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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO

14 AMERICANS FOR SAFE ACCESS,)
15 Plaintiff,)
16 v.)
17 The U.S. DEPARTMENT OF HEALTH)
AND HUMAN SERVICES and the U.S.)
18 FOOD AND DRUG ADMINISTRATION,)
19 Defendants.)
20)

No. C 3:07-01049-WHA
Date: August 9, 2007
Time: 8:00 a.m.

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO DISMISS
PLAINTIFF'S COMPLAINT**

21 Notice of Motion and Motion to Dismiss Plaintiff's Complaint, set for hearing on August
22 9, 2007 at 8:00 a.m. or as soon thereafter as counsel may be heard.

23 Defendants hereby move the Court to dismiss plaintiff's Complaint in its entirety for lack
24 of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) or, in the
25 alternative, for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), for
26 the reasons more fully set forth in defendants' accompanying memorandum of points and
27 authorities.

1 Dated May 25, 2007

Respectfully Submitted,

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**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 DEFENDANTS' MOTION TO DISMISS
 PLAINTIFF'S COMPLAINT**

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INTRODUCTION

1
2 In 2001, the Drug Enforcement Administration (“DEA”), after consulting with the
3 Department of Health and Human Services (“HHS”), denied an individual’s request for a
4 rulemaking to “reschedule” marijuana under the Controlled Substances Act and thereby ease
5 some of the restrictions on that drug’s distribution under federal law. Dissatisfied with DEA’s
6 decision, plaintiff Americans for Safe Access, a non-profit corporation, has joined with other
7 groups to file another petition asking DEA to reschedule marijuana. While that DEA petition
8 remains pending, plaintiff asks this Court to order HHS to “correct” its 2001 statement to DEA
9 that marijuana has no currently accepted medical use in the United States. For a number of
10 reasons, this Court should dismiss plaintiff’s Complaint.

11 As an initial matter, plaintiff lacks standing to pursue its claim. Plaintiff has failed to
12 establish standing on behalf of its individual members because it has failed to identify a single
13 member that has suffered a cognizable injury from HHS’s allegedly incorrect statement
14 concerning marijuana. And even if there were such individual members, their participation in
15 this litigation would be necessary to establish that they had suffered a cognizable injury fairly
16 traceable to HHS’s statement and redressable by injunctive relief. Regardless, plaintiff’s effort at
17 “correction” of HHS’s statement is not (as it must be to establish standing) germane to plaintiff’s
18 stated organizational purpose of “ensur[ing] safe and legal access to cannabis (marijuana) for
19 therapeutic uses and research.” See <http://www.safeaccessnow.org/section.php?id=3> (last visited
20 May 25, 2007). While plaintiff may argue that public rejection of HHS’s statement could
21 encourage some individuals to use illegal drugs, it would not make such use any more or less safe
22 or legal. Similarly, plaintiff also lacks standing to press its claim on its own behalf as an
23 organization because it has not alleged a cognizable injury; plaintiff’s interest in marijuana
24 policy, disagreement with the policy of the United States, and use of resources advocating
25 something different amount to a generalized grievance, not constitutional standing. Moreover,
26 plaintiff lacks prudential standing because the ease of its advocacy is not within the zone of
27

1 interests regulated by the source of law on which plaintiff relies, the Information Quality Act
2 (“IQA”), which serves to guide federal agencies.

3 Even if plaintiff could demonstrate a cognizable injury, its alleged injury is not
4 redressable by injunctive or declaratory relief. In particular, to the extent HHS’s statement
5 makes it more difficult for plaintiff to effectively advocate marijuana use, “correcting” the
6 statement would not change the fact that marijuana is a schedule I controlled substance under
7 federal law, illegal to distribute except under very limited circumstances.

8 Moreover, plaintiff also lacks a cognizable injury because, as every court to consider the
9 matter has found, the IQA does not create any judicially enforceable right for plaintiff to obtain
10 the correction of federal agency information in this Court. Because plaintiff cannot show any
11 invasion of a legal right subject to redress in federal court, it has no grounds for relief under the
12 Administrative Procedure Act (“APA”). Similarly, plaintiff’s attempt to state an APA cause of
13 action also fails because the underlying agency action – HHS’s alleged dissemination of a
14 statement to DEA – is not “final agency action” subject to APA review. Likewise, plaintiff’s
15 claim is inappropriate under the APA because plaintiff has an adequate remedy to complain
16 about the statement at issue under the Controlled Substances Act itself; plaintiff cannot use either
17 the APA or the IQA to evade that exclusive statutory review provision. In addition, the
18 determination as to whether the information in HHS’s statement regarding marijuana lacks
19 sufficient “quality” such that it is appropriate for correction is within the agency’s discretion and
20 expertise to resolve, and is not the kind of issue for which a court is well-equipped to second-
21 guess the agency’s conclusions.

22 Finally, even if plaintiff’s claim was justiciable (which it is not), plaintiff has failed to
23 state a claim upon which relief can be granted under the IQA and APA. The IQA applies to
24 “dissemination” of information; here, the only dissemination of HHS’s statement that plaintiff
25 has alleged or identified was made not by defendants but by DEA when DEA published
26 correspondence from HHS to DEA in the Federal Register. Plaintiff, however, has not sought
27 any relief (administratively or in this Court) from DEA.

1 For all of these reasons, this Court should grant defendants' motion and dismiss
2 plaintiff's Complaint.

3 BACKGROUND

4 I. Statutory and Regulatory Background

5 A. The Information Quality Act

6 The IQA resides in section 515 of the Treasury and General Government Appropriations
7 Act for Fiscal Year 2001 and directs OMB to issue "guidelines" that provide "policy and
8 procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity,
9 utility, and integrity of information (including statistical information) disseminated by Federal
10 agencies" Pub. L. No. 106-554, § 1(a)(3) [Title V, § 515] (Dec. 21, 2000) (published at 44
11 U.S.C. § 3516 note). The IQA also directs OMB to include three specific requirements in its
12 guidelines: (1) that federal agencies develop their own information quality guidelines within one
13 year of the issuance of OMB's guidelines; (2) that federal agencies establish administrative
14 mechanisms for affected persons to seek correction of information that does not comply with
15 OMB's guidelines; and (3) that federal agencies report periodically to OMB on the number and
16 nature of complaints that they receive regarding the accuracy of the information they disseminate.
17 See id. at § 515(b)(2). Neither the IQA itself nor its legislative history provides a mechanism for
18 judicial review of an administrative decision concerning a request for correction of information
19 or of the quality of information.¹ Indeed, the IQA provides no avenue for judicial relief at all.

20 1. OMB Guidelines

21 OMB issued proposed guidelines implementing the IQA on June 28, 2001, 66 Fed. Reg.
22 34489 (June 28, 2001), then, after a period for public comment, published revised guidelines on
23

24 ¹ The legislative history regarding the IQA includes the following sentence in the
25 Conference Report and Committee Report accompanying the omnibus appropriations bill: "The
26 conferees include a new provision requiring OMB to develop guidelines for ensuring and
27 maximizing the quality, objectivity, utility, and integrity of information disseminated by Federal
28 agencies as proposed by the House." H.R. CONF. REP. NO. 106-1033, at 396 (2000); see also
H.R. REP. NO. 106-756, at 83 (2000) (committee report containing nearly identical language).

1 September 28, 2001, 66 Fed. Reg. 49718 (Sept. 28, 2001). Following another period for
2 additional comment, OMB published final guidelines on February 22, 2002. See 67 Fed. Reg.
3 8452 (Feb. 22, 2002). In its final guidelines, OMB provides guidance to federal agencies for
4 ensuring and maximizing the quality of the information they disseminate to the public.
5 Generally, the guidelines require federal agencies to undertake four principal responsibilities:
6 (1) to “adopt specific standards of quality that are appropriate for the various categories of
7 information they disseminate”; (2) to “develop a process for reviewing the quality . . . of
8 information before it is disseminated”; (3) to “establish administrative mechanisms allowing
9 affected persons to seek and obtain, where appropriate, timely correction of information
10 maintained and disseminated by the agency that does not comply with OMB or agency
11 guidelines”; and (4) to provide OMB with reports regarding the agencies’ information quality
12 guidelines and any information quality complaints they receive. 67 Fed. Reg. at 8458-59.²

13 The consistent theme throughout the OMB guidelines is that “agencies must apply these
14 standards flexibly,” “in a common-sense and workable manner,” and that the “guidelines . . . [do]
15 not impose unnecessary administrative burdens that would inhibit agencies from continuing to
16 take advantage of the Internet and other technologies to disseminate information that can be of
17 great benefit and value to the public.” Id. at 8453. For example, the OMB guidelines provide
18 that federal agencies are to “adopt a basic standard of quality . . . as a performance goal,” and
19 “[q]uality is to be ensured and established at levels appropriate to the nature and timeliness of the
20 information to be disseminated.” Id. Recognizing that the guidelines “cannot be implemented by
21 each agency in the same way,” OMB directs agencies to “incorporate [quality standards] into
22 their *existing agency information resources management and administrative practices* rather than
23 create new and potentially duplicative or contradictory processes.” Id. (emphasis added).

24
25 ² The OMB guidelines explain that an agency’s “pre-dissemination review” of information
26 applies only “to information that the agency first disseminates on or after October 1, 2002,”
27 while the “agency’s administrative mechanisms . . . apply to information that the agency
28 disseminates on or after October 1, 2002, regardless of when the agency first disseminated the
information.” Id. at 8458.

1 Agencies thus maintain substantial discretion in determining how best to ensure the quality of the
2 information they disseminate.

3 With respect to the administrative correction mechanisms, the OMB guidelines require
4 agencies to “specify appropriate time periods for agency decisions on whether and how to correct
5 the information” and to “establish an administrative appeal process to review the agency’s initial
6 decision.” Id. at 8459. OMB makes clear, however, that agencies should correct information
7 only “where appropriate,” and that “[t]hese administrative mechanisms shall be flexible” and
8 “appropriate to the nature and timeliness of the disseminated information.” Id. As explained in
9 the preamble to the OMB guidelines:

10 Agencies, in making their determination of whether or not to correct information,
11 may reject claims made in bad faith or without justification, and **are required to**
12 **undertake only the degree of correction that they conclude is appropriate for**
13 **the nature and timeliness of the information involved**, and explain such
14 practices in their annual fiscal year reports to OMB.

15 Id. at 8458 (emphasis added).

16 By their terms, the OMB guidelines apply only to “information” that is “disseminated” by
17 a federal agency. Id. The term “information” includes “any communication or representation of
18 knowledge such as facts or data,” but “does not include opinions, where the agency’s
19 presentation makes it clear that what is being offered is someone’s opinion rather than fact or the
20 agency’s views.” Id. at 8460. The term “dissemination” means “agency initiated or sponsored
21 distribution of information to the public,” but “does not include distribution limited to
22 correspondence with individuals or persons, press releases, archival records, public filings,
23 subpoenas or adjudicative processes.” Id.

24 2. HHS Guidelines

25 On October 1, 2002, pursuant to the IQA and the OMB guidelines, the Department of
26 Health and Human Services implemented its own “Guidelines for Ensuring the Quality of
27
28

1 Information Disseminated to the Public.” See www.hhs.gov/infoquality.³ The HHS guidelines
2 include department-wide umbrella guidelines and agency-specific guidelines, including the
3 guidelines of the FDA.⁴

4 In its guidelines, HHS declares its commitment “to integrating the principle of
5 information quality into every phase of information development, including creation, collection,
6 maintenance, and dissemination.” *Id.* at § A. HHS recognizes that it has flexibility in
7 implementing its guidelines given that OMB understood that OMB’s guidelines could not be
8 implemented in the same way by all agencies and wanted agencies, instead, to apply their
9 guidelines “in a common sense, workable manner.” *Id.* at § B. HHS views its guidelines as “an
10 evolving document and process.” *Id.* at § D.1. Consistent with OMB guidance, the HHS
11 guidelines do not apply to press releases, archival material, or opinions apart from the agency’s
12 views. *Id.*

13 _____ The HHS guidelines also establish a process for information correction requests and
14 appeals. *Id.* at § E. Nothing in the HHS guidelines abrogates the OMB guideline statement that
15 the agency must undertake only the degree of correction it deems appropriate. See generally *id.*
16 HHS reminds complainants that they bear the burden of proof to establish the need for and the
17 type of correction sought. *Id.* A correction request must include specific reasons for asserting
18 that the information at issue violates OMB, HHS, or agency-specific guidelines and “specific
19 recommendations for correcting the information.” *Id.* The agency aims to respond to correction
20 requests within 60 days of receipt, and a party may appeal the agency’s decision within 30 days
21 after that. *Id.* Such an appeal involves “reconsideration within the agency.” *Id.* The agency
22 strives to decide any appeals within 60 days. *Id.* “If the request requires more than 60 calendar
23 days to resolve, the agency will inform the complainant” and provide an “estimated decision
24 _____

25 ³ HHS initially posted draft guidelines on May 1, 2002 and solicited public comments for a
26 sixty day period. See 67 Fed. Reg. 61343, 61344 (Sept. 30, 2002).

27 ⁴ The FDA information quality guidelines implement and reiterate the OMB and HHS
28 guidelines. See <http://aspe.hhs.gov/infoquality/Guidelines/fda.shtml>.

1 date.” Id.

2 The HHS guidelines specifically state that “[e]xisting . . . procedures for rule-makings
3 and other formal agency actions already provide well established procedural safeguards that
4 allow affected persons to raise information quality issues on a timely basis. Accordingly,
5 agencies will use these existing procedures to respond to information quality complaints that
6 arise in this process.” Id.

7 **B. The Controlled Substances Act**

8 The Controlled Substances Act, 21 U.S.C. § 801, et seq. (“CSA”), makes it unlawful to
9 “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or
10 dispense” any controlled substance, “[e]xcept as authorized by [21 U.S.C. 801-904].” 21 U.S.C.
11 § 841(a)(1); see United States v. Moore, 423 U.S. 122, 131, 135 (1975). The CSA imposes
12 criminal and civil penalties for violations. See 21 U.S.C. §§ 841-863.

13 The CSA classifies controlled substances according to their inclusion in one of five
14 schedules. The listing of a drug or other substance in one of the five schedules depends on
15 whether (and to what extent) it has a currently accepted medical use,⁵ its relative potential for
16 abuse, and the degree of psychological or physical dependence to which its use may lead. 21
17 U.S.C. § 812(b). The CSA imposes restrictions on the manufacture, distribution, and dispensing
18 of the substance according to the schedule in which it has been placed. See 21 U.S.C. §§ 821-
19 829. Marijuana is included in schedule I, the most restrictive schedule, because it has “a high
20 potential for abuse,” “no currently accepted medical use in treatment in the United States,” and
21 “a lack of accepted safety for use . . . under medical supervision.” 21 U.S.C. § 812(b)(1)(A)-(C);
22 U.S. v. Oakland Cannabis Buyers’ Co-op., 532 U.S. 483, 492 (2001).

23
24

 5 The DEA Administrator has applied a “five-part test for determining whether a drug is in
25 ‘currently accepted medical use’: ‘(1) The drug’s chemistry must be known and reproducible; (2)
26 there must be adequate safety studies; (3) there must be adequate and well-controlled studies
27 proving efficacy; (4) the drug must be accepted by qualified experts; and (5) the scientific
28 evidence must be widely available.’” Alliance for Cannabis Therapeutics v. DEA (“ACT”), 15
F.3d 1131, 1135 (D.C. Cir. 1994) (quoting 57 Fed. Reg. 10499, 10506 (March 26, 1992)).

1 The CSA establishes “a ‘closed’ system of drug distribution” for all controlled
2 substances. H.R. REP. NO. 91-1444 at 6 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4571; see
3 also Moore, 423 U.S. at 141 (The Act “authorizes transactions within ‘the legitimate distribution
4 chain’ and makes all others illegal”) (quoting H.R. REP. NO. 1444, supra, at 3, reprinted in 1970
5 U.S.C.C.A.N. at 4589). Only persons registered with the Drug Enforcement Administration
6 (“DEA”) may manufacture, distribute, or dispense controlled substances, and only to the extent
7 authorized by their DEA registration. 21 U.S.C. § 822(a), (b).

8 Schedule I controlled substances such as marijuana carry even greater restrictions under
9 federal law. No individual or entity may distribute or dispense a schedule I controlled substance
10 except as part of a strictly controlled research project that has been registered with DEA and
11 approved by the Food and Drug Administration (“FDA”). 21 U.S.C. § 823(f); 21 C.F.R. §§
12 1301.18, 1301.32; 28 C.F.R. § 0.100(b). By contrast, drugs listed in schedules II through V may
13 be dispensed and prescribed for medical use. Physicians, pharmacies, and other legitimate
14 handlers of drugs listed in schedules II through V are the core participants in the closed
15 distribution chain created by Congress to maintain adequate controls over controlled substances.
16 See S. REP. NO. 98-225 at 261-62 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3443-44; 21
17 U.S.C. §§ 822-23. They must therefore comply with stringent statutory and regulatory provisions
18 that mandate registration with DEA, establish security controls, impose recordkeeping and
19 reporting obligations, require distributors to use DEA-issued order forms for all distributions of
20 schedule I and II drugs, and allow controlled substances to be dispensed only pursuant to
21 prescriptions issued in the manner specified in the DEA regulations. See 21 U.S.C. §§ 821-829;
22 21 C.F.R. §§ 1301-1306.

23 The CSA also establishes an exclusive set of statutory procedures under which controlled
24 substances that have been placed in schedule I (or any other schedule) may be transferred to
25 another schedule or be entirely removed from the schedules. 21 U.S.C. § 811(a). See 21 U.S.C.
26 § 811(a); Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1137 (D.C. Cir. 1994)
27 (“ACT”) (upholding Administrator’s decision declining to transfer marijuana from schedule I to

1 schedule II). The responsibility for determining whether a drug should be rescheduled “is
2 assigned to the Attorney General in consultation with the Secretary of Health and Human
3 Services (“HHS”). The Attorney General has delegated his functions to the Administrator of the
4 DEA.” Gettman v. DEA, 290 F.3d 430, 432 (D.C. Cir. 2002) (citing 21 U.S.C. § 811(b) and 28
5 C.F.R. § 0.100(b)).

6 **II. Factual and Procedural Background**

7 **A. Jon Gettman’s Unsuccessful Petition to the Drug Enforcement 8 Administration Seeking Rescheduling of Marijuana and HHS’s Statements 9 to DEA**

10 On July 10, 1995, Jon Gettman petitioned the DEA under the rescheduling provisions of
11 the CSA to reschedule certain controlled substances, including marijuana. See Department of
12 Justice, Drug Enforcement Administration, “Notice of Denial of Petition,” 66 Fed. Reg. 20038
13 (April 18, 2001). Pursuant to the CSA, the Administrator of the DEA consulted with HHS. Id.
14 at 20038, 20039. In response, an HHS official, the Assistant Secretary for Health and Surgeon
15 General, sent a letter and attached analysis to the DEA Administrator. Id. at 20039. DEA chose
16 to publish the Assistant Secretary and Surgeon General’s letter and accompanying analysis in the
17 Federal Register. Id. The Assistant Secretary and Surgeon General’s letter includes the
18 statement that plaintiff now seeks to challenge that marijuana has no currently accepted medical
19 use in treatment in the United States. See id. at 20039; Compl. ¶ 9 (citing 66 Fed. Reg. 20039)
20 see also 66 Fed. Reg. 20038, 20051 (repeating statement in a heading).

21 “Based on the HHS evaluation and all other relevant data, DEA . . . concluded that there
22 is no substantial evidence that marijuana should be removed from schedule I” under the CSA. 66
23 Fed. Reg. at 20038. Accordingly, DEA denied Mr. Gettman’s petition. Id.; see also generally
24 Gettman, 290 F.3d 430.

25 **B. Plaintiff’s IQA Request for Correction**

26 On October 6, 2004, HHS received a request from plaintiff for correction of certain
27 statements pursuant to the IQA and the OMB and HHS IQA guidelines. See Request for
28 Correction, available at <http://aspe.hhs.gov/infoquality/requests.shtml> (request no. 20). Plaintiff

1 requested correction of four statements⁶ contained in the Surgeon General's letter to the DEA
 2 Administrator and the accompanying HHS analysis that DEA published in the Federal Register.
 3 Id. 1-2, citing 66 Fed. Reg. 20038, 20039, 20051, 20052. Following three interim responses,
 4 HHS responded to plaintiff's Request for Correction on April 20, 2005, noting in pertinent part:

5 Both the Office of Management and Budget (OMB) and the HHS Information Quality
 6 Guidelines provide that federal government agencies may use existing processes that are
 7 in place to address correction requests from the public. In the case of marijuana HHS
 8 currently is in the process of conducting a review in response to the petition for change
 9 [in scheduling under the CSA] that was submitted to DEA in October 2002 by the
 10 Coalition for Rescheduling Cannabis (CRC), an association of public-interest groups and
 11 medical cannabis patients that includes the ASA. In the course of the review, HHS will
 12 evaluate all the publicly available peer reviewed literature on the efficacy of marijuana.

13 April 20, 2005 Response, available at <http://aspe.hhs.gov/infoquality/requests.shtml> (request no.
 14 20) (footnote omitted). HHS received plaintiff's Request for Reconsideration on May 20, 2005.

15 See Request for Reconsideration, available at <http://aspe.hhs.gov/infoquality/requests.shtml>

16 _____
 17 6 Those four statements were:

- 18 • “[T]here have been no studies that have scientifically assessed the efficacy of
 19 marijuana for any medical condition” Request for Correction 1-2, quoting 66 Fed.
 20 Reg. 20051 (plaintiff's Request mis-cited this statement as appearing on page
 21 20052);
- 22 • “A material conflict of opinion among experts precludes a finding that marijuana
 23 has been accepted by qualified experts. *At this time*, it is clear that there is not a
 24 consensus of medical opinion concerning medical applications of marijuana.” See
 25 Request for Correction at 2, quoting 66 Fed. Reg. 20051-52 (emphasis added;
 26 italicized portion not quoted by plaintiff) (plaintiff's Request mis-cited this
 27 statement as appearing in full on page 20052);
- 28 • “[A] complete scientific analysis of all the chemical components found in
 marijuana has not been conducted.” See Request for correction at 2, quoting 66
 Fed. Reg. 20051; and
- Marijuana “has no currently accepted medical use in treatment in the United
 States[.]” See Request for Correction at 2, quoting 66 Fed. Reg. 20039 (January
 17, 2001 letter from the Surgeon General to the DEA Administrator).

As noted in the text, in its Complaint plaintiff purports to challenge HHS's alleged denial of
 plaintiff's request for correction of only the fourth statement listed above. See Compl. ¶¶ 7, 16,
 Request for Relief. Cf. supra note 5 (discussing five-part test used by the DEA Administrator to
 evaluate whether a drug has a currently accepted medical use in treatment in the U.S.).

1 (request no. 20). In its Request for Reconsideration, plaintiff complained that the government's
2 response to the rescheduling petition may take a long time. *Id.* Following six interim responses,
3 HHS responded to plaintiff's Request for Reconsideration on June 12, 2006. *See* Response to
4 Request for Reconsideration, available at <http://aspe.hhs.gov/infoquality/requests.shtml> (request
5 no. 20). The agency acknowledged that plaintiff was arguing that "the CSA process should not
6 be utilized because of the length of time it involves," but stated that "a comprehensive review is
7 essential to ensure that our recommendation [to DEA] is accurate." *Id.*

8 Plaintiff filed its Complaint in this action on February 21, 2007. Plaintiff's Complaint
9 seeks declaratory and injunctive relief concerning only one of the four statements identified in its
10 administrative request, the statement that marijuana "has no currently accepted medical use in
11 treatment in the United States[.]" Compl. ¶¶ 7, 16, Request for relief, all quoting 66 Fed. Reg.
12 20039 (January 17, 2001 letter from the Assistant Secretary for Health and Surgeon General to
13 the DEA Administrator). Although HHS has not denied plaintiff's request for correction,
14 plaintiff alleges that the Response to Request for Reconsideration "effectively" did so. *Id.* ¶ 22.

15 ARGUMENT

16 III. Plaintiff's Claims Fail the Case-or-Controversy Requirements of Article III.

17 "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the
18 power to declare the law, and when it ceases to exist, the only function remaining to the court is
19 that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better*
20 *Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1968)). As
21 explained below, plaintiff has failed its burden to establish this Court's subject matter
22 jurisdiction over its claims because they do not meet the "bedrock" constitutional requirement
23 that they present a justiciable "case or controversy" for this Court's decision. *See Valley Forge*
24 *Christian Coll. v. Am. United for Separation of Church & State*, 454 U.S. 464, 471 (1982).

25 A. Plaintiff Lacks Standing to Pursue Its Claims in This Court.

26 Article III of the U.S. Constitution "confines the federal courts to adjudicating actual
27 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). The doctrine of

1 “standing is an essential and unchanging part of the case-or-controversy requirement of Article
2 III,” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). “[T]he party invoking federal
3 jurisdiction bears the burden of establishing its existence.” Steel Co., 523 U.S. at 104. Thus, at
4 the pleadings stage “[i]t is the responsibility of the complainant clearly to allege facts
5 demonstrating that he is a proper party to invoke . . . the exercise of the court’s remedial
6 powers.” Renne v. Geary, 501 U.S. 312, 315 (1991), quoting Bender v. Williamsport Area
7 School Dist., 475 U.S. 534, 546 n.8 (1986). Because standing goes to the power of a federal
8 court to adjudicate a case, resolution of the standing question is necessarily antecedent to any
9 decision on the merits. Steel Co., 523 U.S. at 94.

10 The standing requirement of Article III requires a plaintiff, “at an irreducible minimum,”
11 to show: (1) a distinct and palpable injury, actual or threatened; (2) that the injury is fairly
12 traceable to the defendant’s conduct; and (3) that a favorable decision is likely to redress the
13 complained-of injury. E.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528
14 U.S. 167, 180-81 (2000); Bennett v. Spear, 520 U.S. 154, 162 (1997); Lujan v. Defenders of
15 Wildlife, 504 U.S. 555, 560 (1992); Valley Forge Christian Coll., 454 U.S. at 472; Look v.
16 United States, 113 F.3d 1129, 1130 (9th Cir. 1997). Moreover, a plaintiff must also satisfy the
17 prudential requirements for standing that have been adopted by the judiciary. See Elk Grove
18 Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11-12 (2004).

19 An organizational plaintiff such as ASA must meet these standing requirements. An
20 organization may have standing to sue either on its own behalf (“organizational” standing) or on
21 behalf of its members (“representational” standing). See, e.g., Smith v. Pacific Properties and
22 Dev. Corp., 358 F.3d 1097, 1101 (9th Cir. 2004). An organization’s “representational standing is
23 contingent upon the standing of its members to bring suit,” while its “organizational standing is
24 separate from the standing of its members, turning instead on whether the organization itself has
25 suffered an injury in fact.” Id. (citations omitted). Furthermore:

26 [t]o establish representational standing, [an organization] must demonstrate that: “(a) its
27 members would have standing to sue in their own right; (b) the interests it seeks to

1 vindicate are germane to the organization's purpose; and (c) neither the claim asserted nor
2 the relief requested requires the participation of individual members in the lawsuit."

3 Id. at 1101-02, quoting Hunt v. Washington Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).

4 Here, plaintiff appears to argue that it has both representational and organizational standing. See,
5 e.g., Compl. ¶ 7. Both claims are mistaken.

6 **1. Plaintiff Lacks Representational Standing.**

7 As noted above, to establish standing to sue as a representative of its membership,
8 plaintiff must show three things. First, the group must identify actual members who have
9 suffered an injury "of the sort that would make out a justiciable case had the members
10 themselves brought suit." Warth v. Seldin, 422 U.S. at 511; see also Arizonans for Official
11 English v. Arizona, 520 U.S. 43, 65-66 (1997) ("association has standing to sue" on behalf of its
12 members "only if its members would have standing to sue in their own right" on basis of
13 "concrete injury"). Second, the group must show that "neither the claim asserted nor the relief
14 requested requires the participation of individual members in the lawsuit." United Food &
15 Commercial Workers Local 751 v. Brown Group, Inc., 517 U.S. 544, 553 (1996) (quoting Hunt,
16 432 U.S. at 343). Third, the group must show that "the interests it seeks to protect are germane
17 to the organization's purpose." Id. (quoting Hunt, 432 U.S. at 343). Plaintiff meets none of
18 these tests here.

19 At the outset, plaintiff does not identify a single member who is suffering any alleged
20 injury fairly traceable to HHS's statement that marijuana has no currently accepted medical use.
21 To the contrary, the only members plaintiff does identify are those who (it alleges) have obtained
22 and used marijuana regardless of what HHS says.⁷ See Compl. ¶ 8.a-d.

23 Even if plaintiff had identified an individual member with a potentially justiciable claim
24 for relief, however, resolution of that claim would require the participation of that individual.

25 ⁷ To the extent plaintiff alleges that the individual members it does identify suffered a delay
26 in marijuana use as a result of the HHS statement, a past injury without likelihood of recurrence
27 is not cognizable for standing purposes. See Fortyune v. Am. Multi-Cinema, Inc., 364 F.3d
28 1075, 1081-82 (9th Cir. 2004).

1 Associational standing does not exist where “claims are not common to the entire membership,
2 nor shared by all in equal degree,” but rather “whatever injury may have been suffered is peculiar
3 to the individual members concerned, and both the fact and extent of the injury would require
4 individualized proof.” Lake Mohave Boat Owners Ass’n v. Nat’l Park Serv., 78 F.3d 1360, 1367
5 (9th Cir. 1996) (citing Warth, 422 U.S. at 515-16, and Associated Gen. Contractors, Inc. v. Coal.
6 for Econ. Equity, 950 F.2d 1401, 1408 (9th Cir. 1991)). Individual participation would be
7 necessary here to determine, e.g., whether the individuals were actually aware of HHS’s
8 statement in question; whether they relied on it; whether they were actually injured by any such
9 reliance; and whether plaintiff’s requested injunctive and declaratory relief would redress any
10 such injury although, e.g., marijuana would nonetheless remain a schedule I controlled substance
11 under federal law. For numerous reasons, therefore, the “individual participation of each injured
12 party” would be “indispensable to proper resolution of the case.” Warth, 422 U.S. at 511.

13 With respect to the third element necessary for representational standing, plaintiff has not
14 sufficiently alleged that its interest in HHS’s statement concerning the medical community’s
15 acceptance of marijuana is germane to plaintiff’s organizational purpose. According to the
16 Complaint, plaintiff “has as its primary purpose working to expand and protect the rights of
17 patients to use marijuana for medical purposes,” which the Complaint construes to “includ[e]
18 providing outreach and education to the public regarding the use of marijuana for medical
19 purposes.” Compl. ¶ 7. Plaintiff’s website, however, includes a different self-described
20 “mission” statement, which reads in full: “The mission of Americans for Safe Access is to ensure
21 safe and legal access to cannabis (marijuana) for therapeutic uses and research.” See
22 <http://www.safeaccessnow.org/section.php?id=3> (last visited May 25, 2007) (describing “Our
23 Mission”). Plaintiff has not alleged how a correction of defendants’ statement concerning the
24 medical community’s acceptance of marijuana would impact the safety or legality of the drug.
25 Plainly, it would not make marijuana use any more (or less) safe. Nor would a correction change
26 the fact that DEA continues to list marijuana as a schedule I drug. Accordingly, the relief

1 plaintiff seeks here is not germane to plaintiff's stated core mission of ensuring that marijuana
2 use for medical purposes is safe and legal.

3 For all of these reasons, plaintiff lacks representational standing.

4 **2. Plaintiff Lacks Organizational Standing.**

5 Plaintiff's claims fare no better to the extent that the group seeks to assert standing in its
6 own right. For an association to sue on its own behalf as an organization, it "must, like any other
7 plaintiff, satisfy the constitutional and prudential considerations of standing." J.L. v. SSA, 971
8 F.2d 260, 268 n.8 (9th Cir. 1992) (citing Hong Kong Supermarket v. Kizer, 830 F.2d 1078, 1081
9 (9th Cir. 1987)). Plaintiff fails both tests. First, the group has suffered no injury to its ability to
10 function as an advocacy organization. Second, an interest in functioning as an advocacy
11 organization is not within the zone of interests protected or regulated by the IQA.

12 **a. Plaintiff Has Alleged No Legally Cognizable Injury to Its**
13 **Ability to Function as an Organization.**

14 As a general rule, every plaintiff "must assert his own legal rights and interests, and
15 cannot rest his claim to relief on the legal rights or interests of third parties." Warth, 422 U.S. at
16 499. The federal courts are not a soapbox to air arguments "at the behest of organizations or
17 individuals who seek to do no more than vindicate their own value preferences," Sierra Club v.
18 Morton, 405 U.S. 727, 740 (1972), or assert "generalized grievances more appropriately
19 addressed in the representative branches." Elk Grove, 542 U.S. at 12 (citation omitted). Thus, a
20 mere policy "'interest in a problem,' no matter how longstanding the interest and no matter how
21 qualified the organization is in evaluating the problem" is insufficient to create standing. Sierra
22 Club, 405 U.S. at 739.

23 [I]f a 'special interest' in [a] subject were enough to entitle [one organization] to
24 commence this litigation, there would appear to be no objective basis upon which
25 to disallow a suit by any other bona fide 'special interest' organization however
small or short-lived. And if any group with a bona fide special interest could
initiate such litigation, it is difficult to perceive why any individual citizen with
the same bona fide special interest would not also be entitled to do so.

26 Id. Where the "[f]rustration of an organization's objectives" alleged in a complaint is a policy-
27 oriented "[c]onflict between a defendant's conduct and an organization's mission," it falls under

1 the rubric of “the type of abstract concern that does not impart standing,” Ctr. for Law & Educ. v.
 2 Dep’t of Educ., 396 F.3d 1152, 1161-62 (D.C. Cir. 2005) (quoting NTEU v. United States, 101
 3 F.3d 1423, 1429 (D.C. Cir. 1996)), and the policy dispute does not lose this non-justiciable
 4 character merely because the organization may have committed “substantial labors and
 5 resources” to advise supporters and interested parties about how to cope with the policy.
 6 Yniguez v. Mofford, 130 F.R.D. 410, 414 (D. Ariz. 1990), aff’d in part, rev’d in part on other
 7 grounds, 939 F.2d 727 (9th Cir. 1991), on reh’g en banc, 69 F.3d 920 (9th Cir. 1995), rev’d, 520
 8 U.S. 43 (1997).

9 In this case, plaintiff alleges that it “has devoted significant resources to combat” HHS’s
 10 allegedly “false statement, including” those aimed at “producing and disseminating educational
 11 materials” disagreeing with the government. Compl. ¶ 7. The mere fact that the group may be
 12 spending more on its activities apparently advocating marijuana use is insufficient to confer
 13 standing. See Resident Councils of Wash. v. Thompson, No. C04-1691Z, 2005 WL 1027123 at
 14 * 7 (W.D. Wash. May 2, 2005) (allegation that organization “has devoted resources towards
 15 assisting in developing [a] pilot program” insufficient to establish standing where “these
 16 activities amount to mere issue advocacy, rather than harm to the organization’s ability to offer
 17 services to its members”).⁸

18
 19 ⁸ The Supreme Court’s decision in Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982),
 20 is not to the contrary. In that case, a group dedicated to helping potential home buyers acquire
 21 truthful information about the availability of houses for sale alleged that its efforts were being
 22 frustrated by dishonest real estate agents, who were telling people lies about the availability of
 23 housing in hopes of steering black buyers and white buyers into different markets. The
 24 organization alleged that this racially-motivated deception “perceptibly impaired [its own] ability
 25 to provide counseling and referral services for low- and moderate-income homeseekers” and
 26 caused a “consequent drain on the organization’s resources” when it had to work that much
 27 harder to disseminate truthful information. Id. at 379. That direct impairment of informational
 28 efforts was held to be a “concrete and demonstrable injury” sufficient to give the organization
 standing to sue on its own behalf. Id. Nothing in Havens, however, remotely suggests that the
 organization would similarly have standing to challenge any *government* policy or dissemination
 of information merely because the organization might disagree with the government’s underlying
 judgment and want to give its clients competing information. By that logic, an organization that
 (continued...)

1 Moreover, it bears repeating that these alleged advocacy expenditures are not directly
2 related to plaintiff's stated organizational mission of "ensur[ing] safe and legal access to cannabis
3 (marijuana) for therapeutic uses and research." See
4 <http://www.safeaccessnow.org/section.php?id=3> (last visited May 25, 2007) (describing "Our
5 Mission"). As noted, plaintiff's statements disagreeing with HHS's judgment may encourage
6 individuals to use marijuana, but they do not make such use any more or less safe or legal.

7 **b. The Organizational Interests of Plaintiff Are Not Within the**
8 **Zone of Interests Protected or Regulated by the IQA.**

9 Even if the plaintiff could show some injury to its ability to function as an advocacy
10 organization, it would still lack standing because its ability to function as an advocacy
11 organization is not within the "zone of interests protected by the law invoked." Elk Grove, 542
12 U.S. at 12 (quoting Allen v. Wright, 468 U.S. at 751). A plaintiff cannot meet this test merely by
13 alleging that a regulatory scheme protects or regulates someone else's interests in a way that
14 might indirectly affect his own. See Air Courier Conference v. Am. Postal Workers Union, 498
15 U.S. 517, 522-31 (1991); Lujan, 497 U.S. at 883. He must show that "the procedures in question
16 are *designed* to protect [or regulate] some concrete interest of his that is the ultimate basis of his
17 standing." Ctr. for Law, 396 F.3d at 1157 (quoting Lujan, 504 U.S. at 573 n.8) (emphasis in Ctr.
18 for Law). In determining the "zone of interest," the relevant provision is the "statutory provision
19 whose violation forms the legal basis for [plaintiffs '] complaint." Lujan, 497 U.S. at 883. See
20 also Clarke v. Securities Industry Ass'n, 479 U.S. 388, 40 n.16 (1987) (noting that in the context
21 of an APA claim, the "zone of interests" test "is most usefully understood as a gloss on the
22 meaning of [5 U.S.C.] § 702."). Here that provision is the IQA, and plaintiff does not meet its
23 burden.

24
25
26 8(...continued)
27 believes the federal income tax to be unconstitutional would have standing to challenge
28 government warnings about the consequences of tax evasion.

1 As discussed supra, the IQA directs OMB to issue “guidelines” that provide “policy and
2 procedural guidance *to Federal agencies* for ensuring and maximizing the quality, objectivity,
3 utility, and integrity of information (including statistical information) disseminated by Federal
4 agencies” See 44 U.S.C. § 3516 note (emphasis added). Indeed, the IQA simply makes no
5 “mention of advocacy organizations’ interests.” Ctr. for Law, 396 F.3d at 1157. Nor does it
6 regulate the conduct of or information dissemination by advocacy groups. The organizational
7 concerns of the plaintiff are therefore not within the zone of interests of the relevant statute. Nor
8 can plaintiff argue its organizational advocacy concerns are within the zone of interests of the
9 other source of law it identifies, the OMB and HHS IQA guidelines, since those guidelines
10 simply implement the IQA. See HHS Guidelines at ¶ D.1. (“The Guidelines provide policy and
11 procedural guidance to HHS staff and are intended to inform the public about agency quality
12 assurance policies and procedures.”); OMB Guidelines, 67 Fed. Reg. at 8452 (“OMB has
13 designed the guidelines to help agencies . . .”). Cf. INS v. Legalization Assistance Project, 510
14 U.S. 1301, 1305 (1993) (O’Connor, Circuit Justice) (zone of interests test equally applicable in
15 the case of litigants who wish to invoke regulations).

16 For all of these reasons, plaintiff also lacks organizational standing, and its claim should
17 be dismissed.

18 **B. Plaintiff’s Alleged Harm is Not Redressable in This Court**

19 To meet the case or controversy requirement of Article III, a plaintiff must also show that
20 it is “‘likely,’ as opposed to merely ‘speculative,’ that its alleged injury will be ‘redressed by a
21 favorable decision.’” Lujan, 504 U.S. at 561 (citation omitted). Accordingly, “[r]elief that does
22 not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very
23 essence of the redressability requirement.” See Steel Co., 523 U.S. at 107. Here, the relief
24 plaintiff seeks is a declaration that the agency’s response to plaintiff’s IQA petition was
25 improper, and an injunction “enjoining defendants from continuing to disseminate statements
26 that marijuana ‘has no currently accepted medical use in treatment in the United States;’ and . . .
27 requiring HHS to make appropriate corrections to all [such] statements that it has

1 disseminated[.]” Compl., Part VII (“Relief Sought”). As we will discuss in more detail below,
2 plaintiff’s Complaint fails to state a claim upon which relief may be granted because HHS has
3 not “disseminated” the statement in question under the terms of the IQA and, moreover, the APA
4 waiver of sovereign immunity does not apply to plaintiff’s claim for a number of reasons. Even
5 if plaintiff had stated a proper claim, and this Court could adjudicate that claim, it still fails
6 because plaintiff’s alleged injury would not be redressed by a decision in plaintiff’s favor.

7 “[M]arijuana is a controlled substance within the meaning of [21 U.S.C.] § 841(a),” the
8 CSA.⁹ See U.S. v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1099 (N.D. Cal. 1998). As
9 discussed above, it is a schedule I controlled substance under the CSA. Accordingly, under the
10 CSA no individual or entity may distribute or dispense marijuana except as part of a strictly
11 controlled research project that has been registered with DEA and approved by the FDA. 21
12 U.S.C. § 823(f); 21 C.F.R. §§ 1301.18, 1301.32; 28 C.F.R. § 0.100(b).

13 This would remain the case even if this Court were to grant plaintiff the relief it seeks and
14 order HHS to somehow “correct” its 2001 statement that marijuana has no currently accepted
15 medical use. It would therefore remain difficult for plaintiff to effectively convince its members
16 to use marijuana, such use would remain “impeded,” Compl. ¶ 24, and unspecified individual
17 patients’ “access” to marijuana, id. ¶ 23, would remain sharply limited, since distribution of the
18 drug outside already-permissible, albeit strictly controlled, circumstances would remain a crime.
19 For these reasons, plaintiff’s purported injuries are not redressable in this Court and plaintiff’s
20 Complaint should be dismissed for failure to meet the case-or-controversy requirements of
21 Article III.¹⁰

24 9 The Ninth Circuit has held that the Controlled Substances Act’s prohibition on the
25 distribution, cultivation, or possession of marijuana and other controlled substances “is
26 constitutional under the Commerce Clause.” United States v. Bramble, 103 F.3d 1475, 1479 (9th
27 Cir. 1996). [add cite to Raich in SCT, which says it reaches intrastate growing for pers med use.]

28 10 Put another way, these alleged harms are not fairly traceable to the fact that HHS has not
granted plaintiff’s IQA request for correction.

1 Plaintiff's claim is not redressable even though plaintiff may seek (indeed, has sought) to
2 avail itself of the CSA procedure by which DEA may choose to list marijuana under a less
3 restrictive schedule. See ACT, 15 F.3d at 1133 (discussing unsuccessful petitions to reschedule
4 marijuana). It is that existing, established procedure through which HHS informed plaintiff it
5 would consider the merits of plaintiff's Request for Correction. See April 20, 2005 Response,
6 available at <http://aspe.hhs.gov/infoquality/requests.shtml> (request no. 20).

7 The CSA requires DEA to consider eight factors concerning a controlled substance when
8 reviewing a rescheduling petition on that substance:

- 9 (1) Its actual or relative potential for abuse.
- 10 (2) Scientific evidence of its pharmacological effect, if known.
- 11 (3) The state of current scientific knowledge regarding the drug or other substance.
- 12 (4) Its history and current pattern of abuse.
- 13 (5) The scope, duration, and significance of abuse.
- 14 (6) What, if any, risk there is to the public health.
- 15 (7) Its psychic or physiological dependence liability.
- 16 (8) Whether the substance is an immediate precursor of a substance already controlled
17 under this subchapter.

18 21 U.S.C. § 811(c). "Although the recommendations of HHS are binding on the DEA as to
19 scientific and medical considerations involved in the eight-factor test, the ultimate decision as to
20 whether to initiate rulemaking proceedings to reschedule a controlled substance is made by the
21 DEA." Gettman, 290 F.3d at 432 (citing 21 U.S.C. § 811(a), (b)).¹¹ As an initial matter, the
22 exclusive means to seek judicial review of a rescheduling decision is contained in the CSA itself,
23 21 U.S.C. § 877, not the IQA or the APA. In any event, an argument in favor of redressability
24 that rests on possible future actions by a non-party (DEA) cannot succeed because where, as here,
25 "a plaintiff seeks injunctive or declaratory relief only, . . . standing will not lie if adjudication . . .
26 rests upon contingent future events that may not occur as anticipated or indeed may not occur at
27 all." Pryor v. National Collegiate Athletic Ass'n, 288 F.3d 548, 561 (3rd Cir. 2002) (internal
28 quotation marks and citations omitted). In such cases, where

11 A drug would not be appropriate for schedule I if the DEA determines it has a currently
accepted medical use in this United States. See 21 U.S.C. § 812(b). Such a drug may be
appropriate for schedule II. Id.

1 [t]he existence of one or more of the essential elements of standing depends on the
2 unfettered choices made by independent actors not before the courts and whose exercise
3 of broad and legitimate discretion the courts cannot presume either to control or to
4 predict, . . . it becomes the burden of the plaintiff to adduce facts showing that those
5 choices have been or will be made in such manner as to . . . permit redressability of
6 injury.

7 Lujan, 504 U.S. at 562 (internal citations omitted). Absent such a showing by plaintiff, an
8 assessment of redressability would be pure speculation insufficient to establish a case or
9 controversy. See University Medical Center v. Shalala, 173 F.3d 438, 441-42 (D.C. Cir. 1999);
10 cf. Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973) (discussing speculative nature of
11 redressability).

12 **IV. HHS's Decision on Plaintiff's IQA Petition is Not Subject to Judicial Review Under 13 the Administrative Procedure Act.**

14 "Under settled principles of sovereign immunity, 'the United States, as sovereign, is
15 immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in
16 any court define that court's jurisdiction to entertain the suit.'" United States v. Dalm, 494 U.S.
17 596, 608 (1990), quoting United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United
18 States v. Sherwood, 312 U.S. 584, 586 (1941)). "A necessary corollary of this rule is that when
19 Congress attaches conditions to legislation waiving the sovereign immunity of the United States,
20 those conditions must be strictly observed, and exceptions thereto are not to be lightly implied."
21 Block v. North Dakota, 461 U.S. 273, 287 (1983). Plaintiff invokes the APA's waiver of
22 sovereign immunity, but that waiver "contains several limitations. Of relevance here is 5 U.S.C.
23 § 704, which provides that only '[a]gency action made reviewable by statute and final agency
24 action for which there is no other adequate remedy in a court, are subject to judicial review.' 5
25 U.S.C. § 704." Gallo Cattle Co. v. Department of Agriculture, 159 F.3d 1194, 1198-99 (9th Cir.
26 1998). Plaintiff's claim is barred by each and every one of these limitations: the action of which
27 it complains is not made reviewable by statute, it does not qualify as final agency action under
28 the APA, and plaintiff has another adequate (and exclusive) remedy under the CSA. Another
APA provision, 5 U.S.C. § 701(a)(2), also bars plaintiff's claim here because the agency's
response to plaintiff's IQA Request for Correction is "committed to agency discretion by law."

1 **A. Agency Statements Lacking the Force and Effect of Law Are Not Subject To**
2 **Judicial Review Under the APA.**

3 Plaintiff contends that the statutory basis for its suit is the APA, Compl. ¶ 26, which
4 authorizes judicial review of “final agency action” for which there is no other remedy in a court.
5 5 U.S.C. § 704. It is well established, however, that an agency’s reports and other statements
6 lacking the force and effect of law do not constitute final agency action within the meaning of the
7 APA.

8 Plaintiff purports to challenge not a rulemaking (or a DEA rescheduling decision) but the
9 alleged dissemination of HHS’s statement that marijuana has no currently accepted medical use
10 in the United States. Dissemination of the agency’s correspondence to DEA, like the
11 correspondence itself, is not “final agency action” reviewable under the APA. Lujan, 497 U.S.
12 at 882, 890, 894 (discussing principle of “final agency action” under APA); FTC v. Standard Oil
13 Co. of Cal., 449 U.S. 232 (1980); Franklin v. Massachusetts, 505 U.S. 788, 798 (1992) (agency
14 report that carried “no direct consequences” was not “final agency action”); see also, e.g., Center
15 for Biological Diversity v. Veneman, 335 F.3d at 853 (“final agency action” must have “an
16 actual or immediate threatened effect,” “must mark the ‘consummation’ of the agency’s
17 decision-making process, and must ‘be one by which rights or obligations have been determined,
18 or from which legal consequences will flow’”) (citations omitted); Nippon Miniature Bearing
19 Corp. v. Weise, 230 F.3d 1131, 1137 (9th Cir. 2000) (“final agency action” must have “legal
20 consequences”); Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922, 925 (9th Cir. 1999) (no
21 “final agency action” where “legal consequences d[id] not necessarily flow” from agency’s
22 action, “nor d[id] rights or obligations arise from it”); Mt. Adams Veneer Co. v. United States,
23 896 F.2d 339, 343 (9th Cir. 1990) (stating numerous indicia of finality under APA, including that
24 “action should have the status of law”); Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA,
25 313 F.3d 852, 861 (4th Cir. 2002) (“if we were to adopt the position that agency actions
26 producing only pressures on third parties were reviewable under the APA, then almost any
27 agency policy or publication issued by the government would be subject to judicial review. . . .

1 We do not think that Congress intended to create private rights of actions to challenge the
2 inevitable objectionable impressions created whenever controversial research by a federal agency
3 is published.”).

4 As to finality under the APA, the “core question is whether the agency has completed its
5 decisionmaking process, and whether the result of that process is one that will directly affect the
6 parties.” Franklin, 505 U.S. at 797. The 2001 HHS correspondence to DEA that plaintiff now
7 seeks to challenge did not have “the status of law,” see Mt. Adams Veneer Co., 896 F.2d at 343,
8 in any manner that would “directly affect” plaintiff, Franklin, 505 U.S. at 797. Rather, the DEA
9 Administrator’s final decision concerning whether to reschedule marijuana under the CSA in
10 response to the Gettman petition was the final agency action in that process, and the action from
11 which legal consequences flowed. Plaintiff’s sole avenue to challenge that final agency action
12 lies not here, however, but under the exclusive review mechanism of the CSA itself, as
13 defendants discuss below. See 21 U.S.C. § 877. Accordingly, because the alleged dissemination
14 of the HHS statement was not final agency action for purposes of plaintiff’s APA challenge,
15 HHS’s response to plaintiff’s IQA Request for Correction is also not final agency action under
16 the APA. Contrary to plaintiff’s apparent premise that the administrative IQA process (which,
17 as we discuss infra, provides plaintiff with no judicially enforceable right) transforms an agency
18 statement into reviewable final agency action, “it is not at all anomalous that Congress could
19 permit them . . . to participate in agency proceedings, and yet they be unable to seek review in
20 federal courts.” Gettman, 290 F.3d at 434. As the Supreme Court has explained, exhaustion and
21 finality are distinct requirements, and the exhaustion of administrative remedies does not make
22 otherwise non-final agency action final. See FTC v. Standard Oil Co., 449 U.S. 232, 243 (1980)
23 (holding that plaintiffs’ exhaustion of administrative remedies did not transform the FTC’s
24 issuance of a complaint into final agency action, and explaining that the plaintiff had “mistaken
25 exhaustion for finality”). Accord Aerosource v. Slater, 142 F.3d 572, 579 (3rd Cir. 1998) (“After
26 all, if a court treated the denial of an application to reconsider an action which is not in itself a
27 final order as a final order, then a petitioner simply by asking for reconsideration could convert a

1 nonfinal action into a final order. Of course, this conversion should not be permitted.”) (citing
2 Standard Oil).

3 Defendants do not take issue with the unexceptionable proposition that agency rules
4 (legislative or interpretive) and/or policy statements, as well as agency decisions not to adopt
5 such proposals, are subject to judicial review in appropriate cases – e.g., cases in which the
6 agency has failed to take action compelled by statute, 5 U.S.C. § 706(1), or there has been final
7 agency action, id. at § 706(2). These conditions, however, have not been satisfied here.

8 Accordingly, this Court should dismiss plaintiff’s Complaint.

9 **B. The APA Waiver of Sovereign Immunity Does Not Apply Action Because**
10 **Plaintiff Has An Adequate Remedy in a Court Under the CSA.**

11 The APA requires not only a “final agency action” before suit may be brought, but such
12 an action where plaintiff has no adequate remedy in a court. 5 U.S.C. § 704. This preclusion of
13 suits challenging agency action for which there exists another adequate remedy in court reflects
14 Congress’s intent that the APA not create an additional remedy for particular agency action for
15 which Congress has established a specific review process. Bowen v. Massachusetts, 487 U.S.
16 879, 903 (1988).

17 Here, plaintiff seeks to challenge a statement made by HHS to DEA in the CSA
18 rescheduling process. The CSA provides plaintiff with an adequate – indeed, an exclusive –
19 remedy for a plaintiff who is aggrieved by such a conclusion. The CSA, 21 U.S.C. § 877,
20 provides:

21 All final determinations, findings, and conclusions of the [DEA] under this
22 subchapter shall be final and conclusive decisions of the matters involved, except
23 that any person aggrieved by a final decision of the [DEA] may obtain review of
24 the decision in the United States Court of Appeals for the District of Columbia or
for the circuit in which his principal place of business is located upon petition
filed with the court and delivered to the Attorney General within thirty days after
notice of the decision. Findings of fact by the [DEA], if supported by substantial
evidence, shall be conclusive.

25 Thus, plaintiff’s challenge to HHS’s recommendation to DEA, which DEA adopted and
26 published in the Federal Register, is fully cognizable, and was required to be made, under the
27 CSA itself. John Doe, Inc. v. DEA, --- F.3d ----, 2007 WL 1225381, *6 (D.C. Cir. April 27,

28 *Americans for Safe Access v. U.S. Dep’t Health & Human Services, et al.*
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Defendants’ Motion to Dismiss Plaintiff’s Complaint -24-

1 2007) (Title “21 U.S.C. § 877 vests exclusive jurisdiction in the courts of appeals over ‘[a]ll final
2 determinations, findings, and conclusions’ of the DEA applying the CSA”); Oregon v. Ashcroft,
3 368 F.3d 1118, 1121 n.1 (9th Cir. 2004). The waiver of immunity in the APA, by its terms, does
4 not “affect [] other limitations on judicial review. . . .” 5 U.S.C. § 702. Moreover, the APA
5 expressly creates an exception to the provisions authorizing judicial review where other “statutes
6 preclude judicial review. . . .” 5 U.S.C. § 701(a). Accordingly, plaintiff cannot bypass the
7 exclusive right of review in the CSA with an APA challenge in this Court.

8 That the CSA’s limitations period may prevent plaintiff from now maintaining its claim
9 under that Act does not alter the conclusion that the CSA, 21 U.S.C. § 877, is an adequate
10 remedy within the meaning of 5 U.S.C. § 704. See Sable Communications of California, Inc. v.
11 FCC, 827 F.2d 640, 642 (9th Cir. 1987) (statutory review provision was “adequate” for APA
12 purposes even though plaintiff’s petition under that review provision was dismissed as untimely)
13 (citing FCC v. ITT World Communications, Inc., 466 U.S. 463, 469 (1984) (rejecting argument
14 that review in the court of appeals is inadequate and that APA action in district court could
15 therefore proceed) and Telecommunications Research and Action Center v. FCC, 750 F.2d 70,
16 78 (D.C. Cir. 1984) (“Where statutory review is available in the Court of Appeals it will rarely be
17 inadequate.”)); Mitchell v. United States, 930 F.2d 893, 897 (Fed. Cir. 1991) (available remedy
18 in Claims Court was adequate even though the plaintiff’s claim in that court may have been
19 time-barred). Section 704 is triggered whenever Congress has provided an adequate remedy for a
20 particular agency action, notwithstanding the fact that the plaintiffs before the court may not be
21 entitled to that remedy. See Sable, 827 F.2d at 642; Mitchell, 930 F.2d at 897. For that reason,
22 plaintiff cannot invoke the APA waiver of sovereign immunity here and, accordingly, its claim
23 should be dismissed.

24 **C. The IQA Does Not Create a Judicially Enforceable Right for Plaintiff to**
25 **Obtain the Correction of Agency Information.**

26 Plaintiff relies on the IQA to sue defendants under the APA for HHS’s alleged failure to
27 correct a statement. This claim must fail because the “IQA . . . does not create any legal right to

1 information or its correctness” enforceable in this Court. See Salt. Inst. v. Leavitt, 440 F.3d at
2 159. Because plaintiff’s claim of a judicially enforceable right to correction under the IQA is
3 illusory, HHS could not be acting arbitrarily, capriciously, or contrarily to law by not producing
4 or correcting its pertinent statement. Cf. Oregon Natural Resources Council v. Thomas, 92 F.3d
5 792, 798 n.11 (9th Cir. 1996) (“As plaintiffs’ ‘arbitrary and capricious’ claims don’t invoke any
6 other statute, plaintiffs have no standing to raise them under section 702.”). That fact, standing
7 alone, is sufficient to prevent plaintiff from using the IQA as a basis to sue under the APA for
8 correction of agency information. Put another way, because both an enforceable right and a
9 mechanism to remedy an alleged violation of that right are required to sue the sovereign, the
10 possibility that the APA may provide a remedy means nothing where the IQA does not provide
11 the underlying right. See Gonzaga Univ. v. Doe, 536 U.S. 273, 283-84 (2002); Alexander v.
12 Sandoval, 532 U.S. 275, 286 (2001).

13 In evaluating whether a statute creates a judicially enforceable right, a court examines the
14 text and structure of the statute to determine whether it displays an intent to create such a right.
15 See Gonzaga Univ., 536 U.S. at 286; Alexander, 532 U.S. at 288. Here, the IQA lacks evidence
16 of a congressional intent to create a judicially enforceable right. Indeed, plaintiff is forced to rely
17 on the generic APA cause of action since the IQA itself provides no private right of action. See
18 Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (finding that “private rights of action to
19 enforce federal law must be created by Congress”); Touche Ross & Co. v. Redington, 442 U.S.
20 560, 578 (1979) (remedies available are those “that Congress enacted into law”). Nothing in the
21 IQA provides anyone a right of action in a court of law for an alleged violation of any of its
22 provisions. Rather, the IQA requires each federal agency to establish “*administrative*
23 *mechanisms* allowing affected persons to seek and obtain correction of information maintained
24 and disseminated by the agency that does not comply with the guidelines issued [by OMB].” Id.
25 at § 515(b)(2)(B) (emphasis added). Thus, nothing in the text of the statute indicates that
26 Congress intended for the *federal courts* to serve as ongoing monitors of the “quality” of
27 information maintained and disseminated by federal agencies; to the contrary, the language and

1 structure of the IQA reflects Congress's intent that any challenge to the quality of information
2 disseminated by a federal agency should take place in administrative proceedings before federal
3 agencies. See Kissinger v. Reporters Committee For Freedom of the Press, 445 U.S. 136, 148-49
4 (1980) (The Federal Records Act "expressly provides administrative remedies for violations of
5 the duties it imposes, implicating our conclusion in [Transamerica Mortgage Advisors, Inc. v.
6 Lewis, 444 U.S. 11, 19 (1979)] that it is 'an elemental canon of statutory construction that where
7 a statute expressly provides a particular remedy or remedies, a court must be chary of reading
8 others into it.'"); In re: Operation of the Missouri River Sys. Litig., No. 03-MD-1555 at 49 (D.
9 Minn. June 21, 2004) (order granting motions for summary judgment). Fully consistent with
10 Congress's intent that IQA challenges be resolved administratively, the statute contains no
11 language that would create a judicially enforceable right as would be "critical to showing the
12 requisite congressional intent" to do so. Gonzaga Univ., 536 U.S. at 287.

13 Nor can an "implied" private right of action be inferred from some source of
14 congressional intent other than the Act's text. For example, the IQA's legislative history is
15 completely silent with respect to the particular question of judicial relief. See Touche Ross &
16 Co., 442 U.S. at 571 (concluding that, where "the plain language of the provision weighs against
17 implication of a private remedy," silence in the legislative history "reinforces our decision not to
18 find such a right of action implicit within the section"). And "[i]t is an 'elemental canon' of
19 statutory construction that where a statute expressly provides a remedy, courts must be especially
20 reluctant to provide additional remedies." Karahalios v. National Federation of Federal
21 Employees, 489 U.S. 527, 533 (1989).

22 Consistent with this conclusion, every court to consider whether the IQA creates a legal
23 right to production or correction of information has concluded that the IQA creates no such right.
24 See Salt Inst. v. Leavitt, 440 F.3d 156, 159 (4th Cir. 2006); Salt Inst. v. Thompson, 345 F. Supp.
25 2d 589, 601 (E.D. Va. 2004); In re Operation of the Missouri River Sys., 363 F. Supp. 2d 1145,
26 1174-75 (D. Minn. 2004), vacated in part and aff'd in part on other grounds, 421 F.3d 618 (8th
27 Cir. 2005). As the Fourth Circuit summarized, the IQA "does not create a legal right to access to

1 information or to correctness” enforceable in federal court. Salt Inst., 440 F.3d at 159. It
2 therefore confers no legal rights to a private entity such as plaintiff that plaintiff can use as a
3 basis for an APA challenge in this Court.¹²

4 **D. HHS’s Response to Plaintiff’s IQA Request for Correction is Committed to**
5 **the Agency’s Discretion.**

6 Judicial review is also foreclosed in this case under the APA, 5 U.S.C. § 701(a)(2),
7 because the agency’s response to plaintiff’s Request for Correction was “committed to agency
8 discretion by law.” Agency action is committed to the agency’s discretion by law when there is
9 “no meaningful standard against which to judge the agency’s exercise of discretion.” Heckler v.
10 Chaney, 470 U.S. 821, 830 (1984). See also Helgeson v. Bureau of Indian Affairs, 153 F.3d
11 1000, 1003 (9th Cir. 1998).

12 In addition, and especially pertinent to this case, “courts have been especially inclined to
13 regard as unreviewable those aspects of agency decisions that involve a considerable degree of
14 expertise or experience[.]” Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574, 579
15 (3rd Cir. 1979). Here, plaintiff is asking this Court to second-guess the 2001 judgment of HHS
16 that marijuana has no currently accepted medical use in treatment in the United States. As
17 explained above, Congress vested in HHS the responsibility to make these recommendations to
18 DEA under the CSA, and the CSA itself provides the exclusive mechanism for review of DEA’s
19 eventual determination. See Gettman, 290 F.3d at 432 (citing 21 U.S.C. § 811(a), (b)).

20 Furthermore, the language of the IQA confirms that Congress did not intend to enlist the
21 judicial branch in policing agencies’ discretion in communicating information. The statute does
22 not impose its own standard of “quality” on agency information; instead, it requires OMB to
23 issue “guidelines . . . that provide policy and procedural guidance to Federal agencies for
24 ensuring and maximizing the quality, objectivity, utility and integrity” of information
25 disseminated by those agencies. Pub. L. No. 106-554, § 1(a)(3) [Title V, § 515(a)], 114 Stat.

26
27 ¹² For this reason, plaintiff also cannot satisfy the injury in fact requirement for Article III
28 standing. See Salt Inst., 440 F.3d at 159.

1 2763, 2763A-153 (Dec. 21, 2000). And – of special importance in this case – Congress’s
 2 decision not to specify when information should be corrected by agencies indicates that Congress
 3 did not intend that federal courts would take control over the flow information among federal
 4 agencies. See Salt Inst. v. Thompson, 345 F. Supp. 2d at 602-03; In re Operation of the Missouri
 5 River Sys., 363 F. Supp. 2d at 1175. Nor, as explained above, do the OMB or HHS IQA
 6 guidelines create a right to judicial review of an agency’s response to a request for correction.

7 In promulgating its IQA guidelines, OMB eschewed “detailed, prescriptive, ‘one-size-
 8 fits-all’ government-wide guidelines that would artificially require different types of
 9 dissemination activities to be treated in the same manner,” and underscored the “flexibility” that
 10 its guidelines gave the agencies. 67 Fed. Reg. at 8452. In particular, OMB stressed that
 11 agencies, “in making their determination whether or not to correct information, may reject claims
 12 made in bad faith or without justification, and are *required to undertake only the degree of*
 13 *correction that they conclude is appropriate* for the nature and timeliness of the information
 14 involved, and explain such practices in their annual fiscal year reports to OMB.” Id. at 8458
 15 (emphasis added); see also OMB Guidelines § III(3) (agencies shall establish administrative
 16 mechanisms allowing affected persons to seek and obtain, “where appropriate,” correction of
 17 agency information).¹³ The HHS guidelines likewise counsel flexibility, indicating that the

18 _____
 19 ¹³ The HHS guidelines also afford agencies considerable deference in determining
 20 correction requests. For instance, the HHS guidelines counsel its agencies to consider “the
 21 nature and timeliness of the information involved and such factors as the significance of the
 22 correction on the use of the information, the magnitude of the correction and the resource
 23 requirements for the correction.” www.hhs.gov/infoquality § E (emphases added). The
 24 reference to “resource requirements” should make courts particularly cautious, as the Supreme
 25 Court has found agency resource allocation determinations (and determinations that rest on
 26 discretionary resource allocations) committed to agency discretion by law. See, e.g., Lincoln v.
 27 Vigil, 508 U.S. 182 (1993) (agency decision based on resource constraints held committed to
 28 agency discretion by law; “Like the decision against instituting enforcement proceedings, . . . an
 agency’s allocation of funds from a lump-sum appropriation requires ‘a complicated balancing of
 a number of factors which are peculiarly within its expertise’: whether its ‘resources are best
 spent’ on one program or another; whether it ‘is likely to succeed’ in fulfilling its statutory
 mandate; whether a particular program ‘best fits the agency’s overall policies’; and, ‘indeed,
 (continued...)”)

1 discretionary determination whether to “correct” prior agency speech will depend upon the
 2 agency’s evaluation of, among other things, “the significance of the correction on the use of the
 3 information, the magnitude of the correction and the resource requirements for the correction.”

4 www.hhs.gov/infoquality § E.

5 Thus, in this case HHS’s response to plaintiff’s correction request regarding the agency’s
 6 scientific and medical judgment was “committed to agency discretion by law.” 5 U.S.C.
 7 § 701(a)(2).¹⁴

8 Moreover, even assuming *arguendo* that HHS’s decision on how to respond to plaintiff’s
 9 administrative request for correction could be deemed reviewable, the agency’s decision was
 10 certainly not arbitrary, capricious, or an abuse of discretion. See 5 U.S.C. § 706 (2)(A). The
 11 agency acted well within its discretion under its own and OMB’s information quality guidelines
 12 in concluding that it could “appropriately” review the merits of plaintiff’s request as part of the
 13 administrative process already in place for considering whether marijuana has a currently
 14 accepted medical use in the United States as HHS makes recommendations to DEA concerning
 15 the separately-pending petition (filed by an organization that includes plaintiff) to reschedule
 16 marijuana under the CSA.

17 For all of these reasons, the complaint should also be dismissed under the APA, 5 U.S.C.
 18 § 701(a)(2).¹⁵

19
 20 _____
 21 13(...continued)

22 whether the agency has enough resources to fund a program ‘at all.’” (quoting Heckler v.
Chaney, 470 U.S. 821 (1984)).

23 14 A different question might be presented in a case in which a plaintiff challenges an
 24 agency’s dissemination of information in connection with its formal rules or regulations.

25 15 The non-justiciability of plaintiff’s demand for correction of HHS’s correspondence with
 26 DEA is perhaps best understood in the context of the allegations of the complaint, which call on
 27 the Court to delve deeply into disputed questions of medical judgment, and thereafter assume an
 28 executive editing function in conforming the agency’s speech to the Court’s scientific
 conclusions. See, e.g., Compl. Part VII (“Relief Sought”) (seeking an injunction “requiring HHS
 (continued...)

1 **VI. Plaintiff's Complaint Fails to State a Claim Upon Which Relief May Be Granted**

2 Plaintiff's Complaint fails to state a claim upon which relief may be granted against
 3 defendants because the HHS statement in question was not "disseminated" by HHS within the
 4 meaning of the IQA. The OMB guidelines¹⁶ which plaintiff alleges defendants HHS and FDA
 5 have violated apply to "information" that is "disseminated" by a federal agency. 67 Fed. Reg. at
 6 8458. "Dissemination" means "*agency initiated* or sponsored distribution of information to the
 7 public," but "does not include distribution limited to correspondence with individuals or persons,
 8 press releases, archival records, public filings, subpoenas or adjudicative processes." *Id.* at 8460
 9 (emphasis added). Similarly, the HHS guidelines define dissemination as "*agency initiated* or
 10 sponsored distribution of information to the public," specifically not including, *inter alia*, "intra-
 11 or inter-agency use or sharing of government information" as well as the other OMB guideline
 12 exclusions. See www.hhs.gov/infoquality § D(h) (emphasis added). Indeed, plaintiff recognizes
 13 this when it states that under the IQA "HHS has an obligation to consider requests from the
 14 public to correct . . . statements that *it has disseminated*." Comp. ¶ 2. While plaintiff alleges that
 15 "HHS continues to disseminate" its statement that marijuana "has no currently accepted medical
 16 use in treatment in the United States," *id.* ¶ 9 (citation omitted), the only "disseminations" that
 17 plaintiff alleges are those plainly initiated by *DEA*, not defendants. In particular, the only
 18 "dissemination" identified or alleged by plaintiff is *DEA*'s publication in the Federal Register of
 19 correspondence from the Surgeon General to the *DEA* Administrator and secondary re-
 20 publication of that Federal Register information on the internet by *DEA* or the Government
 21

22 _____
 23 15(...continued)

24 to make *appropriate* corrections to all statements that it has disseminated that marijuana "has no
 25 currently accepted medical use in treatment in the United States"). In the language of the HHS
 26 IQA guidelines, it is simply not clear how this Court could determine whether correction of
 HHS's statement is "appropriate" in light of "the significance of the correction on the use of the
 information, the magnitude of the correction and the resource requirements for the correction."
www.hhs.gov/infoquality § E.

27 16 The IQA itself does not define "disseminate."
 28

1 Printing Office. Id., citing 66 Fed. Reg. 20038. To the extent this qualifies at all as a
 2 “dissemination” under the IQA, it was not a dissemination by defendants but rather by another
 3 federal agency.¹⁷ Indeed, plaintiff has identified no acts *by defendants* whatsoever to disseminate
 4 the underlying document to the public. For that reason, on the face of plaintiff’s Complaint and
 5 materials referenced therein, plaintiff has failed to state a claim upon which relief may be granted
 6 based on any right plaintiff may claim pursuant to the IQA and agency guidelines thereunder.

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 13 ¹⁷ Although HHS did not directly articulate this fact, there is no need for remand to the
 14 agency to consider the question under the doctrine of SEC v. Chenery Corp., 318 U.S. 80, 87
 15 (1943) (“The grounds upon which an administrative order must be judged are those upon which
 16 the record discloses that its action was based.”), and SEC v. Chenery Corp., 332 U.S. 194, 196
 17 (1947) (same). As numerous courts have noted, “the Chenery doctrine is not applied inflexibly.”
 18 See Fleshman v. West, 138 F.3d 1429, 1433 (Fed. Cir. 1998) (citing, *inter alia*, Arkansas
 19 AFL-CIO v. FCC, 11 F.3d 1430, 1439-40 (8th Cir. 1993); NLRB v. American Geri-Care, Inc.,
 20 697 F.2d 56, 64 (2nd Cir. 1982); Chae-Sik Lee v. Kennedy, 294 F.2d 231, 233-34 (D.C. Cir.
 21 1961)); RNS Services, Inc. v. Secretary of Labor, 115 F.3d 182, 184 n.1 (3rd Cir. 1997). Of
 22 particular relevance here, the Chenery “doctrine does not require a remand to the agency” where
 23 it is clear that the agency “‘would have reached the same ultimate result’ had it considered the
 24 new ground.” Fleshman, 138 F.3d at 1433, quoting Ward v. MSPB, 981 F.2d 521, 528 (Fed. Cir.
 25 1992); Vista Hill Found., Inc. v. Heckler, 767 F.2d 556, 566 n.9 (9th Cir. 1985) (“A remand is not
 26 required when it ‘would be an idle and useless formality.’” (quoting NLRB v. Wyman-Gordon
 27 Co., 394 U.S. 759, 766 n.6 (1969) (also stating “Chenery does not require that we convert
 28 judicial review of agency action into a ping-pong game.”)). Remand is also not necessary where
 the new ground does *not* call for “a determination or judgment which an administrative agency
 alone is authorized to make.” Koyo Seiko, 95 F.3d at 1101; *cf.* Railway Labor Executives’ Ass’n
v. Interstate Commerce Comm’n, 784 F.2d 959, 969 (9th Cir. 1986) (Chenery doctrine does not
 bind courts on matters of statutory interpretation). To the extent this Court has jurisdiction over
 plaintiff’s claims at all, any such jurisdiction includes the ability to rule that defendants did not
 “disseminate” the statement in question pursuant to the IQA. If the Court reaches this ground,
 yet believes it cannot affirm on this ground under Chenery, however, then the proper course
 would be remand to the agency to consider it. See Florida Power & Light Co. v. Lorion, 470
 U.S. 729, 744 (1985).

1 **CONCLUSION**

2 Accordingly, for all of the foregoing reasons, this Court should grant defendants' Motion
3 to Dismiss Plaintiff's Complaint.

4 Dated May 25, 2007

Respectfully Submitted,

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