# 23-738

IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

MUHAMMAD TANVIR, JAMEEL ALGIBHAH, NAVEED SHINWARI,

*Plaintiffs-Appellants,*

AWAIS SAJJAD,

*Plaintiff,*

*(Caption Continued on the Reverse)*

*On Appeal from the United States District Court*
*for the Southern District of New York*

## REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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*Defendants-Appellees,*

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*Defendants.*

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## INTRODUCTION

These American Muslim Plaintiffs-Appellants (hereinafter "Plaintiffs") seek to vindicate one of the most foundational principles in American law—to exercise their religion free from government coercion—as protected by the clear mandate Congress expressly set forth in the Religious Freedom Restoration Act (RFRA). Defendants-Appellees (hereinafter also referred to as "Defendants," "the government," the "Agents," or "FBI Agents"), having mooted Plaintiffs' injunctive claims, seek now to further evade judicial review of the legality of Defendants' conduct. Widespread, documented FBI abuses of the No Fly List have to date failed to result in judicial remedy, perpetuating a "vicious cycle of shielded misconduct." *Sabir v. Williams*, 52 F.4th 51, 58 n.3 (2d Cir. 2022). Plaintiffs seek to have this Court interrupt that cycle and fulfill the judiciary's fundamental role when individual rights are at stake: to "say what the law is."

The government would have this Court remain silent. But it has no defense for the District Court's foundational error, which was to resolve qualified immunity at the motion-to-dismiss stage, despite this Court's firm admonition in *Sabir* that such resolution is improper in a burden-shifting statute like RFRA. That error was exacerbated when the District Court misinterpreted a snippet of the Complaint to relieve the government of its burden of production under RFRA's framework. This

error calls for reversal of the grant of qualified immunity and remand to evaluate the merits of Plaintiffs' RFRA claims.

Should this Court address Defendants' qualified immunity defense, it should resolve Step One of the qualified immunity analysis and find that Plaintiffs have plausibly pled that Defendants imposed a substantial burden on Plaintiffs' sincerely held religious beliefs. Given the persistence of watchlisting abuses by the federal government and the challenges of sustaining an injunctive challenge to such practices, violations will persist absent judicial direction.

The Court need not reach the alternative basis of affirmance the government proposes—that Plaintiffs do not sufficiently plead a connection between Plaintiffs' injuries and each of the individual Defendants—because, per this Court's practice, any such detailed factual assessment should be undertaken by the District Court in the first instance. Finally, the government's insistence on framing the right at issue in the narrowest, most technical form is inappropriate in this case; the very text of the RFRA statute and a "common sense" application, *see Edrei v. Maguire*, 892 F.3d 525, 543 (2d Cir. 2018), of the relevant religious liberty principles it codifies, gave Defendants sufficiently fair warning of the illegality of their conduct so as to preclude a grant of qualified immunity at Step Two.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN RESOLVING QUALIFIED IMMUNITY AT THE MOTION-TO-DISMISS STAGE AND BASED ON AN IMPLAUSIBLE READING OF PLAINTIFFS' ALLEGATIONS.

The government chooses not to defend the threshold error committed by the District Court in contravention of this Court's instruction in *Sabir*: granting qualified immunity to Defendants at the motion-to-dismiss stage even though Plaintiffs plausibly pled a *prima facie* RFRA case (substantial burden of a sincere religious belief), Brief for Plaintiffs ("Br.") at 24, and where no reasonable inference from the Complaint could support Defendants' "exceptionally demanding" burden, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014), of establishing that they had a compelling government interest that was narrowly tailored to the circumstances of these particular plaintiffs. Br. at 27 (citing cases requiring that compelling interest not be generalized, but be tailored to individual plaintiffs).

*Sabir* made clear that, because facts supporting a qualified immunity defense "must appear on the face of the complaint," it is almost always a "procedural mismatch" for the government to "advanc[e] qualified immunity as grounds for a motion to dismiss" in a case involving a burden-shifting statute such as RFRA. 52 F.4th at 63-64 (quoting *Chamberlain v. City of White Plains*, 960 F.3d 100, 111 (2d Cir. 2020)). Ignoring this admonition, the District Court concluded, based on an

acontextual and counter-factual interpretation of one snippet of the Complaint, that Plaintiffs had largely conceded that they were placed on the List due to a "national security" interest, albeit a wholly unparticularized one. JA-152. However, the entire thrust of the Complaint shows that Plaintiffs were wrongfully placed on the List to coerce them to serve as informants in their communities. Far from conceding the government's defense, the Complaint repeatedly alleges that there was no justification for Plaintiffs' placement on the List. JA-53, 60, 69. In *Sabir*, this Court rejected substantially more direct evidence of a compelling government interest, which appeared as exhibits to the complaint in the government's responses to the plaintiff's grievances. 54 F.3d at 60-62.[1]

It was reversible error here for the District Court to read the Complaint in a light most favorable to Defendants and therefore to divine a fully supported strict-scrutiny defense for Defendants.

None of the cases cited by Defendants for the general proposition that it is proper to resolve qualified immunity on a motion to dismiss, Brief for Defendants

[1] This Court properly deemed those responses as insufficiently tailored to Sabir's particular circumstances. In fact, this Court found that tailored responses would be insufficient to support a qualified immunity defense if a plausible reading of the complaint alleged that such justifications were pretextual. Even in that case, "the legitimacy of the officials' justification for the policy would be an issue of fact incapable of resolution at the motion-to-dismiss stage." *Sabir*, 52 F.4th at 62 n.6.

("Opp.") at 26-27, involve a burden-shifting statute like RFRA—a distinction that is central to *Sabir*'s admonition against disposition on the pleadings. Moreover, in all of those cases, plaintiffs' legal theory was not viable on the facts pled, *Ziglar v. Abbasi*, 582 U.S. 120, 150-55 (2017) (officials within same government department "do not conspire" when they discuss policymaking); *Ashcroft v. al-Kidd*, 563 U.S. 731, 743-44 (2011) (since material witness warrant's validity is judged by objective standard, allegations of improper intent were irrelevant); *NRA v. Vullo*, 49 F.4th 700, 717-19 (2d Cir. 2022) (allegations about state official's statements fell short of coercion "as a matter of law"); *Ganek v. Leibowitz*, 874 F.3d 73, 87 (2d Cir. 2017) (allegations insufficient to undermine probable cause as a matter of law); or plaintiffs had failed to plausibly allege facts sufficient to support their theory, *Wood v. Moss*, 572 U.S. 744, 764 (2014).

## II. THIS COURT SHOULD ADDRESS STEP ONE OF THE QUALIFIED IMMUNITY ANALYSIS.

Contrary to the government's assumption and the District Court's analysis, the Supreme Court's opinion in *Pearson v. Callahan* does not grant unfettered discretion to a court to skip over prong one of the qualified immunity analysis. 555 U.S. 223 (2009); *cf.* Opp. at 40-41. That *Pearson* itself is an example of an unexplained decision to skip prong one, Opp. at 41, is not the revelation the government makes it out to be: the opinion expressly avers that the five appellate courts to address the merits question had all resolved it in favor of law enforcement;

the decision under review was the sole outlier. 555 U.S. at 243-44. No such considerations are present here.

The government cites a handful of Supreme Court and Second Circuit decisions as persuasive examples of decisions to skip ahead to the "clearly established" prong. Opp. at 41. But all of those cases are consistent with the six factors set forth in *Pearson* and outlined in Plaintiffs' opening brief. Br. at 30-31. Several of these cases, like *Pearson,* involved claims that cut directly against well-established precedent. *See Mullenix v. Luna*, 577 U.S. 7, 12 (2015) ("[T]his Court has previously considered—and rejected—almost [the] exact formulation of the" Fourth Amendment question presented.); *Radwan v. Manuel*, 55 F.4th 101, 114 (2d Cir. 2022) (vulgar expression by "student-athlete at a university, while in public and on the playing field" was so clearly proscribable under existing law that court refused to opine on exception); *Torcivia v. Suffolk Cnty.*, 17 F.4th 342, 367-68 (2d Cir. 2021) ("[W]e have rejected unlawful seizure claims made by plaintiffs detained for longer periods of time than Torcivia."); *Liberian Cmty. Ass'n of Connecticut v. Lamont*, 970 F.3d 174, 193 (2d Cir. 2020) (in Ebola crisis, acknowledging longstanding deference to public health official's determinations). *San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015), involved a merits "question [that] has not been adequately briefed," a factor *Pearson* took pains to flag as favoring skipping ahead, 555 U.S. at 239-40; the merits of the "intracorporate conspiracy" question in *Abbasi*, 582 U.S.

at 152-54, were similarly summarily briefed—the subject of a single paragraph in plaintiffs' response brief.

Unlike those cases, this case presents a classic "law stagnation" risk, where failing to "address the merits question first to clearly establish the law" risks perpetuating "a vicious cycle of shielded misconduct." *Sabir*, 52 F.4th at 58 n.3. Most importantly, this case presents "questions that do not frequently arise in cases in which a qualified immunity defense is unavailable"—that is, routine criminal, municipal, or equitable cases—such that, therefore, "promot[ing] the development of constitutional precedent . . . is especially valuable." *Pearson*, 555 U.S. at 236; Br. at 33-34. The watchlisting cases cited by the government as "seeking non-monetary relief and therefore not subject to qualified immunity," Opp. at 41, all involved either an informancy request without more,[2] an inadequately-pled connection between the ask and the coercion,[3] or had become moot.[4] In cases where individuals have

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[2] *See El Ali v. Barr*, 473 F. Supp. 3d 479, 527 (D. Md. 2020) ("mere offer of a chance to cooperate [does not] plac[e] a substantial burden on the exercise of religion").

[3] *Ghedi v. Mayorkas*, 16 F.4th 456, 468 (5th Cir. 2021) ("Ghedi's own admissions make it only speculative that he was [watchlisted] in retaliation."); *Fikre v. Fed. Bureau of Investigation*, No. 3:13-CV-00899-BR, 2019 WL 2030724, at *9 (D. Or. May 8, 2019) (dubious "whether Plaintiff has 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.").

[4] *Fikre v. Fed. Bureau of Investigation*, 142 F. Supp. 3d 1152, 1166 (D. Or. 2015) ("to the extent that Plaintiff contends [listing was] solely because he

adequately pled equitable relief claims, the government has moved to moot those claims. The government denies mooting Plaintiffs' equitable relief intentionally, Opp. at 42, but the record belies that claim, *see* Br. at 18.

Defendants seem to suggest that, if they can point to a single No Fly List case that has reached the merits, the principles animating *Pearson*'s recommendation to reach Step One are obviated. Opp. at 41. *Pearson* carries no such formalistic implication. There is a plainly observable trend of law stagnation in this area (unlike, say, in areas of Fourth Amendment jurisprudence), which counsels for resolving this area of law at Step One. In any event, the government's case-by-case analysis is wrong. The half-dozen voluntarily-mooted cases that Plaintiffs cited in the opening brief are examples of the same phenomenon. *See* Br. at 34 n.6. Whether or not the cases involved RFRA causes of action or coercion claims is irrelevant to whether the government has a policy of shielding review of abusive No Fly Listing by mooting equitable claims. *Cf.* Opp. at 42 (attempting to distinguish *Kovac*, *Kashem*, *Long*, and *Maniar*). The district court in *Fikre* held that mere requests to cooperate "failed to state a claim," as the government notes. Opp. at 42. But the court went on to hold that to the extent Fikre's claims were factually rooted in *coercion*, they were

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declined to be a government informant, such a contention is subsumed within Plaintiff's substantive due-process claim," which was moot upon his return to the United States).

moot once he had been permitted to fly home to the United States. *Fikre*, 142 F. Supp. 3d at 1166.

The cases Defendants cite as examples of "No Fly List claims that proceeded to final judgment," Opp. at 43, are largely irrelevant. As the government notes, several of those cases involved plaintiffs who claimed to be on the Selectee List. *Id.* (citing *Elhady* and *Kovac*). In those cases, the court declined to find a liberty or reputational interest in being on a watchlist that subjects plaintiffs to added scrutiny but not to the far-greater coercion of being unable to fly at all. *Mohamed v. Holder* involved a challenge to the very existence of the No Fly List (as violating a fundamental international right to travel without meeting strict scrutiny), 266 F. Supp. 3d 868 (E.D. Va. 2017), and *Busic v. TSA* involved review under 46 U.S.C. § 46110 for a convicted airline hijacker, 62 F.4th 547 (D.C. Cir. 2023). Neither challenged abuse of the List for illegitimate purposes.

Another case the government cites actually supports Plaintiffs' argument. In *Long v. Pekoske*, the Fourth Circuit held a plaintiff's claims moot even though "the government ha[d]n't explained why [he] satisfied the No Fly List's criteria after his DHS TRIP review but ceased doing so shortly before the government's briefing deadline in this case." 38 F.4th 417, 425 (4th Cir. 2022). Plaintiffs here were notified they were off of the List days before a hearing on Defendants' motion to dismiss Plaintiffs' equitable claims. In sum, the law on abusive No-Fly Listing practices is

very far from "already being developed in cases seeking non-monetary relief against the government." Opp. at 44.

Finally, the government unconvincingly argues that certain *Pearson* factors weigh in favor of skipping the prong one inquiry. *See* Opp. at 44. Any "factbound questions about each agent's personal involvement" may require discovery, *id.*, but will not in any way diminish the value of a prong-one ruling on the legal right at issue—the right not to have one's religious exercise substantially burdened by the federal government without a compelling justification. Nor does a generic interest in "judicial restraint and avoidance of advisory opinions" justify skipping the first prong in the absence of other *Pearson* factors outweighing the serious concerns over law stagnation present here. *Id.*; *see generally* Brief for Institute for Justice as Amicus Curiae Supporting Plaintiffs at 12-18, *Tanvir v. Tanzin*, No. 23-738 (2d Cir. Aug. 14, 2023) (Dkt. No. 92) (explaining why *Pearson* factors counsel addressing Step One in this case).

## III. THE COURT SHOULD NOT REACH DEFENDANTS' PROPOSED ALTERNATIVE GROUNDS OF AFFIRMANCE BUT IF IT DOES, PLAINTIFFS HAVE PLAUSIBLY ALLEGED THAT DEFENDANTS HAVE VIOLATED RFRA.

Perhaps revealing the vulnerability of their qualified immunity defense at the motion-to-dismiss stage, Defendants suggest that this Court affirm the ruling below on an alternative ground—that Plaintiffs have failed to plausibly allege a RFRA claim against each individual Defendant. To do so, this Court would have to parse

the hundreds of allegations in the 88-page operative complaint and assess those allegations and principles of causation against each of the fifteen Defendants in the first instance, without the conventional benefit of a lower court opinion to review. Doing so runs contrary to this Court's settled practice. *See Schonfeld v. Hilliard*, 218 F.3d 164, 184 (2d Cir. 2000) ("[I]t is our distinctly preferred practice to remand" issues briefed but not decided below); *accord New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 180-81 (2d Cir. 2020).

Remanding a decision on the plausibility of Plaintiffs' allegations is particularly appropriate for two reasons. First, Defendants have failed to defend the actions of four Defendants (Agents Michael LNU, Artousa, or John Does 4 and 5), such that a remand at least for these four would be required in any event. Second, the District Court has to make the additional assessment of whether any dismissal on this ground should be with or without prejudice to re-pleading—an inquiry typically left to the discretion of a district court.

If the Court does reach this question in the first instance, the Complaint contains plausible allegations of liability against each of the individual Defendants. To establish a violation of RFRA, Plaintiffs must allege (1) that they were engaged in the "exercise of religion" and (2) that the federal agent "substantially burdened" those activities. 42 U.S.C. § 2000bb-1(a). Both prongs are satisfied here.

### A. Plaintiffs' Exercise of Religion Was Substantially Burdened by Defendants.

As the Complaint alleges, Plaintiffs were practicing Muslims and active members of their local American Muslim communities during the time of their recruitment as potential informants. Defendants cannot deny these well-pled allegations. Under RFRA, the "'exercise of religion' extends beyond 'belief and profession' and encompasses 'the performance of . . . physical acts [such as] assembling with others for a worship purpose.'" *Sabir*, 52 F.4th at 59 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)). Contrary to Defendants' cramped reading, the wide scope of "exercise of religion" encompasses the ability to participate or exist in one's religious community without compromising faith tenets and experiencing ostracization, as well as the ability to interact with other members of the religious community through fellowship and in various fora, whether in person or online. *See Hobby Lobby*, 573 U.S. at 714 ("[A]mendment [of RFRA] provid[ed] that the exercise of religion 'shall be construed in favor of a broad protection of a religious exercise, to the maximum extent permitted.'") (citing 42 U.S.C. § 2000cc-3(g)). Community participation is a central tenet of Islam, and has been an element in analyzing Muslims' free exercise claims. *See, e.g.*, *Wilson v. Beame*, 380 F. Supp. 1232, 1241 (E.D.N.Y. 1974) (emphasizing that "[t]he Koran makes it mandatory that Muslims participate in sustaining their community"); *see also* Brief for Muslim

Advocates as Amicus Curiae Supporting Plaintiffs at 11-12, *Tanvir v. Tanzin*, No. 23-738 (2d Cir. Aug. 15, 2023) (Dkt. No. 93).

Plaintiffs' conduct qualifies as protected religious exercise. Defendants engaged in a sustained and deliberate campaign to pressure them to inform on fellow congregants, friends, coworkers, and neighbors who are Muslim, which would have plainly burdened their capacity to freely and fully exercise their faith. *See* JA-48, 56, 64.

Defendants do not seriously dispute that. Defendants instead argue that "no controlling precedent . . . clearly establishes[] whether law enforcement pressure to inform on other members of one's religious community" imposes a substantial burden—in other words, that Defendants might not have known they were doing so or as if the Plaintiffs' adherence to Islam were somehow purely coincidental to the Agents' pressure campaign. Opp. at 32. For the reasons set forth at length in Plaintiffs' opening brief, Br. at 44-54, it should have been perfectly clear to Defendants that their individual participation (detailed below) in a campaign of systematic coercion substantially burdened each of Plaintiffs' exercise of religion.

**B. Plaintiffs Plausibly Allege a RFRA Claim Against Each Agent.**

Defendants contend that Plaintiffs failed to allege facts plausibly showing each Agent's personal involvement in substantially burdening their religious exercise. This is precisely the kind of painstaking factual analysis that should be

remanded to the District Court. In any event, Defendants are wrong. Plaintiffs identified each Defendant's conduct that contributed directly and indirectly to the scheme that substantially burdened Plaintiffs' exercise of religion and therefore violated RFRA. Qualified immunity jurisprudence allows for individual liability where responsibility is shared among actors, as happened here. While "qualified immunity [does] require[] an *individualized* analysis of *each* officer's alleged conduct," Opp. at 45 (citing *S.M. v. Krigbaum*, 808 F.3d 335, 340 (8th Cir. 2015)), it does not require that each individual be responsible for every aspect of the action that infringed the individual right. *See Taylor v. Riojas*, 592 U.S. 7, 9 (2020) ("[T]he record suggests that at least some officers involved . . . were deliberately indifferent to the constitutional violation.") (internal citations omitted). A "'direct participant' includes a person who authorizes, orders, or helps others to do the unlawful acts, even if he or she does not commit the acts personally." *Terebesi v. Torreso*, 764 F.3d 217, 234 (2d Cir. 2014) (citing *Provost v. City of Newburgh*, 262 F.3d 146, 155 (2d Cir. 2001)).

Defendants' argument—that an individual Defendant would only be liable if they had independently masterminded the entire scheme and singlehandedly executed each step of it—ignores precedent, common sense, and the Amended Complaint's allegations about the FBI's organizational structure and investigative strategies. JA-37-45. Plaintiffs' allegations, and inferences reasonably drawn from

them, plausibly support a claim that each Defendant was involved in the violation of Plaintiffs' rights under RFRA and is therefore subject to liability.

*Agent John Doe 1*. Defendants concede that Doe 1 took part in the broader pressure campaign during his "single interaction with Tanvir in February 2007." Opp. at 46. Yet they also claim that "Doe 1 [did not have] any personal involvement in allegedly unlawful conduct." *Id.* However, Doe 1 and Tanzin jointly visited Tanvir in February 2007, and two days later, Tanzin asked Tanvir to provide information about the Muslim community. JA-45. It is clearly plausible that Doe 1 was involved in making the decision to pressure Tanvir to become an informant.

*Agents Tanzin and John Doe 2/3*. Contrary to Defendants' assertions, Tanzin and Doe 2/3's actions were not "too far removed" from the alleged RFRA violations. Opp. at 47. Tanzin visited Tanvir's place of employment, requested that he share information about his Muslim community, and, with Doe 2/3, repeatedly asked Tanvir to serve as an informant. JA-46-47. These actions all directly contributed to the broader scheme to place Tanvir on the List. After Tanvir's refusal, Tanzin and John Doe 2/3 used the List to pressure Tanvir into complying and providing information. Rather than being "far removed" from the RFRA violations, these Agents participated in the pressure campaign that is the basis for this suit.

*Agents Garcia and John LNU*. Defendants claim that there was no connection or coordination between Agents Garcia and John LNU and the Agents involved in

earlier attempts to coerce Tanvir into serving as an informant. Accepting Defendants' argument would require believing that Agents Garcia and John LNU coincidentally asked Tanvir nearly identical questions to those asked by prior agents (including a request to take a polygraph test), and that, despite working for the same agency and asking similar questions, Garcia was acting independently of Tanzin. Further, when Tanvir was denied boarding on a flight to visit his mother in Pakistan, Garcia informed him that he would not be removed from the List until he met with the FBI. The allegations plausibly show that Garcia was directly involved with Tanvir's placement on the List and used that placement as a pressure tactic.

*Agents Steven LNU and Harley*. When Agents Steven LNU and Harley gave Shinwari "the 'go-ahead' [] to fly home to the United States," Opp. at 48, it was not an act of benevolent "facilitat[ion]," Opp. at 49, but one of coercion. Only after an interrogation and a subsequent request for a polygraph test did they confer with "higher ups" to "facilitate[]" Shinwari's return to the United States. Opp. at 48. Further, Shinwari's email to the Agents was a desperate plea to the only individuals he knew who had the power to affect the No Fly List, not a request for a favor. It is clear from the alleged facts that the Agents effectively used the List as a means to generate leverage over Shinwari and wanted him to depend on them.

*Agent Grossoehmig*. Defendants argue that Grossoehmig's "interact[ion] with Shinwari on a single occasion" was insufficient to demonstrate his personal

involvement in pressuring Shinwari to become an informant. Opp. at 49. However, Defendants fail to acknowledge that the "interaction" was a two-hour interrogation that took place after a flight from halfway around the world and which contained "substantially the same questions that [Shinwari] was asked in Dubai by Agents Harley and Steven LNU." JA-65. It is plausible to believe that such conduct constitutes material assistance in a concerted effort to coerce Shinwari into cooperating.

*Agents Dun and Langenberg*. Defendants claim that "Dun and Langenberg's supervisory authority over the investigation is insufficient to show they had any personal involvement" in the violation of Shinwari's freedom to religious exercise. Opp. at 49. But the Agents did not merely have supervisory authority; they personally interrogated Shinwari after his return to Omaha and offered yet another reward—a one-time waiver to travel in an emergency—to entice him into becoming an informant.

### C. It Was Foreseeable to Any FBI Agent That Nomination Would Cause Placement on the List.

Defendants' argument that the FBI does not make the final determination whether to "place or keep individuals on the List," Opp. at 53, fails to address well-pled allegations in the Complaint showing that the TSC is extremely unlikely to reject a nomination from the FBI; this renders Defendants' distinction between the roles of the TSC and FBI a mere technicality. The FBI and its agents hold

considerable power over the List. An individual is virtually automatically placed on the List after an FBI agent nominates them.[5] The acceptance rate for nominations to the broader watchlist is approximately 99%. *El Ali*, 473 F. Supp. at 494.

Even accounting for the TSC's participation in the process after the FBI's nomination, third-party action does not break a chain of causation if that party's action is foreseeable. *See Whitlock v. Brueggemann*, 682 F.3d 567, 584 (7th Cir. 2012) (intervening act could not break causation because it was foreseeable that fabricated evidence would be used in later proceedings). Here, Defendants could "reasonably foresee that [their] misconduct [would] contribute to an 'independent' decision that result[ed] in a deprivation of liberty" because, historically, the TSC has rarely rejected an FBI nomination. *See Zahrey v. Coffey*, 221 F.3d 342, 352 (2d Cir. 2000); *see also Kerman v. City of N.Y.*, 374 F.3d 93, 126 (2d Cir. 2004) ("[A]n actor may be held liable for those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties."); *Taylor v. Brentwood Union Free Sch. Dist.*, 143 F.3d 679, 688 (2d Cir. 1998) (same). Defendants' argument

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[5] The role of the TSC as a rubber stamp for the FBI has had negative consequences. In *Ibrahim v. Dep't of Homeland Sec.*, an FBI agent "erroneously nominated [the plaintiff] to the TSA's no-fly list" by "check[ing] the wrong boxes [and] filling out the form exactly the opposite way from the instructions on the form." 62 F. Supp. 3d 909, 916 (N.D. Cal. 2014). Nevertheless, the TSC accepted the nomination. *See* Fed. Bureau of Inv., *Privacy Impact Assessment for the Terrorist Screening Center – Terrorist Screening Database (TSDB)* 4-5 (2012).

seeking to absolve the FBI of responsibility ignores long-settled precedent and misconstrues the reality of the TSC nomination process.

### D. Plaintiffs' Failure to Explicitly Object on the Basis of Religious Exercise Does Not Absolve the Agents of Liability.

Disregarding the favorable inferences which are to be accorded to Plaintiffs' allegations, Defendants argue unconvincingly that the Agents did not know that they were substantially burdening Plaintiffs' religious exercise because Plaintiffs and their counsel did not expressly articulate an objection. However, as alleged in the Complaint, Defendants (i) knew that Plaintiffs were practicing Muslims who participated in Muslim community life, and (ii) were engaged in post-9/11 national security investigative activity that, in large part, targeted Muslim Americans and their religious activities. JA-37, 44-45, 55-57, 66. Plaintiffs' religion was not somehow incidental to the Agents' planned campaign: the reasonable inference is that Defendants sought out Plaintiffs in part because they were practicing Muslims and pressured them to inform on other practicing Muslims.

RFRA does not require Plaintiffs to have explained to the Agents why their requests to inform on others when attending their houses of worship or participating in Muslim-identified spaces would have burdened their free exercise of religion, since the most plausible reason an individual attends a house of worship *is to worship*. *Compare* JA-44 (explaining the coercive nature of the FBI's use of the List, including the specific impact informing has on American Muslims for whom Islam

"precludes spying on the private lives of others in their communities") *with Boatwright v. Jacks*, 239 F. Supp. 3d 229, 233-34 (D.D.C. 2017) (granting qualified immunity where defendants did not even know plaintiff was Muslim); *May v. Baldwin*, 109 F.3d 557, 562 (9th Cir. 1997) (prisoner never stated a religious interest in his dreadlocks and did not have a known religious affiliation); *and Weinberger v. Grimes*, No. 07-6461, 2009 WL 331632, at *5 (6th Cir. Feb. 10, 2009) (no evidence prison official "acted knowingly in serving [plaintiff] a non-kosher meal"). Furthermore, it was reasonable for Plaintiffs to refrain from discussing the substance of their religious beliefs with FBI Agents out of a fear of retaliation and in light of the absence of any established grievance process to seek protection from retaliation. *Cf. Sabir*, 52 F.4th at 56 (plaintiff could appeal an informal resolution of an alleged constitutional violation to multiple officials.)

Defendants claim there was no RFRA violation because Plaintiffs met the criteria for placement on the List.[6] Opp. at 55. That argument misconstrues the

[6] Defendants' contention that the "obvious" and "more likely' explanation[]" for Plaintiffs' placement on the List is that "the standards for inclusion on the List were met," Opp. at 55—implying that the government is in sole possession of information that was not alleged in the Complaint—is premature and inappropriate at this stage of the case. *See Brown v. Budz*, 398 F.3d 904, 914 (7th Cir. 2005) ("Where pleadings concern matters peculiarly within the knowledge of the defendants, conclusory pleading on 'information and belief' should be liberally viewed.") (citing *Tankersley v. Albright*, 514 F.2d 956, 964 n.16 (7th Cir. 1975)). At the motion-to-dismiss stage, it is impossible for Plaintiffs to know the information that Defendants relied on to place Plaintiffs on the List, as this information is "peculiarly within the

allegations of the Complaint, which must be taken as true and which plausibly allege that Plaintiffs did not or should not have qualified for placement on the List. *See* JA-53, 60, 67. This is a question, as *Sabir* counsels, to be resolved at summary judgment.

Defendants further attempt improperly to transform the actual allegations in the Complaint into an alternative theory that exculpates them—that the questioning at issue was a mere offer to cooperate. Opp. at 54 n.12. This attempted substitution of Plaintiffs' well-pled theory with the government's preferred version is not permissible as a matter of civil procedure and, in any event, misconstrues the nature of FBI surveillance and investigation of Muslim American communities, both before and after 9/11. Where a punitive government action follows an exercise of an individual's religious belief, that is evidence of coercion—and thus a substantial burden on religion. Courts routinely consider the sequence of events in order to determine whether impermissible coercion occurred. *See Washington v. Gonyea*, 538 F. App'x 23, 26 (2d Cir. 2013) ("[T]he conduct alleged here—that [plaintiff] was severely punished for engaging in protected activity—rises to the level of a substantial burden on the free exercise of religion."); *Warsoldier v. Woodford*, 418 F.3d 989, 996 (9th Cir. 2005) (finding that plaintiff was put under "significant

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knowledge of the defendants," *Brown*, 398 F.3d at 914, but the scheme alleged here is sufficiently plausible to overcome the *Iqbal* standard. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

pressure to "abandon [his] religious beliefs" when he refused to conform his hairstyle to prison grooming standard).

It is therefore plausible to conclude that the Agents' orchestrated and sustained campaign to pressure these Muslim Plaintiffs to inform on other Muslim adherents was coercive and substantially burdened Plaintiffs' exercise of religion.

## IV. DEFENDANTS HAD FAIR WARNING OF THIS OBVIOUS VIOLATION OF PLAINTIFFS' RIGHTS.

Defendants acknowledge that even in novel factual circumstances, courts have found the law to be clearly established for qualified immunity purposes even if they have done so rarely. Opp. at 34; *see Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see also Riojas*, 592 U.S. 7 (affirming *Hope*). Defendants similarly acknowledge that direct decisional precedent is not required. Opp. at 34-35; *see Garcia v. Does*, 779 F.3d 84, 92 (2d Cir. 2015) ("[T]he 'absence of a decision by this Court or the Supreme Court directly addressing the right at issue will not preclude a finding that the law was clearly established' so long as preexisting law 'clearly foreshadow[s] a particular ruling on the issue.'") (citations omitted).

Even if there are no precedents applying RFRA to the context of law enforcement recruitment, "common sense," *Edrei*, 892 F.3d at 543, confirms that any officer would have known that coercing an individual to act deceptively vis-à-vis their co-religionists in religious spaces would impose a substantial burden on the exercise of religion. That should be obvious here with these American Muslims, as

it would have been with other faith adherents coerced to betray core religious beliefs and courts should afford Muslims no less protections. *See* Br. at 53-54.

### A. RFRA Provides Fair Warning.

*Sabir* confirmed that the directives set forth in RFRA itself are sufficient to give an officer fair warning of prohibited conduct. *See* 52 F.4th at 65 (citing *Okin v. Vill. of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 433-34 (2d Cir. 2009)). Despite acknowledging this, Defendants ignore the discussion in *Sabir* that the qualified immunity analysis is different in the RFRA context as compared to violations of certain constitutional rights, especially the Fourth Amendment caselaw involving split-second policing decisions upon which the government heavily relies. Opp. at 35-36.

Contrary to Defendants' assertion, Opp. at 35-36, *Sabir* explicitly noted that varying contexts may require different levels of specificity to establish the law for qualified immunity purposes, particularly in the Fourth Amendment context. 52 F.4th at 65 (noting that the "abstract right" to be free from "unreasonable searches and seizures" can make it "difficult for an officer to know whether a search or seizure will be deemed reasonable given the precise situation encountered") (quoting *Abbasi*, 582 U.S. at 151); *see also Mullenix*, 577 U.S. at 12 ("Such specificity [in defining the contour of a right] is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer

to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.") (internal citation omitted). The duration and persistence of the Agents' campaign here is also quite different from exigent circumstances frequently leading to a grant of qualified immunity in the Fourth Amendment context.

As *Sabir* explained, the analysis of a qualified immunity claim under RFRA requires a lesser degree of specificity. 52 F.4th at 65 ("Based 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.'") (citation omitted). *Sabir* stands for the principle that an officer will know they are violating RFRA if they lack a governmental interest, let alone a compelling one, for imposing a substantial burden on the exercise of religion. *Sabir* did not dispense with the need for a factual analogue, as Defendants suggest, Opp. at 35, but clarified that it need not be at the level of specificity appropriate to other contexts.

### B. Defendants Had Fair Warning That They Violated Plaintiffs' Right to Be Free From Government Coercion.

Defendants suggest that the lack of RFRA precedent "in the context of law enforcement efforts to recruit informants" should be dispositive of the question of whether the law was clearly established Opp. at 30, even while acknowledging that officials can have warning in "novel factual circumstances," Opp. at 34. But in addition to citing cases setting forth the right to be free from the aforementioned

government pressure, Plaintiffs also argued that Defendants had "fair warning" because it would have been obvious to an Agent that they could not coerce an individual to violate their religious beliefs, and more so given the sustained campaign the Agents undertook. Br. at 51.

Defendants' insistence that the law could not be clearly established because no court had applied RFRA to the context of law enforcement recruitment of informants is akin to an argument rejected in *Edrei*. 892 F.3d at 540. There, this Court rejected the argument that the law was not clearly established because substantive due process principles had not been previously applied to the method of crowd control. The Court explained that "is like saying police officers who run over people crossing the street illegally can claim immunity simply because we have never addressed a Fourteenth Amendment claim involving jaywalkers. This would convert the fair notice requirement into a presumption against the existence of basic constitutional rights." *Id.* The Court should reject Defendants' similar argument here.

It is of little import that Defendants were abusing the List as opposed to some other government power. The Court has repeatedly held that "[a]n officer is not entitled to qualified immunity" for lack of notice "every time a novel method is used to inflict injury." *Id.* at 543 (citing *Terebesi*, 764 F.3d at 237 (quoting *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994))). *Edrei* confirmed that "[s]ome measure

of abstraction and common sense is required with respect to police methods . . .” *Id.* (citing *Terebesi*, 764 F.3d at 237 n.20). The same common sense should apply here: law enforcement officials cannot use the power of the state—regardless of the particular means of coercion—to force an individual to participate in behavior in a manner at odds with sincerely held religious beliefs.

### C. It Would Be Obvious to Any Official that Such Coercion Would Place a Substantial Burden on the Exercise of Religion.

The Complaint contains voluminous allegations showing that Defendants engaged in a sustained, individually-targeted campaign over years to pressure Plaintiffs to forego their religious principles, betray their communities’ faith and trust, and collect intelligence for the FBI. It would have been obvious to any law enforcement agent that sustained questioning combined with repeated demands to serve as informants would burden Plaintiffs’ exercise of religion. Defendants quibble about whether the Agents explicitly asked each individual Plaintiff to spy on other Muslims, but Defendants never asked Plaintiffs about individuals or communities of any other religion. *See generally* JA-45-70. As noted above, because the Agents made clear they were approaching Plaintiffs because they were Muslim and questioned them about their religious beliefs, each Plaintiff had reason not to share their religious objections to serving as informants to the Agents.

It is clear that the Agents wanted Tanvir specifically to spy on Muslim communities. When the Agents first approached him, they explicitly asked him

about the Muslim community, and whether there was "anything that he knew about within the American Muslim community that he could share with the FBI." JA-45. Defendants point to the fact that the Agents asked Tanvir alternatively to be an informant in Pakistan or Afghanistan, and being particularly interested in 'Desi' (South Asian) communities, Opp. at 36; JA-47, 48, but neglect to acknowledge that given the previous questioning and the religious composition of the populations of those countries, it was obvious that the Agents were asking Tanvir to spy on Muslim communities.

Similarly, it would have been obvious to the Agents who harassed Algibhah that their demands would burden his exercise of religion. Defendants acknowledge that the Agents asked Algibhah to "infiltrate a mosque in Queens" and also "to participate in certain online Islamic forums." Opp. at 37 (citing JA-56, 59). Defendants suggest it is somehow meaningful that the mosque they asked him to infiltrate was not the mosque that he regularly attended and that these were not Islamic forums in which he regularly participated. Opp. at 37. But that improperly narrows the meaning of community in religion. Certainly, a Catholic asked to spy on a parish not their own would still feel as though they were betraying their fellow Catholics. The same logic applies here. The Agents conveyed explicitly they wanted Algibhah to act deceptively in places where Muslims congregate for religious purposes.

The Agents' questioning of Shinwari indicated that they were interested in having him provide information about Muslim communities. JA-64 (asking about his religious activities, which mosque he attends), 68 (asking about videos of religious sermons he had watched). It was clear from their questions and demands that the Agents wanted him to inform on Muslim communities. JA-66.

Defendants' focus on the wording of the requests ignores the most basic understanding of what it means to be a government informant. A request to serve as an informant is *always* a request to act deceptively with the targets of the surveillance. In each instance, it was clear to Plaintiffs that the Agents wanted them to act deceptively with their co-religionists, including in religious spaces—because they were Muslim. Defendants attempt to deflect from these demands by suggesting that Plaintiffs could only bring RFRA claims if Defendants instructed them to report on the activities at the mosques which they regularly attended. Opp. at 37-38. As noted above, this ignores the communal nature of religion, and that an individual's exercise of religion involves activities and relationships outside of their own house of worship and outside of communal prayer.

Defendants also surmise, based on nothing permissibly in the record, that because some Muslims may not object to serving as an informant, or may have non-religious reasons for refusing, it would not have been obvious to the Agents that their actions were imposing a substantial burden on Plaintiffs' exercise of religion. Opp.

at 39. Defendants mischaracterize the issue. The proper framing would take into account that the very act of being an informant requires acting deceptively. Such deception is inherently at odds with Muslim religious practice. It would have been obvious to any agent that an instruction to act deceptively in a religious space would burden someone's religious exercise. No Muslim or other religious adherent could meaningfully seek solace or supplication from prayer knowing that they are deceiving their co-religionists.

## CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's dismissal based on qualified immunity and remand with instructions to resolve qualified immunity at summary judgment. In the alternative, if the Court decides to address qualified immunity, it should nevertheless exercise its discretion under *Pearson* to address Step One of the qualified immunity analysis and hold that Plaintiffs stated a *prima facie* claim under RFRA and also hold that Defendants violated clearly established law.

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