UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PARSONS, et al,

Plaintiffs,

CIVIL NO. 2:14-cv-10071-RHC-PJK

vs.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS

Pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants United States Department of Justice and the Federal Bureau of Investigation, move to dismiss this action and ask this Court to grant judgment in their favor for the reasons stated in the accompanying memorandum.

April 4, 2014

STUART F. DELERY
Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

/s/Amy E. Powell

AMY E. POWELL
Trial Attorney (NY Bar)
U.S. Department of Justice, Civil Division
Federal Programs Branch
20 Massachusetts Ave., N.W., Room 5377
Washington, D.C. 20530
Tel.: (202) 514-9836
Fax: (202) 616-8470
Email: amy.powell@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PARSONS, et al,

Plaintiffs,

CIVIL NO. 2:14-cv-10071-RHC-PJK

vs.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants.
_____/

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR
MOTION TO DISMISS

STUART F. DELERY
Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

AMY E. POWELL
Trial Attorney (NY Bar)
U.S. Department of Justice, Civil Division
Federal Programs Branch
20 Massachusetts Ave., N.W.,
Room 5377
Washington, D.C. 20530
Tel.: (202) 514-9836
Fax: (202) 616-8470
Email:amy.powell@usdoj.gov

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTORY LAW

REGULATIONS

MISCELLANEOUS

INTRODUCTION

Plaintiffs lack standing to challenge a report known as the 2011 National Gang Threat Assessment, an intelligence assessment made by the National Gang Intelligence Center ("NGIC") at the Federal Bureau of Investigation ("FBI"). Plaintiffs claim to be fans of a music band called Insane Clown Posse, who refer to themselves as "Juggalos," and they seek to challenge the 2011 report on the ground that it refers to "Juggalos" as a "hybrid gang." Plaintiffs' disagreement with the NGIC assessment does not amount to an injury-in-fact under the Constitution. Insofar as Plaintiffs plead injuries at all, such injuries are not traceable to Defendants and cannot be redressed by this Court.

Plaintiffs purport to bring all of their claims under the Administrative Procedure Act, which only permits judicial review of final agency actions for which no other remedy is available. Because the 2011 National Gang Threat Assessment creates no legal rights or obligations, it does not constitute a final agency action. Moreover, each of the alleged actions identified by Plaintiffs has some other remedy not before this Court. Finally, Plaintiffs have failed to state a claim under the First Amendment, the Fifth Amendment or the APA.

BACKGROUND

Congress established the National Gang Intelligence Center within the FBI in 2006. The NGIC is staffed by personnel from multiple agencies and has been

directed "to collect, analyze, and disseminate gang activity information" from federal, state, tribal and local authorities. *See* Violence Against Women and DOJ Reauthorization Act of 2005, Pub. L. No. 109-162, Title XI, § 1107(a), 119 Stat. 2960, 3093 (2006). Accordingly, the NGIC integrates gang intelligence from across federal, state, and local law enforcement on the growth, migration, criminal activity, and association of gangs throughout the United States. *See* Declaration of Diedre Butler, dated April 4, 2014, ("Butler Dec."), ¶ 4. NGIC's mission is to support law enforcement by sharing timely and accurate information and by providing strategic and tactical analysis of intelligence reported from across the country. *Id*.

As part of this mission, NGIC prepares a biannual report on gang activity. Butler Dec. ¶ 7. Based on information and intelligence received from law enforcement agencies across the country, NGIC identifies gang-related trends and topics of current interest to law enforcement so that law enforcement and the public may better understand current threats. *Id*. ¶ 8. A public report is provided in order to identify topics and trends in gang activity across the country. *Id*.

In 2011, NGIC published a report titled *2011 National Gang Threat Assessment – Emerging Trends*. *Id*. ¶ 7, available at http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment (hereinafter "2011 NGIC Report"). At the time, NGIC had received information and intelligence

from state and local law enforcement agencies reporting gang-like behavior by certain subsets of "Juggalos"; some of those states had labeled Juggalos as a gang. *Id*. ¶ 10. In particular, Arizona, California, Pennsylvania, and Utah had formally recognized Juggalos as a gang. 2011 NGIC Report at n.e. Accordingly, the 2011 NGIC Report included a description of this emerging trend in law enforcement. Specifically, NGIC reported the collection of information that:

> Although recognized as a gang in only four states, many Juggalos subsets exhibit gang-like behavior and engage in criminal activity and violence. Law enforcement officials in at least 21 states have identified criminal Juggalo sub-sets, according to NGIC reporting.

Id. at 22. The Report goes on to describe serious criminal activity of some of these subsets of Juggalos, and notes in a footnote that the term "Juggalos" traditionally refers to fans of the musical group the Insane Clown Posse. It does not determine, argue, or suggest that all fans of the Insane Clown Posse are engaged in criminal activity. Rather, in reporting this trend, the 2011 NGIC Report described Juggalos as a "loosely-organized hybrid gang." *Id*. The report also defines hybrid gangs as "non-traditional gangs with multiple affiliations" and indicates that they are generally "fluid in size and structure" and "difficult to track, identify, and target as they are transient and continuously evolving." *Id*.

Independently of the intelligence assessment, NGIC generally collects and disseminates information on gang activity through NGIC Online. *See* Butler Dec.

¶ 17. The NGIC Online system includes finished intelligence products, images, announcements, and other materials designed "to assist gang investigations at state, local and federal levels." *Id*. ¶ 18. All information in NGIC Online must relate to criminal gang activity. *Id*. ¶ 19.

On January 8, 2014, Plaintiffs filed a Complaint challenging the NGIC's intelligence analysis in the 2011 NGIC Report. Each Plaintiff alleges that he self-identifies as a Juggalo and that some other non-Defendant entity took some action against him based on his status as a Juggalo. In particular, Plaintiff Mark Parsons alleges that a Tennessee State Trooper searched his truck because he is a Juggalo. Compl. ¶¶ 38-39. Plaintiff Brandon Bradley alleges that, on three separate occasions, state or local law enforcement officials in California stopped and questioned him because he is a Juggalo. Compl. ¶¶ 47-74. Plaintiff Scott Gandy alleges that he removed his Insane Clown Posse tattoos after being informed the Army would deny his recruitment application; the Army nonetheless denied his application after he removed the tattoos. Compl. ¶¶ 78-88. Plaintiff Robert Hellin alleges that the Army might discipline him in the future for his Insane Clown Posse tattoos. Compl. ¶¶ 89-93. Plaintiffs Joseph Bruce and Joseph Utsler are members of the musical group the Insane Clown Posse and they allege that, in 2012, the Royal Oak Music Theater scheduled and then cancelled an Insane Clown Posse

event. Compl. ¶¶ 94-99. The Plaintiffs allege that each of these non-Defendant entities relied in whole or in part on the NGIC report.

The Complaint raises various claims under the Administrative Procedure Act, including violations of the First Amendment (free association and free expression) and the Fifth Amendment due process clause, and acting contrary to the APA. The Complaint seeks, *inter alia*, injunctive and declaratory relief "setting aside the 2011 Assessment and any other classification . . . of the Juggalos, as a whole, as a 'gang,'" ordering DOJ to "expunge and eliminate purported criminal intelligence information concerning the Juggalos" from various purported databases, and enjoining the collection of such intelligence information. [1]

ARGUMENT

Defendants move to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). When evaluating a facial challenge under Rule 12(b)(1), all of the allegations in the complaint must be taken as true, but under a factual challenge, the court can actually weigh evidence to confirm the existence of the factual predicates for subject-matter jurisdiction. *See Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012).

[1] Count 6 purports to be an independent claim under the Declaratory Judgment Act, but it is well-established that the Declaratory Judgment Act does not provide an independent basis for jurisdiction. Rather, it provides courts with discretion to fashion a remedy in cases where federal jurisdiction already exists. *Heydon v. MediaOne of Se. Mich., Inc.*, 327 F.3d 466, 470 (6th Cir. 2003).

Under Rule 12(b)(6), courts must dismiss complaints that do not allege sufficient facts to demonstrate a plausible entitlement to relief. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This plausibility showing "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation," and it "asks for more than a sheer possibility that the defendant has acted unlawfully." *Id.; see Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011).

I. PLAINTIFFS LACK CONSTITUTIONAL STANDING

A. The Standard

"The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches," and the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146-47 (2013). Article III's limitation on judicial power requires at a minimum that a plaintiff must demonstrate that he has suffered an actual or threatened injury to establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Nat'l Ass'n of*

Home Builders v. EPA, 667 F.3d 6, 11 (D.C. Cir. 2011). A plaintiff must demonstrate that: 1) it has suffered an injury in fact — an invasion of a legally protected interest which is both concrete and particularized as well as actual or imminent, not merely conjectural or hypothetical; 2) that the injury is fairly traceable to the challenged action of the defendant; and, 3) that the injury is likely to be redressed by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 560-61; *Kroll v. White Lake Ambulance Auth.*, 691 F.3d 809, 813 (6th Cir. 2012); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999).

With respect to causation and redressability, Plaintiffs must demonstrate that the injury was not "th[e] result [of] the independent action of some third party not before the court.'" *See Shearson v. Holder*, 725 F.3d 588, 592 (6th Cir. 2013) (quoting *Defenders of Wildlife*, 504 U.S. at 560–61), and that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 793 (6th Cir. 2009) (citation omitted). The Supreme Court has explained that when the "existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," it "becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit

redressability of injury." *Defenders of Wildlife*, 504 U.S. at 562 (citations omitted); *see also U.S. v. Carroll*, 667 F.3d 742, 745-46 (6th Cir. 2012) ("Redressability and causation problems often go hand in hand: If a plaintiff fails to sue the entity causing its injury, a judgment is unlikely to do him any good.").

Moreover, a plaintiff "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)). When pursuing a claim for prospective injunctive relief, a plaintiff must establish standing based on an "injury or threat of injury" that is "both real and immediate, not conjectural or hypothetical;" it should be certainly impending. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) (internal quotation marks and citations omitted); *Clapper*, 133 S.Ct. at 1146. At the pleading stage, the Plaintiff must plead sufficient facts to establish standing. *See Defenders of Wildlife*, 504 U.S. at 561; *Am. Postal Workers Union, AFL–CIO v. USPS*, 891 F.2d 304, 308 (D.C. Cir. 1989) ("a litigant must plead an injury in fact fairly traceable to the conduct complained of and likely to be redressed by the relief requested."), rev'd on other grounds, 498 U.S. 517 (1991).

B. The Plaintiffs Have Not Demonstrated a Redressable Injury

Plaintiffs have not adequately pled a redressable injury, fairly traceable to the 2011 NGIC Report. Each of the Plaintiffs asserts that some third party not before the Court caused some harm, or could cause some hypothetical future harm,

relying at least in part on the 2011 NGIC Report. To the extent the allegation of injury by the FBI's intelligence analysis is plausible, any injury involves the conduct of independent third parties, not before the Court, who are not even regulated by the Defendant agencies.

To begin, the 2011 NGIC Report does not regulate, constrain, or compel any action on behalf of the Plaintiffs or the agencies who allegedly acted against them. *Cf. Clapper*, 133 S. Ct. 1138 (finding no standing for Plaintiffs to challenge alleged surveillance that did not regulate, constrain or compel any action). There are no legal consequences to the FBI's intelligence analysis, and the Complaint does not allege that FBI has taken any action against these individual Plaintiffs in reliance on this analysis.[2] *See* Butler Dec. ¶ 8 (purpose of Report is to provide information). Instead, Plaintiffs allege that the NGIC indirectly has caused or will cause harm by leading third parties not before the court to generalize about fans of the Insane Clown Posse based on an expansive reading of the 2011 NGIC Report and to take actions against particular individuals who self-identify as Juggalos.

[2] The Complaint refers to the 2011 Report as "designating" or "classifying" Juggalos as a "hybrid gang." The language of "designation" is inapposite and is not drawn from either the statute or the report. The statute requires the NGIC to analyze and report on "gang activity information," not to "designate" or "classify" gangs for the imposition of legal consequences. In contrast to laws which impose a consequence as a result of particular classification, the NGIC's role is to synthesize and report information provided by law enforcement agencies. *Compare with* 18 U.S.C. § 2339B (criminalizing support to designated foreign terrorist organizations); 8 U.S.C. § 1189 (authorizing such designations).

This tenuous chain of causation is the sort of speculative reasoning that does not support Article III standing, and any standing for prospective relief is particularly tenuous given that the most recent report does not mention Juggalos.[3]

Plaintiff Mark Parsons. Mr. Parsons has a trucking business "Juggalo Express LLC" and decorates his truck with Insane Clown Posse paraphernalia; he alleges that a Tennessee state law enforcement officer stopped and searched his truck on one occasion in Tennessee in July 2013. Compl. ¶¶ 31-34. The state trooper allegedly "indicated that he detained Parsons for an inspection because of the hatchetman logo on the truck" and "indicated that he considered Juggalos to be a criminal gang because of the DOJ's designation." Compl. ¶¶ 38-40. This allegation concerning a vehicle inspection conducted by a Tennessee state trooper does not constitute a constitutional "injury" caused by the federal Defendants. Even assuming such an allegation would be sufficient to establish standing against the Defendants, Plaintiffs cannot plausibly allege that the Tennessee state trooper accurately read and relied solely on the NGIC's analysis. The Tennessee state trooper was not constrained or bound by the NGIC report in any way whatsoever.

[3] While injury to reputation can be a basis for Article III standing depending on the surrounding facts, *see, e.g., Foretich v. U.S.*, 351 F.3d 1198, 1214 (D.C. Cir. 2003) ("reputational injury that derives directly from government action will support Article III standing to challenge that action."), such injuries have been found generally when the government acts "directly" to regulate the injured party, *see id*. In any case, the government cast no aspersions on the character of these particular plaintiffs when it opined that some Juggalo subsets are engaged in organized criminal activity.

And while the NGIC's conclusion that "many Juggalos subsets exhibit gang-like behavior and engage in criminal activity and violence" could possibly form part of a probable cause determination by Tennessee Highway Patrol, depending on the surrounding circumstances, such a determination was not and cannot be made by the Defendants.[4] Moreover, the 2011 NGIC Report relied on other publicly available reporting that the state trooper may have considered, such as the fact that the State of Utah -- where "Juggalo Express" is incorporated -- considered the Juggalos to be a gang before the NGIC Report,[5] and media reports describing crimes committed by self-identified Juggalos. Plaintiff Parsons alleges no facts from which one could reasonably conclude that an accurate reading of the 2011 NGIC Report was the sole basis for the traffic stop. The Tennessee Highway Patrol is not a party to this action and the Court could not afford relief that would change the trooper's decision to stop Mr. Parsons. Plaintiff Parsons therefore cannot meet the "substantially more difficult" burden entailed when challenging actions taken by a third party. *See Defenders of Wildlife*, 504 U.S. at 562. Finally,

---

[4] Indeed, the Complaint does not appear to dispute the NGIC Report's central conclusion, that "many Juggalos subsets exhibit gang-like behavior and engage in criminal activity and violence." Thus, their claims reduce to the proposition that they are not part of those criminal subsets and therefore were unfairly labeled as gang members. But the report on its face qualifies its conclusions and does not label all Juggalos as involved in criminal gang activity.

[5] "Juggalos: Family or gang?", *Salt Lake Tribune* (Oct. 2, 2009), available at http://www.sltrib.com/news/ci_13474518 (discussing 2009 controversy in Utah over labeling of Juggalos as a gang).

this action seeks prospective injunctive relief, and Mr. Parsons cannot establish a non-speculative, certainly impending future injury based on a single uneventful traffic stop nearly a year ago. *See Lyons*, 461 U.S. at 102.

Plaintiff Brandon Bradley. Mr. Bradley alleges that he was stopped and questioned by state and local law enforcement in California on three separate occasions between September 2012 and January 2013; the last such stop was apparently over a year ago. He alleges that the state and local officers questioned him about being a Juggalo, and on one occasion he believed that they "entered this information into a gang information database that is part of or feeds information into the gang information database that the NGIC administers." Compl. ¶ 72. Moreover, Plaintiff Bradley infers that "each of the law enforcement officials . . . relied upon the DOJ's classification of the Juggalos as a gang when deciding whether to stop, question or otherwise detain or investigate Bradley." Compl. ¶ 74. But even if Plaintiffs' speculation as to the motivations of the state officials was accurate, it is unclear how being questioned by police officers in a public space constitutes an "injury" for the purposes of Article III. The Complaint does not allege that Mr. Bradley was constrained or placed under arrest, only that he was questioned about being a Juggalo. Second, Plaintiffs' speculation as to the motivation of the officers is implausible; the NGIC report indicates that the state of

California considered the Juggalos a gang before the report was published. [6] Accordingly, it is even more unlikely that the NGIC Report formed the sole basis for such actions by state and local officers in California. As with Mr. Parsons, there is public information about Juggalos outside of the 2011 NGIC Report that the officers may have considered in deciding to approach Mr. Bradley.

In addition, the Complaint does not allege that police questioning has occurred in over a year, and Mr. Bradley cannot establish a threat of "certainly impending" future harm. *See Clapper*, 133 S. Ct. at 1151; *Lyons*, 461 U.S. at 102. Mr. Bradley alleges that he has decided "on numerous occasions not to wear Juggalo-related clothing or other merchandise, not to publicly express his affinity for ICP music, and not to express his membership in the Juggalo community . . . in order to avoid similar negative contacts with law enforcement in the future." Compl. ¶ 75. This is exactly the sort of implausible allegation of "chilling" that the Supreme Court rejected in *Clapper*, explaining that Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." 133 S. Ct. at 1151. Similarly, in *Laird v. Tatum*, 408 U.S. 1 (1972), the Court rejected the alleged chilling effect of certain Army investigations. While acknowledging that prior

[6] *See, e.g.*, "Juggalos take issue with label as a gang", *Merced Sun Star* (July 4, 2009), available at: http://www.mercedsunstar.com/2009/07/04/934858/juggalos-take-issue-with-label.html (describing 2009 controversy over labeling of Juggalos a gang in California prosecution).

cases had held that constitutional violations may arise from the chilling effect of "regulations that fall short of a direct prohibition against the exercise of First Amendment rights," the Court declared that none of those cases involved a "chilling effect aris[ing] merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual." *Clapper*, 133 S.Ct. at 1152 (citing *Laird*, 408 U.S. at 11); *ACLU v. NSA*, 493 F.3d 644, 661 (6th Cir. 2007) ("to allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is *regulated, constrained, or compelled directly by the government's actions*, instead of by his or her own subjective chill.") (emphasis added).

Plaintiff Scott Gandy. Mr. Gandy alleges that an Army recruiter stated that Gandy "must remove or permanently cover his Juggalo tattoos or the Army would immediately deny his recruitment application;" after Plaintiff voluntarily did so, the Army denied his application. Compl. ¶¶ 83, 88. Based on these allegations, it is conjectural to conclude that his application was denied as a result of his Juggalo tattoos. Plaintiff also speculates that the recruiter advised him to remove the tattoos as a result of the 2011 NGIC Report, Compl. ¶ 81, but does not allege that the recruiter told him any such thing. Moreover, Army grooming standards are

governed by Army Regulation 670-1, including the tattoo policy at section 3-3, which does not explicitly prohibit gang tattoos, and Army recruitment standards are governed by AR 601-210, 4-2(d), which indicates that applicants with gang tattoos will be questioned and reviewed for eligibility and that "a member of a gang associated with criminal activity will also be denied enlistment." Thus, there is no plausible allegation that the Army's decision was based on the 2011 NGIC Report as opposed to some other policy or concern. Even if Plaintiffs' suppositions were correct that this particular recruiter was influenced by the 2011 NGIC Report, the Army is not a party to this action and exercises independent judgment over its grooming standards and recruitment decisions. *See Carroll*, 667 F.3d at 745-46. Nor can the Court order the Army to accept a hypothetical future application from this Plaintiff.

Plaintiff Robert Hellin. The allegations of Mr. Hellin are devoid of any factual pleadings of injury. Currently a corporal in the Army, he alleges that he has "ICP-related tattoos," and that "Hellin's identity as a Juggalo places him in imminent danger of suffering discipline or an involuntary discharge from the Army." Compl. ¶¶ 92-93. Mr. Hellin pleads no facts that even such action has been threatened, initiated, or may otherwise be "certainly impending." *Clapper*, 133 S. Ct. at 1152.

Plaintiffs Joseph Bruce and Joseph Utsler, band members, allege that a non-party to this litigation – the Royal Oak Police Department in Royal Oak, Michigan – asked another non-party to this litigation – the Royal Oak Music Theatre – to cancel a contract it had entered with another non-party to this litigation – AEG Live, and that as a result, the ICP event at the Royal Oak Music Theatre planned for October 2012 was cancelled. Compl. ¶¶ 96-98. Plaintiffs allege that they discovered that the Police Department had "cited" the 2011 NGIC Report when requesting cancellation. *Id*. ¶ 99. But these Plaintiffs do not allege that this was the only reason given for the cancellation; the Police Department and the Royal Oak Music Theatre are in no way constrained by the NGIC's analysis, and it is not plausible to speculate that they believed they were so constrained. One statement "citing" the Report, apparently made during contract negotiations, cannot amount to causation for purposes of Article III standing when at least two (perhaps three) non-parties acted to cancel the concert. Plaintiffs also do not allege any ongoing or certainly impending injury from the 2011 NGIC Report.

II. PLAINTIFFS HAVE NOT ADEQUATELY PLED APA CLAIMS.

Plaintiffs bring all of their claims under the APA, which permits judicial review of "final agency action for which there is no other adequate remedy." 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154 (1997). Under the APA, a court must "hold unlawful and set aside agency action, findings, and conclusions" that are

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), in excess of statutory authority, 5 U.S.C. § 706(2)(C), or "without observance of procedure required by law," 5 U.S.C. § 706(2)(D). Because Plaintiffs fail to identify any final agency action and have adequate alternative remedies, they have not stated APA claims.

A. Plaintiffs have not challenged a final agency action.

The "agency action" complained of in an APA case must be "final agency action." 5 U.S.C. § 704. *See Norton v. Sn. Utah Wilderness Alliance*, 542 U.S. 55, 61-62 (2004) ("SUWA"). "Agency action" is defined in § 551(13) to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court held that two conditions must be satisfied for a plaintiff to make the threshold showing of final agency action: First, the action must mark the "consummation" of the agency's decision making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow." *Id*. at 177–78.

The Complaint indicates that "[t]he DOJ and FBI engaged in 'final agency action' . . . when the Center issued the 2011 Assessment and its Juggalo gang designations." Compl. ¶ 153. However, the Complaint identifies no such

"designation" in the 2011 NGIC Report, and in any event the report is not a final agency action that determined rights or obligations of Plaintiffs or has any legal consequences. The NGIC's intelligence analysis is not intended to and in fact does not determine any such rights. Thus, even if Plaintiffs were correct in surmising that the report triggered more law enforcement scrutiny of the Juggalos, the report does not constitute final agency action. *See, e.g.*, *ACLU v. NSA*, 493 F.3d 644, 679 (6th Cir. 2007) (rejecting argument that NSA wiretapping was "final agency action" because such action did not determine the legal rights or responsibilities of the parties).

B. Plaintiffs have adequate alternative remedies.

The APA only provides a cause of action where there is no other adequate remedy. 5 U.S.C. § 704. "[F]or a cause of action to provide an adequate remedy in the § 704 context, a court need only be able to provide 'relief of the same genre' to the party seeking redress, but not necessarily 'relief identical to relief under the APA.'" *Rimmer v. Holder*, 700 F.3d 246, 262 (6th Cir. 2012) (quoting *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009). An alternative remedy is adequate if it would remedy the injury about which the plaintiff complains. *See, e.g.*, *Coker v. Sullivan*, 902 F.2d 84, 90 n.5 (D.C. Cir. 1990). The remedy need not "have [an] effect upon the challenged agency action" to be adequate. *Id.*

Plaintiffs claim that state and local authorities unconstitutionally applied a "gang" label to Plaintiffs Parsons, Bradley, Bruce and Utsler. Insofar as Plaintiffs have any cognizable claim, the appropriate vehicle for such applied constitutional challenges is a lawsuit against those state and local authorities. The Courts of Appeals have held repeatedly that lawsuits directly against non-federal entities provide an adequate alternative to APA review, therefore precluding suit under the APA. *See, e.g., Turner v. Sec'y of HUD*, 449 F.3d 536 (3d Cir. 2006); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 191-92 (4th Cir. 1999); *Wash. Legal Found. v. Alexander*, 984 F.2d 483, 486 (D.C. Cir. 1993); *Coker*, 902 F.2d at 90 ("Actions directly against the states are not merely adequate; they are also more suitable avenues for plaintiffs to pursue the relief they seek.").[7]

III. PLAINTIFFS' COUNT 1 "FREEDOM OF ASSOCIATION" CLAIMS SHOULD BE DISMISSED.

Plaintiffs have not stated a claim under the Freedom of Association Clause of the First Amendment. The First Amendment states "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Although not specifically protected in the Constitution, the Supreme

[7] Although it is unlikely that Plaintiffs Gandy and Hellin could state a claim against the military, *see Goldman v. Weinberger*, 475 U.S. 503 (1986); *Parker v. Levy*, 417 U.S. 733, 758 (1974); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), the law does permit seeking an administrative or judicial remedy for a free speech claim, *see, e.g., Blameuser v. Andrews*, 630 F.2d 538 (7th Cir. 1980).

Court has recognized a right of association because "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). The courts have interpreted this language to prohibit laws imposing penalties on mere association with others. *See, e.g., De Jonge v. State of Oregon*, 299 U.S. 353 (1937) (holding invalid "criminal syndicalism" statute that prohibited speaking at or organizing meetings of the Communist Party); *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589 (1967); *U.S. v. Robel*, 389 U.S. 258 (1967). In *Roberts*, the Supreme Court explained that the right of association may be infringed when the government "seek[s] to impose penalties or withhold benefits from individuals because of their membership in a disfavored group." *Roberts*, 468 U.S. at 622.

Plaintiffs allege that the "gang designation" of the 2011 NGIC Report and alleged "law enforcement" actions "burden" their free association with other Juggalos, the purpose of which is "protected expression." *See* Compl. ¶¶ 160-65. There are at least three problems with this claim. First, neither the 2011 NGIC Report, nor any other action by the Defendants, imposes any penalty on free association. The NGIC collects information about gangs from law enforcement

and disseminates it to other law enforcement agencies; that information could be used in any number of lawful ways, and the mere aggregation and dissemination of information imposes no penalty on anyone.

Second, assuming, *arguendo*, that collection and dissemination of gang information constituted a penalty with respect to the Plaintiffs, the penalty is not imposed as a result of mere "association." *Cf. Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 776 (1994). Rather, the gang information collected concerns persons and groups engaged in criminal activity, and Defendants have never maintained that all self-identified Juggalos are engaged in criminal activity. Butler Dec. ¶ 16.

Third, Plaintiffs' claim regarding a protected general association among fans of the same band extends beyond the bound of existing law in this area. As the Supreme Court noted, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (rejecting notion that "social association" of dance hall patrons is covered by the "right of association"). While Plaintiffs may indeed be engaged in some expressive activity as Juggalos, they seek constitutional protection for general social association, and do not claim that they gather for

purposes of petitioning the government or addressing public questions. *See id*. at 24-25. *See also City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (holding that loitering statute that affected "the social contact between gang members and others" did not prohibit "assemblies that are designed to demonstrate a group's support of, or opposition to, a particular point of view.") (plurality portion of opinion); *cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640 (Boy Scouts were organized association for the purpose of instilling values in youth).

IV. PLAINTIFFS' COUNT 2 "FREE SPEECH" CLAIMS SHOULD BE DISMISSED

Plaintiffs also have not stated a claim under the Free Speech Clause of the First Amendment. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." This protection of "speech" does not extend to "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Rather, expressive conduct must be "sufficiently imbued with elements of communication" to be entitled to First Amendment protection at all, a context-specific inquiry. *Id*.(citation omitted); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 390 (6th Cir. 2005) (rejecting challenge to dress code because "the First Amendment does not protect such vague and attenuated notions of expression—namely, self-expression through any and all clothing that a 12–year old may wish to wear on a given day.").

Plaintiffs allege that DOJ, FBI, and NGIC "identify Juggalos on the basis of their Juggalo tattoos, clothing, symbols and other merchandise," and that such targeting "burden[s]" their freedom of expression. Compl. ¶¶ 176-80. But Defendants do not govern, regulate or even encourage any specific activity alleged in the Complaint. Certainly, nothing in the 2011 NGIC Report purports to regulate Plaintiffs' tattoos, clothing or symbols. And although the Defendants analyze and disseminate information about gang activity generally, which could include symbols and signs used by the Juggalo subsets engaged in organized criminal activity, Plaintiffs have not alleged facts sufficient to conclude that information relevant to them has been disseminated.[8] In any event, the Sixth Circuit has specifically rejected the notion that information-sharing alone constitutes a First Amendment violation, "even though it may be directed at communicative or associative activities." *See Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778, 781 (6th Cir. 1983) (holding that the plaintiffs' "subjective fear" about misuse of information collected pursuant to a law enforcement operation "is insufficient to establish a First Amendment claim"); *Ctr for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365 (6th Cir. 2011) (rejecting First Amendment claim based on alleged information-sharing); *see also Reporters Comm. for Freedom of Press*

[8] Protected expressive activity may have legitimate law enforcement uses; indeed, the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

v. Am. Tel. & Tel. Co., 593 F.2d 1030, 1058 (D.C. Cir. 1978) ("the First Amendment affords no protection against Good faith criminal investigative activity beyond that afforded by the Fourth and Fifth Amendments . . . even though it may be directed at communicative or associative activities and even though it may inhibit such activities."); *Phila. Yearly Meeting of Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1338 (3d Cir. 1975) ("We cannot see where the traditional exchange of information with other law enforcement agencies results in any more objective harm than the original collation of such information.").[9] Accordingly, Plaintiffs have not stated a claim under the First Amendment.

V. COUNT 3 SHOULD BE DISMISSED BECAUSE THE 2011 NGIC REPORT IS NOT UNCONSTITUTIONALLY VAGUE

Plaintiffs have not stated a claim under the Due Process Clause of the Fifth Amendment. "It is a basic principle of due process that an enactment is void for vagueness if its *prohibitions* are not clearly defined," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (emphasis added), and in *Morales*, the Supreme Court explained that "Vagueness may invalidate a *criminal law* for either of two

[9] Plaintiffs' allegation that the "classification" is substantially overbroad, Compl. ¶ 181, is also meritless because "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). *See generally Blau*, 401 F.3d at 390. Here, if information-sharing is not a meaningful restriction on Plaintiffs' protected activity, it also cannot constitute an overbroad restriction on the rights of others for the same reasons.

independent reasons[:] First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it *prohibits*; second, it may authorize and even encourage arbitrary and discriminatory *enforcement*." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (emphasis added). In *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007), the Sixth Circuit explained:

> We have recognized that the vagueness doctrine has two primary goals: (1) to ensure fair notice to the citizenry and (2) to provide standards for enforcement [by officials]. With respect to the first goal, the Supreme Court has stated that "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." With respect to the second goal, the Supreme Court stated that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to [officials] for resolution on an *ad hoc* and subjective basis."

Id. (citations omitted).

In each of these cited cases, it is apparent that "prohibitions" must be clearly defined so as to guide "enforcement" of those prohibitions. Plaintiffs have not identified any prohibition or requirement imposed by the 2011 NGIC Report or other alleged "classification" that could be considered void for vagueness. It does not prohibit, penalize, constrain, guide or confer a benefit on any conduct whatsoever. The 2011 Report reports the NGIC's analysis of law enforcement reporting from around the country. That intelligence may or may not be used by

law enforcement entities in the investigation and enforcement of civil and criminal laws applicable in their jurisdictions. But the Report itself has no operative effect, and thus cannot be void for vagueness.[10]

VI. PLAINTIFFS' COUNT 4 ("ARBITRARY AND CAPRICIOUS" ACTION) SHOULD BE DISMISSED.

A. Plaintiffs are not within the Zone of Interests of the NGIC.

When a plaintiff brings a claim under the APA as a party allegedly "aggrieved" by some agency action that violated a substantive statute, *see* 5 U.S.C. § 702, the Supreme Court has stated that an APA suit may not proceed unless the interest asserted by the plaintiff is "arguably within the zone of interests to be protected or regulated by the statute that he says was violated." *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)) (internal quotation marks omitted). The Supreme Court recently clarified that, although this test has been called "prudential standing," that phrase is a "misnomer;" rather, "[w]hether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a

[10] To the extent Plaintiffs identify some prohibition by the Defendants that they believe is vague, they still have not adequately plead a claim of vagueness. The Defendants use a reasonably limited definition of "gangs," *see* Butler Dec. ¶ 2n.1, and have reasonably described criminal activity by certain subsets of Juggalos, *id*.

particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, --- S. Ct. ----, 2014 WL 1168967, *6 (March 25, 2014) (internal marks omitted); *see also Patel v. USCIS*, 732 F.3d 633 (6th Cir. 2013). Although the prudential-standing test "is not meant to be especially demanding," a plaintiff lacks prudential standing if his "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Patchak*, 132 S.Ct. at 2210 (internal quotation marks omitted).

In Count 4, Plaintiffs allege that the decision to describe Juggalos as "gang" in the 2011 NGIC Report is arbitrary and capricious under the APA. There is little legislative history for the amendment to the appropriations bill that created NGIC, but the plain language of the statute creates NGIC in order "to collect, analyze, and disseminate gang activity information," not to consider or protect interests alleged by Plaintiffs. Rather, it is plainly geared towards dissemination of information for use by law enforcement agencies. It cannot reasonably be assumed that Congress intended the Plaintiffs to have a say in the FBI's intelligence analysis.

B. Plaintiffs Have Not Identified Any Arbitrary Action

Pursuant to the APA's limited waiver of sovereign immunity, s*ee* 5 U.S.C. § 706(2)(A); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), the scope of judicial review of agency action is a narrow and deferential

one, and a court cannot substitute its judgment for that of the agency. *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Ky. Waterways Alliance v. Johnson*, 540 F.3d 466, 473-74 (6th Cir. 2008). Under arbitrary and capricious review, the court does not undertake its own fact-finding; rather, the court must review the administrative record as prepared by the agency. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). Under this APA standard, the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (citation omitted).

The challenged action at issue was the preparation of a report, at the direction of Congress, to provide information to law enforcement officials on gang-related matters. Assuming that this constitutes a reviewable agency action, such reports necessarily involve judgments about the collection and dissemination of information. If courts were to find that such reporting constitutes "arbitrary and capricious conduct" and therefore unlawful under the APA based on a dispute as to how content or information might be construed by the public, law enforcement agencies will be substantially constrained in conveying research and vital information to local law enforcement agencies. Moreover, to the extent Plaintiffs' "arbitrary and capricious" claim hinges on the implausible allegation that the Defendants consider all self-identified Juggalos to be "members" of a gang, that

claim is transparently incorrect from the text of the 2011 NGIC Report, which describes Juggalos as a "hybrid" gang because certain "Juggalos subsets exhibit gang-like behavior and engage in criminal activity and violence." In any case, Plaintiffs have not adequately identified any failure to consider "relevant factors" or a "clear error" of judgment.

VII. COUNT 5 SHOULD BE DISMISSED.

Count 5 alleges that Defendants have violated DOJ regulations prohibiting "criminal intelligence systems" from collecting "information about the political, religious, or social views, associations, or activities of any individual or any group, association, corporation, business, partnership, or other organization unless such information directly relates to criminal conduct or activity and there is reasonable suspicion that the subject of the information is or may be involved in criminal conduct or activity." *See* 28 C.F.R. §23.20(b); Compl ¶¶ 204-11. Plaintiffs also claim that that there are inadequate "assurances" that the Defendants will not interfere with "lawful political activities." *See* 28 C.F.R. §23.20(l); Compl. ¶214.

But the allegations in the Complaint do not come close to plausibly alleging any violation of these regulations. The NGIC does not collect or maintain information that does not relate to criminal activity. Butler Dec. ¶ 19. And Plaintiffs' bare allegations that the NGIC could maintain information about them unrelated to any criminal activity is wholly speculative, unfounded, and thus

cannot suffice to survive a motion to dismiss. There is no reason to believe that information related to Plaintiffs can be found in NGIC Online. Nor have Plaintiffs identified any threats to lawful "political activities" in which they seek to engage. Accordingly, Count 5 does not state a plausible claim under the APA.[11]

CONCLUSION

For the foregoing reasons, the Court should dismiss this action.

April 1, 2014

STUART F. DELERY
Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

/s/Amy E. Powell

AMY E. POWELL
Trial Attorney (NY Bar)
U.S. Department of Justice, Civil Division
Federal Programs Branch

[11] Plaintiffs may be able to seek a separate statutory remedy under the Privacy Act for the alleged collection and improper use of information concerning their own First Amendment activities. *See* 5 U.S.C. § 552a(e)(7) (directing that "agency maintaining a system of records" should "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity[....]"); 5 U.S.C. § 552a(g)(1)(D) (permitting suit). A Privacy Act suit is clearly the remedy intended by Congress for such claims, but Plaintiffs would not in any event have grounds to seek expungement of any criminal intelligence information concerning the Juggalos.

20 Massachusetts Ave., N.W., Room 5377
Washington, D.C. 20530
Tel.: (202) 514-9836
Fax: (202) 616-8470
Email: amy.powell@usdoj.gov

Attorneys for Defendants