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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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

Plaintiffs,

v.

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

Defendants.

No. 3:22-cv-06176-RS

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

Hearing Date: December 14, 2023  
Time: 1:30 p.m.  
Judge: Hon. Richard Seeborg

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1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that Defendants, by and through their counsel, hereby move to  
3 dismiss Plaintiffs’ Third Amended Complaint for the reasons set forth below.

4 **INTRODUCTION**

5 This Court previously granted Defendants’ motion to dismiss Plaintiffs’ Second Amended  
6 Complaint except as to a narrow set of claims brought against the National Archives and Records  
7 Administration (“NARA”). Rather than proceeding on those claims, Plaintiffs have sought to  
8 expand this litigation again, filing a Third Amended Complaint that asserts new claims against  
9 NARA under the Administrative Procedure Act (“APA”) and Federal Records Act (“FRA”). But  
10 while Plaintiffs’ claims are new, they each fail for the same reasons that their prior claims failed.

11 *First*, Plaintiffs have asserted a new arbitrary-and-capricious claim against NARA,  
12 contending that the agency acted unlawfully by not releasing certain information to the public,  
13 including the names of living CIA agents. Plaintiffs contend that the President’s memorandum  
14 postponing disclosure of that information was inconsistent with Plaintiffs’ interpretation of the  
15 John F. Kennedy Assassination Records Collection Act (“JFK Act”), but the Court has already  
16 rejected Plaintiffs’ argument. Specifically, the Court held that that the President’s discretion to  
17 postpone disclosure under Section 5(g)(2)(D) of the Act was not constrained by other provisions  
18 of the Act, and that the President was not required to articulate the anticipated harms from  
19 disclosure on a record-by-record basis. Plaintiffs seek to renew these same, rejected arguments,  
20 but offer no reason why the Court should reverse its prior ruling on these issues.

21 *Second*, Plaintiffs have sought to expand their claim to compel NARA to act under the  
22 APA or mandamus statute by adding the same allegations that they have added to their arbitrary-  
23 and-capricious claim. But for the same reasons that these allegations fail to state an arbitrary-and-  
24 capricious claim—reasons the Court explained in its prior decision—they likewise fail to state a  
25 claim to compel NARA to act under the APA or mandamus statute.



1 additional presidential postponements, including most recently in June 2023 (the “6/30/23  
2 Memo”). *See* 83 Fed. Reg. 19,157 (Apr. 26, 2018); 86 Fed. Reg. 59,599 (Oct. 22, 2021); 87 Fed.  
3 Reg. 77,967 (Dec. 15, 2022); 88 Fed. Reg. 43,247 (June 30, 2023). NARA has now released all  
4 assassination records subject to Section 5(g)(2)(D) in full or in part.<sup>1</sup> The collection now consists  
5 of approximately five million pages.<sup>2</sup>

6 The President’s June 2023 memorandum was his “final certification” under the JFK Act.  
7 6/30/23 Memo § 1. The President certified that further postponement of certain redacted  
8 information was necessary and directed that future releases of these postponed records would occur  
9 consistent with certain “Transparency Plans” prepared by federal agencies. *Id.* §§ 3, 5. The  
10 Transparency Plans “detail[] the event-based or circumstance-based conditions that will trigger the  
11 public disclosure of currently postponed information by the National Declassification (NDC) at  
12 NARA.” *Id.* § 5. For example, the CIA’s Transparency Plan provides that the names of living  
13 CIA agents will be released once the individual is deceased or the individuals’ connection to the  
14 CIA has already been officially acknowledged. *See* CIA Transparency Plan,  
15 <https://perma.cc/R5LW-KRYK>.

## 16 **B. Procedural History**

17 In October 2022, the Mary Ferrell Foundation, a nonprofit corporation that maintains a  
18 searchable electronic collection of JFK assassination records, and two of its members, filed a  
19 complaint against President Biden and NARA challenging the President’s October 2022  
20 postponement memorandum. ECF No. 1. In January 2023, Plaintiffs amended their complaint to  
21 challenge the President’s December 2022 memorandum. ECF No. 21. Plaintiffs amended their  
22 complaint again in April 2023, ECF No. 44, and moved for a preliminary injunction in June 2023,  
23 ECF No. 59.

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25  
26 <sup>1</sup> 2023 Additional Documents Release, <https://perma.cc/KP7D-QVFM>.

27 <sup>2</sup> NARA Releases New Group of JFK Assassination Documents, <https://perma.cc/4YEA-KQ4P>.

1 On July 14, 2023, the Court granted in part and denied in part Defendants’ motion to  
2 dismiss the Second Amended Complaint and denied Plaintiffs’ motion for a preliminary  
3 injunction. ECF No. 68; *Mary Ferrell Found.*, 2023 WL 4551066, at \*3–10. The Court dismissed  
4 both of Plaintiffs’ claims against the President, holding that even if it had jurisdiction over those  
5 claims, Plaintiffs’ arguments were “unavailing,” as they “assert[ed] obligations that are simply not  
6 imposed upon the President in the JFK Act.” 2023 WL 4551066 at \*4. The Court also dismissed  
7 Plaintiffs’ arbitrary-and-capricious claim against NARA, holding that the President appropriately  
8 “exercised [his] discretion in accordance with the JFK Act,” and so NARA did not “act[] arbitrarily  
9 and capriciously by implementing the [Presidential] Memoranda.” *Id.* at \*6. The Court dismissed  
10 Plaintiffs’ claim seeking to compel NARA to take a number of actions under the APA or  
11 mandamus statute, holding that the JFK Act “imposes no ‘specific, unequivocal command’” on  
12 NARA to undertake Plaintiffs’ alleged duties, except to the extent Plaintiffs challenged NARA’s  
13 alleged “failure to maintain accurate reference aids and to release the legislative records.” *Id.* at  
14 \*8. The Court also dismissed Plaintiffs’ FRA claim “to the extent it references NARA’s failure to  
15 pursue outstanding record searches,” but otherwise allowed it to proceed. *Id.* at \*9.

16 On August 14, 2023, Plaintiffs moved for leave to file a third amended complaint. ECF  
17 No. 72. Defendants did not oppose amendment but reserved their right to move to dismiss. ECF  
18 Nos. 74–75. The Court granted Plaintiffs’ motion for leave to amend, ECF No.76, and Plaintiffs  
19 filed their Third Amended Complaint, ECF No. 77.

20 Plaintiffs now assert three claims against NARA: (1) a claim alleging agency action that  
21 is “arbitrary, capricious, . . . or otherwise not in accordance with law,” in violation of Section  
22 706(2)(A) of the APA; (2) a claim seeking to compel agency action unlawfully withheld or  
23 unreasonably delayed under Section 706(1) of the APA, or alternatively for mandamus; and (3) a  
24 claim under the FRA. Third Am. Compl. ¶¶ 150–76.



**ARGUMENT**

**I. PLAINTIFFS' ARBITRARY-AND-CAPRICIOUS CLAIM SHOULD BE DISMISSED**

Plaintiffs' arbitrary-and-capricious claim should be dismissed for the same reasons the Court previously dismissed this claim. *See Mary Ferrell Found.*, 2023 WL 4551066, at \*5–6. Plaintiffs largely assert the same allegations that the Court found insufficient to state a claim when it granted Defendants' prior motion to dismiss. *Compare* Second Am. Compl. ¶¶ 150–60 with Third Am. Compl. ¶¶ 150–60. For example, Plaintiffs repeat their contention that NARA's implementation of the Biden Memoranda is unlawful “because the Biden Memoranda violated the express terms of the Act.” Third Am. Compl. ¶ 155. But the Court has already rejected that argument, holding that “Section 5(g)(2) of the Act gives the President substantial discretion” and that the President “exercised that discretion in accordance with the JFK Act.” 2023 WL 4551066, at \*6.

Plaintiffs have added some new allegations relating to the CIA's Transparency Plans, but those allegations fail to state a claim as a matter of law. *See* Third Am. Compl. ¶ 154. As noted, the Transparency Plans allow for names of living CIA agents to be released only after the individual is deceased or the individuals' connection to the CIA has already been officially acknowledged. *Id.* Plaintiffs contend that the CIA's plan, adopted by the President in his June 2023 Memo, is unlawful because Section 6 of the Act provides that disclosure of names may be postponed only “if there is clear and convincing evidence that disclosure ‘would impose a substantial risk of harm to that person.’” *Id.* (quoting JFK Act § 6(2)). And they contend that if the President believed that disclosure of living CIA agents' identities posed an “identifiable harm” within the meaning of § 5(g)(2)(D), the President was required to “reveal[] [that harm] in an unclassified written description.” Pls.' Mot. for Leave to Amend at 3, ECF No. 73-1.

But the Court has already rejected these arguments. As to Plaintiffs' argument that the President's postponement authority is constrained by Section 6 of the JFK Act, the Court has already held (correctly) that Section 6 applies only “to postponement after an initial determination

1 by the ARRB,” not to the President’s postponement power under Section 5(g)(2)(D), which “is a  
2 separate authority that applies after the end of the 25-year deadline.” 2023 WL 45510666, at \*4  
3 & n.4. And with respect to Plaintiffs’ argument that the President was required to state the  
4 identifiable harm that justified postponement of each record, the Court held (again, correctly) that  
5 “Section 5(g)(2)(D) does not require the President to certify, on a record-by-record basis, that the  
6 harm outweighs the public interest in disclosure; . . . or publish an unclassified description of those  
7 determinations.” *Id.* at \*4.

8 Plaintiffs disagree with the Court’s ruling, contending that it “provides no basis to permit  
9 Section 5(g)(2)(D) to be used to withhold the names and identities” of living CIA Agents. Pls.’  
10 Mot. for Leave to Amend at 3. But the Court correctly explained that the basis of its ruling is the  
11 text and structure of the JFK Act itself. *See* 2023 WL 45510666, at \*4 (Plaintiffs “assert  
12 obligations that are simply not imposed upon the President in the JFK Act”). As the Court  
13 explained, the Act sets forth separate standards for postponement after an initial determination by  
14 the ARRB and postponement by the President under Section 5(g)(2)(D). *Id.* at \*4 & n.4. Plaintiffs  
15 offer no reason why the Court should reconsider its prior ruling on this issue.

16 Plaintiffs have also added one new paragraph in support of their argument that the  
17 Transparency Plans are unlawful because they allegedly “return the power to make postponement  
18 decisions to the agencies and NARA.” Third Am. Compl. ¶ 154a. But the Court has already  
19 rejected this argument, too, recognizing that “the President’s approval of the Transparency Plans  
20 is not, as Plaintiffs claim, a delegation of the President’s authority to postpone the release of  
21 records.” 2023 WL 4551066, at \*4. Rather, “it is the Biden Memoranda themselves that postponed  
22 the release of each record,” and the “Transparency Plans merely set forth when that postponement  
23 will end.” *Id.* Again, Plaintiffs offer no reason why the Court should reconsider its ruling.

24 Accordingly, because it fails for the same reasons as before, Plaintiffs’ arbitrary-and-  
25 capricious claim (Count One) should be dismissed.

1 **II. PLAINTIFFS’ CLAIM TO COMPEL NARA TO ACT UNDER THE APA OR**  
 2 **MANDAMUS STATUTE SHOULD BE DISMISSED IN PART**

3 The Court previously dismissed Plaintiffs’ claim to compel NARA to act under the APA  
 4 or mandamus statute “except to the extent it challenges NARA’s failure to maintain accurate  
 5 reference aids and to release the legislative records.” 2023 WL 4551066, at \*8. Plaintiffs have  
 6 included this claim as Count Two of their Third Amended Complaint. *See* Third Am. Compl.  
 7 ¶¶ 161–66. In addition to challenging NARA’s alleged failure to maintain accurate reference aids  
 8 and release the legislative records, however, Plaintiffs have also added the same new allegations  
 9 that they added to their arbitrary-and-capricious claim in Count One. *See id.* ¶¶ 164(c)–(e)  
 10 (challenging redactions of names and alleging that the President has unlawfully delegated the  
 11 postponement decision).

12 These allegations fail to state a claim in Count Two for the same reasons that they fail to  
 13 state a claim in Count One. As noted, the disclosure standards of Section 6 do not apply to the  
 14 President’s decision to postpone the 25-year deadline under Section 5(g)(2)(D). 2023 WL  
 15 45510666, at \*4 & n.4. Nor did the President delegate his authority to postpone the release of  
 16 records. *Id.* at \*4. And in any event, no provision of the Act purports to impose a duty on NARA  
 17 to take the actions Plaintiffs request in their new claims. Accordingly, Count Two should be  
 18 dismissed to the extent that it asserts these new claims.<sup>3</sup>

19 **III. PLAINTIFFS’ FEDERAL RECORDS ACT CLAIM SHOULD BE DISMISSED**

20 Plaintiffs’ Federal Records Act claim (Count Three) should also be dismissed. In this  
 21 claim, Plaintiffs allege that various assassination records are (i) “destroyed” or (ii) “missing.”  
 22 Third Am. Compl. ¶ 169 (citing 44 U.S.C. § 2905(a)). Plaintiffs contend that NARA has an  
 23 obligation to request that the Attorney General initiate an action to recover these records. *Id.*  
 24 (citing 44 U.S.C. § 2905(a)). But, as to “destroyed” records, Plaintiffs lack standing to pursue

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25 <sup>3</sup> Defendants are not presently asking the Court to reconsider its conclusion that, accepting  
 26 Plaintiffs’ allegations as true, Count Two states a claim as to NARA’s alleged failure to maintain  
 27 accurate reference aids and to release the legislative records. Defendants dispute that Plaintiffs are  
 entitled to any relief in connection with this claim, however, and reserve the right to seek judgment  
 in their favor at the appropriate time.

1 their claim, as a ruling in their favor would not redress their alleged injury (because it is impossible  
 2 to recover records that have been destroyed). And, as to records that are allegedly “missing,”  
 3 Plaintiffs have not stated a plausible claim as a matter of law, as they have not alleged any facts  
 4 suggesting that the records were unlawfully “remov[ed], defac[ed], alter[ed], or destr[oyed],” as  
 5 would be required to state a claim under 44 U.S.C. § 2905(a).

6 **A. Plaintiffs Lack Standing to Assert a Federal Records Act Claim As to  
 7 Destroyed Records**

8 “No principle is more fundamental to the judiciary’s proper role in our system of  
 9 government than the constitutional limitation of federal-court jurisdiction to actual cases or  
 10 controversies.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citation omitted). To have standing,  
 11 Plaintiffs must show “(i) that [they have] suffered an injury in fact that is concrete, particularized,  
 12 and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the  
 13 injury would likely be redressed by judicial relief.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190,  
 2203 (2021).

14 With respect to the third prong—redressability—Plaintiffs must show that it is “likely, as  
 15 opposed to merely speculative, that the injury will be redressed by a favorable decision.” *M.S. v.*  
 16 *Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561  
 17 (1992)). In the context of the FRA specifically, Plaintiffs must show that “there is a ‘substantial  
 18 likelihood’ that the Attorney General could find some [federal records].” *Cause of Action Inst. v.*  
 19 *Pompeo*, 319 F. Supp. 3d 230, 234 (D.D.C. 2018).

20 Plaintiffs cannot make that showing here as to records that have been destroyed. *See* Third  
 21 Am. Compl. ¶ 61(f) & n.79 (alleging that the “ARRB Final report reported CIA, FBI, Secret  
 22 Service, and other organizations intentionally destroyed documents”).<sup>4</sup> As to destroyed records,  
 23

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24 <sup>4</sup> Defendants did not raise standing in their motion to dismiss Plaintiffs’ second amended  
 25 complaint, instead focusing on their argument that the Federal Records Act does not require  
 26 referral to the Attorney General in the case of destroyed records. Because Article III standing is  
 27 jurisdictional, however, a party can raise the issue at any time. *City of Los Angeles v. Cnty. of*  
*Kern*, 581 F.3d 841, 845 (9th Cir. 2009).

1 the judicial relief that Plaintiffs seek—requiring NARA to request that the Attorney General  
2 initiate an action to try to recover the records—would not make it any more “likely” that Plaintiffs’  
3 injury would be redressed, because, even assuming the Attorney General were to act on a request  
4 by NARA, it is impossible to recover records that have been destroyed. That is particularly so  
5 when the lone reported instance of destruction occurred decades ago, *see* ARRB Final Report at  
6 149, <https://perma.cc/F42P-DP7G> (cited at Third Am. Compl. at 27 n.79), and Plaintiffs have  
7 nowhere alleged that there exists some means to reverse the destruction. *See, e.g., Cause of Action*  
8 *Inst.*, 319 F. Supp. 3d at 235–36 (Federal Records Act claim seeking to compel defendants to refer  
9 case to Attorney General became moot because records were “fatal[ly] los[t]”); *Citizens for Resp.*  
10 *& Ethics in Wash. v. SEC*, 916 F. Supp. 2d 141, 148 (D.D.C. 2013) (lawsuit seeking recovery of  
11 “destroyed” records would become moot if records were “permanently unrecoverable”).

12 In its prior decision, the Court held that, accepting Plaintiffs’ allegations as true, they had  
13 stated a plausible legal claim under the FRA. 2023 WL 4551066, at \*9. But “not all meritorious  
14 legal claims are redressable in federal court.” *M.S.*, 902 F.3d at 1083. Absent plausible—or even  
15 any—allegations that the destroyed records could be recovered, Plaintiffs simply cannot show that  
16 their alleged injury is redressable. *See, e.g., ACLU of Fla. v. ICE*, No. 1:22-cv-01129 (CJN), 2023  
17 WL 6461053, at \*6 (D.D.C. Aug. 31, 2023) (plaintiffs had sufficiently alleged redressability  
18 because, unlike here, they had “adequately alleged that ‘deleted’ videos could be recovered”).  
19 Accordingly, Plaintiffs lack standing to pursue their FRA claim insofar as it relates to records that  
20 have been destroyed.

21 **B. Plaintiffs Fail to State a Federal Records Act Claim as to Allegedly “Missing”**  
22 **Records**

23 Plaintiffs also fail to state an FRA claim as to records that they allege are simply “missing,”  
24 but which are not alleged to be subject to any “actual, impending, or threatened unlawful removal,  
25 defacing, alteration, or destruction of records.” 44 U.S.C. § 2905(a). The Court held in its prior  
26 ruling that Plaintiffs could not state an FRA claim “to the extent it references NARA’s failure to  
27 pursue outstanding record searches,” as “the Federal Records Act imposes no independent

1 obligation on NARA to complete those searches.” 2023 WL 4551066, at \*9 & n.11. Yet Plaintiffs’  
2 Third Amended Complaint seeks to reassert an FRA claim to compel NARA to search for a laundry  
3 list of records that Plaintiffs allege are simply “missing,” without any plausible allegations of  
4 actual or impending removal or destruction. *See* Third Am. Compl. ¶¶ 61, 129–49, 169.

5         These allegations fail to state a claim as a matter of law. For example, Plaintiffs allege that  
6 there are “missing attachments to Assassination Records” with “no indication if the originating  
7 agency retains possession, custody and control of these attachments.” *Id.* ¶ 61(e). Plaintiffs allege  
8 “[u]pon information and belief” that NARA “has failed to perform its ministerial non-discretionary  
9 duty, as successor to the ARRB, to direct the originating agency to search for these missing  
10 Assassination Records,” *id.*, and they contend that these allegations state a “violation of 44 USC  
11 2905,” *i.e.*, the Federal Records Act, *id.* ¶ 129.

12         But Section 2905 applies only where there is alleged “actual, impending, or threatened  
13 unlawful removal, defacing, alteration, or destruction of records in the custody of the agency” that  
14 has “come to the Archivist’s attention.” 44 U.S.C. § 2905(a). Section 2905 does not come into  
15 play whenever it is alleged that records are “missing,” which is all that Plaintiffs allege here. *See*  
16 *id.* Moreover, as the Court’s prior opinion made clear, NARA has no duty “as successor to the  
17 ARRB” to “direct the originating agency to search for” missing records (or any other records).  
18 Third Am. Compl. ¶ 61(e). Rather, “NARA and the ARRB are two distinct entities,” and  
19 “Congress specifically and explicitly expressed that ARRB obligations would cease when the  
20 ARRB itself terminated.” 2023 WL 4551066, at \*8. Accordingly, Plaintiff cannot rely on the  
21 FRA (or the JFK Act) to compel NARA to “direct the originating agency to search for” records.  
22 Third Am. Compl. ¶ 61(e); *see also id.* ¶ 169 (alleging that when “NARA becomes aware of  
23 missing . . . records in the custody of the agency, [it] must notify the agency head in an attempt to  
24 recover such records”).

25         Plaintiffs’ allegations of “[o]ther [Section] 2905 violations” fail to state a plausible legal  
26 claim for the same reasons. *See* Third Am. Compl. ¶¶ 61, 129–49. For example, Plaintiffs allege  
27

1 that certain “CIA files of George Joannides” are missing from NARA’s Collection and that NARA  
 2 should conduct a “new search” for the records. *Id.* ¶¶ 61(a), 129. But Plaintiffs do not allege that  
 3 these records were unlawfully “remov[ed], defac[ed], alter[ed], or destr[oyed],” 44 U.S.C.  
 4 § 2905(a). Similarly, Plaintiffs allege that certain “FBI surveillance tapes of Carlos Marcello” are  
 5 missing from the collection because they remain under seal, but they do not allege that these  
 6 records have been removed, defaced, altered, or destroyed. *See* Third Am. Compl. ¶¶ 61(b), 129;  
 7 *see also id.* ¶¶ 130–49 (alleging certain records are “missing” without any plausible allegation of  
 8 removal, defacing, alteration, or destruction). Absent such allegations, Plaintiffs cannot state a  
 9 claim under the FRA.

#### 10 **IV. THE PRESIDENT SHOULD BE DISMISSED AS A DEFENDANT**

11 Plaintiffs’ Second Amended Complaint asserted two claims against the President: (i) a  
 12 claim that the President acted *ultra vires* in issuing the Biden Memoranda (Count One) and (ii) a  
 13 claim for mandamus against the President for allegedly violating the JFK Act (Count Two). *See*  
 14 ECF No. 44 at 48–51. The Court dismissed both claims in its prior ruling “without leave to  
 15 amend.” 2023 WL 4551066, at \*3–5. Although Plaintiffs have removed their two counts against  
 16 the President from the Third Amended Complaint, they still name the President in the caption of  
 17 the complaint and state they are suing him “in his official capacity as President of the United  
 18 States” Third Am. Compl. ¶ 19. Because Plaintiffs have not asserted any claims against the  
 19 President, the Court should dismiss him as a defendant to this case. *See, e.g., Doe v. Trump*, 319  
 20 F. Supp. 3d 539, 544 (D.D.C. 2018) (dismissing the “President as a party to this case”).

#### 21 **CONCLUSION**

22 The Court should grant Defendants’ motion to dismiss.

23  
 24 Dated: October 26, 2023

Respectfully submitted,

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