act, particularly section 5(g)(2)(B) as well as sections 6, 9 and 11(a).

b. Plaintiffs adequately pled that Defendant Biden failed to comply with section 5(g)(2)(B) to provide the unclassified written disclosure for each assassination record that was postponed by the Biden Memos

Defendants argue that Defendant Biden was not required to make the unclassified written disclosure of section 5(g)(2)(B) because it does not address Presidential postponements. (MTD, 16). This argument ignores the *'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'*" *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000).

The Defendants' assertion makes no sense when viewed against the plain text and statutory structure. Section 5(g)(2)(B) provides:

> (B) **All postponed assassination records** determined to require **continued postponement** shall require an **unclassified written description** of the **reason** for **such continued postponement**. Such description shall be provided to the Archivist and published in the Federal Register upon determination.

The only reasonable interpretation of this section is that "all postponed records" that the President determines required "*continued postponement*" under section 5(g)(2)(D) require "an unclassified written description." This interpretation is consistent with the text of section 5(g)(2)(D) that provides that the Presidential certification must be done "*as required by this Act*." Congress used the same phrase "*continued postponement*" in both of these sections. Under the Presumption of Consistent Usage, Congress is assumed to attach the same meaning to same words that are used in a statute. The reference to "*continued postponement*" in 5(g)(2)(B) must be read to harmonize with the reference to "*continued postponement*" in 5(g)(2)(D).

When the Board approved a postponement of a particular assassination records, section 9(c)(3)(A) required that the section 6 statutory basis for the postponement be published so the American people would understand why the record was not disclosed. The President's interpretation is clearly not what Congress intended when it enacted the Act.

Defendants' request argument to read section 5(g)(2)(D) in isolation from section 5(g)(2)(B) and the rest of the statute contravenes the rules of statutory construction, the structure of the Act and the Congressional intent. Accordingly, Defendants motion to dismiss that Plaintiff's allegations that President Biden failed to comply with his obligations under section 5 of the Act should be dismissed as a matter of law should be denied.

4. Plaintiffs have adequately pled that President Biden has deviated from Section 6

Defendants argue that Plaintiffs are mistaken that President Biden deviated from Section 6 requirements because that section was intended to be used by government agencies when they first requested postponement to the Board in the 1990s. MTD at page 15.

Defendants are asking the court to review a section of the Act in isolation, ignore the structure of the statute and how sections 5 and 6 harmonize. When reviewing the four grounds for Presidential certification in section 5(g)(D)(1) (military defense, intelligence operations, law enforcement, and conduct of foreign policy) with the seven "threats" enumerated in Section 6, these two benchmarks fit neatly together. In addition, there is absolutely nothing in the legislative history or the plain text to suggest that section 6 is temporal in nature.

Section 5 titled "Review, identification, transmission to the National Archives, and public disclosure of assassination records by government offices" establishes the **procedural requirements** that government offices must follow to comply with the Act. For example, it establishes the timeframes for the Archivist to create the JFK Collection (§ 5(a)); how long government offices are to maintain custody of assassination records (§ 5(b)); the timing for government offices for searching and transmitting assassination records to the Archivist (§§ 5(c) and (e)); and when the Archivist has to create identification aids and the procedures for periodic review of assassination records. (§ 5(g)).

5. **President Biden violated the JFK Act when he directed government agencies to implement Transparency Plans that use non-statutory criteria**

Section 7 of the Biden December 2022 Memo directs agencies to prepare Transparency Plans that detail the "event-based or circumstance-based conditions that will trigger the public disclosure of currently postponed information" and for submission of these Transparency Plans to the National Declassification Center (NDC) at NARA. The Transparency Plans use non-statutory criteria for continued postponement of assassination records.

The Act does not authorize government offices to make the final determination of assassination records and does not require agencies to establish "clear and convincing evidence"

required by section 6. A number of the event-based conditions in the CIA Transparency Plan do not require the agencies to comply with all of the requirements of sections 6(2) and (3).

The President also appears to have delegated final postponement decisions to the NDC in contravention of the section 9(d)(1) that the President has the sole and non-delegable authority to make disclosure or postponement decisions.

6. Defendants have proffered no evidence that the Biden Memos were issued in compliance with Executive Branch regulations

1 CFR Part 19 requires executive orders or memorandum to be reviewed by the Department of Justice before issuance to ensure they comply with applicable law. Defendants supplied no evidence that the President complied with this procedural requirement or the December 2022 Biden Memo. The Court should enjoin this memo as unlawfully issued.

7. President Biden has no right to withhold legislative branch records

The President has no right to withhold legislative branch records. § 9(c)(4)(B) also mandates a "written unclassified justification" for public disclosure or any postponement, as well as compliance with § 6. Plaintiffs seek to amend complaint and seek immediate release.

8. The President has no right to issue Transparency Plans

The President authorized the government offices to issue Transparency Plans. See MTD 1. These Plans are unauthorized by the Act and use non-statutory criteria for determining when postponed assassination records may be publicly disclosed that would in some cases allow records to remain withheld for as long as 2042 or indefinitely, decades beyond the 2017 sunset clause built into the Act. See § 2(a)(4). Plaintiffs seek amendment on this ground.

C. NARA HAS VIOLATED ITS MANDATORY DUTIES AND OBLIGATIONS AS THE SUCCESSOR IN FUNCTION TO THE BOARD.

1. Background

When the Review Board published its final regulations implementing the JFK Records Act, the Review Board stated the purpose of its regulatory scheme:

> "*The Review Board has added language in the final interpretive regulations to clarify that the purpose of (section 36 CFR 1400.2) is to aid in identifying, evaluating or interpreting assassination records*, including assassination records that may not initially have been identified by an agency." 60 Fed. Reg. 33348 (June 28, 1995) (Italics added).

On July 27, 2000, NARA adopted the Board's definition of "assassination record" when it transferred the Board's regulations to a new subpart 1290 in title 36. 69 Fed. Reg. 39550.

> "NARA continues to maintain and supplement the collection under the provisions of the Act. NARA is, therefore*, the successor in function* to this defunct independent agency…*Agencies continue to identify records that may qualify as assassination records and need to have this guidance available.*" Id. (Italics added)

When the Board made a determination on an assassination record, it was required to notify the President of this decision who then had the sole and non-delegable authority to decide to disclose or postpone such record using the section 6 criteria. § 9(d)(1).

In his two postponement certifications, President Biden asked the Archivist to serve the role of the Board and make postponement recommendations. President Biden could have simply asked the government agencies to make their postponement recommendations directly to him. By asking NARA to play the role formerly performed by the Board, the President's actions confirm that NARA has assumed the duties and responsibilities of the Board.

Contrary to Defendants' assertions (MTD:17-22) that NARA allegedly had no ministerial duties, NARA affirmatively assumed the 'functions" of the defunct Board when it adopted the Board's regulations as NARA regulations and notified the American people that it was the "successor in function" to the Board. At the advice of general counsel Jeremy Dunn, the Board had also taken on the writing of the objections rather than burdening the agencies. Simpich

Declaration, paragraph 12. NARA's general counsel described those functions as "unprecedented powers for the Board." See Alcorn Declaration, Exhibit A.

The Board's ministerial non-discretionary duties have passed to NARA, the successor in function. These include § 7(i), which determines if a record constituted an "assassination record" and if it could be disclosed or qualified for postponement; § 7(j)(1) provides that the Board "shall" direct government officers to search their files for assassination records and transmit them to NARA, follow up with agencies to complete outstanding Board search requests, search for additional information and assassination records, and direct agencies to locate lost and missing records as their existence becomes known. Id. at § 7(j)(1)(C)(i)-(ii). AC 19:5-10.

The legislative history stated that 7(j)(1)(C)(ii) was one of the most important functions of the Board. The Senate Report stated:

> "This provision is extremely important to the proper implementation and effectiveness of the Act because it provides the Review Board with the authority to seek the fullest disclosure possible by going beyond the information and records which government offices initially chose to make available to the public and the Review Board." Senate Report at 24.

NARA's custom and practice has been either to inform individuals providing information regarding assassination records to file a FOIA request (Alcorn Declaration), or to fail to respond to their communication at all (Schnapf Declaration), rather than utilize the procedures set forth in § 7(j)(1)(C)(i)-(ii). Other violations occur due to § 5(c)(2), seen below.

As the successor in function, NARA's statutory role is to direct a search request to the originating government office or the government office holding equities in the record. Government agencies have a continuing obligation under section 5(c)(2)(F) to search, review and transmit assassination records to the JFK Collection:

> "*A government office shall organize and make available to the Review Board any record concerning which the office has* ***any uncertainty*** *as to whether the record is an assassination record governed by this Act*." § 5(c)(2)(F) (emphasis added)

As the successor in function to the Board, NARA is to follow-up the search request with the appropriate government office pursuant to section 5(c)(2)(H), determine if the document is an assassination record pursuant to 36 CFR 1290 if there is any uncertainty, and then determine if the record must be disclosed. If the originating agency objects to any of these NARA decisions, it may seek Presidential review.

When the Board shut down in 1998, CIA, FBI, DOD, INS and the JFK Library were still looking for records pursuant to a Board record search request. The Secret Service and DEA failed to complete the Declarations of Compliance. ONI refused to process records that it submitted under the Act. Certain records were being sought for release from the JFK Library and the RFK Donor Committee. AC 14:18-15:17. No known action has followed since 1999. See Declaration of William Simpich, paragraph 4.

NARA, as successor in function to the Board, has also failed to complete follow up government offices on outstanding record searches requested by the Board in 1998, or to request new searches for assassination records since 1998. AC 3:16-19; 14:18-15:17.

It is unfathomable that NARA would direct private citizens to use FOIA to obtain access to suspected assassination records that have not been transmitted to the Collection, when the Act itself was passed because of the ineffectiveness of FOIA. § 2(5).

These failures of NARA - urging futile FOIA searches, failing to complete outstanding Board searches, and failing to follow up for new records - contravenes the express goal established by Congress. *"All Government records related to the assassination of President John F. Kennedy should be preserved for historical and governmental purposes."* § 2(1). AC 4:7-9.

NARA has failed to follow up on the outstanding 1998 Board record search requests. In 2022, several of Plaintiff MFF's members requested NARA to provide an update on the status of these outstanding Board record search requests. To date, NARA has not responded to this inquiry, nor the inquiry of researcher Roger Odisio, para. 54. Schnapf Declaration, paras. 1-10..

NARA failed to conduct periodic reviews between NARA and the releasing agencies pursuant to Sec. 5(g)(1) for many years. Less than 6000 records were released between 2000-2016, and more than 4000 of them were released during 2004. Similarly, virtually no periodic reviews occurred between 2000-2016 until the 2017 deadline was front and center. An emergency review is not a periodic review. Simpich Declaration, para. 4.

In 2016, when attorney Dan Alcorn asked Ms. Martha Murphy of NARA to search for certain documents he believed to be assassination records, Ms. Murphy told Mr. Alcorn to file a FOIA action because the subjects of the documents did not appear in the JFK Act record index. Having been advised that the materials were suspected assassination records, Ms. Murphy should have either made a determination using the regulatory definition of assassination record that was now part of NARA's regulations or should have referred the request to the appropriate government agency as the Board was authorized to do.

In November, 2022, Mr. Alcorn wrote NARA counsel Gary Stern and asked him to review his FOIA request as an assassination record, he received no response. Alcorn Declaration, para. 11-12. The actions of Ms. Murphy and Mr. Stern were determinations that did not comply with the duties of §§ 5 and 7. § 2(5) states that the Act was "necessary because (FOIA) has prevented the timely disclosure" of JFK assassination records.

Although NARA assumed the obligations and responsibilities of the Board when it stated in the federal register that it was the successor in function to the Board, NARA has pushed away

every opportunity to identify and review documents to be identified as assassination records, and postponed the transmission and release of documents that should have been released in 1993. NARA's pattern and practice is to urge researchers to file FOIA cases to seek assassination records, rather than comply with Sections 2, 5, and 7. See the Alcorn Declaration, para. 9-10.

Counsel wrote the Archivist in February 2022 to review certain documents as assassination records, but received no reply. Schnapf Declaration, paras. 1-7.

In November 2022, when researcher Mr. Roger Odisio provided to NARA's general counsel a request to obtain NBC video footage that allegedly portrays Mr. Lee Oswald watching JFK's motorcade from the front steps of the Texas School Depository – video footage that would provide Oswald with an alibi – NARA's response was to tell Mr. Odisio to provide his information to their general counsel. Mr. Odisio did, with no response. Id., paras. 8-10.

Numerous witnesses have been interviewed since the passage of the Act in 1992. NARA took little action to lift redactions from 2000-2016, except for redactions lifted by previous Board determinations. Simpich Declaration, para. 4. The loss of the recollections of these witnesses is a loss to our history and our American heritage.

The determinations of the Board were reviewable and enforceable by a court of law. §11(c). see also 138 Cong. Rec. 19448, 19449 (1992). Thus, as the successor in function to the Board, NARA's implementation of the Act is also reviewable by this court.

2. **NARA's interpretation is entitled to *Chevron* deference**

NARA retains the obligation to ensure that the agencies identify assassination records under 5(c)(1). See, e.g., 5(c)(2)(H) and 7(j)(1)(C)(ii) - this and other obligations are entitled to *Chevron* deference.

Also note that in 2012, the Assassination Records Review Center asked NARA general counsel Gary Stern to review and release the CIA records by 2013. Mr. Stern replied:

> "As previously mentioned, the 1171 remaining postponed documents will be released in 2017, unless *the President personally certifies on a document by document basis that continued postponement is necessary…*although the CIA shares NARA's interest in wanting to be responsive to your request, *they have concluded there are substantial logistical requirements that must take place…there is simply not sufficient time or resources to complete these tasks prior to 2017.*" Alcorn Declaration, Exhibit A.

As the general counsel to NARA, tasked with administering the JFK Records Act, Mr. Stern's interpretation of President's obligations under the Act are entitled to deference. *Chevron v. Natural Resources Defense Council,* 467 U.S. 837(1984)

3. Other ministerial duties: An accurate central directory and identification aids

NARA has 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 (the "JFK Collection"); and failing to properly maintain its central directory of Identification Aids. AC 3:8-14. The Rex Bradford Declaration details serious inadequacies with the directory and its identification aids. Defendants argue Sections 4-5 impose no mandatory duty. The duties are prefaced by the word "shall".

4. **NARA must halt its practice of arbitrary and capricious conduct or acting not in accordance with law regarding assassination records (3rd and 4th Causes of Action)**

Defendants try to redefine Plaintiffs' case: "Plaintiffs' core contention appears to be that NARA is continuing to withhold assassination 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 (APA)." MTD: 18-24:19:1.

Plaintiffs' core contention is that NARA must engage in a serious effort to identify documents as "assassination records" when the opportunity is put "under their nose" – and follow up with prompt transmission and release of assassination records.

NARA violates 706 with its custom of recommending FOIA filings to seek assassination records – exactly the reason that the JFK Act was passed -*and "not in accordance with law*". See Alcorn Declaration, paragraph 10, Ex. B; Simpich Dec., para. 2.

In other instances, individuals such as the attorneys that filed this lawsuit identified a wide variety of documents for review – supplied the list to the Archivist – and did not receive even the dignity of a reply. See Schnapf Declaration, paragraphs 1-7.

NARA's conduct can be analyzed as a violation of its duty to act "in accordance with law," The standard of review is *de novo*. Each aspect of 706 is separately analyzed. *CW Govt. Travel, Inc. v. United States*, 61 Fed. Cl. 559, 567 (Fed. Cl. 2004).

A different aspect of 706 is "arbitrary and capricious". In *California v. FCC*, 905 F. 2d 1217, 1238 (9th Cir. 1990), the court found that it was arbitrary and capricious for the FCC to abandon safeguards that prevented anticompetitive practices, ruling that "arbitrary and capricious" review did not permit the court to "impute reasons to the agency and uphold its action if it has any conceivable rational basis."

In *California v. Ross,* 362 F. Supp. 3d 749, 757-758 (N.D. 2018) the court held:

"The standard for evaluating whether an agency's decision was **arbitrary and capricious** is whether the decision "was the product of reasoned decision making." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). "This standard is deferential, *Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1173 (9th Cir. 2016), and does not permit the Court to "substitute its judgment for that of the agency," Ctr. For Bio Diversity v. Zinke, 868 F.3d 1054, 1057 (9th Cir. 2017). "The focus at all times must remain on whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Nw. Ecosys. All v. U.S. Fish & Wildlife Serv*., 475 F.3d 1136, 1140, 1145 (9th Cir. 2007) (quotation omitted)."

"Plaintiffs, for their part, argue Secretary Ross's decision to add the citizenship question (to the census)was **arbitrary and capricious** for three reasons:

(1) the agency "relied on factors which Congress has not intended it to consider",
(2) the agency "entirely failed to consider an important aspect of the problem," and
(3) the agency "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

NARA's approach is similar to an ostrich in the sand – resolutely refusing to look for documents in the face of Section 12's mandate to continue the search until all assassination records have been found – while urging researchers to use FOIA instead of the JFK Act.

NARA entirely fails to consider that hundreds of thousands of documents were released between 1993-1999, and less than 6000 were released between 2000-2016 – despite the JFK Act stating that documents should rarely be postponed for release beyond 30 years.

Or, to put it another way, hundreds of thousands of assassination records were submitted to the Board. For the next 25 years, from 1998-2023, based on information and belief, virtually no new proposed assassination records were submitted to NARA by the relevant agencies for addition to the Collection. On information and belief, numerous FOIA requests were submitted with contentions that these records were "assassination records". However, there was little to no known action taken by NARA to determine if these records were assassination records for JFK Act purposes. FOIA and the JFK Act are two entirely different processes, but such a statement in a FOIA request puts both the agencies and NARA of their duties under the Act. It is contrary to law for NARA to urge citizens to use FOIA to find assassination records, when the JFK Records Act is the proper tool to use for the job. Simpich Dec., para. 2; Alcorn Dec., Ex. B.

In its brief, NARA's counsel offers the argument that "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." (MTD:21-1-2). This argument ignores the clear dictate of 5(c)(2)(H)

that "each government office *shall* make available to (NARA) any additional information and records that *(NARA) has reason to believe it requires for conducting a review under this Act.*"

Similarly, Section 5(c)(2)(F) makes it clear that "a government office *shall organize and make available* to the Board any record concerning which the office has *any uncertainty* as to whether the record is an assassination record governed by this Act. Only discovery would answer this question, as well as several other factual contentions advanced in this brief.

A well-known strategy of government agencies is illustrated by CIA counterintelligence chief James Angleton's instruction to his subordinate Ray Rocca to "wait out" the Warren Commission when the CIA was asked to pass on certain records. See Simpich Dec., para. 3.

During the ARRB searches during 1995, an internal CIA memo advises to withhold documents, as the Agency must prevent "the camel's nose" from getting under the tent. Id.

Based on the published statement of NARA CEO William Bosanko, the reason is that "aggressively looking for and demanding documents from other federal agencies is simply not part of NARA's mandate, and, moreover, NARA was never given the resources it would need to fulfill that task.". Id. Russ Baker, WhoWhatWhy, "The Truth of JFK's Death Lies In the Weeds"

We are asking the court to move this case forward and deny the motion to dismiss. The Act mandates that NARA must search for "all assassination records" until the Archivist has a reasonable basis to certify that "all assassination records" have been located pursuant to Section 12. When looking for records, we are asking NARA to be the camel, not the ostrich.

5. Only the rarest cases would justify 30 year delay in disclosure of records – Plaintiffs face a 60 year delay (1st & 2nd Causes of Action) and a five year delay since the deadline

The 1992 statute was founded on the premise that "most of the records related to the assassination of President John F. Kennedy are almost 30 years old, and only in the *rarest cases* is there any legitimate need for continued protection of such records." Section 2(a)(7).

In the past five years both President Trump and Biden have offered various excuses for missing the deadline and not providing a full release of these documents. (First Amended Complaint, paragraphs 47-52). 5 USC 706(1) of the APA mandates that "the court shall compel agency action unlawfully withheld or unreasonably delayed".

"At some point, an agency forfeits its entitlement to 'try again' and correct its own patent legal errors. As explained by the D.C. Circuit Court of Appeals, 'Excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decision-making into future plans." *Cissell Mfg. Co. v. United States DOL*, 101 F.3d 1132, 1145 (6th Cir. 1996).

In cases involving a writ of mandamus, the 9th Circuit has adopted the D.C. Circuit's six-factor test to evaluate claims of unreasonable delay, established in *Telecommunications Research & Action Center v. FCC (TRAC)* . 750 F.2d at 80. to evaluate claims "when an agency's delay is egregious". (*In re NRDC*, 956 F.3d 1134, 1138-1139 (9th Cir. 2020) - granted mandamus after a 12 year wait following an administrative petition for EPA to issue a regulation ending use of a dangerous pesticide in household pet products) justifying a writ of mandamus).

(1) Whether the delay comports with the **"rule of reason"**; (see "*five year delay smacks of unreasonableness on its face*." *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 113 (D.D.C. 2003). This first factor is considered "the most important factor in the analysis" *In re a Community Voice*, 878 F.3d 779, 786 (9th Cir. 2017), and consider if the agency's response time complies with an existing specified schedule and whether it is governed by an identifiable rationale." *Ctr. for Sci. in the Pub. Interest v. FDA*, 74 F. Supp. 3d 295, 300 (D.D.C. 2014);

(2) **Whether Congress has indicated a timeframe** it considers appropriate for the action at issue; (JFK Act provided a 25-year timeframe to 2017);

(3) The extent to which **delay could harm human health and welfare**; as said in the *Potomac* case above, a five year delay "saps public confidence";

(4) The **effect expediting would have on competing agency priorities**; unknown.

(5) The **nature and scope of interests** prejudiced by delay. 30 years was considered too long to wait at the time of the passage of the Act - now it is almost 60.

(6) That **agency impropriety is not required for an unreasonable delay finding.** See *TRAC,* 750 F.2d at 80.

The following facts in the Simpich Declaration, paras. 5-11, support this standard:

1. The Executive Office of the President is now five years late in releasing in full about 4,000 files. See totals from 2022 release.

2. NARA did virtually nothing regarding evaluating the files for disclosure between 1999 and 2013, but for a tiny bump in activity in the 2003-2004 period.

3. NARA created a "four-person team" only in 2013 to prepare for the 2017 release.

4. NARA did virtually nothing to continue the ARRB's work re new searches since 1999, notwithstanding the representations to the American public in the Federal Register.

5. NARA did virtually nothing to continue the ARRB's work re identified documents that needed to be obtained between 1999 and the present.

6. NARA did virtually nothing to search for missing and destroyed files between 1998 and the present, even though such files can also be found in computer databases.

7. NARA did nothing that we know of to ask the Attorney General to enforce the search for missing and destroyed files between 1998 and the present.

D. FEDERAL RECORDS ACT IS A VIABLE CAUSE OF ACTION

Three points here: 1) Section 11(a) is a legislative override of the case law cited by Defendants to postpone searches for missing or destroyed documents pursuant to 44 USC 2905 that should be transmitted and disclosed without delay; 2) Contrary to Defendants' arguments, "removed" can mean both missing and destroyed; 3) If the court disagrees, Plaintiffs seek leave to amend to refine the argument and possibly include statutes such as 44 USC 3306.

E. **PLAINTIFFS SEEK DECLARATORY RELIEF**

Plaintiffs anticipate that their remedies can be substantively attained by the court granting injunctive relief. In the alternative, if these remedies are unavailable, Plaintiffs request a speedy hearing for declaratory relief pursuant to FRCP 57.

F. IN THE ALTERNATIVE, PLAINTIFFS SEEK MANDAMUS

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

CONCLUSION

For these reasons, we oppose the Motion To Dismiss sought by the Defendants, and ask the court to issue an order for the Defendants to Answer each cause of action in the Amended Complaint, or provide leave to amend as requested in this opposition.

Dated: March 7, 2023

__/s/ William M. Simpich_____
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Lawrence P. Schnapf
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