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July 24, 2017

VIA ECF

Catherine O'Hagan Wolfe, Clerk
U.S. Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *Tanvir v. Tanzin*, No. 16-1176 (2d Cir.)
Supplemental Letter Brief of Plaintiffs-Appellants

Dear Ms. Wolfe:

Plaintiffs-Appellants Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari ("Plaintiffs") respectfully submit this response to the Court's July 6, 2017 Order directing the parties to file supplemental letter briefs addressing two questions: (1) "whether, assuming *arguendo* that RFRA authorizes suits against officers in their individual capacities, defendants-appellees would be entitled to qualified immunity," and (2) "whether *Ziglar v. Abbasi*, No. 15-1358, 2017 WL 2621317 (June 19, 2017), applies in any relevant way to this question or the other questions presented in this case on appeal."

I. Introduction

Defendants-Appellants ("Defendants") are not entitled to qualified immunity from personal liability for RFRA violations for at least two reasons. *First*, qualified immunity is more appropriately decided in the first instance by the lower

court on summary judgment and with the benefit of full factual development—not by this Court on a motion to dismiss. *Second*, if the Court were to address the question at this early pleading stage, it would find the rights that Defendants violated were sufficiently clearly established so as to defeat a claim to qualified immunity.

Abbasi does not change this Court's analysis of the qualified immunity question or any other question present in this appeal. *Abbasi* assessed whether it was clearly established that agents from the same executive department could form a conspiracy within the meaning of 42 U.S.C. § 1985(3). Its ruling on that question has no applicability here. *Abbasi*'s analysis with respect to the *Bivens* claims separately at issue in that case is readily distinguishable from the issues before this Court and the opinion did not announce a general rule disfavoring liability for all government officials in cases where they invoke national security.

II. Consideration of Qualified Immunity Is Premature and Best Decided at a Later Stage of the Litigation

Because "the details of the alleged deprivations are more fully developed," qualified immunity is "often best decided" on a motion for summary judgment by the lower court, not on a motion to dismiss before the appellate court in the first instance. *Walker v. Schult*, 717 F.3d 119, 130 (2d Cir. 2013); *see also Barnett v. Mount Vernon Police Dep't*, 523 F. App'x 811, 813 (2d Cir. 2013) ("Defendants

moving to dismiss a suit by reason of qualified immunity would in almost all cases be well advised to move for summary judgment, rather than for dismissal under Rule 12(b)(6) or 12(c)."). Indeed, this Court has noted that in most cases, "the defense of qualified immunity cannot support the grant of a Fed. R. Civ. P. 12(b)(6) motion." *Green v. Maraio*, 722 F.2d 1013, 1018 (2d Cir. 1983). Given the limited information available on a motion to dismiss, this Court has held that a motion to dismiss is simply "a mismatch for immunity." *Barnett*, 523 F. App'x at 813 (citations omitted).

Applying these precedents in the RFRA and Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") context, courts within this Circuit have deferred ruling on qualified immunity to permit the development of a factual record sufficient to assess the scope and clarity of the asserted rights violations. In *Vann v. Fischer*, No. 11-CV-1958, 2012 WL 2384428, at **1-2 (S.D.N.Y. June 21, 2012), the plaintiff, a prisoner and follower of the Santeria faith, alleged that state prison officials improperly confiscated his Santeria beads in violation of RLUIPA. The district court denied defendants' motion to dismiss on grounds of qualified immunity, ruling that a determination as to qualified immunity "should await factual development relating to whether and how defendant prison officials may have deprived Plaintiff of his Santeria beads." *Id*. at *10. Similarly, in *Thomas v. Waugh*, No. 13-CV-321, 2015 WL 5750945, at **6,

9 (N.D.N.Y. Sept. 30, 2015), the plaintiff—a Jewish prisoner—alleged that state prison officials improperly confiscated his Jewish head covering in violation of RLUIPA. Applying the more stringent standard at a motion to dismiss, the district court denied defendants' claim for qualified immunity, ruling that no such defense was available on the face of the complaint. *Id.* at *12. And in *Williams v. Leonard*, No. 11-CV-1158, 2013 WL 5466191, at *5 (N.D.N.Y. Sept. 30, 2013), the plaintiff—a Muslim prisoner—alleged that state prison officials improperly denied his request to observe the Eid el-Adha holiday with his family, in violation of RLUIPA. In contrast, plaintiff alleged, prisoners of other faiths were allowed disparate access to their families on religious holidays. *Id*. Assuming that the facts as alleged in the complaint were true, as required on a motion to dismiss, the district court denied qualified immunity as "premature." *Id*.

This Court, too, should allow the record to develop on remand so the lower court can reach a fully informed decision on qualified immunity in the first instance. For example, to decide the qualified immunity question, the Court must determine "whether and how" Defendants placed Plaintiffs on the No Fly List in retaliation for their refusal to serve as informants as set forth in the Amended Complaint. *Vann*, 2012 WL 2384428, at *10. Discovery from Defendants in advance of any motion for summary judgment would be essential in that regard, as

it would be impossible to resolve those determinations in Defendants' favor on the face of the Amended Complaint alone.

Further, while this Court retains authority to rule *sua sponte* on qualified immunity, the usual practice in the Second Circuit is to remand so that this Court may "give the district court the first opportunity to rule on [it]." *Brown v. City of Oneonta Police Dep't*, 106 F.3d 1125, 1134 (2d Cir. 1997), *abrogated on other grounds by Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). In its decision granting Defendants' Motion to Dismiss, the District Court did not address the question of qualified immunity. *Tanvir v. Lynch*, 128 F. Supp. 3d 756 (S.D.N.Y. 2015). Qualified immunity was not briefed by either party on appeal, or fully addressed by either party at oral argument. In order to further develop the factual record and in keeping with the "practice in this Circuit when a district court fails to address the qualified immunity defense," the Court should "remand for such a ruling" on a motion for summary judgment. *Eng v. Coughlin*, 858 F.2d 889, 895 (2d Cir. 1988).

III. Plaintiffs' RFRA Rights Were Sufficiently Clearly Established to Preclude Granting Qualified Immunity at the Pleading Stage

Qualified immunity does not protect government officials if their conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Messerschmidt v. Millender*, 565 U.S. 535,

546 (2012) (citations omitted). At the time that Defendants interacted with Plaintiffs, it was "clearly established" that RFRA applied to FBI agents; that it applied in the context of law enforcement activities, including ones under the guise of national security; and that it proscribed conduct substantially burdening a person's religious exercise. Should the Court seek to evaluate qualified immunity absent a factual record, at the pleading stage, Defendants face a higher burden that forecloses a finding of qualified immunity: at this stage, the facts as alleged, coupled with reasonable inferences drawn in Plaintiffs' favor, amply prove that Defendants' actions violated a "clearly established" right under RFRA. *See McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004).

A. Standard of Review

"A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011) (alteration in original) (citation omitted). As long as officials have "fair warning" that their conduct was impermissible, even in novel factual circumstances they can still be held liable if their conduct violates established law. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see also United States v. Lanier*, 520 U.S. 259, 270 (1997).

"The burden rests on the defendants . . . to establish the [qualified immunity] defense," *Lee v. Sandberg*, 136 F.3d 94, 101 (2d Cir. 1997), and where defendants claim qualified immunity on a Rule 12(b)(6) motion to dismiss, they "must accept the more stringent standard applicable to this procedural route." *McKenna*, 386 F.3d at 436. This means that "the plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense." *Id.* at 436. "[B]ased on the facts appearing on the face of the complaint," courts must decide "whether the plaintiff could possibly prove any set of facts that would undermine the objective reasonableness of defendants' actions." *Young v. Goord*, 192 F. App'x 31, 32 (2d Cir. 2006) (citation omitted). Defendants face an uphill battle: to prevail, "the facts supporting the defense [must] appear on the face of the complaint," and it must be "beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *McKenna*, 386 F.3d at 436 (citation omitted).

B. *Abbasi* Did Not Alter the Supreme Court's Qualified Immunity Doctrine

The Supreme Court's most recent opinion addressing qualified immunity, *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), did not modify its qualified immunity doctrine. The Supreme Court reiterated that "a given officer" is shielded by qualified immunity unless "it would have been clear to a reasonable officer that the

alleged conduct 'was unlawful in the situation he confronted.'" *Id.* at 1850 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Applying that standard, the Supreme Court ruled that a circuit split on whether officials from the same agency (the Department of Justice) can even form a conspiracy and violate the statute—42 U.S.C. § 1985(3), which makes it a crime to conspire to violate a person's civil rights—meant that an official "lacks the notice required before imposing liability." *Abbasi*, 137 S. Ct. at 1868.

The circumstances here could not be more different. While the parties dispute the capacity in which Defendants may be sued and whether they are liable for damages, there is no dispute that at the time of the events relevant to this action, RFRA applied to federal officers and prohibited FBI agents from substantially burdening a person's exercise of religion.

C. Plaintiffs' RFRA Rights Were Clearly Established and Defendants Violated Those Rights

The plain text of RFRA clearly proscribes the Defendants' conduct: "Government shall not substantially burden a person's exercise of religion . . . ." 42 U.S.C. § 2000bb-1(a). Defendants knew that Plaintiffs were Muslim—indeed, that is precisely why Defendants targeted Plaintiffs for recruitment and probed them about their communities and their religious beliefs. *See* Joint Appendix ("JA") 66–67, 73 (Amended Complaint ("AC") ¶¶ 36–38, 66); JA 74, 75–76, 81

(AC ¶¶ 70, 76, 101) (Mr. Tanvir); JA 85, 89–90, 91 (AC ¶¶ 120–21, 136, 142) (Mr. Algibhah); JA 93, 94, 95 (AC ¶¶ 148, 153, 155–56) (Mr. Shinwari).

For many years, the FBI has been aggressively recruiting and deploying informants in American Muslim communities. *See* JA 66 (AC ¶ 36). Given this history, it is a reasonable inference at this stage that Defendants were familiar with Islamic religious beliefs, including the fact that Muslims often have sincerely-held religious objections to informing on their religious communities and to lying to their coreligionists. *See* JA 73 (AC ¶ 65). In keeping with their religious beliefs, Plaintiffs staunchly resisted Defendants' attempts to recruit them as informants, notwithstanding the severe consequences. *See* JA 74, 76, 77–78, 80 (AC ¶¶ 70, 77–79, 84, 94) (Mr. Tanvir); JA 85 (AC ¶ 121) (Mr. Algibhah); JA 95, 96–97 (AC ¶¶ 156, 161) (Mr. Shinwari).

Defendants had "fair warning," *Hope* 536 U.S. at 741, that "affirmatively compel[ling Plaintiffs], under threat of . . . sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs," would substantially burden Plaintiffs' religious exercise and, therefore, violate RFRA. *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (striking down law that compelled members of the Amish faith, under threat of sanction, to violate their religion). By placing or maintaining Plaintiffs on the No Fly List in retaliation for their religiously-motivated refusal to become informants in their own Muslim communities,

Defendants "condition[ed] receipt of an important benefit upon conduct proscribed by a religious faith, or [denied] such a benefit because of conduct mandated by religious belief," putting "substantial pressure on [Plaintiffs] to modify [their] behavior and to violate [their] beliefs." *Thomas v. Review Board*, 450 U.S. 707, 717–18 (1981) (finding violation of Free Exercise Clause where plaintiff was denied unemployment benefits after leaving job rather than accept transfer to work in armaments factory against his religious beliefs); *see also Washington v. Gonyea*, 538 F. App'x 23, 26 (2d Cir. 2013) (summary order) ("[T]he conduct alleged here—that Washington was severely punished for engaging in protected activity—rises to the level of a substantial burden on the free exercise of religion."); *Bass v. Grottoli*, No. 94 Civ. 3220, 1995 WL 565979, at *6 (S.D.N.Y. Sept. 25, 1995) ("Even under the [pre-RFRA] *O'Lone* standard, plaintiff enjoyed a clearly established right . . . not to be the subject of false misbehavior reports in retaliation for the exercise of his [Free Exercise] rights.").

Coercing people to participate in religious activities and observances under false pretenses is a clear violation. For example, by placing Mr. Algibhah on the No Fly List after he declined to visit a mosque and "act like an extremist," JA 85 (AC ¶ 121), Defendants interfered with Mr. Algibhah's "'real choice' about whether to participate in worship or prayer," in breach of firmly established Supreme Court precedent. *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d

397, 412 (2d Cir. 2001) (citing cases); *see also Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to . . . participate in religion or its exercise.").

These allegations, coupled with "all reasonable inferences from the facts alleged," *McKenna*, 386 F.3d at 436, prove that "every reasonable official would have understood that what [Defendants did] violates [Plaintiffs'] right[s]," under RFRA. *Al-Kidd*, 563 U.S. at 741 (quotation marks omitted).

D. Whether or Not Defendants Knew of Plaintiffs' Specific Religious Objections Is Immaterial

Defendants knew or should have known that their aggressive recruitment activities would substantially burden Plaintiffs' religious exercise. *See* JA 77–78, 85–86, 88, 93, 109–10 (AC ¶¶ 84, 122, 132, 148, 157, 209-211). Regardless of Defendants' knowledge of Plaintiffs' specific religious objections, however, it is clearly established—and was at the time of the events at issue—that RFRA liability attaches whenever "the exercise of religion has been burdened in an incidental way." *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997). There is no need to show the government actors' intent or knowledge or even that "the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs." *Id.*; *see also Thomas v. Review Board*, 450 U.S. at 717–18 (noting that even though challenged law placed only an "indirect"

burden on religious exercise, impermissible burden still existed); *Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 (3d Cir. 2016) ("[A] burden can be 'substantial' even if it involves indirect coercion to betray one's religious beliefs."). RFRA protects Plaintiffs' religious exercise regardless of whether Defendants knew the precise contours of Plaintiffs' sincerely held religious beliefs and objections.

Congress's intent in passing RFRA was to protect religious exercise against "neutral, generally applicable" laws and practices—as RFRA itself declares, "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2), *superseding Employment Div. v. Smith*, 494 U.S. 872, 881 (1990). Indeed, RFRA's substantial-burden test is so robust that it is more than "even a discriminatory effects or disparate-impact test." *Flores*, 521 U.S. at 535.

IV. *Abbasi* Does Not Apply in Any Relevant Way to Other Questions Presented in This Case on Appeal

Plaintiffs have not appealed the dismissal of their *Bivens* claims and the Supreme Court's opinion in *Abbasi* did not speak to the RFRA claims at issue here. In its *Bivens* analysis, the Supreme Court in *Abbasi* asked whether "some . . . feature of a case" should "cause[] a court to pause before acting without express congressional authorization." *Abbasi*, 137 S. Ct. at 1858. The Supreme Court found such authorization lacking for the *Bivens* claims in *Abbasi*, but did not

conduct a similar analysis for the claims authorized by Congress under 42 U.S.C. § 1985(3), *Abbasi*, 137 S. Ct. at 1865–66, presumably because for those claims, as here, congressional authorization was in fact present. The Supreme Court further noted that the specific policies challenged in *Abbasi* had "attract[ed] the attention of Congress," yet Congress had not expressly provided a damages action, and that injunctive relief (through habeas) might have been available to halt the injury while it was ongoing. *Id.* at 1862. The opposite happened here, where Congress passed RFRA in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990).

Abbasi's *Bivens* analysis turned primarily on the fact that the claims challenged the "formulation and implementation of a general policy" by high-level officials, which raised concerns both about chilling the actions of future cabinet-level officials and about the exposure of the deliberative process of high-level policymakers to discovery. *Id*. at 1860–62. No similar concerns are raised by the claims against low-level FBI agents brought here. The Supreme Court repeatedly noted that the policies challenged in *Abbasi* arose in immediate response to a large-scale security crisis. *See, e.g.*, *id.* at 1849, 1863 (noting "balance to be struck" between need to deter unconstitutional action and providing discretion to high-level officials to respond to crises in moments "of great peril"). Here, the abuses

appear to have been part of a program of continuous arm-twisting to develop sources in the American Muslim community over a long period.

Abbasi acknowledges the particular sensitivity of the national security context, *id.* at 1861–63, and shows deference to the systematic policy decisions of high-level officials—deference to "what *the Executive Branch* has determined is essential to national security," *id.* at 1861 (quotations and punctuation marks omitted; emphasis added)— but does not support deference to what individual low-level officials decided was necessary or simply expedient.

The Supreme Court's *Bivens* analysis takes pains to note that the plaintiffs did not "challenge individual instances of . . . law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact." *Id.* at 1862. Even so, it notes the countervailing interest in ensuring that remedies provide sufficient deterrence to prevent officers from violating the Constitution, ultimately concluding only that the weighing of that balance ought to be struck by Congress. *Id.* at 1863.

The instant case involves congressionally-authorized claims against low-level federal officials, challenging abuses which eluded injunctive relief—and

therefore for which it remains "damages or nothing."[1] *Id.* at 1862. Nothing in *Abbasi* should mandate its dismissal.

V. Conclusion

For these reasons, and for the reasons set out in prior submissions and during oral argument, the Court should reverse the District Court's dismissal of Plaintiffs' RFRA claims.

Respectfully submitted,

_____/s/_____

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[1] Prior to this litigation, the government's policy had been neither to confirm nor deny watchlisting status, rendering it difficult to establish standing to challenge placement on the list. *See* JA 72 (AC ¶ 59).