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

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

20 Plaintiffs,

21 v.

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

26 Defendants.

No. 3:22-cv-06176-RS

NOTICE OF MOTION FOR INJUNCTIVE
RELIEF, DECLARATORY RELIEF OR
MANDAMUS ORDERING NARA TO
PUBLICLY DISCLOSE LEGISLATIVE
RECORDS PURSUANT TO THE JFK
RECORDS ACT; POINTS AND
AUTHORITIES

Date: January 18, 2024

Time: 1:30 pm

Dept: Hon. Richard Seeborg

27 **INTRODUCTION**

28 Plaintiffs move the court to grant this motion for injunctive relief, declaratory relief, or
mandamus for an order for NARA to publicly disclose legislative records pursuant to the JFK
Records Act.

1 As stated in the Court’s order of 6/14/23, ECF 68 12:5-23:

2 “Plaintiffs’ challenge to NARA’s failure to release all legislative branch documents in
3 2017 also has merit, since the Presidential authority claimed for the postponements seems limited
4 to records originated by the executive branch.

5 “The language and structure of Section 9 support this conclusion. Section 9(c)(4)(B)
6 provides that after the ARRB makes its determination as to whether an assassination record
7 should be publicly disclosed, it should notice the President for ‘determinations regarding
8 executive branch assassination records,’ and ‘the (Congressional) oversight committees...in the
9 case of legislative branch records.’

10 “Section 9(d)(1) imbues the President with the ‘sole and nondelegable authority to
11 require the disclosure or postponement’ of records that are either (1) ‘an executive branch
12 assassination record’ or (2) information contained in an assassination record, obtained or
13 developed solely within the executive branch,’ but no others.

14 “This siloed structure - requiring notification to the executive and legislative bodies,
15 respectively, and cabining the President’s ability to override the ARRB’s determinations
16 regarding postponement to executive branch records – comports with basic separation of powers
17 principles.

18 “Moreover, the interpretation that the President’s postponement authority in Section
19 5(g)(2)(D) is limited to executive branch records is also bolstered by the JFK Act’s legislative
20 history. The Senate committee report on the Act clearly stated that the President’s ability to
21 postpone release of records after 25 years only applied ‘in the case of executive branch records’.
22 S. Rep. 102-328, at 19, 1992 U.S.C.A.A.N. 2965, 2967; *see id.*, (requiring Congressional
23 resolutions in the event Congress disagrees with ARRB determinations ‘for congressional
24 records’).”

25 **1. NARA has an affirmative duty under Section 5(e)(1) to Make These Legislative
26 Records “Immediately Available to the Public”**

27 Plaintiffs have received an estimate from the Department of Justice as to the number of
28 documents and provided input to DOJ in return. Rather than burden the court with these
estimates, Plaintiffs will state that they are uncertain as to the number and nature of which
records are withheld at the present time until final clarification is provided.

Defendants have not yet taken action to release these records since the court’s order was
issued on 7/14/23.

The Act states that this “legislation is necessary because congressional records related to

1 the assassination of President John F. Kennedy would not otherwise be subject to public
2 disclosure until at least the year 2029.” Section 2(a)(4).

3 The Act also states that at the time of its passage in 1992 “most of the records related to
4 the assassination of President John F. Kennedy are almost 30 years old, and only in the rarest
5 cases is there any legitimate need for continued protection of records.” Section 2(a)(7).

7 The Congress saw no need to protect these records beyond October 26, 2017.

8 NARA had an affirmative duty, as Section 5(e)(1) states that “each government office
9 shall transmit to the Archivist, and make immediately available to the public, all assassination
10 records that can be publicly disclosed”.

12 Plaintiffs ask for an order stating that all of these records and any other “legislative
13 branch records” shall be fully and completely released to the public within 30 days of the court’s
14 order. Plaintiffs waive any express or implied duty to provide social security numbers in the
15 interest of an expeditious release. Plaintiffs will consider any other issues that may be raised by
16 the Department of Justice in its opposition brief, but emphasize that the time for release is now.

18 There is no reason for delay in the release of these records. As stated above in the
19 court’s order , the time for Congressional action for further delay expired on 10/26/17.

20 The JFK Records Act mandates at Section 5(e) “each Government office shall transmit to
21 the Archivist, and make immediately available to the public, all assassination records that can be
22 publicly disclosed...without any redaction, adjustments or withholding under the standards of
23 this Act.”

25 Section 11(a) is entitled: “Precedence over other law”. It states that “when this Act
26 requires...public disclosure, it shall take precedence over any other law...judicial decision
27 construing such law, or common law doctrine that would otherwise prohibit such...disclosure.”
28

1 Such a sweeping legislative override supersedes all other statutes and case law, with the
2 exception of the Constitution itself.

3 Section 2(b) states that the purpose of the Act is “to require the expeditious public
4 transmission to the Archivist and public disclosure of such records.”
5

6 **2. Plaintiffs meet all four factors for injunctive relief and similar remedies**

7 *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken*, 556 U.S. at
8 434) sets forth a four-element test for injunctive relief.

9 **a. Plaintiffs are likely to succeed on the merits**

10 On element (1), “whether the applicant has made a strong showing that it is likely to
11 succeed on the merits”, the Plaintiffs’ statutory interpretation regarding §§ 5(e)(1) is logical and
12 straightforward. Nothing in the JFK Act provides a good argument to withhold these documents
13 after 60 years, particularly because the legislative branch took no action to delay the release date
14 of 2017.
15

16 Section 12(b) mandates that all remaining provisions of the Act “continue in effect until
17 such time that the Archivist certifies to the President and the Congress that all assassination
18 records have been made available to the public in accordance with the Act.” Therefore, there is
19 no good argument that Section 5(e)(1) has lost any of its vitality, and the legislative documents
20 should be made “*immediately available to the public*”. NARA should have released these
21 documents more than six years ago on its own initiative.
22

23 Plaintiffs have provided the Court in the brief filed earlier today with an analysis of the
24 specific provisions that remain in force pursuant to 12(b). Defendant has provided no such
25 analysis to date.
26
27
28

1 Similarly, the adjoining brief provided the court with an analysis of the “unreasonable
2 delay” and “discrete actions” that expose NARA to liability under the APA pursuant to 706(1)
3 and 706(2). There is simply no reason for NARA for any further delay in providing these
4 records, and NARA acted in an arbitrary and capricious manner in failing to produce these
5 documents back in 2017 and in failing to act a prompt manner to take action to release these
6 documents to the public in the aftermath of the court’s decision.
7

8 Section 11(a) requires “transmission of records to the Archivist” by the agencies and
9 exercises a legislative override over any other law or judicial decision that would otherwise
10 prohibit such transmission. The impact of this statutory provision is wide-reaching and
11 provides another basis for NARA to dispense with any further delays in releasing these
12 legislative records.
13

14 As stated by this court, “an injunction on NARA alone would suffice in redressing the
15 averred injuries caused by the implementation of the Biden Memoranda.” Dkt. 68, 6:13-15.
16 *Juliana v. United States*, 339 F. Supp. 3d 1062, 1079 (D. Or. 2018), *rev’d and remanded on*
17 *other grounds*, 947 F.3d 1159 (9th Cir. 2020).
18

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

20 On element (2), “whether the applicant will be irreparably injured absent a stay”:

21 Plaintiffs seek an order for NARA to release these legislative records as quickly as
22 possible. Plaintiffs suggest a deadline of 30 days from the date of the issuance of the order.
23 Witnesses are dying, and their stories will be lost forever. Potential leads to other witnesses and
24 documents will be lost. Such a loss represents a fundamental dis-service to history – and there is
25 no good reason for the names and identities of this individuals and these documents to not be
26 obtained at this time, 30 years after this remedial statute was enacted to prevent this kind of loss.
27
28

1
2 **c. Relief will not substantially injure any other interested parties**

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

8
9 **d. The public interest is best served by fully informing the American people
10 about the history surrounding the Kennedy assassination**

11
12 On element (4), “where the public interest lies.”: See *Lair v. Bullock*, 697 F.3d 1200,
13 1203 (9th Cir. 2012) (quoting *Nken*, 556 U.S. at 434). This element is in the Act’s definition of
14 “public interest” at § 3(10): “the compelling interest in the prompt public disclosure of
15 assassination records for historical and governmental purposes and for the purpose of fully
16 informing the American people about the history surrounding the assassination of President John
17 F. Kennedy.”
18

19 Plaintiffs made the case on “public interest”. Plaintiffs have no interest in challenging
20 the Defendant’s rationale for withholding documents - what the Plaintiffs are calling for is
21 compliance with the statute by utilizing the proper standard of review of the documents still not
22 transmitted at this very late date.
23

24
25 **3. Plaintiffs seek declaratory relief**

26 Plaintiffs seek immediate relief, as the opportunity to interview these elderly individuals
27
28

1 decreases every day. Plaintiffs anticipate that this request for relief pursuant to §§ 5(e)(1), 12(b)
2 and related sections of the Act can be attained with injunctive relief.

3 Plaintiffs submit that the relief sought in the Motion can be characterized as either
4 injunctive relief or declaratory relief. *Merrill Lynch, Pierce, Fenner & Smith v. Doe*, 868 F.
5 Supp. 532, 535-536 (N.Y.S.D. 1994) states that a request for preliminary declaratory relief can
6 be based on either the Federal Declaratory Judgment Act, 28 U.S.C. 2201, or the All Writs Act,
7 28 U.S.C. 1651. The case pointed out that it is the “least intrusive way of vindicating its right to
8 proceed in federal court.” Both statutes were alleged by Plaintiffs in the Second Amended
9 Complaint, ECF 44, 5:6-9. Plaintiffs acknowledge that the cases on the issue of preliminary
10 declaratory relief are split. If the court is not inclined to grant relief in this fashion, Plaintiffs
11 repeat their request for the earliest possible date for a speedy hearing for declaratory judgment
12 pursuant to FRCP 57 for any of the remaining issues addressed in this brief. Plaintiffs
13 respectfully submit that there is no need for discovery of these issues, and that this is a matter of
14 statutory interpretation that should be resolved by the court at the first possible date.

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

24
25 Given the “imminent deadline,” the *Miller* court found “good cause” to resolve a motion
26 for declaratory judgment “on an expedited basis.” Id. Defendant had notice as of October 2022’s
27 complaint of Plaintiffs’ intent to seek expedited relief. Also see Dkt. No. 39, p. 35.
28

1 **4. Plaintiffs seek mandamus, if necessary**

2 If the court believes that injunctive or declaratory relief is unavailable to Plaintiffs, then a
3 writ of mandamus would be the only adequate remedy available. See *In re Cal. Power Exch.*
4 *Corp.*, 245 F.3d 1110, 1120 (9th Cir. 2001) (holding mandamus is appropriate where plaintiffs
5 have no other adequate remedy).
6

7 § 706(1) relief and mandamus relief are considered to “mirror” each other. *Plaskett v.*
8 *Wormuth*, 18 F. 4th 1072, 1081 (9th Cir. 2021).
9

10 **CONCLUSION**

11 The legislative records should have been made immediately available to the public by
12 NARA in October 2017, pursuant to §§ 5(e)(1), 12(b) and related sections of the Act.

13 The Defendant NARA should be ordered to release to the public all legislative records
14 obtained pursuant to the JFK Records Act, and to have any legislative records that should be
15 provided to it under the Act transmitted to it.
16

17 Plaintiffs request that these orders have a specific time limit – Plaintiffs suggest 30 days
18 from the date of the court’s order.

19 Respectfully submitted,
20

21
22
23 _____/s/_____
24 WILLIAM M. SIMPICH
25 LAWRENCE P. SCHNAPF
26 Attorneys for Plaintiffs

27 Dated: December 14, 2023
28