[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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

The U.S. government's ongoing provision of foreign assistance to Israel in non-compliance with the Symington & Glenn Amendments to the Arms Export Control Act Section 2799aa-1 *1 Nuclear reprocessing transfers, illegal exports for nuclear explosive devices, transfers of nuclear explosive devices, and nuclear detonations* is unlawful. Since the Symington & Glenn Amendments became law, defendants have transferred an inflation-adjusted $234 billion in U.S. taxpayer funds [Amended Complaint, ECF 17, page 30] to Israel without issuing the proper waivers to enumerated parties of the U.S. Congress. Waivers require elaborating precisely how the U.S. national interest would be negatively impacted by cutting off aid to a non-Treaty on the Non-Proliferation of Nuclear Weapons (NPT) nuclear power. Given Israel's long history of trafficking and proliferating nuclear weapons technology, such an argument could not seriously be made. See Roger Mattson, "Stealing the Atom Bomb: How Denial and Deception Armed Israel," February 16, 2016 and "Grant F. Smith "How to Smuggle U.S. Nuclear Triggers to Israel" *Antiwar.com*, May 11, 2017. This stands in contrast to proper U.S. government abidance with Section 2799aa-1 in the cases of India and Pakistan.

U.S. government agencies have instead implemented and fortified a robust system of prior restraint, dubbed by many researchers as "nuclear ambiguity." [Amended Complaint, ECF 17, page 13-16] Nuclear ambiguity requires suppressing the release of all classified and unclassified U.S. government information about Israel's nuclear weapons program to the American public, government officials carefully changing the subject or running away from questions about how Israel's nuclear weapons impact foreign policy and treaties such as the Nuclear Non-Proliferation Treaty. [Amended Complaint, ECF 17, pages 15-19] This behavior undermines governance and is purposeful. The core purpose of "nuclear ambiguity" and WPN-136 is to keep Israel's nuclear weapons from becoming "established international fact." See "Israeli Nuclear Program," Memorandum from Henry Kissinger to Richard Nixon, July 19, 1969. This, in turn, would enable U.S. policymakers to serially violate obligations such as Section 2799aa-1 and the NPT.

Since 2012, as the public spotlight on nuclear weapons in the Middle East intensified during negotiations to pass the Joint Comprehensive Plan of Action with Iran, the Obama administration issued and rigorously enforced a legislative rule, WPN-136, which inflicts punishment upon any U.S. federal government official or contractor—all Freedom of Information Act and Mandatory Disclosure Review officials fall into these categories—that endeavors to release any

information about what the U.S. government knows about Israel's nuclear weapons program. Release of information about ongoing smuggling of nuclear weapons technology from the U.S. to Israel in particular—since such activities clearly trigger Symington & Glenn provisions—are withheld through demands for excessive fees and other practices in compliance with "Nuclear Ambiguity" and WPN-136. It is for this reason alone the Bureau of Industry and Security of the U.S. Department of Commerce attempted to charge the Plaintiff $6,984.50, in advance, for the release of several pages of documents detailing an Israeli nuclear weapons technology smuggling operation shipping prohibited U.S. technologies to Israel from 2003 to 2007 which was uncovered in 2010. [Amended Complaint, ECF 17, page 24 and Exhibit 10]. The demand for advance payment of $6,984.50 bore no relation to the cost of processing the FOIA or reproducing documents. Rather, the BIS demand for advance and extraordinary fee payment was intended to quash the Plaintiff's FOIA request, and protect unlawful U.S. aid flows to Israel.

The unlawful legislative rule WPN-136 has systematically subverted FOIA and MDR. As a public interest researcher for IRmep the Plaintiff-Appellant has suffered many repeated, individualized, concrete harms since 2012, and earned the right to challenge WPN-136 as an APA matter.

Plaintiff-Appellant is likely to prevail on the merit of his arguments, but other factors weigh in favor of injunctive relief here as well. The purpose behind

"nuclear ambiguity" doctrine is to keep American taxpayers in the dark so that U.S. foreign aid to Israel—the largest single foreign recipient—can continue unchallenged while elected officials vie for campaign funding from the vast network of pro-Israel campaign contributors. See John Mearsheimer and Stephen Walt "*The Israel Lobby and U.S. Foreign Policy*" Farrar, Straus and Giroux, September 2, 2008. No U.S. national security interest obtains. The balance of equities and the public interest weigh in favor of injunctive relief. Granting the injunctive relief requested would mitigate Plaintiff-Appellants' injuries without compromising any legitimate public interest.

ARGUMENT

I. Plaintiff-Appellant has standing to challenge "nuclear ambiguity"

Misuse of secrecy to cover-up wrongdoing is not allowed in the American system of governance.

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be "uninhibited, robust, and wide-open" debate. *New York Times Co. v. Sullivan*, 376 U. S. 254, 269-270 (1964). On the subject of U.S. policy and Israel's nuclear weapons program, there

is little informed debate even as the question of Middle East nuclear proliferation grows, because of prior restraint.

Former DOE nuclear weapons specialist Bryan Siebert recalls seeing a two-cubic-foot-stack of CIA, FBI, DOJ and DOE documents about Israel's nuclear weapons program. The government's fight to keep such documents from entering the public domain is uniquely purposeful yet the object of widespread and growing public contempt. See "After 47 years, the US is still pretending Israel doesn't have nuclear weapons," Douglas Birch and R. Jeffrey Smith, *Global Post,* September 16, 2014.

The Plaintiff-Appellant's right to obtain this classified, declassified and unclassified U.S. government information under the Freedom of Information Act and Mandatory Declassification Review has been subverted by Defendants' systematized prior restrains, including, but perhaps not limited to, its 2012 implementation of WPN-136. The reason for this prior restraint is clear: in every instance in which the U.S. government releases such information, it reveals that the U.S. government knows a great deal about Israel's nuclear weapons program, and is out of compliance with the Symington & Glenn Amendments to the AECA while also undermining Nuclear Non-Proliferation Treaty bans on prohibitions of transfers of nuclear weapons technologies to non-NPT countries. Rather than comply with the requirements of both law and treaty, the Defendants have instead

sought to unlawfully suppress the release of all classified, declassified and unclassified U.S. government information about Israel's nuclear weapons.

Defendants continue to insist that the financial, informational and other injuries they have systematically inflicted upon the Plaintiff-Appellant [Amended Complaint, ECF 17, pages 20-30] do not provide standing to challenge their growing system of prior restraints that have led to the subversion of FOIA and MDR. They instead insist he must challenge each particular instance of "nuclear ambiguity's" implementation, assuming good faith, in FOIA court and must similarly trust that National Archives and Records Administration officials are also operating in good faith during lengthy MDR processes and ISCAP appeals. This position is not only flawed, it is dangerous.

Inside government the desire to keep the public from knowing about questionable, harmful, corrupt or illegal actions by falsely insisting that a "national security" issue demands secrecy runs deep. Fortunately, the Court's success in striking down spurious secrecy claims is robust. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. "*Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70 (1963); see also *Near v. Minnesota*, 283 U. S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe*, 402 U. S. 415, 419 (1971). "The

Government says that it has inherent powers…to protect the national interest, which in this case is alleged to be national security." *Near v. Minnesota*, 283 U. S. 697), repudiated that expansive doctrine in no uncertain terms. The purpose of the First Amendment is to prohibit the widespread practice of governmental suppression of embarrassing information. Plaintiff-Appellant is an agent of the First Amendment.

Not allowing the Plaintiff-Appellant to challenge Nuclear Ambiguity through overturning WPN-136 as an APA matter, and whether the process that brought it into being was legitimate, within the chain of causation it is designed to enable (unlawful foreign aid to Israel), and remediate harm through the claw-back ill-gotten aid, could very easily be replicated in other domains through similarly unlawful legislative rules, if this prior restraint is allowed to stand.

To escape public scrutiny, an administration could release a new legislative rule called "Guidance on Release of Information Relating to the Potential for a U.S. Mass Surveillance Capability." FOIA and MDR requesters would be left wondering why no information was ever forthcoming about real, known programs they read about in the news, not ethereal "potential…capabilities." Deprived of the ability to extract facts and challenge the constitutionality of real programs, they would be left battling individual FOIA cases and making vain MDR requests to officials who—under pain of sanction, dismissal or even imprisonment, were

required to deny the existence of any relevant information or public access to information known to exist, and enact punitive measures against requesters. To escape public scrutiny, an administration could release another new legislative rule called "Guidance on Release of Information Relating to the Potential for a U.S. Torture and Rendition Capability." The wording of the legislative rule denying the fact of the programs' existence, would signal that denial that such programs was mandatory, under threat of sanction, dismissal or even imprisonment awaiting any FOIA or MDR functionary daring to engage in a bona fide search and release process.

Defendants note that the Plaintiff-Appellant "alleges that the government uses the Bulletin [WPN-136] 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-Appellant 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." [Appellee Response, ECF 1703563 page 14 footnote]

It is true that the Plaintiff-Appellant is not a U.S. federal government employee or contractor. However, every FOIA and MDR request he files as a function of his recognized role as a public interest researcher at a nonprofit tax-exempt public

interest organization is made to federal government employees and contractors. WPN-136, issued by the Department of Energy, citing U.S. Department of State classification authorities, is binding on every one of them. Federal agency employees and contractors now well-understand that they can be punished for the proper execution of their duties if that proper execution involves the release of any information to the public about the U.S. government's deep knowledge—especially since 1976—of Israel's nuclear weapons program.

The Plaintiff-Appellant [Amended Complaint, ECF 17, pages 20-21] cites the very public example that was made of James Doyle under WPN-136. James Doyle was a former nuclear policy specialist at Los Alamos. He accurately stated as fact in a magazine that Israel has nuclear weapons:

> "Moreover, states without nuclear weapons have even attacked those who possess them, an outcome that flies in the face of the claims of deterrence proponents. Nuclear weapons did not deter Egypt and Syria from attacking Israel in 1973…" James A Doyle, "Why Eliminate Nuclear Weapons?" *Survival: Global Politics and Strategy* February–March 2013

Shortly after publication, WPN-136 was invoked to suspend Doyle, raid his home computer and fire him. His crime in the eyes of those federal agencies dedicated to undermining Section 2799aa-1, was referring to Israel's nuclear

weapons as established fact—while still serving as a U.S. federal government agency employee—in an article seeking to leverage his taxpayer-funded knowledge to produce better public policy. WPN-136 insists upon prior restraint, mandating that such officials instead claim that Israel's nuclear weapons are only a "potential…capability" and that the U.S. government cannot release information in its possession accurately discussing them as fact, even to improve public policy and transparency. It does not matter that Doyle cited facts that have long been in the public domain. Prior restraint via "nuclear ambiguity" demanded that Doyle and all others may not educate the public about the policy implications of Israel's nuclear weapons *while actively serving in government*.

This not only subverts sunshine laws, but creates an Orwellian requirement that all government employees are compelled to issue false or misleading statements or lies of omission whenever the issue of Israel's nuclear weapons arises. At its core WPN-136 is not only designed to establish prior restraint, it requires the serial violation of 18 USC §1001, which makes it a crime to: 1) knowingly and willfully; 2) make any materially false, fictitious or fraudulent statement or representation; 3) in any matter within the jurisdiction of the executive, legislative or judicial branch of the United States.

All government employees and contractors are currently as vulnerable to WPN-136 actions as Doyle was. If Defense counsel desired to test the reach of WPN-136

he could simply drop the word "alleged" his references to Israel's nuclear status (the qualifier appears eight times) in [Appellee Response, ECF 1703563]. Plaintiff-Appellant has no doubt that Defense counsel would be unjustly disciplined, likely replaced and possibly fired over such warranted accuracy. His future career in the legal profession might be forever ruined.

Fortunately, most Americans are neither gagged nor deceived. 63.9% of Americans believe Israel has nuclear weapons. See "Most Americans Correctly Believe Israel has Nuclear Weapons" IRmep Poll through Google Consumer Surveys, September 26, 2014. Unfortunately, *lacking official acknowledgement due to prior restraint*, their knowledge alone cannot lead to better policy, advice and consent engagement with their legislators, or informed public debate on issues such as the legality of, and amount of, U.S. foreign aid to Israel.

II. APA is an appropriate avenue for challenging prior restraint

A number of U.S. states came together in 2014 to challenge as unlawful the Obama administration's implementation of legislative rules, known as Deferred Action for Childhood Arrivals, they claimed "unilaterally suspend the immigration laws as applied to 4 million to the 11 million undocumented immigrants to the United States." They too cited the "Administrative Procedure Act (APA). "See 5 U.S.C. § 703 ([T]he action for judicial review may be brought against the United States.)."

An injunction suspending the challenged legislative rules was quickly issued, but plaintiffs dropped their lawsuit when Obama administration left office. It became moot. The Attorney General announced the DACA program was ending on September 5, 2017. See Liz Robbins "Mail is Late, and DACA Renewals Are Denied," *New York Times*, November 11, 2017. While this means no precedent from *States v USA, case 1:14-cv-00254 (US District Court for rhe Southern District Of Texas Brownsville Division) (* is available for citation, the lessons of the case apply, because Plaintiff's legal action is similar in many ways.

Under heavy pressure to clarify U.S. policy toward Israel's nuclear weapons program, particularly from tenacious journalists such as White House correspondent Helen Thomas, [Amended Complaint, ECF 17 pages 15-17] the Obama administration implemented WPN-136 for the sole purpose of cutting off accurate U.S. government information flows to the public about Israel's nuclear weapons program, as a function of its goal to make massive annual foreign aid payments to Israel without complying with the required Symington & Glenn Amendments of the AECA Section 2799aa-1. This prior restraint includes any statements or communications by federal agency employees and the proper public release of such information under FOIA and MDR. It demands retaining such information, not because it is classified or not already in the public domain from multiple non-government sources, but rather *because it would generate warranted*

accountability and greater legal recourse for those demanding applicable laws be observed.

The Defendants in the DACA case made identical arguments to those of the Appellee Defendants in this action, including failure to demonstrate injury, no standing for remuneration of costs already inflicted, or about to be inflicted, upon them, that Plaintiffs had a "generalized policy grievance in this area of unique federal control," and that DACA was an "unreviewable exercise" of executive discretion.

Defendants failed to prevail with those arguments. Defendants could not convince the court in the DACA case that the executive branch had not overstepped the law by issuing unlawful legislative rules to advance programs impacting the U.S. and many other countries, with no basis in immigration laws passed by the Congress.

Similarly, in Plaintiff-Appellant's case, it remains clear that the intent of Congress that the existing Symington & Glenn provisions of AECA Section 2799aa-1 be observed across federal agencies. The Executive and federal agencies may not sidestep Congress through the issuance of legislative rules that mandate withholding all facts about Israel's nuclear weapons program, with the sole

purpose of escaping warranted public pressure to properly enforce the AECA, and global pressures to abide by the NPT.

III. Defendants are not "secretly complying" with Section 2799aa-1

Defendants imply that the Executive may have properly determined Israel is a nuclear weapons state and subsequently are secretly complying with the Symington & Glenn waiver provisions of the AECA. "The statute does not require that any such presidential determination be made public." [Appellee Response, ECF 1703563 page 4] "Section 2799aa-1 does not require the public disclosure of information." [Appellee Response, ECF 1703563 page 32]

The Defendants are clearly not complying with Section 2799aa-1 because such compliance, contrary to what Defendants claim, would be publicly observable. Rather, they are conspiring to suppress the release information about Israel's nuclear weapons that would generate public calls for them to comply with Section 2799aa-1 (or, perhaps alternatively, calls for Congress to specifically exempt Israel from the law.).

The legislative intent of the Symington & Glenn Amendments embodied in 2799aa-1 is to "name and shame" both non-NPT countries with nuclear weapons programs like Israel, Pakistan and India, but also the administrations that subvert NPT by continuing to provide foreign aid if there is no sound justification for

doing so. [See Amended Complaint, ECF 17, Exhibits 1 and 2] Amendment author, Senator Stuart Symington, was a defender of taxpayer rights, and he demanded they not to be forced provide foreign aid that undermined the NPT, when he said:

> "If you wish to take the dangerous and costly steps necessary to achieve a nuclear weapons option, you cannot expect the United States to help underwrite that effort indirectly or directly." [Amended Complaint, ECF 17 page 8]

In requiring the Executive Branch to notify Congress that, rather than halt foreign aid, federal agencies intended to provide aid to a non-NPT signatory nuclear weapons state, Symington made sure the American public would know about it.

In the case of both India and Pakistan, the actual contents of congressional waiver notifications have been very quickly disseminated to congressional representatives, their constituents, the news media, and public policy research entities. When Congress saw such waivers were not going to be the exception, but rather be the rule, they signaled acceptance of required justifications in the waivers by passing legislation specifically making such waivers for annual foreign aid allotments to India and Pakistan unnecessary. See "Nuclear Sanctions: Section

102(b) of the Arms Export Control Act and Its Application to India and Pakistan," Congressional Research Service, October 5, 2001.

Because there is no attempt to violate Section 2799aa-1 on behalf of Pakistan and India, there are no prior restraint mechanisms such as WPN-136 subverting FOIA and MDR releases of information about Pakistani and Indian nuclear weapons. Indeed, information about the number of their nuclear weapons, delivery vehicles, deployment, planned arsenal expansions, modernization and safeguards flows freely from multiple U.S. government sources directly to policymakers, the news media and watchdog organizations with no need for sunshine laws, years of administrative FOIA and MDR processing, expensive lawsuits or ISCAP appeals. See Paul K. Kerr and Mary Beth Nikitina "Pakistan's Nuclear Weapons," Congressional Research Service, August 1, 2016.

Executive Branch waivers under Section 2799aa-1, contrary to what Defendants imply, are therefore widely available to the press and public, openly debated and considered by members of Congress, and the subject of further legislative action. Waivers and determinations of Israel's nuclear status are not, as the Defendants imply, transmitted secretly to Congress by furtive members of the Executive Branch, striving to comply with Section 2799aa-1 in the darkness of night. Carnegie Endowment provides another example of the public nature of reporting on waivers for Pakistan, when it trumpeted, "On September 22nd, Glenn,

Symington and Pressler sanctions, all imposed due to Pakistan's nuclear weapons program, were waived for U.S. national security reasons." (see "Pakistan's Sanction Waivers: A Summary," *Carnegie Endowment for International Peace*, October 29, 2001.)

If secret waivers had been serially issued to Congress, given the much larger amount of aid that Israel receives (again, an inflation-adjusted $234 billion since the Symington & Glenn Amendments became law in 1976) the public would certainly know about it, and Congress might have debated and passed laws similar to those exempting Section 2799aa-1waiver requirements on U.S. foreign aid to India and Pakistan.

But such Israel waivers do not exist because there is no conceivable rational the Defendants could possibly advance. Plaintiff-Appellant inquiries to his nonvoting member of Congress for the District of Columbia, Eleanor Holmes Norton, and her foreign policy advisor Camilo Manjares, produced no evidence of any uncommented-upon 2799aa-1 waivers for Israel over the 30 years the law has been in effect.

IV. Plaintiff-Appellant is an affiliated public interest researcher

Defense attorney states as a "factual allegation" [Appellee Response, ECF 1703563 page 4] that "Plaintiff Grant F. Smith is an independent researcher who asserts an interest in Israel's nuclear status."

This is incorrect. The amended complaint clearly states his affiliation [Amended Complaint, ECF 17, page 4]. As the Lower Court properly noted in its Memorandum Opinion [Doc 26, page 1] "Plaintiff Grant F. Smith is a public interest researcher and founder of the Institute for Research: Middle Eastern Policy, Inc." *Barron's* wrote in 2015 that "Grant Smith, [is] head of the Institute for Research: Middle Eastern Policy, a small policy-research and education organization highly critical of U.S. policy toward Israel." See Jim McTague "Don't Blame Obama for Data on Israel's Nukes," Barron's, April 3, 2015. IRmep's motto is "Research, Awareness, Accountability." IRmep has supporters in all fifty states. Since 2002 the Plaintiff-Appellant has overseen the 501(c)(3) tax-exempt organization's publicly-supported research agenda while authoring numerous books and articles about the Israeli nuclear weapons program and holding conferences with thought leaders including former officials drawn from the DNI, CIA, AEC and NRC to publicly discuss how these and other facts impact U.S. Middle East policy.

One of these former CIA senior analyst experts, Paul Pillar who has been hosted twice by IRmep and American Education Trust joint annual policy conferences at the National Press Club, attempts to avoid prior restraint punishments by referring to Israel's nuclear weapons as "unmentionables" and "kumquats." See Paul Pillar "Israel's Nuclear Weapons: Widely Suspected Unmentionables" *The National Interest*, September 3, 2014 and Paul Pillar, "Israeli Objectives Regarding the Iranian Nuclear Issue" Transcript, Speech at The Israel Lobby conference held at the National Press Club, April 10, 2015.

Defense counsel's break with lower court due recognition of Plaintiff-Appellant's institutional affiliation is a late-in-the-game effort to minimize this lawsuit as that of a disgruntled lone individual hurling about unfounded "allegations." Nothing could be further from the truth. Disdain for this variety of prior restraint and the costly lawlessness, misrepresentations and disinformation it engenders is widespread in the United States.

IRmep was established following the unfounded U.S. government allegations that Iraq possessed WMDs, which it then used as a justification to invade Iraq. IRmep entered the field to conduct research and expose unfounded assertions, disinformation and lies of omission perpetrated by the government actors and their surrogates before they can undermine the public interest. IRmep has endured for 15 years because Americans have a much keener interest in the justifications

supporting trillions of their tax dollars committed to the Middle East, including upon what basis foreign aid to Israel is made. 52% of Americans want Israel's nuclear weapons included in congressional debates about how to finance its "qualitative military edge" because their absence in public policymaking leads to unfounded arguments for inflated aid packages. See IRmep Poll "52% of Americans Want Congress to Consider Israel's Nuclear Weapons," *IRmep Poll*, March 10, 2017.

However, at present, Americans cannot engage in bona fide "advice and consent" since, under the WPN-136 gag order, no accurate U.S. government information about the number, deployment, targeting and impact of Israel's nuclear arsenal on the region and U.S. may be released under WPN-136, which insists government officials in office state they are "potential…capabilities" rather than reality. Only after leaving office do some U.S. government officials enter into uncensored and warranted conversations about Israel's nuclear weapons, including President Jimmy Carter (see "Israel has at least 150 atomic weapons: Carter" *Reuters*, May 26, 2008) and former Secretary of State Colin Powell (see Jack Moore "Colin Powell in leaked email says Israel has 200 nukes", *Newsweek*, September 16, 2016.

V. Plaintiff-Appellant sustained direct injuries.

Plaintiff-Appellant has documented numerous injuries inflicted upon him by the implementation of WPN-136 and "nuclear ambiguity." [ECF 17, Amended Complaint, pages 20-30].

The Defendant counsel concedes, albeit in a footnote, that the Plaintiff-Appellant was never paid $624.78 in fees following an immensely costly, years-long battle to obtain public release of an unclassified report detailing the state of Israel's nuclear weapons laboratories and hydrogen bomb program as it existed in 1987. See "Critical Technology Assessment in Israel and NATO Nations." Prepared for Office of Under Secretary of Defense, April 1978.

Defense counsel unconvincingly claims nonpayment was "apparently as a result of the departure from federal employment of prior counsel for the government," but that "The issues before this Court on appeal are unaffected by this matter." Plaintiff-Appellant disagrees.

The record reveals a far more logical explanation for the non-payment of fees and injury to the Plaintiff-Appellant. It was the final injury inflicted upon him at the end of an exhausting and extremely costly fight to penetrate "nuclear ambiguity." The DOD's incredible, unlawful administrative and legal maneuvers to thwart overdue release of the unclassified report, which included false

courtroom claims that there were nondisclosure agreements precluding release (there were none), inability to locate any of the 100 copies of the report (the Plaintiff-Appellant located two), that Israel had to sign off on release (no such requirement existed). These may be reviewed in *Smith v DOD*, Case 1:14-cv-0161 (District Court of the District of Columbia). It became obvious to the Plaintiff-Appellant, as it should to the court, that nonpayment of court fees was entirely consistent extension of "nuclear ambiguity" and WPN-136. These demand not only unlawfully withholding information (which they clearly do), but also punishing those who manage to release it, whether they are government employees such as James Doyle, or public interest researchers, such as the Plaintiff-Appellant. This injury and retribution is inflicted at the end of the chain of causation leading to Plaintiff-Appellant's Section 2799aa-1 claims. The president's ability to violate 2799aa-1 is undermined every time a James Doyle or Grant F. Smith releases indisputable, official U.S. government facts about Israel's nuclear weapons program. An injunction overturning WPN-136, barring disbursement of further foreign aid to Israel and compelling the President to make an overdue and proper determination regarding Israel under Section 2799aa-1 would relieve the Plaintiff-Appellant of the need to use FOIA to seek documents in the future, because after prior restraint was lifted and the Defendants properly executed their duties, such

information would be freely released to inform the debate and advise and consent governance, as it is in the case of Pakistan and India.

VI. FOIA is insufficient to redress "nuclear ambiguity" injuries

The Defendants claim enjoining "nuclear ambiguity and all its manifestations" is non-justiciable because Plaintiff-Appellant might seek relief elsewhere, and that "The availability of an adequate remedy under FOIA precludes any relief." [Appellee Response, ECF 1703563 Page 7]

Challenging "nuclear ambiguity" and its manifestation in WPN-136 under FOIA is not possible. Government officials required to withhold and treat information about Israel's nuclear weapons as a "potential…capability" have never once cited, nor may they cite, WPN-136 *Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability, US Department of Energy, September 6, 2012* in denials since it is almost entirely classified. Rather, they cite FOIA exemptions claiming, "properly classified information" or issue "GLOMAR" responses. WPN-136 has never itself appeared in a FOIA administrative process on records or legal actions involving FOIA. That is because it is a gag order to create prior restraint and not a classification guideline. [Appellant Brief, page 28,] It is clearly not derivative of *U.S. Department of State Classification Guide (DSCG 05-01) January 2005* because WPN-136 does not seek to empower the release of government information that is already widespread

across the public domain. Rather, as a legislative gag rule, it enforces prior restraint.

Defendants would prefer the Plaintiff-Appellant limit himself to individual FOIA cases, unchallengeable exemptions based on WPN-136 and fees, which never reach nuclear ambiguity instruments such as WPN-136 (others may exist) or challenge why WPN-136 exists. However, the Plaintiff-Appellant is not seeking a palliative for symptoms (numerous individual FOIA cases, expenses and fees) but rather a cure for the disease (Nuclear ambiguity, a known agency action, WPN-136, and the Section 2799aa-1 requirements it is designed to subvert). FOIA alone cannot, was never intended to, and never has, addressed prior restraint and unlawful actions on this scale.

The Plaintiff-Appellant seeks to enjoin "nuclear ambiguity" and all of its manifestations [Appellee Response, ECF 1703563 page 9] because no other legal remedy suffices. Only as an APA matter, is this addressable.

If WPN-136 alone is overturned, but not "nuclear ambiguity" another legislative rule masquerading as a classification guide (itself completely classified, including its title) could replace WPN-136. There may already be another already in the pipeline, an implementation of "nuclear ambiguity" that the public may never come to know about.

Plaintiff-Appellant's right to seek Administrative Procedure Act (APA) review of Nuclear Ambiguity and WPN-136 is permitted as "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Administrative Procedure Act 5 U.S. Code § 702 Right of review.

Defendants argue that "nuclear ambiguity" is not an "agency action" subject to judicial review under the APA since it is not "circumscribed" and "discrete." [Appellee Response, ECF 1703563 Page 20] Individuals impacted by "nuclear ambiguity" argue otherwise. Nuclear ambiguity has driven agency actions for over thirty years, achieving the remarkable retention of most of the existing U.S. government corpus of classified, unclassified and declassified material on Israel's nuclear weapons program.

Even if the court does not accept "nuclear ambiguity" as a "final agency action," WPN-136 certainly fits that description. WPN-136 has 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.").

It is clear that application of "nuclear ambiguity" through WPN-136 that has injured the Plaintiff-Appellant. Because "there is no other adequate remedy in a court." 5 U.S.C. § 704 through FOIA, it is the most appropriate avenue for redress.

Defendants claim the FOIA provides for review of Plaintiff-Appellant 's chief contention regarding "nuclear ambiguity": that information about Israel's alleged nuclear status is not "in fact properly classified." citing *Judicial Watch, Inc. v. U.S. Dep't of Def.*, 715 F.3d 937, 940-44 (D.C. Cir. 2013). Closer examination reveals that in this instance the CIA's "apply[ing] classification markings... as directed by a classification guide," was not deploying an instrument of prior restraint.

In *Judicial Watch, Inc. v. U.S. Dep't of Def* the CIA's derivative declassification guide was not labeled "Guidance on Release of Information Relating to the Potential for an Dead Al Qaeda Founder Potentially Shot by US SEALS." If it had been, Judicial Watch also would have sued under APA over prior restraint. In addition, the court accepted the rationale that the photos were classified and un-releasable because if "disclosed, they could be expected to lead to retaliatory attacks against Americans and aid the production of anti-American propaganda." The CIA's secret derivative classification guide did not mandate that Bin Laden may or may not exist, or that his death may or may not have been the direct result of a U.S. military engagement.

VII. A $238 billion injury warrants a Mandamus remedy

Defendants correctly state that Plaintiff-Appellant invocation of "mandamus is a drastic remedy" by citing 28 U.S.C. § 1361, seeking relief in the nature of mandamus to compel the President to "faithfully uphold" Section 2799aa-1. Defendants yet again make Plaintiff-Appellant's point for him in citing *Walpin v. Corporation for Nat'l & Cmty. Servs* 630 F.3d 184, 187 (D.C. Cir. 2011) that mandamus only applies to a "clear and compelling duty" to act. [Appellee Response, ECF 1703563 page 19].

Walpin v. Corporation for Nat'l & Cmty. Servs)was a mundane employment matter over a stymied CNCS inspector general's demand to be restored to office because the President did not comply with the Inspector General Act (IGA).

The Plaintiff-Appellant's case is about the Defendants' violations of Section 2799aa-1 that now amount to more than a quarter of a trillion dollars in unlawful taxpayer transfers in the form of U.S. foreign aid to Israel since 1976. Defendants have long had a clear duty to uphold Section 2799aa-1 rather than obstruct it through prior restraint on Plaintiff-Appellant's and other researchers' and members of the news media activities. Instead, they have sought to solidify their wrongdoing through WPN-136.

If this court is unconvinced that the injuries inflicted upon the Plaintiff-Appellant lie along a direct chain of causation cemented in Defendants' implementation of the policy of violating Section 2799aa-1, it can still provide relief by declaring WPN-136 and any concurrent or future version unlawful legislative rule designed to impose prior restraint on the subject of Israel's nuclear weapons. Such relief could restore a warranted flow of government information necessary to compel the Defendants to perform of their duty to both the Plaintiff-Appellant and the public.

Defendants are incorrect in asserting that "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)."

Nowhere in Exec. Order No. 13526 does it mandate requesters must specify "specific documents or materials." In practice, such exactitude is often impossible because the names of classified files and underlying support documents themselves are classified, as already stated in the Plaintiff-Appellant Brief (8, 11, 14-16). Two of Plaintiff's outstanding year 2017 MDR requests at the Nixon Presidential Library at Yorba Linda (NLN 18-01 and NLN 18-H-01), are a continuation of a previously failed MDR process that began in the year 2012, sought hundreds of documents underlying National Security Study Memo 40 "Israeli Nuclear

Weapons Program," and which was derailed by WPN-136. None of these hundreds of underlying classified source files can be specifically named and are therefore are only referred to by box number and their relation to NSSM 40. The Plaintiff-Appellant and the public face immanent informational harm if this non-specific MDR request for documents and materials is yet again subverted by WPN-136's prior restraint and yet again the Plaintiff-Appellant will have no recourse through the courts. Defendants appear to agree. "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")." [Appellee Response, ECF 1703563 page 31]

Since the Nixon administration National Security Study Memo 40 "Israeli Nuclear Weapons Program" study files can neither be requested nor obtained through FOIA, and MDR decisions may only be reviewed by the ISCAP panel, APA is the only possible remedy available for challenging nuclear ambiguity as mandated WPN-136. Plaintiff-Appellant would like to advise MDR officials at NARA's Nixon Presidential Library that "nuclear ambiguity" has been enjoined by the court, and that they may not reference WPN-136 as a classification guide as they again process his declassification review.

Defendants claim that Plaintiff-Appellant's "depriv[ation] of the knowledge as to whether a violation of the law has occurred" is not itself a cognizable

informational injury." [Appellee Response, ECF 1703563 page 24]. The Plaintiff-Appellant's injuries derive from denial of material through prior restraint. The release of "Critical Technological Assessment in Israel and NATO Nations" already satisfactorily proves that President Reagan violated Section 2799aa-1, just as President Carter, who delivered foreign aid to Israel without waivers, acknowledges Israel had 150 nuclear weapons, revealing he verifiably violated Section 2799aa-1 before Reagan.

VIII. The relevance of attorney fees

Defendants mischaracterize Plaintiff-Appellant's argument about attorney fees. "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." [Appellee Response, ECF 1703563 page 31]

The Plaintiff-Appellant's actual argument is that the Lower Court clearly erred in assuming Plaintiff-Appellant had an ability to recover attorney fees, and that this compounded its mistaken perception that the many injuries suffered by the Plaintiff-Appellant could somehow be mitigated via FOIA. [Dismissal, ECF 26, page 7]. The Plaintiff-Appellant's main point, which Defendants do not meaningfully refute, is that the Lower Court was incorrect to dismiss the case

while asserting that FOIA provides fee-level compensation to Pro Se filers when it clearly does not.

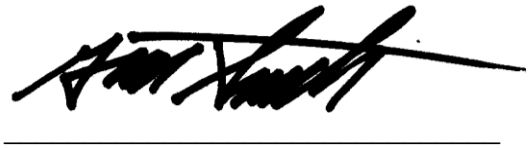
CONCLUSION

For the reasons stated above, Plaintiff-Appellant respectfully submits that this Court should vacate the lower court decision and remand for further proceedings.

ADDENDUM

CERTIFICATE OF COMPLIANCE

1. This brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 6,279 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and that it complies with typeface and type style requirements of Rule 32(a)(5)-(6) because it is printed in a proportionally spaced 14-point font, Times New Roman.



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On November 22, 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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