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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO-OAKLAND DIVISION

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

20 Plaintiffs,

21 v.

22 DEPARTMENT OF JUSTICE; LORETTA E.
23 LYNCH,¹ in her official capacity as the Attorney
General of the United States; PROGRAM
24 MANAGER - INFORMATION SHARING
ENVIRONMENT; KSTEMENDRA PAUL, in
25 his official capacity as the Program Manager of
the Information Sharing Environment,

26 Defendants.

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

**FIRST SUPPLEMENTAL COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Administrative Procedure Act Case

27 _____
28 ¹ In light of Ms. Lynch's swearing in as Attorney General on April 27, 2015, she is automatically substituted as a
Defendant in this action in place of Eric Holder. *See* Fed. R. Civ. P. 25(d).

INTRODUCTION

1
2 1. This complaint challenges a widespread domestic surveillance program that
3 targets constitutionally protected conduct and encourages racial and religious profiling.
4 Plaintiffs are five United States citizens – two photographers, one white man who is a devout
5 Muslim, and two men of Middle Eastern and South Asian descent. They engaged in innocuous,
6 lawful, and in some cases First Amendment protected activity. Two were photographing sites of
7 aesthetic interest, one was likely viewing a website about video games inside his home, one was
8 buying computers at Best Buy, and another was standing outside a restroom at a train station
9 while waiting for his mother. Due to the standards issued by Defendants that govern the
10 reporting of information about people supposedly involved in terrorism, Plaintiffs were reported
11 as having engaged in “suspicious activities,” reports about them were entered into
12 counterterrorism databases, and they were subjected to unwelcome and unwarranted law
13 enforcement scrutiny and interrogation. Defendants’ unlawful standards for maintaining a
14 federal law enforcement database regarding such supposedly “suspicious” activities have not
15 yielded any demonstrable benefit in the fight against terrorism, but they have swept up innocent
16 Americans in violation of federal law.

17 2. Through the National Suspicious Activity Reporting Initiative (“NSI”), the federal
18 government encourages state and local law enforcement agencies as well as private actors to
19 collect and report information that has a potential nexus to terrorism in the form of so-called
20 Suspicious Activity Reports (“SARs”). SARs are collected and maintained in various
21 counterterrorism databases and disseminated to law enforcement agencies across the country.
22 An individual who is reported in a SAR is flagged as a person with a potential nexus to terrorism
23 and automatically falls under law enforcement scrutiny, which may include intrusive questioning
24 by local or federal law enforcement agents. Even when the Federal Bureau of Investigation
25 concludes that the person did not have any nexus to terrorism, a SAR can haunt that individual
26 for decades, as SARs remain in federal databases for up to 30 years.

27 3. Defendants Department of Justice (“DOJ”) and Program Manager of the
28 Information Sharing Environment (“PM-ISE”) have issued standards governing the types of

1 information that should be reported in a SAR. Both standards authorize the collection,
2 maintenance, and dissemination of information, in the absence of any reasonable suspicion of
3 criminal activity. Defendants have also identified specific categories of behavior that they claim
4 satisfy each agency's standard and should be reported as suspicious. These behavioral categories
5 range from the constitutionally protected (photographing infrastructure) to the absurd ("acting
6 suspiciously").

7 4. Defendants' standards conflict with a duly promulgated regulation of Defendant
8 DOJ that prohibits the collection, maintenance, and dissemination of criminal intelligence
9 information, unless there is reasonable suspicion of criminal activity. *See* 28 C.F.R. § 23 (1993).
10 The regulation's reasonable suspicion requirement reflects the constitutional principle that law
11 enforcement should not take action against someone, unless there is good reason to believe
12 criminal activity is afoot. Neither of Defendants' standards for reporting suspicious activity was
13 promulgated in accordance with the notice and comment requirements of the Administrative
14 Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* (2012). As a result, Defendants' issuance and
15 implementation of standards for suspicious activity reporting violate federal statutory
16 requirements that agencies not act in an arbitrary and capricious manner and observe the
17 procedures required by law. Through this action for declaratory and injunctive relief, Plaintiffs
18 seek to set aside as unlawful Defendants' standards for suspicious activity reporting.

19 **PARTIES**

20 5. Plaintiff Wiley Gill is a United States citizen and a custodian at California State
21 University, Chico ("Chico State"). Mr. Gill converted to Islam while he was a student at Chico
22 State. He resides in Chico, California. He is the subject of a SAR, attached as Appendix A to
23 this Complaint. The SAR was uploaded to eGuardian, a law enforcement database maintained
24 by the FBI. The SAR identifies Mr. Gill as a "Suspicious Male Subject in Possession of Flight
25 Simulator Game." Mr. Gill was likely viewing a website about video games on his computer at
26 home, when two officers of the Chico Police Department entered and searched his home without
27 voluntary consent or a warrant based on probable cause.
28

1 6. Plaintiff James Prigoff is a United States citizen and an internationally renowned
2 photographer of public art. Mr. Prigoff resides in Sacramento, California. Private security
3 guards warned Mr. Prigoff not to photograph a piece of public art called the “Rainbow Swash” in
4 Boston, Massachusetts. As a result of that encounter, an agent of the Federal Bureau of
5 Investigation (“FBI”) went to Mr. Prigoff’s home in Sacramento several months later and
6 questioned at least one neighbor about him. Upon information and belief, Mr. Prigoff is the
7 subject of a SAR or SAR precursor report.

8 7. Plaintiff Khaled Ibrahim is a United States citizen of Egyptian descent who works
9 as an accountant for Nordix Computer Corporation, a computer network consulting and service
10 company. He formerly worked as a purchasing agent for Nordix. Mr. Ibrahim resides in San
11 Jose, California. Mr. Ibrahim is the subject of a SAR, attached as Appendix B to the Complaint.
12 The SAR describes a “[s]uspicious attempt to purchase large number of computers.” Mr.
13 Ibrahim attempted to make a bulk purchase of computers from a Best Buy retail store in Dublin,
14 California, in his capacity as a purchasing agent for Nordix. The SAR was uploaded to
15 eGuardian, a law enforcement database maintained by the FBI. Dublin is located in Alameda
16 County, California.

17 8. Plaintiff Tariq Razak is a United States citizen of Pakistani descent. A graduate
18 of the University of California at Irvine, he works in the bio-tech industry. Mr. Razak resides in
19 Placentia, California. Mr. Razak is the subject of a SAR, attached as Appendix C to this
20 Complaint. The SAR identifies Mr. Razak as a “Male of Middle Eastern decent [sic] observed
21 surveying entry/exit points” at the Santa Ana Train Depot and describes him as exiting the
22 facility with “a female wearing a white burka head dress.” Mr. Razak had never been to the
23 Depot before and was finding his way to the county employment resource center, which is
24 located inside the Depot and where he had an appointment. The woman accompanying him was
25 his mother.

26 9. Plaintiff Aaron Conklin is a graphic design student and amateur photographer.
27 He resides in Vallejo, California. Private security guards have twice prevented Mr. Conklin
28 from taking photographs of industrial architecture from public locations. One such incident

1 occurred outside the Shell refinery in Martinez, California, and resulted in Mr. Conklin being
2 detained and having his camera and car searched by Contra Costa County Sheriff's Deputies,
3 who told Mr. Conklin that he would be placed on an "NSA watchlist." Upon information and
4 belief, Mr. Conklin is the subject of a SAR. Martinez is located in Contra Costa County,
5 California.

6 10. Defendant DOJ is a federal agency within the meaning of the APA, 5 U.S.C. §
7 551(1). DOJ, through its components, has issued a standard governing SAR reporting, conducts
8 trainings on that standard, and plays a major role in implementing the NSI.

9 11. The FBI is a component of DOJ with both intelligence and law enforcement
10 responsibilities. The FBI has issued a standard governing the reporting of SARs, and trains law
11 enforcement and private sector personnel on its SAR reporting standard. The FBI oversees and
12 maintains the eGuardian system, which serves as a repository for SARs and allows thousands of
13 law enforcement personnel and analysts across the country to access SARs in the eGuardian
14 system. The FBI is one of the primary entities responsible for the NSI.

15 12. The Office of Justice Programs ("OJP") was created pursuant to 42 U.S.C. § 3711
16 (2012) and is a component of Defendant DOJ. OJP administers grants to state and local law
17 enforcement entities. Upon information and belief, OJP funding supports, among other things,
18 entities that engage in the collection, maintenance, and dissemination of SARs, and systems that
19 collect, maintain, and disseminate SARs.

20 13. The Bureau of Justice Assistance ("BJA"), within OJP, provides assistance to
21 local criminal justice programs through policy, programming, and planning. BJA served as the
22 executive agent of the NSI until October 2013. BJA has issued a standard governing the
23 reporting of SARs, and conducts trainings on its SAR reporting standard.

24 14. The Program Management Office ("PMO"), also a component of DOJ, has played
25 a key role in implementing the NSI. On December 17, 2009, DOJ was named the executive
26 agent to establish and operate the PMO for the NSI. In March 2010, DOJ established the NSI
27 PMO within BJA to support nationwide implementation of the SAR process.
28

1 in this district, including Alameda and Contra Costa Counties, and one or more plaintiffs reside
2 in this district.

3 INTRADISTRICT ASSIGNMENT

4 21. Pursuant to Local Rule 3-2(c) and (d), assignment to the San Francisco-Oakland
5 Division is proper because a substantial part of the events giving rise to this action occurred in
6 Alameda and Contra Costa Counties.

7 FACTUAL ALLEGATIONS

8 A. The Nationwide Suspicious Activity Reporting Initiative

9 22. The federal government created the NSI to facilitate the sharing of information
10 potentially related to terrorism across federal, state, local, and tribal law enforcement agencies.
11 In particular, the NSI creates the capability to share reports of information with a potential nexus
12 to terrorism, which have been dubbed Suspicious Activity Reports.

13 23. Fusion centers are focal points of the system for sharing SARs. There are
14 currently 78 fusion centers nationwide. They are generally, though not always, owned and
15 operated by state or local government entities. Fusion centers receive federal financial support,
16 including from OJP.

17 24. Defendants PM-ISE and DOJ train state, local, and tribal law enforcement
18 agencies as well as private entities to collect information about activities with a potential nexus
19 to terrorism based on the standard each agency has adopted, and to submit the information in the
20 form of a SAR, either to a fusion center or the FBI.

21 25. Fusion centers gather, receive, store, analyze, and share terrorism and other
22 threat-related information, including SARs. On information and belief, fusion centers collect,
23 maintain, and disseminate SARs through databases that receive financial support from OJP.

24 26. Defendants train fusion center analysts in their respective standards for SAR
25 reporting. Fusion center analysts review submitted SARs. If a SAR meets Defendants'
26 standards, it is uploaded to one or more national databases, such as the FBI's eGuardian system,
27 where it can be accessed by the FBI and law enforcement agencies across the country. The
28 federal government maintains SARs sent to the FBI's eGuardian system for 30 years. This is

1 done even when the FBI determines that the SAR has no nexus to terrorism. *See* Functional
2 Standard 1.5 at 34, 53; United States Government Accountability Office, “Information Sharing:
3 Additional Actions Could Help Ensure That Efforts to Share Terrorism-Related Suspicious
4 Activity Reports Are Effective” at 7 (March 2013) (“GAO SAR Report”).

5 27. Pursuant to the process created by Defendants PM-ISE and DOJ for suspicious
6 activity reporting, individuals who are the subject of a SAR are automatically subjected to law
7 enforcement scrutiny at multiple levels of government. That scrutiny may include, but is not
8 limited to, follow-up interviews and other forms of investigation by law enforcement. For
9 example:

10 (a) At the initial response and investigation stage, and even before a SAR is
11 submitted to a fusion center or the FBI, Defendant PM-ISE instructs the federal,
12 state, local, or tribal law enforcement agency with jurisdiction to respond to the
13 reported observation by “gather[ing] additional facts through personal
14 observations, interviews, and other investigative activities. This may, at the
15 discretion of the [responding] official, require further observation or engaging the
16 suspect in conversation.” Functional Standard 1.5 at 32; accord Functional
17 Standard 1.5.5 at 53.

18 (b) Fusion center personnel “tak[e] steps to investigate SARs – such as
19 interviewing the individual engaged in suspicious activity or who witnessed
20 suspicious activity – before providing the SARs to the FBI.” GAO SAR Report at
21 16. Officials from fusion centers do investigative work as part of their vetting
22 process. *Id.* at 17.

23 (c) The FBI reviews all SARs that it receives from fusion centers for follow-up.
24 That follow-up can take the form of an interview with the subject of the SAR, and
25 includes, but is not limited to, engaging in a threat assessment of or opening an
26 investigation into the subject.

27 (d) FBI agents have admitted that they are required to follow-up on SARs, even
28 when they know the individual does not pose a threat. For example, a

1 professional freelance photographer in Los Angeles, California who specializes in
2 industrial photography, has twice been interviewed by the FBI after
3 photographing industrial sites. After security guards instructed him not to
4 photograph certain industrial sites in the area of the Port of Long Beach in April
5 2008, FBI agents visited him at his home to question him about the incident. The
6 FBI contacted him again, after Los Angeles Sheriff's Department personnel
7 interfered with his efforts to photograph another industrial site in approximately
8 December 2009. The FBI agent told the photographer that he knew the
9 photographer did not pose a threat but that because a report had been opened, he
10 was required to follow-up on it.

11 (e) As explained above, SARs that have been uploaded to a national database can
12 be accessed by law enforcement agencies nationwide. Once uploaded to a
13 national database, the subject of a SAR faces scrutiny and potential investigation
14 by one or more of the law enforcement agencies across the country that has access
15 to the database. That scrutiny is only increasing, as queries of national SAR
16 databases have dramatically jumped in recent years. The number of queries of
17 national SAR databases such as eGuardian has risen from about 2,800 queries as
18 of July 2010 to more than 71,000 queries as of February 2013. *See* GAO SAR
19 Report at 36.

20 28. This surveillance program has not proven effective in the fight against terrorism.
21 The United States Government Accountability Office ("GAO") has faulted the program for
22 failing to demonstrate *any* results-oriented outcomes, such as arrests, convictions, or thwarted
23 threats, even though tens of thousands of SARs had been deemed sufficiently significant to be
24 uploaded to national SAR databases as of October 2012. *See* GAO SAR Report at 33, 36-38. In
25 2012, a Senate Subcommittee reviewed a year of similar intelligence reporting from state and
26 local authorities, and identified "dozens of problematic or useless" reports "potentially violating
27 civil liberties protections." United States Senate, Permanent Subcommittee on Investigations,
28 Committee on Homeland Security and Governmental Affairs, "Federal Support for and

1 Involvement in State and Local Fusion Centers,” October 3, 2012 at 27. Another report, co-
2 authored by Los Angeles Police Department Deputy Chief Michael Downing, found that SARs
3 have “flooded fusion centers, law enforcement, and other security entities with white noise.”
4 The George Washington University Homeland Security Policy Institute, “Counterterrorism
5 Intelligence: Fusion Center Perspectives,” June 26, 2012 at 31.

6 29. While the SARs process has not proven effective in combating terrorism, it has
7 been extremely effective in sweeping up innocent Americans and recording their lawful activity
8 in federal counterterrorism databases. Over 1,800 SARs from fusion centers in California show
9 that the program targets First Amendment protected activity such as photography and encourages
10 racial and religious profiling. Examples of SARs that met Defendants’ standards for SAR
11 reporting and have been uploaded to the FBI’s eGuardian database include:

- 12 • “Suspicious ME [Middle Eastern] Males Buy Several Large Pallets of Water”
- 13 • A sergeant from the Elk Grove Police Department reported “on a suspicious
14 individual in his neighborhood”; the sergeant had “long been concerned about a
15 residence in his neighborhood occupied by a Middle Eastern male adult physician
16 who is very unfriendly”
- 17 • “Female Subject taking photos of Folsom Post Office”
- 18 • “an identified subject was reported to be taking photographs of a bridge crossing
19 the American River Bike trail”
- 20 • “I was called out to the above address regarding a male who was taking
21 photographs of the [name of facility blacked out] [in Commerce, California]. The
22 male stated, he is an artist and enjoys photographing building[s] in industrial
23 areas ... [and] stated he is a professor at San Diego State private college, and
24 takes the photos for his art class.”
- 25 • “I observed a male nonchalantly taking numerous pictures inside a purple line
26 train [in Los Angeles County] ... The male said he was taking pictures because
27 they were going to film the television show ‘24’ on the train next week.”

- 1 • “two middle eastern looking males taking photographs of Folsom Dam. One of
- 2 the ME males appeared to be in his 50’s”
- 3 • “Suspicious photography of the Federal Courthouse in Sacramento”: an “AUSA
- 4 [Assistant United States Attorney] reported to the Court Security Officer (CSO) a
- 5 suspicious vehicle occupied by what [name blacked out] described as two Middle
- 6 Eastern males, the passenger being between 40-50 years of age.”
- 7 • “Suspicious photography of Folsom Dam by Chinese Nationals”: “a Sac County
- 8 Sheriff’s Deputy contacted 3 adult Asian males who were taking photos of
- 9 Folsom Dam. They were evasive when the deputy asked them for identification
- 10 and said their passports were in their vehicle.”

11 **B. Conflicting Federal Rules for Collection of Intelligence Information**

12 30. Defendants have issued three separate rules governing the collection of

13 intelligence information, in particular, suspicious activity reports. Only one of these rules,

14 however, requires reasonable suspicion of criminal activity for the information to be collected,

15 maintained, and disseminated, and only that rule was duly promulgated under the APA.

16 **1. 28 C.F.R. Part 23**

17 31. On June 19, 1968, President Lyndon B. Johnson signed into law the Omnibus

18 Crime Control and Safe Streets Act of 1968 (“Omnibus Act”). The Act created the Law

19 Enforcement Administration Agency (“LEAA”), a forerunner to OJP and a component of DOJ,

20 and authorized it to oversee the distribution of federal grants to state and local law enforcement

21 programs.

22 32. In 1978, after observing the notice and comment process set forth in the APA,

23 Defendant DOJ, through its component the LEAA, published a final rule establishing operating

24 principles for “Criminal Intelligence Systems.” *See* 28 C.F.R. § 23 (1993). The regulation was

25 promulgated pursuant to the LEAA’s statutory mandate to ensure that criminal intelligence is not

26 collected, maintained, or disseminated “in violation of the privacy and constitutional rights of

27 individuals.” 42 U.S.C. § 3789g(c) (2012).

28

1 33. Several commenters on the then-proposed regulation “were concerned that the
2 collection and maintenance of intelligence information should only be triggered by a reasonable
3 suspicion that an individual is involved in criminal activity.” *See* 43 Fed. Reg. 28,572 (June 30,
4 1978). The agency concurred, and the proposed operating principles were “revised to require
5 this criteria as a basis for collection and maintenance of intelligence information.” *Id.*

6 34. Among other requirements, the final rule provides that a “project shall collect and
7 maintain criminal intelligence information concerning an individual only if there is reasonable
8 suspicion that the individual is involved in criminal conduct or activity and the information is
9 relevant to that criminal conduct or activity.” 28 CFR § 23.20(a).

10 35. In addition, the regulation states that while “pooling of information about” various
11 kinds of criminal activities such as drug trafficking, smuggling, and public corruption can be
12 helpful in “expos[ing] ... ongoing networks of criminal activity,” “the collection and exchange
13 of intelligence data necessary to support control of serious criminal activity may represent
14 potential threats to the privacy of individuals to whom such data relates,” and the privacy
15 guidelines set forth in 28 CFR Part 23 are therefore necessary. 28 CFR § 23.2.

16 36. In 1980, DOJ amended the rule, following the public notice and comment process
17 set forth in the APA, to extend the reach of 28 C.F.R. Part 23 to criminal intelligence systems
18 funded by both discretionary and formula grants. 45 Fed. Reg. 61,612 (Sep. 17, 1980).

19 37. DOJ amended the rule again in 1993 to include a definition of “reasonable
20 suspicion”:

21 Reasonable Suspicion . . . is established when information exists which establishes
22 sufficient facts to give a trained law enforcement or criminal investigative agency officer,
23 investigator, or employee a basis to believe that there is a reasonable possibility that an
individual or organization is involved in a definable criminal activity or enterprise.

24 *See* 28 C.F.R. § 23.20.

25 38. “Reasonable suspicion” is the time-tested, constitutional standard that limits law
26 enforcement from taking action against someone, unless there is good reason to believe criminal
27 activity is afoot.
28

1 39. One commenter argued that “reasonable suspicion . . . is not necessary to the
2 protection of individual privacy and Constitutional rights, [and suggested] instead that
3 information in a funded intelligence system need only be ‘necessary and relevant to an agency’s
4 lawful purposes.’” 58 Fed. Reg. 178, 48451 (Sept. 16, 1993). The agency disagreed, replying:

5 the potential for national dissemination of information in intelligence information
6 systems, coupled with the lack of access by subjects to challenge the information,
7 justifies the reasonable suspicion standard as well as other operating principle restrictions
8 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.

9 *Id.*

10 40. DOJ made an attempt in 2008 to amend the regulation to weaken its privacy
11 protections. In particular, the proposed rule would have (1) permitted information to be stored
12 regarding organizations as well as individuals; (2) allowed information to be stored based on
13 reasonable suspicion related to “domestic and international terrorism, including material support
14 thereof,” and (3) eliminated the requirement that law enforcement agencies receiving information
15 from a Criminal Intelligence System agree to comply with 28 C.F.R. Part 23, so that recipients
16 would merely need to have procedures “consistent with” Section 23. *See* 73 Fed. Reg. 44,674
17 (July 31, 2008). This attempted rulemaking, however, met with criticism and DOJ withdrew its
18 proposed rule. The regulation has remained unchanged since its last amendment in 1993.

19 41. In short, in initially adopting the regulation, DOJ emphasized the importance of
20 the reasonable suspicion requirement and since then has expanded the scope of the regulation,
21 reiterated the importance of the reasonable suspicion requirement, and withdrawn efforts to
22 weaken the regulation’s privacy protections.

23 **2. PM-ISE Standard for Suspicious Activity Reporting**

24 42. Defendant PM-ISE subsequently issued a standard for SAR reporting, known as
25 the “Functional Standard,” that – unlike 28 CFR Part 23 – does not require reasonable suspicion
26 of criminal activity before a suspicious activity report is collected, maintained, or disseminated
27 and was not issued through the notice and comment procedure required by the APA, thus
28 dodging public review.

1 43. Pursuant to the exercise of its statutory authority to “exercise governmentwide
2 authority over the sharing of [terrorism and homeland security] information,” 6 U.S.C. §
3 485(f)(1) (2012), PM-ISE has issued “Functional Standards” governing suspicious activity
4 reporting.

5 44. In or about May 2009, PM-ISE released Information Sharing Environment (ISE) -
6 Functional Standard (FS) - Suspicious Activity Reporting (SAR) Version 1.5 (“Functional
7 Standard 1.5”). In or about February 2015, PM-ISE released Information Sharing Environment
8 (ISE) – Functional Standard (FS) – Suspicious Activity Reporting (SAR) Version 1.5.5
9 (“Functional Standard 1.5.5”). Both Functional Standard 1.5 and Functional Standard 1.5.5
10 adopt a “reasonably indicative” standard for suspicious activity reporting. *See* Functional
11 Standard 1.5 at 2 (defining suspicious activity as “[o]bserved behavior reasonably indicative of
12 pre-operational planning related to terrorism or other criminal activity”); Functional Standard
13 1.5.5 at 4 (defining suspicious activity as “[o]bserved behavior reasonably indicative of pre-
14 operational planning associated with terrorism or other criminal activity”). PM-ISE is
15 considering a further update to the Functional Standard (to be designated Version 2.0) that may
16 broaden the standard for suspicious activity reporting.

17 45. The agency has expressly acknowledged that the Functional Standard’s
18 “reasonably indicative” standard requires “less than the ‘reasonable suspicion’ standard.” PM-
19 ISE, Privacy, Civil Rights, and Civil Liberties Analysis and Recommendations–Nationwide
20 Suspicious Activity Reporting Initiative at 12 (draft May 2010).

21 46. The Functional Standard also identifies sixteen categories of activity that fall
22 under the standard and provide a guide to law enforcement in determining what amounts to a
23 suspicious activity. These categories include photography, observation/surveillance, and
24 acquisition of materials or expertise. Functional Standard 1.5 at 29-30; Functional Standard
25 1.5.5 at 42-51.

26 47. The Functional Standard applies to, *inter alia*, “all departments or agencies that
27 possess or use terrorism or homeland security information.” Functional Standard 1.5 at 1;
28 Functional Standard 1.5.5 at 1. The Functional Standard applies to state, local, and tribal law

1 enforcement agencies and fusion centers that participate in the NSI. Agencies participating in
2 the NSI follow the Functional Standard in reporting suspicious activity.

3 48. The Functional Standard purports to define the scope of suspicious activity that
4 should be reported for agencies participating in the NSI. The purpose of the Functional Standard
5 is to standardize SAR reporting at the federal, state, and local levels.

6 49. PM-ISE trains participants in the NSI about, among other things, how to follow
7 the Functional Standard .

8 50. In promulgating the Functional Standard, PM-ISE expressly cited its legislative
9 authority under, *inter alia*, the IRTPA over governmentwide standards for information sharing.
10 Functional Standard 1.5 at 1; Functional Standard 1.5.5 at 1.

11 51. The Functional Standard constitutes final agency action and a legislative rule
12 within the meaning of the APA.

13 52. PM-ISE issued the Functional Standard without observing the process set forth in
14 the APA for public notice and comment. Functional Standard 1.5.5 went into immediate effect
15 upon its publication on February 23, 2015 and remains currently in effect.

16 **3. DOJ Standard for Suspicious Activity Reporting**

17 53. Defendant DOJ, through its components, has issued a standard for SAR reporting
18 (“DOJ’s SAR Standard”) that – unlike 28 CFR § 23 – does not require reasonable suspicion of
19 criminal activity before a suspicious activity report is collected, maintained, or disseminated and
20 was not issued through the notice and comment procedure required by the APA, thus dodging
21 public review.

22 54. DOJ, through its component the FBI, has set forth the following standard for
23 suspicious activity reporting: “observed behavior that *may be indicative* of intelligence gathering
24 or pre-operational planning related to terrorism, criminal or other illicit intention.” FBI, Privacy
25 Impact Assessment for the eGuardian Threat Tracking System at § 1.1 (emphasis added). This
26 standard is set forth in the FBI’s 2008 eGuardian Privacy Impact Assessment (“2008 eGuardian
27 PIA”), which is attached as Appendix E to this Complaint. “[T]he FBI uses the criteria in the
28

1 eGuardian Privacy Impact Assessment (dated November 25, 2008) ... to determine if SARs have
2 a potential nexus to terrorism.” GAO SAR Report at 6 n.10.

3 55. DOJ’s “may be indicative” SAR Standard is even broader than PM-ISE’s
4 “reasonably indicative” Functional Standard. *See* GAO SAR Report at 15-16. But like the
5 Functional Standard, DOJ’s SAR Standard encourages reporting even in the absence of
6 reasonable suspicion of criminal activity.

7 56. Just as Defendant PM-ISE has enumerated categories of behavior that fall under
8 its “reasonably indicative” reporting standard, DOJ through its components has also enumerated
9 categories of behavior that fall under its “may be indicative” reporting standard. These
10 categories of behavior are broader than the categories set forth in the Functional Standard and
11 include but are not limited to:

12 (a) “Possible indicators of terrorist behaviors at hotels:...” FBI and United States
13 Department of Homeland Security, “Roll Call Release,” July 26, 2010, attached as
14 Appendix F to this Complaint.

15 (1) “Using payphones for outgoing calls or making front desk requests in
16 person to avoid using the room telephone.” *Id.*

17 (2) “Interest in using Internet cafes, despite hotel Internet availability....”
18 *Id.*

19 (3) “Requests for specific rooms, floors, or other locations in the
20 hotel....” *Id.*

21 (4) “Multiple visitors or deliveries to one individual or room.” *Id.*

22 (b) “No obvious signs of employment.” FBI, “Quick Reference Terrorism Card,”
23 attached as Appendix G to this Complaint.

24 (c) “Possess student visa but not English Proficient.” *Id.*

25 (d) “Persons not fitting into the surrounding environment, such as wearing
26 improper attire for the location.” *Id.*

1 (e) “Persons exhibiting unusual behavior such as staring or quickly looking away
2 from individuals or vehicles as they enter or leave designated facilities or
3 parking areas.” *Id.*

4 (f) “A blank facial expression in an individual may be indicative of someone
5 concentrating on something not related to what they appear to be doing.” *Id.*

6 (g) “[P]eople in places where they do not belong.” Bureau of Justice Assistance,
7 “Communities Against Terrorism: Potential Indicators of Terrorist Activities
8 Related to the General Public,” attached as Appendix H to this Complaint.

9 57. One category of behavior identified by DOJ as “suspicious” activity that should
10 be reported is a “catch-all”:

11 (a) “[P]eople acting suspiciously.” *Id.*

12 58. DOJ through its components has also issued “Potential Indicators of Terrorist
13 Activities Related to Electronic Stores” (attached as Appendix I to this Complaint) and
14 “Potential Indicators of Terrorist Activities Related to Mass Transportation” (attached as
15 Appendix J to this Complaint). Activities identified as suspicious in connection with mass
16 transportation include “[a]cting nervous or suspicious,” and “[u]nusual or prolonged interest in
17 ... entry points and access controls.”

18 59. DOJ through its components trains participants in the NSI about DOJ’s SAR
19 Standard. For example, as of 2013, the PMO had provided training for 290,000 line officers (law
20 enforcement officers whose routine duties put them in a position to observe “suspicious”
21 activity), 2,000 analytical personnel, and executives from 77 fusion centers. *See* GAO SAR
22 Report at 29. DOJ components teach participants in the NSI, including frontline officers and
23 fusion center analysts to submit to the FBI “all potentially terrorism-related information and not
24 just ISE-SARs that met the [PM-ISE’s] Functional Standard.” GAO SAR Report at 16.

25 60. DOJ’s SAR Standard applies to state, local, and tribal law enforcement agencies
26 and fusion centers that participate in the NSI. Agencies participating in the NSI follow DOJ’s
27 SAR Standard in reporting suspicious activity.
28

1 61. DOJ's SAR Standard purports to define the scope of suspicious activity that
2 should be reported for agencies participating in the NSI. The purpose of DOJ's SAR Standard is
3 to standardize SAR reporting at the federal, state, and local levels.

4 62. Because DOJ's SAR Standard is broader than PM-ISE's Functional Standard and
5 DOJ's behavioral categories include the catch-all "people acting suspiciously," any activity that
6 falls under PM-ISE's Functional Standard also falls under DOJ's SAR Standard.

7 63. Fusion centers that follow DOJ's SAR Standard instead of PM-ISE's Functional
8 Standard send many SARs to the FBI for review. For example, of the SARs uploaded by one
9 state's fusion center to a national SAR database from June 2011 to October 2012, only 10% met
10 PM-ISE's Functional Standard. *See* GAO SAR Report at 16.

11 64. DOJ establishes an even broader standard than the already overbroad Functional
12 Standard, and the DOJ reinforces its broader standard through the trainings it provides to NSI
13 participants and through other mechanisms. For example, when fusion center personnel are
14 uncertain whether to share a SAR, DOJ encourages them to err on the side of overreporting. *See*
15 GAO SAR Report at 16. In addition, the only feedback mechanism participants in the NSI
16 currently receive on whether they are reporting SARs appropriately is provided by the FBI
17 through its eGuardian system. *See* GAO SAR Report at 13-14. The feedback the FBI provides
18 reinforces the DOJ SAR Standard to NSI participants.

19 65. DOJ's 2008 eGuardian PIA, which sets forth the agency's standard for reporting
20 suspicious activity, was signed by four "Responsible Officials," two "Reviewing Officials," and
21 one "Approving Official." It reflects the consummation of the agency's decision making
22 process.

23 66. DOJ's 2008 eGuardian PIA contains a set of mandatory, non-discretionary rules
24 and obligations. It lays out clear instructions for the use of the eGuardian system to collect and
25 share SARs and the standard for defining "suspicious activity." For example, the 2008
26 eGuardian PIA states that the eGuardian system will "ensure consistency of process and of
27 handling protocols" and mandates that all users "will be required to complete robust system
28 training that will incorporate eGuardian policies and procedures." 2008 eGuardian PIA at 4. In

1 addition, the eGuardian User Agreement, attached to the 2008 eGuardian PIA, states that
2 “[i]ncidents not meeting the criteria of suspicious activity or with a potential nexus to terrorism
3 and that, further, do not comply with the above-stated rules, will be immediately deleted from
4 eGuardian.” 2008 eGuardian PIA at 25.

5 67. DOJ has consistently reinforced its standard for SAR reporting, set forth in the
6 2008 eGuardian PIA, through training materials and other publications that identify categories of
7 behavior that the agency contends are suspicious and should be reported.

8 68. In promulgating DOJ’s SAR Standard, DOJ expressly invoked its statutory
9 “mandate” under IRTPA and “other statutes ... to share terrorism information with other federal,
10 and state, local and tribal (SLT) law enforcement partners.” 2008 eGuardian PIA at 2.

11 69. DOJ’s SAR Standard constitutes final agency action and a legislative rule within
12 the meaning of the APA.

13 70. Defendant DOJ issued the DOJ SAR Standard without observing the process set
14 forth in the APA for public notice and comment. It is the DOJ Standard for SAR reporting
15 currently in effect.

16 **4. PM-ISE’s Functional Standard and DOJ’s SAR Standard Conflict with 28**
17 **CFR Part 23**

18 71. As a report of “[o]bserved behavior reasonably indicative of pre-operational
19 planning” related to or associated with “terrorism or other criminal activity” (Functional
20 Standard) or a report of “observed behavior that may be indicative of intelligence gathering or
21 pre-operational planning related to terrorism, criminal or other illicit intention” (DOJ’s SAR
22 Standard), a SAR contains data relevant to the identification of an individual who is suspected in
23 some fashion of being involved in criminal, in particular, terrorist activity.

24 72. A SAR constitutes “criminal intelligence” within the meaning of 28 CFR Part 23.

25 73. State, local, and tribal law enforcement agencies and fusion centers that
26 participate in the NSI and observe PM-ISE’s Functional Standard and/or DOJ’s SAR Standard
27 collect, review, analyze, and disseminate SARs. These entities operate arrangements,
28 equipment, facilities, and procedures, used for the receipt, storage, interagency exchange or

1 dissemination, and analysis of SARs. Upon information and belief, these entities and the
2 systems they operate for receiving, storing, exchanging, disseminating, and analyzing SARs
3 operate through support from Defendant DOJ's component OJP.

4 74. State, local, and tribal law enforcement agencies and fusion centers that
5 participate in the NSI and observe PM-ISE's Functional Standard and/or DOJ's SAR Standard
6 are "projects" within the meaning of 28 CFR Part 23. The systems or databases on which SARs
7 are maintained and through which they are collected and disseminated are "criminal intelligence
8 systems" within the meaning of 28 CFR Part 23.

9 75. PM-ISE's Functional Standard and DOJ's SAR Standard set forth operating
10 principles for the collection, maintenance, and dissemination of data relevant to the identification
11 of an individual who is suspected in some fashion of being involved in criminal, in particular,
12 terrorist activity. Both standards, however, encourage or purport to authorize collection,
13 maintenance, and dissemination of such data even in the absence of reasonable suspicion of
14 criminal activity. Both standards encourage or purport to authorize collection, maintenance, and
15 dissemination of much more data than that permitted under 28 CFR Part 23. Both standards
16 therefore conflict with 28 CFR Part 23.

17 76. Through PM-ISE's promulgation of its Functional Standard and DOJ's
18 promulgation of its SAR Standard, and through each agency's training of entities participating in
19 the NSI in their respective standards for reporting suspicious activity, Defendants PM-ISE, Paul,
20 DOJ, and Holder have undermined and thereby violated 28 CFR Part 23.

21 77. Neither DOJ nor PM-ISE has offered any reasoned basis for departing from the
22 reasonable suspicion standard set forth in 28 CFR Part 23 for the collection, maintenance, and
23 dissemination of SARs.

24 78. DOJ could rescind its SAR reporting standard. If DOJ rescinded its SAR
25 reporting standard, participants in the NSI would cease collecting, maintaining, reviewing,
26 analyzing and disseminating SARs based on DOJ's SAR Standard, and it would be clear that the
27 governing standard for suspicious activity reporting is 28 CFR Part 23. As a result, individuals
28 who are currently the subject of SARs but whose conduct did not give rise to a reasonable

1 suspicion of criminal activity would no longer have their information collected, maintained, and
2 disseminated in SAR databases. DOJ could cease collecting, maintaining, reviewing, analyzing,
3 and disseminating SARs about individuals whose conduct did not give rise to a reasonable
4 suspicion of criminal activity.

5 79. PM-ISE could rescind the Functional Standard. If PM-ISE rescinded the
6 Functional Standard, participants in the NSI would cease collecting, maintaining, reviewing,
7 analyzing and disseminating SARs based on the Functional Standard, and it would be clear that
8 the governing standard for suspicious activity reporting is 28 CFR Part 23. As a result,
9 individuals who are currently the subject of SARs but whose conduct did not give rise to a
10 reasonable suspicion of criminal activity would no longer have their information collected,
11 maintained, and disseminated in SAR databases.

12 **C. Plaintiff's Allegations**

13 **1. Wiley Gill**

14 80. Wiley Gill is a United States citizen living in Chico, California. He works as a
15 custodian at Chico State, which he attended as an undergraduate. Mr. Gill converted to Islam in
16 2009, after learning about the religion in a course he took while a student at Chico State.

17 81. Mr. Gill is the subject of a SAR that identifies him as a "Suspicious Male Subject
18 in Possession of Flight Simulator Game." This SAR falls into one or more of the behavioral
19 categories identified in the Functional Standard, in particular, "[a]cquisition of [e]xpertise" and
20 potentially "[a]viation [a]ctivity." Functional Standard 1.5 at 29-30; Functional Standard 1.5.5 at
21 45, 50. It also falls under one or more behavioral categories identified by Defendant DOJ, such
22 as the catch-all behavioral category of "acting suspiciously."

23 82. Mr. Gill's SAR was collected, maintained, and disseminated through a fusion
24 center SAR database, and uploaded to eGuardian and/or another national SAR database. As a
25 result, the FBI has scrutinized Mr. Gill, conducted extensive background checks on him, and
26 created a file about him.

27 83. The SAR was created on or about May 23, 2012, and purports to document an
28 encounter between Mr. Gill and the Chico Police Department ("CPD") on or about May 20,

1 2012. The SAR states that a CPD officer was investigating a domestic violence incident and
2 believed the suspect may have fled into Mr. Gill's residence. The SAR states that this was later
3 discovered to be unfounded. It acknowledges that the CPD officer searched Mr. Gill's home.
4 The SAR asserts that Mr. Gill's computer displayed a screen titled something to the effect of
5 "Games that fly under the radar," which appeared to be a "flight simulator type of game." The
6 SAR concludes by describing Mr. Gill's "full conversion to Islam as a young WMA [white, male
7 adult]," "pious demeanor," and "potential access to flight simulators via the internet" as "worthy
8 of note."

9 84. CPD's search of Mr. Gill's residence on or about May 20, 2012 did in fact occur.
10 But the SAR contains numerous misstatements and omits several crucial facts, including that two
11 CPD officers banged on Mr. Gill's door and after when he went to open it, they came around the
12 corner of the house with their guns drawn and pointed at Mr. Gill. Mr. Gill was thrown off
13 guard. The officers eventually lowered their guns, and then asked to search Mr. Gill's home,
14 based on the alleged domestic violence incident involving two individuals that they claimed to
15 have received. Mr. Gill informed the officers that he was home alone. Despite that, the officers
16 continued to ask to search his home. Mr. Gill was reluctant to grant permission, but felt that he
17 had no choice under the circumstances. One officer remained with Mr. Gill outside, while the
18 other searched his home. Mr. Gill did not feel free to leave. Mr. Gill cooperated with the
19 officers' request for identification. Mr. Gill believes that he was likely viewing a website about
20 video games at the time of the May 20, 2012, incident.

21 85. On information and belief, the officers' contention that they were investigating a
22 domestic violence call was a pretext for searching Mr. Gill's home because CPD had already
23 decided to investigate Mr. Gill because of his religion.

24 86. The SAR also describes two earlier encounters between CPD and Mr. Gill, one at
25 the Mosque that Mr. Gill attends and another while Mr. Gill was walking through downtown
26 Chico "with elders." The SAR describes Mr. Gill in these instances as "avoid[ing] eye contact"
27 and "hesitant to answer questions."
28

1 87. Mr. Gill recalls CPD officers visiting the Mosque he attends, paying what they
2 described as a courtesy visit in an attempt to build good relations with the Muslim community.
3 Mr. Gill listened to the presentation. When it was over, CPD officers asked Mr. Gill his name,
4 whether he went to school, and if he was employed. Mr. Gill answered all of their questions.
5 His understanding is that the officers did not question anyone else in this manner.

6 88. Mr. Gill also recalls encountering CPD officers while he was walking through
7 downtown Chico with two older Muslim men who are friends from the Mosque. A CPD officer
8 called out Mr. Gill's name and asked Mr. Gill if he had found a job yet. Mr. Gill answered the
9 question, but was caught off guard by the encounter because he did not recognize the officer and
10 was surprised that the officer knew his name and employment status.

11 89. At no point during any of the encounters with CPD recounted in the SAR did Mr.
12 Gill engage in conduct that gave rise to a reasonable suspicion of criminal activity.

13 90. The CPD also targeted Mr. Gill in two other encounters that are not described in
14 the SAR, and that do not involve any conduct by Mr. Gill that gave rise to a reasonable suspicion
15 of criminal activity, but instead reflect CPD's suspicion of Mr. Gill because of his religion. One
16 of the incidents occurred before CPD filed the SAR about Mr. Gill on or about May 23, 2012;
17 the other occurred after. This religious harassment is attributable to the training of local law
18 enforcement on the SARs standards and process.

19 91. In approximately September 2010, after Mr. Gill had converted to Islam, two
20 CPD officers visited him at his apartment and requested to speak to him about supposedly "anti-
21 American statements" that he had made. One of the officers referred to having a file on Mr. Gill,
22 refused to explain what "anti-American statements" Mr. Gill had purportedly made or the source
23 of the information, and stated that he wished to ensure Mr. Gill would not turn into another
24 Mohammed Atta, one of the individuals identified as a September 11 hijacker. Mr. Gill still does
25 not know how he came to the attention of the CPD.

26 92. Around or after July 2012, Mr. Gill also received a telephone call from a CPD
27 officer. Over the phone, the CPD officer said Mr. Gill should shut down his Facebook page
28 because of the video games Mr. Gill played. At the time, Mr. Gill had a picture of the Shahada,

1 the Muslim statement of faith, on his Facebook page. Mr. Gill told the CPD officer he would not
2 take down his Facebook page and Mr. Gill also told the CPD officer that he believed the CPD
3 wanted Mr. Gill to take down his Facebook page because of its references to Islam. The CPD
4 officer refused to comment on Mr. Gill's observation, but stated that he had a report on Mr. Gill
5 and indicated that Mr. Gill was on some kind of watch list.

6 93. By describing Mr. Gill's conversion to Islam and "pious demeanor" in the SAR as
7 "worthy of note," CPD implicitly acknowledges that it found him "suspicious" because he is a
8 devout Muslim.

9 94. Defendants' issuance of overly broad definitions of "suspicious activity" and the
10 categories of behavior they have identified as "suspicious" include, among other things,
11 "[a]cquisition of expertise" (PM-ISE) and "[n]o obvious signs of employment" (DOJ). On
12 information and belief, CPD officers are trained in Defendants' standards for SAR reporting.

13 95. Defendants' overly broad standards for reporting suspicious activity opens the
14 door to and encourages religious profiling. These standards opened the door to and encouraged
15 the religious profiling of Mr. Gill by CPD, CPD's repeated questioning and ongoing scrutiny of
16 Mr. Gill, and CPD's identification of Mr. Gill in a SAR as someone engaged in activity with a
17 potential nexus to terrorism.

18 96. In addition, the Functional Standard instructs law enforcement agencies at the
19 "[i]nitial [r]esponse and [i]nvestigation stage" to respond to the observation reported in a SAR,
20 and "gather[] additional facts," by, *inter alia*, "engaging the suspect in conversation" and "other
21 investigative activities." Functional Standard 1.5 at 32; Functional Standard 1.5.5 at 53. The
22 CPD was implementing the protocols set forth in the Functional Standard when it harassed Mr.
23 Gill on or about May 2012, before, and after.

24 97. Because Mr. Gill is the subject of a SAR that falls under Defendants' standards
25 for suspicious activity reporting, Mr. Gill has been automatically subjected to law enforcement
26 scrutiny. That scrutiny has included, among other things, CPD's telephone call to him around or
27 after July 2012 and the FBI's creation of a file about and investigation of Mr. Gill.

1 98. Given the repeated harassment Mr. Gill has already suffered by CPD, he fears
2 further action may be taken against him by CPD and other investigative agencies as the result of
3 this SAR. He also fears further investigative harassment at the hands of the CPD and other
4 agencies caused by the existence of the SAR.

5 99. Mr. Gill also has experienced frustration and stress resulting from the creation of
6 the SAR based on innocent conduct. He is also deeply troubled by what may result from the
7 collection, maintenance, and dissemination in a national database of a report describing him as
8 engaging in suspicious activity with a potential nexus to terrorism.

9 100. The SAR about Mr. Gill is maintained and will continue to be maintained in one
10 or more national SAR databases, where it can be accessed by law enforcement agencies across
11 the country.

12 **2. James Prigoff**

13 101. James Prigoff is a United States citizen who resides in Sacramento, California.
14 He is an internationally renowned photographer. The focus of his work is public art, such as
15 murals and graffiti art. He has amassed over 80,000 photographic slides and published several
16 books containing his photography. Mr. Prigoff is also a former business executive, having
17 served as a Senior Vice President of the Sara Lee Corporation and a President of a division of
18 Levi Strauss.

19 102. In or around the spring of 2004, Mr. Prigoff was in Boston, Massachusetts. While
20 there, he sought to photograph a famous piece of public art known as the “Rainbow Swash,”
21 located in the Dorchester neighborhood of Boston. The artwork is painted on a natural gas
22 storage tank, which is surrounded by a chain link fence. It is highly visible to commuters from
23 the local expressway.

24 103. Mr. Prigoff drove a rental car to a public area outside the fence surrounding the
25 Rainbow Swash, and set up to take photographs. He chose the location in part because of
26 favorable lighting conditions. From this location, the sun was behind him and casting its light on
27 the Rainbow Swash. Before Mr. Prigoff could take any photographs, two private security guards
28 came out from inside the fenced area and told him that he was not allowed to photograph,

1 claiming the area was private property. Mr. Prigoff pointed out to the security guards that he
2 was not, in fact, on private property. The guards still insisted that Mr. Prigoff could not
3 photograph.

4 104. To avoid a confrontation with the guards, Mr. Prigoff departed. He left without
5 giving the security guards any identifying information.

6 105. He drove further down the road to another public location outside the fenced
7 perimeter and attempted to take photographs from this second location. But the guards began to
8 follow him.

9 106. To avoid further harassment by the guards, he drove to a third location on the
10 other side of the Rainbow Swash. The guards did not follow him to this third location, and he
11 was finally able to take photographs of the Rainbow Swash unmolested. But the lighting
12 conditions were significantly inferior to those at the first two locations; from this third location,
13 he had to photograph into the sunlight.

14 107. At no point while he was attempting to photograph the Rainbow Swash did Mr.
15 Prigoff engage in conduct that gave rise to a reasonable suspicion of criminal activity.

16 108. Mr. Prigoff subsequently discovered photographs online, including on the
17 Rainbow Swash's Wikipedia webpage. These widely available photographs were taken from
18 vantage points closer than the three locations from which Mr. Prigoff attempted to and actually
19 took photographs.

20 109. Mr. Prigoff returned to his home in Sacramento, California after his trip to
21 Boston. A few months later, on or about August 19, 2004, he came home one day to find a
22 business card affixed to his door from Agent A. Ayaz of the Joint Terrorism Task Force, which,
23 as noted above, is a partnership between the FBI and other law enforcement agencies. On the
24 back was a handwritten note stating, "Mr. Prigoff, please call me. Thanks." Mr. Prigoff later
25 learned from a neighbor across the street that two agents had knocked on her door and asked for
26 information about Mr. Prigoff.

27 110. Mr. Prigoff called Mr. Ayaz, who asked if Mr. Prigoff had been to Boston.
28 Realizing that Mr. Ayaz was referring to his efforts to photograph a piece of public art, Mr.

1 Prigoff explained what had occurred. On information and belief, security guards at the site of the
2 Rainbow Swash had submitted a SAR or SAR precursor report regarding Mr. Prigoff that
3 included his rental car information, after which authorities traced him from Boston,
4 Massachusetts, to his home in Sacramento, California.

5 111. Mr. Prigoff is very upset that he was tracked cross-country from Boston to
6 Sacramento, and contacted by law enforcement agents at his home over his effort to engage in
7 photography from a public location. Mr. Prigoff is also very upset that law enforcement agents
8 questioned at least one of his neighbors about him, as such questioning casts the negative and
9 strong implication that Mr. Prigoff had somehow engaged in misconduct.

10 112. Taking photographs of infrastructure falls under one or more of the behavioral
11 categories identified by Defendant PM-ISE under the Functional Standard as “suspicious,” and
12 also falls under one or more behavioral categories identified by Defendant DOJ, such as the
13 catch-all behavioral category of “acting suspiciously.” After attempting to photograph a piece of
14 public art painted on a natural gas storage tank in Boston, Mr. Prigoff was tracked to his home in
15 Sacramento and questioned about his trip to Boston, even though he never provided the security
16 guards with identifying information. On information and belief, Mr. Prigoff is the subject of a
17 SAR or SAR precursor report, which was filed by security guards at the Rainbow Swash. On
18 information and belief, the report about him was collected, maintained, and disseminated through
19 a fusion center database, and uploaded to eGuardian and/or another national SAR or similar
20 counterterrorism database. On information and belief, the report about him was collected,
21 maintained, and disseminated under standards that authorized collection, maintenance and
22 dissemination of information even in the absence of reasonable suspicion of criminal activity;
23 Defendants’ standards for SAR reporting ratify that conduct.

24 113. On information and belief, security guards at the Rainbow Swash were trained in
25 standards that encourage reporting of activity deemed connected to terrorism, even in the
26 absence of reasonable suspicion of criminal activity; Defendants’ standards for SAR reporting
27 ratify that conduct. Because of that training, they interfered with Mr. Prigoff’s lawful efforts to
28 take photographs of the Rainbow Swash.

1 114. Because Mr. Prigoff is the subject of a report that falls under Defendants’
2 standards for suspicious activity reporting, Mr. Prigoff has been automatically subjected to law
3 enforcement scrutiny. That scrutiny has included but may not be limited to a follow-up visit by
4 an agent of the Joint Terrorism Task Force to his home, a telephone call with that agent, and
5 inquiries by that agent of at least one of his neighbors about him.

6 115. Upon information and belief, the report about Mr. Prigoff is maintained and will
7 continue to be maintained in one or more national SAR or similar counterterrorism databases,
8 where it can be accessed by law enforcement agencies across the country.

9 116. Mr. Prigoff continues to be an active photographer and often takes pictures of
10 architectural structures and post offices, among other sites that could be described as
11 “infrastructure.” Because taking photographs of infrastructure falls under one or more of the
12 behavioral categories identified by Defendant PM-ISE under the Functional Standard as
13 “suspicious,” and also falls under one or more behavioral categories identified by Defendant
14 DOJ, such as the catch-all behavioral category of “acting suspiciously,” he is likely to be the
15 subject of another SAR in the future. He fears that his efforts to take photographs of such areas
16 will be hindered again in the future.

17 117. Mr. Prigoff is also deeply troubled by what may result from the collection,
18 maintenance, and dissemination in a national database of a report describing him as engaging in
19 suspicious activity with a potential nexus to terrorism.

20 **3. Khaled Ibrahim**

21 118. Khaled Ibrahim is a United States citizen of Egyptian descent living in San Jose,
22 California. He works in accounting for Nordix Computer Corporation, a computer network
23 consulting and service company. He formerly worked as a purchasing agent for Nordix. As part
24 of his job as purchasing agent, Mr. Ibrahim bought computers in bulk from retail stores, where
25 the stores allowed such transactions.

26 119. On several occasions in 2011, Mr. Ibrahim went to the Best Buy in Dublin,
27 California in order to attempt to purchase computers in bulk for Nordix. On one such occasion,
28 he was told that management did not allow such bulk purchases and, with that, Mr. Ibrahim left.

1 120. At no point while he was attempting to purchase computers from Best Buy did
2 Mr. Ibrahim engage in conduct that gave rise to a reasonable suspicion of criminal activity.

3 121. Mr. Ibrahim is the subject of a SAR, created on November 14, 2011, regarding
4 Mr. Ibrahim's attempts to purchase "a large amount of computers." The SAR about him was
5 collected, maintained, and disseminated through a fusion center SAR database, and uploaded to
6 the FBI's eGuardian database. Upon information and belief, the personnel at the fusion center
7 who uploaded Mr. Ibrahim's SAR to eGuardian were trained in Defendants' standards for SAR
8 reporting.

9 122. The SAR pertaining to Mr. Ibrahim falls into one or more of the behavioral
10 categories identified in the Functional Standard, in particular, "[a]cquisition ... of unusual
11 quantities of materials." Functional Standard 1.5 at 30; Functional Standard 1.5.5 at 50. It also
12 falls under one or more behavioral categories identified by Defendant DOJ, such as the catch-all
13 behavioral category of "acting suspiciously" and DOJ's "Potential Indicators of Terrorist
14 Activities Related to Electronic Stores."

15 123. Because Mr. Ibrahim is the subject of a SAR that falls under Defendants'
16 standards for suspicious activity reporting, Mr. Ibrahim has been automatically subjected to law
17 enforcement scrutiny. That scrutiny may include but is not limited to scrutiny or interviews by
18 any of the law enforcement agencies across the country that have access to the FBI's eGuardian
19 system, to which his SAR was uploaded.

20 124. Mr. Ibrahim is particularly disturbed that trained law enforcement personnel at a
21 fusion center uploaded the SAR about him to eGuardian, thereby flagging him as an individual
22 with a potential nexus to terrorism. He is also troubled by what may result from the collection,
23 maintenance, and dissemination in a national database of a report describing him as engaging in
24 suspicious activity with a potential nexus to terrorism. Mr. Ibrahim is upset that a SAR was
25 entered about him potentially because of his Middle Eastern descent, and believes that this
26 system of racial profiling diminishes the rights of Middle Eastern communities.

1 125. The SAR about Mr. Ibrahim is maintained and will continue to be maintained in
2 one or more national SAR databases, where it can be accessed by law enforcement agencies
3 across the country.

4 **4. Tariq Razak**

5 126. Tariq Razak is a United States citizen of Pakistani descent. He resides in
6 Placentia, California. A graduate of the University of California at Irvine, he works in the bio-
7 tech industry.

8 127. Mr. Razak is the subject of a SAR pertaining to a “Male of Middle Eastern decent
9 [sic] observed surveying entry/exit points” at the Santa Ana Train Depot.

10 128. On May 16, 2011, Santa Ana Police Officer J. Gallardo filed a SAR regarding Mr.
11 Razak. According to the SAR, Officer Gallardo responded to a call at the Santa Ana Train
12 Depot from Security Officer Karina De La Rosa. Ms. De La Rosa explained that her “suspicion
13 became aroused because the male appeared to be observant of his surroundings and was
14 constantly surveying all areas of the facility. The male’s appearance was neat and clean with a
15 closely cropped beard, short hair wearing blue jeans and a blue plaid shirt.” The SAR goes on to
16 describe how Mr. Razak, after studying entry/exit points moved to a part of the train station
17 where the restrooms are located and eventually departed the train station with “a female wearing
18 a white burka head dress” who had emerged from the restrooms. Office Gallardo concludes the
19 SAR by requesting that it be forwarded to the fusion center in Orange County “for review and
20 possible follow-up.”

21 129. According to the SAR, Security Officer De La Rosa stated that “she received
22 ‘suspicious activity as related to terrorism training’” and that “the behavior depicted by the male
23 was similar to examples shown in her training raising her suspicion and making the decision to
24 notify the police.” Mr. Razak is the subject of the SAR because of Defendants’ trainings on their
25 SAR reporting standards to state and local law enforcement and the private sector.

26 130. Mr. Razak was, indeed, at the Santa Ana Train Depot on May 16, 2011. The
27 woman he was with was his mother. He had an appointment at the county employment resource
28 center, which is located in the station building. He had not been to the station before and spent

1 some time locating the office before meeting up with his mother by the restrooms and leaving.
2 His mother was wearing a hijab (head scarf), and not a burka.

3 131. Mr. Razak did not talk to any security officers at the Santa Ana Train Depot that
4 day. The SAR notes the make and model of Mr. Razak's vehicle, and his license plate number.
5 On information and belief, Security Officer De La Rosa followed Mr. Razak to his vehicle and
6 wrote down his license plate number to identify him.

7 132. At no point while he was waiting in the Train Depot did Mr. Razak engage in
8 conduct that gave rise to a reasonable suspicion of criminal activity.

9 133. This SAR falls into one or more of the behavioral categories identified in the
10 Functional Standard, in particular, "Observation/Surveillance." Functional Standard 1.5 at 30;
11 Functional Standard 1.5.5 at 49. It also falls under DOJ's "Potential Indicators of Terrorist
12 Activities Related to Mass Transportation," which includes, among other things, "[u]nusual or
13 prolonged interest in ... [e]ntry points and access controls." It also falls under one or more
14 behavioral categories identified by Defendant DOJ, such as the catch-all behavioral category of
15 "acting suspiciously." The SAR about Mr. Razak was collected, maintained, and disseminated
16 through a fusion center SAR database, and on information and belief has been uploaded to
17 eGuardian and/or another national SAR database.

18 134. Because Mr. Razak is the subject of a SAR that falls under Defendants' standards
19 for suspicious activity reporting, Mr. Razak has been automatically subjected to law enforcement
20 scrutiny. That scrutiny may include but is not limited to scrutiny or interviews by any of the law
21 enforcement agencies across the country that have access to the SAR about him.

22 135. Mr. Razak is deeply troubled by what may result from the collection,
23 maintenance, and dissemination in a national database of a report describing him as engaging in
24 suspicious activity with a potential nexus to terrorism.

25 136. Upon information and belief, the SAR about Mr. Razak is maintained and will
26 continue to be maintained in one or more national SAR databases, where it can be accessed by
27 law enforcement agencies across the country.

28 **5. Aaron Conklin**

1 137. Aaron Conklin resides in Vallejo, California. Mr. Conklin is a student at Diablo
2 Valley College, studying graphic design. He is also an amateur photographer who posts his
3 work online. Mr. Conklin has a strong aesthetic interest in photographing industrial architecture,
4 including refineries.

5 138. In either 2011 or 2012, Mr. Conklin was photographing the Valero Refinery
6 located in Benicia, California at around 10:00 p.m. He chose to photograph at night for aesthetic
7 reasons, to capture the refinery illuminated against the dark night sky. Mr. Conklin set up in an
8 empty lot where a food truck parks during the day, near a publicly accessible sidewalk and a bus
9 stop. Mr. Conklin was positioned outside the refinery's fenced perimeter.

10 139. Despite Mr. Conklin's location outside the refinery's perimeter in a publicly
11 accessible location, a private security guard from the refinery came out to tell Mr. Conklin that
12 he could not photograph the refinery and issued stern warnings. Mr. Conklin felt threatened and
13 feared that the situation would escalate if he remained, so he left. Because he fears further
14 harassment, he has not returned to photograph the refinery, despite his desire to develop his
15 portfolio with photographs of industrial sites.

16 140. Mr. Conklin later discovered that images of the refinery, taken from a similar
17 location, were viewable on the internet through Google Maps, using the site's "street view"
18 feature.

19 141. In or about November 2013, Mr. Conklin was attempting to photograph the Shell
20 Refinery located in Martinez, California at approximately 9:30 or 10:00 pm. He wished to
21 photograph the refinery at night for artistic reasons.

22 142. Mr. Conklin set up in the parking lot of a strip mall containing a smog testing
23 center and a dance studio, across the street from the Shell Refinery's fenced perimeter.

24 143. As Mr. Conklin was preparing to photograph, a private security guard came out
25 from the refinery and stopped him. At least one other guard from the refinery soon joined the
26 first security guard. The security guards told Mr. Conklin that he was prohibited from
27 photographing the refinery and that photographing the refinery was illegal and somehow
28 connected to terrorism.

1 144. Despite Mr. Conklin's complete cooperation with the security guards, they called
2 the Contra Costa County Sheriff's department, and at least two deputies arrived on the scene.
3 The deputies searched through the pictures on Mr. Conklin's camera and searched his car. They
4 also took pictures of Mr. Conklin, his camera equipment, and his vehicle. Mr. Conklin was
5 afraid and felt as though he did not have the option to object to the searches without making
6 matters worse for himself.

7 145. The deputies concluded by telling Mr. Conklin that he would have to be placed on
8 an "NSA watch list." Only then was Mr. Conklin allowed to leave. The entire encounter lasted
9 between forty-five minutes and an hour.

10 146. At no point while he was attempting to photograph the Valero or Shell refineries
11 did Mr. Conklin engage in conduct that gave rise to a reasonable suspicion of criminal activity.

12 147. Taking photographs of infrastructure falls under one or more of the behavioral
13 categories identified by Defendant PM-ISE as "suspicious," and also falls under one or more
14 behavioral categories identified by Defendant DOJ, such as the catch-all behavioral category of
15 "acting suspiciously." A Contra Costa deputy sheriff expressly told Mr. Conklin that he had to
16 be put on an "NSA watchlist." On information and belief, Mr. Conklin is the subject of a SAR,
17 which was collected, maintained, and disseminated through a fusion center SAR database, and
18 uploaded to eGuardian and/or another national SAR database.

19 148. On information and belief, security guards at oil refineries are trained in
20 Defendants' standards for SAR reporting. As a result, security guards at the Valero and Shell oil
21 refineries prevented Mr. Conklin from taking photographs of sites of aesthetic interest to him.
22 On information and belief, the Contra Costa deputy sheriffs are trained in Defendants' standards
23 for SAR reporting. As a result, they detained and searched Mr. Conklin for doing nothing more
24 than attempting to photograph a site of aesthetic interest from a public location, told Mr. Conklin
25 that he had to be placed on a watchlist, and reported Mr. Conklin in a SAR.

26 149. Because Mr. Conklin is the subject of a SAR that falls under Defendants'
27 standards for suspicious activity reporting, Mr. Conklin has been automatically subjected to law
28

1 enforcement scrutiny. That scrutiny may include but is not limited to scrutiny or interviews by
2 any of the law enforcement agencies across the country that have access to the SAR about him.

3 150. Mr. Conklin was very upset by the encounter with private security and Contra
4 Costa deputy sheriffs at the Shell refinery. He wants to continue taking photographs of
5 industrial architecture in the future. But because of this event and the earlier incident at the
6 Valero refinery, he is afraid to continue photographing industrial sites for fear of being stopped
7 and questioned or, worse, arrested. Mr. Conklin has been chilled and has refrained from
8 engaging in certain forms of photography, despite his desire to develop his photography
9 portfolio. His inability to develop his photography portfolio limits his ability to apply
10 successfully for jobs in his chosen field.

11 151. Mr. Conklin is also deeply troubled by what may result from the collection,
12 maintenance, and dissemination in a national database of a report describing him as engaging in
13 suspicious activity with a potential nexus to terrorism.

14 152. Mr. Conklin currently worries about being on a watchlist because he fears it will
15 adversely impact him in the future. For example, he is concerned about his employment
16 prospects if employers conduct background checks and he is flagged as someone with a potential
17 connection to terrorism. Mr. Conklin also currently worries about being on a watchlist because
18 he fears it will adversely impact his family. His father has worked and is seeking employment in
19 the aviation industry and as a result must undergo rigorous background checks; Mr. Conklin is
20 afraid about jeopardizing his father's career based on his own innocent efforts to take
21 photographs of aesthetically interesting sites.

22 **FIRST CLAIM FOR RELIEF**

23 **Violation of APA by Defendants DOJ and Loretta Lynch for**
24 **Agency Action that is Arbitrary and Capricious and Not in Accordance with Law**
25 **5 U.S.C. §§ 702, 706(2)(A)**

26 153. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth
27 herein.

28 154. DOJ's promulgation of DOJ's SAR Standard constitutes final agency action.

1 the systems they operate receive support from OJP and constitute “projects” and “criminal
2 intelligence systems” within the meaning of 28 CFR Part 23.

3 162. Because the Functional Standard is broader than 28 CFR Part 23 and authorizes
4 the collection, maintenance, and dissemination of information even in the absence of reasonable
5 suspicion of criminal activity, it conflicts with 28 CFR Part 23. PM-ISE has also undermined 28
6 CFR Part 23 by training participants in the NSI on the Functional Standard.

7 163. Defendants PM-ISE and Kshemendra Paul have not provided a reasoned basis for
8 adopting a conflicting standard.

9 164. Defendants’ actions described herein were and are arbitrary, capricious, an
10 abuse of discretion, otherwise not in accordance with law and should be set aside as unlawful
11 pursuant to 5 U.S.C. § 706 (2012).

12 **THIRD CLAIM FOR RELIEF**

13 **Violation of APA by Defendants DOJ and Loretta Lynch** 14 **for Issuance of a Legislative Rule Without Notice and Comment** 15 **5 U.S.C. §§ 553, 706(2)(A), (D)**

16 165. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth
17 herein.

18 166. DOJ’s SAR’s Standard is a legislative rule but was adopted without observing the
19 notice and comment procedure required under 5 U.S.C. § 553 (2012). Because DOJ’s SAR
20 Standard was adopted without observing the required notice and comment procedure,
21 Defendants’ actions described herein were and are also arbitrary, capricious, an abuse of
22 discretion, otherwise not in accordance with law, and without observance of procedure required
23 by law. Defendants’ actions should be set aside as unlawful pursuant to 5 U.S.C. § 706 (2012).

24 **FOURTH CLAIM FOR RELIEF**

25 **Violation of APA by Defendants PM-ISE and Kshemendra Paul** 26 **for Issuance of a Legislative Rule Without Notice and Comment** 27 **5 U.S.C. §§ 553, 706(2)(A), (D)**

28 167. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth
herein.

1 168. PM-ISE's Functional Standard is a legislative rule but was adopted without
2 observing the notice and comment procedure required under 5 U.S.C. § 553 (2012). Because
3 PM-ISE's Functional Standard was adopted without observing the required notice and comment
4 procedure, Defendants' actions described herein were and are also arbitrary, capricious, an abuse
5 of discretion, otherwise not in accordance with law, and without observance of procedure
6 required by law. Defendants' actions should be set aside as unlawful pursuant to 5 U.S.C. § 706
7 (2012).

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiffs pray that the Court:

10 1. Enter a declaratory judgment that DOJ's standard for SAR reporting, and any
11 successor standard for SAR reporting that adopts a standard lower than "reasonable suspicion,"
12 is invalid and issue a permanent injunction requiring Defendants DOJ and LORETTA LYNCH
13 to rescind DOJ's SAR Standard and cease and desist from training participants in the NSI in
14 DOJ's SAR Standard.

15 2. Enter a declaratory judgment that PM-ISE's Functional Standard, and any
16 successor standard for SAR reporting that adopts a standard lower than "reasonable suspicion,"
17 is invalid and issue a permanent injunction requiring Defendants PM-ISE and KSHEMENDRA
18 PAUL to rescind the Functional Standard and cease and desist from training participants in the
19 NSI in the Functional Standard.

20 3. Enter a declaratory judgment that 28 CFR Part 23 sets forth the standard for SAR
21 reporting.

22 4. Enter a permanent injunction requiring Defendants to use 28 CFR Part 23 as the
23 standard for SAR reporting.

24 5. Award Plaintiffs their costs and expenses, including reasonable attorneys' fees
25 and expert witness fees; and

26 6. Award such further and additional relief as is just and proper.

27 DATED: August 25, 2015

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Respectfully submitted,

By: _____ /s/ Linda Lye _____

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