NOT YET SCHEDULED FOR ORAL ARGUMENT

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

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| GRANT F. SMITH,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>UNITED STATES OF AMERICA, et al.,<br><br>Defendants-Appellees. | No. 17-5091 |

**DEFENDANTS' OPPOSITION TO MOTION FOR EMERGENCY INJUNCTIVE RELIEF PENDING APPEAL**

## INTRODUCTION

Plaintiff Grant F. Smith asks this Court to enjoin the President and multiple cabinet secretaries from disbursing foreign aid to Israel from funds appropriated by Congress for that express purpose—funds that Congress required to be disbursed within 30 days of enactment of the appropriations legislation. Plaintiff claims that 22 U.S.C. § 2799aa-1 creates a mandatory, non-discretionary duty for the President to determine that

Israel has engaged in conduct involving certain nuclear technologies, and to withhold foreign aid from Israel or to exercise the President's statutory waiver authority to continue to provide such aid. Plaintiff claims that every President since the 1970s has willfully violated this statute by declining to make that determination before disbursing aid to Israel.

This Court should deny plaintiff's motion for an injunction pending appeal. Plaintiff has no likelihood of success on the merits. As the district court correctly held in dismissing his claims and denying a preliminary injunction, plaintiff lacks Article III standing. In any event, the statute permits but does not require that the President make the determination that plaintiff seeks. Nor does the statute create a justiciable, private right of action to compel the President to make such a determination. Moreover, plaintiff is not injured at all, much less irreparably so, by the continued provision of foreign aid to Israel during the pendency of this appeal. And the balance of the equities and the public interest tip decisively against an injunction. Interrupting the flow of foreign aid to Israel would threaten to impair our national security and foreign relations with a key ally. This

Court should deny plaintiff's request for the extraordinary remedy of emergency relief.

## STATEMENT

**1.** The Arms Export Control Act authorizes the President "to finance the procurement of defense articles, defense services, and design and construction services by friendly foreign countries." 22 U.S.C. § 2763(a). That statute provides that such financing can be extended on credit. *Id.* § 2763(b). However, annual legislation appropriating funds for this program specifies that certain foreign military financing shall be distributed in the form of grants. *See, e.g.*, Consolidated Appropriations Act, 2016, Div. K, Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Title IV, Pub. L. No. 114-113, 129 Stat. 2242, 2727 (Dec. 18, 2015) (appropriating grants earmarked for Israel).

Israel is the largest recipient of foreign military financing under this program. Jeremy M. Sharp, Cong. Research. Serv., RL33222, *U.S. Foreign Aid to Israel* 1, 10 (2016), https://fas.org/sgp/crs/mideast/RL33222.pdf. Annual appropriations legislation requires "[t]hat of the funds

appropriated under this heading [for foreign military financing], not less than $3,100,000,000 shall be available for grants only for Israel." *E.g.*, Consolidated Appropriations Act, 2016, 129 Stat. at 2727. Annual appropriations legislation further requires that "the funds appropriated under this heading for assistance for Israel shall be disbursed within 30 days of enactment of this Act." *Id.*; *see also* Consolidated Appropriations Act, 2017, Div. J, Department of State, Foreign Operations, and Related Programs Appropriations Act, 2017, Title IV, Pub. L. No. 115-31 (May 5, 2017) (same).

**2.** The Arms Export Control Act prohibits the United States from providing foreign aid, including foreign military financing, upon the President's determination that the recipient country has engaged in certain conduct involving nuclear technologies. 22 U.S.C. §§ 2799aa-1(a)(1) (prohibiting the provision of foreign aid to "any country which the President determines" engaged in certain nuclear conduct), 2799aa-1(b)(1) (prohibiting the provision of foreign aid "in the event that the President determines that any country" engaged in other nuclear conduct). The

statute does not cabin the President's discretion regarding whether, when, or how to make any determination.

If the President does determine that a recipient country has engaged in the conduct enumerated in the statute, several waiver provisions may nonetheless permit the government to distribute foreign aid to that country. For determinations involving certain conduct, the President may notify congressional committees and officials that cutting off aid would "jeopardize the common defense and security." *Id.* § 2799aa-1(a)(2). The statute provides that, after notification, the President may continue to provide aid unless Congress enacts a joint resolution of disapproval. *Id.* § 2799aa-1(a)(3). For determinations involving other conduct, the statute provides that the President and Congress, acting together, may jointly exercise waiver authority. *Id*. § 2799aa-1(b)(4), (b)(5). And for determinations regarding a third type of conduct, the President may exercise waiver authority entirely on his own. *Id*. § 2799aa-1(b)(6)(B).

**3.** Plaintiff is an independent researcher with a particular interest in Israel's nuclear status. ECF No. 17 (Amd. Compl.), at 4. He brought this

action against the United States, the President, and multiple cabinet secretaries and other officers. *Id.* at 4-6. He alleges that Israel has engaged in conduct specified in Section 2799aa-1, and that the President must make a determination to that effect and therefore not disburse aid to Israel. *Id.* at 10-13. Plaintiff sought a writ of mandamus directing the President to determine that Israel has engaged in conduct enumerated in Section 2799aa-1, an injunction to prevent the Defendants from disbursing foreign aid to Israel, and an injunction to "claw[] back" payments made to Israel since the 1970s. *Id.* at 37.

Plaintiff also brought a second claim regarding the government's control over information regarding Israel's supposed nuclear status. Plaintiff alleges that U.S. government agencies and officers have implemented a policy of "nuclear ambiguity" with respect to Israel, under which: (1) officials do not respond to journalists' questions regarding Israel's nuclear status; (2) agencies delay or improperly withhold information requested under the Freedom of Information Act (FOIA) or Mandatory Declassification Review, charge high processing fees for such

requests, or fail to pay costs awarded in litigation regarding such requests; and (3) agencies improperly classify information regarding Israel's nuclear status in order to punish leakers and deter disclosures regarding Israel's nuclear status. Amd. Compl. 3, 12-34. Plaintiff asked the district court to "[d]eclare 'nuclear ambiguity' and all of its manifestations in the form of continual misrepresentation, gag orders, systemic violations of government sunshine laws and all violations of the Administrative Procedure Act and the 'Take Care' clause to be unlawful." *Id.* at 37.

**4.** The district court granted defendants' motion to dismiss and denied plaintiff's motion for a preliminary injunction. ECF No. 26 (Mem. Op.), at 2. The district court concluded that plaintiff lacks standing to bring his claims alleging violations of Section 2799aa-1 because he has not been injured by the lack of a presidential determination regarding Israel's nuclear status, or by continued foreign aid to Israel. *Id.* at 6. To the extent plaintiff claims to have suffered injuries because he paid taxes used for foreign aid to Israel, binding Supreme Court precedent forecloses taxpayer standing outside the narrow context of certain Establishment Clause

claims. *Id.* And although plaintiff claims to have suffered "[i]ndirect injuries" caused by "the constant blowback [the Israeli-Palestinian conflict] generates against the United States," Amd. Compl. 31, the district court concluded that these alleged injuries were "neither particularized nor concrete or imminent." Mem. Op. 7.

The district court noted plaintiff's claim to have incurred approximately $12,000 in expenses from FOIA requests and litigation, but concluded that those costs were unrelated to plaintiff's claim that the President has violated Section 2799aa-1. Mem. Op. 5. The court reasoned that the lack of a presidential determination that Israel has engaged in conduct enumerated in that statute did not cause plaintiff to incur 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 related to any such presidential determination. *Id.*

Finally, with regard to plaintiff's claim seeking an injunction to end "nuclear ambiguity" and to compel the government to release information

regarding Israel's nuclear status, the district court concluded that plaintiff "must seek redress under FOIA" to "access the information he seeks." Mem. Op. 7.

**5.** Plaintiff appealed, and filed an emergency motion for an injunction barring the government from disbursing aid to Israel during the pendency of this appeal. Defendants hereby oppose.

## ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A movant seeking a preliminary injunction must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20.

Ordinarily, a plaintiff must "carr[y] the burden of persuasion" on each of these four factors "by a clear showing." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). Even more is required where the requested relief

would "deeply intrude[] into the core concerns of the executive branch," such as foreign affairs and national security. *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978). Even assuming that an action seeking to compel an executive branch officer to make a particular discretionary determination affecting foreign affairs is justiciable, this Court requires "an extraordinarily strong showing to succeed." *Id.* at 955. Plaintiff fails to make the requisite showing, and his emergency motion should be denied.

## I. LIKELIHOOD OF SUCCESS ON THE MERITS

**A.** Plaintiff seeks to prevent Defendants from transferring foreign aid to Israel during the pendency of this appeal. Motion 11. That relief is relevant only to plaintiff's claim that Section 2799aa-1 provides him with a private cause of action to compel the President to make a determination regarding Israel's nuclear status that would prohibit disbursing foreign aid to Israel absent a waiver. Yet plaintiff makes no argument in his motion for emergency relief as to why he is likely to prevail on that particular claim. *See* Motion 7-8 (arguing only that the FOIA does not displace his claim under the Administrative Procedure Act to enjoin the policy of "nuclear

ambiguity," and otherwise addressing only issues related to standing). For that reason, alone, this Court should deny his motion for an injunction pending appeal.

**B. 1.** Furthermore, plaintiff lacks Article III standing to bring a claim under Section 2799aa-1, because he has not alleged an injury in fact that is fairly traceable to Defendants' conduct and is likely to be redressed by favorable adjudication of plaintiff's claims. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Plaintiff's "mere personal offense" at the lack of a presidential determination under Section 2799aa-1, and his "belief that a favorable judgment will make him happier" by "knowing that the Government is following" his reading 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). Article III requires that the federal courts be "more than [just] a vehicle for the vindication of the value interests of concerned bystanders." *Id.*

Similarly, plaintiff does not derive standing from the fact that he may pay federal taxes used to fund foreign aid to Israel. *See Hein v. Freedom*

*From Religion Found., Inc.*, 551 U.S. 587, 593 (2007); *Mahorner v. Bush*, No. 02-5335, 2003 WL 349713, at *1 (D.C. Cir. Feb. 12, 2003) (unpublished summary affirmance) ("[A]ppellant lacks standing to pursue his claims concerning . . . the provision of foreign aid to Israel."). And plaintiff's allegation that U.S. aid to Israel perpetuates the Israeli-Palestinian conflict and thereby generates "blowback" against the United States, including the attacks of September 11, 2001, Amd. Compl. 31, is too generalized and speculative to establish injury-in-fact. *See Bernstein v. Kerry*, 584 F. App'x 7 (D.C. Cir. 2014) (unpublished) (affirming dismissal for lack of standing because the plaintiff's "belief that a change in [U.S. foreign aid] policy would reduce the threat of terrorism is, at best, mere speculation" (alteration in original)). Nor does it show redressability: even if the President were compelled to make a determination under Section 2799aa-1 that Israel has engaged in specified conduct, the statute's waiver provisions permit the political branches to continue to disburse foreign aid to Israel.

The only concrete and particularized injury that plaintiff alleges is that he has incurred about $12,000 in expenses in the course of filing and

litigating FOIA requests for information about Israel's nuclear status, and is likely to incur more expenses in the near future. As the district court correctly held, Mem. Op. 6, these costs are unrelated to his claim under Section 2799aa-1. The costs were not caused by the lack of a presidential determination. And it is pure speculation that any future presidential determination, even if it were publicly available, would provide plaintiff with the same information he has sought under the FOIA regarding Israel's nuclear status, such that he would no longer need to expend funds for that purpose. Plaintiff also has not asserted that if the President were to reach a determination under Section 2799aa-1, he would cease filing FOIA requests similar to those he has filed in the past.

**2.** In any event, plaintiff cannot prevail on the merits of his claim under Section 2799aa-1 because he has no right to the relief he seeks. Congress has vested in the President the discretion to decide whether, how, and when to make a threshold determination under that statute. Section 2799aa-1 permits but does not require that the President make such a determination regarding Israel or any other recipient of foreign aid. The

statute uses no language that would cabin the President's discretion. Nor does the statute establish any timeline for making such a determination, or specify the types of evidence and other factors to be considered, or the quantum of proof that must be satisfied. *See* 22 U.S.C. §§ 2799aa-1(a)(1) (prohibiting the provision of foreign aid to "any country *which the President determines*" engaged in certain conduct (emphasis added)), 2799aa-1(b)(1) (prohibiting the provision of foreign aid "*in the event that the President determines* that any country" engaged in other specified conduct (emphasis added)).

Furthermore, nothing in the statute contemplates judicial review of any portion of the procedures set out by Section 2799aa-1, nor authorizes a private right of action to compel the President to make a particular discretionary determination regarding a particular country. Determinations regarding a country's nuclear status, and decisions to withhold foreign military financing or other aid, implicate national security and foreign affairs—"the core concerns of the executive branch" into which Congress and the courts are reluctant to intrude. *Adams*, 570 F.2d at 954. It

is therefore understandable that Congress chose to commit the Section 2799aa-1 determination to the President's sole discretion.

Congress's annual appropriations for Israel further support the conclusion that Section 2799aa-1 determinations are at the President's discretion. Every year, Congress appropriates foreign aid funds earmarked for Israel, and directs that the President "shall" disburse appropriated funds within 30 days of enactment of the legislation—a directive Congress applies to no other appropriations for foreign military financing. *E.g.* 129 Stat. at 2727. Congress makes these appropriations with full knowledge of Section 2799aa-1, and with full knowledge that the President has never made a determination regarding Israel's nuclear status under that statute.

**C.** Plaintiff is also unlikely to prevail on the merits of his second claim, which seeks to end "nuclear ambiguity."

First, this claim is unrelated to the interim injunctive relief that he seeks. *See* Motion 11.

Second, plaintiff lacks standing to bring this claim. Plaintiff appears to assert an informational injury with respect to this second claim, *i.e.*, that

the government's alleged policy of "nuclear ambiguity" deprives him of information about the government's compliance with Section 2799aa-1. *See* Amd. Compl. 35. But a plaintiff may not establish an injury in fact "merely by alleging that he has been deprived of the knowledge as to whether a violation of the law has occurred." *Common Cause v. Fed. Election Comm'n*, 108 F.3d 413, 418 (D.C. Cir. 1997).

To the extent plaintiff desires specific information contained in particular agency records, he would have standing to sue to compel disclosure of that information under the FOIA, should the government decline to produce responsive records in response to a FOIA request. But plaintiff's general interest in obtaining information to expose the President's alleged non-compliance with Section 2799aa-1, outside the FOIA context, does not constitute a concrete or particularized injury in fact.

Finally, plaintiff fails to state a claim on which relief may be granted. Plaintiff fails to identify any provision of law that requires government officials to respond to journalists' questions. Nor does he identify a legal right to access classified information or to challenge executive directives

regarding classification or personnel policies. To the extent plaintiff seeks information from the government, plaintiff is free to submit a FOIA request—as he has a number of times, *see* Amd. Compl. 4, 22-24. The private cause of action and equitable relief available under that statute provide the means by which plaintiff may seek to compel the disclosure of any information to which he has a legal right and recoup any expenses unlawfully imposed in the course of FOIA administrative processing or litigation.

Plaintiff does not raise the FOIA as a grounds for relief, Amd. Compl. 37, nor does he appear to have filed this action following the administrative denial of any particular request for information under the FOIA or other similar statute. Rather, he brings an action for injunctive relief under the Administrative Procedure Act (APA). As the district court correctly held, Mem. Op. 7, the cause of action and remedies available under the FOIA are adequate and thus preclude suit under 5 U.S.C. § 704. *See Citizens for Responsibility & Ethics in Washington v. United States Dep't of Justice*, 846 F.3d 1235, 1246 (D.C. Cir. 2017).

## II. IRREPARABLE HARM

Plaintiff also has not shown that "he is likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. "This court has set a high standard for irreparable injury," *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006), which goes far beyond the kind of injury required to establish standing. An irreparable injury sufficient to justify preliminary injunctive relief "must be both certain and great," "actual and not theoretical," and "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (quotation marks and citations omitted). "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Id.* at 297-98.

As a preliminary matter, plaintiff cannot show irreparable harm because, as the district court correctly held, Mem. Op. 6, and as discussed above, plaintiff does not even satisfy the lesser requirements for constitutional standing. In any event, plaintiff has not shown that

continued disbursement of aid during this appeal would irreparably harm him. Plaintiff argues that if the funds recently appropriated by Congress for Israel are disbursed, he may not be able to obtain an injunction that would recover those particular funds, even if he prevailed in his suit. Motion 9. But, as plaintiff's complaint alleges, Congress appropriates foreign aid for Israel each year, and a new, ten-year Memorandum of Understanding contemplates that this will continue through 2028. Successful adjudication of his claims on the merits could therefore result in an injunction barring disbursement of future funds.

Plaintiff has made no showing as to why disbursement of the particular installment of funds appropriated for Israel in 2017 would, on their own, irreparably harm him. Even if plaintiff's "blowback" theory, FOIA expenses, and informational interests were constitutionally cognizable injuries sufficient to establish standing, plaintiff has not explained how disbursement of the 2017 installment of aid for Israel would irreparably harm those interests.

To the extent the plaintiff's primary concern is that the President has not made a determination regarding Israel under Section 2799aa-1, the President will remain as capable of making that determination after a full hearing on the merits as he is today. And even if plaintiff had asked for injunctive relief pending appeal for his claim regarding "nuclear ambiguity," plaintiff has not shown how release of information after full adjudication on the merits would fail to remedy fully his claimed informational harm.

Finally, plaintiff's claims of irreparable injury during the pendency of this appeal are belied by his own delay in filing this action and seeking a preliminary injunction. According to plaintiff, the government has been openly violating the requirements of Section 2799aa-1 since the 1970s, *see* Amd. Compl. 3, 10, and plaintiff has been seeking to bring these unlawful actions to light since at least 2011, *see id.* at 26; *see also id.* at 24-25 (discussing plaintiff's activities in 2012); *id.* at 22 (discussing plaintiff's activities in February of 2015). Yet plaintiff waited until August of 2016 to bring this action and waited another four months to move to enjoin the

disbursement of funds to Israel. Plaintiff's own actions thus reveal that, whatever harm plaintiff alleges he will incur as a result of disbursement of funds to Israel, that harm is not so great or imminent as to be irreparable. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) ("Our conclusion that an injunction should not issue is bolstered by the delay of the appellants in seeking one.").

## III. THE BALANCE OF THE EQUITIES, AND THE PUBLIC INTEREST.

Finally, plaintiff has failed to show "that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. When the government opposes a motion for injunctive relief, these final two factors merge "because the government's interest *is* the public interest." *Pursuing America's Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016).

Granting plaintiff's motion for an injunction pending appeal would threaten to impair the United States' national security and foreign relations. The United States maintains a strong diplomatic relationship with Israel, built on shared values, history, and security interests. *See* Sharp, *supra*, at 1.

That bilateral relationship involves "cooperation in developing military technology," "information sharing," and "joint [military] exercises," as well as cooperation in "homeland security, cyber issues, energy, and trade." Jim Zanotti, Cong. Research Serv., No. RL33476, *Israel: Background and U.S. Relations* 19-20 (2016), https://fas.org/sgp/crs/mideast/RL33476.pdf.

The foreign military financing that plaintiff seeks to enjoin is a critical component of that bilateral relationship. Sharp, *supra*, at 1. Israel is the largest recipient of foreign military financing appropriated by the United States, and that aid accounts for nearly one-fifth of the total Israeli defense budget. *Id.* at 10. The United States provides this aid under the terms of a ten-year Memorandum of Understanding between the United States and Israel, which calls for providing Israel with $30 billion in foreign military financing from 2009 to 2018, and $33 billion from 2019 to 2028. *Id.* at 4-6. The Memorandum of Understanding also structures other facets of the bilateral relationship, including the joint development of missile defense systems. *See, e.g.*, Sharp, *supra*, at 6-7.

Enjoining distribution of foreign military financing to Israel would threaten to impair the national security and the United States' bilateral relationship with a key ally. Plaintiff asserts that Israel possesses nuclear weapons, and assumes from that predicate that Israel therefore must be able to adequately defend itself without further U.S. aid. Motion 10. That is pure speculation, and in any event does not account for the United States' security and diplomatic interests in the bilateral relationship and in regional stability. *See, e.g., Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 796, 798 (D.C. Cir. 1971) (refusing to issue an injunction against nuclear testing and deferring to the government's "assertions of potential harm to national security and foreign policy—assertions which we obviously cannot appraise").

Plaintiff has thus not come close to making the "extraordinarily strong showing" necessary for this Court to issue an injunction that "deeply intrudes into the core concerns of the executive branch." *Adams*, 570 F.2d at 954. This Court should deny his emergency motion. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207-08 (D.C. Cir. 1985) (Scalia, J.)

(concluding that "it would be an abuse of discretion to provide discretionary relief," such as mandamus or an injunction, in a case involving a "sensitive foreign affairs matter"—there, federal officials' support for Contra forces in Nicaragua during the 1980s).

## CONCLUSION

For the foregoing reasons, the Court should deny plaintiff's motion for an injunction pending appeal.

Respectfully submitted,

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MAY 2017

**CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 2017, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I also hand-delivered the original document and four copies to the Clerk of Court by 4 P.M. that same day. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system, except for plaintiff Grant F. Smith, who will be served via U.S. mail:

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## CERTIFICATE OF COMPLIANCE

This filing complies with the length requirement established by this Court in an Order dated May 9, 2017, because it contains 4,143 words. This filing also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Palatino Linotype 14-point font, a proportionally spaced typeface.

**/s/ Joseph F. Busa**
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