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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WILEY GILL; JAMES PRIGOFF; TARIQ RZAK; KHALID IBRAHIM; AND AARON CONKLIN,

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE AND SUPPLEMENT

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

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I. INTRODUCTION

This is an Administrative Procedure Act (APA) challenge to Defendants' issuance of the Functional Standard. Under the governing legal framework, the Functional Standard is unlawful and must be set aside if the agency's reasoning in support of adopting the "reasonably indicative" standard was arbitrary and capricious, or if the Functional Standard is a legislative rule. Unable to prevail under this framework, Defendants instead distract the Court with a number of extraneous arguments.

First, they contend that the "bottom-line question" in this case is whether the federal government and state, local, and tribal law enforcement may share suspicious activity reports without vetting them to ensure there is reasonable suspicion of criminal activity. Defts.' Reply at 1 (Dkt. No. 124). But that is not the question. In APA challenges, the question is whether Defendants' *reasoning* in issuing the rule was adequate—not whether the agency *could have* adopted the rule it did based upon the *post hoc* rationalizations Defendants now offer on summary judgment.[1] In any event, even if the agency's reasoning had been adequate, it adopted its rule without providing the public with notice and an opportunity to comment. In short, if the government wishes to share suspicious activity reports lacking in reasonable suspicion, it must go through public notice and comment and provide a reasoned basis why 28 C.F.R. Part 23 does not apply. It has failed to do both.

Second, Defendants assert that because eGuardian, one of the information systems used to share suspicious activity reports, does not directly receive 28 C.F.R. Part 23 funding, the Functional Standard does not conflict with the regulation. Again, Defendants misapprehend the governing legal standard. The question is whether the agency's reasoning in rejecting the 28 C.F.R. Part 23 reasonable suspicion standard was adequate. Defendants cannot now defend the agency's decision based upon a funding argument Defendants never articulated on the Record.

In any event, the fact that eGuardian does not directly receive 28 C.F.R. Part 23 funding

[1] Although Defendants pose the wrong question, the answer to their question is no. Federal government and state, local, and tribal law enforcement *may not* share suspicious activity reports without vetting them to ensure there is reasonable suspicion of criminal activity.

does not mean that the Nationwide Suspicious Activity Reporting Initiative (Initiative or NSI), *in toto*, does not receive or utilize 28 C.F.R. Part 23 funding. Defendants fail to acknowledge that the Functional Standard calls for the use of *multiple* information systems—centralized systems for sharing, with storage on local fusion center servers. Data systems used to collect suspicious activity reports, such as RISSNET, as well as data systems used to store them, such as the suspicious activity reporting information system used by the fusion center in Northern California, receive 28 C.F.R. Part 23 funding. These collection and storage functions directly implicate the regulation. *See* 28 C.F.R. § 23.20(a) (prohibition against collection and maintenance of criminal intelligence absent reasonable suspicion).

Third, Defendants continue to emphasize the distinction between tips and leads on the one hand and criminal intelligence on the other. While that distinction is sensible, Defendants fail to explain why suspicious activity reports are the former rather than the latter. Suspicious activity reports satisfy what Defendants themselves contend to be the salient definition of criminal intelligence. AR 413. They are *evaluated and investigated* pursuant to Functional Standard criteria. And they focus on identifying the specific *behaviors* and *persons* involved in supposedly terrorist, *i.e.*, criminal activity. The entire purpose of the Functional Standard was to enhance preexisting tips and leads systems, and to develop a process for evaluating and investigating those reports of suspicious activity deemed to have a sufficient nexus to terrorism to warrant large-scale dissemination. Although Defendants unlawfully adopted a very low threshold, they still adopted a standard for evaluating raw reports. If suspicious activity reports were merely tips and leads, the Functional Standard would be entirely pointless.

Finally, this Court should hold the Functional Standard unlawful and set it aside. Defendants urge this Court to remand without vacating the rule. But they have not met their burden of demonstrating that their unusual remedy is appropriate. They offer no evidence, merely scaremongering, to support the assertion that vacating the Functional Standard would increase the risk of terrorist attacks. There is no evidence that the Initiative has thwarted any terrorist attacks or otherwise contributed to public safety. In fact, the Record explicitly notes that the Initiative's effectiveness is uncertain. And there is ample evidence that it has harmed

individuals, such as Plaintiffs, who have engaged in no wrongdoing.

Defendants' threat that they would operate the Initiative without any information sharing guidance is a bluff, as it would drown law enforcement in useless information. In any event, this Court could fashion an equitable remedy that would address Defendants' stated desire to continue operating the Initiative with some kind of standard for information sharing, while granting Plaintiffs' presumptive right under the APA to an order setting aside unlawful agency action. To address Defendants' concerns, the Court, instead of simply vacating the Functional Standard, could vacate the rule and also clarify that during the pendency of a remand to the agency, Defendants may continue to operate the Initiative if they vet suspicious activity reports pursuant to the standard set forth in 28 C.F.R. Part 23. *See Brown v. Plata*, 563 U.S. 493, 538 (2011) ("Once invoked, the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies." (citations omitted)).

II. ARGUMENT

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

Agency action must be set aside as arbitrary and capricious if the agency's reasoning in support of the decision was inadequate, for example, because it "entirely failed to consider an important aspect of the problem, offered an explanation . . . that runs counter to the evidence before the agency, or is . . . implausible." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Defendants' reasoning, as set forth in the Record, in support of the decision to adopt the "reasonably indicative" standard cannot meet this test. Defendants thus make little effort to defend the agency's actual reasoning, and instead rely primarily on arguments articulated for the first time in this litigation. But "the post hoc rationalizations of the agency . . . cannot serve as a sufficient predicate for agency action." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981).

1. *Motor Vehicle,* Not *Salerno*, Governs This APA Challenge

Defendants' continued insistence that the "no set of circumstances" standard governs this case is legally meritless and reflects Defendants' ongoing effort to inject the question of funding

into this case—even though the issue was nowhere raised by the agency in the Record as a basis for its decision. Defendants cannot circumvent the well-established prohibition in APA challenges against reliance on *post hoc* justifications for poorly reasoned agency decisions.

The Supreme Court in *Motor Vehicle* articulated the standard for APA challenges, such as this, to agency action on the ground that it is arbitrary and capricious. That governing standard requires agency action to be set aside where the agency's reasoning was inadequate. *See Motor Vehicle*, 463 U.S. at 43 ("an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, 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"). "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id*. at 50.

By contrast, the Supreme Court initially articulated the "no set of circumstances" standard of review in a facial constitutional challenge to a statute. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). It also applied that test in a challenge to a regulation as unconstitutional and inconsistent with the authorizing statute. *See Reno v. Flores*, 507 U.S. 292, 300-01 (1993). Plaintiffs here do not contend that the Functional Standard is either unconstitutional or inconsistent with the underlying statute.

In numerous cases postdating *Salerno and Flores*, the Supreme Court has continued to apply the *Motor Vehicle* standard in reviewing agency actions challenged as arbitrary and capricious; none of these decisions has applied *Salerno*. *See, e.g., Judulang v. Holder*, 132 S. Ct. 476, 483-84 (2011) (applying *Motor Vehicle* in APA challenge to Board of Immigration Appeals policy regarding determination of eligibility for discretionary relief from deportation as arbitrary and capricious); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 502–04 (2009) (applying *Motor Vehicle* in APA challenge to FCC policy regarding use of expletives as arbitrary and capricious).

In response to the very arguments Defendants make here—that *Salerno's* "no set of circumstances" test applies to an agency action challenged as arbitrary and capricious—the Ninth

Circuit stated: "[W]e are not convinced that [*Salerno*] should be applied," and cited other circuit decisions in support of this view. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1024 (9th Cir. 2007). Moreover, as the Ninth Circuit explained, "[E]ven if we were to apply [*Salerno*] in this case, it would not benefit the Forest Service. . . . The invalidity of the [agency rule] flows from the . . . violation [of the National Environmental Policy Act], not from the application of the [agency rule]." *Id*.

Although Defendants attempt to distinguish *Bosworth* as involving a procedural violation, the case involved a challenge to agency action as arbitrary and capricious. *Id*. at 1027. Moreover, its reasoning is directly on point. If Defendants' stated reasons in support of the Functional Standard are "arbitrary and capricious" within the meaning of *Motor Vehicle*, then the Functional Standard must be set aside. *Motor Vehicle*, 463 U.S. at 42-43. Thus, "[t]he invalidity of the [Functional Standard] flows from the [inadequacy of the agency's decisionmaking], not from the application of" the Functional Standard to particular individuals. *Bosworth*, 510 F.3d at 1024. "In other words, if [Plaintiffs'] claims have merit, the stricter Salerno standard is met and there would be no set of circumstances under which the [Functional Standard] could be valid because [Defendants] failed to comply with" the APA. *Id*.

Since *Bosworth*, the Ninth Circuit has continued to apply the *Motor Vehic*le standard, rather than *Salerno*, in cases challenging agency action as arbitrary and capricious. In *Natural Resources Def. Council, Inc. v. Pritzker*, 828 F.3d 1125 (9th Cir. 2016), for example, the court found the Navy's rule regarding the areas in which it could use low-frequency sonar to be arbitrary and capricious based on the agency's reasoning in arriving at the rule. *See id*. at 1138 ("agency has offered no explanation why it meets" the "least practicable adverse impact"); *id*. at 1139 (agency claimed in litigation that decision reflected "an inten[tion] to balance the equities between military readiness and conservation" but failed to make "such balancing . . . explicit in rulemaking"). Notably, the rule resulted in "nearly 70% of the candidate areas" being removed from protection; the court did not require plaintiffs to demonstrate that 100% of candidate areas had been removed and instead focused on the reasoning underlying the agency's decision. *Id*. at 1137; *see also Friends of Columbia Gorge, Inc. v. Schafer*, 624 F. Supp. 2d 1253, 1264 (D. Or.

2008) (applying APA "arbitrary and capricious" standard and rejecting government's argument that plaintiffs were required to satisfy *Salerno*). Defendants' contention—that Plaintiffs must demonstrate that every application of a challenged agency rule is invalid—does not comport with Supreme Court or Ninth Circuit authority.[2]

2. The Reasoning Set Forth by the Agency in the Record Was Inadequate

The question in this case is whether the reasons articulated by the agency in adopting the "reasonably indicative" standard satisfy *Motor Vehicle*. In Defendants' opening brief, they correctly acknowledged that the analysis turns on whether Defendants' reasoning in initially adopting the reasonably indicative standard in 2009 and subsequently rejecting the reasonable suspicion standard in 2015 was adequate under *Motor Vehicle*. *See* Defts.' Br. at 28-33 (Dkt. No. 113). But as Plaintiffs previously explained, it was not.

First, when Defendants adopted the "reasonably indicative" standard in 2009, they failed to offer *any* explanation as to why they chose not to adopt the reasonable suspicion standard set forth in 28 C.F.R. Part 23, despite having themselves "acknowledge[d] that questions arise as to whether a SAR should meet the 'reasonable suspicion' standard established for Criminal Intelligence Systems under 28 C.F.R. Part 23." AR 135. Like the agency in *Motor Vehicle*, which entirely failed to address the issue of airbags when developing a rule regarding passive restraints in vehicles, Defendants failed to address an "important aspect of the problem" to which they had "ascribed" significance. *Motor Vehicle*, 463 U.S. at 43; *see also* Pltfs.' Br. at 20-22 (Dkt. No. 115).

In their reply, Defendants offer no defense of this omission. Although they dispute that the Record reflects any admission on their part that suspicious activity reports constitute criminal intelligence, they cannot and do not deny that in evaluating the privacy and civil liberties implications of the Functional Standard, they acknowledged the importance of addressing the 28

[2] Defendants do not press their contention that there is no private right of action to enforce 28 C.F.R. Part 23. *Cf.* Defts.' Br. at 26. As Plaintiffs previously explained, this action does not seek to enforce that regulation and so the existence or nonexistence of a private right of action has no bearing on this case. *See* Pltfs.' Br. at 20.

C.F.R. Part 23 question (AR 135) and nevertheless failed to answer that question.

Their efforts to dismiss the SAR Project Report are also unavailing. That Report confirms that from the very outset, key stakeholders of the Initiative including the FBI and two other components of Defendant Department of Justice recognized that the Functional Standard's process for evaluating suspicious activity reports transforms the data into criminal intelligence governed by 28 C.F.R. Part 23. *See* Supp. AR 88; AR 82-83; Pltfs.' Br. at 12-13.[3] Defendants contend that a diagram in the Report supports their view that suspicious activity reports only become criminal intelligence if reasonable suspicion is established, and that such reports can in any event be shared "even before this level of suspicion is satisfied." Defts.' Reply at 17. The ambiguous diagram, however, could also be construed to mean that the authors of the Report believed that suspicious activity reports should only be disseminated if reasonable suspicion is established,[4] or that dissemination to other law enforcement agencies of information that is deemed "Terrorism Related" after an initial evaluation renders the data criminal intelligence subject to the regulation.[5] These readings are more consistent with the text of the Report, which explains that the "point at which SAR information" is evaluated against Functional Standard criteria is the point when the data "actually becomes intelligence and subsequently subject to 28 C.F.R. Part 23 requirements." Supp. AR 88. In any event, the SAR Project Report confirms that key stakeholders recognized the importance of the relationship between the Functional Standard and 28 C.F.R. Part 23, but the agency failed to address the interplay between the issues.

Second, when Defendants ultimately addressed the issue in 2015, after this lawsuit was

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[3] Defendants dispute the significance of Plaintiffs' citation to some language in Version 1.0 of the Functional Standard (AR 83). Defts.' Reply at 17. The purpose of that citation was to define the term "Integration and Consolidation phase," as used in the SAR Project Report.

[4] The middle column includes a box stating "reasonable suspicion established" and then a "yes" arrow points to two columns on the right that are labeled at the top "Intelligence (28 C.F.R. Part 23)." Supp. AR 89.

[5] The diagram includes a path for information deemed "Terrorism Related" to be disseminated, after the "[c]onduct [of an] Initial Evaluation," to law enforcement agencies, such as a Joint Terrorism Task Force, a fusion center, the ISE Shared Space, or eGuardian. *Id.* The columns in which the box for disseminated information appears are labeled "Intelligence (28 C.F.R. Part 23)." *Id.*

filed, they asserted that suspicious activity reports are merely uncorroborated "tips and leads" and not "criminal intelligence" governed by the regulation because suspicious activity reports are not "a product of investigation." AR 413; Defts.' Br. at 31-32. This argument runs counter to the very process set forth in the Functional Standard for vetting suspicious activity reports; that process involves evaluating reports through "investigative activity." AR 466; *see also Motor Vehicle*, 463 U.S. at 43 ("an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency"). The argument also implausibly renders the entire Initiative pointless. *See Motor Vehicle*, 463, U.S. at 43 (agency explanation is arbitrary and capricious if "implausible"). The purpose of the Initiative was to revamp preexisting tips and leads systems so that they could be processed into information useful to law enforcement. If suspicious activity reports were merely uncorroborated tips and leads, the Functional Standard would serve no purpose. *See* Pltfs.' Br. at 4-5, 23. While the distinction between uncorroborated "tips and leads" and "criminal intelligence" makes sense, Defendants fail to offer a reasoned explanation supported by the Administrative Record why suspicious activity reports are the former rather than the latter.

On reply, Defendants now contend that the evaluation conducted pursuant to the Functional Standard "is not a form of 'investigation' that converts the SARs into criminal intelligence information within the meaning of 28 C.F.R. Part 23" because "[a]nalysts do not have the law enforcement authority to conduct criminal investigations." Defts.' Reply at 16. But this explanation was not set forth in the Record. Instead, the agency merely stated what suspicious activity reports are ("information about suspicious behavior that has been observed and reported to or by law enforcement officers or other NSI participants") and what the agency contends criminal intelligence to be ("a product of investigation"). AR 413. In other words, Defendants reasoned that suspicious activity reports are not criminal intelligence because they are not a "product of investigation." But in rejecting the 28 C.F.R. Part 23 standard, Defendants never asserted either in the Record or in their opening brief that only *certain types* of active criminal "investigations" convert suspicious activity reports into criminal intelligence. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency

itself." *Motor Vehicle*, 463 U.S. at 50; *see also, e.g.*, *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005) (issue waived when not "specifically and distinctly" argued in opening brief).

In any event, Defendants' argument finds no support in the regulatory text and is contradicted by the regulatory history. The regulation defines "criminal intelligence" as "data which has been evaluated" (28 C.F.R. § 23.3(b)(3) (emphasis added)), not "data which has been *investigated*." Moreover, when Defendant Department of Justice adopted the current definition of "criminal intelligence," it explained that "there is no requirement that 'an active investigation' is necessary." 58 Fed. Reg. 48,448, 48,450 (1993). The agency further made clear that "[t]he character of an information system as a criminal intelligence system does not depend upon the source or categorization of the underlying information as 'raw' or 'soft' intelligence, preliminary investigation information, or investigative information, findings or determinations." *Id*.

Notably, Defendants characterize suspicious activity reports as merely information that "may lead law enforcement to initiate a criminal investigation." *See* Defts.' Reply at 15 ("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."). Yet, as the regulatory history makes clear, this very description brings suspicious activity reports within the regulation's sweep. "The definition [of criminal intelligence systems] includes both systems that store detailed intelligence or investigative information on the suspected criminal activities of subjects and those which store only information designed to identify individuals or organizations that are the subject of an inquiry or analysis (*a so-called 'pointer system'*)." 58 Fed. Reg. 48,448 (emphasis added). There is simply no basis in the regulation's plain language or regulatory history to support Defendants' *post hoc* argument that information must be part of a full-blown criminal investigation to constitute "criminal intelligence."

In their reply brief, Defendants also point to certain portions of the regulatory text.[6]

[6] Defendants accuse Plaintiffs of ignoring certain portions of the regulatory language and mischaracterize Plaintiffs as asserting that criminal intelligence is any information that is "'relevant' to criminal activity, including what [Plaintiffs] call the 'crime of terrorism.'" Defts.' Reply at 14. (It is unclear why Defendants use the phrase "what they call the 'crime of

(continued on next page)

Criminal intelligence, they emphasize, is "data which has been evaluated to determine that it . . . [i]s 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." Defts.' Reply (quoting 28 C.F.R. § 23.3(b)(3)). But this regulatory language does not cure the defective reasoning articulated by the agency at the time it made its decision.

In asserting that suspicious activity reports are not criminal intelligence, the agency merely stated what suspicious activity reports are, and then posited a supposedly contrasting definition of criminal intelligence: "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." AR 413. But it never explained in the Record or its opening brief why the two are mutually exclusive. *See Pritzker*, 828 F.3d at 1138 (agency's action arbitrary and capricious where "it offered no explanation" of why its conduct met legal standard).

And indeed they are not. Just like criminal intelligence, the Functional Standard "focuses on the investigative stage once a tip or lead has been received." *Cf.* Defts.' Reply at 15 (citing AR 413). In particular, it focuses on how to investigate, vet, or evaluate information once a raw suspicious activity report has been received. *See, e.g.*, AR 466 (collecting agency conducts an "Initial Response and Investigation" consisting of "observations, interviews, and other investigative activities"; "[w]hen the initial investigation is complete, the official documents the event" as a suspicious activity report); AR 427 ("The SAR undergoes a two-part review process by a trained analyst or an investigator to establish or discount a potential nexus to terrorism.").

(continued from prior page)
terrorism.'" Terrorism is plainly a crime. *See, e.g.*, 18 U.S.C. § 2332b (defining terrorism and listing crimes that can meet the definition).) Plaintiffs do not contend that information transitions to criminal intelligence whenever it is "relevant" to criminal activity; rather, as set forth in the regulatory language, the critical element is that the information must have been *evaluated* for its relevance to criminal activity. *See* 28 C.F.R. § 23.3(b)(3) ("data that has been evaluated"). The entire purpose of the Functional Standard was to develop a process for evaluating raw and otherwise useless reports of suspicious activity and disseminate only those that, after evaluation, were determined to have the requisite nexus to terrorism.

Just like criminal intelligence, suspicious activity reports focus "on identifying the specific [person]" alleged to be involved in potentially terrorist activity. *Cf.* Defts.' Reply at 15 (citing AR 413). The Functional Standard, which was intended to standardize the format in which suspicious activity reports are written, prescribes dozens of data elements to be included in a report. 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. AR 433, 436-39, 444-45. Indeed, because suspicious activity reports focus on identifying specific subjects, Plaintiffs in this case were named and described in reports submitted to eGuardian and/or investigated by the FBI. *See, e.g.*, Razak Decl., Ex. 1 at 1-2 (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.* Defts.' Reply at 15-16 (citing AR 413). Indeed, as Defendants repeatedly note, suspicious activity reports constitute "information about suspicious behavior that has been observed and reported to or by law enforcement officers or other NSI participants." AR 413; *see also* Defts.' Reply at 15. And the Functional Standard also 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.*, AR 442-43 (thirteen data elements regarding type of suspicious activity); AR 444 (seven data elements regarding type of infrastructure involved); AR 434-35 (twenty-nine data elements regarding location of incident).

In short, just like criminal intelligence, suspicious activity reports focus on *evaluating* information after it has been received, on identifying the specific *person* alleged to be engaged in potentially criminal (here, terrorist) activity, and on further identifying the allegedly potentially terrorist *activity*. The Record thus contradicts Defendants' assertion that suspicious activity reports fall outside what Defendants contended to be the salient definition of criminal

intelligence.[7]

3. Defendants' *Post Hoc*, Extra-Record Funding Arguments Cannot Salvage the Agency's Defective Reasoning

Defendants make a number of misdirected arguments about funding. In particular, they emphasize that eGuardian, which is currently used to disseminate suspicious activity reports, does not receive 28 C.F.R. Part 23 funding. This factual assertion is intended to support their argument that there is no conflict between the Functional Standard and the regulation because the two rules affect different data systems. But this argument appears nowhere in the Record. Moreover, regardless of the functions eGuardian performs or the funding it receives, other data systems, such as RISSNET and fusion center suspicious activity reporting databases, perform functions that implicate the regulation (collection and maintenance) and receive 28 C.F.R. Part 23 funding.

Although Defendants now make the funding source of suspicious activity reporting information systems the centerpiece of their argument, the issue of funding appears nowhere in the Record. In 2015, the agency stated that suspicious activity reports are not criminal intelligence and offered what it contended to be the dispositive definition of criminal intelligence. AR 413.[8] But the agency never identified the funding source of the information system as a salient portion of the definition of criminal intelligence or the basis for its distinction between

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[7] To be sure, the regulation defines criminal intelligence as "data which has been evaluated to determine that it . . . [i]s 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) (emphasis added). This could be construed to mean that data is only criminal intelligence if the person at issue is reasonably suspected of criminal involvement, or conversely, that data is not criminal intelligence—and thus loses the privacy protections of the regulation—if reasonable suspicion is lacking. As Plaintiffs previously explained, this tautological reading would render the regulation pointless. *See* Pltfs.' Br. at 23-24; Pltfs.' Opp'n to Mot. to Dismiss at 29-31 (Dkt. No. 26 at 36-38). The regulatory history also forecloses any such reading. In explaining the importance of the regulation's "operating principles," the Department of Justice explained that "[t]he finding of reasonable suspicion is a threshold requirement for entering intelligence information on an individual or organization into an intelligence data base." 58 Fed. Reg. 43,449. The Department of Justice did not say that the finding of reasonable suspicion was a threshold requirement for determining whether data constitutes intelligence information.

[8] As discussed above, the agency did not explain why suspicious activity reports fall outside that definition. *See supra* Part II-A-2.

criminal intelligence and suspicious activity reports. "[T]he post hoc rationalizations of the agency . . . cannot serve as a sufficient predicate for agency action." *Am. Textile Mfrs. Inst.*, 452 U.S. at 539; *see also Pritzker*, 828 F.3d at 1132-33 (impermissible to "bolster the agency decision on grounds that it did not include in its reasoning" in the Record). Under this "fundamental rule of administrative law . . . , a reviewing court . . . must judge the propriety of [agency action] solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action." *SEC v. Chenery*, 332 U.S. 194, 196 (1947). The Court should therefore disregard Defendants' arguments regarding funding.

But even if funding issues were properly before this Court, Defendants' contentions are meritless. Relying on evidence plainly outside the Record (such as declarations) or citations to the Record that do not support the stated proposition, Defendants attempt to argue that no information system used in connection with the Initiative receives 28 C.F.R. Part 23 funding. On the contrary, information systems governed by 28 C.F.R. Part 23 are used to collect and share suspicious activity reports, as well as to store them. We address the specific infirmities with Defendants' arguments in turn.

a. Multiple Information Systems Are Used for Storage and Sharing of Suspicious Activity Reports

Defendants' emphasis on the funding received by eGuardian is a red herring. Defendants state 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." Defts.' Reply at 18 (emphasis added) (citing AR 415). But as Plaintiffs previously explained, the Record citation—which is to the definitions section of the Functional Standard—does not support Defendants' assertion in their brief. See Pltfs.' Br. at 27 n.8. Indeed, the citation confirms that *multiple* systems are used in connection with storage and sharing of suspicious activity reports: the "NSI SAR Data Repository" was "built to respect and support *originator control and local stewardship of data*." AR 415 (emphasis added). This is consistent with the Initiative's "distributed data model," now termed the NSI SAR Data Repository, which allows participating agencies to house the data on their own servers but search it through a central location. Supp. AR 230; AR 415. In

other words, while eGuardian is used to share suspicious activity reports, the reports are stored locally at fusion centers. As a result, Defendants' Record citation demonstrates that eGuardian is only one of several information systems used in connection with the Initiative.

In addition, Defendants state that because eGuardian does not receive the requisite funding, "any attempt to require enforcement of 28 C.F.R. Part 23 against the FBI based on its operation of eGuardian would be meritless." Defts.' Reply at 18. But Plaintiffs have never sought to "enforce" 28 C.F.R. Part 23 against the FBI or any other entity. Rather, this APA challenge contends that the Functional Standard was unlawfully promulgated and should therefore be vacated.

b. Fusion Centers Store Vetted Suspicious Activity Reports on Information Systems that Receive 28 C.F.R Part 23 Funding

Defendants now inexplicably argue that "the funding received by state and local law enforcement agencies and fusion centers is not relevant." Defts.' Reply at 24; *see also id*. at 19-20. But if funding is relevant at all, then it matters whether the entities that participate in the Initiative are bound by 28 C.F.R. Part 23. This is so because it is arbitrary and capricious for an agency to issue rules that impose standards on affected entities that conflict with the standards imposed on those same entities by another agency. *See United States v. Boeing, Co.*, 802 F.2d 1390, 1395 (Fed. Cir. 1986); Pltfs.' Br. at 25.

The evaluation of suspicious activity reports pursuant to Functional Standard criteria—which is what transforms raw suspicious activity report data into criminal intelligence—occurs primarily at fusion centers. *See, e.g.*, AR 427, 471. Once a report is deemed to satisfy the Functional Standard criteria and thus, in Defendants' view, to have a "potential nexus to terrorism," it becomes what Defendants term an "ISE-SAR." AR 427. The ISE-SAR is then disseminated to other Initiative participants but "remains under the ownership and control of the submitting organization (i.e., SLTT law enforcement agency, fusion center, or Federal agency that made the initial determination that the activity constituted an ISE-SAR)." AR 428. In other words, the Functional Standard calls for a process by which *vetted* suspicious activity reports, *i.e.*, suspicious activity reports that have transitioned to criminal intelligence, are stored on fusion

center data systems.

And fusion centers that participate in the Initiative, such as the fusion center in Northern California, house suspicious activity report data on databases that receive funding expressly conditioned on compliance with 28 C.F.R. Part 23. See Lye Decl. ¶¶ 3-7 & Ex. 4 (¶ 25). These fusion center databases perform the function that Defendants contend implicates 28 C.F.R. Part 23. As Defendants themselves emphasize, what is salient for purposes of the regulation is whether the data system maintains or collects criminal intelligence. Defts.' Reply at 19. Fusion center data systems do just that. AR 428 (suspicious activity reports evaluated pursuant to Functional Standard criteria "remain[] under the ownership and control of the submitting organization . . . i.e., . . . fusion center").

Because fusion centers store vetted suspicious activity reports on data systems that receive 28 C.F.R. Part 23 funding, these Initiative participants must comply with the regulation's core "operating principle," which prohibits the collection and maintenance of criminal intelligence absent reasonable suspicion. *See* 28 C.F.R. § 23.20(a). This principle means that "[t]he finding of reasonable suspicion is a threshold requirement for entering intelligence information on an individual or organization into an intelligence data base." 58 Fed. Reg. 43,449. It was therefore arbitrary and capricious for Defendants to tell these very same entities covered by 28 C.F.R. Part 23 that they could and should collect, maintain, and share suspicious activity reports even when they *lack* reasonable suspicion—absent a reasoned explanation why doing so was appropriate.

Defendants dismiss the significance of Plaintiffs' factual demonstration by asserting that "the funding status of law enforcement agencies at all levels of government, including fusion centers, is not relevant to the question before the Court" because "[t]he Functional Standard only provides guidance for the sharing of SARs in connection with the NSI." Defts.' Reply at 20. This observation may have been pertinent if Plaintiffs had merely asserted that fusion centers receive 28 C.F.R. Part 23 funding to fund non-NSI related data systems. But Plaintiffs have demonstrated that they receive 28 C.F.R. Part 23 funding for data systems specifically used for suspicious activity reports. *See* Lye Decl. ¶ 7 & Ex. 4 at 14 (¶ 25). Defendants' contention that the Court need not consider any "conflict" between the Functional Standard and 28 C.F.R. Part 23

as well as their effort to distinguish the federal circuit's decision in *Boeing* and a companion case, *Westinghouse Electric Corp. v. United States*, 782 F.2d 1017 (Fed. Cir. 1986) (*cf.* Defts.' Reply at 20), thus rest on the incorrect factual premise that the Functional Standard and 28 C.F.R. Part 23 do not apply to the same data systems.[9]

c. RISSNET Collects Vetted Suspicious Activity Reports and Receives 28 C.F.R. Part Funding

Defendants also attempt to dismiss the significance of the acknowledgment in the Record that RISSNET was used "as the connection and transport mechanism for sharing SARs." Defts.' Reply at 18-19.

Notably, Defendants do not dispute that RISSNET is governed by 28 C.F.R. Part 23. *See* Lye Decl., Ex. 6 ("28 C.F.R. Part 23 . . . appl[ies] to . . . any Office of Justice Programs and Bureau of Justice Assistance Programs such as RISS"). Instead, Defendants contend that because the regulation is concerned with the collection and maintenance of criminal intelligence information, the use of RISSNET for sharing suspicious activity reports "does not implicate 28 C.F.R. Part 23." *See* 28 C.F.R. Part 23.20(a). The conclusion does not follow from the premise. In order to serve as the connection and transport mechanism for *sharing* suspicious activity reports, RISSNET would necessarily have to *collect* them, even if it did not thereafter maintain them. Thus, this connection and transport function squarely implicates the regulation.[10]

Defendants also attempt to argue that RISSNET was used only "prior to the transition to eGuardian" and that this prior use does not "justify importation" of 28 C.F.R. Part 23 into the Functional Standard. Defts.' Reply at 19. Defendants have pointed to no Record citation that

[9] Despite now arguing that the funding received by various law enforcement entities is "not relevant" (Defts.' Reply at 20), Defendants acknowledged in their opening brief that Plaintiffs would be able to demonstrate an "as applied" conflict if Plaintiffs could identify "a specific NSI information-sharing system" that operated through the requisite federal funding. *See* Defts.' Br. at 25. Although the facial/as applied distinction has no bearing on this APA challenge, that is precisely what Plaintiffs have done. *See* Lye Decl. ¶ 7 & Ex. 4 at 14 (¶ 25) (Northern California fusion center suspicious activity reporting database receives 28 C.F.R. Part 23 funding).

[10] Indeed, if the dissemination function of RISSNET does not implicate the regulation, then the dissemination function of eGuardian does not either. If Defendants are correct that Plaintiffs' emphasis of RISSNET is misplaced, so, too, is their emphasis of eGuardian.

supports their assertion that RISSNET is no longer used in connection with the NSI.[11] In any event, the question is not whether the use of RISSNET "justified" adoption of the 28 C.F.R. Part 23 standard, but rather (1) whether use of a system undisputedly governed by 28 C.F.R. Part 23 illustrates the unreasonableness of the agency's failure in 2009 to address the regulation at all and (2) whether use of RISSNET underscores the inadequacy of the agency's stated reasons for rejecting that standard (which reasons nowhere included funding sources) or otherwise undermines Defendants' *post hoc*, factually inaccurate argument that there is no overlap in the data systems covered by the Functional Standard and 28 C.F.R. Part 23.

* * *

In short, it is of no significance that eGuardian does not receive the relevant federal funding. This is so because other data systems used to collect suspicious activity reports (such as RISSNET) as well as data systems used to store them (such as the suspicious activity report information system used by the fusion center in Northern California) receive 28 C.F.R. Part 23 funding.[12] Defendants' contention that the Functional Standard and the regulation are concerned with different information systems is not borne out by the Record or even their extra-record declarations.

B. Because the Functional Standard Is a Legislative Rule, Defendants Must Engage in Notice and Comment

1. The Functional Standard Is a Legislative Rule That Does Not Meet the "General Statement of Policy" Exception

When an agency exercises its rulemaking powers, the notice-and-comment procedure is mandatory except for "interpretative rules, general statements of policy, or rules of agency organization." 5 U.S.C. § 553(b)(3)(A). Defendants do not dispute that the Functional Standard

[11] The only Record citations in Defendants' discussion of RISSNET describe the functions it performs within the NSI, but do not support the proposition that RISSNET "predates" eGuardian. *See* Defts.' Reply at 19 (citing Supp. AR 254, 289).

[12] Defendants continue to assert that programs must receive funding under the "Omnibus Act," but have not addressed Plaintiffs' argument that the regulation applies more broadly to all criminal intelligence systems operating through support from the Office of Justice Programs. *See* 28 C.F.R. § 23.3(a) ("applicable to all criminal intelligence systems operating through support under . . . 42 U.S.C. § 3711 et seq., as amended"); 42 U.S.C. § 3711 (creating Office of Justice Programs); Pltfs.' Br. at 28 n.10.

is a rule as to which notice-and-comment is presumptively mandatory, and instead insist that the Functional Standard falls within the exception for general statements of policy. But their argument for *why* it falls within that exception has changed significantly. *Compare* Defts.' Br. at 16, *with* Defts.' Reply at 5-8. In their moving brief, Defendants argued that the Functional Standard is a "guidepost" but "not a strict legal standard or rule with which NSI participants must comply." *See* Defts.' Br. at 16. That argument fails because the Functional Standard contains mandatory language and a built-in enforcement mechanism in which only those suspicious activity reports that comply with the Functional Standard's criteria are shared. *See* Pltfs.' Br. at 30-33. In their reply, Defendants effectively abandon this argument and now claim that "[i]t is not relevant whether 'agencies that choose to participate in the Initiative' do or do not have discretion to follow 'the Functional Standard[].'" Defts.' Reply at 6.

Defendants' new argument is that even if the Functional Standard is binding on Initiative participants, it still will not constitute a legislative rule unless it regulates the conduct of Defendants themselves. *See id*. ("The only question is whether PM-ISE has restricted its own discretion."). This argument rests on a mischaracterization of what a general statement of policy actually is. "When officials or agencies have been delegated discretionary authority over a given area," the agency may issue a general statement of policy "to 'educate' and provide direction to the agency's personnel in the field, who are required to implement its policies and exercise its discretionary power in specific cases." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987). However, if the agency's guidance "so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion," then it ceases to be a statement of policy and becomes a legislative rule that must be promulgated via notice-and-comment rulemaking. *Id*. at 1014 (citation omitted); *see also CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) (directive was a legislative rule and not a policy statement, where it "binds private parties or the agency itself with the 'force of law'").

The Functional Standard is a legislative rule because it "fills out the statutory scheme" and establishes a "binding norm" for the collection and dissemination of SARs. *See Mada-Luna*, 813 F.2d at 1014. In an effort to escape this conclusion, Defendants focus entirely on *Mada-Luna's*

reference to the "agency's discretion." Defendants argue that this means a federal agency may enact regulations that have the force of law as to other "agencies that choose to participate in the Initiative" without following notice-and-comment rulemaking, so long as those regulations do not impose any obligations on the agency that issued them. See Defts.' Reply at 6. This is obviously not the law, and Defendants cite no support for this proposition because it would mean a federal agency could always enact a rule without notice-and-comment rulemaking, so long as it delegated the implementation and enforcement of that rule to other agencies, or to state and local officials.

Another court of this district recently rejected an argument that is almost identical to the one Defendants make here. In *Center for Environmental Health v. Vilsack*, the defendants had issued a "guidance document" in connection with a federal program "which accredits individuals and state officials as agents 'for the purpose of certifying a farm or handling operation as a certified organic farm or handling operation.'" No. 15-CV-01690, 2016 WL 3383954, at *1 (N.D. Cal. June 20, 2016). There, as here, the defendants argued that they did not need to follow notice-and-comment rulemaking because the "guidance document" was simply a general statement of policy. *See id*. at *3. The court rejected this argument, recognizing that if the defendants had issued a document that "neither state certifying agents nor organic producers are 'free to ignore,'" then they had promulgated a legislative rule. *Id*. at *9. The court also rejected the defendants' "confusing argument" that the guidance statement was "a general statement of policy because it only binds lower-level implementing agents," and does not restrict the federal agency's "discretion as to how to implement the [enabling statute]." *Id*. The court recognized that this argument was unsustainable because it "would allow an agency to perpetually amend the rules and evade the APA's procedural requirements." *Id*. Therefore, because the Functional Standard creates a new "binding norm" that must be followed by the law enforcement agencies that create and disseminate SARs, it is a legislative rule that should have been promulgated via notice-and-comment rulemaking.[13]

[13] Defendants emphasize that the tests for whether an agency action is "final" and whether it constitutes a legislative rule are not identical. Defts.' Reply at 5-6. But Plaintiffs do not contend that all final agency actions are necessarily legislative rules. Plaintiffs merely observed that this Court, in rejecting Defendants' final agency action argument on the motion to dismiss, has

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2. Defendants' Error Was Not Harmless Because They Did Not Provide Plaintiffs or the Public with Notice and an Opportunity to Comment

Defendants acknowledge that "if Section 553 applies, [Defendants] did not comply with its . . . requirements." Defts.' Reply at 9. In their reply, Defendants do no more than reiterate their argument that because they consulted with certain advocacy groups, they sufficiently met the requirements of APA section 553, such that any failure to comply with the "technical requirements of promulgating notice in the Federal Register" was not prejudicial. *See* Defts.' Reply at 8-11. However, Defendants have cited no authority for the proposition that their wholesale failure to provide the public with notice and an opportunity to comment is a "technical" failing that can be brushed aside.

The sole case relied upon by Defendants for their argument, *Safari Aviation Inc. v. Garvey*, is distinguishable because there the agency followed notice-and-comment rulemaking, including publication of the proposed rule in the *Federal Register*, a review period, comments by the public and affected parties, consideration of those comments by the FAA, a reasoned determination by that agency, and publication of the final rule. The FAA's error was its failure to address the specific comments of one entity, plaintiff Safari Aviation. The Ninth Circuit compared the actual comments submitted by Safari Aviation with the comments of other entities well-addressed by the FAA and concluded that "the main thrust of Safari's comments" had been the subject of numerous previous comments and "[m]ost of Safari's points were also made by Blue Hawaiian Helicopters." 300 F.3d 1144, 1152 (9th Cir. 2002).

As Defendants acknowledge, *Safari Aviation* involved a situation where an agency "ignores comments submitted by people *who did receive notice*." Defts.' Reply at 9 (emphasis added). Here, by contrast, Plaintiffs did not receive notice and thus lacked an opportunity to actually submit any comments. *See* Gill Decl. ¶ 22; Razak Decl. ¶ 24; Ibrahim Decl. ¶ 9; Prigoff Decl. ¶ 27; Conklin Decl. ¶ 14. Defendants have not cited any cases in which a court found an

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already rejected an argument that Defendants concede to be similar. *See id*. at 6 (acknowledging that two inquiries "largely coalesce").

agency to have adequately addressed comments of individuals, like Plaintiffs and other members of the public, who lacked notice or an opportunity to comment. And indeed, Defendants' assumption that the comments of the advocacy groups with whom they chose to consult mirror not only what would have been the comments of Plaintiffs, but also the comments that the public would have made, is pure speculation. An agency's error cannot be made harmless because the agency has manifested an intent to pre-judge evidence it has not yet received.[14]

Courts "must exercise great caution in applying the harmless error rule in the administrative rulemaking context . . . because harmless error is more readily abused there than in the civil or criminal context." *Nw. Res. Info. Ctr., Inc. v. Nw. Power & Conservation Council*, 730 F.3d 1008, 1021-21 (9th Cir. 2013). In addition, a demonstration of prejudice is not "a particularly onerous requirement," *Shinseki v. Sanders*, 556 U.S. 396, 410 (2009),[15] and the Ninth Circuit has explained that this is particularly so when there has been a failure to provide proper notice and comment procedure:

> To avoid gutting the APA's procedural requirements, harmless error analysis in administrative rulemaking must therefore focus on the process as well as the result. We have held that the failure to provide notice and comment is harmless only where the agency's mistake "clearly had no bearing on the procedure used or the substance of decision reached."

Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1090 (9th Cir. 2011) (quoting *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992) (quoting *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764-65 (9th Cir. 1986))).

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[14] Defendants also contend that any comments Plaintiffs would have submitted about their particular circumstances do not materially differ from various suspicious activity reports that demonstrated racial, political, ethnic and religious bias and that were identified by advocacy groups with which Defendants consulted. Defts.' Reply at 10. But there is a vast difference between suspicious activity reports (although troubling on their face) and suspicious activity reports accompanied by the personal, real-life concerns of the individuals identified in those reports, and the impact of the Initiative on their lives. Internationally renowned photographer James Prigoff, for example, was prevented from taking a photograph of a water tower while standing on public property because the very act of taking a photograph was considered suspicious. *See* Prigoff Decl. ¶¶ 6-10. And Wiley Gill has been singled out for repeated, intrusive inquiries from law enforcement, directed both to him and even his family, because of his "pious demeanor." *See* Gill Decl. ¶¶ 6-11.

[15] Or, as the Ninth Circuit has put it: "If prejudice is obvious to the court, the party challenging agency action need not demonstrate anything further." *Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015) (en banc).

Because Defendants' error involved the wholesale failure to provide the public with any notice or any opportunity to comment, rather than a merely technical violation of procedural requirements, and because Plaintiffs and the public at large lacked any notice or opportunity to comment on the Functional Standard, Defendants' error was not harmless. Agencies should not be permitted to avoid the requirements of the APA by cherry-picking advocacy groups with which they wish to consult, and then pre-judging the comments that they assume the public would have made had they been given notice and the opportunity to comment.

C. Remand with Vacatur Is the Only Appropriate Remedy

As discussed in Plaintiffs' opposition and cross-motion, vacatur is the only appropriate remedy. The Ninth Circuit and courts in this district recognize that remand without vacatur is rarely granted absent extraordinary circumstances. *See Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) ("We order remand without vacatur only in limited circumstances."); *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 109 F. Supp. 3d 1238 (N.D. Cal. 2015) ("[C]ourts within this circuit rarely remand without vacatur."), *appeal dismissed* (9th Cir. Aug. 25, 2015, Aug. 28, 2015). Defendants contend that vacatur would be disruptive because they would either have to stop operating the Initiative or share information without any standard for vetting it. But neither the government's interest in continuing to operate the Initiative or having a standard for information sharing justifies the unusual remedy of remand without vacatur. The first argument rests on pure speculation about the Initiative's effectiveness and its second concern can be fully addressed, as discussed below.

In arguing that this Court should remand without vacatur, Defendants fail to acknowledge that it is their "burden to show that vacatur is unwarranted." *See Vilsack*, 2016 WL 3383954, at *13. Moreover, Defendants' primary argument for remand without vacatur is that SAR reporting can prevent terrorism—an empirical claim patently unsupported by the evidence on the Record. In fact, the very document that Defendants selectively and misleadingly quote to support its argument that SAR reporting can prevent terrorism (Defts.' Reply at 21) actually emphasizes the exact opposite—that the success of the NSI *has not been determined*:

- "The only way to validate the program's effectiveness is through concrete

measurements . . . [t]he report recommends that Congress request the DHS' Program Management Office for the NSI to develop these metrics";

- "The success of the NSI will depend on the infrastructure that supports it, and funding may fall short at fusion centers in some jurisdictions" ; and
- "But will a nationwide SAR program increase the likelihood that additional attacks will be stopped? The Department of Homeland Security thinks so – ***it just can't prove it yet***."

Supp. AR 387 (emphasis added).[16] Aside from this document, Defendants cite to no other evidence for the proposition that SAR reporting can prevent terrorism. Defendants' speculation is palpably insufficient to warrant the unusual remedy of remand without vacatur. Indeed, the only evidence before the Court shows that it is unclear whether the SAR program is effective, and that the federal government "can't prove" that its implementation will prevent terrorism. *Id*. Because Defendants have failed to meet their burden, the Court should vacate the rule. *See* 5 U.S.C. § 706(2) ("reviewing court *shall* … hold unlawful and set aside agency action" that is arbitrary and capricious and adopted "without observance of procedure required by law") (emphasis added).

Additionally, Defendants argue that if the Functional Standard were vacated, the federal government could operate the NSI without any information-sharing guidance. Information sharing without a standard for doing so, they contend, would be disruptive. *See* Defts.' Br. at 34; Defts.' Reply at 21-22. Defendants are correct that this outcome would have troubling privacy and civil liberties consequences. *Cf*. Defts.' Br. at 22. But their threat to operate the NSI without a standard for dissemination is a bluff. Such collection and sharing would result in a massive overload of information, rendering such collection wasteful and sharing unusable. *See, e.g.*, Supp. AR 326 (Boston Police Department urged against "entry of information . . . that is not of value").

Defendants have, in fact, conceded that the widespread sharing of information without adequate vetting harms both privacy and law enforcement interests. During the notice-and-

[16] Notably, Defendants criticize Plaintiffs' reliance on this very same document (a summary of draft Congressional Research Service reports).

comment rulemaking conducted for 28 C.F.R. Part 23, one member of the public stated that "reasonable suspicion . . . is not necessary to the protection of individual privacy and Constitutional rights, [and suggested] instead that information in a funded intelligence system need only be 'necessary and relevant to an agency's lawful purposes.'" 58 Fed. Reg. 48,451 (Sept. 16, 1993). The Office of Justice Programs responded:

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

Id. (emphasis added).

It is Defendants' burden to prove that the unusual remedy of remand without vacatur is warranted, and Defendants have patently failed to meet this burden. Thus, the Court should vacate the Functional Standard and require Defendants to engage in appropriate notice-and-comment rulemaking should they wish to promulgate a new rule in its place.

If this Court believes it appropriate to address Defendants' concerns, it could vacate the rule and remand to the agency, but clarify that if Defendants choose to operate the Initiative in the interim, it do so pursuant to the "reasonable suspicion" standard of 28 C.F.R. Part 23. *See* 28 C.F.R. § 23.20. This remedy satisfies Defendants' stated goal of continuing to operate the Initiative with some standard for information sharing, grants Plaintiffs the relief to which they are entitled—vacatur of an unlawful agency rule, and falls within the Court's broad equitable powers to fashion appropriate relief. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 15 (1971) ("[b]readth and flexibility are inherent in equitable remedies").[17] Such a remedy would not bind the agency in deciding what standard to adopt upon remand, but would simply

[17] The APA provides for equitable remedies. *See* 5 U.S.C. § 702 ("relief other than money damages"); *Wiechers v Moore*, No. 1:13-cv-00223, 2014 WL 1400843, *15 (E.D. Cal. Apr. 10, 2014) ("The APA waives a federal agency's sovereign immunity . . . with respect to claims for *equitable* relief.") (citing 5 U.S.C. § 702)).

supply an interim standard in order to address Defendants' concerns about sharing information without any standard.

D. The Court Should Grant Plaintiffs' Motion to Strike and Supplement

The Court should strike Defendants' declarations and grant Plaintiffs' motion to supplement the Record with the declarations of the individual Plaintiffs.[18]

1. The Court Should Strike Defendants' Declarations

Defendants make no effort to excuse their failure to move to supplement the Record with their declarations. Nor have they belatedly moved to supplement the Record, or offered any explanation why they should be permitted at this juncture to expand the Record after repeatedly insisting that judicial review in this case be limited to the Record, twice certifying the Record as complete, and aggressively fighting Plaintiffs' efforts to close gaps in the Record. *See* Pltfs.' Mot. to Strike and Supplement at 2-3 (Dkt. No. 121 at 7-8). Even if the Court does not grant Plaintiffs' motion to strike these declarations, there is no motion before this Court to supplement the Record with Defendants' declarations, which are plainly outside the Record and should therefore be excluded from consideration.

In any event, the Atsatt declaration should be stricken. Defendants correctly state that extra-record materials may be considered to determine if the agency has considered all relevant factors. Defts.' Reply at 23. But that narrow exception to the record-only review rule does not apply here. Defendants completely ignore the fact that they never offered funding as the basis for their decision to reject the 28 C.F.R. Part 23 standard. The purpose of the record-only review rule is to limit judicial consideration to matters that were actually before the agency. Defendants have cited no authority for the stunning proposition that the "all relevant factors" exception can be used to expand the record to provide a factual basis for an argument never articulated by the agency itself. Just as the "court[] may not accept . . . counsel's *post hoc* rationalizations for agency action," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962), it should not

[18] Defendants do not object to the supplementation of the Record with the Lye Declaration. The Court should therefore supplement the Record with this declaration.

look beyond the Record to "bolster the agency decision on grounds that it did not include in its reasoning." *Pritzker*, 828 F.3d at 1133.[19]

The Harris declaration should be stricken as well. Defendants contend that the declaration "cites heavily to the administrative record." Defts.' Reply at 23. The duplicative declaration thus adds nothing to this Court's review. *Cf., e.g., Stanley C. v. M.S.D. of Sw. Allen Cnty. Sch.*, No. 1:07-cv-169, 2007 WL 4438624, at * 3 (N.D. Ind. Dec. 14, 2007) (in case brought under Individuals with Disabilities Education Act, denying motion to supplement with report because, *inter alia*, it was "duplicative" of other evidence in record).

2. The Court Should Supplement the Record with the Declarations of Each of the Plaintiffs

Defendants do not dispute that consideration of extra-record evidence is appropriate to establish standing. *See NW. Envtl. Def. Ctr.*, 117 F.3d 1520, 1528 (9th Cir. 1997). Instead, they contend that because they have chosen not to challenge Plaintiffs' standing on summary judgment, the Court should exclude the declarations of the individual Plaintiffs. Defts.' Reply at 24. But "the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Moreover, because standing is a jurisdictional issue, Defendants, who challenged Plaintiffs' standing in their motion to dismiss, would be free to raise standing at a future stage of this litigation. *See, e.g., United States v. Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997) ("Defendant's initial argument that the Government waived its right to challenge standing on appeal fails because the jurisdictional issue of standing can be raised at any time, including by the court *sua sponte*."). Plaintiffs would be prejudiced if the Court were to exclude declarations

[19] Defendants state: "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." Defts.' Reply at 23. Defendants themselves placed 28 C.F.R. Part 23 "front and center in this case" by "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." AR 135. The absence of any discussion in the Record of the funding received by eGuardian or any other system used in connection with the Initiative merely confirms that the agency did not rely on this reason and cannot do so now.

establishing their standing, and Defendants chose to challenge standing in the event of an appeal, or if this or another Court were to raise the issue *sua sponte*. Defendants' choice not to challenge standing on summary judgment does not therefore present a basis for denying Plaintiffs' motion to supplement the record with their declarations.[20]

Defendants also object to portions of Plaintiffs' declarations stating that they did not receive notice of Defendants' proposed adoption of the Functional Standard and would have commented. Defts.' Reply at 25. These portions of the declarations are admissible for two independent reasons. First, they establish standing based on procedural injury. *See, e.g., City of Las Vegas v. FAA*, 570 F.3d 1109, 1114 (9th Cir. 2009) (procedural injury relevant to standing inquiry). Second, Defendants contend that their wholesale failure to provide public notice and comment was "harmless error." But that doctrine requires an analysis of whether "interested parties received some notice that sufficiently enabled them to participate in the rulemaking process before the relevant agency adopted the rule," or whether instead "petitioners were given no such opportunity." *Paulsen v. Daniels*, 413 F.3d 999, 1007 (9th Cir. 2005). Plaintiffs' declarations directly address what Defendants acknowledge to be the factual question dispositive of the legal doctrine they have chosen to invoke—whether Plaintiffs received notice. *See* Defts.' Reply at 9 (describing pertinent Ninth Circuit authority as holding that error is harmless if agency "ignores comments submitted by people who did receive notice" (emphasis added)). It would gravely compound the unfairness of Defendants' refusal to provide public notice and comment by prohibiting Plaintiffs from introducing factual information demonstrating why the error here was

[20] Defendants cite *Ventana Wilderness Alliance v. Bradford*, but in that case, unlike here, "the plaintiffs [were] not relying on the declarations to show standing." No. 06-5472, 2007 WL 1848042, at *6 (N.D. Cal. June 27, 2007), *aff'd*, 313 F. App'x 944 (9th Cir. 2009). Although Defendants correctly quote *W. Watersheds Project v. Salazar*, 766 F. Supp. 2d 1095 (D. Mont. 2011), *aff'd in part*, 494 F. App'x 740 (9th Cir. 2012), as striking declarations containing standing allegations "because standing is not in dispute," the immediately preceding sentence, which Defendants do not quote, offers a directly contradictory view: "Defendants' motion to strike Plaintiffs' Declarations (Doc. 34) is well taken (*other than the standing representations* in Doc. 34–3, 34–5 and 34–6, although standing does not appear to be an issue in this case and is not challenged by Defendants)." *Id.* at 1104 (emphasis added). In any event, neither case offers any reasoning why defendants' choice not to dispute standing is relevant, given the jurisdictional nature of the issue. Plaintiffs respectfully contend that these cases are thus not persuasive.

prejudicial.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' motion to strike Defendants' declarations and to supplement the Record with Plaintiffs' declarations should be granted. In addition, Plaintiffs' motion for summary judgment should be granted and Defendants' motion for summary judgment should be denied. The Court should hold the Functional Standard unlawful and set it aside

Dated: November 16, 2016

By: */s/ Linda Lye*

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FILER'S ATTESTATION

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

Dated: November 17, 2016

By */s/ Phillip J. Wiese*
Phillip J. Wiese