23-738

To Be Argued By:
SARAH S. NORMAND

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 23-738

MUHAMMAD TANVIR, JAMEEL ALGIBHAH,
NAVEED SHINWARI,

Plaintiffs-Appellants,

AWAIS SAJJAD,

Plaintiff,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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—v.—

"JOHN" TANZIN, SPECIAL AGENT, FBI, SANYA GARCIA, SPECIAL AGENT, FBI, FRANCISCO ARTOUSA, JOHN LNU, SPECIAL AGENT, FBI, STEVEN LNU, JOHN C. HARLEY III, MICHAEL LNU, GREGG GROSSOEHMIG, WEYSAN DUN, JAMES C. LANGENBERG, JOHN DOES 1-6, SPECIAL AGENTS, FBI,

Defendants-Appellees,

JAMES COMEY, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, RAND BEERS, ACTING SECRETARY, DEPARTMENT OF HOMELAND SECURITY, JOHN S. PISTOLE, ADMINISTRATOR, TRANSPORTATION SECURITY ADMINISTRATION, CHRISTOPHER M. PIEHOTA, DIRECTOR, TERRORIST SCREENING CENTER, JEH CHARLES JOHNSON, MICHAEL RUTKOWSKI, WILLIAM GALE, LORETTA E. LYNCH, JEFFERSON B. SESSIONS III, JOHN DOES 7-13, SPECIAL AGENTS, FBI, JOHN DOE, SPECIAL AGENT, FBI,

Defendants.

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BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari ("plaintiffs") seek to hold fifteen federal agents personally liable for damages under the Religious Freedom Restoration Act ("RFRA"), alleging that the agents used the No Fly List to pressure them to become informants against their Muslim communities. The district court correctly held that the agents are entitled to qualified immunity—a defense plaintiffs have conceded "was created for precisely these circumstances" and is a "powerful shield" that "protects all but the plainly incompetent or those who flout clearly established law." *Tanzin v. Tanvir*, 141 S. Ct. 486, 492 n.* (2020) (quotation marks omitted). Indeed, at the time of the agents' alleged activity, no federal court had addressed claims—let alone actually held—that law enforcement pressuring individuals to inform on members of their religious communities through retaliatory or coercive means substantially burdened their religious exercise in violation of RFRA.

Plaintiffs' brief is replete with assertions that they were pressured to "abandon their religious commitments" and "forgo their religious principles." (Brief for Plaintiffs-Appellants ("Br.") 2, 46). But according to their own allegations, no plaintiff ever conveyed to any agent that he had a religious objection to becoming an informant. Two plaintiffs gave non-religious reasons

for their refusal, and the third plaintiff said he would become an informant if he was taken off the No Fly List. Given the facts alleged, and the lack of any precedent holding that law enforcement pressure to become an informant imposes a substantial burden on religious exercise, plaintiffs have not satisfied their burden to allege a violation of clearly established law. Nor do their particular allegations plausibly state a claim against the individual agents for damages under RFRA. The agents are thus entitled to qualified immunity, and the district court's judgment should be affirmed.

Jurisdictional Statement

The district court had jurisdiction under 28 U.S.C. § 1331, as the action arose under federal law. The district court entered an opinion and order dismissing the amended complaint on February 24, 2023. (Joint Appendix ("JA") 135-60). No separate judgment was entered. (JA 27). Plaintiffs filed a timely notice of appeal on April 25, 2023. (JA 161-62). This Court thus has jurisdiction under 28 U.S.C. § 1291.

Issues Presented

1. Whether it was clearly established that pressuring an individual to inform on members of his religious community, through the retaliatory or coercive use of the No Fly List or any other government tool, imposes a substantial burden on religious exercise in violation of RFRA, where the individual does not convey any religious objection to becoming an informant.

2. Whether the factual allegations in the amended complaint plausibly state a RFRA claim for damages against each agent.

Statement of the Case

A. Procedural History

Tanvir commenced this lawsuit on October 1, 2013, and he, along with Algibhah, Shinwari, and Awais Sajjad, filed an amended complaint on April 22, 2014. (JA 1, 11). Plaintiffs sought injunctive and declaratory relief under the First and Fifth Amendments, the Administrative Procedure Act ("APA"), and RFRA against the heads of the federal agencies and components involved in administering the No Fly List, as well as twenty-five federal agents, in their official capacities (collectively, the "government"). (JA 31-32, 34-36, 78-83). Plaintiffs also sought damages against the agents in their personal capacities, under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and RFRA. (JA 32, 84).[1] Only Tanvir, Algibhah, and Shinwari asserted a RFRA claim. (JA 80-81).

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[1] Pursuant to a stipulation and order (JA 86-91), defendants FNU Tanzin, John LNU, Steven LNU, Michael LNU, and John Does 1, 4-6, and 9-13 proceeded under the pseudonyms in the amended complaint, and John Doe 2 proceeded as John Doe 2/3. The government was not able to identify John Does 7-8; those defendants were not served, and the district court dismissed the personal-capacity claims against them. (Dist. Ct. ECF No. 104 at 36).

On July 28, 2014, the government and the individual agents filed separate motions to dismiss the amended complaint. (JA 13-14). The district court stayed and then dismissed the official-capacity claims on consent of the parties. (Dist. Ct. ECF Nos. 93, 109). The district court granted the agents' motion to dismiss the individual-capacity claims, concluding that neither *Bivens* nor RFRA permitted plaintiffs to bring claims for money damages. (Dist. Ct. ECF No. 104).

Tanvir, Algibhah, and Shinwari (but not Sajjad) filed an appeal challenging only the district court's determination that RFRA does not provide for such claims. (Dist. Ct. ECF No. 113). Accordingly, the only defendants who remained parties were the fifteen agents who allegedly interacted with Tanvir, Algibhah, or Shinwari (the "agents").[2] This Court reversed the district court's judgment, holding RFRA permits plaintiffs to recover damages against individual federal officers. *Tanvir v. Tanzin*, 894 F.3d 449, 453 (2d Cir. 2018). However, "sensitive to the notion that qualified immunity should be resolved at the earliest possible stage in the litigation," and that it can be "successfully asserted in a Rule 12(b)(6) motion," the Court remanded to the district court to determine whether the agents are entitled to qualified immunity. *Id.* at 472 (quotation marks omitted).

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[2] Namely, FNU Tanzin, John Does 1, 2/3, and 4-6, Garcia, John LNU, Artousa, Harley, Steven LNU, Michael LNU, Grossoehmig, Dun, and Langenberg.

The Supreme Court granted certiorari and affirmed this Court's decision, holding that RFRA's provision for "'appropriate relief' includes claims for money damages against Government officials in their individual capacities." *Tanzin*, 141 S. Ct. at 489. Like this Court, however, the Supreme Court cautioned that the agents may be entitled to qualified immunity, noting that the parties agreed the defense is available and that plaintiffs had "emphasize[d] that the 'qualified immunity defense was created for precisely these circumstances,' and is a 'powerful shield' that 'protects all but the plainly incompetent or those who flout clearly established law.'" *Id.* at 492 n.* (citations omitted).

Following remand, the agents renewed their motion to dismiss the RFRA claims based upon qualified immunity. (JA 94-95).[3] On February 24, 2023, the district court held the agents are entitled to qualified immunity and dismissed plaintiffs' remaining claims with prejudice. (JA 135-60). This appeal followed.

B. The No Fly List and Redress Process

1. The No Fly List

Congress directed the Transportation Security Administration ("TSA"), a component of the Department of Homeland Security ("DHS"), to establish procedures

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[3] The agents who interacted with Shinwari also moved to dismiss the amended complaint for lack of personal jurisdiction (JA 95), but the district court did not reach that question (JA 145 n.4).

for notifying appropriate officials "of the identity of individuals" who are "known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety." 49 U.S.C. § 114(h)(2). TSA is required to "utilize all appropriate records in the consolidated and integrated terrorist watchlist maintained by the Federal Government in performing that function." 49 U.S.C. § 44903(j)(2)(C)(ii).

The government's watchlists, including the No Fly List, are maintained by the Terrorist Screening Center ("TSC"), a multi-agency organization created to "consolidate the Government's approach to terrorism screening," Homeland Security Presidential Directive 6 (Sept. 16, 2003), and administered by the Federal Bureau of Investigation ("FBI"). (JA 38). At the time of the events at issue, the TSC maintained the Terrorist Screening Database ("TSDB"), a consolidated database of information about persons known or reasonably suspected to be involved in terrorist activity. (JA 38); *see Kashem v. Barr*, 941 F.3d 358, 365-66 (9th Cir. 2019).[4] The No Fly List was a subset of the TSDB, composed of individuals who satisfied heightened criteria for inclusion. (JA 39 (alleging that "[t]o be properly placed on the No Fly List, an individual must not only be a

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[4] The information formerly maintained in the TSDB has been relocated to a new system. The TSC no longer uses the term "TSDB."

'known or suspected terrorist,' but there must be some additional 'derogatory information' ")).[5]

The FBI, along with other intelligence agencies, nominated individuals for inclusion in the TSDB and, if the heightened criteria were satisfied, on the No Fly List. (JA 39). The TSC then determined whether those nominations would be accepted. (JA 39); *see* Homeland Security Presidential Directives 6, 11, and 24. As plaintiffs acknowledge, individual agents have no authority to determine the composition of the No Fly List. (JA 38-39).

2. The Redress Process for Travelers Denied Boarding

Congress also directed TSA to "establish a timely and fair process for individuals identified [under TSA's passenger prescreening function] to appeal to [TSA] the determination and correct any erroneous information." 49 U.S.C. § 44903(j)(2)(G)(i); *see id.* §§ 44903(j)(2)(C)(iii)(I), 44926(a). Accordingly, TSA administers the Traveler Redress Inquiry Program, or "DHS TRIP," through which travelers may seek

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[5] Although plaintiffs allege the derogatory information must "demonstrat[e] that the person 'poses a threat of committing a terrorist act with respect to an aircraft' " (JA 39 ¶ 42 (alteration omitted)), the No Fly List criteria also include threats to the homeland and U.S. government facilities and personnel abroad, and other acts of terrorism, *see Kashem*, 941 F.3d at 365-66.

redress if they believe, among other things, they have been unfairly or incorrectly delayed or prohibited from boarding an aircraft. 49 C.F.R. §§ 1560.201, 1560.205. During the period relevant to this case, if DHS TRIP determined a traveler was an exact or possible match to an identity in the TSDB, DHS TRIP referred the matter to the TSC, "which ma[de] the final decision as to whether any action should be taken." (JA 42 ("TSC 'coordinate[d] with' the agency that originally nominated the individual," but "TSC ma[de] a final determination regarding a particular individual's status on the No Fly List")). At that time, DHS TRIP responses would "neither confirm nor deny the existence of any No Fly List records relating to an individual," but instead would state "whether or not any such records related to the individual ha[d] been 'modified' " (JA 43 (noting general U.S. government policy at the time not to "confirm in writing that a person is on or off the No Fly List")).

All four plaintiffs availed themselves of the DHS TRIP process before they filed suit. As alleged, Tanvir and Shinwari received letters advising that the government had "made updates" to its records and thereafter they were able to fly (JA 54-55, 69), while Algibhah and Sajjad received letters advising of the government's determination that "no changes or corrections are warranted at this time" (JA 58, 72, 75).

3. The Revised DHS TRIP Procedures

On April 13, 2015, the government notified the district court and plaintiffs that it had revised the DHS TRIP procedures. (Dist. Ct. ECF No. 85). The revision

was "directed at improving the redress procedures, including by increasing transparency relating to the No Fly List." (*Id.*). As explained in the notice, "[u]nder the previous redress procedures, individuals who had submitted inquiries to DHS TRIP generally received a letter responding to their inquiry that neither confirmed nor denied their No Fly status." (*Id.*). Under the revised procedures, however, "a U.S. person . . . will now receive a letter providing his or her status on the No Fly List and the option to receive and/or submit additional information"; if requested, "DHS TRIP will . . . identify the specific criterion under which the individual has been placed on the No Fly List and will include an unclassified summary of information." (*Id.*).[6]

The government offered plaintiffs the opportunity to have their DHS TRIP inquiries reconsidered under the revised procedures. (*Id.*). Plaintiffs availed themselves of that opportunity, and on June 8, 2015, the government informed all four plaintiffs that the "U.S. Government knows of no reason why you should be unable to fly." (Dist. Ct. ECF No. 92). As a result, plaintiffs consented to the dismissal of their official-capacity claims without prejudice. (Dist. Ct. ECF No. 109).

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[6] The redress process was revised following *Latif v. Holder*, No. 3:10-cv-750, 2014 WL 2871346 (D. Or. June 24, 2014), holding the former redress process was insufficient under the Due Process Clause. The revised procedures have since been upheld. *See Kashem*, 941 F.3d at 364-65.

C. Plaintiffs' RFRA Claims

Plaintiffs allege they sincerely hold religious beliefs that preclude them from informing on their Muslim communities. (JA 44, 48-49, 56-57, 66-67, 80). Plaintiffs allege that certain agents pressured them to become confidential informants, and "placed" or "kept" them on the No Fly List when plaintiffs refused. (JA 50, 53, 57, 67). Plaintiffs claim that, by attempting to recruit them as informants through the retaliatory or coercive use of the No Fly List, the agents substantially burdened the exercise of their religion in violation of RFRA. (JA 81). According to their allegations, however, none of the plaintiffs ever expressed any religious objection to serving as an informant.

1. Tanvir's Allegations

Tanvir alleges that in February 2007, Agents Tanzin and John Doe 1 approached him at work and asked about an old acquaintance who may have attempted to enter the United States illegally. (JA 45). This was Tanvir's only interaction with John Doe 1, who retired in December 2007. (Dist. Ct. ECF No. 42). Tanvir does not allege Tanzin or John Doe 1 asked him to serve as an informant during this meeting.

Agent Tanzin allegedly called Tanvir two days later and asked about "what people in the Muslim community generally discussed, and whether there was anything that he knew about within the American Muslim community that he 'could share' with the FBI." (JA 45). Tanvir did not assert any religious objection to answering the questions, but responded that "he did

not know of anything that would concern law enforcement." (JA 45).

Tanvir was able to fly after these interactions; he flew to Pakistan in July 2008 and back in December 2008. (JA 45-46). Tanvir alleges that upon his return, unspecified "government officials" confiscated his passport and "gave him a January 28, 2009 appointment with DHS to pick it up." (JA 45-46). On January 26, 2009, Agents Tanzin and John Doe 2/3 allegedly came to Tanvir's workplace and asked him to go to the FBI's office, and he agreed. (JA 46). There, Tanzin and John Doe 2/3 asked Tanvir about terrorist training camps near the village where he was raised, whether he had any Taliban training, and his rope-climbing skills, referring to "the fact that at his previous job as a construction worker, Tanvir would rappel from higher floors" while other workers cheered. (JA 46).

According to the amended complaint, Tanzin and John Doe 2/3 asked Tanvir to "work for them as an informant," first in Pakistan and then Afghanistan, and offered him incentives, such as facilitating his family's visits from Pakistan, financially assisting his parents' religious pilgrimage, and providing money. (JA 46-47). Tanvir did not assert any religious objection; he said he "was afraid to work in Pakistan as a United States government informant as it seemed like it would be a very dangerous undertaking," and he was "similarly concerned about his safety if he were to become an informant in Afghanistan." (JA 47).

Agent Tanzin called Tanvir the next day and asked if he had thought more about being an informant, allegedly saying Tanzin would "authorize the release" of

Tanvir's passport if he agreed, but if he declined, he "would be deported if he went to the airport to pick up his passport." (JA 47). Tanvir again refused the request, but was still able to retrieve his passport from the airport. (JA 47-48).

Tanvir alleges Agents Tanzin and John Doe 2/3[7] contacted him multiple times over the next three to four weeks and asked him to be an informant, saying "they were specifically interested in people from the 'Desi' (South Asian) communities." (JA 48). Tanvir again declined without expressing any religious objection, telling the agents that "if he knew of any criminal activity he would tell them, but that he would not become an informant or seek out such information proactively." (JA 48). Tanvir alleges Tanzin and John Doe 2/3 also asked him to take a polygraph test and threatened to arrest him if he declined; he declined but was not arrested. (JA 49).

Tanvir was able to fly after these interactions with agents in early 2009; he flew to Pakistan in July 2009 and back to the United States in January 2010. (JA 49-50).

In October 2010, approximately twenty months after his last contact with any agent, Tanvir allegedly was denied boarding on a flight from Atlanta to New York. (JA 50). Tanvir alleges, "[u]pon information and

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[7] Although the amended complaint states John Doe 1 contacted Tanvir in early 2009 (JA 48), Tanvir has since clarified that this was an error. (Dist. Ct. ECF No. 133 at 3 n.2, 41 n.11).

belief," that he was placed on the No Fly List by Tanzin, John Doe 1, "and/or" John Doe 2/3 "at some time during or before October 2010 because he refused to become an informant against his community and refused to speak or associate further with the agents." (JA 50). Tanvir allegedly called Tanzin, who told Tanvir he was "no longer assigned to Tanvir" and to " 'cooperate' with the FBI agent who would be contacting him soon." (JA 50). Tanvir alleges he was contacted two days later by Agent Sanya Garcia, who requested a meeting, but Tanvir refused to meet with her. (JA 51).

Tanvir alleges that one year later, he purchased tickets to fly to Pakistan in November 2011. (JA 51). The day before the flight, Agent Garcia allegedly contacted Tanvir and told him she would only allow him to fly to Pakistan if he met with her and answered questions. (JA 51). Tanvir met with Agents Garcia and John LNU at a restaurant and answered questions. (JA 52). The agents allegedly said they "would try to permit him to fly again by obtaining a one-time waiver," but "it would take some weeks for them to process the waiver." (JA 52). Tanvir does not allege Garcia or John LNU ever requested he become an informant.

Tanvir alleges that on the day of his scheduled flight to Pakistan, Garcia called him and said he would not be permitted to fly unless he took a polygraph test; Tanvir refused and canceled his flight. (JA 52). Later, Tanvir allegedly purchased two more tickets to travel internationally, and both times he was denied boarding. (JA 53-54).

Tanvir retained counsel, who contacted Agents Garcia and John LNU. (JA 53). These agents referred Tanvir's counsel to FBI counsel, who pointed counsel to the DHS TRIP process. (JA 53). Tanvir does not allege his counsel advised the FBI that Tanvir had any religious objection to serving as an informant. (JA 53-54).

On May 28, 2013, Tanvir received notice from DHS TRIP that the government had "made updates" to its records. (JA 54). On June 27, 2013, before he filed this lawsuit, Tanvir boarded a flight and flew to Pakistan. (JA 55).

2. Algibhah's Allegations

Algibhah alleges that on December 17, 2009, Agents Artousa and John Doe 4 approached him at work and asked questions about his friends, acquaintances, and individuals with whom he worked and attended college. (JA 56). Algibhah alleges these agents asked him to "work for them as an informant," first asking him to "infiltrate a mosque in Queens." (JA 56). The agents did not specify what they wanted Algibhah to do at the Queens mosque, which was not his individual mosque; he lived in the Bronx. (JA 119). According to Algibhah, after he declined the agents' request, they asked him to "participate in certain online Islamic forums and 'act like an extremist.'" (JA 56). When Algibhah again declined, the agents allegedly asked him to "inform on his community in his neighborhood," offering him money and travel assistance for his family in Yemen. (JA 56). Algibhah said no, and

Artousa allegedly told him to "think about it some more." (JA 56-57).

Algibhah was allegedly denied boarding on flights to Yemen on May 4, 2010, and September 19, 2010 (JA 57-58). Algibhah alleges, "[u]pon information and belief," that Artousa and John Doe 4 placed him on the No Fly List "at some time" after the December 2009 meeting "because he declined to become an informant against his community and declined to speak or associate further" with them. (JA 57).

In January 2012, Algibhah allegedly "sought help from his elected representatives," who "reached out to the TSA on [his] behalf." (JA 58). In June 2012, Agents Artousa and John Doe 5 allegedly approached Algibhah and said they wanted to speak to him. Artousa denied placing Algibhah on the No Fly List, but allegedly said "he would take Mr. Algibhah off of the No Fly List in one week's time should their present conversation 'go well' and should Mr. Algibhah work for them." (JA 59). Algibhah also alleges John Doe 5 said, "Congressmen can't do shit for you; we're the only ones who can take you off the list." (JA 59).

Algibhah alleges Artousa and John Doe 5 asked him questions about his "religious practices, his community, his family, his political beliefs, and the names of websites he visited," "where he went to mosque," and the "types of people who go to his mosque"; they also asked for "specific information, such as whether he knew people from the region of Hadhramut in Yemen." (JA 59). According to the amended complaint, Artousa and John Doe 5 "again told Mr. Algibhah that they wanted him to access some Islamic websites for

them," and said he "would need to . . . 'act extremist.' " (JA 59).

Algibhah does not allege he raised any religious objection to providing information or accessing websites; he answered the agents' questions and told them "he needed time to consider their request that he work as an informant." (JA 59-60). Algibhah then "assured the agents that he would work for them as soon as they took him off the No Fly List," and Artousa allegedly replied that Algibhah "didn't need to worry." (JA 59-60). Ten days later, Algibhah alleges, Artousa called him, said it would be "very helpful" if Algibhah became an informant, and asked to meet with Algibhah "one more time." (JA 60). However, Artousa did not contact Algibhah again for nearly a year. (JA 60-61).

Algibhah retained counsel in June 2012, who contacted Artousa that month. (JA 60). Artousa allegedly told Algibhah's counsel that "the FBI could be 'of assistance' in removing" Algibhah from the No Fly List, and said he wanted Algibhah "to go on Islamic websites, looking for 'radical, extremist types of discussions,' and 'perhaps more aggressive information gathering.' " (JA 60-61). During this conversation, and another in November 2012, Algibhah's counsel did not indicate Algibhah had any religious objection to Artousa's requests. His counsel told Artousa that Algibhah "would only speak with the FBI on the condition that he be removed from the No Fly List and allowed to travel to Yemen." (JA 61). Artousa allegedly said he would speak to his supervisors, but he did not get back to Algibhah for six to seven months. (JA 61).

On May 29, 2013, Artousa allegedly called Algibhah and reiterated his desire to "help[ ]" Algibhah "get off the No Fly List." (JA 61). Algibhah directed Artousa to his counsel, who called Artousa. (JA 61). Artousa allegedly told Algibhah's counsel he was "simply reaching out to Mr. Algibhah to 'touch base' regarding the matters he had previously discussed with him," "he was still interested in speaking to Mr. Algibhah," Algibhah "was not in any trouble," and "he was trying to bring the matter to a conclusion." (JA 61-62). Algibhah does not allege his counsel advised Artousa during this call that Algibhah had any religious objection to serving as an informant.

3. Shinwari's Allegations

Shinwari alleges that, while traveling from Afghanistan to Omaha on February 26, 2012, he was denied boarding on a connecting flight from Dubai, and told he needed to visit the U.S. embassy to be allowed to fly. (JA 63). After receiving a call from Agent Steven LNU, Shinwari went to the U.S. consulate the following day, where he was interviewed by Steven LNU and Harley. (JA 63-64). The agents asked him questions about "his religious activities, including which mosque he attends, and more general questions about his origin and background." (JA 64). They also asked where he had stayed during his trip to Afghanistan, whether he had associated with any "bad guys" or visited any training camps, and whether he had traveled to Pakistan. (JA 64). Steven LNU and Harley advised Shinwari they "needed to confer with 'higher-ups in D.C.' before allowing [him] to fly back to the United States." (JA 64-65). Shinwari does not allege

Steven LNU or Harley asked him to work as an informant. Two days later, Harley allegedly told Shinwari they had received the "go-ahead," and Shinwari flew to the United States on March 1, 2012. (JA 65).

Shinwari alleges that when he arrived at Dulles Airport, he was met by Agents Michael LNU and Grossoehmig, who asked similar questions to "verify" what Shinwari told the agents in Dubai. (JA 65). Shinwari does not allege Michael LNU or Grossoehmig asked him to work as an informant during this conversation. This was Shinwari's only alleged interaction with Grossoehmig. Shinwari flew from Dulles to Omaha on March 2, 2012. (JA 66).

Shinwari alleges that approximately one week later, Agents Michael LNU and John Doe 6 interviewed him at home, again asking similar questions. (JA 66). This time, the agents allegedly offered to pay him to become "an informant for the FBI." (JA 66). Shinwari declined, but did not convey any religious objection to the request. (JA 66).

Shinwari was denied boarding on a flight from Omaha to Orlando on March 11, 2012. (JA 67). He alleges, "[u]pon information and belief," that he was "placed and/or maintained on the No Fly List because he refused the FBI's requests to work as an informant for them against members of his community." (JA 67). Shinwari alleges that on March 12, 2012, he emailed Harley "seeking help," but received no response. (JA 67).

Agents Michael LNU and John Doe 6 allegedly returned to Shinwari's home on March 13, 2012, and

again asked him to serve as an informant, offering him "help" and "financial compensation." (JA 67). Shinwari again did not convey any religious objection, but told the agents "he believed becoming an informant would put his family in danger." (JA 67-68).

Shinwari retained counsel, who arranged a meeting on March 21, 2012, with Weysan Dun and James Langenberg, who were in charge of the FBI's Omaha office. (JA 68). At the meeting, Dun and Langenberg allegedly asked Shinwari "to think about the reasons why he may have been placed on a watch list," and when he said he did not know, they asked him "about videos of religious sermons that he had watched on the internet." (JA 68). Dun and Langenberg refused to confirm or deny whether Shinwari was on the No Fly List, but allegedly told him he could potentially get a one-time waiver to fly in an emergency. (JA 68). Shinwari does not allege Dun or Langenberg asked him to serve as an informant. A year later, Shinwari allegedly sent Langenberg an email asking whether he could obtain a waiver to fly to Afghanistan, but Langenberg never replied. (JA 68).

On December 24, 2013, Shinwari received notice from DHS TRIP that the government had "made updates" to its records. (JA 69). On March 19, 2014, before he joined this lawsuit, Shinwari was able to fly round trip between Connecticut and Nebraska. (JA 70).

D. The District Court's Decision

Accepting the factual allegations in the amended complaint as true, the district court concluded the

agents are entitled to qualified immunity because "a reasonable officer in [their] position would not have known—much less 'known for certain'—that their conduct would impose a substantial burden on Plaintiffs' religious exercise and thus violate RFRA." (JA 147 (citation omitted)).

The district court determined that at the time of the alleged events, it was not clearly established that plaintiffs had a "right not to be pressured by law enforcement to inform on members of their religious community through the coercive or retaliatory use of the No Fly List," or "*any* governmental tool." (JA 150). The court noted that at the time of the alleged events, "no federal court had addressed claims—let alone actually held—that law enforcement pressuring individuals to inform on members of their religious communities through retaliatory or coercive means substantially burdened their religious exercise in violation of RFRA." (JA 150). The court distinguished cases plaintiffs cited to assert the law was clearly established, noting some were decided after the alleged events and thus "could not possibly have provided any relevant notice to Defendants because they did not 'exist at the time of the alleged violation.'" (JA 150-55 (quoting *Okin v. Village of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 433 (2d Cir. 2009); alteration omitted)). But "[e]ven if given the benefit of all available precedent today," the district court concluded that plaintiffs' argument "would likely still fail," as the cases they cited "involved factual circumstances plainly distinguishable from the alleged violations" in the amended complaint. (JA 155-56).

Indeed, the district court observed, "the only federal court to have directly addressed the claims at issue here rejected the argument that they stated a RFRA violation." (JA 156 (citing *El Ali v. Barr*, 473 F. Supp. 3d 479 (D. Md. 2020)). In *El Ali*, the court noted, "the plaintiffs claimed that 'offers to act as informants for the FBI in exchange for resolution of their travel woes substantially burdened their free exercise of religion,' because 'their religious beliefs restricted bearing false witness and betraying the trust of their religious community,' and thus prohibited them from agreeing to serve as informants." (JA 156 (quoting 473 F. Supp. 3d at 527)). The *El Ali* court "held that law enforcement's efforts to persuade the plaintiffs to serve as informants on their religious community members—even if accompanied by an offer of assistance to remove them from a watchlist—did not impose a substantial burden on religious exercise." (JA 156 (citing 473 F. Supp. 3d at 527)).

The district court rejected plaintiffs' alternative argument, relying on this Court's decision in *Sabir v. Williams*, 52 F.4th 51 (2d Cir. 2022), that "the language of RFRA, itself, should have provided clear notice to the agents" that their alleged conduct violated clearly established law. The court noted plaintiffs' "selective[ ]" quotation of *Sabir* that " '[b]ased upon RFRA's requirements' alone, . . . 'it is not difficult for an official to know whether an unjustified substantial burden on religious exercise will be deemed reasonable.' " (JA 157 (quoting 52 F.4th at 65)). But the district court observed that plaintiffs "cite the case for a proposition broader than the one articulated by the Second Circuit." (JA 157). The district court noted that unlike

this case, "*Sabir* concerned textbook violations of law clearly establishing that 'preventing a prisoner from engaging in congregational prayer constitutes a substantial burden on the prisoner's religious exercise.'" (JA 157 (quoting *Sabir*, 52 F.4th at 65 n.9, and citing *Salahuddin v. Coughlin*, 993 F.2d 306, 308 (2d Cir. 1993))). The district court also noted that "in *Sabir*, unlike here, the plaintiffs specifically and repeatedly raised their religious objections to the defendant wardens' conduct preventing them from participating in group prayer." (JA 157-58 (citing 52 F.4th at 55-56)).

The district court further distinguished *Sabir* on the ground that, because the warden had denied the prisoners' requests for group prayer "'with no justification' whatsoever, RFRA itself provided clear warning that doing so—without justification—violated the law." (JA 158 (quoting 52 F.4th at 66)). Here, the court noted, the amended complaint does not plausibly allege the agents acted "with no justification whatsoever," given their role in gathering intelligence. (JA 159).

The district court concluded that "[t]he text of RFRA itself is thus not dispositive to the question of whether clearly established law would have put Defendants on notice that their requests to Plaintiffs violated RFRA." (JA 159). Looking instead to Supreme Court and Second Circuit precedent at the time of the alleged actions, "it was not clearly established that Defendants' pressuring of Plaintiffs to inform on their fellow Muslims would have violated RFRA." (JA 160). The court thus dismissed the amended complaint with prejudice. (JA 160).

Summary of Argument

As the district court correctly held, the agents are entitled to qualified immunity on the pleadings because plaintiffs failed to allege facts showing it was clearly established that the agents' alleged conduct would impose a substantial burden on plaintiffs' exercise of religion. The district court properly framed the right at issue by reference to the factual context of the amended complaint: as the right not to be pressured to inform on members of one's religious community through the coercive or retaliatory use of the No Fly List or any governmental tool. *See infra* Point I.B. As the district court noted, and plaintiffs do not dispute, at the time of the events at issue (and even today), no court had held that law enforcement pressure to inform on members of one's religious community imposes a substantial burden on religious exercise. Plaintiffs cite the text of RFRA itself and cases articulating broad principles of law, but the qualified immunity inquiry must be particularized to the facts of the case. *See infra* Point I.C. Focusing on plaintiffs' factual allegations, which make clear that plaintiffs never conveyed any religious objection to serving as an informant, a reasonable officer in the agents' position would not have known for certain that his conduct would impose a substantial burden on plaintiffs' religious exercise in violation of RFRA. *See infra* Point I.D.

The district court acted well within its discretion in first deciding it was not clearly established that the agents' alleged conduct would violate RFRA, without addressing whether plaintiffs have plausibly pleaded a RFRA claim. This Court need not reach the pleading

question either, as there are other cases not subject to qualified immunity that can develop relevant precedent. *See infra* Point II.A. If the Court does reach the issue, plaintiffs' factual allegations do not plausibly state a claim against any agent for monetary relief. Plaintiffs fail to allege facts showing the agents were personally involved in the conduct they claim violated RFRA; they allege no facts showing the agents knew their actions would burden plaintiffs' religious exercise. *See infra* Point II.B.1. Nor do plaintiffs plausibly allege they were placed or kept on the No Fly List because they refused to become informants, particularly as plaintiffs acknowledge that FBI agents have no power to place individuals on the No Fly List, and the TSC could place someone on the List only if they met specific criteria. *See infra* Point II.B.2.

ARGUMENT

Standard of Review

This Court reviews a district court's determination of qualified immunity on the pleadings *de novo*. *Ganek v. Leibowitz*, 874 F.3d 73, 80 (2d Cir. 2017).

POINT I

It Was Not Clearly Established That the Agents' Alleged Conduct Would Impose a Substantial Burden on Religious Exercise

A. Qualified Immunity

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does

not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).[8] Courts have recognized that "officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Davis v. Scherer*, 468 U.S. 183, 195 (1984).

"[B]ecause qualified immunity protects officials not merely from liability but from litigation," that issue "should be resolved when possible on a motion to dismiss, before the commencement of discovery, to avoid subjecting public officials to time consuming and expensive discovery procedures." *Garcia v. Does*, 779 F.3d 84, 97 (2d Cir. 2015) (citation and quotation marks omitted); *see Ziglar v. Abbasi*, 582 U.S. 120, 150-55 (2017); *Wood v. Moss*, 572 U.S. 744, 764 (2014); *Ashcroft v. al-Kidd*, 563 U.S. 731, 743-44 (2011); *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009); *NRA v. Vullo*, 49 F.4th 700, 707 (2d Cir. 2022); *Ganek*, 874 F.3d at 77

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[8] Although some amici suggest qualified immunity should not apply to RFRA claims, *see* ECF No. 92, this Court has applied the doctrine in RFRA cases, *Sabir*, 52 F.4th at 58-65, and other circuits have held the defense is available, *e.g.*, *Mack v. Yost*, 63 F.4th 211, 222 (3d Cir. 2023); *Ajaz v. BOP*, 25 F.4th 805, 813 (10th Cir. 2022). Plaintiffs have conceded "government officials are entitled to assert a qualified immunity defense" under RFRA. *Tanzin*, 141 S. Ct. at 492 n.*.

(all reversing denials of qualified immunity on pleadings). Because of " 'the importance of resolving immunity questions at the earliest possible stage' " of a case, *Wood*, 572 U.S. at 755 n.4, a defendant official "is entitled to dismissal before the commencement of discovery" unless the complaint "state[s] a claim of violation of clearly established law," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

To do so, a plaintiff must "plead[ ] facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *al-Kidd*, 563 U.S. at 735 (quotation marks omitted). To be clearly established, the contours of the right must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 577 U.S. at 11 (quotation marks omitted); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021) (per curiam). "[C]learly established law should not be defined at a high level of generality"; instead, it "must be particularized to the facts of the case." *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam) (quotation marks omitted); *accord Abbasi*, 582 U.S. at 151 ("the dispositive question is whether the violative nature of *particular* conduct is clearly established" (quotation marks and alteration omitted)). "Otherwise, plaintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *White*, 580 U.S. at 79 (quotation marks and alterations omitted). In short, "a court must ask whether it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation he confronted"—"if a

reasonable officer might not have known *for certain* that the conduct was unlawful," that officer is entitled to qualified immunity. *Abbasi*, 582 U.S. at 152 (quotation marks omitted; emphasis added).

B. The District Court Properly Framed the Right at Issue by Reference to the Particular Conduct Alleged in the Amended Complaint

At the outset of the qualified immunity analysis, the district court properly framed the right at issue by looking to the particular conduct plaintiffs alleged: that the agents violated RFRA "[b]y attempting to recruit Plaintiffs as confidential government informants by resorting to the retaliatory or coercive use of the No Fly List." (JA 81). The court accordingly construed the right at issue as "the right not to be pressured by law enforcement to inform on members of their religious communities through the coercive or retaliatory use of the No Fly List." (JA 150). But the court also considered whether the law was clearly established "if the right were defined more broadly" to encompass the use of "*any* government tool" to pressure someone to inform on members of their religious community. (JA 150).

That analysis struck the "delicate balance" required to "articulat[e] the right at issue with the appropriate specificity." *Golodner v. Berliner*, 770 F.3d 196, 205-06 (2d Cir. 2014). Contrary to plaintiffs' argument, the district court's definition of the right did not "turn on the particularities of the No Fly List" (Br. 46), or even government watchlists more generally, as the court expressly considered the use of "*any* government

tool" to exert pressure. (JA 150). Plaintiffs' proposed alternative framing—a "right to be free from government pressure that forces an individual to participate in behavior in a manner that is at odds with sincerely held religious beliefs" (Br. 50)—is not "particularized to the facts of the case," *White*, 580 U.S. at 79 (quotation marks omitted); indeed, it contains no reference at all to plaintiffs' particular allegations. To the contrary, as the district court noted, "[b]y characterizing the right in such a generalized and vague fashion," plaintiffs "render their definition legally meaningless." (JA 149).

To avoid that, courts considering qualified immunity defenses in RFRA cases "regularly delineate the right at issue with a considerable degree of particularity—and much more narrowly than Plaintiffs propose." (JA 149 (citing cases)); *e.g.*, *Mack v. Yost*, 63 F.4th 211, 230 (3d Cir. 2023) ("right to engage in prayer free of substantial, deliberate, repeated, and unjustified disruption by prison officials"); *Fazaga v. FBI*, 965 F.3d 1015, 1061 (9th Cir. 2020) (whether "covert surveillance conducted on the basis of religion" is "a substantial burden on individual congregants"), *rev'd on other grounds*, 142 S. Ct. 1051 (2022). The district court properly followed that approach here, focusing not on whether the agents would have been aware of broad principles of law, but on whether the law was clearly established that the particular conduct alleged in the amended complaint—using the No Fly List (or any government tool) to pressure plaintiffs to inform on members of their religious communities—would impose a substantial burden on plaintiffs' religious exercise.

C. No Law Clearly Established That Pressuring Someone to Inform on Others in His Religious Community Substantially Burdens Religious Exercise

As the district court correctly concluded, at the time of the events at issue, "no federal court had addressed claims—let alone actually held—that law enforcement pressuring individuals to inform on members of their religious communities through retaliatory or coercive means substantially burdened their religious exercise in violation of RFRA." (JA 150); *al-Kidd*, 563 U.S. at 741 (noting that at time of events, "not a single judicial opinion had held" conduct unlawful). Plaintiffs do not dispute that there is no precedent applying RFRA in the context of law enforcement efforts to recruit informants. Instead, they maintain such precedent was unnecessary because "RFRA itself" and "elementary principles of religious liberty" were sufficient to give the agents "fair warning" that they were violating RFRA. (Br. 47, 50). In fact, the authorities plaintiffs cite show the opposite.

Plaintiffs first (Br. 47) point to this Court's statement in *Sabir* that "[b]ased on RFRA's requirements, it is not 'difficult for an official to know whether' an unjustified substantial burden on religious exercise 'will be deemed reasonable.'" 52 F.4th at 65 (quoting *Abbasi*, 137 S. Ct. at 1866; alteration omitted). But that "selective[ ]" quotation (JA 157) ignores the context: at issue in *Sabir* was a denial of prisoners' ability to engage in congregational prayer, a specific right the violation of which has been "consistently recognized" by this Court as a substantial burden on religious

exercise. 52 F.4th at 65 n.9. For that reason, the Court addressed only the separate question of RFRA's defense to liability if the government " '*demonstrates* that application of the burden . . . is *in furtherance* of a compelling governmental interest.' " 52 F.4th at 65 (quoting 42 U.S.C. § 2000bb-1; alteration omitted).

That question is irrelevant to this appeal—although plaintiffs repeatedly conflate the claim of substantial burden on religious exercise with the defense of a compelling government interest (Br. 25-27, 37-38, 43-44, 48-50), the agents did not raise that defense at the pleading stage (Dist. Ct. ECF No. 148). The issue here is not whether any religious burden was justified, but the question about which there was no "serious[ ] dispute" in *Sabir*: whether the agents' alleged conduct would substantially burden plaintiffs' religious exercise in the first place. 52 F.4th at 65 n.9.[9] On that point, *Sabir* underscores that the law was *not* clearly established. Unlike prisoners' "performance of congregational prayer" in *Sabir*, providing information to law enforcement about other members of one's religious community is not "undoubtedly religious exercise." 52 F.4th at 59. Nor are there precedents

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[9] The district court did not "conclude[ ] that the elements of this defense had been met." (Br. 43; *id*. 38, 49). While the court noted that "it cannot be said Defendants made the requests 'with no justification' " (JA 159), that passing mention regarding an issue the agents did not raise does not detract from the district court's focus in the prior paragraphs on whether there was a substantial burden at all (JA 157-58).

establishing that the government's activity alleged here constitutes a substantial burden on religious exercise, 52 F.4th at 65 n.9—indeed, no controlling precedent addresses, much less clearly establishes, whether law enforcement pressure to inform on other members of one's religious community imposes such a burden. And as the district court noted, "in *Sabir*, unlike here, the plaintiffs specifically and repeatedly raised their religious objections to the defendant wardens' conduct preventing them from participating in group prayer." (JA 157-58 (citing 52 F.4th at 55-56)).

Plaintiffs' contention that case law articulating "basic principles of religious freedom" would have been "sufficient to give Defendants 'fair notice' of their illegal conduct" (Br. 22; *id.* 51-52 (citing *Edrei v. Maguire*, 892 F.3d 525 (2d Cir. 2018))) contradicts the Supreme Court's holdings that to be clearly established, a "legal principle [must] clearly prohibit the officer's conduct in the particular circumstances before him." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). *Edrei* did not address a religious exercise claim at all; it involved police use of painful sound technology to move peaceful protesters onto sidewalks. And the Court did not find the law clearly established based on "basic principles"; it considered analogous cases addressing government officials' authority to stop and disperse a protest, *id.* at 541, cases emphasizing that officers using force on protesters must comply with principles of proportionality, *id.*, and "cases generally prohibiting 'pain compliance techniques' in order to disperse peaceful protesters" (Br. 52 (quoting 892 F.3d at 541)). Considering those precedents together, the Court held that "[w]hen engaging with non-violent protesters who

had not been ordered to disperse, no reasonable officer would have believed that the use of such dangerous force was a permissible means of moving protesters to the sidewalks." *Id.* at 544.

In contrast, plaintiffs here offer nothing close to that level of specificity—only "elementary principles of religious liberty" (Br. 50) that are divorced from their factual allegations. Plaintiffs cite cases involving an Establishment Clause challenge to state funding of an alcoholic treatment facility whose program included religious sessions, *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397 (2d Cir. 2001); the application of state compulsory education laws to students whose religious beliefs prevented them from attending school beyond eighth grade, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); an inmate's RFRA challenge to his medical confinement for years for refusing to submit to a tuberculosis test based on religious objections, *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996); and an inmate's claim that prison officials denied him religious services in retaliation for providing a Quran to another inmate, *Washington v. Gonyea*, 538 F. App'x 23 (2d Cir. 2013).

All of those cases are "plainly distinguishable" from the facts alleged in this case, as the district court concluded. (JA 150-55). In addition, *Washington* "could not possibly have provided any relevant notice" to the agents, both because it "did not 'exist at the time of the alleged violation'" (JA 155 (quoting *Okin*, 577 F.3d at 433)), and because an unpublished order does not "constitute 'precedent' for purposes of establishing clearly established law" (JA 155 (quoting *Cerrone v. Brown*,

246 F.3d 194, 202 (2d Cir. 2001)). This Court's decisions in *DeStefano*, *Washington*, and *Jolly* also could not clearly establish the law for the agents who interacted with Shinwari: all of their actions took place in locations (Dubai, Virginia, and Omaha) outside of this circuit, and Shinwari identifies no relevant Fourth or Eighth Circuit precedent. *See Reichle v. Howards*, 566 U.S. 658, 665-66 (2012) (law not clearly established where neither Supreme Court nor circuit where the incident occurred had ruled on issue).

Plaintiffs contend "direct decisional precedent" is unnecessary, citing the Supreme Court's observation that " 'officials can still be on notice that the conduct violates established law even in novel factual circumstances.' " (Br. 45 (quoting *Hope v. Pelzer*, 536 U.S. 730, 743 (2002), and *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam))). But such " 'obvious case[s],' where the unlawfulness of [an official's] conduct is sufficiently clear even though existing precedent does not address similar circumstances," are "rare." *Wesby*, 138 S. Ct. at 590. The cases in which the Supreme Court has applied this principle highlight its rarity. *See Hope*, 536 U.S. at 745-46 (shirtless prisoner handcuffed for hours to hitching post in burning sun, with little water and no bathroom breaks); *Taylor*, 141 S. Ct. at 53 (inmate confined in cell with "massive amounts of feces" or "left to sleep naked in sewage" in "frigidly cold" cell). The facts alleged in this case bear no resemblance to those egregious scenarios.

To defeat qualified immunity, there need not be "a case directly on point," but "existing precedent must have placed the statutory or constitutional question

beyond debate." *al-Kidd*, 563 U.S. at 741; *accord United States v. Lanier*, 520 U.S. 259, 271 (1997) (fair warning given when "a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct in question"). The authorities plaintiffs cite do not address whether pressure to inform on members of one's religious community substantially burdens religious exercise, nor do they make the answer "obvious" or "beyond debate." They are "not remotely similar" to the factual allegations in this case. *Messerschmidt v. Millender*, 565 U.S. 535, 555 (2012) (rejecting lower court's reliance on dissimilar case to defeat qualified immunity). Not only do they involve disparate factual scenarios, but in each of the cited cases—unlike here—the plaintiffs made their religious beliefs and objections known to the defendants. They do not "clearly prohibit [the agents'] conduct in the particular circumstances before [them]." *Wesby*, 138 S. Ct. at 590.

Lastly, plaintiffs are wrong to suggest the qualified immunity analysis is different for RFRA claims. (Br. 47-48). No authority limits the requirement of a particularized factual analogue to the Fourth Amendment, and the Supreme Court has consistently applied that requirement in every context presenting the issue. *E.g.*, *Taylor v. Barkes*, 575 U.S. 822, 826 (2015) (per curiam) (inmate suicide prevention screening); *Lane v. Franks*, 573 U.S. 228, 245-46 (2014) (government employee speech); *Wood v. Moss*, 572 U.S. at 759-60 (viewpoint discrimination); *Reichle*, 566 U.S. at 665-66 (retaliatory arrest for protected speech); *Davis v. Scherer*, 468 U.S. 183, 184 (1984) (due process right

to a pretermination hearing). There is no basis for treating RFRA claims differently.

D. A Reasonable Agent Would Not Have Known for Certain That the Alleged Conduct Would Substantially Burden Religious Exercise

When "viewed in the light of the specific context of th[is] case, not as a broad general proposition," the agents' alleged conduct did not violate clearly established law. *NRA*, 49 F.4th at 715.

Tanvir alleges Agents Tanzin and John Doe 2/3 asked him to travel to Pakistan or Afghanistan to work as an informant, and when he refused, retaliated by placing him on the No Fly List. (JA 46-50). Even if the retaliation allegation were plausible in light of plaintiffs' acknowledgment that the TSC makes No Fly List determinations, *but see infra* Point II.B.2, Tanvir does not allege facts showing these agents necessarily would have known that serving as an informant would burden his religious exercise. Tanvir does not allege the agents even mentioned his religion when they asked him to serve as an informant in Pakistan and Afghanistan. (JA 46-47). The agents allegedly told him they were "specifically interested in people from the 'Desi' (South Asian) communities." (JA 48). Tanvir himself defines the group he was asked to surveil in geographic, not religious, terms. And while Tanvir alleges he had religious objections to informing on members of his community, he never conveyed that to the agents. Instead, he told the agents he "was afraid to work in Pakistan" as an informant, and "similarly" in Afghanistan, "as it seemed like it would be a very

dangerous undertaking." (JA 47). Even when Tanvir later retained counsel to represent him in his interactions with the FBI, there is no allegation his counsel conveyed Tanvir's religious objection. (JA 53).

Like Tanvir, Shinwari alleges he was asked by Agents Michael LNU and John Doe 6 to "bec[o]me an informant for the FBI," without any reference to Shinwari's religion. (JA 66). Shinwari alleges he "understood from the context" that the agents wanted him to inform on American Muslims (JA 66), but that is not what the agents said, according to the amended complaint. And although Shinwari alleges he declined to work as an informant because it violated his religious beliefs, that is not what he told the agents: he told them "he believed becoming an informant would put his family in danger." (JA 68). Even when Shinwari retained counsel, who requested a meeting with supervisory agents Dun and Langenberg, there is no allegation Shinwari or his counsel said anything at the meeting to convey a religious objection. (JA 68).

Algibhah claims Agents Artousa and John Doe 4 asked "if he would become an informant for the FBI, and infiltrate a mosque in Queens." (JA 56). As Algibhah's counsel acknowledged to the district court, however, the Queens mosque was not Algibhah's mosque, and the agents did not say what they wanted him to do at the mosque. (JA 119). Algibhah also alleges he was asked "to participate in certain online Islamic forums and 'act like an extremist'" (JA 56; JA 59 (alleging Artousa and John Doe 5 made similar request)). But again, Algibhah does not allege such online forums were part of his own religious exercise;

rather, the agents allegedly said "they would provide him with the names of websites." (JA 59). Algibhah was also asked more generally to "inform on his community in his neighborhood," without reference to his religion. (JA 56).

Thus, while some of the informant requests allegedly made to Algibhah referred to religious spaces or practices, it is far from clear the agents would have understood that acceding to those requests would substantially burden Algibhah's own religious exercise. And again, Algibhah never told any agent that serving as an informant would violate his religious beliefs; rather, he "told the agents he needed time to consider their request" (JA 59) and even "assured the agents he would work for them as soon as they took him off the No Fly List" (JA 60). Likewise, Algibhah's counsel never told Artousa in their multiple calls that Algibhah had a religious objection to becoming an informant. (JA 59-62). Even when Artousa allegedly told Algibhah's counsel that he wanted Algibhah "to go on Islamic websites, looking for 'radical, extremist types of discussions,' and 'perhaps more aggressive information gathering'" (JA 60-61), Algibhah's counsel raised no religious objection, but instead "informed Agent Artousa that he would only speak with the FBI on the condition that he be removed from the No Fly List and allowed to travel to Yemen." (JA 61).

Plaintiffs make no effort to contend with the specific facts they allege. They simply assert it is "obvious" that "the use of watchlisting to coerce compliance with a request to inform on one's own religious community violates religious liberty." (Br. 53 n.12). But they

contradict that bald assertion with their own allegation that "*[m]any* American Muslims . . . have sincerely held religious and other objections against becoming informants in their own communities," and *"[f]or these American Muslims*, the exercise of Islamic tenets precludes spying on the private lives of others in their communities." (JA 44 (emphases added)). It can hardly be "obvious" that requesting American Muslims to inform on their community violates their religious belief when not all American Muslims hold this belief. Their co-plaintiff, Sajjad, did not allege any such belief. (JA 33, 71-78, 80-81). Plaintiffs also acknowledge that Muslim Americans, "like many other Americans," can have "other objections against becoming informants in their own communities" apart from religion. (JA 44, 48, 56, 66 (alleging that working as informants would violate plaintiffs' "personal" as well as religious beliefs), 73 (alleging Sajjad had non-religious objections)). According to plaintiffs' own allegations, therefore, a reasonable agent would not have known, let alone "for certain," that a Muslim American would have a religious objection to informing on other members of that community. *Abbasi*, 137 S. Ct. at 1867.

Rather than addressing that logical gap, plaintiffs compare this case to agents' "coerc[ing] an observant Baptist to infiltrate a Bible study group, or a Catholic to record a confession, or a Jew to inform on mourners while sitting shiva," and suggest the district court reflexively devalued plaintiffs' faith because they are Muslim. (Br. 3, 53-54). But the alleged requests to Tanvir and Shinwari did not mention religious practices at all. And while Algibhah allegedly was asked to "infiltrate a mosque" other than his own and go on

"Islamic websites" provided to him by agents, it is far from clear that doing so would affect his own religious exercise—particularly in light of his statement that he *would* serve as an informant if he were taken off the No Fly List. Given plaintiffs' factual allegations, at the very least not "every reasonable official would have understood," *Mullenix*, 577 U.S. at 11, that the agents' alleged requests would impose a substantial burden on plaintiffs' exercise of religion.

Plaintiffs have failed to allege that the agents violated a clearly established right; the district court therefore correctly dismissed this action.

POINT II

Plaintiffs Have Not Plausibly Alleged a RFRA Claim Against Each Agent

A. The Court Need Not Address the First Prong of the Qualified Immunity Analysis

Having properly concluded that the right at issue was not clearly established, the district court exercised its "sound discretion" under *Pearson*, 555 U.S. at 236, to dismiss the action on that basis, without deciding whether plaintiffs had stated a RFRA claim, *see Camreta v. Greene*, 563 U.S. 692, 705 (2011) (where "prior case law has not clearly settled the right . . . the court can simply dismiss the claim"). Plaintiffs insist "*Pearson* intended to cabin courts' discretion" (Br. 30); in fact, *Pearson* recognized that "judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each

case." 555 U.S. at 242. Nor does *Pearson* require courts to provide an "explanation for 'skipping ahead'" to the second prong of the qualified immunity analysis. (Br. 29). In *Pearson* itself, the Supreme Court chose to address only the second prong, without explaining that choice. 555 U.S. at 243-45; *see Abbasi*, 582 U.S. at 155; *Mullenix*, 577 U.S. at 11; *San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015). This Court has often done the same. *E.g.*, *Radwan v. Manuel*, 55 F.4th 101, 114 (2d Cir. 2022); *Torcivia v. Suffolk County*, 17 F.4th 342, 367 n.41 (2d Cir. 2021); *Liberian Community Ass'n v. Lamont*, 970 F.3d 174, 187 n.15 (2d Cir. 2020).

Nothing about this case "compel[s] this Court" to decide the first prong of the qualified immunity analysis. (Br. 28). This case does not present "questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Pearson*, 555 U.S. at 236. To the contrary, similar pleading issues have arisen in cases seeking non-monetary relief and therefore not subject to qualified immunity. *See Ghedi v. Mayorkas*, 16 F.4th 456, 468 (5th Cir. 2021) (affirming dismissal of APA claims challenging watchlist placement allegedly based on refusal to be an informant); *El Ali*, 473 F. Supp. 3d at 527 (dismissing RFRA claim premised on alleged informant coercion); *Fikre v. FBI*, 142 F. Supp. 3d 1152, 1166 (D. Or. 2015) (dismissing freedom of association claim premised on alleged use of No Fly List placement to coerce plaintiff to become informant); *Fikre v. FBI*, No. 3:13-CV-899, 2019 WL 2030724, at *8-9 (D. Or. May 8, 2019) (questioning pleading adequacy of RFRA claims premised on alleged informant coercion).

Plaintiffs incorrectly suggest the government "evaded review of its law enforcement practices" here by removing plaintiffs from the No Fly List. (Br. 34). Tanvir and Shinwari both received redress through DHS TRIP and were able to fly before they filed their claims in this case. (JA 54-55, 69). And in 2015, after the redress procedures were revised for reasons unrelated to this case, all three plaintiffs elected to have their DHS TRIP inquiries re-reviewed. (Dist. Ct. ECF No. 92). DHS TRIP's determinations resulted from application of the revised procedures, and were unrelated this lawsuit. Plaintiffs note the letters were issued shortly before argument on the government's motion to dismiss (Br. 29), but it was plaintiffs' election to reopen their DHS TRIP inquiries under the revised procedures that determined the timing of the letters. (Dist. Ct. ECF No. 90 at 4 (TSA anticipated it would issue responses "within two weeks")).

More generally, plaintiffs fail to substantiate their assertion that "the government has consistently rendered equitable relief moot in similar circumstances." (Br. 33-34). Plaintiffs cite a handful of cases where some claims became moot after a person was removed from the No Fly List (Br. 34 n.6), but several of those cases did not involve RFRA claims (*Kovac*, *Kashem*, and *Long*) or coercion claims (*Maniar*) at all. And in both *Fikre* and *Kashem*, the courts did address the merits of similar claims. Fikre initially alleged government officials infringed his freedom of association by offering to get him removed from the No Fly List if he agreed to become an informant; the district court ruled he failed to state a claim. 142 F. Supp. 3d at 1166. When Fikre attempted to replead the claim under

RFRA, *after* he had been removed from the No Fly List, the court did not dismiss the claim as moot, but found it untimely, while expressing "concerns regarding" whether Fikre had "pleaded an adequate nexus between his placement and maintenance on the No Fly List and the alleged request that he serve as an informant at his mosque." 2019 WL 2030724, at *3, 8-9; *see Fikre v. Wray*, 2020 WL 4677516, at *2 n.3 and *11 n.11 (D. Or. Aug. 12, 2020) (describing earlier orders), *vacated and remanded sub nom. Fikre v. FBI*, 35 F.4th 762 (9th Cir. 2022), *cert. granted*, 2023 WL 6319658 (Sept. 29, 2023). In *Kashem*, at least two plaintiffs alleged law enforcement pressure to become informants. *See* 10-cv-750-BR (D. Or.), ECF No. 83 ¶¶ 112, 121. Following review under the revised DHS TRIP procedures, one of those plaintiffs remained on the No Fly List, his procedural claims were rejected on the merits, and his substantive challenge to inclusion on the List remained reviewable on a petition for review. *Id.* ECF No. 358; *Kashem*, 941 F.3d at 367, 390-91.

There have been other No Fly List claims that proceeded to final judgment on the merits. *E.g.*, *Busic v. TSA*, 62 F.4th 547, 548 (D.C. Cir. 2023); *Mohamed v. Holder*, 266 F. Supp. 3d 868, 883 (E.D. Va. 2017). Another case is pending in the D.C. Circuit on the merits of a petition for review. *See Moharam v. TSA*, Nos. 22-1184, 23-1198 (D.C. Cir.). At least two cases challenging watchlist (but not specifically No Fly List) placement have also resulted in judgment on the merits.

Elhady v. Kable, 993 F.3d 208 (4th Cir. 2021);[10] *Kovac v. Wray*, No. 3:18-CV-0110-X, 2023 WL 2430147, at *1 (N.D. Tex. Mar. 9, 2023), *appeal pending*, No. 23-10284 (5th Cir.). The fact that some No Fly List claims have become moot does not mean that all claims have or will become moot. *See Long v. Pekoske*, 38 F.4th 417, 425 (4th Cir. 2022) (declining to accept argument that government removed plaintiff from No Fly List to moot lawsuit); *Nur v. Unknown CBP Officers*, No. 1:22-CV-169, 2022 WL 16747284, at *9 (E.D. Va. Nov. 7, 2022).

There are good reasons the Court should not address prong one of qualified immunity in this case. Because plaintiffs seek to hold individual agents personally liable for damages, this case raises factbound questions about each agent's personal involvement that may limit its value in providing "guidance for future cases." *Pearson*, 555 U.S. at 237. And principles of judicial restraint and avoidance of advisory opinions outweigh the need to develop an area of the law that is already being developed in cases seeking non-monetary relief against the government. *See al-Kidd*, 563 U.S. at 735 ("[c]ourts should think carefully before" resolving "difficult and novel questions" that will not affect the outcome); *Camreta*, 563 U.S. at 705 ("our usual adjudicatory rules suggest that a court should forbear resolving" whether alleged conduct states a constitutional violation). Restraint is especially

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[10] *Elhady* included allegations of informant coercion, *see* 16-cv-375-AJT (E.D.V.A.), ECF No. 22 ¶¶ 100, 181-84, 205-12.

appropriate in the sensitive and nuanced area of counterterrorism operations.

B. Plaintiffs Have Not Plausibly Alleged a RFRA Claim for Damages Against Each Agent

If the Court does reach the issue, plaintiffs fail to state a claim against each agent.

Only complaints that state a "plausible claim for relief" can survive a motion to dismiss. *Iqbal*, 556 U.S. at 679. The Court must accept non-conclusory factual allegations in the complaint as true, but need not for "legal conclusions." *Id*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*.; *accord Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (pleading burden "requires more than labels and conclusions"). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

After separating the amended complaint's "factual allegations from its conclusions," "the remaining well-pleaded factual allegations" do not "plausibly allege entitlement to relief." *NRA*, 49 F.4th at 716.

1. Plaintiffs Fail to Allege Facts Plausibly Showing Each Agent's Personal Involvement in Substantially Burdening Their Religious Exercise

"[Q]ualified immunity requires an *individualized* analysis of *each* officer's alleged conduct." *S.M. v.*

Krigbaum, 808 F.3d 335, 340 (8th Cir. 2015) (quotation marks omitted). That is because "each Government official . . . is only liable for his or her own misconduct." *Iqbal*, 556 U.S. at 693; *accord Tangreti v. Bachmann*, 983 F.3d 609, 612 (2d Cir. 2020).

While plaintiffs refer generally to "Defendants" as an undifferentiated group (Br. 37-43), such "categorical references" do not "allege, with particularity, facts that demonstrate what *each* defendant did to violate the asserted [statutory] right." *Marcilis v. Township of Redford*, 693 F.3d 589, 596-97 (6th Cir. 2012) (quotation marks omitted). As described below, the actual individualized allegations plaintiffs make do not plausibly support a claim that the agents violated plaintiffs' rights under RFRA by attempting to recruit them as informants.

Agent John Doe 1. John Doe 1 had a single interaction with Tanvir in February 2007, during which no request was made that Tanvir serve as an informant. (JA 45). John Doe 1 retired from the FBI in December 2007. (Dist. Ct. ECF No. 42). Tanvir was able to board flights in July 2008, December 2008, July 2009, and January 2010, before he was first denied boarding in October 2010. (JA 45, 49-50). Thus, the alleged burden that forms the basis for Tanvir's RFRA claim did not arise until more than three years after Tanvir's sole interaction with John Doe 1, and more than two years after John Doe 1 retired from the FBI. Tanvir fails to show John Doe 1 had any personal involvement in allegedly unlawful conduct.

Agents Tanzin and John Doe 2/3: Tanvir alleges Tanzin came to his workplace (with John Doe 1) in

February 2007, and called him two days later asking "what people in the Muslim community generally discussed" and whether there was anything he "could share" with the FBI. (JA 45). Nearly two years later, on January 26, 2009, Tanzin and John Doe 2/3 allegedly asked Tanvir to serve as an informant, repeating this request multiple times over the next month. (JA 46-47). The agents did not contact Tanvir after that, however, and after their last contact Tanvir was able to fly twice—to Pakistan in July 2009 and back in January 2010. (JA 49-50). Tanvir was not denied boarding until October 2010 (JA 50), approximately twenty months after his last interaction with Tanzin and John Doe 2/3. Tanvir fails to allege facts plausibly establishing a nexus between the alleged requests that he serve as an informant and his denial of boarding twenty months later, having been able to fly twice in the interim. *See, e.g., Wong v. INS*, 373 F.3d 952, 967, 977 (9th Cir. 2004) (officials' actions "were simply too far removed" from the alleged RFRA violations).

Agents Garcia and John LNU. Garcia's first interaction with Tanvir was in October 2010, and John LNU's was in November 2011—both long after Tanzin and John Doe 2/3 last allegedly asked Tanvir to be an informant in February 2009. (JA 46-47, 51). Neither Garcia nor John LNU is alleged to have asked Tanvir to become an informant; they only asked him to sit for an interview and take a polygraph test (which he refused). (JA 51-52). There is no allegation that Tanvir's religion precluded him from those activities; to the contrary, he had previously answered agents' questions. (JA 45-46).

Nor does Tanvir allege facts showing Garcia or John LNU coordinated with other agents to pressure him to serve as an informant. When Tanvir was first denied boarding in October 2010, he contacted Tanzin, who told Tanvir he was no longer assigned to Tanvir. (JA 50). Tanzin allegedly encouraged Tanvir to "cooperate" with the agent who would be contacting him, who turned out to be Garcia, but the only cooperation Garcia and John LNU allegedly requested from Tanvir consisted of an interview and a polygraph test. (JA 50-51). Although they allegedly asked Tanvir similar questions as the prior agents (JA 46), and Garcia allegedly knew of the prior failed attempts to recruit him as informant (JA 51), they did not make any informant request when they met with Tanvir (JA 52). These alleged facts do not show Garcia or John LNU were personally involved in allegedly pressuring Tanvir to become an informant using the No Fly List.

Agents Steven LNU and Harley. Steven LNU and Harley interviewed Shinwari in Dubai after the first time he was denied boarding. After these agents questioned Shinwari, asked him to take a polygraph (which he refused), and conferred with "higher ups" in Washington, D.C.—all without any request that Shinwari serve as an informant—Harley emailed Shinwari that the agents had "received the 'go-ahead' for him to fly home to the United States." (JA 63-65). Rather than showing these agents used the No Fly List to pressure Shinwari to become an informant, these allegations show the agents helped him fly home. Shinwari later emailed Harley for assistance when he was denied boarding in Omaha (JA 67), underscoring that Harley

and Steven LNU facilitated rather than impeded Shinwari's travel.

Agent Grossoehmig. Grossoehmig allegedly interacted with Shinwari on a single occasion—an interview at Dulles airport—after which Shinwari flew to Omaha. (JA 65). Shinwari alleges he was asked similar questions during this interview; the agents said "they wanted to 'verify' everything that he told Agents Harley and Steven LNU in Dubai." (JA 65). Those questions did not, however, include any request to serve as an informant. This single interview, after which Shinwari was able to fly, does not show Grossoehmig was personally involved in using the No Fly List to pressure Shinwari to become an informant.

Supervisory Agents Dun and Langenberg. Dun and Langenberg were in charge of the FBI's Omaha Division, and they interacted with Shinwari and his counsel at a single meeting, at his counsel's request. (JA 68). Dun and Langenberg allegedly asked Shinwari to think about why he might be on a watchlist and (without confirming or denying his No Fly List status) told him he could potentially get a one-time waiver to travel in an emergency, but they did not ask Shinwari to serve as an informant. (JA 68). Dun and Langenberg's supervisory authority over the investigation is insufficient to show they had any personal involvement in pressuring him to be an informant using the No Fly List. *See Tangreti*, 983 F.3d at 618 (plaintiff must plead supervisor's own individual involvement in violation).

All Agents: Plaintiffs fail to allege personal involvement in another way. To state a claim against an agent

personally, plaintiffs must show he had "knowledge of the facts that rendered the conduct illegal." *Provost v. City of Newburgh*, 262 F.3d 146, 155 (2d Cir. 2001). The amended complaint fails to allege any facts showing any agents knew their actions would burden plaintiffs' exercise of religion, in violation of RFRA. *See supra* Point I.C.

While RFRA claims seeking equitable relief may not contain a scienter requirement, in order to hold individual officials personally liable for damages plaintiffs must show the officials knew their conduct was burdening the plaintiffs' exercise of religion. *See May v. Baldwin*, 109 F.3d 557, 562 (9th Cir. 1997) (court must "consider the information possessed by the prison officials at the time of the alleged violations," and the fact the plaintiff "never asserted a religious interest . . . until *after* the incidents complained of" established their immunity). This makes eminent sense: if an official did not know his conduct would impose a substantial religious burden, money damages from the official's own pocket could not be "appropriate relief." 42 U.S.C. § 2000bb-1(c).

Indeed, during the argument before the Supreme Court in this case, Justice Kavanaugh raised a "concern" about exposing "career FBI agents to life-altering damages remedies" in the absence of a *mens rea* requirement. *Tanzin v. Tanvir*, No. 19-71, Tr. of Oral Arg. 52-53. Plaintiffs' counsel responded that the law already accounts for this because it provides "a well-established and robust doctrine of qualified immunity." *Id.* at 53; *see id.* at 14 (Justice Alito noting plaintiff "emphasizes the fact that . . . federal officials

who are sued in a personal capacity would be able to assert a defense of qualified immunity"). Justice Thomas asked a similar question, *see id* at 35-36, and explicitly noted in his decision for the Court that plaintiffs had "emphasize[d] that the 'qualified immunity defense was created for precisely these circumstances,' and is a 'powerful shield' that 'protects all but the plainly incompetent or those who flout clearly established law,'" *Tanzin*, 141 S. Ct. at 492 n.* (quoting plaintiffs' brief and oral argument).

Plaintiffs claim it is "obvious" that pressuring an individual to inform on members of the same religious community would "violate basic principles of religious freedom." (Br. 53 & n.12). But plaintiffs' *ipse dixit* is belied by their acknowledgment that not all Muslims would have religious objections to serving as informants, and by the fact that former plaintiff Sajjad does not allege any such objection. And plaintiffs' responses to the requests—giving non-religious reasons for refusing (Tanvir and Shinwari) or expressing potential willingness to be an informant (Algibhah)—undermine any inference that the agents knew or should have known the requests would burden plaintiffs' religious exercise.

In light of these alleged facts, it would not be "appropriate relief," 42 U.S.C. 2000bb-1(c), to award damages against the agents in their personal capacities. Plaintiffs therefore fail to state a claim against the agents for damages under RFRA. At the very least, based on the facts plaintiffs have alleged, reasonable officers in the agents' position would not have "known for certain," *Abbasi*, 582 U.S. at 152, that their alleged

requests that plaintiffs become informants would substantially burden plaintiffs' exercise of religion. The agents accordingly are entitled to qualified immunity. *Id.*; *see Mullenix*, 577 U.S. at 12 ("qualified immunity protects all but the plainly incompetent or those who *knowingly* violate the law" (emphasis added; quotation marks omitted)).

2. Plaintiffs Fail to Allege Facts Plausibly Showing They Were Placed or Kept on the No Fly List Because They Refused to Become Informants

Finally, plaintiffs fail to allege facts to support their conclusory allegations, made "[u]pon information and belief," that they were "placed" or "kept" on the No Fly List because they refused to serve as informants on others in their religious communities. (JA 50, 53, 57, 67).[11] Plaintiffs' assertions that they were not " 'known or suspected terrorist[s]' or a potential or actual threat to civil aviation," and that the agents "had no basis to believe" otherwise (JA 53, 60, 69), are

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[11] Tanvir and Algibhah allege their refusal to serve as informants was only partly why they were placed on the list; they also attribute their placement to their refusal "to speak or associate further with the agents." (JA 50, 57). Shinwari alleges he was "placed and/or maintained" on the No Fly List because he refused to work as an informant (JA 67), but he was denied boarding before he ever interacted with any agent (JA 63), and thus he could not have been "placed" on the No Fly List for refusing.

nothing more than "threadbare recitals" of the standard for placement on the No Fly List, which are not entitled to any presumption of truth. *Iqbal*, 556 U.S. at 678; *NRA*, 49 F.4th at 713 ("conclusions, such as statements concerning a defendant's state of mind," not accepted as true). Moreover, plaintiffs' own subjective beliefs cannot establish the beliefs of the FBI or its agents.

Based on the factual allegations in the amended complaint, it is implausible that plaintiffs would have been included on the No Fly List simply because they declined to be informants. Plaintiffs acknowledge that neither the FBI nor individual FBI agents have authority to place or keep individuals on the List. Although the FBI is "one of the agencies empowered to 'nominate' individuals for placement on the No Fly List," and "has an ongoing responsibility to notify the TSC of any changes that could affect the validity or reliability of information used to 'nominate' someone to the No Fly List" (JA 34), plaintiffs allege the multi-agency TSC was "responsible for reviewing and accepting nominations to the No Fly List from agencies, including the FBI[,] and for maintaining the List" (JA 34-35). According to plaintiffs' factual allegations, it was "[t]he TSC," and not the FBI or any individual agent, that was "responsible for making the final determination whether to add or remove an individual from the No Fly List." (JA 35, 39). Plaintiffs also allege that according to the policy at the time, a person could be placed on the No Fly List only if that person was a "known or suspected terrorist" and there was

additional "derogatory information." (JA 39).[12] Thus, according to their allegations, if plaintiffs were on the No Fly List, it would have been necessary not only for an agent to have nominated each plaintiff for inclusion, but also for the TSC to determine (rightly or wrongly) that each plaintiff met the standard for inclusion.

Plaintiffs' conclusory allegations here are akin to those the Supreme Court rejected in *Iqbal*. In that case, the plaintiff claimed he was not a suspected terrorist and thus the detention conditions he experienced after September 11, 2001, must have resulted from discrimination. 556 U.S. at 668-69. The Court rejected that conclusory claim as implausible, noting that the factual allegations in the complaint must show more than conduct "consistent with" wrongdoing; they must "plausibly establish" a discriminatory purpose. *Id*. at 681. The *Iqbal* plaintiff's allegation of

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[12] According to the amended complaint, the government had at least some information about plaintiffs' backgrounds, associates, and travel. (JA 45-46 (Tanvir asked about terrorist training camps near the village where he was raised, whether he had Taliban training, where he learned to climb ropes, and an old acquaintance), 56, 59 (Algibhah asked about college and work associates, websites he visited, and whether he knew people from a particular region in Yemen), 64-65, 68 (Shinwari asked about recent travel to Afghanistan, where he stayed, people he traveled with, whether he visited training camps or traveled to Pakistan, and internet videos he watched)).

discriminatory motive, although "consistent with" the allegations regarding his detention, was not plausible "given more likely explanations," including the "obvious alternative explanation" that the arrests at issue "were likely lawful and justified by [the] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Id*. at 681-82.

Similarly here, there is an "obvious" and far "more likely" explanation for plaintiffs' alleged placement and retention on the No Fly List, other than their refusal to be informants: that the TSC concluded that the standards for inclusion on the List were met. As in *Iqbal*, plaintiffs' conclusory allegations regarding the reasons for their alleged placement or retention on the No Fly List are insufficient to state a plausible claim. *See Ghedi*, 16 F.4th at 468 & n.55 (speculative allegation that plaintiff was placed on selectee list for "declining to serve as an FBI informant" did not state plausible claim in light of requirement of "at least reasonable suspicion" to place someone on list); *see also NRA*, 49 F.4th at 719 (complaint failed to plausibly allege official "unconstitutionally threatened or coerced" third parties to "stifle [plaintiff's] speech" because "it was only natural" for that official "to take steps . . . to enforce the law"); *Collins v. Putt*, 979 F.3d 128, 134-35 (2d Cir. 2020) (plaintiff failed to plausibly allege First Amendment claim where teacher's removal of student's blog post was "most reasonably understood to ensure that the message board was used for its school-sponsored, pedagogical purpose" rather than viewpoint discrimination).

Setting aside plaintiffs' threadbare recitals and implausible claims, "the most that is plausibly alleged" by the amended complaint, *Garcia*, 779 F.3d at 96, is that plaintiffs were offered assistance with their No Fly List status if they agreed to cooperate with law enforcement. (JA 52, 59-60, 67-68). But such offers of assistance in exchange for cooperation do not state a claim under RFRA. As the *El Ali* court noted in rejecting similar RFRA claims, virtually all potential law enforcement informants are offered "possible favorable treatment in exchange for helpful information." 473 F. Supp. 3d at 527. The fact that a potential informant has "something to gain, and often something to lose, from saying yes" does not mean that the officer's request is coercive. *Id*. Although the potential informant may feel "pressure" to cooperate—in the sense that they strongly desire the favorable treatment that is being offered in exchange—that is the same choice "faced by scores of suspects who enter into cooperation agreements with the government on a daily basis." *Id.*[13]

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[13] Plaintiffs do not dispute the *El Ali* court's analysis, but they argue for the first time on appeal that their claim more closely resembles a separate RFRA claim concerning "persistent questioning about [individuals'] Muslim faith" that was allowed to proceed in *El Ali*. (Br. 41-42). This new argument cannot be squared with the amended complaint, which alleges it was pressure to serve as informants, rather than religious questioning, that violated RFRA. (JA 80-81). In any event, plaintiffs miss the point that their conclusory allegations do not state a plausible retaliation claim. At most, plaintiffs plausibly allege they were

Plaintiffs thus fail to plausibly allege that the pressure they allegedly felt to serve as informants, in exchange for assistance with their No Fly List status, constituted a substantial burden on their religious exercise in violation of RFRA.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: New York, New York
October 27, 2023

Respectfully submitted,

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offered assistance with their watchlist status in exchange for cooperation—just like the plaintiffs whose RFRA claim was rejected in *El Ali*.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 13,980 words in this brief.

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