BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
ANTHONY J. COPPOLINO
Deputy Branch Director
STEVEN A. MYERS
Trial Attorney

Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-8648
Facsimile: (202) 616-8460
E-mail: steven.a.myers@usdoj.gov

Attorneys for Federal Defendants

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

No. 3:14-cv-03120 (RS)(KAW)

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, AND OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' DECLARATIONS AND TO SUPPLEMENT THE RECORD WITH PLAINTIFFS' DECLARATIONS

Hearing Date: December 8, 2016
Time: 1:30 PM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES & REGULATIONS

INTRODUCTION

In law enforcement, there is a well-understood distinction between tips and leads, (which include suspicious activity reports, or "SARs"), and "criminal intelligence information" within the meaning of 28 C.F.R. Part 23. SARs are received from a variety of sources, and "without further inquiry or analysis it is unknown whether the information is accurate or useful." A.R. 168. "Unlike intelligence information that has undergone an evaluation process to determine the likely possibility that the information is accurate, tips and leads information hangs between being of no use to law enforcement and being extremely valuable if time and resources are available to determine its meaning." *Id.* Criminal intelligence information, on the other hand, is the product of an investigation that identifies specific individuals and organizations engaged in criminal activity and the criminal conduct in which they are engaged. *See* A.R. 164 (defining "Criminal Intelligence Data" as "[i]nformation deemed relevant to the identification of and criminal activity engaged in by an individual or organization reasonably suspected of involvement in criminal activity."). Each can be useful to law enforcement in appropriate applications, but SARs and criminal intelligence information are not the same thing.

There are a variety of complex legal issues in this long-running case, but the bottom-line question is simple: may the federal government and its state, local, tribal, and territorial partners seek to prevent terrorist attacks by sharing tips and leads among themselves, even before the tips and leads have been sufficiently investigated to reach the level of criminal intelligence information — that is, before there is reasonable suspicion that particular individuals have committed particular crimes? Because the answer to that question is yes, Defendant Program Manager for the Information Sharing Environment ("PM-ISE") released a "Functional Standard" for the Information Sharing Environment

("ISE"), pursuant to which SARs are shared among federal, state, local, tribal, and territorial law enforcement when the SARs document observed behavior reasonably indicative of pre-operational planning associated with terrorism — even if the tips and leads do not meet the standard of "reasonable suspicion." *See generally* Defs.' Mot. for Summ. J. (ECF No. 113, "Defs.' Mot."). Plaintiffs disagree, and apparently believe that participants in the Nationwide Suspicious Activity Reporting Initiative ("NSI") should not be able to share SARs with a potential nexus to terrorism unless and until those SARs have been sufficiently investigated to reach the standard of reasonable suspicion, thus constituting criminal intelligence information. *See generally* Pls.' Cross-Mot. & Opp., ECF No. 115 ("Pls.' Opp."). Each of Plaintiffs' arguments fails, often on multiple bases.

Plaintiffs contend that the Functional Standard is a legislative rule promulgated without the notice-and-comment rulemaking that the Administrative Procedure Act requires, *see* 5 U.S.C. § 553. That claim fails for two separate reasons. First, the Functional Standard is not a legislative rule with the force of law; it is "limited to *describing* the ISE-SAR process." A.R. 414 (emphasis added). In all respects it "leave[s] agency officials free to consider the individual facts in the various cases that arise and to exercise discretion." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1015 (9th Cir. 1987). For that reason, publication in the Federal Register was not required. Second, after the ACLU changed its mind and decided that it was dissatisfied with the very language that it had originally proposed, multiple commenters (including the ACLU) raised the exact legal argument that Plaintiffs (represented by the ACLU) make in this case. PM-ISE stated its reasons for rejecting the ACLU's argument, and the sufficiency of PM-ISE's explanation is the subject of Plaintiffs' separate arbitrary-and-capricious claim. But because the agency was squarely presented with and unambiguously rejected the claim that Plaintiffs press

here, any failure to publish the Functional Standard in the Federal Register was by definition harmless error.

Plaintiffs' arbitrary-and-capricious claim, which contends that Defendants failed to adequately consider a supposed conflict between the Functional Standard and a separate Department of Justice regulation, 28 C.F.R. Part 23, fares no better. At the outset, this claim constitutes a facial challenge because Plaintiffs seek to do away with the Functional Standard in all of its applications. But because (at a minimum) Plaintiffs cannot demonstrate that the Functional Standard would be unlawful when applied to systems that are not funded under the Omnibus Crime Control and Safe Streets Act of 1968 ("the Omnibus Act"), the Functional Standard can (at a minimum) be lawfully applied to such systems. And in actuality, the only information-sharing system subject to the Functional Standard for ISE-SARs is the FBI-managed eGuardian System, which receives no Omnibus Act funding. Thus, the only existing application of the Functional Standard falls outside of Plaintiffs' facial challenge.

Even if Plaintiffs had brought an as-applied challenge to the Functional Standard, that challenge would fail. 28 C.F.R. Part 23 applies only to the sharing of "criminal intelligence information." *See* 28 C.F.R. § 23.20(a) ("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 . . . ." (emphasis added)). In rejecting the ACLU's suggestion that the Functional Standard echo 28 C.F.R. Part 23's "reasonable suspicion" standard, PM-ISE cogently explained that it "is critical to recognize that SAR and ISE-SAR information is not criminal intelligence information" but simply "information about suspicious behavior that has been observed." A.R. 345. While the information has "a potential criminal nexus," it is not "criminal intelligence," which is

"a product of investigation" and "focuses 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.* That explanation accords with the text of 28 C.F.R. Part 23 and is more than sufficient to satisfy the APA's deferential standard, which merely requires that the agency consider the relevant issues. *See generally Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Finally, even if the Court rules against Defendants, the only appropriate remedy would be a remand to the agency without vacatur of the Functional Standard. Otherwise, vacating the Functional Standard pending remand to the agency would force the government participants in the ISE to either (1) stop sharing SARs, increasing the risk of terrorist attacks by hamstringing law enforcement's ability to share reports of incidents that are reasonably indicative of terrorism, or (2) share SARs without any information-sharing guidance, potentially increasing both the risk of terrorist attacks and the chance that inappropriate SARs would be shared.

ARGUMENT

I. Defendants Were Not Required To Publish The Functional Standard In The Federal Register, And Any Failure To Do So Was Harmless Error Because Defendants Considered And Rejected The Arguments That Plaintiffs Present In This Case.

Plaintiffs contend that the Functional Standard is a legislative rule that was promulgated without the notice and comment required by the APA, and that as a result the Functional Standard is invalid. Pls.' Opp. at 28-37. This argument fails at both steps: the Functional Standard is not a legislative rule, and even if it were, any failure to publish it was plainly harmless.

A. The Functional Standard Is Not A Legislative Rule Subject To Notice-and-Comment Rulemaking.

Plaintiffs' notice-and-comment claim fails at the threshold because 5 U.S.C. § 553 applies to legislative rules, and not "general statements of policy," *id.* § 553(b)(3)(A). *See generally* Defs.' Mot. at 14-18. Because the Functional Standard merely describes a standardized process and does not even contemplate the possibility of PM-ISE taking any action with respect to NSI participants, it is not a legislative rule.

Plaintiffs suggest that the Court's prior determination that the Functional Standard is final agency action under 5 U.S.C. § 704 necessarily means that the Functional Standard is a legislative rule. That is wrong. In holding that the Functional Standard was final agency action in the course of denying Defendants' motion to dismiss (a holding to which Defendants respectfully preserve their objection), the Court explained that "if a state or local law enforcement agency does participate in the NSI and submits SARs, it is to do so consistent with the Defendants' Standards." MTD Op., ECF No. 38, at 9. In other words, the Court looked to the Functional Standard's effects upon state and local law enforcement agencies, and not the federal agency that had promulgated the Functional Standard (*i.e.*, PM-ISE).

With respect to the legislative rule analysis, however, the question is the "effect of the regulation or directive upon agency decisionmaking, not the public at large." *Mada-Luna*, 813 F.2d at 1016 (emphasis omitted). And in that regard the critical issue is whether a directive "establish[e]s a binding norm" or instead "leave[s] agency officials free to consider the individual facts in the various cases that arise and to exercise discretion." *Id.* at 1015. "[S]imply because agency action has substantial impact does not mean it is subject

to notice and comment if it is otherwise expressly exempt under the APA." *Id.* at 1016 (citation omitted); *see also* Pls.' Opp. at 30 (agreeing that *Mada-Luna* states the actual test).

Thus, while it is true that the "final agency action" and "legislative rule" analysis "largely coalesce," *see* Defs.' MTD Reply (ECF No. 28) at 7, the overlap is not complete. As the Ninth Circuit explained in *Mada-Luna*, "[t]he determinations of whether an agency's decisions implementing a particular directive are subject to judicial review and whether the directive itself constitutes a general statement of policy exempt from section 553's notice-and-comment requirements are not necessarily interdependent," as the "two issues involve different statutory provisions, are analyzed under different standards, and arise at different chronological stages of a directive's history." 813 F.2d at 1014-15; *accord id.* at 1015 ("[O]ur decision . . . finding determinations made pursuant to the 1978 Operating Instruction reviewable, does not foreclose the possibility that the 1978 Instruction constitutes a general statement of policy for purposes of section 553.").

Under the test established by the Ninth Circuit, Plaintiffs cannot show that the Functional Standard creates a binding norm that does not leave agency officials free to exercise discretion with respect to the facts of individual cases as they arise. It is not relevant whether "agencies that choose to participate in the Initiative" do or do not have discretion to follow "the Functional Standard's process and criteria for designating reports that have . . . a potential nexus to terrorism," Pls.' Opp. at 31, nor would it matter if (as Plaintiffs say) the Functional Standard contains "language requiring Initiative participants to comply." *Id.* The only question is whether PM-ISE has restricted its own discretion. Plaintiffs cannot show this standard is satisfied because the document is intended solely as descriptive guidance for participants in the NSI.

The Functional Standard explicitly indicates that it is "limited to *describing* the ISE-SAR process." A.R. 414 (emphasis added). Plaintiffs point to language indicating that "only those tips and leads that comply with the ISE-SAR Functional Standard are broadly shared with NSI participants," A.R. 429, characterizing this language as a "built-in compliance mechanism." Pls.' Opp. at 31. The language provides nothing of the sort, and critically does not indicate that there is any role for PM-ISE in policing SARs for compliance with the Functional Standard. Nor, pursuant to the Intelligence Reform and Terrorism Prevention Act of 2004, is there even statutory authority for PM-ISE to play such an enforcement role. Read in context, this language is purely descriptive of how the NSI works:

> Multiple federal agencies currently have the authority to collect terrorism-related tips and leads. However, only those tips and leads that comply with the ISE-SAR Functional Standard are broadly shared with NSI participants. At the SLTT level, crime and terrorism information, including terrorism-related non-ISE-SAR information, can and should be reported to appropriate Federal agencies based on their relevant legal authorities.

A.R. 429. Plaintiffs cannot identify a single respect in which the Functional Standard limits PM-ISE's discretion to do anything, which makes sense because PM-ISE does not have a role in evaluating specific tips and leads or in determining which will or will not be shared among participating law enforcement agencies. Rather, it is the various law enforcement agencies that document, submit, and share SARs that are responsible, by virtue of their own respective agency privacy policies, for following the Functional Standard.

Plaintiffs' invocation of out-of-Circuit precedent, *see Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206 (D.C. Cir. 1999), misses the mark largely for that reason. The agency decision challenged in that case "provide[d] that every employer that does not participate [in the program] will be searched," and so the "effect of the rule is . . . to inform

employers of a decision already made." *Id.* at 213. The agency even admitted that "the inspection plan leaves no room for discretionary choices by inspectors in the field." *Id.* (alterations omitted). The challenged guidance here is entirely different because it does not impose legal consequences and does not limit PM-ISE's discretion to do anything.[1]

B. Any Failure To Comply With Notice-and-Comment Rulemaking Was Harmless Because PM-ISE Considered And Rejected The Contention That Plaintiffs Bring Here.

Should the Court conclude that the Functional Standard is a legislative rule subject to 5 U.S.C. § 553, it must then determine whether the failure to publish notice of the Functional Standard in the Federal Register was prejudicial error. *See* 5 U.S.C. § 706 ("[T]he court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."). Because the agency considered and rejected the precise contentions that Plaintiffs advance in this lawsuit, any error was harmless.

It is undisputed that before adopting the Functional Standard's "reasonably indicative" language, PM-ISE consulted with numerous advocacy groups and solicited their opinions. *See generally* Defs.' Mot. at 20-21.[2] Plaintiffs do not dispute that it was

---

[1] Defendants' motion for summary judgment noted that the Functional Standard can be customized for unique communities. *See* Defs.' Mot. at 15. Defendants do not dispute that this means that the Functional Standard's technical inputs can be customized by those communities. The ability to customize the Functional Standard remains consistent with the Functional Standard being a general statement of policy, subject to customization, rather than a legislative rule.

[2] Plaintiffs have moved to strike the declaration of Basil N. Harris, which summarized information in the administrative record making apparent that this consultation occurred. As described in Part IV, *infra*, the Court should deny Plaintiffs' motion to strike. But even

the advocacy group representing them in this case — the ACLU — that first proposed the "reasonably indicative" language, *see* A.R. 158 ("We suggest amending the definition of a SAR to 'behavior reasonably indicative of pre-operational planning related to terrorism . . . ."), nor do they dispute that after the ACLU changed its mind and complained about the "reasonably indicative" language that it had proposed, PM-ISE considered that complaint and stated its reasons for rejecting it, *see* A.R. 345 ("It is critical to recognize that SAR and ISE-SAR information is not criminal intelligence information"). The arguments that Plaintiffs present are either irrelevant, wrong, or both.

First, Plaintiffs observe that "Section 553 is not satisfied when proxies for the public are given an opportunity to comment" because the statute "requires that the public be given that opportunity." Pls.' Opp. at 34. It is undisputed, however, that if Section 553 applies, Defendants did not comply with its technical requirements of promulgating notice in the Federal Register. The parties' dispute instead concerns whether the error was prejudicial, and Plaintiffs' recitation of what Section 553 requires does not speak to that question.

Second, Plaintiffs note that in a variety of cases in which the Ninth Circuit has found error harmless, the plaintiffs had received some form of notice of the policy, even if that notice was imperfect. *See* Pls.' Mot. at 34-35. Yet Plaintiffs all but ignore the Ninth Circuit's holding that an agency does not create prejudicial error when it ignores comments submitted by people who did receive notice, provided that the issue raised by those people had nevertheless been considered by the agency. *See Safari Aviation, Inc. v. Garvey*, 300

---

if the Court were to strike the Harris declaration, the administrative record itself reveals that this consultation occurred, and Plaintiffs do not argue otherwise.

F.3d 1144, 1152 (9th Cir. 2002) ("We hold that the FAA's failure to examine Safari's comments before promulgating the final rule is harmless under these circumstances. The main thrust of Safari's comments on the final rule concerned safety aspects of the 1,500-foot minimum flight altitude requirement, an issue that had been extensively commented on and discussed in previous rulemaking proceedings. Most of Safari's points were also made by Blue Hawaiian Helicopters, an entity whose comments were specifically referenced by the FAA in the final rule."). If the Plaintiffs in this case had submitted comments, Ninth Circuit precedent holds that it would not have been prejudicial error for PM-ISE to entirely ignore them, because the issues had been raised by other commenters. It therefore makes little sense to contend that Plaintiffs' failure to receive specific notice of the proposed Functional Standard was prejudicial.

Third, it is no answer for Plaintiffs to contend that PM-ISE was "not presented with, and thus did not consider, concrete *factual* evidence — such as Plaintiffs' individual stories — about harms that result from a standard that does not require reasonable suspicion." Pls.' Opp. at 36. The comments submitted by the ACLU specifically complained that the Functional Standard "would open the door to inappropriate and unnecessary collection of information based on racial, ethnic, religious or political bias," and they included a list of what the ACLU believed were eleven inappropriate SARs. *See* A.R. 332. This list of allegedly improper SARs included SARs that, according to Plaintiffs, noted the individuals' ethnicities and faulted individuals for taking photographs of public infrastructure — allegations all but identical to those brought by Plaintiffs in this case. Because PM-ISE was presented with the argument that the Functional Standard as drafted permitted the collection and sharing of allegedly inappropriate SARs, and nonetheless stated its reasons for adopting the Functional Standard, Plaintiffs cannot satisfy their

burden of demonstrating that any error committed by PM-ISE was harmful. *See Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

Congress did not intend for "the APA's harmless error rule to be a nullity," *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992), and there is no reason for the Court to disregard the rule here. That is particularly true because if the Court rejects Plaintiffs' notice-and-comment claim and proceeds to adjudicate the arbitrary-and-capricious claim, it will either (1) uphold the Functional Standard on the merits, making it even more implausible that Defendants would change their minds on remand, or (2) find the Functional Standard arbitrary and capricious, mooting Plaintiffs' notice-and-comment claim.

II. The Functional Standard Is Not Arbitrary And Capricious.

Plaintiffs next contend that the Functional Standard is arbitrary and capricious because it conflicts with 28 C.F.R. Part 23, which governs the sharing of criminal intelligence information in criminal intelligence systems funded under the Omnibus Act. That argument fares no better than Plaintiffs' notice-and-comment claim.

A. Plaintiffs' Facial Challenge Cannot Succeed Because They Cannot Show That The Functional Standard Is Invalid In All Applications.

Because Plaintiffs' lawsuit seeks to do away with the Functional Standard in its entirety, in all of its potential applications, Plaintiffs bring a facial challenge. *See* Defs.' Mot. at 22-23. Plaintiffs cannot satisfy the standard for such a challenge because they cannot show that the regulation would be invalid in every case. Specifically, Plaintiffs' claims depend upon the application of 28 C.F.R. Part 23, which only applies to criminal intelligence systems funded under the Omnibus Act, and so they cannot show that "no set of circumstances exists" under which the Functional Standard's "reasonably indicative"

operational concept would be valid — it plainly would be valid when applied to systems that do not receive such funding.

Plaintiffs suggest that "[t]he Ninth Circuit and district courts in this circuit have rejected the applicability of the 'no set of circumstances' test to cases such as this, *i.e.*, a challenge to agency action as arbitrary and capricious." Pls.' Opp. at 20. The only Ninth Circuit authority that Plaintiffs have cited for that proposition, however, explicitly declined to decide the issue for which Plaintiffs cite it. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1024 (9th Cir. 2007) ("We need not decide . . . whether [*United States v.*] *Salerno*'s 'no set of circumstances' standard is the proper standard of review for facial challenges to agency procedures . . . ."). In the absence of Ninth Circuit precedent actually deciding the issue, this Court is bound by the Supreme Court's holding that the familiar "no set of circumstances" standard applies to facial challenges to agency regulations. *See Reno v. Flores*, 507 U.S. 292, 301 (1993); *see also Bosworth*, 510 F.3d at 1023 (noting that this "no set of circumstances standard" was "extended by the Court in *Reno v. Flores*, to agency regulations reviewed for inconsistency with the authorizing statute" (citation omitted)).

Plaintiffs nonetheless contend that if the Functional Standard were arbitrary and capricious in any respect, that would make it invalid in any application, thereby satisfying the standard for a facial challenge. *See* Pls.' Opp. at 20. That too is wrong. Plaintiffs' only authority for this proposition, *Bosworth*, holds only that not complying with the requirements of the National Environmental Policy Act ("NEPA") in promulgating a regulation can render the regulation invalid in all of its applications. *See* 510 F.3d at 1024 ("If the Forest Service failed to comply with the procedures required under NEPA in promulgating the Fuels CE, then its procedural noncompliance would render the Fuels CE unlawful regardless of how the CE is applied."). But the impact of such procedural error

differs markedly from the basis on which Plaintiffs seek facial invalidation here — that the standard does not comply with a distinct substantive standard for criminal intelligence systems funded under the Omnibus Act. *Bosworth* does not hold that any hypothetical conflict between a regulation and other legal authority is sufficient to invalidate the regulation in all of its potential applications, particularly when that purported conflict is not applicable in this very case. Here, Plaintiffs are only contending that the Functional Standard would be arbitrary and capricious when applied in certain limited circumstances that do not exist in this case. Such an argument cannot vitiate the Functional Standard in all of its potential applications.

B. An As-Applied Challenge Would Fail Because The Functional Standard Is Not Arbitrary And Capricious In Any Application.

Had Plaintiffs brought an as-applied challenge in addition to the facial challenge that their complaint actually brings, that challenge would also fail. The heart of Plaintiffs' arbitrary-and-capricious claim is that the Functional Standard should have incorporated 28 C.F.R. Part 23, which provides that criminal intelligence systems funded by the Omnibus Act "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).

Plaintiffs contend that this regulation broadly "prohibits the collection of criminal intelligence unless there is reasonable suspicion of criminal activity," Pls.' Opp. at 19, but that is simply not so. In reality, (1) the regulation only applies to criminal intelligence systems operating through support under the Omnibus Act, and (2) the regulation only applies to the collection and maintenance of "criminal intelligence information" as

specifically defined by the regulatory regime. For those reasons, the regulation does not apply in this instance.

1. *Suspicious Activity Reports Are Not "Criminal Intelligence Information" As Specifically Defined By 28 C.F.R. Part 23.*

The relevant provision of 28 C.F.R. Part 23 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." 28 C.F.R. § 23.20(a). For purposes of the regulation, "criminal intelligence information" is specifically defined 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*." *Id.* § 23.3(b)(3)-(b)(3)(i) (emphasis added). In other words, to be "criminal intelligence information" for purposes of 28 C.F.R. Part 23, the clear text of the regulation requires that the data must be relevant to both "the identification of . . . an individual who or organization which is reasonably suspected of involvement in criminal activity," and "the criminal activity engaged in" by that individual or organization. The regulation "includes an explicit definition," and so the Court "must follow that definition, even if it varies from that term's ordinary meaning," *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000), or any other meaning that Plaintiffs believe the term should have.

Plaintiffs nonetheless inaccurately describe the standard, stating that SARs are "criminal intelligence" information whenever they are determined to be "relevant" to criminal activity, including what they call the "crime of terrorism." Pls.' Opp. at 22-23. Thus, Plaintiffs say, any and all information that is "relevant" to terrorism in any sense is *ipso facto* subject to 28 C.F.R. Part 23. But that is not what the regulation says — and

contrary to Plaintiffs' suggestion, Defendants have not "waived" any argument to the contrary. *See* Defs.' Mot. at 32 ("Once collated and analyzed with correlating pieces of data from other sources, this SAR information may lead law enforcement to initiate a criminal investigation seeking to gather information about specific individuals and organizations suspected of being engaged in criminal conduct. But this is a distinct law enforcement process that occurs outside the scope of the NSI and is not subject to the Functional Standard." (citation omitted)); *cf.* Pls.' Opp. at 24 (claiming waiver).

Plaintiffs' brief elides important and operative regulatory text. *Compare* Pls.' Opp. at 22-23 ("The regulation defines 'criminal intelligence' as 'data which has been evaluated to determine that it . . . is relevant to criminal activity . . . .'" (partially quoting 28 C.F.R. § 23.3(b)(3)), *with* 28 C.F.R. § 23.3(b)(3) ("Criminal Intelligence Information means data which has been evaluated to determine that it: (i) 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, and (ii) Meets criminal intelligence system submission criteria**." (language omitted by Plaintiffs bolded)). Thus, it is not sufficient that the data merely be "relevant to terrorism" to be criminal intelligence information; the data must be about identifying individuals as to whom there is reasonable suspicion that they have already committed (or are committing) a crime and determining the particular crime or crimes those individuals have committed (or are committing). In other words, as the administrative record explains, SAR and ISE-SAR information "represents information about suspicious behavior that has been observed," whereas "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." A.R. 413.

To be sure, before SARs are broadly shared, they are vetted to ensure that they are potentially terrorism-related. But this vetting is not a form of "investigation" that converts the SARs into criminal intelligence information within the meaning of 28 C.F.R. Part 23. Analysts do not have the law enforcement authority to conduct criminal investigations. *See* A.R. 359 (describing analyst vetting role). Instead, initial investigations of criminal activity, including of terrorism-related criminal activity, are conducted by trained law enforcement officers or investigators, whether at the state, local, tribal, territorial, or Federal level. *See* A.R. 466, 468. If a subsequent investigation results in a determination that an ISE-SAR shared in the NSI is supported by reasonable suspicion that an identified individual or organization is involved in a specific criminal activity or enterprise (whether or not it constitutes terrorism) and meets the additional submission requirements of 28 C.F.R. Part 23, then the information relevant to the identification of the criminal subject and the subject's criminal activity may also be submitted to a separate and distinct criminal intelligence project or system funded under the Omnibus Act because only then will it meet the criteria for inclusion in a Criminal Intelligence System.[3]

For all these reasons, the distinction between tips about suspicious activity and criminal intelligence information is reasonable, intuitive, and amply supported by the administrative record. Plaintiffs cannot defeat this articulation of the agency's position by cherry-picking quotes out of context from the administrative record. Plaintiffs point to a

---

[3] *See* A.R. 400 (if ISE-SAR information meets "the reasonable suspicion standard for criminal intelligence, [then] the information may also be submitted to a criminal intelligence information database and handled in accordance with 28 CFR Part 23.")

statement in the October 2008 Suspicious Activity Report Support and Implementation Project indicating that SARs become subject to 28 C.F.R. Part 23 upon integration and consolidation, Supp. A.R. 88, but the diagram appearing on the following page makes entirely clear that SARs become subject to 28 C.F.R. Part 23 when, and only when, reasonable suspicion is established that a particular individual has committed a crime. *See* Supp. A.R. 89. The diagram further reveals that terrorism-related SARs can properly be shared among law enforcement even before this level of suspicion is satisfied. *Id.* Far from supporting Plaintiffs' claims in this case, this document rather succinctly makes Defendants' point.

Plaintiffs also point to certain language in Version 1.0 of the Functional Standard, but the pages that they have cited again do not support their argument. Those pages indicate that "[o]nce SAR information has been identified as potentially terrorism-related, an ISE participant would share that information . . . with the State or major urban area fusion center and the broader ISE community." A.R. 83. That is not disputed. The language does not suggest, however, that ISE-SARs become criminal intelligence, or that they become 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," 28 C.F.R. § 23.3(b)(3)-(b)(3)(i), which is the standard for criminal intelligence information.

Finally, Plaintiffs inaccurately suggest that "[b]oth DOJ and Program Manager admitted in 2008 that suspicious activity reports constitute a form of 'criminal intelligence.'" Pls.' Opp. at 23. In reality, the cited pages refer to "terrorism-related suspicious information" before separately describing "other crime-related information and criminal intelligence." *See* A.R. 148 ("Integrate the management of terrorism-related

suspicious information with processes and systems used to manage other *crime-related information* and *criminal intelligence* . . . .” (emphasis added)); Supp. A.R. 67 (“incorporate the gathering, documenting, processing, reporting, analyzing, and sharing of terrorism-related suspicious activities and incidents into existing processes and systems used to manage *other crime-related information* and *criminal intelligence* . . . .” (emphasis added)). This language merely suggests that SARs are a form of “crime-related information,” which is not disputed. There is no way to parse the language as a concession that SARs are criminal intelligence information — and for all the reasons described above, they are not.

2. *The Functional Standard Does Not Govern The Sharing of ISE-SARs On Omnibus-Act Funded Systems.*

The administrative record also makes clear that the only NSI information-sharing system that is currently in operation is the NSI SAR Data Repository, which is operated by the FBI within its eGuardian system. *See* A.R. 415. The record does not suggest that eGuardian receives any Omnibus Act funding, and Defendants have demonstrated that it does not. *See* Decl. of Marilynn B. Atsatt, ECF No. 113-2.[4] Accordingly, any attempt to require enforcement of 28 C.F.R. Part 23 against the FBI based on its operation of eGuardian would be meritless.

In response, Plaintiffs point to a 2010 document observing that the ISE-SAR evaluation environment “uses multiple Secure But Unclassified (SBU) networks, including the DOJ-supported Regional Information Sharing Systems Secure Intranet (RISSNET), . . .

[4] Plaintiffs have moved to strike this declaration. Because it is submitted to make clear that the agency did not fail to consider any relevant factors, it is properly before the Court. *See infra* Part IV.

as the connection and transport mechanisms for sharing SARs." Pls.' Opp. at 17 (quoting Supp. A.R. 254). That same document, which predates the use of eGuardian as the NSI SAR Data repository, provides more context about what was meant: "User access to the ISE-SAR distributed search is provided utilizing . . . RISSNET," Supp. A.R. 289; *accord id.* 291 ("When access protocols for the shared space concept were designed, it was determined that access to information needed to be provided over a secure network that would protect the information and provide for user authentication. Three SBU networks were identified as being suitable for this function: the DOJ-supported RISSNET; the FBI-supported LEO [Law Enforcement Online]; and DHS-supported HSIN [Homeland Security Information Network]."). In other words, prior to the transition to eGuardian, RISSNET was used to authenticate users searching the "shared space." Even taking the document at its word that RISSNET was once used as a "connection" and "transport" mechanism for SARs, however, that does not implicate 28 C.F.R. Part 23, which imposes conditions upon systems "collect[ing]" and "maintain[ing]" criminal intelligence information. *See* 28 C.F.R. § 23.20(a) ("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.'" (emphasis added)). And as noted above, RISSNET was used to provide access the shared space, which predated the use of eGuardian as the NSI SAR Data Repository. The fact that computer systems interfaced six years ago to authenticate users cannot possibly be sufficient to justify importation of an entirely distinct legal standard that does not apply to the NSI SAR program.

Finally, Plaintiffs contend that state and local law enforcement agencies (which retain control of SARs) receive Omnibus Act funding, as do fusion centers. *See* Pls.' Opp.

at 27. The simple response is that the Functional Standard is not intended to provide guidance for all information and intelligence collection by and sharing among all law enforcement agencies at all levels of government. The Functional Standard only provides guidance for the sharing of SARs in connection with the NSI. *See* A.R. 429 ("[T]his ISE-SAR Functional Standard is designed to support the sharing of unclassified information or sensitive but unclassified (SBU)/controlled unclassified information (CUI) within the NSI SDR."). The Functional Standard does not alter the legal standards that apply when law enforcement officers gather information. A.R. 423-24. It also does not override any legal authorities permitting the sharing of information outside the context of an NSI information-sharing system, including the sharing of terrorism-related tips and leads with the FBI for investigative follow up. *Id*. 429-30. Accordingly, the funding status of law enforcement agencies at all levels of government, including fusion centers, is not relevant to the question before the Court.

Thus, because 28 C.F.R. Part 23 does not govern the sharing of tips and leads, and because it only applies to Omnibus Act-funded programs, the Court need not consider what Plaintiffs contend is a "conflict" between the Functional Standard and that regulation. Even assuming that an agency may not "violate another binding provision of law or regulation" issued by a different agency, nothing in 28 C.F.R. Part 23 fits that categorization. Plaintiffs' authorities do not suggest otherwise. *See Westinghouse Elec. Corp. v. United States*, 782 F.2d 1017, 1020 (Fed. Cir. 1986) (noting that DOD's and CASB's authority did not overlap, and finding no conflict); *United States v. Boeing Co.*, 802 F.2d 1390, 1394-95 (Fed. Cir. 1986) (declining to address "the alleged authority of DOD over procurement matters" because the DOD contract at issue incorporated CASB standards). Here, nothing in the text of 28 C.F.R. Part 23 purports to regulate information

and intelligence sharing generally — it simply imposes funding conditions on Omnibus Act-funded programs. There is no statutory authority to do anything more.

III. Remand Without Vacatur Would Be The Only Appropriate Remedy

Even if the Court found that Defendants had failed either to engage in notice and comment rulemaking or to adequately consider 28 C.F.R. Part 23, the appropriate remedy would be to remand the Functional Standard to the PM-ISE without vacating the Functional Standard. While Plaintiffs cite a concurring opinion from outside the Ninth Circuit suggesting that remand should always include vacatur, they concede that the Ninth Circuit has held otherwise. *See* Pls.' Opp. at 37.

Plaintiffs suggest that Defendants' request that any remand be without vacatur "fail[s] to address the seriousness of the error," Pls.' Opp. at 38, but that is not correct. Defendants of course submit that they committed no error at all, for all the reasons discussed above. But in the event the Court finds error and orders a remand, it would only be to correct a ministerial failing: Defendants' alleged failure to receive public comments or more fully explain why the Functional Standard is not at odds with 28 C.F.R. Part 23. Vacatur would not be appropriate in these circumstances.

It is Plaintiffs who fail to give due consideration to the disruptive consequences that could follow if the Functional Standard were vacated pending remand. Plaintiffs contend that the SAR Initiative is not pertinent to national security, but the only document that they cite for that proposition, a draft document containing summaries of Congressional Research Service reports, states that "SAR reporting has stopped several terrorist attacks" and that the "Department of Homeland Security thinks" that "a nationwide SAR program [will] increase the likelihood that additional attacks will be stopped." Supp. A.R. 387. The Ninth Circuit has repeatedly "acknowledge[d] the need to defer to the Executive on matters

of foreign policy and national security," *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007), and there is no reason for the Court to do otherwise in this case.

Finally, Plaintiffs contend that "leaving the Functional Standard in place risks ongoing, serious harm to Plaintiffs and countless other individuals who engage in innocent conduct but risk being swept up in Defendants' net." Pls.' Opp. at 39. As Defendants have explained, however, if the Functional Standard were vacated, the federal government could simply operate the NSI without any information sharing guidance at all. *See* Defs.' Mot. at 34. Plaintiffs cannot explain — and notably do not try to explain — how this result better serves their privacy and civil-liberty concerns.

IV. The Court Should Deny Plaintiffs' Motion To Strike Defendants' Declarations And Supplement The Record With Plaintiffs' Declarations.

Finally, the Court should deny Plaintiffs' motion to strike Defendants' declarations and also deny their request to supplement the record with the individual Plaintiffs' declarations. (Defendant has no opposition to the Court's consideration of the Lye Declaration submitted by Plaintiffs, though it has no bearing on any of the issues before the Court for the reasons explained above.)

A. The Court Should Not Strike Defendants' Declarations.

Defendants submitted two declarations alongside their motion for summary judgment: one from Basil N. Harris (ECF No. 113-1), which addresses the collaborative process used by PM-ISE in promulgating the Functional Standard, and one from Marilynn B. Atsatt (ECF No. 113-2), which explains that the NSI SAR Data Repository does not receive any funding under the Omnibus Act. Plaintiffs' motion to strike both declarations should be denied.

With respect to the Harris Declaration, the Ninth Circuit permits declarations that are submitted "for the limited purpose of explaining the administrative record." *Idaho Conservation League v. Bonneville Power Admin.*, --- F. App'x ----, 2016 WL 3409458, at *2 (9th Cir. June 21, 2016) (citing *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 n.22 (9th Cir. 1992) (as amended)); *see also, e.g.*, *Olivares v. Transp. Sec. Admin.*, 819 F.3d 454, 464 (D.C. Cir. 2016) (permitting "post-hoc account" that provides "the contemporaneous explanation" for agency action and is "merely explanatory of the original record" (citation omitted)). Here, the administrative record itself makes plain that PM-ISE consulted with numerous advocacy groups in promulgating the Functional Standard, and the Harris Declaration, which cites heavily to the administrative record, is explanatory of the record. It is properly before the Court.

With respect to the Atsatt Declaration, Plaintiffs contend that the question of funding is not relevant because "Defendants never articulated funding as their rationale for rejecting 28 C.F.R. Part 23 and its reasonable suspicion requirement." Pls.' Strike Mot. (ECF No. 121) at 5. That argument fails. The record contains no indication that the eGuardian system receives Omnibus Act funding, yet Plaintiffs have put 28 C.F.R. Part 23 front and center in this case, quite in error. Plaintiffs have argued that Defendants failed to consider a relevant consideration, and the Atsatt declaration serves to rebut that baseless charge. *See, e.g.*, *City of Las Vegas, Nev. v. F.A.A.*, 570 F.3d 1109, 1116 (9th Cir. 2009) (consideration of "extra-record materials" appropriate when, *inter alia*, "necessary to determine whether the agency has considered all relevant factors").

B. The Court Should Not Consider The Individual Plaintiffs' Declarations.

Plaintiffs have also moved to supplement the record with declarations from (1) Linda Lye, and (2) each of the individual Plaintiffs. Defendant has no objection to the Court's consideration of the Lye Declaration, but because the funding received by state and local law enforcement agencies and fusion centers is not relevant, *see supra*, it has no bearing on the issues before the Court.

The individual Plaintiffs' declarations, however, are plainly improper. Plaintiffs contend that the Court should permit these declarations because they are relevant to Plaintiffs' standing. But while Defendants' motion to dismiss this case contended that Plaintiffs had failed to adequately plead standing, *see* Defs.' MTD (ECF No. 21) at 17-21, the Court rejected that challenge. *See* MTD Op. (ECF No. 38) at 6-7. Defendants' motion for summary judgment provides no further argument on this issue. *Cf.* Pls.' Opp.' at 17 (arguing that "Defendants have abandoned their challenge to Plaintiffs' standing"). Insofar as neither party is asking this Court to revisit its ruling on Plaintiffs' standing at this time, Plaintiffs' declarations are inappropriate. *See, e.g.*, *Ventana Wilderness All. v. Bradford*, No. 06-5472, 2007 WL 1848042, at *10 (N.D. Cal. June 27, 2007) (striking declarations offered "for purposes of standing and irreparable harm, which are not at issue in these motions"), *aff'd*, 313 F. App'x 944 (9th Cir. 2009); *W. Watersheds Project v. Salazar*, 766 F. Supp. 2d 1095, 1104 (D. Mont. 2011) ("The Court believes that the Declarations containing both standing allegations and the extra-record submission should be stricken in full because standing is not in dispute and the extra-record submissions are intermixed with the standing allegations.").

Because the instant motions do not raise the issue of standing, the Court should decline to supplement the record on that basis. But even if the Court were willing to

consider additional facts pertinent to standing, as in *Western Watersheds Project*, "the extra-record submissions are intermixed with the standing allegations." *W. Watersheds*, 766 F. Supp. 2d at 1104. Other than rebutting a challenge to standing that Defendants' motion for summary judgment does not raise, *see* Pls.' Opp. at 17-19, the only place where Plaintiffs' opposition makes use of these declarations is to support their assertion that they would have liked to comment on the Functional Standard if they had been given the opportunity, *see id.* at 36. That allegation goes exclusively to the merits of Plaintiffs' notice-and-comment claim, as to which the declarations are improper.

CONCLUSION

For the aforementioned reasons, Defendants respectfully request that the Court grant summary judgment in favor of Defendants and deny Plaintiffs' motion to strike Defendants' declarations and supplement the record with their own.

October 20, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Branch Director

/s/ *Steven A. Myers*
Steven A. Myers
Trial Attorney
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 305-8648
Facsimile: (202) 616-8460
E-mail: steven.a.myers@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2016, I filed the above document with the Court's CM/ECF system, which will send notice of such filing to all parties.

Date: October 20, 2016

/s/ *Steven A. Myers*
Steven A. Myers