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 BARR in his Official Capacity as Acting Attorney General of the United States, and KIRSTJEN NIELSEN in her Official Capacity as Secretary of the Department of Homeland Security, Defendants.	)	Case No. 1:18-cv-10874-DPW

BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

On Jan. 25, 2021 (Dkt. No. 61) this Court granted the motion of *amicus curiae* William G. Kelly, Jr. for leave to file this brief.

This brief addresses the issue, raised in the pleadings, briefs, and oral argument, of whether an agency denial of a petition for correction of information under the "Information Quality Act" (IQA) (and its incorporated Paperwork Reduction Act of 1995 (PRA) provisions) is subject to review under the Administrative Procedure Act (APA), applying the requirements of the "Guidance" and peer review "Bulletin" issued by the Office of Management and Budget and the conforming agency guidance.

SUMMARY OF ARGUMENT

This *amicus curia*e brief presents three related points that were not covered in the briefs of Plaintiffs or Defendants, or during oral argument, which establish that the Defendants' denial of Plaintiffs' IQA petition is subject to judicial review under the APA: (1) The APA definition of "agency action" expressly includes agency action on a "petition," and the "administrative mechanism" to "seek and obtain" correction of information required by the IQA is a "petition" mechanism, and has been regularly recognized as such; (2) the legislative history of the IQA shows that both OMB and Congress were aware that the petition mechanism in the IQA would allow for APA judicial review; and (3) a 2016 opinion of the U.S. Court of Appeals for the Seventh Circuit, which is the only circuit court opinion to address the issue of APA reviewability of an agency denial of an IQA petition, reviewed an IQA petition denial under the APA.

ARGUMENT

I. THE CHALLENGED AGENCY ACTION IN THIS CASE IS DENIAL OF AN IQA "PETITION," WHICH IS EXPRESSLY INCLUDED IN THE APA AS A TYPE OF "AGENCY ACTION" SUBJECT TO JUDICIAL REVIEW.

The "Definitions" section of the judicial review chapter of the APA, in 5 U.S.C. § 701(b)(2), states that, with two exceptions not addressed here,[1] reviewable "agency action" has the same meaning as in § 551. Section 551(13) states that "agency action" "includes *relief*, or the equivalent or *denial* thereof, or failure to act." (Emphasis added) Subsection (11)(C) of section 551 in turn defines "relief" as including the "taking of other action on the application or *petition* of, and beneficial to, a person . . . . " (Emphasis added) The agency action described in the IQA and at issue in this case – "administrative mechanisms allowing affected persons to seek and

[1] Those two exceptions are (1) preclusion by statute, and (2) committed to agency discretion by law.

obtain correction of information"-- is simply a description of a "petition." The plain and common meaning of a "petition" is "a formal written *request* made to an authority or organized body. . . ." [2] That this IQA language on administrative process is understood as a "petition" process is evidenced by the frequent use of "petition" (or "petitioner") by the Department of Justice in its briefs in this case,[3] by the Plaintiffs,[4] by the Department of Homeland Security in its IQA Guidelines,[5] and by the courts in opinions in cases presenting IQA issues.[6] As will be shown below, the "administrative mechanisms" language proposed for the IQA was also recognized by both Congress and OMB as providing a "petition" process.

Defendants' suggestion that the words "administrative mechanisms" somehow means that all review shall be only administrative is contrary to the plain meaning of "petition" as used in the APA, since agency action in reviewing and acting on a petition is certainly an "administrative mechanism."

II. THE LEGISLATIVE HISTORY OF THE IQA SUPPORTS JUDICIAL REVIEW.

Contrary to the belief of both the parties and the court as expressed at oral argument, there is a substantial amount of legislative history material for both the IQA and the PRA provisions which it incorporates, and some of it speaks to the issue of judicial review.[7] That

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[2] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/petition (emphasis added).
[3] Defs'. Mem. of Law in Supp. of Mot. to Dismiss at 2, 6, 18, 20.
[4] Pls.' Amended Compl. at 22, 27; Pls.' Mem. of Law in Opp. to Mot. to Dismiss at 7, 10.
[5] https://www.dhs.gov/sites/default/files/publications/dhs-iq-guidelines-fy2011.pdf, throughout. Other agency IQA guidelines that use the term "Request for Correction" do not serve to avoid APA review since any formal written "request" is clearly a "petition."
[6] *Salt Inst. v. Leavitt*, 440 F.3d 156, at 156-57 (4th Cir. 2006); *Am. for Safe Access v. HHS*, 399 Fed. Appx. 314, No. 07-17388, 2010 WL 4024989, at 1, 2 (9th Cir. 2010); *Single Stick, Inc. v. Johanns*, 601 F.Supp.2d 307, at 311 (D.D.C. 2009).
[7] A draft working paper on the Social Sciences Research Network ("SSRN") contains a more detailed account of this legislative history. Although the working paper is in the process of some editorial revision and updating, the legislative history material cited and discussed is accurate and fully supported with confirmable citations. William G. Kelly, Jr., *A Closer and More Current Look at the 'Information Quality*

legislative history shows that both Congress and the Office of Management and Budget were aware that a requirement for a petition mechanism allowing affected persons to seek and obtain correction of information, as in proposed legislative language, would allow for judicial review.

In 1998, the House Appropriations Committee submitted its report covering recommended FY1999 appropriations for OMB. H.R. Rep. No. 105-592 (1998). The report specified what it expected from OMB in implementing the information dissemination and quality provisions of the Paperwork Reduction Act of 1995:

RELIABILITY AND DISSEMINATION OF INFORMATION

> The Committee urges the Office of Management and Budget (OMB) to develop, with public and Federal agency involvement, rules providing policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies, and information disseminated by non-Federal entities with financial support from the Federal government, in fulfillment of the purposes and provisions of the Paperwork Reduction Act of 1995 (P.L. 104–13). The Committee expects issuance of these rules by September 30, 1999. The OMB rules shall also cover the sharing of, and access to, the aforementioned data and information, by members of the public. Such OMB rules shall require Federal agencies to develop, within one year and with public participation, their own rules consistent with the OMB rules. *The OMB and agency rules shall contain administrative mechanisms allowing affected persons to petition for correction of information which does not comply with such rules*; and the OMB rules shall contain provisions requiring the agencies to report to OMB periodically regarding the number and nature of *petitions* or complaints regarding Federal, or Federally-supported, information dissemination, and how such *petitions* and complaints were handled. OMB shall report to the Committee on the status of implementation of these directives no later than September 30, 1999. [Emphasis added]

Id., at 49-50 (1998). Although this statement does not specifically mention judicial review or the APA, it shows that Members of Congress equated "administrative mechanisms" for correction with "petitions," action on which is expressly "agency action" under the APA as explained above. Congress is presumed to be familiar with its laws, particularly such important ones as the APA.

Act,' Its Legislative History, Case Law, and Judicial Review Issues (March 30, 2018), https://ssrn.com/abstract=3122670 or http://dx.doi. /10.2139/ssrn.3122670.

This is demonstrated in the PRA itself, on which the IQA is based, with the specific preclusion of judicial review for certain OMB decisions on paperwork collections in 44 U.S.C. § 3507(d)(6).[8]

When OMB took no apparent action in response to the above Appropriations Committee instructions by May of 1999, the House Committee on Commerce wrote to the Director of OMB, Jacob J. Lew, to express its concern over OMB's apparent inaction in implementing the PRA provisions on "data quality," reminding him of the above report language from the last Congress and requesting a status report. The letter emphasized the importance of including in the OMB and agency rules "*administrative mechanisms* to allow affected persons to *petition* for correction of information." (Emphasis added) App. A-1, at A-2.

On September 16, 1999, the Senate Committee on Appropriations issued a report on proposed appropriations that included independent agencies. In a portion of the report that focused mainly on EPA information dissemination activities, the Committee expressed broad concerns -- going beyond EPA -- regarding the Administration's opposition to judicial review of agency information dissemination actions:

> [T]he Committee is concerned that the Administration is pursuing legal positions that would have the effect of insulating its information dissemination activities from all forms of judicial review. The Committee believes that the availability of judicial review is an important means to provide redress for those who might be harmed by government action and to provide proper incentives for care in the use of information by government agencies.[9]

S. Rep. No. 106-161, at 82.[10]

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[8] "The decision by the Director to approve or not act upon a collection of information contained in an agency rule shall not be subject to judicial review."

[9] This report language was confirmed in the conference report. H.R. Rep. 106-379 (Conf. Rep.), at 82.

[10] This report preceded the IQA legislation, and its reference to "pursuing legal positions" is apparently a reference to the Department of Justice's positions in various information quality cases brought prior to the IQA.

With continuing inaction by OMB extending into the 106th Congress (1999-2000), the Appropriations Committee and its Subcommittee with jurisdiction over OMB appropriations questioned OMB Director Lew in person regarding the OMB inaction at a hearing on March 28, 2000.[11] In his response, Mr. Lew (a lawyer[12]) plainly indicated the Administration's concern that the proposed language in the House report from 1998 (*supra*) would bestow "rights" that could be the basis for "litigation." Mr. Lew explained OMB's reluctance to proceed:

> Let me, if I may, respond to the substance of the matter [in the House report] and our concern. We have been concerned in the discussion of this policy that right now there are private rights of action in cases where there are consequences. We are concerned about a change of policy *that would create rights of action* where there aren't consequences. That is a tremendous expansion of *potential litigation*. It is the kind of issue we have worked with the Congress on over the years when we discussed regulatory reform generally, and it is a very, very serious matter.
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> . . .
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> . . . The problem is – and this is not unique to this particular proposal – there are many proposals where *when you change the administrative process to create rights*. [Sic[13]] There are also opportunities *for review* and delay.

Congress then proceeded to enact the legislative provisions now known as the IQA without expressing any agreement with the OMB concerns regarding new rights and litigation.

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[11] *Hearings for Fiscal Year 2001 Before the Treasury, Postal Service, and General Government Appropriations Subcommittee of the House Committee on Appropriations, Part 3, Executive Office of the President and Funds Appropriated to the President*, 106th Cong. (2000), https://www.gpo.gov/fdsys/pkg/CHRG-106hhrg64690/html/CHRG-106hhrg64690.htm. There are two versions of the hearing transcript – an online version and a hard-copy version. This citation is to the online version, which is not paginated. The above-quoted material can be found in the section on OMB appropriations, testimony of Director Jacob J. Lew, on March 28, 2000, under the heading of "Improving Data Quality." The hard-copy version contains considerably more material on the "data quality" issue, including correspondence between Members or Committees of Congress and OMB and written questions submitted by the Appropriations Committee to OMB. This material omitted from the online version does not, however add much that would be useful to this case beyond what is in the online version, other than to show how widespread was Congressional concern with the matter. The hard-copy print of the hearing is available through the Library of Congress Law Library or from GPO, GPO 64-690, ISBN 0-16-060759-0, H181-57(2000), with the quoted material at 477-78.

[12] The Administrator of OMB's Office of Information and Regulatory Affairs, John Spotila, was also a lawyer, having previously served as General Counsel for the Small Business Administration.

[13] The insertion of a period after "rights" appears to be a transcription error, so the statement should read "when you change the administrative process to create rights, there are also opportunities for review and delay." Otherwise, the words beginning "The problem is" do not form a sentence.

III. THE ONLY U.S. CIRCUIT COURT DECISION TO EXPRESSLY ADDRESS THE ISSUE OF APA REVIEWABILITY OF AGENCY DENIAL OF AN IQA PETITION REVIEWED THE PETITION DENIAL UNDER THE APA.

The Seventh Circuit, in *Zero Zone v. U.S. Dep't of Energy*, 832 F.3d 654 (7th Cir. 2016), expressly reviewed, under the APA, an industry "petition" for information correction. This case was not cited in the briefs or in oral argument by either party in the case at hand. It is the latest circuit case involving denial of an IQA petition and the only one that addresses APA judicial review.[14]

In *Zero Zone*, the plaintiffs had filed an IQA petition for correction of a Technical Support Document (TSD) likely to be used in a DOE rulemaking setting energy-saving standards for commercial refrigeration equipment. About a week after the petition was filed, DOE issued a notice of proposed rulemaking that relied on the TSD, and plaintiffs filed a detailed comment letter that expressly incorporated the IQA petition. App. A-3. When DOE issued a final rule that relied on the TSD without addressing the information deficiencies alleged by the plaintiffs, they filed suit under the APA for review of their IQA claims.

In briefing, the DOJ argued that "By its terms, this statute [the IQA] creates no legal rights in any third parties" and "the Information Quality Act provides no basis for challenging the standards rule," citing *Salt Institute v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006) and *Mississippi v. EPA*, 744 F.3d 1334, 1347 (D.C. Cir. 2013).

Since the court's ruling on the APA challenge to the TSD under the IQA is succinct, it is quoted here in full, along with its important footnote 25.

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[14] In many cases cited by litigants (in this case and others), a district court addressed the APA reviewability issue, but on appeal the circuit court did not address that issue in affirming, but the citation provides only the term "*aff'd*" rather than "*aff'd on other grounds*," or any information at all on subsequent history.

> Alternatively, AHRI and Zero Zone contend that DOE's calculation of SCC [social cost of carbon, an issue in the TSD] was irredeemably flawed. They submit that DOE failed to address three concerns about these calculations raised by the Chamber of Commerce in a letter during the notice and comment period. *See* App. R.6, *Admin. R. 79-A2. 25* That letter complained that (1) who exactly worked on the SCC analysis had not been made public, *id.* at 5-7; (2) the inputs to the models were not peer reviewed, *id*. at 7-9; and (3) the "damages functions" or variables based on problems like sea level rise, were determined in an arbitrary manner, *id*. at 12. DOE responded to the letter in general, noting that it "acknowledge[d] the limitations in the SCC estimates." 79 Fed. Reg. at 17,779. DOE then referenced letters from multiple parties that supported the SCC values, a 2010 interagency group report on the discount rates used, and the OMB's Final Information Quality Bulletin for Peer Review. *Id*. Although DOE did not respond to the specific points laid out in the Chamber of Commerce letter, it did respond to the Chamber of Commerce's general concerns and made clear that, despite those concerns, the calculation of SCC could be used. *See St. James Hosp*. *v. Heckler*, 760 F.2d 1460, 1469 (7th Cir. 1985). DOE's determination of SCC was neither arbitrary nor capricious.

832 F.3d 654, at 678 (emphasis added). Footnote 25, incorporated into the above statement immediately following the citations to the administrative record (R.79-A2), states:

> 25 AHRI and Zero Zone frame this issue as a violation of the Information Quality Act. *See* 44 U.S.C. § 3516 note (a). However, "almost every court that has addressed an Information Quality Act challenge has held that the statute 'creates no legal rights in any third parties.' " *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 184 (D.C. Cir. 2015) (quoting *Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006)). *That being said, the APA still affords the petitioners the right to bring this challenge*. [Emphasis added]

In other words, the court was noting that although a number of courts had addressed IQA challenges, the cited circuit court decisions and the cases they collected concerning judicial review were based only on the text of the IQA, not the APA, and the IQA obviously does not address judicial review. The APA, as the 7th Circuit seems clearly to have ascertained, provides a right of judicial review. Thus, the statements in Defendants' brief that the IQA does not provide a basis for judicial review are correct with regard to the IQA, but they do not address the APA, as does *Zero Zone*.

It might be argued that the reference at the end of the footnote to "this challenge" refers simply to the undifferentiated APA challenge otherwise analyzed in the opinion and the agency's cited response to comment; however, such a view is contrary to the express wording of that portion of the opinion and footnote 25.[15]

At the start of its quoted analysis, the court refers to a Chamber of Commerce "letter," and gives a citation to the administrative record. That "letter" was a comment on the proposed rulemaking that expressly incorporated the IQA "petition" to which the Chamber was a party. ("Admin. R. 79-A2") App. A-3. This submission of a "letter" comment on a proposed rulemaking was a correct way to raise IQA issues embedded in a rulemaking proposal, as clearly explained by DOE in its Guidelines.[16]

Moreover, the portion of the *Federal Register* final rulemaking notice cited by the court, 79 Fed. Reg. at 17,779, contains DOE's responses to numerous IQA rulemaking comments submitted by multiple parties, including the Chamber of Commerce via comment number 79, and it concludes: "DOE believes that the SCC estimates comply with OMB' Final Information Quality Bulletin for Peer Review and DOE's own guidelines for ensuring and maximizing the quality, objectivity, utility and integrity of information disseminated by DOE." [Footnote omitted] App. A-4.

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[15] The opening notation of "Alternatively" also supports the view that this portion of the opinion was addressing a different issue than the general APA issue.

[16] DOE IQA Guidelines require that IQA comments on proposed rules be presented as comment letters during the rulemaking comment period. https://www.energy.gov/sites/prod/files/cioprod/documents/finalinfoqualityguidelines03072011.pdf, sec. IV, A, 1 (pdf p. 36 – document not paginated).

Although this quoted portion of *Zero Zone* did not specifically discuss application of the IQA Guidelines or OMB peer review bulletin, it cited and relied on the DOE's response to the specific IQA challenges.[17]

In short, the above-quoted portions of the *Zero Zone* opinion addressed IQA petition challenges and reviewed them under the APA.

IV. CONCLUSION

Based upon the facts and analysis above, this court should conclude that the publicly disseminated information at issue here must be judicially reviewed under the APA, applying the IQA and its regulations.

Respectfully submitted,

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[17] The Plaintiffs' IQA assertions of non-compliance appear to have been weak, thus obviating the need for detailed discussion of compliance with the OMB and agency guidance.