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

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

20 Plaintiffs,

21 v.

21 DEPARTMENT OF JUSTICE; LORETTA
22 LYNCH, in her official capacity as the
23 Attorney General of the United States;
24 PROGRAM MANAGER – INFORMATION
25 SHARING ENVIRONMENT;
26 KSTEMENDRA PAUL, in his official
27 capacity as the Program Manager of the
28 Information Sharing Environment,

26 Defendants.

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

**PLAINTIFFS’ MOTION TO STRIKE
DEFENDANTS’ DECLARATIONS
AND TO SUPPLEMENT THE
RECORD WITH PLAINTIFFS’
DECLARATIONS; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT**

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

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NOTICE OF MOTION TO STRIKE AND SUPPLEMENT THE RECORD

TO DEFENDANTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on December 8, 2016 at 1:30 p.m., or as soon thereafter as the parties may be heard before the Honorable Richard Seeborg in the District Court for the Northern District of California in Courtroom 3, 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiffs Wiley Gill, James Prigoff, Tariq Razak, Khaled Ibrahim, and Aaron Conklin (“Plaintiffs”) will and hereby do move to strike from the record the declarations of Marilyn Atsatt and Basil Harris, submitted by Defendants, and to supplement the Administrative Record with the Plaintiffs’ declarations. This motion is based on the attached memorandum of points and authorities; Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment and Cross-Motion for Summary Judgment and supporting documents; all pleadings and papers filed in this action; and such oral argument and evidence as may be presented at the hearing on the motion.

Dated: September 22, 2016

By: _____ /s/ Linda Lye

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1 **I. INTRODUCTION**

2 Plaintiffs move to strike the declarations of Marilyn Atsatt and Basil Harris submitted by
3 Defendants, and to supplement the Administrative Record with the declarations of Wiley Gill,
4 Tariq Razak, Khaled Ibrahim, Aaron Conklin, James Prigoff, and Linda Lye, submitted by
5 Plaintiffs. This action is a challenge under the Administrative Procedure Act (“APA”) to the
6 Functional Standard, which establishes a nationwide process for collecting, evaluating, and
7 disseminating information about activity that Defendants deem to have a potential nexus to
8 terrorism. In APA actions, the scope of judicial review is limited to the Administrative Record
9 certified by the agency, subject to certain exceptions.

10 Defendants seek to introduce evidence through two extra-record declarations, but have not
11 moved to supplement the Record or otherwise offered any reason why this Court should consider
12 the information in their declarations. The declarations should therefore be stricken.

13 The Court should supplement the Record, however, with the declarations of the Plaintiffs
14 in this action, Gill, Razak, Ibrahim, Conklin, and Prigoff, which provide factual information
15 related to their standing. Courts may consider extra-record evidence to establish standing.

16 The Court should also supplement the Record with the declaration of Linda Lye, which
17 provides information related to the funding used by systems on which suspicious activity reports
18 are stored and exchanged. This information falls within exceptions to the general rule limiting
19 APA review to the Record.

20 **II. LEGAL STANDARD**

21 The Administrative Procedure Act limits the scope of judicial review to the administrative
22 record. *See* 5 U.S.C. § 706; *Thompson v. U.S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989);
23 *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1044 (N.D. Cal. 2007) (denying motion to add
24 documents to record). An agency’s designation and certification of an administrative record is
25 entitled to a “presumption of administrative regularity.” *McCrary*, 495 F. Supp. 2d at 1041.
26 Courts presume that the agency properly designated the record absent “clear evidence to the
27 contrary.” *Id.* To rebut the presumption of regularity, the party seeking to supplement the record
28

1 bears a “heavy burden.” *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th
2 Cir. 2010).

3 The Ninth Circuit has recognized several exceptions, however, to the record-review rule.
4 First, consideration of extra-record declarations is plainly proper to address jurisdictional issues
5 such as standing. *See, e.g., Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520,
6 1528 (9th Cir. 1997). Second, courts may supplement the record “if necessary to determine
7 whether the agency has considered all relevant factors and has explained its decision” or “to
8 explain technical terms or complex subject matter.” *Sw. Ctr. for Biological Diversity v. U.S.*
9 *Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (citation and internal quotation marks omitted).

10 **III. ARGUMENT**

11 **A. The Court Should Strike Defendants’ Declarations Because They Seek to** 12 **Introduce Facts Outside the Administrative Record.**

13 In support of their motion for summary judgment, Defendants have filed two extra-record
14 declarations. The Declaration of Marilyn Atsatt, an official in the Department of Justice’s Office
15 of Justice Programs, states that her office did not provide “funding to the Federal Bureau of
16 Investigation (FBI) for eGuardian or the NSI SAR Data Repository.” *See* Dkt. No. 113-2 ¶ 3.
17 The Declaration of Basil Harris, the Chief of Staff to Defendant Office of the Program Manager
18 for the Information Sharing Environment, describes the process undertaken by that office in
19 developing the Functional Standard. *See* Dkt. No. 113-1. But Defendants have not moved to
20 supplement the record with these declarations, nor provided any reasons why this Court should
21 depart from the default rule in APA cases that limits the court’s review to “the administrative
22 record that the agency compiles and submits to the court.” *McCrary*, 495 F. Supp. 2d at 1041.
23 The declarations should therefore be stricken.

24 It bears emphasis that throughout this proceeding, Defendants have asserted vigorously
25 that this matter should be decided solely on the basis of the Administrative Record they certified,
26 and they fought aggressively any efforts to expand the Record. Defendants repeatedly invoked
27 the record-review rule in objecting to Plaintiffs’ efforts to take discovery. *See, e.g., Case*
28 *Management Statements* (Dkt. No. 36 at 6-9; Dkt. No. 40 at 5-6). After Defendants certified the

1 Administrative Record, (*see* Dkt. No. 52-1), Plaintiffs identified numerous gaps in the Record.
2 After meet and confer efforts proved unfruitful, Plaintiffs were forced to litigate the adequacy of
3 the Record. *See* Pltfs.’ Mot. to Complete Administrative Record (Dkt. No. 73). Although
4 Plaintiffs largely prevailed before the Magistrate Judge, Defendants continued to fight any effort
5 to expand the Record and sought relief before this Court from the Magistrate Judge’s order. *See*
6 Magistrate Judge Order (Dkt. No. 88); Defs.’ Mot. for Relief from Nondispositive Pretrial Order
7 of Magistrate Judge (Dkt. No. 94). Only after this Court sustained portions of the Magistrate
8 Judge’s order requiring Defendants to revisit their compilation of the Administrative Record did
9 they file a Supplemental Administrative Record. *See* Order Re Defs.’ Mot. for Relief (Dkt. No.
10 102); Am. Certification of Administrative Record and Suppl. Administrative Record (Dkt. No.
11 107-1).

12 Allowing Defendants to supplement the Record—a Record they twice certified as
13 complete (Dkt. Nos. 52-1, 107-1)—with declarations of individuals whom Plaintiffs have had no
14 opportunity to depose would violate the APA’s record-review rule and sanction gamesmanship by
15 allowing the agency to “skew the ‘record’ for review in its favor.” *Env’tl. Def. Fund, Inc. v. Blum*,
16 458 F. Supp. 650, 661 (D.D.C. 1978).

17 Moreover, the Atsatt declaration seeks to introduce information about the funding
18 received by information systems used to exchange suspicious activity reports—a factual issue that
19 is not relevant to the legal question before this Court.

20 Plaintiffs in this APA action contend that the Functional Standard is arbitrary and
21 capricious because, among other things, it creates a standard for reporting suspicious activity that
22 conflicts with a duly promulgated regulation, 28 C.F.R. Part 23, which prohibits the collection of
23 criminal intelligence, absent reasonable suspicion of criminal activity. Defendants’ defense of the
24 Functional Standard in this litigation rests heavily on the argument that information systems used
25 to exchange suspicious activity reports do not receive the funding from the Office of Justice
26 Programs that would trigger the applicability of 28 C.F.R. Part 23. *See* Defs.’ Br. at 23-25, 27.
27 But Defendants nowhere articulated funding issues in the Administrative Record as the basis for
28 their decision to reject 28 C.F.R. Part 23’s reasonable suspicion requirement. *See* AR 413. “It is

1 well-established that an agency’s action must be upheld, if at all, on the basis articulated by the
2 agency itself.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50
3 (1983).

4 Indeed, the fact that Defendants now rely on an extra-record declaration to support their
5 funding argument underscores the *post-hoc* nature of their arguments. If the funding received by
6 information systems used to exchange suspicious activity reports had played a role in Defendants’
7 decision to reject the regulation, the Record would contain factual information on this issue.
8 Defendants must defend the Functional Standard on the basis of the rationale and facts contained
9 in the Administrative Record. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156,
10 168 (1962) (“[C]ourts may not accept...counsel’s post hoc rationalizations for agency action.”).
11 This Court should not permit Defendants to support their impermissible *post-hoc* rationalization
12 through extra-record evidence. As this Court has explained, “[i]n reviewing an agency decision,
13 the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, based on
14 the administrative record that the agency compiles and submits to the court.” *McCrary*, 495 F.
15 Supp. 2d at 1041. For this additional reason, the Atsatt declaration should be stricken.

16 **B. The Court Should Supplement the Record with the Gill, Razak, Ibrahim,
17 Conklin and Prigoff Declarations Regarding Standing.**

18 Plaintiffs are filing a declaration from each of the Plaintiffs in this action. The
19 declarations explain Plaintiffs’ individual experiences and provide the factual basis for their
20 standing to bring this suit. *See Nw. Env’tl. Def. Ctr.*, 117 F.3d at 1528 (considering extra-record
21 affidavits submitted to establish standing). Defendants have acknowledged that “evidence
22 outside of the administrative record can be considered on the question of standing.” *See, e.g.*,
23 Joint Case Management Statement (Dkt. No. 36) at 6:23-24. The Court should therefore
24 supplement the Record with Plaintiffs’ declarations.

25 **C. The Court Should Supplement the Record with Information in the Lye
26 Declaration About Funding.**

27 Plaintiffs are also filing a declaration from Linda Lye, counsel in this matter, to
28 authenticate various government documents and correspondence with government agencies that

1 provide information about (1) the funding received by a fusion center in Northern California to
2 store suspicious activity reports (*see* Lye Decl. ¶¶ 2-7 & Exhs. 1-4) and (2) the funding received
3 by the Regional Information Sharing System (*see id.* ¶¶ 8-9 & Exhs. 5-6), which, according to the
4 Record, is used as a “connection and transport mechanism[] for sharing [suspicious activity
5 reports].” Supp. AR at 254.

6 Plaintiffs contend that the funding used to support suspicious activity report information
7 systems is not relevant to the question of whether the Functional Standard is arbitrary and
8 capricious. This is so because Defendants never articulated funding as their rationale for rejecting
9 28 C.F.R. Part 23 and its reasonable suspicion requirement. For this reason, the Atsatt declaration
10 submitted by Defendants should be stricken.

11 But if the Court deems the funding issue relevant, then it should supplement the Record
12 with the funding information in the Lye declaration. The Ninth Circuit allows a court to consider
13 extra-record materials “if necessary to determine ‘whether the agency has considered all relevant
14 factors and has explained its decision.’” *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1450
15 (citation omitted).

16 Even if the Court does not deem funding relevant, however, it should also supplement the
17 Record with information in the Lye declaration pertaining to the funding received by the Regional
18 Information Sharing System (¶¶ 8-9 & Exhs. 5-6). As discussed above, the Record states “the
19 DOJ-supported Regional Information Sharing Systems[®] Secure Intranet (RISSNET[™])” is one of
20 several systems used “as the connection and transport mechanisms for sharing SARs.” Supp. AR
21 at 254. The Record does not explain the technical term “Regional Information Sharing
22 Systems[®].” The Court should therefore supplement the Record with the portion of the Lye
23 declaration that sheds light on this term (Lye Decl. at ¶¶ 8-9 & Exhs. 5-6) for the separate and
24 independent reason that it assists the Court by “explain[ing] technical terms or complex subject
25 matter.” *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1450.

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FILER’S ATTESTATION

I, Phillip J. Wiese, am the ECF user whose identification and password are being used to file this PLAINTIFFS’ MOTION TO STRIKE DEFENDANTS’ DECLARATIONS AND TO SUPPLEMENT THE RECORD WITH PLAINTIFFS’ DECLARATIONS. Pursuant to L.R. 5-1(i)(3), I hereby attest that concurrence in the electronic filing of this document has been obtained from each of the other signatories.

Dated: September 22, 2016 By /s/ Phillip J. Wiese
Phillip J. Wiese