

1 William M. Simpich #106672
2 Attorney at Law
3 528 Grand Avenue
4 Oakland, CA 94610
5 Telephone: (415) 542-6809
bsimpich@gmail.com

6 Lawrence P. Schnapf
7 Schnapf LLC
8 55 E. 87th Street #8N
9 New York, New York 10128
10 Telephone: (212) 876-3189
11 Larry@schnapflaw.com

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

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

19 Plaintiffs,

20 v.

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

26 Defendants.
27
28

No. 3:22-cv-06176-RS

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

Date: November 30, 2023

Time: 1:30 pm

Dept: Hon. Richard Seeborg

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

TABLE OF CONTENTS

Page

INTRODUCTION: ELDERLY WITNESSES PROVIDE HISTORY.....1

THE NEW STORY OF SECRET SERVICE AGENT PAUL LANDIS.....1

SUMMARY OF THE RELIEF SOUGHT IN THIS MOTION.....4

1. Section 6(a) of the 2022 Biden Memo must be set aside, and the documents re-reviewed based on the JFK Act’s public interest standard.....4

2. The NARA Guidance Document must be set aside.....5

3. The agencies and NARA must continue to engage in periodic review.....6

ARGUMENT

1. The 2022 Biden Memo must be set aside.....6

2. NARA’S Guidance Document must be set aside.....8

3. The agencies and NARA must continue to engage in periodic review, and the portion of the 2023 Biden Memo stating that the President’s duty to certify the postponement of records is no longer required must be set aside.....12

4. NARA acted arbitrarily and capriciously in approving the Transparency Plans.....14

5. All four of the elements for injunctive relief strongly tilt in the Plaintiffs’ favor.....19

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- a. Plaintiffs are likely to succeed on the merits.....19
- b. Plaintiffs face irreparable injury if relief is denied.....20
- c. Relief will not substantially injure any other interested Parties.....22
- d. The public interest is best served by fully informing the American people about the history surrounding the Kennedy assassination.....22
- 6. Plaintiffs seek declaratory relief.....23
- 7. Plaintiffs seek mandamus, if necessary.....24
- CONCLUSION.....24

TABLE OF AUTHORITIES

Page

CASES

Juliana v. United States, 339 F. Supp. 3d 1062, 1079 (D. Or. 2018),
rev'd and remanded on other grounds, 947 F.3d 1159
(9th Cir. 2020). 20

In re Cal. Power Exch. Corp., 245 F.3d 1110 (9th Cir. 2001) 24

Lair v. Bullock, 697 F.3d 1200, 1203 (9th Cir. 2012) 19, 22

Merrill Lynch, Pierce, Fenner & Smith v. Doe, 868 F. Supp. 532
(N.Y.S.D. 1994) 23

Miller v. Warner Literary Group LLC, 2013 WL 360012
(D. Colo. 2013) 24

National Basketball Association v. Williams, 857 F. Supp. 1069
(S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995) 24

Nken v. Holder, 556 U.S. 418 (2009) 19, 22

Plaskett v. Wormuth, 18 F. 4th 1072 (9th Cir. 2021) 24

STATUTES

FRCP Section 57 23, 25

5 U.S.C. Section 706(1) 24

5 U.S.C. Section 706(2)(A) 12

28 U.S.C. 1651 23

28 U.S.C. 2201 23

President John F. Kennedy Assassination Records Collection
Act of 1992, 44 U.S.C. 2107, note *passim*

1 JFK Records Act, Section 5(g)(1) 13

2 JFK Records Act, Sections 5(g)(2)(A)–(C) 13

3

4 JFK Records Act, Section 5(g)(2)(D) 5-6, 10, 12-15, 25

5 JFK Records Act, Section 6 10

6

7 JFK Records Act, Section 6(a) 5

8 JFK Records Act, Section 6(4) 17

9

10 JFK Records Act, Section 3(10) 5-7, 25

11 JFK Records Act, Section 9(a)(2) 6, 8, 13, 25

12 JFK Records Act, Section 9(d) 14

13

14 7/14/23 Order 10, 13

OTHER AUTHORITIES

15

16 Biden 2022 Memo 4-7, 9, 15, 25

17

18 Biden 2023 Memo 2-3, 6, 9

19

20 CIA Transparency Plan 2, 9

21 DOD JFK Assassination Record Withholds 2, 9

22 NARA Guidance Document, titled “*Procedures for Processing*

23 *Remaining Postponed Records in the President John F. Kennedy*

24 *Assassination Records Collection Act of 1992* 12

25 Bosanko Memo of 2017 16-18

26

27

28

1 **INTRODUCTION: ELDERLY WITNESSES PROVIDE HISTORY**

2 Elderly witnesses have emerged with surprising new evidence in the JFK
3 case - why the Court should act here. Given the passage of sixty years since the
4 assassination, such events won't be possible much longer. Last month's headlines
5 about Secret Service agent Paul Landis show why this motion is necessary. This
6 motion is based on the attached points and authorities, the Schnapf Declaration and
7 the attached 2017 Bosanko Memo, and the Request for Judicial Notice.
8
9
10

11 **THE NEW STORY OF SECRET SERVICE AGENT PAUL LANDIS**

12 [In a new memoir reported in the New York Times on September 9, 2023,](#)
13
14 88-year-old Secret Service agent Paul Landis stated for the first time that he found
15 a near-pristine bullet lodged in the back of the seat cushion of the limousine where
16 President Kennedy was slain, and that it was not the bullet that caused the fatal
17 wound. Landis was fifteen feet away from the President at the time of the shooting.
18

19 Landis' account contradicts the Warren Report finding that the near-pristine
20 bullet originated from the rear of the limousine, causing seven wounds in JFK and
21 Texas Governor John Connally, and falling out of Connally's body while he was
22 lying in a different stretcher. Landis' placement of the seat cushion bullet would
23 obliterate the "magic bullet theory" used by the Warren Commission as the basis
24 for its finding that there was only one shooter of the President.
25
26
27

1
2
3 Given that one bullet apparently originated from the front and the other from
4 the rear, Landis believes this may be proof of a second shooter in addition to Lee
5 Harvey Oswald. This would align with the conclusions of the House Select
6 Committee on Assassinations, which concluded contrary to the Court’s statement
7 in the first paragraph of its opinion that “*scientific acoustical evidence establishes*
8 *a high probability that two gunmen fired at President John F. Kennedy.*” Dkt. 77,
9
10
11 3rd Amended Complaint, paragraph 8.

12 Any further releases that would reveal the name of other elderly witnesses
13 have been postponed by the Department of Defense and other agencies until said
14 witnesses are dead, or 100 years old, unless their names have already been
15 released. See Dkt. 51, Second Simpich Declaration, filed 5/23/23, Exhibit E,
16 pages 1-3 (re CIA Transparency Plan); Exhibit F, page 2 (re DoD “JFK
17 Assassination Record Withholds”). Postponing names of witnesses until they pass
18 away or reach 100 years old violates the express grounds for postponement that
19 Congress established in the JFK Act. [amended complaint]
20
21
22
23

24 On 6/30/23, President Biden issued an executive order (“June 2023 Order”)
25 asserting that he had no duty to issue any certifications for further postponements
26 pursuant to the 1992 JFK Assassination Records Act (referred to herein as the 2023
27

1 Biden Memo, Dkt. 65-1), while acquiescing to demands of national security
2 agencies that portions of thousands of assassination-related documents remain
3 hidden from public view. Specifically, the President stated: “With my final
4 certification made in this memorandum – the last required under the Act – and
5 definitive plans for further disclosures, my Administration is fulfilling the promise
6 of transparency to the American people.” June 2023 Order at § 1.
7

8
9 “As part of their review, each agency prepared a plan for the eventual
10 release of information (Transparency Plan to ensure that information would
11 continue to be disclosed over time as the identified harm associated with the
12 release of the information dissipates. Each Transparency Plan details the event-
13 based or circumstance-based conditions that will trigger the public disclosure of
14 currently postponed information by the National Declassification Center (NDC) at
15 NARA...on May 1, 2023, the Acting Archivist recommended continued use of
16 agencies’ Transparency Plans to release information covered by the Act.
17

18 Therefore, I direct the NDC to continue to use the Transparency Plans to conduct
19 further reviews of any information covered by the Act that has been postponed
20 from public disclosure.” June 2023 Order at §5.
21
22
23
24

1 **SUMMARY OF THE RELIEF SOUGHT IN THIS MOTION**
2
3

4 The recently obtained statement from Secret Service agent Paul Landis
5 illustrates the importance of the relief sought by Plaintiffs in this motion:
6

7 **1. Section 6(a) of the 2022 Biden Memo must be set aside and the**
8 **documents re-reviewed based on the proper statutory standard**

9 6(a) of the 2022 Biden Memo states that "*in applying the statutory standard,*
10 *agencies shall (1) accord **substantial weight** to the public interest in transparency*
11 *and full disclosure of any record that falls within the scope of the Act.*" (See Dkt.
12 51, Second Declaration of William M. Simpich, Exhibit D.) [emphasis added].
13
14

15 Section 6(a) was not the proper standard for the agencies and NARA to use
16 when they analyzed the assassination documents. Section 3(10) of the Act defines
17 public interest as "*the compelling public interest in the prompt public disclosure*".
18

19 Nonetheless, the agencies were instructed by the President to give "**substantial**
20 **weight**" to the public interest.
21

22 For that reason alone, another review of the documents is necessary. The
23 agencies and NARA were instructed to use the wrong standard, and NARA took
24 no action to correct this incorrect advice from the President.
25
26
27
28

1 **2. The NARA Guidance Document must be set aside.**

2 Section 5(g)(2)(D) of the Act is based on “an identifiable harm to the
3 military defense, intelligence operations, law enforcement, or conduct of foreign
4 relations”. The grounds for postponing the release of names and identities are
5 found in Section 6, which the court has found is not applicable with regards to the
6 certifications issued by the President pursuant to 5(g)(2)(D) as discussed in this
7 brief.
8

9 The Transparency Plans of the agencies rely on Section 7 of the 2022 Biden
10 Memo, which states that “each Transparency Plan details the event-based or
11 circumstance-based conditions that will trigger the public disclosure of currently
12 postponed information by the National Declassification Center (NDC) at NARA.”
13 Based on that reliance, the agencies’ Transparency Plans state that a previously
14 unrevealed name and identity cannot be revealed until the person dies or turns 100
15 years old. This is not the statutory standard.
16

17 NARA set the grounds for this error by the agencies when it created a
18 guidance document that uses as a standard for review “the impact on agency
19 operations” and is therefore arbitrary and capricious. An immediate re-review of
20 the documents that complies with the statutory grounds for postponement is
21 necessary to determine what names can be released now.
22

1 **3. The agencies and NARA must continue to engage in periodic review.**

2 Section 9(d)(2) of the JFK Records Act is unequivocal on the continued
3
4 need for periodic review, stating that "*any executive branch assassination record*
5 *postponed by the President shall be subject to the requirements of periodic review,*
6 *downgrading and declassification of classified information, and public disclosure*
7 *in the collection set forth in section 4.*"

8
9 Both the 2022 Biden Memo (at Section 7) and 2023 Biden Memo (at Section
10 5) direct the use of the Transparency Plans created by the agencies and reviewed
11 by NARA, even though these Plans override the JFK Records Act's standards in
12 3(10), 5(g)(2)(D), and ignore the mandate for continued periodic review in Section
13 9(d)(2).
14
15

16 **ARGUMENT**

17
18
19 **1. Section 6(a) of the 2022 Biden Memo must be set aside**

20 Plaintiffs ask the court to set aside Section 6(a) of the 2022 Biden Memo for
21 rewriting the definition of "public interest" rather than using the definition of
22 "public interest" used in the JFK Records Act. The proper remedy is a re-review of
23 the remaining documents - also known as a "periodic review" as set forth in JFK
24 Records Act Section 9(d)(2).
25
26
27

1 6(a) of the 2022 Biden Memo states that "*in applying the statutory standard,*
2 *agencies shall (1) accord **substantial weight** to the public interest in transparency*
3 *and full disclosure of any record that falls within the scope of the Act.*" [*emphasis*
4 *added*]

5
6 6(a) substitutes itself as the definition of "public interest" - but "public
7 interest" is defined in 3(10) of the Act as "the compelling interest in the prompt
8 public disclosure of assassination records for historical and governmental purposes
9 and for the purpose of fully informing the American people about the history
10 surrounding the assassination of President John F. Kennedy."

11
12 The agencies used Biden 2022 Memo 6(a) as the standard by the agencies
13 and NARA to give "**substantial weight**" to the public interest - not "*the compelling*
14 *public interest in the prompt public disclosure*" cited in the JFK Records Act 3(10).

15
16 The President can only exercise the statutory authority granted to him by 7-
17 Congress. This means the President cannot rewrite the law to use less stringent
18 standards than those established by Congress.

19
20 The Transparency Plans do not establish events that provide for automatic
21 declassification, Instead, they only identify events or circumstances that will
22 trigger review by the relevant agency and the NDC. There is no longer any role for
23 the President in these future postponement decisions. Indeed, the President could
24
25
26
27

1 not have been clearer that this was his decision when he wrote in paragraph 1 that
2 the order was the final certification required under the Act. Given Section 9(d)(2)'s
3 mandate for "periodic review, downgrading and declassification", this statement
4 and the delegation of future postponement decisions was *ultra vires* for which the
5 plaintiffs are entitled to request review by this Court.
6
7

8 Nor can the President water down the "public interest" aspect of the JFK
9 Act, as he did in 6(a).
10

11 This Court has the duty to curb the President's *ultra vires* actions.

12 The President asked NARA to review the Transparency Plans and
13 authorized the use of Transparency Plans to govern future postponement decisions
14 based on NARA's review. NARA approved the Transparency Plans despite their
15 use of criteria that violate the express terms of the statute was arbitrary and
16 capricious. The Court has a duty to review NARA's unlawful actions under the
17 APA.
18
19
20

21 The Court should strike those portions of the Transparency Plan that do not
22 comply with the JFK postponement criteria.
23
24

25 **2. NARA's Guidance Document must be set aside**
26
27
28

1
2 Section 7 states that "event-based or circumstance-based conditions" will
3 trigger the public disclosure of currently postponed information" by the National
4 Declassification Center. The Department of Defense and the CIA use "the date of
5 death of a living person" as a triggering event pursuant to Section 7 of the 2022
6 Biden Memo. See Dkt. 51, Second Simpich Declaration, filed 5/23/23, Exhibit E,
7 pages 1-3 (re CIA Transparency Plan); Exhibit F, page 2 (re DoD "JFK
8 Assassination Record Withholds"). Such an event is not allowed by the JFK
9 Records Act and NARA cannot use it as a postponement standard.
10
11
12
13

14 Section 7 of the 2022 Biden Memo states that "each agency prepared a plan
15 for the eventual release of information (Transparency Plan) to ensure that
16 information would continue to be disclosed over time as the identified harm
17 associated with release of information dissipates. Each Transparency Plan details
18 the event-based or circumstance-based conditions that will trigger the public
19 disclosure of currently postponed information by the National Declassification
20 Center (NDC) at NARA." This statement is repeated in Section 5 of the 2023
21 Biden Memo. Dkt. 65-1.
22
23
24

25 The President is free to cite "triggering events" or a "triggering
26 circumstance", but these triggering events or circumstances are limited by the
27

1 statute which establishes the grounds for postponement. In other words, the
2 President may not approve triggering events or circumstances that are less
3 stringent than the statute. 5(g)(2)(D) states that the President must certify "an
4 identifiable harm to the military defense, intelligence operations, law enforcement,
5 or conduct of foreign relations...of such gravity that it outweighs the public interest
6 in disclosure."
7

8
9 5(g)(2)(D) does not cite the name and identity of a living person or waiting
10 for this person's death as a basis for postponement. Section 6 addresses this issue,
11 but the court has determined that this section is applicable to "postponement after
12 an initial determination by the ARRB. Section 5(g)(2)(D) is a separate authority
13 that applies after the end of the 25-year deadline and is the authority invoked by
14 the President here." 7/14/23 Order, p. 7, footnote 4.
15
16
17

18 The 2022 Biden Memo relies, as it must, on Section 5(g)(2)(D). The name
19 and identity of a living person - standing alone - is a non-statutory criterion that
20 cannot be used to justify continued postponement. It is the information held by
21 that person, or the threat caused by the exposure of that person that determines
22 whether there is "an identifiable harm to the military defense, intelligence
23 operations, law enforcement, or conduct of foreign relations." Privacy – standing
24 alone - cannot be a factor. Nor can the impact on agency operations – see the
25
26
27
28

1 problem with the “guidance document” at page 5 of this brief..

2 NARA tried to address the issue of "identifiable harm" by creating
3 subgroups re "PII (personal identifiable information)" in each of the above four
4 categories. However, the manner that these subgroups were created violates the
5 JFK Records Act.
6
7

8 The new allegations in the Third Amended Complaint (Dkt. 77, paragraphs
9 67-69) explains this violation:
10

11 “67. On or about February 2017, NARA sent letters to all agencies and
12 departments with equities in the withheld assassination records to inform them that
13 NARA would be releasing the remaining records by October 2017 unless further
14 postponements were requested and certified by the president. To assist with this
15 process, NARA helped develop a guidance document titled “*Procedures for*
16 *Processing Remaining Postponed Records in the President John F. Kennedy*
17 *Assassination Records Collection Act of 1992*” (Note: See Plaintiffs’ attached
18 Request for Judicial Notice of this “Guidance Document” that established the
19 procedures to be followed by all affected Federal agencies/departments on how and
20 when withheld assassination records were to be processed.)
21
22
23
24

25 “68. For previously postponed records for which agencies/departments
26 intend to request continued postponement from the President, paragraph 2(a)(ii)
27

1 of this guidance document provides that each agency/department had to submit
2 “(ii) supporting documentation indicating (I) the rationale for such postponement,
3 consistent with the criteria for postponement specified in section 5(g)(2)(D) of the
4 Act; **(2) the impact of disclosure on current agency/department operations;**
5 and (3) when possible, a specific proposed date or an independently verifiable
6 event when the record(s) can be released”. [emphasis added]
7

8
9 “69. **It should be noted that (2)(a)(ii)(2) requiring disclosure on “impact**
10 **of disclosure on current agency/department operations” is a non-statutory**
11 **criterion.** NARA acted arbitrarily and capriciously by approving and
12 implementing the guidance document JFK records using nonstatutory criteria in
13 violation of 5 U.S.C. § 706(2)(A).” [emphasis added]
14

15
16 2(a)(ii)(2)’s “impact of disclosure” is a non-statutory criterion not included
17 in the JFK Records Act. 2(a)(ii)(1)’s “rationale...consistent with the criteria for
18 postponement specified in section 5(g)(2)(D)” completely covers the ground. The
19 way these names went into the PII categories is flawed. This aspect must be
20 removed as a criterion and the names reviewed once more.
21
22

- 23
24 **3. The agencies and NARA must continue to engage in periodic review,**
25 **and the portion of the 2023 Biden Memo stating that the President’s**
26 **duty to certify the postponement of records is no longer required**
27 **must be set aside.**

1 The court's order of 7/14/23 states that "the JFK Act imposes a duty on the
2 "originating agency" and the Archivist to perform periodic reviews of the
3 postponed releases, JFK Act § 5(g)(1)" Dkt. 68, Order, 7:7-8.

4
5 The order also states that "The President's power further to postpone record
6 releases is described in a subsequent provision, JFK Act § 5(g)(2)(D), which was a
7 power **seemingly meant to conclude the periodic review process** described in
8 Sections 5(g)(2)(A)–(C). It would therefore make little sense for Sections
9 5(g)(2)(A)– (C) to modify the President's power under Section 5(g)(2)(D). (*Id.*,
10 14:1-14:5, emphasis added)

11
12
13
14 Plaintiffs maintain that although the court did state that the President's power
15 to postpone record releases under 5(g)(2)(D) is not modified by the periodic review
16 process, the court simply posed a question as to whether the 5(g) periodic review
17 process between the Archivist and the agencies was concluded.

18
19 Section 9(d)(2) is unequivocal that the review process was not concluded
20 with the invocation of 5(g)(2)(D) in 2017 and thereafter: "Any executive branch
21 assassination record postponed by the President shall be subject to the
22 requirements of periodic review, downgrading and declassification of classified
23 information, and public disclosure in the collection set forth in section 4."

24
25
26 The periodic review process between these two entities is not concluded,
27

1 and the President acted in an *ultra vires* manner by stating that his duties under the
2 Act are concluded. Although the President does not participate in a periodic
3 review, the President has a duty to engage in a 5(g)(2)(D) certification if the
4 agencies and NARA seek to continue to postpone records once the periodic review
5 is concluded.
6
7

8 Indeed, the actions of the Defendant over the past six years belie its legal
9 argument. The procedure used by the Defendant since 2017 replicates the statutory
10 period review process with NARA serving the same role as the ARRB. In the
11 summer of 2017, NARA contacted the agencies with postponed records and told
12 them the records would be disclosed unless the agencies provided support for
13 further postponement much in the same manner that the ARRB informed the
14 agencies when it decided to disclose records.
15
16
17

18 If the agencies sought postponement, they provided grounds for
19 postponement. If NARA disagreed with the grounds for postponement (which it
20 did in memos in August of 2017), the agencies then sought review by the President
21 just like the process provided in section 9(d) of the statute.
22
23

24 This same process was followed for each presidential postponement
25 certification AFTER the statutory deadline expired on October 26, 2017. Having
26 followed the same periodic review process in 2018, 2021, 2022 and 2023,
27
28

1 the Defendant should now be estopped from arguing that the statutory periodic
2 review requirements ceased on October 26, 2017.

3
4 Accordingly, NARA must be ordered to halt this *ultra vires* conduct by the
5 President. Future periodic reviews must be conducted, and the President may have
6 to issue a new 5(g)(2)(D) order after the periodic review is completed - as the
7 President has repeatedly done during the 2017-2023 period.

8
9 Section 1 of the 2023 Biden Memo states his certification in this
10 memorandum is “the last required under the Act”. Dkt. 65-1. This portion of this
11 Memo should be stricken.

12
13
14 **4. NARA acted arbitrarily and capriciously in approving the**
15 **Transparency Plans.**

16 In the 2022 Biden Memo, the President directed that the Transparency Plans
17 be used by the NDC to conduct future reviews of information that had been
18 postponed under his order. He made this decision because “*These Transparency*
19 *Plans have been reviewed by NARA, and the Acting Archivist has advised that use*
20 *of the Transparency Plans by the NDC will ensure appropriate continued release*
21 *of information covered by the Act.*” 2022 Biden Memo at § 7.

22
23
24 The Transparency Plans approved by NARA allowed for the postponement

1 of names of persons until their death. However, NARA previously concluded that
2 such an approach was inconsistent with the standards of the JFK Act. Adopting
3 inconsistent interpretations of the statute is the very essence of arbitrary and
4 capricious action. See Schnapf Dec., Bosanko Memo at page 3.
5

6
7 For example, when the FBI sought to postpone release of names of living
8 persons who were mentioned in, subject to investigation or who provided
9 information to the FBI, NARA concluded:
10

11 *“As justification for each of these, the FBI relies on broad statements*
12 *concerning possible stigmatization, harassment, or even violent retribution. As the*
13 *information is concerning events more than 50 years ago, while there may be a*
14 *residual privacy interest by the individuals named, it is difficult to imagine*
15 *circumstances under which an individual could be harmed by the release of their*
16 *name in a file in the JFK Collection. **The standard set by the JFK Act and the***
17 ***Assassination Records Review Board during their deliberations is a high one:***
18 ***there has to be "clear and convincing evidence" of a "substantial risk of harm,"***
19 ***and any invasion of privacy is "so substantial that it outweighs the public***
20 ***interest."** Bosanko Memo at page 3. [emphasis added]*
21

22 With respect to names of confidential sources that the FBI sought to
23 withhold from disclosure, NARA determined:
24

25 *“...Some of the sources being protected, however, are in the main*
26 *investigative case files for Jack Ruby, Oswald, and the JFK investigation. Because*
27 *the intent of the Act was to release information concerning the assassination, and*
28 *these events are 50 or more years old, and these files clearly relate directly to the*
*assassination, **NARA opposes the continued postponement of any confidential***
source information in these files, barring clear and convincing evidence of a
substantial risk of harm. NARA otherwise has no objection to the continued
postponement of source information in other files, with the exception of documents
in the [La Cosa Nostra] bucket.” Bosanko Memo at page 4[emphasis added]

1 In response to the FBI's request to continue to protect information about the
2 identities of foreign law enforcement agencies that appear in the records, and
3
4 specific named foreign law enforcement and other foreign government sources,
5 NARA concluded:

6
7 **“The application of this standard runs counter to the "clear and**
8 **convincing evidence" standard** and ignores the balancing test written into JFK
9 Act Section 6(4), which concerns the relationship between government agents and
10 cooperating foreign governments. The FBI's assertion that the information would
11 do little to further the public's understanding of the assassination, because, ‘in
12 nearly all instances, the foreign government information at issue concerns a
13 specific investigation of an individual and does not speak directly or indirectly
14 about the assassination,’ ignores the Review Board's broad view of what
15 constitutes an assassination record. In many instances, the foreign government
16 information at issue concerns a now-deceased critic of the Warren Commission, a
17 subject clearly related to the assassination. In any event, **the weight is on showing**
18 **harm that outweighs the public interest, not the other way around.”** Bosanko
19 Memo at page 5 [emphasis added]

20 Whether or not § 6(4) is applicable, it is powerful evidence of the public
21 interest as defined by Congress. When the FBI also sought to withhold 6,097 files
22 involving members of organized crime or La Cosa Nostra (LCN), NARA found:

23 **“In justifying the continued postponement of postponed LCN documents,**
24 **the FBI's appeal justification relies on broad statements of potential harms,**
25 **instead of the "clear and convincing evidence" standard of the JFK Act.**
26 Because we can find no indication that the FBI made any attempt to determine if
27 additional information could be released, NARA cannot support the continued
28 postponement of these records absent additional work by FBI.” Bosanko Memo at
page 5. [emphasis added]

1 In first rejecting proposed postponements but then approving Transparency
2 Plans that contained standards that contradicted NARA's interpretation as reflected
3
4 in the Bosanko Memo, NARA adopted different interpretations of the same
5 statutory duties. Differing interpretations without any explanation - much less a
6
7 rational explanation - constitutes arbitrary and capricious decision-making.

8 Since the President relied on this unlawful decision-making by NARA in
9 approving the Transparency Plans, the President acted *ultra vires*. The Court
10
11 should conduct a review of the grounds for postponement in the Transparency
12 Plans and enjoin the agencies from using the Transparency Plans until the Court
13
14 evaluates the lawfulness of the Transparency Plans. If the Court agrees with the
15 Plaintiffs that the Transparency Plans violate the standards of the JFK Act, the
16
17 Court should order the agencies to revise the Transparency Plans. The Plaintiffs
18
19 request that the Court retain jurisdiction over the Transparency Plans so it can
20
21 determine if the revised Transparency Plans comply with the "high" standards of
22 the JFK Act.

22 ///

23 ///

24 ///

25 ///

1 Plaintiffs also rely on Section 11 of the JFK Records Act, which makes it
2 clear that “when this Act requires...public disclosure, it shall take precedence over
3 any other law...judicial decision construing such law, or common law doctrine that
4 would otherwise prohibit such...disclosure...”
5

6
7 As stated by this court, “an injunction on NARA alone would suffice in
8 redressing the averred injuries caused by the implementation of the Biden
9 Memoranda.” Dkt. 68, 6:13-15. *Juliana v. United States*, 339 F. Supp. 3d 1062,
10 1079 (D. Or. 2018), *rev’d and remanded on other grounds*, 947 F.3d 1159 (9th Cir.
11 2020).
12

13
14 The relevant portions of the Transparency Plans and the Guidance
15 Document should be stayed while this litigation is in progress.
16

17 **b. Plaintiffs face irreparable injury if relief is denied**

18 On element (2), “whether the applicant will be irreparably injured absent a
19 stay”: Witnesses in this 60-year-old case are dying every day. Witnesses who were
20 30 years old in 1963 are now 90, if they are still alive. Many key witnesses were in
21 their twenties during the 1960s. When one of these witnesses die, their memories
22 are lost. These memories could also lead to other important witnesses and
23 documents. Film and photo evidence also need to be in controlled conditions.
24 Time is of the essence in a case that is based on the preservation of history.
25
26
27

1 Common sense also tells us that individuals in the documents are now at
2 least 80 or even 90 years old and at that age the risk of death and dementia
3 exponentially accelerates.
4

5 Plaintiffs know first-hand that these are very real and actual concerns
6 because MFF members have unfortunately encountered these situations since
7 NARA began releasing assassination records in 2017. 2nd Declaration. of
8 Lawrence Schnapf (Dkt. 63, paras. 3-5) and Declaration of William E. Kelly, Jr.
9 (Dkt. 63-1, paras. 3-6). The Schnapf Declaration (at paragraph 8) recounts the
10 story of CIA officer Donald Heath, who passed away in 2019 while living here in
11 the San Francisco Bay Area. Mr. Heath's name was not released until December
12 15, 2022.
13
14
15
16

17 The document containing Mr. Heath's name confirmed that CIA had tasked
18 the Miami CIA station to interview pro-Castro and anti-Castro activists in Miami
19 the weekend of the assassination to determine if they had been involved in the
20 assassination. The CIA had previously denied that such an investigation existed.
21

22 Mr. Heath could have answered a multitude of questions about the
23 investigation of the Cubans. His knowledge will never be known.
24

25 The Kelly Declaration (Dkt. 63-1, para. 4 & Exhibit 1) recounts that the
26 identity of the CIA asset NIEXIT-3 has still not been revealed – he had two Dallas
27

1 contacts stating that JFK was killed due to a joint operation by the Chinese
2 Communists and Castro. There was also discussion that the Soviets made up the
3 rumor to “make it rough” on the Chinese Communists and Castro.
4

5 **c. Relief will not substantially injure any other interested parties**

6
7 On element (3), “whether issuance of the relief will substantially injure the
8 other parties interested in the proceeding”, it is hard to conceive of any reason that
9 would injure either NARA, other agencies, or the President. There is no fear of
10 physical injury or institutional damage. Nor is there any fear of monetary loss.
11

12 **d. The public interest is best served by fully informing the American
13 people about the history surrounding the Kennedy assassination**

14
15 On element (4), “where the public interest lies.”: See *Lair v. Bullock*, 697
16 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken*, 556 U.S. at 434). This element is
17 in the Act’s definition of “public interest” at § 3(10): “the compelling interest in
18 the prompt public disclosure of assassination records for historical and
19 governmental purposes and for the purpose of fully informing the American people
20 about the history surrounding the assassination of President John F. Kennedy.”
21
22

23 Plaintiffs made the case on “public interest”. Plaintiffs have no interest in
24 challenging the Defendant’s rationale for withholding documents - what the
25 Plaintiffs are calling for is compliance with the statute by utilizing the proper
26 standard of review of the documents still withheld at this very late date.
27
28

1
2
3 **6. Plaintiffs seek declaratory relief**

4 Plaintiffs seek immediate relief, as the opportunity to interview these elderly
5 individuals decreases every day. Plaintiffs anticipate that their request for a stay
6 on the Transparency Plans can be attained with injunctive relief.
7

8 Plaintiffs submit that the relief sought in the Motion can be characterized as
9 either injunctive relief or declaratory relief. *Merrill Lynch, Pierce, Fenner & Smith*
10 *v. Doe*, 868 F. Supp. 532, 535-536 (N.Y.S.D. 1994) states that a request for
11 preliminary declaratory relief can be based on either the Federal Declaratory
12 Judgment Act, 28 U.S.C. 2201, or the All Writs Act, 28 U.S.C. 1651. The case
13 pointed out that it is the “least intrusive way of vindicating its right to proceed in
14 federal court.” Both statutes were alleged by Plaintiffs in the Second Amended
15 Complaint, ECF 44, 5:6-9. Plaintiffs acknowledge that the cases on the issue of
16 preliminary declaratory relief are split. If the court is not inclined to grant relief in
17 this fashion, Plaintiffs repeat their request for the earliest possible date for a speedy
18 hearing for declaratory judgment pursuant to FRCP 57 for any of the remaining
19 issues addressed in this brief. Plaintiffs respectfully submit that there is no need for
20 discovery on these issues, and that this is a matter of statutory interpretation that
21 should be resolved by the court at the first possible date.
22
23
24
25
26
27
28

1 In *Miller v. Warner Literary Group LLC*, 2013 WL 360012, at *2 (D. Colo.
2 2013), a novelist sought a declaration allowing him to terminate a contract with his
3 agent in advance of an upcoming publication date. As in *Miller*, “the raw facts” are
4 “not in dispute” and the parties’ disagreement “center[ed] on the applicable legal
5 standard.” Also see *National Basketball Association v. Williams*, 857 F. Supp.
6 1069, 1071 n.1 (S.D.N.Y. 1994), aff’d, 45 F.3d 684 (2d Cir. 1995).
7
8

9 Given the “imminent deadline,” the *Miller* court found “good cause” to
10 resolve a motion for declaratory judgment “on an expedited basis.” Id. Defendant
11 had notice as of October 2022’s complaint of Plaintiffs’ intent to seek expedited
12 relief. Also see Dkt. No. 39, p. 35.
13
14

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

16 If the court believes that injunctive or declaratory relief is unavailable to
17 Plaintiffs, then a writ of mandamus would be the only adequate remedy available.
18 See *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1120 (9th Cir. 2001) (holding
19 mandamus is appropriate where plaintiffs have no other adequate remedy).
20
21

22 § 706(1) relief and mandamus relief are considered to “mirror” each other.
23 *Plaskett v. Wormuth*, 18 F. 4th 1072, 1081 (9th Cir. 2021).
24

25 **CONCLUSION**

26 For these reasons stated above, we ask the court to issue:
27
28

1 1) A preliminary injunction to halt implementation of Section 6(1)
2 of the 2022 Biden Memo, in regard to the “substantial weight” given to the public
3 interest, which violates Section 3(10) of the JFK Records Act; and specifically, to
4 order a re-review of the continued postponement of the release of the names and
5 identities of the persons cited in these documents to see if there is an "identifiable
6 basis" to withhold these names and identities pursuant to 5(g)(2)(D) of the JFK
7 Records Act;
8
9

10
11 2) To halt implementation of 2(a)(ii)(2) in the NARA Guidance Document,
12 with a re-review as described above;
13

14 3) For the agencies and the Archivist to establish a timetable for periodic
15 review of all postponed documents Section 9(d)(2) of the JFK Act;
16

17 4) For an order for re-review of all of the Transparency Plans;

18 5) Alternatively, Plaintiffs request a speedy hearing for declaratory
19 judgment for any remaining issues at the first possible date, pursuant to FRCP 57.
20

21 6) Or, in the alternative, to issue a writ for mandamus as appropriate.
22

23
24 Dated: October 26, 2023

25 _____/s/_____
26 WILLIAM M. SIMPICH
27 LAWRENCE P. SCHNAPF
28 Attorneys for Plaintiffs