IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH, Plaintiff, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	)	Case No. 1:16-cv-01610-TSC

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff brought this action in August 2016 to enforce section 102(a) of the Arms Export Control Act of 1961, as amended, which prohibits the United States from providing foreign assistance to any country that the President determines has engaged in certain specified conduct relating to nuclear technology and equipment. *See* 22 U.S.C. § 2799aa-1(a). Nearly four months later, plaintiff moved for a preliminary injunction. *See* Pl.'s Mot. for Prelim. Inj. ("Pl.'s Mot."), ECF No. 18 (Nov. 28, 2016). In his motion, plaintiff claims that the President (and prior presidents) violated the Take Care Clause of the U.S. Constitution by not determining that Israel engaged in conduct specified in § 2799aa-1 as early as 1978; and that the Department of Energy unlawfully issued Classification Bulletin WNP-136, which is an internal document that provides guidance to agency employees on the proper derivative classification of information. Although the alleged conduct plaintiff challenges dates back decades and plaintiff obtained a redacted copy of the Classification Bulletin a year ago, plaintiff now claims that he will be irreparably harmed if this Court does not act immediately to "block further U.S. foreign aid payments to Israel" and "suspen[d]" Classification Bulletin WNP-136. *Id*. at 7.

Plaintiff's motion for a preliminary injunction is specious and should be denied. As explained in defendants' pending motion to dismiss (and reiterated below), there are numerous, independent grounds for dismissal of all of plaintiff's claims. *See* Mem. in Supp. of Defs.' Mot. to Dismiss ("Defs.' MTD"), ECF No. 19-1. Indeed, courts have routinely dismissed similar cases, including *sua sponte*. *See, e.g.*, *Mahorner v. Bush*, 224 F. Supp. 2d 48, 49 (D.D.C. 2002) (denying motion for preliminary injunction and dismissing case *sua sponte*). In addition, plaintiff cannot make the "extraordinarily strong showing" that is required not only for a preliminary injunction but before this Court can "intrude[] into . . . core concerns of the

executive branch," like foreign affairs and the control of access to information bearing on national security. *Adams v. Vance*, 570 F.2d 950, 954-55 (D.C. Cir. 1978). Plaintiff has not demonstrated *any* injury from the Government's alleged conduct—much less that he will be irreparably harmed in the absence of a preliminary injunction. His motion seeks to halt foreign policies that he concedes have been in place for years—underscoring not only the lack of any possible credible basis for "emergency" injunctive relief, purportedly while the merits are considered, but also that his motion seeks to alter, not preserve, the status quo. Such relief undoubtedly would interfere with the actions and judgments of the political branches and thus would be contrary to the public interest.

BACKGROUND

I. STATUTORY BACKGROUND

The Arms Export Control Act ("AECA"), Pub. L. No. 90-629 (1968), as amended, authorizes the President to, *inter alia*, finance the procurement of defense articles and defense services by friendly foreign countries. *See* 22 U.S.C. § 2763. Foreign Military Financing (or FMF) is a type of foreign assistance authorized by § 2763 of the AECA and funded through appropriations to the Foreign Military Financing Program account. *See, e.g.*, Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Div. K, Pub. L. No. 114-113.

Sections 2799aa-1(a) and (b) of the AECA (collectively known as the Glenn-Symington amendment) prohibit the United States from providing specified foreign assistance under the AECA or the Foreign Assistance Act of 1961 to any country that "*the President determines*" has engaged in specified conduct relating to nuclear technology and equipment. 22 U.S.C. § 2799aa-1(a)(1) (emphasis added); *accord id.* § 2799aa-1(b)(1). If the President exercises his or her

discretion to determine that a country has engaged in such conduct, the United States may nevertheless continue to provide foreign assistance to that country if certain statutory conditions are met. *See id*. § 2799aa-1(a)(2), (b)(4)-(6). In general, these so-called "waiver" provisions require the President (in conjunction with Congress in some circumstances) to certify in writing that the termination of such assistance would harm United States interests.[1] *Id*.

The statute, thus, makes the termination of U.S. foreign assistance contingent, in the first instance, upon a determination by the President that a country has engaged in conduct specified in the statute. *Id*. § 2799aa-1(a)(1), (b)(1); *see* H.R. REP. NO. 103-482, at 264 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 398, 509 (explaining that the 1994 amendments "clarif[y] that the determinations under this section are to be made by the President"). The statute permits but does not require that the President make such a determination. And the statute does not limit the President's discretion to decide whether, how, and when to make such a determination. Moreover, if and when the President determines that a country has engaged in conduct specified in the statute, it is the province of the President and Congress to determine whether the United States should continue providing foreign assistance to that country. No provision of § 2799aa-1 authorizes or contemplates judicial review of determinations made by the President or exercises of the waiver authority by the President or Congress.[2]

[1] The President has delegated his waiver authority under § 2799aa-1(a)(2) to the Department of State, *see* Exec. Order No. 13346, § 1(a)(iii), 69 Fed. Reg. 41,905 (July 13, 2004), but he has not delegated his authority under § 2799aa-1(a)(1) to make determinations that a country engaged in conduct specified in that subsection. The President is prohibited from "delegat[ing] or transfer[ring] his power, authority, or discretion to make or modify determinations" under § 2799aa-1(b). 22 U.S.C. § 2799aa-1(b)(8).

[2] For a more detailed discussion of the statute, *see* Defs.' MTD at 2-6.

II. FOREIGN ASSISTANCE TO ISRAEL

The United States and Israel enjoy a strong defense relationship built on a mutual commitment to democratic values and shared security interests in the Middle East. United States foreign assistance has been a critical facet of that relationship, and, in terms of total money received since World War II, Israel is the largest recipient of U.S. foreign assistance. JEREMY M. SHARP, CONG. RESEARCH SERV., RL33222, U.S. FOREIGN AID TO ISRAEL, Summary, 1-4 (2015).

Today, nearly all U.S. foreign assistance to Israel is in the form of FMF, with annual grants representing nearly one fifth of the Israeli defense budget. *Id*., Summary, 1, 5; JIM ZANOTTI, CONG. RESEARCH SERV., R44245, ISRAEL: BACKGROUND AND U.S. RELATIONS IN BRIEF, 5 (2016). FMF assistance to Israel is appropriated annually by Congress as a mandatory "hard earmark." *See, e.g.*, Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Div. K, Pub. L. No. 114-113 (". . . of the funds appropriated under this heading, not less than $3,100,000,000 shall be available for grants only for Israel."). Congress has made these appropriations with full knowledge of existing laws regarding potentially applicable restrictions and the President's authority to waive such restrictions.

III. PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff filed this action on August 8, 2016, asserting two claims under several constitutional and statutory provisions against the United States, President Barack Obama, and various federal officials. *See* Compl., ECF No. 1; Am. Compl. ¶¶ 9-16, ECF No. 17. Although some of the actions plaintiff challenges date back decades, *see id.* ¶ 7, plaintiff did not move for a preliminary injunction until November 28, 2016. In the motion, plaintiff asks the Court to

"block further U.S. foreign aid payments to Israel" and to "suspen[d]" Department of Energy Classification Bulletin WNP-136. Pl.'s Mot. at 7; *see id*. 21-22.

Plaintiff's preliminary injunction motion relies on only a subset of the claims and/or constitutional and statutory provisions raised in plaintiff's amended complaint.[3] Plaintiff first contends that the President (and his predecessors in office dating back to the Nixon Administration) have violated the Take Care Clause of the U.S. Constitution (U.S. Const., art. II, § 3) by providing foreign aid to Israel. *See id*. at 10-16. According to plaintiff, Israel has engaged in conduct relating to nuclear technology and equipment that should have led the President (and prior presidents) to make a determination under § 2799aa-1(a)(1) and/or (b)(1) that Israel has engaged in conduct specified in those subsections, thereby requiring the President (and Congress) to either exercise the waiver authority in § 2799aa-1(a)(2) and/or (b)(4)-(6) or terminate foreign assistance to Israel. *See id*. 10, 13, 14-16; Am. Compl. ¶¶ 5, 24. Plaintiff claims the President's failure to make such a determination under § 2799aa-1 violates "his obligation to 'take Care that the Laws be faithfully executed.'" Pl.'s Mot. at 8.

Second, plaintiff asserts that Department of Energy Classification Bulletin WNP-136, entitled Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability, violates the substantive requirements of the Administrative Procedure Act ("APA"). *See id*. at 17, 20-22. Classification Bulletin WNP-136 is a classification guide issued pursuant to Executive Order 13526. Classification guides are prepared by agencies with original classification authority to facilitate the proper and uniform derivative classification of information. Exec. Order No. 13526, §§ 2.2, 6.1(h), 75 Fed. Reg. 707 (Jan. 5, 2010). Derivative

[3] For a full description of the claims raised in plaintiff's amended complaint, *see* Defs.' MTD at 7-10.

classification is "the incorporating, paraphrasing, restating, or generating in new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information. Derivative classification includes the classification of information based on classification guidance." *Id*. § 6.1(o). Classification guides instruct derivative classifiers about the type of information that should be classified and the level and duration of such classification. *Id.* § 6.1(h); 32 C.F.R. § 2001.15(b).

Plaintiff speculates, based apparently on a redacted copy of Classification Bulletin WNP-136,[4] that the guide prohibits "any U.S. federal government employee or contractor from publicly communicating about [] Israel's nuclear weapons program under threat of immediate employment loss, fines and imprisonment." Am. Compl. ¶ 42; *see* Pl.'s Mot. at 17-19. Plaintiff claims the Classification Bulletin is "not in accordance with" 22 U.S.C. § 2799aa-1 or Executive Order 13526 because it allegedly requires classification of information that plaintiff does not believe should be classified and purportedly is being used to "conceal" or "cover-up" violations of § 2799aa-1. Pl.'s Mot. at 16-17, 20-21; *see* Am. Compl. ¶¶ 42-44.

Plaintiff also raises a procedural APA claim in his motion for preliminary injunction that is not asserted in his amended complaint. Specifically, he argues that Classification Bulletin WNP-136 is invalid because it is a legislative (or substantive) rule that was not subjected to notice-and-comment rulemaking as required by the APA. *See* Pl.'s Mot. at 17-20.

[4] The Department of Energy produced the redacted copy to plaintiff in response to his FOIA request. *See* Am. Compl., Ex. 6 (explaining that agency redacted classified material and information that would provide insight into the types of material the Government considers classified).

ARGUMENT

Plaintiff's motion for preliminary injunction is entirely without merit and should be denied. "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 plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and 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 elements "by a clear showing." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). As noted, the circumstances presented by this case do not give rise to a credible claim for emergency injunctive relief, particularly where plaintiff is challenge long-standing foreign policies and cannot reasonably argue that there is any urgent need to upend the status quo pending merits review. *See Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. de C.V.*, 901 F. Supp. 2d 54, 56 (D.D.C. 2012). Moreover, where, as here, the plaintiff seeks preliminary injunctive relief that would "deeply intrude[] into the core concerns of the executive branch"—such as foreign affairs and the control of access to information bearing on national security—an even greater showing is required. *Adams*, 570 F.2d at 954. In such circumstances, the plaintiff must "make an extraordinarily strong showing" with respect to each preliminary injunction element. *Id*. at 955. Plaintiff has not carried his burden here.

I. PLAINTIFF IS NOT LIKELY TO SUCCEED ON THE MERITS OF HIS CLAIMS

To begin, plaintiff's motion should be denied because all of his claims lack merit and, indeed, the case should be dismissed for lack of jurisdiction and/or failure to state a claim upon which relief may be granted, as explained in defendants' pending motion to dismiss. *See* Defs.'

MTD at 11-40. Defendants summarize those arguments below as they relate to the subset of claims raised in plaintiff's motion for a preliminary injunction. Defendants also address the meritless procedural APA claim that plaintiff raises for the first time in his motion.

A. Plaintiff Is Not Likely To Succeed On His Claim That The President Violated The Take Care Clause By Providing Foreign Aid To Israel

Plaintiff claims that each President in office since 1978 has violated the Take Care Clause by failing to make a determination that Israel engaged in conduct specified in § 2799aa-1. Plaintiff is not likely to succeed on this claim for at least three independent reasons: (1) plaintiff lacks standing to assert the claim; (2) the Take Care Clause does not provide a private cause of action; and (3) the claim presents a non-justiciable political question.

1. Plaintiff Lacks Standing To Challenge The President's Compliance With 22 U.S.C. § 2799aa-1

To establish standing, a plaintiff must (1) have suffered an injury in fact, (2) that is caused by the defendant's conduct, and (3) that is likely to be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). At the preliminary injunction stage, "a plaintiff cannot rest on such mere allegations[] as would be appropriate at the pleading stage[,] but must set forth by affidavit or other evidence specific facts" to support each element of standing. *Food & Water Watch, Inc. v. Vilsack*, 79 F. Supp. 3d 174, 186 (D.D.C. 2015); *see Doe v. Rumsfeld*, 297 F. Supp. 2d 119, 130 (D.D.C. 2003). Here, plaintiff has not presented any affidavits or evidence with his motion for preliminary injunction. Thus, not only has plaintiff failed to allege standing to raise his Take Care Clause claim (as explained in defendants' motion to dismiss), he also has failed to meet his standing burden to obtain a preliminary injunction.

As an initial matter, plaintiff has not suffered any "particularized" injury stemming from the Government's provision of foreign aid to Israel. *Lujan*, 504 U.S. at 560. Plaintiff concedes

that he asserts only generalized grievances that he shares with the "public," Pl.'s Mot. at 22, and "all Americans," Am. Compl. ¶¶ 72, 74. Neither the amended complaint nor plaintiff's motion for preliminary injunction identify (much less present evidence of) any "personal and individual way" in which plaintiff has been harmed by the Government's provision of foreign assistance to Israel. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016); *see also Mahorner*, 224 F. Supp. 2d at 50 ("status as a taxpayer does not afford [plaintiff] standing to . . . challenge . . . the granting of foreign aid by the federal government").

In his amended complaint, plaintiff also attempts to blame the provision of foreign aid to Israel for the conflict between Israel and the Palestinians, and he claims that U.S. aid to Israel was a "major factor[] motivating the 9/11 attackers." Am. Compl. ¶ 67. But plaintiff has not presented evidence to support these conclusory assertions, as he must at the preliminary injunction stage. More importantly, plaintiff has not shown that he was, or imminently will be, injured by the Israeli-Palestinian conflict or the September 11 attacks in a personal way that is distinct from any effects felt by people generally. *See Lujan*, 504 U.S. at 560 n.1. Plaintiff's bare allegations about the general effects of foreign assistance to Israel are entirely insufficient to establish that plaintiff has sustained "some direct injury" that differentiates him from other Americans. *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 599 (2007).

Furthermore, plaintiff has not established causation or redressability. Plaintiff can only speculate that the Israeli-Palestinian conflict and the September 11 attacks—much less any particularized injury plaintiff may have suffered as a result of those events—were caused by the provision of foreign assistance to Israel, as opposed to the independent actions of third parties. *See Lujan*, 504 U.S. at 562. Plaintiff has not shown that, in the absence of such assistance, the Israeli-Palestinian conflict would not exist or would cease, or that the September 11 attacks

would not have occurred. Instead, plaintiff's theory of standing rests on mere allegations of a speculative and "protracted chain of causation" that courts have repeatedly rejected—including in the foreign aid context. *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 670 (D.C. Cir. 1996); *see* Defs.' MTD at 14-16 (citing cases). In addition, because the President is not required to terminate aid to Israel even if he determines that Israel has engaged in conduct specified in § 2799aa-1(a)(1) and/or (b)(1), and because "[c]ountries respond to the suspension of foreign assistance in many ways," *Betteroads Asphalt Corp. v. United States*, 106 F. Supp. 2d 262, 268 (D.P.R. 2000), plaintiff cannot show that a favorable decision will result in the termination of foreign aid to Israel or that it will redress any particularized injuries plaintiff may have suffered. *See Aerotrade, Inc. v. Agency for Int'l Dev.*, 387 F. Supp. 974, 975-76 (D.D.C. 1974); Defs.' MTD at 14-16 (citing cases).

Because plaintiff plainly cannot establish standing to bring his claim, and has not otherwise presented any evidence of irreparable harm in his quest for emergency injunctive relief, his motion should be denied.

2. The Take Care Clause Does Not Provide Plaintiff With A Cause Of Action Against The President

Plaintiff also is not likely to succeed on this claim because the Take Care Clause does not provide a cause of action to challenge the President's compliance with 22 U.S.C. § 2799aa-1. The Supreme Court has long recognized that "the duty of the President in the exercise of the power to see that the laws are faithfully executed" "is purely executive and political," and not subject to judicial direction. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866). Thus, the Take Care Clause does not furnish citizens with a right to sue to challenge the President's actions or inaction. *Cf. Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383-84 (2015) (holding that the Supremacy Clause does not confer an implied right of action). Indeed,

recognizing such a right would express a "lack of the respect due" to the Nation's highest elected official, *Baker v. Carr*, 369 U.S. 186, 217 (1962), by assuming judicial superintendence over the exercise of Executive power that the Take Care Clause commits to the President. *Cf. Dalton v. Specter*, 511 U.S. 462, 474-75 (1994) (judicial review "is not available" when a statute or constitutional provision "commits the decision to the discretion of the President"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803) (Under "the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character.").

Plaintiff maintains that "the Take Care Clause is judicially enforceable," Pl.'s Mot. at 11, but none of the cases he cites support the proposition that the Take Care Clause provides an independent cause of action. *See Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 533, 525 (1838) (petition for writ of mandamus against postmaster general); *Medellin v. Texas*, 552 U.S. 491, 498 (2008) (application for writ of habeas corpus); *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 576 (D.D.C), *aff'd*, 343 U.S. 579 (1952) (suit against Secretary of Commerce under the *Larson-Dugan* exception, which preceded the APA); *Angelus Milling Co. v. Commissioner of Internal Revenue*, 325 U.S. 293, 293 (1945) (claim against federal official under Revenue Act of 1936).[5] Moreover, to the extent plaintiff's cases address circumstances of "incompatib[ility]" between the President's actions and the expressed will of Congress, *see* Pl.'s Mot. at 12, there is no such incompatibility here. Congress has explicitly instructed that the President alone has the authority to make a determination under § 2799aa-1(a)(1) and/or (b)(1), *see* 22 U.S.C. § 2799aa-1(a)(1), (b)(1); H.R. REP. NO. 103-482, at 264, and Congress has continued to appropriate funds

[5] As explained in defendants' motion to dismiss, none of the other statutory provisions on which plaintiff relies in his amended complaint provide a private cause of action either. *See* Defs.' MTD at 16-22.

annually for foreign assistance to Israel. Accordingly, plaintiff's motion for a preliminary injunction should be denied for the additional reason that plaintiff's claim fails as a matter of law.

3. The Political Question Doctrine Bars Plaintiff's Claim

Plaintiff also is not likely to prevail on this claim because it presents a non-justiciable political question. The President's exercise of exclusive discretion to determine whether Israel has engaged in conduct specified in § 2799aa-1, and thus, whether Israel may continue to receive U.S. foreign assistance without invocation of the waiver provisions of the statute, implicates several of the indicia of political questions that the Supreme Court identified in *Baker v. Carr*, any one of which can render a claim non-justiciable. *See* 369 U.S. at 217.

First, "decision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005). Courts, therefore, have repeatedly held that determinations about the provision of foreign aid are political questions for the Executive and Legislative Branches. *See Mahorner*, 224 F. Supp. 2d at 53 (concluding that claims relating to the provision of foreign aid to Israel presented non-justiciable political questions); Defs.' MTD at 23 (citing cases).

Second, although fact-finding is a task courts are typically competent to undertake, the statute at issue here provides no judicially discoverable or manageable standards for the Court to use in evaluating the President's determinations (or lack thereof). *See* 22 U.S.C. § 2799aa-1(a)(1), (b)(1). The statute does not purport to specify what types of evidence the President should consider or the quantum of proof that is required. It instead calls for judgments to be made by the President, taking into account complex and evolving diplomatic and national security circumstances. *See Atl. Tele-Network, Inc. v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126,

131 (D.D.C. 2003) ("To grant or deny a loan to a foreign nation is a decision fraught with foreign policy implications."). Moreover, even if the Court could invent and apply its own standards, it should decline to do so for the very reason the political question doctrine exists: the Constitution commits these sorts of decisions to the political branches. *See Chi. & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948). Indeed, here, Congress has explicitly stated that the President alone—not the courts or even Congress—has the authority to make a determination that a particular country has engaged in the specified conduct for the purposes of this statute. 22 U.S.C. § 2799aa-1(a)(1), (b)(1); *see* H.R. REP. NO. 103-482, at 264.

Finally, judicial second-guessing of the President's determinations, or lack thereof, in this area would "express[] lack of [] respect" for the "coordinate branches of government" and could potentially result in "embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. No President has determined that Israel has engaged in the conduct specified in the statute since the relevant amendments were first enacted in the late 1970s. Am. Compl. ¶ 24. During this time, moreover, Congress has continued to appropriate funds for foreign assistance to Israel. *See, e.g.*, Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Div. K, Pub. L. No. 114-113. The decisions whether or not to make a determination under § 2799aa-1 and whether or not to appropriate foreign aid are quintessentially political in nature, and this Court should not second-guess them. *See Dickson v. Ford*, 521 F.2d 234, 236 (5th Cir. 1975) ("a determination of whether foreign aid to Israel is necessary . . . is a 'question uniquely demanding [of a] single-voiced statement of the

Government's views'"). For these reasons, plaintiff's claim is barred by the political question doctrine, and his motion for a preliminary injunction can be denied on this basis as well.[6]

B. Plaintiff Is Not Likely To Succeed On His Claim That Department Of Energy Classification Bulletin WNP-136 Violates The APA

Plaintiff's assertions that the Department of Energy violated the procedural and substantive requirements of the APA by issuing Classification Bulletin WNP-136 also are plainly meritless and cannot support his request for preliminary injunctive relief. As an initial matter, plaintiff is not likely to succeed on the procedural component of this claim because it was not even raised in his amended complaint. The court, therefore, should deny plaintiff's motion with respect to this claim without further consideration. *See, e.g.*, *Sai v. Transp. Sec. Admin.*, 54 F. Supp. 3d 5, 9 (D.D.C. 2014) (The court lacks jurisdiction over a preliminary injunction motion that "raises issues different from those presented in the complaint."); *Clay v. Okla. Dep't of Corr.*, No. CIV-12-1106-C, 2013 WL 3058122, at *2 (W.D. Okla. June 17, 2013) ("When the movant seeks intermediate relief beyond the claims in the complaint, the court is powerless to enter a preliminary injunction."); *In re Ohio Execution Protocol Litig.*, No. 2:11-CV-1016, 2012 WL 1883919, at *3–4 (S.D. Ohio May 22, 2012).

In any event, even if the Court were to consider plaintiff's procedural APA claim, it must fail, along with plaintiff's substantive APA claim, for numerous, independent reasons. First, plaintiff lacks standing to challenge Classification Bulletin WNP-136. Second, plaintiff's challenge to the Classification Bulletin is not ripe. Third, the Classification Bulletin is not final

[6] Even assuming *arguendo* that the factors discussed above were insufficient to render plaintiff's claim a non-justiciable political question, they at least would warrant the withholding of the discretionary relief plaintiff seeks in his preliminary injunction motion. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207-08 (D.C. Cir. 1985) (concluding "it would be an abuse of discretion to provide discretionary relief" in a case involving comparable issues); Defs.' MTD at 25-26.

agency action, as required to be reviewable under the APA. Finally, the claims fail as a matter of law. As to plaintiff's procedural claim, Classification Bulletin WNP-136 is not a legislative rule, and thus, it is not subject to the APA's notice-and-comment requirements. As to plaintiff's substantive claim, the Classification Bulletin is not contrary to law and, in any event, the type of determinations that go into establishing a classification guide are committed to agency discretion.

1. Plaintiff Lacks Standing To Challenge The Classification Bulletin

Plaintiff has not alleged (or presented any evidence of) a "distinct and palpable injury to himself" stemming from the Classification Bulletin. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) ("[A] plaintiff must demonstrate standing for each claim he seeks to press."). Plaintiff asserts that the Classification Bulletin "target[s]" "U.S. federal government employee[s]" and "contractor[s]" with the "threat of . . . employment loss, fines, and imprisonment," Am. Compl. ¶ 42; *see id.* ¶ 6, and he identifies one employee who was allegedly "punish[ed]" pursuant to the Classification Bulletin, *id.* ¶ 43. *See* Pl.'s Mot. at 18-19. But plaintiff has not presented any evidence to support these allegations, as he must at the preliminary injunction stage. *See Food & Water Watch*, 79 F. Supp. 3d at 186. More importantly, plaintiff cannot satisfy the injury-in-fact requirement merely by showing harm to others; plaintiff "himself" must be "among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972); *see, e.g.*, *Ass'n of Am. Physicians & Surgeons, Inc. v. FDA*, 539 F. Supp. 2d 4, 19 (D.D.C. 2008) ("[P]laintiffs cannot rely on the legal rights and interests of [others] to substitute for their own lack of standing.").[7] Because plaintiff has failed

[7] Plaintiff also asserts informational injuries stemming from the Government's purported responses to his FOIA requests. *See* Pl.'s Mot. at 22-23; Am. Compl. ¶¶ 8, 58. Although these alleged injuries may be sufficient to establish standing for a FOIA claim (which plaintiff does

to establish standing to challenge the Classification Bulletin, he is not likely to prevail on this claim and therefore cannot obtain a preliminary injunction with respect to this claim either.

2. Plaintiff's Challenge to the Classification Bulletin Is Not Ripe

Plaintiff also is not likely to succeed on this claim because it is not ripe. Department of Energy Classification Bulletin WNP-136 provides guidance for agency employees who act as derivative classifiers about the type of information that should be classified and the level and duration of classification. *See* Exec. Order No. 13526, § 6.1(h); 32 C.F.R. § 2001.15(b). Such internal guidance is not ripe for judicial review (assuming it is reviewable at all) "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying [it] to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Accordingly, plaintiff must await the agency's reliance on Classification Bulletin WNP-136 to withhold specific documents or information in response to a FOIA request before seeking judicial review, if appropriate. Assisted by consideration of "a specific application of" the Classification Bulletin, any decision of the Court will "stand on a much surer footing . . . than could be the case in the framework of the generalized challenge" brought here. *Toilet Goods Assoc. v. Gardner*, 387 U.S. 158, 164 (1967). There simply is no credible basis to seek, let alone to obtain, an emergency injunction to foreclose application of a classification guide to a future

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not raise in this case), they are not sufficient to demonstrate standing to challenge the Classification Bulletin under the APA. *See Common Cause v. Fed. Election Comm'n*, 108 F.3d 413, 418 (D.C. Cir. 1997) (explaining that informational injuries can support standing only where "the information denied is both useful . . . and required by Congress to be disclosed"); *id.* (a plaintiff cannot establish injury in fact "merely by alleging that he has been deprived of the knowledge as to whether a violation of the law has occurred"). In any event, plaintiff has not shown that any of his alleged informational injuries were caused by the Classification Bulletin, as opposed to alleged informational injuries caused by the Department of Energy's independent responses to his FOIA requests.

request for information. This is the quintessential type of dispute that can readily be reviewed in the ordinary course under FOIA, when an actual case or controversy exists as to particular information withheld, not on a purported emergency basis beforehand.

Plaintiff, moreover, will not suffer any hardship from denial of review, much less the sort of significant and "irremediable adverse consequences" that might warrant review of internal guidance in the absence of an agency action applying it. *Id*. If and when the Department of Energy withholds information from plaintiff in response to a FOIA request (whether in reliance on the Classification Bulletin or otherwise), plaintiff may seek review of the agency's decision under FOIA. *See Cabais v. Egger*, 690 F.2d 234, 240 (D.C. Cir. 1982) (concluding claims were not ripe where plaintiff had another adequate remedy); *see also* Defs.' MTD at 30-33 (explaining that a remedy for plaintiff under FOIA precludes APA review). Thus, plaintiff's request for preliminary relief directed at the potential future application of the Classification Bulletin is entirely without merit.

3. The Classification Bulletin Is Not Final Agency Action

For reasons similar to those discussed above regarding ripeness, the Classification Bulletin also is not final agency action subject to an injunction at all. When review is sought under the general review provisions of the APA, the agency action being challenged must be "final agency action." 5 U.S.C. § 704. To be final, an action must, among other things, "be one by which 'rights or obligations have been determined, or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

Classification Bulletin WNP-136 does not remotely meet this standard. It is a guidance document for agency employees. It does not determine the rights or obligations of plaintiff, or any other private party; nor does the Classification Bulletin itself create any legal consequences

for plaintiff. *See Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) ("[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review."). To be even arguably affected by the Classification Bulletin, plaintiff must submit a FOIA request to the Department of Energy, and the agency then must rely on the Classification Bulletin to withhold information responsive to plaintiff's request.[8] Because the Classification Bulletin "only affects [plaintiff's rights]," if at all, "on the contingency of future administrative action" (action that is itself reviewable under FOIA), the Classification Bulletin is not final agency action. *DRG Funding Corp. v. Sec'y of Hous. & Urban Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996); *see Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 22 (D.C. Cir. 2006). Accordingly, its application cannot be enjoined, preliminarily or otherwise.

4. Plaintiff's Challenge Fails As A Matter Of Law

a. The Classification Bulletin Is Not Subject to Notice-And-Comment Rulemaking

Assuming the Court reaches the question, plaintiff has not demonstrated a likelihood of success on the merits of his challenge to Classification Bulletin WNP-136. The notice-and-comment procedures of the APA do not apply to every agency pronouncement. In particular, the APA explicitly exempts "interpretative rules" and "general statements of policy" from its procedural requirements. 5 U.S.C. § 553(b)(3)(A). Unlike legislative (or substantive) rules, interpretative rules and general statements of policy do not have the "force and effect of law." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

[8] Even then, plaintiff is not affected by the Classification Bulletin itself, but rather by the original classification authority's underlying determination that the particular information should be classified.

A legislative rule "*modifies* or *adds* to a legal norm based on [an] agency's *own authority*." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997). It purports to—and in fact does—"impose legally binding obligations or prohibitions on regulated parties." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). In contrast, interpretative rules merely reflect an agency's construction of a law. *Syncor*, 127 F.3d at 94. In issuing an interpretative rule, an agency "does not purport to modify [a legal] norm" (*i.e.*, to engage in lawmaking); it merely interprets a pre-existing law, whether a statute, regulation, or Executive Order. *Id*. Similarly, a policy statement "does not seek to impose . . . a legal norm;" it "merely represents an agency position," subject to change, regarding how the agency "will treat . . . the governing legal norm." *Id*.

Classification guides, like Department of Energy Classification Bulletin WNP-136, are not legislative rules, because they do not "impose legally binding obligations or prohibitions on [any] regulated parties." *Nat'l Mining Ass'n*, 758 F.3d at 251. Classification guides are, at most, interpretative rules or policy statements. They are internal documents that provide guidance to agency employees about the type of information that should be classified and the level and duration of such classification. Exec. Order No. 13526, § 6.1(h); 32 C.F.R. § 2001.15(b). They represent an original classification authority's view regarding whether disclosure of particular information "reasonably could be expected to result in damage to the national security." Exec. Order No. 13526, § 1.1(a)(4). But the guide itself sets no binding policy on any regulated party.[9]

[9] Plaintiff contends that the Classification Bulletin could not be an interpretative rule because it purportedly is "binding on all federal officials and [government] contractors." Pl.'s Mot. at 18. But plaintiff misunderstands the nature of interpretative rules. Interpretative rules can bind agency employees. *See, e.g.*, *Splane v. West*, 216 F.3d 1058, 1064 (Fed. Cir. 2000). The point of an interpretative rule is to set forth the agency's view of what a particular law means, and thus, it would not be surprising if such a rule instructed agency employees to act in accordance with the agency's view. *See id*. (interpretative rules are "binding on agency officials insofar as any

Notably, and as pertinent here, in response to requests for information under FOIA by private citizens such as plaintiff, classification guides may describe the basis for withholding information that is classified. But an agency's decision to withhold information from a document as classified is a distinct action that courts can review under FOIA, regardless of whether a classification guide specified that the information should be classified. *See Larson v. Dep't of State*, 565 F.3d 857, 864-65 (D.C. Cir. 2009).

Indeed, courts have routinely held that documents containing agency instructions to agency employees are not legislative rules. *See, e.g.*, *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (concluding that "handbook for internal use by thousands of [Social Security Administration] employees" was not a legislative rule because it "ha[d] no legal force"); *Gatter v. Nimmo*, 672 F.2d 343, 347 (3d Cir. 1982) (holding that "internal VA publications" that provided guidance to agency's employees were not legislative rules because they had "never been published in the Federal Register" and had "never been intended for or used by anyone other than VA employees"); *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 376 (8th Cir. 1974) (concluding "handbooks" were not legislative rules because they "were not published in the Federal Register, were not intended by any government officials to have the force and effect of law, and were only guidelines for government personnel"). The same is true of Classification Bulletin WNP-136, which serves a similar purpose in guiding the actions of agency employees. Because the Classification Bulletin is not a legislative rule subject to notice-and-comment procedures, plaintiff is not likely to prevail on the merits of his procedural APA claim. Thus,

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directive by an agency head must be followed by agency employees"). Unlike legislative rules, however, interpretative rules are not binding on courts (or regulated parties, separate and apart from the laws they interpret). *See id*. (explaining that the requirement that a legislative rule have the "force and effect of law" refers to its "binding effect . . . on tribunals *outside* the agency, not on the agency itself"); *see also Erringer v. Thompson*, 371 F.3d 625, 631 (9th Cir. 2004).

assuming plaintiff's challenge to the Classification Bulletin was a matter suitable for prospective preliminary injunctive relief, it would plainly fail on the merits.

b. The Classification Bulletin Is Not Contrary To Law

Plaintiff also is not likely to prevail on the merits of his substantive APA claim. Plaintiff asserts that Classification Bulletin WNP-136 is contrary to 22 U.S.C. § 2799aa-1 and Executive Order 13526, *see* Pl.'s Mot. at 20-21, but that claim is again plainly wrong as a matter of law. Section 2799aa-1 does not specify what information can or cannot be classified. Indeed, it does not discuss the classification of information at all. Thus, Classification Bulletin WNP-136 cannot possibly be contrary to the statute.

As for Executive Order 13526, it expressly states that it does not "create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, [or its agencies]." Exec. Order No. 13526, § 6.2(d). Plaintiff, therefore, cannot rely on the Executive Order to establish binding standards that are enforceable through the APA.

Furthermore, even if plaintiff could rely on the Executive Order in this manner, his claim as raised under the APA still would fail because the Executive Order commits to agency discretion the contours of classification guides. An action is committed to agency discretion, and thus unreviewable under the APA, *see* 5 U.S.C. § 701(a)(2), when a statute is "drawn in such broad terms that . . . there is no law to apply" or there is "no meaningful standard against which to judge the agency's exercise of discretion." *Webster v. Doe*, 486 U.S. 592, 599-600 (1988). For example, the D.C. Circuit has held that statutes that require action when an agency "determines it to be in the public interest," *Claybrook v. Slater*, 111 F.3d 904, 908 (D.C. Cir.

1997), or "*is of the opinion*" that certain conditions are met, *Drake v. FAA*, 291 F.3d 59, 72 (D.C. Cir. 2002), do not provide sufficient standards to permit review under the APA.[10]

The President has delegated his constitutional authority to "classify and control access to information bearing on national security," *Egan*, 484 U.S. at 527; *see* U.S. Const., art. II, § 2, to various agencies through an Executive Order that permits classification if "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security." Exec. Order No. 13526, § 1.1(a)(4); *see id.* §§ 1.2, 1.3. The Executive Order specifically empowers original classification authorities to create classification guides to "facilitate the proper and uniform derivative classification of information." *Id.* § 2.2(a).

The Executive Order's instruction that an original classification authority must classify information that "reasonably could be expected to result in damage to the national security," *id.* § 1.1(a)(4), does not provide a meaningful standard for courts to assess agency classification guidance, such as the Department of Energy Classification Bulletin. The development of classification guides, which describe what information must be protected for national security reasons, involve "[p]redictive judgment[s] . . . made by those with the necessary expertise in protecting classified information." *Egan*, 484 U.S. at 529. For this reason as well, plaintiff's

[10] Congress has provided for limited review of agency classification decisions under FOIA. *See* 5 U.S.C. § 552(a)(4)(B). This express FOIA remedy does not mean that an APA remedy is also appropriate. *See Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("*[U]nless Congress specifically has provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." (emphasis added)). Indeed, the "deferential posture" adopted by courts in reviewing agency classification decisions under FOIA further confirms that classification decisions, which implicate the "'uniquely executive purview' of national security," are committed to agency discretion for purposes of the APA. *Larson*, 565 F.3d at 865.

challenge under the APA to the Department of Energy Classification Bulletin fails as a matter of law and cannot support plaintiff's motion for a preliminary injunction.

II. PLAINTIFF HAS MADE NO SHOWING OF IRREPARABLE HARM

Plaintiff's motion for preliminary injunction also should be denied because plaintiff has not shown in any way that he will suffer irreparable harm if this case proceeds in the normal course. "The irreparable injury requirement erects a very high bar for a movant." *Coal. for Common Sense in Gov't Procurement v. United States*, 576 F. Supp. 2d 162, 168 (D.D.C. 2008). A plaintiff must establish not only that he will be injured in the absence of a preliminary injunction but also that his injury is "certain, great, actual, . . . imminent," and "irreparable." *Id.* Plaintiff's motion does not remotely satisfy this high standard. He challenges decades old foreign policies with which he disagrees absent any showing of imminent irreparable harm.

As explained above, plaintiff has not alleged (much less presented any evidence of) a particularized injury to him that is caused by the Government's provision of foreign aid to Israel or by Department of Energy Classification Bulletin WNP-136. *See supra* pp. 8-10, 15-16. For the same reasons, plaintiff also has not made the more significant showing required to establish irreparable harm. *See In re Navy Chaplaincy*, 534 F.3d 756, 766 (D.C. Cir. 2008); *Sibley v. Alexander*, 916 F. Supp. 2d 58, 63 (D.D.C. 2013) (Because plaintiff "has failed to demonstrate an injury in fact sufficient to establish standing, he has also failed to demonstrate irreparable harm warranting a preliminary injunction."). The Court, therefore, should deny plaintiff's motion for preliminary injunction on this basis alone.

Plaintiff asserts that any injury resulting from the Government's provision of foreign aid to Israel will become "difficult or impossible" to remedy if and when Congress enacts an appropriations bill for fiscal year 2017 and any funds provided for in that bill are disbursed to

Israel. Pl.'s Mot. at 23-24. It is not sufficient, however, for a plaintiff to assert that an act is "irretrievable." *Coal. for Common Sense*, 576 F. Supp. 2d at 168. The plaintiff also must demonstrate that the irretrievable act will cause "serious" harm "in terms of its effect on the plaintiff." *Id*. Here, plaintiff has failed to show any harm to himself—serious or otherwise—from the Government's provision of foreign aid to Israel.

Plaintiff further contends that "if [Classification Bulletin WNP-136] . . . [is] allowed to continue guiding the Defendant's activities, the Plaintiff's core public information research and dissemination project will end." Pl.'s Mot. at 23. According to plaintiff, his alleged inability to obtain information from the Government has resulted in an "80 percent" decline in "income from his support base." *Id*. But even if plaintiff had presented evidence to support this purported decline (and he has not), it would not be sufficient to establish irreparable harm. To the extent plaintiff believes the Government has improperly withheld information that he requested through FOIA, plaintiff may bring a FOIA action (as he has done in the past, *see* Am. Compl. ¶¶ 27, 62) and, "at the conclusion of th[at] litigation," plaintiff is "entitled to obtain all responsive and non-exempt documents" that the agency failed to produce in response to his request, if any such documents exist. *Sai*, 54 F. Supp. 3d at 10. Accordingly, any injury to plaintiff's ability to obtain information (which, as explained above, does not stem from the Classification Bulletin itself) is not "irreparable" or "beyond remediation." *Id*; *see, e.g.*, *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 15 F. Supp. 3d 32, 46-47 (D.D.C. 2014). Any preliminary injunctive relief on this basis, therefore, would be entirely inappropriate.

Furthermore, plaintiff's long delay in bringing this action and seeking preliminary injunctive relief "further militates against a finding of irreparable harm." *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 44 (D.D.C. 2000). Plaintiff's Take Care Clause claim is directed at

alleged conduct that dates back to 1978. And plaintiff became aware of Classification Bulletin WNP-136 on August 20, 2015, when the Department of Energy produced a heavily-redacted version of it in response to plaintiff's FOIA request. *See* Am. Compl., Ex. 6, at 3-4. Yet, plaintiff waited a year to file suit to challenge the Classification Bulletin and nearly four additional months before moving for preliminary injunctive relief. Plaintiff's own delay in challenging policies—including those that have existed for decades—refutes any claim that he will be irreparably harmed if this case proceeds in the normal course. *See, e.g.*, *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (denying request for preliminary injunction in part due to "the delay of the appellants in seeking one" where "they delayed bringing any action until 44 days [after their injury arose]"); *Mylan Pharms.*, 81 F. Supp. 2d at 44 (eight-month delay undermined allegation of irreparable harm).

III. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST MANDATE AGAINST A PRELIMINARY INJUNCTION

Finally, plaintiff has not demonstrated that any injury to him (and there is none) outweighs the harm that a preliminary injunction would cause the Government, or that "an injunction is in the public interest." *Winter*, 555 U.S. at 20. These two factors merge where, as here, the Government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Courts have accorded "great weight" to considerations of foreign policy and national security when balancing the interests and equities of the parties. *Nat'l Res. Def. Council, Inc. v. Pena*, 972 F. Supp. 9, 20 (D.D.C. 1997); *see Winter*, 555 U.S. at 24; *United States v. South Carolina*, 720 F.3d 518, 533 (4th Cir. 2013) ("[I]njury to the nation's foreign policy" weighs in favor of the United States in public-interest inquiry.); *Comm. for Nuclear Responsibility v. Seaborg*, 463 F.2d 796, 798 (D.C. Cir. 1971) (Because of "assertions of potential harm to national security and foreign policy—assertions which [the court] obviously cannot appraise—and given the meager state of

the record before us, we are constrained to refuse an injunction."); *Adams*, 570 F.2d at 955. Moreover, in assessing the public interest, a court must heed "the judgment of Congress, deliberately expressed in legislation," and "the balance that Congress has struck." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001).

These final elements weigh heavily in favor of the Government. Plaintiff asks the Court to "block further U.S. foreign aid payments to Israel"—a country with which the United States enjoys a strong and long-standing defense relationship. Even if that demand were somehow properly before the Court, such extraordinary relief would obviously be inappropriate. The Constitution commits "decision-making in the fields of foreign policy and national security . . . to the political branches of government." *Schneider*, 412 F.3d at 194. In enacting 22 U.S.C. § 2799aa-1, Congress explicitly stated that the President—not the courts or even Congress—has exclusive power to make a determination that a particular country has engaged in the conduct specified in the statute. 22 U.S.C. § 2799aa-1(a)(1), (b)(1); *see* H.R. REP. NO. 103-482, at 264. Since that time, no President has determined that Israel has engaged in such conduct, and Congress has continued to appropriate funds for foreign assistance to Israel on an annual basis. It undoubtedly would be contrary to the public interest for this Court to ignore Congress's judgment that the President alone should make determinations under § 2799aa-1 or to second-guess the determinations (or lack thereof) made by the President (and Congress) in this area. *See, e.g.*, *Adams*, 570 F.2d at 954 (vacating preliminary injunction that directed action by the Secretary of State in foreign affairs, which "deeply intrude[d] into the core concerns of the executive branch").

Plaintiff also asks the Court to "suspen[d]" Classification Bulletin WPN-136. Again, however, the Constitution vests the President, as Commander in Chief, with the constitutional

authority and responsibility to "classify and control access to information bearing on national security." *Egan*, 484 U.S. at 527. In doing so, the President has empowered original classification authorities to create classification guides to be used by government officials in ensuring the proper and uniform derivative classification of information. If the Court were to suspend the Classification Bulletin, it would inhibit the Government's ability to protect sensitive information bearing on national security, and plaintiff has set forth no credible basis for the Court to do so.

CONCLUSION

The Court should deny plaintiff's motion for preliminary injunction.

Respectfully submitted this 12th day of December, 2016,

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all represented parties. I further certify that on the same day, I emailed a copy of the foregoing to the following *pro se* party:

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