14-1688-cv

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

SYED FARHAJ HASSAN, THE COUNCIL OF IMAMS IN NEW JERSEY, MUSLIM STUDENTS ASSOCIATION OF THE U.S. AND CANADA, INC., ALL BODY SHOP INSIDE & OUTSIDE, UNITY BEEF SAUSAGE COMPANY, MUSLIM FOUNDATION INC., MOIZ MOHAMMED, JANE DOE, SOOFIA TAHIR, ZAIMAH ABDUR-RAHIM, AND ABDUL-HAKIM ABDULLAH,

Appellants,

—against—

THE CITY OF NEW YORK

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY, NO. 2:12-CV-3401
BEFORE THE HONORABLE WILLIAM J. MARTINI

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331, based upon alleged violations of the United States Constitution and 42 U.S.C. § 1983, and 28 U.S.C. § 1343 because they sought relief for the deprivation of their constitutional rights under color of State law. This Court has jurisdiction of the appeal under 28 U.S.C. § 1291, because it is an appeal from a final judgment of dismissal disposing of all parties' claims. The district court entered Final Judgment dismissing the case on February 20, 2014 (Dkt. 41), and Plaintiffs-Appellants filed a timely Notice of Appeal on March 21, 2014 (Dkt. 42).

ISSUES PRESENTED

1. Whether the myriad, specific injuries Plaintiffs allege — which include being subject to discriminatory classification by the City based solely upon their religious identity as Muslims, the stigma that follows such disfavored treatment, interference with religious practices, loss of business and property value, and likelihood of future repercussions — constitute concrete injury-in-fact that confers standing to assert their constitutional claims.

2. Whether Plaintiffs' injuries are fairly traceable to the City and the New York Police Department, which established, implemented, and publicly defended its discriminatory surveillance program, rather than the Associated Press, which exposed the program.

3. Whether Plaintiffs' specific allegations that the New York Police Department targeted them for surveillance pursuant to an expressly discriminatory policy, plausibly state claims upon which relief can be granted for violations of the Equal Protection Clause of the Fourteenth Amendment and the Free Exercise and Establishment Clauses of the First Amendment.

STATEMENT OF FACTS

A. The Complaint's Allegations

Plaintiff's First Amended Complaint ("Complaint") alleged that, since January 2002, defendant City of New York (the "City") has, through the New York City Police Department ("NYPD" or "the Department"), conducted a massive targeting, mapping and surveillance program (the "Program") to monitor the lives of Muslims, their businesses, houses of worship, organizations, and schools in New York City and surrounding states, particularly New Jersey. JA-37, 38 (¶¶36, 38). The fact of this Muslim-surveillance program, and the details of its operation, are revealed by now-public NYPD documents. JA-23–25 (¶¶26-62), JA-54–202, The Program intentionally targets Plaintiffs and untold other Muslim individuals, associations, and organizations based purely on their religious affiliation, JA-24 (¶3), while it does not subject any other religious group to surveillance of this kind. JA-38 (¶37). Moreover, the surveillance activities are undertaken without reason to believe that the Muslim targets have committed or are connected to any crime or terrorism. JA-24 (¶3). In its ten years of existence, the Program has not produced a single lead to criminal activity. JA-24 (¶2).

1. Targeting of Muslims in New Jersey

Using a wide variety of methods to spy on Muslims, the Program targets virtually every aspect of day-to-day Muslim life, from the mundane to the sacred. JA-24, 38–43 (¶¶2, 39-47). Among other measures, the NYPD videotapes, photographs, and infiltrates mosques, Muslim-owned businesses, organizations, and schools; the surveillance has included Plaintiffs. JA-41–43 (¶¶46-47). Undercover officers engage in pretextual conversations to elicit information from proprietors and patrons. JA-38–39 (¶39). For example, the NYPD uses undercover officers called "rakers" to surveil locations such as bookstores, bars,

cafes and nightclubs in neighborhoods it believes to be predominantly frequented by Muslims. JA-41–43 (¶47). These rakers, as well as other officers and agents compile surveillance reports which, among other things, catalogue religiously-oriented facts such as: (i) Muslim prayer mats hanging on restaurant walls; (ii) flyers posted in shops advertising for *Quranic* tutoring; (iii) pictures of mosques hanging in grocery stores; (iv) restaurants that serve "religious Muslims" or that are located near mosques; (v) customers visiting Dunkin' Donuts after Friday prayer; (vi) employees or customers of establishments observed wearing "traditional clothing;" (vii) and stores posting signs announcing that they will be closed in observance of Friday prayer. *Id.* The reports also include maps indicating the locations of mosques, restaurants, retail establishments and schools owned by or serving both Muslims and ethnic populations from heavily Muslim countries. JA-44 (¶53). For Newark, New Jersey, alone, the Department maintains over twenty such maps. JA-24 (¶3).

The Program devotes special attention to Islamic places of worship. The Program uses informants called "mosque crawlers" to monitor sermons and conversations in mosques and then report back to the NYPD. It has tried to insert informants inside every mosque within a 250-mile radius of New York City; it has also prepared an analytical report on every mosque within 100 miles, including Plaintiff Muslim Foundation, Inc. and at least two members of Plaintiff Council of Imams in New Jersey. JA-41–43 (¶47). Mosque crawlers have monitored thousands of prayer services within mosques, thereby amassing a trove of detailed personal information about worshippers solely on the ground of their Muslim affiliation. *Id.* Officers also take photographs and video of license plate numbers of congregants as they arrive to pray. JA-41 (¶46). The Department has even mounted surveillance cameras on traffic light poles aimed at mosques, to allow

round-the-clock surveillance of these religious institutions and to identify worshippers. *Id.*

The Department further closely monitors the activities of Muslim Student Associations ("MSAs") at colleges and universities in New York, New Jersey, Connecticut, and Pennsylvania, solely because of their Muslim membership. JA-43 (¶49). Undercover NYPD officers pose as students to attend MSA events, JA-43 (¶50). One officer, for example, went on a rafting trip with an MSA and monitored and recorded how often the student participants on the trip prayed, describing their religious discussions. *Id.* On a weekly basis, the NYPD prepares an MSA Report, encompassing the MSAs at Rutgers New Brunswick and Rutgers Newark to which some Plaintiffs belonged. JA-43 (¶50). The NYPD even established a base of operations in an off-campus apartment near Rutgers New Brunswick. JA-44 (¶51). By inserting informants and undercover officers into all or virtually all MSAs, the Program extracts information about the activities and individuals involved, including the names of professors, scholars and student participants, *id.*, all without any indication whatsoever of criminal activity or connection to wrongdoing. JA-43 (¶49). NYPD officers also monitor the websites of Muslim student organizations, troll student chat rooms, and talk to students online. JA-43 (¶50).

The NYPD also tracks Muslims by inspecting records of name changes and compiling databases of new Muslim converts who take Arabic names, as well as Muslims who take "Western" names. JA-44 (¶55). Significantly, the Department does not compile similar information for other kinds of name changes. *Id.*

In addition, the Program intentionally targets Muslim individuals by using ethnicity as a proxy for faith, selecting only Muslims for surveillance. JA-39 (¶40). Thus, the Department has designated twenty-eight countries – which, combined,

contain 80% of the world's Muslim population – and "American Black Muslim" as "ancestries of interest." JA-39 (¶41). Tellingly, the NYPD does not surveil all people and establishments linked to countries with "ancestries of interest." To the contrary, it expressly excludes non-Muslim people and establishments with such "ancestries"– thus, for example, the NYPD does not surveil Egyptian Christians, Syrian Jews, or Albanian Catholics and Orthodox Christians. JA-39–40 (¶42). Likewise, the NYPD reports discuss the African-American Muslim population, but not non-Muslim African-American communities. JA-40 (¶43).

The City has made repeated specific statements – both for internal and public consumption – assigning guilt to all Muslims and suggesting they all pose a special threat to public safety. JA-45 (¶57). For example, the Department's Newark report focuses on some forty so-called "Locations of Concern," which consist of mosques, restaurants and retail establishments owned and frequented by Muslims, and Muslim schools. JA-45–46 (¶58). "Locations of Concern" are defined as "location[s] that individuals may find coconspirators for illegal actions" or which have "demonstrated a significant pattern of illegal activities." *Id.* Yet the report fails to identify any "illegal activity" in such locations. It simply assumes that Muslims are inherently more likely to pose a threat to public safety.

2. Injuries to Plaintiffs Caused by the Surveillance Program

All Plaintiffs are injured by being subject to a government classification that disfavors them because of their status as Muslims, and that unfairly stigmatizes them as public safety threat and unequal members of the political community. JA-48 (¶65). Each Plaintiff has also suffered a variety of additional injuries as a result of the NYPD's surveillance above and beyond the Program's obvious stigmatizing effects. *See* JA-25–26, 45–46, 47, 48 (¶¶7, 57-58, 61, 65).

Plaintiff Syed Farhaj Hassan, a soldier in the U.S. Army who has worked in military intelligence, has reduced his mosque attendance out of a reasonable fear that attending mosques under surveillance will jeopardize his ability to hold a security clearance and will tarnish his reputation among his fellow soldiers. JA-27–28 (¶¶11-13). Similarly, Plaintiffs Moiz Mohammed, Jane Doe, and Soofia Tahir now avoid discussing their faith openly or at MSA meetings for fear their comments will be misinterpreted by law enforcement. JA-32–33, 33–34, 34–35 (¶¶24, 27, 29-30). Their future education and professional opportunities are impaired by the NYPD's surveillance and by City officials' public comments about the spying program. JA-33, 33–34, 34 (¶¶25, 27, 29).

The surveillance of Rutgers University chapters of the Muslim Students Association of the U.S. & Canada, Inc. has undermined their ability to fulfill their mission, deterring potential members from joining and casting doubt on these organizations' ability to maintain the confidentiality of their membership. JA-29–30 (¶17). In addition, two member mosques of Plaintiff Council of Imams in New Jersey who are named in the NYPD's Newark report have seen a decline in attendance and contributions as a result of the Department's surveillance. JA-28–29 (¶15). Yet another mosque named in an NYPD report, operated by Plaintiff Muslim Foundation Inc., has been forced to change its religious and educational programming to avoid controversial topics that might attract the attention of law enforcement. JA-31–32 (¶23). Indeed, the NYPD's surveillance of all Plaintiff mosques and individual Plaintiffs has created an atmosphere in which it is impossible to worship freely knowing that law enforcement agents or informants are likely in their midst. JA-28–29, 31–32, 33, 33–34, 35 (¶¶15, 23, 25, 27, 30).

The surveillance has damaged Plaintiffs All Shop Body Inside & Outside and Unity Beef Sausage Company by scaring away customers. JA-30, 30–31

(¶¶19, 20). It has diminished the value of Plaintiffs Zaimah Abdur-Rahim and Abdul-Hakim Abdullah's home as a result of a picture of that home being included in a surveillance report. JA-36, 36–37 (¶¶32, 34). In short, each Plaintiff has suffered multiple injuries as a direct consequence of the City's policy of singling out Muslims for surveillance, on the basis of insidious and patently false stereotypes.

B. Proceedings Below

Plaintiffs commenced this action on June 2, 2012, filing an amended complaint on October 3, 2012. Based on the foregoing allegations, Plaintiffs sued the City pursuant to 42 U.S.C. § 1983 and *Monell v. City of New York Dep't. of Social Services*, 436 U.S. 658 (1978), for its unlawful policy of discriminating against them on the basis of their Islamic faith. Plaintiffs asserted that the City's expressly discriminatory policy violated Plaintiffs rights under the Equal Protection Clause of the Fourteenth Amendment (Count I) and the Free Exercise and Establishment Clauses of the First Amendment (Count II). JA-27 (¶¶66-69). Plaintiffs also sought expungement of their unlawfully obtained records, an injunction prohibiting continued surveillance based on religion; compensatory damages for Plaintiffs who suffered economic harm, and nominal damages for others, *see Cary v. Piphus*, 435 U.S. 247 (1978).

On February 20, 2014, without having entertained oral argument, the district court issued a ten-page opinion and order granting the City's motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of standing and, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim. (JA-13–22). The court first ruled that Plaintiffs failed to demonstrate standing because they failed to identify any cognizable "injury-in-fact." JA-17. The district court likened all of the distinct injuries alleged by Plaintiffs collectively to those

considered and rejected in *Laird v. Tatum*, 408 U.S. 1 (1972), where the Plaintiffs could not allege they were actually the targets of a government surveillance program or otherwise demonstrate that their First Amendment activity was chilled by "any specific action of the Army against them." *Id*. at 3, *cited in* JA-18.

The district court also concluded that Plaintiffs could not satisfy the causation prong of the standing inquiry. JA-18–19. The court reasoned that, even if Plaintiffs had suffered injuries, they were not "fairly traceable" to the design, implementation or public defense of NYPD's surveillance Program, but rather, were caused by the Associated Press's disclosure of the allegedly unlawful program.

Finally, the district court dismissed the Complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The district court did not specifically address Plaintiffs' Equal Protection, Free Exercise, or Establishment Clause claims, treating them all as one, and holding that Plaintiffs' claims of discrimination were not plausible under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), because Plaintiffs failed to show that the City did not adopt the program "for a neutral, investigative reason." JA-20–22. In assessing the sufficiency of the pleadings, the court accepted the City's assertion that a program that exclusively surveils Muslims does not discriminate, and is otherwise justified by the events of September 11, 2001. JA-21 ("The more likely explanation for the surveillance was a desire to locate budding terrorist conspiracies. The most obvious reason for so concluding is that surveillance program began just after the attacks of September 11, 2001.").

STATEMENT OF RELATED CASES

There are no related cases pending in this Court. A case challenging the NYPD's surveillance of Muslims in New York City was filed in the Eastern District of New York, and after the City answered the complaint, is in the midst of

discovery. *Raza, et al. v. City of New York*, No. 13-3448 (E.D.N.Y. June 18, 2013). A case seeking to hold the City in contempt of guidelines adopted in 1971 and amended in 2002, which limited the City's ability to surveil First Amendment activity and keep records of monitored individuals is also pending in the Southern District of New York. *Handschu v. Special Services*, No. 71 Civ. 2203 (S.D.N.Y.) (Mot. for Inj. Relief and Appointment of An Auditor or Monitor filed February 4, 2013 (Dkt. 408)).

STANDARD OF REVIEW

The district court granted the City's motion to dismiss for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim upon which relief can be granted under Rule 12(b)(6). For each such ruling, this Court's standard of review is *de novo*. *Barefoot Architect, Inc. v. Bunge*, 632 F.3d 822, 826 (3d Cir. 2011) (circuit court reviews a district court's dismissal for failure to state a claim under a *de novo* standard of review); *Marion v. TDI Inc.*, 591 F.3d 137, 146 (3d Cir. 2010) (legal conclusion of district court regarding standing reviewed *de novo*).

SUMMARY OF ARGUMENT

Plaintiffs challenge, pursuant to 42 U.S.C. § 1983 and *Monell v. City of New York Dep't. of Social Services*, 436 U.S. 658 (1978), an overtly discriminatory policy adopted by the City that singles out Muslims for law enforcement surveillance based solely on their religion, and not upon any indicia of wrongdoing or criminal suspicion. Plaintiffs have demonstrated that they have standing to challenge the City's policy. The NYPD's surveillance program and the City's public comments about it cause Plaintiffs constitutionally recognized injury by: (1) classifying them for differential treatment based solely upon their religion; (2) stigmatizing them by painting Plaintiffs as a danger to society that should be

monitored constantly; (3) interfering with Plaintiffs' religious practices by deterring them from attending religious services; (4) causing loss in value to a home included in an NYPD surveillance report, decreasing business at stores and reducing donations at mosques; (5) and harming future education and employment prospects for certain Plaintiffs because of their affiliation with mosques and organizations that the NYPD has targeted and besmirched.

Contrary to the district court's reasoning, these discrete injuries are fundamentally distinct from those deemed insufficient in *Laird v. Tatum*. Plaintiffs here have not speculatively altered their behavior based on the mere possibility of a government surveillance program; their injuries stem from having been specifically targeted by a publicly acknowledged surveillance program. The district court also erred in concluding that Plaintiffs' injuries were not "fairly traceable" to the City's unlawful surveillance program, but to the Associated Press's disclosure of the program. There can be no doubt that the City's adoption and maintenance – and post-disclosure defense – of the spying program is the "but for" cause of Plaintiffs' injuries. Nor is there doubt that a judicial order enjoining the City's unlawful program would redress Plaintiffs' injuries. No more is required to meet the causation prong of standing at the pleading stage.

The Complaint also provides ample, non-conclusory allegations – most based on the NYPD's own documents – demonstrating that the NYPD targeted Muslims exclusively for surveillance. The allegations describe the methodology and locations of the NYPD's religion-based spying in great detail, and identify Plaintiffs as specific targets of the program. When assumed to be true, as they must be, *Mandel v. M&Q Packaging Corp.*, 706 F.3d 157, 263 (3d Cir. 2013), the allegations leave no doubt that the City adopted a policy that relies on an express classification of Muslims for disfavored treatment.

A facially discriminatory policy such as the City's here states a claim under the Equal Protection Clause, the Free Exercise Clause and the Establishment Clause, regardless of the subjective motivations of any government decision-maker or of the asserted necessity of the law enforcement reasons for such a policy.

Accordingly, the district court erred in uncritically accepting, at the pleading stage, the City's assertion that its avowedly discriminatory spying program was justified by "a desire to locate budding terrorist conspiracies." JA-21. By endorsing the City's justification for the program rather than evaluating whether Plaintiffs alleged a plausible claim for relief, the district court not only elevated the plausibility standard into a probability requirement, but also subverted the very purpose of strict scrutiny, which is to skeptically examine the government's asserted justification for discrimination against a protected class. Indeed, the district court's decision to accept the stereotypes underlying the City's defense of the program perpetuates the very discrimination this action is designed to challenge.

The district court also erred in interpreting the Supreme Court's decision in *Ashcroft v. Iqbal* to sanction overt discrimination against Muslims. It does not. The claims here differ significantly. The *Bivens* claims asserted in *Iqbal* required those plaintiffs to show the discriminatory state of mind of individual supervisory defendants. In contrast, under *Monell*, the existence of a facially discriminatory policy states a claim for municipal liability, regardless of any individual decision-maker's state of mind. In addition, the non-conclusory allegations in *Iqbal* could not support a legally sufficient disparate treatment claim, whereas Plaintiffs' well-pled allegations here demonstrate the existence of a facially discriminatory government classification – one that triggers strict scrutiny.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO PURSUE THEIR CONSTITUTIONAL CLAIMS

To establish the "constitutional minimum of standing," a party must allege that: (1) it has suffered an "injury in fact" that is "concrete and particularized, and also "actual or imminent;" (2) the injury is "fairly . . . trace[able] to the challenged action of the defendant;" and (3) it is "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted) (alterations in original). Because standing "turns on the nature and source of the claim asserted," *id.*, the proper inquiry here is whether Plaintiffs have alleged concrete and particularized injuries cognizable under the Equal Protection Clause of the Fourteenth Amendment and the Free Exercise and Establishment Clauses of the First Amendment.

Plaintiffs have asserted no fewer than five concrete injuries that have long been cognizable. The district court failed to acknowledge – let alone analyze – these distinct injuries under governing standing law. Instead, the district court summarily concluded that the all of Plaintiffs' injuries "mirror" those of the plaintiffs in *Laird v. Tatum*, 408 U.S. 1 (1972). But unlike the "subjective chill" allegations in *Laird*, Plaintiffs here allege that they are the *actual* targets of an acknowledged government surveillance program. The district court's further conclusion that the Associated Press's revelations of the City's illegal activity – not the illegal activity itself – caused Plaintiffs' injuries is contrary to controlling law, logic and the record.

A. Plaintiffs Have Alleged Numerous Injuries Sufficient to Confer Standing on their Equal Protection and First Amendment Claims.

Plaintiffs' burden of alleging injury-in-fact at the pleading stage is low, requiring nothing more than "an identifiable trifle" of harm. *Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 177 (3d Cir. 2001). In this case, Plaintiffs have suffered numerous harms that are well beyond a "trifle," ones that are routinely recognized under the Equal Protection Clause and First Amendment as injuries-in-fact. *First*, Plaintiffs were subject to a discriminatory government classification, which itself confers standing to challenge that discrimination. *Second*, the City's discrimination stigmatized Plaintiffs based on their religion and subjected them to reputational harm. *Third*, the City's interference with certain Plaintiffs' religious practices confers standing. *Fourth*, some Plaintiffs suffered monetary injury as a result of the surveillance program. And *fifth*, certain Plaintiffs are likely to suffer future, concrete harm as a result of having been classified and surveilled by the NYPD.

1. The City's Classification and Targeting of Plaintiffs Based on Membership in a Protected Class Is an "Injury in Fact"

The Complaint plainly alleges – and the City does not contest – that the challenged policy targets Muslims, and only Muslims, on the basis of religious identity, JA-39–40 (¶¶40-44), and that Plaintiffs are in fact targeted and investigated based solely upon their religion. JA-27–29, 29–33, 34, 35–36, 36–37 (¶¶12-15, 17-26, 28-29, 31-32, 34). The very fact that Plaintiffs are subjected to a discriminatory law enforcement classification constitutes an injury-in-fact. *Northeastern Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment."); *Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 542 (3d Cir. 2011) ("[i]n the equal protection context, an

injury resulting from governmental racial discrimination accords a basis for standing … to those persons who are personally denied equal treatment by the challenged discriminatory conduct") (citing *United States v. Hays*, 515 U.S. 737, 744-45 (1995)); *accord Allen v. Wright*, 468 U.S. 737, 755 (1984) (internal citation omitted)). Indeed, the injury-in-fact from unequal treatment is sufficient to confer standing regardless of any subsequent or additional harm that may or may not flow from the discrimination. *See Northeastern*, 508 U.S. at 666 (no obligation for Plaintiffs to assert subsequent harm because the injury-in-fact is the denial of equal treatment "*not the ultimate inability to obtain the benefit*") (emphasis added); *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (plaintiff-student satisfied the injury-in-fact requirement by alleging that the University's discriminatory admissions policy had "denied him the opportunity to compete for admission on an equal basis," even without proof he could have obtained admission absent the policy); *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (placement in predominantly white election district is a discriminatory classification sufficient to confer standing, even absent any concrete impact on voting rights). On this basis alone, the district court's decision on standing must be reversed and the Complaint reinstated.

2. The Targeting of Plaintiffs for Surveillance and Investigation Based on Religion Causes Stigmatic Harm that Establishes Injury in Fact

Independent of the harm attributable to unequal treatment by the City, the stigma that inevitably flows from a facially discriminatory classification of a disfavored group is also a well-recognized injury that confers standing. As the Supreme Court explained in *Shaw v. Reno*: "Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality'" because they "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial

hostility." 509 U.S. at 643 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Accordingly, the Equal Protection Clause authorizes challenges to discriminatory classifications that "perpetuat[e] archaic and stereotypic notions" or "stigmatiz[e] members of the disfavored group as innately inferior and therefore as less worthy participants in the political community." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (internal quotation omitted); *see also Allen v. Wright*, 468 U.S. 737, 755 (1984) (stigmatic injury associated with invidious official conduct is cognizable for standing purposes if the plaintiff is directly affected).

The City's surveillance program is explicitly based upon, and accordingly perpetuates, a malignant stereotype: that Muslims are a danger to society appropriately kept under constant monitoring. *See* JA-47, 48, (¶¶61, 65) (describing City officials defending the surveillance of Muslims by arguing that the surveillance program was focused on "threats" and "terrorists"). This is precisely the sort of official stereotyping that violates both the Equal Protection Clause, *see Allen*, 468 U.S. at 755, and the Religion Clauses of the First Amendment. *See Church of Scientology Flag Service Organization, Inc. v. City of Clearwater*, 2 F.3d 1514, 1525 (11th Cir. 1993) ("Religious groups and their members that are singled out for discriminatory government treatment . . . have standing to seek redress in federal courts" under the Free Exercise Clause); *Church of Scientology v. Cazares*, 638 F.2d 1272, 1279-80 (5th Cir. 1981) (same); *Awad v. Ziriax*, 670 F.3d 1111, 1123 (10th Cir. 2012) (allegation that "proposed state amendment *expressly* condemns [plaintiff's] religion and exposes him and other Muslims in Oklahoma to disfavored treatment – suffices to establish the kind of direct injury-in-fact necessary to create Establishment Clause standing") (original emphasis).

In addition, unconstitutional government action that diminishes a group's reputation in the community – even short of an invidious classification – has long

been a basis for standing. In *Joint Anti–Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) (plurality opinion), for example, the Supreme Court found that the effect of designating the plaintiff organizations as "Communist" was to "cripple the functioning and damage the reputation of those organizations in their respective communities and in the nation," which is a cognizable injury. *Id.* at 139-40. Similarly, in *Meese v. Keene*, 481 U.S. 465 (1987), the federal government's derogatory designation of plaintiff's films as "political propaganda" allegedly injured plaintiff's reputation and was therefore sufficient to confer standing. *Id*. at 473-74. *See also Turkish Coalition of America, Inc. v. Bruininks*, 678 F.3d 617, 622-23 (8th Cir. 2012) ("a non-profit organization that alleges an injury to reputation through stigmatizing government speech has Article III standing to bring a constitutional claim"); *Riggs v. City of Albuquerque*, 916 F.2d 582, 583–85 (10th Cir. 1990) ("politically active organizations who, it was alleged, have often taken controversial and unpopular positions" pled a cognizable injury where they "allege[d] harm to their personal, political, and professional reputations in the community"). Accordingly, the Plaintiffs have standing to challenge the City's denigration of Muslims.

3. The City's Interference With Plaintiffs' Religious Practices Constitutes an Injury In Fact.

In addition to the injury stemming from the City's discriminatory classification described above, *see supra* Section I(A)(1)-(2), Plaintiffs suffer a second form of Religion Clause injury: interference with their ability to engage in collective worship, as their faith compels. The Complaint clearly alleges that many of the Plaintiffs have stopped attending mosques and MSAs, and instead refrain from openly discussing their religious beliefs for fear their statements will be misinterpreted and so invite unwanted attention from law enforcement. JA-27–

28, 29–30, 33, 33–34, 35 (¶¶13, 17, 25, 27, 30). One Plaintiff mosque has even altered its religious services and programming to avoid subjects and speakers that might generate controversy. JA-31–32 (¶23).

For example, Plaintiff Hassan has significantly reduced his attendance at mosques that were targeted by the NYPD surveillance program. Plaintiff MSA has seen its ability to fulfill the spiritual needs of its members in a confidential manner impaired. JA-29–30 (¶17). Plaintiffs Mohammed, Doe, and Tahir, all current and former members of the Rutgers Muslim Student Association have also changed their worship habits to avoid attracting the attention of the NYPD and the university community. JA-33, 33–34, 35 (¶¶25, 27, 30). Each of these instances of compelled self-censorship is a paradigmatic example of the sort of injury the Free Exercise Clause is meant to redress. Each accords standing.

Indeed, it is well established that centers of worship like churches, mosques, and synagogues, "as organizations, suffer a cognizable injury when assertedly illegal government conduct deters their adherents from freely participating in religious activities protected by the First Amendment." *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 523 (9th Cir. 1989). In considering a challenge to the Immigration and Naturalization Service's practice of sending agents into churches to surreptitiously record services – causing reduction in church attendance and financial support – the Ninth Circuit explained why a religious group suffers a cognizable injury under the Free Exercise Clause:

> When congregants are chilled from participating in worship activities, when they refuse to attend church services because they fear the government is spying on them and taping their every utterance, all as alleged in the complaint, we think a church suffers organizational injury because its ability to carry out its ministries has been impaired. . . . The alleged effect on the churches is

> not a mere subjective chill on their worship activities; it is a concrete, demonstrable decrease in attendance at those worship activities. The injury to the churches is "distinct and palpable."

Id. at 522 (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984) (emphasis removed); *accord Muslim Community Ass'n of Ann Arbor v. Ashcroft*, 459 F.Supp.2d 592, 598 (E.D. Mich. 2006) (finding standing where "members are afraid to attend mosque, practice their religion, and express their opinions on religion and political issues"); *cf. Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate*, 519 F.2d 1335, 1338 (3d Cir. 1975) (finding standing when "mere anticipation of the practical consequences of joining or remaining with plaintiff organizations [subject to police surveillance] may well dissuade some individuals from becoming members").

In sum, houses of worship and those who practice religion in a communal setting cannot function properly with undercover law enforcement officers and informants in their midst, tracking their sermons and conversations, and filming and photographing their activities. They have standing to challenge the surveillance at issue here, and the district court's opinion denying them access to the federal court on standing grounds should be reversed.

4. Plaintiffs' Monetary Damages Are an Injury in Fact

A number of Plaintiffs allege monetary damages – allegations the district court effectively ignored. Two mosques that are members of Plaintiff Council of Imams in New Jersey[1] – Masjid al-Haqq and Masjid Ali K. Muslim – allege a

[1] Plaintiffs Council of Imams in New Jersey and MSA National also assert associational standing under *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). *See* JA 28-30 (¶¶14-17). Suits brought by an association on behalf of members are appropriate where, as here, "the association seeks a declaration, injunction, or some other form of prospective relief [that] can

decrease in contributions as a result of the NYPD's surveillance program. JA-28–29 (¶15). Plaintiff businesses All Body Shop Inside & Outside and Unity Beef Sausage Company allege a decrease in customers caused by the program. JA-30, 31 (¶¶19, 21). Plaintiffs Abdur-Rahim and Abdullah claim compensatory damages due to the loss of value to their home, as a result of it being pictured in the NYPD's Newark report. JA-35–37 (¶¶31-34).

There can be no doubt that such financial harm constitutes injury-in-fact. *Danvers Motor Co., Inc. v. Ford Motor Co*., 432 F.3d 286, 292 (3d Cir. 2005). Indeed, it is the classic form of injury-in-fact that confers standing. *Id*. at 293 (citing *Adams v. Watson*, 10 F.3d 915, 920–25 & n. 13 (1st Cir. 1993) (collecting cases)); *see also Baugh Constr. Co. v. Mission Ins. Co*., 836 F.2d 1164, 1171 (9th Cir. 1988) (diminution in value based upon negative publicity constitutes injury).

5. Likelihood of Future Harm Caused By NYPD Surveillance

Certain Plaintiffs face the likelihood that the NYPD's collection and retention of surveillance records will harm their future education and employment prospects. Plaintiff Hassan is a soldier in the U.S. Army Reserve who has worked in military intelligence. JA-27 (¶11). Any blemish in his background jeopardizes his security clearance and thus his career. JA-27–28 (¶13). Hassan is also concerned that his fellow soldiers, including his superiors, will have diminished trust in him – thereby harming his career prospects – if they learn he is a congregant at mosques under NYPD surveillance. *Id*. Plaintiff Abdur-Rahim is a teacher at Al Hidaayah Academy, a school included in the NYPD's Newark report; from 2002 through 2010, she was the principal of Al Muslimaat Academy, a school for fifth- to twelfth-grade girls on which the NYPD spied, as documented in

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reasonably be supposed . . . will inure to the benefit of those members of the association actually injured." *Warth v. Seldin*, 422 U.S. 490, 516 (1975).

its Newark report. JA-35 (¶31). She reasonably fears that her future employment prospects are diminished by working at two schools under surveillance by law enforcement. JA-36 (¶32). Finally, the three Plaintiffs who are a current student and recent graduates of Rutgers – Mohammed, Doe and Tahir – have their future education and career prospects encumbered by their membership in the University's Muslim Student Association, which the NYPD unlawfully monitored and made records about solely because its membership is Muslim. JA-34 (¶29).

Each of these is a cognizable injury. In this Court's decision in *Philadelphia Yearly*, the plaintiffs alleged that information collected during an investigation conducted by Philadelphia police would be available to other individuals, governmental agencies, and the media. *Philadelphia Yearly*, 519 F.2d at 1338. These allegations, the Third Circuit held, afforded plaintiffs standing because the "general availability of such materials and lists could interfere with the job opportunities, careers or travel rights of the individual plaintiffs." *Id*. In this case, the widespread availability [2] of the City's surveillance records implicating Plaintiffs, combined with City officials' public statements indicating that those records focused on "threats" and attempted to document the "likely whereabouts of terrorists" thus confer standing upon Plaintiffs just as in *Philadelphia Yearly*. Indeed, this Court reached an identical conclusion in *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975), which held that a student plaintiff suffered a cognizable injury and had standing to seek expungement of FBI records where that agency surveilled her and maintained an investigative file, because that file "possibly could endanger

[2] It cannot matter for standing purposes that in *Philadelphia Yearly*, the police intentionally publicized its surveillance system and disclosed certain information regarding the plaintiffs, 519 F.2d at 1337, while in this case the disclosures were originally publicized by an unauthorized leak. The actual harm suffered by the victims of the surveillance is the same in both cases.

her future educational and employment opportunities." *Id.* at 868. *See also Meese v. Keene*, 481 U.S. at 473-74.

B. Because Plaintiffs Are Actual Targets of the City's Surveillance, Their Injury is "Concrete and Particularized," Not "Speculative."

The district court did not analyze each of the above independent bases for standing. Instead, the court summarily concluded that Plaintiffs' assertion of standing "mirror" those in *Laird v. Tatum*, 408 U.S. 1 (1972). This is a fundamentally flawed comparison. In *Laird*, the plaintiffs feared the *possibility* that a government surveillance program might ensnare them, and claimed that such a possibility inhibited their political activity. This mere "subjective chill," the Supreme Court held, was insufficient to confer standing. *See Laird*, 408 U.S. at 11. But in obvious contrast to the *Laird* plaintiffs, Plaintiffs here allege that they have been direct targets of a well-documented Muslim surveillance program. *See Laird*, 408 U.S. at 9 (Plaintiffs "complain of no specific action of the Army against them"). Indeed, every single Plaintiff in this case is either specifically named in an NYPD spying report or is a member of at least one mosque or other association named in such a report. JA-27–29, 29–33, 34, 35–36, 36–37 (¶¶12-15, 17-26, 28-29, 31-32, 34).

This Court, like many others, has long held that when plaintiffs are the subject of law enforcement surveillance based upon constitutionally protected activities, they have standing to challenge the propriety of that surveillance. In *Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997), for example, this Court, distinguishing *Laird*, concluded that a plaintiff who was spied on by police, allegedly in retaliation for advancing a discrimination claim, had standing to challenge such surveillance.. *Id*. at 160. Likewise, in *Riggs v. City of Albuquerque*, 916 F.2d 582 (10th Cir. 1990), the plaintiffs alleged, as do Plaintiffs here, "that

they were the actual targets of the illegal investigations." *Id*. at 585. This allegation rendered *Laird* "easily distinguishable because there the plaintiffs alleged only that they experienced a generalized chilling effect by their mere knowledge of the existence of the Army's data-gathering system without alleging any specific Army action against them." *Id*. at 586-87.

Similarly, several district courts, although reaching different conclusions about the merits of plaintiffs' claims, have found that plaintiffs who alleged they were actually surveilled by the National Security Agency ("NSA") have standing to challenge the legality of the surveillance. *See Klayman v. Obama*, 957 F.Supp.2d 1, 9 (D.D.C. 2013) ("plaintiffs have standing to challenge the constitutionality of the Government's bulk collection and querying of phone record metadata"), *appeal docketed*, No. 14-5004 (D.C. Cir. Jan. 9, 2014); *Am. Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724, 738 (S.D.N.Y. 2013) ("[T]here is no dispute the Government collected telephony metadata related to the ACLU's telephone calls. Thus, the standing requirement is satisfied."), *appeal docketed*, No. 14-42 (2d Cir. Jan. 2, 2014); *Hepting v. AT & T Corp.*, 439 F.Supp. 2d 974, 1000 (N.D. Cal. 2006) (standing found where plaintiffs alleged that defendant provided the government access to their phone records).

In these NSA cases, as in Plaintiffs' case, the allegations of actual surveillance could not be dismissed as merely "speculative." *See Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1154 (2013) (rejecting claim of standing where plaintiffs "present no concrete evidence to substantiate their fears, but instead rest on mere conjecture about possible governmental actions."); *id*. at 1148 (plaintiffs "have no actual knowledge of the Government's . . . targeting practices"). Indeed, in *Clapper*, the Supreme Court makes clear that non-speculative allegations of actual surveillance would confer standing. *See id.* at 1153 (explaining that *Clapper*

would resemble cases in which the Court found standing if it were undisputed that the government had acquired the plaintiffs' communications and the only question in the case was the reasonableness of the plaintiffs' actions to avoid such acquisition).

Accordingly, by alleging that the City has targeted them directly for surveillance based upon their exercise of a constitutionally protected right to practice their religion and/or their membership in a protected class, Plaintiffs have alleged a concrete and particularized injury-in fact-that confers standing to assert claims under the Equal Protection Clause and First Amendment.

C. The District Court Erred in Finding That Plaintiffs' Injuries Were Not "Fairly Traceable" to the NYPD's Unconstitutional Surveillance Practices

In evaluating the second prong of the standing requirement, the district court erred in finding that Plaintiffs failed to demonstrate that their injuries were caused by Defendant's unconstitutional conduct. The court attributed all of Plaintiffs' harms to the revelation of the NYPD's surveillance program, and none to the NYPD's unlawful conduct that was revealed. In particular, the court reasoned that because "[n]one of Plaintiffs' injuries arose until after the Associated Press released unredacted, confidential NYPD documents and articles expressing its own interpretation of those documents," Plaintiffs' injuries were "fairly traceable" not to the City's surveillance practices, but to the Associated Press's reporting which exposed those practices. JA-18–19. That finding is factually and legally incorrect.

1. Because the Discriminatory Surveillance Program Is the But-For Cause of Plaintiffs' Injuries, the Injuries are Fairly Traceable to the City.

To begin, the district court incorrectly assumed that all of the injuries alleged by Plaintiffs were triggered only by the public reporting of the NYPD surveillance

practices. As described in Section I(A)(1) *supra*, however, the mere occurrence of a discriminatory classification – independent of its disclosure – constitutes an injury-in-fact. Accordingly, the adoption of the discriminatory policy in this case, precedent to the Associated Press's revelations, caused Plaintiffs harm by classifying them in violation of the constitution.

Second, even if the Associated Press reports were the immediate cause of Plaintiffs' injuries (and as a factual matter they were not, as explained below) that would not defeat standing. At the pleading stage, plaintiffs' "burden . . . of alleging that their injury is 'fairly traceable'" to the challenged act is "relatively modest." *Bennett v. Spear*, 520 U.S. 154, 171 (1997). To meet this "modest" burden, a plaintiff need only show that the defendant's actions were a "but for" cause of the injury. *Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 418 (3d Cir. 2013). Once the plaintiff makes that showing, the "traceability requirement [will be deemed to be] met even where the conduct in question might not have been a proximate cause of the harm, due to intervening events." *Id.* Put another way, it is well established that the presence of a third party does not break the causal chain for standing purposes. *See Bennett*, 520 U.S. at 168-69 (it is "wrong[]" to "equate[] injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation."); *see also Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003) ("[N]o authority even remotely suggests that proximate causation applies to the doctrine of [Article III] standing") (internal quotation omitted).

In tort law, proximate cause requires a showing that the defendant's conduct was "a substantial factor in the sequence of responsible causation," and that the resulting "injury was reasonably foreseeable or anticipated as a natural consequence," *Rothstein v. UBS AG*, 708 F.3d 82, 91-92 (2d Cir. 2013) (internal

quotation marks omitted). In contrast, "but for" causation only "requires proof that the harmful result would not have come about but for the conduct of the defendant." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 366 (3d Cir. 1990). Courts have routinely found standing even where, as the district court assumed, a third party and not the defendant proximately caused the injury. Thus, for example, in *Meese v. Keene*, 481 U.S. 465 (1987), the Court found that a plaintiff who wished to show films that the government had labeled "political propaganda" had standing to challenge the label even though the proximate cause of the injury was the public's possibly hostile response to anyone who exhibited such material. *Id.* at 472-74. *See also Pitt News v. Fisher*, 215 F.3d 354, 360-61 (3d Cir. 2000) (traceability requirement met where regulation restricting advertisements was cause-in-fact of newspaper's lost revenue, even though the proximate cause was third parties' decision to stop buying advertisements); *Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486, 493-94 (3d Cir. 1999) (plaintiff not hired by employer had standing to challenge government regulations that encouraged affirmative action, even though adverse employment decision was actually made by private employer and not specifically mandated by the challenged regulations).[3]

Here, the NYPD's discriminatory surveillance practices are plainly a "but for" cause of Plaintiffs' injuries: Absent those practices, there would have been nothing for the Associated Press to investigate and expose. That obvious fact resolves the "fairly traceable" inquiry and establishes standing.

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[3] *See also McKay v. Horn*, 529 F. Supp. 847, 854-55 (D.N.J. 1981) (injury was fairly traceable to federal statute even though injury was directly caused by New Jersey legislature's decision to enact a state statute in response to federal statute); *Camden v. Plotkin*, 466 F. Supp. 44, 48-50 (D.N.J. 1978) (plaintiffs had standing to challenge methodology used by Census Bureau because undercounting of minorities might result in reduced federal aid, even though third-party agency was responsible for making such cuts).

Even under the proximate cause standard that the district court erroneously incorporated into the "fairly traceable" inquiry, Plaintiffs' injuries could be readily traced to the NYPD's surveillance practices. That is because, as this Court has made clear, "[a]n intervening cause which is foreseeable or a normal incident of the risk created by a tortfeasor's action does not relieve the tortfeasor of liability." *Thabault v. Chait*, 541 F.3d 512, 526 (3d Cir. 2008). Here, it was of course entirely foreseeable that a massive, discriminatory surveillance operation, employing countless undercover officers and informants across four states, would attract the attention of investigative reporters and the public.[4] Indeed, the very purpose of the press in our democracy –the reason it secures strong First Amendment protections – is that it informs the people about governmental policies and enables the public to challenge official misconduct. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972) (the press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . .") (internal citation omitted). Tellingly, neither the City nor the court below cited a single case for the proposition that the predictable (and salutary) involvement of the press undermines standing with regard to a lawsuit against the actors whom the press was covering.

[4] After all, the scope of this program was staggering. *See, e.g.*, JA-41–43 (¶47) (describing the NYPD's seeking to put an informant inside every mosque within a 250-mile radius of New York City, using mosque crawlers to monitor thousands of prayer services, and deploying undercover officers to surveil bookstores, bars, cafes, and nightclubs in neighborhoods believed to be frequented by Muslims).

2. The Undisputed Existence of a Redressable Harm Proves Causation as a Matter of Law.

It is uncontested that a favorable ruling enjoining the NYPD's unconstitutional surveillance practices would redress Plaintiffs' harms. That fact conclusively demonstrates that those injuries are "fairly traceable" to the NYPD's actions. While "traceability" and "redressability" are traditionally listed as two separate requirements of standing, "the 'fairly traceable' and 'redressability' components for standing overlap and are 'two facets of a single causation requirement.'" *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013) (quoting *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984)); *accord Allen,* 468 U.S. at 759 n.24 (Where "[t]he relief requested by the plaintiffs [is] simply the cessation of the allegedly illegal conduct . . . the 'redressability' analysis is identical to the 'fairly traceable' analysis."); *Dynalantic Corp. v. Dep't of Def.*, 115 F.3d 1012, 1017 (D.C. Cir. 1997) (calling the two standing requirements "two sides of a causation coin"); *Pub. Interest Research Grp. v. Powell Duffryn Terminals*, 913 F.2d 64, 73 (3d Cir. 1990). *Cf. Duquesne Light Co. v. U.S. Env't Prot. Agency*, 166 F.3d 609, 613 (3d Cir. 1999) (Having failed to establish that the injury was fairly traceable to defendants' conduct, plaintiff necessarily failed to satisfy the redressability prong as well); *Lac Du Flambeau Band v. Norton*, 422 F.3d 490, 501 (7th Cir. 2005) (same). Plaintiffs have encountered no case suggesting otherwise.

Defendant has never disputed that a judicial order declaring the NYPD's surveillance practices unconstitutional would redress Plaintiffs' injuries in their entirety. This demonstrates as a matter of logic and law that the surveillance practice caused Plaintiffs harm. By contrast, no judicial order directed at the Associated Press could accomplish that result: even if somehow constitutional, a gag order barring the Associated Press from further reporting on the NYPD's

surveillance conduct could not reverse the facially discriminatory policy, expunge from the public memory the existence of those programs, or erase the harms that have flowed from the NYPD's actions.

The sole case on which the district court relied, *Duquesne Light Co. v. U.S. Env't Prot. Agency*, *supra*, does not remotely support its conclusion that Plaintiffs' injuries are not fairly traceable to the City's conduct. In *Duquesne Light*, the plaintiffs challenged the Environmental Protection Agency's approval of a state regulatory plan that reduced the plaintiffs' emission reduction credits. However, the EPA lacked authority to disallow the state plan because that plan was more stringent than what federal law required. *Id.* at 613. Accordingly, the Court found that the injury was traceable not to the EPA (which had no choice but to approve the plan and played a purely ministerial role), but rather to the state agency that enacted the plan. *Id.* Here, by contrast, the NYPD's conduct was plainly a but-for cause of the Plaintiffs' injuries: the Associated Press could not have exposed a surveillance policy that did not exist, and only an order enjoining the NYPD's practices would provide full relief.

3. The District Court Ignored Allegations Demonstrating The City's Public Ratification of the Discriminatory Program Even After the Associated Press Disclosures.

Finally, the district court's conclusion suffers from a glaring factual flaw: the court inexplicably ignored the role that City officials played in broadcasting the existence of the surveillance program. As the record reveals, *see* JA-53–58, after the Associated Press published its initial expose, the City did not deny or even refuse to comment upon the articles. To the contrary, Mayor Bloomberg and Police Commissioner Kelly offered a full-throated defense of those practices, confirming that the NYPD surveilled Muslim communities even absent allegations

of wrongdoing, JA-59–62, that such surveillance extended across state boundaries, JA-63–69, and that the NYPD undertook a "demographic study" of Muslims in Newark, JA-54–56. Other police officials confirmed that the NYPD targeted individuals from predominantly Muslim "ancestries of interest" and "countries of concern," and that the NYPD surveilled mosques and commercial establishments to discover where "Islamics radicalized toward violence would hide." JA-70–202. In so doing, the City reaffirmed the deeply stigmatizing and unconstitutional premise of the program that was the principal source of Plaintiffs' injuries – namely, that Muslims such as Plaintiffs are properly objects of suspicion simply on account of their religion, and are properly singled out by law enforcement on that basis. *See supra* Section I(A)(2).

II. THE COMPLAINT'S NON-CONCLUSORY ALLEGATIONS THAT THE NYPD HAS ENGAGED IN A FACIALLY DISCRIMINATORY POLICY OF SUSPICIONLESS SURVEILLANCE OF MUSLIMS IN NEW JERSEY STATES A PLAUSIBLE CLAIM OF RELIGIOUS DISCRIMINATION UNDER THE EQUAL PROTECTION CLAUSE AND THE FIRST AMENDMENT.

Plaintiffs set forth ample, non-conclusory allegations demonstrating that the NYPD adopted a facially discriminatory policy to surveil Muslims on the basis of their religion, which plainly state claims for relief under the Equal Protection Clause and the First Amendment. In summarily dismissing these substantial constitutional claims pursuant to Fed. R. Civ. P. 12(b)(6), the district court erred in three ways.

First, the court failed to examine the Complaint's well-pled allegations to assess whether they create the reasonable inference that the City is liable for maintaining a discriminatory policy, as the court was required to do under this Court's interpretation of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic*

Corp. v. Twombly, 550 U.S. 544 (2007). Instead, the district court simply adopted the City's explanation for its discrimination, contravening elementary pleading standards and short-circuiting the mandatory strict-scrutiny inquiry that governs facially discriminatory classifications like this one.

Second, contrary to the district court's perspective, this is unlike a *Bivens* suit against individual supervisory defendants that requires proof of an individualized discriminatory intent, as in *Iqbal*; rather, it is a suit against a city under *Monell v. City of New York Dep't. of Social Services*, 436 U.S. 658 (1978), which imposes liability for a municipality's discriminatory policy and custom, regardless of any decision-maker's state of mind.

And *third*, the district court erroneously applied *Iqbal*'s analysis of challenges to facially neutral policies with disparate impacts to this challenge to a facially discriminatory policy. Neither *Iqbal* nor the law of disparate impact generally has any bearing on Plaintiffs' challenge to a policy that expressly discriminates against a protected class, and is thus presumptively unconstitutional. As a result of these errors, the district court ratified express religious discrimination in contravention of decades of Equal Protection and Religion Clause jurisprudence.

A. The Complaint's Non-Conclusory Allegations State A Plausible Claim For Discriminatory Treatment Under The Equal Protection Clause And The First Amendment

In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6*), Iqbal* requires the court to determine whether a complaint has "sufficient factual matter, accepted as true to 'state a claim for relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 677 (2009) (quoting *Twombly*, 550 U.S. at 570 (2007)). This Court

mandates a three-step process for evaluating the sufficiency of a complaint in light of these precedents:

> [1] [O]utline the elements a plaintiff must plead to state a claim for relief. [2] [P]eel away those allegations that are no more than conclusions and thus not entitled to the assumption of truth. [3] [L]ook for well-pled factual allegations, assume their veracity, and then 'determine whether they plausibly give rise to an entitlement to relief.'

Bistrian v. Levi, 696 F.3d 352, 365 (3d Cir. 2012) (quoting *Iqbal*, 556 U.S. at 679); *see also Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 73 (3d Cir. 2011). In the third step, the court must determine whether, "under any reasonable reading of the complaint," the court is able to "'draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Fowler v. UMPC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678). *See also Badger v. City of Phila. Office of Prop. Assessment*, No. 13-4637, 2014 U.S. App. LEXIS 6983 at *4-5 (3d Cir. April 15, 2014). Of course, pleading "plausibility" does not require demonstrating that a claim is probable. *Twombly*, 550 U.S. at 556; *Iqbal*, 556 U.S. at 678.

1. A Facially Discriminatory Government Classification Violates the Equal Protection Clause Regardless of a Defendant's Animus or Antipathy.

The complaint's gravamen is that the City of New York adopted a facially discriminatory policy that triggers municipal liability under *Monell*. Expressly discriminatory classifications state a claim under the Equal Protection Clause and trigger strict scrutiny. *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999); *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Further, "[a] showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification." *Wayte v. United States*, 470 U.S. 598, 608 n.10

(1985) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880).[5] In challenges to affirmative action and racial gerrymanders, for example, it is well understood that facially discriminatory policies can and will be invalidated even absent evidence of bad intent. *See Fisher v. University of Texas*, 133 S. Ct. 2411, 2419 (2013) ("Any official action that treats a person differently on account of his race or ethnic origin is inherently suspect."); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute. Express racial classifications are immediately suspect.") (internal citations omitted).

There is no doubt here that Plaintiffs are members of a protected class based upon their religion. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (listing distinctions based on religion, like those based on race or alienage, as "inherently suspect"); *Tolchin v. Supreme Court*, 111 F.3d 1099, 1114 (3d Cir. 1997) (identifying "suspect distinctions such as race, religion or alienage"); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F.Supp.

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[5] The Supreme Court has explained that an Equal Protection claim requires a showing of purposeful government discrimination, *Washington v. Davis*, 426 U.S. 229, 240 (1976) – *i.e.*, that the challenged actions occurred "'because of', and not merely 'in spite of,'" a protected characteristic. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Yet unlike cases which merely allege a discriminatory impact and therefore require a more elaborate inquiry to assess whether discriminatory purpose was "a motivating factor" for the government action, *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977), cases involving facially discriminatory classifications categorically demonstrate discriminatory purpose as a matter of law; *Miller v. Johnson*, 515 U.S. 900, 904-905 (1995); *see also Antonelli v. New Jersey*, 419 F.3d 267, 274 (3d Cir. 2005) ("Intentional discrimination can be shown when… a law or policy explicitly classifies citizens on the basis of [a protected characteristic]") (citing *Hunt v. Cromartie*, 526 U.S. 541 (1999)).

2d 961, 976 (N.D. Ill. 2003) (striking down zoning ordinance on equal protection grounds because it "classifie[d] on the basis of religion").

The court's inquiry should have focused on whether Plaintiffs sufficiently alleged that Defendant's policy classified them "differently from similarly situated members of an unprotected class." *Bradley v. United States*, 299 F.3d 197, 206 (3d Cir. 2002). Such facially discriminatory policies are presumptively unconstitutional regardless of the decision-maker's subjective motivations for adopting the challenged policy, as an invidious classification itself causes "stigma or dishonor" and "contravenes equal protection principles." *Powers v. Ohio*, 499 U.S. 400, 410 (1991). Even benign justifications for racial classifications are "constitutionally suspect." *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 223 (1995) (internal citation omitted); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (classification based on "benign" purpose subject to strict scrutiny); *see also Ferrill v. Parker Group, Inc*., 168 F.3d 468, 473 n.7 (11th Cir. 1999) ("[I]ll will, enmity, or hostility are not prerequisites of intentional discrimination").

Nor do discriminatory classifications escape strict scrutiny merely because the government asserts a law-enforcement justification. *See Johnson v. California*, 543 U.S. 499, 505-06 (2005) (racial classifications for penological purposes, such as controlling gang activity in prison, subject to strict scrutiny); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (Law enforcement need "does not justify stopping all Mexican-Americans to ask if they are aliens"). Targeting individuals for investigation based on a protected characteristic is, like any other discriminatory law enforcement activity, presumptively unconstitutional and subject to strict scrutiny. As this Court has explained:

> Although it may be assumed that the state may arrange for photographing all suspicious persons entering the bank, it does not follow that its criterion for selection

> may be racially based, in the absence of a proven compelling state interest.

Hall v. Pa. State Police, 570 F.2d 86, 91 (3d Cir. 1978) (internal citation omitted).

Once a government policy that classifies individuals based on a protected characteristic is identified, strict scrutiny follows. Strict scrutiny will ultimately require – *after* discovery – that the City justify its presumptively unlawful policy by demonstrating that the policy is "narrowly tailored to serve a compelling government interest." *Johnson*, 543 U.S. at 505. But strict scrutiny does not permit the district court to hypothesize or even entertain justifications at the pleading stage. Rather, at this threshold stage, the district court is only to ascertain whether the complaint alleged "'enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary elements'" of a claim for relief. *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556). If courts were permitted to accept a defendant's hypothesized justification for misconduct at the pleading stage, no case would survive a motion to dismiss.

2. A Government Policy that Purposefully Discriminates on the Basis of Religion or Signals Disapproval of a Particular Religion Violates the Free Exercise and Establishment Clauses of the First Amendment.

Plaintiffs assert violations of both the Establishment Clause of the First Amendment, which provides that governments shall "make no law respecting an establishment of religion," and the Free Exercise Clause, "prohibiting the free exercise thereof." U.S. Const. Amend. I. To state a Free Exercise claim, a plaintiff must show that a government policy or practice discriminates "against some or all religious beliefs." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 542 (1993). "If the law is not neutral (*i.e.*, if it

discriminates against religiously motivated conduct) or is not generally applicable (*i.e.*, if it proscribes particular conduct only or primarily when religiously motivated), strict scrutiny applies and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest." *Tenafly Eruv Ass'n Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002). The NYPD's express policy of targeting Muslims based upon their faith alone both targets religiously motivated conduct – such as attending mosques and operating religious schools – and applies to those activities that are religiously motivated – such as participating in Muslim-affiliated student groups. JA-37–44 (¶¶36-52). Plaintiffs' complaint thus plainly states a claim under the Free Exercise clause compels strict judicial scrutiny.

The Establishment Clause, barring government approval or disfavor of a particular religion, also demands government "neutrality." *Tenafly Eruv*, 309 F.3d at 175 n.39. Thus, a plaintiff may state a claim under the Establishment Clause by showing that the challenged government policy or practice signals disapproval, symbolically or otherwise, of a particular religion. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 284 (3d Cir. 2011) (citing *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 100 (3d. Cir. 2009)). Government policies that grant "a denominational preference" or deny equal treatment to "small, new or unpopular denominations," are subject to strict scrutiny. *Larson v. Valente*, 456 U.S. 228, 245 (1982). Here, the NYPD's program classified and stigmatized all members of New Jersey's Muslim community as potential threats, and the City publicly defends its sweeping policy as documenting "the likely whereabouts of terrorists," JA-45–47 (¶¶57-62). Its express policy to deny equal treatment to Muslims boldly trumpets government disfavor of Islam. Hence, Plaintiffs' allegations easily demonstrated a claim under the Establishment Clause.

As with the Equal Protection Clause, plaintiffs alleging violations of the Free Exercise or Establishment Clause need not show that the government policy was motivated by ill will or animus. *Indian River Sch.*, 653 F.3d at 284 (Under Establishment Clause, "'*regardless of its purpose*,'" the government practice "'cannot symbolically endorse or disapprove of religion.'") (internal citation omitted and emphasis added); *Shrum v. City of Coweta, Oklahoma*, 449 F.3d 1132, 1145 (10th Cir. 2006) ("[T]he Free Exercise Clause is not confined to actions based on animus"). As in Equal Protection jurisprudence, constitutional injury flows from the classification itself. *Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring) ("Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less for religious line-drawing than for racial."). Thus, the City's defense of its discriminatory policy at this stage of the proceedings – that it is justified by well-intentioned law-enforcement imperatives – cannot displace the constitutional requirement of closely examining the policy for whether it is narrowly tailored to meet a compelling government interest.

3. Because the Complaint's Non-Conclusory Allegations Plausibly State Discriminatory Treatment Claims, the District Court Erred in Accepting Any Explanation for the City's Discriminatory Policy at the Pleading Stage.

The Complaint sets forth numerous, non-conclusory allegations demonstrating that the NYPD maintains an explicit, formalized policy and practice of targeting Muslims in New Jersey and elsewhere for surveillance and investigation based upon their faith, and absent any individualized suspicion of criminal activity. *See* JA-37–48 (¶¶36-65). The district court simply failed to

evaluate these allegations against the relevant Equal Protection and First Amendment law. *See Bistrian*, 696 F.3d at 365.

Specifically, the Complaint asserts – relying on the NYPD's own, publicly disclosed documents – that the NYPD's surveillance program in New Jersey on its face targets Muslim, and only Muslim, businesses, residents, organizations, mosques, and schools. JA-38, 39–40 (¶¶38, 42-44). It focuses solely on hubs of Muslim life in Newark and Central New Jersey. JA-38, 44 (¶¶38, 51). And Defendant's policy is to conduct surveillance based entirely on a target's status as a Muslim, not because of any criminal suspicion. JA-24 (¶¶2, 3).

The Complaint also alleges that Defendant excludes ethnic communities of Egyptian Coptic Christians, Syrian Jews, and Catholic and Orthodox Christian Albanians from the surveillance program in order to focus exclusively on their Muslim segments. JA-39-40 (¶¶42-44). As such, the Complaint states that Plaintiffs are treated differently not merely from members of unprotected classes, but also differently from similarly situated members of other *protected* classes. The Complaint further alleges that individual and organizational Plaintiffs alike are targeted based solely on their faith. JA-26–27 (¶12) (targeting of Plaintiff Hassan's mosques); JA-31–33, 13 (¶¶23-26, 30) (targeting of Rutgers University MSA chapters); JA-35–37 (¶¶31-34) (targeting and photographing private grade school run by Plaintiff Abdur-Rahim).[6]

[6] The Complaint also thoroughly describes the methods the NYPD uses to target Muslim individuals and associations. For example, the NYPD takes photos and videos of mosques, congregants, and congregants' license plates. JA-38–39, 41 (¶¶39, 41, 46). It uses undercover "rakers" to surveil locations such as bookstores and cafes in communities the NYPD has identified to be predominantly Muslim, JA-41-43 (¶47), and deploys informants it calls "mosque crawlers" to monitor sermons and conversations in mosques and report back to the NYPD. *Id.* The NYPD prepares reports and maps of Muslim communities. JA-25, 27, 38, 41–

These well-pled allegations, all presumed to be true at the motion to dismiss stage, *Bistrian*, 695 F.3d at 365, more than suffice to "draw the reasonable inference that the defendant is liable," *Fowler*, 578 F.3d at 210, under both the Equal Protection Clause and the First Amendment. Indeed, the district court's decision itself appears to acknowledge that the motive for the NYPD's surveillance policy was at least in part discriminatory toward Muslims: "the motive for the Program was not *solely* to discriminate against Muslims." JA-22 (emphasis added). But express discrimination – even if only a part of the City's motivation – established, as a matter of law, that Plaintiffs stated a claim. *See Arlington Heights*, 429 U.S. at 2465-66 (discriminatory purpose need only be "a motivating factor" not the "dominant" or "primary" one).

Rather than assessing Plaintiffs' allegations to see whether they plausibly supported the claim of purposeful discrimination, the district court instead copied, nearly verbatim, the City's self-serving explanation for its facially discriminatory conduct. *Compare* Dkt. 15-1 at 7 ("Plaintiffs allege that the Program was initiated soon after the September 11th terrorist attack. Thus, the initiation of the program was more likely in response to the terrorist threat.") *with* JA-21("The more likely explanation for the surveillance was a desire to locate budding terrorist conspiracies. The most obvious reason for so concluding is that surveillance program began just after the attacks of September 11, 2001."). Thus, the court implicitly found that the City's explanation for its religious classification, which by definition requires the application of strict scrutiny, satisfied that heavy burden at the pleading stage. And it did so without any opportunity for the Plaintiffs to show

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43, 44, 45–46 (¶¶5, 12, 37, 47, 53, 58). And it deploys officers to pose as students to monitor how often MSA members pray. JA-43 (¶50).

that, in fact, the surveillance program was not narrowly tailored to serve a compelling governmental interest.[7]

This finding stands in direct contravention of repeated admonitions by the Supreme Court that courts must not accept justifications for discriminatory classifications at the pleading stage because, "absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race." *Richmond v. J.A. Croson*, 488 U.S. 469, 493; *see also Fisher*, 133 S. Ct. at 2421 ("Strict scrutiny does not permit a court to accept a [defendant's] assertion that it[]… uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.") (internal quotation omitted).

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[7] In effect, the court erroneously applied rational basis scrutiny to Equal Protection and First Amendment claims. While the "exacting standard [of strict scrutiny] has proven automatically fatal in almost every case," *Fisher*, 133 S.Ct. at 2422 (internal quotation omitted), rational basis scrutiny requires far less. "[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996) (striking down Colorado state law nullifying and banning protections for gays and lesbians). But even if rationality review applied here – which of course it does not – the City's justification for its policy would fail, because the NYPD's policy, like Colorado's, has the "peculiar property of imposing a broad and undifferentiated disability on a single named group." 517 U.S. at 632. Further, "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Id.*

The City will have an opportunity at trial, based on a yet-to-be developed evidentiary record, to show that its facially discriminatory policy satisfies strict scrutiny. Yet by summarily resolving that dispute in the City's favor (and ultimately based on invidious stereotypes, *see infra* II(C)), the district court disregarded the principle that all factual averments must be taken as true and the requirement that complaints be viewed in the light most favorable to the plaintiff. *See Mandel v. M&Q Packaging Corp.*, 706 F.3d 157, 263 (3d Cir. 2013). The choice to accept the City's justification for its policy as "more likely" than Plaintiffs' well-pled allegations demonstrating the existence of a law enforcement program that singled out Muslims, likewise runs afoul of the Supreme Court's admonition that "[t]he plausibility standard is not akin to a 'probability requirement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555); *Braden v. Wal-Mart Stores Inc.*, 588 F.3d 585, 596 (8th Cir. 2009) ("[r]equiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges . . . would impose the sort of 'probability requirement' at the pleading stage which *Iqbal* and *Twombly* explicitly reject." (internal citations omitted). *See also Watson Carpet & Floor Covering, Inc. v. Mohawk Indus.*, 648 F.3d 452, 458 (6th Cir. 2011) ("Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage."). This, too, is a reversible error.

B. *Iqbal*'s Holding Regarding Individual Supervisory Liability Under *Bivens* Is Inapposite to Plaintiffs' Claims of Municipal Liability Based on a Facially Discriminatory Policy.

The district court rested its brief analysis of Plaintiffs' substantive claims for relief on an analogy to the Supreme Court's decision in *Iqbal*. Believing that this case and *Iqbal* "grow out of the same tensions between security and the treatment of Muslims" arising after September 11, 2001, the district concluded that *Iqbal* is "particularly instructive" in assessing Plaintiffs' entitlement to relief. JA-21. But

the comparison to *Iqbal* is inapt. *Iqbal*'s analysis is instructive only insofar as it is fundamentally distinguishable from the substantive discrimination claims Plaintiffs present here. Nothing in that decision – including its references to the attacks of September 11th – justifies the overt discrimination against Muslims as a class that is at issue here.

1. *Iqbal*'s Dismissal of Claims Against Individual *Bivens* Defendants for Failure to Plausibly Plead their Discriminatory State of Mind is Inapposite to Plaintiffs' *Monell* Claims.

Plaintiffs allege that the City of New York is liable for the adoption of an unconstitutional "policy or custom" under 42 U.S.C. § 1983 and *Monell*, *supra*. Under *Monell*, if a municipality's policy or custom has an unlawful purpose and effect, the municipality is liable without regard to the intent of individual decision-makers; *mens rea* is irrelevant. *Monell*, 436 U.S. at 694 ("it is when execution of a government's policy or custom … inflicts the injury that the government as an entity is responsible under § 1983"). Framed another way, "[t]he formulation of policies is generally regarded as an intentional act" that obviates the need to show an additional or separate "intentional course of conduct" by individual policymakers. *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1089 (3d Cir. 1991) (Sloviter, J. concurring).

The district court neither mentioned *Monell*, nor analyzed Plaintiffs' claims under its well-established framework. Instead, it reasoned that because Mr. Iqbal's discrimination claims against high-level officials were not plausible, neither were Plaintiffs' against the City. In doing so, it ignored fundamental differences between the claims alleged in the two cases. For the individual defendants in *Iqbal* to be liable under *Bivens* for the implementation of a facially neutral policy, the Supreme Court held that the plaintiff had to plausibly allege that they *personally*

harbored discriminatory intent. *Iqbal*, 556 U.S. at 676. The Court upheld the dismissal of the plaintiff's claim precisely because the complaint failed to allege facts plausibly establishing the supervisory defendants' discriminatory state of mind. *Id*. at 684.

Of course, had Plaintiffs here sought damages pursuant to § 1983 against then-Mayor Michael Bloomberg or Police Commissioner Raymond Kelly in their individual capacities, *Iqbal* would be instructive. But Plaintiffs did not bring such claims, and the City of New York has no "state of mind" or subjective intent for the court to evaluate. Uniform precedent – ignored by the district court – demonstrates that the existence of a discriminatory policy is itself sufficient to establish municipal liability. *See Olivieri v. Country of Bucks*, 502 Fed. Appx. 184, 189 (3d Cir. 2012), *Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996), *Nykiel v. Borough of Sharpsburg Police Dep't*, 778 F. Supp. 2d 573, 586 (W.D. Pa. 2011). Plaintiffs' claims should have been allowed to proceed.

2. *Iqbal*'s Dismissal of a Disparate Impact Claim Arising From a Facially Neutral Policy in No Way Supports Dismissal of Plaintiffs' Unlawful Treatment Claims Arising from a Facially Discriminatory Policy.

Iqbal likewise provides no support for the district court's conclusion that the events of September 11th justify an overtly discriminatory classification of Muslims. *Iqbal* considered the effects of a *specific* investigation into a *particular* terrorist attack. As the Court took pains to point out, the defendants had not targeted Muslims as a group, but only individuals who were illegally present in the United States and who had been classified as "high interest" with "potential connections to those who committed terrorist acts," *Iqbal*, 556 U.S. at 682 – a status shared by none of the Plaintiffs here.

Against the backdrop of a *bona fide*, neutral criminal investigation, Mr. Iqbal's allegations of defendants Ashcroft and Mueller's discriminatory purpose were "threadbare" and "formulaic." *Iqbal*, 556 U.S. at 663. The *Iqbal* complaint did "not show, or even intimate that [Ashcroft and Mueller] purposefully housed detainees in [harsh conditions]" or that they had "labeled [Iqbal] as a person 'of high interest' for impermissible reasons." *Id.* at 683. In the wake of September 11th, the Court found it "no surprise that a legitimate policy directing law-enforcement to arrest and detain individuals because of their suspected links to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 682. In *Iqbal*'s particular context, the unfolding of a lawful criminal investigation with a discriminatory impact on Muslims was a more "obvious alternative explanation" for plaintiffs' arrest than an otherwise unsubstantiated inference of individual purposeful discrimination. *Id.*

Here, in obvious contrast, the NYPD surveillance program does not even purport to be connected to a specific criminal investigation. Its express policy is to target Muslims alone, without even the barest suspicion of criminality. Discriminatory purpose is the very essence of the City's policy and is thus actionable without an inquiry into discriminatory intentions, which are self-evident. *See Wayte v. United States*, 470 U.S. at 609 n.10; *see supra* Section II(A).

C. The District Court's Uncritical Acceptance of the City's Justification for Discrimination at the Pleading Stage Undermines Elementary Civil Rights Protections.

The City attempted to justify the NYPD's discriminatory policy at the motion-to-dismiss stage by a bare assertion: because one specific group of Muslims executed the tragic September 11th attacks, then the undifferentiated

surveillance of Plaintiffs and all other Muslims is constitutionally permissible. *See* Dkt. 15-1 at 7. The district court's uncritical acceptance of this assertion at the pleading stage is not only procedural error, *see supra* at I(A)(3), but it perpetuates the very invidious stereotypes – and resulting discrimination – that Plaintiffs seek to challenge in this case.

The City's justification for wholesale discrimination appears ultimately premised on an ugly, yet all-too-common, stereotype about Muslims: that they have a propensity toward terrorism.[8] This is a discredited and illegitimate law enforcement framework. As the New Jersey Attorney General's office explained,

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[8] This connection, no better than a presumption that blacks have a propensity to commit more crime, is both impermissible and empirically false, as a trial would reveal. There is "overwhelming [empirical] support for two propositions: 1) There is no profile of the type of person who becomes a terrorist; . . . and 2) . . . Islam itself does not drive terrorism." Faiza Patel, Brennan Center For Justice, *Rethinking Radicalization* 8 (2011). For example, a 2008 empirical study by the British national security service (MI5) found that "[f]ar from being religious zealots, a large number of those involved in terrorism do not practise their faith regularly. Many lack religious literacy and could actually be regarded as religious novices." *See* Alan Travis, *MI5 Report Challenges Views on Terrorism in Britain*, Guardian, Aug. 20, 2008. Former CIA case officer and psychologist, Marc Sageman, came to similar conclusions in his review of 500 terrorism cases, Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-First Century* 31 (2008), as did the RAND Corporation, when it found that attraction to terrorist groups "appears to have had more to do with participating in action than with religious [motivation]," Brian Michael Jenkins, RAND Corp., *Would-Be Warriors: Incidents of Jihadist Terrorist Radicalization in the United States since September 11, 2001* 3 (2010), *available at* http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP292.pdf. Moreover, the RAND Corporation study found that "individuals turning toward violence would find little support in the [American] Muslim community." *Id.* at 5. "In fact, the most recent research suggests that a well-developed Muslim identity actually counteracts *jihadism*." Patel, Rethinking Radicalization, *supra* at 10.

after its investigation of unlawful racial profiling on the New Jersey Turnpike, such tautological considerations are impermissible because: "[m]any of the facts that are relied upon to support the relevance of race and ethnicity in crime trend analysis … only demonstrate the flawed logic of racial profiling, which largely reflects *a priori* stereotypes that minority citizens are more likely than whites to be engaged in certain forms of criminal activity." Peter Verniero & Paul H. Zoubek, *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling* 66 (1999), *available at* http://www.state.nj.us/lps/intm_419.pdf.[9] Reliance on such generalizations, the Attorney General warned, "ha[s] been used to grease the wheels of a vicious cycle — a self-fulfilling prophecy." *Id*. at 68.

The City here relies upon just such *a priori* stereotypes, but these kinds of assumptions have been consistently rejected by courts adjudicating similar claims of expressly discriminatory law enforcement policies. Thus, in ruling that the City's "stop-and-frisk" program was racially discriminatory, the court rejected the City's suggestion that law-abiding members of some "racial groups have a greater tendency to appear suspicious than members of other racial groups." *Floyd v. City of New York*, 959 F. Supp. 2d 540, 587 (S.D.N.Y. 2013). The court astutely observed:

> Rather than being a defense *against* the charge of racial profiling, however, this reasoning is a defense *of* racial profiling. To say that black people in general are somehow more suspicious-looking, or criminal in appearance, than white people is not a race-neutral

[9] *See also* U.S. Dep't of Justice, Civil Rights Div., *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* 4 (2003), *available at* http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf ("[A]ffirmative use of such generalized notions" regarding race-based discrepancies in crime rates, in law enforcement "tantamount to stereotyping. . . . This is the core of 'racial profiling' and must not occur.").

> explanation for racial disparities in NYPD stops: it is itself a racially biased explanation.

Id. (emphasis in original). *See also Melendres* v. *Arpaio*, No. PHX-CV-07-02513-GMS, 2013 U.S. Dist. LEXIS 73869, at *241 (D. Ariz. May 24, 2013) (striking down policy of focusing on Hispanic persons in immigration enforcement because "there is no legitimate basis for considering a person's race in forming a belief that he or she is more likely to engage in a criminal violation and the requisite 'exact connection between justification and classification,'. . . . is lacking") (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)).

Here, by accepting the City's illegitimate justification for its policy of discrimination, the district court impermissibly ratified the very discrimination that Plaintiffs here seek to challenge. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect."). Indeed, the district court's reasoning, if left standing, dooms any claim of discrimination on the basis of religion (or another protected characteristic), so long as the defendant offers a rationalization for its conduct in its motion to dismiss that strikes the court as potentially acceptable.

Indeed, the district court's reasoning parallels the long-discredited logic of the infamous *Korematsu* case, in which the Supreme Court uncritically accepted the government's claim of military necessity rather than strictly scrutinizing the factual validity of the government's rationale for its overtly discriminatory policy. *Compare Korematsu v. United States*, 323 U.S. 214, 223 (1944) ("Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire [and] because the properly constituted military authorities . . . felt constrained to take proper security

measures"); *with* JA-21–22 ("the motive for the Program was not solely to discriminate against Muslims, but rather to find Muslim terrorists hiding among ordinary, law-abiding Muslims."). Neither assertion should be left untested.

This is why *Korematsu* now "stands as a caution that in times of international hostility and antagonism, our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused." *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N. D. Cal. 1984). It is this Court's role to ensure that government discrimination against disfavored groups – especially when based on invidious stereotypes – cannot endure. These Plaintiffs, like all civil rights plaintiffs that have come before them, and that will come after, deserve no less.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the Bar of the Court of Appeals for the Third Circuit.

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I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief (as indicated by word processing program, Microsoft Word) contains 13,904 words, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that I am filing the foregoing Brief of Appellant and the Joint Appendices electronically via this Court's ECF system and am serving the forgoing Brief of Appellant, and the accompanying Joint Appendix, via this Court's ECF and by electronic mail, upon all counsel of record for the Defendants.

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