[ORAL ARGUMENT NOT YET SCHEDULED]

No. 17-5091

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GRANT F. SMITH,

Plaintiff-Appellant,

v.

USA, et al

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PLAINTIFF-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiff-Appellant Grant F. Smith certifies as follows:

A. Parties and Amici

The appellant is Grant F. Smith. The appellees (defendants below) are the Central Intelligence Agency, Department of Defense, Secretary of State, Department of Treasury, Department of Energy, President and the Department of Commerce. There were no amici before the district court and none are currently anticipated in this Court.

B. Ruling Under Review

The ruling under review is the February 27, 2017 Order and Memorandum Opinion by the Honorable Tanya Chutkan granting Appellees' motion to dismiss the 1st Amended Complaint and Denying Appellant's motion for a preliminary injunction.

C. Related Cases

This case has not previously been before this or any other court. Appellant has a FOIA case pending before the Honorable Tanya S. Chutkan seeking the release of the CIA secret intelligence support topline annual budget for Israel for

the years 1990-2015, *Smith v. CIA* (D.D.C. September 2, 2015 No. 15-01431).

Plaintiff Appellant is aware of no other related actions.

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GLOSSARY

AIPAC	American Israel Public Affairs Committee
APA	Administrative Procedure Act
AECA	Arms Export Control Act
CIA	Central Intelligence Agency
DOC	Department of Commerce
DOD	Department of Defense
DOE	Department of Energy
DOS	Department of State
FEC	Federal Elections Commission
FOIA	Freedom of Information Act
IRmep	Institute for Research: Middle Eastern Policy, Inc
MDR	Mandatory Declassification Review
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
TRE	Department of Treasury

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under the U.S. Constitution, art. II, § 3, cl. 5, and the APA, 5 U.S.C. § 706. The Court also had jurisdiction under 28 U.S.C. § 1346 because this was civil action or claim against the United States. The court particularly has jurisdiction over this action pursuant to 5 U.S.C. § - 7 - 552(a)(4)(B). Finally, the Court had jurisdiction to compel an officer or employee of the abovenamed federal agencies to perform his or her duty under 28 U.S.C. § 1361.

Venue was proper in this District under 28 U.S.C. § 1391(e) because the Plaintiff was and still is a resident of this judicial district, and a substantial part of the events or omissions giving rise to the Plaintiffs' claims occurred in the District. This Court was authorized to award the requested declaratory and injunctive relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, the APA, 5 U.S.C. § 706, and 28 U.S.C. § 1361 which provides that "the district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Plaintiff timely filed a notice of appeal on April 25, 2017. Notice of Appeal, Grant F. Smith v. U.S., No 15-01431 (D.D.C. April 25, 2017), ECF No 29. This Court has jurisdiction pursuant to 28 U.S.C. § 1291

STATEMENT OF THE ISSUES

1. Whether the District Court erred in its finding the Plaintiff could not seek redress under the APA and other statutes for "informational injury" caused by WPN-136 and misapplications of classification guides specifically and the longstanding "nuclear ambiguity" policy generally.
2. Whether Plaintiff's FOIA litigation costs, MDR denials and other harm inflicted upon him such as the non-payment of funds owed him by the DOD, in the name of upholding "nuclear ambiguity," provide him with individual standing to challenge under APA the Defendant's implementation of WPN-136 which nullifies FOIA and MDR in order to facilitate violations of the Arms Export Control Act.
3. Whether the Plaintiff has standing to challenge Defendants' improperly invoking Executive Order 13526, and denying information under the Mandatory Declassification Reviews, under the doctrine of "nuclear ambiguity" in order to conceal wrongdoing and prevent embarrassment

over FOIA requests for releasable information about the Israeli nuclear weapons program.

4. Whether the Plaintiff has standing to challenge the "chain of causation" by which Defendants colluded through violations of the Administrative Procedure Act and the Take Care Clause and other statutes and can now be compelled through Mandamus to uphold the Symington and Glenn provisions of the Arms Export Control Act *22 USC §2799aa-1: Nuclear reprocessing transfers, illegal exports for nuclear explosive devices, transfers of nuclear explosive devices, and nuclear detonations.*
5. Whether the Plaintiff has standing to challenge future transfers of U.S. foreign aid to Israel that are out of compliance with applicable sections of the Arms Export Control Act. *22 USC §2799aa-1: Nuclear reprocessing transfers, illegal exports for nuclear explosive devices, transfers of nuclear explosive devices, and nuclear detonations.* Whether Plaintiff has standing to question past foreign aid transfers to Israel or seek "claw back" for disgorgement to lawful and proper uses.
6. Whether Plaintiff has standing to challenge "nuclear ambiguity" in some of its manifestations as unlawful legislative rules.

STATEMENT OF THE CASE

Plaintiff respectfully submits that this Court should vacate the decision below and remand for further proceedings. To guide those proceedings, the Court should examine in camera the secret 2012 legislative rule used to unlawfully block FOIA and MDR releases about Israel's nuclear weapons program and fire Federal government employees who speak truthfully about Israel's nuclear weapons program as a known fact rather than hypothetical— *WPN-136 Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability*.

SUMMARY OF ARGUMENT

This case concerns U.S. federal agencies coordinated withholding of records that would allow the public to better understand and evaluate the U.S. government's compliance with the U.S. Arms Export Control Act restrictions on foreign aid to clandestine nuclear powers.

Over more than a decade requesting U.S. government records about Israel's clandestine nuclear weapons program through FOIA, Mandatory Declassification Reviews, ISCAP appeals and other means, the Plaintiff has faced unusual delays, claims of inability to find requested information, excessive and request-prohibitive search and reproduction prepayment fees, and spurious legal barriers to accessing

the releasable material he seeks. The Plaintiff has been impacted by the doctrine of "nuclear ambiguity," which is codified in such legislative orders as WPN-136, that supersede and nullify sunshine laws such as FOIA and MDR. Such unlawful barriers serve but one purpose—allowing the defendants to ignore AECA restrictions and special procedures—popularly known as the Symington & Glenn Amendments—on foreign aid delivery to non-Nuclear Non-Proliferation Treaty (NPT) signatories with clandestine nuclear weapons programs, such as Israel. [ECF 17, pages 14-21].

The district court erred in claiming the Plaintiff Appellant does not have standing to challenge "nuclear ambiguity" as an APA matter. The district court also erred in concluding that the Plaintiff Appellant suffers no particularized injury. However, the law is clear that even if he had not, generalized injuries, even "informational injuries" that are "widely shared" do not preclude standing, as the Supreme Court observed in 524 U.S. 11 (1998) *Federal Election Commission V. Akins et al.* No. 96-1590.

The district court also erred in claiming that the Appellant Plaintiff is eligible to receive "fees" as compensation in FOIA lawsuits (he is not), and that issues related to, but superseding the limits of FOIA and MDR and spanning multiple agencies cannot be reviewed under other, more applicable statutes. This is

also not true, as acknowledged in *Chrysler Corp. v. Schlesinger*, 565 F. 2d 1172 (1977).

The Plaintiff therefore respectfully submits that this Court should vacate the lower court's decision and remand for further proceedings.

STANDARD OF REVIEW

This Court reviews de novo whether the lower court decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *See Marsh*, 490 U.S. at 378; *Ocean Advocates*, 402 F.3d at 859; *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003); *Envtl. Def. Ctr.*, 344 F.3d at 858 n.36.

This Court must determine whether the Appellant/Plaintiff has standing. Generally, there are three standing requirements:

Injury-in-fact: The plaintiff must have suffered or imminently will suffer injury—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent (that is, neither conjectural nor hypothetical; not abstract). The injury can be either economic, non-economic, or both.

Causation: There must be a causal connection between the injury and the conduct complained of, so that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party who is not before the court.

Redressability: It must be likely, as opposed to merely speculative, that a favorable court decision will redress the injury.

ARGUMENT

The lower court misapplied the law in denying the Plaintiff standing to seek relief. In law, standing is the requirement that a person who brings a suit be a proper party to request adjudication of the issues involved. The traditional test applied was whether the party had a personal stake in the outcome of the controversy presented and whether the dispute touched upon the legal relations of the parties having adverse legal interests. In this case, the legal relations are clear. The Plaintiff/Appellant's role was and continues to be obtaining as much U.S. government information about Israel's clandestine nuclear weapons program and other key Middle East policy matters as he possibly can from a wide array of federal agencies for transformation and publication into news reports. The Defendant/Appellees' role was and is to deny release of all U.S. government

information about Israel's nuclear weapons program, since releases serve as an admission of Israel's ineligibility for U.S. foreign aid, under amendments to the AECA in 1976, as a non-Nuclear Non-Proliferation Treaty signatory clandestine nuclear power.

To accomplish this, Defendant/Appellees subvert laws such as FOIA and the MDR through the doctrine and tools of "nuclear ambiguity." In doing so, the Defendant/Appellees have injured the Plaintiff/Appellant as well as many other information-seekers over the past decades.

In its decision to dismiss, the District Court found that the Plaintiff/Appellant had no standing to sue the Defendants/Appellees because he had neither suffered any "injury in fact," that there was no causal relationship between the injury and the basis for the claim, nor that it was "likely" that the injury could be "redressed by a favorable decision." [ECF 26, page 5]

The court then interpreted a newly minted precedent *Citizens for Responsibility & Ethics in Washington v. United States Dep't of Justice*, No. 16-5110, 2017 WL 412626 at *7–8 (D.C. Cir. Jan. 31, 2017) [ECF No. 26, page 7] to advance a novel theory that wholesale, multi-agency violations of FOIA and MDR, over many years, through unlawful legislative rules that nullify sunshine laws, can never be

redressed through APA or other legal reviews on the basis of statutes and other authorities.

The Plaintiff did, in fact, substantiate direct, financial injuries that provided him with standing. The Plaintiff also documented many broader societal injuries that this court may wish to consider, resulting from the same unlawful practices that inflicted injury upon him. Those long-term, grave and mounting injuries form the basis for the Plaintiff/Appellant's request for redress. Not that he individually be made whole for the particularized financial injuries inflicted upon him. Rather, that the unlawful system that inflicts those injuries be challenged, exposed and abolished for the good of the nation.

I. The Plaintiff has standing to sue

A. Plaintiff injuries are particularized

At 6:40 PM on February 10, 2015, the Department of Defense turned over to the Appellant/Plaintiff its 1987 report detailing Israel's nuclear weapons research and development program titled "Critical Technological Assessment in Israel and NATO Nations." This release came after DOD lost its four-year administrative and legal FOIA battle to keep that report out of the public domain. (The report is available online at http://irmep.org/CFP/DoD/02102015_win.pdf) The publicity was immediate and contentious. Some outlets trumpeted the news as a long-

overdue admission of the obvious, "It's Official: The Pentagon Finally Admitted that Israel Has Nuclear Weapons, Too," William Grieder, *The Nation*, March 20, 2015. As Israeli Prime Minister Benjamin Netanyahu prepared to address congress to oppose the Joint Comprehensive Plan of Action peacefully resolving an alleged Iran nuclear crisis, others expressed outrage, "In Shocking Breach, U.S. Declassifies Document Revealing Some of Israel's Nuclear Capabilities." Tom Gross, *The Weekly Standard* March 26, 2015.

The DoD agreed on February 24, 2015 to pay the Plaintiff/Appellee $624.78 in court expense reimbursement ($400 filing fee to the DC Clerk's office, reproduction costs, and other incidentals, though not the substantially greater costs the Plaintiff incurred to research, file and litigate the lawsuit) after it lost the case. [ECF 17, Exhibit 12]. Plaintiff Appellee reminded the Defendant to pay the cost reimbursement on June 5, 2015. However, in retaliation for the Plaintiff/Appellant successfully breeching "strategic ambiguity" doctrine and its many manifestations, DOD has refused to pay. (The DOD's incredible, unlawful administrative and legal maneuvers to thwart overdue release, which included claims that there were non-disclosure agreements precluding release (there were none), inability to locate any of the 100 copies of the report (the Plaintiff located two), that Israel had to sign off on release (no such requirement exists) may be reviewed in *Smith v DOD, Case 1:14-cv-0161* (District Court of the District of Columbia).

In the present case under appeal, the Lower Court selectively reviewed the Appellant/Plaintiff Amended complaint of a systematized abuse of APA and other statutes and authorities, operating over the course of decades. The Lower Court meticulously highlighted and dismissed a number of generalized injuries (misuse of tax dollars, anti-American sentiment) that Appellant Plaintiff cited. The Lower Court all but ignored and mischaracterized his particularized injuries and lack of access to remedies under FOIA and other authorities. [ECF 26, pages 6-7]

Examples of particularized injuries in the complaint following from "Nuclear Ambiguity" and WPN-136 include:

- The Bureau of Industry and Security charging Appellant/Plaintiff $6,984.50 in FOIA search fees for files readily available of an investigation into nuclear weapons technology smuggling from the U.S. to Israel through shell companies that BIS had already released to favored public parties. [ECF 17, page 24, Exhibit 10]
- Claims that files sought under Mandatory Declassification Reviews about Israel's nuclear weapons "cannot be located." [ECF 17, page 27]
- CIA's withholding or obstruction of releasable files about the diversion of weapons-grade uranium from the United States (the NUMEC or Apollo affair), including in the *Nuclear Diversion in the U.S.? 13 Years of Contradiction and Confusion*, Report by the Comptroller General of the

United States, 1978 and other Israel-related nuclear weapons related reports amounting to $12,795 in FOIA administrative and litigation costs. [ECF 17, pages 28-29].

B. Plaintiff cannot seek redress of "nuclear ambiguity" doctrine injuries through FOIA

The Lower Court also states, "Plaintiff may seek compensation for his FOIA fees in the lawsuits he brought pursuant to FOIA." [ECF 26, page 7] This assurance is essential to the Lower Court's dismissal argument that the Appellant / Plaintiff may resolve his issues entirely within the confines of FOIA alone and not through the APA and other statutes. It is also mistaken.

Case law is clear that only attorneys may recover fees in FOIA litigation. "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E). However, the Appellant / Plaintiff, Grant F. Smith, is a public interest researcher, not an attorney. He has not studied law at university, has neither taken any bar exam nor been admitted to any bar.

The weight of authority has long been that pro se litigants may not recover fees under FOIA. See *Crooker v. DOJ*, 632 F.2d 916, 920 (1st Cir. 1980); *Falcone*

v IRS, 714 F.2d 646 (6th Cir. 1983), cert. denied, 466 U.S. 908 (1984); *Debold v. Stimson*, 735 F.2d 1037 (7th Cir. 1984); *Carter v. Veterans* Admin., 780 F .2d 1479 (9th Cir. 1986).

In 1991, the Supreme Court ruled in *Kay v Ehrler*, 499 U.S. 432 (1991) that an attorney who represented himself in a successful civil rights case could not recover attorney's fees under 42 U.S.C. § 1988. In the wake of *Kay*, lower courts have held that several different fee-shifting statutes, including FOIA, preclude awards of fees to all persons who appear pro se. In 1993, the D.C. Circuit held that based on Kay, a pro se non-attorney plaintiff who prevailed in a FOIA action could not obtain attorney's fees. See *Benavides v. Bureau of Prisons*, 993 F.2d 257 (D.C. Cir. 1993), cert. denied, 510 U.S. 996 (1993). See Hammitt, McCall, Rotenberg, Verdi and Zaid, "Litigation under the Federal Open Government Laws 2010" EPIC Publications, 2010, 305-309

II. Informational injuries are redressable under APA and other statutes and authorities

A. Lower court misapplied *CREW v DOJ*

In dismissing Plaintiff/Appellant claims the lower court cited a precedent that was less than a month old, the D.C. Circuit's Jan. 31, 2017 ruling in the case *Citizens for Responsibility & Ethics in Washington v United States Department of Justice*, No. 16-5110, 2017 WL 412626 at *7-8 (D.C. Cir. Jan. 31,2017)) stating:

> ***"To the extent that plaintiff alleges informational injury — harm resulting from his inability to access the information he seeks — based on Executive Order 13526, he must seek redress under FOIA and not the APA," [ECF 26, page 7]***

As previously noted, the Plaintiff/Appellant's core claim is against an unlawful legislative rule, enforced across sunshine laws—impacting both FOIA and MDR requests—implemented by multiple federal agencies.

> **A clear pattern has emerged. Rather than properly respond to government and information in the public domain to enforce Symington & Glenn as required, the President and federal agencies instead thwart it by violating the Administrative Procedures Act, in particular government sunshine laws (FOIA, but also MDR and Executive Order 13526), through improper classification, threatening federal employees with fines, imprisonment, and assessing unwarranted fees and refusing to properly respond to information requesters. Again, the broader umbrella under which this unlawful activity falls has a name. It is called "nuclear ambiguity." [ECF 17, page 14]**

It is not true, as the Lower Court stated, that EO 13526 can be challenged under FOIA. Section 3.5 of Executive Order 13526, "Classified National Security Information" (Federal Register - Executive Order 13526) provides for mandatory declassification review requests (MDR) for all information that was classified under its guidelines or prior to its implementation. The Appellant/Plaintiff has availed himself of MDR in many instances to obtain information. Section 5.3 permits the appeal of agency decisions that were made in response to these mandatory declassification review requests, but not to the judicial system. After an agency's denial of an MDR request, the requestor can only file an administrative appeal with the agency, which, if denied can be only be appealed to the Interagency Security Classification Appeals Panel, a body made up of the same federal agencies who abide "nuclear ambiguity." The ISCAP, not FOIA court, is the highest body to appeal individual MDR denials.

MDR is being improperly invoked to enforce the unlawful legislative order, WPN-136 and the doctrine behind it, "nuclear ambiguity," it is also the driving force of many MDR denials on requests seeking information about Israel's nuclear weapons program. Because MDR denials, distinct from FOIA, provide no judicial remedies, the FOIA matters before a judge cannot "reach" what is actually a systemic APA violation and its chain of causation, and the Appellant/Plaintiff can only rely on APA and other relief. This kind of circumstance is understood, as was

stated in the *CREW* precedent, citing others, "That said, if the very existence of an alternative remedy is 'doubtful,' *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988)., or 'uncertain,' *El Rio Santa Cruz Neighborhood Health Center v. HHS*, 396 F.3d , 1274 (D.C. Cir. 2005), there is scant basis to displace APA review."

One key MDR denial under WPN-136 and "nuclear ambiguity" raised by the Appellant/Plaintiff, though he could cite many, included denial of access to a DOE Security Office report on the diversion of U.S. nuclear material from an Atomic Energy Commission regulated plant to Israel, written by the Department of Energy's Bill Knauf and Jim Anderson. [ECF 17, page 28]

In contrast, *CREW v. DOJ* through APA sought to compel a single defendant agency, the DOJ Office of Legal Counsel, to proactively make available for public inspection through its FOIA reading room OLC opinions on the "president's authority to direct the use of military force without congressional approval, to the standards governing military interrogation of 'alien unlawful combatants,' to the president's power to institute a blockade of Cuba" requested under FOIA. The case did not reference any MDR issues, no patterns of behavior across multiple agencies, extending through many years, or any unprecedented legislative rules such as WPN-136 or guiding doctrines broadly impacting sunshine laws. Because the Appellant/Plaintiff's challenge here specifically raises the unlawful legislative rule's impact on MDR as well as FOIA, across multiple agencies over time, it

cannot be precluded from accessing the Administrative Procedure Act and other statutes, as the precedent clearly states:

> **"…no one should understand our decision as 'assum[ing], categorically,' — i.e., outside the FOIA context—that an alternative remedy will preclude APA relief even if that alternative circumscribes courts' authority to order appropriate injunctive relief…"** *CREW v. DOJ*

The judges issuing the *CREW v. DOJ* ruling clearly did not intend to limit any plaintiff so impacted by unlawful legislative rules coopting or subverting FOIA and MDR from seeking APA or other relief.

B. Even some FOIA-related questions must proceed under other statutes to redress injury

The Appellant Plaintiff did not proceed under FOIA/APA alone. But even if, like CREW, he had it is clear in his case that that there is no broad or narrow relief "role" to be had under FOIA alone, and that only other statutes can provide this. In *Chrysler Corp.v. Schlesinger,* 565 F. 2d 1172 (1977) the Court of Appeals found that Chrysler had no ability to seek injunctive relief under FOIA because FOIA was not applicable to their "role." The court allowed Chrysler to appeal disclosure of allegedly proprietary Chrysler information held by the government and that

Chrysler did want released FOIA, under other statutes. The Court of Appeals disagreed with the District Court's refusal to allow a review under the APA, and remanded the case. Chrysler subsequently pursued halting the release of its allegedly proprietary information as a violation of its rights under the Trade Secrets Act 15 U.S.C. §1311–1314, rather than FOIA.

C. Legislative rules that nullify FOIA and MDR can only be challenged under APA and other applicable statutes

The Appellant similarly can find no relief solely under FOIA. Challenging the longstanding federal agency-wide ban on releasing releasable government information about Israel's nuclear weapons program by moving all the way up the "chain of causation" is not possible through FOIA. Under FOIA, the Plaintiff can only challenge specific applications of FOIA exemptions or EO 13526 driven by "nuclear ambiguity," and only then at face value, within a framework that assumes good faith. There is no good faith in the doctrine of "nuclear ambiguity," which intentionally targets and undermines the American public's access to information about the functions and roles of government that are made in order to achieve nefarious purposes. None of the Defendants in the Appellant/Plaintiff FOIA legal, administrative, or MDR cases will admit the guiding doctrine behind their consistently excessive fees, unwarranted denials, or "misplaced" information. The Plaintiff simply cannot directly challenge under FOIA alone whether the latest tool

in the "nuclear ambiguity" tool chest promulgated in 2012, WPN-136, which has the "force and effect of law" is the product of proper procedural requisites, which, taken together, are "fairly traceable" to the problems outlined herein. In short, the Plaintiff would be denied the rights, long ago granted to Chrysler and others, to "pull back the curtain" and challenge the source of the denial of his rights as an APA matter. The broader impact "nuclear ambiguity" doctrine on MDR is completely unreachable under FOIA.

III. WPN-136 and "nuclear ambiguity" doctrine nullify FOIA and MDR and may only be challenged under APA and other authorities

That WPN-136 is a product of improper procedural requisites is evident in its very title, "Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability." The Israeli nuclear capability is neither "potential" nor merely a "capability" but rather fact, as Defendant Appellee DOD's own "Critical Technological Assessment in Israel and NATO Nations" report delivered to the Appellant Plaintiff and spread throughout the public domain clearly revealed. [ECF 17, pages 10-11]

The Appellant/Plaintiff is an "affected party" of this legislative rule, but as mentioned cannot reach or challenge it case-by-case under FOIA or MDR. Rather, the legislative rule and the procedures and motives that produced it may only meaningfully be challenged under APA and other authorities.

A. The Appellant's injuries are fairly traceable to "nuclear ambiguity" doctrine in general and WPN-136 in particular

WPN-136 and the process that produced WPN-136, which attempts to nullify FOIA and other sunshine law release (MDR) of facts about Israel's nuclear program, are therefore the issue which must be allowed to be challenged, not their repeated, demonstrated application through years of applied FOIA exemptions, MDR denials from the agencies implementing "nuclear ambiguity," punitive costs imposed on public interest researchers and multi-agency systematized misuse of classification guidelines.

The lower court's assertion that "To the extent that Plaintiff alleges informational injury—harm resulting from his inability to access the information he seeks—based on Executive Order 13526, he must seek redress under FOIA and not the APA" [ECF 26, page 7] is wrong in asserting that the Plaintiff only suffered informational injury, and that this was based only on bona fide FOIA application of EO 13526. But even if that were true, the courts have long recognized the fact that "informational injury" is tangible and redressable in APA complaints and other "Take Care" clause actions lodged against federal agencies.

A group of voters sued the Federal Elections Committee over "informational injury" after seeing secret memos obtained and published by the *Washington Post* that a 501(c)(4) nonprofit lobbying organization, the American Israel Public

Affairs Committee (AIPAC), was secretly giving direction to Political Action Committees (PACs) with misleading names, to donate specific amounts to particular candidates based on their favorability to Israel, in a nationwide secret coordination effort. See "Papers Link Pro-Israel Lobby To Political Funding Efforts," Charles R. Babcock, *Washington Post,* November 14, 1988.

The group of voters demanded that AIPAC, since it was acting like the PACs it was directing (and in some cases, had helped establish), be compelled by the FEC to release the names of its own donors as all PACs were required to do at the time. The FEC and AIPAC then challenged plaintiffs' standing in the Supreme Court. *524 U.S. 11 (1998) Federal Election Commission v. Akins et al.* No. 96-1590.

The Supreme Court could have found the group of voters' legal challenge as "sour grapes" and told them—all of them staunch opponents of AIPAC and the so-called U.S.-Israel "special relationship"—that the proper venue would be for them to make a stronger case to voters heading to the voting booth and in the "marketplace of ideas." The Supreme Court could have denied them standing because their injuries were merely "informational" and not "fairly traceable" to the actions or inactions of the FEC or AIPAC. It could have denied appellants standing—as a small handful of complaining, disgruntled voters among millions—to challenge agency discretion to take or not take action on the damning

information published in the *Washington Post*. But the Supreme Court found the group of voters did have standing over their "informational injury":

> ***We conclude that, similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.*** *FEC v Akins*

Similarly, the right of the Appellant/Plaintiff to obtain information about the functions of government, a basic right he shares with fellow Americans and certain members of the news media, and all taxpayers, is fundamental. As one of many victims of a scheme to undermine those rights, the Plaintiff, like the group of voters disenfranchised by AIPAC's activities and the FEC's refusal to enforce U.S. election laws in force at the time, has the right to challenge the manifestations of "nuclear ambiguity," a scheme to subvert enforcement of the Arms Export Control Act, as an APA matter in court. The Appellant's core legal question for the court addresses how EO 13526 and FOIA are being undermined by 'nuclear ambiguity" doctrine and its manifestations, such as WPN-136, not the inherent legality of EO 13526, as the Lower Court incorrectly stated.

The amended complaint documents, in addition to direct financial harm, indirect costs in "the unnecessarily arduous and costly" nature of all sunshine law requests for U.S. information about Israel's nuclear weapons program. [ECF 17, page 10]. These travails and costs are indirectly caused through EO 13526, MDR, and FOIA, but directly by "Nuclear Ambiguity" and the unlawful legislative rule(s) (there may be others) that implement it: WPN-136.

B. The Lower Court employed selective quotation of the Appellant/Plaintiff's complaint in its dismissal.

The Lower Court claimed the Appellant/Plaintiff "...alleges that Executive Order 13526, signed by President Obama on January 5, 2010, which sets out a system for classifying and declassifying information related to national security, violates the APA. " The Plaintiff made no such allegations. Rather, the Plaintiff argued repeatedly that the Defendant Appellees violations of APA in the pursuit of "nuclear ambiguity" misused and violated EO 13526 and FOIA. At no point did the Appellant/Plaintiff challenge EO 13526 alone. Rather, the Appellant/Plaintiff clearly emphasized the interconnection between an unlawful legislative rule under APA and the perpetration of other harmful acts:

- "Such a unilateral suspension of the nation's Arms Export Control laws through violations of sunshine laws, Administrative Procedure Act, the Take Care Clause and Executive Order 13526 – Classified

National Security Information is unlawful. Only this Court's immediate intervention can offer redress to the Plaintiff's past and future injuries and broader relief to American taxpayers who have suffered grave and ongoing harm since 1978." [ECF 17, page 4]

- Defendant John O. Brennan, Director of the Central Intelligence Agency is sued under the Administrative Procedure Act ("APA"). The CIA violates the Administrative Procedure Act ("APA". See 5 U.S.C. § 703) and Executive Order 13526 – Classified National Security Information, to unduly slow, delay and thwart the release of information about the Israeli nuclear weapons program through systemic efforts to thwart and impose unwarranted costs on outside Freedom of Information Act and other sunshine law requesters. [ECF 17, page 4]
- Defendant Ashton Carter is U.S. Secretary of Defense. Carter and is responsible for the Department of Defense's violations of the Administrative Procedure Act ("APA") and Executive Order 13526 – Classified National Security Information to unduly slow, delay and thwart the release of information about the Israeli nuclear weapons program, punish outside FOIA requesters through the non-payment of court-ordered settlements. Carter is also responsible for the Foreign

Military Sales program which unlawfully transfers funding to weapons contractors supplying Israel and Israeli military companies even though Israel is an ineligible recipient under Symington & Glenn. [ECF 17, page 5]

- Defendant John Kerry, is Secretary of State. Kerry and the U.S. Department of State violates the Administrative Procedure Act ("APA") and Executive Order 13526 – Classified National Security Information promulgating and defending and an unlawful gag law to unduly slow, delay and thwart the release of information about the Israeli nuclear weapons program and punish federal employees, contractors, and outside sunshine law information requesters. [ECF 17, page 5], etc.

A careful review of the Appellant/Plaintiff amended complaint reveals that the technical issues with sunshine laws of primary forensic concern in the Lower Court dismissal, are located at the very bottom of the chain of causation:

1. Appellee/Defendants' desire to ignore the AECA which places conditions on U.S. foreign aid to non-NPT signatory nuclear weapons states such as Israel;

2. Implementation of "nuclear ambiguity" to restrict release of U.S. government information about Israel's nuclear weapons program.
3. Enforcement of "nuclear ambiguity" through WPN-136 and other measures to thwart information releases and informed official responses to public queries.
4. Improper classification under EO 13526 that cover up wrongdoing. Perpetuation of violations through MDR.
5. Spurious use of FOIA exemptions, MDR denials, excessive fees, and delaying tactics.

C. Defendant Appellee compliance with APA and related statutes would redress harm

In its ruling to deny, the lower court claimed, "Even if Defendants were ordered, as Plaintiff requests, to cease providing aid to Israel, Plaintiff would nevertheless be required to obtain any records or documents related to the government's actions with regard to Israel through FOIA."

This claim misinterprets the hierarchy of the Plaintiff's request for injunctive relief listed in the amended complaint [ECF 17, p 37]. The core request was that the court declare "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." Upon the termination of these unlawful practices, information long bottled up inside the U.S. government about Israel's nuclear weapons program and its implications would begin to flow out into the public domain, without the need for FOIA requests, lengthy administrative processes and courtroom battles taking tens of thousands of dollars and many years to litigate. Contrary to what the Lower Court claimed, the Plaintiff would no longer incur costs, legal, administrative, or retaliatory (such as DOD non-payment of Plaintiff court fees). Americans would finally understand the functions (or dysfunction) of government in this domain.

D. Free flow of U.S. government information about Israel's nuclear weapons program would benefit all Americans

Also contrary to what the Lower Court claims, once information about Israel's nuclear weapons programs flowed freely into the public domain, the Appellees/Defendants would have to comply with the AECA by terminating U.S. aid to Israel. Or, they could comply with the waiver provisions of the AECA and publicly explain why they were delivering the lion's share of U.S. aid to Israel despite its nuclear arsenal. Or Congress could repeal or change the AECA to specifically exempt Israel.

In the Amended Complaint, the Appellant/Plaintiff reveals why APA and other authorities, rather than FOIA, are the only means for challenging the systemic government-wide non-release of releasable information he seeks. [ECF 17, p 21]

E. WPN-136 is improperly derived from a U.S. State Department classification guide and may be challenged.

WPN-136 is a Department of Energy classification guide that claims to be wholly derivative of another classification guide, the *U.S. Department of State Classification Guide (DSCG 05-01) January 2005*. APA challenge of WPN-136 is warranted because WPN-136 contradicts its source, which mandates disclosure of information already in the public domain, and not systemic multi-agency, government-wide cover-ups. *U.S. Department of State Classification Guide (DSCG 05-01) January 2005, pp 13-14* instructs*:*

> ***"Reporting on and analysis of the internal affairs or foreign relations of a country is a central function of U.S. foreign service posts and is vital to the formulation and execution of U.S. foreign policy. This reporting should be unclassified when the subject matter is routine, already in the public domain, or otherwise not sensitive."***

Information already in the public domain indicates that if the U.S. Department of State's classification guidelines were properly promulgated, federal employees would be encouraged to be more informative—not completely muzzled under threat of dismissal—about Israel's nuclear program, its implications for nuclear proliferation and for U.S. policy. As documented in the complaint, the fact of Israel's nuclear weapons program is well-documented, well-known by policymakers and 63.9% of the American public believe Israel has nuclear weapons. But they are banned from questioning their government about its policy toward those weapons or question the legality of U.S. foreign aid, by "nuclear ambiguity doctrine" and an unlawful legislative order. [ECF 17, pages 21-22]

CONCLUSION

For the reasons stated above, Plaintiff respectfully submits that this Court should vacate the decision below and remand for further proceedings. To guide those proceedings, the Court should examine for itself the 2012 legislative rule used to unlawfully block FOIA releases about Israel's nuclear weapons program—WPN-136—in camera.

Plaintiff recognizes that this Court ordinarily leaves review of such records to the district court, but Plaintiff once again asks the Court to review WPN-136 here because most of the contents of the classification guide are classified and it is

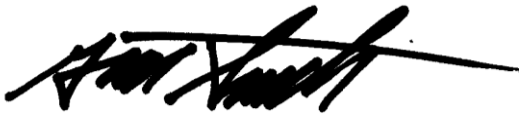
presently (though not necessarily solely) of great importance to the doctrine of "nuclear ambiguity" in undermining FOIA, contravening EO 13526's ban on classification to coverup wrongdoing, gutting MDR, and punishing public interest researchers (as well as Federal employees and contractors such as James Doyle, see [ECF 17, pp 20-21]).

ADDENDUM

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it fewer than the maximum allowed number of words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it contains 7,054 words has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.



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On September 18, 2017, I served upon the following counsel for Defendant–Appellee one copy of Plaintiffs–Appellants' BRIEF FOR PLAINTIFFS–APPELLANTS via this Court's electronic-filing system:

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