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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MUSLIM ADVOCATES, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE; U.S. DEPARTMENT OF HOMELAND SECURITY, Defendants.	CASE NO. 18-cv-02137-JSC **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** Date: June 19, 2019 Time: 9:00 a.m. Place: Courtroom F, 15th Floor Before: Hon. Jacqueline Scott Corley

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on June 19, 2019, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom F, 15th Floor, of the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Jacqueline Scott Corley, United States Magistrate Judge, the United States Department of Justice and the United States Department of Homeland Security will move this Court for dismissal of Plaintiff's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and, in the alternative, pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. This motion is based on this notice and motion, the accompanying memorandum of points and authorities, the accompanying Declaration of Claire T. Cormier, the Court's files and records in this matter, and any other matters of which the Court takes judicial notice.

RELIEF SOUGHT

DOJ and DHS seek an order dismissing the Amended Complaint without leave to amend.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Every court to have considered a claim alleging a violation of the Information Quality Act ("IQA"), whether brought directly under the IQA or framed as a challenge under the Administrative Procedure Act ("APA"), has rejected it, reasoning that third parties have no basis to enforce legal rights under the IQA. Undeterred by this weight of authority, Plaintiff, Muslim Advocates, asks this Court to become the first to reach the merits of an IQA claim. That request should be rejected for a number of reasons. The report issued by the Department of Justice ("DOJ") and the Department of Homeland Security ("DHS") in response to Executive Order 13780 violates neither the APA, the IQA, or the agencies' IQA Guidelines, and there is no basis for this Court to review the agencies' responses to Plaintiff's petition for correction and request for reconsideration. Thus, no basis exists for this Court to declare that the report violates the IQA, its implementing guidelines, and the APA, let alone to order DOJ and DHS to retract or correct the report, and to cease dissemination of the report. The established case law instead compels dismissal of Plaintiff's claim.

Plaintiff's claim is not justiciable because Plaintiff cannot establish an injury in fact that is fairly traceable to the agency conduct being challenged here, nor is Plaintiff's claim likely to be redressed by a favorable judicial decision. As such, Plaintiff lacks standing to pursue this action. In dismissing IQA lawsuits, courts have also found that agencies' IQA decisions are committed to their discretion by law, and agency responses to IQA petitions do not constitute "final agency action" reviewable under the APA. Finally, even were the Court to find Plaintiff's IQA claim justiciable, Plaintiff's claim should be dismissed in any event for failure to plead allegations sufficient to state a claim for relief under the APA. For these reasons, as more fully explained below, the Court should grant Defendants' motion to dismiss.

II. BACKGROUND

A. Statutory Background and Agency Guidelines

1. The Information Quality Act

Congress enacted the Information Quality Act 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 any 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 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). 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* http://www.justice.gov/iqpr/iqpr.html (updated October 31, 2018) ("DOJ Guidelines"). 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, "may file a request for reconsideration with the disseminating DOJ component" within 45 calendar days. *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 and directives 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 April 15, 2019) ("DHS Guidelines"). 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." *Id.* Under the DHS Guidelines, components should respond to requests for correction within 60 calendar days of receipt and should notify the petitioner if the request for correction requires an extended period of time to process. *Id.* 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." *Id.*

B. Factual Background

1. The Initial Section 11 Report

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.

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* First Amended Complaint ("FAC") ¶ 38 & n.8; Initial Section 11 Report at 1, *available at* https://www.dhs.gov/sites/default/files/publications/Executive%20Order%2013780%20Section%2011%20Report%20-%20Final.pdf (last visited April 15, 2019); Declaration of Claire T. Cormier ("Cormier Decl.") Ex. A.[1] 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." Cormier Decl. Ex. A 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.*

2. Plaintiff's IQA Request

By letter dated January 29, 2018, Plaintiff and the Democracy Forward Foundation (which is not a plaintiff in this lawsuit) submitted a request to DOJ and DHS under both agencies' IQA Guidelines seeking retraction and correction of certain information in the Initial Section 11 Report ("IQA

[1] Defendants request that the Court take judicial notice of the Initial Section 11 Report, which is available on the DHS website. *See* FAC ¶ 38 & n.8. The information reflected on this official website is incorporated by reference into Plaintiff's complaint and is not subject to reasonable dispute. *See* Fed. R. Evid. 201(b); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 999 (9th Cir. 2010) (taking judicial notice of information on the websites of two school districts because they were government entities); *Paralyzed Veterans of Am. v. McPherson*, No. C 06-4670, 2008 WL 4183981, at *5 (N.D. Cal. Sept. 8, 2008) ("…[I]nformation on government agency websites . . . have often been treated as proper subjects for judicial notice.") (internal citations omitted); *Johnson v. Winco Foods, LLC*, No. ED CV-2288-DOC (SHK$_X$), 2019 WL 1425200, at *1 (C.D. Cal. March 11, 2019) ("[J]udicial notice is appropriate for information obtained from government websites…") (internal citation omitted).

Request"). FAC Attach. B. In its IQA Request, Plaintiff raised several challenges to the Initial Section 11 Report. *See id.* With respect 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, Plaintiff raised four objections. First, Plaintiff contended that "[t]he Report provides misleading and biased information by substituting foreign-born for foreign national." *See id.* Attach. B at 7; *id.* ¶¶ 46-52. Second, Plaintiff claimed that "[t]he Report's substitution of international terrorism for all terrorism misleadingly ignores domestic terrorism, artificially inflating the proportion of terrorist incidents committed by foreign nationals." *See id.* Attach. B at 8-9; *id.* ¶¶ 42-45. Third, Plaintiff claimed that "[t]he Report's inclusion of individuals who committed terrorism overseas and whose only apparent tie to the United States is extradition to the United States for prosecution is misleading." *See id.* Attach. B at 9-10; *id.* ¶¶ 53-57. Fourth, Plaintiff claimed that "[t]he Report's examples of foreign nationals charged with or convicted of terrorism-related offenses are misleading and perpetuate the Administration's discriminatory narrative that Muslims are likely to commit acts of terrorism." *See id.* Attach. B at 10; *id.* ¶¶ 58-62. Finally, with respect to the information provided in the Report regarding the number and types of acts of gender-based violence against women by foreign nationals, Plaintiff contended that "[t]he Report's information relating to gender-based violence is misleading and perpetuates anti-Muslim stereotypes." *See id.* Attach. B at 11-12; *id.* ¶¶ 63-70.

3. DOJ′s And DHS′s Responses To Plaintiff′s IQA Request

On June 15, 2018, DOJ provided an interim response, stating that it required additional time to resolve Plaintiff's request given the number and complexity of issues raised in the request. *See* FAC Attach. C at 2. On June 19, 2018, DHS also provided an interim response, in which it stated that additional time would be required to review Plaintiff's IQA Request and provide any response. *See id.* Attach. D at 2.

On July 31, 2018, DOJ issued a further response to Plaintiff's IQA Request. *See id.* Attach E. The DOJ response explained that the Initial Section 11 Report was consistent with the requirement of the IQA Guidelines to ensure the quality, objectivity, utility, and integrity of information disseminated, and that the Report outlined the scope and source of the data utilized and, where applicable, provided appropriate caveats. *Id.* First, with respect to Plaintiff's claim that the Report improperly "substitute[ed]

foreign-born for foreign national," the response noted that the Report in fact provided figures for both foreign-born individuals and foreign nationals. *Id*. at 2. Second, with regard to Plaintiff's claim that the Report ignored instances of domestic terrorism, the response noted the Report's express clarification that it "does not include individuals convicted of offenses relating to domestic terrorism, nor does it include information related to terrorism-related convictions in state courts." *Id*. at 3. Third, with regard to Plaintiff's claim that the inclusion of individuals extradited to the United States for prosecution was misleading, the response noted that the Report accurately stated that the information included "defendants who were transported to the United States for prosecution." *Id*. Fourth, with regard to Plaintiff's claim that the Report's examples of foreign nationals misleadingly perpetuated a "discriminatory narrative," the response determined that this was a subjective conclusion which DOJ disputed. *Id.* at 3. Fifth, with regard to Plaintiff's claim that there was a lack of data in the federal government regarding domestic violence and honor killings, the response pointed to the Report's acknowledgment that the "federal government lacks comprehensive data regarding incidents of such offenses," and also made note of two independent reviews currently being conducted by the DOJ Office of Justice Programs. *Id.* at 3. Based on its review, DOJ determined that there was no inconsistency with the IQA Guidelines and concluded that neither retraction nor correction of information in the Initial Section 11 Report was required. *Id.* at 4. DOJ advised Plaintiff of its administrative appeal rights. *Id.*

On August 1, 2018, DHS also issued a further response to Plaintiff's IQA Request. *See* FAC Attach. F. In response to Plaintiff's claim that the Report should include information on domestic terrorism, the DHS response noted that the Report made clear that "the scope of the data is confined to international terrorism-related offenses and the unique threats posed by international terrorism." *Id.* at 3. In response to Plaintiff's request that additional data, context, and explanations be provided, the response noted that the Report provided aggregated data and research from multiple federal agencies, specifically identified what information was available, and noted that because of previous information collection practices some of the data presented did not capture the full spectrum of statistics envisioned by the Executive Order. *Id.* The response further pointed out that the Report identified the specific data being provided and contained caveats for data limitations, including the lack of availability of data or citations to other sources of estimated data. *Id.* The DHS response found that much of Plaintiff's request

did not specifically challenge the accuracy of the data contained in the Report, and in many instances concerned Plaintiff's differing interpretation of that data. *Id.* The DHS response noted that DHS was endeavoring to provide additional information in future reports, and that it was working to refine the available data, provide more detail where practicable, and examine other datasets that might warrant release. *Id.* Based on its review, DHS determined that there was no inconsistency with the IQA Guidelines and concluded that neither retraction nor correction of information in the Initial Section 11 Report was required. *Id.* DHS advised Plaintiff of its administrative appeal rights. *Id.* at 4.

4. Plaintiff's Administrative Appeal Process With DOJ

On September 13, 2018, Plaintiff submitted a Request for Reconsideration of Denial of Request for Correction Under the Information Quality Act ("Request for Reconsideration") to DOJ. *See* FAC Attach. G. On October 24, 2018, DOJ acknowledged receipt of Plaintiff's Request for Reconsideration and stated that the Department would provide a further response within 45 days. *See id.* Attach. I at 2. On December 21, 2018, DOJ issued its response. *See id.* Attach J. In response, DOJ declined to withdraw or correct the Report based on its analysis of the five areas of concern that Plaintiff raised in the Request for Reconsideration. *Id.* at 6.

First, with respect to Plaintiff's claim that the Report lacks objectivity and utility for including statistics on foreign-born U.S. citizens who have been charged with or convicted of terrorism-related offenses in the U.S. and removed from the U.S., DOJ found the statistics "relevant to public safety and security, within the meaning of Executive Order 13780, and relevant to the report." *Id.* at 3. Also, DOJ replied that it "cannot control the way in which information in the Report is used or interpreted." *Id.* But, DOJ acknowledged that "in future reports the Department can strive to minimize the potential for misinterpretation by some readers, to the extent possible, through more thorough explanation of the context for information and clearer differentiation of the information presented." *Id.*

Second, with regard to Plaintiff's claim that the Report ignored instances of domestic terrorism, DOJ noted that Section 11 does not mandate agencies to report solely on domestic terrorism. *Id.* at 4. Also, the response reiterated what DOJ said in its Final Response – "that it does not possess comprehensive data related to domestic terrorism." *Id.*

Third, with regard to Plaintiff's claim that the inclusion of individuals extradited to the United States for prosecution was misleading, and that the Report violates the IQA by not including underlying data that would enable a reader to determine "'the degree to which the inclusion of overseas offenses misinterprets the nexus between foreign nationals and the risk of terrorism in the United States,'" DOJ explained that the IQA, OMB, and implementing guidelines do not require agencies to "always provide underlying data when disseminating information to the public." *Id.* at 4. Also, the response reiterated what DOJ said in its response to Plaintiff's IQA Request—that the statistics are "clearly stated and accurately described." *Id.* (internal quotations omitted).

Fourth, with regard to Plaintiff's claim that the Report's "'illustrative examples'" of foreign nationals "'perpetuates a discriminatory narrative,'" DOJ responded that the department did not intend for these examples to be "'representative' of the entire body of 402 terrorism-related convictions of foreign nationals or naturalized citizens." *Id.* at 5. Yet, in acknowledgment of Plaintiff's perspective, DOJ noted: "Should examples again be included in future reports, the Department will work with DHS to include more varied examples and describe the method of selection of examples, to the extent possible, while noting that they are not intended to be representative of all cases." *Id.*

Fifth, with respect to Plaintiff's claims that the Report should not have included any data on domestic violence and honor killings due to a lack of available data, and that the Report should not have included any references to insufficient studies, DOJ responded: "[T]he Report could have better met IQA standards by more clearly indicating a lack of responsive information. To the extent possible, the Department will proceed on that basis in the future when issuing reports under Section 11." *Id.* at 6.

Thus, based on these reasons, DOJ reaffirmed its decision not to correct or retract the Report after evaluating Plaintiff's Request for Reconsideration.

5. Plaintiff's Administrative Appeal Process With DHS

On September 13, 2018, Plaintiff submitted a Request for Reconsideration under the IQA to DHS. *See* FAC Attach. H. On November 7, 2018, DHS provided an interim response, acknowledging receipt of the Request for Reconsideration and stating that DHS needed additional time to review and respond. *See id.* Attach. K at 2. DHS informed Plaintiff that the Department anticipated providing a further response, or an update, within 45 days. *Id.*

In letters dated December 19, 2018 and January 31, 2019, DHS provided an update to Plaintiff, stating that the department was in the process of reviewing the Request for Reconsideration and needed additional time. As in the first interim response, these letters noted that DHS anticipated providing a response, or an update on the review process, within 45 days. *See id.* Attachs. L-M.

On February 14, 2019, DHS provided its response to Plaintiff's Request for Reconsideration. *See id.* Attach. N. Based on its review, DHS reaffirmed its decision not to correct or retract the Report. *Id.* at 2. Yet, DHS acknowledged Plaintiff's concerns and noted the department "will take those [points] into consideration in its future Section 11 Reports." *Id.* DHS responded to each of the five areas of concern that Plaintiff raised in its Request for Reconsideration. *Id.* at 2-3.

First, with regard to Plaintiff's claim that the Report inappropriately substitutes "foreign-born" for "foreign national" in the section on terrorism-related charges, DHS responded that the Report's presentation of the data was "transparent," and that the Report did not conclude that all 549 individuals cited were foreign nationals. *Id.* at 2. Second, with regard to Plaintiff's claim that the Report improperly ignored cases of domestic terrorism, DHS responded that Section 11 "does not require the Department to limit its report to only domestic terrorism" and the Report "specifically explains that the Department does not possess comprehensive data related to domestic terrorism." *Id.* at 3. Third, with regard to Plaintiff's claim that the Report should not have included data on individuals who committed terrorism-related offenses abroad or who were extradited to the U.S. for prosecution, DHS responded that the Report was "transparent" about the data and Section 11 did not restrict what kind of relevant information DHS should include in the Report. *Id.* Fourth, with regard to Plaintiff's claim that the Report's examples of individuals charged with or convicted of terrorism-related offenses reflects bias, DHS replied that the examples were merely "illustrative," not "representative." *Id.* Finally, with respect to Plaintiff's claim that the Report's discussion of gender-based violence against women was "misleading and anti-Muslim," DHS responded that the Report "acknowledged that the federal government lacks aggregated statistical information pertaining to gender-based violence against women, and therefore it was unable to provide responsive information." *Id.* For these reasons, DHS reaffirmed its decision not to retract or withdraw the Report after reconsideration.

6. This Litigation

Plaintiff filed this action on April 9, 2018, citing jurisdiction under the IQA and the APA. Compl. ¶ 12; ECF No. 1. The first complaint pled a single claim for relief for a violation of the APA. *Id.* ¶¶ 85-92. Specifically, Plaintiff alleged that Defendants' failure to respond to its petition within the required timeframe is in violation of the IQA and its implementing guidelines and is therefore arbitrary, capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, and otherwise violative of the APA under 5 U.S.C. § 706(2). *Id.* ¶ 91. Plaintiff further alleged that Defendants' ongoing dissemination of the Report violates the IQA and its implementing guidelines and is therefore arbitrary, capricious, an abuse of discretion, not in accordance with law, and otherwise violative of the APA under 5 U.S.C. § 706(2). *Id.* ¶ 92.

Defendants filed a motion to dismiss on August 2, 2018. ECF No. 21. Later that month, the Honorable Jacqueline Scott Corley granted a stipulated request to stay the case pending Plaintiff's administrative appeals. ECF No. 24. During the pendency of Plaintiff's administrative appeals, Judge Corley granted the parties' stipulated requests to extend the stay already in place. ECF Nos. 26, 28.[2] In February 2019, Judge Corley granted a stipulated request regarding a proposed schedule, ECF No. 32, which was modified by stipulated order in March 2019, ECF No. 35.

Following the completion of the administrative appeal process with DOJ and DHS, Plaintiff filed a first amended complaint for injunctive and declaratory relief on April 1, 2019, again citing jurisdiction under the APA and IQA. FAC ¶ 15; ECF No. 37. Plaintiff claims that Defendants' ongoing dissemination of the Report violates IQA Guidelines because the Report allegedly contains information that is "biased, misleading, and incomplete," and thus, "lack[s] utility and objectivity." FAC ¶ 41.

III. LEGAL STANDARDS

A complaint is subject to dismissal under Federal Rule of Civil Procedure 12(b)(1) when the plaintiff fails to meet its burden of establishing subject matter jurisdiction. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). "Federal courts are courts of limited jurisdiction," so "[i]t is to be presumed that a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins.*, 511 U.S.

[2] Certain matters in this case were delayed by the lapse in appropriations for federal government departments and agencies in December 2018 and January 2019. Cormier Decl. ¶ 3.

375, 377 (1994). A Rule 12(b)(1) dismissal is proper when the plaintiff fails to establish the elements of standing. *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009). "The plaintiff bears the burden of proof to establish standing 'with the manner and degree of evidence required at the successive stages of the litigation.'" *Id.* at 969-70 (9th Cir. 2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). While a pleading does not require "detailed factual allegations," it must do more than merely offer "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" without "further factual enhancement." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted) (citing *Twombly*, 550 U.S. at 555).

A complaint that consists only of "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" is subject to dismissal. *Iqbal*, 556 U.S. at 678. Courts construe the allegations in the complaint in the light most favorable to the non-moving party and all material allegations are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). A court is not, however, required to accept as true conclusory allegations that are contradicted by documents referred to in the complaint, unreasonable inferences, or unwarranted deductions of fact. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). On a Rule 12(b)(6) motion, a court can consider material attached to the complaint and documents upon which the complaint "necessarily relies," and may take judicial notice of matters of public record without converting the motion into one for summary judgment. *United States v. Corinthian Colls.*, 655 F.3d 984, 998-99 (9th Cir. 2011); *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

IV. ARGUMENT

A. Plaintiff lacks standing to pursue this action.

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). 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. at 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 (internal citation omitted). 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, although not certain, that his injury can be redressed by a favorable decision." *Wolfson v. Brammer*, 616 F.3d 1045, 1056 (9th 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. Plaintiff's allegations fall short and are insufficient to confer standing, as courts have concluded in cases brought by other IQA petitioners. *See Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006); *Family Farm All. v. Salazar*, 749 F. Supp. 2d 1083, 1103 (E.D. Cal. 2010).

First, the Amended Complaint contains conclusory allegations of injury, stating that "Muslim Advocates 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" and "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." *See* FAC ¶¶ 12, 86, citing Plaintiff's IQA Request. Plaintiff further contends that the Report

"serves as a mechanism to justify" the travel restrictions outlined in Executive Order 13780, and provides "further post hoc justification for those efforts, which directly harm Muslim Advocates and its clients." *See id.* ¶ 86, citing Plaintiff's IQA Request. At most, these allegations assert no more than a generalized grievance shared by members of the public. *See Rubin v. City of Santa Monica*, 308 F.3d 1008, 1020 (9th Cir. 2002) ("To establish standing, however, the injury must be more than a generalized grievance common to all members of the public.") (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216-27 (1974)). To the extent that Plaintiff's claim to injury hinges on an asserted interest in preventing anti-Muslim discrimination, *see* FAC ¶¶ 12, 86, that is not enough because "a 'mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself' to provide standing." *Ctr. for Sci. in Pub. Interest v. Bayer Corp.*, No. C 09-05379 JSW, 2010 WL 1223232, at *3 (N.D. Cal. Mar. 25, 2010) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)). And, insofar as Plaintiff claims it has a right to informational correctness, 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.*, 440 F.3d at 159; *Family Farm All.*, 749 F. Supp. 2d at 1103.

Plaintiff also claims that the Report "contribut[es] to the stigmatization of Muslims" and asks the Court to speculate that the Report "is also likely to contribute to increases in associated hate speech and violence" and "likely to contribute to this increase in violence and stigmatization experienced by Muslim communities." *See* FAC ¶ 84. But these are no more than speculative assertions of hypothetical future harm by unspecified (and unknowable) third parties that are insufficient to create standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (holding that organizations "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending").

Second, the Amended Complaint fails to allege facts sufficient to show that Plaintiff's claimed injury is traceable to the dissemination of the Report and not attributable to independent acts of third parties. Plaintiff's allegations of harm based on the travel restrictions outlined in Executive Order 13780, *see* FAC ¶ 86, fail to show how the alleged harm is caused by the Report itself or the IQA administrative

proceedings. Plaintiff also asserts injury from the use (and purported misuse) of the report by "commentators in the public sphere," *see id.* ¶¶ 82-83, but this alleged harm is caused by the autonomous decisions of third parties and only reinforces the lack of injury caused by DOJ or DHS. *See Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) ("[W]here the causal chain 'involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries, . . . the causal chain [is] too weak to support standing at the pleading stage.'" (quoting *Allen v. Wright*, 468 U.S. 737, 757 (1984), *abrogated by Lexmark Intern., Inc. v. Static Control Components, Inc.*, 468 U.S. 737 (2014)).

Finally, the Amended Complaint fails to allege the plausibility that any injury is likely to be redressed by a favorable court decision. Although "[p]laintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision," *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1003 (9th Cir. 1998), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010), they do need to "show that there would be a 'change in a legal status'" as a consequence of a favorable decision "and that a 'practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (citing *Utah v. Evans*, 536 U.S. 452, 464 (2002)). Here, Plaintiff has not alleged any facts showing that its claimed injury is likely to be redressed by any relief that the Court could grant. *See Family Farm All.*, 749 F. Supp. 2d at 1103 ("Subject matter jurisdiction over Plaintiff's IQA claims is absent because no statutes or regulations create the rights [plaintiff] claims were violated.").

Accordingly, because Plaintiff has not pled facts sufficient to show any injury in fact traceable to the Defendants that is likely to be redressed favorably by the Court, Plaintiff lacks Article III standing to pursue this action.

B. Plaintiff does not have a right of action under the IQA.

Plaintiff's complaint alleges violations of the DOJ and DHS IQA Guidelines in connection with the Initial Section 11 Report. Specifically, Plaintiff alleges that Defendants violate the IQA and its implementing guidelines by refusing to retract or correct the Report and by "continu[ing] to disseminate it" despite "admitt[ing] that the information quality concerns raised by Plaintiff have merit." FAC ¶¶ 10-

11. As the cases below demonstrate, courts have declined to review IQA claims on their merits because Congress has foreclosed any right of action to pursue them in federal court.

The IQA does not confer any legal rights on private parties to compel the correction or retraction of allegedly inaccurate information, as Plaintiff seeks through this action. 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, 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),[3] quoting *Salt. Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006). 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 All.*, 749 F. Supp. 2d at 1090 ("It is undisputed that the IQA provides no private right of action."); *Ams. 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

[3] The Ninth Circuit has observed that "[a]bsent a statutory provision, an individual cannot assert a cause of action against the government for the dissemination of inaccurate, incorrect, or defamatory information." *Harkonen*, 800 F.3d at 1148. In *Harkonen*, because it decided that OMB and DOJ had the authority to exclude press releases from the coverage of the IQA Guidelines, the Ninth Circuit did not reach the question of whether a plaintiff may obtain judicial review of whether information disseminated by the government is correct under the IQA. *See id.* ("We have no reason in this case to reach the broad question of whether the IQA confers upon a private individual the right to seek judicial review of the correctness of all information published by the government."). Although the Ninth Circuit affirmed *Harkonen* on the ground that press releases were excluded from the coverage of DOJ's IQA Guidelines, nothing in the Ninth Circuit's opinion disturbs or casts doubt on the district court's conclusion that there is no judicial review of IQA decisions available under the APA.

(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 Miss. 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).

C. Plaintiff's claims are not subject to judicial review under the APA.

In an attempt to overcome the settled case law disallowing any private right of action or right to obtain correction under the IQA, Plaintiff frames its IQA claim as an APA challenge, but such efforts, too, have been rejected by the courts. *See Habitat for Horses v. Salazar*, No. 10 Civ. 7684 (WHP), 2011 WL 4343306, at *7 (S.D.N.Y. Sep. 7, 2011) (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. U.S.*, 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 Plaintiff 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. DOJ's and the DHS's responses to Plaintiff's IQA Request, and Request for Reconsideration, do not constitute "final agency action" that is reviewable under the APA.

1. The IQA precludes judicial review.

Judicial review of IQA claims is not authorized under the APA because the IQA is a statute that precludes judicial review. The Supreme Court has held that APA review is not available in "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) (applying statutory exception to judicial review contained in 5 U.S.C. § 701(a)(1)). As discussed above, the IQA 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 Ninth Circuit has 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.

2. 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.'" *City & Cty. of San Francisco v. U.S. Dep't of Transp.*, 796 F.3d 993, 1001 (9th Cir. 2015) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Thus, "[i]f no 'judicially manageable standard' exists by which to judge the agency's action, meaningful judicial review is impossible and the courts are without

jurisdiction to review that action." *Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003). The IQA required the OMB to provide policy and procedural guidance to federal agencies about information quality, but it did not set forth any limitations restricting an agency's discretion in responding to IQA requests for correction. As the court in *Family Farm All.* concluded, "the IQA itself contains *absolutely no substantive standards*, let alone any standards relevant to the claims brought in this case" concerning either the substance or timing of responses to IQA petitions. *See Family Farm All.*, 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 (emphasis added).

As with the IQA, the DOJ and DHS Guidelines do not contain any meaningful standards governing those agency actions—the timing of the agencies' response to Plaintiff's IQA Request and the continued dissemination of the Report—that Plaintiff challenges. Under the DOJ Guidelines, DOJ will "normally" respond 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 the "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 they direct the component to "notify the petitioner" "if the request for correction requires an extended period of time for processing." *See* DHS Guidelines. DHS Guidelines thus 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 All.*, 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 All.*, 749 F. Supp. 2d at 1095 (concluding that "[t]he IQA itself contains no standards concerning peer review, committing such matters to agency discretion").

There is simply no meaningful standard for judicial review of Plaintiff's claims under the IQA. Consistent with the IQA's broad guidance, the DOJ and DHS Guidelines do not contain mandates to which Plaintiff can point that are either enforceable through a civil action or have been violated. The agencies' guidelines in fact make plain 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. *See* DOJ Guidelines; DHS Guidelines. 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 Info. & 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"); *Miss. River Sys. Litig.*, 363 F. Supp. 2d at 1174-75 (concluding that "the plain language of the legislation fails to define the IQA's substantive terms). Because the IQA was "drawn in such broad terms," "there is no law to apply," and the "agency action is committed to agency discretion." *Miss. River Sys. Litig.*, 363 F. Supp. 2d at 1174 (internal citations and quotations omitted).

Accordingly, because the IQA is a statute that precludes judicial review, review of Plaintiff's claims is not available and the Amended Complaint should be dismissed. Alternatively, the Amended Complaint should be dismissed because the actions taken by DOJ and DHS in responding to an IQA petition are committed to agency discretion by law, and hence not reviewable in this Court.

3. The challenged actions do not constitute final agency action.

APA review is also unavailable for yet another independent reason—because neither DOJ nor DHS has taken any "final agency action." The APA allows judicial review of only "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)). "The general rule is that administrative orders are not final and reviewable 'unless and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process.'" *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990) (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). Plaintiff has not alleged, nor could it, that the agencies' responses to its IQA Request 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 Single Stick*, 601 F. Supp. 2d at 316; *Ams. 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. Not only does the APA not provide an alternative cause of action, but the application of Sections 701(a) and 704 of the APA forecloses judicial review of Plaintiff's IQA claim. The Court should therefore dismiss Plaintiff's Amended Complaint.

D. In the alternative, Plaintiff fails to state a claim under the APA.

Alternatively, even were the Plaintiff able to overcome the lack of standing and the absence of an available cause of action, Plaintiff's claim should be dismissed for failure to state a claim. To state a claim under the APA, Plaintiff must plead facts sufficiently alleging that Defendants' ongoing dissemination of the Report violates the IQA and its implementing guidelines and is therefore "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2). *Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1035 (9th Cir. 2012).

Plaintiff raised four 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: (1) its "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," (2) it "provided misleading and biased information by substituting data concerning foreign-born individuals for data concerning foreign nationals," (3) its "inclusion of individuals who committed terrorism overseas and whose only apparent tie to the United States is extradition to the United States for prosecution is misleading," and (4) its "examples of foreign nationals charged with or convicted of terrorism-related offenses are misleading and perpetuate the Administration's discriminatory narrative that Muslims are likely to commit acts of terrorism." *See* FAC Attach. B at 7-10; *id.* ¶¶ 42-62. These objections do not, however, challenge the accuracy of the data contained in the Report but rather, at best, show Plaintiff's differing interpretation of the data.[4] They also ignore the caveats outlined in the Report regarding the limits of the data presented. Indeed, the Report expressly states that the data on terrorism convictions in U.S. federal courts is limited to "international terrorism-related charges." *See* Cormier Decl. Ex. A at 2. Far from "misleading," the Report also makes clear that "[t]his information includes both individuals who committed offenses while located in the United States and those who committed offenses while located abroad, including defendants who were transported to the United States for prosecution" and "does not include individuals

[4] By including this argument, DOJ and DHS are not conceding that the IQA and related guidelines contain any standards such as those argued by Plaintiff here. However, even if they did, Plaintiff's allegations would not state a claim.

convicted of offenses relating to domestic terrorism, nor does it include information related to terrorism-related convictions in state courts." *See id.*

Plaintiff's further objection that the information provided in the Report "relating to gender-based violence is misleading and perpetuates anti-Muslim stereotypes," *see* FAC Attach. B at 11-12; *id.* ¶¶ 63-70, likewise fails to state a claim of an IQA violation. Pointing to the Report's citation of "the average annual number of non-fatal domestic violence victimizations," Plaintiff acknowledges "that number is significant," but nevertheless faults the Report because "the data does not reveal the proportion perpetuated by foreign nationals." *Id.* ¶ 67. In citing the approximately 1.3 million non-fatal domestic violence victimizations, the Report expressly states that "[i]t is unclear how many were perpetrated by foreign nationals because the federal government has not recorded and tracked in an aggregated statistical manner information pertaining to gender-based violence against women committed at the federal and state level." Cormier Decl. Ex. A at 7. The Report further explains that "the federal government lacks independent data regarding incidents of honor killing," and provides the source for the data that is discussed. *Id.* at 8.

In enacting the IQA, Congress did not invite courts to second-guess the accuracy of all Government information, let alone to weigh the propriety of how that information may be interpreted by members of the public, such as Plaintiff here. Consequently, because Plaintiff's petition was based on Plaintiff's differing interpretation of the data, the Court should dismiss Plaintiff's claim of an IQA violation for failure to state a claim.

V. CONCLUSION

Plaintiff has not met its burden to demonstrate that it has standing to sue. Also, the APA forecloses judicial review of Plaintiff's claim that the Initial Section 11 Report violates the IQA. In the alternative, Plaintiff has failed to state a claim upon which relief can be granted. Accordingly, DOJ and

DHS are entitled to judgment as a matter of law and the Court should grant Defendants' motion to dismiss the Amended Complaint with prejudice.

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Respectfully submitted,

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