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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Muslim Advocates, *Plaintiff,* vs. U.S. Department of Justice; U.S. Department of Homeland Security, *Defendants*.	Case Number: 18-cv-02137-JSC **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT** Date: June 20, 2019 Time: 9:00 a.m. Place: Courtroom F, 15th Floor Before: Hon. Jacqueline Scott Corley

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MEMORANDUM OF POINTS AND AUTHORITIES

Statement of issues to be decided: (1) Whether Plaintiff Muslim Advocates has standing to pursue their claims; (2) Whether Plaintiff's claim is subject to judicial review under the APA[1] as challenging a final agency action not committed to the agency's discretion; and (3) Whether Plaintiff has stated a claim under the APA.

INTRODUCTION

At issue is the nature of the federal government's obligation when it publicly disseminates admittedly misleading and erroneous information contrary to Congress's mandate that such information must be of maximal quality, objectivity and utility. In 2018, on the heels of President Trump's second attempt to bar immigrants from certain Muslim-majority nations, Defendants issued a report purporting to link immigrants, particularly those who are Muslim, to the threat of terrorism in the United States. The Report rests on a host of obviously misleading and selective factual assertions that artificially inflate any threat and was swiftly debunked by a broad swath of national security and counterterrorism experts. Plaintiff, pursuant to the Information Quality Act ("IQA"), petitioned for a correction of the report, explaining its myriad factual defects. Defendants acknowledged those defects to a large degree but refused to make any corrections. Instead, they continue to disseminate the report and have merely promised to do better the next time.

In this litigation, Defendants continue to avoid coming to terms with those errors, and instead seek dismissal on several procedural grounds, all of them unavailing. They first argue that Plaintiff lacks standing because it has not been injured. But under well-settled principles of procedural standing, Defendants' denial of the petition for correction in disregard of the IQA and its implementing Guidelines gives rise to an actionable injury that is redressable by court order.

[1] Terms not defined below take the same meaning as indicated in the First Amended Complaint (the "FAC").

Defendants next argue that Plaintiff's claims, brought under the Administrative Procedure Act ("APA"), are not reviewable by a court because the IQA forecloses review and, in any event, the decision whether to grant a petition for correction is committed to their discretion. But multiple courts have recognized a right of action under the APA where an agency has failed (or is alleged to have failed) to act in accordance with the IQA's standards. And the IQA and its Guidelines provide a readily discernible set of quality criteria by which a court can review an agency's actions.

Defendants finally argue that Plaintiff has failed to state a claim under the APA because the denial of the petition was not a final agency action and Defendants acted reasonably. But the denials were most assuredly final as they were the conclusion of the petition process and determined Plaintiff's rights (to a process whereby information that fails to meet the requisite quality standards is corrected) and Defendants' obligations (relieving them of having to take further action on the report). Furthermore, Defendants indeed violated the APA, acting not in accordance with law, without observance of required procedures, and arbitrarily and capriciously in reviewing Plaintiff's petition in a manner that failed to correct acknowledged defects.

At bottom, the quality and accuracy of information issued under the government's imprimatur matters for an informed public and sound, evidence-based policymaking. It matters all the more given today's torrent of misinformation from non-governmental sources posing as objective fact. Defendants, by their actions, have failed to meet the information quality standards mandated by Congress, and it is firmly within the Court's province to review and remedy that failure. Defendants' motion to dismiss therefore should be denied.

BACKGROUND FACTS

I. The Information Quality Act

The IQA requires OMB to issue guidelines concerning the dissemination of public information by federal agencies to "ensur[e] and maximiz[e]" its "quality, objectivity, utility, and integrity." 44 U.S.C. § 3516 note (citing 44 U.S.C. §§ 3504(d)(1), 3516). The Act further

instructs that these guidelines shall require the covered federal agencies (including DOJ and DHS) to issue their own guidelines to the same end and to "establish administrative mechanisms allowing affected persons to seek and obtain correction of [non-compliant] information maintained and disseminated by the agency." *Id*.

Following a period of notice and public comment, OMB issued the required guidelines in 2002. *See* 67 Fed. Reg. 8451 (Feb. 22, 2002) ("OMB Guidelines")). These guidelines set forth precise and detailed definitions of the statute's information quality watchwords: "quality", "utility", "objectivity", and "integrity." *Id.* at 8459-8560. In response, Defendants each promulgated Guidelines that define "quality", "utility", "objectivity", and "integrity," and establish an information correction process. *See* FAC ¶¶ 26-32.

II. EO 13780 and the EO 13780 Section 11 Terrorism Report

On March 6, 2017, President Trump signed Executive Order 13780, Protecting the Nation from Foreign Terrorist Entry into the United States ("EO 13780") to significantly restrict entry to the United States by individuals from six Muslim-majority countries. Additionally, and purportedly out of a desire "[t]o be more transparent with the American people and to implement more effectively policies and practices that serve the national interest," EO 13780 requires that DHS and DOJ "collect and make publicly available": (i) "the number of foreign nationals in the United States who have been charged with [or convicted of] terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity"; (ii) "the number of foreign nationals in the United States who have been radicalized after entry into the United States and who have engaged in terrorism-related acts"; (iii) the number and types of acts of gender-based violence against women, including so-called "honor killings," in the United States by foreign nationals; and (iv) "any other information relevant to public safety and security as determined by the Secretary of Homeland Security or the Attorney General, including information on the immigration status of foreign nationals charged with major offenses." *See* EO 13780, Sec. 11(a).

On January 16, 2018, Defendants released the initial report (the "Report"), which purported to provide the information requested by EO 13780 and misleadingly asserted that three out of four individuals convicted of international terrorism and terrorism-related offenses are foreign-born. FAC ¶¶ 38-39.[2] Defendants continue to disseminate the Report to the public on their respective webpages. *Id.* ¶ 11.[3]

III. Plaintiff's Petition for Correction and Appeal

Pursuant to Defendants' IQA correction procedures, Plaintiff submitted a petition for correction on January 29, 2018 (the "Petition"). *See* FAC ¶ 85. The Petition, which established that Plaintiff is an "affected person" within the meaning of the IQA and its implementing Guidelines, *id.* ¶ 86, identified five ways in which the Report failed to meet information quality standards: (i) omitting any discussion of domestic terrorism thereby inflating the proportion of terrorist incidents attributable to immigrants and foreign nationals, despite EO 13780 calling for a discussion of all terrorism-related offenses; (ii) substituting data concerning foreign-born individuals for data concerning foreign nationals thereby inflating the proportion of terrorist incidents attributable to immigrants and naturalized citizens; (iii) counting individuals who committed acts of terrorism overseas and whose only tie to the United States is through extradition to the United States; (iv) profiling eight apparently Muslim individuals as "illustrative examples" of foreign nationals prosecuted for terrorism-related offenses thereby perpetuating the discriminatory narrative that Muslims are likely to commit acts of terrorism; and (v) relying on

[2] Defendants issued the Report with accompanying press releases highlighting the "three out of four" conclusion, which was followed shortly thereafter by misleading statements from the White House, *Id.* ¶ 78, then-Attorney General Jeff Sessions, *Id.* ¶ 79, and then-Secretary of DHS Kirstjen Nielsen, *Id.* ¶ 80. All argued the Report showed a link between immigration and terrorism, justifying harsher immigration measures.

[3] As Defendants note, MTD at 6 n. 1, it is appropriate for the Court to take judicial notice of the Report, which continues to be disseminated through both DHS and DOJ's websites. *See* FAC ¶ 38; *see also* U.S. DHS & U.S. DOJ, *Executive Order 13780: Protecting the Nation from Foreign Terrorist Entry Into the United States Initial Section 11 Report* (Jan. 2018), *available at* https://www.justice.gov/opa/press-release/file/1026436/download.

inaccurate and misleading information in discussing "honor killings" and other gender-based violence. *Id.* ¶¶ 42-70.

After Plaintiff sued, Defendants denied the Petition on July 31, 2018 (DOJ) and August 1, 2018 (DHS). *See Id.* ¶¶ 92-93. Plaintiff then submitted administrative appeals, which Defendants also denied. *Id.* ¶ 95. But in doing so Defendants admitted that the Report's information was lacking in quality. *Id.* ¶¶ 99-104. Specifically, DOJ stated:

> [T]he Department concludes on reconsideration that ***information in the Report could be criticized by some readers, consistent with some of the concerns voiced in your Request for Reconsideration***. … Working closely with DHS, the Department will consider IQA principles in issuing future reports under Section 11 of Executive Order 13780 ***to better present such information to the public***.

Id. ¶ 99. For its part, DHS admitted that Plaintiff's contention regarding the bias in the selection of the eight illustrative examples is "well-taken," and promised to "take into consideration in future Section 11 Reports those points raised in both" the Petition and appeal. *Id.* ¶ 104. Both DOJ and DHS declined to retract or correct the Report. *Id.* ¶ 101, 105.

STANDARD OF REVIEW

Defendants have moved to dismiss this action for lack of jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). Under Rule 12(b)(1), the Court must "accept[] the allegations of the complaint as true and construes them in the light most favorable to the plaintiff." *Geertson Farms, Inc. v. Johanns*, 439 F. Supp. 2d 1012, 1016 (N.D. Cal. 2006) (citing *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989)). A claim will be dismissed "only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (quoting *Love*, 915 F.2d at 1245). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

ARGUMENT

Defendants' justiciability challenges to this action are meritless. Plaintiff has standing because Defendants' refusal to retract or correct the Report inflicts a cognizable and redressable procedural injury. Plaintiff also has a right of action under the APA to challenge Defendants' actions. Nearly every Circuit to consider the issue, including the Ninth Circuit, has acknowledged, at least by implication, that a federal court may reach the merits of an IQA challenge. *See, e.g.*, *Harkonen v. U.S. Dep't of Justice*, 800 F.3d 1143, 1151 (9th Cir. 2015) (resolving the case by substantively applying agency Guidelines to the petition at issue). The few non-binding cases that Defendants muster are not to the contrary. And Defendants violated the APA by disseminating the Report in contravention to the information quality standards and procedures established by the IQA and Guidelines. As Defendants acknowledged, the Report failed to meet the requisite information quality standards. They therefore acted contrary to law, without procedures required by law, and arbitrarily and capriciously in refusing to correct or retract it.

I. PLAINTIFF HAS STANDING TO PURSUE THIS ACTION

Article III standing requires a plaintiff to show a past, ongoing, or threatened "injury in fact" that is "fairly traceable" to the defendant's actions and that is "likely to be redressed" by the relief sought. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). An injury to procedural interests is sufficient, provided the procedures at issue "are designed to protect some threatened concrete interest." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969–70 (9th Cir. 2003) (internal quotation marks omitted). Procedural injuries suffice even where a plaintiff has no right to expect a certain outcome; the injury results from the defendant's failure to follow an established process. *See, e.g.*, *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1177-1180 (9th Cir. 2011) (finding plaintiff "asserted actual harm to its procedural interest in federal management decisions made

under the deliberation-forcing requirements of NEPA" where it alleged agency had not made the requisite "hard look").

The requirements for causation and redressability are relaxed for "a litigant to whom Congress has accorded a procedural right to protect his concrete interests." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (citation omitted); *accord. California ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 790 (9th Cir. 2014). One need only show "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant," and "that the procedural step was connected to the substantive result." *Massachusetts*, 549 U.S. at 518 (citations omitted); *see also Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 817–18 (9th Cir. 2017) (describing the causation inquiry as one "focused clearly on the process and not the result").

Plaintiff has standing because Defendants' refusal to retract or correct the Report injures Plaintiff's procedural interest in "seeking and obtaining" a response to the Petition that correctly applies IQA standards, and its requested relief would remedy this injury.[4]

a. Plaintiff has suffered an injury-in-fact.

It is long established that a plaintiff may be injured by an agency's failure to comply with legally required procedures. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969–70 (9th Cir. 2003) (quoting *Pub. Citizen v. U.S. Dep't of Transp.*, 316 F.3d 1002, 1015 (9th Cir.2003)). A plaintiff in that circumstance "must allege … that (1) the [agency] violated certain procedural rules; (2) these rules protect [the plaintiff's] concrete interests; and (3) it is reasonably probable that the challenged action will threaten [the plaintiff's] concrete interests." *Id.* Plaintiff has made such allegations.

[4] Defendants misconstrue Plaintiff's standing theory as one based on an "interest in preventing anti-Muslim discrimination," or "speculative assertions of hypothetical future harm by unspecified (and unknowable) third parties[.]" MTD at 15. On the contrary, those allegations establish Plaintiff's status as an "affected person" for the purpose of seeking a correction under the IQA, which Defendants have never contested.

As to the first element, the IQA establishes a procedural right to "seek and obtain correction of information maintained and disseminated by the agency that does not comply" with the Guidelines. 44 U.S.C. § 3516 note (b)(2)(B); *see also* OMB Guidelines (establishing such a mechanism); DOJ Guidelines (same); DHS Guidelines at 2 (same). Defendants do not challenge that the IQA requires an agency to respond to an affected person's petition. Nor could they, as the IQA and OMB and agency Guidelines—which courts have treated as binding—establish clear rights for "affected persons to seek and obtain correction of information" that does not meet the touchstones of "quality", "objectivity", "utility", and "integrity." 44 U.S.C. § 3516 note (b)(2)(A), (B); OMB Guidelines at 8459; DOJ Guidelines; DHS Guidelines at 9-10; *see Harkonen*, 800 F.3d at 1150 (accepting and applying definitions contained in OMB and DOJ's Guidelines); *see also Prime Time Intern. Co. v. Vilsack*, 599 F.3d 678, 685 (D.C. Cir. 2010) (describing OMB's Guidelines as Congressionally mandated and, therefore, "binding" and worthy of deference).

As part of that right, a petitioner is entitled to "obtain correction" of disseminated information when it "does not comply" with the OMB Guidelines. 44 U.S.C. § 3516 note (b)(2)(B). As with other procedural contexts, the injury is not predicated on the *outcome* of the agency's process, but rather on the *means* by which the agency arrived at that outcome. *See, e.g.*, *Sierra Forest Legacy*, 646 F.3d at 1177-1180 (finding plaintiff was injured in fact where it alleged that a federal agency failed to undertake the "hard look" required by NEPA prior to issuing an economic impact statement). And in responding to a petition, an agency must substantively apply the IQA and Guidelines' information quality standards and provide a "correction of information maintained and disseminated that does not comply" with them. 44 U.S.C. § 3516 note (b)(2)(B); *see also* OMB Guidelines at 8459; DOJ Guidelines; DHS Guidelines at 2. Here, Plaintiff has alleged that the agencies' adjudication of the petition was inadequate because they failed to apply the information quality standards establish by the Guidelines. FAC ¶¶ 41-70. The plausibility of these allegations is, of course, buttressed by the

agencies' own admissions that the information disseminated in the Report lacks the requisite quality in certain respects. *See* FAC ¶¶ 99, 104.

Denial of these procedural rights impedes the important underlying informational interests they protect, such as Plaintiff's ability to "use" or "benefit," or not be "harmed," from information disseminated by the federal government. While Plaintiff does not claim that the IQA establishes a free-standing right to quality information, the statute and Guidelines require that an agency correct publicly disseminated information when presented with a petition showing why that information does not comply with the IQA. Where the procedures are compromised, so too is the underlying informational interest which it serves. *See Citizens for Better Forestry*, 341 F.3d at 969–70 (holding that a procedural injury is an injury in fact where there is a reasonable nexus to an underlying interest). Thus, in alleging that Defendants violated the IQA's mandated correction process, Plaintiff has adequately pled the first element of a procedural injury.

Plaintiff has also adequately pled the second and third elements of procedural standing—that the IQA correction process protects their concrete interest and that Defendants' failure to abide by that process threatens that interest. The Act sets forth the class of qualifying persons as "affected persons," 44 U.S.C. § 3516 note (b)(2)(B), whom Defendants define to mean an "individual or entity that may use, benefit, or be harmed by the disseminated information at issue." DOJ Guidelines; DHS Guidelines at 2. Defendants have never contested that Plaintiff is an "affected person" within the meaning of the IQA and the Guidelines. Nor could they. As Plaintiff describes its interest and the harm to it:

> Muslim Advocates is an "affected person" … because … [it] works to ensure that policies enacted under the banner of national security do not wrongfully discriminate against Muslims and are not based on inaccurate or misleading information. Muslim Advocates uses reliable information concerning the American immigration population in its work, and it, as well as its clients, is also "harmed" by the dissemination of the Report, which seeks to portray immigrants, and particularly Muslim immigrants, as inherently violent and likely to commit acts of terror. Moreover, the Report serves as a mechanism to justify the travel and refugee bans, which the Administration has attempted to justify, at least in part, by reference to the kinds of inaccurate data and biased findings contained in the Report. The Report serves as further post hoc justification for those efforts, which directly harm Muslim Advocates and its clients.

See FAC ¶ 86. Having satisfied the affected person definition, Plaintiff has also satisfied the remaining procedural standing elements.[5]

b. Defendants' actions caused Plaintiff's harms and a court order can provide full redress.

Plaintiff has established causation and redressability, whether measured under procedural standing's relaxed standard or any other standard. Plaintiff's injury stems solely from Defendants flouting the process contemplated by the IQA and its Guidelines: in considering the Petition, Defendants found that it contained meritorious arguments but nevertheless denied it. A court order declaring that the Report fails to meet baseline information quality standards, that Defendants violated the IQA and APA, and ordering them to correct or retract and cease disseminating the Report would cure Plaintiff's injury. Nothing more is required for standing.

II. PLAINTIFF'S CLAIMS ARE REVIEWABLE UNDER THE APA.[6]

"The APA, by its terms, provides a right to judicial review of all 'final agency action for which there is no other adequate remedy in a court.'" *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (quoting 5 U.S.C. § 704). This right to judicial review "applies universally 'except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency

[5] It is immaterial that Plaintiff has no right to expect a certain outcome under the IQA and Guidelines as a procedural injury can exist even where, as here, a plaintiff asserts no absolute right to "informational correctness," MTD at 15. The IQA requires Defendants to apply the standards of "quality", "utility", "objectivity", and "integrity." At a minimum, agencies should be held to reach the logical outcome of granting a petition for correction when their own analysis determines that the petition correctly identifies shortfalls in a dissemination. That has not happened here. Defendants failed to adequately apply the information quality standards in the first instance, *see* FAC ¶¶ 41-70, and then, despite acknowledging the validity of concerns raised in the Petition, failed to retract or correct the Report, *see* FAC ¶¶ 100-105. In effect, Defendants' conduct renders illusory Plaintiff's right as an "affected person" to "seek and ***obtain*** a correction" of noncompliant information. *See* 44 U.S.C. § 3516 note (b)(2)(B) (emphasis added).

[6] Plaintiff asserts only an APA claim, and contrary to Defendants' arguments, MTD at 16-18, is not seeking direct review under the IQA itself. *See* FAC ¶ 111. Moreover, because Plaintiff raises procedure-based injuries, and not a right to informational correctness, the cases Defendants cite to establish that the IQA does not create a "legal right to information or its correctness" are off base. MTD at 17 (citing *Salt. Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006); *Harkonen v. U.S. Dep't of Justice*, 12-cv-629-CW, 2012 WL 6019671, at *11 N.D. Cal. Dec. 3, 2012)).

discretion by law.'" *Id.* All three prerequisites are met here for review under the APA: Defendants' denial of the Petition is a final agency action, the adjudication of petitions for correction under the IQA is not committed to agency discretion, and there is no statutory bar to judicial review.

a. Courts have recognized judicial review under the APA, and there is good reason to exercise that jurisdiction here.

In asserting that the IQA precludes judicial review of Plaintiff's claim under the APA, Defendants must overcome the "strong presumption that Congress intends judicial review of administrative action." *Aguayo v. Jewell*, 827 F.3d 1213, 1223 (9th Cir. 2016) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)). They cannot.

Multiple Circuit Courts have concluded that IQA claims raised under the APA may be adjudicated. *See Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 678 n. 25 (7th Cir. 2016) ("[T]he APA … affords the petitioners the right to bring this [IQA] challenge"); *see also Prime Time Int'l Co.*, 599 F.3d at 686 ("[T]he proper resolution of the IQA issue is beyond any doubt, so this court is free to reach it" (alteration adopted)). The Ninth Circuit has likewise acknowledged, at least by implication, that a court may reach the merits of an IQA challenge raised under the APA. *See Harkonen*, 800 F.3d at 1151 (substantively applying the Guidelines to resolve the case by affirming dismissal); *see also Ams. for Safe Access v. U.S. Dep't of Health and Human Servs.*, No. 07-cv-01049, 2007 WL 2141289, at *5 (N.D. Cal. July 24, 2007) (Alsup, J.) (granting leave to amend complaint and noting that it was "[c]onceivabl[e]" that "a district court may order an agency to act on the merits of an information-correction petition within a specific time frame").[7] And, as explained below, *see infra* at 14-15, none of the cases

[7] Defendants point to *Habitat for Horses v. Salazar*, No. 10-cv-7684-WHP, 2011 WL 4343306, at *3 (S.D.N.Y. Sept. 7, 2011) and *Wood ex rel. U.S. v. Applied Research Assocs., Inc.*, No. 07-cv-3314-GBD, 2008 WL 2566728, at *6 (S.D.N.Y. June 26, 2009) for the proposition that raising an IQA violation under the APA has "been rejected by the courts." MTD at 18. But these cases are inapposite. To begin, their holdings rely on cases Plaintiff distinguishes below, *infra* 14-15, and predate the Ninth Circuit's treatment of the IQA issue in *Harkonen*. Further, in *Habitat for Horses*, the plaintiff sought to "limit … the types of information on which an agency may *rely* in reaching its decision," *Habitat for Horses*, WL 4343306, at *3 (emphasis in original), an effort the court rejected as in conflict with the definition of "disseminate" contained

Defendants cite—neither the lone Circuit Court decision, nor the handful of non-binding district court cases that have passingly considered the question—preclude the Court from hearing Plaintiff's claim as they are legally and factually distinguishable from this case.

Nor are Defendants aided, as they suggest, MTD at 17, by the fact that the IQA does not explicitly provide a right to review. That gets the question backward. The relevant inquiry is not whether there is "[a] separate indication of congressional intent to make agency action reviewable under the APA," but instead whether review is available "absent some clear and convincing evidence of legislative intention to preclude review." *Japan Whaling Ass'n v. Am Cetacean Soc.*, 478 U.S. 221, 230 (1986). Such clear and convincing evidence does not exist either in the text of the IQA or even in the Congressional record preceding its passage, and Defendants identify none.

The circumstances here also raise important policy considerations supporting reviewability. First, the Report perpetuates a harmful narrative that immigrants, particularly Muslim immigrants, are a danger to the United States. FAC ¶¶ 77-81. Allowing the continued dissemination of that narrative through an official government report stigmatizes Muslim communities and puts them at risk of suffering further acts of hate and violence. *Id.* ¶¶ 82-84 (describing the well-established correlation between rhetoric that targets a disfavored group and increases in violence aimed at those groups); *see also id.* ¶ 84 (citing reports of significant increases in hate incidents against Muslim communities over the past couple of years). Second, and as set forth in a letter from former counterterrorism officials—including former top officials at both DOJ and DHS—submitted to Defendants in support of Plaintiff's appeal, the Report

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in the OMB Guidelines, *see id.* at *7. Plaintiff here does not seek to limit the kinds of information on which Defendants may rely, and only ask the Court to review whether Defendants conduct in disseminating the Report and responding to the Petition comported with the binding standards and processes set forth in the IQA and Guidelines. Defendants also rely on *Wood ex. rel. U.S.*, but that case is likewise of no help to Defendants. There, conspiracy theorists raised frivolous claims in an effort to halt a congressionally mandated technical investigation into the structural failings of the World Trade Center buildings that collapsed on 9/11. *Wood ex. Rel. U.S.*, 2008 WL 2566728, at *6. The effort, which included a complaint rife with pleading deficiencies and request for extraordinary relief, is not comparable to Plaintiff's claim.

hampers the very national security concerns it purports to serve. *See id.* Att. A at 4 ("[A]ccurately informing the public about the nature and scope of the terrorism threat it faces is a critical component of effective counterterrorism policy," and "the misleading statements and omissions in the … Report may undermine effective counterterrorism policies.").

Together with the cases concluding that APA review is available, the serious stigmatic harms the Report imposes on immigrant and Muslim communities, and the risks its continued dissemination poses to legitimate counterterrorism efforts, the APA's strong presumption of judicial review should carry the day here.

b. The denial of the Petition is not committed to agency discretion, and the IQA provides detailed standards to judge Defendants' conduct.

Judicial review of final agency actions is unavailable only where the statute contains an explicit and affirmative prohibition on judicial review, or where the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). Neither factor bars review here.

The IQA contains no text even suggesting that judicial review is foreclosed. To the contrary, as explained above, courts have reasoned that the APA provides for review of an IQA violation—a conclusion that necessarily means that the IQA does not prohibit judicial review. *See Zero Zone*, 832 F.3d at 678 n.25; *Prime Time Int'l Co.*, 599 F.3d at 686; *Harkonen*, 800 F.3d at 1151.

Nor is unreviewable agency discretion at issue. "'This is a very narrow exception' that comes into play only 'in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply,'" *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 494 (9th Cir. 2018) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)), or "where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (internal quotation marks omitted). Even where a statute grants an agency very broad discretion, courts are still able to review whether the agency has abused that discretion. *See Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 720 (9th

Cir. 2011) ("The fact that an agency has broad discretion in choosing whether to act does not establish that the agency may justify its choice on specious grounds. To concede otherwise would be to disregard entirely the value of political accountability[.]" (internal quotation marks omitted)); *see also Beno v. Shalala*, 30 F. 3d 1057, 1066 (9th Cir. 1994) (holding that authority permitting agency to issue "waiver for projects which '*in the judgment of the Secretary* [are] likely to assist in promoting the objectives' of the Act" was not committed to agency discretion) (emphasis added)). Indeed, multiple courts have managed to apply the OMB Guidelines to decide cases implicating the IQA. *See Harkonen*, 800 F.3d at 1150 (applying OMB and DOJ's definition of "dissemination," which exempts agency press releases from the IQA's requirements, to affirm dismissal); *Prime Time Intern. Co.*, 599 F.3d at 685 (same).

Defendants cite only to the district court decision in *Harkonen* as support for their contention that IQA claims are committed to agency discretion, and therefore not justiciable. MTD at 20 (citing *Harkonen v. U.S. Dep't of Justice*, 2012 WL 6019571, at *16). They fail to appreciate, however, the significance of the Ninth Circuit's affirming opinion resolving the APA claim before it by substantively applying the definition of "dissemination" contained in the OMB and DOJ Guidelines, and even expressly leaving open the "broad question of whether the IQA confers [a private right of action]." *See Harkonen*, 800 F.3d at 1148-1150; *see also* MTD at 17 n.3. The sister court cases Defendants draw on are equally unpersuasive. Defendants contend, for example, that *Family Farm Alliance v. Salazar*, 749 F. Supp. 2d 1083 (E.D. Cal. 2010) establishes that the IQA contains no reviewable standards "concerning either the substance or timing of responses to IQA petitions." MTD at 20 (citing 749 F. Supp. 2d at 1092). But Plaintiff neither presses a timeliness claim, *see infra* note 10, nor raises an issue concerning the make-up and findings of a peer review panel, which was the narrow focus of *Family Farm Alliance's* discussion. *See* 749 F. Supp. 2d at 1095.[8] Likewise, *Salt Institute v. Thompson* was decided on

[8] Defendants cite *Styrene Information & Research Center., Inc. v. Sebelius*, 944 F. Supp. 2d 71, 82-83 (D.D.C. 2013) for this same proposition. But there too, the court considered inapposite claims pertaining to timeliness and conduct of a peer review panel. *Id.*

standing grounds; it's *dicta* on whether IQA decisions are committed to agency discretion should not guide the Court here. *See* 345 F. Supp. 2d 589, 601 (E.D. Va. 2004) (holding that the plaintiffs lacked standing before turning to the justiciability of IQA claims). Plaintiff's claim in that case was also principally one in which it sought to compel the production of agency information and was expressly not based on a petition for retraction or correction of information that had been disseminated. *See id.* at 596.[9]

The better-reasoned view is that the IQA, together with the implementing Guidelines, provides meaningful standards for courts to apply to evaluate whether an agency has properly reviewed a petition for correction.[10] Specifically, disseminations should be measured against the following standards (as supplemented by the Guidelines): "quality, objectivity, utility, and integrity." 44 U.S.C. § 3516 note (a). Reviewing courts have found similar terms to provide law to apply. *See, e.g., Dewakuku v. Martinez*, 226 F. Supp. 2d 1199, 1204 (D. Ariz. 2002) ("decent, safe, and sanitary" was not too subjective to evaluate adequacy of low-income housing provided by HUD); *see also Beno*, 30 F. 3d at 1066 (holding that authority permitting agency to issue "waiver for projects which '*in the judgment of the Secretary* [are] likely to assist in promoting the objectives' of the Act," which it described with "some specificity," was not committed to agency discretion). The IQA's specific metrics stand in stark contrast to the type of indefinite or hortatory statutory language found to provide agencies with unreviewable discretion. *Compare Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003) (FAA Administrator's authority to act "at any time for any reason the Administrator considers appropriate" was committed to agency discretion by law).

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[9] Defendants also cite *In re Operation of the Missouri River System* as further support for the notion that the IQA provides no "law" for a court to apply. MTD at 21. The opinion provides no deep analysis of the issue, however, and fails to mention, let alone discuss, the robust OMB Guidelines on its way to concluding that there is no "'meaningful standard' against which to evaluate the agency's discretion[.]" 363 F. Supp. 2d 1145, 1174-75 (D. Minn. 2004).

[10] While Defendants emphasize the lack of mandatory language as to when an agency must respond to a petition, that question is no longer before the Court, because Defendants have provided Plaintiff with their final responses. Instead, the question is whether the IQA provides "law to apply" to determine the adequacy of those responses.

Further, the Guidelines define each of these terms in detail. *See* OMB Guidelines at 8459. Relevant here, OMB defines "Quality" to be "an encompassing term comprising utility, objectivity, and integrity," and so the four statutory terms are sometimes referred collectively as "quality." *Id.* "Utility" is defined by reference "to the usefulness of the information to its intended users, including the public." *Id.* And "'Objectivity' involves two distinct elements, presentation and substance." *Id.* The "presentation" inquiry focuses on "whether disseminated information is being presented in an accurate, clear, complete, and unbiased manner," which sometimes calls for the provision of additional information to provide proper context. *Id.* The "substance" inquiry "involves a focus on ensuring accurate, reliable, and unbiased information." *Id.*

That these definitions are regulatory rather than statutory does not change the conclusion that they readily provide a source of applicable law. *See Ghafoori v. Napolitano*, 713 F. Supp. 2d 871, 878 (N.D. Cal. 2010) ("A regulation has the force of law; therefore, an agency's interpretation of a statute in a manner inconsistent with a regulation will not be enforced."). First, the IQA itself reveals Congressional intent that OMB make use of its expertise regarding agency management of information in order to promulgate standards for the quality of information disseminated by agencies. Specifically, Congress placed the IQA within the Paperwork Reduction Act, the comprehensive scheme providing OMB with authority to oversee federal information policy. *See* 44 U.S.C. § 3501 (purpose of PRA); 44 U.S.C. § 3504 (setting forth functions of Director, including to "provide direction and oversee … (ii) agency dissemination of and public access to information"). Relatedly, the Ninth Circuit has recognized that even where a statute itself may not provide meaningful standards by which to judge an agency's action, "additional regulations might, in some circumstances, be sufficient to result in a reviewable controversy under the APA." *CPATH v. USTR*, 540 F.3d 940, 947 (9th Cir. 2008); *see also Physicians Comm. for Responsible Med. v. Vilsack*, No. 16-CV-00069-LB, 2016 WL 5930585, at *5 (N.D. Cal. Oct. 12, 2016) (reviewing Federal Register material to determine

whether there was "law to apply"); *Prime Time Intern. Co.*, 599 F.3d at 685 (describing OMB's Guidelines as Congressionally mandated and, therefore, "binding" and worthy of deference).

Thus, the text of the IQA, in tandem with the statutorily mandated and binding OMB Guidelines,[11] provides the Court all the law it needs to review Defendants' conduct under the IQA. But beyond the text, the structure and purpose of the IQA provide an additional standard against which the Court can consider Plaintiff's APA claim. *Cf. Page v. Donovan*, 727 F.2d 866, 868 (9th Cir. 1984) ("Even if the statute is drawn broadly, review is not precluded if the legislative history offers standards that a reviewing court can apply."). Implicit in the twin requirements the IQA imposes upon federal agencies—(i) establish guidelines "for ensuring and maximizing the quality, objectivity, utility, and integrity of information" and (ii) "establish administrative mechanisms allowing affected persons to seek and obtain correction" of sub-standard information—is that agencies cannot exercise their discretion in a manner that renders the rights of "affected persons" illusory. *See* 44 U.S.C. § 3516 note (a), (b)(2)(B).

In sum, the IQA, as informed by its purpose and structure and the Guidelines, provides applicable law and meaningful standards by which to determine whether Defendants, by admitting error but nevertheless denying the Petition, have violated the APA. *See Pinnacle Armor, Inc.*, 648 F.3d at 720 (holding that even broad grants of discretion do not preclude review of whether the agency abused that discretion).

c. Defendants' final denial of Plaintiff's Petition is final agency action.

The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Two factors determine whether an agency action is "final." First, whether the action "mark[s] the consummation of the agency's decisionmaking process," *Bennett*, 520 U.S. at 156 (citation omitted), meaning "the process of administrative

[11] The Court may also look to the Guidelines the Defendants each promulgated, which are binding on themselves, should it require additional sources of "law." Those Guidelines adopt the definitions of "quality", "objectivity", and "utility" first promulgated by OMB. *See* FAC ¶¶ 26, 30.

decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication[.]" *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). Second, whether the action is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177 (quoting *Port. Of Bos. Marine Terminal Ass'n*, 400 U.S. at 71). For both prongs, courts should "focus on the practical and legal effects of the agency action and interpret finality in a pragmatic and flexible manner." *Gill v. U.S. Dep't of Justice*, 913 F.3d 1179, 1184 (9th Cir. 2019) (internal quotation marks omitted).

On the first *Bennett* factor, there is no question that Defendants' denials of the Petition are the consummation of their decisionmaking process.[12] *See AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 912 (9th Cir. 2002) (describing an agency's "explicit determination" to be the "most important feature" of a final action).

The second *Bennett* factor is also satisfied because Defendants' final denials determined rights and obligations. The IQA and the Guidelines establish a right for "affected persons to seek and obtain correction of information" that is not of sufficient "quality", "objectivity", "utility," or "integrity." *See* 44 U.S.C. § 3516 note (b)(2)(B); *see also* OMB Guidelines at 8458. The product of notice and comment rulemaking, the OMB Guidelines are binding and have received broad deference from the various courts that have applied them as reasonable interpretations of the IQA. *See Harkonen*, 800 F.3d at 1150 (accepting and applying the interpretation of "disseminate" contained in OMB and DOJ's Guidelines); *see also Prime Time Intern. Co.*, 599 F.3d at 685 (describing OMB's Guidelines as Congressionally mandated and, therefore, "binding" and worthy of deference). In denying the Petition, Defendants determined Plaintiff's right to petition for correction as an "affected person," rendering it meaningless by at

[12] Such denials of petitions are definitionally "agency action" under the APA. *See* 5 U.S.C. 551(13) ("agency action" includes "denial" of "relief") and 5 U.S.C. § 551(11)(C) ("relief" includes "taking action on" a "petition, beneficial to a person").

once acknowledging the Petition's merit but then insisting that the Report satisfies the IQA.[13] Moreover, Defendants determined their own obligations under the IQA, concluding that the IQA does not obligate further action on the Report. *See* FAC ¶¶ 101, 105.

Defendants' reliance on *Single Stick, Inc. v. Johanns*, 601 F. Supp. 2d 307, 316 (D.D.C. 2009) and *Americans for Safe Access*, 2007 WL 2141289 at *4 is misplaced. While citing the district court decision in *Single Stick*, Defendants ignore the D.C. Circuit's decision on appeal, which makes clear that agency decisions to deny a petition under the IQA can constitute reviewable final agency action. *See Prime Time Intern. Co.*, 599 F. 3d at 685. In *Americans for Safe Access* the "agency process ha[d] not yet run its course," and the plaintiff also failed to demonstrate that the failure to correct certain statements had legal consequences. *See* 2007 WL 2141289, at *4. Plaintiff's amended complaint does not suffer from these same pleading deficiencies, and is, indeed, replete with factual allegations demonstrating that the agency process has completed, FAC ¶ 10, and that Defendants' denial of the Petition affects its rights and interests, *id.* ¶ 86.

III. Plaintiff has stated a claim under the APA, 5 U.S.C. § 706(2)

The APA imposes on agencies a standard of reasoned decision-making, authorizing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). To meet that standard, an agency must at a minimum have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). In

[13] Defendants argue that the IQA must contain a right to information or a correction of information in order for Defendants' actions to "determine … rights or result in any legal consequences" that would meet the second *Bennett* factor. MTD at 22. But the IQA creates a right to a specific petition procedure by which an agency must engage with the information quality standards and take corrective action if those standards are not met. Defendants' final denial letters interfered with that right, rendering it illusory. *See supra* note 5.

reviewing agency action, courts consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (internal quotation marks omitted); *Citizens to Preserve Overton Park*, 401 U.S. at 416. An agency's error is clear where, for example, it has "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Defendants have violated the APA in three respects: (1) Defendants' dissemination was "not in accordance with law," 5 U.S.C. § 706(2)(A); (2) the process by which they denied the Petition was "without observance of procedure required by law," *id.* § 706(2)(D); and (3) the denials of the Petition were "arbitrary and capricious," *id.* § 706(2)(A).

Defendants' dissemination of the Report was not in accordance with law because it fails the "objectivity" and "utility" requirements of information quality. *See* FAC ¶¶ 42-70, 110.[14] "Quality" is defined as an "encompassing term comprising utility, objectivity, and integrity." OMB Guidelines at 8459. "'Utility' refers to the usefulness of the information to its intended users, including the public." *Id.* "Objectivity" is measured by whether "information is being presented in an accurate, clear, complete, and unbiased manner," meaning it must be "presented within a proper context." *Id.* Instead, the Report presents information in a deceptive, misleading, and incomplete manner. *See* FAC ¶¶ 42-70, 110.

The Report violates the standards of information quality set forth in the IQA and its binding Guidelines in the following ways:

First, the Report's substitution of international terrorism for all terrorism misleadingly undercounts domestic terrorism, and artificially inflates the proportion of terrorist incidents committed by immigrants and foreign nationals. FAC ¶¶ 42, 45. Despite the prevalence of serious domestic terrorist threats, particularly the threat posed by far-right wing violent extremist

[14] *See also* FAC Att. A at 4 (describing the ways in which the Report is not useful, including because, by disseminating misleading information, it prohibits readers from "effectively evaluat[ing] the government's counterterrorism policies").

groups, the Report—which purports to respond to EO 13780's directive to publish information regarding foreign nationals charged with "terrorism-related offenses," generally—only provides data related to ***international terrorism-related offenses***. *Id.* ¶¶ 43-44. Defendants do not explain the omission of domestic terrorism data, but the effect of this exclusion is to dramatically misrepresent the actual terrorist threat posed to the United States. *See id.* ¶ 43. Through their manipulation of data, Defendants artificially increased the proportion of immigrants and foreign nationals presented as responsible for terrorist incidents—without making clear that the scope of the data is much narrower than what EO 13780 requires and without explaining how the presentation skews the terrorist threat actually posed to the United States. *Id.* ¶ 45.

Second, the Report provides misleading and biased information by substituting data concerning foreign-***born*** individuals for data concerning foreign ***nationals***. Section 11 directed Defendants to provide information related to "foreign nationals" and terrorism-related offenses, EO 13780, Sec. 11(a), but the Report instead disseminates information regarding foreign-born individuals, rather than foreign nationals. It does not explain why it makes this substitution but doing so results in the misleading conclusion that nearly three-quarters of individuals who were convicted of international terrorism-related charges were immigrants or naturalized citizens. *See* FAC ¶¶ 47-48 (citing Report at 2, which states that of at least 549 individuals who were convicted of international (and only international) terrorism-related charges in U.S. federal courts between September 11, 2001, and December 31, 2016, "approximately 73 percent (402 of these 549 individuals) were foreign-born"). Had Defendants actually followed EO 13780's directive to report on foreign nationals, even based on their own flawed method, they would have concluded that fewer than half, or 46 percent, of individuals charged or convicted of international terrorism-related offenses met this criterion. *See id.* ¶ 49. Responding to a request for information that purports to be about the terrorist threat that foreign nationals pose to the United States by disseminating information that includes naturalized citizens perpetuates the

Administration's discriminatory view that only native-born individuals are actually American, and results in numbers that are artificially inflated.

Third, the Report includes in its count of individuals who were charged with or convicted of terrorism-related offenses "while in the United States" individuals who committed terrorism overseas and whose only apparent tie to the United States is extradition. FAC ¶¶ 53-54. This not only contravenes EO 13780's directive, *see* EO 13780, Sec. 11(a)(i), but also misleads readers of the Report because it inflates the number of foreign nationals Defendants can claim are responsible for terrorism-related offenses. FAC ¶ 57. Although someone who has been extradited to the United States for trial may be charged and convicted while in the United States, offenses committed overseas do not necessarily reveal an actual terror threat to the United States, nor could they serve to inform the United States' immigration policy. *Id.* ¶ 55. Defendants neither provide an explanation for the inclusion of this information, nor does the Report include readily available and nonconfidential underlying aggregate data (*i.e.*, the number of charges and convictions it counted for which the perpetrator's primary connection to the United States was extradition for trial), which is necessary context to understand this aspect of the Report. *Id.* ¶ 56.[15]

Fourth, the Report disseminates eight "illustrative examples" of the "402 [terrorism-related] convictions of foreign nationals or naturalized U.S. citizens." *Id.* ¶ 58. Each of these profiles, however, is of a man who appears to be Muslim and who has arrived in the United States through the precise immigration provisions the Administration has sought to eliminate: refugee resettlement, migration preferences to support family reunification, and the visa diversity lottery. *Id.* ¶¶ 59-60. The Report provides none of the additional information (*e.g.*, conviction records) necessary for a reader to evaluate the Report's dubious assertion that these examples are "illustrative." *Id.* ¶ 61. As Defendants admit, *see id.* ¶ 104 & Att. N (admitting that Plaintiff's

[15] Plaintiff raises the absence of underlying data only to illustrate the Report's deviation from IQA requirements, as is made clear by the relief it seeks, and not in an effort to request that this data be made available to it through this case. *See id.* at 32.

arguments regarding bias in the selection of these "illustrative examples" is "well-taken"), this presentation of information lacks utility and is not objective.

Fifth, and finally, the Report purports to disseminate information responsive to EO 13780's call for information regarding the number and types of acts of gender-based violence against women, including so-called "honor killings," in the United States by foreign nationals. EO 13780, Sec. 11(a)(iii). As the Report concedes, however, the federal government does not maintain either "aggregated statistical … information pertaining to gender-based violence against women committed at the federal and state level," Report at 7, or reliable information regarding the prevalence of so-called "honor killings," FAC ¶ 65. Defendants nevertheless elected to disseminate inaccurate and misleading information. *See generally id.* ¶¶ 63-69; *see, e.g., id.* ¶¶ 68 (mis-identifying a privately funded study on "honor killings" as one commissioned by DOJ's Bureau of Justice Statistics and failing to disclose that the study's author had disclaimed the accuracy of its conclusions as "not terribly scientific").

Because Plaintiff is an "affected person," it was entitled to petition for a correction of these identified violations. 44 U.S.C. § 3516 note (b)(2)(B); *see also* OMB Guidelines at 8459. As part of that petition process, Defendants were required to meaningfully apply the binding standards governing information quality set forth in the Guidelines, and to fulfill Plaintiff's right to "obtain" correction, where the application of those standards suggested correction was appropriate. But, as a capstone to the deficient process that permeated the creation and dissemination of the Report, Defendants acknowledged that the Petition raised meritorious arguments before denying it, claiming the Report was of sufficient quality. This deficient correction process contravenes the one contemplated by the IQA and Guidelines and so was not carried out "in accordance with law." 5 U.S.C. § 706(2); *Ghafoori*, 713 F. Supp. 2d at 878.

For many of the same reasons, Defendants' adjudication of the Petition was "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). The IQA and its Guidelines provide a procedural right for "affected persons to seek and obtain correction of information."

44 U.S.C. § 3516 note (b)(2)(B); *see also* OMB Guidelines at 8459. By acknowledging the validity of the Petition's claims, but nevertheless failing to retract or correct the Report, Defendants have rendered illusory Plaintiff's right as an "affected person" to "seek and ***obtain*** a correction" of noncompliant information. *See id.* (emphasis added). Because Defendants issued their final denials on that basis, they have taken final action on an IQA petition without affording Plaintiff the full petition rights contemplated by the Act and implementing Guidelines, in violation of 5 U.S.C. § 706(2)(D).

Finally, Defendants also acted arbitrarily and capriciously in denying Plaintiff's Petition. 5 U.S.C. 706(2)(A). Despite acknowledging the validity of Plaintiff's information quality concerns, Defendants nevertheless denied the Petition, asserting that the Report meets relevant IQA standards. FAC ¶¶ 99, 104. In doing so, Defendants act in the kind of arbitrary manner that courts have routinely deemed unlawful under the APA. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. The error is so clear in this case because Defendants have "offered an explanation for its decision that runs counter to the evidence before the agency[.]" *Id.* Indeed, Defendants' rationale for denying the Petition—namely, that the Report does not violate the IQA or its implementing Guidelines, FAC ¶¶ 101, 105—not only runs counter to the evidence before it, as presented in the Petition and appeals, but also to the Defendants' own conclusions that the Petition correctly identified information quality infirmities in the Report, *see* FAC ¶¶ 99, 104. Moreover, the decision to deny the Petition cannot "be ascribed to a difference in view or the product of agency expertise," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, because the Petition's merit was acknowledged by Defendants so, in at least some respects, Defendants' views were aligned with those expressed in the Petition.

CONCLUSION

For the reasons set forth above, Defendants' motion should be denied.

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Respectfully submitted,

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