No. 17-16107

In the United States Court of Appeals for the Ninth Circuit

WILEY GILL; JAMES PRIGOFF; TARIQ RAZAK; KHALED IBRAHIM; AARON CONKLIN,

Plaintiffs-Appellants,

v.

DEPARTMENT OF JUSTICE; JEFF SESSIONS, Attorney General; PROGRAM MANAGER – INFORMATION SHARING ENVIRONMENT; and KSHEMENDRA PAUL, in his official capacity as Program Manager of the Information Sharing Environment,

Defendants-Appellees.

BRIEF OF APPELLANTS

On Appeal from the United States District Court
for the Northern District of California
No. 3:14-cv-03120-RS
The Honorable Richard Seeborg, District Judge

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INTRODUCTION

The federal government maintains a nationwide surveillance program that brands innocent Americans as potential terrorists. Plaintiffs are five United States citizens who were swept into Defendants' surveillance net, known as the Nationwide Suspicious Activity Reporting Initiative (the "Initiative"), based on entirely lawful conduct such as playing video games, buying computers, and taking photographs in public places. Plaintiffs brought this action under the Administrative Procedure Act ("APA") to challenge the "Functional Standard," the rule that underpins this surveillance program, as arbitrary and capricious and issued without notice and comment. The district court erroneously granted summary judgment for Defendants. This Court should reverse.

Defendants developed the Functional Standard in the wake of 9/11 to increase information sharing among local, state, and federal law enforcement entities. It created a standardized process for evaluating and investigating reports of suspicious activity, and it adopted a standardized definition for identifying those reports that, in Defendants' view, have a potential nexus to terrorism. That definition, however, sweeps very broadly.

The Functional Standard defines as "suspicious" activity that is "reasonably indicative of criminal activity" and enumerates 16 categories of behavior that satisfy Defendants' definition. The categories include wholly innocuous conduct

such as taking photographs, making observations, and asking questions. Individuals are swept into the system, even when their conduct does not give rise to reasonable suspicion of criminal activity. When someone engages in conduct that falls within one or more of the Functional Standard's behavioral categories, a "suspicious activity report," or "SAR," with personal information about the individual is shared with thousands of law enforcement agencies across the country. The individual is stigmatized as a person with a potential nexus to terrorism and faces potential investigation by the FBI and other law enforcement agencies. While wrongly stigmatized individuals such as Plaintiffs face reputational, privacy, and other harms, Defendants have admitted that they "just can't prove" that the Initiative has been effective.

The Functional Standard should be set aside for two independent reasons. First, it is a substantive rule that was issued without notice and comment. It creates a "binding norm" as to the types of activities that, according to Defendants, do and do not establish a potential nexus to terrorism. Law enforcement officers evaluating suspicious activity reports against the Functional Standard criteria have no discretion to revisit its definition or list of 16 behavioral categories. *See, e.g.*, *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987) (analysis turns on "extent to which … implementing official[] [is] free to exercise discretion to follow … the [announced] policy in an individual case"); *Pickus v. Bd. of Parole*,

507 F.2d 1107, 1112-13 (D.C. Cir. 1974) (criteria for parole determinations subject to notice and comment because they "focus the decision-maker's attention on the Board approved criteria"). For this reason, the Functional Standard is not a general statement of policy exempt from the APA's procedural requirements.

The Functional Standard should also be set aside because it is arbitrary and capricious. A duly promulgated, privacy-protecting regulation—28 C.F.R. Part 23—prohibits criminal intelligence from being shared among law enforcement agencies, unless it rises to the level of reasonable suspicion of criminal activity. But Defendants adopted what they admit is a lower, "reasonably indicative" standard that allows suspicious activity reports to be shared even absent reasonable suspicion, without offering a reasoned basis for disregarding the higher threshold set by the regulation.

When Defendants adopted the first version of the Functional Standard, they expressly acknowledged that suspicious activity reports "may be fact information or criminal intelligence" to which 28 C.F.R. Part 23—and therefore the reasonable suspicion threshold—applies. ER 430. But when Defendants adopted their alternative "reasonably indicative" standard, they initially made no effort to reconcile that decision with the conflicting standard in the regulation or otherwise consider the regulation at all. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (arbitrary and capricious for agency to

ignore "an important aspect of the problem"); *California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002) (where record indicates legal requirement "may apply, the agency must at the very least explain why [it] does not").

After this lawsuit was filed, Defendants for the first time addressed the regulation: They claimed that the regulation did not apply because "suspicious activity reports" are not the "product of investigation" and therefore do not constitute "criminal intelligence" within the meaning of 28 C.F.R. Part 23. ER 500. But this *post hoc* rationale cannot withstand even arbitrary and capricious review. Defendants' assertion that suspicious activity reports are "not the product of investigation" is "inexplicable," given that a major goal of the Functional Standard was to standardize evaluation and investigation of suspicious activity reports (albeit under the Functional Standard's broad definition of suspicious activity). *Alvarado Cmty. Hosp. v. Shalala*, 155 F.3d 1115, 1122-23 (9th Cir. 1998) (agency's failure to use particular data set regarding patients' lengths of stay was "inexplicable" "[g]iven that decreased [length of stay] was a primary goal of" the program).

In developing the Functional Standard, Defendants were not writing on a blank slate. If they wished to adopt a standard other than reasonable suspicion, they were required to provide a reasoned basis for declining to follow 28 C.F.R. Part 23. They failed to do so.

The judgment below should be reversed.

JURISDICTIONAL STATEMENT

This APA challenge seeks to set aside unlawful agency action. *See* 5 U.S.C. § 706(2)(A), (D). The district court had subject matter jurisdiction over this federal question under 28 U.S.C. § 1331. The district court granted summary judgment for Defendants on March 27, 2017. ER 1-10. It entered judgment on March 29, 2017. ER 16. Plaintiffs filed a timely notice of appeal within 60 days of the judgment, on May 28, 2017. ER 11-15; *see* Fed. R. App. P. 4(a)(1)(B) (60 days from entry of judgment to file notice of appeal where party is a United States agency). This Court has jurisdiction over the district court's final decision under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the Functional Standard is a substantive rule subject to notice and comment where it establishes an exclusive list of 16 categories of behavior deemed to have a potential nexus of terrorism, and individual law enforcement officers analyzing suspicious activity reports have no discretion to add or detract from this list.

2. Whether the Functional Standard is arbitrary and capricious where the agency initially failed to explain why 28 C.F.R. Part 23 does not apply to suspicious activity reports and the reason it ultimately offered cannot be reconciled with the Functional Standard's requirement that suspicious activity reports be evaluated and investigated.

STATEMENT OF THE CASE

I. PLAINTIFFS HAVE BEEN BRANDED AS "SUSPICIOUS" FOR THEIR LAWFUL CONDUCT.

The Plaintiffs in this case are five U.S. citizens who engaged in wholly innocent conduct, but were reported as suspicious and faced intrusive law enforcement encounters because the Functional Standard classifies their lawful behavior as having a potential nexus to terrorism.

Wiley Gill, a U.S. citizen; graduate of California State University, Chico; and convert to Islam, is the subject of a suspicious activity report. ER 18 at ¶¶ 2-3, 5; ER 26-27. The Chico Police Department ("CPD") searched his home without a warrant or voluntary consent, for reasons later acknowledged to be unfounded. ER 20-21 at ¶¶ 10-11; ER 26-27. The report notes that Gill had "potential access to flight simulators via the internet" because his computer displayed a web page titled something "similar to 'Games that fly under the radar.'" ER 26-27. While this describes nothing that would give rise to a reasonable suspicion of criminal activity, the Functional Standard designates "Aviation Activity" as suspicious. ER 478. Gill, a video game enthusiast, was likely viewing a website about video games. ER 20 at ¶ 10. The report describes as "worthy of note" Gill's "full conversion to Islam as a young WMA [white, male adult]" and his "pious demeanor." ER 26-27. A few months later, a CPD officer asked Gill 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. ER 21 at ¶ 12. Defendants admit that the report about Gill was uploaded to eGuardian. ER 563 at ¶ 97. It was forwarded to the FBI, which created and continues to maintain a file about him. ER 21-22 at ¶¶ 14-15. After this lawsuit was filed, the FBI visited Gill's sister and interrogated her about Gill's religious beliefs. ER 22 at ¶ 19.

Tariq Razak, a U.S. citizen of Pakistani descent, is the subject of a 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." ER 106 at ¶ 9; ER 112-13. While this, too, describes nothing that gives rise to reasonable suspicion, the Functional Standard designates "Observation/Surveillance" as suspicious. ER 479. Razak was visiting the county employment resource center, which is located at the train station. ER 105 at ¶ 4. He waited outside the restrooms for his mother, who had accompanied him and was wearing a head scarf, not a burka. ER 105 at ¶¶ 5-6. Defendants admit that Razak's report was uploaded to eGuardian. ER 565 at ¶ 134. It was also forwarded to the FBI, which then questioned Razak. ER 116-31. The FBI created and continues to maintain a file about Razak and the incident reported in the SAR. ER 108-09 at ¶¶ 21-23; ER 137-42.

Khaled Ibrahim, a U.S. citizen of Egyptian descent who works in accounting, is the subject of a report describing his attempt to purchase "a large

amount of computers." ER 95 at ¶¶ 2-3; ER 101-03. Again, this conduct does not establish reasonable suspicion, but the Functional Standard designates "Materials Acquisition" as suspicious. ER 479. Ibrahim, who then worked as a purchasing agent, was seeking to make a bulk purchase of computers. ER 95-96 at ¶¶ 4-7. Defendants admit that two incident reports about Ibrahim were uploaded to eGuardian. ER 562, 564 at ¶¶ 7, 121.

James Prigoff and Aaron Conklin have faced intrusive law enforcement encounters based on their efforts to photograph infrastructure, behavior that does not give rise to reasonable suspicion, but is nonetheless designated as suspicious by the Functional Standard. ER 144-45 at ¶¶ 7-10; ER 89-91 at ¶¶ 4-12; ER 479. Prigoff, an internationally renowned photographer, was harassed by private guards while attempting to photograph a famous piece of public art near Boston, and was prevented from taking photographs from his preferred location. ER 144-45 at ¶¶ 4, 7-10. The FBI subsequently tracked him cross-country; visited his home in Sacramento, California; and questioned a neighbor about him. ER 146 at ¶¶ 12-15. The FBI created and continues to maintain a file about him. ER 146 at ¶ 16; ER 157-67. Conklin, an amateur photographer, has twice been prevented from photographing oil refineries. ER 89-91 at ¶¶ 4-12. In an almost hour-long ordeal at a refinery in Northern California, he was questioned by private security and

detained and searched by sheriff's deputies, who told him he had to be placed on a "watch list." ER 89-91 at ¶¶ 7-12.[1]

II. THE GOVERNING STANDARD FOR REPORTING CRIMINAL INTELLIGENCE.

Long before the creation of the Initiative, Congress and Defendant Department of Justice ("DOJ") sought to balance law enforcement's interests in pooling information about potentially criminal activity with 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 created the Law Enforcement Administration Agency 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,

[1] Plaintiffs moved to supplement the administrative record with declarations from each Plaintiff; these declarations provide the factual basis for Plaintiffs' standing to bring suit. *See* ER 73-84. The district court denied Plaintiffs' motion to supplement on the ground that although Defendants challenged standing in their motion to dismiss, they did not raise it on summary judgment. ER 10 n.5. In the event Defendants renew their standing arguments on appeal or this Court chooses to address the issue *sua sponte*, Plaintiffs request that the Court consider Plaintiffs' declarations. *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997) (considering extra-record affidavits submitted to establish standing).

Pub. L. No. 90-351, 82 Stat. 197. The statute delegated that entity—and then its successor, the Office of Justice Programs, also a component of 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. § 3789(c) (transferred to 34 U.S.C. § 10231).

The agency initiated a rulemaking in 1978. It explained that "certain criminal activities … involve a large number of participants over a broad geographical area," and that "[t]he exposure of such ongoing networks of criminal activities can be aided by the pooling of information about such activities." 28 C.F.R. § 23.2. The regulation sought to address the "threats to the privacy of individuals to whom such data relates" when such information is collected and exchanged. *Id.*

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* 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 id.* § 23.20(c). One commenter argued that the "reasonable suspicion" requirement was "not necessary." 58 Fed. Reg. 48,451 (Sept. 16, 1993). But the agency disagreed, replying that "the potential for national dissemination of information … justifies" the standard. *Id.* The agency also observed that it improves "the quality and utility of 'hits' in an information system" and avoids wasting "[s]carce resources" in following up on "information [that] is vague, incomplete and conjectural." *Id.* The reasonable suspicion requirement thus furthers both law enforcement and privacy goals.

The regulation applies to certain "criminal intelligence systems." 28 C.F.R. § 23.3(a). The regulation defines "Criminal Intelligence System" as "arrangements, equipment, facilities, and procedures used for the receipt, storage, interagency exchange or dissemination, and analysis of criminal intelligence information." 28 C.F.R. § 23.3(b)(1). The regulation in turn defines "criminal intelligence" as, among other things, "data which has been evaluated to determine that it … is relevant to the identification of and the criminal activity engaged in by an individual." 28 C.F.R. § 23.3(b)(3). Thus, the regulation focuses on systems

used for the "interagency exchange," 28 C.F.R. § 23.3(b)(1), or "pooling of information" that has been evaluated to be relevant to "[t]he exposure of … criminal activity," 28 C.F.R. § 23.2.

In short, the regulation balances law enforcement and privacy needs by prohibiting the collection, maintenance, and dissemination of information absent reasonable suspicion. And it applies to systems used to pool information that has been evaluated for its relevance to the exposure or identification of potentially criminal activity and the persons involved in such activity.

III. THE FUNCTIONAL STANDARD CREATES A NATIONWIDE INFORMATION SHARING SYSTEM INTENDED TO PREVENT AND PROSECUTE TERRORISM CRIMES.

Defendants adopted the Functional Standard against the backdrop of this longstanding privacy-protecting regulation governing the sharing of criminal intelligence. The federal government created the Initiative to facilitate the nationwide sharing of information potentially related to terrorism. ER 299-300, 503, 509. The Functional Standard establishes a standard definition for identifying and a standard process for collecting, evaluating, and disseminating reports of "suspicious activity," that is, activity deemed to have a sufficient terrorism nexus to warrant sharing it with law enforcement agencies across the country. ER 509. While individuals reported as "suspicious" face a variety of privacy and other

harms, the Initiative has not proven effective in the fight against terrorism. ER 307-09.

A. The Purpose Of The Initiative Is To Create A Standardized System For Identifying And Vetting Reports Of Suspicious Activity.

The overall purpose of the Initiative is to "assess[], deter[], prevent[], or prosecut[e] those involved in criminal activities with a potential nexus to terrorism." ER 509. It sought to address concerns following 9/11 that "gaps in information sharing … hindered law enforcement's ability" to detect and respond to events associated with the crime of terrorism. ER 299. Several features of the Initiative are salient here.

First, it rests on the view that detection and prevention of terrorism requires interjurisdictional information sharing. *See id.* ("multijurisdictional" "exchange of information" was necessary "to prevent crime or respond to a criminal or terrorist incident"); ER 509 (interjurisdictional information exchange assists in identification of "patterns and trends").

Second, Defendants thus sought to "leverage" preexisting, although often inconsistent, programs among state and local law enforcement for documenting suspicious activities. ER 300.

But third, Defendants believed that threat information captured on the ground was only useful if vetted according to a uniform definition and process.

See, e.g., ER 282, 435-36, 509. They therefore sought to address the lack of "standardization and formality" in preexisting systems for reporting tips and leads. ER 300. Recognizing that "[s]tandardized and consistent sharing" was "vital" to furthering the goal of assessing or preventing terrorism, ER 509, Defendants created "standardized processes and policies" for the nationwide sharing of information with a potential nexus to terrorism. ER 503.

In short, the goal was to encourage more pooling of potentially terrorist-related information; but Defendants' view was that the criteria for identifying and the process for vetting such information had to be standardized. ER 299-300.

In 2008, Defendant Program Manager for the Information Sharing Environment ("Program Manager") issued the Functional Standard, which sets forth "standardized means for identifying and sharing" locally collected suspicious activity reports before they are disseminated nationally. ER 511; *see also* ER 401, 403. It amended the Functional Standard in 2009 and 2015. ER 450-85, 501-60.[2]

Although Defendants reached out to a handful of advocacy groups in developing the Functional Standard, *see* ER 447, 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, ER 291, 294-95, 300, 304; one of DOJ's components, the FBI, operates eGuardian, a web-based system through which SARs are disseminated. ER 502.

B. The Functional Standard Standardized The Definition And Process For Evaluating Suspicious Activity Reports.

The purpose of the Functional Standard is to ensure that reports of suspicious activity are vetted according to a standard process and definition before they are nationally disseminated. *See, e.g.*, ER 509-11. To this end, the Functional Standard does two main things: It creates a uniform substantive definition and criteria for identifying those activities that Defendants deem to have the requisite nexus to terrorism; and it creates a uniform process for vetting suspicious activity reports according to the Functional Standard's definition and criteria. "[O]nly those tips and leads that comply with the ISE-SAR Functional Standard are broadly shared with [Initiative] participants." ER 516.

Definition and criteria. The Functional Standard delineates the universe of activity deemed by Defendants to have a nexus to the crime of terrorism. It defines suspicious activity as "[o]bserved behavior reasonably indicative of pre-operational planning associated with terrorism or other criminal activity." ER 504. Defendants acknowledge that the "reasonably indicative" standard does not require reasonable suspicion of criminal activity. ER 440. Instead, 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 adopts a "behavior-focused approach to identifying suspicious activity." ER 456, 510 (emphasis omitted). It sets forth 16 categories

of behavior that, according to the agency, are "associated with terrorism." ER 514, 541, 542-51 (listing categories). Defendants contend that these categories "describe behaviors and incidents identified by law enforcement officials and counterterrorism experts from across the country as being indicative of criminal activity associated with terrorism." ER 436. The behavioral categories include criminal acts, such as cyberattacks or vandalism, but also entirely innocent, noncriminal activities, such as engaging in photography, asking questions, making observations, and taking notes. ER 544, 546, 548, 549.

Multistage process for evaluating and investigating suspicious activity reports. The Functional Standard requires suspicious activity reports to undergo "multiple levels of review by trained personnel." ER 515.

At the outset, the agency that collects or receives suspicious activity reports conducts an "Initial Response and Investigation" consisting of "observation, interviews, and other investigative activities" to "gather[] additional facts" about the reported activity. ER 553. "When the initial investigation is complete, the official documents the event" as a suspicious activity report. *Id.*; *see also* ER 504 (definition of SAR). The agency then typically submits the report to a "fusion center," an entity established by a state or major urban area that coordinates the gathering, analysis, and dissemination of threat-related information, although in

some instances it submits it directly to the FBI, a component of Defendant "DOJ". ER 292, 513-14, 554.

In addition, the fusion center (or FBI, if it received the information directly) analyzes the report for consistency with Functional Standard criteria. ER 514, 555. In particular, "a trained analyst or law enforcement officer … [will] determine whether [the] suspicious activity falls within any of the" 16 enumerated behavioral categories Defendants deem to have a potential terrorism nexus. ER 436.

Analysts and investigators cannot designate reports that involve behavior outside these 16 categories: "[O]nly those tips and leads that comply with the ISE-SAR Functional Standard are broadly shared with [Initiative] participants." ER 516. Once confirmed to have the requisite terrorism nexus, the suspicious activity report becomes what the Functional Standard terms an "ISE-SAR." ER 503, 514, 555.

The ISE-SAR is then uploaded to a repository where it can be accessed by all law enforcement agencies participating in the Initiative. ER 514-15. Reports that have survived this multistage review process "can be presumed by Federal, State, and local analytic personnel to have a potential nexus to terrorism (i.e., to be reasonably indicative of pre-operational planning associated with terrorism)." ER 515.

Multiple systems are used to disseminate SARs, including "the DOJ-supported Regional Information Sharing Systems® Secure Intranet (RISSNET™)" and the FBI's eGuardian system. ER 303. In addition, 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. ER 502, 555.

C. Individuals Identified In A Suspicious Activity Report Face Myriad Consequences.

Even before a report has been determined to have a potential terrorism nexus, an individual that is the subject of the report may face questioning from a local law enforcement officer. ER 481, 553 (Functional Standard instructs collecting agency to engage in an "Initial Response and Investigation," which may include "observation or engaging the subject in conversation").

Once a report has been validated, the subject's information is placed in multiple government databases accessible by federal, state, and local law enforcement agencies throughout the country. ER 502, 514-15, 553-55 (ISE-SARs in SAR Data Repository as well as FBI and DHS Systems). The subject also faces a potential investigation by federal, state, and/or local law enforcement. ER 442, 555.

Finally, the subject is tarred as having a "nexus to terrorism." ER 515 (ISE-SARs "can be presumed by Federal, State, and local analytic personnel to have a potential nexus to terrorism").

D. The Initiative Has Not Proven Effective.

Governmental oversight bodies and law enforcement agencies participating in the Initiative have expressed concerns about the overcollection of information, which "divert[s] law enforcement personnel and other resources from meaningful work." ER 307 (Congressional Research Service identified consequences of "avalanche of irrelevant or redundant data"); *see also* ER 305 (Boston Police Department urged against "entry of information … that is not of value").

Initiative proponents stressed the importance of actual metrics to assess the program's effectiveness. ER 308. But 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." *Id.*

IV. DEFENDANTS ADOPTED A STANDARD FOR REPORTING SUSPICIOUS ACTIVITIES THAT DOES NOT REQUIRE REASONABLE SUSPICION.

Defendants have adopted three versions of the Functional Standard. None was issued pursuant to APA notice and comment procedures. And none requires the supposedly suspicious conduct to give rise to a reasonable suspicion of criminal activity for the report to be broadly disseminated. ER 440. The first

version of the Functional Standard adopted a "may be indicative" standard. ER 402. Defendants then adopted the "reasonably indicative" standard in 2009, and readopted it in 2015. ER 451, 504.

A. 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"). ER 278-79.

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 identification of persons and the potentially criminal activity in which they are engaged. 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. ER 288, 408-09. 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 C.F.R. Part 23 regulations." ER

288. 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 C.F.R. Part 23 requirements." ER 281. It therefore explicitly recommended that agencies "clearly articulate when 28 C.F.R. Part 23 should be applied." ER 284. It further recommended that "audits of the quality and substance of reports … be conducted … to ensure that the integrity of the program is maintained and that appropriate respect and attention are given to reasonable suspicion and other civil rights issues." ER 285.

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 such reports of suspicious activities from mere uncorroborated tips into "criminal intelligence" governed by the regulation. The question for these key Initiative stakeholders was not whether, but instead when the regulation applies. It therefore recommended that "respect and attention [be] given to reasonable suspicion" to ensure the "integrity of the program." ER 285.

B. Defendants Acknowledged That 28 C.F.R. Part 23 May Apply.

Before adopting the "reasonably indicative" standard in 2009, Defendants themselves acknowledged that 28 C.F.R. Part 23 may apply to SAR information.

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. ER 393. It therefore established a working group to study the "legal [and] regulatory … constraints" affecting the exchange of suspicious activity reports. ER 396. Its working group acknowledged that "a number of challenges and issues … will need to be further addressed, including … [p]otential … constraints … on the sharing and handling of specific types of information." *Id.*

In 2008, Defendant Program Manager published an "Initial Privacy and Civil Liberties Analysis" of the Functional Standard in which it "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." ER 440.

The first version of the Functional Standard explicitly acknowledged that the regulation may apply: "For State, local, and tribal law enforcement, *the ISE-SAR information, may be* fact information or *criminal intelligence and is handled in accordance with 28 C.F.R. Part 23*." ER 430 (emphasis added). The Functional Standard defines the term "ISE-SAR" to mean a report that, upon evaluation, has been determined to meet Functional Standard criteria. ER 402. Defendants, like the authors of the SAR Project Report, thus recognized that the evaluation of raw

suspicious activity reports pursuant to Functional Standard criteria transforms the reports into "criminal intelligence" covered by the regulation.

C. Defendants' Stated Rationale For Initially Adopting The "Reasonably Indicative" Standard

The first version of the Functional Standard adopted a "may be indicative" standard. ER 402. At the time, Defendants did not offer any reasons to support adoption of this threshold. Defendants then adopted the "reasonably indicative" standard in 2009 with the second version of the Functional Standard. ER 451. Again, Defendants did not offer reasoning to support adoption of this threshold. On summary judgment, Defendants and the court below thus pointed to a 2010 report by Defendant Program Manager as adequately explaining the agency's rationale for its 2009 decision. ER 8-9, 249 (quoting ER 491-92). According to Defendants' 2010 rationale, the adopted standard balances law enforcement's needs to access suspicious activity reports with privacy concerns. *See* ER 8-9, 249 (quoting ER 491-92). Notably, this explanation contains *no discussion* of 28 C.F.R. Part 23 and how to reconcile that regulation with the agency's decision to adopt a more lax standard. *See* ER 491-92.

D. Defendants' Most Recent Rationale

After this lawsuit was filed, Defendants 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 because suspicious

activity reports are "not the product of investigation" and thus do not constitute "criminal intelligence" governed by the regulation:

> It is critical to recognize that SAR and ISE-SAR information is not criminal intelligence information and represents information about suspicious behavior that has been observed and reported to or by law enforcement officers or other NSI participants …. 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. Criminal intelligence information is a product of investigation. Consequently, the ISE-SAR FS does not establish "reasonable suspicion," as defined by 28 CFR Part 23, as the standard for the sharing of this information in the NSI SAR Data Repository (SDR).

ER 500.

V. PROCEDURAL BACKGROUND

Defendants 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 under the APA. *See* ER 586-87. The district court denied Defendants' motion. *See* ER 569-80.

Thereafter, Defendants submitted an administrative record. ER 376-77. They vigorously opposed Plaintiffs' efforts to obtain any discovery, ER 374-75, 567-68, 582-85, and to expand the administrative record. ER 310-11, 322-23. In response to a court order, they supplemented the record. ER 253-54.

The parties brought cross-motions for summary judgment. The district court granted Defendants' motion and denied Plaintiffs' motion. ER 10.

The district court rejected Plaintiffs' procedural challenge, finding that the Functional Standard is a general statement of policy exempt from notice and comment. The Functional Standard, the district court found, "merely provide[d] guidance to agency officials in exercising their discretionary powers while preserving their flexibility and their opportunity to make 'individualized determination[s].'" ER 6 (citation omitted).

With respect to Plaintiffs' contention that the Functional Standard is arbitrary and capricious, the district court acknowledged "that the Functional Standard allows for collection and dissemination of SARs not meeting" the reasonable suspicion standard of 28 C.F.R. Part 23. ER 7. But, pointing to Defendants' statement in 2010 that the reasonably indicative standard balances law enforcement and privacy concerns, the court held that it was not arbitrary and capricious for the Functional Standard to do so. ER 8-9. The district court rejected Plaintiffs' argument that Defendants were aware of the need to address 28 C.F.R. Part 23 and should at least have explained their rationale for departing from the regulation. ER 9. No such explanation was necessary, in the district court's view, because Plaintiffs had not established that suspicious activity reports "are 'criminal intelligence' governed under Part 23." *Id.*

The district court did not, however, accept one of Defendants' main arguments in defense of the Functional Standard. Defendants asserted, based on facts contained in a declaration outside the record, that SAR databases supposedly do not receive a particular stream of federal funding that would trigger the regulation. The district court held that funding issues "were not the basis on which the agency decided to adopt the 'reasonably indicative' standard in lieu of a 'reasonable suspicion' standard," and thus could not be the basis for upholding the agency's action. ER 8. The district court also granted Plaintiffs' motion to strike declarations offered by Defendants in support of their extra-record argument. ER 9-10.

STANDARD OF REVIEW

Under the APA, a district court may hold unlawful and set aside an agency's actions if they are arbitrary and capricious, or issued "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D) (1979). This Court conducts a *de novo* review. *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005). While the APA requires that a reviewing court not substitute its own judgment for that of the agency, it nevertheless requires the court to "engage in a substantial inquiry" and a "thorough, probing, in-depth review." *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005)

(quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)).

SUMMARY OF ARGUMENT

The district court erred in granting summary judgment for Defendants for two independent reasons.

First, the Functional Standard is a substantive rule that was issued without notice and comment. By designating 16 exclusive categories of behavior deemed by Defendants to have a potential nexus to terrorism, the Functional Standard "focus[es] attention on specific factors to the implicit exclusion of others." *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1322 (D.C. Cir. 1988). Agencies evaluating individual suspicious activity reports have no discretion to revisit the underlying definition of suspicious activity or enumerated behavioral categories. *See Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) ("In subsequent … proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule …. The underlying policy embodied in the rule is not generally subject to challenge before the agency.").

Second, Defendants' rationales for adopting the "reasonably indicative" standard are arbitrary and capricious. Even Defendants acknowledged that suspicious activity reports "may be" criminal intelligence to which 28 C.F.R. Part

23 applies. ER 430. But they initially failed to consider the interaction of their proposed definition of "suspicious" with that regulation or to explain why the regulation did not apply to suspicious activity reports. *See Motor Vehicle*, 463 U.S. at 43 (arbitrary and capricious to ignore "an important aspect of the problem"); *Norton*, 311 F.3d at 1177 (where record indicates legal requirement "may apply, the agency must at the very least explain why [it] does not").

After this lawsuit was filed, Defendants asserted that suspicious activity reports are not criminal intelligence because they are not the "product of investigation." ER 500. But this rationale is simply counter to the process for vetting suspicious activity reports set forth in the record, indeed, the Functional Standard itself (which requires suspicious activity reports to be evaluated and investigated). *See Motor Vehicle*, 463 U.S. at 43 (agency action invalid if agency's "explanation for its decision … runs counter to the" record). The agency's assertion that suspicious activity reports are not the product of investigation is particularly "inexplicable" "[g]iven that ... a primary goal of" the Functional Standard is to create a uniform process for vetting suspicious activity reports before they are broadly disseminated. *Alvarado Cmty. Hosp.*, 155 F.3d at 1122-23 (agency's failure to use particular data set regarding patients' lengths of stay was "inexplicable" "[g]iven that decreased [length of stay] was a primary goal of" the program).

In sum, Defendants were not writing on a blank slate when they adopted the Functional Standard. If Defendants wished to adopt a standard lower than "reasonable suspicion," they could not simply invoke their prerogative to balance law enforcement and privacy interests. Instead, they were required to address 28 C.F.R. Part 23. And the reason they ultimately offered for rejecting the standard set forth in the regulation rests on a characterization of suspicious activity reports that is simply at odds with Defendants' own Functional Standard. *See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1242 (9th Cir. 2001) (finding arbitrary and capricious agency position that was "contrary to … the agency's own regulations").

For both of these reasons, the Functional Standard should be set aside.

ARGUMENT

I. THE FUNCTIONAL STANDARD IS A SUBSTANTIVE RULE SUBJECT TO NOTICE AND COMMENT.

The Functional Standard should be set aside because it was issued without notice and comment.[3]

[3] Plaintiffs have standing to bring this suit. Each Plaintiff is the subject of a suspicious activity report and/or faced other law enforcement scrutiny for engaging in wholly innocent conduct deemed suspicious under the Functional Standard. *See* ER 22 at ¶ 16 (Gill viewed online video game reviews); ER 105 at ¶ 6 (Razak waited in train station for mother); ER 95-96 at ¶ 7 (Ibrahim bought laptops); ER 144-46 at ¶¶ 7-14 (Prigoff photographed public art); ER 89-91 at ¶¶ 4-12 (Conklin photographed refineries). They suffered reputational, privacy, aesthetic, and other

A. The APA Requires Notice And Comment For Substantive Rules.

The APA requires agencies to provide the public with notice and an opportunity to comment whenever they issue "rule[s]," subject to limited exceptions for, *inter alia*, "general statements of policy." 5 U.S.C. § 551(4); *id.* § 551(5); *id.* § 553(b)-(c) (procedural requirements for rulemaking); *id.* § 553(b)(A) (exceptions). Exceptions are "narrowly construed and only reluctantly countenanced." *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984) (citation omitted). An agency's characterization of its own rule is given no deference. *Reno-Sparks Indian Colony v. U.S. EPA*, 336 F.3d 899, 909 & n.11 (9th Cir. 2003).

The primary distinction between a substantive rule, for which notice and comment is required, and an exempt general statement of policy is "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." *Mada-Luna*, 813 F.2d at 1013 (alterations in original; citation

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injuries when their information was disseminated to law enforcement agencies participating in the Initiative and they were prevented from engaging in artistic endeavors. *See Meese v. Keene*, 481 U.S. 465, 474-75 (1987) (standing based on "risk of injury to his reputation"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 131, 140-41 (1951) ("clear" standing based on injury to "reputation"); *Cantrell v. City of Long Beach*, 241 F.3d 674, 680 (9th Cir. 2001) (aesthetic injury constitutes injury-in-fact). Plaintiffs' harms arise directly from the Functional Standard's categorization of Plaintiffs' behavior as "suspicious." Causation and redressability are therefore also satisfied.

omitted). A rule is substantive if it "narrowly limits administrative discretion or establishes a binding norm." *Id.* at 1014 (alterations omitted).

Courts look to the language and effect of the agency directive. "The use of the word 'will' suggests the rigor of a rule, not the pliancy of a policy." *McLouth*, 838 F.2d at 1320-21.

A binding norm is established if the directive "conclusively resolves certain issues," *id.* at 1321, or "foreclose[s] alternate courses of action" *Malone v. Bureau of Indian Affairs*, 38 F.3d 433, 438 (9th Cir. 1994) (eligibility criteria for higher education grants for Native Americans was substantive rule because it "'foreclose[d]' other options"; "the [agency] could have extended eligibility more broadly" (citation omitted)).

Even if the rule does not mechanically dictate the result in each case, it is still substantive if it "focus[es] attention on specific factors to the implicit exclusion of others." *McLouth*, 838 F.2d at 1322 (citing *Pickus*, 507 F.2d at 1112-13). Thus, in *Pickus*, the D.C. Circuit found factors guiding parole determinations to be a substantive rule. 507 F.2d. at 1110. Although decisionmakers retained some discretion under the guidelines in how to apply the criteria ("they provide no formula for parole determination"), the guidelines "cannot help but focus the decision-maker's attention on the Board-approved criteria." *Id.* at 1113.

By contrast, a rule is a general statement of policy if it "merely provides *guidance* to agency officials in exercising their discretionary powers while preserving their flexibility and their opportunity to make 'individualized determination[s].'" *Mada-Luna*, 813 F.2d at 1013 (quoting *Guardian Fed. Savings & Loan Ass'n v. Fed. Savings & Loan Ins. Corp.*, 589 F.2d 658, 666-67 (D.C. Cir. 1978)). Thus, in *Mada-Luna*, this Court found an immigration Operating Instruction to be a general statement of policy where it set forth a nonexclusive list of factors to consider in granting a discretionary relief from deportation. *Id.* at 1017. Similarly, in *Guardian*, the D.C. Circuit found a rule prescribing standards for audits to be a general statement of policy because the agency decisionmaker had "discretion to accept a non-conforming audit report." 589 F.2d at 666.

B. The Functional Standard Creates A Binding Norm.

The Functional Standard is a "rule" within the meaning of the APA.[4] It does not fall within any exception to the statute's notice and comment requirements because it is a substantive rule that creates a binding norm: It focuses attention on

[4] The Functional Standard easily satisfies the definition of a "rule" to which notice and comment presumptively applies. 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 have never argued to the contrary.

the specific categories of behavior Defendants believe to establish a nexus to terrorism.

1. Like the parole guidelines in *Pickus* that set forth "nine general categories of factors" to consider in making parole determinations, 507 F.2d at 1113, the Functional Standard identifies 16 specific categories of behavior that, according to the agency, are "indicative of criminal activity associated with terrorism," ER 436. Analysts and investigators are only to validate suspicious activity reports that fall within one or more of the 16 categories. ER 514. Defendants intentionally adopted a "*behavior-focused approach* to identifying suspicious activity" that (at least on its face) purports to "require[] that factors such as race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity … not be considered as factors creating suspicion." ER 510.[5] The Functional Standard's behavioral categories "focus the decision-maker's attention on the … approved criteria. They thus narrow his field of vision, minimizing the influence of other factors and encouraging decisive reliance upon [the specified] factors." *Pickus*, 507 F.2d at 1113.

[5] Individuals have nevertheless still been targeted based on their religious beliefs. For example, the CPD found Plaintiff Gill suspicious because he is a devout Muslim. ER 27 (identifying as "worthy of note" Gill's "full conversion to Islam as a young WMA [white, male adult]" and his "pious demeanor").

While analysts and investigators necessarily exercise some "professional judgment" in applying Functional Standard criteria to suspicious activity reports. ER 514, they lack any discretion to decide that additional unenumerated categories of behavior should be deemed suspicious, ER 516 ("[O]nly those tips and leads that comply with the ISE-SAR Functional Standard are broadly shared with NSI participants."); *see Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980) (methodology for calculating unemployment rates was substantive rule because it left "no discretion to weigh or alter the contributing elements" to the formula).

The Functional Standard thus "conclusively dispos[es] of certain issues," in particular, that certain categories of behavior establish a terrorism nexus, while others do not. *McLouth*, 838 F.2d at 1321; *see also Gen. Elec. Co. v. EPA*, 290 F.3d 377, 384 (D.C. Cir. 2002) (document describing risk assessment methodologies was substantive rule because "in reviewing applications the Agency will not be open to considering approaches [to conducting risk assessments] other than those prescribed in the Document").

Notably, the Functional Standard's exclusive list of 16 behavioral categories "focus[es] attention on specific factors to the implicit exclusion of others." *McLouth*, 838 F.2d at 1322; *see also Malone*, 38 F.3d at 438 (eligibility criteria for higher education grants were substantive rule because they necessarily "foreclose[d]" eligibility on the basis of unenumerated criteria). In this critical

regard, the Functional Standard is distinguishable from a general statement of policy that sets forth an optional list of considerations that decisionmakers are free to follow, supplement, or ignore. *See*, *e.g.*, *Mada-Luna*, 813 F.2d at 1017 (Operating Instruction was general statement of policy where it authorized immigration officer to consider "undue hardship," "humanitarian factors," and any "'individual facts' that he may feel appropriate" in granting discretionary relief from deportation); *Guardian*, 589 F.2d at 666 (guidance document setting forth standards for audits was general statement of policy where agency had "discretion to accept a non-conforming audit report").

2. The district court held that the Functional Standard is a general statement of policy because it "merely provides guidance to agency officials in exercising their discretionary powers while preserving their flexibility and their opportunity to make 'individualized determination[s].'" ER 6 (citation omitted). The district court conflated the critical distinction between discretion retained by decisionmakers in applying a rule to a given set of facts, with discretion retained by decisionmakers to revisit the policy reflected in the rule. As the D.C. Circuit has explained, the mere fact that subsequent proceedings will involve the application of a rule does not render it a general statement of policy: "In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be

waived or applied in that particular instance. The underlying policy embodied in the rule is not generally subject to challenge before the agency." *Pac. Gas & Elec. Co.*, 506 F.2d at 38. "When," by contrast, "the agency states that in subsequent proceedings it will thoroughly consider not only the policy's applicability to the facts of a given case but also the underlying validity of the policy itself, then the agency intends to treat the order as a general statement of policy." *Id.* at 39.

The Functional Standard merely permits Initiative participants to make individualized determinations about whether a particular suspicious activity report meets Defendants' definition and criteria for suspicious activity. It does not permit Initiative participants to question the underlying validity of the "reasonably indicative" standard or any of the 16 enumerated categories of suspicious behavior.

3. Defendants argued below that the Functional Standard does not establish a binding norm because it merely "describes a standardized process" and "does not use any imperative terms." ER 245. But the Functional Standard is replete with mandatory language. *See, e.g.*, ER 516 ("This *ISE-SAR Functional Standard* will be used as the ISE-SAR information exchange standard for all NSI participants." (emphasis added)); ER 511 (Functional Standard "offers a standardized means for identifying and sharing" suspicious activity reports); ER 503 (Functional Standard "will serve as a unified process to support the reporting, tracking, processing, storage, and retrieval of terrorism-related suspicious activity

reports"); ER 501 (Functional Standard "applies to all departments or agencies that … participate (or expect to participate) in the [Information Sharing Environment]").[6] Courts have found "decisive the choice between the words 'will' and 'may.'" *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987).

Defendants create a false dichotomy between requiring and describing a standardized process. Standardization of information sharing was the entire point of the Functional Standard, which describes in mandatory terms a definition of "suspicious activity" and enumerates the exclusive list of behavioral categories that Defendants deem to have a potential nexus to terrorism. *See* ER 511 (Functional Standard sets forth "standardized means for identifying and sharing ISE-SARs"). Defendants' suggestion that Initiative participants are free to disregard the Functional Standard would render it pointless. *Cf.* ER 509 ("Standardized and consistent sharing of [suspicious activity reports] … is vital to assessing, deterring, preventing, or prosecuting those involved in criminal activities with a potential nexus to terrorism.").

[6] Predecessor versions contained similarly mandatory language. *See* ER 397 (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" (emphasis added)); ER 449 (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" (emphasis added)).

Defendants also argued below that even if the Functional Standard is binding on Initiative participants, it is not "binding" in the relevant sense unless it constrains the discretion of Defendant Program Manager. ER 70. The Program Manager, the agency that issued the Functional Standard, Defendants emphasized, plays no role in evaluating suspicious activity reports, which are instead evaluated by law enforcement agencies participating in the Initiative. But courts have not permitted agencies to evade their notice and comment obligations by delegating administration to third parties. Thus, in *Linoz v. Heckler*, 800 F.2d 871 (9th Cir. 1986), this Court found that a rule clarifying whether certain ambulance services would be covered by Medicare was a substantive rule subject to notice and comment. The Court reached this result even though the issuing agency, the federal Department of Health and Human Services, had "delegated the administration of Medicare Part B claims to private insurance carriers" and thus played no role in determining whether particular claims were covered by Medicare under its rule. *Id.* at 874.

Finally, Defendants argued that the Functional Standard is not binding because Initiative participants face no legal sanction for noncompliance. ER 246. But courts have rejected the argument that a rule can only "be considered a 'binding norm'" if "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); *see also Cmty.*

Nutrition, 818 F.2d at 948 (agency rule was binding even though, when violated, it did not "automatically subject [regulated entities] to enforcement proceedings").

C. The Functional Standard Constitutes Final Agency Action.

For reasons similar to why the Functional Standard is a substantive rule subject to notice and comment, it is also final agency action subject to judicial review under the APA.

The court below at the motion-to-dismiss stage rejected Defendants' argument that the Functional Standard was not final agency action. ER 576-77. On summary judgment, the district court equivocated on this point: "Even though the order on the motion to dismiss called that question in plaintiff's favor at the pleading stage, there is good reason to treat the Functional Standard as not constituting a final agency action within the meaning of *Bennett v. Spear*[, 520 U.S. 154 (1997)]." ER 6. The court below did not elaborate on what that "good reason" might be and then proceeded to address the merits of Plaintiffs' APA claims. To the extent the court below ruled that the Functional Standard is not final agency action, that ruling was erroneous.

In *Bennett*, the Supreme Court set out the legal standard for an agency action to be considered final. It "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" 520 U.S. at 178. The agency's determination must be "binding" in the sense that it "has direct and

appreciable legal consequences." *Id.* Courts "focus on the practical and legal effects of the agency action." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006). "[T]he finality element must be interpreted in [a] pragmatic and flexible manner." *Id.* (citation omitted).

Defendants argued below that the Functional Standard was not final agency action because it did not create a "binding legal norm," and instead merely provided "functional guidance" that participants in the Initiative are not "require[d]" to follow. ER 618.

The Functional Standard creates a "binding legal norm" for the same reasons that it is a substantive rule subject to notice and comment—it enumerates an exclusive list of behavioral categories that in Defendants' view establish a nexus to terrorism. Participants in the Initiative have no discretion to revisit the underlying categories when assessing individual suspicious activity reports.

Further, the Supreme Court in *Bennett* rejected Defendants' argument that agency action is only "final" if it *requires* compliance. Petitioners in *Bennett* challenged a biological opinion issued by the Fish and Wildlife Service pursuant to the Endangered Species Act regarding the operation of a dam by the Bureau of Reclamation. 520 U.S. at 157. The opinion found that the dam's operation would jeopardize endangered fish and identified various measures that would avoid harm. *Id.* at 159. The defendant agency argued that the biological opinion was not

"final" because "the Bureau was not legally obligated" to adopt its recommendations. *Id.* at 177. The Supreme Court disagreed: "the Biological Opinion … alter[ed] the legal regime" because the Bureau was "authoriz[ed] to take the endangered species if (but only if) it complies with the prescribed conditions." *Id.* at 178.

While no state or local law enforcement agency is legally obligated to participate in the Initiative, the Functional Standard does mandate that *if* a state or local law enforcement agency participates in the Functional Standard, it must adhere to the Functional Standard's substantive definition and categories for identifying suspicious activity and its process for evaluating and investigating suspicious activity. ER 516 ("only those tips and leads that comply with the ISE-SAR Functional Standard are broadly shared with NSI participants"). This condition on participation renders Defendants' Functional Standard, like the biological opinion in *Bennett*, final agency action.

In addition, there are "several avenues for meeting the … finality requirement." *Or. Nat. Desert*, 465 F.3d at 986.

First, the Functional Standard sets forth "a definitive statement of the agenc[ies'] position" on the type of suspicious activity that has, in Defendants' view, the requisite nexus to terrorism and should therefore be reported and disseminated. *Id.* at 982; *see* ER 515 (suspicious activity reports that have been

vetted pursuant to Functional Standard "can be presumed by Federal, State, and local analytic personnel to have a potential nexus to terrorism").

Second, Defendants clearly "expect[]" "compliance" with their Functional Standard. *Or. Nat. Desert Ass'n*, 465 F.3d at 982. This is evident from the Functional Standard's purpose, language, and structure, as well as Defendants' multipronged efforts to ensure compliance.

The purpose of the Functional Standard is to standardize suspicious activity reporting at the federal, state, and local levels. *See* ER 509. Defendants' suggestion that Initiative participants are free to disregard the Functional Standard would defeat Defendants' purpose in issuing the Functional Standard.

To implement this purpose, the Functional Standard contains mandatory language requiring compliance by "all departments or agencies that … participate (or expect to participate) in the" Initiative. ER 501; *see also* ER 516 ("This *ISE-SAR Functional Standard* will be used as the ISE-SAR information exchange standard for all NSI participants."); *supra* Argument, Part I-B & n.6.

Defendants also structured the Functional Standard so that "only those tips and leads that comply with the ISE-SAR Functional Standard are broadly shared with [Initiative] participants." ER 516; *see also* ER 502 ("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."); ER 438 ("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.")

Further, Defendants recommended numerous safeguards to police adherence. These include auditing and accountability measures, as well as training to ensure that participants at every level understand the criteria and process for vetting information. ER 515 (Functional Standard instructs that participants "should implement auditing and accountability measures"); *see also* ER 266 (Defendants' Privacy Guidelines require agencies to cooperate with audits); ER 270-71 (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"); ER 446, 289 (Program Manager recommended audits); ER 444 (training); ER 487-88 (same); ER 298 (same).

In short, compliance with the Functional Standard is a condition on participation in the Initiative. Defendants clearly expect compliance with the Functional Standard as evidenced by its purpose, language, and structure, and Defendants' efforts to police adherence. It therefore constitutes final agency action.

II. DEFENDANTS' RATIONALES FOR ADOPTING THE REASONABLY INDICATIVE STANDARD ARE ARBITRARY AND CAPRICIOUS.

The Functional Standard should be set aside for the independent reason that it is arbitrary and capricious.

A. Agency Action Is Arbitrary And Capricious If The Agency Failed To Consider An Important Aspect Of The Problem Or Offered An Implausible Explanation.

Under the "arbitrary and capricious" standard, an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, 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." *Id.*

Critically, a reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("*Chenery I*"). While "a court is not to substitute its judgment for that of the agency," *Motor Vehicle*, 463 U.S. at 43, it "will defer to an agency's decision only if it is 'fully informed and well-considered'" *Sierra Club*

v. Bosworth, 510 F.3d 1016, 1023 (9th Cir. 2007). Rational explanations for agency action, if not articulated by the agency itself, cannot be used to justify the decision. *See, e.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("*Chenery II*").

B. Defendants Initially Failed To Address 28 C.F.R. Part 23 At All.

Defendants' initial adoption of the reasonably indicative standard was arbitrary and capricious because the agency "entirely failed to consider an important aspect of the problem," *Motor Vehicle*, 462 U.S. at 43, in particular, the apparent conflict with the reasonable suspicion standard set forth in 28 C.F.R. Part 23.

Defendants first adopted the "reasonably indicative" standard in 2009, after the agency and its key stakeholders acknowledged that 28 C.F.R. Part 23's higher "reasonable suspicion" standard may instead govern. *See supra* Statement of the Case, Part IV-A&B. The Functional Standard itself, while lengthy, offers no explanation of the agency's reasoning in support of its decision to adopt the "reasonably indicative," rather than another, standard. To make up for this deficit, Defendants below pointed to an explanation offered by the agency a year later, in 2010. ER 249-50 (quoting ER 491-92). The district court agreed that this adequately explained the agency's decision. ER 8-9.

1. As a threshold matter, the agency's 2010 explanation cannot be used to justify its earlier 2009 decisions. "*[P]ost hoc* rationalizations" cannot be used to save agency action. *Motor Vehicle*, 463 U.S. at 50.

In any event, the 2010 explanation is defective. Although it sets forth the view that the "reasonably indicative" standard balances law enforcement needs and privacy interests, it contains no discussion whatsoever of 28 C.F.R. Part 23 and the higher reasonable suspicion threshold. ER 491-92. Had the agency been writing on a blank slate, it would certainly have had the discretion to strike the balance as it did. But on this record, the slate was not blank and the agency impermissibly ignored "an important aspect of the problem." *Motor Vehicle*, 462 U.S. at 43.

In *Motor Vehicle*, the Supreme Court invalidated a decision by a transportation safety agency to rescind a requirement that vehicles be equipped with passive restraints. *Id*. at 34. The "most obvious" flaw in the agency's reasoning was its 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 discusse[d] 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.*

Motor Vehicle's mandate to consider important aspects of the problem means that agencies must "consider[] all of the relevant factors." *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 265 F.3d 1028, 1034 (9th Cir. 2001) (citation omitted) ("*Pacific Coast I*"); *see also id.* at 1037-38 (invalidating agency action where agency failed to consider short-term effects of agency activities on species); *Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1039 (9th Cir. 2010) (invalidating agency action where agency failed to consider whether water structures were necessary for conservation of bighorn sheep); *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1094 (9th Cir. 2005) (invalidating agency action where agency failed to consider life cycle of species) ("*Pacific Coast II*").

A factor is "relevant" and must be considered if expert agencies or the agency's own staff identify the issue as one that ought to be addressed. *See, e.g.*, *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497-98 (9th Cir. 2001) (invalidating agency action where agency failed to consider findings of own scientists and of another expert agency that proposed agency action "'may affect' listed species and their habitat").

Relevant factors can include not only factual, but also legal issues. *See, e.g.*, *Beno v. Shalala*, 30 F.3d 1057, 1074, 1075 (9th Cir. 1994) (invalidating agency action to approve benefit cuts designed to increase incentives to work, where

agency failed to consider, *inter alia*, adjudications under other government programs that certain beneficiaries are disabled or unable to work); *Friends of the E. Fork, Inc. v. Thom*, 688 F. Supp. 2d 1245, 1251, 1255 (W.D. Wash. 2010) (invalidating agency action where agency failed to consider affected parties' "preexisting obligations under state law"); *Ctr. for Food Safety v. Johanns*, 451 F. Supp. 2d 1165, 1186 (D. Haw. 2006) (invalidating agency action where agency failed to provide "*any* explanation" why National Environmental Policy Act did not apply). In *California v. Norton*, 311 F.3d 1162 (9th Cir. 2002), for example, this Court found arbitrary and capricious the agency's failure to explain why the action was not governed by the National Environmental Policy Act's requirement to prepare environmental documentation, where the record indicated that the legal requirement "may apply." *Id.* at 1177 ("Where there is substantial evidence in the record that exceptions to the categorical exclusion may apply, the agency must at the very least explain why the action does not fall within one of the exceptions.").

The record makes clear that 28 C.F.R. Part 23 was "an important aspect of the problem" that the agency failed to consider. *Motor Vehicle*, 463 U.S. at 43. Similar to the agency in *Motor Vehicle*, the agency here had a "mandate" to address privacy, ER 393, and itself "ascribed" significance to the regulation, *Motor Vehicle*, 463 U.S. at 48. The agency itself issued a "Privacy and Civil Liberties Analysis," "acknowledg[ing] 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." ER 440. And it admitted in the first version of the Functional Standard that the regulation *may apply* to suspicious activity reports. ER 430 ("the ISE-SAR information may be fact information or criminal intelligence and is handled in accordance with 28 CFR Part 23").

In addition, the expert stakeholder agencies that authored the SAR Project Report explained that the Functional Standard's process for evaluating suspicious activity reports is what "transitions" "SAR information … to intelligence … subject to 28 C.F.R. Part 23 regulations." ER 288. Accordingly, they specifically recommended that care and attention be paid to the regulation. ER 284 ("When developing an order to mandate the SAR process, agencies should clearly articulate when 28 C.F.R. Part 23 should be applied."). They therefore recommended that "respect and attention [be] given to reasonable suspicion" to ensure the "integrity of the program." ER 285.

But in adopting the "reasonably indicative" standard in 2009, the agency completely ignored its own expert analysis and that of expert stakeholder agencies that the regulation may apply to suspicious activity reports. *See W. Watersheds*, 632 F.3d at 498 ("BLM failed to consider relevant expert analysis" by "agency experts" and Fish and Wildlife Service that proposed agency action "'may affect'

listed species and their habitat"). This omission renders the agency's decision arbitrary and capricious.

2. The court below rejected the argument that Defendants should have addressed 28 C.F.R. Part 23 in adopting the reasonable suspicion standard. "Plaintiffs' argument," the court reasoned, "presupposes that SARs are 'criminal intelligence' governed under Part 23." ER 9. In so ruling, the court effectively held that the agency need not address 28 C.F.R. Part 23 unless Plaintiffs conclusively demonstrated that the regulation applies.

In this regard, the district court ignored the relevant inquiry in this APA action. An agency may well be able to muster a legally defensible rationale in support of its rule, but the rule is still arbitrary and capricious if the agency failed to articulate that alternate rationale. *See, e.g.*, *Arrington v. Daniels*, 516 F.3d 1106, 1116 (9th Cir. 2008) (even where "there are rational explanations" for a rule, the rule will "fail arbitrary and capricious review where the agency neglects to articulate" those rationales in support of its exercise of discretion).

As a result, the legal issue in this case is *not* whether 28 C.F.R. Part 23 applies to suspicious activity reports as a matter of law. The question is whether, given the record in this case, the agency "considered all of the relevant factors." *Pacific Coast I*, 265 F.3d at 1034.

Here, "there is substantial evidence in the record"—based on the agency's *own statements* and that of expert stakeholder agencies—that 28 C.F.R. Part 23 "may apply" to suspicious activity reports. *Norton*, 311 F.3d at 1177; ER 288, 430. As a result, "the agency must at the very least explain why [suspicious activity reports] do[] not fall within" 28 C.F.R. Part 23. *Norton*, 311 F.3d at 1177.

In effect, the district court absolved the agency of any obligation to address 28 C.F.R. Part 23's reasonable suspicion requirement based on an implicit conclusion that the regulation did not apply. But a court reviewing agency action "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle*, 463 U.S. at 43. Instead, it must "rely only 'on what the agency *actually said.*'" *Pacific Coast II*, 426 F.3d at 1091 (emphasis added). When the agency adopted the reasonably indicative standard in 2009, it did not actually say anything about the regulation, let alone offer an explanation as to why it did not apply. "To permit [the] agency to 'implicitly' conclude that" the regulation does not apply "and not require the agency to articulate a basis for its conclusion, 'would reject the bedrock concept of record review.'" *Id.*

C. Defendants' Stated Rationale For Rejecting 28 C.F.R. Part 23 Is Contrary To The Purpose Of The Functional Standard.

After this lawsuit was filed, Defendants ultimately addressed 28 C.F.R. Part 23. The agency claimed it was free to adopt a standard other than reasonable suspicion because 28 C.F.R. Part 23 does not apply to suspicious activity reports.

ER 500. But its stated rationale relies on a premise—that suspicious activity reports are "not the product of investigation"—that is contrary to the text and purpose of the Functional Standard, which expressly calls for suspicious activity reports to be investigated before they are disseminated. As a result, it cannot survive arbitrary and capricious review.

Agency action is arbitrary and capricious if, among other things, the 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." *Motor Vehicle*, 463 U.S. at 43.

Agency reasoning is "inexplicable" if it is inconsistent with the purpose of the relevant statutory scheme or contradicts the agency's own rule. *Alvarado Cmty. Hosp.*, 155 F.3d at 1122-23 (agency's failure to use particular data set regarding patients' lengths of stay was "inexplicable" "[g]iven that decreased [length of stay] was a primary goal of" the program); *see also Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (agency decision to regulate power plant emissions without initially considering cost was arbitrary and capricious where its "line of reasoning overlooks the whole point of" statute); *Or. Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1127 (9th Cir. 2007) (rejecting agency's interpretation that "would contradict the … directive" of the agency's rule); *Ariz. Cattle Growers'*

Ass'n, 273 F.3d at 1242 (agency action arbitrary and capricious where "contrary to … the agency's own regulations").

Defendants here asserted that suspicious activity reports are "not criminal intelligence information" because the latter is "a product of investigation." ER 500. In particular, criminal intelligence, the agency stated, "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.* While this description of "criminal intelligence" tracks the regulation, it also squarely describes suspicious activity reports as called for under the Functional Standard.[7]

The Functional Standard "focuses on the investigative stage once a tip or lead has been received." *Cf. id.* It goes to great pains to establish a multipart process for how to investigate, vet, and evaluate a raw suspicious activity report once it has been received. *See, e.g.*, ER 511-14, 553-55; *supra* Statement of the Case, Part III-B (describing Functional Standard's stage process for investigating and evaluating suspicious activity reports).

[7] *See* 28 C.F.R. § 23.3(b)(3) (defining "criminal intelligence" as "data which has been evaluated to determine that it … is relevant to the identification of and the criminal activity engaged in by an individual who or organization which is reasonably suspected of involvement in criminal activity").

Just like criminal intelligence, suspicious activity reports focus "on identifying the specific [person]" alleged to be involved in potentially terrorist activity. *Cf.* ER 500. The Functional Standard, which standardizes the formatting of suspicious activity reports, prescribes dozens of data elements to be included in a report. *See, e.g.*, ER 437 ("fusion center personnel will document [suspicious activity] in the data format … prescribed by the standard"). These include the subject's name; physical build; eye color; hair color; height; weight; sex; race; skin tone; clothing description; vehicle make, model, color, year and identification number; driver's license; and passport number, to name a few. ER 520, 523-26, 531-32. Indeed, because suspicious activity reports focus on identifying specific subjects, Plaintiffs in this case were named and described in reports distributed to law enforcement agencies across the country. *See, e.g.*, ER 112-13 (identifying "Tariq Razak," providing physical description: "*Close Cropped Beard*[,] Male / Arab[,] 5'11" tall, 175 lbs., medium build, short black straight hair, brown eyes, beard," and noting vehicle make, model, color, year and license plate).

And just like criminal intelligence, suspicious activity reports focus "on identifying . . . the [allegedly] criminal activity in which they are engaged." *Cf.* ER 500. The Functional Standard adopts a "*behavior-focused* approach to identifying suspicious activity." ER 510. Suspicious activity reports constitute information "of observed behavior" deemed to have a potential nexus to terrorism.

ER 504; *see also* ER 500 (suspicious activity reports represent "information about suspicious *behavior* that has been observed and reported") (emphasis added). The Functional Standard prescribes dozens of data elements to be included in a suspicious activity report and that are aimed at identifying with specificity the type of supposedly potential terrorist activity. *See, e.g.*, ER 529-30 (thirteen data elements regarding type of suspicious activity); ER 531 (seven data elements regarding type of infrastructure involved); ER 521-22 (twenty-nine data elements regarding location of incident).

The agency's claim that suspicious activity reports are somehow *not* the product of investigation "would contradict the … directive" of the Functional Standard that such reports be evaluated and investigated before they are shared with other law enforcement agencies. *Or. Nat. Res.*, 492 F.3d at 1127; ER 553 (Functional Standard calls for reports to be vetted through "investigative activities"). Under the process and standards set forth in Defendants' own Functional Standard, suspicious activity reports fall squarely within what Defendants agree to be the salient definition of criminal intelligence: Suspicious activity reports focus on *evaluating* information after it has been received, and on identifying the specific *person* and the allegedly potential terrorist *activity* in which he or she is involved. Defendants' contention that 28 C.F.R. Part 23 does not apply rests on a characterization of suspicious activity reports that is flatly at odds

with the agency's own Functional Standard. *See Or. Nat. Res.*, 492 F.3d at 1127 (rejecting agency interpretation that was "inconsistent with [its own] directive"); *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1242 (finding arbitrary and capricious agency position that was "contrary to … the agency's own regulations").

* * *

In sum, Defendants' stated rationales for adopting the reasonably indicative standard were fatally flawed. The Functional Standard cannot be upheld merely because, had the agency been writing on a blank slate, it would have had the discretion to choose how to strike the privacy/law enforcement balance as it did. *See Chenery II*, 318 U.S. at 94 ("The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act."). On this record, which includes Defendants' own acknowledgment that suspicious activity reports "may be" criminal intelligence to which the regulation applies, 28 C.F.R. Part 23 was a critical aspect of the problem that Defendants were not free to ignore. *See Norton*, 311 F.3d at 1177; ER 430. And the rationale they belatedly offered for declining to follow the regulation is irreconcilably at odds with the Functional Standard's entire approach to vetting suspicious activity reports.

D. Defendants' *Post Hoc* Rationales Are Meritless.

On summary judgment, Defendants offered two further defenses of their decision. Neither is set forth in the record; both are meritless.[8]

First, Defendants argued that the Functional Standard and 28 C.F.R. Part 23 were issued by separate federal agencies, pursuant to separate statutory schemes, and serve different law enforcement purposes. ER 252-53.

But agencies are frequently called upon to address the impact of proposed agency action "in the context of other" overlapping regulatory regimes. *See, e.g.*, *Beno*, 30 F.3d at 1074 (agency impermissibly failed to consider impact of benefit cuts under particular welfare program "in the context of other" government benefit programs).

Should an agency "violate another binding provision of law or regulation, whether within [its statutory mandate] or outside," the action would be "arbitrary or capricious." *Westinghouse Elec. Corp. v. United States*, 782 F.2d 1017, 1020 (Fed. Cir. 1986) (addressing interplay of Department of Defense ("DOD") rule

[8] The only explanation in the record for Defendants' decision not to adopt 28 C.F.R. Part 23's "reasonable suspicion" requirement is found on a single page in a document issued in conjunction with the third version of the Functional Standard in 2015, after this lawsuit was filed. ER 500. The additional arguments Defendants made in the court below are not in the record and must be disregarded. *See, e.g.*, *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1124 (9th Cir. 2012).

regarding progress payments to contractors and regulation of Cost Accounting Standards Board regarding accounting standards).

Contrary to Defendants' argument, an agency may not "completely ignor[e]" potentially overlapping regulations simply because they were issued by another agency. *See United States v. Boeing Co.*, 802 F.2d 1390, 1395 (Fed. Cir. 1986) (sustaining action because agency reconciled potentially contradictory requirements imposed by own rule and separate rule issue by different agency: "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."); *see also Nat. Res. Def. Council v. EPA*, 937 F.2d 649, 652-53 (D.C. Cir. 1991) (rejecting arbitrary and capricious challenge because agency had analyzed interaction of its proposed action with separate agency's overlapping regulations).

Moreover, the information systems covered by 28 C.F.R. Part 23 and the Functional Standard serve fundamentally the same purpose: Pooling or sharing information for the purpose of exposing serious criminal activity. *Compare* ER 406 ("sharing of suspicious activity information" "will provide for the discovery of patterns … beyond what would be recognized within a single jurisdiction" and "is deemed vital to assessing, deterring, preventing, or prosecuting those planning terrorist activities"); ER 455 (same); ER 509 (same), *with* 28 C.F.R. § 23.2

("exposure of [certain] ongoing networks of criminal activity can be aided by the pooling of information").

Defendants argued in the court below that suspicious activity reports are merely "[u]ncorroborated" "tips and leads," rather than criminal intelligence. ER 251-52. But suspicious activity reports are clearly more than uncorroborated tips and leads. A central purpose of the Functional Standard was to standardize preexisting but inconsistent systems for sharing tips and leads and instead require the vetting of raw reports at multiple levels before they are shared with other law enforcement agencies. *See supra* Statement of the Case at Part III-A&B; *see also* ER 301-02 ("Functional Standard was released … to build upon, consolidate, and standardize … processing, sharing, and use of suspicious activity information" "already occurring at the federal, state, and local levels."). If suspicious activity reports were nothing more than uncorroborated tips and leads, the Functional Standard would be entirely pointless.

Second, Defendants argued below that 28 C.F.R. Part 23 does not apply to suspicious activity reports because one of the databases used to share such reports, eGuardian, supposedly does not receive the requisite federal funding. ER 247. The record lacks any discussion of the funding received by systems used to collect and maintain suspicious activity reports. Defendants therefore sought to introduce an extra-record declaration addressing funding, despite having twice certified the

administrative record as complete and vigorously opposing Plaintiffs' efforts to obtain any discovery or supplement the record. ER 376-77 (certifying record as complete); ER 253-54 (certifying record as complete again); ER 374-75, 567-68, 582-85 (opposing discovery); ER 310-11, 322-23 (opposing supplementation of record). The district court properly granted Plaintiffs' motion to strike this declaration and declined to consider this *post hoc* argument that relies on extra-record facts. ER 8-10.

In any event, the record shows that both eGuardian and the "DOJ-supported Regional Information Sharing Systems® Secure Intranet (RISSNET™)" are used to collect, maintain, and disseminate suspicious activity reports. ER 303. The latter receives federal funding from the federal Office of Justice Programs, which triggers the regulation. ER 206-07 at ¶¶ 8-9; ER 239-42; 28 C.F.R. § 23.3(a) (regulation applies to "criminal intelligence systems operating through support under … 42 U.S.C. 3711, *et seq.*, as amended"); 42 U.S.C. § 3711 (transferred to 34 U.S.C. § 10101) (establishing Office of Justice Programs). In addition, fusion centers such as the Northern California Regional Intelligence Center store suspicious activity reports on databases supported by federal funding conditioned on compliance with 28 C.F.R. Part 23. ER 205-06 at ¶¶ 6-7; ER 234.[9] Thus,

[9] Plaintiffs moved to supplement the record with an attorney declaration setting forth information about the funding received by RISSNET and the Northern

databases used to collect, exchange, and store suspicious activity reports receive the requisite federal funding.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and this Court should direct that summary judgment be granted to Plaintiffs. *See Lands Council*, 395 F.3d at 1026 ("Because this is a record review case, we may direct that summary judgment be granted to either party based upon our de novo review of the administrative record.")

Dated: November 3, 2017

Respectfully submitted,

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California fusion center. ER 73-84, 204-42. Defendants did not object to supplementation of the record with this declaration. ER 72. The court below did not rule on Plaintiffs' motion to supplement the record with this declaration, and instead only ruled on the motion to supplement the record with declarations from the individual plaintiffs. ER 10 n.5 (ruling only on declarations related to standing). To the extent this Court deems funding issues relevant, which they are not, it should consider the information in the attorney declaration.

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STATEMENT OF RELATED CASES

There are no related cases pending before this Court.

Dated: November 3, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,672 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Professional Plus 2016 Times New Roman 14-point font.

Dated: November 3, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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