No. 17-16107

In the United States Court of Appeals for the Ninth Circuit

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

REPLY BRIEF OF APPELLANTS

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

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INTRODUCTION

Defendants fail to address the central reasons why the Functional Standard violates the Administrative Procedure Act ("APA"). The Functional Standard is a legislative rule because agencies participating in the Nationwide Suspicious Activity Reporting Initiative ("NSI" or "Initiative") lack discretion to designate a suspicious activity report, or "SAR," as having a potential nexus to terrorism unless it satisfies the Functional Standard's definition and one or more of its behavioral categories. The adoption of the "reasonably indicative" threshold was also arbitrary and capricious because the agency failed to offer a reasoned explanation as to why 28 C.F.R. Part 23 does not govern the NSI. The NSI shares the same purpose of "criminal intelligence systems" governed by the regulation—to serve as pointer systems that pool information ostensibly for the purpose of identifying serious criminal activity. The relationship of the regulation to the NSI was therefore "an important aspect of the problem" that the agency was required to address. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

Instead of engaging with these arguments, Defendants make various factually misleading and legally irrelevant assertions. First, Defendants assert that agencies participating in the NSI do not lose access to the SAR database if they submit SARs in violation of the Functional Standard. This is false and contradicts

Defendants' admission to the contrary below. Because a violation of the Functional Standard has practical and legal consequences—revocation of an agency's right to contribute to or access the SAR database—the Functional Standard is final agency action. Second, Defendants posit that the "reasonably indicative" language was recommended by the ACLU. Defendants, however, rejected the expressed intent of the ACLU's recommendation, which was that SARs not be nationally disseminated absent reasonable suspicion of criminal activity. In any event, the agency provided no public notice and conducted no public hearing, thereby depriving Plaintiffs and the general public of the opportunity to participate that is required by the APA. Third, Defendants claim they consistently took the position that SARs are not criminal intelligence within the meaning of 28 C.F.R. Part 23. But none of the cited documents explains *why* Defendants believed that SARs are not "criminal intelligence." Indeed, these documents actually confirm that there were "questions" and "confusion" around the relationship of the regulation to the NSI, thus underscoring that the issue was an important aspect of the problem and the agency was required to provide a reasoned explanation. It failed to do so.

The district court's judgment should be reversed and the Functional Standard set aside.

BACKGROUND

I. Agencies That Violate The Functional Standard Lose Access To The SAR Database.

Defendants claim that "[a]n agency that deviates from the functional standard does not lose access to ISE-SARs." Answering Br. at 28. That is untrue.

Defendants use the FBI's eGuardian system to disseminate SARs. ER502. Agencies that wish to access eGuardian must sign a "User Agreement." Further Excerpts of Record ("FER") 25. The User Agreement requires signatories to "agree to the...information sharing policies and protocols . . . of the eGuardian system," which include following the Functional Standard's definition of suspicious activity. *Id.*; FER9 ("[A] standard definition of what constitutes a suspicious activity will be used by all participating agencies...[T]he suspicious activity definition will be the definition currently developed by the PM/ISE."). The User Agreement explicitly states: "Failure to comply with this agreement will result in termination of your eGuardian membership." FER26.

Defendants admitted below that the eGuardian User 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," and that agencies wishing to "share incident reports" that fail to meet the Functional Standard would have to do so "through channels other than eGuardian." FER32.

II. Defendants Privately Consulted With Select Organizations.

Defendants contend they engaged in a "collaborative" process of revising the Functional Standard and that the ACLU recommended the "reasonably indicative" definition. But they do not dispute that they failed to provide the public notice and comment required by the APA. The Administrative Record ("the Record") also reveals that the ACLU explicitly urged Defendants *not* to interpret "reasonably indicative" as setting a threshold lower than "reasonable suspicion"—which is exactly what Defendants have now done.

Defendants point to an email in which the ACLU proposed the term "reasonably indicative," Answering Br. at 9 (citing SER346), but omit relevant context. Functional Standard 1.0 proposed a sweeping "may be indicative" definition. ER402. In January 2009, when Defendants were considering a revision, the ACLU, in the email Defendants cite, stated that the existing definition was "overbroad and will result in unnecessary law enforcement interaction with innocent persons." SER346. The ACLU therefore recommended replacing "may be indicative" with "reasonably indicative," explaining that information should not be reported "absent other facts and circumstances that would create a *reasonable suspicion* of criminality." SER347 (emphasis added).

Defendants cite a May 2009 ACLU press release (not in the Record or cited below) that praised the "reasonably indicative" language. Answering Br. at 11.

But at that juncture, the ACLU could not have understood that Defendants would interpret "*reasonably* indicative" of criminal activity to mean less than *reasonable* suspicion of criminal activity. Indeed, it was not until 2010 that Defendants made clear their view that "reasonably indicative" was distinct from "reasonable suspicion." *See* Answering Br. at 17 (citing SER138 and SER247).

Notably, in 2010 Defendants shared a draft report with the ACLU. *See id.* (citing SER373-408). That report expressed Defendants' view that "[t]he 'reasonably indicative' threshold...requires...less than the 'reasonable suspicion' standard applicable to criminal intelligence information." SER387. But the ACLU recommended deleting that sentence. *Id.*

Although Defendants cite their sharing of this draft 2010 report as evidence of their "collaborative" process, Answering Br. at 12, the document underscores that the ACLU consistently opposed adoption of any threshold lower than "reasonable suspicion" and that it was not clear until after the ACLU issued its May 2009 press release that Defendants interpreted "reasonably indicative" to mean *less than* "reasonable suspicion."

III. Defendants' Rationale For The Functional Standard

Defendants' justifications for the "reasonably indicative" standard have shifted over the course of this litigation. Those justifications must be understood against the backdrop of the framework governing "criminal intelligence systems."

A. The NSI Has The Key Features Of A Criminal Intelligence System.

The NSI rests on the premise that it is necessary to pool information to identify serious criminal activity, but that the information should not be shared between agencies unless it has first been evaluated for reliability. The same premise underlies 28 C.F.R. Part 23.

Defendant Department of Justice ("DOJ") issued 28 C.F.R. Part 23 pursuant to its statutory mandate to prescribe "policy standards" that ensure "criminal intelligence systems" do not "collect, maintain, [or] disseminate criminal intelligence information...in violation of the privacy and constitutional rights of individuals." 42 U.S.C. § 3789(c) (transferred to 34 U.S.C. § 10231). DOJ recognized that "exposure of...[] networks of certain criminal activities...can be aided by the pooling of information. . ." 28 C.F.R. § 23.2. But the agency cautioned that "the collection and exchange of intelligence data...may represent potential threats to...privacy," and that privacy protections were therefore necessary. *Id.*

As a result, the regulation's first "[o]perating principle[]" is that a "project shall collect and maintain criminal intelligence information concerning an individual *only* if there is reasonable suspicion that the individual is involved in criminal conduct or activity and the information is relevant to that criminal conduct or activity." 28 C.F.R. § 23.20(a) (emphasis added). In adopting this "operating

principle," DOJ explained that "this criteria [of reasonable suspicion] [is] a basis for collection and maintenance of intelligence information." 43 Fed. Reg. 28,572 (June 30, 1978). In addition to protecting privacy, evaluation for "reasonable suspicion" serves law enforcement interests, improving "the quality" of information in shared databases and ensuring "[s]carce resources" are not wasted by following up on "vague, incomplete and conjectural" information. 58 Fed. Reg. 48,451 (Sept. 16, 1993).

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

It is clear that DOJ intended an expansive definition of "criminal intelligence systems" because the regulation applies both to systems that store "detailed intelligence or investigative information" about criminal suspects and to "pointer system[s]" that store information for the purpose of assisting in the identification

of individuals or organizations that may be engaged in criminal activity. *See* 58 Fed. Reg. 48,448-01 (Sept. 16, 1993).

The purpose and intent of the regulation correspond to those of the NSI. First, the NSI rests on Defendants' view, following 9/11, that greater sharing of information was necessary to address the serious criminal activity of terrorism. *Compare* 28 C.F.R. § 23.2 ("exposure of...ongoing networks of criminal activity can be aided by the pooling of information"). Second, the NSI also reflected Defendants' view that threat information was only useful and should only be shared if evaluated according to a uniform definition and process. *Compare, e.g.*, ER282, 435-36, 509, *with* 28 C.F.R. § 23.3(b)(3); 58 Fed. Reg. 48,451 (law enforcement and privacy interests are served when "criminal intelligence" is evaluated for reliability before it is collected, maintained, and disseminated). Third, SARs that have been evaluated under the Functional Standard are shared nationally, with the aspiration that analysis of the pooled data will help identify "possible terrorism-related behaviors." *Compare* ER508, *with* 58 Fed. Reg. 48,448 (regulation focuses on "criminal intelligence systems," which include "pointer systems" that pool information for the purpose of identifying potentially serious criminal activity). Thus, the purpose of the SAR database is to serve as exactly the type of "pointer system" 28 C.F.R. Part 23 governs.

B. Defendants' Ever-Evolving Justifications

Defendants have offered various justifications for the "reasonably indicative" standard.

When Defendants initially adopted the standard in 2009, they offered no explanation as to why they believed 28 C.F.R. Part 23 did not apply. *See* Opening Br. at 23, 45-51.

After this lawsuit was filed, Defendants amended the Functional Standard and in 2015 offered for the first time a rationale—that SARs are not "criminal intelligence" because they are not "a product of investigation." ER500. But that rationale cannot be reconciled with the purpose of the Functional Standard, which sets forth a detailed process and definition for *investigating* raw reports for reliability. Opening Br. at 23-24, 51-56.

Defendants also raised additional justifications in the court below, including one that was not articulated in the Record and relied on extra-record evidence about federal funding (despite vigorously opposing Plaintiffs' efforts to take discovery or expand the Record). ER247, 310, 322, 374. The district court had little difficulty rejecting that argument. *See* ER8.

In this Court, Defendants abandon their *post hoc*, extra-record funding argument and make no effort to defend the not-a-product-of-investigation rationale. Instead, they now attempt to portray themselves as having consistently

asserted that SARs are not governed by 28 C.F.R. Part 23. Answering Br. at 15-16, 45-46. While the cited documents contain conclusory assertions to the effect that SARs are not criminal intelligence, none even purports to explain *why* SARs are not criminal intelligence. Moreover, the quoted statements date from a period when SARs were not subjected to the type of vetting that is required by the current Functional Standard and that transforms raw SARs into criminal intelligence. In addition, unquoted portions of these documents point to considerable "confusion" around the relationship of the NSI to 28 C.F.R. Part 23. SER382.

Defendants point to a 2007 report stating that "[t]ips and leads are not criminal intelligence as defined by" the regulation. Answering Br. at 15-16 (citing SER351-52). Tips and leads are not suspicious activity reports that have been vetted pursuant to the Functional Standard (or any other standard). *See* SER352 (tips and leads data are "[*u*]*ncorroborated* report[s] or information ... alleg[ing] or indicat[ing] some form of criminal activity" (emphasis added)); SER357 (tips and leads have "not been validated for truthfulness, accuracy, or reliability of the source"). The purpose of the NSI was to "leverag[e]" preexisting systems for collecting tips and leads, and to ensure that raw reports were instead evaluated according to a standardized definition and process. ER301, 503. That process of evaluation for purported reliability—central to the current Functional Standard—is

what transforms tips and leads data (*i.e.*, a raw SAR) into criminal intelligence. *See* Opening Br. at 20-21.

Defendants also point to two isolated statements opining that SARs are not criminal intelligence. Answering Br. at 16 (citing ER440), 17 (citing SER68). But one document (SER68) offers no explanation as to *why* that is so. And the other suggests why, under the "reasonably indicative" standard, they might well be. In particular, Defendants point to a 2008 report by Defendants Program Manager and DOJ that states: "ISE-SAR Information is considered fact-based information rather than criminal intelligence." ER440. At the outset, it is unclear why "fact-based information" and "criminal intelligence" would be mutually exclusive categories. Presumably, criminal intelligence is fact-based. In any event, this 2008 document predates the 2009 Functional Standard 1.5 and 2015 Functional Standard 1.5.5. ER450. In 2008, SARs were not subjected to the type of vetting that transforms raw SARs into criminal intelligence and that is now required under the current version of the Functional Standard. The operative Functional Standard in 2008 (version 1.0) "was not originally intended to address the legal standard to be used...for determining what level of evidence or certainty is necessary or sufficient for submitting a SAR" and instead focused on process issues such as

standardizing "data format." ER440.[1] In other words, at the time Defendants asserted that SARs are not criminal intelligence, the Functional Standard was not intended to set forth a substantive standard for evaluating the requisite degree of relevance to potential terrorism.

But that evaluation for relevance to criminal activity is what transforms a raw SAR into criminal intelligence, or, as Defendants acknowledged in this same document, at least raises the question whether the SAR has transitioned into criminal intelligence: "The authors of [the] report 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." ER440.

Defendants then point to another report from DOJ, claiming that it "illustrat[es]" that SARs are to be shared through the SAR database, but if a SAR also meets the reasonable suspicion threshold, then it can be submitted to a criminal intelligence system. Answering Br. at 45-46 (citing ER289). The citation

[1] Defendants cite a report evaluating early implementation of the NSI under Functional Standard 1.0 to support their assertion that "the government did not change its position, and reiterated that…the correct 'level of suspicion'" was the "reasonably indicative standard." Answering Br. at 17 (citing SER138). But the agency clearly did change its position because it moved from Functional Standard 1.0's "may be indicative" language to Functional Standard 1.5's "reasonably indicative" standard. Moreover, the cited document confirms that there was uncertainty whether Functional Standard 1.0 set forth a *substantive* standard for evaluating SARs: "[T]he level of suspicion needed to…share[] [information] with other law enforcement agencies was not clearly defined." SER138.

goes to a cryptic flowchart contained in a report, the text of which actually says that the Functional Standard's "Integration and Consolidation" phase, *i.e.*, the phase at which a report is evaluated under the Standard's process and criteria, is "the point at which SAR information transitions to intelligence and is then subject to 28 C.F.R. Part 23." ER288.

Finally, Defendants claim a draft report "reiterated the view that the 'reasonably indicative' standard was different from, but could interact with, 'other requirements such as 28 C.F.R. Part 23.'" Answering Br. at 46 (citing SER382). The full sentence reads: "Finally, to address some confusion regarding the threshold for ISE-SARs, personnel at NSI sites should receive training regarding the 'reasonably indicative' threshold for documenting ISE-SARs and the interaction of that threshold with other requirements such as 28 C.F.R. Part 23." SER382. Thus, Defendants identified "confusion" over the relationship between the Functional Standard and the regulation.

Yet Defendants did nothing to alleviate the confusion and explain *why* they believed SARs that had been evaluated pursuant to the Functional Standard were not criminal intelligence, until after this lawsuit was filed and they adopted Functional Standard 1.5.5. At that point, they offered the rationale that SARs are not "a product of investigation," which is at odds with the purpose of the

Functional Standard, *see* Opening Br. at 23-24, 51-56, and which Defendants make no attempt in this Court to defend.

ARGUMENT

I. The Functional Standard Constitutes Final Agency Action.

Because compliance with the Functional Standard is a condition of participation in the Initiative, it constitutes final agency action. Defendants misstate the facts and ignore the law.

1. Defendants assert that "[a]n agency that deviates from the functional standard does not lose access to ISE-SARs, nor is there any risk of enforcement proceedings, civil penalties, or criminal penalties." *Id.* at 28. This is false.

An agency that deviates from the Functional Standard *does* lose access to ISE-SARs. Defendants admitted below that access to the SAR database is conditioned on compliance with the Functional Standard. FER32. The mechanism for compelling compliance is the eGuardian User Agreement. The government

will terminate the eGuardian membership of agencies that violate the Functional Standard. FER9, 25-26.[2]

2. Agency action is final if it "mark[s] the consummation of the agency's decision-making process" and is an action "by which rights and obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks omitted). Defendants contest only the second prong, dismissing the significance of the Functional Standard's practical effects. But the Functional Standard has legal force: Defendants can revoke eGuardian membership for violation of its terms. Moreover, this Court's pragmatic approach does look to practical effects.

[2] Although Defendants did not include the eGuardian User Agreement in the Record, this Court should consider it. Final agency action is jurisdictional. *See Havasupai Tribe v. Provencio*, 876 F.3d 1242, 1248 (9th Cir. 2017); *see also Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997) (considering affidavits not contained in administrative record and submitted by petitioners on appeal to address jurisdictional issue of standing). Plaintiffs attempted to supplement the Record on jurisdictional issues such as final agency action. FER43. Defendants opposed, and the district court rejected these efforts. FER46, 50. Moreover, Plaintiffs were not on notice of the specific need to place the eGuardian User Agreement in the Record because of Defendants' express admission, on the motion to dismiss and at summary judgment, that agencies' "ability to access" SARs was conditioned on compliance with the Functional Standard. FER32 (concession at motion-to-dismiss stage); FER55 (adopting at summary judgment final-agency-action arguments asserted on motion to dismiss). Agencies should not be able to impede judicial review by making false factual assertions on appeal that are contradicted by documents they excluded from the Record and by their admissions below. *Cf. Envtl. Defense Fund, Inc. v. Blum*, 458 F. Supp. 650, 651 (D.D.C. 1978) ("agency may not…skew the 'record' for review in its favor").

Agency action is final if it "has a direct and immediate effect on the day-to-day operations[] of the subject party, or if immediate compliance [with the terms] is expected." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006). Finality "must be interpreted in a pragmatic and flexible manner." *Id.*

In *Oregon Natural Desert*, this Court held that annual operating instructions, or "AOI," issued by the Forest Service to holders of agency-issued grazing permits, constituted final agency action. The AOI contained the "terms and conditions by which the Forest Service expects the permit holder to graze his livestock," while the grazing permits "authorize[d] the Forest Service to cancel or suspend a permit for failure to comply with" the AOI. *Id.* at 988, 989. The Forest Service argued that the AOI had no legal force because any violation would involve sanctions under the separate grazing permit. This Court rejected the argument: "[T]hat an AOI violation can prompt the Forest Service to take enforcement action against the non-complying permittee is a show of the AOI's 'legal force' and the Forest Service's expectation of 'immediate compliance with its terms.'" *Id.*

Exactly like the AOI in *Oregon Natural Desert*, the Functional Standard sets forth the terms and conditions with which the government expects NSI participants to comply in submitting SARs to eGuardian. The eGuardian User Agreement authorizes the government to revoke membership in eGuardian for failure to

comply with the Functional Standard. That a Functional Standard violation can prompt enforcement action (revocation of eGuardian membership) is a show of the Functional Standard's "legal force" and Defendants' expectation of "immediate compliance" with its terms. *Id.*[3]

In any event, this Court has found final agency action even where the agency action had no legal effect, and the consequences were entirely practical. *Havasupai Tribe v. Provencio*, 876 F.3d 1242 (9th Cir. 2017), found an agency's Mineral Report to constitute final agency action, even though it merely reflected the agency's "opinion" about an entity's mining rights; the agency lacked legal authority to confer mining rights. *Id.* at 1249. "[T]he practical effects of an agency's decision make it final agency action, regardless of how it is labeled." *Id.* at 1249-50 (citation omitted). Significantly, "the Mineral Report was a practical requirement to the continued operation of Canyon Mine because 'the Forest Service, Energy Fuels, and interested tribes all understood that mine operations would not resume until [it] was completed.'" *Id.* at 1250.

[3] To be sure, the Functional Standard was issued by Defendant Program Manager, and the User Agreement is enforced by the FBI, a component of Defendant DOJ. But action by one agency can be final even if enforcement rests with another. The Supreme Court found a Biological Opinion issued by one agency to be final agency action even though the ultimate consequence—decisions about water allotments—was controlled by another. *Bennett*, 520 U.S. at 168-69, 178.

The Functional Standard has far more legal effect than the Mineral Report in *Havasupai Tribe*, given enforcement through the eGuardian User Agreement. But even in Defendants' account, the Functional Standard constitutes final agency action under *Havasupai Tribe*. Defendants admit that compliance with the Functional Standard is a practical requirement to operation of the Initiative, which depends on all NSI participants sharing reports according to a consistent standard. Answering Br. at 26 ("practical benefit for all NSI participants" to comply).[4]

[4] Defendants' cases are distinguishable. In *Fairbanks N. Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008), an agency's determination that certain property fell under Clean Water Act jurisdiction was not final agency action because "[i]n any later enforcement action, Fairbanks would face liability only for noncompliance with the CWA[]..., not for disagreement with the Corps' jurisdictional determination." *Id.* at 594. And in *Parsons v. U.S. Dep't of Justice*, 878 F.3d 162 (6th Cir. 2017), the FBI's gang designation of certain individuals was also not final agency action because "no government officials are required to consider or abide by the gang designation." *Id.* at 171. By contrast, NSI participants are required to abide by the Functional Standard and face revocation of eGuardian membership for noncompliance. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 796 (D.C. Cir. 2006), involved guidelines with permissive ("may be permissible," "may act favorably") language, *id.* at 809, that bears no resemblance to the Functional Standard's imperatives. *See, e.g.*, ER397 ("agencies…must apply this functional standard"); ER503 ("will serve as a unified process"). "[T]he choice between the words 'will' and 'may'" is "decisive." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987).

II. The Functional Standard Is A Legislative Rule.

A. NSI Participants Have No Discretion To Ignore The Functional Standard.

Defendants argue that the Functional Standard is not a legislative rule because analysts exercise discretion in the vetting process. But that type of discretion—to determine whether a report falls within the Functional Standard and to decline to submit a report that does—does not render the Functional Standard a general statement of policy. The Functional Standard constrains discretion in a salient way: NSI participants have no discretion to revisit its definition or behavioral categories, or to submit noncompliant SARs.[5]

Defendants emphasize that analysts are encouraged to apply their professional judgment in individually analyzing each SAR. *See* Answering Br. at 30-32. This conflates the difference between the discretion inherent in applying a rule to a set of facts, with the discretion whether to apply the rule at all. *See* Opening Br. at 35-36.

Like the eligibility criteria for higher education grants in *Malone v. Bureau of Indian Affairs*, 38 F.3d 433, 438 (9th Cir. 1994), or the factors for making parole determinations in *Pickus v. U.S. Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir.

[5] Defendants abandon their argument below that the Functional Standard is not a legislative rule even if it binds NSI participants, because it must bind Defendant Program Manager. *See* Opening Br. at 38.

1974)—two cases that Defendants neglect to address—the Functional Standard "focus[es] the decision-maker's attention on the... approved criteria." *Id.* While analysts have discretion to determine whether a fact pattern falls within one of the Functional Standard's 16 categories, that is not the type of discretion that renders the action a statement of policy. *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (with legislative rule, decision-maker evaluates "whether the...facts conform to the rule"). Critically, analysts have no discretion to disregard the Functional Standard's definition or behavioral categories, or to include any noncompliant reports. *Compare id.* (with general statement of policy, decision-maker can consider underlying "validity of the policy itself"), *with* ER516 ("only those tips and leads that comply" with Functional Standard are shared).

Defendants also emphasize that even if a report falls within an enumerated category, "further individualized analysis is necessary" before reports are submitted. Answering Br. at 32. But a legislative rule need merely constrain discretion, not eliminate it. *Pickus* found parole selection criteria to constitute a legislative rule, even though the exercise of discretion was still necessary after the criteria were applied: Application of the factors produced a range of months, but precisely "when[,] within the specified range[,] an inmate should be released" was "not controlled by the regulation." *Pickus*, 507 F.2d at 1113 n.11. The court nevertheless found "the rules...[to be] substantive agency action, for they define a

fairly tight framework to circumscribe the Board's statutorily broad power." *Id.* at 1113. Similarly, the Functional Standard "circumscribe[s]" discretion by "defin[ing] a fairly tight framework" for identifying reports that have, in Defendants' view, a potential nexus to terrorism. *See id.*[6]

Defendants' cases stand for the unremarkable proposition that agency action does not amount to a legislative rule if it contains criteria that decision-makers can ignore—a context that plainly differs from the Functional Standard. *See Clarian Health West, LLC v. Hargan*, 878 F.3d 346, 358 (D.C. Cir. 2017) (agency free to make determination "regardless of whether the criteria in the instructions are met."); *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) ("State permitting authorities 'are free to ignore'" challenged agency action); *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983) (decision-makers free to ignore the "various criteria" and instead invited to look to "the totality of the facts").

[6] Defendants misapprehend the significance of *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980), and *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988). *Cf.* Answering Br. at 32. As *Pickus* makes clear, a legislative rule need not dictate the ultimate answer. The Functional Standard focuses attention on the exclusive universe of behavioral categories that agencies may consider. *See Batterton*, 648 F.2d at 707 (rule "leaves no discretion to weigh or alter the contributing elements"); *McLouth*, 838 F.2d at 1322 (rule "focus[es] attention on specific factors to the implicit exclusion of others").

Finally, Defendants repeat the misstatement of fact made in support of their erroneous final agency action argument. Answering Br. at 35. As Defendants conceded below, participating agencies that fail to comply with the Functional Standard lose access to eGuardian. *See* FER32.

B. The Error Was Not Harmless.

Defendants claim their error was harmless because they privately consulted with various organizations. They mischaracterize the consultation that occurred and ignore the relevant legal standard. Error is not rendered harmless when the agency communicates with hand-selected entities behind closed doors.

An error is "harmless only where the agency's mistake clearly had no bearing on the procedure used or the substance of the decision reached." *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 442 (9th Cir. 1993). Although Plaintiffs bear the burden on harmlessness, that burden "is not...a particularly onerous requirement" because the harmless error doctrine can be "readily abused." *Nw. Res. Info. Ctr., Inc. v. Nw. Power & Conservation Council*, 730 F.3d 1008, 1021 (9th Cir. 2013) (citations omitted).

Where the agency "fail[s] to provide the required notice and comment," the "violation of the APA [is] not merely technical" and the error is not harmless. *Paulsen v. Daniels*, 413 F.3d 999, 1006 (9th Cir. 2005); *see also Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982) (failure to provide notice and

comment for interim rule found not harmless "[i]n light of the importance of the notice and comment procedure").

This Court will find error harmless only where the agency provided some notice, even if technically imperfect, to the affected public, and the agency actually held public hearings. *See, e.g.*, *Cal-Almond*, 14 F.3d at 442 (agency held "open meetings" and provided notice directly to affected parties); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992) (agency placed "advertisements in the newspaper before holding a public meeting"); *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764-65 & n.5 (9th Cir. 1986) (notice identified incorrect agency decision-maker, but agency published notice in Federal Register correctly describing substance of issue and held public hearing).

Here, Defendants' violation was "not merely technical." *Paulsen*, 413 F.3d at 1006. Unlike the agencies in *Cal-Almond*, *Riverbend*, or *Sagebrush Rebellion*, Defendants provided no notice to the public and held no public hearing. The outreach they conducted and the conferences they hosted were not for the public, rather for organizations of their own choosing. *See Nat'l Ski Areas Ass'n, Inc. v. U.S. Forest Serv.*, 910 F. Supp. 2d 1269, 1278 (D. Colo. 2012) ("the ability to communicate informally with an agency does not lawfully substitute for what the APA requires").

Defendants also assert that the ACLU proposed the "reasonably indicative" language. Answering Br. at 37. This is legally irrelevant and factually misleading.

Defendants rely on *Safari Aviation, Inc. v. Garvey*, 300 F.3d 1144 (9th Cir. 2002). But in that case, the agency issued a public notice of the proposed rulemaking and the plaintiff actually submitted a comment. *Id.* at 1149. Given Defendants' private process, none of the Plaintiffs here had the opportunity to submit comments. ER23, 91, 96-97, 109, 151.

Moreover, Defendants accepted the letter but then perverted the spirit of the ACLU's recommendation. Defendants falsely claim that "[a]ll of [the] [ACLU's] suggestions were incorporated into the [F]unctional [S]tandard." Answering Br. at 39. The ACLU explicitly recommended rejecting Defendants' proposal that "[t]he 'reasonably indicative' threshold...requires...less than...'reasonable suspicion.'" SER387. Defendants clearly did not accept that recommendation.

Finally, Defendants argue that the Record already contained anecdotes of "over-zealous police behavior," and Plaintiffs' accounts would not "have resulted in a different standard." Answering Br. at 38. The Record only contains summaries of obviously erroneous reports. *See, e.g.*, SER344 (Al Jazeera television crew filming on public road). It contains no firsthand experiences of wrongfully targeted individuals, or descriptions of the lasting harm they have suffered. *See, e.g.*, ER22 (Plaintiff Gill's family faced subsequent FBI interview;

Gill fears further harassment by law enforcement and experiences ongoing frustration and stress); ER91 (Plaintiff Conklin's fear of further law-enforcement encounters deters him from pursuing photography).

Defendants' assumption that they would have adopted the same standard regardless of the evidence reflects indifference to public comment. *See Batterton*, 648 F.2d at 703-704 (one purpose of APA is to ensure the agency "educate[s] itself"). "[I]f the harmless error rule were to look solely to result, an agency could always claim that it would have adopted the same rule even if it had complied with the APA procedures." *Riverbend*, 958 F.2d at 1487.

Defendants' wholesale disregard of the APA was harmful.

III. The Functional Standard Is Arbitrary And Capricious.

Defendants contend that the Functional Standard is not arbitrary and capricious because they have consistently taken the position that 28 C.F.R. Part 23 does not apply to the NSI. The Record does not support Defendants' characterization of their supposedly consistent position, and the argument misses the point. The Functional Standard is arbitrary and capricious because the agency did not provide a reasoned explanation as to *why* 28 C.F.R. Part 23 purportedly does not apply to the NSI, and none of Defendants' Record citations offers any such explanation. Defendants do not dispute—indeed, the portions of the Record on which they rely confirm—that the relationship between the NSI and the

regulation was an important aspect of the problem. Nor do Defendants attempt to justify to this Court the unsupportable rationale offered by the Program Manager, who asserted that SARs are not "criminal intelligence" because they are not "a product of investigation." ER500; *see* Opening Br. at 45-56.

Defendants point to stray assertions in the Record that SARs are not "criminal intelligence." Answering Br. at 16-17 (citing ER440, SER68). But these September 2008 and January 2009 statements both predate Functional Standard 1.5, when the agency first adopted the "reasonably indicative" threshold and the type of substantive vetting requirements that transform raw SARs into criminal intelligence. At the time these statements were made, the operative Functional Standard (1.0) focused on *process* issues, such as standardizing "data format"; it "was not...intended to address the legal standard...for determining [the] level of evidence...for submitting a SAR." ER440. In evaluating pilot implementation of Functional Standard 1.0, Defendants realized that *substantive* criteria for sharing a SAR were "not clearly defined" and recommended "specific future guidance to future participating agencies concerning the appropriate level of suspicion." SER138.

But as Defendant DOJ itself explained, it is precisely the process of evaluating raw SARs according to substantive criteria that is "the point at which

SAR information transitions to intelligence and is then subject to 28 C.F.R. Part 23 regulations." ER288.

In the process of developing Functional Standard 1.5 and a substantive definition for evaluating SARs, Defendants therefore "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" (ER440) and that there was "confusion" regarding the "interaction of . . . the 'reasonably indicative'" standard with "requirements such as 28 C.F.R. Part 23." SER382. The Record thus reinforces the conclusion that the relationship of the regulation to the NSI was a significant issue that needed to be addressed.

But in this Court, Defendants completely ignore the agency's threshold obligation to offer a reasoned basis for the position that the regulation does not apply to the NSI. The district court erroneously held that the agency did not need to offer any such explanation because "Plaintiffs' argument...presupposes that SARs are 'criminal intelligence' governed under Part 23." ER9. But the court below misapprehended the APA inquiry, and Defendants repeat that error here. The issue before this Court is not whether 28 C.F.R. Part 23 applies to the NSI. The issue is whether, given the considerable importance of and confusion about the relationship between the regulation and the NSI, the agency offered a reasoned explanation for its belief that the regulation did not apply. *See Motor Vehicle*, 463

U.S. at 43. "To permit [the] agency to 'implicitly' conclude that" the regulation does not apply "and not require the agency to articulate a basis for its conclusion, 'would reject the bedrock concept of record review.'" *Pac. Coast Fed'n of Fishermen's Associations v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005).

The documents cited by Defendants underscore that the regulation was "an important aspect of the problem." *Motor Vehicle*, 463 U.S. at 43. Given Defendants' acknowledgment of "questions" and "confusion" surrounding the relationship of 28 C.F.R. Part 23 and the NSI (ER440, SER382), "the agency must at the very least explain why" it believed the regulation did not apply. *California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002) (agency's failure to explain why action not governed by National Environmental Policy Act was arbitrary and capricious).

None of the portions of the Record on which Defendants rely offers any such explanation. The only purported rationale in the Record is the agency's claim that SARs are not criminal intelligence because they are not a "product of investigation." ER500. That explanation is arbitrary and capricious because it is irreconcilably at odds with the Functional Standard's approach to investigating SARs (*see* Opening Br. at 51-56), and Defendants make no effort to defend it here.

IV. Vacatur Is The Only Appropriate Remedy.

The Court should vacate the Functional Standard.

"[R]emand without vacatur is a remedy used sparingly in this circuit." *Wood v. Burwell*, 837 F.3d 969, 976 (9th Cir. 2016); *see also Pollinator Stewardship Council v. U.S. E.P.A.*, 806 F.3d 520, 532 (9th Cir. 2015) (permitted "only in limited circumstances"). In determining whether to vacate an invalid agency action, this Court must "weigh how serious the agency's errors are" against the "disruptive consequences" of vacatur. *Id.* (internal citations omitted). Courts have focused on whether the remedy would "deny ongoing benefits to the very individuals who sought procedural relief through agency reconsideration." *Wood*, 837 F.3d at 976. Remand without vacatur may be appropriate in the unusual circumstance where "no one disputes" that vacatur would cause irreparable harm. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (remanding without vacatur where "no one disputes" that snail species would be harmed by vacatur). The agency bears the "burden to show that vacatur is unwarranted." *See Ctr. for Envtl. Health v. Vilsack*, No. 15-CV-01690-JSC, 2016 WL 3383954, at *13 (N.D. Cal. June 20, 2016). Defendants have not met their burden on either prong.

First, Defendants' procedural and substantive violations were serious and each warrants vacatur. This Court routinely vacates agency action issued without

notice and comment. *See, e.g.*, *Paulsen*, 413 F.3d at 1008; *Hemp Indus. Ass'n v. Drug Enf't Admin.*, 333 F.3d 1082, 1091 (9th Cir. 2003) (rule "invalid and unenforceable"). "[T]he severity of the error [in failing to provide for notice and comment] weighs in favor of vacatur." *Ctr. for Envtl. Health*, 2016 WL 3383954, at *11. The Functional Standard is also arbitrary and capricious because the agency failed to address an important aspect of the problem. Courts "have not hesitated to vacate a rule when," as here, "the agency has not responded to...an argument inconsistent with its conclusion." *Comcast Corp. v. F.C.C.*, 579 F.3d 1, 8 (D.C. Cir. 2009).

Second, Defendants have not met their burden of demonstrating disruption. Vacatur, they claim, would create uncertainty about law enforcement's ability to share information. Answering Br. at 40 n.10. But agencies can always report information they deem suspicious directly to the FBI, and can also continue to submit information to a criminal intelligence database that complies with 28 C.F.R. Part 23. The Record, moreover, contains no evidence that the NSI is effective in detecting or deterring terrorism. Indeed, the Congressional Research Service concluded that Defendants "just can't prove" that the NSI is actually effective.

ER308.[7] In fact, over the seven years between the first and third iterations of the Functional Standard, Defendants never even tried to determine whether the NSI is effective.[8]

At the same time, leaving the Functional Standard in place risks ongoing, serious harm to Plaintiffs and countless innocent individuals who risk being swept up in Defendants' net. *See Pollinator*, 806 F.3d at 532 (evaluating whether leaving invalid agency action "in place risks more potential...harm than vacating it"). They will continue to face privacy, reputational, and aesthetic injuries as their information is collected and shared. *See* Opening Br. at 29-30 n.3. Given the harm to Plaintiffs and the public if the Functional Standard is *not* vacated, this is simply not a situation where irreparable harm from vacatur is undisputed. *See Idaho Farm Bureau*, 58 F.3d at 1405. Indeed, the equities weigh in Plaintiffs' favor as

[7] Defendants contend this statement was an observation by the Congressional Research Service. Answering Br. at 36 n.9. Due to an ambiguity given the layout of the cited document, Plaintiffs previously attributed it to Defendants. Opening Br. at 2, 19 (citing ER308). But if Defendants are correct, the Congressional Research Service faulted Defendants for not being able to prove the NSI is effective.

[8] The Record that Defendants compiled contains no indication that Defendants ever adopted any metrics or any other evidence, even anecdotal, that the NSI is effective.

Defendants' requested remedy would "deny [relief] to the very individuals who sought procedural relief[.]" *Wood*, 837 F.3d at 976.[9]

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the Functional Standard set aside.

Dated: March 30, 2018

Respectfully submitted,

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[9] *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 993 (9th Cir. 2012), is distinguishable because the error was harmless. *Electronic Privacy Information Center v. U.S. Department of Homeland Security*, 653 F.3d 1, 8 (D.C. Cir. 2011), declined to vacate a rule based on disruption to a "security operation." But the opinion is conclusory and did not balance any countervailing harm to the plaintiffs or the public.

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CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,108 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Dated: March 30, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2018, I electronically filed the Reply Brief of Appellants with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

Dated: March 30, 2018

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