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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.  
27

No. 3:22-cv-06176-RS

PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR INJUNCTIVE  
RELIEF, DECLARATORY RELIEF OR  
MANDAMUS TO ORDER NARA TO  
COLLECT ALL ASSASSINATION  
RECORDS AND TO HALT ADVISING  
RESEARCHERS TO FILE FOIA ACTIONS  
RATHER THAN JFK ACT REQUESTS

Date: January 18, 2024

Time: 1:30 pm

Dept: Hon. Richard Seeborg

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1           **INTRODUCTION**

2           Plaintiffs bring this motion pursuant to JFK Act Section 12(b), seeking an order from the  
3 court instructing NARA to collect all remaining assassination records before the Archivist  
4 certifies that “all assassination records have been made available to the public in accordance with  
5 the Act.” Plaintiffs recognize that the court rejected its claim that NARA is the successor in  
6 function to the ARRB, and now ask the court to analyze this case through the lens of § 12(b).  
7

8           Plaintiffs also seek an order from the court to prevent NARA from directing JFK  
9 assassination researchers to seek these records pursuant to FOIA, rather than pursuant to the Act  
10 itself, particularly in view of the finding at § 2(a)(5) stating that “legislation is necessary because  
11 *the Freedom of Information Act, as implemented by the executive branch, has prevented the*  
12 *timely public disclosure of records related to the assassination of President John F. Kennedy.*”  
13

14           The JFK Act is a remedial statute that must be broadly construed to achieve its  
15 congressional objectives. ARRB Final Report, pages i and xxiii. Also see ECF 59, 5:10-7:9.  
16 When interpreting statutes, courts are to “examine not only the specific provision at issue, but  
17 also the structure of the statute as a whole, including its object and policy.” *Children’s Hosp. &*  
18 *Health Center v. Belshe*, 188 F.3d 1090, 1096 (9<sup>th</sup> Cir. 1999).  
19

20           The JFK Records Act is “a unique solution to the problem of secrecy.” Congress enacted  
21 the Act because “...30 years of government secrecy relating to the assassination of President  
22 John F. Kennedy led the American public to believe that the government had something to hide.  
23 The solution was legislation that required the government to disclose whatever information it had  
24 concerning the assassination.” ARRB Final Report, p. 1.  
25

26           The legislative intent of the Act can be paraphrased as “Enough! Find all assassination  
27 records and release them as soon as possible.”  
28

1 After sixty years, it is time to obtain all the records that can reasonably be obtained, while  
2 witnesses mentioned in those records are still alive to be interviewed and to review the records.  
3 Some of these records were specifically identified by the ARRB in the 1998 MOU co-signed by  
4 NARA and CIA, as well as in outstanding assassination requests and related documents. Others,  
5 such as the “Joannides documents”, were identified by ARRB members after termination of the  
6 ARRB as documents that were wrongfully withheld by CIA pursuant to FOIA and should be  
7 immediately released.  
8

9 Plaintiffs maintain that NARA has a duty to take immediate action to obtain “all  
10 assassination records”, based on § 12(b) and a host of related statutory provisions.  
11

12 If the court somehow agrees with the Defendant that it is the agencies – not NARA - that  
13 has the duty to obtain these records, the court should halt any acts by NARA officials to obstruct  
14 researchers seeking to use the JFK Records Act to obtain assassination records from the agencies  
15 that maintain them in their possession. The simple remedy is to order NARA to stop directing  
16 researchers to use FOIA in any search to unearth JFK assassination records and to instruct  
17 NARA to refer such requests to the relevant agencies if the researcher directs the request to  
18 NARA rather than to the agency itself.  
19

20 **1. As Section 11(a) requires “transmission of a record to the Archivist”, It Shall**  
21 **Take Precedence Over Any Other Law, Judicial Decision or Common Law that**  
22 **Would Otherwise Prohibit Such Transmission**

23 JFK Act § 11(a) is Plaintiffs’ first consideration, and ask the court to address it:

24 "When the Act requires transmission of a record to the Archivist or public disclosure, it  
25 shall take precedence over any other law, judicial decision construing such law, or common law  
26 doctrine that would otherwise prohibit such transmission or disclosure of an assassination  
27 record."  
28

1 Plaintiffs contend that § 11(a) supersedes any aspect of the APA statute - or the judicial  
2 decisions that interpret it - that would prohibit transmission of an assassination record “when the  
3 (JFK Records Act) requires transmission of a record to the Archivist.”

4 The only body of law that can override the § 11(a) legislative override is the U.S.  
5 Constitution itself.  
6

7 **2. Section 12(b) Mandates that the Remaining Provisions of the JFK Records Act**  
8 **Shall Continue in Effect, Other than Portions of Section 7 and All of Section 8**

9 When does the JFK Act require transmission of a record to the Archivist?

10 The court’s 7/14/23 ruling did not address the impact of Section 12(b) of the Act, which  
11 states: “The remaining provisions of this Act shall continue in effect to such time as the  
12 Archivist certifies to the President and the Congress that all assassination records have been  
13 made available to the public in accordance with this Act.”  
14

15 What provisions of the Act continue in effect since the termination of the Review Board,  
16 pursuant to 12(b)? The answer is revealed by studying the sections terminated pursuant to 12(a).

17 Section 12(a) states “the provisions of this Act that pertain to the **appointment and**  
18 **operation** of the Review Board” terminate with the ARRB’s dissolution.  
19

20 In reviewing the sections of the Act, Plaintiffs contend that the only sections that have  
21 terminated are §§ 7(a)-(h) which addresses the appointment of the Board, and §§ 7(k)-(m) and  
22 § 8 which address the operation of the Board. The Merriam-Webster definition of “operation” is  
23 “the quality or state of being able to work or function”. Thus, “ARRB operations” must be  
24 defined as the **administrative** functions of the Board.  
25

26 *All other sections of the JFK Records Act remain in full force and effect.* This is why the  
27 ARRB entered into the MOU with CIA and NARA. The ARRB expected NARA would assume  
28

1 these responsibilities.<sup>1</sup> For example, §§ 5(b), 5(c)(2)(E) and § 9(a) require government offices to  
2 transfer assassination records to the Review Board – these transfers have been made to NARA  
3 from 1998 to the present. These are powers and duties of the Board, not “operations” or  
4 administrative functions.  
5

6 For an enumeration of the ARRB’s powers and duties, see ECF 36, Amended Simpich  
7 Dec., Ex. C, JFK Act analysis by ARRB counsel Jeremy Gunn, pp. 7-8. The facts in this brief  
8 show that NARA has assumed several of these duties between 1998 to the present, such as:

- 9 • “Direct Government offices to complete identification aids and organize assassination  
10 records. Sec. 7(j)(1)(A).”
- 11 • “Direct Government offices to transmit to the Archivist assassination records. Sec.  
12 7(j)(1)(B); see also Sec. 9(1).”
- 13 • “Obtain access to assassination records that have been identified and organized by a  
14 Government office. Sec. 7(j)(1)(C)(i).”
- 15 • “Direct a Government office to...make available additional information, records or  
16 testimony from individuals. Sec. 7(j)(1)(C)(ii).”
- 17 • “Issue interpretive regulations. Sec. 7(n).”  
18  
19  
20

21 Note that §§ 7(i)-(j), (n) and (o) and 7(j) address the powers and duties of the Board, not  
22 the **administrative** functions of the Board.

23 Thus, NARA accepts some ARRB duties, but rejects the notion that it has any duties.

### 24 **3. NARA issued regulations assuming many ARRB duties and powers in 2000**

25 NARA issued regulations in 2000. These regulations expressly assume many duties and  
26 powers. See, e.g., 65 FR 39550 (NARA’s role is to maintain and supplement the Collection and  
27

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28 <sup>1</sup> At a December 6, 2022, press conference organized by MFF at the National Press Club, Judge John Tunheim, former ARRB chair, said he believed that NARA had the inherent authority to continue to enforce the Act.

1 provide guidance to agencies; 36 CFR 1290.1 (scope of assassination records); 36 CFR 1290.3  
2 (sources of assassination records and additional records and information); 36 CFR 1290.5  
3 (requirement that assassination records be released in their entirety); and 36 CFR 1290.8  
4 (implementing the JFK Act – notice of Assassination Record designation).  
5

6 Section 5(c)(2)(F) mandates any government office in possession of assassination records  
7 to review, identify, and transmit possible Assassination Records to the JFK Collection when any  
8 office of the federal government such as NARA has *any uncertainty* as to whether a document is  
9 an assassination record”. NARA is a “government office” pursuant to § 3(c)(5), and it assumed  
10 the duty to provide guidance to the other agencies pursuant to 65 FR 39550.  
11

12 Two similar statutes are also applicable, as §§ 5(c)(2)(H) and 7(j)(1)(c) mandate such  
13 action when the “Review Board” has “*reason to believe*” that a document must be reviewed.

14 Note that procedures established by both the Trump Administration and the Biden  
15 Administration to review assassination records assign roles played by the ARRB to NARA.  
16

17 Defendant NARA has ignored the finding in § 2(a)(1) that “all Government records  
18 (related to the JFK assassination) should be preserved for historical and governmental purposes”;  
19 the mandate in 4(a)(1) that “the Collection shall consist of all Government records relating to the  
20 assassination of President John F. Kennedy”; that NARA has a duty to determine if it has  
21 “uncertainty” about whether a record is an assassination record governed by the JFK Records  
22 Act pursuant to §5(c)(2)(F); that NARA has “reason to believe” that additional documents from  
23 the agencies should be reviewed pursuant to §§ 5(c)(2)(H) and 7(j)(1)(C)(2); and the  
24 aforementioned mandate in § 12(b) to obtain “all” assassination records.  
25

26 36 CFR 1290.7(d) states that the terms “any” and “all” shall be understood in their  
27 broadest and most inclusive sense. 36 CFR 1290 states that although the ARRB terminated in  
28

1 1998, “NARA has determined that these regulations are still required to provide guidance to  
2 agencies.” Also see 65 FR 39550, *supra*, stating that this guidance is necessary because NARA  
3 continues to “supplement the collection” and that agencies “continue to identify records that may  
4 qualify as assassination records and need to have this guidance available.”  
5

6 **4. The §706(2) “arbitrary and capricious” challenges to NARA actions involve several**  
7 **discrete agency actions that are incoherent and chaotic, not coherent or methodical**

8 The Plaintiffs contend that facts illustrate that the § 706(2) “arbitrary and capricious”  
9 challenges to NARA’s actions involve several discrete agency actions, as set forth below.

10 Plaintiffs recognize the court’s ruling that “an APA claim cannot seek the ‘wholesale  
11 improvement of (a) program by court decree’. *Lujan*, 497 U.S. at 891. For this reason, averring a  
12 pattern and practice is generally insufficient to state a claim under the APA.” ECF 68, 10:3-5.  
13

14 Plaintiffs also recognize the court’s ruling that “while Plaintiffs outline examples of  
15 NARA failing to search for documents under the JFK Act, Plaintiffs make clear that they are  
16 challenging a pattern and practice of NARA, not NARA’s actions in any particular instance.  
17 Therefore, Plaintiffs are not challenging a discrete agency action.” ECF 68, 10:7-10.  
18

19 Plaintiffs have alleged several discrete agency actions in the Third Amended Complaint.  
20 These actions illustrate that NARA had no coherent or methodical approach about how to  
21 address the requests of researchers seeking to obtain “additional assassination records”.

22 1. In 2000, NARA issued regulations in the Federal Register stating that it was  
23 continuing to exercise authority over searches for additional assassination records. “NARA  
24 continues to maintain and *supplement* the collection under the Provisions of the Act...*Agencies*  
25 *continue to identify records* that may qualify as assassination records and *need to have this*  
26 *guidance available.*” 65 FR 39550.  
27  
28

1           Between 2000-2023, JFK researchers and the American public relied on NARA's  
2 regulatory scheme and the representations it made to the American people in the Federal Register  
3 that agencies were continuing to identify possible additional assassination records and that  
4 NARA was providing guidance and *supplementing* the JFK Collection.  
5

6           The discrete events below chronicle researchers who relied on NARA's guidance.

7           2. Some NARA officers like Gene Morris provide guidance to researchers. Morris  
8 obtained additional assassination records when researcher Bill Kelly alerted him that Secret  
9 Service officer Gerald Blaine was keeping some of the records allegedly destroyed in 1995 under  
10 his bed. TAC, paragraph 103, see ECF 63-1, Kelly Declaration, paragraph 7.  
11

12           The destruction of these records caused a scandal when the Secret Service reported that it  
13 had intentionally destroyed them after the JFK Records Act was passed. Plaintiffs continue to  
14 seek these records to this day. TAC, paragraph 61f, fn. 79.  
15

16           Morris also told researcher Roger Odisio that NARA did accept recommendations for  
17 matters to be added to the Collection, and to provide the details of any possible assassination  
18 record to NARA general counsel Gary Stern. TAC, paragraph 107.

19           3. Despite Mr. Morris' guidance that researchers should contact NARA counsel Stern if  
20 they became aware of assassination records not in the JFK Collection, Mr. Stern failed to  
21 respond to such inquiries or failed to submit the researchers' requests directly to the agencies.  
22 Because Mr. Stern failed to take action, the searches would not go any further. Mr. Odisio  
23 followed up with Mr. Stern and received no response. TAC, paragraph 108. Relying on  
24 discussion resulting from Morris' statement to Odisio, researcher Dan Alcorn also contacted  
25 counsel Stern and asked him to conduct a search pursuant to the JFK Records Act for certain  
26 records. Mr. Stern provided no response to Mr. Alcorn's request. TAC, para. 86. Mr. Schnapf  
27  
28



1 also received no response from Mr. Stern when he submitted a search request pursuant to the  
2 JFK Records Act. TAC, para. 100-106. Mr. Stern's failure to respond to these requests are  
3 discrete actions in the form of inaction that illustrate NARA's incoherent and chaotic approach to  
4 obtaining new records.  
5

6 4. A third approach towards obtaining additional assassination records is provided by  
7 yet another NARA officer: Mr. Alcorn was informed by NARA officer Martha Murphy that  
8 items found in an index might be sought under the JFK Records Act, but that items not in the  
9 index "fall under FOIA, rather than the JFK Act" in direct contradiction to Section 2(a)(5) of the  
10 Act. TAC, paragraph 84, ECF 33-1, Alcorn Declaration, paragraph 10 & Exhibit B.  
11

12 5. William Simpich has spoken with other individuals who told him that they were  
13 advised by NARA to file FOIA requests rather than JFK Records Act requests. TAC 109.  
14

15 Each of these events illustrate "discrete agency actions", not "a wholesale improvement  
16 of the program by joint decree". These events show that if a researcher requests records under  
17 the JFK Records Act, the response will vary depending on "who you talk to". This inconsistent  
18 handling of record search requests is the very definition of arbitrary and capricious behavior, and  
19 contrary to law pursuant to § 706(2). These examples also illustrate "unreasonable delay"  
20 pursuant to § 706(1).  
21

22 The amended TAC summarizes that the Plaintiffs have properly alleged that NARA has  
23 an incoherent and chaotic approach to the use of the JFK Records Act to obtain additional  
24 assassination records. From 2000-2023, NARA has operated pursuant to a regulation stating that  
25 it is responsible for providing guidance to the agencies on the application of the JFK Records  
26 Act. According to an 8/21/19 email from Ms. Britney Crawford, acting director of NARA's  
27 Special Access and FOIA Staff (RDF), NARA "(has) not had one specific archivist dedicated to  
28

1 the JFK Collection in over 10 years.” NARA cannot abandon its duty to the countless  
2 researchers who have turned to NARA rather than the agencies to obtain these records. Nor  
3 should NARA undermine the efforts of researchers like Jefferson Morley who obtained some of  
4 the “Joannides documents” pursuant to FOIA, and then saw the rest of the Joannides documents  
5 buried in a *Vaughn* index from 2003 to the present. See the discussion re the Joannides  
6 documents below.

8 To summarize:

9 If a researcher such as Kelly or Odisio contacts NARA official Gene Morris, Morris is  
10 willing to use the JFK Records Act to obtain records. Morris also recommends that researchers  
11 contact NARA counsel Gary Stern and request its use.

13 On the other hand, when Alcorn or Schnapf directly contacted Gary Stern, the result was  
14 no response.

16 Yet another approach is illustrated by Alcorn’s contacts with official Martha Murphy.  
17 She indicated that she was willing to use the JFK Records Act to find records, but only if the  
18 name in question could be found in the JFK Collection index. Upon learning that a record was  
19 not in the index, she instructed the researcher to use FOIA instead of forwarding the request to  
20 the relevant agency so the agency could comply with its continuing duty to search for  
21 assassination records. Mr. Simpich reported similar events as those reported by Mr. Alcorn.

23 § 5(c)(2)(F) mandates action when any government office has “*any uncertainty as to*  
24 *whether the record is an assassination record governed by this Act*”. § 3(c)(5) defines a  
25 “government office” as “any office of the federal government that has possession or control of  
26 assassination records”, specifically including NARA. The above discrete events provide the  
27 Plaintiffs with a strong case based on “arbitrary and capricious” conduct that violates the law.  
28

1           **5. The above-described events show that Plaintiffs also meet the § 706(1)**  
2           **requirements for unreasonable delay**

3           An agency's delay in completing a pending action as to which there is no statutory  
4 deadline may not be withheld when such delay is unreasonable when weighing such  
5 considerations as the agency's need to set priorities among lawful objectives, the challenger's  
6 interest in prompt action, and any relevant indications of legislative intent. Administrative Law  
7 & Regulatory Practice, American Bar Ass'n, *A Blackletter Statement of Federal Administrative*  
8 *Law*, 54 Admin L. Rev. 1, 44 (2002).  
9

10           These factors weigh in favor of the Plaintiffs. It does not aid NARA's priorities to  
11 provide confusing and contradictory advice to researchers who seek the release of additional  
12 assassination records. The challenger's interest in prompt action and the legislative intent in  
13 favor of transmission and release is consistently stated throughout the JFK Records Act. As  
14 stated in § 2(a)(7) of the Act, only in the "rarest" cases should there be any delay in transmission  
15 and release of all of the records.  
16

17           *See Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77–78 (D.C.  
18 Cir. 1984) ("TRAC") ("*[S]ection 706(1) coupled with section 555(b) does indicate a*  
19 *congressional view that agencies should act within reasonable time frames and that courts*  
20 *designated by statute to review agency actions may play an important role in compelling agency*  
21 *action that has been improperly withheld or unreasonably delayed.*"). Section 555(b) states that  
22 agencies should conclude matters "within a reasonable time," and Section 706(1) states that  
23 courts "shall ... compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C.  
24 §§555(b), 706(1).  
25  
26

27           In this case, Plaintiffs and the public have been waiting since 1998 for NARA to obtain  
28 the last of the assassination records. However, NARA has stated that it has no duty to obtain any

1 more records in its previous filings. Thus, the Plaintiffs ask the Court to address that duty so that  
2 the duty issue can be addressed to the 9<sup>th</sup> Circuit.

3 Similarly, Plaintiffs maintain that NARA's use of the JFK Records Act has been  
4 intermittent since 1998, and the public is entitled to have NARA enjoined from directing the  
5 public towards FOIA when seeking JFK assassination records – the very procedure Congress  
6 concluded was ineffective and sought to replace when it passed the JFK Act (“the Freedom of  
7 Information Act... has prevented the timely public disclosure of records related to President John  
8 F. Kennedy.”) § 2(a)(5).  
9

10 Also see, e.g. *Gordon v. Norton*, 322 F.3d 1213, 1220 (10th Cir. 2003) (“An agency’s  
11 failure to act ... can become a final agency action if the agency delays unreasonably in  
12 responding to a request for action (or if) if the agency delays in responding until the requested  
13 action would be ineffective.”). The absence of an absolute deadline does not give an agency the  
14 right to postpone a decision indefinitely. *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir.  
15 2001). Under both the Mandamus Act and the APA, courts measure delay in circumstances  
16 where there is no absolute deadline under a reasonableness standard. *Kim v. USCIS*, 551 F.  
17 Supp. 2d 1258, 1264-1265 (D. Colo. 2008)  
18

19 Two of the TRAC factors always tend to receive ample discussion from the courts. First,  
20 statutory deadlines are a significant factor in determining a case of unreasonable delay. *When*  
21 *Congress signifies that it wants an agency to prioritize an action, the courts are more willing to*  
22 *enforce that priority. We have that time-based urgency stated by Congress in the JFK Records*  
23 *Act.* Second, courts appear to be more willing to compel an agency to act when the action  
24 involves the public interest such as the JFK documents, compared to mere economic interests.  
25  
26  
27  
28

1 It should be added that courts more readily compel agencies to act in cases where there is  
2 a statutory deadline imposed on an agency. The Supreme Court declared, in *Norton v.*  
3 *SUWA*, 542 U.S. at 65, that “when an agency is compelled by law to act within a certain time  
4 period ... a court can compel the agency to act.” The entire impetus of the JFK Records Act was  
5 to release all available records by 1993 except for the “rarest cases” pursuant to Section 2(a)(7),  
6 and to obtain and release the rest of the records by 2017 absent a finding by the President of  
7 “identifiable harm...of such gravity that it outweighs the public interest in disclosure” for “each  
8 assassination record” pursuant to 5(g)(2)(D) that harmonizes with the applicable portions of §§ 6  
9 (grounds for postponement of public disclosure) and 9 (review of records).

10  
11  
12 **6. It violates the letter and the spirit of § 2(a)(5) for NARA to advise researchers to**  
13 **file FOIA requests for assassination records. This method prevents records from seeing**  
14 **the light of day, like the Joannides records that have now been buried for 20 years.**

15 If the Court is going to interpret the JFK Act so that NARA has no duty to seek more  
16 records "in accordance with the Act", Plaintiffs request the Court to expressly make such a  
17 holding so that Plaintiffs can seek relief in the Ninth Circuit.

18 Public transmission of “additional records” cannot be delayed without compliance with  
19 §2(a)(5)’s finding on FOIA’s negative impact on records releases; the postponement standards of  
20 § 6, the mandate to transmit all assassination records “to the Archivist” in 9(c)(1), the approval  
21 of postponements in § 9(c)(2), the requirements of periodic review in § 9(d)(2), and to apply the  
22 “remaining provisions of the Act” as stated in § 12(b) – not mere compliance with § 5(g)(2)(D).  
23

24 The “Joannides documents” were requested by researcher Jefferson Morley pursuant to  
25 FOIA. Even though the relationship between Joannides and Lee Harvey Oswald was hidden  
26 from the public until 2003 by the actions of Joannides and his superiors (see *infra*, as well as  
27 *Morley v. CIA*, 508 F.3d 1108, 1118 (D.C. Cir. 2007)), the Joannides documents have been  
28

1 hidden from the public in a *Vaughn* index for twenty years despite the protestations of three of  
2 the five former ARRB members, including former ARRB chair Judge John Tunheim, who stated  
3 on this subject that:

4  
5 ***“By its actions, the CIA has thus destroyed the integrity of the probe made by Congress***  
6 ***and cast additional doubt upon itself. It is imperative that all additional information which***  
7 ***bears upon the CIA’s conduct regarding both the congressional investigation and the Kennedy***  
8 ***assassination itself be made public as soon as possible.”*** TAC 25:22-28.

9 This is a case where NARA should have collected the rest of the documents by October  
10 2017. NARA is now more than six years late. Although is not a statutory deadline, it is clearly  
11 the intent of the Congress to get all documents to the public as quickly as possible and not after  
12 October 2017 except in the face of an “*identifiable harm that is of such gravity that it outweighs*  
13 *the public interest in disclosure.*” § 5(g)(2)(D)(ii). “Public interest” is defined at § 3(10) as:

14 ***“(T)he compelling interest in the prompt public disclosure of assassination records for***  
15 ***historical and governmental purposes and for the purpose of fully informing the American***  
16 ***people about the history surrounding the assassination of President John F. Kennedy.”***

17 The JFK Records Act expressly stated at the time of passage in 1992 that: “most of the  
18 records related to the assassination...are almost 30 years old, and only in the rarest cases is there  
19 any legitimate need for continued protection of such records.” § 2(a)(7). The Act’s mechanisms  
20 are designed to collect “all assassination records” to provide the full history for the American  
21 people. §§ 2(a)(1), 2(a)(2), 12(b). But NARA has unreasonably delayed and unlawfully withheld  
22 responses to requests, for example, by MFF member Larry Schnapf, as well as researchers Dan  
23 Alcorn and Roger Odisio. The “Joannides documents” remain unavailable due to the use by  
24 NARA and the CIA of FOIA, rather than consistent use of the JFK Records Act. NARA has  
25 refused to comply with the Memorandum of Understanding (MOU), a key tool recommended by  
26 ARRB to obtain additional assassination records. NARA’s approval of the Transparency Plans  
27 is the latest method that results in the delay disclosure of any additional records.  
28

1  
2 **7. As the ARRB identified “additional assassination records”, NARA has a mandatory**  
3 **duty under Section 12(b) and related sections of the Act to obtain these records for the**  
4 **American people**

5 This court has ruled that "the JFK Act imposes ‘no specific, unequivocal command’ to  
6 undertake the *remaining averred duties* (‘seeking ‘Final Declarations of Compliance’, following  
7 up on outstanding search requests...)", stating that it was a "*voluntary program*" *designed to aid*  
8 *the ARRB to “(carry) out its obligation to ‘direct that all assassination records be transmitted to*  
9 *the Archivist’. JFK Act Section 9(c)(1). The ARRB accordingly could not have been*  
10 *‘specifically commanded’ to implement this voluntary program.*" ECF 68, 13:13-21.

11 Plaintiffs agree that ARRB was not commanded to implement this voluntary program.  
12 Plaintiffs respectfully respond that if the court agrees that 12(b) and its related sections of the Act  
13 regarding the search for “additional assassination records” remain in full force and effect, then  
14 12(b) mandates that NARA is “specifically commanded” to undertake the “remaining averred  
15 duties” and obtain the additional assassination records that have been identified by the ARRB.

16 These records include:

- 17
- 18 • ARRB requests to search for additional designated assassination-related records  
19 made to certain agencies including the CIA, Department of Defense and FBI remain  
20 outstanding. TAC, para. 46.
  - 21 • In addition, the ARRB was also working with the JFK Library and the RFK Donor  
22 Committee at the time of the final report to release certain papers of Robert F.  
23 Kennedy. These records remain outstanding. TAC, para. 46; ARRB Final Report,  
24 pp. 145, 149, 155-56, 162 and 168 note 9.
  - 25 • Upon information and belief, additional Assassination Records exist that have not  
26 been transmitted to Defendant NARA and that are not currently part of the Collection.  
27 Also, on information and belief, Defendant NARA has not followed up on the  
28

1 outstanding ARRB records search requests nor have several agencies submitted  
2 sworn Final Declarations of Compliance. TAC, para. 61.

- 3 • Mr. George Joannides served as chief of covert action at the CIA station in Miami  
4 and served as case officer for a New Orleans-based CIA-funded exile group that had a  
5 series of encounters with Lee Oswald in 1963. Joannides was then appointed the  
6 CIA's documents gatekeeper and prevented HSCA investigators from obtaining  
7 important documents, including any discovery of Joannides' own role with the CIA-  
8 funded exile group that repeatedly interacted with Oswald in 1963. According to  
9 former ARRB board members, 44 Joannides documents from 1962-64 and 1978-81  
10 constitute Assassination Records entitled to "the presumption of immediate  
11 disclosure" and should have been transferred to the ARRB to determine if they should  
12 be disclosed. Instead, the CIA withheld the Joannides files from the ARRB and  
13 continues to withhold these files. The CIA should be ordered to transfer these  
14 materials to NARA. (TAC, para. 61a)

15 Regarding the Joannides documents: In 2004, three former members of the ARRB  
16 submitted sworn affidavits in *Morley v. CIA*, a Freedom of Information Act lawsuit,  
17 stating that the Joannides files met the board's criteria of "assassination-related" and  
18 should be released. Former ARRB member Anna Nelson stated that "the Freedom of  
19 Information Act, as implemented by the executive branch, has prevented the timely  
20 public disclosure of records relating to the assassination of President John F .

21 Kennedy." TAC, p. 25, fn. 73. Former ARRB counsel Jeremy Gunn stated that the  
22 CIA "undermined the investigation which the House Select Committee on  
23 Assassinations made of the JFK assassination in 1976-1978." TAC, p. 25, fn. 73.

24 Also see Judge Tunheim's protests at CIA's conduct at p. 14 of this brief, *supra*.

- 25 • NARA has failed to request the assistance of the Department of Justice to unseal all tape  
26 recordings of Louisiana Mafia boss Carlos Marcello in violation of its ministerial non-  
27 discretionary duty. See §§ 10(b)(1); 10(b)(3). (TAC, para. 61b)

28



- 1 • NARA did virtually nothing since 1999 to continue the ARRB's work to recover  
2 assassination records that are believed to be held by government agencies. TAC,  
3 para. 112. This includes the records enumerated in the Memorandum of  
4 Understanding signed by ARRB, NARA and CIA. TAC, paras. 111-112; 119-121.
- 5 • Plaintiffs allege that if any of the acts alleged in this complaint are determined by the  
6 court to be discretionary rather than mandatory, that such action constitutes an abuse  
7 of discretion. TAC, para. 116.

8  
9 **8. Plaintiffs meet all four factors for injunctive relief and similar remedies**

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

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

13 On element (1), “whether the applicant has made a strong showing that it is likely to  
14 succeed on the merits”, the Plaintiffs’ statutory interpretation regarding §§ 2(a)(5) and 12(b) are  
15 invulnerable to attack in any hearing.

16 Plaintiffs have made a strong case that The CIA has failed to provide certain documents  
17 pursuant to the MOU. NARA has failed to take action to seek these documents. 2(a)(5)  
18 mandates that NARA halt advising researchers to use FOIA in conducting JFK research.  
19 Similarly, 12(b) mandates that all remaining provisions of the Act “continue in effect until such  
20 time that the Archivist certifies to the President and the Congress that all assassination records  
21 have been made available to the public in accordance with the Act.”

22 As the court is aware, thousands of records remain withheld in part. Many records  
23 remain to be transmitted to the JFK Collection, as identified by the ARRB, the Plaintiffs, and  
24 other researchers. The CIA has failed to provide certain documents pursuant to the MOU.  
25 NARA has failed to take action to seek these documents. Plaintiffs have provided the Court in  
26 this brief with an analysis of the specific provisions that remain in force pursuant to 12(b).  
27 Defendant has provided no such analysis to date.

1 Plaintiffs have explained to the court that NARA must comply with the postponement  
2 standards of § 6, the mandate to transmit all assassination records “to the Archivist” in 9(c)(1),  
3 the approval of postponements in § 9(c)(2), and the requirements of periodic review in § 9(d)(2).  
4 NARA cannot focus on § 5(g)(2)(D) in isolation and ignore these other statutory provisions.

5 Plaintiffs have provided the court with an analysis of the “unreasonable delay” and  
6 “discrete actions” that expose NARA to liability under the APA pursuant to 706(1) and 706(2).

7 Section 11(a) requires “transmission of records to the Archivist” by the agencies and  
8 exercises a legislative override over any other law or judicial decision that would otherwise  
9 prohibit such transmission. The impact of this statutory provision is wide-reaching, and should  
10 make it unnecessary for the Court to consider the aspects of the APA that ordinarily would bar  
11 the relief sought by Plaintiffs.

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

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

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

18 Plaintiffs contend that they were misled by NARA. NARA stated that it was  
19 supplementing the JFK Collection with additional assassination records and that agencies were  
20 seeking its guidance on this subject. In fact, review of the documents reveals that very few  
21 additional assassination records were included into the JFK Collection between 2000-2023, and  
22 that NARA now states that it has no duty to obtain additional assassination records. NARA  
23 cannot have it both ways.

24 What makes it worse is that NARA has been violating the letter and the spirit of the JFK  
25 Records Act by advising researchers to frame their requests pursuant to FOIA rather than the Act  
26 itself. Records have not been obtained for decades because of the chaotic approach adopted by  
27 NARA in providing different advice to different researchers depending on what NARA  
28 employee provides the advice.

1 Nor does NARA encourage researchers to contact the agencies directly. Instead, NARA  
2 acts as a bottleneck to effective efforts at research. Plaintiffs seek an order to stop NARA from  
3 advising researchers to seek JFK documents through the use of FOIA.

4 Plaintiffs also seek an order for NARA to collect all remaining assassination records as  
5 quickly as possible. Witnesses are dying, and their stories will be lost forever. Potential  
6 leads to other witnesses and documents will be lost. Such a loss represents a fundamental dis-  
7 service to history – and there is no good reason for the names and identities of this individuals  
8 and these documents to not be obtained at this time, 30 years after this remedial statute was  
9 enacted to prevent this kind of loss.

10  
11 **c. Relief will not substantially injure any other interested parties**

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

16  
17 **d. The public interest is best served by fully informing the American people  
18 about the history surrounding the Kennedy assassination**

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

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

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**9. Plaintiffs seek declaratory relief**

Plaintiffs seek immediate relief, as the opportunity to interview these elderly individuals decreases every day. Plaintiffs anticipate that their request for relief pursuant to §§ 2(a)(5) and 12(b) can be attained with injunctive relief.

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

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

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

**10. Plaintiffs seek mandamus, if necessary**

If the court believes that injunctive or declaratory relief is unavailable to Plaintiffs, then a

1 writ of mandamus would be the only adequate remedy available. See *In re Cal. Power Exch.*  
2 *Corp.*, 245 F.3d 1110, 1120 (9th Cir. 2001) (holding mandamus is appropriate where plaintiffs  
3 have no other adequate remedy).

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

6 **CONCLUSION**

7 Pursuant to JFK Act Section 12(b) – and the above-stated portions of the JFK Records  
8 Act – Plaintiffs seek that 1) NARA be ordered to collect all remaining assassination records, and  
9 2) all assassination records be made available to the public in accordance with the Act before 3)  
10 the Archivist issues any certification pursuant to the statute. This collection should include all  
11 the documents identified in the MOU, the Final Declarations of Compliance, and similar requests  
12 from both NARA and researchers.  
13

14 Plaintiffs also seek an order from the court to prevent NARA from directing JFK  
15 assassination researchers to seek these records pursuant to FOIA, pursuant to § 2(a)(5) of the Act  
16 which states that “legislation is necessary because the Freedom of Information Act, as  
17 implemented by the executive branch, has prevented the timely public disclosure of records  
18 related to the assassination of President John F. Kennedy.”  
19

20 Respectfully submitted,  
21

22  
23 \_\_\_\_\_/s/  
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25 LAWRENCE P. SCHNAPF  
Attorneys for Plaintiffs

26 Dated: December 14, 2023  
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