No. 16-2440

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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MARK PARSONS; BRANDON BRADLEY; SCOTT GANDY; ROBERT HELLIN; JOSEPH F. BRUCE; JOSEPH W. UTSLER,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE; FEDERAL BUREAU OF INVESTIGATION,

Defendants-Appellees.

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On Appeal from the
United States District Court for the Eastern District of Michigan

# APPELLANTS' BRIEF

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# CORPORATE DISCLOSURE FORM

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-2440 Case Name: Mark Parsons, et al v. DOJ, et al

Name of counsel: Emily C. Palacios, Miller Canfield Paddock and Stone, PLC

Pursuant to 6th Cir. R. 26.1, M. Parsons, B. Bradley, S. Gandy, R. Hellin, J. Bruce, J. Utsler
*Name of Party*
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on February 8, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Emily C. Palacios
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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## STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs request oral argument because this case involves important questions of federal law that go to the heart of federal courts' authority to review agency decisions that lead to constitutional violations and government wrongdoing. This is the second time this case is before this Court on appeal, with the prior appeal resulting in a published opinion after oral argument. *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701 (6th Cir. 2015).

## I. JURISDICTIONAL STATEMENT

This case falls within the court's federal question jurisdiction. 28 U.S.C. § 1331. On January 8, 2014, Mark Parsons and five other plaintiffs filed a complaint in the United States District Court for the Eastern District of Michigan. (Compl., RE 1, Page ID # 1.) The complaint asserts that defendants United States Department of Justice and Federal Bureau of Investigation violated the plaintiffs' rights under the First and Fifth Amendments of the Constitution. The claims also involve disputes over the interpretation of 18 U.S.C. § 521 (relating to "criminal street gangs") and regulations codified at 28 C.F.R. §§ 23.1 and 23.20. The complaint seeks relief under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*.

At issue here is the district court's final order dismissing the case and entering judgment in favor of Defendants, entered on September 29, 2016. (Op. & Order, RE 45, Page ID # 577; Judgment, RE 46, Page ID # 578.) Plaintiffs filed their Notice of Appeal on October 13, 2016, within the time allotted by Federal Rules of Appellate Procedure 3 and 4(a). (Pls.' Notice of Appeal, RE 47, Page ID # 579-81.) This Court has jurisdiction under 28 U.S.C. § 1291.

## II. STATEMENT OF THE ISSUES

Plaintiffs' complaint alleges that defendants Department of Justice and Federal Bureau of Investigation improperly designated "Juggalos," or fans of the

musical group Insane Clown Posse ("ICP"), as a criminal gang. Plaintiffs are law-abiding Juggalos and the members of ICP. They seek an order declaring that the government's designation of Juggalos as a gang is unconstitutional, and an order, pursuant to the Administrative Procedure Act ("APA"), requiring the government to rescind its Juggalo gang designation and take other corrective measures.

At issue in this appeal is, first, did the district court err in dismissing plaintiffs' APA claims on the grounds they were not reviewable under the APA because the consequences alleged to flow from the government's designation—reputational harm, chilling of expressive and associational rights, illegal detainments, interference with contractual relationships, and lost job opportunities—did not constitute "legal consequences"?

Second, did the district court err in dismissing Counts 4 and 5 under the APA, alleging arbitrary and capricious action and failure to follow procedures required by law, on the ground that Defendants' action is "committed to agency discretion by law," even though there are policies, regulations, and statutes not considered by the district court that provide meaningful standards by which to judge the action here?

The answer to both these questions is yes. The district court's order dismissing plaintiffs' complaint should therefore be reversed.

## III. INTRODUCTION

Suppose the Department of Justice designates the NAACP a "hybrid gang" in a yearly report released to law-enforcement agencies nationwide. The report states that some members of the NAACP are engaged in street crime, vandalism, and other "gang-like" criminal activity, and that "transient, criminal NAACP groups pose a threat to communities." Across the country, members of the NAACP are then harassed by law enforcement and other officials because of the gang designation. One member in Tennessee is pulled over because he has an NAACP bumper sticker on his truck. Another is stopped and questioned because he is wearing apparel that identifies him as a member of the NAACP. Yet another member has an NAACP tattoo, and a military recruiter tells him he has to remove it to join the Army. Similar stories abound.

These members of the NAACP decide enough is enough, and file a lawsuit against the DOJ in federal court seeking to defend their constitutional rights of free expression and association, and their statutory rights to be free from arbitrary and capricious agency action. Substitute "National Rifle Association," "Nation of Islam," "Tea Party," "Federalist Society," "Operation Rescue," "PETA," or "Greenpeace" above, and it is easy to see the significance of this case: A seemingly mundane DOJ document can be weaponized to quell dissent and chill First Amendment expression.

Substitute "Juggalos" for "NAACP" above, and we have the facts of this case: The DOJ designates the Juggalos a "hybrid gang" in its 2011 National Gang Threat Assessment, and, as a direct result, Juggalo members across the country then suffer the specific harms alleged in the complaint. The district court held that the Juggalo-plaintiffs had no means whatsoever of challenging the gang designation, and dismissed the case.

This Court has reversed the district court once already in this case, and should do so again here. *See Parsons v. U.S. Dep't of Justice*, 801 F.3d 701 (6th Cir. 2015). In the first appeal, this Court held in a published opinion that Plaintiffs have standing to challenge the DOJ gang designation because they alleged "concrete reputational injuries resulting in allegedly improper stops, detentions, interrogations, searches, denial of employment, and interference with contractual relations" that were directly "link[ed]" to the DOJ report. *See id*. at 712, 714. On remand, however, the district court held that those same allegations of concrete harms nonetheless failed to state reviewable claims under the Administrative Procedures Act, because the DOJ report supposedly did not cause "legal consequences" for the plaintiffs. Although couched in different doctrinal terms, the district court repeated the same error here that triggered the first appeal: it continued to embrace the fiction that the DOJ's designation was not reviewable under the APA because it caused no harm to the plaintiffs despite their allegations

that the designation caused unconstitutional detainments, threatened discharge or denial of employment, and denied business opportunities, among other things. The district court's adherence to the notion that the government's gang designation does not have a controlling effect on the decision-making of local and state law enforcement officials does not square with reality. The reality is that Congress set the DOJ and FBI up to be the national gang intelligence experts, and that is how state and local law enforcement officials view their intelligence reports and the conclusions contained in them. The co-extensive and dependent relationship is evident from the plaintiffs' allegations that law enforcement officials have repeatedly identified the DOJ and its report as the source of their judgment that Juggalos are a gang and individual Juggalos are gang members.

## IV. STATEMENT OF THE CASE

### A. Juggalos

Plaintiffs are "Juggalos"—that is, fans or members of the Insane Clown Posse ("ICP") and other bands on ICP's record label, Psychopathic Records. (Compl., RE 1, ¶¶ 3, 15, 16, 29, 45, 76, 89, 94, Page ID # 2, 5, 7, 8, 11, 13, 14.) ICP is a hip-hop musical group that has been performing since the early 1990s, earning two platinum and five gold records. (*Id*. ¶¶ 21, 23, Page ID # 5-6.) The group's music deals with "social, political or religious themes." (*Id*. ¶ 22, Page ID # 6.) Songs range from "hopeful, life-affirming themes about the wonders of life

and the support that Juggalos give to one another," to "horrorcore hip hop" that tells "night-mare like stories with an underlying message that horrible things happen to people who choose evil over good." (*Id*. ¶ 3, Page ID # 2). The federal government estimates that there are over a million Juggalos in the United States. (*Id*. ¶ 5, Page ID # 3.)

Like other interest groups, Juggalos associate together to engage in First Amendment-protected activity, namely "to listen to ICP's music, to share ideas surrounding the music, to express their support of or interest in the ideas that ICP expresses through its music, to express their affiliation with ICP and the artists on its record label, and to express their affiliation with one another." (*Id*. ¶¶ 25-26, Page ID # 6; *see also id*. ¶¶ 4, 28, Page ID # 2-3, 6-7.) Juggalos express their shared identity by displaying distinctive tattoos, art, clothing, jewelry, bumper stickers, and personal belongings bearing recognizable ICP and Psychopathic Records symbols, such as the "hatchetman" logo. (*Id*. ¶¶ 4, 24, Page ID # 2-3, 6.) Some paint their faces like clowns. (*Id*. ¶ 4, Page ID # 2.)

These expressive activities and purposes are primary reasons why Juggalos associate with one another; Juggalos' purposes as a group "do not include engaging in criminal activity." (*Id*. ¶¶ 26-27, Page ID # 6.) Since there are so many Juggalos, it is inevitable that some of them commit crimes. But like other musical fan bases, the vast majority of Juggalos have nothing to do with criminal activity,

let alone organized crime. (*See id*. ¶¶ 2, 5, Page ID # 2-3.) Plaintiffs are law-abiding citizens who do not knowingly affiliate with any criminal gang. (*Id*. ¶¶ 30, 46, 77, 90, 95, Page ID # 7, 8, 11, 13, 14.)

### B. The DOJ's Juggalo Gang Designation Rule

In 2006, Congress directed the Attorney General to "establish a National Gang Intelligence Center ["NGIC"] and gang information database to be housed at and administered by" the FBI[1] for the purpose of "collect[ing], analyz[ing] and disseminat[ing] gang activity information." (*Id*. ¶ 100, Page ID # 14.) Congress directed the DOJ to make the information available to federal, state and local law enforcement agencies all over the country, and to "annually submit to Congress a report on gang activity." (*Id*. ¶¶ 100-01, Page ID # 14-15.)

Through the NGIC and the FBI, the DOJ has classified the Juggalos as a gang and has disseminated that designation to other law enforcement agencies. (*See id*. ¶¶ 118-19, 132-40, Page ID # 18, 20-21.) The DOJ publicly announced the Juggalo gang designation when it widely published the NGIC's 2011 National Gang Threat Assessment. (*Id*. ¶¶ 119, 132, Page ID # 18, 20.) The 2011 Threat Assessment defines Juggalos as "traditionally fans of the musical group the Insane Clown Posse" and describes Juggalos as "a loosely-organized hybrid gang." (*Id*.

[1] Since the FBI is an agency within the DOJ, this Brief will use the term "DOJ" to refer to both defendants.

¶¶ 132, 134, Page ID # 20.) From its publication, the 2011 Threat Assessment has been available to the general public on the NGIC website. (*Id*. ¶ 123, Page ID # 18-19.)

As a result of the DOJ's Juggalo gang designation, law enforcement officials all over the country target these music fans as criminal gang members. (*Id*. ¶ 6, Page ID # 3.) In "collect[ing], analyz[ing] and disseminat[ing] gang activity information" to law enforcement agencies throughout the country (*id*. ¶ 100, Page ID # 14-15), Defendants have used and caused other law enforcement agencies to use a person's Juggalo tattoos, clothing, insignia and ICP merchandise to infer that he or she is a Juggalo—by which they mean a "gang" member. (*Id*. ¶¶ 141-43, Page ID # 21.) The DOJ's influence over other law enforcement agencies is by design. As noted, the NGIC's Congressional mandate includes "disseminat[ing] gang activity information" to state and local law enforcement, prosecutors and correctional officers, and the FBI, Bureau of Prisons, DEA, and other federal agencies, as well as "annually submit[ting] to Congress a report on gang activity." (*Id*. ¶¶ 100-01, Page ID # 14-15.)

By 2008, the Attorney General reported that the NGIC had established "partnerships" with other federal, state, and local agencies possessing gang-related information, that the NGIC served as a "centralized intelligence resource for gang information and analytical support," and that the NGIC's work "enables gang

investigators and analysts . . . to further identify gangs and gang members . . . ***and to guide the appropriate officials in coordinating their investigations and prosecutions***." (*Id*. ¶ 103, Page ID # 15 (emphasis added).) The number of law enforcement inquiries to NGIC Online, the DOJ's Internet-based system for disseminating gang information to other law enforcement agencies, exceeds 200,000 per year. (*Id*. ¶¶ 109, 112-14, Page ID # 16-17.[2]) Through its gang-related administrative materials, the DOJ plays its intended role of having a causal impact on state and local officials' decisions and conduct. (*See id*. ¶¶ 125, 164, Page ID # 19, 25.)

### C. Plaintiffs' Injuries

By targeting and designating Juggalos as a criminal gang, the DOJ's classification directly burdens and chills Plaintiffs' freedom to associate within an artistic group, *i.e*., to associate as Juggalos. (*Id*. ¶¶ 163-66, Page ID # 25-26.) The designation also burdens Juggalos' freedom to express their identities as Juggalo music fans through distinctive tattoos, art, clothing, jewelry, bumper stickers, merchandise, and other personal belongings, which bear recognizable ICP and Psychopathic Records symbols such as the "hatchetman" logo. (*Id*. ¶¶ 4, 24, 176-

[2] Defendants have confirmed that NGIC Online contains a "gang encyclopedia" of signs, symbols and tattoos "to assist gang investigations at state, local, and federal levels." (Butler Decl., RE 20-1, ¶ 18, Page ID # 182-83.)

80, Page ID # 2, 6, 27-28.) In branding Juggalos as criminals, the designation also stigmatizes them and damages plaintiffs' reputations. (*Id*. ¶¶ 149, 156, Page ID # 23-24.) Plaintiffs' complaint spells out in detail examples of the numerous harms they and other Juggalos suffer as a result of the DOJ's Juggalo gang designation.

Plaintiff Mark Parsons is a Juggalo residing in Las Vegas, Nevada. (*Id*. ¶¶ 11, 29, Page ID # 4, 7.) He is a truck driver, and when the complaint was filed, he owned "a small trucking business entitled 'Juggalo Express LLC.'" (*Id*. ¶¶ 31-32, Page ID # 7.) On his truck, he had "a large, visible ICP 'hatchetman' logo[, which] express[ed] his affinity for ICP's music, his identity as a Juggalo, and his affiliation with the Juggalo community." (*Id*. ¶ 33, Page ID # 7.) In July 2013, he was on a delivery heading down "an interstate freeway outside Knoxville, Tennessee . . . when [the truck] entered a weigh station operated by the Tennessee Department of Transportation." (*Id*. ¶ 34, Page ID # 7.) There, the state police ordered him "to stop the truck and park for a safety inspection." (*Id*. ¶ 35, Page ID # 7.) The trooper "asked if [Parsons] was a Juggalo," "detained Parsons for an inspection *because of* the hatchetman logo on the truck," and said that "he considered Juggalos to be a criminal gang ***because of the DOJ's designation***." (*Id*. ¶¶ 37-39, Page ID # 7-8 (emphasis added).) The trooper asked if Parsons "had any axes, hatchets, or other similar chopping instruments in the truck," which he did not. (*Id*. ¶ 40, Page ID # 8.) There was no legitimate reason for the stop and search,

and the only real cause of it was the DOJ's designation. (*Id*. ¶¶ 42-44, Page ID # 8.) After delaying Parsons's tightly scheduled hauling work for about an hour, the trooper found nothing. (*Id*. ¶ 41, Page ID # 8.)

Plaintiff Brandon Bradley is a Juggalo residing in Citrus Heights, California. (*Id*. ¶ 12, 45, Page ID # 4, 8.) Because of the DOJ's designation, police have stopped him three times. In September 2012, a "Police Officer in a patrol car flashed the car's lights and stopped Bradley when Bradley was biking home." (*Id*. ¶ 47, Page ID # 9.) At the time, "Bradley had visible Juggalo tattoos and was wearing a Twiztid Batman shirt, which is Juggalo merchandise." (*Id*. ¶ 48, Page ID # 9.) He displayed the tattoos and wore the shirt "to express his affinity for the music of Psychopathic Records artists, his affiliation with the Juggalos as music fans, and his pride in being a member of the Juggalo community." (*Id*. ¶¶ 49-50, Page ID # 9.) The officer considered the Juggalos to be a gang because of the DOJ's designation, and "the actual and primary reason that the officer stopped Bradley was because the officer saw Bradley's Juggalo tattoos and merchandise." (*Id*. ¶¶ 51, 54, 74, Page ID # 9, 11.) The officer detained "Bradley for about fifteen minutes while interrogating [him] about being a Juggalo and about his Juggalo tattoos," while taking notes. (*Id*. ¶¶ 52-53, Page ID # 9.)

Around October 2012, Bradley was crossing "a street in downtown Sacramento," while "wearing a shirt bearing an ICP-related insignia, and some of

his ICP-related tattoos were visible." (*Id*. ¶¶ 55-56, Page ID # 9.) A "uniformed deputy from the Sacramento Sheriff's Department approached" him and "asked if [he] was a Juggalo," demanding to see Bradley's identification. (*Id*. ¶¶ 57-59, Page ID # 10.) The deputy held Bradley's "ICP-themed wallet . . . throughout the encounter" and "ran a background check on Bradley." (*Id*.¶ 60, 62, Page ID # 10.) The sheriff interrogated Bradley "for a substantial amount of time, [while] accus[ing] Bradley of being in a gang because he was a Juggalo. The deputy stated that to be a Juggalo is to be a gang member. (*Id*. ¶ 63, Page ID # 10.) The deputy also asked Bradley about his ICP-related tattoos." (*Id*.) The sheriff viewed the Juggalos as a gang and stopped Bradley because of the DOJ's gang designation. (*Id*. ¶ 74, Page ID # 11.)

Again in January 2013, Bradley was stopped and interrogated—this time, late in the day by gang-squad officers. He "was walking alone in the bike lane on a stretch of road that did not have a sidewalk," wearing "an ICP jacket with a large red 'hatchetman' . . . on the back." (*Id*. ¶¶ 64-65, Page ID # 10.) Two gang-squad officers passed him in an unmarked police cruiser, made a U-Turn, stopped him with their lights, and approached him in bullet-proof vests. (*Id*. ¶¶ 66-68, Page ID # 10.) They "immediately told Bradley that they noticed his jacket with the 'hatchetman' insignia" and ordered him "to stand in front of a guardrail with his back to them so that they could take pictures of his jacket," as well as "his face and

his tattoos." (*Id*. ¶¶ 68-70, Page ID # 10-11.) They held him for a long time, "interrogat[ing him] about his status as a Juggalo and about whether he was a gang member. The[y also] took notes about the encounter and about Bradley's responses. Although Bradley denied being in any gang, the officers translated his answers into gang-related terms" in their notes. (*Id*. ¶ 71, Page ID # 11.) "[T]he officers entered this information into a gang information database that is part of or feeds information into the gang information database that the NGIC administers." (*Id*. ¶ 72, Page ID # 11.) These officers "relied upon the DOJ's classification of the Juggalos as a gang when deciding whether to stop, question or otherwise detain or investigate Bradley." (*Id*. ¶ 74, Page ID # 11.)

The DOJ's designation and these incidents are having a chilling effect on Bradley's speech. Due to them, "Bradley 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. He has taken these steps in order to avoid similar negative contacts with law enforcement in the future." (*Id*. ¶ 75, Page ID # 11.)

Plaintiff Scott Gandy is a Juggalo residing in Concord, North Carolina. (*Id*. ¶¶ 13, 76, Page ID # 4, 11.) In 2012, he visited some familiar Army recruiters at their station. (*Id*. ¶ 78, Page ID # 12.) He wanted to enlist, but he "had large ICP-related tattoos on his chest, which he obtained to express his affinity for ICP's

music, his status as a Juggalo and his appreciation of other Psychopathic Records artists' music." (*Id*. ¶ 79, Page ID # 12.) "The Sergeant told Gandy that the Juggalos were on the federal government's gang list [and] said that he considered Gandy's Juggalo tattoos to be gang-related . . . based on the DOJ's Juggalo gang designation." (*Id*. ¶ 81, Page ID # 12.) "The Sergeant questioned Gandy about whether he was a gang member," and "instructed Gandy that he must remove or permanently cover his Juggalo tattoos or the Army would immediately deny his recruitment application" without any further consideration. (*Id*. ¶¶ 82-83, Page ID # 12.) The Army bases its view that Juggalos are a gang "on the DOJ's Juggalo gang designation." (*Id*. ¶ 85, Page ID # 12.) As a result, "Gandy spent hundreds of dollars to undergo [an otherwise unnecessary and unwanted] painful procedure in which his Juggalo tattoos were covered with other tattoos." (*Id*. ¶ 86, Page ID # 13.) Afterward, the Sergeant approved the new tattoos and took Gandy's application for further review. (*Id*. ¶ 88, Page ID # 13.)

Plaintiff Robert Hellin is a Juggalo who enlisted in the Army before the DOJ published its gang designation, and he has served honorably in a number of places overseas, including Iraq, Afghanistan, and Korea. (*Id*. ¶¶ 14, 89-91, Page ID # 5, 13.) "Hellin has visible ICP-related tattoos, which he obtained and displays in order to express his identity as a Juggalo." (*Id*. ¶ 92, Page ID # 13.) "[B]ecause of the [DOJ's] Juggalo gang designation, Hellin's identity as a Juggalo places him in

imminent danger of suffering discipline or an involuntary discharge from the Army." (*Id*. ¶ 93, Page ID # 13.)

Finally, plaintiffs Joseph Bruce and Joseph Utsler are ICP's two members and they identify as Juggalos. (*Id*. ¶¶ 15-16, 94, Page ID # 5, 14.) In August 2012, "ICP entered into a contract with AEG Live to perform at the Royal Oak Music Theater in Royal Oak, Michigan on October 31, 2012 for ICP's annual musical and artistic event known as 'Hallowicked,' with a possible second performance on October 30, 2012 if tickets to the October 31 performance sold out." (*Id*. ¶ 96, Page ID # 14.) Roughly three weeks before the show, the theater cancelled the event, giving a pretextual reason at first but then admitting that it did so at the behest of the Royal Oak Police Department. (*Id*. ¶¶ 97-98, Page ID # 14.) "When asking the Royal Oak Music Theater to cancel the Hallowicked event, ***the Royal Oak Police Department cited the federal Juggalo gang designation.***" (*Id*. ¶ 99, Page ID # 14 (emphasis added).)

### D. Procedural History

On January 8, 2014, Plaintiffs filed this lawsuit seeking declaratory and injunctive relief under the Administrative Procedure Act and the Declaratory Judgment Act for constitutional and statutory violations arising from the DOJ's Juggalo gang designation. (RE 1, Compl., Page ID # 1-38.) On April 9, 2014, Defendants filed a motion to dismiss the complaint, challenging the district court's

jurisdiction on standing grounds and additionally arguing that Plaintiffs failed to state a claim, which Plaintiffs opposed. (Defs.' Mot. to Dismiss, RE 20, Page ID # 137; Pls.' Resp. to Defs.' Mot. to Dismiss, RE 25, Page ID # 234.) The district court issued an opinion and order granting Defendants' motion to dismiss, concluding that Plaintiffs lacked standing to bring their lawsuit. (Op. & Order Granting Defs.' Mot. to Dismiss, RE 29, Page ID # 309.)

This Court reversed, finding that Plaintiffs had adequately alleged an injury in fact by alleging that their "First Amendment rights are being chilled accompanied by allegations of concrete reputational injuries resulting in allegedly improper stops, detentions, interrogations, searches, denial of employment, and interference with contractual relations." *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 710-11 (6th Cir. 2015). This Court also rejected the district court's reasoning that Plaintiffs could not establish causation because any injury was the result of other agencies' conduct. Instead, this Court explained that the allegations "link the 2011 NGTA Report to [Plaintiffs'] injuries by stating that the law enforcement officials themselves acknowledged that the DOJ gang designation had caused them to take the actions in question." *Id*. at 714; *see also id*. ("[I]t is still possible to motivate harmful conduct without giving a direct order to engage in said conduct."). Finally, in addressing redressability, this Court observed the "force of the DOJ information label" that brands Juggalos as criminals, requiring Juggalos

"to choose between [First-Amendment-protected activity]" and continuing to incur the risk of harm. *Id*. at 716 (alteration in original) (citation omitted). A court order declaring the designation and NGIC Report unconstitutional, this Court said, would therefore redress the concrete injury to the legally cognizable rights of Plaintiffs. *Id*. at 717.

On remand, Defendants filed a second motion to dismiss, arguing in part that Plaintiffs did not adequately plead claims under the APA because Plaintiffs did not challenge a "final agency action" under the APA, and that the challenged actions were "committed to agency discretion by law." (Second Mot. to Dismiss, RE 37, Page ID # 405-40.) They also argued that each individual count failed to state a claim on separate grounds. (*Id*.) Plaintiffs filed a response explaining why Defendants were wrong on all of these arguments. (Pls.' Resp. to Defs.' Second Mot. To Dismiss, RE 42, Page ID # 489-525.)

### E. District Court Opinion

On September 29, 2016, the district court granted Defendants' motion and again dismissed the complaint. (Op. & Order Granting Defs.' Mot. to Dismiss ("Op. & Order"), RE 45, Page ID # 561-77.) The district court's opinion began by reciting the appropriate standard for reviewing whether Defendants' designation was a final agency action and making the undisputed finding that Defendants' report containing the designation was the "consummation of the [defendants']

decision making process." (Op. & Order, RE 45, Page Id # 569.) It nevertheless held that the designation and report did not cause "legal consequences" to Plaintiffs. (*Id*., Page ID # 570.) In reaching this conclusion, the district court reiterated the same rationale that this Court rejected the first time around—that Defendants' designation and report supposedly caused no legal consequences because *no consequences*—legal or otherwise—emerged until other agencies decided to act. (*Id*., Page ID # 573.)

Next, the district held that two of Plaintiffs' claims are unreviewable actions "committed to agency discretion by law." (*Id*., Page ID # 574-75.) In particular, although the district court recognized that Plaintiffs' constitutional claims (Counts 1-3) are reviewable, it held that Counts 4 and 5—for arbitrary and capricious action and for failure to follow procedures required by law—were not subject to judicial review because there were no meaningful standards by which to judge Defendants' gang designation. (*Id*., Page ID # 575.) The district court based this holding solely on a single statute and did not look to other standards that guide the Defendants' action.

Finally, the district court dismissed Plaintiffs' due-process claim (Count 3) and declaratory-judgment claim (Count 6) on additional, alternative grounds. (*Id*., Page ID # 576.) This appeal followed. (Pls.' Notice of Appeal, RE 47, Page ID # 579.)

## V. SUMMARY OF THE ARGUMENT

The district court erroneously dismissed Plaintiffs' APA claims for a second time by failing to consider the very real practical and legal effects caused by Defendants' classification of Juggalos as a gang. Plaintiffs specifically alleged in the complaint—among a litany of concrete harms—that they were pulled over and otherwise harassed by various officials *specifically because of* the gang designation. Indeed, on more than one occasion, the officers specifically *told* the plaintiffs that the gang designation was the reason for the harassment. The district court's conclusion that these were not "legal consequences" of the gang designation runs counter to common sense, the plain allegations in the complaint, and this Court's express holding the first time around (albeit in an opinion addressing standing) that Plaintiffs *had* alleged a direct "link" between the gang designation and their injuries. It also ignores that, as the congressionally designated national experts on gang trends and activity, it is the FBI and DOJ that are the primary, or certainly proximate, cause of Plaintiffs' harm, not just the local and state law enforcement officers who rely and act upon Defendants' expert judgment. Plaintiffs pleaded viable claims for relief under the APA, and the district court again erred by dismissing the complaint.

The district court also erred by holding that two of Plaintiffs' claims were "committed to agency discretion by law." The district court failed to consider

relevant statutes, internal policies, regulations, and judicial decisions that constrain Defendants' gang-designation decision and accompanying report, and render that decision subject to judicial review.

Plaintiffs have pleaded viable claims under the APA, and the district court's order dismissing their complaint should be reversed.

## VI. ARGUMENT

### A. STANDARD OF REVIEW

This Court reviews *de novo* questions of statutory interpretation and a district court's order dismissing a complaint for failure to state a claim. *Berry v. U.S. Dep't of Labor*, 832 F.3d 627, 632 (6th Cir. 2016). "In reviewing a motion based on Rule 12(b)(6), '[this Court] accept[s] all allegations in the complaint as true and determine[s] whether the allegations plausibly state a claim for relief.'" *Id.* (quoting *Roberts v. Hamer*, 655 F.3d 578, 581 (6th Cir. 2011)).

### B. PLAINTIFFS ALLEGE A FINAL AGENCY ACTION WITHIN THE MEANING OF THE APA

#### 1. Legal Framework

Courts apply a '"strong presumption" favoring judicial review of administrative action, *Mach Mining, LLC v. E.E.O.C.*, _ U.S. _, 135 S. Ct. 1645, 1651 (2015) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)), and the APA expressly permits judicial review of "final agency

action for which there is no other adequate remedy in a court," 5 U.S.C. § 704. Plaintiffs' claims here are pleaded under the special APA provision that addresses "agency action, findings and conclusions" that violate constitutional rights, § 706(2)(B), are arbitrary and capricious, § 706(2)(A), and are without observance of procedure required by law, § 706(2)(D).

An agency action includes "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).[3] The Supreme Court interprets "the term agency action . . . expansively" because it "brings together previously defined terms to assure complete coverage of every form of agency power, proceeding, action or inaction." *Synthetic Organic Chem. Mfrs. Assoc. v. Secretary, Dep't of Health & Human Servs*., 720 F. Supp. 1244, 1249 (W.D. La. 1989) (quoting *FTC v*. *Standard Oil Co*. *of Cal*., 449 U.S. 232, 238, n.7 (1980)) (Annual Report and Classification Procedures and Criteria constitute final agency action as each is designed to implement law and thus is a reviewable "rule" under the APA). In determining what constitutes agency action, it is "the *substance* of an agency's activities" that "is the controlling factor, regardless of the *label* that may be applied." *Id*.; *see also*

[3] Defendants did not argue that Plaintiffs failed to allege an agency action under 5 U.S.C. § 551(13); they only argued that the agency action was not final under the APA, waiving any argument to the contrary.

*Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021-23 (D.C. Cir. 2000) (regardless of whether EPA Guidance is a policy statement or interpretative rule, challenged elements of report constitute final agency action because they represents agency's settled position having legal consequences for state agencies and regulated companies).[4]

The Supreme Court recently summarized what constitutes a final agency action:

> In *Bennett v. Spear*, we distilled from our precedents two conditions that generally must be satisfied for agency action to be "final" under the APA. "First, the action must mark the consummation of the agency's decisionmaking 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."

*U.S. Army Corps of Engineers v. Hawkes Co.*, _ U.S. _, 136 S. Ct. 1807, 1813 (2016) (internal citations omitted) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). This requires a "pragmatic" approach, which has as its purpose "to prevent unnecessary judicial intervention into agency proceedings" where the challenging party still has an opportunity to convince the agency to change its

[4] Interpretative rules and policy statements are also "rules" under the APA, even if they are not the product of formal rule-making. *See, e.g., Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1337 (6th Cir. 1991) ("'As a general rule, final agency action includes 'interpretative decisions that crystalize or modify private legal rights.'" (quoting *Federal Trade Comm'n v Standard Oil of Cal.*, 449 U.S. 232, 247 (1980))).

mind. *Berry*, 832 F.3d at 634 (quoting *Abbott Labs*. *v*. *Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v*. *Sanders*, 430 U.S. 99 (1977)); *see also Oregon Natural Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977, 982 (9th Cir. 2006) (explaining that, in addressing final agency action, courts "focus on the practical and legal effects of the agency action," and interpret the finality element "in a pragmatic and flexible manner"). "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v*. *Massachusetts*, 505 U.S. 788, 797 (1992), *quoted in Sierra Club v*. *Slater*, 120 F.3d 623, 631 (6th Cir. 1997) (Environmental Impact Statement and related Record of Decision constitute final agency actions).

**2. Defendants' Gang Designation was not Tentative or Interlocutory—It was Final**

Here, the DOJ's gang designation was a "final" agency action. First, as the district court correctly held, the Defendants' challenged action was "[n]either tentative nor interlocutory," and constitutes "consummation of the [FBI's] decision making process" pursuant to the statutory authorization. (Op. & Order, RE 45, at Page ID # 569.)[5] The designation was made; the report containing the designation

[5] Defendants did not argue otherwise in their motion to dismiss, and therefore may not do so on appeal.

was published and is not subject to further review; and the harm on Plaintiffs has been inflicted. The DOJ's gang designation therefore meets the first criterion of "final" agency action. There is also no mechanism—outside of judicial review—by which plaintiffs may formally challenge the DOJ's action to convince them to change their minds. The DOJ's designation of Juggalos as a gang is therefore "final" within the plain meaning of that term, and the purpose of the finality requirement is satisfied here. *See Berry*, 832 F.3d at 634.

**3. The Gang Designation Caused Legal Consequences to Plaintiffs**

Second, Plaintiffs' allegations show that "legal consequences will flow"—and indeed *have* flowed—from the gang designation. *Bennett*, 520 U.S. at 177-78. By way of example, plaintiff Parsons was detained for an hour by state police due to the hatchetman logo on his truck, and was told by the police officer that "he considered Juggalos to be a criminal gang ***because of the DOJ's designation***." (Compl., RE 1, ¶¶ 37-39, Page ID # 7-8; emphasis added.) Likewise, plaintiff Bradley has been detained several times, again based solely on Bradley's Juggalo tattoos and merchandise and the DOJ's designation. (*Id*. ¶¶ 52-74, Page ID # 9-11.) Plaintiff Gandy was forced to endure painful and expensive tattoo-removal procedures because Army recruiters viewed his Juggalo tattoos as gang-related based on the DOJ's designation. (*Id*. ¶¶ 78-88, Page ID # 12-13.) And Plaintiffs Bruce and Utsler—the ICP band members—have had business contracts cancelled,

at the behest of law enforcement, due to Defendants' designation of Juggalos as a gang. (*Id*. ¶¶ 94-99, Page ID # 14.)

The complaint thus sets forth in detail the direct, day-to-day impact that the classification and its publication in the 2011 Assessment has had on Plaintiffs: they face unfavorable treatment in employment and business relationships and law enforcement and prosecutorial activities. All these and other consequences follow directly from Defendants' designation of Juggalos as a gang and law enforcement's reliance on the NGIC as the definitive source for gang information and investigative expertise. *See Airline Pilots Ass'n Int'l v. Dep't of Transp., Fed. Aviation Admin*., 446 F.2d 236, 241 (5th Cir. 1971) ("To say, therefore that the FAA's determination on the question of hazard is either practically, administratively, or legally insignificant is to ignore reality.").

This Court's previous opinion practically compels a finding of final agency action here. *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701 (6th Cir. 2015). The issue there was standing, of course, and not whether Plaintiffs had stated a claim for relief upon which relief can be granted. But common reasoning underlies both issues. Indeed, in holding that Plaintiffs had standing to challenge the gang designation, this Court expressly held that there *was* a direct "link" between

Defendants' gang designation and the legal consequences that flowed from them.[6] *Id*. at 714 (explaining that the allegations in the complaint "link the 2011 NGTA Report to [Plaintiffs'] injuries by stating that the law enforcement officials themselves acknowledged that the DOJ gang designation had caused them to take the actions in question."). Accepting the allegations in the complaint as true, this Court need not surmise whether legal consequences *might* flow from the gang classification, because Plaintiffs have detailed the legal consequences that have *already* occurred. As this Court has already found, Defendants' classification directly caused reputational harms that chill the exercise of Plaintiffs' constitutional rights and lead to unconstitutional detainments (*e.g.*, Compl., RE 1, Page ID # 7-11), threatened discharge or denial of employment (*e.g.*, *id*. at Page ID # 13), and the denial of business opportunities (*e.g.*, *id*. at Page ID # 14), among other things. These are "legal consequences" that Plaintiffs have already suffered. Thus, Defendants' action is a final agency action under the APA.

The Supreme Court's recent decision in *Hawkes Co*. is instructive. There, the issue was whether a jurisdictional determination ("JD") by the Army Corps of Engineers specifying whether a particular property contains "waters of the United

[6] The district court not only ignored the legal consequences that flowed from the report, it went one step further and found that *no* consequences, '"legal' or otherwise," emerged until other agencies decided to act, directly contradicting this Court's opinion. (Op. & Order, RE 45, Page ID # 573.)

States" was a final agency action. 136 S. Ct. at 1811-12. If a property contains "waters of the United States," landowners who discharge pollutants into those waters without a permit risk criminal and civil penalties. *Id*. In the *Hawkes Co*. case, the Corps had issued an affirmative approved JD that concluded that the property into which the respondents wanted to discharge pollutants contained "waters of the United States." *Id*. at 1813. The Supreme Court held that the affirmative approved JD was a final agency action and gave rise to legal consequences even though "no administrative or criminal proceeding can be brought for failure to conform to the approved JD itself," because it deprived the respondents of the benefits that a negative approved JD would have afforded and it "warns that if they discharge pollutants onto their property without obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties." *Id*. at 1815.

In making this determination, and in support of the proposition that an action need not affect the plaintiff on its own to qualify as a final agency action, the Court referred back to a prior case:

> For example, in *Frozen Food Express v. United States*, 351 U.S. 40, 76 S.Ct. 569, 100 L.Ed. 910 (1956), we considered the finality of an order specifying which commodities the Interstate Commerce Commission believed were exempt by statute from regulation, and which it believed were not. Although the order "had no authority except to give notice of how the Commission interpreted" the relevant statute, and "would have effect only if and when a particular action

> was brought against a particular carrier," *Abbott*, 387 U.S., at 150, 87 S.Ct. 1507 we held that the order was nonetheless immediately reviewable, *Frozen Food*, 351 U.S., at 44-45, 76 S.Ct. 569. The order, we explained, "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties." *Id*., at 44, 76 S.Ct. 569.

*Hawkes Co*., 136 S. Ct. at 1815. In other words, when an agency action commits to a view of the law that forces the plaintiff either to alter its conduct or expose itself to potential liability, legal consequences are created.

Applying *Hawkes Co*. here, Defendants' designation gave notice that it considered the Juggalos to be a criminal gang. Even if this would have *no* effect on Plaintiffs until another agency acted—which was not the case here—the designation warns every Juggalo that he risks harassment and discrimination if he continues to exercise his constitutional rights. *See Hawkes Co*., 136 S. Ct. at 1815 (citing *Frozen Food*, 351 U.S. at 44-45). This is sufficient to constitute "legal consequences" and a final agency action.

Given the pragmatic nature of the finality test, the classification of Juggalos as a criminal gang imposes direct legal consequences on Plaintiffs' constitutionally protected activity: It *prima facie* brands individual Juggalos as criminals based on their status. It requires them to choose between exercising their constitutional rights and suffering loss of freedom and job opportunities, and hiding what they believe and what they stand for to ensure that they do not endure harassment and

discrimination. To hold that no legal consequences flow from the designation requires ignoring the facts alleged in the complaint and casting aside the "pragmatic" approach mandated by the Supreme Court. Plaintiffs have pleaded a final agency action.

#### 4. The District Court's Holding is Contrary to the Pragmatic Approach Required under Binding Precedent, and is Inconsistent with this Court's Prior Opinion

The district court held that the designation and report did not cause "legal consequences" because Plaintiffs suffer no harm until a different agency acts. (RE 45, Op. & Order, Page ID # 570-73.) Reaching this conclusion requires ignoring common sense and the facts as alleged in the complaint. Accepting Plaintiffs' allegations as true, as courts must at this stage of the litigation, Plaintiffs' allegations show that DOJ's gang designation is an enduring, across-the-board classification of the group as a criminal gang. The classification is a reviewable rule in the classic sense. Congress directed Defendants to establish the NGIC and gang information database "to collect, analyze and disseminate gang activity information" from various federal, state, and local law enforcement agencies. (Compl., RE 1, Page ID # 14-15.) Congress directed Defendants to make that information available to law enforcement at the federal, state, and local levels, as well as to corrections officials and penal institutions and prosecutorial agencies.

(*Id*.) Congress also directed Defendants to report on its collection, analysis, and dissemination of gang activity information. (*Id*.)

Defendants' classification of Juggalos as a hybrid criminal gang has both the purpose and effect of implementing these congressional directives as a reviewable interpretative rule. It carries out the "substance" of the agency's activities. *See Synthetic*, 720 F. Supp. at 1249 ("[T]he *substance* of an agency's activities is the controlling factor, regardless of the *label* that may be applied."). The statutory language and framework show that Congress intended for Defendants (i) to collect, analyze and disseminate gang activity information; (ii) to offer their judgment about that activity to a broad range of regulatory agencies; and (iii) to impact the efforts of other law enforcement agencies to police gang activity. These aims prompted the Attorney General's 2008 report to Congress that highlighted Defendants' (i) "partnerships" with other state and local agencies in anti-gang activities; (ii) role as the "centralized intelligence resource for gang information and analytical support"; and (iii) role in identifying gangs and gang members and in guiding officials in the coordination "of their investigations and prosecutions to disrupt and dismantle gangs." (Compl., RE 1, Page ID # 15.) Thus, the classification is significant and impactful precisely because it reflects the result of Defendants' analysis and decision-making process relating to gang activity.

Indeed, that state and local law enforcement would rely on Defendants' designation of Juggalos as a criminal gang and act accordingly is not just a predictable consequence of the designation; it is by design, and exactly what Defendants intend. (*See* RE 1, Compl., Page ID # 17 ("The DOJ and FBI intend for federal, state and local prosecutors, law enforcement officials and corrections officials to use the information that is available on NGIC Online when they engage in governmental actions against members or affiliates of any gang that the DOJ and/or FBI identifies").) The FBI and DOJ—not local law-enforcement agencies—are the designated national experts with resources to monitor national trends and synthesize the information from other agencies across the country to be shared and relied upon by local law-enforcement agencies. As the allegations in the complaint demonstrate, this is precisely what happened: local agencies relied exclusively on Defendants' designation to inflict unwarranted harm on Plaintiffs. Without a court order requiring Defendants to correct their erroneous designation, local agencies will continue to defer to Defendants' expertise and target law-abiding Juggalos due to the gang designation.

Importantly, the district court employed the same erroneous rationale as in its dismissal on Article III standing grounds, which was unanimously reversed by a panel of this Court in a published opinion. *Parsons*, 801 F.3d 701. In particular, this Court found Plaintiffs had adequately alleged an injury in fact—defined in part

as an injury "to a legally cognizable right"—as to Counts 1-3 (First Amendment and Due Process) by alleging that their "First Amendment rights are being chilled accompanied by allegations of concrete reputational injuries resulting in allegedly improper stops, detentions, interrogations, searches, denial of employment, and interference with contractual relations." *Id*. at 710-11. The same was true as to the procedural claims (Counts 4-5). *See id*. at 712-13.

This Court also rejected the district court's reasoning that Plaintiffs could not establish causation because any injury was the result of other agencies' conduct. Instead, this Court explained that the allegations "link the 2011 NGTA Report to [Plaintiffs'] injuries by stating that the law enforcement officials themselves acknowledged that the DOJ gang designation had caused them to take the actions in question." *Id*. at 714; *see also id*. ("[I]t is still possible to motivate harmful conduct without giving a direct order to engage in said conduct."). Finally, in addressing redressability, this Court made the commonsense observation that the "force of the DOJ information label" brands Juggalos as criminals and effectively requires Juggalos "to choose between [First-Amendment-protected activity]" and continuing to incur the risk of harm. *Id*. at 716 (alteration in original) (citation omitted). A court order declaring the designation and NGIC Report unconstitutional, this Court said, would therefore redress the concrete injury to the legally cognizable rights of Plaintiffs. *Id*. at 717. Applying the same reasoning

here, Plaintiffs suffered legal consequences as a result of Defendants' gang designation even without considering other agencies' actions.

The district court ignored the pragmatic, common-sense approach required in a finality analysis and instead gave near-dispositive weight to an out-of-circuit case that is inconsistent with Supreme Court precedent, and is in any event readily distinguishable. In particular, the district court relied on *Flue-Cured Tobacco Coop. Stabilization Corp. v. E.P.A.*, 313 F.3d 852, 858 (4th Cir. 2002), in dismissing Plaintiffs' claims because mere "coercive pressures" placed on third parties by agency action do not constitute "legal consequences" and are therefore unreviewable under the APA. (Op. & order, RE 45, at Page ID # 571.) But at the heart of *Flue-Cured*'s analysis was the fact that Congress had expressly stripped the EPA's report of rule-making authority; thus, its report *could not* have the final say and was therefore not a final agency action. *Id*. at 858-59. There was, in other words, clear Congressional intent that the report *not* be relied upon. No such provision is present in the NGIC enabling statute.[7]

The district court also cited *Franklin v. Massachusetts*, 505 U.S. 780 (1992), where Massachusetts unsuccessfully challenged as a final agency action the

[7] Even if *Flue-Cured* were on all fours with this case, this Court is not bound by this decision from the Fourth Circuit. The Sixth Circuit has never even cited *Flue-Cured*, much less adopted its reasoning.

Secretary of Commerce's report to the President that tentatively recommended the apportionment of seats in the House of Representatives. In *Franklin*, however, Congress specifically vested the power in the President to decide apportionment, not the Cabinet. 505 U.S. at 797-98. The Secretary, like the EPA in *Flue-Cured*, could not have the final say. By contrast, here, a decision about the gang designation was specifically given to the DOJ and is within the DOJ's general power to interpret gang laws and to decide which groups to target.

As *Hawkes Co*. makes clear, even if this Court agrees that Defendants' classification "would have effect only if and when a particular action" was taken against a particular Juggalo by a different agency, Defendants' designation warns every Juggalo who continues to exercise his constitutional rights, that he does so at the risk of incurring legal consequences, such as those described in the complaint. *See Hawkes Co*., 136 S. Ct. at 1815 (citing *Frozen Food*, 351 U.S. at 44-45). This is sufficient to constitute a final agency action.

The Juggalos are outside of the mainstream. Some people may be put off by the Juggalos' choice in music, the way they decorate their bodies, or the symbols they display. But the Juggalos' constitutional rights are deserving of protection just as much as anyone's. It is difficult to imagine in a similar case any court closing the door of relief on a group of Plaintiffs whose views, words, and appearances are more palatable. However, as this Court recently explained, the First Amendment

applies "with the same force" "to loathsome and unpopular speech"; indeed, it is the people whose views are not in lockstep with the majority who "most often need[] protection under the First Amendment." *Bible Believers v. Wayne County*, 805 F.3d 228, 243 (6th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 2013 (2016). Holding, as the district court did, that a DOJ/FBI designation of Juggalos as a criminal gang—a designation that is disseminated to other law enforcement agencies and the public and relied upon to harass and deny opportunities to Juggalos—results in no legal consequences to them ignores the allegations in the complaint and treats Juggalos as second-class citizens unworthy of constitutional protections guaranteed to others. The district court's decision should be reversed.

### C. DEFENDANTS' ACTION IS NOT IMMUNE FROM JUDICIAL REVIEW

Section 701 allows for judicial review of agency actions unless "(1) statutes preclude judicial review;[8] or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining*, 135 S. Ct. at 1651. An agency seeking to immunize action from judicial review "bears a 'heavy burden' in attempting to show that Congress 'prohibit[ed] all judicial review' of the agency's

[8] It is undisputed that § 701(a)(1) does not apply, as Congress did not expressly bar review by statute.

complaint with a legislative mandate." *Id*. (alteration in original) (citation omitted). It is further well-established that the exception to judicial review under APA § 701(a)(2) is "very narrow," only applying in the "rare circumstances" where the law is drawn so that a court would have no meaningful standard against which to judge the agency's discretion. *Heckler v*. *Chaney*, 470 U.S. 821, 830 (1985). Where there are "standards, definitions, or other grants of power [that] deny or require action" in given situations, judicial review is available. *Diebold v*. *United States*, 947 F.2d 787, 789 (6th Cir. 1991) (alteration in original) (internal quotation mark and citation omitted); *see also Davis Enterprises v*. *E.P.A*., 877 F.2d 1181, 1185 (3d Cir. 1989) ("[W]hen agency regulations or internal policies provide sufficient guidance to make possible federal review under an abuse of discretion standard, agency decisions are not unreviewable, even absent express statutory limits on agency discretion.").

The district court recognized that Counts 1-3 are reviewable because they raise constitutional claims. (Op. & Order, RE 45, Page ID # 575 (citing *Burdue v*. *F.A.A*., 774 F.2d 1076, 1082 (6th Cir. 2014).) Holding otherwise would raise serious constitutional questions because it would deny any judicial review of colorable constitutional claims. *See Burdue*, 774 F.2d at 1082 (quoting *Webster v*. *Doe*, 486 U.S. 592, 603 (1988)). The district court nevertheless alternatively

dismissed Counts 4 and 5 because it found that there are no meaningful standards against which to judge the agency's action. This latter finding is erroneous.

The district court appears to have considered only a single statute, in isolation, in determining that there were no meaningful standards by which to judge the Defendants' action here. (*See* Op. & Order, RE 45, Page ID # 575 (citing Pub. L. No. 109-162, Title XI, § 1107).) But this is not the law. Rather, courts are permitted to consider any applicable statutes, regulations, established agency policies, other agency rules, and judicial decisions. *See Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 719 (9th Cir. 2011) (looking to statutes, regulations, policies, and judicial decisions); *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1124 (6th Cir. 1996) (relying on the "statutory scheme" and "implementing regulations"); *Diebold*, 947 F.2d at 789-90 (relying on a "complex scheme of statutes and regulations" as well as judicial decisions). A court should also consider whether the general purpose of the statute would be endangered by permitting judicial review, and whether the action is peculiarly within the agency's expertise. *See Webster*, 486 U.S. at 599-601; *Heckler*, 470 U.S. at 831; *Pinnacle Armor*, 648 F.3d at 719.

Here, as detailed in Plaintiffs' complaint, there is more than just the NGIC-enabling statute that allows courts to judge the agency's action. In particular, in Count 4, Plaintiffs alleged that Defendants classified Juggalos as a "criminal street

gang," as that term is defined under federal law,[9] without a plausible factual basis and without adequately developing an administrative record. (Compl., RE 1, Page ID # 31-32.) *See* 18 U.S.C. § 521(a) (defining "criminal street gang"). As to Count 5, Plaintiffs cited "operating principles" that apply through regulations to criminal intelligence systems like the NGIC and provide important procedural benefits to individuals, including that Defendants are required to have reasonable suspicion about criminal activity before maintaining criminal intelligence information about particular groups. (Compl., RE 1, Page ID # 32-35.) *See also* 28 C.F.R. § 23.20. The district court did not address these allegations at all due to its erroneous belief that it must confine its inquiry solely to the statute that specifically authorized the agency action.

The relevant statutes, regulations, and judicial decisions provide ample standards to review Defendants' challenged action of classifying the Juggalos as a gang. Under those standards, Defendants were tasked with researching and disseminating information relating to criminal gang organizations while complying with certain regulations and policies. The courts may review, among other things, whether the designation of Juggalos as a gang was supported by sufficient evidence that rose to the level of reasonable suspicion of criminal activity, and

[9] The 2011 Report cites this definition.

whether the designation was appropriate given the definition provided by federal law and based on the information Defendants had acquired.[10]

Further, Defendants' action should not be immune from review because the general purpose of the statute would be endangered by permitting judicial review or because the action is peculiarly within the agency's expertise. Indeed, courts are well-versed in determining "reasonable suspicion" and in interpreting and applying federal criminal statutes. Nor would the purpose of the statute be endangered, for example, by threatening national security, *see Webster*, 488 U.S. at 600-01, if courts were to review whether Defendants followed the appropriate procedures and had sufficient information before designating a group of people as a criminal gang and sharing that information with other law-enforcement agencies and the public.

At bottom, this is not a case where the agency would have abused its discretion only if it operated "outside of the space-time continuum," which is the type of rare circumstance when courts find agency actions unreviewable. *Burdue*, 774 F.3d at 1082. The district court nowhere acknowledged that its holding was

[10] One of the reasons the district court cited to support its holding was that the statute did not "require a process for identified groups to challenge their inclusion in a report." (Op. & Order, RE 45, Page ID # 575.) It is unclear how or why this factors into the analysis about whether a court can review the action. It does, however, reinforce that the agency's action was final under the APA, and why this lawsuit is the appropriate—indeed, only—means to challenge defendants' gang designation. *See Berry*, 832 F.3d at 634.

invoking a "very narrow" exception to judicial review, *Heckler*, 470 U.S.at 830, and it instead ignored the relevant standards in dismissing Plaintiffs' claims on this alternative ground. The district court's dismissal of Counts 4 and 5 should be reversed.

## VII. CONCLUSION

Plaintiffs have adequately alleged a final agency action, and none of their claims are committed to agency discretion by law. The dismissal of Counts 1-2 and 4-5[11] should be reversed and the matter remanded for further proceedings.

Respectfully submitted,

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[11] Plaintiffs do not appeal the alternative grounds for dismissal of Counts 3 and 6. (*See* Op. & Order, RE 45, Page ID # 576.)

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because, as counted by the Microsoft Word word-count tool, this brief contains 9,556 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii). This brief complies with the typeface requirements in Rule 32(a)(5)(A) and the type-style requirements in Rule 32(a)(6) because this brief has been prepared in proportionally spaced 14-point Times New Roman font.

/s/ Emily C. Palacios

## DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

## E.D. Mich. Case No. 14-cv-10071

| Record Entry | Description | Page ID Range |
|---|---|---|
| 1 | Complaint | 1-38 |
| 20 | Defendants' Motion to Dismiss | 137-177 |
| 20-1 | Declaration of Diedre D. Butler | 178-184 |
| 25 | Plaintiffs' Response to Defendants' Motion to Dismiss | 234-272 |
| 29 | Opinion and Order Granting Defendants' Motion to Dismiss | 309-322 |
| 33 | Judgment from U.S. Court of Appeals – Sixth Circuit | 377-399 |
| 37 | Defendants' Second Motion to Dismiss | 405-440 |
| 39 | Plaintiffs' Response to Defendants' Second Motion to Dismiss | 489-525 |
| 45 | Opinion and Order Granting Defendants' Second Motion to Dismiss | 561-577 |
| 46 | Judgment | 578 |
| 47 | Plaintiffs' Notice of Appeal | 579-581 |

## CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2017, I electronically filed the foregoing paper with the Clerk of the court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Emily C. Palacios

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