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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)

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Hearing Date: January 8, 2015
Time: 1:30 p.m.
Ctrm: 3, 17th Floor
Judge: Hon. Richard G. Seeborg

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INTRODUCTION

Plaintiffs have not demonstrated that their challenge to the guidance—the Functional Standard for Suspicious Activity Reporting Version 1.5 ("Functional Standard") and the Privacy Impact Assessment for the eGuardian Threat Tracking System ("Privacy Impact Assessment")—issued by Defendants in connection with the Nationwide Suspicious Activity Reporting Initiative ("NSI") should survive Defendants' motion to dismiss.

As a threshold matter, Plaintiffs lack standing to proceed. First, Plaintiffs have failed to provide any support for the notion that the alleged collection and dissemination of Suspicious Activity Reports ("SARs") to covered law enforcement personnel, alone, constitutes a "legally recognized harm" that would support standing. And while Plaintiffs contend in their opposition brief that the alleged dissemination of this information has branded Plaintiffs as potential terrorists or otherwise resulted in reputational harm, no facts are alleged that would support that contention. Second, Plaintiffs' assertion that they may be questioned or investigated in the future because of the purported inclusion of their information in an NSI database—and that they have allegedly suffered anxiety and refrained from engaging in certain activities because of such hypothetical, future harm—is also insufficient. Such allegations fail to demonstrate the imminent harm required for the prospective relief Plaintiffs seek. Third, the only concrete, cognizable legal harms alleged in the Complaint are the past law enforcement actions of third-party state and local police and private security guards not before the Court. Defendants have no authority or control over the actions of those third-party actors, and there is no basis to infer that these actions were substantially motivated by Defendants' guidance as opposed to the independent law enforcement mandates of these agencies. Because Plaintiffs have failed to carry their burden of establishing standing, this action should be dismissed for that reason alone.

Plaintiffs have also failed to demonstrate that Defendants' guidance creates the type of binding obligations or rights necessary to be considered a final agency action subject to review under the Administrative Procedure Act ("APA"), much less a binding legislative rule that requires notice-and-comment rulemaking to implement. Plaintiffs concede that that there is no requirement that any law enforcement agency participate in the NSI, and that even those

agencies that voluntarily participate are never compelled to share information. Plaintiffs argue that Defendants' guidance is nonetheless binding because, as a practical matter, Defendants expect participating agencies to refrain from sharing any information that is not reasonably indicative of preoperational planning related to terrorism. An expectation of compliance, however, does not rise to the level of legal compulsion, nor does it carry the status of law.

Assuming for the sake of argument that Plaintiffs are able to overcome these deficiencies, Plaintiffs nonetheless cannot show that Defendants acted arbitrarily or capriciously in not requiring application of the reasonable suspicion standard found in 28 C.F.R. Part 23 to information-sharing systems established in connection with the NSI. That regulation does not govern the sharing of all intelligence information at all levels of government; it only governs the sharing of information in defined criminal intelligence systems supported through funding under the Omnibus Crime Control and Safe Streets Act of 1968 ("Omnibus Act"). Defendants, in an appropriate and reasonable exercise of agency discretion and expertise, selected a different preferred standard for the NSI, and there is no basis under the APA to require Defendants to apply a standard from an inapplicable regulation promulgated by a different agency.

Finally, at a minimum, the claims of all but Plaintiff Khalid Ibrahim should be dismissed for lack of venue. Joinder of Plaintiffs' claims is improper, as each of the Plaintiffs' claims revolve around distinct facts, time periods, circumstances, and third-party actions. While Plaintiffs argue that they challenge a common government policy, this is not a sufficient basis to permit joinder because that policy (Defendants' guidance) was not the cause of the investigative actions about which Plaintiffs complain. And apart from Ibrahim, who resides in this district, there is no basis to permit the other claims of Plaintiffs to proceed in this District, which is almost a complete stranger to the incidents alleged in the Complaint.

ARGUMENT

I. PLAINTIFFS FAIL TO ALLEGE FACTS TO ESTABLISH STANDING

As the party seeking to invoke the jurisdiction of the Court, Plaintiffs individually carry the burden of establishing standing by proving three essential elements—cognizable injury,

causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Because Plaintiffs have failed to satisfy that burden, dismissal for lack of jurisdiction is appropriate.

A. Plaintiffs Fail to Allege Facts of Credible, Real, and Immediate Harm

Plaintiffs fail to provide any authority to support the notion that the purported collection and dissemination of incident reports in connection with the NSI, alone, is a "legally recognized injury." *Schmier v. U.S. Ct. of Appeals for the Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2002). The cases Plaintiffs rely upon, moreover, recognize that Plaintiffs must allege facts that the alleged collection and dissemination of information pertaining to them poses a "credible threat of harm" that is "real and immediate, not conjectural or hypothetical." *Krottner v. Starbucks Corp*., 628 F.3d 1139, 1143 (9th Cir. 2010). Plaintiffs have failed to satisfy that burden.

1. No Credible Threat of Harm is Alleged

Plaintiffs' attempt to analogize the factual allegations made here to security breach cases, *see* Pls. Opp. at 14–15 (relying on *Krottner v. Starbucks Corp*., 628 F.3d 1139, 1143 (9th Cir. 2010) and *In re Sony Gaming Networks & Customer Data Sec. Breach Litig*., 996 F. Supp. 2d 942 (S.D. Cal. 2014)), is unavailing. In *Krottner* and *In re Sony Gaming Networks*, the plaintiffs were able to demonstrate a risk of imminent harm based upon the circumstances of security breaches, which included hacking into systems containing personally identifiable information and the theft of a laptop containing such information. No comparable allegations of credible, imminent harm are alleged here. Plaintiffs' conjecture that their information will be disclosed to the public, or that disclosure of their information to eGuardian users will result in harm, is the very type of hypothetical harm that *Krottner* recognizes is insufficient to establish standing. *See Krottner*, 628 F.3d at 1143 (recognizing that the alleged harm that conjectural or hypothetical is insufficient to establish standing) (quotation marks and citation omitted). Moreover, the NSI has significant privacy protections in place—including that SAR information is only accessible to users with accounts for the Federal Bureau of Investigation's (FBI's) eGuardian system (*i.e.*, those individuals working in law enforcement, force protection, and professional staff working directly to support law enforcement and force protection). *See* Compl., Ex. E. at 103–05 (describing limitations on access to eGuardian); FBI, Privacy Impact Assessment for the

eGuardian System (Jan. 4, 2013), *available at* http://www.fbi.gov/foia/privacy-impact-assessments/eguardian-threat ("Access controls have been implemented, with scrutiny, to determine an individual's 'need to know' for access to the eGuardian system.").

Given these protections, there is no "credible threat of harm" that the dissemination of incident reports pertaining to Plaintiffs will result in any real and immediate harm to Plaintiffs' public reputation. Pls. Opp. at 15. No facts are alleged in the Complaint (or presented in Plaintiffs' opposition brief) that would support Plaintiffs' bald assertion that they have been "branded as persons with a potential nexus to terrorism," Pls. Opp. at 15, as a result of the collection and dissemination of incident reports in connection with the NSI. This case is thus distinguishable from *Meese v. Keene*, 481 U.S. 465 (1987), in which the plaintiff was referred to in "public" as the "disseminator of foreign political propaganda," and *Joint Anti-Fascist Refugee Comm. v. McGr*ath, 341 U.S. 123 (1951), in which a loyalty oath publicly impaired plaintiff's reputation. Pls. Opp. at 15.

Indeed, the only Plaintiff-specific allegations referenced in support of such reputational harm are those of Prigoff, s*ee* Pls. Opp. at 15, which occurred long before the guidance challenged in this case was even issued. As explained in Defendants' motion to dismiss, the guidance challenged in this case was not promulgated until 2008 and 2009—long after an agent from a Joint Terrorism Task Force spoke to Prigoff and his neighbor in 2004, and when Plaintiffs allege that information pertaining to Prigoff was purportedly included in a "SAR or SAR precursor report." Gov. Br. at 19 (referencing Compl. ¶¶ 109-10). Rather than offer evidence in support of standing, Plaintiffs assert that Defendants somehow improperly introduced evidence to refute standing. Pls. Opp. at 14 n. 4. But the date of the issuance of the guidance is drawn directly from the Complaint's allegations, Compl. ¶¶ 16, 54, and its attachments, Compl., Exs. D, E, which are properly considered by this Court on a motion to dismiss. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).[1]

[1] Contrary to Plaintiffs' suggestion, Pls. Opp. at 14 n.4, each Plaintiff has the individual burden of establishing the "irreducible constitutional minimum" of injury, causation, and redressability to establish standing. See *Lujan*, 504 U.S. at 560–61 (recognizing burden). The case cited by Plaintiffs, *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252 (1977), is not to the contrary. Although the Court found that it could proceed to the merits of the challenge based

2. Speculative and Self-Imposed Harm Is Insufficient

Plaintiffs also cannot proceed based upon the speculation that they may be questioned or investigated in the future because of the purported inclusion of their information in an NSI database. Pls. Opp. at 15-16. To seek prospective declaratory and injunctive relief based on such an allegation, Plaintiffs must allege facts that would demonstrate that such a threatened injury is "'certainly impending.'" *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Standing cannot be based upon "speculative fear." *Id*. at 1148. Plaintiffs' suggestion that "a subset of [individuals reported in a SAR] will face direct questioning and active investigation by the initial responding agency, fusion center staff, the FBI, and/or other law enforcement agencies that have access to a SAR database," Pls. Opp. at 15, fails to allege facts establishing that any of the Plaintiffs individually are among the subset of individuals whose questioning or investigation is "certainly impending." *Clapper*, 133 S. Ct. at 1147.[2]

Plaintiffs likewise cannot proceed based on the argument that they purportedly suffer from anxiety and stress as a result of the NSI, or have refrained from engaging in First Amendment activity allegedly because of that initiative. Pls. Opp. at 16-17. All of Plaintiffs'

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upon the standing of a corporate and individual plaintiff, 429 U.S. at 264 n.9, nothing in the decision suggests that a party's individual burden to establish standing and jurisdiction is somehow waived if other plaintiffs in an action are able to establish standing. Indeed, the law is clear that each party must allege facts sufficient to establish standing that are "personal" to them. *Schmier*, 279 F.3d at 821.

[2] Plaintiffs' assertion that the purported continued maintenance and dissemination of their personal information constitutes on-going harm, Pls. Opp. at 14-17, also fails. Plaintiffs rely on *Haro v. Sebelius*, 747 F.3d 1099 (9th Cir. 2013), *Ibrahim v. Dep't of Homeland Sec*., 669 F.3d 983, 993-94 (9th Cir. 2012), and *Melendres v. Arpaio*, 695 F.3d 990, 998 (9th Cir. 2012), but those cases are distinguishable. Unlike in *Haro*, in which plaintiff was deprived of money at the time the complaint was filed, Plaintiffs do not allege similar facts of any "concrete", "ongoing" injury. *Haro*, 747 F.3d at 1109. And unlike in *Ibrahim*, where the plaintiff was found to have to pled imminent harm resulting from the purported inability to return to the United States because of alleged inclusion of her identity on a terrorist watchlist, 669 F.3d at 993-94, Plaintiffs fail to allege any imminent harm that permit standing to pursue the prospective relief sought here. Finally, in contrast to *Melendres*, Plaintiffs have not alleged a "policy or practice" of constitutional violations. Plaintiffs bring no constitutional claims and rely upon the allegations of only five plaintiffs, some of whom rely upon facts that demonstrate that the incidents complained of did not even stem from the guidance challenged.

alleged harms are the very type of self-imposed, hypothetical harms that the Supreme Court held in *Laird v. Tatum*, 408 U.S. 1 (1972), and more recently in *Clapper*, fail to establish standing. Even if the Court were to credit Plaintiffs' assertions, Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 133 S. Ct. at 1151. The *Clapper* Court, moreover, reaffirmed the earlier holding in *Laird* that "'allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'" *Id*. (quoting *Laird*, 408 U.S. at 13–14, where plaintiffs' members were the subject of reports maintained in government records, *Tatum v. Laird*, 444 F.2d 947, 956 (D.C. Cir. 1971), that were allegedly distributed to civilian officials in state, federal and local governments and stored in data banks, *Laird*, 408 U.S. at 25 (Douglas, J., dissenting)).

B. Plaintiffs Have Failed to Allege Facts That Would Demonstrate the Third-Party Actions Complained of Were Caused by the Guidance Challenged

Plaintiffs continue to attempt to proceed upon the basis of the actions of state and local police and private security guards, Pls. Opp. at 18–19, but "much more is needed," *Lujan*, 504 U.S. at 562, for Plaintiffs to carry their burden of establishing standing. Facts must be presented showing the guidance was a "substantial factor motivating" the actions of these third parties. *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014). Because "causation and redressability . . . hinge on the response of the . . . third party" to the guidance challenged, *Lujan*, 504 U.S. at 562, Plaintiffs must allege facts that would demonstrate that the actions of the state and local law enforcement and private security guards were not "th[e] result [of] the independent action" of the third-parties, *id*. at 560-61 (quotation marks and citation omitted), and that it is "likely, as opposed to merely speculative, the injury will be redressed by a favorable decision," *id*.

Plaintiffs have not satisfied that requirement in this case. The only case that Plaintiffs cite in support of their causation argument is *Mendia*, but that case is readily distinguished. In *Mendia*, plaintiff was found to have standing to sue U.S. Immigration and Customs Enforcement ("ICE") for his detention in a federal facility because it was the immigration detainer issued by ICE that led to plaintiff's inability to obtain bail and release. *Mendia*, 768 F.3d at 1014. The

Court determined that the Plaintiff had standing based "on words directly from the mouths of the relevant third parties explaining why they took actions that caused [plaintiff's] injury." *Id.* In contrast, Plaintiffs' bald assertions that the guidance challenged caused local police and private security guards to undertake the actions complained of are insufficient to establish the causal nexus required to establish standing.[3]

II. THE GUIDANCE CHALLENGED DOES NOT CONSTITUTE BINDING FINAL AGENCY ACTION THAT IS REVEWABLE UNDER THE APA OR A BINDING LEGISLATIVE RULE REQUIRING NOTICE-AND-COMMENT RULEMAKING

Even if Plaintiffs did have standing to bring this lawsuit against Defendants, the challenged guidance is not subject to the APA. The procedural requirements of the APA do not automatically apply to all actions taken by federal agencies. An agency action is only subject to judicial review if it determines the rights and obligations of relevant actors. *Bennett v. Spear*, 520 U.S. 154, 178 (1997). And an agency pronouncement is only required to go through notice-and-comment rulemaking if it is an exercise of delegated legislative power to make rules that have the same legal force as statutory enactments. *Stoddard Lumber Co. v. Marshall*, 627 F.2d 984, 987 (9th Cir. 1980). When the challenged agency action is the issuance of a purported rule, these doctrines largely coalesce into a single inquiry: whether the challenged agency rule establishes a binding norm with the force of law. *See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006).[4]

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[3] Contrary to their assertions otherwise, *see* Pls. Opp. at 19–22, Plaintiffs are not left without an adequate remedy. As explained, *see* Gov. Br. at 22–23, to the extent Plaintiffs claim that they were improperly investigated by local police and private entities, a lawsuit against those third-parties under state or federal law is an adequate remedy that precludes APA review. And to the extent Plaintiffs attempt to proceed under the APA as a means to redress other hypothetical, speculative harms alleged to have resulted from the challenged guidance, *see* Pls. Opp. at 21 (arguing that collection and dissemination of SAR information has resulted in injury), those harms fail to provide a basis to proceed under the APA. To proceed under the APA, Plaintiffs must allege facts demonstrating that they have been "adversely affected or aggrieved" under 5 U.S.C. § 702, which requires a showing of, among other things, the same "injury-in-fact" required by standing doctrine. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). As explained, Plaintiffs cannot make this showing based on the speculative, hypothetical harm alleged in the Complaint.

[4] Plaintiffs' focus on the multi-prong test articulated by the D.C. Circuit, and adopted by the Ninth Circuit, is misplaced. Pls. Opp. at 31–33 (citing *Am. Mining Congress v. Mine Safety &*

Defendants' guidance does not create any such binding norm. Plaintiffs concede that that there is no requirement that any law enforcement agency participate in the NSI, and that even those agencies that do elect to participate are never compelled to share information. Pls. Opp. at 22–23. Nonetheless, they argue that Defendants' guidance constitutes final agency action because that guidance prohibits law enforcement agencies that do participate in the NSI from sharing SARs that are not reasonably indicative of preoperational planning related to terrorism. *Id.* While Plaintiffs are correct that Defendants' guidance indicates that NSI participants should refrain from sharing SARs that do not meet the reasonably indicative standard through NSI databases, this guidance does not alter the rights or obligations of these participants, and thus, is not subject to the APA's requirements.

Unable to cite any legal requirement that law enforcement agencies comply with Defendants' guidance, Plaintiffs argue that this guidance has the "practical effect" of being binding because Defendants expect compliance with that guidance. *See* Pls. Opp. at 24–25. However, though an expectation of immediate compliance with an agency regulation or order can be an indicator of finality, *see, e.g., Ukiah Valley Med. Ctr. v. F.T.C.*, 911 F.2d 261, 264 (9th Cir. 1990), the standard for whether an agency action is final still requires that the agency action determine rights or obligations. Accordingly, an expectation of compliance is only significant to the extent that it shows that the challenged agency action has the status of law. *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239–40 (1980) (explaining that immediate compliance with an agency regulation requiring prescription drug manufacturers to print certain information on drug labels was expected because the regulation had the "the status of law"); *Oregon Natural*

Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993)). That test is specifically designed to determine if the interpretive-rule exemption to the APA's notice-and-comment requirements is applicable. 5 U.S.C. § 553(b)(3)(A); *Am. Mining*, 995 F.2d at 1108–12. It is largely irrelevant here because Defendants do not assert that the guidance interprets a pre-existing legal rule governing the sharing of information by state and local law enforcement in connection with the NSI. To the contrary, no such legal rule exists at all. The APA also exempts "general statements of policy" and "rules of agency organization, procedure, or practice" from its procedural requirements. 5 U.S.C. § 553(b)(3)(A). Assuming for argument's sake that Defendants' guidance is a final agency action subject to APA review, these exemptions would more appropriately be applied to analyze Defendants' guidance than the interpretive-rule exemption.

Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 987 (9th Cir. 2006) ("We consider whether the [action] has the status of law or comparable legal force, and whether immediate compliance with its terms is expected." (quotation marks and citation omitted)); *National Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) ("[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review."). Plaintiffs fail to point to any action by Defendants demonstrating that the guidance satisfies that standard.

First, the language that Plaintiffs cite in the Functional Standard and Privacy Impact Assessment, *see* Pls. Opp. at 24, does not demonstrate that the guidance has binding effect. The term "will be used" as employed in the functional standard is not the equivalent of "shall be used" and is consistent with these documents being descriptive rather than imposing an obligation. Unlike in other cases where courts have found that agency guidance is binding based in part on the language of that guidance, neither the Functional Standard nor the Privacy Impact Assessment expressly states that compliance with the standards they describe is mandatory. *See Bennett*, 520 U.S. at 170 ("The [biological opinion] at issue in the present case begins by instructing the reader that any taking of a listed species is prohibited unless 'such taking is in compliance with this incidental take statement' and warning that '[t]he measures described below are nondiscretionary, and must be taken by [the Bureau].'"); *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) ("[T]he entire Guidance, from beginning to end—except the last paragraph—reads like a ukase. It commands, it requires, it orders, it dictates."). In addition, contrary to other instances where courts have found that agency guidance has a binding legal effect based partly on the language of that guidance, there is no statute or regulation providing that state and local law enforcement agencies are required to comply with Defendants' guidance or that any sanction will be imposed for a failure to comply. *See Bennett*, 520 U.S. at 170; *Appalachian Power*, 208 F.3d at 1017–20.[5]

[5] A comparison to 28 C.F.R. Part 23—a regulation that was issued through notice-and-comment rulemaking—is instructive in this respect. That regulation both expressly conditions federal funding on a grantee's adherence to specific operating principles and imposes a monitoring

Second, there is no support for the proposition that training provided by Defendants to state and local law enforcement is an indicator of final agency action. *See* Pls. Opp. at 24–25. While such training is undertaken to achieve uniformity in the sharing of SAR information, as explained in Defendants' initial brief, an agency's decision to encourage others to follow its guidance does not amount to the imposition of a legal obligation. *See* Gov. Br. at 25.

Third, the existence of the eGuardian User Agreement does not transform the issuance of the Privacy Impact Assessment (let alone the Functional Standard) into a final agency action reviewable by this Court.[6] That agreement, as Plaintiffs must concede, does not require law enforcement agencies to participate in the NSI or compel NSI participants to share incident reports. Instead, the agreement conditions a user's ability to access eGuardian on the user refraining from sharing incident reports that are not reasonably indicative of preoperational planning related to terrorism through eGuardian. The agreement does not impose any other sanction on an individual who fails to satisfy that condition, and NSI participants remain able to share incident reports that are not reasonably indicative of preoperational planning related to terrorism through channels other than eGuardian. Indeed, if the Functional Standard and Privacy Impact Assessment were independently binding (as Plaintiffs contend), there would be little reason to require users to enter into a voluntary agreement that they will follow Defendants' guidance when using this federally managed database.[7]

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program to ensure compliance. 28 C.F.R. §§ 23.30, 23.40. And a federal statute allows for the imposition of significant civil penalties on any person that fails to comply with these principles. 42 U.S.C.A. § 3789g(d). Here, in contrast, there is no corresponding regulatory regime imposing legal rights or obligations, and thus, the APA's procedural requirements are not implicated.

[6] Plaintiffs argue that it is not necessary for them to show that the issuance of the Privacy Impact Assessment is a final agency action. Pls. Opp. 23 n.14; *see also id.* at 4 n.1. However, Plaintiffs do not point to any other agency pronouncement (other than a few pamphlets) through which the Department of Justice ("DOJ") supposedly issued an allegedly binding legislative rule. Plaintiffs' difficulty in identifying a document issuing a distinct standard for the dissemination of SAR information is likely because the DOJ has never issued such a standard. Instead, as explained in Defendants' initial brief, *see* Gov. Br. at 10, the Privacy Impact Assessment simply repeats the standard described by the Program Manager in the Functional Standard.

[7] Plaintiffs also offhandedly suggest that Defendants' guidance is reviewable because it affects the rights of individuals whose personal information is shared in connection with the NSI. Pls. Opp. at 24. This suggestion, however, does not add anything to the analysis. An agency action

Plaintiffs, moreover, have failed to cite to any authority that would justify subjecting this guidance to APA review. *Bennett v. Spear*, 520 U.S. 154 (1997), on which Plaintiffs primarily rely, is inapposite. In *Bennett*, the Fish and Wildlife Service issued a biological opinion explaining that a project proposed by the Bureau of Reclamation was likely to harm an endangered species of fish and outlining alternative actions that the Bureau of Reclamation could take to avoid that negative impact. *Id.* While there was no requirement that the Bureau of Reclamation proceed with its planned project, the Supreme Court held that the biological opinion constituted a final agency action because it altered the legal regime to which the Bureau of Reclamation was subject. *Id.* at 178. Specifically, federal regulations prohibited the Bureau of Reclamation from proceeding with its project unless it complied with the conditions of the opinion and provided a safe harbor to any person complying with the biological opinion from otherwise applicable penalties. *Id.* at 170.

Defendants' guidance does not similarly alter the legal regime to which state and local law enforcement agencies are subject. Unlike in *Bennett*, there are no federal regulations providing that NSI participants will be deemed to be in compliance with any legal requirement if they follow Defendants' guidance. Plaintiffs suggest that Defendants have granted NSI participants immunity from 28 C.F.R. Part 23 by authorizing them to share reports that are reasonably indicative of terrorism. Pls. Opp. at 24. But Defendants' guidance does not suggest that it provides that protection and there is no federal regulation conferring immunity. In short, the guidance is not subject to APA review because it does not affect the "legal rights of the relevant actors" involved in the NSI process. *Bennett*, 520 U.S at 178.

III. DEFENDANTS WERE NOT REQUIRED BY STATUTE OR REGULATION TO APPLY 28 C.F.R. PART 23 TO THE NSI

The central argument on which Plaintiffs' case rests is that the reasonable suspicion standard in 28 C.F.R. Part 23 applies to the NSI and that Defendants' failure to apply that

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is only final if it fixes obligations or rights, or alters the legal regime to which regulated parties are subject. And Defendants' guidance—which does not bind individuals—has not changed anything in that regard.

provision to NSI information-sharing systems is arbitrary and capricious. But, even if plaintiffs were able to satisfy the jurisdictional requirements addressed above, this central contention fails.

Plaintiffs conflate two separate information-sharing programs, each of which has its own distinct statutory mandate and purpose. The Office of Justice Programs ("OJP") promulgated 28 C.F.R. Part 23 pursuant to its statutory authority to impose funding conditions on criminal intelligence systems supported through the Omnibus Act. *See* 42 U.S.C § 3789g(c). That statute does not govern all information-sharing systems, and 28 C.F.R. Part 23 does not purport to provide standards for all information sharing. The NSI, in contrast, was established pursuant to the Intelligence Reform and Terrorism Prevention Act ("IRTPA")—a statute that makes no mention of the Omnibus Act, 28 C.F.R. Part 23, or the reasonable suspicion standard. *See* 6 U.S.C. § 485. Instead, IRTPA directs the Program Manager to issue "functional standards" for the "management, development, and proper operation" of the NSI. *See* 6 U.S.C. § 485. There is nothing in the applicable statutory framework to support the view that the Program Manager (or the FBI) should now be required to impose the conditions of 28 C.F.R. Part 23 on the NSI.

In addition, by its own terms, 28 C.F.R. Part 23 only applies to criminal-intelligence systems that are (1) funded through support of the Omnibus Act and (2) used for the purpose of sharing information about individuals that are suspected of criminal conduct. Gov. Br. at 28–29. Because the challenged guidance is not intended for information-sharing systems satisfying that criteria, there is no basis to require Defendants to adopt that regulation's operating principles.

First, Defendants' guidance is not based on the presumption that information-sharing systems used in connection with the NSI will be or should be funded through the Omnibus Act. As noted, the NSI is an initiative developed pursuant to IRTPA, not the Omnibus Act, and the challenged guidance does not include any mention of Omnibus Act funding. Indeed, the FBI is not eligible to receive Omnibus Act grants, and the eGuardian system that is presently used to share reports in connection with the NSI does not receive any such funding.[8] *See* Gov. Br. at 29.

[8] Plaintiffs object to this Court taking judicial notice of the fact that eGuardian is the system used to share SARs in connection with the NSI. *See* Pls. Opp. at 5 n.2, 27–28. Plaintiffs argue that this fact is in dispute because they allege in their Complaint that there are other information-sharing systems exist. They do not, however, cite to any facts that would make that conclusory allegation plausible or which casts any doubt on a publicly available government document

Second, Defendants' guidance is intended for an information-sharing initiative that has a different purpose than the intelligence systems governed by 28 C.F.R. Part 23. The purpose of the intelligence systems governed by 28 C.F.R. Part 23 is to gather information about individuals and organizations reasonably suspected of crime. *See* 28 C.F.R. § 23.3(b)(3); Final Revision to the Office of Justice Programs, Criminal Intelligence Systems Operating Policies, 58 FR 48448–01 (Sept. 16, 1993).[9] The purpose of the NSI, in contrast, is to gather information about suspicious incidents, provide indications about potential specific terrorism-related crimes, and identify patterns and trends across jurisdictional lines. Compl. Ex. D at 58. In other words, the NSI is designed to gather reports about observed suspicious incidents, not to gather information about particular individuals or organizations suspected of engaging in criminal conduct. Instead of addressing this essential distinction, Plaintiffs focus on irrelevant attributes shared by these two separate programs—such as that both programs collect information related to crime. *See* Pls. Opp. at 26–27. But this truism does not mean that the NSI serves the same purpose as the criminal intelligence systems subject to 28 C.F.R. Part 23, or that both programs should be governed by the same reasonable suspicion standard.[10]

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indicating that other information-sharing systems previously in use have been discontinued. In short, the fact that there are no other NSI systems currently operative is not reasonably in dispute, and thus, is subject to judicial notice. *See* Fed. R. Evid. 201(b)(2).

[9] Plaintiffs argue that Defendants have misread 28 C.F.R. § 23.3(b)(3), purportedly by interpreting the term "reasonably suspected" to modify the term "data" rather than the terms "individual" or "organization." Pls. Opp. at 29–30. However, Defendants advanced no such reading of the provision in in their initial brief and do not advance it here. To the contrary, as Defendants have argued, 28 C.F.R. Part 23 only applies to information-sharing systems used for the purpose of collecting criminal intelligence on persons or organizations who are reasonably suspected of criminal activity. But the NSI is not intended for that purpose.

[10] Plaintiffs are also wrong that Defendants' interpretation of 28 C.F.R. Part 23's applicability section, 28 C.F.R. § 23.3, renders one of its operating principles, 28 C.F.R. § 23.20, superfluous. Pls. Opp. 28–30. The applicability section provides that 28 C.F.R. Part 23 only applies to intelligence systems that generally have the purpose of collecting information about individuals reasonably suspected of criminal conduct. 28 C.F.R. § 23.3(b)(3); 58 FR 48448–01 (Sept. 16, 1993). The operating principle provides that intelligence systems used for this purpose are prohibited from collecting information about any particular individual that is not reasonably suspected of engaging in criminal activity. 28 C.F.R. § 23.20(a). These provisions easily coexist under Defendants' interpretation because an intelligence system may be generally used to collect information about individuals reasonably suspected of criminal conduct (thus satisfying the applicability section) but in a particular instance collect information about an individual that is

Plaintiffs are incorrect, moreover, that this analysis raises factual questions regarding the information-sharing systems used in connection with the NSI and the content of the incident reports disseminated through those systems. *See* Pls. Opp. at 26–27. The scope of judicial review under the arbitrary-and-capricious standard is limited to evaluating whether Defendants' NSI guidance is the product of reasoned decisionmaking. *Judulang v. Holder*, 132 S. Ct. 476, 484 (2011); *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005). An evaluation of whether Defendants have met this standard does not require or permit this Court to make factual findings regarding the operation of the information-sharing systems that have been established in conjunction with Defendants' guidance. *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) (explaining that district courts conducting APA review act as appellate courts resolving predominantly legal issues). To the contrary, that issue is appropriately resolved by reviewing the challenged guidance itself and the governing law (including distinct statutory authority), which this Court is able to do on a motion to dismiss.

In sum, Plaintiffs argue that Defendants' guidance is contrary to law, but they do not identify any law dictating that the reasonable suspicion standard be used to govern information sharing in connection with the NSI.[11] Though Plaintiffs cite to 28 C.F.R. Part 23, that regulation only applies to defined criminal intelligence systems authorized and funded by a separate statute—the Omnibus Act. And Plaintiffs' view that 28 C.F.R. Part 23 bars state and local law enforcement from sharing tips about activities that could be possible precursors to terrorism unless that information already rises to the level of reasonable suspicion is unsupported by the terms of that provision. For these reasons, there is no basis for Plaintiffs' contention that Defendants' guidance is contrary to law.

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not reasonably suspected of criminal conduct (thus violating the operating principle). This interpretation, moreover, is entitled to deference to by this Court. *See* Gov. Br. at 29 n.9.

[11] The "contrary to law" prong of arbitrary-and-capricious review is rarely used by courts to invalidate an agency decision. Plaintiffs have not cited any case where an agency decision was deemed contrary to law, and Defendants have only identified one case in the Ninth Circuit where a court invalidated an agency decision on that ground. In that case, an agency decision was deemed contrary to law because its reasoning relied on incorrect principle of statutory analysis. *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 682 (9th Cir. 2007).

IV. IN THE ALTERNATIVE, ALL BUT PLAINTIFF IBRAHIM'S CLAIMS SHOULD BE DISMISSED FOR LACK OF VENUE

Even if the Court does not dismiss this action in its entirety, it should, at a minimum, sever Plaintiffs' claims and dismiss all but Ibrahim's claims for lack of venue. Joinder is inappropriate. Plaintiffs assert that their claims should be joined because their injuries all arise out of Defendants' guidance. *See* Pls. Opp. at 34. As explained, however, Plaintiffs have not adequately alleged that their alleged injuries—which were caused by the unrelated actions of police officers and private security guards in different judicial districts—were the result of that guidance. *See supra* Argument, Part I.B. Without doing so, the mere allegation that there is a common policy that led to the actions complained of is not sufficient to establish that joinder is proper. *See Coughlin v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997) ("[A] common allegation . . . does not suffice to create a common transaction or occurrence.").

And apart from Ibrahim, there is no basis to for venue to lie in this District, which has no relationship to the guidance that is challenged, and where only one of the Plaintiffs (Ibrahim) resides and only two of the incidents alleged occurred. Plaintiffs rely upon *Rodriguez v. Cal. Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000), but there the law enforcement stops challenged occurred in the Pacheco Pass area located in this District, *id*. at 1136. In this case, in contrast, this District is almost a complete stranger to the incidents alleged in the Complaint by all but one Plaintiff (Ibrahim).

CONCLUSION

For the foregoing reasons, Plaintiffs' claims should be dismissed in their entirety under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), or in the alternative, Plaintiffs' claims should be severed and the claims of Plaintiffs Gill, Prigoff, Razak, and Conklin should be dismissed under Federal Rule of Civil Procedure 12(b)(3).

December 11, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2014, I electronically filed Defendants' Reply In Support of Motion to Dismiss on the Clerk of the Court using the CM/ECF system, which will send notice of this filing to all parties.

/s/ *Kieran G. Gostin*
KIERAN G. GOSTIN