No. 19-71

IN THE

Supreme Court of the United States

FNU TANZIN, *et al.*,

Petitioners,

v.

MUHAMMED TANVIR, *et al.*,

Respondents.

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

BRIEF OF MUSLIM ADVOCATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ANDREI VRABIE
JACOB KARR
DAVID S. SANSON
HOLWELL SHUSTER & GOLDBERG LLP
425 Lexington Avenue
New York, New York 10017
(646) 837-5151

MATTHEW CALLAHAN
Counsel of Record
MUSLIM ADVOCATES
P.O. Box 34440
Washington, DC 20043
(202) 897-1892
matthew@muslimadvocates.org

Counsel for Amicus Curiae

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INTEREST OF *AMICUS* CURIAE

Muslim Advocates is a national legal advocacy and educational organization formed in 2005. Muslim Advocates works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. The issues at stake in this case relate directly to Muslim Advocates' work fighting religious discrimination against vulnerable communities.[1]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Respondents, like many members of the Muslim community, were caught in the machinery of the government's discriminatory national security apparatus—specifically, its watchlisting system. Yet despite having alleged all the elements of a claim of religious discrimination under the Religious Freedom Restoration Act ("RFRA"), Petitioners now argue that Respondents should be left without a remedy for the harm they suffered. Such a holding would be inconsistent with this country's proud tradition of religious liberty and would prevent accountability for the religious discrimination leveled against Respondents.

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[1] Counsel for Respondents have filed a blanket consent to the filing of *amicus* briefs, and counsel for Petitioners consented to the filing of this brief. Sup. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Sup. Ct. R. 37.6.

Indeed, Congress enacted RFRA to safeguard the rights of religious minorities and to extend the protections of religious freedom embodied in the First Amendment. In the wake of the terrorist attacks of September 11, 2001, the Muslim community—one such religious minority—became the target of both the government's overreaching national security policies and political rhetoric that calumniously equated Islam with terrorism. Over the past two decades, American Muslims have been summarily executed abroad, wrongfully stripped of the ability to fly into or over the United States, arbitrarily detained, and subject to extensive warrantless domestic surveillance.

Today, the Muslim community continues to bear the brunt of government policies and surveillance techniques that are aimed at Muslims solely because of their religious affiliation. The government has targeted mosques and demanded that Muslims spy on their fellow religious adherents, a practice that is particularly offensive to a faith rooted in the primacy of religious duty and communal worship. Further, as courts have repeatedly recognized, the government's watchlisting system—used by government officials as a threat and a cudgel in this case—is fundamentally broken. The standards for inclusion are extremely low, and the secret evidence that the government relies upon to make such determinations is often innocuous or uncorroborated. As a result, the government's master watchlist is wildly overinclusive and rife with errors that the Executive has been unable or unwilling to rectify. U.S. citizens receive no

notice of their watchlisting status until it has already interfered with their lives, often in severe ways.

This case is the latest attack on Muslims' civil liberties. The government has gone from watchlisting to persecuting American Muslims for refusing to violate their religious beliefs and practices by spying on their coreligionists. Where religious minorities are so flagrantly injured by individual government officials, damages are the only meaningful way to deter unlawful incursions into religious liberties that have been at the core of the United States since its founding.

Moreover, injunctive forms of relief work only prospectively and cannot redress past harm. Congress entrusted the Judiciary to fashion "appropriate relief." In the instant case, damages are not simply an appropriate remedy under RFRA: for American Muslims injured by individual government officials, damages are the essential remedy.

ARGUMENT

I. RFRA, Like The Free Exercise Clause, Is Especially Concerned With Protecting Religious Minorities.

A. Religious Liberty Is A Bedrock American Principle.

The freedom to practice one's religion is among "the cherished rights of mind and spirit" protected by the Constitution. *Malloy v. Hogan*, 378 U.S. 1, 5 (1964). As Justice Murphy noted, "nothing enjoys a higher estate in our society than the right given by the

First and Fourteenth Amendments freely to practice and proclaim one's religious convictions." *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (Murphy, J., concurring).

The First Amendment's religion clauses—particularly the Free Exercise Clause—were designed to protect expressions of religious belief by minority religions. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 679 n.4 (2002) (Thomas, J., concurring) (citing Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1159 (1991)); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532–33 (1993). The framers' goal was to protect "members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar," *Goldman v. Weinberger*, 475 U.S. 503, 524 (1986) (Brennan, J., dissenting), and so "prove this country's commitment to serving as a refuge for religious freedom," irrespective of the popularity of the religious belief, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

B. Congress Enacted RFRA To Safeguard Religious Liberty And Adequately Compensate Victims.

RFRA was Congress's direct response to the majority holding in *Employment Division v. Smith*, 494 U.S. 872 (1990). That case concerned a state government's decision to deny unemployment benefits to Native Americans terminated by their employer for

using peyote for sacramental purposes. *Id.* at 874. Congress's response was unambiguous: the right to free exercise is so fundamental that any government action—even neutral action—that burdens a person's exercise of religion must be subject to strict scrutiny review.

In addition to restoring the pre-*Smith* standard of review, Congress expanded free exercise protections in two more ways. First, Congress designed RFRA to "provide very broad protection for religious liberty," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014), "ensur[ing] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter," *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). Second, Congress explicitly included a private right of action, designed to ensure that courts will fashion "appropriate relief" sufficient to remedy every RFRA injury. 42 U.S.C. §§ 2000bb-1(c), 2000bb-2(1).

If the government's conduct in *Smith* violated a religious minority's liberties, then the government's conduct here was patently more invasive and egregious. Indeed, there was nothing neutral or bona fide about it. Petitioners penalized devout Muslims specifically for refusing to violate among the most central tenets of their faith. Consequently, to qualify as "appropriate" and reflect the seriousness of the government's violation, Respondents' relief under RFRA must include damages. Injunctive relief alone does not compensate Respondents for past harm and

does not serve as an adequate deterrent against future discrimination, especially in light of Petitioners' outrageous conduct.

II. The Government's Watchlisting System Is Fundamentally Broken.

A. Structural Flaws In The Watchlisting System Ensure That It Is Inaccurate and Overinclusive.

Respondents in this case turned to the court to vindicate their rights after becoming enmeshed in a widespread effort by the government to surveil and track Muslims. Over the past two decades, "the federal government has assembled a vast, multi-agency, counterterrorism bureaucracy that tracks hundreds of thousands of individuals." *Ibrahim v. DHS*, 669 F.3d 983, 988–89 (9th Cir. 2012). The final products are an error-riddled master Terrorist Screening Database ("Watchlist"), containing the names of purported terrorists, as well as subset lists, such as the No-Fly List, that stem from the Watchlist. *Id.* at 989. The Watchlist is secret. But what has been revealed through litigation and investigative reporting is cause for grave concern, particularly for the thousands of American Muslims wrongly swept up in the watchlisting system.

The standard for inclusion on the Watchlist is absurdly low, and the secret evidence that the government relies upon to make such determinations is often innocuous or uncorroborated. A federal government agency, or even a foreign government, is allowed to "nominate" an individual to the Watchlist

based only upon "articulable intelligence or information" that the individual is planning or participating in terrorist activities. *Elhady v. Kable*, 391 F. Supp. 3d 562, 568 (2019); *see also Ibrahim v. DHS*, 62 F. Supp. 3d 909, 918 (N.D. Cal. 2014).

In reviewing a nomination for inclusion, the FBI's Terrorist Screening Center ("TSC"), which was created to consolidate the government's terrorism-screening efforts, is supposed to determine whether there is a "reasonable suspicion that the individual is a known or suspected terrorist." *Elhady*, 391 F. Supp. 3d at 569. Not only is "reasonable suspicion" itself a low bar for branding individuals as known or suspected terrorists, but officials in charge of the Watchlist are also advised that "concrete facts are not necessary" to make such a determination. Nat'l Counterterrorism Ctr., Watchlisting Guidance 34 (2013), https://www.eff.org/files/2014/07/24/2013-watchlist-guidance_1.pdf ("Watchlisting Guidance"). Moreover, the TSC should credit "inferences" by nominating officials and consider "uncorroborated" information that is of questionable reliability. *Id.* Although none of the underlying information used to make these determinations is ultimately included in the Watchlist, it is clear that "completely innocent conduct" may "serv[e] as the starting point for a string of subjective, speculative inferences that result in a person's inclusion." *Mohamed v. Holder*, 995 F. Supp. 2d 520, 532 (E.D. Va. 2014); *see also Elhady,* 391 F. Supp. 3d at 581 (finding that individuals were labeled "suspected terrorists" and included in the Watchlist

"based to a large extent on subjective judgments" (citation omitted)).

Indeed, the government is explicitly permitted to consider First Amendment–protected activities, including religious affiliation, so long as its determination is not based "solely" on such activities. Watchlisting Guidance, *supra*, at 34–35. Remarkably, a single social media post could be sufficient grounds for accepting a nomination to the Watchlist. *Id.* at 34.

Given the essentially standard-less discretion afforded to reviewing officials, it is unsurprising that the TSC appears to reject fewer than one percent of all nominations to the Watchlist. Jerome P. Bjelopera, Bart Elias & Alison Siskin, Cong. Research Serv., R44678, *The Terrorist Screening Database and Preventing Terrorist Travel* 6 (2016), https://fas.org/sgp/crs/terror/R44678.pdf ("From FY2009 to FY2013, approximately 1.6 million individuals were nominated and only about 1% (just over 14,000) were rejected."). Once added to the Watchlist, moreover, "there is no independent review of a person's placement on the [Terrorist Screening Database] by a neutral decisionmaker." *Elhady*, 391 F. Supp. 3d at 581–82.

The government's slipshod designation process has repeatedly been found to be inadequate by both the Judiciary and the Executive itself. *See, e.g.*, *Ibrahim v. DHS*, 912 F.3d 1147, 1179 (9th Cir. 2019) ("Any person could have the misfortune of being mistakenly placed on a government watchlist . . . ."); *Shearson v. Holder*, 725 F.3d 588, 595 (6th Cir. 2013)

("[T]here are thousands more people each year whom the government misidentifies as being on the lists."); *Ibrahim*, 669 F.3d at 990 (citing a 2007 DOJ Office of the Inspector General ("OIG") report that criticized the TSC for its "weak quality assurance process" and noting that a 2006 internal review of the No-Fly List resulted in the immediate deletion of over 5,000 records and the downgrade of over 22,000 records); *Latif v. Holder*, 969 F. Supp. 2d 1293, 1306 (D. Or. 2013) (citing a 2009 DOJ OIG audit that concluded that the "FBI did not update or remove watch list records as required" and that "the FBI failed to (1) timely remove records in 72 percent of cases where it was necessary, (2) modify watch-list records in 67 percent of cases where it was necessary, and (3) remove terrorism case classifications in 35 percent of cases where it was necessary"); Dep't of Homeland Security, 2019 Privacy Office Annual Report to Congress 47–48 (2019), https://www.dhs.gov/sites/default/files/publications/dhs_privacy_office_2019_annual_report-final-10-22-2019.pdf (revealing that, in FY2019, the Transportation Security Administration granted over 91% of appeals from transportation sector workers who believed they were wrongly identified as a threat to transportation security); *Step 1: Should I Use DHS Trip?*, Dep't of Homeland Sec., https://www.dhs.gov/step-1-should-i-use-dhs-trip (last updated May 10, 2018) (stating that "[n]inety-nine percent of individuals who apply for redress" are "misidentified as people who are" on the Watchlist).

B. Once Individuals Have Been Swept Up Into The System, It Is Almost Impossible For Them To Escape It.

The government neither notifies individuals when they are added to the Watchlist nor provides them an opportunity to rebut any of the secret information that the government may have relied upon to add them. If they have reason to believe that they have been placed on the Watchlist—for example, because they were denied boarding an airplane or were subjected to invasive screening at a port of entry—their only recourse is to submit a standard inquiry form to the DHS Traveler Redress Inquiry Program ("DHS TRIP"). This procedure has proven to be a sham—one that the courts have now deemed lacks requisite due process protections for individuals placed on the Watchlist. *See Elhady*, 391 F. Supp. 3d at 584–85.[2]

Even when it becomes undeniably clear to the government that a certain individual does not belong on the Watchlist, there is no guarantee that the government will remove her on its own accord. An egregious example of this practice is the case of Dr. Rahinah Ibrahim, who was placed on the No-Fly List due to a clerical error. Within two weeks of her filing suit to clear her name and remove herself from the No-Fly List, government officials discovered the

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[2] Pursuant to *Latif v. Holder*, 28 F. Supp. 3d 1134, 1161–62 (D. Or. 2014), the DHS TRIP process was slightly modified for U.S. citizens or lawful permanent residents who are on the No-Fly List. A recent decision in *Elhady v. Kable* similarly required DHS to propose modified procedures for U.S. persons who are on the Watchlist. *See* 391 F. Supp. 3d at 584.

mistake. Nonetheless, the government spent almost a decade litigating against her—a strategy that multiple judges sitting en banc in the Ninth Circuit compared to Franz Kafka's *The Trial*.[3]

Latif and *Ibrahim* underscore that judicial intervention is necessary to compel the government to change what are clearly unworkable procedures and inadequate remedies. Here, Congress has expressly authorized courts to fashion "appropriate relief" for violations of RFRA brought by private plaintiffs. And damages are the only appropriate relief when, as in the instant case before the Court, the harm perpetrated by the government cannot be adequately remedied by an injunction alone.

C. Watchlisted Individuals Suffer Profoundly.

Inclusion on the Watchlist is a draconian sanction: it severely burdens an individual's ability to travel; it restricts her ability to associate with family, friends, and social or professional organizations; it stigmatizes as a terrorist an individual who has never been charged with any crime; and it has devastating consequences for an individual's personal, professional, and religious life.

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[3] It took nearly ten years of gratuitous litigation for the government to "at last concede[] that [Dr. Ibrahim] poses no threat to our safety or national security, has never posed a threat to national security, and should never have been placed on the No Fly list." *Ibrahim*, 912 F.3d at 1152–53.

Individuals on the Watchlist face acute restrictions on their ability to travel, "including being denied boarding on international flights, being subject to secondary inspection, having their electronic devices and those of their travel companions subject to an advanced search, and, if they are a foreign national, being denied admission to the United States." *Elhady*, 391 F. Supp. 3d at 570. They may have their travel disrupted and miss connecting flights. *Id.* at 572. Some individuals "have been forcibly arrested (often at gunpoint) and detained for long hours in front of their family." *Id.* at 572. Many now avoid certain travel altogether, even domestically, due to their experiences and the associated "psychological trauma." *Id.* at 578–79.

The experience of the lead plaintiff in *Elhady v. Kable* vividly captures the stark reality of individuals who travel while on the Watchlist. When returning to the United States from Canada, Plaintiff Anas Elhady was surrounded by Customs and Border Protection ("CBP") officers, handcuffed, and then repeatedly interrogated. On prior occasions, Mr. Elhady had similarly been detained while crossing the border and "handcuffed, stripped . . . of his belongings, kept in a cell, and prohibited from contacting his attorney." *Elhady*, 391 F. Supp. 3d at 571–72. "As a result of these experiences, [Mr.] Elhady stopped crossing the border altogether and stopped flying for more than a year." *Id.*

Moreover, because the government shares Watchlist information and other related intelligence

with dozens of foreign governments, *Elhady*, 391 F. Supp. 3d at 570 (explaining that the FBI disseminates Watchlist information to "more than sixty foreign governments"), individuals traveling overseas may face "extensive detention and interrogation at the hands of foreign authorities" as a result of their Watchlist status, *Latif*, 28 F. Supp. 3d at 1149; *see also* Press Release, Rep. Ilhan Omar, Members of Congress Send a Letter to Secretary Mike Pompeo to Protect American Citizens from Human Rights Abuses Abroad (June 28, 2019), https://omar.house.gov/media/press-releases/rep-ilhan-omar-members-congress-send-letter-secretary-mike-pompeo-protect (noting that the FBI has acknowledged that "it has never stopped disseminating watchlist information to a foreign government as a result of that government's human rights abuses"); Justin Ling, *Revealed: Canada Uses Secretive Anti-Terrorist Database Run by US*, The Guardian (June 21, 2018), https://www.theguardian.com/world/2018/jun/21/canada-us-tuscan-anti-terrorist-database-at-borders (discussing U.S.-Canadian sharing of border watchlists). Additionally, oppressive regimes may watchlist political opponents or dissidents, and the U.S. government may defer to those judgments, despite the fundamental injustice of the watchlisting. *See, e.g.*, Olivia B. Waxman, *The U.S. Government Had Nelson Mandela on Terrorist Watch Lists Until 2008. Here's Why*, Time (July 18, 2018), https://time.com/5338569/nelson-mandela-terror-list.

The direct harms of watchlisting go well beyond these heavy burdens on travel. Most immediately, the wide dissemination of Watchlist information to over eighteen thousand law enforcement agencies ensures that an individual's Watchlist status has the potential to impact any interaction that she may have with law enforcement, at all levels of government, including "traffic stops, field interviews, house visits, municipal permit processes, firearm purchases, certain licensing applications, and other scenarios." *Elhady*, 391 F. Supp. 3d at 580; *see also* Bob Orr, *Inside a Secret U.S. Terrorist Screening Center*, CBS News (Oct. 1, 2012), https://www.cbsnews.com/news/inside-a-secret-us-terrorist-screening-center ("[E]ach time a police officer run[s] someone's ID through a computer, that person is checked against the lists.").

Watchlisting may also impact an individual's employment prospects. Watchlist information is used extensively to screen government employees and contractors. *See Crooker v. TSA*, 323 F. Supp. 3d 148, 151 (D. Mass. 2018). Watchlist information is further provided to hundreds of private entities and used to screen employees of certain large government contractors, as well as private sector employees with transportation and infrastructure functions. *Elhady*, F. Supp. 3d at 580. And whether or not a private employer has direct access to Watchlist information, it may discover an individual's Watchlist status through other means, particularly if the job requires any type of travel. *See Mohamed v. Holder*, No. 1:11–cv–50 (AJT/MSN), 2015 WL 4394958, at *6 (E.D. Va. July 16, 2015).

The reputational harm and stigma associated with watchlisting are also lasting and substantial. Inclusion on the Watchlist brands an individual as one capable of committing war crimes—someone who is dangerous, disloyal, "a second class citizen, or worse." *Mohamed*, 995 F. Supp. 2d at 529. And "one can easily imagine the broad range of consequences that might be visited upon such a person if that stigmatizing designation were known by the general public." *Id.* Unfortunately, given how extensively and recklessly Watchlist information is disseminated, it is only a matter of time before an individual's Watchlist status becomes known outside of the government, the airlines, or employers. *See Mohamed*, 2015 WL 4394958, at *6.

III. The Muslim Community Disproportionately Suffers The Effects Of The Government's National Security Practices.

A. Muslims Are Routinely Targeted By The Government's National Security Practices, Including Watchlisting.

Since the terrorist attacks of September 11, 2001, Muslims like Respondents have been routinely targeted for invasive law enforcement and surveillance under the guise of federal, state, and local counterterrorism policies. Muslim communities are disproportionately on the receiving end of the government's national security scrutiny and, at times, hysteria. This has been so despite the fact that white-nationalist and other extremist groups have been responsible for more violence in the United States over the same time period. *See* Elisha Fieldstadt &

Ken Dilanian, *White Nationalism-Fueled Violence Is on the Rise, but FBI Is Slow to Call It Domestic Terrorism* (Aug. 5, 2019), https://www.nbcnews.com/news/us-news/white-nationalism-fueled-violence-rise-fbi-slow-call-it-domestic-n1039206 (describing the "comparatively minimal resources" dedicated to white-nationalist violence); Michael German & Emmanuel Mauleón, Brennan Ctr. for Justice, *Fighting Far-Right Violence and Hate Crimes* 7 (2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_Far_Right_Violence.pdf ("The Justice Department named counterterrorism its number one mission after the 9/11 attacks, but it has as a matter of policy and practice subordinated investigations of far-right militants, which it labels 'domestic' terrorists, in favor of those targeting Muslim suspects, which it calls 'international' or 'homegrown' terrorists.").

Based on the best available evidence, Muslims make up a disproportionate number of names on the Watchlist. *See, e.g.*, Jeremy Scahill & Ryan Devereaux, *Watch Commander*, The Intercept (Aug. 5, 2014), http://interc.pt/1qRHpSa (revealing that, as of 2014, the city of Dearborn, Michigan, with a population of only 96,000 people—forty percent of whom are of Arab descent—had more residents on the Watchlist than cities like Houston and Chicago, with populations in the millions). Given the disproportionate number of Arabic names on the Watchlist, Muslims also suffer due to the misidentification of common names and personal

identifiers. *See* DHS Privacy Office, Report on Effects on Privacy & Civil Liberties 8 (2006), https://www.dhs.gov/sites/default/files/publications/privacy_rpt_nofly.pdf (noting that the risks of misidentification "are magnified by the fact that watch lists contain names derived from languages and alphabets other than English and for which there may not be a universal transliteration standard").

Most of the government's counterterrorism and national security resources appear to be targeted at Muslims, particularly through the use of informants. *See* Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 Stan. L. Rev. 1333, 1350–51 (2019); *see also, e.g.*, Cora Currier, *The FBI Wanted to Target Yemenis Through Student Groups and Mosques*, The Intercept (Sept. 26, 2016), https://theintercept.com/2016/09/29/the-fbi-wanted-to-target-yemenis-through-student-groups-and-mosques. In fact, federal and local government "Countering Violent Extremism" programs have been targeted "almost exclusively" at Muslims. *Why Countering Violent Extremism Programs Are Bad Policy*, Brennan Ctr. for Just. (Sept. 9, 2019), https://www.brennancenter.org/our-work/research-reports/why-countering-violent-extremism-programs-are-bad-policy.

Muslims also often bear the brunt of kneejerk national security responses to political crises. Following the announcement and implementation of the Trump Administration's 2017 travel ban, DHS's Trusted Traveler program appears to have targeted

citizens of Muslim-majority countries for exclusion. Data obtained from the government through Freedom of Information Act litigation show that travelers born in Muslim-majority countries have been especially likely to have their eligibility for the program revoked—for example, there was a 74% increase in revocations for persons of Iranian origin and a 200% increase for persons of Pakistani origin. Matthew Callahan, *Newly Released Data Reveals Extent of Unwarranted Revocations of Trusted Traveler Status Under the Muslim Ban*, Muslim Advocates (Feb. 7, 2018), https://muslimadvocates.org/2018/02/newly-released-data-reveals-extent-of-unwarranted-revocations-of-trusted-traveler-status-under-the-muslim-ban. Moreover, the average number of revocations increased for persons born in each of the seven countries targeted by the travel ban. *Id.*

Even more recently, following the government's killing of Iranian General Qasem Soleimani, CBP officers were directed by the Seattle Field Office to target for interrogation at the border any individuals—including U.S. citizens—with connections to Iran, Lebanon, and the Palestinian territories. *See* Geneva Sands, *Lawmakers Say CBP Admits Breaching Protocol Targeting Iranian Americans*, CNN (Feb. 4, 2020), https://www.cnn.com/2020/02/04/politics/cbp-breach-protocol-iranian-americans/index.html. U.S. citizens of Iranian descent were reportedly detained for hours and asked detailed questions about their countries of birth as well as their religious affiliations. *Id.* In total, "[u]p to 200 individuals of Iranian, Lebanese, or

Palestinian descent were detained by CBP" over a two-day period in early January 2020. *Id.*

B. Muslims Are Targeted And Stigmatized Because Of Their Religious Affiliation.

Muslims are being added to the Watchlist, surveilled in their schools and places of worship, denied otherwise-obtainable immigration benefits, and being interrogated by border officials. These stigmatic harms as a result of the government's national security policies are compounded by the fact that Muslims are targeted simply because of their faith. *See Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) ("[D]iscrimination itself . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." (citations omitted)).

Within the United States, the term "terrorism" has become laden with anti-Muslim bias. And the government's highly visible and singular counterterrorism focus on Muslim communities reifies the notion that Muslims are suspicious solely because of their religious faith. *See What Is Wrong with the Government's "Countering Violent Extremism" Programs* 4, Am. C.L. Union, https://www.aclu.org/other/aclu-v-dhs-briefing-paper; Sinnar, *supra*, at 1396 ("Federal and state policies in the years since September 11 reinforced ideas of Islam as foreign, threatening, and oppositional to American identity."). This governmental targeting has "cascading effects on Muslim communities." Sinnar,

supra, at 1366. Thus, out of fear of both private and state-sponsored retribution, Muslims may avoid openly professing their faith or engaging with non-Muslims. This is precisely the kind of estranging effect on a religious minority that is anathema to the Constitution and that RFRA is designed to combat.

The government's unilateral targeting of Muslims also creates perverse incentives for individuals to lie to or entrap their coreligionists in order to obtain benefits for themselves. In 2007, for example, the FBI paid an informant to indiscriminately gather information on Muslims in southern California by pretending to convert to Islam and joining a mosque. *See Fazaga v. FBI*, 916 F.3d 1202, 1212–14 (9th Cir. 2019). The FBI obtained from the informant extensive personal information on Muslims associated with the mosque, as well as surreptitious video recordings of their homes and places of worship. *Id.* at 1213. The scheme collapsed when the informant began asking questions about jihad and indicated a willingness to engage in violence—at which point Muslim members of the community reported the informant to the authorities, including the FBI. *Id.* at 1213–14.

Further, law enforcement is seeking out already marginalized or vulnerable members of the Muslim community, anticipating that they might be more amenable to cooperation. Shamiur Rahman, for example, was recruited to be an informant for the NYPD as a teenager, while he was in jail for "a series of minor drug arrests." Dashiell Bennett, *NYPD Informant Says He Was Paid to 'Bait' Muslims*, The

Atlantic (Oct. 23, 2012), https://www.theatlantic.com/national/archive/2012/10/nypd-informant-says-he-was-paid-bait-muslims/322225. Rahman earned thousands of dollars from the NYPD by surveilling mosques and Islamic study groups. *Id.* In order to increase his earnings, he would exaggerate and distort the information he had gathered. Without recourse to a damages award as relief from violations of RFRA, marginalized religious minorities remain acutely susceptible to such misguided government practices.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in Respondents' brief, the Court should affirm the judgment of the Second Circuit.

Respectfully submitted,

ANDREI VRABIE
JACOB KARR
DAVID S. SANSON
HOLWELL SHUSTER
& GOLDBERG LLP
425 Lexington Avenue
New York, NY 10017
(646) 837-5151

MATTHEW CALLAHAN
Counsel of Record
MUSLIM ADVOCATES
P.O. BOX 34440
WASHINGTON, D.C. 20043
(202) 897-1892
matthew@muslimadvocates.org

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