

No. 20-828

In The
Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,

Petitioners,

v.

YASSIR FAZAGA, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF ASIAN AMERICANS ADVANCING
JUSTICE-ASIAN LAW CAUCUS, CREATING
LAW ENFORCEMENT ACCOUNTABILITY
AND RESPONSIBILITY, CENTER FOR
CONSTITUTIONAL RIGHTS, AMERICAN-ARAB
ANTI-DISCRIMINATION COMMITTEE, AMERICAN
MUSLIM BAR ASSOCIATION, PARTNERSHIP FOR
THE ADVANCEMENT OF NEW AMERICANS,
AND SECURE JUSTICE AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

Whether Section 1806(f) of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §1801 *et seq.*, displaces the state-secrets privilege and authorizes a district court to resolve, *in camera* and *ex parte*, the merits of a lawsuit challenging the lawfulness of government surveillance by considering the privileged evidence.

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INTERESTS OF AMICI CURIAE

Asian Americans Advancing Justice-Asian Law Caucus defends Muslim and other communities unjustly targeted by the government's national security policies and practices. The **Creating Law Enforcement Accountability and Responsibility** project's mandate is to support Muslim and all other clients, communities, and movements nationwide that are targeted by local, state, or federal government agencies under the guise of national security. The **Center for Constitutional Rights** is a national legal, educational, and advocacy organization that has litigated landmark cases challenging FBI surveillance, see *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972), and law enforcement targeting of Muslims, see *Ziglar v. Abassi*, 137 S. Ct. 1843 (2017), *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015).

Additional *amici* include: American-Arab Anti-Discrimination Committee; American Muslim Bar Association; Partnership for the Advancement of New Americans; Secure Justice.

The issues at stake in this case relate directly to *amici's* work representing Muslim and other communities targeted by unlawful government surveillance.¹



¹ The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

INTRODUCTION

The lead plaintiff in this case, Respondent Yassir Fazaga, is a Black Muslim imam who immigrated to the United States from Eritrea. The FBI targeted Respondent Fazaga, as well as the congregants he served, under a dragnet surveillance operation that, by the FBI's own acknowledgment, was based on no reason other than Respondent Fazaga and his congregations' Muslim faith.

The FBI's surveillance of Respondent Fazaga and his congregants, even where no factual or legal bases justified such scrutiny, is part of a deep and sustained history of government targeting of Muslims, and in particular Black Muslims, in America. These communities have been subjected to suspicionless and unlawful surveillance based on the government's baseless assumptions of their purported foreignness, disloyalty, and supposed proclivity for violence, presumed by the government to be inherent racial and religious characteristics. That Respondent Fazaga is both a Black Muslim and an immigrant reflects aptly the historical patterns of suspicionless surveillance to which Muslim Americans have been unrelentingly subjected at the hands of the government.

This case is of immense consequence not only to Muslim communities in the United States, but to the preservation of this country's democratic principles. Muslim Americans have been subjected to pervasive, suspicionless dragnet surveillance involving disturbing conduct and tactics for decades. Such conduct has

persisted, however, with the government allowed to carry out its unlawful surveillance operations targeting Muslims unabated. That such conduct persists unchecked imperils this nation's democratic foundations and threatens the rule of law. In a case that will determine our true adherence to this country's core democratic and constitutional values, this brief recounts a mere portion of the history and impacts of the unjust and indiscriminate surveillance to which Muslim communities have been subjected.

◆

SUMMARY OF ARGUMENT

The government has subjected Muslim Americans to suspicionless, dragnet surveillance for decades. Such operations include surveillance of Black Muslim organizations based primarily on their racial and religious identities serving as markers of purported disloyalty to the United States. Suspicionless surveillance of Muslim communities has also targeted immigrant Muslim communities, particularly after September 11, 2001. The history of such surveillance reveals no other bases besides the targeted communities' religious and racial identities as the reason for the government's dragnet operations. Indeed, post-9/11 government policy itself marked Muslim religious identity and expression as "indicators" of potential "terrorist"² activity.

² The term "terrorist" is used here to track pervasive characterizations of violence perpetrated by Muslim actors, in

Suspicionless surveillance of Muslims based only on their faith violates core constitutional rights. It also inflicts deep and lasting harms on religious practice and expression, with members of targeted communities fearing whether they can safely worship, seek religious guidance, or freely practice their faith at the workplace, schools, or other spaces. Suspicionless surveillance also harms Muslim Americans by reinforcing discriminatory views held by others while deepening discord and distrust internally. Such harms are especially pronounced when the government, a primary actor in shaping civic culture, imposes and reinforces biases and stereotypes through action and policy.

The Ninth Circuit’s judgment enables communities subjected to unlawful surveillance on the basis of their religious identities to obtain some judicial review—and thus some accountability—of government conduct. Reversing the Court of Appeals’ ruling, however, would permit the government to freely conduct suspicionless surveillance on the basis of constitutionally protected activities and characteristics with

contrast to the overwhelming non-use of that term as applied to violence perpetrated by non-Muslim persons. *See* Leti Volpp, *The Boston Bombers*, 82 *FORDHAM L. REV.* 2209, 2215 (2014) (noting that it is “uncontroversial today that those who appear Middle Eastern, Arab, or Muslim are identified as terrorists”); *see also* Leonard Pitts, *White-Extremist Terror Rare?: History Argues Otherwise*, *SEATTLE TIMES*, Feb. 12, 2017, <https://www.seattletimes.com/opinion/white-extremist-terror-rare-history-argues-otherwise/> (listing examples of violence and concluding “[w]hen white people do it, it is less likely to be perceived—or reported by news media—as terrorism”).

impunity. Judicial review is an essential safeguard for minority communities, particularly those routinely targeted by law enforcement. The Ninth Circuit’s judgment should be affirmed to ensure that the Government respects the rule of law and, most importantly, that the rights of religious communities are protected.

◆

ARGUMENT

I. The History of Suspicionless and Dragnet Government Surveillance of Muslims in the United States Spans Decades

Government and cultural perceptions of Muslim communities in the United States as foreign, suspect, and constituting threats to the political status quo long predate September 11, 2001. Edward E. Curtis IV, *The Black Muslim Scare of the Twentieth Century*, in *ISLAMOPHOBIA IN AMERICA: THE ANATOMY OF INTOLERANCE* 75 (Carl W. Ernst ed., 2013) [hereinafter *The Black Muslim Scare*]. Islam and Muslims have served as a symbol of the undesirable and fearful “other” in U.S. politics and culture since as early as the nineteenth century when, during the election of 1800, John Adams and Thomas Jefferson referred to each other as “oriental despots and Mahometans.” *Id.* at 76.

In the twentieth century, the government marked Islam and Muslims as posing threats to the stability and security of the nation, particularly in a changing political and cultural landscape leading up to and

through the civil rights movement. *Id.* at 74. After September 11, 2001, government surveillance of Muslims grew to be so pervasive and indiscriminate that the experience of surveillance itself has become normalized for targeted communities. Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post 9/11 America*, 47 GONZ. L. REV. 429, 433, 443 (2011) (“Mosque infiltration has become so rampant that some congregants assume they are under surveillance as they fulfill their religious obligations.”) Even former federal agents have denounced and disavowed the policies and tactics the government has employed. Janet Reitman, *I Helped Destroy People*, N.Y. TIMES, Sept. 1, 2021, <https://www.nytimes.com/2021/09/01/magazine/fbi-terrorism-terry-albury.html> (“It was made very clear from Day 1 that the enemy was not just a tiny group of disaffected Muslims. Islam itself was the enemy.”) [hereinafter *I Helped Destroy People*].

Underlying almost the entirety of this history of surveillance of U.S. Muslims is one common thread: the overwhelming majority of the surveillance operations carried out by the government and focused on Muslim communities has been based on Muslim identity, practice, and expression itself rather than any credible suspicion of wrongdoing. In many cases, government records and agents involved in these operations themselves have cast doubt over the government’s bases for conducting and sustaining such surveillance, and multiple public records confirm that such scrutiny was unwarranted and, ultimately, ineffectual. Rather,

Muslim organizations, leaders, and communities have been systematically targeted for surveillance on the basis of their religion, race, and ethnicity. From Petitioner Federal Bureau of Investigation's (FBI) surveillance operations in the twentieth century to the dragnet operations carried out by FBI and other law enforcement agencies after 9/11, Muslim communities have been a central target of the government's surveillance activities for nearly a century.

A. Government Surveillance of Muslim Americans in the Twentieth Century was Based Primarily on Biased Perceptions of their Religious and Racial Identities

Throughout the 1900s, the government subjected Muslim organizations and their leaders and members to sustained and formal surveillance under numerous intelligence operations aimed to suppress, among other "threats," Black political empowerment and "dangerous" foreign connections and influences. *The Black Muslim Scare* at 85. Such scrutiny was based primarily on the perception that Muslim Americans and their organizations, particularly in their pursuit of Black empowerment, posed a threat to the political status quo, with their religious identities (allegedly foreign) intersecting with their racial identities (allegedly disloyal). *Id.* The surveillance operations to which Muslim Americans were subjected during this era, however, lacked any factual bases or legal justification.

1. The Moorish Science Temple, Nation of Islam, and the Purported Threats Posed by Black Muslim Organizations

The FBI first conducted systematic surveillance of Muslim Americans in the 1930s and 1940s, monitoring and infiltrating the Moorish Science Temple of America (MSTA), a Black Muslim organization. Sylvester A. Johnson, *The FBI and the Moorish Science Temple of America, 1926-1960*, in *THE FBI AND RELIGION: FAITH AND NATIONAL SECURITY BEFORE AND AFTER 9/11* 55 (Steven Weitzman & Sylvester A. Johnson eds., 2017). Despite the MSTA's emphasis on "obedience to government authorities" and its insistence that MSTA followers "exhibit loyalty to both their religious community and the United States," the FBI repeatedly targeted MSTA for surveillance, particularly during World War II. *Id.* at 58. Of particular concern to the FBI was its fear that members of the MSTA would racially align with the Empire of Japan, and that such sympathies motivated members to avoid registering for the draft as required under the Selective Service and Training Act of 1940. In one instance, the FBI raided an MSTA temple in Anderson, Indiana, seizing its possessions and shutting down its operations as part of the FBI's efforts to counter purported subversive activity. *Id.* The FBI later concluded that the branch in fact posed no threat and harbored no pro-Japanese sympathies. *Id.* Contrary to what the FBI had initially asserted and as later confirmed by the agency's own records, the MSTA never served as a

front for foreign entities and never received funding from international enemies of the United States. *Id.*

Similarly, the federal government targeted the Nation of Islam (NOI), a Black Muslim religious and political organization seeking racial justice and Black empowerment in the United States, as a subversive group warranting surveillance for nearly three decades. During a World War II investigation codenamed ‘RACON,’ the FBI singled out the NOI’s Islamic identity as a specific marker by which the agency determined whether a Black American organization posed a seditious threat. *The Black Muslim Scare* at 77, 91-93. In 1943, for instance, the FBI’s final report on RACON, *Survey of Racial Conditions in the United States*, created profiles of pro-Japanese Black American organizations, warning of “Islam’s links to pro-Japanese sentiment.” *Id.* at 91. It also noted “the adoption of Mohammedan religion” as among the “characteristics common to pro-Japanese negro organizations.” *Id.* at 91-92. Islam and Islamic identity were thereby singled out as a particularized marker for the FBI of pro-Japanese, and thus anti-American, sympathies, used to justify scrutiny of NOI and other Black American groups during the war. *Id.* at 93. Through this process, the government actively fashioned Islam itself as a threat as early as World War II.

2. The FBI, COINTELPRO and the Nation of Islam

After World War II, the federal government employed even more aggressive counterintelligence techniques to monitor and undermine the activities of Muslim Americans, with the Black leadership of NOI again as its primary target. In 1956, as part of its “Counter Intelligence Program,” or COINTELPRO, the FBI authorized phone taps of NOI’s leader, Elijah Muhammad, and placed informants, just as it did in the present matter, within the organization. S. REP. No. 94-755, at 319 (1976). All of this was done despite the fact that, as one FBI agent supervising the agencies’ surveillance of Black organizations testified, the FBI knew “the organization was not itself involved in violence,” but subjected NOI to continued surveillance anyway because it purportedly had an undefined and vague “potential.” *Id.* at 20, n.90 (“When asked why, therefore, the NOI was included as a target, Mr. Moore answered: ‘Because of the potential, they did represent a potential . . . there was a very definite potential, very definite potential.’”).

Even though the FBI knew the NOI itself was not engaged in violence, the agency intensified operations targeting the organization in 1967, when the FBI’s COINTELPRO expanded to include so-called “Black Nationalist” groups. *The Black Muslim Scare* at 98. As part of its pursuit of FBI Director J. Edgar Hoover’s “new counterintelligence endeavor” to “expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalist” organizations, MATTIAS

GARDELL, IN THE NAME OF ELIJAH MUHAMMAD: MINISTER LOUIS FARRAKHAN AND THE NATION OF ISLAM 86 (1996), the FBI penned anonymous letters to Muhammad's wife and daughters detailing his extramarital affairs. *The Black Muslim Scare* at 98. Its agents also attempted to foment rivalries and discord between Black American organizations like NOI and the Black Panthers. *Id.* And the FBI sent anonymous letters to Muhammad himself, accusing NOI members of betraying the organization, all while the agency planted informants at mosques to spread rumors about members and leaders. *Id.*

COINTELPRO and the FBI's surveillance activities that preceded it, particularly those targeting NOI, were expressly criticized in a 1976 Senate report on "intelligence activities and the rights of Americans," part of the Church Committee reports which led to the creation of the Foreign Intelligence Surveillance Act. S. REP. NO. 94-755 (1976). The report notes that, in previous decades, the government had conducted dragnet domestic surveillance operations targeting innocent U.S. citizens "on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a hostile power." *Id.* at 5. The report also reveals that the Department of Justice (DOJ) instructed the FBI to continue surveillance operations targeting NOI despite the former's own Internal Security Division advising, on multiple occasions, that there was "insufficient evidence" to "justify federal prosecution or other legal action by the Justice Department," with the only basis

for the FBI's investigation of NOI being that "the group's leaders 'advocate disobedience of any law contrary to the beliefs of Muslims.'" *Id.* at 454-54, 477-79.

Despite acknowledgments that Muslim organizations did not engage in any violence and the lack of any evidence to support criminal prosecutions, the FBI relentlessly surveilled these organizations' members and leaders for decades based on its own baseless determinations of the organizations' "potential" threats or their unsubstantiated links to foreign enemies. This pattern of unlawful and baseless surveillance and scrutiny of entire groups on the basis of their religious, racial, and ethnic identities would only deepen in the years leading up to September 11, 2001.

3. Muslim Immigrants in Bridgeview, Illinois

Government surveillance operations targeted immigrant Muslim communities prior to September 11. One such community is Bridgeview, Illinois, a Chicago suburb home to a significant, mostly Muslim, Arab American population where chilling government conduct has left lasting impacts. According to a lawsuit filed pursuant to a Freedom of Information Act (FOIA) request in 2017, Bridgeview's Arab and Muslim community was "subject to widespread surveillance as part of one of the largest anti-terrorism investigations ever conducted in the United States before 9-11." Complaint at 1, *Boundaoui v. FBI*, No. 17-4782 (N.D.

Ill. June 26, 2017), ECF No. 1. Government activities in the neighborhood lasted over a decade. Alia Malek, *The FBI's 'Vulgar Betrayal' of Muslim Americans*, THE NEW YORK REVIEW, Apr. 21, 2018, https://www.nybooks.com/daily/2018/04/21/the-fbis-vulgar-betrayal-of-muslim-americans/?lp_txn_id=1269176 [hereinafter *The FBI's Vulgar Betrayal*].

Bridgeview residents who witnessed surveillance operations in their neighborhoods recount incidents that could be mistaken for scenes from a crime fiction novel. Residents, including children, saw unfamiliar cars parked outside their homes; men who did not appear to be in need rummaging through residents' trash; and odd clicking sounds and static when residents spoke on the phone. *The FBI's Vulgar Betrayal*. Congregants discovered hidden cameras near mosques, and FBI records produced in the *Boundaoui* litigation revealed FBI notes from a 1997 national gathering of thousands of Muslim Americans in Chicago. Nausheen Husain & Morgan Greene, *A Suburban Filmmaker Sued to Find Out Why the FBI Was Watching Her Muslim Community*, CHICAGO TRIB., Jan. 30, 2020, <https://www.chicagotribune.com/news/breaking/ct-bridgeview-muslims-fbi-surveillance-2020-0130-eoyicwf4vvhulhhyej6r4nnjeq-story.html> [hereinafter *Chicago Tribune*].

The personal and communal impacts of the Bridgeview operations are hard to measure. Bridgeview's Arab American community "has always felt like it's being watched." *Id.* Young children have become "hypervigilant" . . . saying things like, "[l]ook, the FBI

is here’” when certain cars or trucks appear, indicating how normalized the reality of surveillance has become, even for children. *Id.* Many families have left Bridgeview altogether, citing the chilling and unsettling atmosphere created by the FBI’s operations. *Chicago Tribune.*

After 9/11, the FBI revived its surveillance efforts in Bridgeview as part of its nationwide operations to find connections between Muslim communities in America and the 9/11 attacks. *Id.* Even after nearly thirty years since the FBI’s surveillance operations in Bridgeview first began, however, the operations have never yielded a single terrorism conviction. *The FBI’s Vulgar Betrayal.*

B. After September 11, 2001, Law Enforcement Agencies Dramatically Expanded their Suspicionless Surveillance of Muslims

Immediately following September 11, 2001, the federal government hurriedly implemented dragnet operations prioritizing the detention, interrogation, and surveillance of Muslim Americans across the country. See ERIC LICHTBLAU, BUSH’S LAW: THE REMAKING OF AMERICAN JUSTICE 5 (2008). With no evidence other than association by religion or national origin with the perpetrators of the attacks, the FBI detained over a thousand citizens and noncitizens. U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT

OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 1 (2003), <https://oig.justice.gov/sites/default/files/legacy/special/0306/full.pdf> (“Within 2 months of the attacks, law enforcement authorities had detained, at least for questioning, more than 1,200 citizens and aliens nationwide.”); *see also* U.S. GEN. ACCOUNTING OFFICE, GAO-03-459, HOMELAND SECURITY: JUSTICE DEPARTMENT’S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001 1 (2003), <https://www.gao.gov/assets/gao-03-459.pdf> (noting that DOJ “initiated a project to interview about 7,600 nonimmigrant aliens . . . whose characteristics were similar to those of the September 11 hijackers to try to determine . . . what knowledge they had of terrorists and planned terrorist activities”). None of those detentions led to findings of connections to the attacks, let alone any terrorism convictions. David Cole, *Are We Safer?*, THE NEW YORK REVIEW, Mar. 9, 2006, <https://nybooks.com/articles/2006/03/09/are-we-safer/> [hereinafter *Cole, Are We Safer*].

To further track and monitor Muslims in America, the federal government instituted the National Security Entry-Exit Registration System (NSEERS), a Department of Homeland Security (DHS) program requiring special and periodic registration of nationals of twenty-five countries, twenty-four of which were majority-Muslim. STEVE POSNER, MODERN SURVEILLANCE AND PRIVACY LAW 2338-41 (2021). Under NSEERS, the federal government “called in 80,000 foreign nationals for fingerprinting, photographing

and ‘special registration’ simply because they came from predominantly Arab or Muslim countries.” David Cole & Jules Lobel, *Why We’re Losing the War on Terror*, THE NATION, Sept. 6, 2007, <https://www.thenation.com/article/archive/why-were-losing-war-terror/>. DHS later determined that NSEERS was “redundant, inefficient and provided no increase in security.” J. David Goodman & Ron Nixon, *Obama to Dismantle Visitor Registry Before Trump Can Revive It*, N.Y. TIMES, Dec. 22, 2016, <https://www.nytimes.com/2016/12/22/nyregion/obama-to-dismantle-visitor-registry-before-trump-can-revive-it.html>.

In sum, the federal government subjected nearly 8,000 to interrogations, detained at least 1,200, with some experts estimating this figure at 5,000, and subjected more than 80,000 to special registration as part of its post-9/11 investigations targeting mostly Muslims residing in America. *Cole, Are We Safer*. Famously, these dragnet operations did not result in even one terrorism conviction. *Id.* “In what [was] surely [] the most aggressive national campaign of ethnic profiling since World War II, the government’s record [was] 0 for 93,000.” *Id.*

1. FBI and Law Enforcement Policy Facilitated Discriminatory and Suspicionless Surveillance of Muslims

After 9/11, DOJ and FBI fundamentally altered their missions and focused their resources and personnel on one overriding threat: what then-Attorney

General John Ashcroft called “the terrorists among us.” John Ashcroft, U.S. Att’y Gen., Prepared Remarks for the US Mayors Conference (Oct. 25, 2001), https://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm. Accordingly, the FBI began what has been called a widespread surveillance and intelligence operation focused sharply on domestic Muslim communities. Trevor Aaronson, *The Informants*, MOTHER JONES, Sept.-Oct. 2011, <https://www.motherjones.com/politics/2011/07/fbi-terrorist-informants/> (noting that the FBI “maintains a roster of 15,000 spies—many of them tasked . . . with infiltrating Muslim communities in the United States”). However, as one former FBI agent recounts, “regard for the rule of law seemed to disappear” after 9/11. Deepa Fernandes, *After 9/11, a 20-Year Civil Rights Journey for Two Women and the Bay Area Muslim Community*, S.F. CHRON., Sept. 5, 2021, <https://www.sfchronicle.com/bayarea/article/After-9-11-a-20-year-civil-rights-journey-for-16435858.php> (“[A]s somebody said to me . . . ‘We can now do whatever we want.’”) [hereinafter *Fernandes*]; see also *I Helped Destroy People* (citing another former FBI agent as stating that the agency “had been so fundamentally transformed by Sept. 11 that its own agents were compelled to commit civil and human rights violations”).

Within this context, the FBI promulgated a number of changes to its own policies and guidelines, in turn facilitating the discriminatory and suspicionless surveillance it subjected Muslim communities to after September 11. In 2002, Attorney General John

Ashcroft revised the Guidelines for General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, permitting the FBI to conduct internet and commercial database searches and attend public events for the purpose of detecting or preventing terrorist activities even where no factual bases or allegations indicating possible violations of law existed. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES FOR GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS 22 (May 2002), <http://www.fas.org/irp/agency/doj/fbi/generalcrimes2.pdf>. DOJ also permitted racial and religious profiling in the FBI's national security and border integrity investigations beginning in 2003. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AUTHORITIES 7-8 (June 2003), <https://www.scribd.com/document/22092319/DOJ-Guidance-Regarding-the-Use-of-Race-by-Federal-Law-Enforcement-Agencies-June-2003>.

Years before the unlawful surveillance occurred in this case, the Justice Department revised FBI guidelines authorizing the agency to conduct "threat assessments." U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES FOR FBI NATIONAL SECURITY INVESTIGATIONS AND FOREIGN INTELLIGENCE COLLECTION (Oct. 2003), [https://irp.fas.org/agency/doj/fbi/nsiguide lines.pdf](https://irp.fas.org/agency/doj/fbi/nsiguide%20lines.pdf). These assessments did not require agents to open preliminary or full investigations, which ordinarily require factual bases. *Id.* Such authority was further memorialized in 2008, when Attorney

General Michael Mukasey's revised FBI guidelines expressly noted that assessments did not require "any particular factual predication." U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 17 (Oct. 2008), <https://www.justice.gov/archive/opa/docs/guidelines.pdf>. These Guidelines also authorized FBI agents to employ an array of investigative techniques when conducting assessments, including physical surveillance and recruiting informants, and are thought to have been implemented by agents in the field well before 2008. *Id.* at 20; see OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF FBI'S INVESTIGATIONS OF CERTAIN ADVOCACY GROUPS (Sept. 2010), <https://www.oversight.gov/sites/default/files/oig-reports/s1009r.pdf> (noting that, from 2002 to 2006, the FBI engaged in a number of investigations of domestic advocacy groups based on "factually weak" or "speculative" bases).

Other FBI documents either explicitly discussed religion as a factor justifying the FBI's investigative conduct or mentioned Muslim-specific religious practices or activities as bases for suspicion. One 2006 FBI document noted, for instance, a list of indicators to identify individuals who may be among those undergoing a "radicalization process for a legal US person who is a convert to Islam" and who may "have the potential to become violent jihadists." COUNTERTERRORISM DIV., FED. BUREAU OF INVESTIGATION, THE RADICALIZATION PROCESS: FROM CONVERSION TO JIHAD 2-3 (May 10, 2006), <http://cryptome.org/fbi-jihad.pdf>. The document expressly lists "[w]earing traditional Muslim attire,"

“[f]requent attendance at mosque or prayer group,” and “[t]ravel to a Muslim country” as “indicators . . . to identify individuals going through the radicalization process.” *Id.* at 10. The FBI’s 2008 Domestic Investigations and Operations Guide also noted that the FBI can consider “the role that religion may play in the membership or motivation of criminal or terrorist enterprise.” FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE 27-28 (2008), <https://tinyurl.com/rjknhcuc> (noting that religious practice may be relevant if practiced by a target group).

Similarly, the New York City Police Department (NYPD), in a 2007 publication titled *Radicalization in the West: The Homegrown Threat*, listed a number of “signatures” that its police officers could use to assess “the threat from Islamic-based terrorism to New York City.” MITCHELL D. SILBER & ARVIN BHATT, NEW YORK POLICE DEPARTMENT, RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT 33 (2007). Among the indicators listed in *Radicalization in the West* are “[w]earing traditional Islamic clothing,” “growing a beard,” and “[b]ecoming involved in social activism and community issues.” *Id.* The report goes on to claim, without support, that New York’s “Muslim communities have been permeated by extremists who have and continue to sow the seeds of radicalization.” *Id.* at 69.

The accounts that follow, detailing the extent and nature of surveillance operations conducted by Petitioner FBI and other law enforcement agencies like the NYPD, serve as chilling examples of the

dragnet, suspicionless surveillance that Muslim communities have been routinely subjected to following September 11, 2001, pursuant to these agencies' own policies and guidelines.

2. NYPD's Suspicionless Surveillance and Mapping of Muslims in the New York City Region

In 2002, the NYPD began a secretive program of mapping and surveillance of Muslims, their businesses, houses of worship, and the schools they attended in New York City and the surrounding region. Complaint, *Raza v. City of New York*, No. 13-3448 (E.D.N.Y. June 18, 2013), ECF No. 1 [hereinafter *Raza Complaint*]; see also First Amended Complaint, *Hassan v. City of New York*, No. 12-3401 (D.N.J. Oct. 3, 2012), ECF No. 10 [hereinafter *Hassan Complaint*]. The NYPD's program was based on an unconstitutional premise: that Muslim identity, religious beliefs, and practices alone serve as a basis for law enforcement scrutiny. See *Raza Complaint* ¶ 1.

The NYPD's surveillance program, as demonstrated through internal Department records, intentionally and solely targeted Muslim communities in the region, taking steps not to conduct similar mapping or surveillance of other religious groups. The program first mapped Muslim communities across New York City based on a list of "ancestries of interest" culled from census data and other information. *Id.* ¶ 25. The list of "ancestries of interest" included

“American Black Muslims”³ and twenty-eight countries or regions representing 80% of the global Muslim population.⁴ *Id.* ¶ 26. The NYPD, however, expressly intended to exclude non-Muslim communities from its surveillance operations. For instance, NYPD documents highlighted Jewish and Christian segments of New York’s Iranian, Egyptian, and Syrian communities to prevent surveillance of those communities, with one document noting that “[t]his report does not represent the Coptic Egyptian community and is merely an insight into the Muslim Egyptian community of New York City.” *Id.* ¶ 27.

Building on its discriminatory mapping, the NYPD’s program engaged in dragnet intelligence and surveillance operations simply to gather as much information about Muslim communities as possible, just as the FBI did in the matter currently before the Court. First Amended Complaint ¶ 89, *Fazaga v. FBI*, No. 11-0301 (C.D. Cal. Sept. 12, 2011), ECF No. 49 (stating that “[t]he central feature of the FBI agents’ instructions to Monteilh was their directive that he gather information on Muslims” and that “they repeatedly made clear that they were interested simply in Muslims”) [hereinafter *Fazaga Complaint*].

³ Black Muslim communities in New Jersey were especially targeted by the NYPD. See *Newark Mayor: NYPD Spying on Muslims ‘Offensive’*, ASSOC. PRESS, Feb. 22, 2012, <https://www.nbcnews.com/id/wbna46488695>.

⁴ As noted in the *Raza* complaint, “[a]ll but three of these countries or regions have majority Muslim populations,” and India “is home to eleven percent of the world’s Muslim population.” *Raza Complaint* ¶ 26.

The Department dispatched plainclothes officers throughout neighborhoods with concentrated Muslim communities to monitor daily activities. *Raza Complaint* ¶ 29. It also recruited informants, often pressured into serving due to pending criminal charges, to report back on the everyday activities and conversations of Muslim community members at their businesses, their homes and neighborhoods, and the mosques and schools they attended. *Id.* ¶ 34; *see also* Adam Goldman & Matt Apuzzo, *Informant: NYPD Paid Me to 'Bait' Muslims*, ASSOC. PRESS, Oct. 23, 2012, <https://www.ap.org/ap-in-the-news/2012/informant-nypd-paid-me-to-bait-muslims> (noting that one informant was told by NYPD officers that, in fact, they did not suspect targeted subjects of any wrongdoing, but continued surveillance anyway because “[w]e just need to be sure”).

The NYPD made mosques a central focus of its surveillance operations. *Raza Complaint* ¶ 31. It identified hundreds of mosques within a 250-mile radius of New York City, with the intention of placing sources inside each one. *Id.* ¶ 33; *see also* Adam Goldman & Matt Apuzzo, *With Camera, Informants, NYPD Eyed Mosques*, ASSOC. PRESS, Feb. 23, 2012, <https://www.ap.org/ap-in-the-news/2012/with-cameras-informants-nypd-eyed-mosques> [hereinafter *NYPD Eyed Mosques*]. Known as “mosque crawlers,” these sources conducted surveillance activities like taking photos of mosques, imams and congregants, recording the ethnic demographics of congregations, and recording the names of people who attended study

groups or classes on Arabic or Islam. *Raza Complaint* ¶ 34; see also *NYPD Eyed Mosques*. To bolster its surveillance of houses of worship, the NYPD mounted cameras on light poles and aimed them at mosques. *NYPD Eyed Mosques*.

The program also monitored the activities of Muslim student organizations at colleges and universities in New York, New Jersey, Connecticut, and Pennsylvania. *Hassan Complaint* ¶ 49. It placed informants or undercover officers in virtually all Muslim student organizations in the region. As one example of the NYPD's surveillance of Muslim college students, an undercover officer accompanied eighteen Muslim students from the City College of New York on a whitewater rafting trip in April 2008. Chris Hawley, *NYPD Monitored Muslim Students all Over Northeast*, ASSOC. PRESS, Feb. 28, 2012, <https://www.ap.org/ap-in-the-news/2012/nypd-monitored-muslim-students-all-over-northeast>. The undercover noted the names of attendees who were officers of the Muslim student organization and summarized the group's activities and discussions in a subsequent report: "In addition to the regularly scheduled events (Rafting), the group prayed at least four times a day, and much of the conversation was spent discussing Islam and was religious in nature." *Id.* ¶ 12.

The NYPD's surveillance operations collected information on thousands of Muslims across hundreds of mosques, tens of colleges and universities, and countless shops, businesses, and other gathering places. Despite the implementation of such a dragnet

operation, however, a top NYPD official admitted that the program never generated a single terrorism lead. *Handschu v. Special Servs. Div.*, No. 71-2203, Galati Dep. 128-129 (S.D.N.Y. June 28, 2012) (testifying in a 2012 deposition that the NYPD’s surveillance operations targeting Muslims “has not commenced an investigation,” with the deponent stating “I never made a lead . . . and I’m here since 2006”); *see also* Adam Goldman & Matt Apuzzo, *NYPD: Muslim Spying Led to No Leads, Terror Cases*, ASSOC. PRESS, Aug. 21, 2012, <https://www.ap.org/ap-in-the-news/2012/nypd-muslim-spying-led-to-no-leads-terror-cases>. Instead, the Department spied on entire communities as they practiced their faith and went about their daily lives, recording their beliefs, opinions, and activities based on the premise that law enforcement scrutiny was justified on the basis of their religious identities and expression.

NYPD’s surveillance left deep and lasting impacts on the region’s—indeed, the nation’s—Muslim communities. These impacts are documented in a compelling report published by civil rights groups in 2013. *See* CREATING LAW ENFORCEMENT ACCOUNTABILITY & RESPONSIBILITY ET AL., *MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS* (2013), <https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/clear/Mapping-Muslims.pdf> [hereinafter *Mapping Muslims*]. The personal and communal narratives of those harmed by the NYPD’s surveillance are described in Section II.A.

3. FBI Surveillance of Muslim Americans in the San Francisco Bay Area Under the Pretense of “Mosque Outreach”

Muslim communities in the San Francisco Bay Area have also been the target of suspicionless surveillance operations based on their religious identities and practices.

From 2004 to at least 2008, the FBI gathered intelligence on Bay Area Muslim organizations and worshippers under the guise of “mosque outreach.” Dan Levine, *FBI Said to Have Gathered Intelligence on California Muslims*, REUTERS, Mar. 27, 2012, <https://www.reuters.com/article/usa-california-muslims-idINDEE82R00B20120328>. Records produced in response to a FOIA request revealed that, during its surveillance operations targeting Bay Area Muslims, the FBI collected information on constitutionally protected activities like religious sermons, the layout of houses of worship and where congregants gathered, and discussions relating to pilgrimage, marking such information as “positive intelligence” and then disseminating the information to other agencies. *Id.*; see also Colin Moynihan, *In Bay Area, a Fragile Relationship Between Muslims and the F.B.I.*, N.Y. TIMES, Feb. 28, 2013, <https://www.nytimes.com/2013/03/01/us/attack-on-mosque-ilustrates-relationship-between-fbi-and-muslims-in-bay-area.html> [hereinafter *Moynihan*].

Bay Area Muslim residents have also been subjected to other forms of surveillance, including GPS tracking devices found installed underneath their cars. *Fernandes*. When one Muslim college student posted a picture of a tracking device he found attached to his car on the internet, he was visited by FBI agents who demanded he return it to them. Mina Kim, *FBI's GPS Tracking Raises Privacy Concerns*, NPR, Oct. 27, 2010, <https://www.npr.org/templates/story/story.php?storyId=130833487> [hereinafter *NPR GPS*]. Another, a U.S. citizen of Yemeni origin, says he and his wife regularly check underneath their cars for GPS devices after first discovering one years before. *Id.* In both cases, no reasons were ever discovered as to why such devices were installed. *Id.*

By conducting such surveillance, including under the pretense of outreach, the FBI exploited the trust of Bay Area Muslims and instead carried out a secretive intelligence gathering operation to collect information about community members' First Amendment protected activities in plain sight. *Moynihan*. To this day, Bay Area Muslims subjected to the FBI's surveillance operations are unaware of any reasons as to why they were monitored other than their faith alone. *NPR GPS*.

II. Suspicionless Surveillance Violates First Amendment Rights and Stigmatizes Communities Subject to Such Surveillance

Surveillance based on the religious identities, practices, and beliefs of communities and individuals harms their right to freedom of religion, expression, and association and further stigmatizes those communities externally and internally.

A. Surveillance Based on Religious Identity and Practice Harms Freedom of Religion, Expression, and Association

The First Amendment protects the right to practice one's faith, speak freely, and the "corresponding right to associate with others" in furtherance of "social . . . religious, and cultural ends." *Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. 2373, 2383 (2021). The "[a]wareness that the Government may be watching chills [these] associational and expressive freedoms." *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring).

Targets of surveillance based on religious identity and practice, even long after the operations they were subjected to cease, are often forced to decide whether and to what degree they should continue aspects of religious life. See Teresa Watanabe & Paloma Esquivel, *L.A. Area Muslims Say FBI Surveillance Has a Chilling Effect on Their Free Speech and Religious Practices*, L.A. TIMES (Mar. 1, 2009), <https://www.latimes.com/archives/la-xpm-2009-mar-01-me-muslim1->

story.html (noting Southern California Muslims expressing that the public revelations of the FBI's surveillance activities in this case, even years after the surveillance occurred, inhibits "their freedoms of speech and faith"). Such individuals also contend with the consequences that result from the government's labeling of them and their communities as inherently suspicious because of their religious identities, beliefs, and practices. As this Court has stated, "[t]hose who can tax the exercise of [a] religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance." *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943).

Accounts of individuals who have been subjected to surveillance and monitoring by law enforcement starkly illustrate the chilling effects of suspicionless, dragnet surveillance on these communities' constitutional rights.

Like Respondent Ali Uddin Malik, Muslims subjected to surveillance are often compelled to sever their relationships with mosques and other community spaces for fear that they may continue to be monitored. *Fazaga Complaint* ¶ 78 ("Malik stopped attending the mosque altogether because Monteilh was there so often."). In New York, one young man abruptly stopped attending the mosque he frequented after discovering his friend and fellow mosque-goer was an undercover NYPD officer. *Mapping Muslims* at 14. He returned over a year later, but minimized his engagement with the mosque and generally became reluctant to befriend other congregants. *Id.* Instead,

the man attended simply to offer prayers, “believing that anything more might put him at risk.” *Id.* Other regular mosque attendees decreased their attendance after learning about surveillance, and those who resumed their attendance became hypervigilant, ever wary of eavesdropping spies. *Mapping Muslims* at 17-18.

Imams have also recounted the deep harms that surveillance inflicts not just on their wider community’s praxis, but their own ability to provide spiritual and religious care to congregants in a ministerial capacity. As with Respondent Fazaga, *Fazaga Complaint* ¶ 64, several report that they are wary of consultations with congregants after learning of the presence of informants at their mosques because they can never be certain that a question posed to them is a sincere one or if it is an attempt by an informant to elicit opinions that will be passed to the police. *Mapping Muslims* at 14-15. “The relationship of trust and confidentiality between an imam and his congregation is no less sacred than that of pastors, rabbis or others. The actions of the NYPD have compromised this sacred relationship.” *Id.* at 15. Another imam noted that congregants have told him that they simply prefer to pray at home rather than at the mosque, citing police installed cameras as the reason. *Id.* at 14.

Others self-censor their speech. One Muslim community organizer noted that, after news of the NYPD’s surveillance operations became public, almost every public event he attended began with some

warning of informants and undercover agents who may be in attendance. *Id.* at 23. Another woman who organized youth activities in her mosque noted how congregants have internalized the need to self-edit religious curricula. “I have to think twice about the sentences I say just in case someone can come up with a different meaning to what I’m saying.” *Id.* at 18. Others feel compelled to regulate their use of languages other than English, expressing concern with how terms and expressions they use may be misinterpreted by law enforcement. *Id.* at 23-24 (providing the example of a common Arabic phrase used to express excitement that can be mistranslated into English as meaning that one is so excited, one might “explode,” and that such phrases are now avoided for fear of misinterpretation).

B. Suspicionless Surveillance Wrongfully Reaffirms Animus and Group Stereotypes and Sows Distrust and Discord Within Targeted Communities

Surveillance of individuals and communities inflicts reputational and stigmatizing harms on those subjected to such conduct. These harms manifest both externally, with outside groups reaffirming or strengthening existing stereotypes or conceiving new ones, and internally, with members within the group questioning, distancing, and stigmatizing others in their communities for fear of presumed criminality or collusion with law enforcement. See Murad Hussain, *Defending the Faithful: Speaking the Language of*

Group Harm in Free Exercise Challenges to Counterterrorism Profiling, 117 YALE L.J. 920, 934-43 (2008).

1. Communities Subjected to Suspicionless Surveillance Suffer Intergroup Harm

Law enforcement profiles of entire groups based on religious, racial, and ethnic identity and national origin risk stigmatizing those groups as presumptively disloyal, suspect, and deserving of scrutiny. *Id.* at 938. When the federal government and law enforcement agencies “treat[] group membership as probative of illegal activity,” they send the wider message “that such group-based presumptions are legitimate and consistent with our shared civic culture.” *Id.* This in turn reaffirms preexisting biases and stereotypes and both legitimizes the unlawful surveillance practices themselves and motivates additional animus with real-life consequences for the target group. *Id.*

Law enforcement surveillance has stigmatized Muslim Americans, endangering them and others who may be perceived to be Muslim. *Id.* at 938-39. At least partly because of government programs that have treated Islam and Muslim identity itself as suspicious, Americans who practice that faith have found that some of their colleagues, neighbors, and classmates view them as suspicious—and even prone to violence—simply because of their religion. *Mapping Muslims* at 29. For instance, college students noted comments from others indicating a perception that certain

colleges were riddled with “terrorists” simply because the NYPD baselessly targeted students at those institutions. *Id.* Others expressed concern that their workplace colleagues may be suspicious of them or reluctant to associate with them for fear that they may become entangled in police questioning or investigations. *Id.* at 29-30. Muslim workers have also reported hiding their religious identities at the workplace, while others minimize the saliency of their Muslim identity on resumes when applying for jobs. *Id.* at 30-31.

Surveillance and scrutiny based purely on group membership also carries the real risk, at least in part, of contributing to hate crimes and attacks on members of the target group. In the United States, public opinion has long held prejudiced views towards Muslims and assumptions that Muslims are predisposed to sedition, violence, and sympathies with those who perpetrated the September 11 attacks based simply on shared religious identity. In a 2006 Gallup poll, for instance, more than half of Americans would not characterize their Muslim compatriots as loyal to the United States. Lydia Saad, *Anti-Muslim Feelings Fairly Commonplace*, GALLUP, Aug. 10, 2006, <http://media.gallup.com/WorldPoll/PDF/AntiMuslimSentiment81006.pdf>. Another Gallup study found that 43% self-reported harboring some degree of prejudice toward Muslims, and that prejudice toward Muslims was higher than self-reported prejudice toward any other religious groups tested by polls. Mohamed Younis, *Perceptions of Muslims in the United States: A*

Review, GALLUP, Dec. 11, 2015, <https://news.gallup.com/opinion/gallup/187664/perceptions-muslims-united-states-review.aspx>. Anti-Muslim violence, therefore, such as attacking mosques with firebombs and pig heads while congregants pray, attacking women in hijab in broad daylight, or murdering turban-wearing adherents of other faiths in the hope of killing Muslims, is arguably at least correlated with the government's own policy formulations of what markers warrant suspicion and which communities are deserving of scrutiny, suspicion, and distrust. *See, e.g.*, Brookings Institute, *Trump and Racism: What do the Data Say*, Aug. 14, 2019, <https://www.brookings.edu/blog/fixgov/2019/08/14/trump-and-racism-what-do-the-data-say/> (noting a "clear correlation" between 2016 campaign events and incidents of prejudiced violence and that counties that held a Trump campaign rally in 2016 "saw hate crime rates more than double compared to similar counties that did not host a rally"); *see also* James Boyd, *Local Mosque Hit by Firebomb*, HERALD-TIMES, July 10, 2005, at A1; Caryle Murphy, *Muslim Mother in Fairfax Assault Has Marine Son: Attacker Shouted 'Terrorist' After Stabbing*, WASH. POST, Oct. 9, 2003, at B7; Howard Fischer, *Post-Sept. 11 Drive-By Killer Gets Life Term*, ARIZ. DAILY STAR, Aug. 15, 2006, at B6 (reporting on a man who murdered Balbir Singh Sodhi, a Sikh gas station owner, four days after 9/11 during a shooting spree targeting those he thought were Arab or Muslim). Those formulations, in turn, risk reifying the very animus and stereotypes that motivate such attacks, due in no small part to the government's role

as a primary actor in shaping civic culture and public opinion. Hussain, *Defending the Faithful*, at 940 (identifying the government as “the most prominent actor within civic culture”).

2. Communities Subjected to Suspicionless Surveillance Suffer Intragroup Harm

Surveillance operations targeting Muslims have also long sowed seeds of distrust and suspicion within those groups and amongst community members toward one another. *Mapping Muslims* at 17-19 (discussing “mistrust of fellow congregants”). The unlawful surveillance activities recounted in this brief have had a corrosive effect within each of these communities, damaging their internal sense of trust and openness.

In Bridgeview, the FBI’s surveillance operations have forced community members to become hypervigilant of one another. *Chicago Tribune*. As one resident notes, community members often wonder whether someone who is suspected of being watched by law enforcement is innocent, even though, years after the FBI’s Bridgeview operations began, no terrorism convictions have resulted. *Id.*

In New York, Muslim residents reported that they became reluctant to make new friends and reexamined their existing friendships, questioning whether they, too, were informants. *Mapping Muslims* at 25. One student, a participant of the aforementioned

whitewater rafting trip, haphazardly ventured a guess on national television as to the identity of the undercover. *Id.* at 26. He later learned he was wrong, but the stigma attached to the name he uttered left lasting damage. *Id.* Surveillance has “created a real suspicious atmosphere,” where community members constantly wonder “if everyone is what they say they are.” *Id.* at 28.

III. Affirming the Court of Appeals’ Decision Will Allow Those Harmed by Surveillance to Litigate their Claims, Obtain Judicial Review of Alleged Constitutional and Other Violations, and Potentially Redress those Violations

Affirming the Ninth Circuit’s decision will permit communities targeted by suspicionless government surveillance, just as the communities recounted here, to seek judicial redress of the alleged violations they suffered. By affirming that the district court erred in dismissing Plaintiffs’ religion claims under the state-secrets privilege, or that FISA’s *ex parte, in camera* judicial review procedures displace the dismissal remedy that may sometimes accompany that privilege, this Court will allow future litigants who bring claims arising from unlawful surveillance to exercise a core function of our democracy: the opportunity to pursue judicial review—and thus accountability—of harmful government conduct.

The Government seeks dismissal of Respondents' First Amendment claims under the state-secrets privilege. Pet. 16-29. Respondents, however, merely seek to prove their case based on publicly-available information, and then favor *in camera* review by the district court under FISA's procedural mechanisms of any evidence Petitioners claim is covered under the state-secrets privilege. Br. in Opp. 1, 22.

Like Respondents in this case, litigants seeking to bring constitutional claims to redress unlawful surveillance on the basis of their religion would consistently be deprived of judicial review of the government's unlawful practices if this Court holds in favor of Petitioners. In effect, such a ruling will issue *carte blanche* to the Government to conduct, without any accountability, the types of surveillance and intelligence gathering documented in this brief.

Religious discrimination, "by [its] very nature," has long been thought "odious to a free people whose institutions are founded upon the doctrine of equality." *Bell v. Maryland*, 378 U.S. 226, 288 (1964) (Goldberg, J., concurring). When cases alleging grave constitutional violations and, in particular, First Amendment religion claims are dismissed on state-secrets grounds, it offends fundamental conceptions of democracy. All of the communities and individuals subjected to the unwarranted, unjustified, and plainly prejudicial surveillance operations as those recounted in this brief deserve, at the least, the opportunity to seek redress for the violations of law they endured. That these violations offend our Constitution's most fundamental

guarantees of freedom of religion, expression, and association makes the Court's decision in favor of Respondents even more necessary and urgent.

By holding, as it should, in favor of Respondents in this case, this Court will provide individuals and communities subjected to pervasive, suspicionless, and discriminatory surveillance the opportunity to seek what has often eluded them: justice.

◆

CONCLUSION

In concluding that the plaintiffs in *Hassan v. City of New York* plausibly pled that the NYPD's suspicionless surveillance of Muslims constituted intentional discrimination that is presumptively unconstitutional, the Court of Appeals for the Third Circuit powerfully expressed the role courts must play in ensuring accountability for law enforcement discrimination when it happens:

What occurs here in one guise is not new. We have been down similar roads before. Jewish-Americans during the Red Scare, African-Americans during the Civil Rights Movement, and Japanese-Americans during World War II are examples that readily spring to mind. We are left to wonder why we cannot see with foresight what we see so clearly with hindsight—that “[l]oyalty is a matter of the heart and mind[,] not race, creed, or color.”

804 F.3d 277, 309 (3d Cir. 2015) (quoting *Ex parte Mitsuye Endo*, 323 U.S. 283, 302 (1944)).

For the foregoing reasons, the Ninth Circuit's ruling should be affirmed.

Respectfully submitted,

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