[CASE BEING CONSIDERED FOR TREATMENT
PURSUANT TO RULE 34(j) OF THE COURT'S RULES]

No. 17-5091

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

GRANT F. SMITH,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiff-appellant is Grant F. Smith. Defendants-appellees are the United States of America; James Mattis, Secretary, U.S. Department of Defense; Steven Mnuchin, Secretary, U.S. Department of the Treasury; Rick Perry, Secretary, U.S. Department of Energy; Michael Pompeo, Director, Central Intelligence Agency; Wilbur Ross, Secretary, U.S. Department of Commerce; Rex Tillerson, Secretary, U.S. Department of State; and Donald Trump, President of the United States. At the time of writing, there are no intervenors or amici, nor were there in district court.

B. Ruling Under Review

Plaintiff seeks review of the Memorandum Opinion and Order of the United States District Court for the District of Columbia granting defendants' motion to dismiss in *Smith v. United States*, 237 F. Supp. 3d 8 (D.D.C. 2017) (Chutkan, J.).

C. Related Cases

This case has not previously been before this Court. Counsel is not aware of any other related cases currently pending in this Court or in any other court.

s/ Joseph F. Busa
JOSEPH F. BUSA
Counsel for defendants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Rule:

Other Authorities:

GLOSSARY

APA	Administrative Procedure Act
FOIA	Freedom of Information Act

INTRODUCTION

Plaintiff Grant F. Smith brought suit against the United States, the President, and other senior officials alleging that each defendant, and his or her predecessor since 1978, has violated federal law by distributing foreign aid to Israel. A statute prevents the distribution of aid to any country that the President determines has engaged in certain activity related to nuclear technology. Plaintiff asserts that Israel has engaged in such activity, and that the President should so determine. Plaintiff contends that the United States has avoided applying the statute to Israel by refusing to release information to the public confirming Israel's alleged nuclear status. Plaintiff brought suit and sought to enjoin the distribution of foreign aid to Israel. He also sought to compel the government to end so-called "nuclear ambiguity" and release unspecified information regarding Israel's alleged nuclear status.

The district court correctly held that plaintiff lacks standing. Plaintiff suffers no individualized or concrete harm by the continued distribution of aid to Israel. Nor does plaintiff raise a concrete dispute regarding his entitlement to receive any particular piece of information. As he has many times in the past, plaintiff may request access to specific documents under the Freedom of Information Act (FOIA) and litigate the government's compliance with its obligations under that statute. But this case does not arise from plaintiff's FOIA requests, and his generalized desire for unspecified information does not present a concrete case or controversy amenable to judicial resolution. In any event, plaintiff fails to state a claim on which relief may be

granted, as he has not identified a private right of action that would permit him to enjoin the distribution of aid to Israel or to compel the release of unspecified information. Accordingly, this Court should affirm the dismissal of plaintiff's complaint.

STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331. Joint Appendix (JA) __ [Am. Compl. 6]. The district court granted defendants' motion to dismiss for lack of standing and entered final judgment on February 27, 2017. JA __ [Op. 7]. Plaintiff timely filed a notice of appeal on April 25, 2017. JA __ [Dkt. No. 29]. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether plaintiff, a private citizen who asserts an interest in Israel's alleged nuclear status, has standing to challenge the continued distribution of foreign aid to Israel, or to compel the release of unspecified information about Israel's alleged nuclear status.

2. Whether, in any event, plaintiff fails to state a claim upon which relief can be granted, where plaintiff identifies no private right of action that would provide a vehicle for judicial review of plaintiff's claims.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Foreign Military Financing

1. The Arms Export Control Act authorizes the President to "finance the procurement of defense articles . . . by friendly foreign countries." 22 U.S.C. § 2763(a). In annual appropriations acts funding this program, Congress has directed that a specific amount of foreign military financing "shall be available for grants only for Israel," and Congress has further required that the funds appropriated for Israel "shall be disbursed within 30 days of enactment."[1] Israel has been the largest recipient of aid under this program. Jeremy M. Sharp, Cong. Research Serv., RL33222, *U.S. Foreign Aid to Israel* at i, 10 (2016).

2. Another provision of the Arms Export Control Act, 22 U.S.C. § 2799aa-1, restricts the provision of foreign military financing, among other forms of foreign aid, to any country that the President determines has engaged in certain conduct involving nuclear technologies. *See id.* § 2799aa-1(a)(1) (prohibiting distribution of foreign aid to "any country which the President determines" engages in certain enumerated nuclear conduct); *id.* § 2799aa-1(b)(1) (barring foreign aid "in the event that the President

[1] *E.g.*, Department of State, Foreign Operations, and Related Programs Appropriations Act, 2017 (Div. J, Pub. L. No. 115-31) (May 5, 2017); Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016 (Div. K, Pub. L. No. 114-113), 129 Stat. 2242, 2727 (2015); Department of State, Foreign Operations, and Related Programs Appropriations Act, 2015 (Div. J, Pub. L. No. 113-235), 128 Stat. 2130, 2594 (2014); Department of State, Foreign Operations, and Related Programs Appropriations Act, 2014 (Div. K., Pub. L. No. 113-76), 128 Stat. 5, 485 (2014).

determines that any country" engages in other enumerated nuclear conduct). The statute vests in the President discretion regarding whether or how to make such a determination in any particular case. The statute does not require that any such presidential determination be made public. If the President does determine that a recipient country has engaged in the nuclear conduct enumerated in the statute, the statute contains several waiver provisions whereby the political branches may take certain actions in order to continue to distribute foreign aid to that country. 22 U.S.C. §§ 2799aa-1(a)(2)-(3), (b)(4)-(6). The statute contains no cause of action for a private citizen to seek judicial review of Congress's or the President's actions under the statute.

B. Factual Allegations

Plaintiff Grant F. Smith is an independent researcher who asserts an interest in Israel's nuclear status. JA __ [Am. Compl. 4]. He alleges that Israel has "long had a nuclear weapons program and continually engages in activities which should trigger" an affirmative presidential determination under Section 2799aa-1. JA __ [Am. Compl. 10]. Plaintiff alleges that every President and relevant cabinet official "since Gerald Ford" has therefore acted unlawfully by distributing foreign aid to Israel. JA __ [Am. Compl. 3].

Plaintiff alleges that the government has been able to continue distributing foreign aid to Israel by "pretending to have no knowledge of Israel's nuclear weapons program." JA __ [Am. Compl. 19]. Plaintiff contends that this policy of "nuclear

ambiguity" has three elements: (1) government officials allegedly avoid journalists' questions about Israel's nuclear status, JA __ [Am. Compl. 3, 14-19]; (2) the government allegedly delays processing FOIA requests, charges high search and reproduction fees, and withholds information that is subject to disclosure, JA __ [Am. Compl. 5-6, 10, 14, 22-29]; and (3) the Department of Energy allegedly uses Classification Bulletin No. WNP-136, titled "Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability," as a "new secret gag law" to "harshly punish" any government employee who releases "any information officially confirming that Israel is a nuclear weapons state," JA __ [Am. Comp. 20]; *see also* JA __ [Am. Compl. 3, 5-6, 14, 20-22].[2]

Plaintiff brought this suit in district court, seeking two categories of relief. First, with regard to Section 2799aa-1, plaintiff sought (i) to compel the President to make an affirmative determination as to Israel's alleged nuclear activity, (ii) to enjoin the distribution of foreign aid to Israel, and (iii) to "claw[] back" all foreign aid

[2] The Department of Energy Classification Bulletin contains information that is classified by the Department of State in order to protect the national security. The Bulletin provides guidance to derivative classifiers in the Department of Energy to enable them to protect that classified information in Department of Energy documents without having to submit each such document to the Department of State for classification review. *See* Exec. Order No. 13526, § 6.1(h) & (o), 75 Fed. Reg. 707, 727, 728 (Jan. 5, 2010) (defining "classification guide" and "derivative classification"). Plaintiff received a redacted copy of the Bulletin in response to a FOIA request submitted to the Department of Energy. He attached that document to his amended complaint in district court. *See* JA __ [Am. Compl. Ex. 6].

disbursed to Israel since 1978. JA __ [Am. Compl. 37]. Second, plaintiff sought "[i]njunctive [r]elief" against "'nuclear ambiguity' and all of its manifestations." *Id.*[3]

C. Prior Proceedings

The district court granted defendants' motion to dismiss. JA __ [Op. 7]. The court held that the case was non-justiciable because plaintiff lacked Article III standing. *Id.* With regard to his claims alleging violation of Section 2799aa-1, the court held that plaintiff did not suffer a concrete or particularized injury that could give rise to standing to sue. His status as a taxpayer was "not enough to establish standing to challenge an action taken by the Federal Government" under binding Supreme Court precedent. JA __ [Op. 6] (quoting *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007)). Similarly, his "'[i]ndirect injuries' in the form of anti-American sentiment around the globe" were "neither particularized nor concrete or imminent." JA __ [Op. 6-7]. And plaintiff's FOIA-related expenses from prior cases

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[3] Plaintiff also sought the release of two memoranda of understanding between the United States and Israel, JA __ [Am. Compl. 37], which he now acknowledges have been released, *see* Mot. for Emergency Relief at 6 (May 8, 2017).

Plaintiff did not seek damages, JA __ [Am. Compl. 37], but did allege that he never received $624.78 in court costs that the Department of Defense had agreed to pay him as part of a settlement of an earlier FOIA suit, JA __ [Am. Compl. 26]; *see* Joint Stipulation of Settlement and Voluntary Dismissal at 2, Dkt. No. 22, *Smith v. Dep't of Defense*, No. 14-cv-1611-TSC (D.D.C. Feb. 26, 2015). Appellate counsel investigated this allegation in the course of preparing this brief, and confirmed that plaintiff had not received payment, apparently as a result of the departure from federal employment of prior counsel for the government. Counsel has sought information from the plaintiff to process payment. The issues before this Court on appeal are unaffected by this matter.

were unrelated to his Section 2799aa-1 claims: The lack of a presidential determination that Israel has engaged in certain nuclear conduct did not cause plaintiff to incur those FOIA expenses, and an injunction barring disbursement of foreign aid to Israel or compelling the President to make a determination regarding Israel under Section 2799aa-1 would not relieve plaintiff of the need to use the FOIA to seek documents in the future. JA __ [Op. 6].

With regard to his claim seeking to enjoin "'nuclear ambiguity' and all of its manifestations," JA __ [Am. Compl. 37], the district court held that plaintiff might seek relief elsewhere but his claims in this case were non-justiciable. Plaintiff could "seek compensation for his FOIA fees in the lawsuits he brought pursuant to FOIA"—but this was not a suit arising under the FOIA related to any such fees. JA __ [Op. 7]. Similarly, to the extent plaintiff sought to "challenge information classification" and thereby obtain specific information relating to Israel's alleged nuclear status, he could do so by challenging the government's withholding of redacted information in a concrete dispute brought under the FOIA. *Id.* "[T]he availability of an adequate remedy under FOIA itself precludes any relief" here, *id.*, where no such concrete dispute was presented about the classification of specific information or plaintiff's entitlement to it under the law.

Plaintiff appealed to this Court and moved for an emergency injunction pending appeal, which this Court denied. *See* Order (May 18, 2017). Plaintiff also

moved for this Court to review an unredacted version of the Department of Energy's Classification Bulletin *ex parte* and *in camera*. This Court denied that motion, too, explaining that "[t]he information was not part of the district court record and appellant has not shown that it is relevant to any issue on appeal." Order (Aug. 1, 2017).

SUMMARY OF ARGUMENT

The district court correctly held that plaintiff lacks standing to bring this suit. With regard to his claims about compliance with Section 2799aa-1, plaintiff's mere personal offense at an alleged violation of law is plainly not an injury-in-fact giving rise to standing to sue, nor is his status as a taxpayer. Plaintiff does allege that continued support for Israel causes "blowback" against the United States, but plaintiff has not demonstrated that he was or will be imminently harmed thereby, nor has he shown that any such injury is fairly traceable to defendants' challenged conduct or that the harm could be redressed by a favorable decision in court.

Plaintiff's claim seeking to enjoin "nuclear ambiguity" is similarly non-justiciable. Plaintiff may seek to recover administrative fees and costs in FOIA suits, where he also may seek access to specific information withheld by the government. FOIA thus provides an avenue for submitting a concrete dispute to the judiciary about plaintiff's legal entitlement to specific information. FOIA even provides an avenue whereby plaintiff may challenge the Executive Branch's classification of specific information and its invocation of that classification as a basis for withholding

the information from public disclosure. *See* 5 U.S.C. §§ 552(a)(4)(B), (b)(1). But this case does not arise under the FOIA, nor does it present a concrete dispute regarding plaintiff's legal entitlement to any particular document or information. Instead, plaintiff seeks to enjoin "'nuclear ambiguity' and all of its manifestations." JA __ [Am. Compl. 37]. That abstract grievance is non-justiciable.

Finally, even if plaintiff had standing, this Court should affirm dismissal on the alternative ground that plaintiff fails to state a claim upon which relief can be granted. Neither Section 2799aa-1 nor any other provision of law supplies a private right of action for plaintiff to seek judicial review of the President's exercise of his discretion under Section 2799aa-1. And plaintiff's claim seeking to end "nuclear ambiguity" is similarly unsupported by any private right of action, as the availability of an adequate alternative cause of action under the FOIA displaces any review under the Administrative Procedure Act (APA).

STANDARD OF REVIEW

This Court reviews de novo a district court's order granting a motion to dismiss for lack of standing. *Humane Soc'y of the U.S. v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015).

ARGUMENT

I. The District Court Correctly Ruled That Plaintiff Lacks Standing To Bring This Suit.

In order to safeguard the separation of powers and leave to the political branches the exercise of the legislative and executive powers, Article III of the

Constitution limits federal courts' exercise of "the judicial Power" to the adjudication of actual "Cases" and "Controversies." *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Courts implement this requirement through the doctrine of constitutional standing.

A plaintiff must satisfy three requirements in order to have standing to bring suit. First, a plaintiff must suffer an injury-in-fact: an "invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and quotation marks omitted). Second, that injury must be "fairly traceable to the challenged action of the defendant," as opposed to the action of a third party. *Id.* (alterations omitted). Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (quotation marks omitted). Here, the district court lacked jurisdiction because plaintiff has no Article III standing to bring this case.

A. Plaintiff's first set of claims involves Section 2799aa-1. He seeks to compel the President to make an affirmative determination regarding Israel under that statute, to enjoin distribution of aid to Israel under that statute, and to "claw[] back" all aid distributed to Israel since 1978. JA __ [Am. Compl. 37]. Plaintiff mentions several injuries related to these claims, but none supports standing.

Plaintiff first alleges that he is injured by "a unilateral suspension of the nation's Arms Export Control laws." JA __ [Am. Compl. 4]. But the Supreme Court

"repeatedly has rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-83 (1982) (quotation marks omitted). Plaintiff's "mere personal offense" at the alleged violation of Section 2799aa-1 "does not give rise to standing to sue." *In re Navy Chaplaincy*, 534 F.3d 756, 763 (D.C. Cir. 2008).

Similarly, plaintiff alleges injury to "American taxpayers" from the continued disbursement of foreign aid to Israel. JA __ [Am. Compl. 4, 30]. But the preference of a taxpayer that his or her tax dollars not be used in a certain way by the Executive Branch—even in a way that allegedly violates the law—is "too generalized and attenuated to support Article III standing." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 599 (2007). Indeed, this Court has already concluded in similar circumstances that being a taxpayer does not supply standing to challenge the government's "provision of foreign aid to Israel." *Mahorner v. Bush*, No. 02-5335, 2003 WL 349713, at *1 (D.C. Cir. Feb. 12, 2003) (unpublished summary affirmance), *aff'g* 224 F. Supp. 2d 48, 50-51 (D.D.C. 2002) (addressing taxpayer standing).

Plaintiff also alleges "[i]ndirect injuries" stemming from providing foreign aid to Israel. JA __ [Am. Compl. 31]. He speculates that U.S. aid to Israel "perpetuat[es]" the Israeli-Palestinian conflict and generates "blowback" against the United States, including the attacks of September 11, 2001. *Id.* But plaintiff does not

allege that he has personally suffered any injury as a result of the Israeli-Palestinian conflict, and plaintiff's "theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013). Moreover, plaintiff does not explain how this injury is fairly traceable to the challenged conduct of the defendants, rather than the conduct of third parties not before this Court (such as the parties responsible for the alleged "blowback"). *See Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 263 (D.C. Cir. 1980) (no standing where injury depended on independent action of a foreign country).

Nor does plaintiff explain how the injury would be likely to be remedied by a favorable determination of his case in court. Even if this Court could compel the President to make an affirmative determination regarding Israel under Section 2799aa-1, the waiver provisions in the statute would allow the government to continue lawfully to disburse foreign aid. And even if foreign aid were to cease, the effect on the Israeli-Palestinian conflict or the alleged "blowback" against the United States would be speculative at best. As this Court has concluded in similar circumstances, plaintiff's "belief that a change in [U.S. foreign aid] policy would reduce the threat of terrorism is, at best, mere speculation." *Bernstein v. Kerry*, 584 F. App'x 7, 7 (D.C. Cir. 2014) (alteration in original) (quoting *Bernstein v. Kerry*, 962 F. Supp. 2d 122, 130 (D.D.C. 2013)).

In sum, plaintiff asserts various harms allegedly stemming from aid to Israel pursuant to congressional appropriations. But none is the kind of injury that would give plaintiff standing to bring his claims about Section 2799aa-1 in court. Plaintiff makes no sustained effort in his opening brief to contest the district court's conclusion on these points. Indeed, to the extent plaintiff discusses these injuries at all, he admits that the "misuse of tax dollars" and "anti-American sentiment" allegedly caused by the continued distribution of foreign aid to Israel are "generalized injuries." Br. 11.

B. Plaintiff's opening brief is focused instead on his second set of claims, in which he seeks to enjoin "'nuclear ambiguity' and all of its manifestations." JA __ [Am. Compl. 37]. Here, too, plaintiff fails to establish standing.

Plaintiff alleges two types of injury resulting from "nuclear ambiguity." First, he alleges economic injury related to his FOIA requests for information about Israel's alleged nuclear status. He alleges that agencies have charged him "exorbitant search/ reproduction or other fees" to perform FOIA searches, JA __ [Am. Compl. 23], and that he has incurred "fees and expenses" when bringing FOIA suits in court, JA __ [Am. Compl. 26]. Second, plaintiff alleges informational injury, contending that

agencies have withheld information about Israel's alleged nuclear status that plaintiff seeks to access. *See* JA __ [Am. Compl. 5, 14, 20-22, 26, 28, 34].[4]

Injuries like these may give rise to standing where a plaintiff states a concrete dispute under the FOIA arising from a particular request for information. For example, FOIA plaintiffs may challenge the government's withholding of specific information sought in a FOIA request. *See* 5 U.S.C. §§ 552(a)(4)(B), (b). FOIA plaintiffs may even challenge whether the specific information withheld by the government is "in fact properly classified." *Id.* § 552(b)(1). FOIA plaintiffs may also challenge the search and reproduction costs assessed by an agency for a particular request, *id.* § 552(a)(4)(A), and prevailing FOIA plaintiffs may obtain "attorney fees and other litigation costs" arising from a given case, *id.* § 552(a)(4)(E)(i). Indeed, the plaintiff here has, in the past, brought these kinds of FOIA actions following agency denial of specific requests for information. *See* JA __ [Am. Compl. 8, 10, 26, 28].

But plaintiff's complaint here does not present any such concrete dispute. As plaintiff readily admits, he does not seek "review of any individual or class of sunshine law cases, or reimbursement of unjust fees or unpaid court awards." JA __ [Am.

[4] Plaintiff's discussion regarding the Department of Energy Classification Bulletin only elaborates on his theory of informational injury. He alleges that the government uses the Bulletin as a "new secret gag law" to prohibit "any U.S. federal government employee or contractor from publicly communicating about" Israel's alleged nuclear status "under threat of immediate employment loss, fines and imprisonment." JA __ [Am. Compl. 20]. Plaintiff does not allege that he is a federal employee or contractor who has been harmed; rather, he alleges only that the Bulletin has prevented him from receiving information he desires.

Compl. 35]. Plaintiff does not ask the Court to adjudicate his legal entitlement to any particular piece of information or document under the FOIA or any other source of law. Nor does plaintiff seek review of the reasonableness of search fees charged by an agency for any specific request, or the availability of attorney's fees or litigation costs for any given FOIA case. Indeed, plaintiff does not seek money at all. JA __ [Am. Compl. 37]; Br. 9. Instead, plaintiff forthrightly states that he seeks, more generally, to enjoin "'nuclear ambiguity' and all of its manifestations." JA __ [Am. Compl. 37]. As he further explains in his brief to this Court, plaintiff wants to obtain "as much U.S. government information about Israel's clandestine nuclear weapons program and other key Middle East policy matters as he possibly can." Br. 7.

That abstract desire is not amenable to judicial resolution. In essence, plaintiff asks for an advisory opinion ordering the release of an unspecified set of information about Israel's alleged nuclear status, without concrete adjudication of his entitlement under law to any particular piece of information. Plaintiff's desire for information, on its own, does not constitute a cognizable informational injury that may support standing. An injury-in-fact arises from the "invasion of a *legally protected* interest." *Lujan*, 504 U.S. at 560 (emphasis added). And "[t]he existence and scope of an injury for informational standing purposes is defined by Congress." *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016). Congress drafted the FOIA such that a requester's entitlement to any particular piece of information depends on facts

specific to each request. *See* 5 U.S.C. § 552(b) (stating context-dependent bases for withholding information). Accordingly, informational standing is available under the FOIA only where a plaintiff "s[eeks] and [is] denied *specific* agency records." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989) (emphasis added). Similarly, the administrative declassification review process that plaintiff references (Br. 8, 11, 14-16) applies to individual requests for specific documents or materials. *See* Exec. Order No. 13526, § 3.5(a)(1), 75 Fed. Reg. 707, 717-18 (Jan. 5, 2010).[5]

Nor does Section 2799aa-1 establish a legally protected interest in plaintiff's abstract desire for information. The "*sine qua non* of informational injury" is that a statute "require the public disclosure of information." *Friends of Animals*, 828 F.3d at 992. But Section 2799aa-1 does not require the public disclosure of information. And though plaintiff seeks to "expose the truth" about the government's alleged violation of Section 2799aa-1, JA __ [Am. Compl. 35], his "depriv[ation] of the knowledge as to whether a violation of the law has occurred" is not itself a cognizable informational injury. *Wertheimer v. FEC*, 268 F.3d 1070, 1074 (D.C. Cir. 2001) (quoting *Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997)).

In short, plaintiff asserts an abstract desire for unspecified additional information, but he does not state a cognizable interest, protected by law, in receiving

[5] In any event, as plaintiff acknowledges (Br. 15), the Executive Order establishing the declassification review process "does not create any right or benefit." Exec. Order No. 13526, § 6.2(d), 75 Fed. Reg. at 730.

any concrete piece of information. Accordingly, he fails to allege an informational injury that could give rise to standing to obtain the relief he seeks.

II. Plaintiff Fails To State A Claim.

In any event, dismissal was independently required because plaintiff has no private right of action to obtain the relief he seeks. *See* Fed. R. Civ. P. 12(b)(6). This Court need not reach this or any other question if the Court affirms dismissal for lack of standing. But if the Court does reach this question, dismissal is warranted. *See McGarry v. Secretary of the Treasury*, 853 F.2d 981, 983 (D.C. Cir. 1988) (affirming district court's dismissal for lack of standing on alternative grounds under Rule 12(b)(6)).

A. In plaintiff's first set of claims, he seeks to compel the President to make an affirmative determination about Israel under Section 2799aa-1, to enjoin the distribution of foreign aid to Israel under that statute, and to "claw[] back" aid already disbursed to Israel. JA __ [Am. Compl. 37]. But none of the sources of law that plaintiff cites provides him with a private right of action to seek judicial review of defendant's alleged violations of Section 2799aa-1.

Section 2799aa-1 itself contains no private right of action. Where a statute conveys discretion to the President, courts "require an express statement by Congress before assuming [that Congress] intended the President's performance of his statutory duties to be [judicially] reviewed for abuse of discretion." *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) (assuming that "Congress will be explicit if it intends to create a private cause of action"). And

Section 2799aa-1 contains no such express statement creating a cause of action. To the contrary, the text of the statute assigns to the *President* the authority and discretion to make a determination regarding a country's alleged nuclear activity.

The President determines the threshold level of proof that is required in order to make an affirmative determination under Section 2799aa-1. The President also determines when evidence rises to that level of proof. In doing so, the President can determine what type of evidence he will consider, as well as the relevance and the credibility of each piece of evidence. Understandably, given the sensitive issues involved, the statute does not cabin the President's exercise of discretion in these matters, nor does it provide for a mechanism by which a private citizen might seek judicial review. *See Adams v. Vance*, 570 F.2d 950, 955 (D.C. Cir. 1978) ("Courts are not in a position to exercise a judgment that is fully sensitive to [the country's foreign affairs interests].").

Because the President is not an "agency" within the meaning of the Administrative Procedure Act, that statute does not provide a right of action to review the President's discretionary determinations under Section 2799aa-1. *See Franklin*, 505 U.S. at 801 ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements."). And because plaintiff cannot obtain review of the President's determinations under Section 2799aa-1, he also fails to state a claim against the other defendants: It is uncontested that the

statute permits disbursement of foreign aid absent an affirmative determination by the President regarding the recipient country's nuclear conduct. *See* 22 U.S.C. § 2799aa-1.

Plaintiff also invokes 28 U.S.C. § 1361, seeking relief in the nature of mandamus to compel the President to "faithfully uphold" Section 2799aa-1. JA __ [Am. Compl. 37]; *see also* JA __ [Am. Compl. 6]. But mandamus is a drastic remedy, available only in extraordinary circumstances, where the plaintiff shows a "clear and indisputable right to relief" based on the violation of a "clear and compelling duty" to act. *Walpin v. Corporation for Nat'l & Cmty. Servs.*, 630 F.3d 184, 187 (D.C. Cir. 2011) (quotation marks omitted). As discussed above, Section 2799aa-1 assigns to the President the discretion to make certain determinations regarding countries receiving foreign aid. And "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Moreover, mandamus is warranted only where a clear and compelling duty is "owed to the plaintiff." 28 U.S.C. § 1361. Section 2799aa-1 does not create any clear duty to act on behalf of the plaintiff here.

B. Plaintiff also has no cause of action to bring his second set of claims, in which he seeks to end "'nuclear ambiguity' and all of its manifestations." JA __ [Am. Compl. 37]. Plaintiff's brief to this Court focuses on the APA, which creates a cause of action for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. But neither the APA, nor any other

provision of law, creates a cause of action for judicial review of plaintiff's "nuclear ambiguity" claim.

First, "nuclear ambiguity" is not an "agency action" subject to judicial review under the APA. In order to qualify for judicial review, "agency action" must be "circumscribed" and "discrete." *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 62 (2004); *see also* 5 U.S.C. § 551(13) (defining "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"). For example, in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 890 (1990), the Supreme Court held that what the plaintiffs there characterized as the Bureau of Land Management's "land withdrawal review program" was not an "agency action" subject to judicial review. Rather, the "program" was "simply the name by which [the plaintiffs] have occasionally referred to the continuing (and thus constantly changing) operations of the [agency] in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans." *Id.* That general program was "no more an identifiable 'agency action'—much less a 'final agency action'—than a 'weapons procurement program' of the Department of Defense or a 'drug interdiction program' of the Drug Enforcement Administration." *Id.* And the APA does not create a cause of action for a plaintiff to "seek *wholesale* improvement of [a] program by court decree." *Id.* at 891.

So, too, here. Plaintiff seeks to challenge what he describes as a "systemic effort[]" involving multiple officials and agencies over decades to "thwart the release

of information" through a general program he calls "nuclear ambiguity." JA __ [Am. Compl. 5]. But that sort of diffuse program would lack the "characteristic of discreteness" necessary to qualify as an "agency action" subject to review under the APA. *Norton*, 542 U.S. at 63; *see also Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001) ("While a single step or measure is reviewable, an on-going program or policy is not, in itself, a 'final agency action' under the APA."). Accordingly, plaintiff cannot obtain through the APA what he seeks: review of the alleged policy of "nuclear ambiguity" in "all of its manifestations." JA __ [Am. Compl. 37].

Second, the APA does not create a cause of action to review any particular application of "nuclear ambiguity" that allegedly resulted in plaintiff not receiving access to information that he seeks. The APA creates a cause of action only where "there is no other adequate remedy in a court." 5 U.S.C. § 704. And the FOIA is adequate to address plaintiff's alleged injuries.

The FOIA creates a cause of action for plaintiffs to seek judicial review of the agency's disclosure of information pursuant to requests for particular records. *See* 5 U.S.C. § 552(a)(4)(B). The FOIA even provides for review of plaintiff's chief contention regarding "nuclear ambiguity": that information about Israel's alleged nuclear status is not "in fact properly classified." *Id.* § 552(b)(1); *see also Judicial Watch, Inc. v. U.S. Dep't of Def.*, 715 F.3d 937, 940-44 (D.C. Cir. 2013) (reviewing whether information withheld from disclosure under the FOIA was properly classified

pursuant to a classification guide). And, where the government does not comply with its obligations under the FOIA, this Court has held that the FOIA gives courts "wide latitude" to "fashion remedies," including "the power to issue prospective injunctive relief" in appropriate cases. *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 846 F.3d 1235, 1242 (D.C. Cir. 2017). In light of these remedies for informational injuries available under the FOIA, this Court has held that the FOIA's cause of action displaces the back-up provision for judicial review in the APA. *See id.* at 1244-46.

Plaintiff offers no substantive argument as to why the FOIA's remedies are inadequate to provide relief for his alleged informational injuries. He does not dispute that the FOIA permits a court to review whether information withheld from disclosure is properly classified under a classification guide, like the Department of Energy Classification Bulletin that plaintiff cites. *See Judicial Watch*, 715 F.3d at 940-44. Instead, plaintiff only asserts that litigation under the FOIA "assumes good faith," and "[t]here is no good faith in the doctrine of 'nuclear ambiguity.'" Br. 18. But plaintiff provides no reason to think that the proper level of deference to the Executive Branch's classification decisions would differ in a suit brought under the APA. And he does not explain why the remedies available under the FOIA, described above, are inadequate to obtain unclassified information to which he is entitled under the FOIA.

Plaintiff asserts that the FOIA does not remedy what plaintiff alleges are wrongful denials of his declassification requests under a process established by Executive Order. Br. 15, 19. But the Executive Order establishing that process "does not create any right or benefit." Exec. Order No. 13526, § 6.2(d), 75 Fed. Reg. at 730. And, in any event, the panel that reviews declassification decisions under the Executive Order "is established for the sole purpose of advising and assisting the President in the discharge of his constitutional and discretionary authority," and the panel's "decisions are committed to the discretion of the Panel." *Id.* § 5.3(e), 75 Fed. Reg. at 725. Accordingly, the APA does not provide for review. *See* 5 U.S.C. § 701(a)(2) (APA does not apply to "agency action [that] is committed to agency discretion by law").

More narrowly, plaintiff argues that the FOIA is inadequate because it would not allow him—a pro se litigant without legal training—to recover attorney's fees. Br. 12-13. This argument fails for multiple reasons. Plaintiff has no attorney's fees to recover, as he has not paid any to an attorney—something that would be true regardless of which cause of action plaintiff might invoke. Nor does plaintiff contend that he would be able to recover an imputed hourly rate for his pro se work on his own case, under the APA or any other provision of law. Accordingly, plaintiff does not explain why the FOIA is less adequate to remedy his alleged injuries in this respect than any other cause of action he might seek to invoke. In any event, the precise scope and applicability of fee-shifting statutes is irrelevant: Plaintiff does not

seek recovery of attorney's fees or any other monetary award. *See* JA __ [Am. Compl. 37]; Br. 9. Moreover, the adequacy of alternative remedies under 5 U.S.C. § 704 turns on whether the remedies are adequate to remedy the substantive violation of law at issue in a case, not whether a plaintiff could also recover attorney's fees after prevailing on the merits.

Finally, no other provision of law cited by plaintiff creates a private right of action by which individuals may seek to compel the end of "nuclear ambiguity." Section 2799aa-1 does not require the public disclosure of information. Plaintiff also invokes 28 U.S.C. § 1361 and appears to seek relief in the nature of mandamus to compel an end to the alleged policy of "nuclear ambiguity." Br. 1. But Section 1361 does not itself create a right for plaintiff to receive any information. And plaintiff cites no other statute that establishes a "clear and indisputable right," *Walpin*, 630 F.3d at 187, to receive "as much U.S. government information about Israel's clandestine nuclear weapons program and other key Middle East policy matters as he possibly can," Br. 7.[6]

[6] Plaintiff also reiterates his request that this Court review an unredacted version of the Department of Energy's Classification Bulletin *ex parte* and *in camera*. Br. 4, 29-30. As it has before, this Court should deny that request because "[t]he information was not part of the district court record and appellant has not shown that it is relevant to any issue on appeal." Order (Aug. 1, 2017).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.[7]

Respectfully submitted,

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[7] The Department of Justice gratefully acknowledges the contribution to this brief of Mr. Andrew A. Roberts, a second-year student at the University of Virginia School of Law.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,310 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

22 U.S.C. § 2799aa-1. Nuclear reprocessing transfers, illegal exports for nuclear explosive devices, transfers of nuclear explosive devices, and nuclear detonations

(a) Prohibitions on assistance to countries involved in transfer of nuclear reprocessing equipment, materials, or technology; exceptions; procedures applicable

(1) Except as provided in paragraph (2) of this subsection, no funds made available to carry out the Foreign Assistance Act of 1961 or this chapter may be used for the purpose of providing economic assistance (including assistance under chapter 4 of part II of the Foreign Assistance Act of 1961), providing military assistance or grant military education and training, providing assistance under chapter 6 of part II of that Act, or extending military credits or making guarantees, to any country which the President determines—

(A) delivers nuclear reprocessing equipment, materials, or technology to any other country on or after August 4, 1977, or receives such equipment, materials, or technology from any other country on or after August 4, 1977 (except for the transfer of reprocessing technology associated with the investigation, under international evaluation programs in which the United States participates, of technologies which are alternatives to pure plutonium reprocessing), or

(B) is a non-nuclear-weapon state which, on or after August 8, 1985, exports illegally (or attempts to export illegally) from the United States any material, equipment, or technology which would contribute significantly to the ability of such country to manufacture a nuclear explosive device, if the President determines that the material, equipment, or technology was to be used by such country in the manufacture of a nuclear explosive device.

For purposes of clause (B), an export (or attempted export) by a person who is an agent of, or is otherwise acting on behalf of or in the interests of, a country shall be considered to be an export (or attempted export) by that country.

(2) Notwithstanding paragraph (1) of this subsection, the President in any fiscal year may furnish assistance which would otherwise be prohibited under that paragraph if he determines and certifies in writing during that fiscal year to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate that the termination of such assistance would be

seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security. The President shall transmit with such certification a statement setting forth the specific reasons therefor.

(3)

(A) A certification under paragraph (2) of this subsection shall take effect on the date on which the certification is received by the Congress. However, if, within 30 calendar days after receiving this certification, the Congress enacts a joint resolution stating in substance that the Congress disapproves the furnishing of assistance pursuant to the certification, then upon the enactment of that resolution the certification shall cease to be effective and all deliveries of assistance furnished under the authority of that certification shall be suspended immediately.

(B) Any joint resolution under this paragraph shall be considered in the Senate in accordance with the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976.

(b) Prohibitions on assistance to countries involved in transfer or use of nuclear explosive devices; exceptions; procedures applicable

(1) Except as provided in paragraphs (4), (5), and (6), in the event that the President determines that any country, after the effective date of part B of the Nuclear Proliferation Prevention Act of 1994—

(A) transfers to a non-nuclear-weapon state a nuclear explosive device,

(B) is a non-nuclear-weapon state and either—

(i) receives a nuclear explosive device, or

(ii) detonates a nuclear explosive device,

(C) transfers to a non-nuclear-weapon state any design information or component which is determined by the President to be important to, and known by the transferring country to be intended by the recipient state for use in, the development or manufacture of any nuclear explosive device, or

(D) is a non-nuclear-weapon state and seeks and receives any design information or component which is determined by the President to be important to, and intended by the recipient state for use in, the development or manufacture of any nuclear explosive device,

then the President shall forthwith report in writing his determination to the Congress and shall forthwith impose the sanctions described in paragraph (2) against that country.

(2) The sanctions referred to in paragraph (1) are as follows:

(A) The United States Government shall terminate assistance to that country under the Foreign Assistance Act of 1961, except for humanitarian assistance or food or other agricultural commodities.

(B) The United States Government shall terminate—

(i) sales to that country under this chapter of any defense articles, defense services, or design and construction services, and

(ii) licenses for the export to that country of any item on the United States Munitions List.

(C) The United States Government shall terminate all foreign military financing for that country under this chapter.

(D) The United States Government shall deny to that country any credit, credit guarantees, or other financial assistance by any department, agency, or instrumentality of the United States Government, except that the sanction of this subparagraph shall not apply—

(i) to any transaction subject to the reporting requirements of title V of the National Security Act of 1947 (relating to congressional oversight of intelligence activities),

(ii) to medicines, medical equipment, and humanitarian assistance, or

(iii) to any credit, credit guarantee, or financial assistance provided by the Department of Agriculture to support the purchase of food or other agricultural commodity.

(E) The United States Government shall oppose, in accordance with section 262d of this title, the extension of any loan or financial or technical assistance to that country by any international financial institution.

(F) The United States Government shall prohibit any United States bank from making any loan or providing any credit to the government of that country, except for loans or credits for the purpose of purchasing food or other agricultural commodities, which includes fertilizer.

(G) The authorities of section 2405 of title 50, Appendix, shall be used to prohibit exports to that country of specific goods and technology (excluding food and other agricultural commodities), except that such prohibition shall not apply to any transaction subject to the reporting requirements of title V of the National Security Act of 1947 (relating to congressional oversight of intelligence activities).

(3) As used in this subsection—

(A) the term "design information" means specific information that relates to the design of a nuclear explosive device and that is not available to the public; and

(B) the term "component" means a specific component of a nuclear explosive device.

(4)

(A) Notwithstanding paragraph (1) of this subsection, the President may, for a period of not more than 30 days of continuous session, delay the imposition of sanctions which would otherwise be required under paragraph (1)(A) or (1)(B) of this subsection if the President first transmits to the Speaker of the House of Representatives, and to the chairman of the Committee on Foreign Relations of the Senate, a certification that he has determined that an immediate imposition of sanctions on that country would be detrimental to the national security of the United States. Not more than one such certification may be transmitted for a country with respect to the same detonation, transfer, or receipt of a nuclear explosive device.

(B) If the President transmits a certification to the Congress under subparagraph (A), a joint resolution which would permit the President to exercise the waiver authority of paragraph (5) of this subsection shall, if introduced in either House within thirty days of continuous session after the Congress receives this certification, be considered in the Senate in accordance with subparagraph (C) of this paragraph.

(C) Any joint resolution under this paragraph shall be considered in the Senate in accordance with the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976.

(D) For purposes of this paragraph, the term "joint resolution" means a joint resolution the matter after the resolving clause of which is as follows: "That the Congress having received on __ a certification by the President under section 102(b)(4) of the Arms Export Control Act with respect to __, the Congress hereby authorizes the President to exercise the waiver authority contained in section 102(b)(5) of that Act.", with the date of receipt of the certification inserted in the first blank and the name of the country inserted in the second blank.

(5) Notwithstanding paragraph (1) of this subsection, if the Congress enacts a joint resolution under paragraph (4) of this subsection, the President may waive any sanction which would otherwise be required under paragraph (1)(A) or (1)(B) if he determines and certifies in writing to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate that the imposition of such sanction would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security. The President shall transmit with such certification a statement setting forth the specific reasons therefor.

(6)

(A) In the event the President is required to impose sanctions against a country under paragraph (1)(C) or (1)(D), the President shall forthwith so inform such country and shall impose the required sanctions beginning 30 days after submitting to the Congress the report required by paragraph (1) unless, and to the extent that, there is enacted during the 30-day period a law prohibiting the imposition of such sanctions.

(B) Notwithstanding any other provision of law, the sanctions which are required to be imposed against a country under paragraph (1)(C) or

(1)(D) shall not apply if the President determines and certifies in writing to the Committee on Foreign Relations and the Committee on Governmental Affairs of the Senate and the Committee on Foreign Affairs of the House of Representatives that the application of such sanctions against such country would have a serious adverse effect on vital United States interests. The President shall transmit with such certification a statement setting forth the specific reasons therefor.

(7) For purposes of this subsection, continuity of session is broken only by an adjournment of Congress sine die and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of any period of time in which Congress is in continuous session.

(8) The President may not delegate or transfer his power, authority, or discretion to make or modify determinations under this subsection.

(c) "Non-nuclear-weapon state" defined

As used in this section, the term "non-nuclear-weapon state" means any country which is not a nuclear-weapon state, as defined in Article IX(3) of the Treaty on the Non-Proliferation of Nuclear Weapons.