No. 19-71

In the Supreme Court of the United States

FNU TANZIN, *ET AL.*, PETITIONERS
v.
MUHAMMAD TANVIR, *ET AL.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, permits claims seeking money damages against federal government officials, agents, and employees sued in their individual capacities for violations of the law's substantive protections of religious belief.

PARTIES TO THE PROCEEDINGS

Petitioners were defendants in the district court and appellees in the court of appeals. They are FNU Tanzin, Sanya Garcia, John LNU, Francisco Artusa, John C. Harley III, Steven LNU, Michael LNU, and Gregg Grossoehmig, Special Agents of the Federal Bureau of Investigation (FBI); Weysan Dun, Special Agent in Charge, FBI; James C. Langenberg, Assistant Special Agent in Charge, FBI; and five John Doe Special Agents, FBI.

Respondents are Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari, who were plaintiffs in the district court and appellants in the court of appeals.[1]

[1] Awais Sajjad was a plaintiff in the district court but did not appear in the court of appeals. *See* App. 1a, 62a.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The amended opinion of the court of appeals (App. 1a–44a)[2] is reported at 894 F.3d 449 (2d Cir. 2018). The court of appeals' order denying rehearing *en banc* (App. 45a–61a) is reported at 915 F.3d 898 (2d Cir. 2019). The opinion of the district court (App. 62a–109a) is reported at 128 F. Supp. 3d 756 (S.D.N.Y. 2016).

JURISDICTION

The decision of the court of appeals was entered on May 2, 2018, and amended on June 25, 2018. The denial of rehearing *en banc* was entered on February 14, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Religious Freedom Restoration Act of 1993, as amended (RFRA), begins with a statement of legislative purpose:

> The purposes of this chapter are—
> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

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[2] All citations to the Appendix (App.) refer to the Appendix to the Petition for a Writ of Certiorari.

> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb. RFRA's substantive provision states:

> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

42 U.S.C. § 2000bb-1(c). RFRA's definitions section provides that "the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States . . . ." 42 U.S.C. § 2000bb-2(a).

STATEMENT

This case presents none of the factors warranting this Court's review. There is no circuit split requiring resolution, as the two circuit courts that have weighed in on the question presented are in accord. The case is also in an interlocutory posture: the court of appeals remanded for adjudication of the individual federal officials' qualified immunity defense, which had been raised before the district court but was not ruled upon. And the case was correctly decided below, consistent with this Court's decisions. Petitioners' proffered reasons for certiorari are exaggerated and neither outweigh these factors nor justify a departure from the considerations governing certiorari.

Respondents filed suit to challenge the Federal Bureau of Investigation's (FBI) unlawful abuse of the No Fly List (also referred to as the List) to coerce law-abiding American Muslims into spying on their religious communities. Respondents Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari were either placed on the List and told they could only be removed if they served as government spies in their religious communities, or were asked to spy and, when they refused, found themselves on the List. Each Respondent is either a citizen or a lawful permanent resident of the United States, and each is a practicing Muslim. Respondents brought suit against FBI agents in their individual capacities under RFRA, seeking monetary damages as relief. While the district court action was pending, the government notified all Respondents that they were no longer on the No Fly List, rendering moot Respondents' claims for injunctive and declaratory relief against the official capacity defendants and leaving only the damages part of the action against the individual capacity defendants as a live controversy. Years later, the court of appeals correctly concluded that RFRA authorizes monetary damages against federal government employees sued in their individual capacities.

A. The No Fly List

1. The No Fly List is a watchlist created and maintained by the government's Terrorist Screening Center (TSC) of people who are prohibited from boarding aircraft for flights that originate from, terminate in, or pass over the United States. App. 5a–6a. Since 2009, the list has grown from roughly three thousand names to in excess of eighty thousand. *See*

Appendix to Brief for Respondents in Opposition (App. Opp'n) 17a (Am. Compl. ¶ 47); Eric Lichtblau, *After Orlando, Questions Over Effectiveness of Terrorism Watch Lists*, N.Y. TIMES, June 22, 2016.[3]

The FBI is the principal agency that administers the TSC. App. 5a. The TSC, in turn, develops and maintains the Terrorist Screening Database (TSDB), the government's repository of information about all individuals who are supposedly known to be or reasonably suspected of being involved in "terrorist activity." *Id.* The No Fly List, a subset of the TSDB, is among the watchlists administered by the TSC. *Id.*

The Department of Homeland Security (DHS) administers the limited redress procedure for individuals who contest their placement on the No Fly List. App. Opp'n 10a (Am. Compl. ¶ 21).

2. While the TSC maintains and distributes the No Fly List, it does not, on its own, generate the names on the List. Rather, it relies on "nominations" from agencies with investigative functions—primarily, the FBI. *Id.* at 15a (Am. Compl. ¶ 41). Individual agents nominate people to these lists.[4] App. 6a; *see also Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 916 (N.D. Cal. 2014) (describing process by which an FBI special agent nominated Dr. Rahinah Ibrahim to various federal watchlists). Although the TSC is expected to review each nomination to ensure that the derogatory information satisfies the No Fly List's already thin placement criteria,

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[3] *Available at* http:// www.nytimes.com/ 2016/06/23/us/ politics/after-orlando-questions-over-terrorism-watch-lists.html?_r=2.

[4] Contrary to Petitioners' assertions, Pet. 4, Respondents have not conceded that individual agents play no role in the composition of the No Fly List or any other watchlist maintained by the TSC.

in practice the TSC rarely rejects any of the names that FBI agents nominate to the No Fly List: more than 99 percent of nominees were placed on the watchlists for which they were nominated. App. Opp'n 17a (Am. Compl. ¶ 47).

Notwithstanding the onerous burden that placement on the No Fly List imposes on an individual's ability to travel domestically and abroad, the standard for inclusion on the List is opaque. The relevant statute requires that the individual "be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). The government's court filings in other cases that have challenged placement on the No Fly List have not elucidated the standard much, disclosing only that the List is reserved for "known or suspected terrorist[s]" who "pose a threat of committing a terrorist act with respect to an aircraft." App. Opp'n 15a (Am. Compl. ¶ 42).

B. Respondents' Placement and Retention on the No Fly List

1. The individual agents who have petitioned for certiorari abused their broad, discretionary power to place or maintain people on the No Fly List and through those actions violated Respondents' rights under RFRA. While the details of each Respondent's experiences with placement and retention on the No Fly List are different, the broad contours are strikingly similar. Each was born into the Muslim faith abroad, where at least some of their family remains. App. 3a. Each immigrated legally to the United States relatively early in life, and each had flown on commercial aircraft many times without incident. None poses, has ever posed, or has ever been accused of posing, a threat to aviation security. *See, e.g.*, App.

Opp'n 23a, 34a, 37a, 47a, 55a (Am. Compl. ¶¶ 68, 108, 118, 145, 166).

Nonetheless, each Respondent found himself on the No Fly List. Throughout most of the proceedings before the district court, the government refused to even confirm that Respondents were on the No Fly List, inform them of the purported basis for their placement, or give them a meaningful opportunity to refute their designations. *See id.* at 36a, 40a–41a, 55a–56a (Am. Compl. ¶¶ 114, 128, 168); App. 75a. They all were prohibited from flying, sometimes when they were headed to visit loved ones or to start a new job, or on their way home from a trip abroad, stranding them overseas. App. 10a; App. Opp'n 6a–8a (Am. Compl. ¶¶ 14–17).

2. Petitioners, FBI special agents, approached Respondents to pressure them to become sources of general information about their own Muslim communities. Since 2001, FBI recruitment of informants has significantly expanded, and considerable pressure exists within the agency to cultivate such resources, irrespective of the impact these efforts have on individuals like Respondents and their communities. *See id.* at 12a–13a (Am. Compl. ¶¶ 36–37). None of Respondents, their friends, or families, were suspected of involvement in criminal activity. Quite the opposite: by all appearances, the agents sought to force Respondents to serve as community spies simply because they were Muslims with access to a faith community under suspicion. *See id.* at 24a, 37a–38a, 48a, 51a–53a (Am. Compl. ¶¶ 70, 120–22, 148, 156–61).[5]

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[5] Petitioners incorrectly assert for the first time that Respondents alleged that the individual FBI agents recruited them to serve as informants in "terrorism investigations." Pet. 4. Re-

3. When initially approached, each Respondent answered the agents' specific questions truthfully, but none wanted to serve as an informant on his Muslim community, in part because to do so violated his religious beliefs. App. 3a (opinion of the court of appeals). Rather than accepting that refusal, the FBI agents persisted—in some instances threatening individual Respondents with deportation and arrest and in other instances offering financial incentives and assistance with family members' immigration to the United States. *Id.*; App. Opp'n 25a–27a, 38a, 51a, 53a (Am. Compl. ¶¶ 74–79, 121, 156, 161). In each case, the agents relied upon what they assumed would be the irresistible coercion of the No Fly List—causing each Respondent to be placed on the List and then either threatening to keep him on the List for refusing to accede to the FBI's demands, or offering the incentive of being removed from the List in exchange for services as an FBI informant. *See, e.g.*, *id.* at 30a, 39a, 152a (Am. Compl. ¶¶ 90, 124, 158). To take one example, FBI agents Artusa and John Doe 5, on an unannounced visit to Mr. Algibhah, told him that his efforts to seek congressional assistance to secure removal from the List would be futile given the FBI's control over his fate: "Congressmen can't do shit for you; we're the only ones who can take you off the list." *Id.* at 42a–43a (Am. Compl. ¶ 131).

Petitioners "forced [Respondents] into an impermissible choice between, on the one hand, obeying their sincerely held religious beliefs and being subjected to the punishment of placement or retention on the No Fly List, or, on the other hand, violating their sincerely held religious beliefs in order to avoid

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spondents never so alleged and, indeed, nothing in the record below supports this assertion in the Petition.

being placed on the No Fly List or to secure removal from the No Fly List." App. 4a (opinion of the court of appeals). Each Respondent alleged that this dilemma placed a substantial burden on his exercise of religion and that the individual Petitioners knew or should have known this.[6] App. Opp'n 28a, 38a–39a, 55a (Am. Compl. ¶ 84, 122, 166). Additionally, placement on the No Fly List resulted in concrete harms for Respondents, preventing them from visiting family members in the United States and overseas, "caus[ing] them to lose money they had paid for plane tickets, and hamper[ing] [Respondents'] ability to travel for work," all of which resulted in "emotional distress, reputational harm, and economic loss." App. 4a.

C. Procedural History

1. After pursuing and exhausting the limited administrative redress process then available through DHS for individuals who believed they were on the No Fly List, Respondents filed suit against Petitioners in their official capacities, seeking injunctive and declaratory relief, and in their individual capacities, seeking compensatory and punitive damages. App. 11a (opinion of the court of appeals).

In June 2015, a mere four days before oral argument on the government's motions to dismiss the official capacity and individual capacity claims, DHS, one of the government defendants, informed Re-

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[6] Petitioners nonetheless quote Second Circuit Judge Dennis Jacobs' dissent from the denial of rehearing *en banc* to claim ignorance of the burden on Respondents' religious beliefs. Pet. 25. The record below indicates otherwise and, at the very least, this is a contested issue of fact ripe for remand and resolution before the district court in the first instance.

spondents that the government "knows of no reason why they would be unable to fly." *Id.* at 12a. Respondents then agreed to stay the official capacity claims, and ultimately to dismiss them after confirming each Respondent was able to board a flight. *Id.* The district court subsequently held, in pertinent part, that RFRA does not permit actions for money damages against federal officers sued in their individual capacities. *Id.* at 13a. Respondents appealed that ruling. *Id.* at 14a.

2. On appeal, a three-judge panel of the Second Circuit, in a unanimous decision, agreed with Respondents and reversed the district court's ruling, holding that RFRA permits actions seeking monetary damages against federal government employees sued in their individual capacities. *Id.* at 32a–33a.[7]

In analyzing RFRA, the court of appeals held that the "plain terms" of the statute's definition of "government" authorized individual capacity suits against federal officers. *Id.* at 19a. The court also noted that the statute's use of language comparable to that of the Civil Rights Act of 1871, 42 U.S.C. § 1983, further indicated that Congress "intend[ed] to adopt not merely" the phrasing of Section 1983, "but the judicial construction of that phrase" as well. *Id.* at 22a (citations omitted).

The court of appeals then turned to the question whether RFRA's use of the term "appropriate relief" includes money damages. Noting that RFRA does not define "appropriate relief," the Second Circuit resorted to canons of statutory interpretation. *Id.* at 24a. Citing the "venerable canon of construction that

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[7] The Second Circuit decision aligns with the Third Circuit's earlier ruling in *Mack v. Warden Loretto FCI*, 839 F.3d 286 (3d Cir. 2016). The government sought neither rehearing nor review of the Third Circuit's decision before that court or this one.

Congress is presumed to legislate with familiarity of the legal backdrop for its legislation," the court of appeals recognized that the Supreme Court had decided *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), a year prior to the passage of RFRA. *Id.* at 24a–25a. Applying the *Franklin* presumption that all appropriate remedies are available unless Congress expressly indicates otherwise, the Second Circuit held that money damages are available under RFRA in individual capacity suits. *Id.*

The court of appeals rejected Petitioners' arguments to the contrary. *Id.* at 26a–42a. In particular, the court of appeals explained why its decision was consistent with its own precedent and that of other circuits interpreting RFRA's sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, which applies to the states, and with this Court's decision in *Sossamon v. Texas*, 563 U.S. 277 (2011), which held that monetary damages are not available in actions against state employees sued in their official capacities. *Id.* at 26a–28a.

3. After first seeking an extension of time to consider whether to file a petition for rehearing *en banc*, *see* Defs.'-Appellees' Mot. for Extension of Time to File Pet. for Reh'g at 1, *Tanvir v. Tanzin*, 894 F.3d 449 (2d Cir. 2018) (No. 16-1176), ECF No. 112-2, Petitioners ultimately sought rehearing *en banc* (no panel rehearing was requested). The court of appeals did not order a response to the *en banc* petition and accordingly, by rule, Respondents did not submit one. *See* FED. R. APP. PROC. 35(e).

4. In a decision issued on February 14, 2019, a majority of the ten judges in the Second Circuit *en banc* pool voted to deny rehearing. App. 45a–50a. Chief Judge Katzmann and Judge Pooler issued an

opinion concurring in the denial of rehearing *en banc*.[8] Judges Jacobs and Cabranes authored separate dissenting opinions. Both judges, and Judge Sullivan, signed both dissenting opinions. *Id.* at 51a–61a. No other judges signed the dissenting opinions. *Id.* Chief Judge Katzmann and Judge Pooler took issue with Judges Jacobs' and Cabranes' response to the panel opinion, clarifying that any concerns relating to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1981), and its progeny are inapposite when considering the interpretation of remedies available under a statute. *Id.* at 48a–50a (describing the dissents' *Bivens*-related concerns as a "red herring").

After two extensions of time—the first to decide "whether to file a petition for writ of certiorari," [First] Application to Extend Time at 4, *Tanzin v. Tanvir*, No. 19-71 (U.S. May 3, 2019), No. 18A1135—the government petitioned this Court for a writ of certiorari on July 12, 2019.

REASONS FOR DENYING THE PETITION

A. Review Is Unwarranted Because There Is No Circuit Split and the Case Is in an Interlocutory Posture

This Court ordinarily does not review cases in an interlocutory posture absent a circuit split or some exceptional circumstance that counsels in favor of immediate review. Petitioners concede "there is not a

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[8] Chief Judge Katzmann and Judge Pooler were both members of the panel that decided the case. Judge Lynch, a member of the panel that decided the case, did not report his views on the petition for rehearing *en banc* owing to his status as a senior judge, per Second Circuit protocol. App. 47a.

circuit conflict" and that "the posture here is interlocutory." Pet. 23. Given that the individual capacity defendants asserted a defense of qualified immunity below, which was not reached by the district court, the court of appeals remanded the case for further consideration of that defense. App. 43a–44a.[9]

1. Petitioners claim that this Court should nonetheless decide the legal question whether RFRA provides for money damages immediately, citing to the potential burden posed by discovery, and the notion that RFRA claims, owing to their basis in subjective, non-rational religious belief, are amorphous by nature and could result in a flood of litigation in the lower courts. Pet. 24–25.[10]

Both objections can be appropriately addressed by the district court on remand. Qualified immunity offers a defense upon which Petitioners may well prevail on remand, and is tailor-made to address the concerns expressed in the Petition about exposure to discovery and any attendant chilling effect on federal

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[9] Despite requesting and receiving supplemental briefing on qualified immunity after oral argument, the court of appeals held the issue was more appropriate for initial consideration by the district court. App. 43a–44a.

[10] Curiously, these objections would seemingly apply just as readily to claims for *injunctive* relief under RFRA, which no one argues is unavailable. Respondents sought removal from the No-Fly List, and surely discovery into the motives for placing or maintaining them on the List would implicate the same concerns. Likewise, to whatever extent federal prisoners might plausibly claim a denial of religious accommodations unduly burdens their religious practice, Pet. 25, RFRA would permit them to seek injunctive relief—although, as with damages claims, such claims would be subject to the barriers to suit under the Prison Litigation Reform Act, 42 U.S.C. § 1997e, including the administrative exhaustion requirement. *See* 42 U.S.C. § 1997e(a), (e); 28 U.S.C. § 1915(b), (g).

employees' performance of their duties. *Id.* In fact, Petitioners argued in the district court that qualified immunity is a defense not just from liability but also from suit—designed to "quickly terminate[]" claims prior to discovery,[11] in order to allow "all but the plainly incompetent or those who knowingly violate the law" to "act without fear of harassing litigation." Mem. of Law in Support of Indiv. Agent Defs.' Mot. to Dismiss (Mot. to Dismiss) at 36–37, *Tanvir v. Holder*, 128 F. Supp. 3d 756 (S.D.N.Y. 2015) (No. 13-CV-6951), ECF No. 39.

The Court has repeatedly highlighted the broad protection that the qualified immunity defense provides not only from having to stand trial, but also from having to bear the burdens associated with litigation, including pretrial discovery. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 685–86 (2009); *Pearson v. Callahan*, 555 U.S. 223, 231–32 (2009). The Court has also emphasized that trial courts should resolve the issue at the earliest possible stage in litigation, and before discovery if possible. *Pearson*, 555 U.S. at 232. If this case were remanded to the district court, Petitioners' qualified immunity defense could be "successfully asserted in a Rule 12(b)(6) motion," and decided on the pleadings, to the extent it turned on a question of law, where "the complaint itself establishe[s] the circumstances required as a predicate to a finding of qualified immunity." *McKenna v. Wright*, 386 F.3d 432, 435 (2d Cir. 2004) (internal quotation marks omitted). In the district court, Petitioners presented three qualified immunity arguments in their Motion to Dismiss, stressing that each could be de-

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[11] *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982); Defs.'-Appellees' Supp. Letter Br. at 3–4, *Tanvir v. Tanzin*, 894 F.3d 449 (2d Cir. 2018) (No. 16-1176), ECF No. 90.

cided as a matter of law. Mot. to Dismiss at 57–61 & 61 n.23. None have been addressed by the lower courts. If the district court denies qualified immunity, the denial would be subject to interlocutory appeal—possibly to this Court, if necessary—under the collateral order doctrine, further shielding Petitioners from any discovery burden. *Mitchell*, 472 U.S. at 528–29.[12]

As for the notion that damages claims grounded in religious belief are inherently amorphous, Petitioners argued below that if official defendants were unaware that their actions burdened plaintiffs' particular religious beliefs, those officials should be shielded by qualified immunity. Mot. to Dismiss at 58–60 (arguing that because no court has held "requesting that an individual inform on his . . . faith community[] places a substantial burden on religious exercise," the "contours of the alleged religious burden are not sufficiently clear" to permit liability); *id.* at 60–61 (arguing failure to directly notify FBI agents that informing on religious community violated religious beliefs means agents "could not" have been aware they were violating "a right under RFRA"); *see also* Defs.'-Appellees' Supp. Letter Br., *supra* note 11, at 2 (same). In sum, Petitioners themselves have argued that qualified immunity is well suited to address any chilling effect on the function-

[12] Even where discovery is granted to assess a qualified immunity defense, such discovery is typically limited in scope, and would not result in the harms predicted by Petitioners. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 598–99 (1998) (in assessing qualified immunity, district court has "broad discretion to tailor discovery narrowly and to dictate the sequence of discovery," and may "limit the time, place, and manner of discovery, or even bar discovery altogether on certain subjects").

ing of government writ large cast by the burdens of suit on these individual defendants.

2. If the federal courts were divided on the legal question presented here, interlocutory intervention by this Court might be less extraordinary. However, as Petitioners acknowledge, there is no circuit split on whether RFRA allows for money damages against federal officials sued in their individual capacities.[13] Pet. 23. The only other circuit court to address the issue also unanimously ruled that it does. *See Mack v. Warden Loretto FCI*, 839 F.3d 286 (3d Cir. 2016).[14]

Despite the fact that *Mack* was decided three years ago and *Tanvir* nearly two years ago, there has not been a flood of RFRA damages suits from prisoners and others, notwithstanding the dire predictions in the Petition.[15] The government itself, for all its

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[13] Petitioners attempt to make hay of the two dissents from the Second Circuit's denial of rehearing *en banc*. But since the Second Circuit did not grant the government's petition for rehearing *en banc* nor even call for a response to it, Respondents did not have the opportunity to brief the issues to the dissenting judges. When this Court decides issues presented by a genuine circuit split, it enjoys the benefit of comparing the reasoning of precedential opinions decided after full briefing and argument. That situation is not presented here. Accepting Petitioners' invitation to treat these dissents as the functional equivalent of contrary circuit precedent would only serve to encourage the widespread filing of petitions for rehearing *en banc* in otherwise-uncontroversial cases in the hope of generating similar dissents, and the filing of petitions for certiorari when there is a similar dissent below.

[14] Judge Roth's partial concurrence agreed with the panel opinion regarding the question presented here. *See* 839 F.3d at 308.

[15] Prior to *Mack*, four district courts had reached the same conclusion. *See Crowder v. Lariva*, No. 214CV00202JMSMJD, 2016 WL 4733539, at *7–8 (S.D. Ind. Sept. 12, 2016); *Rezaq v. Fed. Bureau of Prisons*, No. 13-CV-990-MJR-SCW, 2016 WL 97763, at *9 (S.D. Ill. Jan. 8, 2016); *Patel v. Bureau of Prisons*, 125 F.

protestations about the separation of powers concerns supposedly raised by this case, hesitated at great length prior to filing this Petition, as noted above, and chose not to petition for certiorari at all when the Third Circuit issued its *Mack* decision in 2016. The sky has not come crashing down in the three years since that decision, belying Petitioners' arguments in this case.

Finally, Petitioners' claim that the question presented "recurs with some frequency," Pet. 23, is further undercut by the reality that there have been only two court of appeals opinions deciding this issue since RFRA was enacted 26 years ago. That indicates the question is not so pressing that this Court need take it up on interlocutory appeal prior to consideration of the qualified immunity defense, and in the absence of a circuit split.

B. The Court of Appeals' Decision Is Correct and Consistent with This Court's Decisions

A further reason to deny certiorari is that the court of appeals' decision does not conflict with this Court's decisions and correctly interprets and applies RFRA's statutory text.

Supp. 3d 44, 49–54 (D.D.C. 2015) (Moss, J.); *Jama v. INS*, 343 F. Supp. 2d 338, 375–76 (D.N.J. 2004). Subsequent to *Mack* and the court of appeals' decision in this case, one district court followed those rulings to hold that RFRA allows plaintiffs to seek money damages against officials sued in their individual capacities, *Sabir v. Williams*, No. 17-CV-749 (VAB), 2019 WL 4038331, at *9 (D. Conn. Aug. 27, 2019), while a district court in Illinois declined to do so, *Ajaj v. United States*, No. 14-cv-1245-JPG-RJD, 2019 WL 3804232, at *1 (S.D. Ill. Aug 13, 2019). In each case, the government could have, but so far has not, appealed.

1. The court of appeals correctly found that RFRA provides for damages against federal officials sued in their individual capacities, in a ruling consistent with the statute's text, purpose, and history. App. 17a–25a, 35a–42a. The court of appeals began its analysis "with the language of the statute." *Id.* at 16a (internal quotation marks omitted). In interpreting RFRA, the court also was mindful that, when enacting the statute, Congress "went beyond merely restoring the compelling interest test," *id.* at 37a, in order to "'provide a claim or defense to persons whose religious exercise is substantially burdened by government,'" *id.* (quoting 42 U.S.C. § 2000bb(b)), as well as "'very broad protections for religious liberty,'" *id.* at 21a (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014)). Rarely does Congress speak to a statute's purpose so plainly. Congress did so here because it intended to regulate both federal and state officials—on the model of 42 U.S.C. § 1983, which allows both injunctive relief and damages. *See id.* at 21a–22a, 32a n.12 (noting that similarities between RFRA and Section 1983 reflect Congress's intent for "courts to borrow concepts from § 1983 when construing RFRA" (quoting *Mack*, 839 F.3d at 302)).

The court of appeals found that RFRA's plain language—which authorizes "appropriate relief against a government," with "government" defined to encompass an "official (or other person acting under color of law) of the United States," 42 U.S.C. § 2000bb-2(1)—"provides a clear answer" to whether the statute permits suits against individual officers in their personal capacity. App. 18a (internal quotation marks omitted).[16]

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[16] Congress knows how to legislate to exempt officers from individual capacity liability. The Oil Pollution Act of 1990 (OPA),

2. As to whether damages were permitted in the individual capacity suits authorized by RFRA, Congress chose not to define the term "appropriate relief," opting instead to use a flexible, context-dependent term that made damages available in appropriate circumstances but not in others, such as against sovereign defendants. Faced with a patchwork of potential defendants (*e.g.*, federal and state governments and officials and persons acting under color of federal and state law) and a host of doctrinal limitations (*e.g.*, federal and state sovereign immunity, Congress's limited authority under its commerce and spending powers to regulate state government officials), the term "appropriate relief" represented an elegant solution by Congress to balance claimants' entitlement to relief with the jurisprudential and policy considerations that arise when regulating government actors.

Given the calculated ambiguity of the term "appropriate relief," the panel appropriately looked to canons of statutory interpretation. App. 23a–24a. This Court's ruling in *Franklin* provides that when courts are faced with "the question of what remedies are available under a statute that provides a private right of action," they must "presume the availability of all appropriate remedies"—including damages—"unless Congress has expressly indicated other-

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104 Stat. 484, specifically exempts federal officers and employees from individual capacity liability by providing that "nothing in this Act shall be construed to authorize or create a cause of action against a [f]ederal officer or employee in the officer's or employee's personal or individual capacity . . . ." 33 U.S.C. § 2718. RFRA, passed just three years after OPA, does not contain a similar provision.

wise."[17] 503 U.S. at 66, 76. The *Franklin* presumption is based on a long-standing rule with "deep roots in our jurisprudence," that "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.* at 66 (internal quotation marks omitted).

Applying *Franklin*, the Second Circuit found no "'express[ ] indicat[ion]'" that RFRA proscribes the recovery of money damages. App. 25a (alterations in original) (quoting *Franklin*, 503 U.S. at 66). Applying the canon of construction "that Congress is presumed to legislate with familiarity of the legal backdrop for its legislation," the Second Circuit also found that "Congress enacted RFRA one year after the Supreme Court decided *Franklin*, and . . . used the very same 'appropriate relief' language in RFRA that was discussed in *Franklin*." *Id.* at 24a–25a (internal quotation marks omitted); *see also Ryan v. Gonzales*, 568 U.S. 57, 66 (2013) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." (internal quotation marks omitted)). Relying on these fundamental canons of construction, the Second Circuit correctly concluded that "RFRA permits the recovery of money damages from

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[17] When Congress intends to exclude damages from the remedies available to statutory claimants, it does so clearly. *See* 5 U.S.C. § 702 (providing that, under the Administrative Procedure Act, "relief other than money damages" is available against federal agencies to remedy "legal wrong"); 15 U.S.C. § 797(b)(5) (providing cause of action for "appropriate relief," but specifying that "[n]othing in this paragraph shall authorize any person to recover damages"); 42 U.S.C. § 6395(e)(1) (similar).

federal officials sued in their individual capacities." App. 30a.[18]

Petitioners argue that *Franklin* is inapposite because the *Franklin* Court "construed an implied cause of action, not an express one." Pet. 23. The *Franklin* presumption need not be—and, indeed, has not been—confined only to cases interpreting remedies available under an implied private right of action. To the contrary, and as the Second Circuit ruled, the "logical inference, in our view, runs the other way: one would expect a court to be more cautious about expanding the scope of remedies available for a private right of action that is *not* explicitly provided by Congress, than in determining what remedies are available for a right of action that Congress has expressly created." App. 33a.[19] This holds

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[18] An opaque statement in the Senate Report for RFRA—that "[t]o be absolutely clear, the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling governmental interest test prior to *Smith*," S. REP. NO. 103-111, at 12 (1993)—is not the "express[ ] indicat[ion]" Petitioners claim it is. Pet. 19. That statement, appearing in a section titled "No Relevance to the Issue of Abortion," is part of an assessment that RFRA would not impact available remedies concerning abortion rights. S. REP. NO. 103-111, at 12; H.R. REP. NO. 103-88, at 8 (1993).

[19] Petitioners seek to cabin *Franklin* further by asserting that the decision rested on a unique "statutory context," and claim that "no similar contextual clues" exist here to indicate that Congress intended to make damages available under RFRA. Pet. 22. Petitioners once more get the presumption backward—under *Franklin*, courts must presume the availability of all appropriate remedies when faced with ambiguity in construing a statute. *Franklin*, 503 U.S. at 66. Further, a contextual clue does emerge in the legislative history of RFRA's companion statute, RLUIPA, which specifically references a private cause of action for damages in the context of RFRA. *See* H.R. REP. NO.

especially true here, where Congress has explicitly authorized courts to provide any "appropriate relief," without limitation.

In addition to the Second Circuit here and the Third Circuit in *Mack*, other courts of appeals have applied the *Franklin* presumption to express private rights of action. *See Ditullio v. Boehm*, 662 F.3d 1091, 1098 (9th Cir. 2011) (applying *Franklin* presumption to conclude that punitive damages are available under Trafficking Victims Pro-tection Act); *Reich v. Cambridgeport Air. Sys., Inc.*, 26 F.3d 1187, 1191 (1st Cir. 1994) (applying *Franklin* presumption to conclude that "all appropriate relief" under Section 11 of the Occupational Safety and Health Act includes money damages). And *Franklin* itself relied in part on *Kendall v. United States ex rel. Stokes*, 37 U.S. 524 (1838), in which this Court determined that a statute provided for damages when the statute expressly provided a right of action but failed to specify available remedies, making clear that the Court did not intend to limit its holding to implied rights of action. *Franklin*, 503 U.S. at 67.

3. Petitioners' argument that money damages against an individual official would not constitute "appropriate relief against a government," because "they do not come out of the federal treasury," is equally unavailing. Pet. 12. First, RFRA defines "government" to include not just officials acting in an official capacity, but also persons "acting under color of law." 42 U.S.C. § 2000bb-1(c). The Second and Third Circuits have ruled, App. 18a–22a; *Mack*, 839 F.3d at 301, that this language includes both officials acting in individual capacities, as well as "private

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106-219, at 29 (1999) (noting that language in bill allowing for "appropriate relief" creates private right of action for damages).

parties," a point that Petitioners concede. Pet. 16 n.2. Since RFRA's scope encompasses private party conduct, it is clear that payment from the federal treasury would not always be contemplated or required. Second, even assuming, for the sake of argument, that "appropriate relief against a government" must "come out of the federal treasury," Pet. 12, as a "practical matter," indemnification by the federal government in suits brought against government officials in their individual capacities is a "virtual certainty." *Arar v. Ashcroft*, 585 F.3d 559, 636 (2d Cir. 2009) (Cabranes, J., dissenting) (internal quotations omitted); *see also* App. 78a n.8 (opinion of the district court).

4. Petitioners' assertion that the panel decision is inconsistent with other decisions of this Court ignores the fact that those decisions were based on animating principles that are inapplicable here. Pet. 16–18, 21–23. *Sossamon v. Texas*, 563 U.S. 277 (2011), bears only a surface-level similarity to this case in that the phrase "appropriate relief" was at issue. That case addressed a different statute (RLUIPA), a different class of defendants (state officials), a different claim for relief (official-capacity suit), and a different judicial presumption (state sovereign immunity). *Id.* Although the *Sossamon* Court found that the phrase "appropriate relief" in RFRA's sister statute, RLUIPA, did not permit the recovery of money damages, 563 U.S. at 293, the case was rooted in principles of state sovereign immunity, *id.* at 288—far different from the posture here.

Exactly like the Second Circuit decision here, the S*ossamon* Court began its analysis by recognizing that the phrase "appropriate relief" was ambiguous and "inherently context dependent," *id.* at 286, and then considered whether the *Franklin* presumption

applied. *Id.* at 288-89.[20] *Franklin* did not apply, the Court ended up deciding, because the facts in *Sossamon* triggered a different analysis: "the scope of an express waiver of sovereign immunity." *Id.* at 288. In that narrow and unique context, the traditional presumption is reversed: "[t]he question . . . is not whether Congress has given clear direction that it intends to *exclude* a damages remedy, but whether Congress has given clear direction that it intends to *include* a damages remedy." *Id.* at 289.[21] Because the phrase "appropriate relief" in that context did not "unequivocally express[ ]" Congress's intent to waive state sovereign immunity, this Court held that RLUIPA did not permit a suit for monetary damages against a state or state officials sued in their official capacities. *Id.* at 288, 293.

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[20] *Sossamon*'s finding that the phrase "appropriate relief" was ambiguous is plainly at odds with Judge Jacobs' contention in his dissent that the *Sossamon* ruling relied on "'the plain meaning of the text.'" Pet. 18 (citing App. 52a).

[21] In a preview of this analysis, the Department of Justice, which would be defending RFRA suits, studied the new statute in 1994 and, in a formal opinion issued by the Office of Legal Counsel (OLC), concluded that "[w]hen sovereign immunity concerns are removed from the equation, . . . the interpretive presumption is reversed: as against entities unprotected by sovereign immunity, Congress must provide 'clear direction to the contrary' if it wishes to make money damages unavailable in a cause of action under a federal statute." Walter Dellinger, Availability of Money Damages Under the Religious Freedom Restoration Act, 18 Op. O.L.C. 180, 182–83 (1994) (available on Westlaw) (quoting *Franklin*, 503 U.S. at 70–71). Citing *Franklin*, the OLC further concluded that "[b]ecause RFRA's reference to 'appropriate relief' does not clearly exclude money damages, there is a strong argument that under the *Franklin* standard money damages should be made available to RFRA plaintiffs in suits against non-sovereign entities." *Id.* at 183.

The animating principle underlying *Sossamon* is absent from this case. The individual capacity claims against Petitioners present no sovereign immunity concerns because Respondents seek monetary relief from those officers personally, not from the federal or state government.

Separate and apart from the sovereign immunity context in *Sossamon*, RLUIPA is distinguishable from RFRA in several crucial respects. RLUIPA "was enacted pursuant to Congress' spending power, which allows the imposition of conditions, such as individual liability, only on those parties actually receiving the state funds." *Washington v. Gonyea*, 731 F.3d 143, 145 (2d Cir. 2013) (*per curiam*) (citation omitted). Since "state officials are not direct recipients of the federal funds . . . they cannot be held individually liable under RLUIPA." *Mack*, 839 F.3d at 303. RFRA, by contrast, was passed pursuant to the Necessary and Proper Clause and, therefore, "does not implicate the same concerns." *Id.* at 303–04. This Court reached an analogous conclusion in *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932), where it determined that the identical "restraint of trade or commerce" language in Sections 1 and 3 of the Sherman Anti-Trust Act, 26 Stat. 209, had different meanings, because Section 1 was passed under the commerce power, and Section 3 was passed utilizing Congress's near unlimited power over the District of Columbia. The Court found:

> Where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may

> vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.

Id. at 433. Adopting the same principle, the Third Circuit, joined by the Second Circuit, expressly rejected the argument that RLUIPA decisions decided under the limitations imposed by the spending power would control the outcome in RFRA cases. *Mack*, 849 F.3d at 303–04.

Still, Petitioners claim repeatedly that courts have found that the "identical language" in RLUIPA does not permit damages against state officials. Pet. 5, 8, 16. Yet RLUIPA was also enacted pursuant to the Commerce Clause, *see* 42 U.S.C. § 2000cc(a)(2)(B), and Petitioners previously acknowledged that courts "left open the question" whether RLUIPA claims based on an effect on interstate commerce "could be brought for individual capacity damages." Br. for Defs.-Appellees at 25 n.12, *Tanvir v. Tanzin*, 894 F.3d 449 (2d Cir. 2018) (No. 16-1176), ECF No. 64 (citing *Gonyea*, 731 F.3d at 145–46 (withholding decision on whether "RLUIPA authorizes individual-capacity suits under the imprimatur of the commerce clause" because plaintiff had not pled any facts indicating any effect on interstate or foreign commerce)); *see also Stewart v. Beach*, 701 F.3d 1322, 1334 n.11 (10th Cir. 2012) (same); *Rendelman v. Rouse*, 569 F.3d 182, 189 (4th Cir. 2009) (same). And at least one district court has held that a plaintiff's RLUIPA claims against state prison officials sued in their individual capacities could proceed given evidence that the complained-of conduct affected interstate commerce. *El-Badrawi v.*

United States, No. 07-CV-1074, 2011 WL 13086946, at *13–15 (D. Conn. May 16, 2011).

4. The Second Circuit's decision here also does not run counter to *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), or *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), which Petitioners cite for the notion that "diverting officials from their duties" in "a national-security related lawsuit" is especially damaging to the functioning of the executive branch, and therefore implicates separation of powers concerns. Pet. 24. Both those cases involved claims against high-level policymaking officials, including cabinet secretaries. In *Abbasi*, this Court expressed concerns about the prospective chilling effect on actions by future cabinet-level officials, and the threat to the deliberative process of high-level policymakers, particularly in the aftermath of the acute national crisis posed by the events of September 11, 2001. *Abbasi*, 137 S. Ct. at 1860–63. In contrast, the remaining defendants here are FBI field agents or their immediate supervisors. Unlike in *Abbasi*, "policy-making" is therefore simply not at issue, Pet. 14, and certainly not with respect to "core" executive immigration powers. Pet. 24; *cf. Abbasi*, 137 S. Ct at 1862 (reaffirming, in distinct *Bivens* context, that "challenge[s to] individual instances of discrimination or law enforcement overreach [by] their very nature are difficult to address except by way of damages actions after the fact").

Moreover, the plaintiffs in both *Iqbal* and *Abbasi* had been labelled as "of special interest" to the investigation of the September 11, 2001 attacks. *Abbasi*, 137 S. Ct. at 1851–53; *Iqbal*, 556 U.S. at 666–68. Here, the allegations are that FBI agents sought to coerce Respondents to serve as informants on their religious communities not because they were thought to have any connection whatsoever to foreign or do-

mestic criminals or "terrorists," but rather to gather information on the American Muslim community writ large.[22] Respondents' lack of connection to any activity warranting their watchlisting is underscored by the fact that they were all informed that they were no longer on the List after they sued and before the district court heard argument on the motions to dismiss. App. 12a. Simply put, this is a civil rights case challenging abuses by low-level field officers, not a challenge to national security policymaking by high-level principals.

Another clear distinction between this case and *Abbasi* is that *Abbasi* was decided in the *Bivens* context. As emphasized by Chief Judge Katzmann, concurring in the denial of rehearing *en banc*, unlike a *Bivens* action, which is an implied cause of action, "RFRA contains an *express* private right of action

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[22] The record does not support Petitioners' claim that "agents of the Federal Bureau of Investigation (FBI) asked [Respondents] to serve as informants . . . in terrorism-related investigations." Pet. 4; *see* App. Opp'n 2a–3a (Am. Compl. ¶ 4) (Respondents declined "to spy on their own American Muslim communities and other innocent people"); *id.* at 23a–24a, 37a–38a, 39a–40a, 42a, 51a (Am. Compl. ¶¶ 69–70, 120, 125, 132, 156) (describing generic questioning); *id.* at 42a, 44a (Am. Compl. ¶¶ 133, 136) (Respondent Algibhah asked to go online and "'act extremist'"); *id.* at 25a–26a, 48a–49a (Am. Compl. ¶¶ 75, 148) (two Respondents were asked if they had attended training camps (they had not), not to inform on any others who actually might have). Only once in the complaint does an inquiry touch on a specific potential crime. *See id.* at 23a–24a (Am. Compl. ¶ 69) (Respondent Tanvir asked about an "old acquaintance whom the FBI agents believed had attempted to enter the United States illegally"); *cf.* Pet. 24 ("The allegations in this lawsuit concern purported efforts by FBI agents to obtain assistance from [Respondents] in connection with investigations into *potential* terrorist or criminal activity, including by noncitizens.") (emphasis added).

with an *express* provision for 'appropriate relief.'" App. 47a (quoting 42 U.S.C. § 2000bb-1(c)); *cf. Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 n.5 (2001) (distinguishing judicially implied private right of action in *Bivens* from the Section 1983 context, akin to RFRA, "where Congress already provides for . . . liability"). Rather than imply a right of action here, as in a *Bivens* action, a court's role in this case is to consider "the scope of an express right of action with an express provision of remedies from Congress." App. 50a.

For this reason, unlike in *Abbasi*, separation of powers concerns are not present here. In *Abbasi*, this Court was concerned that implying a right of action would amount to an undue arrogation of legislative authority. *Abbasi*, 137 S. Ct. at 1858. Here, by contrast, a court is interpreting and enforcing a cause of action expressly created by the legislature. Such statutory interpretation is a "time-honored exercise of the judiciary's power to grant relief where Congress has legislated liability." App. 49a. Indeed, "if federal courts declined to recognize remedies for express causes of action, it 'would harm separation of powers principles in another way, by giving judges the power to render inutile causes of action authorized by Congress.'" *Id.* (quoting *Franklin*, 503 U.S. at 74).

5. The panel decision is also consistent with decisions interpreting Section 1983, which, long before RFRA's enactment, had consistently been held to authorize individual and official capacity suits. *See, e.g., Hafer v. Melo*, 502 U.S. 21, 25, 31 (1991); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). When Congress drafted RFRA, it intended for it to apply to both federal and state governments and officials. *See City of Boerne v. Flores*, 521 U.S. 507, 516 (1997)

(noting that RFRA, at the time, applied to any "State, or . . . subdivision of a State" (alteration in original) (quoting 42 U.S.C. § 2000bb-2(1))). The natural model for relief against state officials was Section 1983, and it was clear at the time that damages could be obtained under Section 1983 against state officials for violations of Free Exercise rights. *See, e.g., Hunafa v. Murphy*, 907 F.2d 46, 48–49 (7th Cir. 1990). Only in *Boerne* was RFRA's applicability confined to federal government actions, *see* 521 U.S. at 534–36, and Congress did not revisit the relief provisions of the statute after *Boerne*.

Yet Petitioners seek to contrast RFRA and the similarly-worded Section 1983, which they argue "spoke[] in unambiguous terms" about creating an express cause of action that provides for damages against individual officers. Pet. 11. Like RFRA, Section 1983 creates a private right of action against "person[s]" who, acting "under color of [law]," violate a plaintiff's rights. Because of the textual similarities, courts have found that "it is safe to assume that Congress understood that it acted against the backdrop of settled § 1983 precedent when it added the similar 'under color of law' language to RFRA." *Patel*, 125 F. Supp. 3d at 51 (Moss, J.). For this reason, the Second Circuit, joining several other circuits in interpreting this term, did "not find 'this word choice [ ] coincidental,' as 'Congress intended for courts to borrow concepts from § 1983 when construing RFRA.'" App. 22a (quoting *Mack*, 839 F.3d at 302); *see also Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 738 (7th Cir. 2015); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834–35 (9th Cir. 1999).

The Second Circuit correctly concluded that, by authorizing RFRA suits against "person[s]" acting

"under color of law," Congress's intent was to import the settled judicial interpretation of that phrase to allow for individual capacity claims against federal officials or other "person[s] acting under color of [federal] law." App. 22a. The court also accurately apprehended that the phrase "contemplates that persons other than officials may be sued under RFRA, and persons who are not officials may be sued *only* in their individual capacities." *Id.* at 20a–21a (quoting *Patel*, 125 F. Supp. 3d at 50) (internal quotation marks omitted).

That Section 1983 and RFRA permit individual capacity suits "leads logically to the conclusion that [RFRA] permits a damages remedy against those individuals." *Id.* at 26a n.9. Since official capacity suits for injunctive relief allow for injunctive relief "against the governmental entity as a whole," seeking injunctive relief against a defendant in their individual capacity "has limited value." *Id.* Likewise, "suits seeking compensation from officers in their *official* capacity . . . are generally barred by sovereign immunity." *Id.* As recognized in the court of appeals decision below and in cases construing the same language in Section 1983, individual capacity suits, like this one, "tend to be associated with damages, and official capacity suits with injunctive relief." *Id.*

The Petitioners also attempt to distinguish Section 1983 from RFRA by seizing on language in Section 1983 providing that "[e]very person" acting under color of law who deprives another of federal rights "shall be liable to the party injured in an action at law." Pet. 15. They argue that the inclusion of language regarding actions "at law" means that Section 1983 unambiguously provides for damages actions and, by extension, the omission of such lan-

guage from RFRA means that damages actions are not contemplated. *Id.* at 15–16. Section 1983 was passed in 1871, when the distinction between suits in equity and actions at law had practical implications for civil procedure and available remedies. *See, e.g.*, *Liberty Oil Co. v. Condon Nat'l Bank*, 260 U.S. 235, 242 (1922). Conversely, RFRA was drafted and enacted in 1993, 55 years after the abolition of the distinction between suits in equity and actions at law eliminated any need for textual denotation. *See, e.g.,* Charles E. Clark & James William Moore, *A New Federal Civil Procedure—I. The Background*, 44 YALE L.J. 387, 391 (1935). Absent the need to expressly provide for suits in equity or actions at law, Congress made clear in RFRA the breadth of available remedies with language befitting the present era.

Congress, with bipartisan support and with Section 1983 as its model, sought to create in RFRA "a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g); *see also Burwell*, 573 U.S. at 693 ("Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty."). As this Court found in *Burwell*, "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." 573 U.S. at 695 n.3. Damages, especially in cases such as this one involving "individual instances of discrimination or law enforcement overreach," *Abbasi*, 137 S. Ct. at 1862, are an essential part of that protection.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 11, 2019

APPENDIX A

In the United States District Court
For the Southern District of New York

MUHAMMAD TANVIR; JAMEEL ALGIBHAH; NAVEED SHINWARI; AWAIS SAJJAD,

Plaintiffs,

v.

ERIC H. HOLDER, ATTORNEY GENERAL OF THE UNITED STATES; JAMES COMEY, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION; CHRISTOPHER M. PIEHOTA, DIRECTOR, TERRORIST SCREENING CENTER; JEH C. JOHNSON, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; "FNU" TANZIN, SPECIAL AGENT, FBI; SANYA GARCIA, SPECIAL AGENT, FBI; FRANCISCO ARTOUSA, SPECIAL AGENT, FBI; JOHN "LNU", SPECIAL AGENT, FBI; MICHAEL RUTKOWSKI, SPECIAL AGENT, FBI; WILLIAM GALE, SUPERVISORY SPECIAL AGENT, FBI; JOHN C. HARLEY III, SPECIAL AGENT, FBI; STEVEN "LNU", SPECIAL AGENT, FBI; MICHAEL "LNU", SPECIAL AGENT, FBI; GREGG GROSSOEHMIG, SPECIAL AGENT, FBI; WEYSAN DUN, SPECIAL AGENT IN CHARGE, FBI; JAMES C. LANGENBERG, ASSISTANT SPECIAL AGENT IN CHARGE, FBI; "JOHN DOES 1-9, 11-13", SPECIAL AGENTS, FBI; "JOHN DOE 10", SPECIAL AGENT, DHS,

Defendants.

FIRST AMENDED COMPLAINT
Case No. 13-CV-6951 ECF Case

INTRODUCTION

1. In retaliation for the exercise of their constitutional rights, the United States government has deprived Plaintiffs Muhammad Tanvir, Jameel Algibhah, Naveed Shinwari and Awais Sajjad of their right to travel freely and wrongly stigmatized them without justification and without due process of law by placing them on the No Fly List.

2. The No Fly List is supposed to be limited to individuals who are determined to be such significant threats to aviation safety that it is too dangerous to allow them on any commercial flight to, from or over the United States regardless of the extent of pre-boarding searches.

3. Instead, shielded from public and, to a large extent, judicial scrutiny, and lacking effective controls and supervision, the No Fly List has swelled to approximately 21,000 names as of February 2012, including approximately 500 United States citizens and an unknown number of lawful permanent residents. On information and belief, the number of people on the No Fly List is even larger today.

4. Plaintiffs are among the many innocent people who find themselves swept up in the United States government's secretive watch list dragnet. Defendants have used the No Fly List to punish

and retaliate against Plaintiffs for exercising their constitutional rights. Plaintiffs declined to act as informants for the Federal Bureau of Investigation ("FBI") and to spy on their own American Muslim communities and other innocent people.

5. Inclusion on the No Fly List severely burdens Plaintiffs and significantly interferes with their constitutional right to travel freely. Plaintiffs, like the thousands of other individuals on the No Fly List, lack any effective due process protections to challenge their placement on the No Fly List and the deprivation of their constitutional rights that results from that placement.

6. The Attorney General of the United States, the Secretary of the Department of Homeland Security ("DHS"), and the directors of the FBI and Terrorist Screening Center ("TSC"), (collectively, the "Agency Defendants") each play a part in creating, maintaining, implementing and supervising the No Fly List.

7. The Agency Defendants have not articulated or published any meaningful standards or criteria governing the placement of individuals on the No Fly List. Defendants have not informed any Plaintiff of the basis for his inclusion on the No Fly List. Defendants have even denied the Plaintiffs after-the-fact explanations for their inclusion on the List or an opportunity to contest

their inclusion before an impartial decision-maker.

8. Certain FBI Special Agents and other government agents (collectively, the "Special Agent Defendants"), identified below, exploited the significant burdens imposed by the No Fly List, its opaque nature and ill-defined standards, and its lack of procedural safeguards, in an attempt to coerce Plaintiffs into serving as informants within their American Muslim communities and places of worship. The Special Agent Defendants retaliated against Plaintiffs by placing or retaining them on the No Fly List when they refused to serve as informants.

9. Because of institutional and supervisory pressure to increase the number of confidential informants in American Muslim communities, FBI agents, including the Special Agent Defendants, have used the No Fly List to retaliate against and coerce individuals in these communities who, like Plaintiffs, have refused to become informants but do not pose a threat to aviation safety.

10. The Agency Defendants tolerated and failed to remedy a pattern and practice among FBI and other United States government Special Agents, including the Special Agent Defendants, of unlawfully exploiting the lack of due process surrounding the No Fly List to retaliate against individuals, including Plaintiffs, who exercised their constitutional rights.

11. In order to vindicate their rights, Plaintiffs seek declaratory, injunctive and monetary relief under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702, 706; the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq*.; and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiffs seek, *inter alia*, (i) to remove their names from the United States government's "No Fly List," (ii) declaratory and injunctive relief against the individuals who placed or kept them on the No Fly List without cause and in retaliation for their assertion of constitutional rights in refusing to serve as informants, (iii) declaratory and injunctive relief against the government officials responsible for maintaining a No Fly List that lacks due process and permits misuse, and (iv) monetary relief for damages they suffered as a result of their placement and maintenance on the No Fly List because they refused to act as informants for the FBI.

JURISDICTION AND VENUE

12. This Court has jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 702. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; the RFRA, 42 U.S.C. § 2000bb-1(c); and the APA, 5 U.S.C. § 702. This Court has the authority to compel agency action that has been unlawfully withheld or unreasonably delayed, and to hold unlawful and set aside agency actions

under 5 U.S.C. § 706. Monetary damages are available pursuant to RFRA, 42 U.S.C. § 2000bb-1(c), and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

13. This Court is a proper venue for this action pursuant to 28 U.S.C. § 1391(e)(1) because Defendants are officers and employees of the United States or its agencies operating under color of law, and a substantial part of the events or omissions giving rise to the claims have occurred and are occurring in this judicial district.

PARTIES

14. Plaintiff Muhammad Tanvir is a lawful permanent resident of the United States whose most recent residence in the United States was in Corona, Queens, New York. Mr. Tanvir is Muslim. Mr. Tanvir was placed on the No Fly List after he declined multiple requests by FBI agents to serve as an informant in his Muslim community. He declined to do so because it would have violated his sincerely held religious beliefs. He also felt that he had no relevant information to share. After he learned that he had been placed on the No Fly List, he was told to contact the same FBI agents to clear up what he presumed was an error that led to his placement on the No Fly List. Instead, the FBI agents offered to help him get off the List—but only in exchange for relaying information about

his community. Mr. Tanvir again refused. Mr. Tanvir does not pose, has never posed, and has never been accused of posing, a threat to aviation safety.

15. Plaintiff Jameel Algibhah is a United States citizen who resides in the Bronx, New York. Mr. Algibhah is a Muslim. Mr. Algibhah was placed on the No Fly List after he declined a request from FBI agents to attend certain mosques, to act "extremist," and to participate in online Islamic forums and report back to the FBI agents. After Mr. Algibhah learned that he was on the No Fly List, the same FBI agents again visited him, telling him that only they could remove his name from the No Fly List if he agreed to act as an informant. Mr. Algibhah again exercised his constitutional right to refuse to become an informant and he remains on the No Fly List. Because of his placement on the No Fly List, Mr. Algibhah has been unable to visit his wife and three young daughters in Yemen since 2009. Mr. Algibhah does not pose, has never posed, and has never been accused of posing, a threat to aviation safety.

16. Plaintiff Naveed Shinwari is a lawful permanent resident of the United States who resides in West Haven, Connecticut. Mr. Shinwari is a Muslim. Mr. Shinwari was placed or maintained on the No Fly List after he refused a request from FBI agents to be an informant on his Muslim community. Subsequently, he was prevented from boarding a flight to Orlando, Florida, where

he had found work. Following his placement on the No Fly List, the same FBI agents approached Mr. Shinwari, told him they were aware of his inability to board his flight, and again asked him to work as an informant. Mr. Shinwari again refused. Because of his placement on the No Fly List, Mr. Shinwari's work has been disrupted and he has been unable to visit his wife and family in Afghanistan since 2012. Mr. Shinwari does not pose, has never posed, and has never been accused of posing, a threat to aviation safety.

17. Plaintiff Awais Sajjad is a lawful permanent resident of the United States who resides in Jersey City, New Jersey. Mr. Sajjad is a Muslim. Mr. Sajjad was prevented from flying because he was on the No Fly List. After he sought to be removed from the List, he was approached by FBI agents and subjected to extensive interrogation, including a polygraph test, after which he was asked to work as an informant for the FBI. Mr. Sajjad had no relevant information to share, so he refused. Because of his placement on the No Fly List, Mr. Sajjad has been unable to visit his family in Pakistan, including his ailing 93-year old grandmother, since February 2012. Mr. Sajjad does not pose, has never posed, and has never been accused of posing, a threat to aviation safety.

18. Defendant Eric H. Holder, Jr. is the Attorney General of the United States and the head of the United States Department of Justice, which

oversees the FBI. In turn, the FBI administers the TSC, which is tasked with maintaining the No Fly List. All of the Plaintiffs were pressured to become informants and placed on the No Fly List by FBI Special Agents. Defendant Holder is sued in his official capacity.

19. Defendant James B. Comey is the Director of the FBI. The FBI administers the TSC. The FBI is also one of the agencies empowered to "nominate" individuals for placement on the No Fly List. If an individual who has been placed on the No Fly List challenges his or her inclusion on the List, the FBI coordinates with the TSC to determine whether the individual should remain on the List. The FBI also 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. All of the Plaintiffs were pressured to become informants by FBI Special Agents. Defendant Comey is sued in his official capacity.

20. Defendant Christopher M. Piehota is the Director of the TSC. The TSC is responsible for coordinating the government's approach to terrorism screening and the dissemination of information collected in the Terrorist Screening Database ("TSDB"), which is used in the terrorism screening process. The TSC is responsible for reviewing and accepting nominations to the No Fly List from agencies, including the FBI and for maintaining the List. The TSC is responsible for making the final

determination whether to add or remove an individual from the No Fly List. Defendant Piehota is sued in his official capacity.

21. Defendant Jeh C. Johnson is the Secretary of Homeland Security and serves as the head of the Department of Homeland Security ("DHS"). The DHS is responsible for developing and coordinating the implementation of a comprehensive strategy to protect the United States from threats and attacks. The DHS is additionally charged with establishing and implementing the Traveler Redress Inquiry Program ("TRIP") redress procedures for individuals, which is the sole and wholly inadequate mechanism for, inter alia, filing a complaint about placement on the No Fly List. Defendant Johnson is sued in his official capacity.

22. Defendant "FNU" (first name unknown) Tanzin is a Special Agent with the FBI.[1] He is sued in his individual and official capacity.

23. Defendant Sanya Garcia is a Special Agent with the FBI.[2] She is sued in her individual and official capacity.

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[1] Possible alternative spellings could include "Tanzen," "Tenzin," or "Tenzen." Also, it is unclear whether Tanzin is the agent's first or last name.

[2] Possible alternative spellings could include "Sania," "Sonya," or "Sonia."

24. Defendant John "LNU" (last name unknown) is a Special Agent with the FBI. He is sued in his individual and official capacity.

25. Defendant Francisco Artousa is a Special Agent with the FBI. He is sued in his individual and official capacity.[3]

26. Defendant Michael Rutkowski is a Special Agent with the FBI.[4] He is sued in his individual and official capacity.

27. Defendant William Gale is a Supervisory Special Agent with the FBI. He is being sued in his individual and official capacity.

28. Defendant John C. Harley III is a Special Agent with the FBI. He is sued in his individual and official capacity.

29. Defendant Steven LNU (last name unknown) is a Special Agent with the FBI. He is sued in his individual and official capacity.

30. Defendant Michael LNU (last name unknown) is a Special Agent with the FBI. He is sued in his individual and official capacity.

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[3] Possible alternative designations could be "Frankie" or "Frank," and possible alternative spelling of his last name "Artusa."

[4] Possible alternative spellings could include "Rotkowski."

31. Defendant Gregg Grossoehmig is a Special Agent with the FBI. He is sued in his individual and official capacity.

32. Special Agent in Charge Weysan Dun is a Special Agent with the FBI. He is sued in his individual and official capacity.

33. Assistant Special Agent in Charge James C. Langenberg is a Special Agent with the FBI. He is sued in his individual and official capacity.

34. Defendants "John Doe" 1 through 9 and 11 through 13 are Special Agents with the FBI. They are sued in their individual and official capacities.

35. Defendant "John Doe" 10 is an Agent with DHS. He is sued in his individual and official capacity.

FACTUAL ALLEGATIONS

The FBI's Use of Informants in American Muslim Communities

36. In the past twelve years, the FBI has engaged in widespread targeting of American Muslim communities for surveillance and intelligence-gathering. These law enforcement policies and practices have included the aggressive recruitment and deployment of informants, known as "Confidential Human Sources," in American Muslim communities, organizations, and houses of worship.

37. Since 2001, FBI recruitment of informants has significantly expanded. A November 2004 Presidential Directive required an increase in "human source development and management." In 2007, then-Deputy Director of the FBI John Pistole testified before the United States Senate Select Committee on Intelligence that in response to this directive, the FBI "will encourage [Special Agents] to open and operate new Human Sources." The FBI's 2008 fiscal year budget authorization request included funding for a program to track and manage the growing number of such informants. Many of these informants are recruited from and deployed among American Muslim communities.

38. To recruit informants, FBI agents often resort to exploiting individual vulnerabilities. FBI agents have threatened American Muslims with interfering with their immigration status, or offered to assist with their immigration status – practices that are prohibited under the Attorney General's Guidelines Regarding the Use of Confidential Human Sources, which states: "No promises can be made, except by the United States Department of Homeland Security, regarding the alien status of any person or the right of any person to enter or remain in the United States." American Muslims have also been threatened with prosecution, often on minor, non-violent charges, if they refuse to become informants.

39. However improper these practices may be, they differ in kind from the increasingly common abuse challenged in this lawsuit: retaliation against those who refuse to become informants by placing them on the No Fly List. Withholding immigration benefits or bringing criminal charges against American Muslims can be challenged and resolved under known legal standards through procedurally adequate administrative or judicial proceedings. Unlike those situations, the No Fly List operates under unknown standards and a vague set of criteria with a process that provides no opportunity to learn of the purported bases for placement on the List or to respond to such claims. This secretive process is conducted with no impartial determination on the merits, and without regard to the possibly retaliatory or unduly coercive motives of the field agents who place people on the No Fly List.

The No Fly List

40. The TSC, which is administered principally by the FBI, develops and maintains the TSDB, which includes the No Fly List. The TSDB is the federal government's centralized database that includes information about all individuals who are supposedly known to be or reasonably suspected of being involved in terrorist activity. The TSC maintains and controls the Database and shares the information in it (including the names of individuals on the No Fly List) with federal, state, and local law enforcement

agencies. The TSC also provides the No Fly List to the Transportation Security Administration ("TSA") and to airline representatives, which screen individual passengers before boarding, as well as to cooperating foreign governments for use by their agencies.

41. The FBI is one of the primary agencies responsible for making "nominations" to the TSDB, though a number of other federal agencies may also "nominate" individuals. To be nominated for inclusion in the TSDB, there is supposed to be "reasonable suspicion" that the individual is a "known or suspected terrorist." It is up to each nominating agency to interpret this definition and decide when a person meets the "reasonable suspicion" standard for being a known or suspected terrorist and should be nominated to the Database. The TSC makes the final decision on whether an individual should be placed on the No Fly List.

42. To be properly placed on the No Fly List, an individual must not only be a "known or suspected terrorist," but there must be some additional "derogatory information" demonstrating that the person "pose[s] a threat of committing a terrorist act with respect to an aircraft."

43. Beyond this, little information about the No Fly List has been made public, including its exact size. The government refuses to publish or otherwise disclose the standard or criteria for

inclusion on the No Fly List or what additional "derogatory information" is sufficient to deprive someone of their ability to fly on commercial airlines.

44. Inclusion on the No Fly List imposes severe and onerous consequences on individuals. Individuals on the No Fly List are indefinitely barred from boarding an aircraft for flights that originate from, terminate in, or pass over the United States.

45. The TSDB also includes other watch lists, which identify people who are subject to less severe and intrusive restrictions. For example, individuals on the Selectee List are subject to extensive pre-boarding physical screening but are allowed to travel by air. The very existence of the Selectee List, which is not the subject of a challenge in this lawsuit, implicitly reflects the government's recognition that the No Fly List, with its much more restrictive effect, is supposed to be limited to individuals who present so great a threat to aviation safety that no degree of pre-boarding examination and inspection is sufficient to obviate the perceived threat.

46. Absent a meaningful articulated standard for inclusion on the No Fly List and an adequate set of procedural safeguards, the government has broadened the grounds for inclusion on the No Fly List at least twice: in February 2008 and again in May 2010, according to an audit report published in March 2014 by the Office of the

Inspector General of the United States Department of Justice (the "OIG Report").

47. Despite the narrow purpose intended for the No Fly List, it has grown significantly in recent years. Upon information and belief, in 2009, there were approximately 3,400 individuals on the No Fly List and by February 2012, over 21,000 people were on it. Moreover, on information and belief, the TSC rarely rejects any of the names proposed for the TSDB. The entire TSDB reportedly contained 875,000 names as of May 2013.

48. According to the OIG Report, the TSC itself has found that shortly after the attempted attack on a Northwest Airlines flight on December 25, 2009, many individuals were temporarily placed on the No Fly List who did not qualify for inclusion on it.

49. It is unknown how many of the approximately 21,000 individuals on the No Fly List have been added in error. In a recent case, a federal district court found that a professor was added to the No Fly List because an FBI agent checked the wrong boxes on the nominating form. *Ibrahim v. Dep't of Homeland Security*, No. 3:06-cv-0545 (WHA), *Notice of Compliance with Court's February 3, 2014 Order* (attaching *Findings of Fact, Conclusions of Law, and Order for Relief*), at 9 (N.D. Cal. Feb. 6, 2014). Despite this admitted ministerial mistake, the government refused to confirm that the professor had been removed

from the List until being ordered to do so by the court eight years later.

50. When the TSC provides the No Fly List to the TSA for use in pre-screening airline passengers on commercial flights, the TSA receives certain identifying information for individuals on the No Fly List, including name and date of birth, but not any of the information based upon which that person's name was included on the No Fly List.

51. The fact that an individual is on the No Fly List is provided to, or accessible by, airline personnel who process an individual's request for a boarding pass.

52. The TSA screens travelers by conducting a name-based search of a passenger prior to boarding. This search is conducted when an individual attempts to obtain a boarding pass, not when the individual purchases a ticket. If an individual is on the No Fly List, he or she will be allowed to purchase a ticket but then will be denied boarding.

53. Upon information and belief, airlines generally do not provide refunds or reimbursement for tickets when a purchaser is denied boarding because of their inclusion on the No Fly List.

Waivers and Redress Process

54. No one—not even United States citizens or lawful permanent or temporary alien residents—receives notice when they are added

to the TSDB or the No Fly List. Individuals effectively learn of their placement on the No Fly List when they are denied a boarding pass at the airport by airline representatives who, after identifying an individual's name on the No Fly List, are frequently joined by TSA agents or other airport security or law enforcement personnel.

55. There is no formal process for seeking a waiver to allow an individual on the No Fly List to fly but, upon information and belief, occasionally after being denied the right to board a flight, United States citizens and lawful permanent residents stranded abroad have been granted permission to board a single flight to the United States. These waivers are typically obtained after the individual who is on the No Fly List reaches out to legal counsel, consular officers or other United States government officials for assistance after being prevented from boarding their flight back to the United States from a foreign country.

56. The OIG Report found that a host of challenges—including poor recordkeeping practices and the complex, multiparty nature of the No Fly List's administration—makes ensuring the removal of individuals from the No Fly List extremely difficult.

57. Individuals added to the No Fly List have no procedurally adequate notice and opportunity to be heard or to challenge their placement. The

only avenue available to individuals who have been barred from flying is the TRIP program. DHS is responsible for the TRIP procedures and the administrative appeals from such determinations.

58. If the name of the individual seeking redress is an exact or near match to a name on the No Fly List, DHS submits the TRIP inquiry to the TSC, which makes the final decision as to whether any action should be taken. The TSC's process for making this determination is entirely secret. There is no hearing or other opportunity for the aggrieved individual to participate. The TSC has refused to provide any information about the standards it uses or how it makes such decisions, other than to state that during its review the TSC "coordinates with" the agency that originally nominated the individual to be included in the TSDB. Once the TSC makes a final determination regarding a particular individual's status on the No Fly List, the TSC advises DHS of its decision.

59. DHS will neither confirm nor deny the existence of any No Fly List records relating to an individual. Instead, DHS sends a letter to the TRIP applicant stating whether or not any such records related to the individual have been "modified." The letter does not state how the government has resolved the complaint and does not state whether an individual remains on the No Fly List or will be permitted to fly in the future.

60. Appeal from the TRIP determination is a similarly secret process and, in the end, the appellant is still not told whether they remain on the No Fly List. Thus, the only "process" available to individuals who are prohibited from boarding commercial flights is to submit their names and other identifying information and hope that an unspecified government agency corrects an error or changes its mind. Because the TRIP process never clearly informs the individual of the outcome, they only learn if they are still on the No Fly List by purchasing another airline ticket and trying to travel again.

61. After the TRIP administrative appellate process is complete, there is no way to request a reassessment of the basis for inclusion on the No Fly List nor, upon information and belief, is there any automatic periodic review process to reassess whether any changed circumstances warrant removal of an individual from the No Fly List.

62. As a general matter of policy, the United States government will never voluntarily confirm in writing that a person is on or off the No Fly List, even if individual federal officers or airline employees have told an individual that they cannot board a flight because they are on the List.

Abuse of the No Fly List to Pressure Individuals to Become Informants

63. The processes related to the No Fly List promulgated and maintained by the Agency Defendants—from "nomination" to implementation to redress—are shrouded in secrecy and ripe for abuse.

64. The Special Agent Defendants have exploited these flaws and used the No Fly List to coerce Plaintiffs to become informants for the FBI, not for the stated purpose of keeping extremely dangerous individuals from flying on commercial airlines. This impermissible abuse of the No Fly List has forced Plaintiffs to choose between their constitutionally-protected right to travel, on the one hand, and their First Amendment rights on the other.

65. Many American Muslims, like many other Americans, and many followers of other religions, have sincerely held religious and other objections against becoming informants in their own communities, particularly when they are asked to inform on the communities as a whole rather than specific individuals reasonably suspected of wrongdoing. Acting as an informant would require them to lie and would interfere with their ability to associate with other members of their communities on their own terms. For these American Muslims, the exercise of Islamic tenets precludes spying on the private lives of others in their communities.

66. The FBI uses the No Fly List to coerce American Muslims into becoming informants and to retaliate against them when they exercise constitutionally protected rights.

67. Upon information and belief, the Agency Defendants promulgated, encouraged and tolerated a pattern and practice of aggressively recruiting and deploying informants in American Muslim communities, which the Special Agent Defendants implemented by exploiting the unarticulated and vague standards and the lack of procedural safeguards pertaining to the No Fly List.

Plaintiff Muhammad Tanvir

68. Plaintiff Muhammad Tanvir is a lawful permanent resident of the United States whose most recent residence in the United States was in Corona, Queens, New York. He has been married since March 2, 2006. Mr. Tanvir's wife, son, and parents live in Pakistan. Mr. Tanvir has never been convicted of a crime or arrested. Mr. Tanvir does not pose, has never posed, and has never been accused of posing, a threat to aviation safety.

69. In early February 2007, Mr. Tanvir was approached by the FBI at his workplace, a 99-cents store in the Bronx. FBI Special Agent Defendant FNU Tanzin and another FBI agent, Defendant "John Doe #1," questioned Mr. Tanvir there for approximately thirty minutes. They asked him about an old acquaintance

whom the FBI agents believed had attempted to enter the United States illegally.

70. Two days later, Mr. Tanvir received a phone call from Agent Tanzin. He was asked 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. Mr. Tanvir said that he did not know of anything that would concern law enforcement.

71. In July 2008, Mr. Tanvir visited his wife and family in Pakistan. In late December 2008, Mr. Tanvir returned to New York. At the airport, Mr. Tanvir was escorted by United States government agents off the airplane. Mr. Tanvir's baggage was searched, and he was escorted by the agents to a waiting room where he waited for five hours before the agents confiscated his passport. Mr. Tanvir was eventually allowed to enter the United States, but the government officials retained his passport and gave him a January 28, 2009 appointment with DHS to pick it up.

72. Shortly after this experience, FBI agents resumed their attempts to recruit Mr. Tanvir to work for them as an informant.

73. On January 26, 2009, a few days before Mr. Tanvir was scheduled to pick up his passport from DHS, Agent Tanzin and another FBI Special Agent, Defendant "John Doe #2," came to see Mr. Tanvir at his new workplace, a

different store in Queens. The FBI agents asked Mr. Tanvir to come with them to Manhattan.

74. Mr. Tanvir agreed to accompany the agents, and was driven by the agents from Queens to the FBI's New York offices at 26 Federal Plaza in Manhattan.

75. At 26 Federal Plaza, Mr. Tanvir was brought into an interrogation room and questioned for approximately an hour. The FBI agents asked Mr. Tanvir about terrorist training camps near the village where he was raised, and whether he had any Taliban training. The agents also referred to the fact that at his previous job as a construction worker, Tanvir would rappel from higher floors while other workers would cheer him on. They asked him where he learned how to climb ropes. Mr. Tanvir responded that he never attended any training camps and did not know the whereabouts of any such camps. He also explained to the FBI agents that he grew up in a rural area, where he regularly climbed trees and developed rope-climbing skills.

76. Towards the end of the interrogation, the FBI agents told Mr. Tanvir they recognized that he was "special," "honest," and "a hardworking person." They told him that they wanted him to work for them as an informant. In particular, the agents asked him to travel to Pakistan and work as an informant. The agents offered Mr. Tanvir incentives for his compliance with their requests, such as facilitating his wife's and

family's visits from Pakistan to the United States, financially assisting his aging parents in Pakistan to go on religious pilgrimage to Saudi Arabia, and providing him with money.

77. The incentives did not sway Mr. Tanvir, who reiterated—again—that he did not want to become an informant. In response, the FBI agents threatened Mr. Tanvir, warning him that if he declined to work as an informant, then he would not receive his passport and that if he tried to pick up his passport at the airport he would be deported to Pakistan.

78. Mr. Tanvir was terrified by the agents' threats. He cried and pleaded with the FBI agents not to deport him because his family depended on him financially. He also told them he had not done anything wrong and was afraid to work in Pakistan as a United States government informant as it seemed like it would be a very dangerous undertaking. The FBI agents replied that they were willing to send him to Afghanistan instead. Mr. Tanvir explained that he was similarly concerned about his safety if he were to become an informant in Afghanistan. The FBI agents instructed him to think about it and cautioned him not to repeat their discussion with anyone.

79. The next day, Agent Tanzin called Mr. Tanvir and asked him whether he had thought more about becoming an informant. Agent Tanzin then threatened Mr. Tanvir, telling him that he

would authorize the release of Mr. Tanvir's passport if Mr. Tanvir agreed to become an informant, but if he did not, Mr. Tanvir would be deported if he went to the airport to pick up his passport. Mr. Tanvir told Agent Tanzin that nothing had changed since they last spoke, and again declined to work as an informant.

80. On January 28, 2009, Mr. Tanvir nevertheless headed to John F. Kennedy International Airport to pick up his passport, accompanied by his relatives. The DHS officials were asked why they withheld his passport, and they replied that it was due to an investigation that had since been cleared.

81. The next day, Agent Tanzin called Mr. Tanvir and told him that he had facilitated the release of Mr. Tanvir's passport, having told "them" to release his passport because Mr. Tanvir was "cooperative" with the FBI.

82. Mr. Tanvir's repeated and consistent refusal to work as an FBI informant did not stop the agents from continuing to try to pressure him into becoming an informant. Over the course of the next three to four weeks, Mr. Tanvir received multiple phone calls and visits from Agent Tanzin and Agent John Doe #1 at his workplace. At times, the agents would call from their car outside Mr. Tanvir's workplace and ask him to meet them in the car.

83. Mr. Tanvir left work and entered the agents' car the first three times he received their calls. The

FBI agents repeatedly asked whether he had decided to work for them as an informant, or whether he had obtained any information for them. The agents told Mr. Tanvir that they wanted him to gather information, and that they were specifically interested in people from the "Desi" (South Asian) communities.

84. Mr. Tanvir repeatedly told the FBI 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. Mr. Tanvir did not wish to work as an informant, in part, because he had sincerely held religious and personal objections to spying on innocent members of his community. Mr. Tanvir believed that if he agreed to become an informant, he would be expected to engage with people within his community in a deceptive manner, monitor, and potentially entrap innocent people, and that those actions would interfere with the relationships he had developed with those community members. Through their repeated visits and calls, the FBI agents harassed and intimidated Mr. Tanvir due to his refusal to become an informant. The FBI agents placed significant pressure on Mr. Tanvir to violate his sincerely held religious beliefs, substantially burdening his exercise of religion.

85. Mr. Tanvir eventually reached out to a relative for advice, and was told that, in the United States, he was under no obligation to speak to the government. Relieved to learn that he was

not required to speak with the FBI agents every time that they contacted him, Mr. Tanvir stopped answering the agents' phone calls.

86. Eventually, Agent Tanzin and Agent John Doe #2 again visited Mr. Tanvir at his workplace and asked him why he was no longer answering their phone calls. Mr. Tanvir explained that he had answered all of their questions on multiple occasions, that he no longer had anything to tell them, and that he was busy with work and did not wish to speak with them.

87. Despite Mr. Tanvir's clear refusal to speak to them, the FBI agents then asked Mr. Tanvir to take a polygraph test. Mr. Tanvir declined to submit to the test, prompting the FBI agents to threaten to arrest him. Mr. Tanvir responded that if they arrested him, he would obtain an attorney. The agents left without arresting Mr. Tanvir.

88. In July 2009, Mr. Tanvir traveled to Pakistan to visit his wife and parents. While Mr. Tanvir was abroad, Special Agents Tanzin and Defendant "John Doe #3" visited his sister at her workplace in Queens and questioned her about Mr. Tanvir's travel. The FBI agents wanted to know why Mr. Tanvir had flown on Kuwait Airways instead of Pakistan International Airlines. Mr. Tanvir's sister replied that Kuwait Airways was less expensive, and told the FBI agents that she was uncomfortable speaking with them.

89. Mr. Tanvir subsequently returned to the United States in January 2010 and took a job as a truck driver. Even though it required significant travel, this work paid better than Mr. Tanvir's previous jobs. Mr. Tanvir's new job required him to drive trucks for long distances across the United States and take flights back to New York after completing the deliveries.

90. Upon information and belief, Mr. Tanvir was placed on the No Fly List by Agents Tanzin and/or Defendants John Does #1–3 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.

91. In October 2010, while Mr. Tanvir was in Atlanta for work, he received word that his mother was visiting New York from Pakistan. Mr. Tanvir made plans to fly from Atlanta to New York City. When he arrived at the check-in counter at the Atlanta airport, airline officials told him that he was not allowed to fly. Two unknown FBI agents then approached Mr. Tanvir at the airport and told him that he should contact the FBI agents in New York with whom Mr. Tanvir had originally spoken. The two unknown FBI agents then drove Mr. Tanvir to a nearby bus station where he boarded a bus bound for New York City.

92. While waiting in Atlanta for the bus, Mr. Tanvir called Agent Tanzin, who told Mr. Tanvir that he

was no longer assigned to Mr. Tanvir. Agent Tanzin told Mr. Tanvir to "cooperate" with the FBI agent who would be contacting him soon.

93. Mr. Tanvir traveled by bus from Atlanta to his home in New York. This trip took him approximately 24 hours.

94. Two days after Mr. Tanvir returned to New York City by bus, FBI Special Agent Sanya Garcia called Mr. Tanvir and told him that she wanted to speak with him. Agent Garcia stated that she could help him get off the No Fly List if he met with her and answered her questions. Mr. Tanvir told Agent Garcia that he had answered the FBI's questions on multiple occasions and that he would not answer additional questions or meet with her.

95. Mr. Tanvir subsequently quit his job as a truck driver, in part because he was unable to fly back to New York after completing long-distance, one-way deliveries, as the job required.

96. Upon information and belief, Agent Garcia knew about the prior failed attempts by her colleagues, Special Agents Tanzin and Defendants John Doe #1-3, to recruit Mr. Tanvir as an informant, and their subsequent placement of Mr. Tanvir on the No Fly List in retaliation for his decision not to become an informant.

97. Mr. Tanvir filed a TRIP complaint on September 27, 2011.

98. In October 2011, Mr. Tanvir purchased plane tickets to Pakistan for himself and his wife for travel on November 3, 2011.

99. On November 2, 2011, the day before Mr. Tanvir and his wife were scheduled to fly, Agent Garcia called Mr. Tanvir. She told him that he would not be allowed to fly the next day. When Mr. Tanvir asked why, Agent Garcia told him that it was because he hung up on her the last time she had tried to question him by phone, and she told him that she still wanted to meet with him.

100. Agent Garcia told Mr. Tanvir that she would only allow him to fly to Pakistan if he met with her and answered her questions. Because Mr. Tanvir wanted to fly to Pakistan to visit his ailing mother, he agreed to meet her and another FBI Special Agent, Defendant John LNU, at a restaurant in Corona, Queens.

101. At the restaurant, Special Agents Garcia and Defendant John LNU asked Mr. Tanvir the same questions that Agents Tanzin, Defendants John Doe #1, John Doe #2 and John Doe #3 had already asked him on multiple occasions. These included questions about his family and about his religious and political beliefs. Mr. Tanvir answered the agents' questions because he believed that he was required to do so in order to be allowed to fly to Pakistan to see his mother.

102. After the meeting, Special Agents Garcia and John LNU advised Mr. Tanvir that they would try to permit him to fly again by obtaining a

one-time waiver that would enable him to visit his ailing mother, but that it would take some weeks for them to process the waiver. Agent Garcia told Mr. Tanvir that he would only be allowed to fly on Delta Airlines. When Mr. Tanvir asked if he could keep his ticket on Pakistan International Airlines, Agent Garcia told him that would take her more time to process. Agent Garcia also told Mr. Tanvir that he would only be allowed to fly to Pakistan if he agreed to meet with and speak to her upon his return to the United States.

103. Mr. Tanvir begged Agents Garcia and John LNU to let him fly the next day with his wife. Agent Garcia stated that he might be allowed to take the flight, but that an FBI agent would have to accompany him.

104. The next day, however, Agent Garcia called Mr. Tanvir and told him that he would not be permitted to fly. She further stated that Mr. Tanvir would not be allowed to fly in the future until he agreed to come to FBI headquarters and submit to a polygraph test. As a result, Mr. Tanvir had to cancel his flight, obtaining only partial credit from the airline for the ticket's price, and his wife traveled alone to Pakistan.

105. At that point, Mr. Tanvir decided to retain counsel to represent him in his interactions with the FBI.

106. Mr. Tanvir's counsel reached out to Agents Garcia and John LNU in the hope of facilitating

the removal of Mr. Tanvir's name from the No Fly List, but the agents refused to speak with counsel.

107. The agents directed Mr. Tanvir's counsel to legal counsel at the FBI's New York office. Mr. Tanvir's counsel spoke to counsel from that office, who pointed them to the TRIP process. Mr. Tanvir had already submitted a TRIP complaint, and it had not led to any redress.

108. Mr. Tanvir was not and is not a "known or suspected terrorist" or a potential or actual threat to civil aviation. The Special Agent Defendants who dealt with Mr. Tanvir, including Agent Tanzin and Agent Garcia, had no basis to believe that Mr. Tanvir was a "known or suspected terrorist" or potential or actual threat to civil aviation. Had Mr. Tanvir actually presented a threat to aviation safety, Agent Garcia would not, and could not, have offered to remove Mr. Tanvir from the List merely in exchange for his willingness to become an informant. Yet, knowing that Mr. Tanvir was wrongfully placed on the No Fly List for his prior refusals to become an informant, Agent Garcia kept him on the No Fly List to retaliate against Mr. Tanvir's exercise of his constitutionally protected rights and to coerce him into serving as an informant.

109. Mr. Tanvir again purchased a ticket to fly to Pakistan on December 10, 2011 in the hope of visiting his mother, whose health continued to

deteriorate, but was again denied boarding at the airport and was told that he was on the No Fly List.

110. On April 16, 2012, Mr. Tanvir received a response to his TRIP complaint. The letter did not confirm that Mr. Tanvir was on the No Fly List, nor did it offer any justification for Mr. Tanvir's placement on the No Fly List. The letter simply noted, in part, that "no changes or corrections are warranted at this time."

111. On May 17, 2012, Mr. Tanvir's counsel wrote to FBI counsel again. The letter described Mr. Tanvir's predicament and the FBI's retaliatory actions. It also stated that Mr. Tanvir was prepared to take legal action. To date, neither Mr. Tanvir nor his counsel have received a response to that letter from the FBI.

112. On May 23, 2012, Mr. Tanvir appealed his TRIP determination. Mr. Tanvir also requested the releasable materials upon which his TRIP determination was based.

113. In November 2012, Mr. Tanvir purchased another ticket from Saudi Arabian Airlines to visit his sick mother in Pakistan. He was again denied boarding at JFK airport on the day of his flight. FBI Special Agent Janet Ambrisco approached Mr. Tanvir and his counsel at the check-in area and informed them that Mr. Tanvir would not be removed from the No Fly List until he met with Agent Garcia. Agent

Ambrisco directed Tanvir to call Agent Garcia, telling him that she was waiting for his call.

114. On March 28, 2013, Mr. Tanvir received a letter from DHS which noted that it superseded the April 16, 2012 TRIP response. The letter stated, in part, that Mr. Tanvir's experience "was most likely caused by a misidentification against a government record or by random selection," and that the United States government had "made updates" to its records. As a result, the letter stated, Mr. Tanvir's request for releasable materials was moot and would not be processed by DHS. The DHS letter did not state whether Mr. Tanvir had been removed from the No Fly List or whether he would now be permitted to board flights. DHS's letter offered no clarification on whether he had been granted a temporary waiver permitting his travel on only a single occasion. Mr. Tanvir decided to try to attempt to travel once more and purchased another ticket.

115. On June 27, 2013, Mr. Tanvir boarded a flight and flew to Pakistan on Pakistan International Airlines. Mr. Tanvir does not know whether he was able to fly to Pakistan due to a one-time waiver by the agents or whether they have finally removed him from the No Fly List. Absent confirmation that he has been removed from the No Fly List, Mr. Tanvir believes that his name remains on it.

116. Mr. Tanvir's placement on the No Fly List caused him to quit his job as a truck driver and prevented him from visiting his sick mother in Pakistan. He continues to fear harassment by FBI agents in the United States, which causes him and his family great distress.

117. Mr. Tanvir also suffered economic loss because of his placement on the No Fly List, including but not limited to loss of income and expenses and fees related to the purchase of airline tickets.

Plaintiff Jameel Algibhah

118. Plaintiff Jameel Algibhah is a United States citizen who resides in the Bronx, New York. He has lived in the United States since 1996, when he was fourteen years old. He has been married since 2001. His wife and three daughters, ages eleven, eight, and six, live in Yemen. Prior to being placed on the No Fly List in approximately 2010, Mr. Algibhah visited them at least once every year for several months. Mr. Algibhah does not pose, has never posed, and has never been accused of posing, a threat to aviation safety.

119. On or around December 17, 2009, FBI Special Agents Francisco "Frank" Artousa and Defendant "John Doe #4" came to Mr. Algibhah's uncle's store, where Mr. Algibhah used to work, and asked for Mr. Algibhah.

120. Mr. Algibhah came to the store to meet the agents, and at their request he accompanied

them to their van, where they proceeded to ask him questions about his friends, his acquaintances, other Muslim students who attended his college, and the names of Muslim friends with whom he worked at a hospital library, one of several jobs he held as a college student. The agents also asked Mr. Algibhah where he worships on Fridays, and asked for additional personal information. Despite being deeply uncomfortable with the FBI agents' questions, Mr. Algibhah answered them to the best of his ability.

121. The agents then asked Mr. Algibhah if he would work for them as an informant. The agents first asked Mr. Algibhah if he would become an informant for the FBI, and infiltrate a mosque in Queens. When Mr. Algibhah declined to do so, the agents then asked Mr. Algibhah to participate in certain online Islamic forums and "act like an extremist." When Mr. Algibhah again declined, the agents asked Mr. Algibhah to inform on his community in his neighborhood. The FBI agents offered Mr. Algibhah money and told him that they could bring his family from Yemen to the United States very quickly if he became an informant. Mr. Algibhah again told the FBI agents that he would not become an informant.

122. Mr. Algibhah declined to work as an informant because he believed that it was dangerous, and because it violated his sincerely held personal and religious beliefs. Mr. Algibhah was morally

and religiously opposed to conducting surveillance and reporting to the authorities on the innocent activities of people in his American Muslim community. Mr. Algibhah believed that if he agreed to become an informant, he would be expected to engage with his community members in a deceptive manner, monitor, and entrap innocent people, and that those actions would interfere with the relationships he had developed with those community members. The FBI agents placed significant pressure on Mr. Algibhah to violate his sincerely held religious beliefs, substantially burdening his exercise of religion.

123. Despite Mr. Algibhah's refusal, Agent Artousa gave Mr. Algibhah his card, and told him to "think about it some more."

124. Upon information and belief, Mr. Algibhah was placed on the No Fly List by Agents Artousa and Defendant John Doe #4 at some time after he was first contacted by these FBI agents, because he declined to become an informant against his community and declined to speak or associate further with the agents.

125. The first time Mr. Algibhah tried to travel by air after he refused the FBI's efforts to recruit him as an informant, he was denied boarding. On May 4, 2010, Mr. Algibhah learned that he had been placed on the No Fly List when he went to John F. Kennedy International Airport to check in with a travel companion for a flight to Yemen

on Emirates Airlines. Mr. Algibhah intended to visit his wife and three daughters in Yemen. At the Emirates Airlines check-in counter, he was denied boarding by airline personnel. Shortly thereafter, numerous government officials came to the check-in area and surrounded him. The officials questioned Mr. Algibhah about his travels to Yemen. Despite Mr. Algibhah's cooperation, and without informing him of any basis for his interrogation, the officials told Mr. Algibhah that he would not be able to board, and directed him to the TRIP complaint process. The person with whom Mr. Algibhah was traveling has since distanced himself from Mr. Algibhah as a direct result of the incident at the airport.

126. Shortly after the incident at the airport, Mr. Algibhah filed a TRIP complaint.

127. Mr. Algibhah repeatedly followed up with the DHS, calling the designated TRIP hotline several times over the next months. After receiving no response for several months, missing his wife and children, Mr. Algibhah purchased another ticket for a flight to Yemen on Emirates Airlines on September 19, 2010. Again, he was prevented from boarding the flight when he arrived at the airport, and was not provided with any reason.

128. DHS responded to Mr. Algibhah's TRIP complaint in a letter dated October 28, 2010. The letter stated that a review has been performed and that "it has been determined that no changes or corrections are warranted at this

time." The letter did not provide Mr. Algibhah with any information about whether or not he was on the No Fly List, or what basis existed for such a restriction on his constitutional right to travel.

129. On November 12, 2010, Mr. Algibhah submitted a request for the releasable materials upon which his TRIP determination was made in order to enable him to file an appeal.

130. After submitting this request, Mr. Algibhah did not hear back from DHS. Mr. Algibhah sent several letters to officials at DHS, but did not receive a response. In January 2012, frustrated by the lack of response from the authorities through the TRIP process and by his continued inability to fly, Mr. Algibhah sought help from his elected representatives. The offices of United States Congressman Jose E. Serrano and Senator Charles Schumer each reached out to the TSA on Mr. Algibhah's behalf. As of the date of this Amended Complaint, Mr. Algibhah has not yet received a response from TRIP regarding his request.

131. In June 2012, Agent Artousa and a new FBI agent, Defendant "John Doe #5," stopped Mr. Algibhah while he was driving his car told him they wanted to speak with him. Mr. Algibhah told Agent Artousa that after the last time that Agent Artousa questioned him, Mr. Algibhah had been placed on the No Fly List. Agent Artousa denied placing Mr. Algibhah on the No Fly List,

but informed Mr. Algibhah that 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. John Doe #5 told Mr. Algibhah that "the Congressmen can't do shit for you; we're the only ones who can take you off the list."

132. Mr. Algibhah answered the agents' questions because he believed he was required to do so in order to have his name removed from the No Fly List. Agents Artousa and John Doe #5 asked Mr. Algibhah questions about his religious practices, his community, his family, his political beliefs, and the names of websites he visited. They asked him where he went to mosque and asked him about the types of people who go to his mosque. They also asked him specific information, such as whether he knew people from the region of Hadhramut in Yemen.

133. After this interrogation, the FBI agents again told Mr. Algibhah that they wanted him to access some Islamic websites for them. They asked for his e-mail address and told him that they would provide him with the names of websites, and that he would need to access them and "act extremist." Mr. Algibhah understood these requests to be conditions that he needed to satisfy to have his name removed from the No Fly List.

134. In order to end the lengthy and intimidating interaction with the FBI agents, Mr. Algibhah

told the agents that he needed time to consider their request that he work as an informant. Mr. Algibhah did not want to become an informant, but in the hope of being removed from the No Fly List, he assured the agents that he would work for them as soon as they took him off the No Fly List. Agent Artousa responded that he "didn't need to worry," removing his name would only take one week. Approximately ten days later, Agent Artousa called Mr. Algibhah and told him that he was working on removing Mr. Algibhah's name from the No Fly List, but that it would take a month or more to do so and that he would have to meet with Mr. Algibhah one more time. Agent Artousa reiterated that it would be very helpful if Mr. Algibhah decided to become an informant. Agent Artousa also told Mr. Algibhah that only the FBI could remove his name from the No Fly List. Mr. Algibhah told Agent Artousa to call before he came, but Agent Artousa neither called nor ever came.

135. Mr. Algibhah was not and is not a "known or suspected terrorist" or a potential or actual threat to civil aviation. The Special Agent Defendants who dealt with Mr. Algibhah, including Artousa and John Doe #5, had no basis to believe that Mr. Algibhah was a "known or suspected terrorist" or potential or actual threat to civil aviation. Had Mr. Algibhah actually presented a threat to aviation safety, Agents Artousa and John Doe #5 would not, and could not, have offered to remove Mr. Algibhah from

the List merely in exchange for his willingness to become an informant. Yet, knowing that Mr. Algibhah was wrongfully placed on the No Fly List, Agents Artousa and Defendant John Doe #5, kept him on the No Fly List to retaliate against Mr. Algibhah's exercise of his constitutionally protected rights and to coerce him into becoming an informant.

136. After this third attempt by the FBI agents to use the No Fly List to coerce him into becoming an informant, Mr. Algibhah retained legal counsel in late June 2012. His counsel spoke to Agent Artousa that month, who confirmed that the FBI could be "of assistance" in removing Mr. Algibhah from the No Fly List, and mentioned again that he wanted Mr. Algibhah to go on Islamic websites, looking for "radical, extremist types of discussions," and "perhaps more aggressive information gathering."

137. On or about August 28, 2012, Mr. Algibhah's neighbor was visited by the FBI and asked about Mr. Algibhah. FBI agents also went to two stores in his neighborhood asking about Mr. Algibhah.

138. In November 2012, Mr. Algibhah, through his counsel, 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. In response, Agent Artousa said that he would speak with his supervisors to

look into this possibility and would inform Mr. Algibhah's counsel of their response.

139. FBI Agent Artousa did not immediately respond to Mr. Algibhah's request via his counsel. Mr. Algibhah did not hear from the FBI for approximately six to seven months. On or about May 29, 2013, Agent Artousa again reached out to Mr. Algibhah, telling him that Agent Artousa was still interested in helping Mr. Algibhah get off the No Fly List and that he wanted to meet with him. Mr. Algibhah told Agent Artousa that he should contact Mr. Algibhah's counsel about the matter.

140. That same day, Mr. Algibhah's counsel reached out to Agent Artousa, who informed counsel that he was simply reaching out to Mr. Algibhah to "touch base" regarding the matters he had previously discussed with him. Agent Artousa stated he was still interested in speaking with Mr. Algibhah. Counsel asked Agent Artousa whether there were any developments on Mr. Algibhah's case that triggered this renewed attempt at questioning. The agent replied that there was none, reiterating that Mr. Algibhah was not in any trouble, and that he was trying to bring the matter to a conclusion.

141. Mr. Algibhah has not heard from Agent Artousa since. Mr. Algibhah believes that he remains on the No Fly List.

142. On multiple occasions over the course of the past few years, Mr. Algibhah's American Muslim

relatives and acquaintances have reported to him that they have been approached by government agents, including FBI agents, at their places of work or at the airport, and extensively questioned about Mr. Algibhah. This has caused Mr. Algibhah to be viewed in his community as someone targeted by law enforcement, resulting in his alienation, stigmatization, and loss of employment. Since the FBI's attempts to recruit Mr. Algibhah as an informant, members of Mr. Algibhah's community have taken to distancing themselves from him. In turn, Mr. Algibhah has also distanced himself from Muslim organizations, from his mosque and from many in his community. He no longer speaks with people in his mosque or his community because he is worried that they will report what he says to the FBI.

143. Mr. Algibhah, who is very close to his daughters and wife, typically visited them in Yemen at least once every year. Mr. Algibhah has not seen his family since April or May 2009, the last time he was able to travel to Yemen successfully. He has attempted to fly to Yemen two times since then, and has been denied boarding each time. Upon information and belief, Mr. Algibhah remains on the No Fly List.

144. Mr. Algibhah's placement on the No Fly List has caused him severe emotional distress. Mr. Algibhah has also suffered economic loss because of his placement on the No Fly List, including

but not limited to loss of income and expenses and fees related to the purchase of airline tickets.

Plaintiff Naveed Shinwari

145. Plaintiff Naveed Shinwari is a lawful permanent resident of the United States and has lived in the United States since 1998, when he was 14 years old. He currently lives in West Haven, Connecticut. Mr. Shinwari has been married since January 2012. His wife resides in Afghanistan. Mr. Shinwari earned a Bachelor of Science degree from Southern Connecticut State University in Public Health in May 2008. He has worked for a temp agency, placed on assignment in North Haven, Connecticut, since April 2013. Mr. Shinwari has never been convicted of a crime or arrested. Mr. Shinwari does not pose, has never posed, and has never been accused of posing, a threat to aviation safety.

146. On February 26, 2012, after getting married in Afghanistan, Mr. Shinwari was traveling with his mother, who is a United States citizen, back home to the United States. They flew from Kabul, Afghanistan to Dubai, United Arab Emirates en route to Omaha, Nebraska, where they were residing at the time. They flew from Kabul to Dubai but were then prevented from boarding their connecting Emirates Airlines flight to Houston, Texas. Airport security officials confiscated Mr. Shinwari's Afghan passport and instructed him to wait in the terminal. After several hours of waiting, airport

security officials returned the passport and told Mr. Shinwari that he needed to visit the United States embassy before he would be allowed to fly.

147. That night, after Mr. Shinwari and his mother obtained temporary visas to stay in the United Arab Emirates and checked into a Dubai hotel, Mr. Shinwari received a phone call from FBI Special Agent Steven LNU. Agent Steven LNU told Mr. Shinwari to meet him the next day at the United States consulate in Dubai.

148. The next day, February 27, 2012, Mr. Shinwari went to the consulate. When he arrived, Agent Steven LNU and FBI Special Agent John C. Harley III took Mr. Shinwari into an interrogation room, and instructed Mr. Shinwari to "tell [them] everything." Mr. Shinwari replied he had no idea why he had been prevented from flying. Agents Harley and Steven LNU proceeded to interrogate Mr. Shinwari for three to four hours. Agents Harley and Steven LNU asked Mr. Shinwari whether he had associated with any "bad guys" while in Afghanistan, whether he had visited any training camps, where he had stayed during his trip, and whether he had traveled to Pakistan. The agents also asked Mr. Shinwari about his religious activities, including which mosque he attends, and more general questions about his origin and background. During the interrogation, the agents sometimes used language that Mr. Shinwari found threatening, and at times Mr. Shinwari felt coerced to speak. Believing that he

had to provide the agents information in order to return to the United States, Mr. Shinwari answered all of the agents' questions. Mr. Shinwari provided documents to Agents Harley and Steven LNU, including his driver's license and other identification papers, which the agents photocopied.

149. At several points during the interrogation, Agents Harley and Steven LNU asked Mr. Shinwari to take a lie detector test. They said that if he took the test, it would help him to be able to return home to the United States. Mr. Shinwari declined to take the test, believing he had already been truthful in his answers.

150. At the end of the interrogation, Agents Harley and Steven LNU said they needed to confer with "higher-ups in [Washington] D.C." before allowing Mr. Shinwari to fly back to the United States. Mr. Shinwari returned to his hotel, where he faxed and e-mailed the agents several more documents that they had requested, including his marriage certificate, information about the group of people with whom he had traveled, and the locations where he stayed during his trip to Afghanistan.

151. Mr. Shinwari and his mother waited in Dubai for two more days, not knowing if they would be permitted to return home. Finally, on February 29, 2012, Agent Harley e-mailed Mr. Shinwari to inform him that they had received the "go-ahead" for him to fly home to the United

States, but only if he flew on a United States-based airline. That day, Mr. Shinwari was able to purchase a ticket and, on March 1, 2012, he boarded an American Airlines flight from Dubai to the United States with his mother.

152. When Mr. Shinwari and his mother arrived at Dulles International Airport, in Virginia, United States Customs and Border Protection agents thoroughly searched his bags and belongings. Following this additional screening, two FBI special agents from the FBI's Omaha field office—Michael LNU and Gregg Grossoehmig—approached Mr. Shinwari at Dulles International Airport and escorted him to an interrogation room.

153. Mr. Shinwari was then subjected to additional interrogation. Agents Michael LNU and Grossoehmig interrogated Mr. Shinwari for two hours at Dulles. The FBI agents asked Mr. Shinwari substantially the same questions that he was asked in Dubai by Agents Harley and Steven LNU. Specifically, Agents Michael LNU and Grossoehmig said that they wanted to "verify" everything that he told Agents Harley and Steven LNU in Dubai. The agents told Mr. Shinwari that FBI agents would visit him when he returned to Omaha.

154. As a result of these interrogations by Agents Harley, Steven LNU, Michael LNU and Gregg Grossoehmig, Mr. Shinwari and his mother arrived in Omaha on March 2, 2012, six days

later than expected, having missed the flights for which they had paid. Mr. Shinwari has not been reimbursed for the cost of booking these additional flights.

155. Approximately one week after he returned home to Omaha, Agent Michael LNU, the same agent who interrogated Mr. Shinwari at Dulles International Airport, and FBI Special Agent John Doe #6, appeared at Mr. Shinwari's home. Over the course of an hour, they subjected him to questions similar to the ones posed in his prior interrogations. Mr. Shinwari truthfully answered these questions again.

156. In addition to questioning Mr. Shinwari, Agents Michael LNU and John Doe #6 said that they knew Mr. Shinwari was unemployed and would pay him if he became an informant for the FBI. Mr. Shinwari understood from the context of the questioning that the agents wanted him to inform on the American Muslim community in Omaha, American Muslim communities in other parts of the United States, and Muslims in other countries. Mr. Shinwari told the agents that he would not act as an informant.

157. Mr. Shinwari declined to work as an informant because he believed that it was dangerous, and because it violated his sincerely held personal and religious beliefs. Mr. Shinwari was morally and religiously opposed to conducting surveillance and reporting to the authorities on the innocent activities of people in his American

Muslim community. Mr. Shinwari believed that if he agreed to become an informant, he would be expected to engage with his community members in a deceptive manner, monitor, and entrap innocent people, and that those actions would interfere with the relationships he had developed with those community members. The FBI agents placed significant pressure on Mr. Shinwari to violate his sincerely held religious beliefs, substantially burdening his exercise of religion.

158. On March 11, 2012, Mr. Shinwari attempted to obtain a boarding pass at Eppley Airfield for a flight from Omaha to Orlando, where he had obtained a temporary job, but was told by an airline agent that his ticket could not be processed. Police officers then approached Mr. Shinwari while he was standing at the ticket counter and told him that he was on the No Fly List. The officers then escorted Mr. Shinwari out of the airport.

159. Upon information and belief, Mr. Shinwari 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.

160. Mr. Shinwari's placement on the No Fly List greatly distressed him and upended his life. Mr. Shinwari was unable to take the job in Orlando, and consequently was unable to pay his bills. In addition, Mr. Shinwari's placement on the No

Fly List meant that he could no longer visit his wife and extended family—grandparents, seven uncles, six aunts, cousins, and in-laws—in Afghanistan, nor his father, who suffers from heart disease, in Virginia.

161. On March 12, 2012, Mr. Shinwari sent an e-mail to Agent Harley seeking help in getting removed from the No Fly List. Agent Harley did not respond. The following day, March 13, 2012, Agents Michael LNU and John Doe #6 again visited Mr. Shinwari at his home in Omaha. Mr. Shinwari again understood the FBI agents to be asking him to become a confidential FBI informant, and again offering him financial compensation. Agents Michael LNU and John Doe #6 also offered to "help" Mr. Shinwari if he agreed to become an informant, stating in words or substance: "The more you help us, the more we can help you." Mr. Shinwari understood the agents were suggesting that, in exchange for agreeing to become an informant, they would remove him from the No Fly List. Despite being mired in financial difficulties and wanting to be removed from the No Fly List, Mr. Shinwari would not agree to become an informant. He told the agents that he believed becoming an informant would put his family in danger. Mr. Shinwari also told the agents that if he had any knowledge about dangerous individuals, he would report that to the FBI and did not need any financial incentives to do so.

162. Following this encounter, Mr. Shinwari contacted counsel in Omaha for help in getting off of the No Fly List. On or about March 21, 2012, Mr. Shinwari and his counsel met with Special Agent in Charge Weysan Dun and Assistant Special Agent in Charge James C. Langenberg at the FBI's Omaha Division.

163. Agents Dun and Langenberg began the meeting by asking Mr. Shinwari to think about the reasons why he may have been placed on a watch list. Mr. Shinwari said that he did not know. The agents then asked Mr. Shinwari about videos of religious sermons that he had watched on the internet. Mr. Shinwari responded that he watched the videos to educate himself about his faith.

164. Following this line of questioning, Agents Dun and Langenberg refused to confirm or deny his No Fly List status but told him that he could potentially get a one-time waiver to travel in an emergency. Mr. Shinwari believed the agents offered him the waiver in exchange for all of the information he had provided them about himself. Mr. Shinwari believed the offer of a waiver was provided as a "reward" for his agreement to submit to questioning and to encourage him to provide more information.

165. On March 18, 2013, Mr. Shinwari sent Agent Langenberg an e-mail asking about whether he could obtain a waiver to fly to Afghanistan. Agent Langenberg never replied.

166. Mr. Shinwari was not and is not a "known or suspected terrorist" or a potential or actual threat to civil aviation. The Special Agents who dealt with Mr. Shinwari had no basis to believe that Mr. Shinwari was a "known or suspected terrorist" or potential or actual threat to civil aviation. Had Mr. Shinwari actually presented a threat to aviation safety, Agents Michael LNU and John Doe #6 would not, and could not, have offered to remove Mr. Shinwari from the List merely in exchange for his willingness to become an informant. Yet, knowing that Mr. Shinwari was wrongfully placed on the No Fly List, the Special Agents who interacted with Mr. Shinwari kept him on the No Fly List in order to retaliate against Mr. Shinwari's exercise of his constitutionally protected rights and to coerce him into becoming an informant.

167. Mr. Shinwari filed a TRIP complaint on February 26, 2012. DHS responded to Mr. Shinwari's TRIP complaint almost fifteen months later in a letter dated June 4, 2013. The letter did not confirm that Mr. Shinwari was on the No Fly List, nor did it offer any justification for Mr. Shinwari's placement on the No Fly List. The letter stated, in part, that "no changes or corrections are warranted at this time."

168. Mr. Shinwari filed a second TRIP complaint on December 9, 2013. DHS responded to Mr. Shinwari's TRIP complaint in a letter dated December 24, 2013. The letter stated, in part, that Mr. Shinwari's experience "was most likely

caused by a misidentification against a government record or by random selection," and that the United States government had "made updates" to its records. The DHS letter did not state whether Mr. Shinwari had been removed from the No Fly List or whether he would now be permitted to board flights. DHS's letter offered no clarification on whether he had been granted a temporary waiver permitting his travel on only a single occasion.

169. On March 19, 2014, for the first time since returning to the United States from Kabul, Afghanistan in March 2012, Mr. Shinwari was able to board a flight, and he flew from Hartford, Connecticut to Omaha, Nebraska and returned on March 31. This is the first time Mr. Shinwari had attempted to fly since being denied a boarding pass on March 11, 2012. Mr. Shinwari does not know whether he remains on the No Fly List and he fears further harassment and retaliation by government agents. Absent confirmation that he has been removed from the No Fly List, Mr. Shinwari believes that his name remains on it.

170. Mr. Shinwari's placement on the No Fly List prevented him from visiting his wife, grandparents, uncle and extended family in Afghanistan since February 2012, causing him great personal distress and emotional trauma. Mr. Shinwari's placement on the List also made it difficult for him to travel to Virginia to visit his father, who suffers from heart disease. Finally,

his placement on the No Fly List prevented Mr. Shinwari from obtaining employment in Orlando.

171. Mr. Shinwari suffered economic loss because of his placement on the No Fly List, including but not limited to the loss of expected employment income from his job in Orlando, and approximately $4,000 in expenses and fees related to the purchase of airline tickets and booking of hotel rooms. In addition, because of the harassment and retaliation he has suffered at the hands of government agents, Mr. Shinwari is reluctant to attend religious services, attending his local mosque less frequently, and to share his religious and political views with others.

Plaintiff Awais Sajjad

172. Plaintiff Awais Sajjad is a lawful permanent resident of the United States, and has resided in the United States in Brooklyn, New York since May 2009 and sometimes stays at his sister's home in New Jersey to be closer to work. Upon arriving in the United States, Mr. Sajjad obtained a certificate in medical assistance. He now works twelve-hour shifts at a convenience store while also caring for his brother-in law, a cancer patient. Mr. Sajjad has never been convicted of a crime or arrested. He does not pose, has never posed, and has never been accused of posing, a threat to aviation safety.

173. On September 14, 2012, Mr. Sajjad attempted to board a Pakistan International Airlines flight

from John F. Kennedy International Airport in order to visit his ailing father and his 91-year old grandmother in Pakistan. At the check-in counter, the airline official spoke with someone on the phone and provided Mr. Sajjad's passport information and description. Shortly thereafter, two FBI agents, John Doe #7 and John Doe #8 approached Mr. Sajjad at the counter.

174. Mr. Sajjad felt embarrassed and ashamed because the other passengers could see that he was the subject of law enforcement attention. He felt that they were staring at him.

175. Agents Doe #7 and Doe #8 asked Mr. Sajjad to accompany them to a small, windowless interrogation room. They told him that if he spoke with their supervisor, he might allow Mr. Sajjad to board his flight as there was still some time before the flight's departure. The agents assured Mr. Sajjad that they would try to help him if he went with them.

176. In the back room, Mr. Sajjad was introduced to a plainclothes FBI supervisory special agent, John Doe #9, and a uniformed DHS special agent, John Doe #10. Agent John Doe #9 informed Mr. Sajjad that he would not be allowed to travel because he was on the No-Fly List. The FBI supervisory special agent, John Doe #9, questioned Mr. Sajjad extensively about his background, friends, and family. They asked Mr. Sajjad who accompanied him to the airport that day, and asked for their phone numbers.

They asked him for his best friends' names, and whether he had any girlfriends. He was asked whether he had any military training or ever sought to enlist for terrorism training. Mr. Sajjad answered all of their questions truthfully. He told them he had never had any kind of training and had never been in trouble with the law. Mr. Sajjad was then told that if he wished to have his name removed from the No Fly List, he would have to file a TRIP complaint.

177. During the interrogation, Agents John Doe #7-10 repeatedly reassured Mr. Sajjad that they would be willing to help him get off the No Fly List and gave him the impression that such assistance would be provided if he agreed to their requests.

178. On September 14, 2012, the same day that he was denied boarding, Mr. Sajjad filed a TRIP complaint.

179. On approximately October 24, 2012, Defendant FBI Agent Michael Rutkowski, accompanied by Agent "John Doe #11" and an interpreter, visited Mr. Sajjad's sister's house in New Jersey, when Mr. Sajjad returned from work. The FBI agents said that they were following up on Mr. Sajjad's TRIP complaint. Mr. Sajjad was relieved, believing that he would be removed from the No Fly List. Mr. Sajjad allowed the agents to enter his home. Once inside Mr. Sajjad's home, the agents asked Mr. Sajjad many questions, including questions about his last trip to Pakistan in 2011, why he went and which

cities he visited on that trip. Mr. Sajjad replied that he went to Pakistan to attend his brother's wedding.

180. While still at Mr. Sajjad's house, Agents Rutkowski and John Doe #11 told Mr. Sajjad that because he was a good man from a good family, they wanted him to work for them, in exchange for which they could provide him with United States citizenship and a salary. Mr. Sajjad declined their offer to work for the FBI, replying that he did not need any assistance from the FBI—he had a job that paid him enough and would soon be eligible for citizenship.

181. Mr. Sajjad understood that Agents Rutkowski and John Doe #11 were asking him to work as an informant for the FBI, and declined to do so because he believed it was dangerous and because he was opposed to conducting surveillance on the innocent activities of people in his American Muslim community and reporting that information to the authorities. Mr. Sajjad believed that if he agreed to work for the FBI, he would be expected to act as an informant in his community and engage with others in a deceptive manner to monitor and entrap them and that those actions would interfere with the relationships that he had developed with those community members.

182. Agents Rutkowski and John Doe #11 then asked Mr. Sajjad to go with them to the FBI headquarters in Newark, New Jersey to undergo

a polygraph test. The agents assured Mr. Sajjad that taking the polygraph test would help remove his name from the No Fly List. Although he did not know what a polygraph test was, Mr. Sajjad agreed to accompany the agents because he believed that the polygraph test was part of their investigation into his TRIP complaint and completing it was necessary to have his name removed from the No Fly List.

183. Agents Rutkowski and John Doe #11 drove Mr. Sajjad to the FBI headquarters in Newark. On the way, they asked Sajjad whether he had watched bomb-making videos on YouTube, to which he replied that he had not, that he only watches movies and music videos. The agents also asked Mr. Sajjad questions about his job and salary, and whether Mr. Sajjad believed he made enough money.

184. At the FBI headquarters, another FBI agent, "John Doe #12," conducted the polygraph examination on Mr. Sajjad through a translator. Mr. Sajjad was very frightened. He did not know what a polygraph test was. They attached multiple wires to different parts of his body. He was told to remain very still and not even move his eyes, and to answer their questions. They then asked him many questions, including whether he loved the United States of America, whether he loved Pakistan and whether he would ever do anything that might bring shame to his family. They also asked whether he had signed up for or taken military training in

Pakistan and whether he had ever used any guns. Mr. Sajjad replied, truthfully, that he had never done so.

185. After an hour of questions, Agent John Doe #12 stepped out of the room and returned with Agents Rutkowski and John Doe #11. They told Mr. Sajjad that the machine detected that he was lying. Mr. Sajjad replied that he was not lying. Agent John Doe #11 responded that if Mr. Sajjad did not provide answers, they would be forced to "use alternative methods." Mr. Sajjad replied that his answers were truthful and would not change no matter what methods the agents used.

186. Agent Rutkowski and Agent John Doe #11 proceeded to interrogate Mr. Sajjad for approximately three more hours.

187. The agents then drove Mr. Sajjad to his sister's home in New Jersey. In the car, Agent Rutkowski apologized for taking Mr. Sajjad's time and engaged him in conversation, but also continued to question him, including inquiries about his religious practices, what mosque he attends, and whether the United States or Pakistan would win if the two countries competed in cricket or soccer.

188. At some time over the next several weeks, Agent Rutkowski and an unidentified FBI agent went to Mr. Sajjad's sister's home in Jersey City and questioned her about Mr. Sajjad. In addition, unknown agents from the United States Embassy in Islamabad contacted Mr. Sajjad's

father in Pakistan and asked that he come to the embassy to answer questions about Mr. Sajjad. Mr. Sajjad's father declined. Mr. Sajjad's father was told that he would be questioned once he arrived in the United States. Mr. Sajjad's father arrived at John F. Kennedy airport on November 2, 2013. Approximately 15 days later, Agent Rutkowski and an unidentified FBI agent came to Mr. Sajjad's sister's house to question Mr. Sajjad's father.

189. On December 5, 2012, Mr. Sajjad received a response to his TRIP complaint. The response stated that after consulting with other federal agencies "no changes or corrections [in his status] are warranted at this time."

190. In January 2013, Mr. Sajjad retained counsel to represent him in his interactions with the FBI and to assist him in clearing his name from the No Fly List. On February 8, 2013, through counsel, Mr. Sajjad filed a TRIP appeal.

191. On March 13, 2013, Mr. Sajjad's counsel called Agent Rutkowski. Agent Rutkowski said that if Mr. Sajjad wanted the FBI to help him get off the No Fly List, he would have to answer the FBI's questions, including the ones Mr. Sajjad allegedly failed on the polygraph exam, but he would not specify which questions those were. Mr. Sajjad declined to submit to additional questioning. On May 6, 2013, Mr. Sajjad's counsel spoke to FBI Agent Rutkowski's supervisor, William Gale, over the phone. When asked if the agency was

contacting Mr. Sajjad because they wanted to recruit him as an informant, Agent Gale responded that he "would not get into it over the phone," and that should not be construed as a "yes" or a "no."

192. On April 4, 2014, FBI Agent Rutkowski and an unknown agent "John Doe #13" approached Mr. Sajjad while he was standing outside his sister's home in New Jersey, and asked Mr. Sajjad to accompany them to a nearby diner in their car. The agents told Mr. Sajjad that they were here to help him and talk about his situation. Taken by surprise, Mr. Sajjad felt pressured to comply. At the diner, the agents told Mr. Sajjad that they wanted to help him travel to Pakistan, but that unless he helped them, they could not do anything for him. They asked him hypothetical questions regarding what he would do if he were to find out that any of his relatives or friends were involved in a terrorist attack. When Mr. Sajjad responded that he would inform the police, they accused him of only telling them what he thought they wanted to hear. Agent John Doe #13 told Mr. Sajjad to "shut up" and said he did not believe what Mr. Sajjad was saying. The agents also questioned Mr. Sajjad about his religious practices, asking him where he prays, whether his father is religious, whether his deceased mother was religious, and whether Mr. Sajjad considered himself to be a Wahhabi Muslim.

193. The agents repeatedly insisted that the only way Mr. Sajjad would get off the No Fly List and be able to travel to Pakistan was if he answered all of the agents' questions, and they reminded him that they had the power to decide if he was on the No Fly List. Mr. Sajjad said that he was trying to be helpful by coming with the agents. Agent John Doe #13 told Mr. Sajjad that he had no choice but to come with the agents when they asked. Finally, the agents told Mr. Sajjad that they would return on the following Monday to subject him to another polygraph examination, and that in the meantime, they expected him to ask his friends and relatives if any of them had an affiliation with a Pakistani organization that the United States had designated as a foreign terrorist group. During the conversation, Agent John Doe #13 told Mr. Sajjad that he had been watching Mr. Sajjad for the last two years and knew that Mr. Sajjad did not do anything wrong and was not a "terrorist" or a threat to America.

194. During this lengthy encounter, Mr. Sajjad answered the agents' questions because he felt obligated to do so. Mr. Sajjad was frightened by the agents, and told them so.

195. Mr. Sajjad was not and is not a "known or suspected terrorist" or a potential or actual threat to civil aviation. Agents Rutkowski and John Does #7-13 had no basis to believe that Mr. Sajjad was a "known or suspected terrorist" or a potential or actual threat to civil aviation. Had Mr. Sajjad actually presented a grave threat to

aviation safety, Agents Rutkowski and John Does #7-13 would not, and could not, have offered to remove him from the List merely in exchange for his taking and passing a polygraph test and working as an FBI informant. Yet, knowing that Mr. Sajjad was wrongfully placed on the No Fly List, Agents Rutkowski and John Does #7-13 kept him on the No Fly List in order to pressure and coerce Mr. Sajjad to become an FBI informant and, when he refused, used the No Fly List to retaliate against Mr. Sajjad's exercise of his constitutionally protected rights. Upon information and belief, Mr. Sajjad remains on the No Fly List.

196. Since Mr. Sajjad's placement on the No Fly List, he has been unable to visit his family, including his 93-year old grandmother who raised him after his mother passed away, and with whom he is very close. Because of his brother-in-law's serious illness, Mr. Sajjad needs to be able to travel to assist with the family's affairs. The FBI agents' ongoing attempts to question Mr. Sajjad, combined with his continued placement on the No Fly List have caused Mr. Sajjad significant and ongoing anxiety and distress.

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF

Retaliation in Violation of Plaintiffs' First Amendment Rights

(Against Agency Defendants in their official capacities and Special Agent Defendants in their individual capacities and official capacities)

197. Plaintiffs Muhammad Tanvir, Jameel Algibhah, Naveed Shinwari, and Awais Sajjad incorporate by reference each and every allegation contained in the paragraphs above.

198. Plaintiffs are present or have the legal right to be present in the United States.

199. Plaintiffs each met with Special Agent Defendants in the hope of being removed from the No Fly List and Special Agent Defendants used the No Fly List to attempt to pressure Plaintiffs to sacrifice their First Amendment rights. When Special Agent Defendants asked Plaintiffs to become informants, Plaintiffs refused.

200. By declining to act as informants within their communities, Plaintiffs repeatedly and validly exercised their First Amendment rights to freedom of speech and association. By declining to become informants on the basis of deeply held religious beliefs, Plaintiffs Tanvir, Algibhah, and

Shinwari repeatedly and validly exercised their First Amendment right to freedom of religion.

201. Rather than using the No Fly List as they were authorized to do—to restrict the travel of individuals who are a genuine threat to aviation safety—Special Agent Defendants knowingly, intentionally, and unlawfully placed Plaintiffs on the No Fly List, or maintained Plaintiffs on the No Fly List, because Plaintiffs refused to act as informants. In doing that, Defendants forced Plaintiffs to choose between their First Amendment rights and their liberty interest in travel. Special Agent Defendants knowingly, intentionally, and unlawfully retaliated against Plaintiffs, and continue to retaliate against Plaintiffs for their exercise of their constitutional rights to freedom of speech, association, and religion, in violation of Plaintiffs' First Amendment rights under the United States Constitution.

202. Agency Defendants, acting in their official capacity and under color of authority, were and remain responsible for promulgating, implementing, maintaining, administering, supervising, compiling, or correcting the No Fly List. Agency Defendants are tolerating and failing to remedy a pattern and practice among Special Agent Defendants of using the No Fly List to unlawfully retaliate against Plaintiffs for the exercise of their constitutionally protected rights, in violation of the First Amendment to the United States Constitution.

203. Upon information and belief, Plaintiffs remain on the No Fly List. Plaintiffs' continued presence on the No Fly List is a result of their exercise of their First Amendment rights. By maintaining each Plaintiff's name on the No Fly List, Defendants continue to retaliate against Plaintiffs for the exercise of their First Amendment rights. Absent injunctive relief, upon information and belief, Plaintiffs will continue to suffer from this retaliatory placement on the No Fly List, and Agency Defendants will continue to maintain a pattern and practice that permits Special Agent Defendants' use of the No Fly List to retaliate against Plaintiffs' exercise of their First Amendment rights.

204. Defendants' unlawful actions are imposing an immediate and ongoing harm on Plaintiffs and have caused Plaintiffs deprivation of their constitutional rights, emotional distress, damage to their reputation, and material and economic loss.

SECOND CLAIM FOR RELIEF

Violation of the Religious Freedom Restoration Act (RFRA)

(Against Defendants FNU Tanzin, Sanya Garcia, John LNU, Francisco Artousa, John C. Harley III, Steven LNU, Michael LNU, Gregg Grossoehmig, Weysan Dun, James C. Langenberg, John Does #1-6 in their official and individual capacities)

205. Plaintiffs Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari incorporate by reference each and every allegation contained in the paragraphs above.

206. Plaintiffs are present or have the legal right to be present in the United States.

207. Plaintiffs sincerely believe that informing to the government on innocent people violates their core religious beliefs, including the proscription on bearing false witness against one's neighbor by engaging in relationships and religious practices under false pretenses, and by betraying the trust and confidence of one's religious community.

208. These are fundamental and important tenets of Plaintiffs' religious beliefs because of the central roles that trust, honesty, and good faith play in their religious communities.

209. Defendants instructed and pressured Plaintiffs to infiltrate their religious communities as

government informants, to spy and eavesdrop on other Muslims' words and deeds—regardless of whether these people were suspected of wrongdoing—and to report their observations to the FBI.

210. Defendants forced Plaintiffs into an impermissible choice between, on the one hand, obeying their sincerely held religious beliefs and being subjected to the punishment of placement or retention on the No Fly List, or, on the other hand, violating their sincerely held religious beliefs in order to avoid being placed on the No Fly List or to secure removal from the No Fly List.

211. By forcing Plaintiffs into this impermissible choice between their sincerely held religious beliefs and the threat of retaliation and punishment, Defendants placed a substantial burden on Plaintiffs' exercise of their sincerely held religious beliefs in violation of RFRA, 42 U.S.C. § 2000bb-1(a).

212. The United States government has no compelling interest in requiring Plaintiffs to inform on their religious communities.

213. Requiring Plaintiffs to inform on their religious communities is not the least restrictive means of furthering any compelling governmental interest.

214. By attempting to recruit Plaintiffs as confidential government informants by resorting

to the retaliatory or coercive use of the No Fly List, the Special Agent Defendants substantially burdened Plaintiffs' sincerely held religious beliefs in violation of RFRA.

215. Defendants' unlawful actions are imposing an immediate and ongoing harm on Plaintiffs and have caused Plaintiffs emotional distress, deprivation of their constitutional and statutory rights, damage to their reputation, and material and economic loss.

THIRD CLAIM FOR RELIEF

Violation of the Fifth Amendment: Procedural Due Process

(Against Agency Defendants in their official capacities)

216. Plaintiffs Muhammad Tanvir, Jameel Algibhah, Naveed Shinwari, and Awais Sajjad incorporate by reference each and every allegation contained in the paragraphs above.

217. Plaintiffs are present or have the legal right to be present in the United States.

218. Plaintiffs have a liberty interest in travel free from unreasonable burdens within, to, and from the United States.

219. Plaintiffs have a right to be free from being falsely stigmatized as individuals associated with "terrorist" activity and from having these associational falsehoods disseminated widely to

government agencies, airline carriers, and foreign governments.

220. Plaintiffs' placement or continued listing on the No Fly List has adversely affected their liberty interest in travel and their right to be free from false stigmatization by the government.

221. Defendants, acting in their official capacity and under color of authority, were and remain responsible for promulgating, implementing, maintaining, administering, supervising, compiling, or correcting the No Fly List.

222. By failing to articulate and publish a clear standard and criteria for inclusion on the No Fly List, to inform Plaintiffs of their placement on the No Fly List and the bases for being on the No Fly List, and to provide Plaintiffs with a meaningful opportunity to challenge their placement on the No Fly List, Agency Defendants facilitated the Special Agent Defendants' abuse of the No Fly List and deprived Plaintiffs of protected liberty interests without affording them due process of law in violation of the Fifth Amendment to the United States Constitution.

223. Defendants will continue to violate Plaintiffs' rights to due process if Plaintiffs are not afforded the relief demanded below.

224. Defendants' unlawful actions are imposing an immediate and ongoing harm on Plaintiffs and have caused Plaintiffs emotional distress,

deprivation of their constitutional rights, damage to their reputation, and material and economic loss.

FOURTH CLAIM FOR RELIEF

Unlawful Agency Action in Violation of the Administrative Procedure Act, 5 U.S.C. §§ 702, 706

(Against Agency Defendants in their official capacities)

225. Plaintiffs Muhammad Tanvir, Jameel Algibhah, Naveed Shinwari, and Awais Sajjad incorporate by reference each and every allegation contained in the paragraphs above.

226. Plaintiffs are present or have the legal right to be present in the United States.

227. Defendants' failure to provide Plaintiffs with constitutionally adequate notice of the bases for their placement on the No Fly List and a meaningful opportunity to challenge their continued inclusion on the No Fly List is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and contrary to constitutional rights, power, privilege, or immunity, and should be set aside as unlawful pursuant to 5 U.S.C. § 706.

228. Because Plaintiffs do not present, and have never presented, a threat to aviation safety, Defendants' placement and continued inclusion of Plaintiffs on the No Fly List is arbitrary,

capricious, an abuse of discretion, otherwise not in accordance with law, and contrary to constitutional rights, power, privilege, or immunity, and should be set aside as unlawful pursuant to 5 U.S.C. § 706(1).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request judgment against Defendants as follows:

1. Declaring that the policies, practices, acts, and omissions of Defendants described here are unlawful and violate Plaintiffs' rights under the Constitution of the United States, the Religious Freedom Restoration Act, and the Administrative Procedure Act;

2. Ordering Defendants to remove Plaintiffs' names from the No Fly List, and to provide Plaintiffs with notice that their names have been removed;

3. Enjoining Defendants and their agents, employees, successors, and all others acting in concert with them, from subjecting Plaintiffs to the unconstitutional and unlawful practices described in this complaint;

4. Ordering Defendants sued in their official capacity to provide a constitutionally adequate mechanism affording Plaintiffs with meaningful notice of the standards for inclusion on the No Fly List; meaningful notice of their placement on the No Fly List and of the grounds for their inclusion on the No Fly List, and a meaningful

opportunity to contest their placement on the No Fly List before a neutral decision-maker;

5. Requiring the promulgation of guidelines prohibiting the abuse of the No Fly List for purposes other than the promotion of aviation safety, including for the unlawful purpose of retaliating against or coercively pressuring individuals to become informants;

6. Awarding Plaintiffs compensatory and punitive damages;

7. Awarding Plaintiffs' counsel reasonable attorneys' fees and litigation costs, including but not limited to fees, costs, and disbursements pursuant to 28 U.S.C. § 2412; and

8. Granting such other and further relief as the Court deems just and proper.

Dated: April 22, 2014

Respectfully submitted,

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