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13
14 **UNITED STATES DISTRICT COURT**
15
16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
17

18 THE MARY FERRELL FOUNDATION,
19 INC.; JOSIAH THOMPSON; and GARY
20 AGUILAR,

21 Plaintiffs,

22 v.

23 JOSEPH R. BIDEN, in his official capacity as
24 President of the United States; and
25 NATIONAL ARCHIVES AND RECORDS
26 ADMINISTRATION,

27 Defendants.
28

No. 3:22-cv-06176-RS

**PLAINTIFFS' NOTICE OF MOTION FOR
INJUNCTIVE RELIEF, DECLARATORY
RELIEF, OR MANDAMUS;
SUPPORTING MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: July 13, 2023

Time: 1:30 pm

Dept: Hon. Richard Seeborg

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NOTICE OF MOTION

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

STATEMENT OF ISSUES TO BE DECIDED

The Mary Ferrell Foundation, Inc., Josiah Thompson, and Gary Aguilar (hereinafter “Plaintiffs”) seek an order for injunctive relief, declaratory relief, or mandamus. The Defendants have unlawfully postponed the review, identification and transmission of additional Assassination Records and the disclosure of ascertained Assassination Records as described in Plaintiffs’ Second Amended Complaint (hereinafter “SAC”). The following relief is sought:

1. A declaration that NARA is the successor in function of the ARRB (Assassination Records Review Board), which includes a mandatory duty to conduct reviews for additional Assassination Records as required by the JFK Records Act.

On June 27, 2000, NARA conducted a final agency review with a statement in the Federal Register that it was the “successor in function” to the defunct ARRB.

“NARA continues to maintain and supplement the collection under the provisions of the Act. NARA is, therefore, *the successor in function* to this defunct independent agency...*Agencies continue to identify records that may qualify as assassination records and need to have this guidance available.*” 65 FR 39550.

Since 1998, NARA has unreasonably delayed compliance with the Act by refusing to conduct additional assassination record searches. This conduct is also arbitrary and capricious and contrary to law. 5 U.S.C § 706(1) and § 706(2).

2. An order for NARA to enforce the 1998 Memorandum of Understanding signed by itself, the ARRB and the CIA (“CIA MOU”), where NARA committed to ensure that the CIA completed its “continuing obligations under the JFK Act in a timely manner”. See ECF No. 36, Amended Simpich Dec., Ex. B, pages 3-5; and 2nd Simpich Dec., Ex. A.

1 3. That NARA exercise its mandatory duty to seek additional records as mandated by §§
2 7 and 12 of the JFK Act and 65 FR 39550.

3 4. A stay in the enforcement of the Transparency Plans of the President, a final agency
4 action containing non-statutory criteria for postponements to disclosure, scheduled to become
5 effective on July 1, 2023. The Defendants fail to apply the standards of “public interest” “clear
6 and convincing evidence” and “sole, non-delegable duty”, as set forth in §§ 3, 6, and 9. The Act
7 provides that postponements of releases of Assassination Records were to be “rare”.
8

9 This submission contains a new declaration with the CIA MOU and four previously-filed
10 declarations incorporated within the second amended complaint. 2nd Dec. of William Simpich re
11 MOU at SAC 46:1-6; Dec. of Dan Alcorn at 34:19-36:3; Dec. of Rex Bradford at 36:11-39:16;
12 Dec. of Larry Schnapf at 39:17-41:19; and Amended Dec. of William Simpich at 41:20-43:23.
13

14 **STATEMENT OF FACTS**

15 **THE DEFINITION OF “ASSASSINATION RECORDS” INCLUDES ALL DOCUMENTS** 16 **PROVIDING THE HISTORY OF THE ASSASSINATION**

17 § 6 of the JFK Records Act states “*Disclosure of assassination records or particular*
18 *information in assassination records to the public may be postponed subject to the limitations of*
19 *the Act if there is clear and convincing evidence...*”, referring to statutorily-identified “threats”
20 of “identified harm” that constitute grounds for a postponement of public disclosure of records.
21

22 § 3(10) defines “Public interest” as “*the compelling interest in the prompt public*
23 *disclosure of assassination records for historical and governmental purposes and for the*
24 *purpose of fully informing the American people about the history surrounding the assassination*
25 *of President John F. Kennedy.*”
26

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

1 § 12(b) states that most portions of the Act “*shall continue in effect (after the dissolution*
2 *of the ARRB in 1998) until such time as the Archivist certifies to the President and Congress that*
3 *all assassination records have been made available to the public in accordance with this Act.*”

4 **NARA HAS MANDATORY DUTIES TO DETERMINE AN “ASSASSINATION**
5 **RECORD”, TO CONDUCT REVIEWS FOR ALL ADDITIONAL ASSASSINATION**
6 **RECORDS, AND TO DETERMINE ANY FURTHER POSTPONEMENTS**

7 Prior to the dissolution of the ARRB in 1998, NARA entered into an MOU with ARRB
8 and CIA, adopting many of the ARRB’s duties in adding new documents to the JFK Collection.
9 Amended Simpich Dec., Ex. B, pages 3-5; and 2nd Simpich Dec., Ex. A. NARA adopted the
10 Board’s definition of “assassination record” when it transferred the ARRB’s regulations to a new
11 subpart H of 36 CFR 1290. SAC 45:7-26. NARA also stated in the preamble that it was the
12 “successor in function” to the ARRB. This declaration was unequivocal:
13

14 “NARA continues to maintain and supplement the collection under the provisions
15 of the Act. NARA is, therefore, *the successor in function* to this defunct
16 independent agency...*Agencies continue to identify records that may qualify as*
17 *assassination records and need to have this guidance available.*” Id.
(Italics added) 65 FR 39550 (2000).

18 As the ARRB’s successor in function, NARA has mandatory duties to conduct a
19 review for additional assassination records pursuant to a “reason to believe” standard (§
20 7(i)); to determine whether a record constitutes an assassination record pursuant to a
21 “clear and convincing evidence” standard (§ 9(c)); and to publish all determinations
22 about postponement/disclosure in the Federal Register (§ 9(c)(4)(A), 9(d)).
23

24 Other ARRB functions NARA assumed are the mandatory duties of § 4 (Maintaining the
25 Collection); § 5 (Review, Identification, Transmission to the Public Archives, and Public
26 Disclosure); § 6 (Grounds for Postponement of Public Disclosure of Records) § 7(i)
27
28

1 (Determining if Documents are Assassination Records); § 7(j)(1)(C) (Directing Agencies to
2 make Additional Records Available and to Review) and § 9 (Review of Records).

3 NARA has mandatory duties to review possible additional assassination records when
4 brought to their attention and to direct government offices to identify and review potential
5 assassination records. §§ 5, 7, Subpart H to 36 CFR 1290; 36 CFR 1290.2, and 36 CFR 1290.3.
6 Furthermore, NARA had the duty to make assassination record determinations under §§ 5(c) and
7 7(j) of the Act. Despite stating that it was the “successor in function” to the ARRB, NARA failed
8 to conduct virtually any new searches or review and identify documents that needed to be
9 obtained since 1999. Amended Simpich Dec., § 8-9.
10

11 NARA took virtually no action to evaluate documents for disclosure between 1999-2013.
12 Amended Simpich Dec., § 7. According to section 7 of the 2022 Biden Memo, NARA approved
13 President Biden’s Transparency Plans. 2nd Simpich Dec., Ex. D, p. 6.
14

15 Defendants admit that between 2017 to the present, NARA has been reviewing document
16 redactions with the agencies, negotiating with the agencies, and recommending continued
17 postponements of Assassination Records to Presidents Trump & Biden. ECF No. 46, 5:14-8:6.
18 Plaintiffs’ contention is that NARA accepts these ARRB functions and rejects other functions.
19

20 Plaintiffs’ 1st and 3rd causes of action are applicable to this motion: non-statutory review
21 of *ultra vires* actions by the President and violations of 5 USC 701 et seq. by NARA. Similar
22 relief for mandamus, pursuant to the 2nd and 4th causes of action, is sought only if necessary.
23

24 **STANDARD OF REVIEW**

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

26 “(Our) decision is guided by four questions: (1) whether the applicant has made a strong
27 showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably
28

1 injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties
 2 interested in the proceeding; and (4) where the public interest lies." [Lair v. Bullock, 697 F.3d](#)
 3 [1200, 1203 \(9th Cir. 2012\)](#) (quoting [Nken, 556 U.S. at 434](#)). "The first two factors . . . are the
 4 most critical," [Nken, 556 U.S. at 434](#), and the last two steps are reached "[o]nce an applicant
 5 satisfies the first two factors," [id. at 435](#)."

7 ARGUMENT

8 I. DEFENDANTS' INTERPRETATION OF THE JFK RECORDS ACT IS 9 INCONSISTENT WITH THE GOALS AND TEXT OF THE ACT

10 A. The JFK Records Act is a remedial statute that should be construed to promote the 11 goal of expeditious and full disclosure of assassination records

12 As discussed in more detail in Plaintiffs' opposition memo, the JFK Act is a remedial
 13 statute that must be broadly construed to achieve its Congressional objectives. [ECF No. 49, 7:1-
 14 9:15] The Act was a "unique solution" to the problem of government secrecy. *Assassinations*
 15 *Records Review Board Final Report*, September 30, 1998 (Final Report") p. 1. Congress found
 16 that the JFK Records Act was necessary, *inter alia*, because (1) the Freedom of Information Act
 17 ("FOIA"), 5 USCS § 552, had been implemented by the executive branch in a way that
 18 prevented timely disclosure of assassination records and (2) Executive Order No. 12356 (50
 19 USCS § 401 note) ("EO 12356") had eliminated the declassification and downgrading schedules
 20 relating to classified information which prevented the timely public disclosure of records relating
 21 to the JFK assassination. JFK Act §§ 2(a)(5) and (6).

22 Courts are to narrowly construe exemptions to remedial statutes. In the JFK Act
 23 legislative history, the § 6 grounds for postponement were analogized to the exemptions as used
 24 in FOIA - exemptions to the overriding presumption of full and expeditious disclosure.
 25
 26
 27
 28

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

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

9 The ministerial, non-discretionary acts were not carried out or carried out in an arbitrary
10 and capricious manner (SAC 30:24-34:18; 44:6-45:25; 52:1-53:12-55:15); contrary to law (SAC
11 42:2-43:9; 52:1-53-12); and resulting in unreasonable delay (SAC 42:2-43:9; 44:13-24; 45:1-
12 46:6), due to a failure to act (SAC 42:2-43:9; 44:13-24; 45:1-46:6).

14 By issuing Transparency Plans violating the statutory criteria, acting *ultra vires*, and
15 ignoring §§ 6, 9(c), and 9(d), Defendants have violated all of these principles. SAC 46:12-48:7.

16 The Defendants stated in their Motion to Dismiss that NARA has no duty to search for
17 records. ECF No. 46, 21:7-9. Defendants ignore the CIA MOU (SAC, 46:1-6; see Second
18 Simpich Dec., Ex. A), where NARA, ARRB and CIA entered into a signed agreement to obtain a
19 wide array of documents that to the best of Plaintiffs’ knowledge were not fully obtained based
20 on the last known report of 6/22/99. ECF No. 36, Amended Simpich Dec., Exhibit B, pp. 3-5.

22 Defendants ignore the mandates in §§ 5(c)(2)(F), 5(c)(2)(H), 7(j)(1)(C)(2), and § 2 and §
23 12 to obtain “all” assassination records. NARA officer Gene Morris asked researchers to inform
24 NARA of any assassination records not in the Collection. Schnapf Dec., §§-8-10. NARA’s
25 violations of mandatory duties and selective application of ARRB functions impairs MFF from
26 obtaining assassination records and providing it to its members. SAC 44:13-27.
27
28

1 NARA has ignored other duties by failing to apply the proper definition of assassination
2 records (SAC 45:7-12); advising researchers to file FOIA requests for assassination records even
3 though the JFK Act states that FOIA was an ineffective tool for obtaining such materials (SAC
4 34:25-35:9; 40:21-24); failing to advise researchers to ask NARA to conduct JFK Records Act
5 searches (SAC 34:25-35:3); and failing to respond to requests to review additional records for
6 possible inclusion in the JFK Collection despite NARA's public assurance in 65 FR 39550
7 (2000) that NARA would maintain and supplement the assassination records. SAC 35:11-14;
8 3917-40:24; 40:25-41:19; 45:7-26.

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

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

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

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

22 When §§ 5 and 7 mandate NARA, as successor in function to the ARRB, or the agencies
23 in possession of Assassination Records to review, identify and transmit possible Assassination
24 Records to the JFK Collection, there is no wiggle room to avoid this mandate. Nor is there any
25 wiggle room to avoid the immediate disclosure without complying with §§ 6, 9(c), 9(d), and
26 other applicable portions of the Act.
27
28

1 Section 11(a) of the Act makes it clear that neither the President (MTD 9:8-17:18), nor
2 NARA, or any other agency (MTD 17:20-25:17) may rely on any other statute (e.g., the APA),
3 or judicial opinions interpreting those statutes or common law principles to prohibit the
4 transmission or disclosure of assassination records. The only body of law that can override the §
5 11(a) legislative override is the U.S. Constitution itself. The intent of the Act can be
6 paraphrased as: “Enough! Find all assassination records and release them as soon as possible.”
7

8 **C. Plaintiffs have adequately stated a nonstatutory claim against the President**

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

10 Nonstatutory review of executive action has existed since the founding of the Republic.
11 The Supreme Court has exercised its power to declare Presidential action unlawful or enjoin
12 Presidential executive orders/memoranda . Recent Ninth Circuit cases have granted injunctive
13 relief against an executive order even when President Trump’s actions touched on matters of
14 national security. *Washington v. Trump*, 847 F.3d 1151, 1162-1163 (9th Cir. 2017). The order
15 was against President Trump as well as other federal defendants. See *Washington v. Trump*, 2017
16 LEXIS 16012 (W.D. Wash. 2017); *Nat’l Treasury v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974).
17

18 The APA does not displace equitable causes of action, which allow courts “to review
19 *ultra vires actions by the President that go beyond the scope of the President’s*
20 *statutory authority.*” *Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017).
21

22 The Ninth Circuit found the plaintiffs had an implied equitable action for *ultra vires*
23 violations. *Sierra Club v. Trump*, 963 F.3d 874, 879, 887 (9th Cir. 2020) (no “clear and
24 convincing evidence” of Congress’ intent “to foreclose a remedy for a constitutional violation”).
25 National security and the public interest is served by "*curtailing unlawful executive action so it*
26 *is*
27
28

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

3 **2. The President has acted *ultra vires***

4 **a. The JFK Act was a limited grant of authority**

5 Sections 5, 6, 9 and 11 of the JFK Act impose guardrails on the President’s exercise of
 6 his executive power. The President does not have unfettered authority to postpone Assassination
 7 Records. Instead, Congress provided that the President must first determine that existence of one
 8 or more of the enumerated “threats” of “identifiable harm” set forth in §§ 5 and 6. Then, the
 9 President has to weigh these statutorily-enumerated harms against the compelling “public
 10 interest” and may only certify postponement when the President determines based on the very
 11 stringent “*clear and convincing evidence*” test of §§ 6 and 9(c)(1) that the enumerated identified
 12 harm is of such gravity that it outweighs the strong public interest in disclosure.
 13

14
 15 The JFK Act restrains the President’s authority in additional ways. §3(4) defines the
 16 Executive Office of the President as an “executive agency”; thus, the President must apply the §
 17 6 statutory postponement criteria without reliance on attorney-client privilege, executive
 18 privilege or the deliberative process exemption. *Id.* at §11(a). “Nothing in this Act (i.e.,
 19 postponement certifications) shall be construed to preclude judicial review.” *Id.* at § 11(c).
 20

21 Nor does the President have discretion to overturn an independent statute such as the JFK
 22 Act. *Chamber of Commerce, et al. v. Reich, 74 F.3d 1322, 1326-1328 1328 (D.C. 1996)*
 23

24 **b. President Biden’s Memos were unlawfully issued because they did not comply**
 25 **with executive office regulations governing presidential orders and memoranda**

26 1 CFR Part 19 requires executive orders or memorandum to be reviewed by the
 27 Department of Justice before issuance to ensure they comply with applicable law. Defendants
 28

1 have claimed in this litigation that DOJ reviewed the December 2022 Biden Memo. ECF No. 40
2 at 11; ECF No. 58 at 10. Unless DOJ provides a declaration of compliance under penalty of
3 perjury, the Court should enjoin this memo as unlawfully issued.
4

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

7 § 7 of the Biden December 2022 Memo directs agencies to prepare Transparency Plans
8 that describe the “event-based or circumstance-based conditions that will trigger the public
9 disclosure of currently postponed information” and to submit these Transparency Plans to
10 NARA’s National Declassification Center (NDC). 2nd Simpich Dec., Ex. D.
11

12 The “event-based or circumstance-based conditions” provide new grounds for
13 postponement beyond the statutory criteria in §§ 5(g)(2)(D) and 6; defy the President’s “sole and
14 non-delegable duty to require the disclosure or postponement of such records or information
15 under the standards set forth in section 6” in §9(d)(1); provide no effort to address the public
16 interest as required by §3(10), and ignore the “clear and convincing standard” for review in §
17 9(c)(1). The Transparency Plans apply to all Assassination Records not disclosed by 6/30/23
18 pursuant to sections 2(c) and 2(d) of the 2022 Biden Order. (2nd Simpich Dec., Ex. D). In many
19 instances, the Transparency Plans provide for Assassination Records to be withheld indefinitely
20 far beyond the Act’s 2017 sunset clause.
21

22 For example, The DoD’s 9/29/22 letter (2nd Simpich Dec., Ex. F), states “DoD proposes a
23 ‘Path to Transparency’ for the remaining redacted information. Rather than conducting arbitrary
24 date reviews, DoD proposes the remaining releases be “event triggered”...(examples include) *
25 from the date the partnerships or diplomatic partnerships are formally dissolved and the date the
26 partner is no longer a party to a security agreement or leaves international organizations to which
27
28

1 DoD is also a member...” See the “Legend” for triggering events at 2nd Simpich Dec., Ex. F, p.
2 40. Such “event-based releases” could occur centuries from now – or never.

3 The CIA’s JFK Transparency Plans and DoD’s JFK Records Collection Withholds (2nd
4 Simpich Dec., Ex. E-F) use non-statutory criteria for continued postponements:

5 § 6(1)’s “disclosure would reveal” would be modified by Exhibit F, p. 1: “Disclosure
6 would facilitate identification of” (e.g. JFK Record #124-10289-10461). Non-statutory criterion:
7 “Facilitate identification” is an “upgrade” of classified information. § 5(g)(2)(C): “periodic
8 review of postponed assassination records shall serve to downgrade...”

9 § 6(1)(B)’s “an intelligence source and method which is currently utilized, or reasonably
10 expected to be utilized” would be modified by Exhibit F, p. 7: “identifies an intelligence source
11 or target (JFK Record #144-10001-10052)”. This is another non-statutory criteria: There is no
12 requirement in DoD’s Exhibit F that a source be “currently utilized”; Exhibit F includes “target”,
13 while § 6(1)(B) specifies only “source or method”.

14 § 9(c) authorizes NARA - not government offices - to make the final “formal
15 determination” of Assassination Records. Neither of these Plans (Ex. E-F) order CIA and DoD
16 to meet the burden of “clear and convincing evidence” required by §§ 6 and 9(c)(1), or explain
17 why their interests outweigh the “compelling public interest” cited in §3(10).

18 The event-based condition in Ex. E (CIA JFK Transparency Plan), p. 4, would create a
19 new exemption for “intelligence installations or facilities” found nowhere in §§ 5 or 6.

20 By authorizing the NDC to make future postponement decisions, the President has
21 violated the § 9(d)(1) command that the President has a “sole and non-delegable duty” to make
22 such decisions “under the standards of Section 6.”
23
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d. 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. ECF No. 46, MTD pp. 12-13. Defendants ask the court to assume that “Section 6 sets forth the standard agencies must meet to support individual records, and that provision does not require the President to do anything at all”. *Id.*, 13:11-2. Section 6 applies to all actors, not just “agencies”. Nothing in the statute supports Defendants’ statement, and §9(d)(1) expressly refutes it. Moreover, §3(4) establishes that the Executive Office of the President is an “executive agency”.

§ 5 is entitled “Review, Identification, Transmission to the National Archives, and Public Disclosure of Assassination Records by Government Offices” Nothing in the statute indicates that anyone is exempt from these procedures. § 6 is entitled “Grounds for Postponement of Public Disclosure of Records”. Again, nothing in the statute indicates that anyone is exempt from these grounds for postponement of public disclosure of records.

§§5 and 6 harmonize. The basic principles of statutory construction require the court to interpret the Act to harmonize all portions. These two sections do not contradict each other but complement each other. 5(g)(2)(D) provides four bases for Presidential certification – “military defense, intelligence operations, law enforcement, and conduct of foreign policy”. Section 6 enumerates seven “threats” that authorize a postponement. The initial three threats are defined to apply to “military defense, intelligence operations, and conduct to foreign policy”. The latter four threats include “law enforcement” and the other three bases. The benchmarks cited in §§ 5 and 6 fit neatly together. § 5 describes the President’s general power to certify postponement while § 6 establishes the specific grounds for exercising the § 5 authority granted by Congress.

1 **D. NARA has violated its mandatory duties as successor in function to the ARRB**

2 **1. Background**

3 As discussed above, NARA declared on July 27, 2000 that it was the successor in function
4 to the ARRB, and that NARA continues to supplement the collection under the provisions of the
5 Act because the agencies find new documents and need guidance. 65 FR 39550.

6
7 When NARA receives a search request based on “reason to believe” that a government
8 office may have additional Assassination Records, it has the duty pursuant to section 5(c)(2)(H)
9 to review the document pursuant to 36 CFR Part 1290 to determine if it is an assassination
10 record, and then determine if the record must be disclosed. If the originating agency objects to
11 any of these NARA decisions, it may seek Presidential review.

12
13 When citizens have approached NARA asking for suspected Assassination Records to be
14 transmitted to the JFK Collection, NARA staff have examined the index to the JFK Collection. If
15 the documents were not listed, NARA has informed these citizens to file a FOIA request – even
16 though the Act itself was passed because of the ineffectiveness of FOIA. § 2(5).

17
18 NARA, as successor in function to the ARRB, has also failed to complete follow up
19 government offices on outstanding record searches requested by the ARRB in 1998, or to request
20 new searches for Assassination Records since 1998. SAC 14:18-15:17.

21 In 2022, several of Plaintiff MFF’s members requested NARA to provide an update on
22 the status of these outstanding Board record search requests. NARA has not responded to this
23 inquiry, nor the inquiry of researcher Roger Odisio, para. 54. Schnapf Declaration, paras. 1-10..

24
25 In 2016, when attorney Dan Alcorn asked Ms. Martha Murphy of NARA to search for
26 certain documents he believed to be Assassination Records, Ms. Murphy told Mr. Alcorn to file a
27 FOIA action because the subjects of the documents did not appear in the JFK Act record index.
28

1 Having been advised that the materials were suspected Assassination Records, Ms. Murphy
2 should have either made a determination using the regulatory definition of Assassination Record
3 that are part of NARA's own regulations, or referred to the appropriate government agency

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

9
10 Although NARA assumed the obligations and responsibilities of the ARRB when it
11 stated in the Federal Register that it was the "successor in function" to the Board, NARA has
12 pushed away every opportunity to identify and review documents as Assassination Records, and
13 postponed the transmission and release of documents that should have been released in 1993.
14 NARA's pattern and practice is to urge researchers to file FOIA cases to seek Assassination
15 Records, rather than comply with §§ 2, 5, and 7. See Alcorn Dec., para. 9-10.

16
17 Counsel wrote the Archivist in February 2022 to review certain documents as
18 Assassination Records, but received no reply. Schnapf Declaration, paras. 1-7.

19
20 In November 2022, when researcher Mr. Roger Odisio provided to NARA's general
21 counsel a request to obtain NBC video footage that allegedly portrays Mr. Lee Oswald watching
22 JFK's motorcade from the front steps of the Texas School Depository – video footage that would
23 provide Oswald with an alibi - NARA's response was to tell Mr. Odisio to provide his
24 information to their general counsel. Mr. Odisio did but again has yet to receive any response.
25 *Id.*, paras. 8-10; also Schnapf Dec., paras. 8-10 (NARA representatives instructed researchers to
26 contact Mr. Stern about Assassination Records not in the JFK Collection).
27
28

1 The determinations of the ARRB were reviewable and enforceable by a court of law.
 2 §11(c). see also 138 Cong. Rec. 19448, 19449 (1992). Likewise, as the successor in function to
 3 the Board, NARA’s implementation of the Act is also reviewable by this court.

4 **2. NARA’s violations are actionable under the APA**

5 Plaintiffs challenge three actions by NARA, as discussed above:

- 6
- 7 1) Approval of the Transparency Plans;
 - 8 2) NARA’s practice of denying its mandatory duties as successor in function, and
 - 9 3) NARA’s failure to contact agencies of suspected Assassination Records sought
- 10 pursuant to the JFK Act, or to comply with the MOU. See Alcorn Declaration, paragraph 10, Ex.
 11 B; Amended Simpich Dec., para. 2. It is contrary to law and arbitrary and capricious for NARA
 12 to urge citizens to use FOIA when the JFK Records Act is the proper tool to use for the job - and
 13 when Congress determined in 1992 that FOIA was a futile tool for obtaining Assassination
 14 Records. § 2(a)(5). Alcorn Dec., paras. 10-12, Ex. B. Amended. Simpich Dec., para. 2.
 15 Each of these particular actions are arbitrary and capricious, contrary to law, and constitute
 16 unreasonable delay. These standards have different yardsticks for review – see below.

17

18

19 **3. Unreasonable delay is an exception to the final agency action requirement**

20 Section 706(1) of the APA provides for an exception to the final agency action
 21 requirement. Thus, the claim of unlawful withholding or unreasonable delay establishes court
 22 jurisdiction even though there has been no final agency order. *Kessler v. FCC*, 326 F.2d 673, 684
 23 (D.C. Cir. 1963); *Harvey Radio Laboratories v. United States & FCC*, 289 F.2d 458 (1961).

24

25 “Agency action is defined to include a “failure to act”, see § 5 USC 551(13). ...A claim
 26 under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete*
 27 agency action that it is required to take. *Norton*, 542 U.S. at 63-64. Thus, § 706(1) empowers
 28 court only to compel an agency ‘to perform a ministerial or non-discretionary act’, or ‘to take
 action upon a matter, without directing how it shall act...if there is a ‘specific, unequivocal
 command placed on the agency...’” *Plaskett v. Wormuth*, 18 F.4th 1072, 1081-82 (9th Cir. 2021).

1 Unreasonable delay has occurred in every aspect of the relief sought. The Act states:
 2 “most of the records related to the assassination...are almost 30 years old, and only in the *rarest*
 3 *cases* is there any legitimate need for continued protection of such records.” § 2(a)(7). The
 4 Act’s mechanisms are designed to collect “all assassination records” to provide the full history
 5 for the American people. §§ 2(a)(1), 2(a)(2), 3(10). But NARA, the ARRB’s successor in
 6 function, has unreasonably delayed and unlawfully withheld responses to requests by MFF
 7 member Larry Schnapf, researchers Dan Alcorn and Roger Odisio. It has refused to comply with
 8 the MOU. The Transparency Plans are the latest device used to delay disclosure of records.
 9
 10

11 **4. There has been a delay in additional review of records since 1999, while only the**
 12 **rarest cases would justify a delay in release of records since 1993**

13 “At some point, an agency forfeits its entitlement to ‘try again’ and correct its own patent
 14 legal errors...Excessive delay saps the public confidence in an agency's ability to discharge its
 15 responsibilities and creates uncertainty for the parties, who must incorporate the potential effect
 16 of possible agency decision-making into future plans.” *Cissell Mfg. Co. v. United States DOL*,
 17 101 F.3d 1132, 1145 (6th Cir. 1996).

18 The 9th Circuit has adopted the D.C. Circuit’s six-factor test to evaluate claims of
 19 unreasonable delay, established in *Telecommunications Research & Action Center v. FCC*
 20 (*TRAC*). 750 F.2d 70, 80 (D.C. Cir. 1984) to evaluate claims "when an agency's delay is
 21 egregious". (*In re NRDC*, 956 F.3d 1134, 1138-1139 (9th Cir. 2020) - granted mandamus after a
 22 12 year wait following an administrative petition for EPA to issue a regulation ending use of a
 23 dangerous pesticide in household pet products) justifying a writ of mandamus).

24 In this case, the delay in the release of documents has been 31 years since the passage of
 25 the Act in 1992 – with an outrageous 18 year gap between 1999 and 2017 - and the failure to
 26 search for documents since the halt in completing the searches mandated by the JFK Act, the
 27 1998 MOU, 65 FR 39550, and search requests by the ARRB and private citizens.
 28

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

8 (2) **Whether Congress has indicated a timeframe** it considers appropriate for the action
9 at issue; (JFK Act provided a 25-year timeframe to 2017, stating it should be “rare” after 1992);

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

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

14 (5) The **nature and scope of interests** prejudiced by delay. 30 years was considered too
15 long to wait at the time of the passage of the Act - now it is almost 60. Numerous key witnesses
16 to events surrounding the assassination have died, preventing researchers from interviewing
17 these individuals. It is hard to imagine anything more prejudicial than history forever lost.

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

21 The facts in the Amended Simpich Declaration, paras. 5-11, support this standard.
22 Despite NARA’s role as successor to the ARRB, NARA has failed to take any meaningful action
23 since 1999 to complete the outstanding ARRB search requests and continue the ARRB’s work to
24 search for Assassination Records that have not been transmitted to the Collection.
25

26 Nor did NARA take any meaningful action to transmit or disclose documents between
27
28

1 1999-2013 except for a tiny bump in activity in the 2003-2004 period that were largely a result
2 of release disclosure dates mandated by the ARRB, and virtually no releases between 1999-2017.
3 The Executive Office of the President is now six years late in releasing in full about 3,000 files
4 in the JFK Collection. See totals from 2022 release. ECF No. 58, 1:2-9.

5
6 **5. It is arbitrary and capricious and contrary to law for NARA to refuse to act as
the ARRB's successor in function**

7 Plaintiffs allege § 706(2) violations if any of the above § 706(1) violations fail.

8 NARA has failed to act as the ARRB's successor in function, to enforce the MOU, and to
9 halt the creation of Transparency Plans that violate the sole, non-delegable duties of the
10 President. All of these failures are arbitrary and capricious, contrary to law, and constitute "final
11 agency action".
12

13 NARA's similar failures in enforcing the MOU and in forcing citizens to use FOIA rather
14 than the JFK Act to identify new records are pragmatic "final agency actions".
15

16 **6. Final agency action requires a pragmatic analysis**

17 Defendants have stated that "final agency action" is required that is the "consummation
18 of the agency's decision making process" and one from which "legal consequences will flow"
19 (*Bennett v. Spear*, 520 US 154-177-178 (1997)) that is not a "broad programmatic attack". Also
20 see *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ECF No. 46, 18-19:2.
21

22 The issuance of the MOU in 1998, 65 FR 39550 in 2000 and the Transparency Plans in
23 2022 all represent the consummation of decision-making processes of NARA and/or the
24 President. Legal consequences flow from these decisions: New documents must be obtained;
25 NARA's role to maintain and supplement the Collection has been formalized; and the President
26 is passing his sole, non-delegable role to NARA's National Declassification Center (NDC).
27
28

1 None of the “final agency actions” are cases of formal rulemaking and formal
2 adjudication which require the "substantial evidence" standard of review under 5 USC 706(2)(E).

3 Instead, all of the remedies sought by the Plaintiffs involve “*particular* ‘agency action’
4 that causes harm” described in *Whitewater Draw. Nat. Res. Conservation Dist. v. Mayorkas*, 5
5 F.4th 997, 1010 (9th Cir. 2021) (pertaining to informal rulemaking). As described in *Citizens to*
6 *Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), to find agency decisions arbitrary in
7 informal contexts, courts must first “consider whether the decision was made on a consideration
8 of the relevant factors and whether there has been a clear error of judgment.”
9

10 The US Supreme Court has reemphasized a pragmatic approach to finality, suggesting
11 that the practical effects of agency action play a role in the finality analysis. *U.S. Army Corps of*
12 *Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597-598 (2016). Also see *Chamber of Commerce v.*
13 *Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) (reviewing otherwise unreviewable presidential
14 action once agency action implementing it became final – relevant to the Transparency Plans).
15

16 The implementation of the Transparency Plans in 2023 and the issuance of 65 FR 39550
17 that define NARA’s duties as successor in function and the MOU all constitute “final agency
18 action”. A pragmatic analysis reveals that the refusal to invoke the JFK Act for new searches
19 constitutes final agency action as well.
20

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

22 “The standard for evaluating whether an agency's decision was **arbitrary and**
23 **capricious** is whether the decision "was the product of reasoned decision
24 making." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.
25 29, 52, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). “This standard is deferential,
26 *Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1173 (9th Cir. 2016), and does not
27 permit the Court to "substitute its judgment for that of the agency," *Ctr. For Bio*
28 *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.”

1 *Nw. Ecosys. All v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140, 1145 (9th Cir.
2007) (quotation omitted).”

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

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

9 NARA’s actions are not reasoned decision-making – rather, its actions are similar to an
10 ostrich in the sand – resolutely refusing to admit it is a “successor in function”; refusing to utilize
11 the current definition of “Assassination Record” as spelled out in Subpart H, 36 CFR Part 1290;
12 refusing to admit it has a duty to ask agencies to review, identify and transmit additional
13 documents in the light of its duty to “maintain and supplement the Collection...Agencies
14 continue to identify records that may qualify as assassination records and need to have this
15 guidance available”. (65 FR 39550); and tied to the mandate in §§ 7, 12 and 65 FR 39550 to
16 continue the search until all Assassination Records have been found – again, all while urging
17 researchers to use FOIA instead of the JFK Act.
18

19
20 Because of NARA’s refusal to carry out some of its mandatory duties as the successor in
21 function to the ARRB, virtually no new proposed Assassination Records were submitted to
22 NARA by the relevant agencies for addition to the Collection from 1998-2023 despite the fact
23 that ARRB had outstanding search requests when it ceased operations in 1998 and despite
24 numerous FOIA requests submitted by private citizens for suspected Assassination Records. A
25 FOIA request puts both the agencies and NARA on notice of their duties under the Act.
26
27
28

1 Pursuant to § 706(2), courts are required to "hold unlawful and set aside" agency action
2 it finds to be invalid. *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C. Cir. 1989): "When
3 a reviewing court determines that agency regulations are unlawful, the ordinary result is that the
4 rules are vacated – not that their application to the individual petitioners is proscribed." Also see
5 *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408-1410 (D.C. Cir. 1998).

6
7 NARA as the successor in function to the ARRB, must affirmatively search for "all
8 assassination records" until the Archivist has a reasonable basis to certify that "all assassination
9 records" have been located pursuant to § 12. A well-known strategy is illustrated by CIA
10 counterintelligence chief James Angleton's instruction to his subordinate Ray Rocca to "wait
11 out" the Warren Commission when the CIA was asked to transmit certain records. An internal
12 CIA memo advises to withhold documents, as the Agency must prevent "the camel's nose from
13 getting under the tent." NARA must act like a camel, not like an ostrich. Amended Simpich
14 Dec., 1:3-11 & Ex. A; 2:16-17 & Ex. D.

15 16 **7. A policy statement or similar actions can result in final agency action**

17 Policy statements made by an agency can constitute final agency action. (*Gill v. U.S.*
18 *Department of Justice*, 913 F.3d 1179 (9th Cir. 2019)). as can a series of agency pronouncements
19 *Barrick v. Gold strike Mines, Inc. v. Browner*, 225 F.3d 45, 49 (D.C. Cir. 2000).

20
21 In 2000, NARA said it was the successor in function to the ARRB and was continuing to
22 supplement the JFK Collection (65 FR 39550). However, it has continually failed to comply
23 with this statement when private citizens bring to NARA's attention the possibility of suspected
24 Assassination Records missing from the Collection. (SAC, paragraphs 83-86, 100-107, 109).
25 Each of these actions constitute the "consummation" of the agency's decision-making process
26 from which "legal consequences will flow". *Bennett v. Spear*, 520 US 154, 177-178.
27
28

1 **8. Plaintiffs’ challenges are “discrete”, not “programmatic”**

2 Plaintiffs challenge:

- 3 1) NARA’s failure to act as ARRB’s “successor in function”, as well as its duties to
4 supplement the Assassination Records as defined in 65 FR 39550, to comply with the MOU, and
5 to apply the JFK Act rather than FOIA to search requests;
6
7 2) Defendants’ approval of non-compliant and flawed Transparency Plans;
8
9 3) DOJ’s failure to review the Transparency Plans.

10 These discrete actions are examples of custom and practice that are arbitrary and
11 capricious and contrary to law, as well as unreasonable delay. The extent of the functions of
12 NARA pursuant to the Act can be resolved with a hearing on declaratory relief, while a stay on
13 the Transparency Plans can be resolved with injunctive relief. *Norton v. S. Utah Wilderness*
14 *Alliance*, 542 US 55, 64 (2004) shows that such challenges are not against an entire program, and
15 not a “broad programmatic attack”.

16 **9. All four elements of the test for injunctive relief strongly tilt in Plaintiffs’ favor**

17 [Lair v. Bullock, 697 F.3d 1200, 1203 \(9th Cir. 2012\)](#) (quoting [Nken, 556 U.S. at 434](#)) sets
18 forth a four-element test for injunctive relief, as discussed at p. 6, *supra*.

19 On element (1), “whether the applicant has made a strong showing that it is likely to
20 succeed on the merits”, the Plaintiffs’ statutory interpretation regarding the applicability of
21 Sections 6, 9(c)(1) and 9(c)(4)(B) are well-nigh invulnerable to attack by the Defendants in any
22 hearing. The Transparency Plans should be stayed while this litigation is in progress.
23
24

25 On element (2), “whether the applicant will be irreparably injured absent a stay”, the
26 response is that witnesses in this 60-year old case are dying every day. Witnesses who were 30
27 years old in 1963 are now 90, if they are still alive. Many key witnesses were in their twenties
28

1 during this era. When one of these witnesses die, their memories are lost. These memories
2 could also lead to other important witnesses and documents. Time is of the essence in a case that
3 is based on the preservation of history.

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

9 On element (4), “where the public interest lies.”:

10 See *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken*, 556 U.S. at 434).

11 This element is in the Act’s definition of “public interest” at § 3(10) : “the compelling interest in
12 the prompt public disclosure of assassination records for historical and governmental purposes
13 and for the purpose of fully informing the American people about the history surrounding the
14 assassination of President John F. Kennedy.” This is not a close case.

17 **10. Plaintiffs seek declaratory relief**

18 Plaintiffs seek immediate relief, as the Transparency Plans are scheduled to take effect on
19 July 1, 2023. Plaintiffs anticipate that their request for a stay on the Transparency Plans can be
20 attained with injunctive relief.

22 In the alternative, if these remedies are unavailable, Plaintiffs request declaratory relief
23 for these matters - as well as for the ARRB functions that NARA has taken on as a “successor in
24 function” pursuant to FRCP 57. In *Miller v. Warner Literary Group LLC*, 2013 WL 360012, at
25 *2 (D. Colo. Jan. 30, 2013), a novelist sought a declaration allowing him to terminate a contract
26 with his agent in advance of an upcoming publication date. As in *Miller*, “the raw facts” are
27 “not in dispute” and the parties’ disagreement “center[ed] on the applicable legal standard.”
28

1 Also see *National Basketball Association v. Williams*, 857 F. Supp. 1069, 1071 n.1 (S.D.N.Y.
2 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995).

3 Given the “imminent deadline,” the *Miller* court found “good cause” to resolve a motion
4 for declaratory judgment “on an expedited basis.” *Id.* Defendants had notice as of October
5 2022’s complaint of Plaintiffs’ intent to seek expedited relief. Also see ECF No. 39, p. 35.
6

7 **11. Plaintiffs seek mandamus, if necessary**

8 If the court believes that injunctive or declaratory relief is unavailable to Plaintiffs, then
9 a writ of mandamus would be the only adequate remedy available to Petitioners. See *In re Cal.*
10 *Power Exch. Corp.*, 245 F.3d 1110, 1120 (9th Cir. 2001) (holding mandamus is appropriate
11 where plaintiffs have no other adequate remedy). § 706(1) relief and mandamus relief are
12 considered to “mirror” each other. *Plaskett v. Wormuth* 18 F. 4th 1072, 1081 (9th Cir. 2021).
13

14 **CONCLUSION**

15 The court has the power to make a finding based on “unreasonable delay”, or based on
16 “final agency action”. In either instance, whether or not the court chooses to remand any of
17 these issues to NARA for a hearing or other action, the Plaintiffs maintain their request for
18 prompt injunctive and declaratory relief.
19

20 For these reasons, we ask the court to issue:

- 21 1) A preliminary injunction to halt implementation of the Transparency Plans, and
22 2) Declaratory relief that NARA is the “successor in function” to the ARRB; that it
23 has a mandatory duty to seek additional Assassination Records; that it enforce the MOU; and
24 advise researchers to invoke the JFK Act rather than FOIA.
25

26 ///

27 ///

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

Dated: June 8, 2023

 /s/ William M. Simpich_____

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Attorneys for Plaintiffs

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