IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 13-15197

W. SCOTT HARKONEN,
Plaintiff-Appellant.

v.

UNITED STATES DEPARTMENT OF JUSTICE and
UNITED STATES OFFICE OF MANAGEMENT AND BUDGET
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NO. 4:12-CV-00629 (WILKENS, J.)

BRIEF OF DR. W. SCOTT HARKONEN

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JURISDICTIONAL STATEMENT

Dr. W. Scott Harkonen appeals from a final judgment, entered on December 3, 2012, ER0307, dismissing his Complaint against the Department of Justice ("DOJ") and the Office of Management and Budget ("OMB") for violating the Information Quality Act ("IQA"), 44 U.S.C. §3516, note. Harkonen timely filed a notice of appeal on January 31, 2013, ER0308. The district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

This case is about judicial review and agency accountability. Congress long ago enacted the Administrative Procedure Act ("APA"), 5 U.S.C. §701 *et seq.*, to make federal agencies accountable to the public through judicial review of their final actions. More recently, Congress enacted the IQA to require agencies to provide persons about whom a government agency disseminates false information a means to obtain a correction.

The IQA requires that OMB and each federal agency "shall" issue guidelines for "ensuring and maximizing the quality, objectivity, utility, and integrity of information . . . disseminated by Federal agencies." 44 U.S.C. §3516, note. The OMB guidelines also "shall" require that each federal agency "establish administrative mechanisms allowing affected persons to seek and obtain correction

of information maintained and disseminated by the agency that does not comply with the guidelines." *Id.*

OMB and DOJ have not complied with the IQA. Even though press releases are the principal means by which DOJ communicates with the public, OMB and DOJ issued guidelines that do not apply to DOJ press releases. Under these guidelines, DOJ is free to issue press releases that contain false information and affected individuals may not seek and obtain a correction.

The district court compounded the Agencies' error by holding that courts are powerless to stop this misconduct because there is no judicial review of their compliance with the IQA. Although some courts have declined to review IQA complaints, those cases involved different agency guidelines and were brought by plaintiffs seeking remedies not specifically contemplated by either the IQA or the guidelines. Here, the plain requisites of the IQA are directly at stake. If Congress's unmistakable directive is ever to be enforced, then it needs to be enforced here.

DOJ issued a press release containing false information about Dr. Harkonen, formerly the Chief Executive Office of InterMune, Inc., who was prosecuted for issuing an InterMune press release that contained what prosecutors alleged was a false interpretation of the results of a clinical trial of a prescription drug ("Actimmune") for the treatment of idiopathic pulmonary fibrosis ("IPF"), a fatal

lung disease. On the day the jury announced its verdict, the government issued its own press release, in which it misinformed the public about what happened at trial. The DOJ press release stated that Harkonen "'lied to the public about the results of a clinical trial'" by "'falsifying test results'" ER0056, even though DOJ had conceded in the criminal trial that the data cited in the InterMune press release were accurate and had not been falsified. It was only the "conclusions" drawn from those data, as conveyed in the headlines of the InterMune press release, that DOJ alleged were "false." The DOJ press release also stated that Harkonen's actions "served to divert precious financial resources from the VA's critical mission of providing healthcare to this nation's military veterans" (*id*.), even though DOJ had no evidence that the InterMune press release caused a loss to the Veterans Administration ("VA").

These factually false statements damage Dr. Harkonen's professional reputation. The medical community condemns the diversion of healthcare resources and the falsification of test results, but views that as qualitatively different than drawing a disputed conclusion about the interpretation of accurate data.

These false statements in the DOJ press release also violate the OMB and DOJ guidelines, which require that information disseminated by DOJ be presented

in an "accurate" and "unbiased manner."[1] Yet DOJ refused to correct these false statements because they were contained in a press release.

The district court's dismissal of Harkonen's challenge to that unlawful action upended the longstanding "presumption favoring interpretations of statutes [to] allow judicial review of administrative action" and against giving the executive branch the "authority to remove cases from the Judiciary's domain." *Kucana v. Holder*, 558 U.S. 233, 237 (2010) (internal quotation marks omitted). If its decision is upheld, DOJ will be free to issue press releases with false statements and no person—not even someone singled out in the press release and directly affected by the false statements—can obtain redress. Such a precedent would grant DOJ extraordinary latitude to immunize false statements from any public accountability through the courts. When DOJ issues a press release to inform the public of a recent development in a federal investigation or trial, the press and public ought to have confidence that what DOJ says is true, and that DOJ will make a correction—by means Congress expressly required—if it is not. For DOJ

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[1] OMB Guidelines V.3.a & II.1, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452, 8458-59 (Feb. 22, 2002); *see also* Dep't of Justice, *DOJ Information Quality Guidelines* (2002), *available at* http://www.justice.gov/iqpr/iqpr.html (last visited May 31, 2013) (DOJ "will ensure disseminated information, as a matter of substance and presentation, is accurate, reliable, and unbiased.").

to be unaccountable to private citizens under the IQA is incompatible with the plain language of both the IQA and the APA. This Court should reverse the district court.

STATEMENT OF ISSUES

1. Whether DOJ's denial of a petition under the IQA guidelines for correction of a false statement about the petitioner in a DOJ press release is "final agency action" subject to judicial review under the APA, 5 U.S.C. § 704.

2. Whether DOJ's denial of petition under the IQA guidelines for correction of a false statement about the petitioner in a DOJ press release is "committed to agency discretion by law" and thus precluded from judicial review under the APA, 5 U.S.C. § 701(a)(2).

3. Whether it is arbitrary, capricious, or contrary to the IQA for DOJ to deny a petition for correction of a false statement about the petitioner because the statement was made in a DOJ press release.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. The IQA

The IQA was enacted in 2000 as an amendment to the Paperwork Reduction Act ("PRA"), 44 U.S.C. §3501 *et seq.* The PRA was enacted to govern the collection of information by federal agencies. In 1995, Congress amended the statute to regulate the dissemination of information by the federal government as

well.[2] Among other things, the 1995 amendments required the Director of OMB to "develop and oversee the implementation of policies, principles, standards, and guidelines" to "apply to Federal agency dissemination of public information, regardless of the form or format in which such information is disseminated." 44 U.S.C. §3504(d)(1); *see also id*. §3516 ("The Director shall promulgate rules, regulations, or procedures necessary to exercise the authority provided by this subchapter.").

After several years passed without OMB issuing standards governing the dissemination of information by federal agencies, Congress enacted the IQA to force OMB to act. The IQA required that OMB

> shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of

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[2] *See, e.g*., S. Rep. No. 104-8, at 24 (1995) ("To realize the full potential for the flow of information, particularly electronically, requires new efforts by the Federal government to coordinate and improve dissemination management policies and practices. For this reason, . . . the Committee believes it is important to provide a more detailed statement of dissemination policies in [the] statute."); H. R. Rep. No. 104-37, at 35 (1995) (the bill "promotes the theme of improving the quality and use of information to strengthen agency decisionmaking and accountability and to maximize the benefit and utility of information created, collected, maintained, used, shared, *disseminated*, and retained by or for the Federal Government.") (emphasis added).

> chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.

44 U.S.C. §3516, note. The IQA also mandated that the OMB guidelines "shall—

> (1) apply to . . . information disseminated by Federal agencies; and
>
> (2) require that each Federal agency to which the guidelines apply—
>
> > (A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency . . .;
> >
> > (B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines . . . .

Id.

B. The OMB Guidelines

On June 28, 2001, OMB published proposed guidelines and requested public comment. *See* Proposed Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 34489 (June 28, 2001) (attached in Addendum B). OMB explained that it designed the draft guidelines "so that agencies will meet basic information quality standards. Given the administrative mechanisms required by [the IQA] as well as the standards set forth in the PRA, it is clear that agencies should not disseminate information that does not meet some basic level of quality." *Id.* at 34490.

After receiving public comment, OMB issued interim final guidelines on September 28, 2001, and final guidelines on February 22, 2002. *See* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, *66* Fed. Reg. 49718 (Sept. 28, 2001) (attached in Addendum C); Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002) (attached in Addendum D). The final guidelines require agencies to treat "information quality"—an "encompassing term comprising utility, objectivity, and integrity"—as "integral to every step of an agency's development of information, including creation, collection, maintenance, and dissemination." 67 Fed. Reg. at 8458-59 (Guidelines III.2 & V.1). The guidelines also require agencies to "[i]ssue their own information quality guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information . . . disseminated by the agency . . . ." *Id.* at 8458 (Guideline II.1). This case involves the "objectivity" component, which is defined to include "whether disseminated information is being presented in an accurate, clear, complete, and unbiased manner." *Id.* at 8459 (Guideline V.3.A).

The final guidelines also require agencies to "establish administrative mechanisms allowing affected persons to seek and obtain, where appropriate, timely correction of information maintained and disseminated by the agency that

does not comply with OMB or agency guidelines." *Id.*(Guideline III.3). Agencies "shall specify appropriate time periods" for deciding "whether and how to correct the information," and "shall notify the affected persons of the corrections made." *Id.*(Guideline III.3.i). "If the person who requested the correction does not agree with the agency's decision (including the corrective action, if any) the person may file for reconsideration with the agency," and the "agency shall establish an administrative appeal process to review the agency's initial decision . . . ." *Id.* (Guideline III.3.ii). The "affected persons" who may seek and obtain correction of information disseminated in violation of the OMB Guidelines are "people who may benefit or be harmed by the disseminated information. This includes persons who are seeking to address information about themselves as well as persons who use information." 66 Fed. Reg. at 49721.

The final guidelines define "dissemination" as an "agency initiated or sponsored distribution of information to the public," but exclude

> distribution limited to government employees or agency contractors or grantees; intra or interagency use or sharing of government information; and responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or other similar law. This definition also does not include distribution limited to correspondence with individuals or persons, press releases, archival records, public filings, subpoenas or adjudicative processes.

66 Fed. Reg. at 49725 (Definitions V.8).

C. The DOJ Guidelines

On May 14, 2002, DOJ published notice in the Federal Register that the draft DOJ guidelines were available on the DOJ website and requested public comments. *See* DOJ Information Quality Guidelines for Information Disseminated to the Public, 67 Fed. Reg. 34475 (May 14, 2002). On October 4, 2002, DOJ published in the Federal Register notice that the final DOJ Guidelines are available on the DOJ website. DOJ Information Quality Guidelines for Information Disseminated to the Public, 67 Fed. Reg. 62266 (Oct. 4, 2002) (attached as Addendum E).

The DOJ guidelines state that a "basic standard of quality will be ensured and established for all information prior to its dissemination." Addendum E at 4. The DOJ guidelines, like the OMB guidelines, define the standard of "quality" to encompass the "utility, objectivity, and integrity" of the information. *Id.* With respect to the "objectivity" component, the DOJ guidelines state that "DOJ components will ensure disseminated information, as a matter of substance and presentation, is accurate, reliable, and unbiased. Objectivity is achieved by using reliable data sources, sound analytical techniques, and documenting methods and data sources." *Id.*

Except for certain "categories of information that are specifically exempted from coverage," the DOJ guidelines "apply to all information disseminated by DOJ

. . . , [including] any communication or representation of knowledge such as facts or data, in any medium or form, including textual, numerical, graphic, artographic, narrative, or audiovisual forms. It includes information that an agency disseminates from a web page . . . .” Addendum E at 3. One category of information that is specifically exempted from the DOJ guidelines is “press releases[,] fact sheets, press conferences or similar communications (in any medium) that announce, support or give public notice of information in DOJ[.]” *Id.*

As required by the IQA and the OMB guidelines, the DOJ guidelines provide procedures for submitting a request for correction of information disseminated in violation of the DOJ and/or OMB guidelines. Requests must be submitted by letter, e-mail, or fax to the DOJ component or office that disseminated the incorrect information and should state, among other things, “how the information is incorrect,” the “effect of the alleged error,” and “how the information should be corrected.” *Id.* at 5. DOJ “will normally respond to requests for correction of information within 60 calendar days of receipt.” *Id.* at 6.

If the request for correction is denied, the requester may file a request for reconsideration with the disseminating DOJ component within 45 calendar days after DOJ transmits its initial decision. *Id.* at 6-7. Upon receipt of a request for

reconsideration, the DOJ "component[] should generally provide that the official conducting the second level review is not the same official that responded to the initial request." *Id.* at 7. "DOJ will respond to all requests for reconsideration within 45 calendar days of receipt." *Id.*

II. STATEMENT OF FACTS

A. Dr. Harkonen's Requests Under The IQA And Implementing OMB And DOJ Guidelines

Dr. Harkonen filed two requests for correction pursuant to the IQA and the implementing OMB and DOJ guidelines. Both requests involved false statements in the DOJ press release announcing the jury verdict in Harkonen's criminal case.

1. Request for Correction of Statement that Harkonen "falsif[ied] test results

The first IQA petition sought correction of the false and misleading description of the conduct for which Harkonen was convicted. The DOJ press release stated:

> "Mr. Harkonen lied to the public about the results of a clinical trial and offered false hope to people stricken with a deadly disease. Manipulating scientific research and falsifying test results damages the foundation of the clinical trial process and undermines public trust in our system for drug approval," said FBI Special Agent in Charge Stephanie Douglas.

ER0056. That statement is contrary to DOJ's repeated concession in the criminal proceedings that Harkonen did *not* falsify test results and was prosecuted solely for the conclusions he drew from the test results. As DOJ acknowledged at

Harkonen's sentencing hearing, "The Government has always agreed that there was no falsification of data here . . . . With respect to whether there was a falsification of the conclusions that could be drawn from the data, that was what the trial was all about." *Id.* at ER 0186; *see also id.* at ER0104 (DOJ statement at pre-trial conference that the test results were not "transposed or changed in any way."); *id.* at ER0107 (DOJ statement at closing argument that "I don't need to spend any time on the numbers in [the Press Release]. We all know the numbers are correct.").

The DOJ's false description of the conduct for which Harkonen was convicted damages his professional reputation. In the medical community, falsifying test results is considered far more culpable than drawing false conclusions from those results, the conduct of which Harkonen was actually convicted. ER0046, 0051. Under California law, the falsification of test results can be a separate violation of medical ethical rules apart from a criminal conviction. *See* Cal. Bus. & Prof. Code §2236(a) (a criminal conviction can "constitute[] unprofessional conduct"); *id.*§2262 ("creating any false medical record, with fraudulent intent, constitutes unprofessional conduct"). Harkonen and others elsewhere explain at length the important differences between falsification of data (which defeats any meaningful effort to

interpret the data) and disputes over the conclusions to be drawn from accurate data.[3]

Accordingly, Harkonen submitted a letter petition to DOJ under the IQA, requesting retraction of this false statement that he falsified the test results. The petition explained that it was not filed "to dispute the Government's charges" against Harkonen, but "to request that the Government correct its description of those charges" in the press release. ER0064-65.

H. Marshall Jarrett, Director of the Executive Office for the United States Attorneys, responded on behalf of DOJ, denying the petition on two grounds. ER 0138-39. First, DOJ asserted that the petition "falls outside the scope of" the OMB and the DOJ guidelines, which exclude information "disseminated in 'press releases[,] fact sheets, press conferences, or similar communications (in any

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[3] Harkonen's appeal of his conviction raised the question whether a dispute over the interpretation or "conclusions" to be drawn from data is a permissible basis for a wire fraud prosecution. Although a panel of this Court affirmed the conviction and the Court denied the petition for rehearing en banc, the diverse group of *amici* who supported Harkonen attest to the fact that there is a qualitative difference between falsification of data and drawing a disputed conclusion about the interpretation of the data. The falsification of data obviously corrupts any attempt to analyze or draw conclusion from that data. Neither Harkonen nor the *amici* defend the falsification of data. For the four amicus briefs by the constitutional law scholars, scientists and scholars of epidemiology and biostatistics, the Abigail Alliance for Better Access to Developmental Drugs, and the Pharmaceutical Research and Manufacturers Association, see docket entries 28, 35, 37, 94, 95, 96-2, and 97 in *United States v. Harkonen*, No. 11-10209 (9th Cir. filed 2011).

medium) that announce, support or give public notice of information in DOJ.'" *Id.* at 1 (alteration in original). Second, DOJ asserted that "[e]ven if the guidelines applied, no retraction is necessary because the statement at issue is correct." *Id.* DOJ acknowledged that Harkonen "did not change the data"; nonetheless, DOJ said he used the data "to support his false and misleading conclusions. Because data alone is [sic] meaningless without analysis and conclusions, Mr. [sic] Harkonen's false statements regarding the data's meaning were part and parcel of the results." *Id*. at ER0139. Therefore, DOJ concluded, "it was accurate to say that [Harkonen] falsified the results." *Id.*

Harkonen filed a request for reconsideration, following the procedures set forth in the DOJ guidelines. He challenged DOJ's claim that the guidelines were inapplicable to the press release. ER0142. He also explained that the distinction between scientific data (on the one hand) and scientific analysis of those data (on the other) is well established and "readily apparent in both science and the law." *Id.* at ER0144. "Data" are "separate from, and precede, analysis." *Id.* (citing Webster's II New Collegiate Dictionary 293 (3d ed. 2005) ("'Data'" is defined as "'information organized for analysis or used as the basis for making a decision'"). Thus, scientific articles "separate the reporting of test results from the analysis of those results . . ." ER0144. Indeed, even the OMB guidelines recognize the distinction: "In a scientific . . . context, the original and supporting data shall be

generated, *and* the analytic results shall be developed, using sound statistical and research methods." 67 Fed. Reg. at 8459 (emphasis added). Therefore, DOJ's "conclusion that the 'false statements regarding the data's meaning were part and parcel of the results'" is "nonsensical." ER0145.

H. Marshall Jarrett again responded for DOJ and denied the request for reconsideration. This time, however, DOJ did not address Harkonen's challenge to the accuracy of the press release. DOJ did not claim it was true to say that Harkonen had been convicted for "falsifying test results." Instead, DOJ said "the guidelines do not apply because the statement of which you complain was disseminated in a press release." ER0180. DOJ reasoned that "[b]ecause the guidelines do not apply to press releases, the Department was not required to respond substantively to [Harkonen's] initial request for a retraction." *Id*. Because Harkonen's "request for reconsideration relies on the guidelines," DOJ concluded that the "request is misplaced and cannot be accommodated." *Id*.

2. Request for Correction of Statement that Harkonen's Actions "served to divert precious financial resources" from the VA's healthcare mission

Harkonen's second petition sought correction of another false statement in the DOJ press release: that his actions "served to divert precious financial resources from the VA's critical mission of providing healthcare to this nation's military veterans." ER0193 (emphasis omitted). DOJ made no effort at trial to

show that the InterMune press release actually had any impact of any kind either on the Veterans' Administration ("VA") or on anyone else. DOJ waited until sentencing to try to prove such facts as a basis for enhancing Harkonen's sentence. Although DOJ produced Actimmune-related documents from the VA during the post-trial proceedings, *none* showed that the InterMune press release caused any loss or harm to the VA. *Id.* at ER0195. After giving the government two separate hearings to attempt to make its case, the district court held that DOJ had failed to show that the InterMune press release caused any loss to anyone. *Id.* at ER0195 & ER0282-83.

The statement that Harkonen's conduct served to "'divert precious financial resources'" from "'this nation's military veterans'" thus "misrepresents what the Government proved in this case, misleads the public as to what the Court actually found was the result of the offense, and characterizes the offense as having caused the Government adverse financial consequences that it did not cause." *Id.* at ER0195-96. Harkonen asked DOJ to remove the DOJ press release "from all official government websites," "issue a retraction" and "publish that retraction in the same manner that the Government distributed the [DOJ] press release to the public." *Id.* at ER0196.

DOJ denied the petition, again in a letter from H. Marshall Jarrett. ER0285. DOJ gave two reasons for the denial. First, DOJ said that "[b]ecause the statement

of which you complain was disseminated in a press release and served to inform the public of a successful prosecution by the Department of Justice, the guidelines do not apply." *Id.* Second, DOJ asserted "[e]ven if the guidelines applied, no retraction is necessary" because the challenged statement "accurately described the government's position" in the sentencing proceedings. *Id.* at ER0286. DOJ reasoned that even though the district court rejected the government's argument that Harkonen's conduct caused any "actual loss," this "does not means the press release did not have any effect on Actimmune sales." *Id.* "Moreover," DOJ continued, the statement that Harkonen's conduct "'divert[ed] precious financial resources from the VA's critical mission of providing health care'" to veterans could "reasonably be interpreted to mean that Dr. Harkonen's wrongdoing necessitated an investigation . . . by the Veterans Administration [that was] comprehensive[.]" *Id.*

Harkonen filed a request for reconsideration of this decision, again following DOJ's procedures. ER0288. Harkonen specifically asked, per DOJ's guidelines, for review by "an official other than Mr. Jarrett." *Id.* at ER0288. He also asked DOJ to reconsider its position that the press release is exempt from DOJ's guidelines. *Id.* at ER0289-91. And he asked DOJ to reconsider its assertion that the challenged statement in the DOJ press release was accurate. Harkonen noted that, "[a]s at sentencing," DOJ failed to point to "*any* evidence to support the

statement that [his] conduct diverted health care resources from the nation's military veterans." *Id.* at ER0292 (emphasis added). Indeed, in "tacit recognition" of this fact, DOJ "invent[ed] a new interpretation that could not conceivably be what the agent intended or the public understood"—namely, that the VA investigation of Harkonen diverted resources from veterans' healthcare. *Id.* at ER0293. Harkonen explained that the VA's Office of Inspector General ("OIG"), which conducted the investigation, is independent from the VA and separately funded; therefore, "the fact that OIG chose to devote some of its investigative funds to this case . . . does not support the VA's statement that Dr. Harkonen's conduct diverted any resources that otherwise would have gone to the provision of 'health care' to this nation's veterans." *Id.*

DOJ denied this second request for reconsideration in a letter signed once again by H. Marshall Jarrett. ER ER0296. In that letter, DOJ neither addressed the merits of Harkonen's challenge nor explained why the challenged statement was true. Instead, DOJ said "the Guidelines do not apply to press releases." *Id.* DOJ explained that "because the Guidelines do not apply to press releases, the Department was not required to respond substantively" to Harkonen's "request for retraction" or his "request for reconsideration." *Id.* "Accordingly," DOJ concluded, Harkonen's "request for reconsideration will not be accommodated." *Id.*

B. Harkonen Files Suit Challenging DOJ's Arbitrary And Unlawful Denial Of His Requests For Correction Of The False Statements In The DOJ Press Release

Left with no other administrative recourse, Harkonen filed suit challenging DOJ's arbitrary and unlawful denial of his requests for correction of the false statements in the DOJ Press Release, which caused him substantial harm. ER0040. The government filed a motion to dismiss the complaint, arguing that the denials of Harkonen's requests for correction of the false statements in the DOJ press release are not subject to judicial review under the APA. Harkonen opposed the motion to dismiss and filed a cross-motion for summary judgment.

C. The District Court's Decision

The district court granted the government's motion to dismiss, holding that DOJ's denials of Harkonen's requests for correction are not "final agency action," 5 U.S.C. § 704, and are "committed to agency discretion by law," *id.* § 701(a)(2). *See* ER0018-31.

The district court did not dispute that the denials of Harkonens' requests for reconsideration marked "the 'consummation' of the agency's decisionmaking process." *Id.* at ER0018 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The court held, however, that the denials of Harkonen's requests are not "final agency action" because they did not "determine [his] rights or cause any legal consequence." *Id.* at ER0020. In the district court's view, the IQA "does not

provide that individuals have a right to correct information." *Id.* at ER0023. It only requires OMB to "draft guidelines about information quality . . . including that the guidelines address the establishment of administrative mechanisms for requests for correction." *Id.* Therefore, the court concluded, "the denial of Plaintiff's request for correction did not deny him a legal right." *Id.*

The district court further held that the denials of Harkonen's requests for correction are "committed to agency discretion by law." *Id.* at ER0031. The court recognized that this "'is a very narrow exception'" that applies "'in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.* at ER0026 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S.402, 409 (1971)). The court thought that standard met because the IQA requires OMB to issue guidelines for "ensuring and maximizing the quality, objectivity, utility and integrity of information . . . disseminated by Federal agencies," 44 U.S.C. § 3516, note, but "does not define these terms." ER0029. Further, the "OMB guidelines provide that agencies 'are required to undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved,' which is akin to saying that the decision is committed to the agency's discretion." *Id.* at ER0031.

Although the district court granted the motion to dismiss "because there was no final agency action and the denial was committed to agency discretion by law,"

it also noted that, "had it reached the merits," it would have denied Harkonen's cross-motion for summary judgment. *Id.* at ER0031-32. The court acknowledged that DOJ's final decision was based on the fact that "the information was not covered by the guidelines and the guidelines did not require any substantive response . . ." *Id.* at ER0034. But because the final decision "did not explicitly repudiate the position that the challenged statements in the press release were accurate," the court thought that was also a basis for the final decision. *Id.* at ER0033-34. Evaluating only that reasoning, the court held it was not arbitrary and capricious for DOJ to conclude that the "false statements about the data's meaning and the conclusions to be drawn from the data 'were part and parcel of the results.'" *Id.* at ER0034.

The district court also found it reasonable for DOJ to state that Harkonen's conduct "'served to divert precious financial resources from the VA's critical mission of providing healthcare to this nation's military veterans,'" notwithstanding the fact that the criminal court had expressly rejected this claim at sentencing. *Id.* at ER0035. The district court said the press release "accurately described the government's position" in the sentencing proceedings, and it found "no authority" to require "the government to establish the truth of anything that it puts into press release at the same standard at which it must prove sentencing enhancements in court." *Id.* (quotations omitted).

SUMMARY OF ARGUMENT

The district court decision dismissing Harkonen's complaint and denying his motion for summary judgment should be reversed for four reasons.

First, the district court erred in holding that DOJ's denials of Harkonen's IQA petitions are not "final agency action" subject to judicial review under the APA because they do not determine any right or obligation or have any legal consequences. The IQA mandates that the OMB guidelines "shall" require agencies to establish mechanisms for "affected persons to seek and obtain correction of information maintained and disseminated by the agency," 44 U.S.C. § 3516, note. DOJ's denials of the petitions thus affects Harkonen's right to seek and obtain, and DOJ's obligation to provide, a correction under the guidelines. *Infra*, 27-31.

DOJ's denials of the petitions also have the legal consequence that Harkonen did not receive the correction he sought pursuant to the guidelines. When a statute provides for an administrative process through which a person may petition an agency to take some action, courts have held that the denial of the petition has legal consequences and is final agency action even if the agency has the discretion to deny the petition and thus the petitioner does not have a "right" to obtain the relief requested. *Infra*, 31-36.

Second, the district court erred in holding that the denials of Harkonen's IQA petitions are "committed to agency discretion by law." This very narrow exception to judicial review exists only in the rare case where there is "no law to apply." Here, the IQA specifically directs OMB to issue guidelines that "shall" apply to "information disseminated by Federal agencies," and "shall" "require that each federal agency to which the guidelines apply. . . issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency." 44 U.S.C. § 3516, note. The statute thus provides ample law for judging the Agencies' decision to exempt press releases from the IQA guidelines and to deny Harkonen's IQA petitions on the ground they sought correction of information in a DOJ press release. *Infra*, 36-44.

Third, the denial of Harkonen's petitions is arbitrary, capricious and contrary to law. A DOJ press release "disseminates" information within the plain and ordinary meaning of that word, and neither DOJ nor OMB provided any reasoned explanation for exempting a press release like this one from the guidelines. *Infra*, 46-51. In addition, DOJ posted this press release on its website for over two years; both the OMB *and* the DOJ guidelines expressly apply to information disseminated on an agency web page. *Infra*, 53-54.

Finally, DOJ's decision cannot be affirmed on the alternate ground that the information in the DOJ press release was correct. The court must evaluate the

lawfulness of the action on the grounds stated in DOJ's final decision and may not rely on the post-hoc justifications of government counsel or other grounds that could have been but were not relied on by the final agency decision maker. But even if the law were otherwise, Harkonen would still be entitled to summary judgment because DOJ's preliminary justifications for denying the petitions were arbitrary and capricious. *Infra*, 55-60.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's dismissal of a complaint for failure to state a claim. *See, e.g., AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F. 3d 631, 636 (9th Cir. 2012). In conducting this review, the Court accepts the factual allegations of the complaint as true and construes them in the light most favorable to the plaintiff. *Id.*

This Court also reviews *de novo* a district court's decision to deny a summary judgment motion. *See, e.g., Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004). Viewing the evidence in the light most favorable to the non-moving party, the Court must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

ARGUMENT

I. The Denial of Harkonen's IQA Petitions Is Subject to Judicial Review Under the APA.

The district court held that it lacked authority to review DOJ's denials of Harkonen's requests for correction because DOJ's decisions (1) are not "final agency action," which is a necessary prerequisite to obtaining judicial review under the APA, 5 U.S.C. §704; and (2) fall within the APA exception to judicial review for agency action "committed to agency discretion by law," *id.* §701(a)(2). Neither holding is correct.

A. DOJ's Denials Of Harkonen's Petitions Are Final Agency Action.

An agency action is "final" if it satisfies two conditions: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations and internal quotation marks omitted). It is undisputed that the first condition is satisfied here. ER0018-19. The district court held, however, that the IQA does not confer any "legal right" to correct information, so the denial of Harkonen's IQA petitions "did not determine [his] rights or cause any legal consequence." *Id.* at ER0020. This holding is incorrect in two respects.

First, the IQA requires that the OMB's guidelines and those of each federal agency "*shall* . . . ensur[e] and maximize[e] the quality, objectivity, utility and integrity of information . . . disseminated by the agency" and "*shall*" give "affected persons" an opportunity "*to seek and obtain correction* of information maintained and disseminated by the agency that does not comply with the guidelines." 44 U.S.C. § 3516, note (emphases added). This mandatory language imposes on DOJ an obligation to correct information disseminated in violation of the guidelines, and a corresponding right for an affected person like Dr. Harkonen to seek and obtain that correction.

The district court held otherwise because it construed the IQA "not [to] give Plaintiff the right to request that DOJ correct information nor the right to obtain a correction; instead, it requires the OMB to promulgate guidelines by which agencies must create procedures for such requests." ER0024. That construction makes no sense. There is no reason to require OMB to promulgate guidelines requiring agencies to establish administrative mechanisms for affected persons to seek and obtain corrections if the agencies are not obligated to follow the guidelines and to provide the requisite corrections at the request of an affected person. To the contrary, the APA is based on the premise that the "statutes of Congress are not merely advisory when they relate to administrative agencies, any

more than in other cases." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671 (1986).

The district court also relied on the Fourth Circuit's holding in *Salt Institute v. Leavitt*, 440 F.3d 156, 159 (2006), that the IQA "does not create any legal right to information or its correctness," and some district court cases that relied on *Salt Institute* to hold that the denial of an IQ petition is not final agency action because it does not determine any "rights or cause any legal consequence." ER0020. The facts and theories raised by the plaintiffs in *Salt Institute* are different, however, and the decision should not be read to preclude consideration of Harkonen's IQA claim.

Plaintiffs in *Salt Institute* disagreed with the conclusions of a government-sponsored study, posted on an agency website, about the effect of sodium intake on blood pressure. *Salt Inst. v. Thompson*, 345 F. Supp. 2d 589, 592 (E.D. Va. 2004), *aff'd sub nom. Salt Inst. v. Leavitt*, 440 F.3d 156 (4th Cir. 2006). But instead of seeking a correction, they filed an IQA request for disclosure of the study data. *Id.* The Fourth Circuit affirmed the agency's denial of that request on the ground that plaintiffs lacked standing. *Salt Inst.*, 440 F.3d at 158-59. The "injuries alleged," the court explained, were "the deprivation of the raw data from the studies and the asserted incorrectness in [the agency's] public statements"—injuries that are not

legally cognizable because neither the common law nor the IQA "create a legal right to access to information or to correctness." *Id.* at 158-59.

The result in *Salt Institute* is unexceptional, because the IQA says nothing about disclosure of information, which was the plaintiffs' "lone request." *Id.* at 157. The district court erred, however, in thinking that *Salt Institute* provides a basis for denying judicial review of Harkonen's far different request for correction of false information that DOJ disseminated about him. The IQA does say something about that request: It specifies that the OMB guidelines "shall" require agencies to establish mechanisms for "affected persons to seek and obtain correction of information maintained and disseminated by the agency," 44 U.S.C. § 3516, note. OMB, in turn, has promulgated the required guidelines and has said that the "affected persons" who may seek correction include people, like Dr. Harkonen, who are "harmed by the disseminated information" or " seeking to address information about themselves." 66 Fed. Reg. at 49721. DOJ's denial of Harkonen's request for correction is final agency action, because it does affect his right to seek and obtain, and DOJ's obligation to provide, a correction under the guidelines.

Indeed, when faced with a similar situation in which an agency denied a request for correction of information directly affecting the requester, the D.C.

Circuit decided the case on the merits.[4] *Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678, 685-86 (D.C. Cir. 2010), *aff'g in part and rev'g in part Single Stick, Inc. v. Johanns*, 601 F. Supp. 2d 307 (D.D.C. 2009). *Prime Time* involved a challenge by a cigar manufacturer to an agency's refusal to respond to an IQA request for correction of data used to calculate tobacco assessments that were subject to administrative appeals under another statute. 599 F.3d at 679, 685. The district court, citing the Fourth Circuit's decision in *Salt Institute*, held that there was no final agency action because the IQA does not confer "a right to information or to correction of information." *Single Stick*, 601 F. Supp.2d at 317. The D.C. Circuit affirmed, but it did so on the merits, holding that OMB reasonably defined the term "dissemination" to "exclude documents prepared and distributed in the context of adjudicative proceedings" to which plaintiff "had rights to an administrative appeal and judicial review." 599 F.3d at 685-86.

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[4] The district court also cited a Northern District of California decision that dismissed a challenge to an agency's decision to defer consideration of an IQA petition challenging the accuracy of statements that marijuana has no accepted medical use pending resolution of a separate administrative proceeding addressing that specific issue. *See* ER21(citing *Ams. for Safe Access v. U.S. Dept. of Health & Human Servs*, No. C07-01049 WHA, 2007 WL 4168511 (N.D. Cal. Nov. 20, 2007)). Although this Court affirmed, it did not rely on the purported lack of any "right" to a correction of information disseminated in violation of the guidelines. Instead, it held there was no final agency action because the agency's decision was "interlocutory" since it did not address the merits, but deferred the IQA petition to an "already pending alternative procedure." *Ams. For Safe Access v. Dept. of Health & Human Servs.*, 399 F. App'x 314, 315-16 (9th Cir. 2010).

The district court attempted to distinguish *Prime Time* on the ground that the D.C. Circuit had "no need to," and "did not, consider whether judicial review was also available under the APA" because it had jurisdiction under the separate statute authorizing review of tobacco assessments. ER0022. That logic is flawed. A court must have jurisdiction over each claim it decides. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (plaintiff must demonstrate standing "for each claim he seeks to press" and for "each form of relief sought.") (quotations omitted). Thus the fact that the D.C. Circuit had jurisdiction to review the tobacco assessment under a separate statute could not be used to confer jurisdiction over an IQA claim that is not otherwise subject to judicial review.

Second, even if it were true that the IQA confers no legal "right" to correct information, the denials of Harkonen's petitions are still "final agency action" because they have the "legal consequence" that DOJ did not have to make (and Dr. Harkonen did not receive) the press release corrections that he sought under the guidelines. *See Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 986 (9th Cir. 2006), quoting *Bennett*, 520 U.S. at 178 (final agency action "is one 'by which rights *or* obligations have been determined, *or* from which legal consequences will flow'") (emphases in original).

The APA defines "agency action" to include the grant or denial of "relief," including the "taking of . . . action on [an] application or petition . . . ." 5 U.S.C.

§§ 551(11) & 551(13). Thus when a statute provides for an administrative process through which a person may petition the agency to take some action—such as initiate a rulemaking, issue a declaratory order, or correct an agency record—courts have held that the denial of the petition has "legal consequences" and is "final agency action" subject to judicial review under the APA even if the agency has the discretion to deny the petition and thus the petitioner does not have a "right" to obtain the relief requested. *See, e.g.*, *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1037 (D.C. Cir. 2002) (denial of petition for rulemaking); *Barber v. Widnall*, 78 F.3d 1419, 1421 & n.2, 1423 (9th Cir. 1996) (denial of request for correction of military records); *Intercity Transp. Co. v. United States*, 737 F.2d 103, 107 & n.6 (D.C. Cir. 1984) (denial of petition to institute a declaratory order proceeding).

The district court distinguished these cases on grounds that do not withstand scrutiny. Although Harkonen "seeks to address DOJ's refusal to change a press release," not "Defendants' refusal to embark on formal rulemaking," ER0024, that distinction has no legal significance. In both situations, Congress directed the agencies to permit interested individuals to request a particular agency action. *Compare* 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule"); *with* 44 U.S.C. § 3516, note (agency guidelines promulgated under the IQA "shall" "establish

administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines"). Thus in both situations, the denial of the request has legal consequences and is "final agency action."

The district court also erred in finding that an agency's denial of requests for declaratory judgment orders or correction of military records can be distinguished on the ground that they infringed "separate legal right[s]" not implicated by the denial of Harkonen's requests for correction under the IQA guidelines. ER0025. The APA states that an agency "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e). This means that an agency is "not free to *abuse* that discretion," so the denial of a petition for a declaratory order has the "legal consequence" of affecting the petitioner's "statutory right to a reasoned agency disposition of its request," even though it does "did not define [the petitioner's substantive] legal rights and obligations." *Intercity Transp. Co*, 737 F.2d at 107 & n.6. That reasoning is equally applicable to the denial of a request for correction of a false statement under the IQA. Although the guidelines give DOJ discretion to determine the corrective action based on "the nature and timeliness of the information involved," and factors such as the "significance" and "magnitude" of the error, Addendum E at 6, DOJ is not free to abuse that discretion. Thus the denial of Harkonen's

requests is final agency action because it has the legal consequence of implicating his right to a reasoned consideration of his request.

This Court and other courts have similarly held that denials of requests for correction of military records are final agency action subject to judicial review under the APA. Like the IQA, the statute providing for correction of military records does not specifically provide for judicial review. It states only that the "Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1); *see also id.*§ 1552(a)(3) ("Corrections under this section shall be made under procedures established by the Secretary concerned" and "approved by the Secretary of Defense"). Although a service member may seek correction of military records that affect entitlement to pay or benefits, *e.g.*, *Clinton v. Goldsmith*, 526 U.S. 529, 532 n.1 (1999), the statute is not limited to such situations, as the district court assumed, ER0024. This Court's decision in *Barber v. Widnall*, 78 F.3d 1419, 1423 (9th Cir. 1996), makes clear that a service member can challenge the denial of a request for correction even when the "potential injury if review is denied" is "neither economic nor physical." *See also, e.g.*, *Miller v. Lehman*, 801 F.2d 492, 494- 496 (D.C. Cir. 1986) ("the Secretary's denial of an application for correction of naval records"—there, a request to expunge a letter of censure by a service member who

was promoted and retired with "full pension" and "medical disability benefits"—"is a final agency action subject to review under the standards of the Administrative Procedure Act").

Barber involved a challenge to the denial of a petition to correct military records to reflect what plaintiff believed to be "his sole credit for having shot down Yamamoto's bomber" during World War II. *Id.* at 1420. Acknowledging that plaintiff had a "strong interest in having his military record accurately reflect his participation in an event of deep personal and historical significance," this Court held that his challenge to the denial of his request for correction was "reviewable in accordance with the Administrative Procedure Act." *Id.* at 1423. The district court was thus clearly wrong in believing that *Barber* "does not address" whether "an action is reviewable under the APA," and in distinguishing the case on that basis. ER0025.

Just as service members have a strong interest in having military records accurately describe their military service, Dr. Harkonen has a strong interest in having the DOJ press release accurately describe the conduct for which he was convicted. As OMB itself has recognized, it "is crucial that Federal agencies disseminate information that meets" the guidelines standards. 66 Fed. Reg. at 34490. The Internet allows the dissemination of information "quickly and easily to a wide audience," which "increases the potential harm that can result from the

dissemination of information that does not meet OMB and agency information quality standards." *Id.* DOJ's denial of Harkonen's requests for correction are, therefore, final agency action.

B. Neither The Decision To Exclude Press Releases From The OMB And DOJ Guidelines Nor The Denial Of Harkonen's Requests To Correct The False Statements In The DOJ Press Release Is "Committed to Agency Discretion by Law"

The district court also held that the denial of Harkonen's IQA petitions is not subject to judicial review because it is "committed to agency discretion by law," 5 U.S.C. 701(a)(2). ER0025-31. This holding is contrary to the precedents of this Court and the Supreme Court.

The Supreme Court has long held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Labs.* v. *Gardner,* 387 U. S. 136, 140 (1967) (citing cases); *see also, e.g., Mich. Acad. of Family Physicians,* 476 U.S. at 670 (explaining how Chief Justice Marshall in *United States* v. *Nourse,* 34 U.S. (9 Pet.) 8 (1835), "laid the foundation for the modern presumption of judicial review" contained in the APA).

The APA exception for action that is "committed to agency discretion by law" therefore is "very narrow." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971). It applies only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply," *id.*

(internal quotation marks omitted), and "a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

"[T[he mere fact that a statute contains discretionary language does not make agency action unreviewable." *Beno v. Shalala*, 30 F.3d 1057, 1066 (9th Cir. 1994). Instead, courts must look to the "language of the statute and whether the general purposes of the statute would be endangered by judicial review." *Cnty. Of Esmeralda v. U.S. Dep't of Energy*, 925 F.2d 1216, 1218-19 (9th Cir. 1991). If the statute or agency regulations provide a "meaningful standard" by which the court can review the agency's action, it is subject to judicial review under the APA. *Socop-Gonzalez v. INS*, 208 F.3d 838, 844 (9th Cir. 2000). That standard is easily met here.

1. DOJ denied Harkonen's IQA petitions because they sought correction of false information in a DOJ press release, and because the OMB and DOJ guidelines do not apply to information disseminated in a DOJ press release. *Supra*, 12-19. The IQA does provide a "meaningful standard" for evaluating the legality of those decisions. The IQA specifically directs OMB to issue guidelines that "shall" "require that each federal agency to which the guidelines apply. . . issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency." 44

U.S.C. § 3516, note. The use of the mandatory word "shall," rather than the permissive word "may," dispels any suggestion that Congress intended to give OMB and DOJ unfettered discretion to issue guidelines of whatever nature they chose.

The district court nevertheless held that the IQA fails to provide "meaningful standards" because the "language of the IQA does not define these terms." ER0029. But judicial review is not limited to statutes that specifically define their operative terms. Congress frequently delegates to agencies the responsibility for defining and implementing general statutory language, and courts regularly review agency's interpretations to determine whether they are consistent with congressional intent. *See, e.g.*, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *infra*, 46-52.

In addition, "Congress delegated to OMB authority to develop binding guidelines implementing the IQA." *Prime Time*, 599 F.3d at 685. These guidelines provide additional "meaningful standards" for judicial review. *See*, *e.g.* *Socop-Gonzalez*, 208 F.3d at 844 (even if statute gives agency "unfettered discretion," its decision may be reviewed if agency regulations or "established policies" provide "'meaningful standards' by which this court may review its exercise of discretion"); *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) ("Judicially manageable standards may be found in formal and informal policy

statements and regulations as well as in statutes"). The OMB and DOJ guidelines provide such "meaningful standards." As relevant here, the DOJ guidelines state that "DOJ components will ensure disseminated information, as a matter of substance and presentation, is accurate, reliable and unbiased." Addendum E at 4; *see also* 67 Fed. Reg. at 8459 (OMB Guideline V.3) (OMB guidelines define "Objectivity" to "include whether disseminated information is being presented in an accurate, clear, complete and unbiased manner," and whether the substance of the information is "accurate, reliable and unbiased").

Moreover, the question presented in this case—whether the statutory requirement that the guidelines "shall" apply to information "disseminated by the agency," 44 U.S.C. § 3516, note, permits DOJ to deny Harkonen's requests because they sought correction of information disseminated in a DOJ press release—is virtually identical to the question that the D.C. Circuit addressed on the merits in *Prime Time*. Just as the IQA provided a meaningful standard by which to judge the exemption of documents prepared and distributed in adjudicative proceedings, *Prime Time*, 599 F.3d at 685, the IQA provides a meaningful standard by which to judge the exemption of press releases here.

The D.C. Circuit's decision in *Prime Time* is fully consistent with the precedents of the Supreme Court and this Court, which have found statutes using similar, if not far broader and more discretionary, language to provide a

meaningful standard for judicial review under the APA. In *Citizens to Preserve Overton Park*, for example, the Supreme Court held that a statute specifying that the Secretary of Transportation "shall not approve" a highway project that requires use of public park land unless "there is no feasible and prudent alternative" provided "clear and specific" directives to the Secretary and "law to apply" for the court to evaluate the legality of the Secretary's approval of funds to construct a highway through a park. 401 U.S. at 410-11. The requirement that OMB and DOJ "shall" issue guidelines "ensuring" the "objectivity" of information "disseminated" by DOJ is no less "clear and specific" or "meaningful" than the requirement that there be no "prudent alternative" to the construction of a highway through a park.

Similarly, this Court held in *Socop-Gonzalez v. INS* that regulations allowing the Bureau of Immigration Affairs ("BIA") to reopen deportation proceedings in "exceptional circumstances" established a "'meaningful standard' by which this court may review its exercise of discretion." 208 F.3d at 844-45. That this Court "routinely decide challenges to the BIA's exercise of discretion" under the "'exceptional circumstances standard'" is not a reason to distinguish that decision, as the district court suggested. *Id.* at 845. ER0030. Rather, it confirms that courts can interpret and develop case law for evaluating the lawfulness of agency action even when a statute uses language far more broad and discretionary than that involved here. *Accord Keating v. Fed. Aviation Admin.*, 610 F.2d 611, 612 (9th

Cir. 1980) (statute allowing FAA administrator to grant exceptions to rules governing pilots "if he finds that such action would be in the public interest" provides "law to be applied . . . sufficient to permit judicial review") (internal quotation marks omitted).

It is particularly appropriate to follow those precedents in this case, where the question is whether OMB and DOJ may exempt information disseminated in a DOJ press release from guidelines the IQA specifically directs them to promulgate. The "granting of an exemption from statutory requirements is not an area of agency discretion traditionally unreviewable," and it "would be somewhat surprising were Congress to grant" an agency "unreviewable discretion" to create exemptions to "statutory requirements." *Beno*, 30 F.3d at 1067 (internal quotation marks omitted); *see id.* at 1066 (finding judicial review of Secretary's decision to waive federal laws applicable to California's Medicaid plan where the statute authorizes a waiver "to the extent and for the period [the Secretary] finds necessary" and allows waivers for projects which "in the judgment of the Secretary [are] likely to assist in promoting the objectives" of the Act) (alterations in original) (emphasis omitted) (internal quotation marks omitted).

2. The district court did not follow this binding appellate court precedent. Instead, it followed district court decisions that are readily distinguishable on their facts. The court in *In re Operation of the Missouri River System Litigation*, 363 F.

Supp. 2d 1145, 1174-75 (D. Minn. 2004), *aff'd in part and vacated in part* 421 F.3d 618 (8th Cir. 2005), found that the IQA provided no meaningful standard by which to review an agency's alleged failure to comply with plaintiffs' request for "information and science" regarding proposed flow plans for the Missouri River. Similarly, the court in *Family Farm Alliance v. Salazar*, 749 F. Supp. 2d 1083, 1092 (E.D. Cal. 2010), held that it could not review the Fish and Wildlife Service's denial of a request to correct information in a draft Biological Opinion under the Endangered Species Act, because the "IQA itself contains absolutely no substantive standards" that were relevant to the particular challenge brought there, which concerned "the timing" of the agency's responses to their IQA request and "the makeup of the peer review panels" utilized by the agency. Even assuming, *arguendo*, that those decisions properly held that the IQA provided no meaningful standard by which the court could evaluate the timing of the response to an IQA request, to the makeup of peer review panels, or to the request for information at issue there, they have no bearing on this case, which raises the different legal question of whether OMB and DOJ may exempt press releases and refuse to correct the inaccurate statements about Dr. Harkonen solely because those misstatements were made in a DOJ press release. As to that question, the IQA does provide a meaningful standard to apply. *See supra*, 38-39.

The district court also relied on the district court's decision in *Salt Institute*, which noted that the OMB Guidelines permit agencies to "'reject claims made in bad faith or without justification'" and "'to undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved.'" 345 F. Supp. 2d at 602 (quoting 67 Fed. Reg. at 8458). The district court thought this language in the guidelines "is akin to saying that the decision is committed to the agency's discretion." ER0031. That is wrong for two independent reasons.

First, the fact that DOJ has some discretion to reject unjustified requests and to determine the scope of correction when a violation occurs means only that "courts should accordingly show *deference* to the agency's determination;" it "does not mean the matter is *committed* exclusively to agency discretion." *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) (emphasis in original).

Second, the "fact that an agency has broad discretion in choosing whether to act does not establish that the agency may justify its choice on specious grounds." *Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000). On the contrary, "[c]ourts have widely held that claims that an agency has acted outside its statutory authority are reviewable even though its decision on the merits might be unreviewable as committed to agency discretion." *Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 791-92 (9th Cir. 1986); *see also, e.g., United States v.*

Carpenter, 526 F.3d 1237, 1241-42 (9th Cir. 2008) (vacating settlement agreement approved by the Attorney General even though the Attorney General has "plenary discretion" to "settle litigation to which the federal government is a party," because appellants alleged that the "Attorney General circumvented federal law by entering into the settlement agreement" that relinquished a property interest in federal land without complying with the procedural mechanisms required by federal law).

Thus, even if one were to assume, *arguendo*, that DOJ has the discretion to reject an unjustified request for correction or to determine the appropriate remedy when a request is justified, that would not preclude judicial review of Harkonen's claims that defendants acted outside their statutory authority in excluding press releases from the OMB and DOJ guidelines and denying his IQA petitions solely on the ground that the false statements were disseminated in a DOJ press release.

II. DOJ Wrongfully Denied Harkonen's Requests for Correction

Because Dr. Harkonen has a right to judicial review under the APA, the question to be resolved on the merits is whether DOJ's denials of his requests for correction were arbitrary, capricious or contrary to law. As explained in detail below, they were. The IQA expressly states that the OMB guidelines "shall" apply to information "disseminated" by federal agencies. 44 U.S.C. §3516, note. A press release is a principal means by which DOJ disseminates information to the public, so the statute requires that the OMB and DOJ guidelines must apply, and

the Agencies have no discretion to say otherwise. *See infra*, 46-52. It was also arbitrary and capricious to deny the requested corrections because the DOJ press release was posted on the DOJ website for over two years, and the OMB and DOJ guidelines expressly apply to information disseminated on an agency website. *See infra*, 53-54.

The district court did not address these arguments. Instead, the court said that if there were jurisdiction to reach the merits, it would have denied Harkonen's motion for summary judgment because it was not arbitrary and capricious for DOJ to conclude that the challenged statements were accurate. ER0032-34.

That decision is incorrect. Because the APA authorizes judicial review only of "final" agency action, the court's review is limited to the rationale the agency finally adopted. *See, e.g.*, *Castillo v. INS*, 951 F.2d 1117, 1120-1121 (9th Cir. 1991) ("This court's review is limited to the BIA's decision and thus we may not rely on the IJ's opinion in deciding the merits of Castillo's case"); *Mullins v. Andrus*, 664 F.2d 297, 309, n.101 (D.C. Cir. 1980) ("The subject of our review, of course, is the Board's and not the administrative law judge's decision. And in testing the validity of the Board's disposition, we are confined to the rationale supplied by the Board itself"). But even if there were any doubt on this score (and there is not), the denial of Harkonen's petitions cannot be affirmed on the ground that the information in the DOJ press release was accurate. *See infra*, 55-60.

A. Press Releases May Not Be Excluded From The OMB And DOJ Guidelines

This Court answers the question whether an agency misconstrued a statute under the familiar two-step test announced in *Chevron*. The first step is to ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "In such a case an agency's interpretation of a statute will be permissible unless 'arbitrary, capricious or manifestly contrary to the statute.'" *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1059 (9th Cir. 2003) (en banc) (quoting *Chevron*, 467 U.S. at 844).

The Supreme Court recently reaffirmed that courts should "rigorously" apply the *Chevron* rule that "[w]here Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." *Arlington v. Fed. Commc'n Comm'n*, 2013 U.S. Lexis 3838 *29-30 (S. Ct. May 20, 2013). Here Congress applied a "clear line": the OMB guidelines "shall" apply to information "disseminated" by an agency. 44 U.S.C. §3516, note. Because a press

release "disseminates" information to the public within the plain and ordinary meaning of that term, OMB and DOJ may not exclude press releases from the IQA guidelines. DOJ's denials of Harkonen's requests because they sought correction of information disseminated in a press release is therefore contrary to the IQA and must be reversed.

1. In asking whether Congress has directly spoken to the question whether the IQA guidelines must apply to agency press releases, this Court starts with the language of the statute. Unless "otherwise defined," words are "interpreted as taking their ordinary, contemporary, common meaning." *Resident Councils of Wash. v. Leavitt*, 500 F.3d 1025, 1031 (9th Cir. 2007) (internal quotation marks omitted). Here, the IQA mandates that OMB "shall" issue guidelines "for ensuring and maximizing the quality, objectivity, utility, and integrity of information . . . disseminated by Federal agencies in fulfillment of the purposes and provisions of" the PRA. 44 U.S.C. § 3516, note. The OMB guidelines also "shall" require that each individual agency issue its own guidelines for "ensuring and maximizing the quality, objectivity, utility and integrity of information … disseminated by the agency ...." *Id*. §3516(b)(2)(A). This mandatory language clearly indicates that Congress intended both the OMB guidelines and the DOJ guidelines to apply to "information disseminated by" DOJ.

The word "disseminate" means "to spread out or send out freely or widely as though sowing or strewing seed; make widespread; to foster general knowledge: broadcast, publicize." Webster's Third New International Dictionary; Unabridged 656 (Merriam-Webster's 1993). A press release—the very purpose of which is to broadcast and publicize information—"disseminates" information to the public within the ordinary meaning of the word.[5]

That Congress intended the guidelines to apply to press releases is confirmed by Congress's directive that OMB issue the guidelines "under sections 3504(d)(1) and 3516 of title 44, United States Code." *See* 44 U.S.C. § 3516, note. Section 3504(d)(1) of title 44, in turn, mandates that OMB "shall develop and oversee the implementation of policies, principles, standards, and guidelines" to "apply to Federal agency dissemination of public information, *regardless of the form or format in which such information is disseminated*." 44 U.S.C. §3504(d)(1) (emphasis added).

The IQA itself thus answers the "precise question at issue" here. *Chevron*, 467 U.S. at 842. A press release clearly is a "form or format" for the "dissemination of public information." And because Congress required OMB to

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[5] Even the DOJ guidelines acknowledge that DOJ "disseminates" information via press release. Although the DOJ guidelines specifically exempt "press releases . . . that announce, support, or give public notice of information *in DOJ*," they also state the "information DOJ 'disseminates' includes: … press releases . . . ." Addendum E, at 1, 3 (emphasis added).

promulgate guidelines that apply to an agency's dissemination of information to the public, regardless of form, a press release cannot be excluded from the ambit of the IQA under any construction of the IQA's plain language.

This common sense construction of the IQA's language should be the beginning and the end of the analysis. The "preeminent canon of statutory interpretation requires [courts] to presume that the legislature says in a statute what it means and means in a statute what it says there." *Amalgamated Sugar Co. v. Vilsack*, 563 F.3d 822, 829 (9th Cir. 2009) (internal quotation marks omitted); *see also Schneider v. Chertoff*, 450 F.3d 944, 956 (9th Cir. 2006) (holding that a regulation was *ultra vires* because "[a]s a matter of common sense, the Secretary's regulation produces outcomes that contradict the plain language of the statute"). Here, in exempting information disseminated via press release from the protection of the IQA guidelines, the agencies have not "stayed within the bounds of [their] statutory authority." *Arlington*, 2013 U.S. Lexis 3838, at 2.

2. Even assuming, *arguendo*, that the IQA were silent or ambiguous on the precise question presented, Harkonen would still be entitled to summary judgment. That is because the exclusion of press releases from the OMB and DOJ guidelines, and the denial of Harkonen's requests for correction of the DOJ press release on that basis, are arbitrary, capricious and contrary to the purpose of the IQA.

First, the Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Here, however, OMB provided no explanation whatsoever for excluding information disseminated through an agency press release.

OMB initially proposed guidelines that would have applied to press releases. The proposed guidelines broadly defined "Dissemination" as "the government initiated distribution of information to the public," and excluded from that definition only

> distribution limited to government employees or agency contractors or grantees; intra- or inter-agency use or sharing of government information; and responses to requests for agency records under the Freedom of Information Act or Privacy Act. This definition also does not include distribution limited to replies to correspondence, and subpoenas or judicial process.

66 Fed. Reg. at 34492-93 (citations omitted).

In the final guidelines, however, OMB adopted a narrower definition of "dissemination." For purposes of this case, the relevant changes occurred in the last sentence of the definition, which was revised to exclude "press releases," "archival records," and "public filings" from the "agency initiated or sponsored distribution of information to the public" that is subject to the OMB guidelines. 66 Fed. Reg. at 49725. OMB explained the reason for excluding archival records disseminated from agency libraries—because "libraries do not endorse the

information that they disseminate"— and public filings, such as corporate filings with the Securities and Exchange Commission—because the agencies are not adopting the filings "as representing the agencies' views," but are "simply ensuring that the public can have quicker and easier access to materials that are publicly available." *Id*. at 49720. Yet OMB never even acknowledged that it also was excluding agency press releases from the final guidelines.

That OMB made no findings and provided no analysis to reconcile its belated exclusion of press releases with the mandate of the IQA renders the exclusion of press releases arbitrary and capricious. The "Administrative Procedure Act will not permit [courts] to accept" an agency's failure to include findings and analysis to "justify the choice made." *State Farm*, 463 U.S. at 48 (internal quotation marks omitted); *see also, e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1207 (9th Cir. 2008) (failure to provide "reasoned explanation" renders rule "arbitrary and capricious").

The lack of any explanation for excluding press releases from the IQA guidelines is all the more glaring because when OMB later revisited the issue, it determined that a broad exclusion for press releases was unwise and could "creat[e] an incentive to misuse press releases to circumvent information quality

standards." [6] OMB therefore urged agencies to limit the exemption for press releases to situations in which the information contained in the press release already met the standards of the IQA guidelines because the agency had previously disseminated the information in another way.[7] DOJ did not do that here. Instead, it determined that the DOJ press release was not covered by the DOJ and OMB guidelines even though the information about Dr. Harkonen's conviction had not previously been disseminated in any other way. *See infra*, 12-19.

Second, the exclusion of press releases from the OMB Guidelines is contrary to the policy that Congress sought to implement in the IQA. *See Earth Island Inst. v. Hogarth*, 494 F.3d 757, 765 (9th Cir. 2007) (agency constructions "that are contrary to clear Congressional intent or frustrate the policy that Congress sought to implement must be rejected."). Congress intended that the OMB guidelines would "ensur[e] and maximiz[e] the quality, objectivity, utility, and integrity of information . . . disseminated by Federal agencies." 44 U.S.C. § 3516, note. Excluding press releases, which defendants themselves recognize are "the usual

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[6] Memorandum for President's Management Council from John D. Graham, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, concerning Agency Draft Information Quality Guidelines, at 4 (June 10, 2002), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/iqg_comments.pdf (last visited May 30, 2013).

[7] *Id.*

method" that DOJ uses "to release public information to the media," Dep't of Justice, *U.S. Attorneys' Manual* §1-7.401(A) (2003), cannot be said to "ensure" or "maximize" the objectivity of information disseminated by DOJ.

Third, DOJ's determination that the guidelines do not apply to the DOJ press release is particularly arbitrary, capricious and contrary to the IQA because the press release was posted on the DOJ website for more than two years—until DOJ removed it after Harkonen filed this lawsuit.[8] ER0305. DOJ issued the press release on September 29, 2009, ER0055, then posted it on the DOJ website, where it was one of the top Internet search results for "Scott Harkonen," ER0051. Although the OMB and DOJ guidelines apply to information disseminated on agency websites, DOJ found it "irrelevant" that the DOJ press release was posted on the Internet. ER0180. In DOJ's view, the

> guidelines make no distinction between a press release that is posted on the Internet and one that is issued any other way (*e.g.*, fax or mail). Rather, it is the very fact that the information is contained in a press release that exempts it from the guidelines.

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[8] The government does not claim that the removal of the press release from the website moots this case. It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000) (internal quotation marks omitted). If it did, a defendant could obtain dismissal of a lawsuit while remaining "free to return to his old ways." *Id.* (internal quotation marks omitted).

Id. (denying request for reconsideration of first IQA petition); *see also id.* at ER0296 (denying request for reconsideration of denial of second IQA petition because "[a]s we have previously explained, the Guidelines do not apply to press releases").

The denial of Harkonen's IQA petitions contravenes Congress's intent that "affected persons" be able "to seek and obtain correction of information . . . disseminated by the agency that does not comply with the guidelines . . . ." 44 U.S.C. § 3516, note. OMB recognized in its initial guidelines that it "is crucial that Federal agencies disseminate information that meets" the proposed standards for "quality, utility, objectivity and integrity." 66 Fed. Reg. at 34490. The "fact that the Internet enables persons to communicate information quickly and easily to a wide audience not only offers great benefits to society, but also increases the potential harm that can result from the dissemination of information that does not meet OMB and agency information quality standards." *Id.*

In short, OMB was correct when it stated, in the preamble to the proposed rules, that "[g]iven the administrative mechanisms required by [the IQA] as well as the standards set forth in the PRA, it is clear that agencies should not disseminate information that does not meet some basic level of quality." *Id.* Because the exclusion of press releases allows agencies to do just that, it is contrary to the text and purpose of the IQA. And because DOJ's final decisions denied Harkonen's

IQA requests solely because they sought correction of misstatements in a press release, those denials are also arbitrary, capricious and contrary to the IQA. On this ground alone, this Court should reverse the district court's decision.

B. The DOJ Press Release Contains False Statements About Dr. Harkonen.

1. The Press Release Falsely States That Harkonen "Lied To The Public About The Results Of A Clinical Trial."

Were this Court to consider the alternate rationale on which the district court relied, it should still reverse the district court's decision. DOJ expressly admitted, as had the prosecutors, that Harkonen "did not change the data" in reporting the results of the clinical trial. ER0139. It was the conclusions that Harkonen drew from those results that formed the basis of his conviction. ER0186; *see supra*, 12-13. DOJ nevertheless initially denied the request for correction, saying it was "accurate" to say that Harkonen "falsified the results," because his "false statements *regarding the data's meaning* were part and parcel of the results." ER0139 (emphasis added).

The district court thought DOJ's explanation was reasonable. ER0035. It is not. It is arbitrary and capricious because it ignores the well-recognized distinction between scientific *data* and scientific *analysis*. This distinction is recognized in

ordinary English usage.[9] It also is readily apparent in both science[10] and the law, where judicial opinions commonly distinguish between the facts of the case, and the analysis of the law as applied to those facts. Even the OMB guidelines recognize that scientific data and results are distinguishable from the conclusions to be drawn from them: "In a scientific . . . context, the original and supporting data shall be generated, *and* the analytic results shall be developed, using sound statistical and research methods." 67 Fed. Reg. at 8459 (emphasis added).

Although scientists regularly differ over the conclusions to be drawn from data, no one condones falsification of the data and results themselves. *See supra*, 13-14 & n.3. Falsification of results is widely understood to involve serious wrongdoing. ER0146. For DOJ to say that Harkonen was convicted because he lied about the "results of a clinical trial," when DOJ conceded that he did not change the data that formed the basis of the conclusions that were charged as false, is not the "accurate" and "unbiased" presentation of information required by the DOJ guidelines. Addendum E at 4.

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[9] *See, e.g.*, Webster's II New Collegiate Dictionary 293 (3d ed. 2005) ("Data" is defined as "information organized for analysis or used as the basis for making a decision").

[10] *See, e.g.*, Supachai Rerks-Ngarm, M.D., et al. *Vaccination with ALVAC and AIDSVAX to Prevent HIV-I Infection in Thailand*, N. Eng. J. Med. 2009, at ER0170-74 (Nov. 9, 2009) (setting forth test "Results"); *id.* at ER0174-76 (separately setting forth "Discussion" and analysis), *reprinted in* ER0167.

2. The Press Release Falsely States That Harkonen's Actions "Served To Divert Precious Financial Resources From the VA's Critical Mission Of Providing Healthcare To This Nation's Military Veterans."

Harkonen's second request sought correction of a statement in the DOJ press release by the Special Agent in Charge of the Department of Veterans Affairs, Office of Inspector General, Western Field Office, who said that Harkonen's actions "served to divert precious financial resources from the VA's critical mission of providing healthcare to this nation's military veterans." *See* ER0056, 0193. That statement is false. In Harkonen's criminal case, the government did not produce any evidence that Harkonen caused the VA any loss, and the government conceded in the sentencing proceedings that it had "no basis" for seeking restitution. ER0291. The sentencing court also found there was insufficient evidence that the allegedly false conclusions in Harkonen's press release caused any loss to anyone. *Id.*

In denying Harkonen's request for correction, DOJ initially gave two reasons for asserting that the statement was true. First, DOJ said the statement was true because the government "has consistently maintained" that Harkonen caused a loss in the form of increased Actimmune sales. ER0286. That the sentencing court "found that the government did not meet its burden of proving actual loss," DOJ said, means only that "it was not possible to determine with the degree of certainty necessary for Dr. Harkonen's sentencing, the role the press release played

in the increased sales of Actimmune that followed." *Id.* Second, DOJ said it is "accurate to say that [Harkonen's actions] diverted precious financial resources from the VA's primary mission" because the statement "can reasonably be interpreted to mean that Dr. Harkonen's wrongdoing necessitated an investigation into the matter by the Veterans Administration." *Id.*

The second reason is specious, and the district court did not rely on it in upholding DOJ's denial of the request for correction. The VA Office of Inspector General is independent from the VA and has its own budget, so the fact that the Office of Inspector General spent investigative funds does not establish that Harkonen's conduct "diverted" resources that otherwise would have gone to the provision of health care to veterans. *Id.* Indeed, the expense of the investigation was not even raised, let alone proven, either at trial or at sentencing. *Id.*

The district court did find, however, that DOJ's first reason was not arbitrary and capricious. Although it recognized that the sentencing court did not find that Harkonen's conduct caused any actual loss to the VA or any other person, the district court said "this does not mean that no financial resources were diverted." ER0035. The court also said the press release "'accurately described the government's position,'" and found "no authority" for holding DOJ press releases to the same standards of truth required by a sentencing court. *Id.* (quoting DOJ

denial of request for correction). That reasoning does not address the substance of Harkonen's complaint.

That the DOJ press release accurately described the government's position is beside the point, because the press release did not characterize the statement as a statement of DOJ's litigating position. It characterized the statement as a proven fact: "The actions of this defendant served to divert precious financial resources from the VA's critical mission of providing healthcare to this nation's military veterans." ER0070. And to suggest that Harkonen's disagreement with the press release turns on a technical point about the burden of proof is to ignore the fact that the government produced *no evidence* that the VA suffered any financial loss and *admitted* that there was *no basis* for restitution. *Supra*, 16-17. The inability to cite *any* evidence to support DOJ's statement clearly violates the DOJ guidelines, which state that "disseminated information" will be "accurate" and "unbiased" and that will be "achieved by using reliable data sources . . . and documenting methods and data sources." Addendum E at 4.

CONCLUSION

Because there is judicial review under the APA, and the denials of Harkonen's requests for correction were arbitrary, capricious and contrary to the text and purpose of the IQA, the district court decision must be reversed. The district court should be instructed to remand to DOJ to determine the appropriate

corrective action, such as posting a link to this Court's order on the DOJ website, and/or attaching such a link to any copy of the original press release that it may maintain, or for other relief as the agency deems appropriate.

Dated: May 31, 2013

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STATEMENT REGARDING RELATED CASES

Case Nos. 11-10209 and 11-10242, *United States v. W. Scott Harkonen*, are related, as they involve the wire fraud conviction discussed in the DOJ press release that is at issue in this appeal. Defendant W. Scott Harkonen is not aware of any other related cases.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1, this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,952 words, according to the word count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B) (iii).

Dated: May 31, 2013

/s/ Mark E. Haddad
Mark E. Haddad

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 31, 2013.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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