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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WILEY GILL; JAMES PRIGOFF; TARIQ RAZAK; KHALID IBRAHIM; and AARON CONKLIN,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE; LORETTA LYNCH, in her official capacity as the Attorney General of the United States; PROGRAM MANAGER – INFORMATION SHARING ENVIRONMENT; KSHEMENDRA PAUL, in his official capacity as the Program Manager of the Information Sharing Environment,

Defendants.

Case No. 3:14-cv-03120-RS-KAW

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Hearing Date:	December 8, 2016
Time:	1:30 p.m.
Judge:	Hon. Richard Seeborg
Courtroom:	3, 17th Floor
Date Of Filing:	July 10, 2014
Trial Date:	None Set

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO DEFENDANTS AND THEIR COUNSEL OF RECORD: PLEASE TAKE NOTICE THAT on December 8, 2016 at 1:30 pm, or as soon thereafter as the parties may be heard, Plaintiffs Wiley Gill, James Prigoff, Tariq Razak, Khaled Ibrahim, and Aaron Conklin will bring for hearing a cross-motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 in this Administrative Procedure Act ("APA") action on the ground that Defendant's Functional Standard is arbitrary and capricious and was improperly issued without public notice and comment. The hearing will take place before the Honorable Richard Seeborg, in Courtroom 3, 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102. This motion is based on this notice, the attached memorandum of points and authorities, the accompanying declarations and attached exhibits of Wiley Gill, James Prigoff, Tariq Razak, Khaled Ibrahim, Aaron Conklin; Plaintiffs' Motion to Strike Defendants' Declarations and to Supplement the Record with Plaintiffs' Declarations; all pleadings and papers filed in this action; and such oral argument and evidence as may be presented at the hearing on the motion.

Dated: September 22, 2016

By: */s/ Linda Lye*

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58 Fed. Reg.
48,448 11
48,451 11

OTHER AUTHORITIES

BusinessDictionary.com, *available at*
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DOJ Policy Statement: Information Technology Investment Oversight,
available at https://www.justice.gov/jmd/file/870296/download 31

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action challenges the National Suspicious Activity Reporting Initiative ("Initiative"), a nationwide surveillance program that causes innocent Americans to be wrongly branded as potential terrorists. Defendants have issued a rule, known as the Functional Standard, that defines the types of activities that the federal government deems to have a potential nexus to terrorism and that state and local law enforcement then transmit to thousands of other law enforcement agencies in the form of "suspicious activity reports," also known as "SARs." But Defendants' standard sweeps in a wide array of entirely lawful conduct. Plaintiffs are five U.S. citizens who were caught in Defendants' surveillance net based on wholly innocent activity, including playing video games and buying computers. As a result, Plaintiffs' personal information has been disseminated to law enforcement agencies nationwide, and they have faced intrusive law enforcement scrutiny, among other harms. The Functional Standard's definition of suspicious activity violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 500, *et seq.*, because it is arbitrary and capricious, and was issued without notice and comment.

A duly promulgated regulation, 28 C.F.R. Part 23, prohibits the collection and maintenance of criminal intelligence, unless supported by reasonable suspicion of criminal activity. The purpose of the regulation is to protect constitutional and privacy rights. From the beginning of the Initiative, key stakeholders, including Defendant Department of Justice ("DOJ"), understood this regulation to apply to suspicious activity reports, and Defendant Program Manager-Information Sharing Environment ("Program Manager"), which issued the Functional Standard, "acknowledge[d] that questions arise as to whether a SAR should meet the 'reasonable suspicion' standard established for Criminal Intelligence Systems under 28 C.F.R. Part 23." AR 135.[1]

Yet Defendants' Functional Standard prescribes a definition of "suspicious activity" that

[1] Defendants filed the Administrative Record ("AR") at Dkt. No. 53, and the Supplemental Administrative Record ("Supp. AR") at Dkt. No. 107. Citations to the AR and Supp. AR refer to the page number that appears on the bottom right of each page.

authorizes the collection, maintenance, and dissemination of information, even in the absence of reasonable suspicion. In doing so, Defendants initially failed to offer *any explanation* for the decision not to adopt 28 C.F.R. Part 23's reasonable suspicion requirement. After this lawsuit was filed, Defendants adopted a revised version of the Functional Standard and for the first time explicitly stated that Defendants had decided to reject the regulation's reasonable suspicion requirement. But they articulated only two reasons for that decision—that suspicious activity reports do not constitute "criminal intelligence" within the meaning of the regulation, and that the regulation does not apply when information is collected without reasonable suspicion. The Administrative Record contains no other rationale in support of the decision to reject the regulation's reasonable suspicion requirement.

The Functional Standard is substantively invalid because the decision to authorize the collection, maintenance, and dissemination of purportedly terrorist-related information, absent reasonable suspicion, was arbitrary and capricious. It is unlawful for the independent procedural reason that it was issued without public notice and comment (unlike 28 C.F.R. Part 23).

Defendants now defend the Functional Standard on the basis of procedurally improper and meritless arguments. Their primary substantive defense is that the data systems for suspicious activity reports do not receive the type of federal funding that would trigger 28 C.F.R. Part 23. But this argument was nowhere articulated by the agency in the Administrative Record and relies on extra-record factual evidence. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Defendants therefore recast the funding issue as a claim that Plaintiffs cannot meet the standard for a facial challenge. But the Ninth Circuit has explained why the "no set of circumstances" test does not apply to challenges to agency action as arbitrary and capricious. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1023-24 (9th Cir. 2007). Moreover, the data systems used in the Initiative receive the requisite federal funding.

Defendants' reasoning as articulated in the Record cannot withstand scrutiny. In initially adopting their standard, they failed to address 28 C.F.R. Part 23 at all, and thus "entirely failed to consider an important aspect of the problem." *See Motor Vehicle*, 463 U.S. at 43. When they

finally offered an explanation for the decision to reject the regulation's reasonable suspicion requirement, their reasons were "counter to the evidence before the agency" and "implausible." *See id.* For example, they asserted that suspicious activity reports are not "criminal intelligence" within the meaning of the regulation because the former are merely tips and leads, whereas the latter must be the product of investigation. But the entire purpose of the Initiative was to enhance and transform pre-existing "tips and leads" programs by establishing a uniform process and criteria for evaluating suspicious activity reports. The Functional Standard specifically calls for reviewing agencies to vet suspicious activity reports through "investigative activities." AR 466. If these reports are merely unvetted tips and leads, the Functional Standard would be pointless.

The Functional Standard is also invalid because it is a rule to which the APA's notice and comment requirements apply. *See* 5 U.S.C. § 551(4) (definition of "rule"); *id.* § 553(b)-(c) (requirements for rulemaking). Defendants contend that the Functional Standard is an exempt general statement of policy. But the argument recycles their position on the motion to dismiss, that the Functional Standard is not "final agency action" subject to judicial review, because it does not create a binding norm. The Court has already rejected that view and should do so again here.

Nor can Defendants' procedural violations be dismissed as harmless error. In Defendants' view, agencies seeking to avoid the public process could simply cherry-pick a group of insiders to comment and then self-servingly claim that no public input would have altered the outcome. This position makes a mockery of the APA's public processes and must be rejected.

Finally, the remedy in this case should be vacatur of the invalid Functional Standard. Vacatur is the presumptive remedy and Defendants bear the burden of demonstrating why vacatur is not warranted. Courts routinely vacate agency actions where, as here, the agency failed to provide notice and comment, or to address an important issue. Defendants' assertion of harm to "national security" is purely speculative and contradicts the acknowledgment in the Record that the Initiative has not proven effective in the fight against terrorism. At the same time, leaving the Functional Standard in place would cause on-going injury to Plaintiffs and the countless other people who would be branded potential terrorists for their innocent conduct. The Court should

therefore grant the default remedy under the statute, and set aside the Functional Standard.

II. FACTUAL BACKGROUND

A. The Functional Standard Creates a Uniform System for Collecting, Evaluating, and Disseminating Intelligence About Individuals Considered to Have a Potential Nexus to Terrorism Crimes.

The federal government created the Nationwide Suspicious Activity Reporting Initiative to facilitate the nationwide sharing of information potentially related to the crime of terrorism. AR 416, 422; Supp. AR 233-34. The purpose of the Initiative is to create a single, standard process for collecting, evaluating, and disseminating reports of "suspicious activity," that is, activity purported to have a potential terrorism nexus. AR 422. While individuals reported as "suspicious" face a variety of privacy and reputational harms, the Initiative has not proven effective in the fight against terrorism. *See* Supp. AR 386-88 (acknowledging that Initiative proponents "just can't prove" its efficacy).

1. The Purpose of the Initiative Is to Create a Uniform System for Evaluating Reports of Suspicious Activity.

The Initiative grew out of the Intelligence Reform and Terrorism Prevention Act and National Strategy for Information Sharing, which sought to "prioritize and unify . . . the sharing of terrorism-related information among federal, state, and local government entities." Supp. AR 233. The Initiative was Defendants' response to the concerns that information was not being shared effectively. Supp. AR 233-34.

Defendants sought to "leverage" pre-existing, though often informal, programs among state and local law enforcement for documenting suspicious activities. Supp. AR 234. But they sought to improve upon the lack of "standardization and formality." Supp. AR 234. The premise of the Initiative is that state, local, and tribal law enforcement agents, so-called "front-line personnel," are well situated to capture threat information on the ground, but that the information is only useful if rigorously vetted according to a uniform standard and process. *See, e.g.*, AR 123-24, 422, Supp. AR 19, 70.

Recognizing that "[s]tandardized and consistent sharing" was "vital" to furthering the goal of assessing or preventing terrorism (AR 422), Defendants therefore created "standardized

processes and policies" for the nationwide sharing of information with a potential nexus to terrorism. AR 416. In 2008, Defendant Program Manager thus issued a rule, known as the Functional Standard, with the intended purpose of providing a uniform standard for evaluating information collected by front-line personnel before it is disseminated nationally. AR 75, 77, 80; *see also* AR 424 (Functional Standard sets forth "standardized means for identifying and sharing ISE-SARs"). It amended the Functional Standard in 2009 and 2015. AR 192-227, 414-73.[2]

In particular, the Functional Standard delineates the universe of activity deemed by Defendants to have a nexus to the crime of terrorism. It does so by defining suspicious activity as "[o]bserved behavior reasonably indicative of pre-operational planning associated with terrorism or other criminal activity" and enumerates 16 categories of behavior that satisfy its definition. AR 417, 454-64. These include criminal acts, such as cyberattacks or vandalism, but also entirely non-criminal, and in some cases First Amendment-protected activities, such as engaging in photography, asking questions, making observations, and taking notes. AR 457, 459, 461, 462. The "reasonably indicative" standard does not require reasonable suspicion of criminal activity. AR 135. In other words, the Functional Standard deems conduct to have a potential nexus to terrorism even if the conduct would not give rise to a reasonable suspicion of criminal activity.

The Functional Standard creates a standardized multi-part process for vetting reported information to ensure consistency with its definition of "suspicious activity." AR 423, 468. "[O]nly those tips and leads that comply with the ISE-SAR Functional Standard are broadly shared with [Initiative] participants." AR 429.

The Functional Standard "applies to all departments or agencies that . . . participate (or expect to participate) in the [Initiative]." AR 414.

Although Defendants reached out to a handful of advocacy groups in the course of developing the Functional Standard, AR 175-77, it is undisputed that they did not provide the public with notice or an opportunity to comment.

[2] Defendant DOJ, a key sponsor of the Initiative, has provided "planning, project management, and implementation services" for critical elements of the Initiative (Supp. AR 112, 192-93, 234, 305); one of DOJ's components, the FBI, operates eGuardian, a web-based system through which SARs are disseminated. AR 415.

2. The Functional Standard Creates a Process for Collecting, Evaluating, and Disseminating Suspicious Activity Reports.

The Functional Standard creates a multi-part framework for processing suspicious activity reports: (1) collection by front-line personnel; (2) investigation and evaluation by analysts trained on the Functional Standard; and (3) dissemination to the federal government as well as state and local law enforcement across the country. AR 426-28. A major purpose of the Functional Standard is to ensure that information about suspicious activity reported by front-line personnel is consistently reviewed and vetted before it is disseminated nationally. *See, e.g.*, AR 422-24. As a result, evaluation is key, and information is repeatedly evaluated to determine if it meets the criteria set forth in the Functional Standard, which purports to describe whether conduct has a potential nexus to terrorism. AR 428.

For example, the collecting agency conducts an "Initial Response and Investigation" consisting of "observations, interviews, and other investigative activities." AR 466. "When the initial investigation is complete, the official documents the event" as a suspicious activity report. *Id.*; *see also* AR 417 (definition of SAR). The agency then typically submits the report to a "fusion center," an entity established by a state or major urban area government that coordinates the gathering, analysis, and dissemination of threat-related information, though in some instances it submits it directly to the FBI, a component of Defendant DOJ. AR 426-27, 467; Supp. AR 172.

In addition, the fusion center (or the FBI if it has received the information directly) analyzes the report to determine if it satisfies the Functional Standard criteria. AR 427, 468. Once confirmed to have the requisite terrorism nexus, the suspicious activity report becomes what the Functional Standard terms an "ISE-SAR." AR 416, 427, 468.

The ISE-SAR is then uploaded to the "SAR Data Repository," where it can be accessed by all law enforcement agencies participating in the Initiative. AR 427-28. Multiple systems are used to share SARs, including "the DOJ-supported Regional Information Sharing Systems® Secure Intranet (RISSNET™)" and the FBI's eGuardian system. Supp. AR 254. [3] In addition,

[3] Defendants contend that eGuardian is the "only" system currently used to share suspicious activity reports, Def. Br. at 27. But the Record does not support this assertion. *See infra* Part III-A-4-b & n. 8.

the ISE-SAR is migrated to the FBI's classified Guardian system (which is separate from the unclassified eGuardian system) and the Department of Homeland Security's system, from which it is forwarded to the Office of Intelligence Analysis. AR 415, 468.

3. Individuals Reported in Suspicious Activity Reports Face Law Enforcement Scrutiny and Other Consequences.

Individuals reported in a suspicious activity report face myriad consequences.

At the very initial stage, even before a report has been determined to have a potential nexus to terrorism, the Functional Standard instructs the collecting agency to engage in an "Initial Response and Investigation," which may include "observation or engaging the subject in conversation." AR 223, 398, 466.

After a report has been validated and becomes an "ISE-SAR," the subject of the ISE-SAR faces an investigation by the FBI, as well as potentially other federal, state, and local law enforcement. AR 468 (ISE-SAR sent "to the FBI for investigation"); AR142 (describing "Investigation" of "possible terrorist activities" as an "Authorized" use of ISE-SARs by "federal, state, and local law enforcement officers").

In addition, the subject's information is retained in multiple government databases. AR 415, 468 (ISE-SARs in SAR Data Repository as well as FBI and DHS Systems).

Finally, given the Functional Standard's definition of an "ISE-SAR," the subject is tarred as having a nexus to terrorism. AR 428 (ISE-SARs "can be presumed by Federal, State, and local analytic personnel to have a potential nexus to terrorism").

4. Plaintiffs Have Been Reported and Investigated for Their Lawful Conduct but Lacked an Opportunity to Comment on the Functional Standard.

Plaintiffs have each been reported as "suspicious" for engaging in innocent activity, but none has had an opportunity to share his factual account or perspective with Defendants.

Wiley Gill, a U.S. citizen and graduate of California State University, Chico, is the subject of a suspicious activity report. Gill Decl. ¶ 2-3, 5 & Exh. 1. He converted to Islam after learning about the religion in a class. *Id.* ¶ 3. In 2012, the Chico Police Department ("CPD") conducted a search of his home without a warrant or voluntary consent, and for reasons later acknowledged to

be unfounded; CPD reported the encounter and two earlier interactions with Gill in a suspicious activity report. *Id.* ¶ 10-11 & Exh. 1. The SAR notes that Gill had "potential access to flight simulators via the internet" because his computer displayed a webpage titled something "similar to 'Games that fly under the radar.'" *Id.* Exh. 1. Gill, a video game enthusiast, was likely viewing a website about video games. *Id.* ¶ 17. The report concludes by describing as "worthy of note" Gill's "full conversion to Islam as a young WMA [white, male adult]" and his "pious demeanor." *Id.* Exh. 1. In describing Gill's religion as "worthy of note," CPD implicitly acknowledges that it found Gill suspicious because he is a devout Muslim. *Id.* ¶ 11. A few months later, a CPD officer called Gill, stated he had a report about him, asked him to take down his Facebook page (on which he displays a picture of the Shahada, the Muslim statement of faith), and warned him he was on a watchlist. *Id.* ¶ 12. Defendants admit that the report about Gill was uploaded to eGuardian. Answer (Dkt. No. 46-1) at ¶ 97. It was then forwarded to the FBI, which also created and continues to maintain a file about him. *Id.* ¶ 14-15. Gill continues to experience stress based on the existence of files in national law enforcement databases that connect him to terrorism based on his affinity for video games. *Id.* ¶ 21.

Tariq Razak, a U.S. citizen of Pakistani descent, is the subject of a May 2011 suspicious activity report describing him as a "Male of Middle Eastern decent [sic] observed surveying entry/exit points" at the Santa Ana Train Depot, and departing with "a female wearing a white burka head dress." Razak Decl. at ¶ 8 & Exh. 1. At the time, Razak was visiting the county employment resource center, which is located at the train station. *Id.* ¶ 4. He waited outside the restrooms for his mother, who was wearing a head scarf, not a burka. *Id.* ¶¶ 5-6. Defendants admit that the report about Razak was uploaded to eGuardian. Answer ¶ 134. It was also forwarded to the FBI, which followed up by questioning Razak. Razak Decl. Exh. 2. Although Defendants assert that the report was deleted from eGuardian, the FBI created and continues to maintain a file about Razak and the incident reported in the SAR. *Id.* ¶¶ 21-23 & Exhs. 3-5. Based on the ongoing existence of a file about him in the FBI's database, Razak continues to be concerned that the report will cause law enforcement to continue to scrutinize him. *Id.* ¶ 20.

Khaled Ibrahim, a U.S. citizen of Egyptian descent who works in accounting, is the

subject of a suspicious activity report describing his attempt to purchase "a large amount of computers." Ibrahim Decl. ¶¶ 2-3 & Exh. 1. Ibrahim, who then worked as a purchasing agent, was seeking to make a bulk purchase of computers for his employer. *Id.* ¶¶ 4-7. Defendants admit that two incident reports about Ibrahim were uploaded to eGuardian. Answer ¶¶ 7, 121. Ibrahim is deeply troubled by what may result from the ongoing collection, maintenance, and dissemination of information in a national database of a report describing him as someone who engaged in suspicious activity with a potential nexus to terrorism. Ibrahim Decl. ¶ 12.

James Prigoff and Aaron Conklin have faced intrusive law enforcement encounters based on their efforts to photograph infrastructure, behavior deemed "suspicious" under the Functional Standard. Prigoff Decl. at ¶¶ 7-10; Conklin Decl. ¶¶ 4-12; AR 461. Prigoff, a renowned photographer of public art, was harassed by private guards and prevented from taking photographs from his preferred location while attempting to photograph a famous piece of public art on a natural gas storage tank near Boston. Prigoff Decl. ¶¶ 4, 7-10. Although he provided the guards no identifying information, the FBI subsequently tracked him cross-country, visited his home in Sacramento, and questioned a neighbor about him. *Id.* ¶¶ 12-15. The FBI created and continues to maintain a file about him. *Id.* ¶ 16 & Exhs. 2-4. Conklin, an amateur photographer, has twice been prevented from photographing oil refineries. Conklin Dec. at ¶¶ 4-12. In an almost hour-long ordeal at a Shell refinery, he was questioned by private security, and then detained and searched by sheriff's deputies, who told him he had to be placed on a "watch list." *Id.* ¶¶ 7-12. His two encounters with law enforcement and the possibility that a report has been created about him has caused him anxiety and distress, and discouraged him from pursuing his photography. *Id.* ¶ 13.

All of the Plaintiffs are concerned that Defendants' standard for suspicious activity reporting harms innocent Americans. None of them was aware that Defendants sought input on the standard for suspicious activity reporting. All would have wanted to share, based on their individual experiences, the factual basis for their concerns about an overly broad standard. Gill Decl. at ¶ 22; Razak Decl. at ¶ 24; Ibrahim Decl. ¶ 9; Prigoff Decl. at ¶ 27; Conklin Decl. at ¶ 14.

5. The Initiative Has Not Proven Effective Against Terrorism.

Governmental oversight bodies and law enforcement agencies participating in the Initiative have expressed concerns about the over-collection of information, which "divert[s] law enforcement personnel and other resources from meaningful work." Supp. AR 386 (Congressional Research Service identified consequences of "an avalanche of irrelevant or redundant data"); *see also* Supp. AR 326 (Boston Police Department urged against "entry of information . . . that is not of value"). Proponents of the Initiative have acknowledged the importance of metrics to assess the effectiveness of the program. Supp. AR 387. But even years after the Functional Standard was first adopted, they admitted that they "just can't prove" that "a nationwide SAR program increase[s] the likelihood that additional attacks will be stopped." Supp. AR 387.

B. The Governing Standard for Reporting Criminal Intelligence

Long before the creation of the Initiative, Congress and DOJ addressed the privacy concerns that arise when information purporting to link individuals to crimes is broadly disseminated. The solution was to prohibit the collection, maintenance, and dissemination of criminal intelligence absent reasonable suspicion of criminal activity.

In 1968, Congress enacted the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, which among other things created the Law Enforcement Administration Agency ("LEAA") within DOJ to oversee the distribution of federal grants to state and local law enforcement programs. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197. The statute also vested LEAA—and then its successor, the Office of Justice Programs, a component of Defendant DOJ—with the authority to prescribe "policy standards" that ensure that federally funded "criminal intelligence systems" do not "collect, maintain, [or] disseminate criminal intelligence information . . . in violation of the privacy and constitutional rights of individuals." 42 U.S.C. § 3789g(c).

The agency initiated a rulemaking process in 1978. Commenters on the then-proposed regulation "were concerned that the collection and maintenance of intelligence information should only be triggered by a reasonable suspicion that an individual is involved in criminal activity." *See* Criminal Intelligence Systems Operating Policies, 43 Fed. Reg. 28,572 (June 30,

1978). The agency concurred, and the proposed regulation was "revised to require this criteria as a basis for collection and maintenance of intelligence information." *Id.* The first "[o]perating principle[]" of the final rule therefore provides that a "project shall collect and maintain criminal intelligence information concerning an individual only if there is reasonable suspicion that the individual is involved in criminal conduct or activity and the information is relevant to that criminal conduct or activity." 28 C.F.R. § 23.20(a).

DOJ amended the rule in 1993 to include a definition of "reasonable suspicion." *See* 28 C.F.R. § 23.20. During that rulemaking, a commenter argued that the "reasonable suspicion" requirement was "not necessary." Final Revision to the Office of Justice Programs, Criminal Intelligence Systems Operating Policies, 58 Fed. Reg. 48,448, 48,451 (Sept. 16, 1993). But the agency disagreed, replying:

> the potential for national dissemination of information in intelligence information systems, coupled with the lack of access by subjects to challenge the information, justifies the reasonable suspicion standard as well as other operating principle restrictions set forth in this regulation. Also, the quality and utility of 'hits' in an information system is enhanced by the reasonable suspicion requirement. Scarce resources are not wasted by agencies in coordinating information on subjects for whom information is vague, incomplete and conjectural.

Id. The regulation has remained unchanged since its last amendment in 1993.

The regulation applies to criminal intelligence, which is defined as "data which has been evaluated to determine that it . . . is relevant to . . . criminal activity." 28 C.F.R. § 23.3(b)(3); *see also* § 23.3(b)(1).

In short, the regulation's reasonable suspicion requirement serves the statute's and regulation's privacy-protecting purpose by constraining the collection, maintenance, and dissemination of information that purportedly relates to criminal activity.

The regulation also states that it applies to "all criminal intelligence systems operating through support under . . . 42 U.S.C. § 3711, et seq., as amended." 28 C.F.R. § 23.3(a). Section 3711 establishes the Office of Justice Programs, a component of Defendant DOJ. *See* 42 U.S.C. § 3711. The regulation therefore applies to any criminal intelligence system funded by the Office of Justice Programs. Among the more well-known of these is the Regional Information Sharing System, also known as RISS. *See* www.riss.net/Policy/CFR, attached as Exhibit 6 to Lye

Declaration ("28 CFR Part 23 . . . appl[ies] to . . . any Office of Justice Programs and Bureau of Justice Assistance programs such as RISS"). According to the Office of Justice Programs, the purpose of the RISS program is to "enable multi-jurisdictional information sharing across law enforcement and criminal justice agencies at all levels." Lye Decl. ¶ 8 & Ex. 5. RISS includes "[a] secure online information and intelligence sharing network." *Id.*

C. Defendants Adopted a Standard for Reporting Suspicious Activities that Does Not Require Reasonable Suspicion.

Defendants have created a uniform system for collecting, evaluating, and disseminating potentially terrorist related information. *See supra* Part II-A-1&2. They have adopted three versions of the Functional Standard, each of which purports to define the universe of information that has a potential nexus to terrorism. None was issued pursuant to APA notice and comment procedures. And none requires the conduct to give rise to a reasonable suspicion of criminal activity. AR 135. The second and third versions, adopted in 2009 and 2015, respectively, instead adopted a looser "reasonably indicative" standard to define the universe of information that purportedly has "a potential terrorism nexus." AR 193, 417.

Key stakeholders acknowledged at the inception of the Initiative that 28 C.F.R. Part 23 applies to suspicious activity reports. Yet in adopting the first two versions of the Functional Standard, Defendants declined to adopt the reasonable suspicion requirement and inexplicably failed to offer *any* explanation why 28 C.F.R. Part 23's reasonable suspicion standard does not apply. It was only in 2015, after this lawsuit was filed, that Defendants offered an explanation for why they believed the regulation does not apply to the Initiative.

1. Key Stakeholders Understood that Suspicious Activity Reports, Once Evaluated to Satisfy Functional Standard Criteria, Constitute "Criminal Intelligence."

After Defendants adopted the first version of the Functional Standard, the FBI, two other components of Defendant DOJ, and other law enforcement entities studied the suspicious activity reporting processes at four major agencies and made recommendations to improve the program. Their work is set forth in the Findings and Recommendations of the Suspicious Activity Report (SAR) Support and Implementation Project ("SAR Project Report"). Supp. AR 66-67.

As noted above, 28 C.F.R. Part 23 defines "criminal intelligence" as "information that has been evaluated to determine that it is" relevant to criminal activity. 28 C.F.R. § 23.3(b)(3). The SAR Project Report described the various stages in the Functional Standard's information flow, including "Integration and Consolidation," the stage at which a suspicious activity report is evaluated against Functional Standard criteria. Supp. AR 88; AR 82-83. The Integration and Consolidation phase, the SAR Project Report explained, is "the point at which SAR information transitions to intelligence and is then subject to 28 CFR Part 23 regulations." Supp. AR 88. The SAR Project Report was concerned that "slightly different decision-making processes" at agencies led to variations in the specific "point [at which] SAR information actually becomes intelligence and subsequently subject to 28 CFR Part 23 requirements." Supp. AR 69. Thus, it recommended that agencies "clearly articulate when 28 CFR Part 23 should be applied." Supp. AR 74.

In other words, the authors of this report recognized that the Functional Standard's process for evaluating suspicious activity reports for their potential nexus to the crime of terrorism transforms reports of suspicious activities from a mere "tip or lead" into "criminal intelligence" governed by the regulation. The question for these key Initiative stakeholders was not whether the regulation applies, but only when in the process it is triggered.

2. Defendants Were Aware of the Need to Address 28 C.F.R. Part 23's Reasonable Suspicion Requirement.

Defendants were well aware of the need to address 28 C.F.R. Part 23's applicability to suspicious activity reports.

Defendant Program Manager's mandate to develop a common framework for sharing information with a potential terrorism nexus included instructions from the President to protect information privacy. AR 4. It therefore established a working group to study the "legal [and] regulatory . . . constraints" affecting the exchange of suspicious activity reports. AR 30.

In a 2008, Defendant Program Manager published an "Initial Privacy and Civil Liberties Analysis" of the Functional Standard. AR 121. At the time, Defendant "acknowledge[d] that questions arise as to whether a SAR should meet the 'reasonable suspicion' standard established for Criminal Intelligence Systems under 28 C.F.R. Part 23." AR 135.

In addition, both DOJ and Program Manager admitted in 2008 that SARs constitute a form of "criminal intelligence." AR 148 (Program Manager recommendation that SAR processes be integrated with "existing systems used to manage *other* . . . criminal intelligence") (emphasis added); Supp. AR 67 (DOJ recommendation that agencies "incorporate [SAR processes] into existing . . . systems used to manage *other* . . . criminal intelligence") (emphasis added).

Further, as Defendants themselves explained, the Initiative "uses multiple secure Sensitive But Unclassified (SBU) networks, including the DOJ-supported Regional Information Sharing Systems® Secure Intranet (RISSNET™)." Supp. AR 254. As noted above, the Office of Justice Programs funds RISS, which is governed by 28 C.F.R. Part 23. *See supra* Part II-B.

3. Defendants' Stated Rationale for Initially Adopting the Reasonably Indicative Standard

Defendants point to a 2010 report by the Program Manager as setting forth "a concise explanation of the reasons for its decision" to adopt the "reasonably indicative" standard in version 1.5. Def. Br. (Dkt. No. 113) at 29-30. That standard, according to Defendants, balances law enforcement's needs to have access to suspicious activity reports with privacy concerns. *See id*. (citing AR 281-82). Notably, however, Defendants' report, contains *no discussion* of 28 C.F.R. Part 23 and how to reconcile that regulation with the agency's decision to adopt a standard less rigorous than reasonable suspicion. *See* AR 281-82.

4. Defendants' Most Recent Rationale for Adopting the Reasonably Indicative Standard

After this lawsuit was filed, Defendants directly addressed for the first time whether the Functional Standard should adopt 28 C.F.R. Part 23's reasonable suspicion requirement. They asserted that the regulation does not apply, and that there is thus no need to adopt the reasonable suspicion standard. AR 413. In support of that decision, they articulated two reasons.

First, they contend that "SAR and ISE-SAR information is not criminal intelligence." *Id.* "In contrast to SAR and ISE-SAR information, criminal intelligence information focuses on the investigative stage once a tip or lead has been received and on identifying the specific criminal subject(s), the criminal activity in which they are engaged, and the evaluation of facts to

determine that the reasonable suspicion standard has been met." *Id.* "Criminal intelligence," Defendants emphasize, "is a product of investigation." *Id.*

Second, Defendants contend that the regulation does not apply because "'reasonable suspicion' is not a required standard for information gathering or collection, processing, retention, or sharing." *Id.* In other words, Defendants maintain that the regulation only applies when the information gathered is supported by reasonable suspicion.

The Record does not contain any other rationale for concluding that the regulation does not apply. Notably, the Record contains no discussion by Defendants of the funding used to support systems on and through which suspicious activity reports are stored and exchanged.

D. Implementation of the Functional Standard

1. Defendants Expect Initiative Participants to Comply with the Functional Standard.

The plain language of the Functional Standard and other documents in the Administrative Record make clear that Defendants expect law enforcement agencies that participate in the Initiative to comply with the Functional Standard. Indeed, if Initiative participants did not comply, the Functional Standard—the central purpose of which is to establish a "standardized means for identifying and sharing" reports deemed to have a potential terrorism nexus—would be pointless. AR 424.

First, the Functional Standard contains mandatory language requiring compliance. AR 414 ("This *ISE-SAR Functional Standard* applies to all departments or agencies that . . . participate (or expect to participate) in the" Initiative); AR 429 ("This *ISE-SAR Functional Standard* will be used as the ISE-SAR information exchange standard for all NSI participants).[4]

Second, the Functional Standard creates a built-in enforcement mechanism to ensure that

[4] Predecessor versions contained similar mandatory language. *See* AR 75 (Version 1.0: "This ISE-FS applies to all departments or agencies that . . . participate (or expected to participate) in the" Initiative); AR 71 (Memorandum regarding release of Version 1.0: "agencies responsible for the collection and processing of SARs with a nexus to terrorism must apply this functional standard"); AR 202 (Version 1.5: "This *ISE-SAR Functional Standard* will be used as the ISE-SAR information exchange standard for all NSI participants"); AR 188 (Memorandum regarding release of Version 1.5: "Each . . . agenc[y] responsible for the collection and processing of SARs with a nexus to terrorism must apply this Functional Standard).

participants in the Initiative comply with its definition of "suspicious activity": "[O]nly those tips and leads that comply with the ISE-SAR Functional Standard are broadly shared with NSI participants." AR 429; *see also* AR 409 (same); AR 415 (¶ 5.d) ("All information that is available to NSI participants . . . will be vetted by a trained fusion center or Federal agency analyst or investigator to ensure that it meets the vetting standard for an ISE-SAR"); AR 131 ("An ISE-SAR is created and shared with appropriate ISE participating organizations only when a trained expert has determined that the information meeting the criteria has a potential nexus to terrorism.").

Third, Defendants themselves have recommended numerous measures to police adherence to the Functional Standard. These include auditing and accountability measures. AR 428 (Functional Standard instructs that participants "should implement auditing and accountability measures"); *see also* Supp. AR 4 (Defendant's Privacy Guidelines require agencies to cooperate with audits); Supp. AR 43-44 (National Strategy for Information Sharing, out of which Initiative grew, provides that "[a]gencies must . . . [i]mplement adequate accountability, enforcement, and audit mechanisms to verify compliance"); AR 148 and 278 (Program Manager's Initial and Final Privacy and Civil Liberties Analyses recommended audits). Defendants also recommended standardized training to ensure that participants at every level understood the criteria and process for vetting the information. AR 146, 272-73; Supp. AR 232.

2. Suspicious Activity Reports Are Stored and Exchanged on Federally Funded Networks.

Suspicious activity reports are stored and exchanged on federally funded data systems.

A key element of the Initiative was to use technology to enhance information sharing. Supp. AR 230. The goal was to allow state and local agencies to "maintain . . . ownership of the data" on "state and local systems" while facilitating the exchange of information through a "national information sharing platform[]." *Id.* The Functional Standard therefore uses a "distributed data model" in which the agency from which a suspicious activity report originated retains control of the data, while allowing Initiative participants to search for ISE-SARs, *i.e.*, reports that have been vetted and meet the Functional Standard's definition of having a potential

nexus to terrorism, through a common platform. *Id.* This approach allows Initiative participants "to securely search the ISE-SAR data located on local agency-controlled servers from one central location." *Id.* That "central location" is termed alternately the "'shared space' environment" or the "NSI SAR Data Repository." *Id.*; AR 415.

Given this distributed data model, multiple information systems are involved in both the exchange and storage of suspicious activity reports.

With respect to exchange, the Initiative uses "multiple Secure But Unclassified (SBU) networks, including the DOJ-supported Regional Information Sharing Systems® Secure Intranet (RISSNET™) . . . as the connection and transport mechanisms for sharing SARs." Supp. AR 254. The Regional Information Sharing System is funded by the Office of Justice Programs. Lye Decl. ¶¶ 8-9. "Additionally, the eGuardian system provides the connection between" the FBI's Joint Terrorism Task Force and the common data repository. Supp. AR 254.

With respect to storage, suspicious activity reports are "located on local agency-controlled servers." Supp. AR 230. Fusion centers such as the Northern California Regional Intelligence Center store suspicious activity reports on systems funded through DOJ's Office of Justice Programs, using funding to which that Office has expressly attached "Special Conditions," such as compliance with 28 C.F.R. Part 23. *See* Lye Decl. ¶ 6 & Ex. 4.

E. Procedural Background

Defendants previously brought a motion to dismiss in which they argued, *inter alia*, that Plaintiffs lack standing and the Functional Standard does not constitute "final agency action" subject to judicial review. *See* Mot. to Dismiss (Dkt. No. 21). The Court denied the motion, finding among other things that Plaintiffs have standing and that the Functional Standard constitutes final agency action. *See* Order Denying Mot. to Dismiss ("Order") (Dkt. No. 38).

III. ARGUMENT

A. Plaintiffs Have Standing.

Defendants have abandoned their challenge to Plaintiffs' standing. The record in any event is clear that Plaintiffs have standing to pursue this suit. *See Lujan v. Defs. of Wildlife,* 504

U.S. 555, 560-61 (1992) (standing requires injury, causation, and redressability).[5]

Plaintiffs are all personally affected. Each is the subject of a suspicious activity report or faced other law enforcement scrutiny for engaging in wholly innocent conduct deemed suspicious under the Functional Standard. *See* Gill Decl. ¶ 16 (viewing online video game reviews); Razak Decl. ¶ 6 (waiting in train station for mother); Ibrahim Decl. ¶ 7 (buying laptops); Prigoff Decl. ¶ 7-14 (photographing public art); Conklin Decl. ¶ 4-12 (photographing refineries).

And Plaintiffs have all suffered reputational, privacy, aesthetic, and other injuries. Information about Gill, Ibrahim, and Razak was disseminated to all law enforcement agencies participating in the Initiative through eGuardian. Answer ¶¶5, 7, 8. Their reputations have all been injured as the inclusion of their information in eGuardian identifies them as individuals engaged in conduct with a potential nexus to terrorism. AR 415. Prigoff additionally suffered reputational injury when the FBI questioned a neighbor about him. Prigoff Decl. ¶ 13. Gill, Razak, and Prigoff all continue to have FBI files. Gill Decl., Exh. 2; Razak Decl., Exh. 2; Prigoff Decl., Exhs. 2-4; *see Meese v. Keene*, 481 U.S. 465, 474-75 (1987) (plaintiff had standing to challenge statute based on "risk of injury to his reputation"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 131, 140-41 (1951) (organizations had "clear" standing to challenge loyalty oath based on injury to "reputation"); Order at 7 (rejecting Defendants' challenge to standing based on "privacy and reputational interests").

Gill, Prigoff, and Razak have all faced intrusive law enforcement questioning. *See* Gill Decl. ¶ 12-13; Prigoff Decl. ¶ 12-14; Razak Decl. ¶ 14 & Exh. 2; *Hemp. Indus. Ass'n v. DEA*, 333 F.3d 1082, 1086 (9th Cir. 2003) (risk of enforcement proceedings establish standing). Prigoff and Conklin suffered aesthetic injuries when they were prevented from taking photographs. *See* Conklin Decl. ¶¶ 4-12; Prigoff Decl. ¶ 10 (forced to move to location with inferior lighting); *Cantrell v. City of Long Beach*, 241 F.3d 674, 680 (9th Cir. 2001) (aesthetic injury constitutes

[5] Plaintiffs have submitted declarations to establish their standing in this matter. Plaintiffs request that the Court supplement the record with these declarations. *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997) (appropriate to consider extra-record evidence regarding standing). In the event Defendants challenge standing at a subsequent stage in this litigation, Plaintiffs reserve their objection to the Court's earlier ruling barring Plaintiffs from taking any jurisdictional discovery. *See* Order (Dkt. No. 72) at 1.

injury-in-fact). Gill and Conklin continue to experience worry and stress. Gill Decl. ¶ 21; Conklin Decl. ¶ 13; *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010) ("generalized anxiety and stress" constitutes injury-in-fact).

And Plaintiffs' harms "arise directly from the existence of Defendants' Standards." Order at 7. Causation and redressability are therefore also satisfied. *See id.*

B. Defendants' Adoption of the "Reasonably Indicative" Standard Was Arbitrary and Capricious.

A duly promulgated privacy-protecting regulation prohibits the collection of criminal intelligence unless there is reasonable suspicion of criminal activity. Key stakeholders in the Initiative, including components of Defendant DOJ, understood this regulation to apply to suspicious activity reports. Yet Defendants have adopted a definition of suspicious activity that encourages law enforcement agencies to collect, maintain, and disseminate information that has a supposed nexus to the crime of terrorism, even when there is no reasonable suspicion of criminal activity. As a result, innocent Americans have been wrongfully branded as potential terrorists. This decision was arbitrary and capricious.

First, in adopting their standard in 2010, Defendants "entirely failed to consider an important aspect of the problem," in particular, the applicability of 28 C.F.R. Part 23 to suspicious activity reports. *See Motor Vehicle*, 463 U.S. at 43. Second, in adopting a revised version of the Functional Standard in 2015, Defendants addressed the regulation, but the reasons they offered for concluding that the regulation does not apply are "counter to the evidence before the agency" and "implausible." *See id.* Third, Defendants in their brief now rely heavily on the factual assertion that the information systems used in connection with the Initiative do not receive the type of federal funding that triggers the regulation. Def. Br. at 23-25. But this *post-hoc* factual argument was nowhere articulated by the agency in the Record and impermissibly relies on facts contained in an extra-record declaration. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle*, 463 U.S. at 50. Moreover, to the extent factual information about funding is relevant to the analysis, the facts show that the systems used to share and store suspicious activity reports receive funding from the

Office of Justice Programs and are therefore covered by 28 C.F.R. Part 23. Before addressing these arguments, we first turn to Defendants' meritless threshold objections.

1. Defendants' Procedural Objections Are Meritless.

Defendants contend that Plaintiffs must satisfy the standard for a facial challenge, and that 28 C.F.R. Part 23 does not provide a private right of action. Def. Br. at 22-25, 26-27. The first point is incorrect and the second irrelevant.

The Ninth Circuit and district courts in this circuit have rejected the applicability of the "no set of circumstances" test to cases such as this, *i.e.*, a challenge to agency action as arbitrary and capricious. *See, e.g.*, *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023-24 (9th Cir. 2007) (challenge under National Environmental Policy Act); *Friends of Columbia Gorge, Inc. v. Schafer*, 624 F. Supp. 2d 1253, 1264 (D. Or. 2008) (APA challenge). In any event, if using the Functional Standard is arbitrary and capricious, doing so would be "unlawful regardless of how [it] is applied." *Bosworth*, 510 F.3d at 1024. "In other words, if [Plaintiffs'] claims have merit, the stricter . . . standard [for facial challenges] is met and there would be no set of circumstances under which [the agency rule] could be valid." *Id.*

Second, Plaintiffs do not seek to privately enforce 28 C.F.R. Part 23. Rather, Plaintiffs point to the regulation to underscore why, as discussed further below, Defendants' adoption of the Functional Standard was arbitrary and capricious. *See infra* Part III-B-2&3.

2. Defendants Entirely Ignored a Critical Privacy-Protecting Regulation in Adopting the "Reasonably Indicative" Standard.

Defendants' adoption of the "reasonably indicative" standard was arbitrary and capricious because they entirely ignored 28 C.F.R. Part 23.

In *Motor Vehicle*, the Supreme Court explained that agency action is arbitrary and capricious "if the agency has . . . entirely failed to consider an important aspect of the problem." 463 U.S. at 43. That case involved the decision by a transportation safety agency to rescind a requirement that vehicles be equipped with passive restraints. *Id.* at 34. The Court invalidated the agency action on multiple grounds, the "most obvious" flaw being the agency's complete failure to address airbag technology. *Id.* at 46. The Court emphasized that the agency, which had

a "mandate . . . to achieve traffic safety," had itself "ascribed" "effectiveness" to airbag technology. *Id.* at 48. But "[n]ot one sentence of [the agency's] rulemaking statement discusses the airbags-only option." *Id.* "At the very least," the Court held, the alternative of requiring airbags as a "way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment." *Id.*

Following *Motor Vehicle*, courts have found agency actions arbitrary and capricious where the agency failed to address important factual or legal considerations. *See, e.g.*, *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1094 (9th Cir. 2005) (agency failed to consider life-cycle of species); *Friends of the E. Fork, Inc. v. Thom*, 688 F. Supp. 2d 1245, 1251 (W.D. Wash. 2010) (agency failed to consider affected parties' "preexisting obligation under state law"); *Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 370 (E.D. Cal. 2007) (agency failed to include "*any* discussion" of climate change); *Ctr. for Food Safety v. Johanns*, 451 F. Supp. 2d 1165, 1186 (D. Haw. 2006) (agency failed to provide "*any* explanation" why National Environmental Policy Act did not apply).

It is clear from the Record that 28 C.F.R. Part 23 was an "important aspect of the problem." *See Motor Vehicle*, 463 U.S. at 43. Key stakeholders in the Initiative, including the FBI and two other components of Defendant DOJ, explained in the SAR Project Report that when suspicious activity reports are evaluated against the Functional Standard's criteria, the "information transitions to intelligence and is then subject to 28 CFR Part 23 regulations." Supp. AR 88. Defendants Program Manager and DOJ described suspicious activity reports as a form of "criminal intelligence." AR 148, Supp. AR 67. And Defendant Program Manager itself "acknowledge[d] that questions arise as to whether a SAR should meet the 'reasonable suspicion' standard established for Criminal Intelligence Systems under 28 C.F.R. Part 23." AR 135.

Yet in adopting the "reasonably indicative" standard, Defendants entirely failed to answer the very question they posed. In explaining the decision to adopt this standard, Defendants point to a "concise explanation" articulated by the agency in 2010. Def. Br. at 29-30 (citing AR 281-82). Even assuming the agency can rely on a 2010 justification to support its adoption of the "reasonably indicative" standard in 2009, the justification is deficient. It contends that the

standard balances the government's interest in obtaining consistently vetted suspicious activity reports with privacy concerns. AR 281-82. But "[n]ot one sentence" of Defendant's explanation addresses 28 C.F.R. Part 23. *See Motor Vehicle*, 463 U.S. at 48. Defendant had a "mandate" to respect privacy rights, and itself "ascribed" significance to the question of the regulation's applicability. *See id.*; AR 4, 30, 135. "At the very least," the adoption of 28 C.F.R. Part 23's reasonable suspicion standard as an "alternative way of achieving" privacy protections "should have been addressed and adequate reasons given for its" rejection. *See Motor Vehicle*, 463 U.S. at 48. Defendants' failure to provide "*any* explanation" for its decision to reject the reasonable suspicion standard is arbitrary and capricious. *See Ctr. for Food Safety*, 451 F. Supp. 2d at 1186.[6]

3. Defendants' Stated Reasons for Rejecting 28 C.F.R. Part 23 Contradict the Record and Are Implausible.

Defendants ultimately addressed 28 C.F.R Part 23, but not until 2015, after this lawsuit was filed. Even assuming this post-hoc rationalization should be considered, Defendants belatedly articulated only two reasons for rejecting the regulation's reasonable suspicion requirement. AR 413. They are both arbitrary and capricious. *See Motor Vehicle*, 463 U.S. at 43 (action invalid if agency "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

First, Defendants asserted that suspicious activity report information is not "criminal intelligence" within the meaning of the regulation because they are not "a product of investigation" and instead merely uncorroborated "tip[s] and lead[s]." AR 413; Def. Br. at 31. This rationale ignores the entire point of the Initiative and the Functional Standard.

The regulation defines "criminal intelligence" as "data which has been evaluated to

[6] Defendants note that the "reasonably indicative" language was proposed by advocates. Def. Br. at 21 (citing AR 158). But the same correspondence also recommends that the Functional Standard include a "discussion of . . . *Terry v. Ohio*," (AR 159), the case that established the reasonable suspicion threshold for the police to conduct temporary seizures. *See Terry v. Ohio*, 392 U.S. 1, 16-19 (1968); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-83 (1975). The advocates could not have anticipated that Defendants would have interpreted "reasonably indicative" to allow the collection of personally identifiable information without reasonable suspicion of criminal activity.

determine that it . . . is relevant to criminal activity . . . ." 28 C.F.R. § 23.3(b)(3). Suspicious activity report information is "criminal intelligence" precisely because the Functional Standard establishes a process and standard by which to evaluate tips and leads for their relevance to the crime of terrorism. *See supra* Part II-A-2. Key Initiative stakeholders, including components of Defendant DOJ, recognized as much in the SAR Project Report. As they explained, "SAR information transitions to intelligence and is then subject to 28 CFR Part 23 regulations," when it is evaluated pursuant to the Functional Standard's procedure for identifying information with a potential nexus to terrorism. Supp. AR 88; AR 82-83. Both DOJ and Program Manager admitted in 2008 that suspicious activity reports constitute a form of "criminal intelligence." AR 148; Supp. AR 67. Contrary to Defendants' assertion that suspicious activity reports are not "the product of investigation" (AR 413), the Functional Standard expressly calls for them to be evaluated through "investigative activities." AR 466 (emphasis added). If suspicious activity report information were merely "tips and leads," the Initiative—which sought to enhance and revamp pre-existing tips and leads systems by creating a uniform, nationwide process and set of criteria for evaluating the information, *see supra* Part II-A-1—would have been entirely pointless.

In short, Defendants' purported explanation for why suspicious activity report information is not "criminal intelligence" contradicts admissions in the Record to the contrary, and cannot be reconciled with the Functional Standard's process for evaluating such information. *See Motor Vehicle*, 463 U.S. at 43 (action invalid if agency "offered an explanation for its decision that runs counter to the evidence before the agency").

Second, Defendants stated: "[T]he ISE-SAR FS does not establish 'reasonable suspicion,' as defined in 28 CFR Part 23, as the standard for the sharing of this information in the NSI SAR Data Repository (SDR). Further, the FS need not do so because 'reasonable suspicion' is not a required standard for information gathering or collection, processing, retention, or sharing." AR 413. In other words, they contend that because the information is collected without reasonable suspicion, the regulation's key privacy protection—the prohibition against collecting, maintaining, and disseminating information without reasonable suspicion—does not apply. But setting limits on the collection, maintenance, and sharing of information by law enforcement

about individuals' non-criminal activities is the central purpose of the regulation and authorizing statute. *See* 42 U.S.C. § 3789g(c). This "implausible" argument is entirely circular and renders the regulation meaningless; *supra* Part II-B. *See Motor Vehicle*, 463 U.S. at 43.

Notably, Defendants nowhere discuss this second justification in their brief and have therefore waived any argument in support of it. *See, e.g.*, *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005) (issue waived when not "specifically and distinctly" argued in opening brief).

4. Defendants' Extra-Record Reasons for Rejecting 28 C.F.R. Part 23 Are Also Meritless.

Defendants now offer two additional arguments—that the Functional Standard and the regulation were adopted pursuant to separate statutory schemes and that the criminal intelligence systems used to share suspicious activity reports do not receive the requisite federal funding. But Defendants never articulated either rationale at the time they adopted the Functional Standard. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle*, 463 U.S. at 50. For that reason alone, these justifications must be rejected. In any event, both arguments are meritless.

a. Defendants Can Neither Violate nor Ignore a Duly Promulgated Regulation of Another Agency.

Defendants contend they were not required to adopt the 28 C.F.R. Part 23 standard because that regulation was adopted by a different agency pursuant to a different statutory scheme. Def. Br. at 31. But it is arbitrary and capricious for one agency to adopt a regulation that violates another agency's regulation and equally unlawful to completely ignore a plainly pertinent regulation of another agency.

Courts have recognized that an agency, acting within its own statutory mandate, is prohibited from taking an action that "violate[s] another binding provision of law or regulation," even if that other law or regulation was enacted by a separate agency pursuant to a separate statute. *Westinghouse Elec. Corp. v. United States*, 782 F.2d 1017, 1020 (Fed. Cir. 1986). In *Westinghouse*, the Federal Circuit addressed the interplay between a Department of Defense rule

regarding progress payments to contractors and a regulation regarding cost accounting standards promulgated by the Cost Accounting Standards Board. *Id*. at 1019. The court held that while Defense had authority to address progress payments to its contractors, a "power [that] exists independently and is not drawn from the statute creating and implementing the [Cost Accounting Standards Board]," Defense's "exercise of that power may conceivably be defeated or modified" by a rule of the Cost Accounting Standards Board. *Id.* at 1020. Should an agency "violate another binding provision of law or regulation, whether within [its statutory mandate] or outside," the court suggested, the action would be "arbitrary or capricious." *Id*.

In *United States v. Boeing Co.*, 802 F.2d 1390 (Fed. Cir. 1986), the court then sustained a Defense action precisely because it reconciled potentially contradictory cost accounting requirements imposed by its own rule and a rule of the separate Cost Accounting Standards Board. "To hold otherwise would force this court to sanction DOD exercising its procurement authority in an arbitrary and capricious manner by completely ignoring a particular cost accounting standard." *Id*. at 1395. In other words, the Federal Circuit recognized that it would have been arbitrary and capricious for Defense to "completely ignor[e]" the Cost Accounting Standards Board's rule; the fact that it had been issued by a separate agency did not alter the analysis. *Id.*; *cf. Nat. Res. Def. Council v. EPA*, 937 F.2d 641, 647-48 (D.C. Cir. 1991) (rejecting arbitrary and capricious challenge because agency had analyzed interaction of its proposed action with separate agency's overlapping regulations).

Similarly, here, it was arbitrary and capricious for the Program Manager to "completely ignor[e]" 28 C.F.R. Part 23. *See Boeing*, 802 F.2d at 1395. And just like the Defense and Cost Accounting Standards Board rules in *Boeing* and *Westinghouse*, 28 C.F.R. Part 23 and the Functional Standard establish conflicting standards for affected parties: The former prohibits the collection and maintenance of criminal intelligence absent reasonable suspicion; the latter invites law enforcement agencies to do so. That the regulation was promulgated "outside" the Program Manager's own statutory mandate does not grant it license to issue a rule that "violate[s]" 28 C.F.R. Part 23. *See Westinghouse*, 782 F.2d at 1020.

b. Suspicious Activity Reports Are Stored and Shared on Federally Funded Systems.

Defendants' *post-hoc* funding argument relies on the extra-record factual premise that the FBI's eGuardian system, which is used to disseminate suspicious activity reports, does not receive the federal funding that would trigger 28 C.F.R. Part 23. Def. Br. at 27. This argument is plainly procedurally improper but also fails to address (1) *other systems* used to disseminate suspicious activity reports and (2) the systems used by state and local law enforcement to *store* suspicious activity reports.

First, Defendants seek to rely on the declaration of Marilynn B. Atsatt, the Deputy Chief Financial Officer for the Office of Justice Programs, who states that "OJP has not provided any funding to the Federal Bureau of Investigation (FBI) for eGuardian or the NSI SAR DATA Repository." Atsatt Decl. ¶ 3 (Dkt. No. 113-2). But, as Defendants emphasized throughout this case in attempting to bar Plaintiffs from obtaining any discovery, "a court's review of an agency decision [in an APA case] is limited to the administrative record." *See* Case Management Statement (Dkt. No. 36) at 6 (citing *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007)). Defendants have not moved to supplement the Record with this declaration, which Plaintiffs move to strike.[7] Indeed, the fact that Defendants must now look outside the Record for funding information underscores the point that the agency never considered funding at all relevant to its decision to reject 28 C.F.R. Part 23. "It would be improper for [the court] to accept as sufficient justification for the [agency] decision . . . a reason that is not even hinted at in the [Record]." *Ry. Labor Execs.' Ass'n v. ICC*, 784 F.2d 959, 974 (9th Cir. 1986).

Second, even if Defendants' declarations were properly before this Court, they do not prove Defendants' point. Ms. Atsatt's declaration only addresses the funding received *by the FBI* for the system Defendants contend to be the only system currently used to exchange suspicious activity reports. *See* Atsatt Decl. at ¶ 3 ("OJP has not provided any funding *to the Federal Bureau of Investigation* . . . .") (emphasis added); AR 415; Def. Br. at 27. But Ms. Atsatt's

[7] Defendants have also filed a declaration by Basil N. Harris purporting to recount the process by which the Program Manager developed the Functional Standard. Plaintiffs move to strike this extra-record declaration as well.

declaration does not address the funding sources for systems used *by state and local agencies* in connection with the Initiative. Nor does the Record support Defendants' assertion in their brief that the FBI's eGuardian system is "the *only* NSI information-sharing system that is currently in operation." Def. Br. at 27 (emphasis added).

According to the Record, multiple systems, including "the DOJ-supported Regional Information Sharing Systems® Secure Intranet (RISSNET™) . . . [are used] as the connection and transport mechanisms for sharing SARs." Supp. AR 254. "Additionally, the eGuardian system provides the connection between the [FBI's Joint Terrorism Task Force] and the ISE-SAR Shared Spaces." Supp. AR 254.[8]

Further, Ms. Atsatt addresses only the funding that "has been provided to the FBI." Atsatt Decl. ¶ 3. She does not address funding received by state and local agencies, which, under the Functional Standard's distributed data model, retain control of suspicious activity reports on their own servers. Supp. AR 230.

Third, to the extent funding is relevant, and even if eGuardian were the only system used to *disseminate* suspicious activity reports, fusion centers such as the Northern California Regional Intelligence Center use systems supported by the Office of Justice Programs to *store* the information. *See* Lye Decl. ¶¶ 6-7 & Exh. 4.[9] Indeed, the Office of Justice Programs grant for that system expressly requires compliance with 28 C.F.R. Part 23. *See id.* at ¶ 6 & Exh. 4 at 14.

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[8] To support the proposition that eGuardian is the "only" system currently used to share suspicious activity reports, Defendants cite the definitions in the Functional Standard of the terms NSI SAR Data Repository and eGuardian. Def. Br. at 27 (citing AR 415). But those definitions merely describe eGuardian as the FBI's system for sharing suspicious activity reports, and state that the NSI SAR Data Repository "consists of a single data repository, built to respect and support originator control and local stewardship of data . . . . Within the SDR, hosted data enclaves extend this approach . . . by ensuring a separation of data across participating agencies." AR 415. The definition of the NSI SAR Data Repository is entirely consistent with the Record's description of the Initiative's "distributed data model," which allows participating agencies to house the data on their own servers but search it through a "one central location," known as the shared space or NSI SAR Data Repository. Supp AR 230; AR 415. Thus, nothing in the Functional Standard's definitions indicates that the DOJ-supported Regional Information Sharing System is no longer used as "the connection and transport mechanisms for sharing SARs." Supp. AR 254.

[9] Plaintiffs move to supplement the Record with the information presented in the declaration of Linda Lye regarding the funding sources of systems used to store and exchange suspicious activity reports.

In short, the Record makes clear that Defendants never considered funding issues in deciding to reject the 28 C.F.R. Part 23 standard. But if funding were relevant, the evidence would show that information systems used in connection with the Initiative receive support from the Office of Justice Programs. In particular, that office funds (a) the Regional Information Sharing System, which is used to *exchange* SARs and (b) systems used by fusion centers to *store* SARs.[10]

C. The Functional Standard Is an Invalid Legislative Rule.

This Court should invalidate the Functional Standard for the separate and independent reason that it was issued without providing the public with notice or an opportunity to comment.

First, Defendants contend that the Functional Standard is a general statement of policy, not a legislative rule to which the APA's notice and comment requirements apply. This argument repackages Defendants' earlier contention, rejected by this Court on the motion to dismiss, that the rule does not constitute final agency action.

Second, Defendants assert that their failure to follow APA procedures is harmless because they selectively consulted with a handful of privacy advocates and would have reached the same conclusion no matter what. But the APA affords the *public*, not interest groups hand selected by an agency, the right to notice and an opportunity to comment. Because of Defendants' procedural violation, the public—including all of the Plaintiffs in this action—was deprived of the opportunity to participate. Defendants dismiss the comments Plaintiffs would have made as duplicating *legal* arguments raised by advocacy organizations. But the Plaintiffs would have presented the agency with *factual* information, based on their actual experiences, about the impact of an overly broad definition of "suspicious activity." As a result, the agency did not have before it important factual evidence. The error here was far from harmless. Defendants' conduct

[10] Defendants focus on whether the information sharing system is supported by the "Omnibus Act." Def. Br. at 27. Because 28 C.F.R. Part 23 applies to "all criminal intelligence systems operating through support under . . . 42 U.S.C. § 3711, et seq., as amended," and Section 3711 establishes the Office of Justice Programs, the regulation applies to all criminal intelligence systems operating through support from the Office of Justice Programs. *See* www.riss.net/Policy/CFR, attached as Exhibit 6 to Lye Declaration ("28 CFR Part 23 . . . appl[ies] to . . . any Office of Justice Programs and Bureau of Justice Assistance programs.").

undermined the two interests the APA's procedural requirements seek to promote—ensuring public participation and improving the quality of agency decisionmaking.

1. The APA Requires Notice and Comment to Promote Democratic Accountability and Improve Agency Decisionmaking.

Section 553 of the APA requires that an agency provide notice of proposed rulemaking in the *Federal Register* and allow an opportunity for the public and other interested persons to present their views and, in this way, participate in the rulemaking. 5 U.S.C. § 553(b)-(c). These requirements serve two important functions: "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies," and to improve the quality of agency-decisionmaking by inviting comment from the public. *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980); *see also Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 758 (9th Cir. 1992) ("The procedural safeguards of the APA help ensure that government agencies are accountable and their decisions are reasoned.").

The APA therefore broadly requires notice and comment whenever an agency formulates, amends, or repeals a "rule," subject "only [to] limited exceptions." *Batterton*, 648 F.2d at 700-01; 5 U.S.C. § 551(4) (definition of "rule"); *id.* § 551(5) (definition of "rule making"); *id.* § 553(b)-(c) (procedural requirements for rulemaking). The statute's procedural requirements do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A); *Mora-Meraz v. Thomas*, 601 F.3d 933, 940-41 (9th Cir. 2010). Exceptions are "narrowly construed and only reluctantly countenanced." *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984) (internal quotation marks and citations omitted). An agency's characterization of its own rule is given "[no] deference." *Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 909 n.11 (9th Cir. 2003).

Defendant DOJ followed the rulemaking process for legislative rules when it promulgated the rule governing the collection, maintenance and dissemination of criminal intelligence. That process engendered a lively debate regarding the standard to be employed for the collection and maintenance of criminal intelligence information, and the agency revised the proposed regulation in response to public comments. *See* Criminal Intelligence Systems Operating Policies, 43 Fed.

Reg. 28, 572 (June 30, 1978) (describing agency's revision of proposed regulation to address public concerns regarding reasonable suspicion). The agency utilized the notice and comment process again when it amended 28 C.F.R. Part 23 by providing a formal definition for the term "reasonable suspicion." *See supra* Part II-B.

Here, by contrast, Defendants adopted the Functional Standard without notice and comment. The Functional Standard easily satisfies the definition of a "rule" to which notice and comment requirements by default apply. It is "an agency statement" that applies generally to all agencies participating in the Initiative and is "designed to implement" and "prescribe" the process and criteria for identifying and disseminating suspicious activity reports. *See* 5 U.S.C. § 551(4) (defining "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"). Defendants make no argument to the contrary. They were thus required to comply with the APA's procedural requirements, unless the Functional Standard falls within a statutory exception.

2. The Functional Standard Is Not a General Statement of Policy Because It Creates a Binding Norm.

Defendants' sole justification for ignoring the APA's notice and comment procedures is that the Functional Standard is a "general statement of policy," rather than a "legislative rule." Def. Br. at 14-17. They argue that the Functional Standard is a "guidepost" but "not a strict legal standard or rule with which NSI participants must comply or else face sanction." *Id.* at 16. This argument ignores the language and structure of the Functional Standard, which creates a binding norm. Defendants' rule contains mandatory language and a built-in enforcement mechanism that constrains agency decisionmaking: Only those suspicious activity reports that comply with its definition of suspicious activity can be shared with other Initiative participants.

As the Ninth Circuit explained in *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987), the analysis turns on whether the rule establishes a "binding norm," that is, courts looks to "the extent to which the challenged [directive] leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case." *Id.* at 1013-14 (internal quotation marks omitted; bracketed text in original).

The Functional Standard itself is replete with mandatory language requiring Initiative participants to comply. Defendants falsely claim that "the Functional Standard does not use any imperative terms," Def. Br. at 15, but the rule states: "This *ISE-SAR Functional Standard* will be used as the ISE-SAR information exchange standard for all NSI participants." AR 429 (emphasis added); *see also* AR 414 ("This *ISE-SAR Functional Standard* applies to all departments or agencies that . . . participate (or expect to participate) in the ISE . . . ."); *supra* Part II-D-1 & n.2.

The Functional Standard contains a built-in compliance mechanism: "[O]nly those tips and leads that comply with the ISE-SAR Functional Standard are broadly shared with NSI participants." AR 429. The Functional Standard is mandatory in that a law enforcement agency may not choose a less strict standard for disseminating suspicious activity reports, and still participate in the Initiative. *See, e.g.*, AR 415 ("All information that is available to NSI participants . . . will be vetted by a trained fusion center or Federal agency analyst or investigator to ensure that it meets the vetting standard for an ISE-SAR"); AR 131 ("An ISE-SAR is created and shared with appropriate ISE participating organizations *only when* a trained expert has determined that the information meeting the criteria has a potential nexus to terrorism.") (emphasis added). As a result, agencies that choose to participate in the Initiative lack "discretion to follow, or not to follow" the Functional Standard's process and criteria for designating reports that have, in Defendants' view, a potential nexus to terrorism. *See Mada-Luna*, 813 F.2d at 1013.

Defendants attempt to characterize the rule as "describ[ing] a standardized process." Def. Br. at 15. But Defendants create a false dichotomy between requiring and describing a standardized process. Indeed, standardization of information sharing was the entire point of the Functional Standard, which describes in mandatory terms the standard definition of "suspicious activity" that agencies must adopt if they wish to participate in the Initiative. Defendants' suggestion that Initiative participants are free to disregard the Functional Standard would render it pointless.[11]

[11] Defendants misleadingly state that the Functional Standard may be "customized" for "unique communities," Def. Br. at 15 (citing AR 429), but the underlying citation merely indicates that the Functional Standard permits participating agencies to customize their software, not to alter the substantive definition or criteria for "suspicious activity." *See* AR 429 ("the extensibility of this ISE-SAR Functional Standard does support customization for unique communities"); DOJ, DOJ

Defendants also argue that there is no legal sanction for non-compliance. Def. Br. at 16-17. But courts have rejected the argument that "a rule could not be considered a 'binding norm' unless it is backed by a threat of legal sanction." *Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999). In *Chamber of Commerce*, the D.C. Circuit addressed a rule that encouraged employers to adopt a comprehensive safety and health program; it rejected the argument that the rule was a general statement of policy. Under the rule, participating employers would be removed from the primary list of workplaces facing inspection, if they met program guidelines. *Id.* at 208. Like the program in *Chamber of Commerce*, the Functional Standard is binding because agencies can only participate in the Initiative if they comply with the Functional Standard's requirements. The Functional Standard need not be "backed by a threat of legal sanction" to constitute a legislative rule subject to notice and comment. *See id.* at 212.

Relatedly, Defendants assert that they have never enforced or contemplated enforcing the Functional Standard. Def. Br. at 17. But this ignores the Functional Standard's built-in enforcement mechanism, as well as the numerous measures recommended by Defendants themselves to police compliance, such as training, auditing, and accountability procedures. *See supra* Part II-D-1. In any event, prior agency enforcement is not the legal test and, if required, would insulate unlawfully promulgated legislative rules from pre-enforcement challenges. Moreover, if Defendants are correct that the Functional Standard has no binding effect and that 28 C.F.R. Part 23 is inapplicable to SARs, then no rules restrict the collection and dissemination of information about private citizens. That is an unsupportable result, which also undermines Defendants' stated purpose in issuing their Standards—promoting uniformity in reporting.

Policy Statement: Information Technology Investment Oversight at 10 ("framework that is extensible (can be built upon)"), *available at* https://www.justice.gov/jmd/file/870296/download; BusinessDictionary.com (defining "extensibility" as "[a]bility of a software system (such as a database system) to allow and accept significant extension of its capabilities, without major rewriting of code or changes in its basic architecture"), *available at* http://www.businessdictionary.com/definition/extensibility.html. Moreover, the Functional Standard goes on to state that any modifications should "follow a formal change request process," AR 429, underscoring the expectation that participating agencies comply with the Functional Standard absent permission to the contrary.

Notably, the legislative rule inquiry is similar to the test for whether a rule is final agency action under the APA; both ask whether the agency pronouncement imposes a binding legal norm. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). This Court has already ruled that the Functional Standard meets this test for the simple reason that "if a state or local law enforcement agency does participate in the NSI and submits SARs, it is to do so consistent with the Defendants' Standards." Order at 9. For the same reasons that the Functional Standard establishes a "binding legal norm" for final agency action purposes, it does so for purposes of the legislative-rule inquiry. Indeed, as Defendants previously acknowledged, the legislative rule and final agency action inquiries "largely coalesce." Def. Reply ISO Mot. to Dismiss at 7:16 (Dkt. No. 28 at 12).[12]

Because the Functional Standard is a legislative rule and not a general statement of policy, Defendants violated the APA by failing to provide public notice and comment.

3. Defendants' Wholesale Failure to Provide Notice and Comment Prejudiced Plaintiffs and Undermined the Quality of the Agency's Decisionmaking.

According to Defendants, any failure to observe the "technical requirements of the APA's rulemaking procedures" is of no concern because doing so was harmless error. Def. Br. at 18. This is so, Defendants contend, because its process did not prejudice Plaintiffs, and the substantive outcome would have been the same in any event. *Id.* at 18-22. The first part of Defendants' argument is simply wrong, and the second part requires either clairvoyance or a predetermined indifference to public comment.

(a) Plaintiffs and the Public Suffered Prejudice.

Defendants assert that "the development of the Functional Standard was a collaborative

[12] Defendants incorporate by reference the argument in their motion to dismiss that the Functional Standard does not constitute final agency action. Def. Br. at 17-18. The contention is meritless for the reasons stated in the Court's order on the motion to dismiss and set forth in Plaintiffs' opposition to that motion, which Plaintiffs hereby incorporate. *See* Pltfs.' Opp. Mot. to Dismiss at 22-25 (Dkt. No. 26 at 29-32). Like the biological opinion found by the Supreme Court in *Bennett* to constitute final agency action, the Functional Standard establishes a condition on participation in the Initiative. *See Bennett*, 520 U.S. at 178 ("Biological Opinion . . . alter[ed] the legal regime" because the Bureau was "[authorized] to take endangered species if (but only if) it complie[d] with the prescribed conditions").

process that allowed for significant participation by interested parties—including NSI participants and advocacy organizations representing the privacy and civil liberty interests of individuals." Def. Br. at 20. Advocacy organizations may have commented, but the public at large and the Plaintiffs to this lawsuit did not. Section 553 is not satisfied when proxies for the public are given an opportunity to comment; it requires that the public be given that opportunity. *See Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992) ("[T]he notice and comment requirements . . . are designed to ensure public participation in rulemaking."). There is a vast difference between providing a select group of insiders the opportunity to comment, and providing that opportunity to the public. *Sequoia Orange*, 973 F.2d at 758 ("[T]he appearance and integrity of the decision-making process would have benefited from a more formal procedure."); *Nat'l Ski Areas Ass'n, Inc. v. U.S. Forest Serv.*, 910 F. Supp. 2d 1269, 1278 (D. Colo. 2012) ("[T]he ability to communicate informally with an agency does not lawfully substitute for what the APA requires.").

In *Paulsen v. Daniels*, 413 F.3d 999, 1006-07 (9th Cir. 2005), the Ninth Circuit examined cases where the courts ruled the error harmless:

- In *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995), the agency failed to provide the required individual notice to affected counties, but it held a public hearing and the county commissioner "was aware of the proposed regulation, as demonstrated by his presenting" written and oral comments. *Paulsen*, 413 F.3d at 1006 (citing *Idaho Farm*, 58 F.3d at 1405).[13]
- In *Riverbend*, the agency failed to publish notice in the *Federal Register*, but provided individual notice to all regulated entities and the public by placing "advertisements in the newspaper before holding a public meeting." 958 F.2d at 1483, 1486. The process had existed for 35 years and was well known to plaintiffs, who did not complain until they "ran into trouble with the Department of Agriculture." *Id.* at 1488.
- In *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760 (9th Cir. 1986), the agency published notice in the *Federal Register*, but the notice failed to comply with technical provisions of the Federal Land Policy and Management Act, for example, by failing to "state that the Secretary, rather than Congress, might create" a conservation area. *Id.* at 762 & n.5, 764. The court concluded that the "same public would have responded to a notice of administrative [action] as responded to the noticed congressional [action]." *Id.* at 765.

[13] Similarly, in *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007), cited by Defendants (Def. Br. at 18-19), the Supreme Court found harmless error where the agency made an incorrect statement in the *Federal Register* regarding whether a consultation was required or voluntary *after* the consultation had taken place. 551 U.S. at 659.

The court in *Paulsen* contrasted these cases with *Buschmann v. Schweiker*, 676 F.2d 352, 356-58 (9th Cir. 1982), in which the agency did not provide the public with advance notice or an opportunity to comment on a regulation that affected Social Security Income eligibility. *Paulsen*, 413 F.3d at 1007-08. After surveying these cases, the court concluded that the error is harmless where "interested parties received some notice that sufficiently enabled them to participate in the rulemaking process before the relevant agency adopted the rule," but is prejudicial where "petitioners were given no such opportunity." *Id.* at 1007. Applying this rule, the *Paulsen* court found not harmless an agency's "fail[ure] to provide the required notice-and-comment period before effectuating [a rule]" because the error "preclud[ed] public participation in the rulemaking." *Id.* at 1006, 1008.

Three related themes emerge. First, "harmless error doctrine . . . is narrow" and "applies to technical or minor procedural violations, not total failures to comply with important rule-making processes." *Nat'l Ski Areas Ass'n*, 910 F. Supp. 2d at 1277. Second, it applies where the agency provided some kind of notice, even if technically imperfect, to affected parties and the public. Third, the error is harmless where affected parties and the public, notwithstanding a technical defect in notice, were aware of and participated in the proceedings. None is true here.

Defendants' error was not a technical defect, such as the failure to include particular language in an otherwise public notice, *see, e.g.*, *Sagebrush Rebellion*, 790 F.2d at 762 & n.5, 764, but a wholesale failure to provide public notice and comment. Under these circumstances, courts find the error prejudicial. *See, e.g.*, *Paulsen*, 413 F.3d at 1008; *Buschmann*, 676 F.2d at 356-57; *Nat'l Ski Areas Ass'n*, 910 F. Supp. 2d at 1279; *W.C. v. Heckler*, 629 F. Supp. 791, 808, 812-13 (W.D. Wash. 1985), *aff'd sub nom. W.C. v. Bowen*, 807 F.2d 1502 (9th Cir. 1987), *opinion amended on denial of reh'g*, 819 F.2d 237 (9th Cir. 1987).

Although certain advocacy organizations were invited to participate (the Record leaves unanswered how these groups were selected), AR 116-19, Defendants published no notice in the Federal Register or otherwise notified the public. In Defendants' cases, moreover, the courts found harmless error where the plaintiffs had actual notice of the challenged agency action. *See Riverbend*, 958 F.2d at 1482-83 (plaintiffs were "domestic 'handlers' of navel oranges" and the

agency "notifie[d] all handlers by letter"); *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1149 (9th Cir. 2002) (agency issued notice of proposed rulemaking and plaintiff submitted comment). None of the Plaintiffs to this lawsuit was aware that Defendants sought input on the Functional Standard. Gill Decl. ¶ 22; Razak Decl. ¶ 24; Ibrahim Decl. ¶ 9; Prigoff Decl. ¶ 27; Conklin Decl. ¶ 14.

Finally, because Plaintiffs lacked any notice, they were "denied . . . the opportunity to comment on a new policy which directly affected" them. *See Heckler*, 629 F. Supp. at 813 (failure to provide notice was prejudicial). Each of the Plaintiffs here would have appreciated the opportunity to provide his views and would have relayed, based on his personal experience, the factual basis for his concerns about a loose standard. Gill Decl. ¶ 22; Razak Decl. ¶ 24; Ibrahim Decl. ¶ 9; Prigoff Decl. ¶ 27; Conklin Decl. ¶ 14.

(b) Defendants Cannot Know the Result of a Correct Process.

In defense of their deficient process, Defendants say "[t]he substantive outcome would have been the same." Def. Br. at 21. But this is unknowable, given that Defendants have not had an opportunity to examine the comments of the public or the Plaintiffs.

In *Safari Aviation*, on which Defendants rely, the plaintiff, who had submitted a comment that had been "overlooked" by the agency, raised the same concerns as other comments considered by the agency. 300 F.3d at 1151-52. Defendants assume that Plaintiffs' comments would similarly duplicate comments submitted by advocacy organizations. Def. Br. at 20-21. But Plaintiffs' perspective cannot be conflated with that of the advocacy organizations, which presented general *legal* arguments. The agency was not presented with, and thus did not consider, concrete *factual* evidence—such as Plaintiffs' individual stories—about harms that result from a standard that does not require reasonable suspicion. The experiences of Gill and Razak, for example, provide a concrete illustration of how the Functional Standard encourages religious profiling. *See* Gill Decl. ¶ 11 & Exh. 1 (SAR describes his "pious demeanor" as "worthy of note"); Razak Decl. ¶ 9 & Exh. 1 (SAR describes Razak, who is Pakistani, as "Middle Eastern" and "Arab," and also his mother, who was wearing a head scarf, as wearing a "burka"). As Defendants themselves observe, their decision turned on a balancing of law enforcement and

privacy interests. *See* Def. Br. at 29-30 (citing AR 281-82). Factual information about the impact of their standard is precisely the kind of topic about which the agency should have educated itself in striking that balance. *See Alcaraz*, 746 F.2d at 611 (notice and comment requirement "creates a pre-publication dialogue which allows the agency to educate itself on the full range of interests the rule affects").

Defendants cite *PDK Laboratories Inc. v. DEA*, 362 F.3d 786 (D.C. Cir. 2004), but that case rejected the very argument Defendants make here—that "the result of the agency proceedings would not have changed" if it had considered a particular issue. *See id.* at 799.

Riverbend Farms states the other obvious problem with taking Defendants' position: "if the harmless error rule were to look solely to result, an agency could always claim that it would have adopted the same rule even if it had complied with the APA procedures." 958 F.2d at 1487.

* * *

The error here was not harmless. Indeed, it undermined the twin goals of the APA's procedural requirements by precluding the public and these Plaintiffs from participating and depriving agency decisionmakers of important factual information. *See Alcaraz*, 746 F.2d at 611 (discussing purposes of APA procedural requirements).

D. Vacatur Is the Only Appropriate Remedy.

The Court should vacate the Functional Standard. Defendants' violations of the APA were serious, and they have not met their burden of demonstrating disruptive consequences.

The APA states in mandatory terms that a "reviewing court shall . . . hold unlawful and set aside agency action" that is arbitrary and capricious or adopted "without observance of procedure required by law." 5 U.S.C. § 706(2). As some appellate judges have observed, "'[s]hall' means 'must'" and there is "no play in the joints." *Comcast Corp. v. FCC*, 579 F.3d 1, 10 (D.C. Cir. 2009) (Randolph, J., concurring). Nevertheless, the Ninth Circuit has permitted remand without vacatur, but "only in 'limited circumstances.'" *See Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015); *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1239 (N.D. Cal. 2015) ("[C]ourts within this circuit rarely remand without vacatur."). In determining whether to vacate an invalid

agency action, courts "weigh the seriousness of the agency's errors against the disruptive consequences" of vacatur. *Pollinator*, 806 F.3d at 532 (internal citations and quotation marks omitted). The agency bears the "burden to show that vacatur is unwarranted." *See Ctr. for Envtl. Health v. Vilsack*, No. 15-cv-01690, 2016 WL 3383954, at *13 (N.D. Cal. June 20, 2016). Defendants have not met their burden on either prong of the analysis.

First, they have failed to address the seriousness of the error, and their substantive and procedural violations each warrant vacatur. The Functional Standard is arbitrary and capricious for several reasons, including that Defendants did not address 28 C.F.R. Part 23. *See supra* Part III-B-2. Courts "have not hesitated to vacate a rule when the agency has not responded to . . . an argument inconsistent with its conclusion." *Comcast Corp.*, 579 F.3d at 8. Similarly, courts routinely vacate agency actions issued without notice and comment. *See, e.g.*, *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1261 (D.C. Cir. 2005); *CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003); *Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206, 212-13 (D.C. Cir. 1999). "[T]he severity of the error [in failing to provide for notice and comment] weighs in favor of vacatur." *Ctr. for Envtl. Health*, 2016 WL 3383954, at *11.

Defendants contend that vacatur is not warranted because the agency is likely to issue the same rule on remand. Def. Br. at 34. But such a prediction does not justify remand without vacatur when the agency failed to engage in notice and comment. *See Ctr. for Envtl. Health*, 2016 WL 3383954, at *11. Indeed, Defendants' "apparent position that it is merely a matter of time before they reinstate the same . . . decision . . . causes some concern that Defendants are not taking this process seriously." *See Ctr. for Food Safety*, 734 F. Supp. 2d at 953 (vacating invalid agency action). In any event, Defendants' argument here simply echoes their meritless harmless error argument. Defendants cannot predict the result when they have not actually considered comments Plaintiffs and the public have not yet made. The error here was not harmless because Defendants' wholesale failure to provide public notice and comment prejudiced the public and Plaintiffs, and led to an incomplete factual record before the agency. *See supra* Part III-C-3. These factors distinguish this case from those upon which Defendants rely, which involved

harmless error. *See Idaho Farm*, 58 F.3d at 1405-06 (agency's failure to provide direct notice to county was harmless error); *Cal. Cmties. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (EPA's misstatement regarding docket index was harmless error).

Second, Defendants have not met their burden of demonstrating that vacatur would have disruptive consequences. Vacatur, they argue, would mean the government must either operate the Initiative without a definition of suspicious activity or cease to operate the Initiative; both options, they contend, "would pose a significant risk to national security." Def. Br. at 34-35.

The Ninth Circuit remands without vacatur "only in limited circumstances." *See Pollinator*, 806 F.3d at 532. Defendants offer only speculation that ceasing to operate the Initiative would harm national security. The unstated factual premise for such speculation is that the Initiative keeps us safe. But its proponents have admitted that they "just can't prove" that the Initiative "increase[s] the likelihood that additional attacks will be stopped." Supp. AR 387.

At the same time, leaving the Functional Standard in place risks ongoing, serious harm to Plaintiffs and countless other individuals who engage in innocent conduct but risk being swept up in Defendants' net. *See Pollinator*, 806 F.3d at 532 (evaluating whether leaving invalid agency action "in place risks more potential . . . harm than vacating it"). Their information will continue to be collected and shared with law enforcement agencies across the country; and they will continue to face privacy, reputational, and aesthetic injuries. This is simply not a situation in which "no one disputes" that vacatur would cause irreparable harm. *See Idaho Farm*, 58 F.3d at 1405-06 (declining to vacate rule where harm to snail species from vacatur was undisputed).

Leaving the Functional Standard in place presents concrete and continuing harms to Plaintiffs and other individuals who engage in innocent conduct that Defendants nonetheless deem suspicious, and any harms resulting from vacatur are purely speculative. Defendants' violations of the APA are serious, and the balance of harms weighs strongly in favor of vacatur.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment should be granted and Defendants' motion for summary judgment should be denied. The Court should hold the Functional Standard unlawful and set it aside.

Dated: September 22, 2016

By: */s/ Linda Lye*

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FILER'S ATTESTATION

I, Phillip J. Wiese, am the ECF user whose identification and password are being used to file this PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT. Pursuant to L.R. 5-1(i)(3), I hereby attest that concurrence in the electronic filing of this document has been obtained from each of the other signatories.

Dated: September 22, 2016 By */s/ Phillip J. Wiese*
Phillip J. Wiese