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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' REPLY BRIEF IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF, ET AL.** **Date: July 13, 2023** **Time: 1:30 pm** **Dept: Hon. Richard Seeborg**

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REPLY

Please take notice that Plaintiffs, by and through their counsel, reply in support of their motion for injunctive relief, declaratory relief, or mandamus on the bases set forth below.

STANDARD OF REVIEW

The test for irreparable injury to obtain injunctive relief in the 9th Circuit:

"(Our) decision is guided by four questions: "(1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken*, 556 U.S. at 434). "The first two factors . . . are the most critical," *Nken*, 556 U.S. at 434, and the last two steps are reached "[o]nce an applicant satisfies the first two factors," *id.* at 435."

ARGUMENT

Plaintiffs will first turn to the merits argument.

1. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS –

A. Contemporary 9th Circuit law weighs in favor of justiciability

In response to Plaintiffs' opening brief (ECF 59, 8:8-12:27), Defendants repeat their shibboleth that this Court lacks jurisdiction over Plaintiff's claims. *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992). Defendants also insist that Plaintiffs' claims must be brought against federal agencies or subordinate officials, not against the President himself. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) and *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 928 n. 23 (N.D. Cal. 2019). ECF 61, 11:1-27.

In many instances, courts have found that judicial review of the President's decision is appropriate. See *Holder v Humanitarian Law Project*, 561 U.S.1, 33-34 (2010); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952). Also see ECF 39, 11:8-17:11.

Plaintiffs draw the Court's attention to the recent Ninth Circuit opinion of *Murphy Co., v. Biden*, 65 F.4th 1122 (9th Cir. 2023) where the court upheld its jurisdiction to hear a statutory challenge to a presidential proclamation that restricted logging. The Court noted that the Supreme Court had in recent years adopted the practice of "assuming without deciding" justiciability and would consider statutory claims like those before it without addressing the issue of reviewability. *Id.* at 1130. The court added that "*Contemporary Ninth Circuit jurisprudence weighs in favor of justiciability*." *Id.* The court also noted that "*In two other cases, the D.C. Circuit acknowledged jurisdiction over ultra vires allegations but ultimately concluded that the claims failed because of insufficient factual allegations." Id.*

The Ninth Circuit concluded that Murphy's particularized allegations that the O&C Act restricted the President's designation powers under the Antiquities Act satisfied the jurisdictional standard. *Id.* at 1131. The Plaintiff's allegations in this case are sufficient to establish jurisdiction.

B. An executive order cannot exceed the scope of delegation granted by statute

Plaintiffs emphasize that the Biden order is a so-called Article I executive order which the President issued pursuant to a limited statutory delegation of authority by Congress under the JFK Act. Quite simply, the President cannot exceed the scope of a delegation granted to him by the authorizing statute. *Cole v. Young*, 351 U.S. 536 (1956).

A president performing obligations dictated by statute "occupies a position quite similar to that of any other administrative officer in that his legal sanction to carry out those responsibilities is derived solely from the enacted law." Colin S. Diver, *Presidential Powers*, 36 AM. U. L. REV.

519, 522 (1987). A president acting under power granted by a statute must exercise that power consistently with the structure and purposes of the statute that delegates that power. The president cannot circumvent the conditions of a limited congressional delegation of power by engrafting new conditions into an executive order. Where an executive order and the underlying legislation delegating power to the president are inconsistent, the statute prevails.

In this case, the JFK Act delegated limited powers and responsibilities to the president that were to be exercised in accordance with specific conditions. The JFK Act did not confer upon the President the broad and significant powers without any discernible limits.

Congress did not want the president to act unilaterally under the JFK Act. Instead, it imposed significant and stringent procedural requirements on the president as a prerequisite or *quid pro quo* for conferring delegated power.

Under the JFK Act, the president is required to make specific fact findings to postpone records and the Act provides guidance to the president when making a certification of postponement.

Compare this limited delegation of power to the sweeping powers that Congress has granted to the president in other laws involving national security, such as those allowing the President to control if private business enterprises can receive loans (50 U.S. C. § 4532); allowing construction of a temporary air base or fortification on private land (10 U.S.C. § 9776); to take control over communications or energy facilities(47 U.S.C. § 606); to ration production or use of critical products (50 U.S.C. § 4511); and to instruct the Secretary of Transportation to make laws and regulations governing anchorage and movement in U.S. waters that may include inspecting or seizing vessel (50 U.S.C. § 191);

The Biden Order conflicts with the delegation of authority conferred by Congress under the JFK Act and should be enjoined.

C. Defendants refuse to comply with their ministerial, non-discretionary duties

- The President has a "sole, non-delegable authority" re postponements. § 9(d)(1).
- NARA has a duty to act as the ARRB's successor in function. 65 FR 39550.
- To determine an "assassination record" in compliance with the definition in 36 CFR 1290 et seq, and pursuant to the "clear and convincing evidence" standard. § 9(c).
- To conduct a review for additional assassination records pursuant to a "reason to believe" standard. § 7(i)
- To publish all determinations about postponement/disclosure in the Federal Register. § 9(c)(4)(A), 9(d).

This list provides a few examples. Plaintiffs' briefs provide additional examples.

Plaintiffs request the Court to grant injunctive relief to halt the enforcement of Sections 6 and 7 of the Transparency Plans. The President cannot delegate to NARA's National Declassification Center (NDC) the authority for making future declassification decisions over assassination records, nor can the Plans re-write the JFK Act's standards for the postponement of the release of documents. The President and NARA should be ordered to re-review the documents while strictly utilizing the standards set forth in Sections 3(10), 6, and 9.

D. The JFK Act provides standards for the disclosure of records

Section 6 of the JFK Records Act states "*Disclosure of assassination records or particular information in assassination records to the public may be postponed subject to the limitations of the Act if there is clear and convincing evidence*…", referring to statutorily-

identified "threats" of "identified harm" that state grounds to postpone disclosure of records. Also see § 9 on "clear and convincing evidence".

Section 3(10) defines "public interest" as "*the **compelling interest** in the prompt public disclosure of assassination records for historical and governmental purposes and for the purpose of fully informing the American people about the history surrounding the assassination of President John F. Kennedy*."

Section 9(d)(1) states that *"After the Review Board has made a formal determination concerning the public disclosure or postponement of disclosure of an executive branch assassination record…the President shall have **the sole and nondelegable authority to require the disclosure or postponement of such record or information under the standards set forth in section 6**,*

These definitions of "clear and convincing evidence" and "public interest" are key standards used to determine whether to postpone release of documents under §§ 5 and 6.

Similarly, the President's "sole and nondelegable authority" in § 9(d)(1) remains solely in President Biden's hands.

E. Defendants refuse to apply these JFK Act standards

The President and NARA failed to apply the standards of §§ 3(10), 6, and 9(d)(1) in the Executive Order of 12/15/22. The Order creates new, non-statutory standards in its Sections 6 and 7 that overrules the Act's standards, under the guise of "applying the statutory standard".

The Biden Order, Section 6, states:

"In applying the statutory standard, agencies shall:

(i) accord **substantial weight** to the public interest in transparency and full disclosure of any record that falls within the scope of the Act; and

(ii) give **due consideration** that some degree of harm is not grounds for continued

postponement unless the degree of harm is of such gravity that it outweighs the public interest in disclosure."[emphasis added]

Section 3(10)'s ***compelling interest*** *in the prompt public disclosure of assassination records for historical and governmental purposes* is watered down to the "**substantial weight** to the public interest in transparency" in an effort to re-write the JFK Act.

Section 6's mandate of "*clear and convincing evidence*" to justify postponement is watered down to harm "of such gravity that it outweighs the public interest in disclosure".

F. NARA Agrees to Assume Some Functions, But Not All

Section 12(b) states that most portions of the Act "*shall continue in effect (after the dissolution of the ARRB in 1998) until such time as the Archivist certifies to the President and Congress that all assassination records have been made available to the public in accordance with this Act."*

The Defendants admits that NARA has defined itself as the "successor in function" to the ARRB, but then scramble to argue that the regulation doesn't really mean what it says it means.

Defendants describes 65 FR 39550 as mere "bureaucratic housekeeping". ECF 61, 19:6. Defendants then cite to Section 12 of the Act - which states that ARRB's operations cease at the time of its dissolution – in an attempt to support their notion that there were no ministerial, non-delegable duties for NARA to assume. Plaintiffs' response: "Operations" in the context of the Act refer to ARRB's administrative matters such personnel, physical plant and materials, while "functions" refer to the tasks performed by ARRB – and now NARA.

NARA has taken on some of the ARRB's functions – such as maintaining, and reviewing redactions to the Collection (§§ 4, 5, 6, and 9). The review of the Collection conducted by NARA is far in excess of § 4(d)(1), cited by Defendants. NARA refuses to admit that it has taken on other functions such as supplementing the Collection, or reviewing to possibly add

additional assassination records to the Collection (§§7(i), 7(j)(1)(C), 12)– see 65 FR 39550's unequivocal language:

> "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) 69 FR 39550 (2000).

As the Declaration of William E. Kelly, Jr. states (para. 7) NARA has on occasion supplemented the Collection and obtained new JFK records when it chooses to do so. In other situations, NARA refuses to take action or directs researchers to "use FOIA" even though the JFK Act was passed because of the futility of the use of FOIA in this context. This *ad hoc* approach in the review of assassination records reasonably believed to exist and not in the Collection is the very definition of arbitrary and capricious behavior.

The remedy Plaintiffs seek is for NARA to comply with the duty to obtain assassination records, which includes - but is not limited to -the 1998 MOU entered into by NARA, ARRB and CIA, which adopts many of the ARRB's duties in adding new documents to the JFK Collection, as well as the other outstanding ARRB search requests and those of private researchers that NARA ignored when it told them to use FOIA to obtain those records. Amended Simpich Dec., Ex. B, pages 3-5; and 2nd Simpich Dec., Ex. A.

Defendants cited no cases in their throwaway claim that Plaintiffs lacked standing to seek relief for the issues involving 1 CFR 19 and the MOU, in what appears to be a plea for *sua sponte* relief from the court. Hence, Plaintiffs will cite no cases in response, and respectfully request the court for leave to brief the issue only if needed. The non-compliance with 1 CFR 19 is not an issue of standing but to the validity of the Biden Order. While Defendants claim that Plaintiffs offer no reason why the Court should not defer to the President's judgment, an executive order that did not

undergo the customary vetting process is not entitled to the same level of respect or deference such as was the case with President Trump's travel bans that bypassed the customary review process.

As discussed above, Ninth Circuit and Supreme Court jurisprudence is to assume justiciability in such circumstances. Given that Plaintiffs are cited by NARA as a key "resource" at their website (See 2nd Schnapf Dec., Ex. 1), and given that Plaintiffs are a membership organization dedicated to providing its members and the public with the largest private array of documents from the JFK Collection coupled with extensive analysis of these documents, Defendants' standing question is not meritorious.

G. Defendants avoid addressing the remedial nature of the JFK Act

As discussed in the Opening Brief, the JFK Act is a remedial statute that must be broadly construed to achieve its Congressional objectives. [also see ECF No. 49, 7:1-9:15] The Act was a "unique solution" to the problem of government secrecy. *Assassinations Records Review Board Final Report*, September 30, 1998 (Final Report") p. 1.

Defendants avoid addressing the remedial nature of the JFK Act. ECF 61, 23:17-22. Instead, Defendants adopt a cramped interpretation that rewrites the statute. The canons of statutory interpretation are that a statute and its words must be read as a whole, with a view to their place in the overall statutory scheme, and to avoid giving a section of the statute no effect.

The Defendants' goal is to rewrite the JFK Act so that the limitations on the President's power under this statute cease to pose any meaningful restraint.

H. Defendants avoid admitting that it is illegal to apply FOIA to the JFK Act

The Opening Brief also discussed how Congress found that the JFK Records Act 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. JFK Act § 2(5).

Defendants' brief ignores their fundamental error in applying FOIA to the JFK Act. Instead, Defendants object to Plaintiffs' right to ask the question. ECF 61, 17:16-22.2.

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

Defendants refuse to address Section 11(a) in any substantive manner in their brief.

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

> When this Act requires transmission of a record to the Archivist or public disclosure, it shall take precedence over any other law…judicial decision construing such law, or common law doctrine that would otherwise prohibit such transmission or disclosure of an assassination record…"

In any conflict between a particular term of the JFK Act and the Biden order, the body of APA administrative law, statutes, common law, and judicial decisions, section 11(a) overrides and requires the application of the procedures of the JFK Records Act that govern the transmission and disclosure of assassination records. The findings of 2(5) and 2(6) – highlighting the failure of FOIA and Executive Order 13526 to declassify these records – illustrate its broad sweep.

When §§ 5 and 7 mandate NARA, as successor in function to the ARRB, or the agencies in possession of Assassination Records to review, identify and transmit possible Assassination Records to the JFK Collection, there is no wiggle room to avoid this mandate. Nor is there any wiggle room to avoid the immediate disclosure without complying with §§ 6, 9(c), 9(d), and other applicable portions of the Act.

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J. Defendants avoid analyzing the object and policy of this "unique" statute

Courts are to narrowly construe exemptions to remedial statutes. In the JFK Act legislative history, the § 6 grounds for postponement were analogized to the exemptions as used in FOIA - exemptions to the overriding presumption of full and expeditious disclosure.

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).

Defendants consistently parse this "unique" statute in an attempt to demolish a coherent discussion of its object and policy– which is to immediately disclose documents except in the "rarest" of cases, and to provide "agency guidance" until all assassination documents had been located. Defendants ignore the mandates in §§ 5(c)(2)(F), 5(c)(2)(H), 7(j)(1)(C)(2), and § 2 and § 12 to obtain "all" assassination records; also see the preamble to 65 FR 39550.

Thirty years after Congress said thirty years had been enough time, the Congressional goals have not yet been achieved. Defendants do not deny that thousands of redacted assassination records remain in the JFK Collection, as well as an undetermined number of additional assassination records have yet to be properly reviewed or transmitted in violation of §§ 5(c), 5(e), 7(i), and 7(j)(1)(C)(ii).

Congress established a presumption of disclosure and wanted American people to know why records should be postponed, on a document-by-document basis. Defendants refuse to provide an explanation of the specific harms and how they outweigh the public interest. This begs the question: What are they hiding?

Plaintiffs' case is not that all the documents must be released. (See Defendants' argument that Plaintiffs' goal is to "compel disclosure that the President has determined would harm the nation's military, intelligence operations" and more, at ECF 61 1:9-11).

Plaintiffs' case is that if the Defendants feel that they must hide something – tell the people why – and in plain English.

2. PLAINTIFFS HAVE PROPERLY ALLEGED IRREPARABLE INJURY

Defendants assert that Plaintiffs "make almost no attempt to demonstrate that they will suffer irreparable harm absent an injunction. This is another example of Defendants ignoring Plaintiffs' arguments. ECF 61, page 7. Defendants also claim that Plaintiffs "never explain why they now suddenly face imminent irreparable harm". Id., p. 16.

Plaintiffs explained that injunctive relief was necessary because witnesses in this "60-year old case" are "dying every day" and that their memories "could" lead to other important witnesses and documents. Film and photo evidence also need to be in controlled conditions.

Defendants try to shrug off this by characterizing Plaintiffs allegation as "hypothetical assertions" and "speculative assumptions". ECF 61, p. 9. Common sense tells us that individuals in the documents are now at least 80 or even 90 years old and at that age the risk of death and dementia exponentially accelerates. The Opening Brief was right on point.

In rebuttal, Plaintiffs know first-hand that these are very real and actual concerns because MFF members have unfortunately encountered these situations since NARA began releasing assassination records in 2017. 2nd Declaration. of Lawrence Schnapf (paras. 3-5) and Declaration of William E. Kelly, Jr. (paras. 3-6).

The Schnapf Declaration (at paragraph 8) recounts the story of CIA officer Donald Heath, who passed away in 2019, but whose name was not released until December 15, 2022.

The document containing Mr. Heath's name confirmed that CIA had tasked the Miami CIA station to interview pro-Castro and anti-Castro activists in Miami the weekend of the assassination to determine if they had been involved in the assassination. The CIA had previously denied that such an investigation existed. His knowledge will never be known.

The Kelly Declaration (para. 4 & Exhibit 1) recounts that the identity of the CIA asset NIEXIT-3 has still not been revealed – he had two Dallas contacts stating that JFK was killed due to a joint operation by the Chinese Communists and Castro. There was also discussion that the Soviets made up the rumor to "make it rough" on the Chinese Communists and Castro.

Defendants also assert that Plaintiffs waited too long to file their motion for injunctive relief after filing the brief in October 2022. Defendants fail to share with the court that Plaintiffs held discussions with Defendants in good faith in December but Defendants opted to file a motion to dismiss, which led to a stipulation between the parties for amending the complaint due to the new Biden order of 12/22 and filing of the Motion to Dismiss in February. At that point, Plaintiffs came across new evidence and the parties again stipulated to permit a 2nd Amended Complaint to be filed in April. This motion for injunctive relief was filed in May, a little more than a month after the new complaint. 2nd Schnapf Declaration, paragraph 9.

3. BALANCE OF HARMS AND PUBLIC INTEREST FAVOR AN INJUNCTION

Defendants state that the balance of harms and public interest weigh overwhelmingly against an injunction because the president was advised by federal intelligence agencies advised him that full disclosure of the remaining records would pose a "substantial threat" to the intelligence operations of the United States. ECF 61, at p. 20.

However, this is not the test under the JFK Act. Section 6(1)(c) requires a showing that disclosure would *demonstrably impair the national security*. Hence, the President's certification was *ultra vires* since it was based on a less stringent standard than required by the Act.

Plaintiffs made the case on "public interest". Plaintiffs have no interest in challenging the Defendants' rationale for withholding documents at this late date – what the Plaintiffs are calling for is compliance with the statute and explain why particular documents are being withheld.

4. PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF

On the issue of declaratory relief, Plaintiffs submit that the relief sought in the Motion can be characterized as either injunctive relief or declaratory relief.

Merrill Lynch, Pierce, Fenner & Smith v. Doe, 868 F. Supp. 532, 535-536 (N.Y.S.D. 1994) states that a request for preliminary declaratory relief can be based on either the Federal Declaratory Judgment Act, 28 U.S.C. 2201, or the All Writs Act, 28 U.S.C. 1651. The case pointed out that it is the "least intrusive way of vindicating its right to proceed in federal court." Both of these statutes were alleged by Plaintiffs in the Second Amended Complaint, ECF 44, 5:6-9.

Plaintiffs acknowledge that the cases on the issue of preliminary injunctive relief are split. If the court is not inclined to grant relief in this fashion, Plaintiffs repeat their request for the earliest possible date for a speedy hearing for declaratory judgment pursuant to FRCP 57 for any of the remaining issues addressed in this brief. Plaintiffs respectfully submit that there is no need for discovery on these issues, and that this is a matter of statutory interpretation that should be resolved by the court at the first possible date.

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CONCLUSION

As stated in the Opening Brief, the court has the power to make a finding based on "unreasonable delay", or based on "final agency action". In either instance, whether or not the court chooses to remand any of these issues to NARA for a hearing or other action, the Plaintiffs maintain their request for prompt injunctive and declaratory relief.

For these reasons, we ask the court to issue:

1) A preliminary injunction ordering the President and NARA to halt implementation of the Transparency Plans, and

2) Injunctive or declaratory relief that NARA is the "successor in function" to the ARRB; that NARA has a mandatory duty to seek additional Assassination Records; that NARA enforce the MOU; and that NARA advise researchers to invoke the JFK Act rather than FOIA when seeking a review for possible additional assassination documents.

3. Alternatively, Plaintiffs request a speedy hearing for declaratory judgment for any remaining issues at the first possible date, pursuant to FRCP 57.

4. Or, in the alternative, to issue a writ for mandamus as appropriate.

Dated: June 29, 2023

__/s/ William M. Simpich_____

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