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, U.S. DEPARTMENT OF HOMELAND SECURITY, WILLIAM PELHAM BARR 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.

No. 1:18-cv-10874-DPW

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Protect Democracy Project, Inc., Brennan Center for Justice at New York University School of Law, Michael F. Crowley, and Benjamin Wittes allege as follows:

NATURE OF THE ACTION

1. Our democracy suffers when the government publishes false and misleading information under a veneer of objectivity. Government misinformation skews the public debate over contentious policy objectives. It undermines trust in our public institutions. Most importantly, citizens cannot hold their elected representatives accountable when they are misled about the facts upon which the government's decisions are based.

2. This case concerns the refusal by two federal agencies to correct *acknowledged* disinformation they published in connection with the so-called "Muslim Ban."

3. In 2018, Defendant Department of Justice ("DOJ") and Defendant Department of Homeland Security ("DHS") (collectively, the "Agencies") jointly published a report in service of the Administration's high-profile disinformation campaign against immigration. Subsequent analysis by the nonpartisan Government Accountability Office ("GAO") has revealed that this report inflates the incidents of terrorism committed by non-citizens in the United States by a factor of three. The report includes factual claims that the Agencies have since admitted are not just misleading, but false. The Agencies have nevertheless refused to correct their report, which remains available on the Agencies' websites to this day.

4. Agencies are not entitled to make up their own facts. The Agencies' refusal to correct admittedly false information is illegal. Congress has given interested parties the ability to enforce the statutory information quality standards that bind the Agencies. Plaintiffs filed this action in order to enforce those standards.

Background

5. The report was originally commissioned to support President Trump's January 27, 2017 Executive Order barring people from various majority-Muslim nations from entering the United States. The Executive Order required the Agencies to prepare a report on foreign nationals who were convicted of terrorism-related crimes in the United States.

6. After courts enjoined the January Executive Order for lack of any factual foundation, the President rescinded it, and in March 2017 issued a new Executive Order, which still restricted immigration from majority-Muslim nations and still required the Agencies to prepare a report connecting foreign nationals with terrorism-related crimes.

7. Nearly a year later, on January 16, 2018, Defendants issued that report, entitled *Executive Order 13780: Protecting the Nation from Foreign Terrorist Entry into the United States, Initial Section 11 Report*, attached hereto as **Exhibit 1** (the "Report").

8. The Report is rife with inaccuracies and methodological flaws. Its leading claim is that 73% of individuals convicted of international terrorism-related charges since September 11, 2001 (408 of 549) were born in foreign countries. *See* Report at 2. It sets out eight supposedly "illustrative" examples of those 408 foreign-born individuals—but that sample set selectively comprises only individuals who came to the United States voluntarily according to legal methods now criticized by the Administration.

9. The Report discloses neither the data supposedly substantiating the conviction statistic, nor how the Agencies selected the "illustrative" examples. In fact, the GAO's analysis of DOJ data demonstrates that the figures are likely wrong and, at the very least, highly misleading. Of the 549 convictions underlying the terrorism conclusions in the Report, only 303 (55%) were for convictions under statutes directly related to terrorism during the relevant period, yet the Report falsely and misleadingly asserts that all of these 549 convictions are for international terrorism-related charges.

10. The Report compounds this error by including, without explanation, those who were transported to the United States by the United States government solely to prosecute crimes committed outside of the United States. By grouping individuals who voluntarily came to the United States with individuals transported here by the government purely for prosecution, the Report inflates the apparent proportion of "immigrants" responsible for terrorism-related crimes.

11. The Report also includes naturalized U.S. citizens with non-citizens in its tally of "immigrant" convictions. The Report's special focus on the subset of U.S. citizens who are

naturalized departs from our constitutional and legal tradition of treating natural-born and naturalized citizens the same in nearly every instance, including in the national security context. Indeed, in this respect the Report deviates even from the authorizing Executive Order, which instructs Defendants to provide information on foreign *nationals*, not foreign-born U.S. *citizens*—who are, of course, nationals of the United States. The Report's extension to *some* U.S. citizens, based on their place of birth, fails to meet basic objectivity standards that all U.S. citizens reasonably expect from their government.

12. These choices cause the Report to significantly overstate the number of terrorism-related crimes by immigrants. GAO's analysis of the 303 individuals convicted of terrorism-related crimes indicates that only 187—or 62%—were confirmed to be "foreign-born." Moreover, when the 61 individuals extradited to the United States solely for criminal prosecution and the 40 naturalized U.S. citizens are excluded from the count, the GAO analysis indicates that the number of non-citizen immigrants convicted of terrorism-related crimes accounts for just *28%* of those convicted (86 of 303)—just over *a third* of the 78% that the Agencies suggest in the Report.

13. Separately, the Report excludes instances of domestic terrorism from its tally of terrorism-related crimes, without explanation. Yet domestic terrorism convictions account for the majority of terrorism convictions resulting in fatalities since September 11, 2001. By focusing solely on international terrorism, the Report inevitably further inflates the proportion of foreign-born individuals associated with terrorism-related crimes.

14. Finally, the Report draws on questionable sources and misquotes or mischaracterizes others. It relies on a database that the Chief of Staff to the FBI Director has expressly warned is unreliable. Other statements are based on unreliable studies, or misstate the

results of studies on which they are based, pandering to negative stereotypes about Islam instead of reporting facts on "Foreign Terrorist Entry into the United States." The Report discusses so-called "honor killings," for instance, without mentioning that its statistics are drawn from a study commissioned by an anti-Muslim critic who regularly seeks to stigmatize Muslim communities and which its own author admitted was unscientific. The Report also blatantly overstates the number of immigrants convicted of crimes involving gender-based violence, erroneously mischaracterizing the data in the underlying GAO study.

15. Notwithstanding the Report's significant flaws, President Trump and the Administration have repeatedly used the Report to support their political and policy agenda via television appearances, Congressional testimony, and even President Trump's Twitter account. The President, his staff, the former Attorney General, and the Secretary of Homeland Security have all cited the Report as evidence supporting their call for stricter immigration policies, including the end of family reunification and diversity visa programs. This is not a government report collecting dust in a basement on Pennsylvania Avenue. The Report has played a central role in major policies affecting our country, yet it is false, deceptive, and unreliable.

16. Taken together, the Report's gross overstatement of the relationship between immigration and terrorism, its failure to disclose analytic choices that would allow informed evaluation by the public, and the Administration's aggressive use of the Report to push specific policies indicate that the Report is the result of undisclosed bias in favor of particular policy outcomes.

17. This is not the first time that political appointees within the DOJ have required information published by the agency to comport with pre-commitments against immigration, regardless of the facts. In September 2017, FBI officials reportedly concluded that refugees did

not present a significant threat to the United States, but a senior DOJ political appointee indicated that the Attorney General would not be guided by those findings because he "doesn't agree with the conclusions." The willingness to make policy decisions based on falsehoods is reckless. The dissemination of falsehoods to foster public support for those policy decisions is dangerous to our democracy.

18. Congress has afforded a remedy for correcting inaccurate or misleading information disseminated by executive agencies. Aware of the potential for political actors to co-opt an administrative platform for political ends, Congress enacted the Information Quality Act ("IQA"), which requires that information published by agencies of the federal government satisfy standards of objectivity, utility, and integrity. It directs the Office of Management and Budget ("OMB") to promulgate information quality standards for any information that executive branch agencies disseminate. These standards are legally binding and require that agency publications be accurate, clear, complete, unbiased, and useful, including identifying the data and methods underlying their statistical claims. An agency must disclose sufficient information to allow an informed member of the public to understand the agency's methodologies and analytic choices, and evaluate how much of the agencies' conclusions hinge on those choices. And because the information that agencies publish is central to democratic decision making, a heightened standard applies when a publication has an impact on public policies.

19. The IQA also requires that all agencies establish an administrative process for third parties to obtain correction of publications that violate these standards. On February 8, 2018, Plaintiffs filed a petition, attached hereto as **Exhibit 2**, (the "Petition" or "Pet.") that identified specific flaws in the Report that violate the quality standards in the IQA. Plaintiffs

requested that Defendants either rescind the Report or revise it to correct the IQA violations identified in the Petition.

20. Defendants denied both the Petition and a subsequent administrative appeal. In doing so, the Agencies acknowledged the force of Plaintiffs' critiques and promised that future reports would do better. They wrote that Plaintiffs' contention that they should release the DOJ National Security Division ("NSD") data underlying the Report was "well-taken" and that disclosure "could promote transparency" as required by the IQA. DOJ admitted that disclosing the number of individuals brought to the country solely for prosecution and providing "a more thorough discussion" of the data's limitations would "further promote the perception of objectivity in the presentation of the information," and allow future reports to "maximize[] the goals of the IQA." DOJ similarly acknowledged that the illustrative examples "could cause some readers of the Report to question its objectivity" and promised to, in future reports, "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." Finally, the Agencies admitted that certain gender-based violence statistics in the Report were incorrect, explaining them as "editorial errors."

21. Despite these admissions, Defendants concluded that the Report's information was "reasonably transparent" and so declined to withdraw or correct the Report.

22. Agencies may not refuse to correct admitted errors in the information that they distribute to the public, particularly when that information remains publicly available and continues to be used for political ends. Congress has made insufficient a mere promise to do better in the future. Inaction mocks Congress's choice to hold the executive branch to information quality standards and transgresses the right of Plaintiffs to "obtain correction" of

information that is inconsistent with those standards. Plaintiffs bring this lawsuit to enforce this right and to compel the Agencies to rescind or correct the Report.

JURISDICTION AND VENUE

23. The Court has jurisdiction under 28 U.S.C. § 1331 because this case concerns a federal question under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, the Paperwork Reduction Act, 44 U.S.C. §§ 3506-07, and the Information Quality Act and its implementing regulations, 44 U.S.C. 3516 note; 67 Fed. Reg. 8451 *et seq.* The Court may enter declaratory and further necessary and proper relief under 28 U.S.C. § 2201 and 28 U.S.C. § 2202.

24. Venue in this judicial district is proper under 28 U.S.C. § 1391(e) because at least one Plaintiff resides in this district.

PARTIES

25. Plaintiff Protect Democracy, Inc. is a 501(c)(3) not-for-profit organization whose mission is to engage in research, public education, and litigation as necessary to prevent our democracy from declining into a more authoritarian form of government. Its work focuses on defending core democratic norms and institutions, and countering the threats of the politicization of independent institutions, the spread of disinformation, and the delegitimization of minority communities.[1] Protect Democracy is incorporated under the laws of the District of Columbia, and maintains offices in Cambridge, MA; New York, NY; and Washington, D.C.

26. Plaintiff Brennan Center for Justice at New York University School of Law is a not-for-profit nonpartisan law and policy institute that seeks to improve the nation's systems of democracy and justice. It advocates for effective national security policies that respect constitutional values and the rule of law, including publishing research evaluating "extreme

[1] *See, e.g.*, Protect Democracy and Stand Up Ideas, *The Republic at Risk: American Democracy One Year into the Trump Administration*, Protect Democracy (Jan. 17, 2018), https://protectdemocracy.org/update/republic-at-risk.

vetting" as a counterterrorism policy[2] and the claims in the Report.[3] The Brennan Center is organized under the laws of New York and has its principal place of business in New York, NY.

27. Plaintiff Michael F. Crowley was a Senior Policy Analyst with the Justice Branch of the Office of Management and Budget ("OMB") from 2004 to 2013 and his responsibilities there included DOJ's crime statistics program. He currently writes on the Department of Justice programs and criminal justice reform, including their interaction with immigration policy,[4] and also serves as a Senior Fellow at the Brennan Center for Justice at New York University School of Law. Mr. Crowley resides in Belmont, Massachusetts.

28. Plaintiff Benjamin Wittes is the editor-in-chief of *Lawfare*, an online publication by The Lawfare Institute, a 501(c)(3) not-for-profit educational organization, published in cooperation with The Brookings Institution, a 501(c)(3) not-for-profit public policy organization. *Lawfare* is dedicated to integrity in national security decision-making, and Mr. Wittes specifically researches and writes about issues related to national security and terrorism, including the claims made in the Report.[5] Mr. Wittes resides in Washington, D.C.

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[2] *See, e.g.*, Harsha Panduranga, Faiza Patel, and Michael Price, *Extreme Vetting and the Muslim Ban*, Brennan Center for Justice (Oct. 2, 2017), https://www.brennancenter.org/publication/extreme-vetting-and-muslim-ban.

[3] *See, e.g.*, Faiza Patel, *Why the Trump Administration is Trying to Make Muslim Immigrants Seem Dangerous*, Wash. Post (Jan. 29, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/01/29/why-the-trump-administration-is-trying-to-make-muslim-immigrants-seem-dangerous/.

[4] Michael Crowley, *Trump's 2019 Budget Harms Criminal Justice*, Brennan Center for Justice (Feb. 14, 2018), http://www.brennancenter.org/blog/trump's-2019-budget-harms-criminal-justice; Michael Crowley and Ed Chung, *Congress Can Lead on Criminal Justice Reform Through Funding Choices*, Center for American Progress (Sept. 7, 2017), https://cdn.americanprogress.org/content/uploads/2017/09/07054711/DOJGrant-brief.pdf; Michael Crowley, *The Sanctuary City Debate Distracts From Public Safety*, Brennan Center for Justice (Mar. 30, 2017), http://www.brennancenter.org/blog/sanctuary-city-debate-distracts-public-safety.

[5] Benjamin Wittes, *Did the Justice Department Really Support the President's Misstatement to Congress? Let's Find Out*, Lawfare (Apr. 7, 2017, 7:55 AM), https://lawfareblog.com/did-justice-department-really-support-presidents-misstatement-congress-lets-find-out; Benjamin Wittes, *The Friendliest Lawsuit Ever Filed Against the Justice Department*, Lawfare (Aug. 12, 2017, 7:29 AM), https://www.lawfareblog.com/friendliest-lawsuit-ever-filed-against-justice-department; Lisa Daniels, Nora Ellingsen, and Benjamin Wittes, *Trump Repeats His Lies About Terrorism, Immigration and Justice Department Data*, Lawfare (Jan. 16, 2018, 10:30 PM), https://www.lawfareblog.com/trump-repeats-his-lies-about-terrorism-immigration-and-justice-department-data.

29. Defendant U.S. Department of Justice is an executive agency within the federal government of the United States. DOJ is headquartered at 950 Pennsylvania Avenue NW, Washington, D.C. 20530.

30. Defendant U.S. Department of Homeland Security is an executive agency within the federal government of the United States. DHS is headquartered at 3801 Nebraska Avenue, NW, Washington D.C., 20016.

31. Defendant William Pelham Barr is the Attorney General of the United States and is sued in his official capacity.

32. Defendant Kirstjen Nielsen is Secretary of DHS and is sued in her official capacity.

THE INFORMATION QUALITY ACT

33. The IQA requires that OMB promulgate regulations to "ensur[e] and maximiz[e] the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." *See* Pub. L. 106-554 § 515, 114 Stat. 2763A-153–54 (Dec. 21, 2000), *codified at* 44 U.S.C. § 3516 note. These regulations "shall apply to the sharing by Federal agencies of . . . information disseminated by Federal agencies." *Id*.

34. The IQA also requires that each federal agency permit "affected persons to seek and obtain correction" of information "maintained and disseminated by the agency" that does not comply with OMB's regulations. 44 U.S.C. § 3516 note (b)(1) & (b)(2)(B).

35. OMB duly promulgated its final IQA regulations on February 22, 2002. *See* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8452-01 (Feb. 22, 2002). The regulations require that agencies examine the objectivity, utility, and integrity of their communications to ensure they meet the IQA's quality requirements:

a. **Objectivity** requires determining (i) whether the information is presented "in an accurate, clear, complete, and unbiased manner," with appropriate context, and (ii) whether the substance of the information is "accurate, reliable, and unbiased," including providing the underlying data when reporting statistics. *Id.* at 8459.

b. **Utility** requires agencies to "consider the uses of the information not only from the perspective of the agency but also from the perspective of the public." *Id.*

c. **Integrity** is defined as the "protection of the information from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification." *Id.* at 8460.

36. Additionally, OMB's regulations provide that "influential information," or information that "will have or does have a clear and substantial impact on important public policies or important private sector decisions," should be held to a higher standard. *Id.* at 8455. Similarly, agencies that disseminate "influential . . . statistic information" shall require "a high degree of transparency about data and methods." *Id.* at 8460.

37. In accordance with the IQA and OMB's regulations, DOJ and DHS each promulgated Information Quality Guidelines that further explicate OMB's regulations. DOJ Information Quality Guidelines (updated Nov. 1, 2016);[6] DHS Information Quality Guidelines (Mar. 18, 2011).[7]

[6] https://www.justice.gov/iqpr/information-quality.

[7] https://www.dhs.gov/sites/default/files/publications/dhs-iq-guidelines-fy2011.pdf.

38. OMB has reminded agencies that their Guidelines are legally binding, noting that "agency guidelines should not suggest that agencies are free to disregard their own guidelines." OIRA Review of Information Quality Guidelines Drafted by Agencies (June 10, 2002), at 14.[8] The Office of Information and Regulatory Affairs administrator who promulgated OMB's guidelines advises that courts should enforce the IQA in "cases of egregious agency mismanagement." *See* John D. Graham, OIRA Administrator, OMB's Role in Overseeing Information Quality, Remarks to Public Workshop on Information-Quality Guideline (Mar. 21, 2002).[9]

THE ADMINISTRATIVE PROCEDURE ACT

39. Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*., a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] without observance of procedure required by law," *id.* § 706. The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id*. § 551(13).

FACTUAL ALLEGATIONS

I. President Trump Issues Executive Orders to Ban Muslims from Entering the United States, and Orders DHS and DOJ to Find Information to Retroactively Justify His Discriminatory Policy

40. On January 27, 2017—just one week after taking office—President Trump issued Executive Order 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States* ("EO-1"), which followed through on his campaign promise to impose a ban on the

[8] https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/inforeg/iqg_comments.pdf.

[9] https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/info-quality_march21.pdf.

immigration of Muslims into the United States through an immediate temporary ban on entry by nationals of several overwhelmingly Muslim countries, as well as all refugees. *See generally* 82 Fed. Reg. 8977 (Feb. 1, 2017).

41. EO-1 claimed that "numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program," but it did not cite any statistics in support of this claim. *Id.* at 8977. To the contrary, per media reports, an internal DHS report released shortly afterwards concluded that citizenship is an "unlikely indicator" of terrorism threats.[10]

42. In an apparent effort to bolster the factual basis of this policy, Section 10 of EO-1 directed the Secretary of DHS, in consultation with the Attorney General, to collect and publicly disseminate certain categories of information within 180 days, and every 180 days thereafter. The requested information included:

> (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, or material support to a terrorism-related organization, or any other national security reasons . . . ;
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> (ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and 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 . . . ;

[10] *See* William Salama, *DHS Report Disputes Threats From Banned Nations*, Associated Press (Feb. 4, 2017), https://www.apnews.com/39f1f8e4ceed4a30a4570f693291c866.

> (iii) information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals, since the date of this order or the last reporting period, whichever is later; and
>
> (iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security and the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

Id. at 8981.

43. EO-1 justified this collection by noting an interest in transparency and required that DHS and DOJ implement the Order "consistent with applicable law." *Id.* at 8980.

44. According to information released by DOJ in response to a Freedom of Information Act ("FOIA") request by Mr. Wittes, NSD provided to the Office of the Attorney General on February 10, 2017, an updated chart listing 668 international terrorism and terrorism-related crimes between September 11, 2001 and December 31, 2016, attached hereto as **Exhibit 3**. This chart cautions that it included 119 individuals prosecuted following a broad nationwide investigation after the September 11, 2001 attacks and "regardless of whether investigators developed or identified evidence that they had any connection to international terrorism." *Id.* And it explains that *all* of the crimes deal with "charged violations of federal statutes" that were related to terrorism "regardless of the offense of conviction," "including investigations of terrorist acts planned or committed outside the territorial jurisdiction of the United States." *Id.* This caution was included in a preamble that NSD warned should always accompany the chart or any quotation of the total number of convictions. *Id.*

45. NSD suggested that the data would support certain narrow statements that "[s]ince 9/11, convictions have been obtained against hundreds of defendants for terrorism or terrorism-related charges in Article III courts," and "[w]e have a long history of using the

criminal justice system to incapacitate individuals who pose a threat to the U.S. and its interests here and abroad." *Id.*

46. According to additional information released by DOJ in response to that same FOIA request, attached hereto as **Exhibit 4**, DOJ revised the chart provided by NSD, deleting 115 of the 119 individuals convicted following the September 11, 2001 investigations and cross-referenced the remaining 553 names with its FBI investigation files to determine each defendant's place and date of birth. The data, however, are riddled with errors. The then-Chief of Staff to the FBI Director admitted that "[g]iven the use of aliases in I[nternational] T[errorism] matters, factual errors in the initial data, and conflicting DOBs, database checks are limited in their ability to accurately identify a date/place of birth," which he "highlight[ed] . . . to note the . . . list likely contains gaps or errors . . . ." *See* Exhibit 4. The final chart included 392 or 393 individuals who were born abroad (the FBI was unsure whether one individual was born in Jamaica or the United States), 136 or 137 individuals who were born in the United States, and 24 individuals whom the FBI was unsure of their place of birth. *See id.* This chart was passed on to DHS on February 22, 2017, and onto the Office of the Attorney General on February 27. 2017.

47. The next day, on February 28, 2017, President Trump announced in his first speech before a joint session of Congress that "[a]ccording to data provided by the Department of Justice, the vast majority of individuals convicted of terrorism and terrorism-related offenses since 9/11 came here from outside of our country." *See* Remarks by President Trump in Joint Address to Congress (Feb. 28, 2017, 9:09 PM).[11] President Trump promised to "take new steps to keep our nation safe and to keep out those out who will do us harm." *Id.*

[11] https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-address-congress/.

48. In defending the legality of EO-1 in the courts, the government "pointed to no evidence that any alien from any of the countries named in [EO-1] has perpetrated a terrorist attack in the United States." *See Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (per curiam). Courts enjoined EO-1's immigration provisions, finding that it had no basis in fact. *Id.*

49. In response, President Trump issued a second Executive Order on March 6, 2017. Executive Order 13780, also called *Protecting the Nation from Foreign Terrorist Entry into the United States* ("EO-2"), revoked EO-1 and made minor changes to its immigration provisions while still temporarily barring entry by nationals of certain predominantly Muslim countries and all refugees. *See* 82 Fed. Reg. 13209 (Mar. 6, 2017). Section 11 of EO-2 again tasked the Secretary of DHS and the Attorney General with finding the same information identified in Section 10 of EO-1. *See id.* at 13217.

50. The immigration provisions of EO-2 were also quickly enjoined, and expired of their own accord before the U.S. Supreme Court was able to substantively review them. *See Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017) *aff'd in part, vacated in part* 857 F.3d 554 (4th Cir. 2017) (en banc) *vacated as moot* 138 S. Ct. 353 (2017); *Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017) *aff'd in part, vacated in part* 859 F.3d 741 (9th Cir. 2017) *vacated as moot* 138 S. Ct. 377 (2017).[12]

51. According to a news report, in September 2017, FBI officials provided a report to senior Administration officials concluding that refugees did not present a significant threat to the

[12] The Supreme Court issued a partial stay limiting the lower court's injunctions to those similarly situated to the plaintiffs there, without discussing the merits. *See Trump v. Int'l Refugee Assistance Program*, 137 S. Ct. 2080, 2087-88 (2017). Without waiting for the DHS and DOJ report required by Section 11 of EO-2, President Trump made permanent a modified version of the immigration provisions of EO-1 and EO-2 in his September 24, 2017 *Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, Proc. 9645 (Sept. 24, 2017) (the "Proclamation"). *See* 82 Fed. Reg. 45161 (Sept. 24, 2017). The Proclamation abandoned any attempt to root its provisions in data regarding terrorism and did not alter Defendants' obligations under Section 11 of EO-2, and the Supreme Court ultimately upheld its constitutionality. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

United States. *See* Dan de Luc and Julia Ainsley, *Trump Admin Rejected Report Showing Refugees Did Not Pose Major Security Threat*, NBC News (Sept. 5, 2018, 4:56 PM).[13] The then-Assistant Attorney General acknowledged receiving the report, but indicated that the Attorney General would not be guided by its findings because he "doesn't agree with the conclusions." *Id.* At least one intelligence community official interpreted this to mean that the Department was not "able to have an honest conversation about the risk." *Id.*

II. DHS and DOJ Issue Report Making False and Misleading Claims

52. On January 16, 2018—months after the deadline imposed by EO-2—Defendants issued the Report, entitled *Executive Order 13780: Protecting the Nation From Foreign Terrorist Entry Into the United States, Initial Section 11 Report*.

53. The Report's headline claim is that 402 of 549 people convicted of international terrorism-related charges from September 11, 2001 through December 31, 2016 (roughly 73%), were "foreign-born." Report at 2. Of those 402 "foreign-born" individuals, the Report asserts that 148 were naturalized U.S. citizens (i.e., nationals of the United States) and that 254 were foreign nationals. *Id.* (The Report does not discuss the possibility that some foreign-born individuals could also be U.S. citizens by birth because they have a U.S. citizen parent.) And it provides detailed descriptions of eight of the 402 "foreign-born" individuals, which it claims are "illustrative" examples. Report at 3-7.

54. The Report does not provide any underlying data, but it does acknowledge that it relied on "a list maintained by DOJ's National Security Division" of those convicted of international terrorism-related charges. Report at 2. Its list of 549 total convictions corresponds

[13] https://www.nbcnews.com/politics/immigration/trump-admin-rejected-report-showing-refugees-did-not-pose-major-n906681.

to the list that NSD compiled a year earlier, excluding the 119 individuals investigated following the September 11, 2001 attacks. *See* Exhibit 4.

55. The Report estimates that 23 to 27 "honor killings" and 1,500 "forced marriages" occurred every year in the United States between September 11, 2001 and December 31, 2016. Report at 7-8. The Report cites an outside study to surmise that 91% of these honor killings occurred because the victim was perceived as "too Westernized." *Id.*

56. The Report also includes other statistics that have no apparent connection to terrorism. For example, it volunteers that between October 1, 2011 and September 30, 2017, 372,098 non-citizens were deported following convictions for an aggravated felony or two or more felonies. Report at 9-10. The Report also notes that between 2007 and 2017, USCIS referred 45,858 foreign nationals who applied for immigration benefits to ICE for enforcement action based on information that they had committed crimes. *Id.*

57. Finally, the Report concludes with a promise to continue to provide similar information to "highlight the threats facing the United States." It asserts that DOJ is "committed to" investigating and prosecuting terrorists—and also to denaturalizing citizens who "derive their citizenship through naturalization fraud," a problem not otherwise discussed in the Report.

III. The Trump Administration Uses the Report to Mislead the American Public and Congress About the Need for Stricter Immigration Policies

58. Despite the earlier availability of data for its central claim, the Report's publication coincided with a renewed push by the Administration to convince Congress and the American people that stricter immigration laws are needed.

59. At a televised immigration roundtable one week before the Report was issued, President Trump falsely claimed that twenty-two to twenty-four people immigrated to the United

States on the basis of their relation to the suspect in the Manhattan truck attack. *Bipartisan Immigration Bill Roundtable Transcript*, CNN (Jan. 9, 2018).[14]

60. On January 11, 2018, five days before the Report was issued, President Trump attacked family reunification and diversity lottery policies in an interview with the Wall Street Journal, saying, "[t]he lottery system is a disaster, we have to get rid of the lottery system. The—as you know chain is—chain migration is a horrible situation. You've seen the ads, you've seen everything, you know all about chain." *Transcript of Donald Trump Interview with the Wall Street Journal*, Wall Street Journal (Updated Jan. 14, 2018, 12:03 AM).[15]

61. The Report was issued while Congress was considering sweeping immigration reform legislation,[16] and after the Report was issued, the Administration embarked on a public relations campaign to amplify its findings. It was the subject of a dedicated White House press briefing, where Press Secretary Sarah Huckabee Sanders stated that the Report "highlights the urgent need for Congress to adopt immigration reforms identified in the administration's priorities." *Press Briefing by Press Secretary Sarah Sanders and Principal Deputy Assistant Attorney General Ed O'Callaghan*, White House Press Briefing (Jan. 17, 2018, 1:16 PM).[17]

62. In a White House Fact Sheet, the Administration claimed that the Report "shows, once again, that our current immigration system jeopardizes our national security." *Our Current Immigration System Jeopardizes American Security*, White House Fact Sheet (Jan. 16, 2018).[18]

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[14] http://transcripts.cnn.com/TRANSCRIPTS/1801/09/wolf.01.html; *see also* Miriam Valverde, *Donald Trump's Unsubstantiated Claims About Chain Migration, NYC Terror Suspects*, PolitiFact (Jan. 24, 2018, 12:00 PM), http://www.politifact.com/truth-o-meter/statements/2018/jan/24/donald-trump/donald-trumps-unsubstantiated-claims-about-chain-m/.

[15] https://www.wsj.com/articles/transcript-of-donald-trump-interview-with-the-wall-street-journal-1515715481.

[16] *See, e.g.*, Securing America's Future Act of 2018, H.R. 4760, 115th Cong. (2d Sess. 2018).

[17] https://www.whitehouse.gov/briefings-statements/press-briefing-by-press-secretary-sarah-sanders-and-principal-deputy-assistant-attorney-general-ed-ocallaghan01172018/.

[18] https://www.whitehouse.gov/briefings-statements/current-immigration-system-jeopardizes-american-security.

The press release also cites the "facts" set forth in the Report as reason to end so-called "chain migration," the Administration's term for immigration laws aimed at reunifying families with some members living abroad. *Id.*

63. President Trump also used the Report to buttress the claim he made to Congress in February 2017, tweeting to his millions of followers that the Report showed that "nearly 3 in 4 individuals convicted of terrorism-related charges are foreign-born" and emphasizing that the Report supports ending family reunification and diversity lottery immigration policies.[19]

64. Then-Attorney General Sessions stated in a DOJ press release that the Report "reveals an indisputable sobering reality—our immigration system has undermined our national security and public safety."[20] *DOJ, DHS Report: Three Out of Four Individuals Convicted of International Terrorism and Terrorism-Related Offenses were Foreign-Born*, Department of Justice Press Release (Jan. 16, 2018).

[19] Donald Trump (@realDonaldTrump), Twitter (Jan. 16, 2018, 3:19 PM), https://twitter.com/realDonaldTrump/status/953406553083777029.

[20] https://www.justice.gov/opa/pr/doj-dhs-report-three-out-four-individuals-convicted-international-terrorism-and-terrorism.

65. Defendant DHS Secretary Nielsen described the Report as "a clear reminder of why . . . we must examine our visa laws and continue to intensify screening and vetting of individuals traveling to the United States to prevent terrorists, criminals, and other dangerous individuals from reaching our country." *Id.* On live television, she repeated the 73% number and used this statistic to advocate for the "continual vet[ting]" of lawful permanent residents. *See DHS Report: 73 Percent of Terrorism-Related Offenders over Last 15 Years Were Foreign-Born*, CBS News (Jan. 16, 2018, 8:08 AM).[21] Secretary Nielsen repeated these points in prepared testimony to the Senate Judiciary Committee the same day, stating that "tougher vetting and tighter screening" is warranted because "[t]he majority of individuals convicted on terrorism charges in the United States since 9/11 were foreign-born."[22] *Oversight of the United States Department of Homeland Security Before the S. Comm. on Judiciary*, 114th Cong. (2018) (statement of Kirstjen Nielsen, Sec'y of DHS). She called the data "truly chilling," suggesting that it was "just the tip of the iceberg," and using it to justify the Muslim ban. *See id.* at 56.

66. Several members of Congress also amplified the claims made in the Report, including the Chairman of the House of Representatives' Homeland Security Committee. *See, e.g.*, McCaul Statement on DHS-DOJ Report on Terrorist Entry Into the United States (Jan. 16, 2018);[23] Lou Barletta, *Report Shows 73% of Individuals Convicted of Terrorism Since 9/11 Gained Access Via U.S. Immigration Laws*, Jan. 17, 2018.[24]

[21] https://www.cbsnews.com/news/kirstjen-nielsen-dhs-secretary-terror-charges-report-us-citizens.

[22] https://www.dhs.gov/news/2018/01/16/written-testimony-dhs-secretary-kirstjen-nielsen-senate-committee-judiciary-hearing.

[23] https://web.archive.org/web/20181223102006/https://homeland.house.gov/press/mccaul-statement-dhs-doj-report-terrorist-entry-united-states/.

[24] https://web.archive.org/web/20181223073050/https://barletta.house.gov/media-center/press-releases/report-shows-73-of-individuals-convicted-of-terrorism-since-911-gained.

67. Ultimately, on January 25, 2018, President Trump and his Administration released an immigration plan calling for legislation that would, among other goals, end family migration and increase the speed of immigration violation processing and deportations. *See White House Framework on Immigration Reform and Border Security*, White House Fact Sheet (Jan. 25, 2018).[25]

68. The Report has therefore been highly influential and has had a clear and substantial impact on important public policy discussions and initiatives.

IV. Plaintiffs File an Administrative Petition Under the IQA Showing That the Report Fails to Satisfy the Agencies' Information Quality Obligations

69. On February 8, 2018, Plaintiffs filed an administrative petition under the IQA.

70. OMB has explained to agencies that "[t]he focus of the complaint process should be on the merits of the complaint, not on the possible interests or qualifications of the complainants." *See* OIRA Review of Information Quality Guidelines Drafted by Agencies (June 10, 2002) at 13.[26] Nevertheless, the Petition demonstrated that Plaintiffs are "affected persons" within the meaning of DHS's and DOJ's Guidelines and are therefore entitled to petition Defendants for a correction of the Report and to a meaningful response to their petition. Indeed, the IQA requires the government to disclose significant information, both along with the Report as well as in response to the Petition. Plaintiffs further the IQA's purpose of holding DOJ and DHS accountable for the information in the Report, and to promote the utility of the Report, and its underlying data, in the public debate on immigration and national security.

71. Specifically, the Petition explained that Plaintiffs Brennan Center, Mr. Crowley, and Mr. Wittes, all write on the topic of criminal justice, terrorism, and/or immigration, and that

[25] https://www.whitehouse.gov/briefings-statements/white-house-framework-immigration-reform-border-security/.

[26] https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/inforeg/iqg_comments.pdf.

the Brennan Center and Mr. Wittes had both written public analyses based on the data and claims in the Report. They have been unable to rely on the false and misleading information in the Report, and have had to respond to it instead. Pet. at 2-3.

72. Plaintiffs 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. They devote substantial resources to ensuring that the democratic process does not suffer due to the spread of disinformation, including by conducting research and publishing on core democratic norms and principles, the politicization of independent institutions, and the delegitimization of minority communities.[27] Pet. at 2. Indeed, because the Report has been widely publicized and continues to remain available notwithstanding the Petition, Protect Democracy and the Brennan Center have had to undertake material efforts to educate the public on the implications of the Report and to publicly correct its falsehoods and misstatements.[28] Moreover, because the Agencies have refused to disclose the data underlying the Report—notwithstanding the IQA transparency standards that bind the Agencies, as they now admit—Plaintiffs have had to expend considerable resources investigating the Report's claims in an attempt to understand the full breadth of its inaccuracy.[29] These efforts are continuing and have

[27] *See, e.g.*, Protect Democracy and Stand Up Ideas, *The Republic at Risk: American Democracy One Year into the Trump Administration* (Jan. 17, 2018), https://protectdemocracy.org/update/republic-at-risk; Harsha Panduranga, Faiza Patel, and Michael Price, *Extreme Vetting and the Muslim Ban*, Brennan Center for Justice (Oct. 2, 2017), https://www.brennancenter.org/publication/extreme-vetting-and-muslim-ban.

[28] *See, e.g.*, Faiza Patel, *Trump Administration's Fuzzy Math on Terrorism Origins is More than Misleading - It's Dishonest*, Washington Post (Jan. 16, 2018); https://www.justsecurity.org/51084/trump-administrations-fuzzy-math-terrorist-origins-misleading-its-dishonest/; Harsha Panduranga, Tru*mp Administration's Watchlist Data Overstates Terror Threat*, Just Security (Jan. 23, 2018); Faiza Patel, *Why the Trump Administration is Trying to Make Muslim Immigrants Seem Dangerous*, Washington Post (Jan. 29, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/01/29/why-the-trump-administration-is-trying-to-make-muslim-immigrants-seem-dangerous/?utm_term=.f94f2133d463.

[29] *See* Harsha Panduranga and Faiza Patel, *Trump Administration's Terrorism Claims Omit Crucial Available Data*, Brennan Center for Justice (Aug. 10, 2018), https://www.brennancenter.org/blog/trump-administrations-terrorism-claims-omit-crucial-available-data.

drained resources that Protect Democracy and Brennan Center could have dedicated to their other advocacy efforts. As recently as January 2019, the Brennan Center had to dedicate resources to publicly communicate the meaning and implications of the Agencies' half-baked Appeal response, which admits error while refusing to correct it.[30]

73. Plaintiff Mr. Crowley also has a professional interest in the accurate, fair, and unbiased presentation of data as a former Senior Policy Analyst with OMB with extensive oversight experience involving DOJ, as well as its crime statistics programs. Pet. at 3-4.

74. Plaintiff Mr. Wittes writes on national security issues, including counter-terrorism efforts. As a journalist and academic focused on issues directly related to the Report, he has an interest in the accuracy of data about terrorism. Pet. at 3.

75. The Petition was meritorious and detailed how the Report violates the IQA.

a. Exclusion of Domestic Terrorism. The Report includes only individuals with a nexus to "foreign terrorism" and excludes those with a nexus to domestic terrorism, limiting its data set to include only offenses that by definition are far more likely to be committed by foreign nationals. Pet. at 7. Yet domestic terrorism convictions account for the majority of terrorism convictions since September 11, 2001. *Ibid*. In selectively cultivating its data without disclosing the significance of that choice, the Report misleads readers to believe that foreign-born individuals are the primary perpetrators of terrorism. *Ibid.*

b. Distorted information related to extraditions and capture. The Report does not disaggregate cases where the defendant was transported to the United States *solely for*

[30] *See* Faiza Patel and Raya Koreh, *Our Lawsuit Against the Trump Administration Revealed How It Lies About Terrorism*, Time (Jan. 10, 2019), http://time.com/5499443/trump-administration-lies-terrorism-border-wall/.

the purpose of prosecution. The Petition explained that it is "highly likely" that nearly one in five individuals in the Report were brought to the United States just to prosecute them and thus were unaffected by and did not interact with U.S. immigration policies. Pet. at 7.

c. Failure to provide important information about underlying data. The Report fails to provide necessary context about the underlying data maintained by DOJ's National Security Division. The Report includes only an abbreviated version of the caveats and explanations that are included in a preamble to the underlying data, which, according to the responsible NSD analyst, "always need[s] to accompany [the] total number" of convictions listed on the chart. Exhibit 3. For example, the Report leaves out language from this preamble highlighting that the underlying data includes anyone charged with terrorism, "regardless of offense of conviction," meaning that the data may include convictions where all terrorism charges were ultimately dropped, or where the defendant was in fact acquitted of terrorism. *Id.* And the Report acknowledges that the underlying data includes charges themselves unrelated to terrorism so long as the investigation "involved an identified link to international terrorism." Report at 2.

d. Manufactured distinctions between U.S. citizens. The Report also manufactures a distinction between those who are U.S. citizens by birth and those who are citizens by naturalization. As the Petition explained, this departs from Defendants' longstanding practice of treating all citizens equally in counterterrorism efforts, consistent with our constitutional and legal tradition. Further, this decision departs from Section 11 of EO-2, which instructs Defendants to provide certain information on "foreign nationals"—not foreign-born U.S. citizens. Pet. at 8. Defendants even suggest

that the Report would draw a distinction between natural-born citizens based on the citizenship status of their parents, were data available. *See* Report at 2 n.1.

e. Cherry-picked and unrepresentative examples. The Report also cherry-picks so-called "illustrative" examples of foreign-born terrorists that are not, in fact, representative of the vast majority of individuals on the list, and then used these examples to support a call for the end of family-based migration. *Id.* at 3-7.

f. Failure to provide critical underlying information and content about terrorist watchlist claim. The Petition explained that the Report generally lacks transparency, objectivity, and utility because it withholds or fails to disclose the data on which it relies. For example, it fails to provide the data underlying its claim that DHS had 2,554 encounters with those on the terrorist watch list, which is widely understood to be overbroad. Pet. at 9.

g. Gender-based violence. The Report also blatantly exaggerates the number of immigrants arrested for gender-based violence and fails to provide necessary context for its figures on this topic. For instance, while the Report states that aliens were convicted of 69,929 sex offenses between 2003 and 2009, this number comes from a GAO report that addresses arrests—not convictions—between 1955 and 2010. *Id.* Furthermore, the 69,929 figure represents the number of unique arrest *offenses*, and a single arrest can relate to numerous offenses. Finally, the Report assumes without explanation that the arrests mostly pertain to violent offenses against women, an assumption that the Petition explains is unjustified. *Id.*

h. Honor killings and forced marriages. The Report fails to disclose that its figures regarding "honor killings" are drawn from a study commissioned by an anti-

Muslim critic who regularly seeks to stigmatize Muslim communities and which its own author admitted was "not terribly scientific." *See* Jesse Singal, *Here's What the Research Says About Honor Killings in the U.S.*, New York Magazine (Mar. 6, 2017).[31] And while the Report claims that 1,500 forced marriages occur in the United States every year, nothing in the underlying study on which Defendants relied suggested that these marriages occurred in the United States (as opposed to abroad), and the authors expressly disclaimed that their data addressed how many forced marriages occur in any given year, instead focusing on how many forced marriages certain service providers "encountered." Pet. at 9-10. These dubious statistics related to gender-based violence and honor killings bear no apparent relationship to "Foreign Terrorist Entry into the United States" but invoke unrelated negative stereotypes about Islam.

i. Lack of transparency. Finally, the Report fails to disclose (i) the data and analysis from NSD upon which it relies; (ii) the list of 1,716 aliens removed because of 'national security concerns,' and (iii) the 2,554 DHS alleged encounters with individuals on the terrorist watchlist. *Id.* at 10-11.

76. The Petition concluded that "the Report is so saturated with bias and a lack of objectivity—both in conception and execution—that the appropriate course is to retract it in its entirety." *Id.* at 11.

77. In the alternative, Plaintiffs asked Defendants to make the following specific corrections.

a. Include data and appropriate context regarding domestic terrorism-related convictions, including the methodology for determining that a charge has an "identifiable

[31] http://nymag.com/daily/intelligencer/2017/03/heres-what-the-research-says-about-american-honor-killings.html.

link" to a terror-related investigation and for determining that an offense is "directly related to international terrorism";

b. Include data and appropriate context regarding the underlying data on which the Report relies, including the number of foreign-born individuals convicted of international terrorism-related offenses who were extradited to the United States for prosecution and the number of convictions for attacks that took place overseas;

c. Explain why drawing a distinction between naturalized citizens and citizens by birth is relevant, as well as why information about the citizenship of the parents of citizens by birth is relevant;

d. Include data to support the assertion that the eight individuals named in the Report are "illustrative," particularly as to their method of admission to the United States (or, if such data are unavailable, provide context so that the public can judge whether the examples are truly "illustrative");

e. Provide additional information about DHS's 2,554 encounters with individuals on the terrorist watch list, including how an "encounter" is defined;

f. Correct data and appropriate context regarding gender-based violence, honor killings, and forced marriages;

g. Provide access to the data underlying the Report; and

h. Consult with relevant experts, including career DHS officials and those in the private sector.

Id. at 11.

78. The Petitions' contentions are supported by two GAO reports that also analyze DOJ's international terrorism conviction data from 9/11 through 2016. As the chart below

demonstrates, the GAO reports together indicate that the true number of foreign nationals convicted of terrorism-related offenses in the United States is 86, or just 28% of all international-terrorism convictions. Analyzing data from DOJ, the GAO concluded that only 303 defendants were in fact *convicted* of crimes related to international terrorism.[32] Of these 303 individuals, only 187—or 62%—were ostensibly "foreign-born," substantially short of the 73 percent that the Report described. *Id*. By further eliminating the 61 convictions of individuals extradited to the United States solely for criminal prosecution, and the 40 who were naturalized U.S. citizens, the number of non-citizen immigrants convicted of terrorism-related crimes is 86, or just 28% of those convicted. This is just a *third* of the percentage that the Agencies reported from the same data.

Category	Pre-March 2010	Post-March 2010	Total	Percentage
All convictions	107	196	303	100
Born U.S. Citizens	30	73	103	34
Unknown	9	4	13	4
All Non-Natural Born Citizens			303 - (103 + 13) = 187	62
Extradited for Prosecution	30	31	61	20
Naturalized U.S. Citizens	16	24	40	13
All Non-Citizen Immigrants			187 - (61 + 40) = 86	28

V. Defendants Offer an Inadequate Response to Plaintiffs' IQA Petition After This Lawsuit Is Filed

79. Defendants' 60-day deadline passed on April 9, 2018 without action, and Plaintiffs filed this lawsuit on April 30, 2018.

[32] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-187, Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs at 26 (2011) (containing data for September 2001 to March 2010); U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-433, Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs at 92 (2018) (containing data for March 2010 through December 2016).

80. On June 19, 2018—71 days after Defendants' deadline to respond to the Petition—the Agencies provided interim responses stating that they needed additional time to resolve the Petition.

81. On July 31, 2018—two days before the government filed its initial motion to dismiss—Defendant DOJ denied the Petition by letter, concluding that the "Report outlines the scope and source of the data utilized and, where applicable, provides appropriate caveats, thereby meeting all applicable requirements" under the IQA ("DOJ Pet. Response," attached as **Exhibit 5**). DOJ disputed Plaintiffs' critiques of the conviction data because the Petition did not identify any inaccuracies, and dismissed the charges of bias as "subjective." DOJ Pet. Response at 2-3. Responding to Plaintiffs' analysis of the gender-based data, DOJ acknowledged its lack of "comprehensive data" but promised that the Office of Justice Programs was undertaking two studies to remedy that lack. *Id.* at 3.

82. On August 1, 2018, Defendant DHS also denied the petition ("DHS Pet. Response," attached as **Exhibit 6**). DHS's response did not refer to any of the specific problems the Petition identified in the Report, but sought to generally justify the lack of context by pointing out that "the Report 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 EO." DHS Pet. Response at 2. Like DOJ, DHS dismissed the issues identified in the Petition as matters of "interpretation" rather than "accuracy," which it claimed fell outside the scope of the IQA. *Id.* at 2.

VI. Plaintiffs Administratively Appeal Defendants' Flawed IQA Response

83. On September 13, 2018, Plaintiffs timely administratively appealed Defendants' decisions on the Petition, attached as **Exhibit 7** (the "Appeal" or "App.").[33]

84. In their Appeal, Plaintiffs identified seven categories of objections that the Defendants' response failed to address at all: (i) conviction data that is presented without the caveats and explanations required by NSD to give it proper context; (ii) terrorism watchlist data that is unclear and not transparent for failing to define key terms and lack of any explanation of the methods the Agencies used to place individuals on the watchlist; (iii) gender-based violence statistics that are simply wrong according to the government's own citation; (iv) gender-based violence statistics that fail to define gender-based violence or explain that a single arrest can be for multiple offenses; (v) reliance on a biased honor killing study that the author admitted was not scientific; (vi) misstating the number of forced marriages cited by the biased honor killing study found as occurring *every* two years as opposed to those encountered by social services organizations in a two year period; and (vii) failing to disclose data underlying the NSD list, the list of removed aliens, and the list of terrorist watchlist encounters. App. at 11-13.

85. The Appeal explained that while the Agencies' responses dismiss the Petition as merely requesting "context," the IQA in fact requires proper context for any information—and the Agencies' responses do not actually defend the context provided in the Report. *See* App. at 13. And while the DOJ response relies heavily on the contention that the conviction data "was accurately stated and clearly described," the Deputy Director of the FBI has admitted to factual errors in the investigation files that ensured that the conviction data was *not* accurately represented in the Report. *Id.* at 13.

[33] The parties asked the court to stay this action in the interim. *See* ECF No. 18.

86. The Appeal explained that, even assuming technical correctness, the Report is inconsistent with the IQA's transparency requirement, as one-third of the 549 convictions on which the Report relies were not for terrorism charges at all. The Appeal reiterated that it is misleading to aggregate data on crimes committed in the United States with crimes committed outside of the United States that lead to extradition to the United States for prosecution, and to distinguish between naturalized and natural-born U.S. citizens without explaining why the distinction was relevant to public safety and security, despite the long-standing practice of treating American citizens equally in the context of counterterrorism efforts. *Id.* at 13-15. As the Appeal explained, while the descriptions of the final result of those analytical choices may be clear, their significance is not, and the context in the Report is therefore neither clear nor complete. *Id.* at 14.

87. The Appeal also explained that the Petition's objections to the so-called "illustrative examples" were not Plaintiffs' mere "subjective conclusions;" to the contrary, the entire point of Plaintiffs' objection was that *Defendants* failed to explain any objective measures by which they chose their examples. *Id.* at 15.

88. Taken together with reports that senior DOJ officials refused to credit facts set forth by the intelligence community that conflicted with the then-Attorney General's pre-existing conclusions about immigrants, the Report's flaws suggest that the Report was merely a *post hoc* justification for the Administration's pre-conceived policy preferences. At the very least, the Report misled the President and the Secretary of Homeland Security during a time when key immigration and national security policy was being proposed and executed. *Id.* at 15.

VII. Defendants Admit Errors Under the IQA in Further Administrative Proceedings, But Refuse to Correct Those Errors

89. DOJ and DHS notified Plaintiffs on October 24, 2018 and November 7, 2018, respectively, that they needed additional time to review the Appeal.

90. In a letter dated December 19, 2018, DHS notified Plaintiffs a second time that they required additional time to review their administrative appeal.

91. DOJ denied Plaintiffs' Appeal by letter dated December 21, 2018, attached as **Exhibit 8** (the "DOJ App. Response").

92. In a letter dated January 31, 2019, DHS notified Plaintiffs for a third time that it would need additional time to respond to the Appeal.

93. DHS denied Plaintiffs' Appeal by letter dated February 14, 2019, attached as **Exhibit 9** ("DHS App. Response").

94. In responding to the Appeal, Defendants admitted to a litany of errors:

a. Gender-Based Violence: Defendants admitted that the gender-based violence statistics in the Report were wrong. Defendants sought to explain these significant misstatements as "mere editorial errors." DOJ App. Response at 4; DHS App. Response at 3.

b. Underlying NSD Data: Defendants admitted that they should release the NSD data underlying the Report. DOJ agreed that the "perception of objectivity of future reports could be enhanced by . . . releasing underlying data" and that Plaintiffs' suggested corrections "could promote transparency of underlying NSD data." DOJ App. Response at 4. Similarly, DHS responded that Plaintiffs' objection was "well-taken" and promised to consider disclosing the data in future reports. DHS App. Response at 2.

c. Extradition Data/Caveats in the NSD Data: DOJ also agreed that the Report distorts information relating to extraditions and fails to provide important information underlying the data concerning the NSD list by admitting that the Petition's suggested corrections would "further promote the perception of objectivity in the presentation of the information." DOJ App. Response at 3.

d. Illustrative Examples: DOJ admitted flaws in the so-called illustrative examples, which "could cause some readers some readers of the Report to question its objectivity." *Id*. at 3. It promised to, in future reports, "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." DOJ App. Response at 3-4.

95. Despite admitting to errors that are inconsistent with the IQA, Defendants declined to change anything about the Report. Instead, DOJ decided that the Report is "reasonably transparent" and simply promised to "consider IQA principles in issuing future reports." DOJ App. Response at 2. DHS similarly found that the Report is "sufficiently transparent," but committed to "tak[ing] into consideration in future Section 11 Reports those points raised" in the Petition and Appeal. DHS App. Resp. at 1.

96. Defendants also rejected several of Plaintiffs' contentions:

a. Alienating Naturalized Citizens: DOJ stood by its exclusion of domestic terrorism and the Report's false distinction between naturalized and natural-born U.S. citizens, stating that it "cannot control the way in which information in the Report is used or interpreted," without addressing the misinterpretations by *its own principals*. DOJ App. Response at 3. DHS maintained that "the description of the information presented is apparent on the face of the [] Report." DHS App. Response at 2.

b. Honor Killing Study Bias: Defendants did not defend the honor killing study or dispute that it was biased. Instead, DOJ disclaimed its obligation to rely on unbiased information, claiming that "[t]he IQA does not obligate agencies to research, report, and analyze all possible negative inferences that one may draw from sources they rely on." DOJ App. Response at 4. DHS responded that the Report "cited sufficient information about the source of the data so that readers could draw their own conclusions." DHS App. Response at 3.

c. Terrorism Watch List Encounters: Similarly, Defendants did not substantively address Plaintiffs' concerns about the terrorism watch list data. Instead, DOJ insisted that "[t]he figures and what they report stand for themselves." DOJ App. Response at 4. DHS went so far as to insist that because the data was "compiled for law enforcement purposes, . . . nothing in the IQA requires further extrapolation." DHS App. Response at 2. But it cited no support for the proposition that the IQA includes an exemption for disseminated information that has its source in law enforcement data.

97. Finally, Defendants simply failed to respond to several other issues raised in the Appeal, including that: (i) the Report misstates the number of forced marriages the honor killing study found as occurring *every* two years as opposed to those encountered by social services organizations in a two year period; (ii) the Report fails to define gender-based violence in connection with the related statistics and to explain that a single arrest can be for multiple offenses; (iii) the Report fails to disclose data underlying the list of removed aliens; and (iv) the Report is biased.

98. The Agencies' responses to the Appeal are insufficient to comply with their obligations under the IQA. Plaintiffs bring this lawsuit to enforce the information quality standards mandated by federal law.

CAUSES OF ACTION

COUNT I

Violation of the Administrative Procedure Act—Agency Action Contrary to Law (5 U.S.C. § 706(2)(A))

99. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 98.

100. Under the APA, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law," 5 U.S.C. § 706(2)(A).

101. Defendants' denial of Plaintiffs' Petition and Appeal, and refusal to correct or rescind the Report, are agency actions within the meaning of the APA.

102. Plaintiffs' Petition and Appeal raised meritorious objections to the Report under the IQA.

103. Despite Defendants' admission that the Report does not comply with the IQA, and Plaintiffs' other meritorious objections to the Report, Defendants have refused to rescind the Report or otherwise make any corrections.

104. Defendants' failure to grant the Petition and Appeal, or otherwise rescind or correct the Report, is therefore contrary to law, in violation of 5 U.S.C. § 706(2)(A).

COUNT II

Violation of the Administrative Procedure Act—Arbitrary and Capricious Agency Action (5 U.S.C. § 706(2)(A))

105. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 98.

106. Under the APA, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary [and] capricious." 5 U.S.C. § 706(2)(A).

107. Defendants' denial of Plaintiffs' Petition and Appeal, and refusal to correct or rescind the Report, are agency actions within the meaning of the APA.

108. Defendants' failure to grant the Petition and Appeal, or otherwise rescind or correct the Report, disregards the Departments' and OMB's IQA regulations and does so without a reasonable justification.

109. Defendants' decisions to deny the Petition and Appeal, and refusal to otherwise rescind or correct the Report, were made in bad faith and concealed the true basis for their decisions.

110. Defendants' failure to grant the Petition and Appeal, or otherwise rescind or correct the Report, is therefore arbitrary and capricious, in violation of 5 U.S.C. § 706(2)(A).

COUNT III

Violation of the Administrative Procedure Act—Agency Action That Is an Abuse of Discretion (5 U.S.C. § 706(2)(A))

111. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 98.

112. Under the APA, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . an abuse of discretion." 5 U.S.C. § 706(2)(A).

113. Defendants' denial of Plaintiffs' Petition and Appeal, and refusal to correct or rescind the Report, are agency actions within the meaning of the APA.

114. Defendants admitted in administrative proceedings that Plaintiffs' Petition and Appeal raised meritorious objections to the Report under the IQA.

115. Defendants nevertheless refused to grant the Petition and Appeal, or otherwise correct or rescind the Report, and announced that it would only comply with the IQA in subsequent reports.

116. Defendants' failure to grant the Petition and Appeal, or otherwise rescind or correct the Report, is therefore an abuse of any discretion granted to them by the IQA, in violation of 5 U.S.C. § 706(2)(A).

COUNT IV

Violation of the Administrative Procedure Act—Agency Action Without Observance of Procedure Required by Law
(5 U.S.C. § 706(2)(D))

117. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 98.

118. Under the APA, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

119. Defendants' denial of Plaintiffs' Petition and Appeal, and refusal to correct or rescind the Report, are agency actions within the meaning of the APA.

120. Defendants admitted that aspects of the Report did not comply with the IQA and its implementation, but nevertheless denied Plaintiffs' Petition and Appeal, and refused to correct or rescind the Report.

121. Defendants have therefore failed to establish or follow a functional "administrative mechanism[] allowing affected persons to *seek and obtain* correction of information maintained and disseminated by the agency that does not comply with" OMB's regulations. 44 U.S.C. § 3516 note (b)(1) & (b)(2)(B) (emphasis added).

122. Defendants' actions therefore do not observe the procedure required by the IQA, in violation of 5 U.S.C. § 706(2)(D).

PRAYER FOR RELIEF

Plaintiffs pray that this Court:

A. Declare that Defendants' failure to grant Plaintiffs' Petition and Appeal and to withdraw or correct the Report as requested in the Petition and Appeal and as required by the IQA and its implementing regulations violates the APA;

B. Set aside Defendants' denial of Plaintiffs' Petition and Appeal, and issue an injunction ordering Defendants to withdraw or correct the Report as set out in the Petition and Appeal, as required by the IQA, applicable regulations, and the APA;

C. Award Plaintiffs costs and expenses and any interest allowable by law; and

D. Issue any other relief that this Court deems just and appropriate.

Dated: March 29, 2019

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CERTIFICATE OF SERVICE

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

/s/ Meaghan VerGow
Meaghan VerGow
Pro Hac Vice

Dated: March 29, 2019