UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PROTECT DEMOCRACY PROJECT, INC.; BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW; MICHAEL F. CROWLEY; and BENJAMIN WITTES, Plaintiffs, v. U.S. DEPARTMENT OF JUSTICE; DEPARTMENT OF HOMELAND SECURITY; JEFFERSON BEAUREGARD SESSIONS, III, in His Official Capacity as Attorney General of the United States; and KIRSTJEN NIELSEN, in Her Official Capacity as Secretary of the Department of Homeland Security, Defendants.	))))))))))))))))))	C.A. No. 18-10874-DPW

**DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS**

Defendants, U.S. Department of Justice, Department of Homeland Security, Jefferson Beauregard Sessions, III, and Kirstjen Nielsen ("Defendants"), by their attorney, Andrew E. Lelling, United States Attorney for the District of Massachusetts, pursuant to Rule 12(b)(1) and, in the alternative, Rule 12(b)(6), respectfully move the Court for an order dismissing Plaintiffs' complaint against them. The grounds for this motion are set forth below.

I
BACKGROUND

Plaintiffs, Protect Democracy Project, Inc. ("Protect Democracy"), Brennan Center for Justice at New York University School of Law ("Brennan Center"), Michael F. Crowley ("Crowley") and Benjamin Wittes ("Wittes") (collectively "Plaintiffs"), bring this action pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 500, *et seq.* They seek an

Order compelling Defendants to respond to their petitions submitted under the Information Quality Act challenging a Report issued by Defendants U.S. Department of Justice ("DOJ") and Department of Homeland Security ("DHS") pursuant to Executive Order 13780.

Both Counts of Plaintiffs' complaint seek relief pursuant to the APA. Count I claims that Defendants violated section 706(1) of the APA, 5 U.S.C. § 706(1), because Defendants did not respond to their petition within the time suggested by the DOJ and DHS Guidelines. Count II claims that Defendants violated section 706(2)(D), because their alleged failure to respond to the petition unlawfully withheld required agency action because they did not observe procedure required by law.

II
STATEMENT OF FACTS

A. The Statutory Background and Agency Guidelines

1. The Information Quality Act

Congress enacted the Information Quality Act ("IQA") in a note to the Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763 (2000), codified at 44 U.S.C. § 3516 note. The IQA directed the Office of Management and Budget ("OMB") to draft guidelines "that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions" of the Paperwork Reduction Act. *Id.* § 515(a). The IQA also directed OMB to include specific requirements for federal agencies in its guidelines, including requiring that agencies develop their own information quality guidelines within one year of the issuance of OMB's Guidelines, establish administrative procedures for affected persons to seek and obtain correction of

information not in compliance with guidelines, and report periodically to OMB on the number and nature of complaints that they receive regarding the accuracy of the information they disseminate. *See id.* § 515(b)(2). Congress did not provide in the IQA for judicial review of the information disseminated by agencies. Instead, Congress directed OMB to "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued." *See id.*

2. The OMB Guidelines

OMB published its IQA guidelines in February 2002. *See* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8451, 8458-59 (Feb. 22, 2002) ("OMB Guidelines"). The OMB Guidelines direct agencies to undertake four primary responsibilities (1) adopt specific standards of quality, including objectivity, utility, and integrity, for various categories of disseminated information; (2) develop processes for reviewing the quality of information before dissemination; (3) adopt administrative mechanisms that are "flexible" and "appropriate to the nature and timeliness of the disseminated information" to allow affected persons to seek and obtain, where appropriate, timely correction of disseminated information that does not comply with OMB or agency guidelines; and (4) provide OMB with reports regarding the agencies' information quality guidelines and any information quality complaints they received. *Id.* at 8458-59. The OMB Guidelines state that "agencies must apply these standards flexibly," "in a common-sense and workable manner," and that "[i]t is important that these guidelines do not impose unnecessary administrative burdens that would inhibit agencies from continuing to take advantage of the Internet and other technologies to disseminate information

that can be of great benefit and value to the public." *Id.* at 8453. The determination of whether to correct information is left to the agencies, and agencies "may reject claims made in bad faith or without justification, and are required to undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved." *Id.* at 8458.

3. The DOJ Guidelines

In October 2002, DOJ issued its own Information Quality Guidelines. *See* Information Quality: DOJ Information Quality Guidelines, *available at* https://www.justice.gov/iqpr/iqpr.html (updated Nov.1, 2016) ("DOJ Guidelines") (last visited July 31, 2018). The DOJ Guidelines adhere to the final OMB Guidelines, and focus on the basic standard of quality of information, the process for reviewing the quality of information, and the establishment of administrative mechanisms to allow affected persons to seek and obtain, where appropriate, timely correction of information maintained and disseminated by the agency that does not comply with OMB or agency guidelines. *Id.* When DOJ finds it necessary to respond to a request for correction of information, it will "normally" do so within 60 calendar days of receipt, but will inform the requestor if the request requires more time before it can be resolved. *Id.* Any corrective action that DOJ may take in response to an IQA request "will be determined by the nature and timeliness of the information involved and such factors as the significance of the error on the use of the information and the magnitude of the error," but "DOJ is not required to change, or in any way alter, the content or status of information simply based on the receipt of a request for correction." *Id.* A requestor who disagrees with DOJ's denial of a request, or with the corrective action DOJ intends to take, "file a request for reconsideration with the disseminating DOJ component." *Id.* Reconsideration requests that are not filed "45 calendar days after" transmission of the initial DOJ decision are to be denied as untimely. *Id.* The DOJ

Guidelines specifically state that they "provide[] guidance to component staff and inform[] the public of the agency's policies and procedures. These guidelines are not a regulation. They are not legally enforceable and do not create any legal rights or impose any legally binding requirements or obligations on the agency or the public." *Id.*

4. The DHS Guidelines

Based on the OMB Guidelines, DHS issued its own Information Quality Guidelines to provide transparency into the processes DHS and its components use to ensure the quality of *disseminated* information and to outline a process by which affected persons may seek or obtain correction of disseminated information. *See* United States Department of Homeland Security, Information Quality Guidelines, *available at* https://www.dhs.gov/sites/default/files/publications/dhs-iq-guidelines-fy2011.pdf (last visited July 31, 2018) ("DHS Guidelines"). DHS has also issued directives concerning the processes and mechanisms for receiving, reviewing, and responding to information requests. *See* Information Quality Guidelines, DHS Directives System Instruction Number 129-02-001 (issued Oct. 14, 2014). DHS provides for an administrative correction process, by which "affected persons can seek, and obtain, where appropriate, timely correction of information that does not comply with OMB Guidelines, DHS Guidelines, or [DHS] Component standards." *See* DHS Guidelines. Under the DHS Guidelines, components should respond to requests for correction within 60 days of receipt, and should notify the petitioner if the request for correction requires an extended period of time to process. The DHS Guidelines further provide that "[c]omponents need undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved." *Id.* A petitioner may appeal a decision on a request for correction. *Id.* The DHS Guidelines require that the administrative appeal process include a

final judgment by an official independent from the initial response, specifically "someone who can offer objectivity (i.e., was not involved in making the decision on the original request for correction or in producing the underlying information) and who has a reasonable knowledge of the subject matter." *Id.*

The DHS Guidelines expressly disclaim any legal enforceability: "The guidelines are not intended to be, and should not be construed as, legally binding regulations or mandates. These guidelines are intended only to improve the internal management of DHS and, therefore, are not legally enforceable and do not create any legal rights or impose any legally binding requirements or obligations on the agency or the public. Nothing in these guidelines affects any available judicial review of agency action."

B. <u>Executive Order 13780 and Initial Section 11 Report</u>

In March 2017, the President signed Executive Order 13780, Protecting the Nation from Foreign Terrorist Entry into the United States. 82 Fed. Reg. 13209 (Mar. 9, 2017). Executive Order 13780 imposed restrictions on entry, with case-by-case waivers, into the United States by individuals from six countries, Iran, Libya, Somalia, Sudan, Syria, and Yemen. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2404 (2018). Section 11 of Executive Order 13780 directed the Secretary of Homeland Security, in consultation with the Attorney General, to collect and make publicly available the following categories of information "[t]o be more transparent with the American people and to implement more effectively policies and practices that serve the national interest":

> (i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation with or provision of material support to a terrorism-related organization, or any other national-security-related reasons;

> (ii) information regarding 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, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States;
>
> (iii) 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; 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.

Exec. Order 13780, Sec. 11(a); 82 Fed. Reg. at 13217 (2017).

Subsequent to the issuance of Executive Order 13780, DHS and DOJ worked collaboratively to provide information responsive to the requirements of Section 11. On January 16, 2018, DHS and DOJ released a report titled "Executive Order 13780: Protecting the Nation From Foreign Terrorist Entry Into the United States Initial Section 11 Report" ("Initial Section 11 Report" or "Report"), which contained information responsive to the categories of information that were required to be made publicly available under Section 11 for the period from September 11, 2001 until the date of issuance. *See* Compl. ¶ 46, Ex. 3 (ECF 04-2); Initial Section 11 Report at 1, Exhibit A. The Initial Section 11 Report noted that "because of previous information collection and reporting practices of DHS and DOJ, some of the information provided in this initial report does not capture the full spectrum of statistics envisioned by Executive Order 13780." Initial Section 11 Report at 1. The Report further stated that "DHS and DOJ will endeavor to provide additional information in future reports issued pursuant to the requirements of Executive Order 13780." *Id.*

C. Plaintiffs' IQA Request and DOJ's and DHS's Response

1. <u>The IQA Request</u>

By letter dated February 8, 2018, Plaintiffs (and one other individual, Nora Ellingsen, who is not a party to this litigation) submitted a request to DOJ and DHS under both agencies' IQA Guidelines seeking correction of information in the Initial Section 11 Report, or retraction. Compl. Exhibit 4 (ECF 4-3). In their IQA request, Plaintiffs raised several issues regarding the information contained in the Initial Section 11 Report. They requested the agencies to either retract the Report or correct it, based upon Plaintiffs' interpretation of the data. *See id.* Plaintiffs raised numerous objections to the information provided in the Report regarding the number of foreign nationals charged, convicted, or removed from the United States in connection with terrorism-related offenses.

First, Plaintiffs alleged that because the Report excluded domestic terrorism, it "leaves the reader with the impression that foreign-born individuals are the primary perpetrators of acts of terrorism more generally." *Id.* p. 7, ¶ 1. Second, Plaintiffs alleged that the Report used distorted information relating to extraditions and capture and is "inconsistent with the requirement that information be presented in an 'accurate, clear, complete, and unbiased manner' and put 'in a proper context'." *Id.* ¶ 2. Third, Plaintiffs alleged that the Report failed to provide important information about the underlying data, and thereby "omitt[ed] important context about the underlying data." *Id.* p. 8, ¶ 3. Fourth, Plaintiffs alleged that the Report manufactured distinctions between U.S. citizens because it distinguished between "those who are U.S. citizens by birth and those who are naturalized citizens. *Id.* ¶ 4. Fifth, Plaintiffs claimed that the Report cherry-picked unrepresentative examples when it provided eight illustrative examples of individuals convicted of international terrorism-related charges. *Id.* ¶ 5. Sixth, Plaintiffs complained that the Report failed to provide underlying information and context about terrorist watchlist claims. *Id.* p. 9, ¶ 6. Seventh, Plaintiffs alleged that the Report's "section on violence against women repeatedly misrepresent[ed] or fail[ed] to put into proper context the sources on

which it relies" *Id.* ¶ 7. Eighth, they alleged that the Report's discussion on honor killings and forced marriages was "similarly flawed." *Id.* ¶ 8. Finally, Plaintiffs claimed that the Report "suffer[ed] from a general lack of transparency about the underlying data on which it relie[d]." *Id.* ¶ 9.

2. <u>DHS and DOJ Responses</u>

On June 19, 2018, DOJ provided an interim response ("DOJ June 19 Response"), stating that it required additional time to resolve Plaintiffs' request given the number and complexity of issues raised in the request. Exhibit B, DOJ June 19 Response. On June 19, 2018, DHS also provided an interim response ("DHS June 19 Response"), in which it stated that additional time would be required to review Plaintiffs' IQA request and provide any response. Exhibit C, DHS June 19 Response.

On July 31, 2018, DOJ issued a further response to Plaintiffs' IQA request ("DOJ July 31 Response"). Exhibit D, DOJ July 31 Response. In the response, DOJ responded to the issues raised in the IQA request, and concluded that neither retraction or correct of information, which Plaintiffs requested, was required. The response also outlined appeal rights available to Plaintiffs. Specifically, Plaintiffs were advised they had the right to request reconsideration within forty-five (45) calendar days from the date of the letter. The letter provided the contact information to effectuate the appeal.

On August 1, 2018, DHS issued a further response to Plaintiffs' IQA request (DHS August 1 Response"). Exhibit E, DHS August 1 Response. The DHS response also addressed the issues raised by Plaintiffs, as well as outlined DHS' appeal rights. If Plaintiffs choose to appeal, the appeal must be submitted within thirty (30) days of the letter. DHS provided Plaintiffs with the contact information for the appeal.

III
ARGUMENT

A. <u>**Plaintiffs Lack Standing To Pursue This Action**</u>

A plaintiff who seeks to invoke federal jurisdiction bears the burden of establishing "the

irreducible constitutional minimum" of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Standing to sue "is part of the common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (citation omitted). Courts "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quotation and citations omitted). To satisfy the elements of standing, the plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo*, 136 S.Ct. 1547 (citing *Lujan*, 504 U.S. at 560-61). Injury in fact is the "[f]irst and foremost" of standing's three elements. *Steel Co.*, 523 U.S. at 103. "[T]he plaintiff must have suffered an injury in fact -- an invasion of a legally protected interest" that is concrete, particularized, and actual or imminent, rather than conjectural or hypothetical. *Lujan*, 504 U.S. at 560. The plaintiff's injury must also be "fairly traceable to the challenged conduct of the defendant," as well as "likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. The redressability element requires a showing that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d. 18, 26 (1st Cir. 2007); *Animal Welfare Inst. v. Martin*, 623 F.3d 19, 25 (1st Cir. 2010).

At the pleading stage, the plaintiff must "clearly . . . allege facts demonstrating" each element of the standing inquiry. *Spokeo*, 136 S. Ct. at 1547. Plaintiffs' allegations fall short and are insufficient to confer standing. The complaint states that "Protect Democracy and Brennan Center both have an interest in advancing their missions to prevent the spread of disinformation, especially in the national security context" and that academic scholar Plaintiffs Crowley and Wittes have an "interest in the accuracy of data about terrorism." *See* Compl. ¶ 71, 73. Plaintiff

Crowley, meanwhile, asserts merely a "professional interest in the accurate, fair, and unbiased presentation of data" based on his past federal positions, *id.* ¶ 72, while Plaintiff Wittes claims "an interest in the accuracy of data about terrorism" in his capacity as a "journalist and academic," *id.* ¶ 73. At most, each of the Plaintiffs' allegations of interest asserts no more than a generalized grievance held by other members of the public. *See United States v. AVX Corp.*, 962 F.2d 108, 113 (1st Cir. 1992) ("While the requisite injury may be common to many, it may not be shared by all . . . [N]o matter how charged with public import the event [is, it] will not substitute for actual injury.") (citing *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 216-27 (1974)). As the First Circuit has explained, "[t]he injury-in-fact inquiry 'serves to distinguish a person with a direct stake in the outcome of a litigation—even though small —from a person with a mere interest in the problem.'" *Adams v. Watson*, 10 F.3d 915, 918 (1st Cir. 1993) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 n. 14 (1973)). Plaintiffs here have failed to show injury-in-fact.

Plaintiffs also do not show how their claim is traceable to the challenged conduct of Defendants, nor how they would likely be redressed by a favorable judicial decision *Spokeo*, 136 S. Ct. at 1547. Indeed, insofar as Plaintiffs claim they have a right to informational correctness that will redress their alleged harm, courts have found that they lack subject matter jurisdiction to hear IQA claims because the IQA "creates no enforceable legal rights at all" and therefore IQA petitioners lack standing to pursue a federal action. *See Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006); *Family Farm Alliance v. Salazar*, 749 F. Supp. 2d 1083, 1103 (E.D. Cal. 2010).

Accordingly, because Plaintiffs have not pled facts sufficient to show any injury in fact traceable to the Defendants that is likely to be redressed favorably by the Court, they lack Article

III standing to pursue this action. For sake of completeness, whether a plaintiff has standing and a private right of action under a particular statute are two separate questions. *See Rhode Island Med. Soc. v. Whitehouse*, 66 F. Supp. 2d 288, 301 (D.R.I. 1999), *aff'd*, 239 F.3d 104 (1st Cir. 2001) (An analysis of a plaintiff's standing focuses not on the claim itself, but on the party bringing the challenge; whether a plaintiff's complaint could survive on its merits is irrelevant[. . . .]"); *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 305 (1st Cir. 2003).

B. <u>Plaintiffs' Request That the Court Order DOJ and DHS to Respond to Their IQA Petition Is Moot</u>

This action should be dismissed as moot. "It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, . . . which cannot affect the matter in issue in the case before it." *Church of Scientology v. United States,* 506 U.S. 9, 12 (1992); *Iron Arrow Honor Soc'y v. Heckler,* 464 U.S. 67, 70 (1983) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies."). When a claim has "lost [] its character as a present, live controversy" it is moot. *Am. Civil Liberties Union of Massachusetts v. U.S. Conference of Bishops,* 705 F.3d 44, 54 (1st Cir. 2013) (citations omitted). Indeed, "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Alvarez v. Smith,* 558 U.S. 87, 93 (2009)). As a general matter, "a case becomes moot when 'intervening events make it impossible to grant the prevailing party effective relief.'" *Pineiro v. Gemme*, 937 F. Supp. 2d 161, 170 (D. Mass. 2013) (quoting *Pine Tree Medical Assocs. v. Secretary of HHS*, 127 F.3d 118, 121 (1st Cir.1997)); *Family Farm Alliance*, 749 F. Supp. 2d at 1090.

Here, both DOJ and DHS in fact issued their responses to Plaintiffs on July 30 and

August 1, 2018, respectively. *See* Exhibit D and E. As such, Plaintiffs received the very relief they requested and the case is moot. The complaint should therefore be dismissed in its entirety. *See Family Farm Alliance*, 749 F. Supp. 2d at 1090.

C. Plaintiffs' Claims Are Not Subject to Judicial Review Under the APA

The alleged violations of the APA upon which Plaintiffs' claims rely are based upon Defendants' alleged failure to respond to Plaintiffs' IQA petition. *See* Compl. ¶¶ 90-104. They claim that Defendants have not substantively responded to their "request for correction or provided notice to [them] that extra time would be required," *id.* ¶ 92, as they believe that they were legally entitled to a response to their IQA petition within 60 days, and that the alleged failure to respond constitutes final agency action. They seek an Order from the Court declaring that the failure to respond violates the APA and that the Court require Defendants to respond. Even if Defendants' issuance of a response had not rendered their claims moot, Plaintiffs' claim could not proceed under the APA.

1. Plaintiffs Do Not Have a Right of Action Under the IQA

The IQA does not confer any legal rights on private parties to compel the correction or retraction of allegedly inaccurate information. Significantly, Congress did not include in the IQA any provisions permitting judicial review of the information disseminated by agencies, but instead directed the OMB to promulgate policies about information quality, including guidelines to "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued." *See* IQA § 515(b)(2). This plainly reflects a congressional intent to preclude review through any avenue other than through administrative channels.

For this reason, while neither the Court of Appeals for the First Circuit nor the district

courts in the First Circuit have addressed the issue, other courts that have reviewed claims alleging violations of the IQA "have uniformly found that it 'does not create any legal right to information or its correctness.'" *Harkonen v. U.S. Dep't of Justice*, No. C 12-629 CW, 2012 WL 6019571, at *11 (N.D. Cal. Dec. 3, 2012), *aff'd on other grounds*, 800 F.3d 1143 (9th Cir. 2015). Indeed, in every case to come before the federal courts since the IQA was enacted, courts have concluded that Congress has precluded judicial review of alleged IQA violations. *See, e.g.*, *Family Farm Alliance*, 749 F. Supp. 2d at 1090 ("It is undisputed that the IQA provides no private right of action."); *Americans for Safe Access v. U.S. Dep't of Health & Human Servs.*, No. C 07-01049 WHA, 2007 WL 2141289, *3 (N.D. Cal. July 24, 2007) ("[T]he IQA does not subject agency IQA decisions to judicial review."); *see also Single Stick, Inc. v. Johanns*, 601 F. Supp. 2d 307, 316 (D.D.C. 2009) (holding that "[b]ecause the IQA lacks any rights-creating language, [plaintiff] has no right under that statute to seek review of the USDA's actions"), *aff'd in pertinent part sub nom. Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678, 686 (D.C. Cir. 2010); *Haas v. Gutierrez*, No. 07 CV 3623 (GBD), 2008 WL 2566634, at *6 (S.D.N.Y. June 26, 2008) ("The Information Quality Act does not create any legal rights, enforceable by unrelated third parties, to information or its correctness."); *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, 2008) (same), *aff'd*, 328 Fed. Appx. 744 (2d Cir. 2009); *Morgan ex rel. U.S. v. Science Applications Int'l Corp.*, No. 07 CV 4612 (GBD), 2008 WL 2566747, at *6 (S.D.N.Y. Jun. 26, 2008) (same); *In re Operation of the Missouri River Sys. Litig.*, 363 F. Supp. 2d 1145, 1174 (D. Minn. 2004), *aff'd in part and vacated in part on other grounds*, 421 F.3d 618 (8th Cir. 2005) (holding that "the language of the IQA indicates that the Court may not review an agency's decision to deny a party's information quality complaint" and "[t]he IQA does not provide for a private cause of action"); *Salt Inst. v.*

Thompson, 345 F. Supp. 2d 589, 601 (E.D. Va. 2004) (holding that "[t]he language of the IQA reflects Congress's intent that any challenges to the quality of information disseminated by federal agencies should take place in administrative proceedings before federal agencies and not in the courts"), *aff'd sub. nom. Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006).

2. Neither the IQA Nor The APA Allow for Judicial Review in this Case

Plaintiffs frame their IQA claim as an APA challenge, but this, too, has been rejected by the courts. *See Habitat for Horses v. Salazar*, No. 10 Civ. 7684 (WHP), 2011 WL 4343306, at *7 (citing the absence of "any authority supporting Plaintiffs' contention that they may bring [an IQA] claim under the APA" and "declin[ing] to fashion a new remedy"); *Wood ex rel. United States*, 2008 WL 2566728, at *6 (holding that "[n]either the Information Quality Act, nor the Administrative Procedure Act, create a private right of action upon which plaintiff may independently pursue this litigation").

By its very terms, the APA does not apply when "statutes preclude judicial review," 5 U.S.C. § 701(a)(1), and the IQA is a statute that precludes judicial review. The APA also does not apply where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Through the IQA, Congress prescribed no standard for an agency to apply in considering a correction request, and agency regulations grant broad discretion on this issue. Finally, even were Plaintiffs able to overcome both of these exceptions to judicial review of agency action, the APA subjects to review only "[a]gency action made reviewable by statute" and "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Thus, assuming, *arguendo,* that DOJ's and DHS's responses to Plaintiffs' IQA request had not rendered Plaintiffs' claims moot, or if Plaintiffs were to challenge the responses themselves, those responses would not constitute "final agency action" that is reviewable under

the APA.

A. The IQA Precludes Judicial Review

Section 701(a) of the APA specifically states "that [the APA] applies, . . . *except to the extent that*—(1) statutes preclude judicial review" 5 U.S.C. § 701(a)(1) (emphasis added). The Supreme Court has applied the exception in 5 U.S.C. § 701(a)(1) to "cases in which the existence of an alternative review procedure provided 'clear and convincing evidence,' . . . of a legislative intent to preclude judicial review." *Franklin v. Massachusetts*, 505 U.S. 788, 820 (1992). Judicial review of IQA claims is not authorized under the APA because the IQA precludes it. As discussed above, the statutes sets forth an alternative review procedure by which agencies are required to establish administrative mechanisms to allow affected persons to seek and obtain correction of disseminated information that allegedly does not comply with an agency's IQA guidelines. *See* IQA § 515(b)(2). As the Court in *Harkonen* explained, "the IQA creates an administrative system designed to permit federal agencies and OMB to monitor and improve the information used and disseminated by federal agencies." *Harkonen*, 800 F.3d at 1148. The availability of administrative review thus reflects the Congressional intent that "any challenges to the quality of information disseminated by federal agencies should take place in administrative proceedings before federal agencies and not in the courts." *See Salt Inst.*, 345 F. Supp. 2d at 601.

B. Agency IQA Decisions Are Committed To Agency Discretion

Judicial review of IQA claims is also unavailable under the APA because agencies' IQA decisions are "matters 'committed to agency discretion by law.'" *Salt Inst.*, 345 F. Supp. 2d at 602 (quoting 5 U.S.C. § 701(a)(2)). Agency action is committed to an agency's discretion by law if "a court would have no meaningful standard against which to judge the agency's exercise of discretion, [such as] where statutes are drawn in such broad terms that in a given case there is

no law to apply." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)(quotation marks and citations omitted); *see also Massachusetts Pub. Interest Research Grp., Inc. v. U.S. Nuclear Regulatory Comm'n*, 852 F.2d 9, 15 (1st Cir. 1988). The IQA required the OMB to provide policy and procedural guidance to federal agencies about information quality, but did not set forth any limitations restricting an agency's discretion in responding to IQA requests for correction. As the court in *Family Farm Alliance* concluded, "the IQA itself contains *absolutely no substantive standards*, let alone any standards relevant to the claims brought in this case" concerning the timing of responses to IQA petitions and the request that the agency conduct an adequate peer review of its biological opinion. *See Family Farm Alliance*, 749 F. Supp. 2d at 1092 (emphasis in original). The district court in *Harkonen* similarly found that "the IQA is silent on the standards by which an affected person's request for correction should be judged" and "[t]he OMB Guidelines provide that agencies 'are required to undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved,' which is akin to saying that the decision is committed to the agency's discretion." *Harkonen*, 2012 WL 6019571, at *16.

As with the IQA, DOJ's and DHS's IQA Guidelines do not contain any meaningful standards governing the agency actions that Plaintiffs challenge (the timing of the agencies' response to Plaintiffs' IQA request).[1] Under the DOJ Guidelines, DOJ will "normally" respond

[1]Insofar as Plaintiffs intended to challenge the Report as non-compliant with the IQA (a claim not squarely alleged in the Complaint), there is also no meaningful standard for judicial review. Consistent with the IQA's broad guidance, the DOJ and DHS IQA Guidelines do not contain mandates to which Plaintiffs can point that either are enforceable through a civil action nor have been violated. The agencies' Guidelines in fact make clear that determining whether an information quality issue exists, and in turn deciding what, if any, corrective action to take is a matter committed to each respective agency

to requests for correction of information within 60 calendar days of receipt, but will inform the requestor if the request requires more time before it can be resolved. *See* DOJ Guidelines. The DOJ Guidelines further provide that"[a]ny corrective action will be determined by the nature and timelines of the information involved" and "DOJ is not required to change, or in any way alter, the content or status of information simply based on the receipt of a request for correction." *See id*. Similarly, DHS Guidelines provide that DHS components "should" respond to requests for correction within 60 days of receipt, but direct the component to "notify the petitioner if the request for correction requires an extended period of time to process." *See* DHS Guidelines. DHS Guidelines leave it to the component's discretion to "undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved." *See id.*

By their plain terms, both agencies' Guidelines "consign[ ] all matters related to application of those Guidelines, including the timing of responses, to the discretion" of the agency. *See Family Farm Alliance*, 749 F. Supp. 2d at 1093. The agencies' IQA Guidelines provide that "[a]gencies, in making their determination of whether or not to correct information, may reject claims made in bad faith or without justification, and are required to undertake only the degree of correction that *they conclude* is appropriate for the nature and timeliness of the information involved." *See Salt Inst.*, 345 F. Supp. 2d at 602 (emphasis original); *Family Farm Alliance*, 749 F. Supp. 2d at 1095 (concluding that "[t]he IQA itself contains no standards concerning peer review, committing such matters to agency discretion"). On this basis, courts have found that judicial review of agencies' discretionary decisions is not available under the APA where the guidelines at issue "insulate the agency's determinations of when correction of information contained in informal agency statements is warranted." *Salt Inst.*, 345 F. Supp. 2d at

602; *see also Styrene Information & Research Ctr., Inc. v. Sebelius*, 944 F. Supp. 2d 71, 82 (D.D.C. 2013) (concluding that "the IQA and OMB guidelines do not provide judicially manageable standards").

Accordingly, because the IQA is a statute that precludes judicial review and the actions taken by DOJ and DHS in responding to an IQA petition are committed to agency discretion by law, Plaintiff cannot seek judicial review under the APA.

C. The Challenged Actions Do Not Constitute Final Agency Action.

Were Plaintiffs to seek to amend their complaint in an effort to challenge the agencies' responses, APA review would also be unavailable because neither DOJ nor DHS has taken any "final agency action." The APA allows judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Two conditions must be met for there to be a final agency action: (1) "the action must mark the consummation of the agency's decisionmaking process -- it must not be of a merely tentative or interlocutory nature," and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). An agency action is "final" only where it "represents the culmination of the agency's decisionmaking process and conclusively determines the rights and obligations of the parties with respect to the matters at issue." *Berkshire Envtl. Action Team, Inc. v. Tennessee Gas Pipeline Co., LLC*, 851 F.3d 105, 111 (1st Cir. 2017) (referencing *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). Plaintiffs failed to allege that the agencies' responses to its IQA petition are actions from which legal consequences will flow.

As courts have explained, "[a]gency dissemination of advisory information that has no

legal impact has consistently been found inadequate to constitute final agency action and thus is unreviewable by federal courts under the APA." *Salt Inst.*, 345 F. Supp. 2d at 602. That is, because the IQA "does not vest any party with a right to information or to correction of information," DOJ's and DHS's actions under the IQA did not determine any of Plaintiffs' rights or result in any legal consequences for Plaintiff. *See Americans for Safe Access*, 2007 WL 2141289, at *4 (dismissing complaint where plaintiff failed to allege any facts suggesting that the defendant agency's failure to correct their allegedly erroneous statement had any legal consequences or determined any rights or obligations). Here, even were they to be squarely challenged at this juncture, DOJ's and DHS's responses to Plaintiffs' IQA petitions did not mark the consummation of the agency's decisionmaking process, as both agencies afforded Plaintiffs the right to an administrative appeal with an official who was not involved with the response to the initial request. *See* Exhibits D and E. Moreover, Plaintiffs have not alleged, nor could they, that the agencies' responses to its IQA petition are actions from which legal consequences will flow.

As courts have explained, "[a]gency dissemination of advisory information that has no legal impact has consistently been found inadequate to constitute final agency action and thus is unreviewable by federal courts under the APA." *Salt Inst.*, 345 F. Supp. 2d at 602. That is, because the IQA "does not vest any party with a right to information or to correction of information," DOJ's and DHS's actions under the IQA did not determine any of Plaintiff's rights or result in any legal consequences for Plaintiff. *See Americans for Safe Access*, 2007 WL 2141289, at *4 (dismissing complaint where plaintiff failed to allege any facts suggesting that the defendant agency's failure to correct their allegedly erroneous statement had any legal consequences or determined any rights or obligations).

In sum, the IQA itself does not provide a cause of action, and the DOJ and DHS IQA Guidelines explicitly do not create any enforceable right, claim, or cause of action. Moreover, the APA does not provide an alternate path by which Plaintiff can obtain judicial review of its claims. The APA does not provide an alternative cause of action, and, indeed, the application of Sections 701(a) and 704 of the APA forecloses judicial review of Plaintiffs' IQA claim. The Court should therefore dismiss Plaintiffs' complaint.

IV
CONCLUSION

Based upon the foregoing, Defendants request the Court grant their motion and dismiss Plaintiffs' complaint in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Susan M. Poswistilo
Susan M. Poswistilo

Dated: August 2, 2018