UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

ERIC H. HOLDER, ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Defendants.

13 Civ. 6951 (RA)

ECF CASE

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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B	Declaration of Christopher M. Piehota, Director for Operations for the Terrorist Screening Center, *Latif v. Holder*, No. 3:10-cv-00750-BR (D. Or. Nov. 17, 2010)
C	Declaration of Cindy A. Coppola, Acting Deputy Director for Operations of the Terrorist Screening Center, *Arjmand v. Department of Homeland Security*, No. 12-71748 (9th Cir. Feb. 19, 2013)
D	*Audit of the Federal Bureau of Investigation's Management of Terrorist Watchlist Nominations*, United States Department of Justice Office of the Inspector General, March 25, 2014
E	*Ibrahim v. Department of Homeland Security*, No. C 06-00545 WHA, Findings of Fact, Conclusions of Law, and Order for Relief (N.D. Cal. Feb. 6, 2014)
F	*Mohamed v. Holder*, No. 11-1924, slip op. (4th Cir. May 28, 2013)
G	*Five Years After the Intelligence Reform and Terrorism Prevention Act (IRTPA): Stopping Terrorist Travel*, *Hearing Before the S. Comm. on Homeland Sec. & Gov'tal Affairs*, 111th Cong. (Dec. 9, 2009) (statement of Timothy J. Healy, Director, Terrorist Screening Center)
H	Memorandum of Understanding on the Integration and Use of Screening Information to Protect Against Terrorism, September 16, 2003
I	Declaration of Cindy A. Coppola, Acting Deputy Director for Operations of the Terrorist Screening Center, *Latif v. Holder*, No. 3:10-cv-00750-BR (D. Or. Feb. 13, 2013)
J	Memorandum of Understanding on Terrorist Watchlist Redress Procedures, October 24, 2007
K	Supplemental Joint Status Report, *Latif v. Holder*, No. 3:10-cv-00750-BR (D. Or. Sept. 3, 2014)
L	Letter from Sarah S. Normand, Assistant United States Attorney, to Robert N. Shwartz, counsel for Plaintiffs, November 5, 2014
M	*Mohamed v. Holder*, No. 1:11-cv-00050 (AJT/TRJ), slip op. (E.D. Va. Oct. 30, 2014)

Defendants Eric H. Holder, James B. Comey, Jeh C. Johnson and Christopher M. Piehota (collectively, the "Agency Defendants") and twenty-five individual agent defendants (collectively, the "Special Agent Defendants," and collectively with the Agency Defendants, "Defendants")[1] have filed a motion to dismiss the official capacity claims ("OC Br.") in the First Amended Complaint, dated April 22, 2014 ("AC") filed by Plaintiffs Muhammad Tanvir, Jameel Algibhah, Naveed Shinwari and Awais Sajjad (collectively "Plaintiffs"). Twenty-three of the Special Agent Defendants also filed a separate motion to dismiss the claims Plaintiffs asserted against those defendants in their personal capacity ("PC Br."). Plaintiffs respectfully submit this single memorandum of law in opposition to Defendants' official and personal capacity motions to dismiss.[2]

PRELIMINARY STATEMENT

The policies and procedures surrounding the No Fly List are shrouded in secrecy. Individuals are placed on the No Fly List without notice and have no meaningful avenue to challenge that designation. This secrecy and lack of due process are the deliberate result of procedures and standards that the Agency Defendants have promulgated and maintained. The Special Agent Defendants took advantage of this opacity, pressuring Plaintiffs to inform on their own religious communities and abusing their own authority by placing or keeping Plaintiffs on the No Fly List when the facts did not warrant such treatment. As a result, the Defendants put

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[1] Pursuant to the Court's July 24, 2014 Order, Defendants First Name Unknown ("FNU") Tanzin, John Last Name Unknown ("LNU"), Steven LNU, Michael LNU, John Doe 1, John Doe 2 (who is proceeding as "John Doe 2/3"), John Doe 4, John Doe 5, John Doe 6, John Doe 10, John Doe 11, John Doe 12, and John Doe 13 are proceeding in the motion to dismiss phase of this litigation under the pseudonyms specified in the First Amended Complaint.

[2] For the Court's convenience, Appendix A specifies where each portion of Defendants' two briefs are addressed herein.

Plaintiffs in the untenable position of choosing between their First Amendment rights and their right to travel.

In their First Amended Complaint, Plaintiffs have brought and sufficiently pleaded broad constitutional claims challenging the lack of due process surrounding the No Fly List and the exploitation of the List by certain federal law enforcement agents to pressure Plaintiffs to become informants in violation of their constitutional and statutory rights. Defendants' motions to dismiss the First Amended Complaint are without merit and should be denied in all respects.

First, as other courts have held with respect to similar claims, this Court has jurisdiction over Plaintiffs' claims, which focus on actions by the Federal Bureau of Investigation ("FBI") and the Terrorist Screening Center ("TSC"), not on the ministerial actions of the Transportation Security Administration ("TSA"). *Second*, Plaintiffs Tanvir and Shinwari are entitled to injunctive relief because there remains Defendant-perpetuated uncertainty about their ability to board commercial airlines in the future. *Third*, *Bivens* and its progeny authorize Plaintiffs to seek money damages against the Special Agent Defendants in their personal capacities. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *Fourth*, the Special Agent Defendants are not entitled to qualified immunity: Plaintiffs have properly alleged the personal involvement of each Special Agent Defendant in actions which collectively violated Plaintiffs' clearly established constitutional and statutory rights. Each of these Defendants directly participated in the concerted efforts to retaliate against Plaintiffs for refusing to become informants. *Fifth*, as other courts have found, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), permits Plaintiffs to "obtain appropriate relief," including monetary damages from individual government agent defendants sued in their personal capacities. *Finally*, Mr. Tanvir's claims with respect to John Does 1 and 2/3 are timely,

because Mr. Tanvir's rights were violated as recently as November 2012, when he was denied boarding on a flight.

FACTUAL ALLEGATIONS

A. The No Fly List

The FBI is the principal agency that administers the TSC. AC ¶ 40. The TSC, in turn, develops and maintains the Terrorist Screening Database ("TSDB"), the federal government's ("Government's") repository of information about all individuals who are supposedly known to be or reasonably suspected of being involved in terrorist activity. *Id*. The No Fly List, a subset of the TSDB, is among the watchlists administered by the TSC. *Id*.

While the TSC maintains and distributes the No Fly List, it does not, on its own, generate the names on the List. Rather, it relies on "nominations" from agencies with investigative functions—primarily, the FBI. *See id.* ¶ 41. Although the TSC is expected to review each nomination to ensure that the derogatory information satisfies the No Fly List's placement criteria, in practice the TSC rarely rejects any of the names that FBI agents nominate to the No Fly List: fewer than one percent of all nominees were not placed on the watchlists for which they were nominated. *See id.* ¶ 47; Defendants' Objections and Responses to Plaintiff's First Set of Interrogatories 10-11, *Mohamed v. Holder*, 1:11-cv-00050-AJT-TRJ, Dkt. No. 91-3 (E.D. Va. Apr. 7, 2014), attached hereto as Exhibit A.[3] Nor does the TSA play any role in deciding who should be placed or kept on the No Fly List. The TSA and airline representatives are simply given access to the No Fly List and coordinate with the TSC to screen individual passengers before boarding aircraft. *Id.* ¶ 40.

[3] Exhibits A-M, cited herein, have been filed via ECF with this memorandum. A list of the Exhibits is included in the Table of Contents.

Among the various watchlists maintained by the TSC, the No Fly List imposes severe consequences on individuals: they are barred from boarding any aircraft for flights that originate from, terminate in, or pass over the United States. *Id.* ¶ 44. Indeed, individuals on the No Fly List are presumptively so dangerous that no amount of pre-boarding searches would be sufficient to address the threat that they supposedly pose.[4] *Id.* ¶ 45.

Yet, notwithstanding the significant burden that placement on the No Fly List imposes on an individual's ability to travel, the standard for inclusion on the List is opaque. The relevant statute requires that the individual "be a threat to civil aviation or national security." 49 U.S.C. § 114(h)(3)(A). The Government's court filings in other cases challenging placement on the No Fly List have stated vaguely that an individual must be a "known or suspected terrorist" and there must be some "derogatory information" that demonstrates that the individual "pose[s] a threat of committing a terrorist act with respect to an aircraft." AC ¶ 42; *see* Declaration of Christopher Piehota at ¶ 8, *Latif v. Holder*, No. 10-750 (D. Or. Nov. 17, 2010), attached hereto as Exhibit B; Declaration of Cindy Coppola at ¶ 12, *Arjmand v. Dep't of Homeland Sec.*, No. 12-71748 (9th Cir. Feb. 19, 2013), attached hereto as Exhibit C.[5]

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[4] Indeed, the Government has at its disposal other, less intrusive watchlists to protect aviation security. For instance, the Selectee List permits individuals to fly after especially thorough pre-boarding searches. AC ¶ 45. The Selectee List is not the subject of this lawsuit.

[5] In deciding a Rule 12(b)(6) motion to dismiss, "the Court may consider documents that are referenced in the complaint, documents that the plaintiffs relied on in bringing suit and that are either in the plaintiffs' possession or the plaintiffs knew of when bringing suit, or matters of which judicial notice may be taken." *In re Loral Space & Commc'ns Ltd. Sec. Litig.*, 01 Civ. 4388(JOK), 2004 WL 376442, at *2 (S.D.N.Y. Feb. 27, 2004) (citing, *inter alia*, *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)); *see also Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). A court may also consider "public documents of which the plaintiff has notice." *Brodeur v. City of New York*, No 04–CV–1859(JG), 2005 WL 1139908, at *3 (E.D.N.Y May 13, 2005) (citing *Cortec Indus., Inc v. Sum Holding L.P.*, 949 F.2d 42, 47–48 (2d Cir. 1991)); *see also Guo Hua Ke v. Morton*, 10 CIV. 8671 PGG, 2012 WL 4715211, at *3 (S.D.N.Y. Sept. 30, 2012) (same).

It is common and proper for this Court to take judicial notice of other court proceedings and filings. *See Faulkner v. Verizon Commc'n, Inc.*, 156 F. Supp. 2d 384, 391 (S.D.N.Y. 2001) (explaining that a court "may take judicial notice of pleadings in other lawsuits . . . as a matter of public record" (citations omitted)); *see also Sheppard v. Lee*, No. 10 Civ. 6696(GBD) (JLC), 2011 WL 5314450, at *1 n.2 (S.D.N.Y. Nov. 7, 2011) (taking

Procedural safeguards pertaining to the No Fly List, moreover, are nonexistent. There is no notice of placement, no way to learn the factual basis for placement on the No Fly List, and no meaningful opportunity to be heard or to challenge that placement. The Agency Defendants refuse to confirm or deny whether anyone, even United States citizens, has been placed or remains on the No Fly List. Individuals on the No Fly List are not provided with any notification of that designation until they are denied boarding passes and prevented from boarding aircraft. AC ¶¶ 52–54.

Not surprisingly, the opacity of the standard for inclusion on the No Fly List and the lack of procedural safeguards have created the opportunity for error and abuse. For example, the Department of Justice's Office of Inspector General found that, shortly after the attempted attack on a Northwest Airlines flight on December 25, 2009, many individuals were erroneously placed on the No Fly List. *See id.* ¶ 48; *Audit of the Federal Bureau of Investigation's Management of Terrorist Watchlist Nominations* 30–31, United States Department of Justice Office of the Inspector General, March 25, 2014, attached hereto as Exhibit D. On another occasion, the TSC accepted an FBI agent's nomination of a woman to the No Fly List even though that nomination was solely the result of the agent erroneously checking the wrong box on the nomination form, AC ¶ 49, and maintained that designation even after the error was discovered. *Ibrahim v. Dep't of Homeland Security*, No. 3:06-cv-0545 (WHA), Findings of Fact, Conclusions of Law, and Order for Relief at 9 (N.D. Cal. Feb. 6, 2014), attached hereto as Exhibit E.

The only program to provide any theoretical redress to those individuals erroneously or inappropriately placed on the No Fly List is the Department of Homeland Security's ("DHS") Traveler Redress Inquiry Program ("TRIP") and limited judicial review of TRIP determinations

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judicial notice of state court proceedings attached to the motion to dismiss in a § 1983 case) (Report and Recommendation).

by the courts of appeals. If the name of the individual seeking redress is on the No Fly List, DHS transfers the TRIP inquiry to the TSC. The TSC then "coordinates with" the agency that originally nominated the individual to the No Fly List, usually the FBI. *See* AC ¶ 58. The Government refuses to disclose the standard used to evaluate TRIP requests. *See id.* Individuals requesting redress through TRIP receive no information about the basis for placement on the No Fly List, who placed them on the List, or the agencies' review of their request. Such individuals also often do not receive any determination of their status, or any clear statement about whether they remain on the List. *Id.* For many of these reasons, TRIP was recently found to be unconstitutional. *See Latif v. Holder*, No. 3:10-cv-00750, 2014 WL 2871346, at *24 (D. Or. June 24, 2014).

There is no formal process for seeking a waiver to allow an individual on the No Fly List to fly. On occasion, certain individuals have been able to obtain one-time waivers, typically after being prevented from boarding a flight. *See* AC ¶ 55.

B. Informant Recruitment In American Muslim Communities And The FBI's Use Of The No Fly List

In addition to expanding terrorist watchlists, during the past decade the Government has also increasingly sought to recruit American Muslims to work as confidential informants. AC ¶¶ 36–37. FBI agents in particular have aggressively cultivated "Confidential Human Sources," or informants, in American Muslim communities. *See id*. Many Muslims do not want to work as informants because it violates their sincerely held religious beliefs. *See id.* ¶ 65. Certain FBI agents have abused their authority and taken advantage of the lack of traditional due process protections for people placed on the No Fly List. The agents have used the No Fly List as both carrot and stick, without regard to whether or not the individual in question is a genuine threat to aviation safety: an individual may be offered removal from the No Fly List in exchange for

becoming an informant or placed on the No Fly List if they do not agree to become an informant. *Id.* ¶¶ 64–66.

* * *

While the details of each of the four Plaintiffs' experiences with their placement and retention on the No Fly List are different, the broad contours are strikingly similar. Each Plaintiff was born into the Muslim faith in a foreign land where at least some of their families remain. Each Plaintiff immigrated legally to the United States relatively early in life, and each has flown on commercial aircraft many times without incident. None poses, has ever posed, or has ever been accused of posing, a threat to aviation security.

Nonetheless, each Plaintiff finds himself on the No Fly List. The Government refuses to even confirm that Plaintiffs are on the No Fly List or tell them why they are on the List, or to give them a meaningful opportunity to refute the purported bases for that designation. They have all been prohibited from flying, sometimes when they were en route to visit loved ones or to start a new job.

Plaintiffs allege that the Special Agent Defendants abused their virtually unchecked power to place or maintain names on the No Fly List and through those actions violated Plaintiffs' constitutional rights. Each Plaintiff was approached by Special Agent Defendants for the purpose of pressuring them to become informants in their own Muslim communities. Each Plaintiff answered the agents' questions truthfully when they were initially approached, but none wanted to serve as an informant. Rather than accepting that refusal, the Special Agent Defendants persisted—in some instances threatening individual Plaintiffs with deportation and arrest and in other instances offering financial incentives and assistance with family members' immigration to the United States. When those threats did not suffice, the Special Agent Defendants collectively pressured Plaintiffs by abusing the No Fly List—by placing the Plaintiff

on the List, or threatening to keep him on the List for refusing to become an informant, or offering each Plaintiff the incentive of being removed from the List in exchange for becoming an informant. The Special Agent Defendants retaliated against Plaintiffs by using the No Fly List to punish them for exercising their constitutional rights.

The details of the abuse of each Plaintiff through the collective actions of and steps taken by particular Special Agent Defendants follow:

C. Plaintiff Muhammad Tanvir

1. Overview

Mr. Tanvir is a lawful permanent resident of the United States and a Muslim. AC ¶ 68. Originally from Pakistan, where his parents still reside, Mr. Tanvir is married with one child. *Id.* He has never been arrested or convicted of a crime. He is not and never has been a terrorist or a threat to aviation security. *Id.* ¶¶ 68, 108. Starting in 2007, the FBI began its efforts to recruit Mr. Tanvir as an informant in his Muslim community. Although he answered the FBI's questions on several occasions, Mr. Tanvir declined to work as an informant, in part because of his sincerely held religious views and his unwillingness to engage with his community in a deceptive manner. *Id.* ¶ 84. In retaliation for his refusal to serve as an informant for the FBI, Mr. Tanvir was threatened with deportation and arrest, and eventually placed and kept on the No Fly List. *Id.* ¶ 90. As a result of that retaliation, Mr. Tanvir was forced to quit a good job as a trucker that required him to fly and suffered other economic hardships. He was also prevented from seeing his ailing mother in Pakistan—all of which caused him and his family great distress. *Id.* ¶ 109.

2. Interactions With The FBI And The TRIP Process

Mr. Tanvir was first approached by FBI Special Agent Defendants Tanzin and John Doe 1 in February 2007, when they arrived unannounced at Mr. Tanvir's workplace to question

him about an old acquaintance. *Id.* ¶ 69. Two days later, Agent Tanzin contacted Mr. Tanvir again, by phone, and asked broad and general questions concerning what Mr. Tanvir knew about discussions within the American Muslim community. *Id.* ¶ 70.

Mr. Tanvir first began experiencing trouble travelling in July 2008. When he returned to New York after visiting his wife and family in Pakistan in late December 2008, Mr. Tanvir was escorted off his flight by United States government agents and detained for five hours at the airport. His passport was confiscated. *Id.* ¶ 71. He was eventually told that he would have to pick up his passport from DHS at John F. Kennedy International Airport ("Kennedy Airport") several weeks later. *Id.*

Two days before Mr. Tanvir's appointment, Agents Tanzin and John Doe 2 arrived unannounced at Mr. Tanvir's workplace and asked Mr. Tanvir to come with them to the FBI's offices in Manhattan. *Id.* ¶ 73. Mr. Tanvir agreed, and was brought to 26 Federal Plaza, where he was questioned for around an hour. *Id.* ¶¶ 74–75. At this interview, Agents Tanzin and Doe 2 asked Mr. Tanvir to work as a government informant in Pakistan, in exchange for which they would provide him and his family with money and assistance travelling to the United States. *Id.* ¶ 76. Subsequently, these same two agents proposed to Mr. Tanvir that they could send him to Afghanistan to work as an informant. Mr. Tanvir told the agents that he did not want to become a government informant. *Id.* ¶¶ 77–78.

When Mr. Tanvir declined to become an informant, Agents Tanzin and Doe 2 threatened Mr. Tanvir with deportation if he tried to pick up his passport at DHS as scheduled. *Id.* ¶¶ 77, 79. Despite these threats that he would be deported, Mr. Tanvir went to Kennedy Airport on January 28, 2009 to pick up his passport. *Id.* ¶ 80. At the airport, Mr. Tanvir was given his passport and told by DHS officials that it had been withheld due to a now-cleared investigation.

Id. Agent Tanzin called Mr. Tanvir the next day, and Agent Tanzin told Mr. Tanvir that he had authorized the release of Mr. Tanvir's passport because of Mr. Tanvir's cooperation with the FBI. *Id.* ¶ 81.

In the months that followed, Agents Tanzin and John Doe 2[6] repeatedly called Mr. Tanvir to pressure him into becoming an FBI informant—despite Mr. Tanvir's repeated and consistent refusal to do so. *Id.* ¶¶ 82–84. Eventually, Mr. Tanvir stopped answering phone calls from the agents, but they showed up at his workplace once again. *Id.* ¶¶ 85–86. Agents Tanzin and Doe 2 asked Mr. Tanvir why he was not answering their calls. Mr. Tanvir explained that he had answered their questions and had nothing more to say. *Id.* ¶ 86. Despite this clear refusal to speak further, Agents Tanzin and Doe 2 then asked Mr. Tanvir to take a polygraph test. When he declined, they threatened to arrest him. Ultimately they did not follow through with their threat. *Id.* ¶ 87.

In July 2009, Mr. Tanvir travelled to Pakistan to visit his wife and family and returned to the United States in January 2010. *Id.* ¶¶ 88–89. Upon his return, Mr. Tanvir found work as a long-haul truck driver, a job which required him to drive for long distances and then fly home to New York. *Id.* In October 2010, Mr. Tanvir purchased a ticket to fly from Atlanta to New York, after learning his mother was visiting. At the Atlanta airport, the airline officials told Mr. Tanvir that he was not allowed to fly. *Id.* ¶ 91. Mr. Tanvir was then approached by two unidentified government agents, who told Mr. Tanvir that he should speak to the FBI agents he knew in New York. *Id.* He subsequently called Agent Tanzin, who explained that he was no longer assigned to his case but that Mr. Tanvir would soon be contacted by other FBI agents in New York. *Id.* ¶ 92.

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[6] The First Amended Complaint may have incorrectly identified this Defendant as John Doe 1. *See* AC ¶ 82.

Unable to fly, Mr. Tanvir took a 24-hour bus ride home to New York. *Id.* ¶ 93. Mr. Tanvir eventually had to give up his job as a truck driver in part because he was unable to fly back to New York from the various destinations on his routes. *Id.* ¶ 95.

Two days after Mr. Tanvir returned to New York, Agent Sanya Garcia called him. *Id.* ¶ 94. Agent Garcia told Mr. Tanvir that she could help him have his name removed from the No Fly List if he spoke with her and answered her questions. Mr. Tanvir told her that he had already repeatedly answered the FBI's questions and did not want to speak to the FBI. *Id.*

In the fall of 2011, Mr. Tanvir purchased tickets for a November 3, 2011 Pakistan International Airlines flight from New York to Pakistan for himself and his wife, so that they could visit Mr. Tanvir's sick mother. *Id.* ¶ 98. On November 2, 2011, however, Mr. Tanvir received a phone call from Agent Garcia, who told Mr. Tanvir that he would not be allowed to fly the next day because he had refused to speak with her 13 months earlier. *Id.* ¶ 99. Agent Garcia told Mr. Tanvir that he would only be able to fly if he met with her and answered her questions. *Id.* ¶ 100.

Believing that he had to speak with Agent Garcia to be permitted to fly, Mr. Tanvir met Agents Garcia and John LNU at a restaurant in Queens. *Id.* At the restaurant, Agents Garcia and John LNU repeated the questions about Mr. Tanvir's family, religion and politics that he had been asked many times before by Agents Tanzin, Doe 1, and Doe 2. *Id.* ¶ 101. Because Mr. Tanvir answered their questions, Agent Garcia told Mr. Tanvir that she would try to obtain a one-time waiver to allow him to fly to Pakistan, but that the waiver would require him to fly on Delta Airlines, would take several weeks to process, and Mr. Tanvir would be required to speak with Agent Garcia again upon his return to the United States. *Id.* ¶ 102. On the day he was supposed to fly to Pakistan, November 3, 2011, Mr. Tanvir received a call from Agent Garcia

informing him that he would not be permitted to fly that day, and her prior offer about a one-time waiver was now contingent on Mr. Tanvir coming to FBI headquarters and taking a polygraph examination. *Id.* ¶ 104. Mr. Tanvir cancelled his flight and his wife flew to Pakistan alone. *Id.* Mr. Tanvir did not hear from Agent Garcia again.

Mr. Tanvir had previously filed a TRIP complaint on September 27, 2011. *Id.* ¶ 97. Mr. Tanvir received a response letter to his TRIP complaint on April 16, 2012, stating that "no changes or corrections are warranted at this time," and neither confirming nor denying that Mr. Tanvir was on the No Fly List. *Id.* ¶ 110. In response, on May 17, 2012, Mr. Tanvir's counsel wrote to the FBI, describing the retaliatory actions taken by the FBI detailed above and stating that Mr. Tanvir was prepared to take legal action based on his continued placement on the No Fly List. *Id.* ¶ 111. Neither Mr. Tanvir nor his counsel ever received a response to that letter. *Id.* On May 23, 2012, Mr. Tanvir filed an administrative appeal to his TRIP determination. *Id.* ¶ 112.

Mr. Tanvir purchased another ticket from New York to Pakistan in November 2012. *Id.* ¶ 113. Once again, however, Mr. Tanvir was denied boarding at Kennedy Airport. *Id.* He was then approached by another FBI agent, who told Mr. Tanvir and his counsel that he had to meet with Agent Garcia in order to be removed from the No Fly List. *Id.*

On March 28, 2013, Mr. Tanvir received a letter in response to his TRIP appeal, which again did not confirm or deny that Mr. Tanvir was on the No Fly List, and which stated without explanation that the Government had "made updates" to its records based on his appeal. *Id.* ¶ 114. Hoping that this meant that he had at least received the one-time waiver Agent Garcia had discussed, Mr. Tanvir purchased another ticket from New York to Pakistan, and was permitted to fly to Pakistan on June 27, 2013. *Id.* ¶ 115.

Mr. Tanvir believes he remains on the No Fly List, having been told repeatedly that he was on the No Fly List and having received no confirmation that his name was removed from the No Fly List. *Id.*

D. Plaintiff Jameel Algibhah

1. Overview

Mr. Algibhah is a United States citizen and a Muslim. He and his wife married in 2001. His wife and their three daughters currently live in Yemen. AC ¶ 118. Mr. Algibhah is not and never has been a terrorist or a threat to aviation security. *Id.* Prior to 2010, Mr. Algibhah was able to visit his family in Yemen at least once a year. *Id.* ¶ 143. In 2009, the FBI began trying to recruit Mr. Algibhah as an informant in his American Muslim community. Mr. Algibhah refused because doing so violated his sincerely held personal and religious beliefs and would require him to act in a deceptive manner in his community. *Id.* ¶ 122. In retaliation for his refusal to become an informant, Mr. Algibhah was placed on the No Fly List. As a result, he has suffered economic loss and was unable to visit his wife and daughters. *Id.* ¶ 144.

2. Interactions With The FBI And The TRIP Process

Mr. Algibhah was first approached by FBI Agents Francisco Artusa and John Doe 4 in December 2009, when they arrived unannounced at Mr. Algibhah's workplace. *Id.* ¶ 119. Agents Artusa and Doe 4 escorted Mr. Algibhah to their van, where they questioned him about his Muslim friends and acquaintances, as well as his religious practices and work history. *Id.* ¶ 120. After Mr. Algibhah answered their questions, Agents Artusa and Doe 4 asked him to work for the FBI as an informant, specifically requesting that Mr. Algibhah infiltrate a mosque in Queens and act like an "extremist" in online Islamic forums. *Id.* ¶ 121. Mr. Algibhah declined to do so. *Id.* The agents did not take his "no" for an answer, pressing Mr. Algibhah to inform on members of his community, and offering him money and assistance with bringing his family in

Yemen to the United States. *Id.* Mr. Algibhah again told Agents Artusa and Doe 4 that he would not work as an informant for the FBI. *Id.* Mr. Albighah believes that he was placed on the No Fly List shortly after this encounter. *Id.* ¶ 124.

In May 2010, in his first attempt to fly since meeting with Agents Artusa and Doe 4, Mr. Algibhah went to Kennedy Airport to fly to Yemen to visit his wife and daughters, but airline personnel at the check-in counter refused to give him a boarding pass. *Id.* ¶ 125. He was then surrounded by government officials, who told him that he would not be permitted to fly. *Id.*

Mr. Algibhah filed a TRIP complaint after his experience at Kennedy Airport in May 2010. *Id.* ¶ 126. Mr. Algibhah received no response from DHS. *Id.* ¶ 127. Mr. Algibhah purchased another ticket to Yemen for September 19, 2010, but was again denied boarding. *Id.*

On October 28, 2010, DHS sent Mr. Algibhah a letter in response to his TRIP complaint stating that "no changes or corrections are warranted at this time." *Id.* ¶ 128. The letter did not provide any information about whether or not Mr. Algibhah was on the No Fly List or the reason why restrictions had been placed on his ability to travel. *Id.* Mr. Algibhah submitted a request for releasable materials to DHS, which would allow him to file an informed appeal, but four years later has not heard back from DHS about this request. *Id.* ¶¶ 129–30.

Frustrated with the lack of response from DHS, Mr. Algibhah reached out to his representatives in Congress, Representative Jose Serrano and Senator Charles Schumer, whose offices corresponded with the TSA on Mr. Algibhah's behalf in January 2012. *Id.* ¶ 130. His elected representatives' efforts did not generate a response from the TSA. In June 2012, Agents Artusa and John Doe 5 paid Mr. Algibhah an unannounced visit and told him that "Congressmen can't do shit for you; we're the only ones who can take you off the list." *Id.* ¶ 131. Agent Artusa told Mr. Algibhah that he would have to answer additional questions and, if he cooperated, he

would be taken off the No Fly List. *Id.* Believing that he had to answer these questions to be removed from the No Fly List, Mr. Algibhah answered Agent Artusa and Doe 5's questions about his family, community, religious practices and politics. *Id.* ¶ 132.

After posing their questions, Agents Artusa and Doe 5 renewed their demand that Mr. Algibhah work for them as an informant, telling him that they wanted him to go on Islamic websites and "act extremist." *Id.* ¶ 133. Mr. Algibhah, understanding this to be part of an essential condition for his removal from the No Fly List, told Agents Artusa and Doe 5 that he needed time to consider whether he could work for them as an informant, and asked to be taken off the No Fly List. *Id.* ¶ 134. Agent Artusa told Mr. Algibhah that he could be removed from the No Fly List in as little as a week. *Id.* In a call ten days later, Agent Artusa said that he was working on removing Mr. Algibhah from the No Fly List, but it would take a month or more to do so, and reiterated that only the FBI could remove his name from the List. *Id.*

After this recruitment attempt, Mr. Algibhah decided to retain counsel, who contacted Agent Artusa later in June 2012. *Id.* ¶ 136. Agent Artusa confirmed to Mr. Algibhah's counsel that he could assist in removing Mr. Algibhah's name from the No Fly List, but wanted Mr. Algibhah to go on Islamic websites to look for "extremist" discussions, and perhaps undertake more "aggressive information gathering." *Id.*

Mr. Algibhah's counsel informed Agent Artusa in November 2012 that Mr. Algibhah would not speak to the FBI further unless he was removed from the No Fly List and allowed to visit his family in Yemen. *Id.* ¶ 138. Agent Artusa said he would look into the possibility, but did not respond to Mr. Algibhah's counsel. In May 2013, Agent Artusa called Mr. Algibhah directly to ask for a meeting about getting off the No Fly List. *Id.* ¶ 139. Mr. Algibhah directed Agent Artusa to his counsel, who reached out to Agent Artusa that same day. *Id.* ¶¶ 139–40.

Agent Artusa told counsel that he still wanted to speak to Mr. Algibhah, but Mr. Algibhah was not in any trouble. *Id.* ¶ 140. Mr. Algibhah did not wish to speak to Agent Artusa and so did not follow up on his counsel's call. Neither Mr. Algibhah nor his counsel has heard from Agent Artusa since that time. *Id.* ¶ 141.

Mr. Algibhah believes he remains on the No Fly List, having been told repeatedly that he was on the No Fly List and having received no confirmation that his name was ever removed. *Id.*

E. Plaintiff Naveed Shinwari

1. Overview

Mr. Shinwari is a lawful permanent resident of the United States and a Muslim. His wife resides in Afghanistan. AC ¶¶ 145–46. Mr. Shinwari has never been arrested or convicted of a crime. He is not and never has been a terrorist or a threat to aviation security. *Id.* ¶ 145. In 2012, the FBI tried to recruit Mr. Shinwari to be an informant in his American Muslim community. He refused because he believed, among other things, that becoming an informant would violate his sincerely held personal and religious beliefs and would require him to act in a deceptive manner in his own community. *Id.* ¶ 157. Mr. Shinwari was placed or maintained on the No Fly List in retaliation for his refusal to become an informant. As a result, he was prevented from seeing his wife and family in Afghanistan, lost a job, was caused serious economic and emotional distress, and is now reluctant to attend religious services. *Id.* ¶ 170–71.

2. Interactions With The FBI And The TRIP Process

In February 2012, Mr. Shinwari and his mother were travelling from Kabul, Afghanistan to Omaha, Nebraska, where he was living at the time. *Id.* ¶ 146. While in transit in Dubai, United Arab Emirates, they were prevented from boarding their next flight on Emirates Airline to Houston, Texas. *Id.* Airport security officials in Dubai confiscated Mr. Shinwari's passport,

made him wait in the terminal for several hours, and then returned his passport without explanation and informed him that he would need to contact the United States consulate in Dubai before he could fly. *Id.*

Mr. Shinwari and his mother obtained temporary visas to stay in Dubai and checked into a hotel. There Mr. Shinwari received a call from Agent Steven LNU, who asked Mr. Shinwari to come to the United States consulate the next day. Mr. Shinwari did so, and met with Agents Steven LNU and John C. Harley III. *Id.* ¶ 148. The agents took Mr. Shinwari into an interrogation room and questioned him for over three hours, asking whether he had visited any training camps during his trip to Afghanistan and whether he was associated with any "bad guys." *Id.*

Agents Steven LNU and Harley also asked Mr. Shinwari direct questions about the mosque he attended, his religious activities and his personal background. *Id.* The agents repeatedly asked Mr. Shinwari to take a polygraph test, saying that doing so would help him return home to the United States; Mr. Shinwari declined, as he was telling the truth without needing to be polygraphed. *Id.* ¶ 149.

At the end of their interrogation, Agents Steven LNU and Harley told Mr. Shinwari they would need to speak to "higher-ups" in Washington, D.C. before allowing him to fly. *Id.* ¶ 150. After waiting in Dubai for two days, Agent Harley emailed Mr. Shinwari on February 29, 2012, stating that he could return to the United States if he purchased a new ticket on a U.S.-based airline. *Id.* ¶ 151. Mr. Shinwari did so, and he and his mother flew on American Airlines from Dubai to Virginia on March 1, 2012. *Id.*

When they landed at Dulles International Airport in Virginia, Mr. Shinwari's belongings were thoroughly searched. Mr. Shinwari also was met by FBI Agents Michael LNU and Gregg

Grossoehmig, who escorted Mr. Shinwari to an interrogation room at that airport. *Id.* ¶ 152. Agents Michael LNU and Grossoehmig questioned Mr. Shinwari for two hours, telling him they needed to "verify" everything Mr. Shinwari had previously told Agents Steven LNU and Harley in Dubai. *Id.* ¶ 153. Mr. Shinwari again answered the agents' questions truthfully, but was told that he would be visited by FBI agents when he arrived home in Omaha. *Id.* Mr. Shinwari was released. He flew home to Omaha with his mother, arriving six days later than planned and having purchased a new set of tickets for which they were never reimbursed. *Id.* ¶ 154.

Mr. Shinwari filed a TRIP complaint on February 26, 2012. *Id.* ¶ 167. In mid-March 2012, Agents Michael LNU and John Doe 6 appeared without warning at Mr. Shinwari's home. *Id.* ¶ 155. They questioned him again about the same topics that had been raised in prior interrogations—Mr. Shinwari's religion and personal background. Mr. Shinwari again answered the questions truthfully.

During this third interrogation, Agents Michael LNU and Doe 6 told Mr. Shinwari that they knew that he was unemployed and that they were willing to pay him to be an informant for the FBI. *Id.* ¶ 156. Mr. Shinwari declined based on his personal and religious objections. *Id.* ¶¶ 156–57.

Shortly after this conversation, on March 11, 2012, Mr. Shinwari attempted to board a flight from Omaha to Orlando, where he had obtained temporary employment. He was denied a boarding pass at the airport. *Id.* ¶ 158. An airline agent told Mr. Shinwari that his ticket could not be processed, and police officers then approached Mr. Shinwari at the ticket counter and told him that he was on the No Fly List. *Id.* The officers escorted Mr. Shinwari out of the airport. *Id.*

Mr. Shinwari's placement on the No Fly List meant that he could not take the job in Orlando, causing him significant financial hardship. It also meant he was not able to visit his wife and family in Afghanistan or his father in Virginia. *Id.* ¶ 160. Greatly distressed by learning that he had been placed on the No Fly List, Mr. Shinwari emailed Agent Harley on March 12, 2012 asking for help. *Id.* ¶ 161. Although Mr. Harley did not respond, the next day, Agents Michael LNU and Doe 6 returned unannounced to Mr. Shinwari's home in Omaha, where they again asked Mr. Shinwari to become an FBI informant. *Id.* The agents offered Mr. Shinwari both financial compensation and other assistance if he agreed to work as an FBI informant, telling Mr. Shinwari that his helping the FBI would mean that the FBI could help him. *Id.* Mr. Shinwari again declined, even though he understood the agents to be offering to remove him from the No Fly List. *Id.*

Mr. Shinwari contacted counsel in Omaha for assistance. *Id.* ¶ 162. In mid-March, Mr. Shinwari and his counsel met with FBI Agents Weysan Dun and James C. Langenberg at the FBI's offices in Omaha. *Id.* The agents offered Mr. Shinwari no explanation for his inability to fly, and did not confirm or deny that Mr. Shinwari was on the No Fly List, much less agree to remove him from the List, but discussed the possibility of giving Mr. Shinwari a one-time waiver to fly in case of an emergency. *Id.* ¶ 164. Agents Dun and Langenberg asked Mr. Shinwari a number of questions, including questions about religious sermons that Mr. Shinwari watched online. Mr. Shinwari answered their questions truthfully. *Id.* ¶ 163.

On March 18, 2013, Mr. Shinwari emailed Agent Langenberg to inquire about obtaining a one-time waiver to fly to Afghanistan. *Id.* ¶ 165. Although Agent Langenberg never replied to the request for a one-time waiver, on June 4, 2013, DHS responded to Mr. Shinwari's TRIP complaint stating that "no changes or corrections are warranted at this time," and neither

confirming nor denying that Mr. Shinwari was on the No Fly List. *Id.* ¶ 167. Mr. Shinwari filed a second TRIP complaint on December 9, 2013. *Id.* ¶ 168. This time he received a response on December 24, 2013 stating that the Government had "made updates" to its records, but again neither confirming nor denying that Mr. Shinwari was on the No Fly List. In March 2014, Mr. Shinwari purchased a round-trip ticket to Connecticut and flew there and back. *Id.* ¶ 169.

Mr. Shinwari believes he remains on the No Fly List, having been told repeatedly that he was on the No Fly List and having received no confirmation that his name was ever removed from the No Fly List. *Id.*

F. Plaintiff Awais Sajjad

1. Overview

Mr. Sajjad is a lawful permanent resident of the United States and a Muslim. AC ¶ 172. Mr. Sajjad has a certificate as a medical assistant. He works twelve-hour shifts at a convenience store and also cares for his brother-in-law, a cancer patient. *Id.* Mr. Sajjad has never been arrested or convicted of a crime. He is not and never has been a terrorist or a threat to aviation security. *Id.* In 2012, the FBI attempted to recruit Mr. Sajjad as an informant in his American Muslim community. He refused, believing that to do so would, among other reasons, force him to engage with his community in a deceptive manner. *Id.* ¶ 181. In retaliation for refusing to work as an informant, Mr. Sajjad was kept on the No Fly List long after the FBI agents concluded there was not any genuine basis for keeping him on the List. As a result, Mr. Sajjad has been unable to visit his family in Pakistan, including his 93-year old grandmother who raised him, all of which is a source of ongoing anxiety and distress for him. *Id.* ¶ 196.

2. Interactions With The FBI And The TRIP Process

On September 14, 2012, Mr. Sajjad attempted to fly from Kennedy Airport to Pakistan to visit his family. *Id.* ¶ 173. When he arrived at the check-in counter, the airline official took

Mr. Sajjad's ticket and passport. *Id.* Shortly thereafter, FBI Agents John Doe 7 and John Doe 8 approached Mr. Sajjad at the ticket counter, and escorted him to a windowless interrogation room. *Id.* ¶¶ 173–75. Mr. Sajjad was told that if he spoke with the agents' supervisor he might be allowed to fly. *Id.* ¶ 175.

In the interrogation room, Mr. Sajjad was introduced to FBI Agent John Doe 9 and DHS Agent John Doe 10. *Id.* ¶ 176. Agent Doe 9 told Mr. Sajjad that he was on the No Fly List and would not be allowed to fly. Agent Doe 9 then questioned Mr. Sajjad extensively about his background and family members, whether he had any girlfriends and whether he had any military or terrorist training. *Id.* Mr. Sajjad told the agents that he had never had any such training and had never been in legal trouble. *Id.* During the questioning, Agents John Doe 9 and 10 all repeatedly assured Mr. Sajjad that they were willing to help him get off the No Fly List. Although Mr. Sajjad answered all of their questions, the agents did not allow him to fly. *Id.* ¶¶ 176–77.

On the same day, Mr. Sajjad filed a TRIP complaint. *Id.* ¶ 178. A little over a month later, FBI Agents Michael Rutkowski and John Doe 11 appeared unannounced at Mr. Sajjad's sister's home as Mr. Sajjad was returning from work. *Id.* ¶ 179. The agents said they were following up on a TRIP complaint, and asked Mr. Sajjad questions about his previous trip to Pakistan in 2011. Mr. Sajjad truthfully told the agents that he was in Pakistan to attend his brother's wedding. *Id.*

Agents Rutkowski and Doe 11 told Mr. Sajjad that they believed that he was a good man, and told him that they would give him a salary and United States citizenship if Mr. Sajjad was willing to work as an FBI informant. *Id.* ¶¶ 180–81. Mr. Sajjad told the agents that he already had a job and was not interested in working for the FBI. Mr. Sajjad did not want to work as an

informant for the FBI because, among other reasons, he believed that it would force him to act in a deceptive manner within his own community. *Id.*

Agents Rutkowski and Doe 11 then asked Mr. Sajjad to take a polygraph test, telling him that doing so would help get him off the No Fly List. *Id.* ¶ 182. Although he did not know what a polygraph test was, Mr. Sajjad agreed to go with the agents to the FBI offices in Newark, New Jersey. *Id.* When they arrived at the FBI offices, Agents Rutkowski and Doe 11 led Mr. Sajjad into an interrogation room, where Agent John Doe 12 subjected Mr. Sajjad to a polygraph examination through a translator. *Id.* ¶ 184. Agent Doe 12 then asked Mr. Sajjad questions about his family, his loyalty to the United States and whether he had any military training. *Id.* Mr. Sajjad answered their questions truthfully. *Id.*

After an hour of questioning, Agents Rutkowski, Doe 11 and Doe 12 told Mr. Sajjad that the polygraph test indicated that he was lying. *Id.* ¶ 185. Mr. Sajjad replied that he was not lying, but Agent Doe 11 said that Mr. Sajjad needed to tell the truth or the agents would "use alternative methods" to get answers. *Id.* Despite Mr. Sajjad's protestations that he was already telling the truth, Agents Rutkowski and Doe 11 continued to question Mr. Sajjad for three more hours. *Id.* ¶ 186. After their questioning was finished, Agents Rutkowski and Doe 11 drove Mr. Sajjad back to his sister's house in New Jersey, and taking a more conversational approach, continued to interrogate him along the way about his religious beliefs and practices. *Id.* ¶ 187.

On December 5, 2012, Mr. Sajjad received a response to the TRIP complaint he had filed in September. *Id.* ¶ 189. The letter stated that "no changes or corrections are warranted at this time," but did not confirm or deny whether Mr. Sajjad was on the No Fly List. *Id.* In January 2013, Mr. Sajjad retained counsel, who assisted him in filing an administrative TRIP appeal on February 8, 2013. *Id.* ¶ 190.

On March 13, 2013, while Mr. Sajjad's TRIP appeal was pending, Mr. Sajjad's counsel called Agent Rutkowski, who told them that Mr. Sajjad would not be removed from the No Fly List unless he answered more questions. *Id.* ¶ 191. On May 6, 2013, Mr. Sajjad's counsel called Agent Rutkowski's supervisor, FBI Agent William Gale, who refused to confirm or deny that the FBI was interested in hiring Mr. Sajjad as an informant. *Id.*

This communication was the last contact Mr. Sajjad had with the FBI for almost a year, until FBI Agent Rutkowski and Agent John Doe 13 appeared without warning at Mr. Sajjad's sister's home on April 4, 2014. *Id.* ¶ 192. Agents Rutkowski and Doe 13 asked Mr. Sajjad to go with them to a diner, saying that they were there to help him. *Id.* Taken by surprise, Mr. Sajjad complied, but at the diner the agents only subjected Mr. Sajjad to further questioning about his and his family's religious practices and his national loyalties. *Id.* Agents Rutkowski and Doe 13 told Mr. Sajjad that his name would not be removed from the No Fly List unless he answered all of their questions. *Id.* ¶ 193.

At the end of this questioning, Agent Doe 13 said that he had been watching Mr. Sajjad for the past two years and knew that Mr. Sajjad was not a threat to America. *Id.* Despite this, the agents told Mr. Sajjad that they would return the following week to give him another polygraph examination, and that in the meantime they wanted him to ask his friends and relatives if they had any affiliation with a Pakistani terrorist group. *Id.* Mr. Sajjad has made no such inquiries to his friends and relatives, and has not heard from Agents Rutkowski or Doe 13 since their April 4th questioning.

Mr. Sajjad believes he remains on the No Fly List, having been told repeatedly that he was on the No Fly List and having received no confirmation that his name was removed from the No Fly List. *Id.* ¶ 195.

LEGAL ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' OFFICIAL CAPACITY CLAIMS.

In their official capacity claims, Plaintiffs bring broad constitutional challenges regarding the lack of due process available to effectively challenge Defendants' placing and maintaining Plaintiffs on the No Fly List. Defendants contend that this Court's jurisdiction over these claims is divested by 49 U.S.C. § 46110(a), which vests exclusive jurisdiction in the courts of appeals for claims seeking review of orders issued by the TSA, among other agencies. OC Br. 15–18. Section 46110 poses no bar to this Court's jurisdiction because the actions challenged in this litigation are not subject to the exclusive review jurisdiction of that statute.[7]

The Ninth and Fourth Circuits, as well as the District Court for the Eastern District of Virginia, have all recently ruled that claims like those brought by Plaintiffs here do not fall within the narrow scope of § 46110, and subject matter jurisdiction over such claims properly lies with the district court. *Arjmand v. Dep't of Homeland Sec.*, 745 F.3d 1300, 1302 (9th Cir. 2014); *Latif v. Holder*, 686 F.3d 1122, 1127 (9th Cir. 2012); *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1255–56 (9th Cir. 2008); *Mohamed v. Holder*, No. 11-1924, slip op. at 4–6 (4th Cir. May 28, 2013), attached hereto as Exhibit F; *Mohamed v. Holder*, No. 11-cv-00050, 2011 WL 3820711, at *6 (E.D. Va. Aug. 26, 2011).

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[7] To fall under § 46110's narrow scope, a plaintiff's claim must challenge a reviewable "order" of the TSA that "imposes an obligation, denies a right, or fixes some legal relationship." *Paskar v. Dep't of Transp.*, 714 F.3d 90, 96 (2d Cir. 2013). The TSA's "final order" must satisfy two criteria: (1) the order must mark the "consummation of the agency's decisionmaking process," and (2) the order "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* "[T]he test for determining whether an exclusive jurisdiction provision [such as Section 46110] precludes a district court from hearing a given claim is whether the administrative agency[—the TSA—]had the authority to decide th[e] issue raised by the claim." *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 188 n.9 (2d Cir. 2001) ("*Merritt II*").

A. Broad Constitutional Claims Attacking The Adequacy Of No Fly List Policies And Procedures Are Properly Before This Court.

Plaintiffs' claims broadly challenge the constitutional "adequacy" of No Fly List placement, redress, and removal procedures. *See* AC ¶¶ 222, 227. Constitutional challenges to the No Fly List are beyond the scope of § 46110 because they involve claims challenging government policy, not the merits of specific administrative orders. Both the Ninth Circuit and the Fourth Circuit have recognized this fundamental point. *See Latif*, 686 F.3d at 1129 (challenge to adequacy of No Fly List removal and redress process is a "broad constitutional claim[]" outside § 46110's scope); *Arjmand*, 745 F.3d at 1302 ("§ 46110 does not grant circuit courts jurisdiction over broad constitutional claims . . . that seek removal from the TSDB."); Ex. F, *Mohamed*, No. 11-1924, slip op. at 5 (remanding to district court plaintiff's "substantive and procedural due process challenges to [his] inclusion on the No-fly list" because § 46110 "does not give us . . . independent authority over the TSC"); *see also Adams v. Fed. Aviation Admin.*, 550 F.3d 1174, 1176 (D.C. Cir. 2008) ("[W]e do not have jurisdiction [under § 46110] to consider constitutional questions unrelated to the FAA's order" because constitutional challenges "must be brought in the district court in the first instance"). Indeed, no court of appeals has ever found that it has original subject matter jurisdiction under § 46110 or otherwise over constitutional challenges to the No Fly List. As discussed more fully below, the few rulings in district courts outside this circuit that have ruled otherwise were based on materially distinguishable facts or were mistakenly decided.

B. The TSA Has No Authority To Make No Fly List-Related Determinations.

Plaintiffs were placed and kept on the No Fly List by the FBI and TSC, not by the TSA. Plaintiffs' injuries were caused by the FBI and the TSC placing and maintaining Plaintiffs on the No Fly List, which permitted the Special Agent Defendants "to retaliate against Plaintiffs'

exercise of their First Amendment rights." AC ¶ 203. Plaintiffs' injuries resulted from the TSC's failure to "inform Plaintiffs of their placement on the No Fly List and the bases for being on the No Fly List." *Id.* ¶ 222.

Plaintiffs' inability to fly was "determined," *Paskar v. Dep't of Transp.*, 714 F.3d 90, 96 (2d Cir. 2013), when (1) the FBI and TSC placed Plaintiffs on the No Fly List, which imposed a general, indefinite prohibition on flying, and (2) prior to boarding, the TSC matched Plaintiffs to the No Fly List, which prohibited them from boarding a particular flight. *See* 49 C.F.R. § 1560.3; Secure Flight Program, 73 Fed. Reg. 64,018, 64,025 (Oct. 28, 2008) (possible match between passenger and watchlisted individual sent to TSC for "confirmation of the match"); *Five Years After the Intelligence Reform and Terrorism Prevention Act: Stopping Terrorist Travel: Hearing Before the S. Comm. on Homeland Sec. & Gov'tal Affairs*, at 92, 111th Cong. (Dec. 9, 2009) (statement of Timothy J. Healy, Director, TSC) ("Healy Statement"), attached hereto as Exhibit G (TSC "determine[s] whether individuals encountered [at airports] are a positive match to a watchlisted known or suspected terrorist.").[8]

The TSC's role does not stop there. The TSC also maintains Plaintiffs' names on the No Fly List. *Latif*, 686 F.3d at 1127 n.6 ("TSC decides both whether travelers are placed on the List and whether they stay on it."). In addition, the TSC is the final arbiter of whether an individual will be removed from the No Fly List—the relief Plaintiffs seek in this case. S*ee*, *e.g.*, *Latif*, 686 F.3d at 1129 (TSC is the "sole entity with . . . the authority to remove [Plaintiffs] from the List."); Memorandum of Understanding on the Integration and Use of Screening Information to

[8] Where, like here, subject-matter jurisdiction is contested pursuant to a Rule 12(b)(1) motion to dismiss, "the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings," such as exhibits and affidavits. *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014). Accordingly, in meeting their burden to affirmatively demonstrate this Court's subject-matter jurisdiction, Plaintiffs rely, in part, on "evidence outside of the pleadings," including documentary exhibits. *Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000).

Protect against Terrorism ¶ 16, Homeland Security Presidential Directive-6 (Sept. 16, 2003) ("HSPD-6 MOU") attached hereto as Exhibit H (TSC "will establish procedures to review the continued inclusion of a person in the [TSDB], and to review the inclusion of that person in particular screening processes . . . whenever new information about that person is developed").[9]

By contrast, the TSA does not have the power to place, maintain, or remove a Plaintiff from the No Fly List or make changes to the procedures surrounding the No Fly List. "Ordering TSA to tell Plaintiffs why they were included on the List and to consider their responses in deciding whether they should remain on it, would be futile. Such relief must come from TSC—the sole entity with both the classified intelligence information Plaintiffs want and the authority to remove them from the List." *Latif*, 686 F.3d at 1129. At airports, the TSA does not issue "orders" preventing watchlisted persons from boarding individual flights—the TSA plays a non-discretionary role in terrorist screening and "watchlist matching," 49 C.F.R. § 1560.1(b), using information "provide[d]" by the TSC, 49 C.F.R. § 1560.3 (which, in turn, was largely provided by the FBI). Far from issuing any "orders" as part of this role, the TSA merely "compar[es] passenger information . . . to the automatic selectee and no fly list[] . . . maintained by the Federal Government." 49 U.S.C. § 44903(j)(2)(C)(i). Even the TSA's limited screening and watchlist matching function is conducted "in coordination with the TSC," with the TSC playing the decisive role. Secure Flight Program, 73 Fed. Reg. at 64,025. Once the TSA "identifies a possible match between a passenger and an individual identified on the watch list," the TSA "*will send* the passenger information to TSC and request confirmation of the match." *Id.* (emphasis added). The TSA's role is ministerial and limited to "notify[ing]" the airline to "prevent the individual from boarding an aircraft," 49 U.S.C. § 114(h)(2)–(4), by means of a

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[9] *See* supra note 8.

"boarding pass printing result." 49 C.F.R. § 1560.105(b)(1). Accordingly, no TSA "order" resulted in an injury to Plaintiffs.

In *Ibrahim*, the Ninth Circuit confirmed that "putting [plaintiff's] name on the No-Fly List was an 'order' of [the TSC,] an agency *not* named in section 46110," and therefore § 46110 was not a bar to the district court's jurisdiction to hear the case. 538 F.3d at 1254–56 (emphasis in original). The Ninth Circuit reaffirmed that analysis in *Latif* and *Arjmand*. *See Latif*, 686 F.3d at 1127 (holding that a district court has subject matter jurisdiction "over substantive challenges to the inclusion of one's name on the [No Fly] List" because "TSC 'actually compiles the list of names ultimately placed' on the List"); *Arjmand*, 745 F.3d at 1302 ("[S]ince § 46110 does not grant circuit courts jurisdiction to review TSC orders, the statute cannot grant jurisdiction over claims seeking removal from the TSDB."). Further, as the district court explained in *Mohamed*, the plaintiff's challenge to his No Fly List placement was "not sufficiently related to a TSA order to bring it within the scope of Section 46110" because "a TSA order issues *only after* the name of a person on the No-Fly List is disseminated from the TSDB to the TSA." 2011 WL 3820711, at *6 (emphasis added).

The TSA, moreover, could not alone remedy the injuries Plaintiffs continue to suffer. Plaintiffs' injuries arise from the FBI's and TSC's conduct.[10] Because § 46110 only permits the court of appeals to "affirm, amend, modify, or set aside" any part of a TSA order and then require the TSA to conduct further proceedings, the court of appeals would be "limited by [its] inability to directly review the TSC's actions, direct the agency to develop necessary facts or

[10] Plaintiffs' claims for relief do not challenge the TSA's role in "notify[ing]" airlines to "prevent the [watchlisted] individual from boarding an aircraft." 49 U.S.C. § 114(h)(2)–(4). While Plaintiffs allege that they were denied boarding on account of their No Fly List placement, *see*, *e.g.*, AC ¶¶ 113, 125, 158, 173, 176-77, Plaintiffs' claims seek substantive relief in the form of an injunction directed at the TSC to "remove Plaintiffs' names from the No Fly List," AC at 57 ¶ 2, not an order instructing the TSA at airports to allow them to board specific flights.

evidence, or compel its compliance with any remedy [the courts of appeals] might fashion." Ex. F, *Mohamed*, No. 11-1924, slip op. at 5–6; *see also Arjmand*, 745 F.3d at 1302–03 (transferring the case to the district court because the petitioner "cannot be granted relief without reviewing and modifying TSC orders"). Defendants' reading of § 46110—which would channel to the courts of appeals every claim relating to the No Fly List and preclude persons from effectively challenging the No Fly List's constitutional deficiencies—is plainly paradoxical and wrong.

C. The Statutory Language Is Clear That Only Orders Of The TSA Are Within The Scope Of § 46110.

Section 46110 applies to final orders of the TSA, but not the TSC: "Section 46110 grants exclusive jurisdiction to the federal courts of appeals to 'review' the 'order[s]' of a number of agencies, including the Transportation Security Administration . . . . The No-Fly List is maintained by the Terrorist Screening Center, and section 46110 doesn't apply to that agency's actions." *Ibrahim*, 538 F.3d at 1254, 1256. Defendants attempt to evade the statutory language by arguing that Plaintiffs' claims are "inescapably intertwined" with TSA "orders" preventing Plaintiffs from boarding planes. OC Br. at 23–24. Defendants' argument for broad statutory construction of § 46110 should be rejected here. As the Ninth Circuit held in *Ibrahim*, § 46110 "provides jurisdiction to review an 'order'—it says nothing about 'intertwining,' escapable or otherwise. Defendants advance no good reason why the word 'order' should be interpreted to mean 'order or any action inescapably intertwined with it.'" 538 F.3d at 1255.

Defendants repeatedly rely on two unpublished district court decisions from other circuits, *Mokdad v. Holder*, No. 13-12038, 2013 WL 8840322 (E.D. Mich. Dec. 5, 2013); *Scherfen v. Dep't of Homeland Sec.*, No. CV-08-1554, 2010 WL 456784 (M.D. Pa. Feb. 2, 2010). OC Br. at 21–22, 24, 26. The *Scherfen* court mistakenly applied the "inescapably

intertwined" doctrine, finding that a mere "interrelationship" between the TSC and TSA in administering the No Fly List was sufficient to bring the plaintiffs' claims within § 46110's scope. 2010 WL 456784, at *12.[11] Both courts failed to consider or determine whether TSA Security Directives implementing TSC No Fly List determinations could have injured the plaintiffs "separate and apart," *Mohamed*, 2011 WL 3820711, at *6, from TSC orders.[12] *Scherfen*, 2010 WL 456784, at *12–13; *Mokdad*, 2013 WL 8840322, at *4–5. Their reasoning is therefore not persuasive: both courts misconstrued the applicable statute and took an overly narrow view of the claims and harms at issue.

Merritt v. Shuttle, Inc., 187 F.3d 263 (2d Cir. 1999) (*Merritt I*) is also wholly inapposite. *See* OC Br. at 16. The plaintiff in *Merritt I* was a pilot challenging the specific conduct of FAA officials in the administrative review of his license suspension. He was appealing from a full administrative record that included factual evidence and testimony presented in an adversarial hearing, after which an administrative law judge made credibility determinations and factual and legal findings. Hearing those claims again in a district court would have resulted in a "new adjudication" of the prior proceeding. *Merritt I*, 187 F.3d at 271.[13] Unlike *Merritt I*, Plaintiffs

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[11] It is not true, as *Scherfen* suggests, that "inclusion on a list has no practical significance in the absence of the [TSA] Security Directives." 2010 WL 456784, at *11. Watchlist information is available to screening agencies other than the TSA, including foreign, federal, state, county, and local law enforcement agencies. *See*, *e.g.*, *id.* at *5 (noting that "TSDB information is also provided to [U.S. Customs and Border Protection] . . . for inclusion in its computerized inspection and boarder [sic] crossing system"); *Mohamed*, 2011 WL 3820711, at *3 ("The TSC . . . makes terrorist identity information accessible to various screening agencies and law enforcement entities"); Ex. G, Healy Statement, at 92. These agencies are directed to promptly notify the TSC of encounters with watchlisted individuals. Ex. G, Healy Statement, at 92-93.

[12] Unlike the plaintiffs in *Scherfen*, 2010 WL 456784, at *1, Plaintiffs here do not allege an injury by virtue of their treatment by airport or border security agents acting on authority of TSA Security Directives.

[13] Even in *Merritt I*, the Second Circuit explained that a "broad-based, facial constitutional attack on an FAA policy or procedure—in contrast to a complaint about the agency's particular actions in a specific case—might constitute appropriate subject matter for a stand-alone federal suit." *Id.* at 271.

here could appeal from no such record and no such factual or legal findings. As the Ninth Circuit observed in *Ibrahim*:

> Our interpretation of section 46110 is consistent not merely with the statutory language but with common sense as well. Just how would an appellate court review the agency's decision to put a particular name on the list? There was no hearing before an administrative law judge; there was no notice-and-comment procedure. For all we know, there is no administrative record of any sort for us to review. So if any court is going to review the government's decision to put Ibrahim's name on the No-Fly-List, it makes sense that it be a court with the ability to take evidence.

Ibrahim, 538 F.3d at 1256 (internal citations omitted). The orders which Plaintiffs challenge here were made by the TSC, not the TSA. There is no basis in the applicable statutes for finding that the TSA played any role that would trigger the narrow jurisdictional provisions of § 46110.

D. The TRIP Redress Letters Do Not Defeat This Court's Jurisdiction.

The Defendants further attempt to distinguish this case from the analysis in *Ibrahim* by claiming that, because Plaintiffs here sought relief through the "DHS TRIP redress process" and received "determination letters issued to plaintiffs at the conclusion of that process," their claims can only be heard in the court of appeals. OC Br. at 19–20. Once again, Defendants mischaracterize Plaintiffs' claims and the respective administrative roles and responsibilities of the TSC and TSA. Like the *Latif* plaintiffs, Plaintiffs here attack the *adequacy* of the redress process itself, not the merits of their TRIP determinations.[14] *See* AC ¶ 222. As described above, those broad constitutional claims are properly heard here, in the district court. Plaintiffs' current claims were not—and could not have been—raised or litigated in their individual TRIP appeals. As *Latif* recognized, "DHS TRIP does not appear to provide any mechanism for Plaintiffs to

[14] Defendants contend that Plaintiffs challenge TSA regulations establishing the TRIP process, which Defendants claim are reviewable final orders under § 46110. OC Br. at 20–21. Even if Plaintiffs were challenging TSA regulations—they are not and nowhere in their First Amended Complaint do they allege they are—Plaintiffs' facial challenge to TRIP's constitutionality must be heard in the district court. *Latif*, 686 F.3d at 1129.

challenge the adequacy of the process itself." *Latif*, 686 F.3d at 1129-30; *see also*, *e.g.*, *Merritt II*, 245 F.3d at 190 (Section 46110 did not foreclose district court review of FTCA claim because FAA proceedings made "no provision" for such claims).

Even accepting Defendants' premise that Plaintiffs challenge the merits of their individual TRIP determinations—which they do not—those determinations are TSC orders, and are therefore not within the scope of § 46110. The TSC is the "final arbiter" of a TRIP complaint, Declaration of Cindy A. Coppola at ¶¶ 50–51, *Latif v. Holder*, 3:10-cv-00750-BR (D. Or. Feb. 13, 2013), attached hereto as Exhibit I. "Based on information provided by TSC," the TSA simply relays whether or not the TSC decided to modify the traveler's status. Memorandum of Understanding on Terrorist Watchlist Redress Procedures ¶ 4.B.v (Oct. 24, 2007) ("Redress MOU"), attached hereto as Exhibit J. Under this scheme, the TSA is a mere stenographer; the content of any letter must either "be coordinated with TSC and the nominating/originating agency through TSC," or, if the TSA uses "standardized response letters," they must "have been coordinated in advance by the screening agency [here, the TSA], TSC, and DOJ." *Id.*; *see also Arjmand*, 745 F.3d at 1303.

Indeed, executive orders creating the TSC and establishing watchlist redress procedures provide that the TSC alone adjudicates TRIP complaints.[15] Following receipt of a TRIP complaint, the TSC conducts an "independent review of the traveler's record," *Arjmand*, 745

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[15] Defendants claim that the TRIP program in its entirety is a "TSA order" because it was promulgated pursuant to the TSA's "authority to establish a redress process." OC Br. at 20–21. Plaintiffs' challenge to the "procedural adequacy of DHS TRIP," Defendants contend, is therefore a "challenge to a TSA final order." OC Br. at 21. Defendants ignore the TSC's responsibility to promulgate "necessary procedures" to "address the repeated misidentification of persons in any U.S. Government screening process." Ex. H, HSPD-6 MOU ¶ 8(a). Moreover, Plaintiffs are not challenging the substantive merits of prior TRIP proceedings, or seeking relief TRIP could grant. Plaintiffs do not, for example, contest the TSC's adjudication of their individual TRIP complaints or challenge TSC's application of watchlisting criteria to their individual complaints. Rather, Plaintiffs seek to enjoin the agency with the authority to grant the relief Plaintiffs seek—the TSC—to provide notice to Plaintiffs of their No Fly List status, the bases for Plaintiffs' inclusion, and a meaningful opportunity to challenge the TSC's determination. AC at 57 ¶ 2.

F.3d at 1302, and "make[s] a determination whether the record should remain in the TSDB." Ex. J, Redress MOU ¶ 4.C.iii. TSC then shares that determination with DHS, which "may send an appropriate determination letter to the traveler." Ex. I, Coppola Decl. ¶ 51. Indeed, Defendants themselves do not dispute how TRIP is administered, admitting that the TSC "determines whether [a traveler seeking redress] is a positive match to the No Fly List and, if so, whether his No Fly List status should change based on currently available information." OC Br. at 8.

In light of this administrative scheme, the *Latif* Court correctly described why broad challenges to TRIP determinations seek review of TSC, not TSA, orders:

> TSA is merely a conduit for a traveler's challenge to inclusion on the List. TSA simply passes grievances along to TSC and informs travelers when TSC has made a final determination. TSC—not TSA—actually reviews the classified intelligence information about travelers and decides whether to remove them from the List. And it is TSC—not TSA—that established the policies governing that stage of the redress process.

Latif, 686 F.3d at 1128. Likewise, in *Arjmand*, a case where the petitioner appealed his TRIP determination letter, the Ninth Circuit found that "the fundamental problem remains that Arjmand cannot be granted relief without reviewing and modifying *TSC orders*, which cannot be done under § 46110." 745 F.3d at 1303 (emphasis added). As with the No Fly List placement and matching processes, any injury to Plaintiffs from the TRIP process is therefore "separate and apart from any TSA order." *Mohamed*, 2011 WL 3820711, at *6.

Defendants also make much of the fact that TRIP letters describe themselves as "final" agency decisions. OC Br. at 21 (citing *Scherfen*, 2010 WL 456784, at *11). Just because a TRIP letter states that it "constitutes our agency decision" and is "reviewable by the United States Court of Appeals" does not end this Court's inquiry. It is a "time-honored principle of administrative law . . . that the label an agency puts on its actions 'is not necessarily

conclusive,'" and courts must "examine the process by which an agency result is achieved rather than at the result itself." *San Diego Air Sports Ctr., Inc. v. Fed. Aviation Admin.*, 887 F.2d 966, 970 (9th Cir. 1989); *see id.* at 968 (holding that, though the FAA "stipulates that the letter is final and appealable, we must determine for ourselves whether jurisdiction is proper").

Even assuming the substantive TRIP determination did issue from the TSA, the letter still is not reviewable under § 46110. It is not a final agency order, in that it does not impose "tangible, definite, and immediate legal consequences." *Paskar*, 714 F.3d at 97. Rather, the letter is

> non-substantive, does not reveal whether an alteration in status has been accomplished, . . . has no substantive relationship to the TSC's review of a complaint by a listee . . ., [and] does not affect a change in legal obligation, which, if at all, is accomplished by the TSC and is not communicated to the listee or an airline until another boarding pass printing result is issued.

Mohamed, 2011 WL 3820711, at *8 n.6; *see also Arjmand*, 745 F.3d at 1302 ("[D]etermination letters do not notify the traveler whether he or she was, or still is, included on the TSDB.").

II. PLAINTIFFS TANVIR AND SHINWARI HAVE STANDING TO SEEK PROSPECTIVE RELIEF ON THEIR OFFICIAL CAPACITY CLAIMS.

Defendants seek to dismiss the claims of Plaintiffs Tanvir and Shinwari for prospective, injunctive relief because each has been permitted to fly at least once since being put on the No Fly List. If the Defendants wish to establish that either Mr. Tanvir or Mr. Shinwari does not have standing to seek injunctive relief, they can simply confirm that his name has been removed from the No Fly List.[16] Mr. Tanvir and Mr. Shinwari have adequately pled that they have

[16] In another No Fly List case, the Government recently agreed to "provide the names of those Plaintiffs (if any) who are not currently on the No Fly List to Plaintiffs and their counsel" to "provide clarity to individual Plaintiffs . . . and eliminate any alleged hardship." *See* Supplemental Joint Status Report at 8, *Latif v. Holder*, No. 3:10-cv-00750-BR (D. Or. Sept. 3, 2014), attached hereto as Exhibit K. By letter dated November 5,

suffered and will continue to suffer concrete and particularized injuries from their placement on the No Fly List.[17] A one-time waiver for a particular flight is not relief equivalent to the removal of one's name from the No Fly List.

A. Plaintiffs Tanvir And Shinwari Sufficiently Plead Future Injury Due To Their Continued Placement On The No Fly List.

Defendants' argument for lack of standing is based solely on the first prong of the standard set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)—that because they have been allowed to fly, Mr. Tanvir and Mr. Shinwari have not each suffered an "injury in fact" sufficient to request prospective relief. *See* OC Br. at 29. Plaintiffs have pled more than sufficient facts to establish their standing for prospective relief. The bases for Plaintiffs' belief that they were placed and remain on the No Fly List are specified in the First Amended Complaint. Plaintiffs were actually barred from boarding flights and told at that time by FBI agents that they were on the No Fly List. AC ¶¶ 14, 16, 59–60, 62, 90–91, 94, 104, 109–10, 114–15, 158, 163–64, 167–69. Their efforts to get off the No Fly List since then have not been successful. AC ¶¶ 106–07 (Tanvir), ¶¶ 162, 167–68 (Shinwari). Finally, Mr. Tanvir and Mr. Shinwari specified how their continued placement on the No Fly List has and will continue to impose hardships on them personally. *See* AC ¶¶ 115–16 (Mr. Tanvir lost his job, cannot visit ailing relatives and continues to fear harassment of himself and his family); ¶¶ 169–71 (Mr. Shinwari was unable to visit his wife and his family for over two years, has had difficulty visiting his ailing father, and has been prevented from obtaining employment). Even in the face

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2014, the Government has declined to provide the same information here. *See* Letter from S. Normand to R. Shwartz, November 5, 2014, attached hereto as Exhibit L.

[17] Defendants do not challenge Mr. Tanvir's or Mr. Shinwari's standing to seek monetary damages. Defendants also do not challenge the standing of Mr. Sajjad or Mr. Algibhah in any respect.

of this lawsuit, Defendants have expressly refused to confirm or deny that Plaintiffs were ever or remain on the No Fly List. OC Br. at 4 n.2.

B. Plaintiffs Tanvir's And Shinwari's Ability To Board Certain Flights And Receipt Of TRIP Letters Is Not Inconsistent With Their Continued Inclusion On The No Fly List.

Defendants rely on two facts that, taken alone or together, do not establish that Plaintiffs have been taken off the No Fly List. *First*, Defendants highlight that after being denied boarding on flights and told they were on the No Fly List, Mr. Tanvir and Mr. Shinwari each "have since been able to fly." OC Br. at 30. *Second*, Defendants rely on Mr. Tanvir's and Mr. Shinwari's receipt of "[TRIP] responses indicating that updates to government records had been made." OC Br. at 31.

1. Placement On The No Fly List Does Not Preclude The Ability To Board Certain Flights With One-Time Waivers.

The fact that Mr. Tanvir and Mr. Shinwari were each permitted to fly on at least one occasion after being denied boarding on earlier flights is not inconsistent with their remaining on the No Fly List. As the First Amended Complaint alleges, both generally and specifically, the Government has a practice of sometimes providing "waivers" to individuals who are on the No Fly List so that they may fly under certain conditions. *See* AC ¶¶ 55, 102, 164. Plaintiffs were both in fact offered one-time waivers that would allow them to fly without their names being removed from the No Fly List. *See* AC ¶ 55 (discussing waivers generally), ¶ 102 (discussing a one-time waiver offered to Mr. Tanvir by Defendant Garcia), ¶ 164 (discussing a one-time waiver offered to Mr. Shinwari by Defendants Dun and Langenberg). Of course, there would be no reason to offer a one-time waiver to anyone unless they were still on the No Fly List. And being provided with a waiver to fly on one flight is no assurance that Plaintiffs Tanvir and Shinwari can take a return or other flight. The allegations of being offered one-time waivers

only strengthen the conclusion that these Plaintiffs remain on the No Fly List and have demonstrated their continuing injury.

2. TRIP Determinations Letters Did Not Confirm Or Clarify Plaintiffs Tanvir's Or Shinwari's Watchlist Status.

Defendants' reliance on the form letter response to Plaintiffs' TRIP requests is equally misplaced. Through the TRIP program, Mr. Tanvir and Mr. Shinwari each asked to be taken off the No Fly List. Neither request was granted. Neither Plaintiff received an acknowledgement from the Government that their status on the No Fly List had changed. Instead, the form letters say only that "*where appropriate*, [Homeland Security officials] have made updates to our records that *may* assist in avoiding future incident of misidentification." *See* OC Br., Declaration of Deborah Moore, at Ex. A (Mr. Tanvir); Ex. C (Mr. Shinwari) (emphasis added). The TRIP letters, which the Defendants repeatedly reference, contain (1) no statement that either Plaintiff's name has been removed from the No Fly List or other government watchlists, and (2) no statement about what update or change, if any, has been made to the Government's records in their particular case. S*ee* OC Br. at 31; Moore Decl. The Government's lack of candor in its TRIP letters is consistent with Defendants' flat refusal to confirm or deny that Plaintiffs are on the No Fly List. OC Br. at 4 n.2. In these circumstances, the conclusion that Plaintiffs remain on the No Fly List and will continue to suffer harm is more than "plausible." *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011); *see also O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974).

Defendants' argument that Mr. Tanvir and Mr. Shinwari can only "speculate" as to the possibility of future harm is belied by the facts alleged in the First Amended Complaint and Defendants' own failure to assert that each has been removed from or at least is not presently on the No Fly List—information that is uniquely within the Government's possession. OC Br. at

30. Defendants cannot have it both ways: they cannot refuse to confirm or deny that these Plaintiffs remain on the No Fly List, and simultaneously insist that the Court must assume that they are not on the No Fly List despite the facts alleged in the First Amended Complaint. *Compare* OC Br. at 4 n.2, *with id.* 30–31.

Defendants' reliance on *Scherfen* for the proposition that the TRIP process can sufficiently resolve a complaint so as to deny a plaintiff standing is entirely misplaced. OC Br. at 31. Scherfen was a commercial airline pilot who, after learning that he was on the Selectee List, was suspended by his employer without pay. Scherfen went through the TRIP process, after which his employer was notified unambiguously that he was no longer on the Selectee List and could therefore resume piloting. *Scherfen*, 2010 WL 456784, at *3. Unlike Plaintiffs here, Scherfen *learned for a fact* that he was no longer on the Selectee List. *Id.* at *7. By contrast, Mr. Tanvir and Mr. Shinwari have never been told that they are no longer on the No Fly List.

Defendants' reliance on *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), is similarly misplaced. OC Br. 28, 29, 31. The *Amnesty Int'l* plaintiffs "merely speculate[d] and [made] assumptions about whether their communications with their foreign contacts will be acquired." *Id.* at 1148. That speculation contrasts sharply with the concrete facts alleged by Mr. Tanvir and Mr. Shinwari who were prohibited from boarding flights and told by government agents that they had been placed on the No Fly List. *See* AC ¶ 94 (alleging that Defendant Garcia told Mr. Tanvir that he was on the No Fly List); ¶¶ 158–61 (alleging that both unnamed police officers as well as Defendants Michael LNU and John Doe 6 told Mr. Shinwari that he was on the No Fly List).

III. A *BIVENS* CLAIM IS AVAILABLE TO COMPENSATE PLAINTIFFS FOR VIOLATIONS OF THEIR FIRST AMENDMENT RIGHTS.

The Supreme Court and the Second Circuit have acknowledged that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions [for exercising their First Amendment rights]," and "[w]hen the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*." *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *see also Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *M.E.S., Inc. v. Snell*, 712 F.3d 666 (2d Cir. 2013).

The Defendants' insistence that Plaintiffs' *Bivens* claims arise in a "new context" is thus flatly wrong. PC Br. at 13. Plaintiffs seek damages under *Bivens* against federal agents who "retaliated against Plaintiffs and continue to retaliate against Plaintiffs for their exercise of their constitutional rights to freedom of speech, association and religion, in violation of Plaintiffs' First Amendment rights." AC ¶ 201. These claims are squarely within the existing jurisprudence for *Bivens* claims. But even if this case did present a "new context," a *Bivens* claim should be available to Plaintiffs because there is no "alternative, existing process for protecting [Plaintiffs'] interest," *Wilkie*, 551 U.S. at 550, and "special factors" would argue in favor of extending *Bivens* to encompass Plaintiffs' claims.

A. *Bivens* Claims Are Available When Government Agents Retaliate For The Exercise Of First Amendment Rights.

Plaintiffs' *Bivens* claims arise from the "longstanding recognition that the Government may not retaliate for exercising First Amendment speech rights." *Wilkie*, 551 U.S. at 555. Although not addressing the issue in depth, both the Supreme Court and the Second Circuit have recognized that a *Bivens* claim may be brought by victims of First Amendment retaliation. *Hartman*, 547 U.S. at 256; *Wilkie*, 551 U.S. at 556; *Snell*, 712 F.3d at 675. In *Hartman v. Moore*, the plaintiff brought a *Bivens* claim against postal investigators and a federal prosecutor

for "engineer[ing] his criminal prosecution in retaliation for criticism of the Postal Service, thus violating the First Amendment." *Id.* at 254. The Supreme Court concluded that *Bivens* was available in the First Amendment retaliation context.[18] *Id.* at 256. However, the Court decided that the plaintiff had failed to state a claim for retaliatory prosecution because he did not plead that the prosecution lacked probable cause. *Id.* at 265–66. Similarly, in *M.E.S., Inc. v. Snell*, the Second Circuit described *Hartman* as reiterating "the general availability of a *Bivens* action to sue federal officials for First Amendment retaliation" even though the court dismissed the plaintiff's claims because a comprehensive remedial scheme existed. *Snell*, 712 F.3d at 675.

The Second Circuit is not alone. In *George v. Rehiel*, 738 F.3d 562 (3d Cir. 2013), the Third Circuit considered the Supreme Court's statements on the topic and concluded that while "[w]e are mindful of the fact that the Supreme Court has twice in recent years noted that it has not extended *Bivens* implied causes of action to First Amendment claims . . . nonetheless, despite the cautionary notes sounded by the Court, it does appear that the Court has held that there is a *Bivens* cause of action for First Amendment retaliation claims." *Id.* at 585 n.24. The court concluded that it would "proceed on the assumption that there is a *Bivens* cause of action for First Amendment retaliation claims." *Id.*; *see also Bistrian v. Levi*, 696 F.3d 352, 376 (3d Cir. 2012) (upholding denial of motion to dismiss a *Bivens* claim that prison management punished plaintiff for protesting earlier confinement in special housing unit). At least three other circuits have also recognized that *Bivens* claims can be brought if government agents retaliate against a plaintiff's exercise of First Amendment rights. *Burns v. Warden, USP Beaumont*, 482 F. App'x 414, 417 (11th Cir. 2012) (reversing dismissal of First Amendment retaliation *Bivens* action);

[18] The Court also described *Bivens* as the federal analog to § 1983, albeit "more limited in some respects not relevant here," *id.* at 254 n.2, thus implicitly confirming the availability of *Bivens* for First Amendment retaliation claims, which are firmly established in § 1983 jurisprudence. *See, e.g.*, *Royal Crown Day Care LLC v. Dep't of Health of City of N.Y.*, 746 F.3d 538, 544 (2d Cir. 2014).

Hill v. Lappin, 630 F.3d 468, 471 (6th Cir. 2010) (same); *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 14 F.3d 457, 461, 464 (9th Cir. 1994) (affirming rejection of motion to dismiss *Bivens* action alleging First Amendment retaliation by FBI agents).

Defendants argue that courts "disfavor" implying *Bivens* remedies, claiming that the Supreme Court has "repeatedly rejected *Bivens* claims" outside the specific context presented in that case, and suggest that *Bivens* has been abandoned, deemed inapplicable to the First Amendment, or cannot be extended. PC Br. at 12–13. Those arguments are without merit. The notion that *Bivens* is a "relic" is "not a view that the majority of the Supreme Court has accepted." *Munsell v. Dep't of Agric.*, 509 F.3d 572, 591 (D.C. Cir. 2007). The Special Agent Defendants' list of cases in which the Supreme Court declined to extend *Bivens* to various issues, *see* PC Br. at 12–13, therefore is not relevant to the question of whether Plaintiffs can bring *Bivens* claims for First Amendment retaliation, as the Supreme Court has clearly said that they may.

Defendants' contention that *Bush v. Lucas*, 462 U.S. 367 (1983) "declined to extend *Bivens* to a claim sounding in the First Amendment" misconstrues that decision. PC Br. at 13. The "key to the Court's refusal [in *Bush*] to find an implied damages remedy under the Free Exercise Clause was the fact that Congress had already provided 'comprehensive procedural and substantive provisions giving meaningful remedies against the United States.'" *Turkmen v. Ashcroft*, 915 F. Supp. 2d 314, 353 n.26 (E.D.N.Y. 2013).[19] In fact, rather than shut the door on future First Amendment *Bivens* claims, *Bush* affirmed the general proposition that courts have

[19] After NASA engineer William Bush was demoted for publicly criticizing the agency, Bush appealed NASA's decision, and raised his First Amendment claim, before both the Federal Employee Appeals Authority and Civil Service Commission's Appeals Review Board. The administrative review process restored Bush to his former position and awarded him back pay. *Bush*, 462 U.S. at 371. The Court found that Bush was "protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors," and observed that "[c]onstitutional challenges to agency action, such as the First Amendment claims raised by [Bush], are fully cognizable within this system." *Id.* at 385–86.

"adequate power [under *Bivens*] to award damages to the victim of a constitutional violation," including in the context before it, but declined to do so on account of the special factors in that case. 462 U.S. at 378. Indeed, other district courts in the Second Circuit have found *Bivens* to be an appropriate remedy for First Amendment violations. *See*, *e.g.*, *Turkmen*, 915 F. Supp. 2d at 352 (rejecting motion to dismiss *Bivens* claim and holding that "*Bivens* should be extended to afford the plaintiffs a damages remedy if they prove the alleged violation of their free exercise rights."); *Olesen v. Morgan*, No. 06-cv-959, 2008 WL 5157459, at *3 (N.D.N.Y. Dec. 8, 2008) (rejecting motion to dismiss First Amendment retaliation claim because "[i]t is well-established that all of Plaintiffs' alleged constitutional violations are proper in a *Bivens* action.").

Defendants' reliance on *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Hudson Valley Black Press v. I.R.S.*, 409 F.3d 106 (2d Cir. 2005) is similarly misplaced. PC Br. at 13–14. Defendants conveniently omit that the *Iqbal* Court assumed without deciding that the respondent's "First Amendment claim is actionable under *Bivens*." *Iqbal*, 556 U.S. at 675. In any event, *Iqbal* simply restated *Bush*'s holding in noting that the Court "declined to extend *Bivens* to a claim sounding in the First Amendment" in the context there presented, but did not address *Hartman*'s statement regarding the general availability of *Bivens* claims for retaliation for the exercise of First Amendment rights. *Id.* *Hudson Valley* is likewise inapt. In that case, the plaintiff newspaper was audited by the IRS after publishing criticism of the agency. The Second Circuit declined to imply a First Amendment *Bivens* remedy not because it was "not available," as Defendants contend, but in light of the "complex and comprehensive administrative scheme that provides various avenues of relief for aggrieved taxpayers." *Hudson Valley*, 409 F.3d at 111–114.[20]

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[20] Defendants' reliance on *Zielinski v. DeFreest*, No. 12 Civ. 1160 (JPO), 2013 WL 4838833 (S.D.N.Y. Sept. 10, 2013) is also unavailing. PC Br. at 13. Citing *Iqbal* and *Hudson Valley*, the court refused to extend *Bivens* not

The only factual component of Plaintiffs' *Bivens* claims that is arguably "new" is the weapon Defendants used in this case to retaliate against Plaintiffs: the No Fly List. But "every [*Bivens*] case has points of distinction," *Arar v. Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009), and misuse of law enforcement power with a new tool does not transform a familiar pattern of misconduct into a novel context for purposes of recognizing a *Bivens* claim. *Engel v. Buchan* is instructive in this regard. 710 F.3d 698 (7th Cir. 2013). In that case, Gary Engel brought a *Bivens* suit against an FBI agent, alleging that the agent paid a key witness to testify against Engel on trumped-up kidnapping charges in retaliation for Engel's refusal to assist the agent with a murder investigation. *Id.* at 700–01. The agent had also been the subject of a separate *Bivens* action brought by Steve Manning, in which Manning accused the agent of retaliating against him "by using highly suggestive lineups, inducing a jailhouse informant to testify falsely against him, knowingly submitting false reports that Manning had confessed, and destroying or tampering with physical evidence." *Id.* at 700, 702. The Seventh Circuit determined that Engel's *Bivens* suit arose from the same "context" as Manning's, even though the retaliatory tools differed. *Id.* at 702. Likewise here, Plaintiffs' allegations give rise to the same "legal and factual components," *Arar*, 585 F.3d at 572, as prior *Bivens* actions accusing federal agents of First Amendment retaliation even though the tool used to pressure Plaintiffs here is different. *See, e.g.*, *Hill*, 630 F.3d at 476 (*Bivens* claim where federal prison employees placed prisoner in segregated housing in retaliation for protected First Amendment act of filing grievances against the employees).

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because it was foreclosed as a matter of constitutional law, but because the plaintiff in that case had an alternative remedy and his First Amendment rights were circumscribed by virtue of the fact that he was on probation.

B. Even If This Were A New Context, *Bivens* Should Be Extended To Compensate Plaintiffs For Their Injuries.

Even if Plaintiffs' case here did seek to extend *Bivens* to a "new context," the Court should allow it because (1) there is no "alternative, existing process for protecting [Plaintiffs'] interest," and (2) there are no "special factors counseling hesitation." *Wilkie*, 551 U.S. at 550.

1. Congress Has Not Provided Plaintiffs With An Alternative Remedy.

(a) TRIP And § 46110 Do Not Provide Any Remedy For Constitutional Violations.

Plaintiffs have no "alternative, existing process" to seek damages from Special Agent Defendants for their First Amendment retaliation. *Wilkie*, 551 U.S. at 550. Contrary to Defendants' assertion, TRIP and § 46110 cannot provide remedies to Plaintiffs' constitutional violations, (PC Br. at 15), and cannot achieve *Bivens*' purpose of "deter[ring] individual federal officers from committing constitutional violations." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001); *Latif*, 686 F.3d at 1125–26 (summarizing limited administrative and judicial review provided by TRIP and § 46110); *see supra* p. 6 (discussing TRIP). While purporting to provide a prospective remedy for individuals who are improperly put on the No Fly List, TRIP provides no relief for those, like Plaintiffs, who have been targeted for retaliation by FBI agents seeking to recruit them as informants. *See Navab-Safavi v. Broad. Bd. of Governors*, 650 F. Supp. 2d 40, 68 (D.D.C. 2009) (implying *Bivens* remedy for First Amendment retaliation despite remedial scheme for contract disputes because plaintiff's claim "is ultimately based not on breach of contract, but on an alleged governmental infringement of constitutional rights which preexisted any contracts." (internal citations and quotation marks omitted)). Likewise, under § 46110 the courts of appeals "have no jurisdiction to grant other remedies," *Latif*, 686 F.3d at 1128 (quoting *Americopters, LLC v. Fed. Aviation Admin.*, 441 F.3d 726, 735 (9th Cir. 2006)), beyond

affirming, amending, modifying, or setting aside TSA orders, and requiring TSA to "conduct further proceedings." 49 U.S.C. § 46110(c). As such, TRIP and § 46110 are incapable of providing remedies for the constitutional violations that the Special Agent Defendants committed. *See Navab-Safavi*, 650 F. Supp. 2d at 67 (*Bivens* action alleging First Amendment retaliation was not preempted by alternative remedial scheme for contract disputes because "plaintiff's claim does not relate to the terms of her contract and is founded instead upon the protections of the First and Fifth Amendments."); *Latif*, 686 F.3d at 1129–30 (challenge to No Fly List is a "broad constitutional claim[]" outside § 46110's scope and "DHS TRIP does not appear to provide any mechanism for Plaintiffs to challenge" its constitutionality).

Defendants do not even attempt to argue that the remedies available under TRIP or § 46110 are effectively equivalent or adequate alternative relief. Instead, Defendants argue remarkably that the "adequacy" of relief available under TRIP and § 46110 processes is "irrelevant." PC Br. at 18 n.11.[21] But the alternative remedial scheme that displaces a *Bivens* remedy must be "adequate" and "effective," even if it does not provide "complete" relief. *See, e.g.*, *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (statutes in place to provide remedy for denial of disability benefits "suggest[ed] that Congress has provided what it considers adequate remedial mechanisms for constitutional violations"); *Bush*, 462 U.S. at 378–88 (closely analyzing Civil Service Commission remedial scheme to determine whether its procedures provide sufficient protection); *Carlson v. Green*, 446 U.S. 14, 23 (1980) (granting *Bivens* remedy after examining FTCA statutory scheme and finding that it "is not a sufficient protector of

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[21] Defendants appear to have borrowed that statement from dicta in *United States v. Stanley*, 483 U.S. 669 (1987), in which a military serviceman sued the Government for injuries suffered during the course of his service. The Court stated that "it is irrelevant to a 'special factors' analysis whether the laws on the books afford [plaintiff] an 'adequate' federal remedy," but the "special factor" counseling hesitation in that case was judicial intrusion into "the unique disciplinary structure of the Military Establishment," which is not at issue here. *Id.* at 683.

citizens' constitutional rights"); *Davis v. Passman*, 442 U.S. 228, 248 (1979) (plaintiff was entitled to relief under *Bivens* because she "has no effective means other than the judiciary" to vindicate her rights, and noting that "were Congress to create equally effective alternative remedies, the need for damages relief might be obviated."). That Plaintiffs purportedly can in theory obtain limited prospective relief under TRIP and § 46110 with respect to placement on the No Fly List does not, therefore, foreclose a *Bivens* remedy for the retaliation against them for their exercise of their constitutional rights. *See Turkmen*, 915 F. Supp. 2d at 353 (holding that Bureau of Prison's administrative grievance scheme provides no adequate alternative remedy for plaintiffs because "there is no scheme—statutory or regulatory, comprehensive or otherwise—for a person detained in a federal facility to seek any remedy from an officer for intentionally and maliciously interfering with his right to practice his religion.").

Moreover, the process pursuant to TRIP and § 46110 is not nearly as robust as the remedial schemes found to preempt *Bivens* remedies in *Bush* and *Schweiker*, both of which included consideration of the constitutional claims. *Bush*, 462 U.S. at 369–70; *Schweiker*, 487 U.S. at 424–25. As described *supra* in Point I, the TRIP process is conducted entirely in secret with little input from the complainant and no stated resolution. Judicial review under § 46110 is likewise abbreviated and only considers "the same one-sided and potentially insufficient administrative record that TSC relied on in its listing decision without any additional meaningful opportunity for the aggrieved traveler to submit evidence intelligently in order to correct anticipated errors in the record." *Latif*, 2014 WL 2871346, at *15. In both *Ibrahim* and *Latif*, the courts found the administrative and judicial review process under TRIP and § 46110 to be

unconstitutional. *See* Ex. E, *Ibrahim*, Findings of Fact, Conclusions of Law and Order for Relief at 29; *Latif*, 2014 WL 2871346, at *15.[22]

(b) Defendants Present No Authority That Congress Intended To Preclude A *Bivens* Remedy.

Defendants argue that because Congress created minimal process to challenge placement on the No Fly List, its silence on a constitutional damages remedy should be interpreted to preclude *Bivens* actions arising from all conduct however related to the No Fly List. *See* PC Br. at 17. But silence from Congress "is far from the clearly discernible will of Congress" necessary to foreclose *Bivens*.[23] *Davis*, 442 U.S. at 247. Here, because there is no comprehensive or effective remedial scheme providing Plaintiffs with relief, this Court should not infer that Congress intentionally excluded a remedy under *Bivens*. *See Davis*, 442 U.S. at 247 (incomplete remedial scheme protecting some federal employees from discrimination but not plaintiff, a congressional employee, was not evidence that Congress meant "to foreclose alternative remedies [such as *Bivens*] available to those not covered by the statute"). Indeed, courts have

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[22] In a footnote, Defendants argue that "the [Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* ("APA")] is a comprehensive remedial scheme that precludes recognition of a *Bivens* remedy." PC Br. at 18 n.11. The APA suffers from the same substantive and procedural flaws that afflict TRIP and § 46110, namely that it provides no opportunity to review the Special Agent Defendants' constitutional violations or seek remedies for the injuries caused by their misconduct. In addition, neither the Supreme Court nor the Second Circuit has ever held that the APA precludes the availability of a *Bivens* remedy. To the contrary, *Wilkie* found that the availability of APA review, as part of a "patchwork" of statutes and regulations, did not preclude *Bivens* recovery on a Takings Clause claim because it was not possible to infer that "Congress expected the Judiciary to stay its *Bivens* hand . . . ." *Wilkie*, 551 U.S. at 554. Subsequently, the D.C. Circuit assumed without deciding in *Munsell v. Dep't of Agric.* that the APA did not preclude the plaintiffs there, who had been participants in a regulated industry, from seeking *Bivens* remedies for their claims of First Amendment retaliation by agency officials. 509 F.3d 572, 591–92 (D.C. Cir. 2007).

[23] The legislative history of the No Fly List remedial scheme shows that Congress considered, and struck down, an amendment that would create a civil remedy against the Government if, following the TRIP review process, the TSC decided not to remove the complainant from the No Fly List. H.R. Rep. No. 108-724, pt. 5, at 270-71 (2004). This does not, however, constitute an "indication[] that congressional inaction has not been inadvertent" and does not suggest that Congress "has provided what it considers adequate remedial mechanisms for constitutional violations" that may occur when FBI agents recruit informants. *Schweiker*, 487 U.S. at 423. Similar to the § 46110 judicial review process, at most the amendment would have provided a remedy against the Government, not individual nominating agents, and would create no jurisdiction to hear claims, like Plaintiffs', relating to the constitutional violations of nominating agents who abuse their authority as they seek to recruit informants.

held that some claims challenging the administration of the No Fly List must be brought in the district courts precisely because of the limited scope of the TRIP and § 46110 remedial process. *See Ibrahim*, 538 F.3d at 1255–56; *Latif*, 686 F.3d at 1127; *Arjmand*, 745 F.3d at 1302; Ex. F, *Mohamed*, slip op. at 4–6. Given these holdings, challenges to the conduct of individual FBI agents who abuse their authority and use the No Fly List to retaliate for the exercise of First Amendment rights should not be dismissed in deference to such a limited and flawed process.

2. No Other "Special Factors" Bar The Traditional *Bivens* Remedy.

In addition to there being no alternative remedial scheme, there are here no "special factors counseling hesitation." *Wilkie*, 551 U.S. at 550. Defendants quote dicta from *Arar* suggesting that the "special factors" analysis is subject to a "remarkably low" threshold and *Bivens* should not be extended whenever "thoughtful discretion would pause even to consider" a "special factor." PC Br. at 19 (quoting *Arar*, 585 F.3d at 573–74). Defendants' theory is inconsistent with the Supreme Court's *Bivens*' rulings, including *Bivens* itself. There were special factors counseling hesitation there—the drain on the public fisc, the strain on judicial resources, the hindrance to law enforcement personnel whose efforts had to be diverted to defending lawsuits for damages. Despite the "consideration" of those factors, the *Bivens* Court held that a damages remedy was necessary to enforce the Fourth Amendment. *Bivens*, 403 U.S. at 397–98. Defendants' theory also contradicts *Davis v. Passman*. In that case, the Court extended *Bivens* to a claim for employment discrimination in violation of the equal protection component of the Fifth Amendment's Due Process Clause against a member of Congress. The Court recognized a *Bivens* remedy despite pausing to give thoughtful consideration to the argument that Passman's status as a member of Congress "counsel[ed] hesitation." 442 U.S. at 246.

The "special factors" that Defendants raise here—issues relating to national security, sensitive intelligence information and graymail—do not "counsel[] hesitation" of the sort that would preclude a *Bivens* remedy. PC Br. at 18–21. Defendants rely heavily on *Arar* to claim that this case implicates a multitude of "special factors," but this case is fundamentally different from *Arar*. Unlike Plaintiffs here, who seek *Bivens* damages against individual FBI agents, the plaintiff in *Arar* invoked *Bivens* "to challenge policies promulgated and pursued by the executive branch, not simply isolated actions of individual federal employees." *Arar*, 585 F.3d at 578. The court was careful to emphasize in *Arar* that *Bivens* was disfavored in that context because it would in effect be a suit against the United States Government itself. *See Arar*, 585 F.3d at 574–75 (suit against "senior officials" who "implement an extraordinary rendition policy would enmesh the courts ineluctably in an assessment of the validity and rationale of that policy"). Also critical to the court's decision was that adjudicating the propriety of "extraordinary rendition" policy would be fraught with sensitive judgments about the U.S.'s relationships with foreign nations. *Arar*, 585 F.3d at 576 (stressing "foreign affairs implications" of the suit). No such concerns are present here, where Plaintiffs seek damages only against a handful of lower-level federal employees.[24]

Citing *Arar* and *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), Defendants also argue that this case might "potentially" require the Court to consider "classified or otherwise protected information, which counsels hesitation against creating a *Bivens* remedy." PC Br. at 20–21.

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[24] Plaintiffs seek only injunctive relief and not monetary damages from the Agency Defendants, and Plaintiffs explicitly allege that high-level Agency Defendants "are tolerating and failing to remedy a pattern and practice among Special Agent Defendants of using the No Fly List to unlawfully retaliate . . . ." AC ¶ 202.

Defendants also seek to dismiss Plaintiffs' First Amended Complaint on the grounds that Plaintiffs seek monetary relief from the Defendants sued in their official capacity and that Plaintiffs seek equitable relief against individual agents sued in their personal capacities. *See* OC Br. at 32–34; PC Br. at 69. Plaintiffs' First Amended Complaint, however, does not seek such relief, and thus Defendants' arguments on these points are moot.

Defendants' concern is more properly raised through motions regarding other doctrines, such as the state secrets privilege, than the categorical dismissal of Plaintiffs' *Bivens* claims. In *Arar* and *Lebron*, the subject matter was, respectively, extraordinary rendition and the military detention of a United States citizen as an "enemy combatant." Here, Plaintiffs' *Bivens* claims arise in the ordinary context of law enforcement activity.

Courts have routinely permitted cases involving classified materials to proceed. Indeed, the evaluation of classified intelligence sources arises in nearly every terrorism-related prosecution. Courts have used the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. III §§ 1-16, to protect against the risk of inappropriate disclosure. *See*, *e.g.*, *Aref v. United States*, 452 F.3d 202, 204 (2d Cir. 2006) (discussing trial court's issuance of a protective order in criminal terrorism trial pursuant to CIPA); *United States v. Rezaq*, 134 F.3d 1121, 1142–43 (D.C. Cir. 1998) (affirming trial court's substitution of summaries for classified information under CIPA in criminal terrorism trial); *United States v. Holy Land Found. for Relief & Dev.*, No. 04-cr-00240, 2007 WL 959029, at *2 (N.D. Tex. Mar. 28, 2007) (applying CIPA in criminal terrorism trial and allowing *ex parte* submissions by government); *United States v. Warsame*, No. 04-cr-00029, 2007 WL 748281, at *3 (D. Minn. Mar. 8, 2007) (implementing CIPA procedures in criminal terrorism trial); *United States v. Bin Laden*, 58 F. Supp. 2d 113, 115–17, 124 (S.D.N.Y. 1999) (implementing security measures and entering protective order in criminal terrorism trial pursuant to CIPA); *United States v. Rahman*, 870 F. Supp. 47, 49–53 (S.D.N.Y. 1994) (applying CIPA procedures in criminal terrorism trial to determine whether, and if so, how, classified information should be disclosed).

The court's effective adjudication of a challenge to the Government's No Fly List decision for the plaintiff in *Ibrahim*, despite the Government's contention that sensitive security

information required its dismissal, readily demonstrates that adjudication on the merits would be possible here as well. Similarly, a district court recently denied the Government's motion to dismiss another case challenging the No Fly List based on the state secrets doctrine. *See Mohamed v. Holder*, No. 11-cv-50, slip op. at 3 (E.D. Va. Oct. 30, 2014), attached hereto as Exhibit M.

Defendants' bare assertion that *Bivens* is precluded because watchlisting decisions "implicate[] the national security" does not withstand scrutiny. PC Br. at 21. As the Ninth Circuit repeatedly has held, district courts can subject the No Fly List to judicial review. *Ibrahim*, 538 F.3d at 1255–56; *Latif*, 686 F.3d at 1127; *Arjmand*, 745 F.3d at 1302. As the *Arar* court itself noted, "there is a long history of judicial review of Executive and Legislative decisions related to the conduct of foreign relations and national security." *See Arar*, 585 F.3d at 581.[25] If anything, permitting a *Bivens* remedy here would protect national security: "national security interests would only be enhanced if the world knew that . . . officers [who commit constitutional violations] were held liable for the damages they caused."[26] *Turkmen*, 915 F. Supp. 2d at 354. Of course, bloating the No Fly List with American Muslims who are not

[25] The cases Defendants cite in support of their argument that national security is a "special factor" have no bearing on the instant case. PC Br. at 21–22. *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012), *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), and *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) involved claims against military officials, or were brought by foreign nationals claiming abuse on foreign soil, and the courts were primarily concerned with judicial intrusion into military affairs. *Doe* 683 F.3d at 394-96; *Lebron*, 670 F.3d at 548; *Ali*, 649 F.3d at 773. By contrast, Plaintiffs are all United States citizens or legal permanent residents seeking a remedy for injuries inflicted at home by FBI agents, not military personnel, operating in the traditional law enforcement context.

[26] Without explaining why, Defendants note that this suit "will make the government vulnerable to graymail." PC Br. 20 n.12 (quoting *Arar*, 585 F.3d at 578-79). The state secrets privilege protects the Government from any such risk, by "provid[ing] a necessary safeguard against litigants presenting the government with a Hobson's choice between settling for inflated sums or jeopardizing national security." *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005). In addition, the risk of graymail is present in every tort suit against a government agent, and defendants in civil suits are always subject to pressures to settle. This has never been considered a reason to bar categorically a type of suit against government officials.

terrorists and pose no threat to aviation safety can only interfere with legitimate national security interests.

Finally, in weighing "special factors," this Court should also "weigh[] reasons for . . . the creation of a new cause of action, the way common law judges have always done." *Wilkie*, 551 U.S. at 554 (*citing Bush*, 462 U.S. at 378). Here, several factors counsel in favor of permitting a *Bivens* remedy: the absence of other remedies for the alleged constitutional violations; the need to deter federal officials with authority to nominate individuals to the No Fly List from abusing their power; and the fact that First Amendment retaliation claims present no judicial manageability concerns. *See Wilkie*, 551 U.S. at 554, 556 (assessing the inadequacy of existing remedies and deciding that First Amendment retaliation claims may be brought under *Bivens*).

IV. THE SPECIAL AGENT DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Qualified immunity does not insulate government officials from personal liability for conduct that "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012) (internal quotation marks omitted); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Special Agent Defendants are not entitled to qualified immunity from being found personally liable for their constitutional and statutory violations for at least three reasons. *First*, the availability of qualified immunity is best decided at a later stage when the factual record has been more fully developed. *Second*, the First Amended Complaint sufficiently describes patterns of behavior by the Special Agent Defendants who interacted directly with each Plaintiff, in which those Defendants made repeated, collective efforts to coerce each Plaintiff into becoming a government informant, and then proximately and wrongfully placed or maintained each

Plaintiff on the No Fly List in retaliation for each Plaintiff's valid exercise of his First Amendment rights. *Third*, the Special Agent Defendants were on notice that the constitutional and statutory rights they violated were clearly established.

A. Resolution of Defendants' Qualified Immunity Defense Is Premature And Would Be "Best Decided" At A Later Stage In The Litigation

Because "the details of the alleged deprivations are more fully developed" on a motion for summary judgment, qualified immunity is "often best decided" at that later stage of litigation. *Walker v. Schult*, 717 F.3d 119, 130 (2d Cir. 2013); *see also King v. Simpson,* 189 F.3d 284, 289 (2d Cir. 1999). Here, the Special Agent Defendants have asked this Court to consider their qualified immunity defense on a motion to dismiss. That argument is therefore subject to "the more stringent standard applicable to this procedural route," and Plaintiffs are "entitled to all reasonable inferences from the facts alleged, not only those that support [their] claim, but also those that defeat the immunity defense." *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004).

The Special Agent Defendants' insistence that "a qualified immunity ruling 'should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive[,]'" PC Br. at 37 (quoting *Saucier v. Katz*, 533 U.S. 194, 200 (2001)), does not contradict the standard of review articulated in *McKenna*. *Saucier* came up to the Supreme Court on appeal from a summary judgment. The *Saucier* court noted that a qualified immunity defense would be "effectively lost if a case is erroneously permitted to *go to trial*." *Id.* (emphasis added) (internal quotations and citations omitted). That is simply not the procedural posture of this case. *See also Walker v. Schult*, 717 F.3d 119, 130 (2d Cir. 2013) ("[Q]ualified immunity is often best decided on a motion for summary judgment when the details of the alleged deprivations are more fully developed.").

B. Plaintiffs' Extensive, Non-Conclusory Allegations More Than Plausibly Support The Inference That The Special Agent Defendants Are Liable For Harm To Plaintiffs.

The question for the Court at the motion to dismiss stage is whether, under any reasonable reading of the First Amended Complaint, and drawing all inferences in favor of Plaintiffs, the Court can conclude that each Special Agent Defendant is liable for the alleged misconduct. *Iqbal* requires only allegations that plausibly support liability. *Iqbal*, 556 U.S. at 678; *see also Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010) (explaining that, after *Iqbal*, "personal involvement is not limited solely to situations where a defendant violates a plaintiff's rights by physically placing his hands on him"). As the Seventh Circuit explained, "the Court [in *Twombly* and *Iqbal*] is saying . . . that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (emphasis in original). *Id.* Plaintiffs therefore need only allege an inference of causation—enough facts to "nudge" their allegations across the line from "conceivable to plausible"; thereafter, discovery will permit Plaintiffs to test their claims. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

With respect to the degree of personal involvement that Plaintiffs must plead (and as to which the Court must draw all reasonable inferences in favor of Plaintiffs), the Second Circuit recognizes forms of liability other than final or exclusive responsibility. "In this Circuit, a 'direct participant' includes a person who *authorizes*, *orders*, *or helps others* to do the unlawful acts, even if he or she does not commit the acts personally." *Terebesi v. Torreso*, 764 F.3d 217, 234 (2d Cir. 2014) (citing *Provost v. City of Newburgh,* 262 F.3d 146, 155 (2d Cir. 2001)) (emphasis added). A defendant may therefore be liable if he or she "set[s] in motion" a constitutional violation. *Veeder v. Nutting*, No. 1:10-CV-665 MAD/CFH, 2013 WL 1337752, at

*11 (N.D.N.Y. Mar. 29, 2013) (denying a motion for summary judgment where there was evidence in the record that one of the defendants "set in motion" an illegal search); *see also Harrison v. Machotosh*, No. CV-91-2417, 1992 WL 135028, at *2 (E.D.N.Y. May 28, 1992) ("The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or should have known would cause others to deprive the plaintiff of her constitutional rights.") (quoting *Conner v. Reinhard*, 847 F.2d 384, 397 (7th Cir. 1988)); *Morrison v. LeFevre*, 592 F. Supp. 1052, 1077 (S.D.N.Y. 1984) (state actors may be liable if the deprivation of rights occurs as the "natural and foreseeable" consequence of their conduct).

Because proximate causation and foreseeability are ultimately questions of fact, Plaintiffs need not, as the Special Agent Defendants implicitly demand, demonstrate now that their injuries were proximately the result of each Defendant's actions. *Lombard v. Booz-Allen & Hamilton, Inc.*, 280 F.3d 209, 216 (2d Cir. 2002) ("[F]oreseeability and causation . . . are issues generally and more suitably entrusted to fact finder adjudication.") (internal quotations and citations omitted). Instead, Plaintiffs need merely to have alleged facts from which the Court can reasonably infer that the Special Agent Defendants caused such injuries. Plaintiffs have amply done that. Plaintiffs allege that each Special Agent Defendant personally participated in the unlawful conduct, either by their direct participation, by their assistance to others who more directly participated, or by their setting in motion the unlawful conduct executed by others. When viewed as a whole, the allegations in the First Amended Complaint support the more than plausible inference that the Special Agent Defendants who interacted with each Plaintiff acted in concert. At the motion to dismiss stage, such allegations and reasonable inferences are more than sufficient.

In arguing that claims against the Special Agent Defendants should be dismissed for lack of personal participation, those Defendants make several arguments based on faulty premises. They urge the Court to consider the actions alleged against each individual Special Agent Defendant in isolation from the actions taken by the other agents, and to ignore the collective effort in which each directly played an active part. They also rely on wholly inapt cases in which claims against high-level or supervisory officials were dismissed because no allegations had been made that such defendants had personally taken any actions to participate in or contribute to the unlawful conduct. For example, in *Alfaro Motors v. Ward* (cited at PC Br. at 58), the Second Circuit dismissed claims against the Police Commissioner for the City of New York and a police sergeant regarding the denial of the plaintiff's applications for tow car medallions because "the complaint is entirely devoid of any allegations of their personal involvement in denying appellants either a prompt hearing or the additional medallions sought," or that the two individual defendants "were directly and personally responsible for the purported unlawful conduct." 814 F.2d 883, 885–86 (2d Cir. 1987); *see also Kwai Fun Wong v. INS*, 373 F.3d 952, 966, 977 (2d Cir. 2004) (dismissing religious leader's detention-related RFRA claim as against INS officials, because the complaint "fail[ed] to identify what role, if any, each individual defendant had in placing her in detention"); *Barbera v. Smith*, 836 F.2d 96, 97–99 (2d Cir. 1987) (dismissing constitutional claims brought against former U.S. Attorney, on the basis that the complaint did "not allege any personal involvement by [the former U.S. Attorney] in the decisions to reveal [the murdered cooperating witness's] identity and to deny her protection"); *Black v. United States*, 534 F.2d 524, 525–28 (2d Cir. 1976) (dismissing constitutional claims against the Secretary of the Treasury and the Commissioner of Internal Revenue alleging a

harassing and intrusive tax investigation because plaintiff alleged no "direct and personal responsibility" by these defendants for "the purportedly unlawful conduct of their subordinates").

As detailed more fully below, the facts alleged in the First Amended Complaint demonstrate that each Special Agent Defendant was a direct and personal participant in the collective effort that caused the retaliatory violation of each Plaintiff's constitutional and statutory rights.

1. The Special Agent Defendants' Collective Action Against Mr. Tanvir

The facts alleged in the First Amended Complaint, and the reasonable inferences that can be drawn from those allegations, more than plausibly demonstrate that the Special Agent Defendants who interacted with Mr. Tanvir—Agents Tanzin, John Doe 1–3, Garcia, and John LNU—personally and directly participated in a scheme to coerce Mr. Tanvir to serve as an informant and inappropriately used the No Fly List in retaliation for his refusal to do so, in violation of his First Amendment and RFRA rights.

Mr. Tanvir alleges that Agents John Does 1–3 asked Mr. Tanvir on multiple occasions "questions about his family and about his religious and political beliefs." AC ¶ 101. Mr. Tanvir also alleges that he was placed on the No Fly List by Agents Tanzin and/or Special Agent Defendants John Does 1–3 because he refused to become an informant. *Id.* ¶ 90. Mr. Tanvir therefore alleges that these Special Agent Defendants directly participated in the deprivation of his constitutional rights.[27]

Mr. Tanvir alleges that Agent Tanzin at one point told him that he (Agent Tanzin) was no longer assigned to Mr. Tanvir and that Mr. Tanvir should cooperate with the FBI agent who

[27] At the very least, the facts alleged by Mr. Tanvir with respect to John Does 1–3 support the inference that they "set in motion" the series of events that resulted in the foreseeable deprivation of his constitutional rights. *Veeder*, 2013 WL 1337752, at *10–11.

would be contacting him soon. *Id.* ¶ 92. Mr. Tanvir alleges that he was then contacted by Agent Garcia and John LNU. *Id.* ¶¶ 94, 100–01. He further alleges, upon information and belief, that Agent Garcia knew about the prior failed attempts by her colleagues to recruit Mr. Tanvir as an informant. *Id.* ¶ 96. Further, Mr. Tanvir alleges that Agents Garcia and John LNU offered to help him get off the No Fly List or procure waivers for him to fly if he agreed to cooperate with them. AC ¶¶ 94, 102–03. The implicit threat in this offer of help was clear: if he would not work as an informant, the agents would leave Mr. Tanvir on the No Fly List. Based on these allegations, one can reasonably infer that Agents Tanzin, Garcia and John LNU (1) knew that Mr. Tanvir posed no threat to aviation security, and (2) participated in and continued the same illicit scheme to recruit Mr. Tanvir as an informant and use the No Fly List to retaliate against him. *See Terebesi*, 764 F.3d at 234.

2. The Special Agent Defendants' Collective Action Against Mr. Algibhah

The facts alleged in the First Amended Complaint, and the reasonable inferences that can be drawn from those allegations, more than plausibly demonstrate that the Special Agent Defendants who interacted with Mr. Algibhah—Frank Artusa, John Doe 4, and John Doe 5—personally and directly participated in a scheme to coerce Mr. Algibhah to serve as an informant and inappropriately used the No Fly List in retaliation for his refusal to do so, in violation of his First Amendment and RFRA rights.

The Special Agent Defendants implicitly concede that Mr. Algibhah alleges facts sufficient to plead Agent Artusa and John Doe 4's direct involvement. PC Br. at 43. John Doe 5, however, argues that (1) because Mr. Algibhah "signaled" that he might be willing to be an informant, John Doe 5 would not have retaliated against him, and (2) that Mr. Algibhah fails to allege that he was denied boarding following his encounter with him. PC Br. at 47–48. These

arguments again ignore the allegations in the First Amended Complaint that John Doe 5 directly participated with Agents Artusa and John Doe 4 in their scheme to recruit Mr. Algibhah to serve as an informant and retaliate against him for his refusal. *See* AC ¶¶ 131 (alleging that, along with Agent Artusa, John Doe 5 told Mr. Algibhah that "we're the only ones who can take you off the list."), 132 (alleging that, along with Agent Artusa, John Doe 5 asked Mr. Algibhah questions about his religious practices, his community, and the people who attend his mosque), 133 (alleging that, along with Agent Artusa, John Doe 5 asked Mr. Algibhah to "act extremist."). Nor was Agent John Doe 5's offer to assist Mr. Algibhah inconsistent with violating his First Amendment and RFRA rights. Rather, such assistance is a tacit recognition that Agent John Doe 5 understood that Mr. Algibhah posed no threat to aviation security, but nonetheless personally participated in a scheme to retaliate against him for refusing to become an informant by using the No Fly List when the facts did not warrant such treatment. *See Terebesi*, 764 F.3d at 234.

3. The Special Agent Defendants' Collective Action Against Mr. Shinwari

The facts alleged in the First Amended Complaint, and the reasonable inferences that can be drawn from those allegations, more than plausibly demonstrate that the Special Agent Defendants who interacted with Mr. Shinwari—Agents Steven LNU, Harley, Michael LNU, Grossoehmig, John Doe 6, Dun, and Langenberg—personally and directly participated in a scheme to coerce Mr. Shinwari to serve as an informant and inappropriately used the No Fly List in retaliation for his refusal to do so, in violation of his First Amendment and RFRA rights.

Mr. Shinwari alleges that, at the United States consulate in Dubai, Agents Harley and Steven LNU instructed him to "tell [them] everything," and proceeded to interrogate him for three to four hours about his activities in Afghanistan and his religious activities. *Id.* ¶ 148.

Mr. Shinwari alleges that Agents Harley and Steven LNU told him that they "needed to confer with 'higher-ups in [Washington] D.C.'" before allowing him to fly back to the United States. *Id.* ¶ 150. Upon arriving at Dulles International Airport a few days after his encounter with Agents Harley and Steven LNU, Mr. Shinwari alleges that Agents Michael LNU and Grossoehmig asked him "substantially the same questions" in order to "'verify' everything that he told Agents Harley and Steven LNU in Dubai." *Id.* ¶ 153. After returning to Omaha, Mr. Shinwari alleges that Agent Michael LNU (the same agent who questioned him at Dulles International Airport) and John Doe 6 subjected him to further repetitious questioning, and asked him to become an informant, which Mr. Shinwari declined due to his religious beliefs. *Id.* ¶ 156. A few days later, Mr. Shinwari was denied boarding on a flight and alleges that he was placed and maintained on the No Fly List for his refusal to become an informant. *Id.* ¶¶ 158–59. When he emailed Agent Harley for assistance on March 12, 2012, he was met the following day by Agents Michael LNU and John Doe 6, who again asked Mr. Shinwari to become an informant. *Id.* ¶ 161. Based on these allegations, it is reasonable to infer that (1) Agents Steven LNU and Grossoehmig, at the very least, "set in motion" the series of events that resulted in the foreseeable deprivation of his constitutional rights, *Veeder*, 2013 WL 1337752, at *10–11, and (2) that these Agents collectively participated in a scheme to recruit Mr. Shinwari to serve as an informant, and when he refused, retaliated against him by placing or keeping him on the No Fly List when the facts did not warrant such treatment. *See Terebesi*, 764 F.3d at 234.

With respect to Agents Dun and Langenberg, Mr. Shinwari alleges that he met with them approximately two weeks after his last encounter with Agents Michael LNU and John Doe 6. Mr. Shinwari alleges that Agents Dun and Langenberg offered to look into obtaining a one-time waiver, leading Mr. Shinwari to believe that they "offered him the waiver in exchange for all the

information he had provided them about himself," and "as a 'reward' for his agreement to submit to questioning and to encourage him to provide more information." *Id.* ¶¶ 163–164. They, however, never followed up with Mr. Shinwari. *Id.* ¶ 164. One can reasonably infer that, in offering assistance to Mr. Shinwari to get removed from the No Fly List, these Special Agent Defendants (1) knew that Mr. Shinwari posed no threat to aviation security, and (2) personally participated in improperly pressuring Mr. Shinwari to choose between his First Amendment rights and remaining indefinitely on the No Fly List when they knew the facts did not warrant such treatment. *See Terebesi*, 764 F.3d at 234.

4. The Special Agent Defendants' Collective Action Against Mr. Sajjad

The facts alleged in the First Amended Complaint, and the reasonable inferences that can be drawn from those allegations, more than plausibly demonstrate that the Special Agent Defendants who interacted with Mr. Sajjad—John Doe 7–11, Agent Rutkowski, John Doe 12, Agent Gale, and John Doe 13[28]—personally and directly participated in a scheme to coerce Mr. Sajjad to serve as an informant and inappropriately used the No Fly List in retaliation for his refusal to do so, in violation of his First Amendment rights.

Shortly after being denied boarding on a flight to Pakistan to visit his ailing father and his 91-year-old grandmother, Mr. Sajjad alleges that Agents John Doe 9 and John Doe 10 questioned him about his friends and girlfriends, and asked him broad questions about military and terrorist training. AC ¶ 176. Mr. Sajjad alleges that these agents "repeatedly reassured [him] that they would be willing to help him be removed from the No Fly List and gave him the impression that such assistance would be provided if he agreed to their requests." *Id.* ¶ 177. Based on these allegations, this Court can reasonably infer that John Does 9 and 10 (1) knew that Mr. Sajjad

[28] John Does 7 and 8 have not yet been served in this litigation or filed a motion to dismiss.

posed no threat to aviation security, and (2) "set in motion" a series of events that resulted in the foreseeable deprivation of his constitutional rights. *Veeder*, 2013 WL 1337752, at *10–11.

Approximately one month after being denied boarding and filing a TRIP complaint, Mr. Sajjad alleges that he was approached by Agent Rutkowski and John Doe 11, who asked him to work as an informant. *Id.* ¶¶ 180–81. Along with John Doe 12, Agents Rutkowski and John Doe 11 collectively administered a polygraph test on Mr. Sajjad and falsely stated that Mr. Sajjad's truthful answers had been detected as lies. *Id.* ¶¶ 184–85. In March 2013, Agent Rutkowski offered to help Mr. Sajjad get off the No Fly List, but only if he would answer the FBI's questions. William Gale directly supervised Agent Rutkowski's conduct. When confronted, however, Agent Gale refused to confirm whether the FBI sought to recruit Mr. Sajjad as an informant. On April 4, 2014, Agent Rutkowski and John Doe 13 again offered to help Mr. Sajjad get off the No Fly List, but only if Mr. Sajjad cooperated with them. Mr. Sajjad alleges that John Does 13 told him that he had been watching Mr. Sajjad for two years and knew that Mr. Sajjad was not a terrorist. Based on these allegations, this Court can reasonably infer that John Doe 11, John Doe 12, John Doe 13, Agent Rutkowski, Agent Gale, and John Doe 13 (1) knew that Mr. Sajjad posed no threat to aviation security, and (2) personally participated in a scheme to improperly pressure Mr. Sajjad to choose between his First Amendment rights and remaining indefinitely on the No Fly List when they knew the facts did not warrant such treatment. *See Terebesi*, 764 F.3d at 234.

5. The Special Agent Defendants Cannot Defeat The Reasonable Inferences That They Were Personally And Directly Involved In The Unlawful Conduct.

In attempting to diminish their personal involvement in the schemes to recruit Plaintiffs Tanvir, Algibhah, Shinwari and Sajjad as informants and use the No Fly List as a retaliatory tool, the Special Agent Defendants seek to hold Plaintiffs to an impossible pleading standard.

Plaintiffs have no way of knowing at this stage in the proceeding who specifically placed or maintained them on the No Fly List, or what the agents said to one another. Nor do they need to plead such facts to survive a motion to dismiss. The Special Agent Defendants also mischaracterize Plaintiffs claims in order to raise "strawman" defenses. These efforts fail for several reasons.

First, with respect to Mr. Tanvir and Mr. Shinwari, several of the Special Agent Defendants who interacted with them—Agents Tanzin, John Does 1–3, Steven LNU, Harley and Grossoehmig—argue that they could not have placed these Plaintiffs on the No Fly List because they were both able to fly after those interactions. PC. Br. at 45. For the reasons stated *supra* in Point II, the fact that Mr. Tanvir and Mr. Shinwari were able to board airplanes does not establish that either was no longer on the No Fly List. Further, Mr. Tanvir and Mr. Shinwari more than plausibly allege that these agents "set in motion" a series of events that resulted in the foreseeable deprivation of their constitutional rights. *Veeder*, 2013 WL 1337752, at *10–11.[29]

Second, several of the Special Agent Defendants[30] argue that, because they did not each specifically ask Mr. Tanvir, Mr. Shinwari or Mr. Sajjad to become an informant, it is wholly implausible that these Defendants retaliated against the Plaintiffs when those Plaintiffs refused the requests of others to become informants. PC. Br. at 43–44. Likewise, several of the Special Agent Defendants[31] argue that, because Mr. Tanvir, Mr. Shinwari and Mr. Sajjad alleged that

[29] For this reason, John Doe 1's argument at PC. Br. at 47, and Agent Harley, Steven LNU and Grossoehmig's arguments at PC. Br. at 48–49, also fail: at minimum, these Special Agent Defendants "set in motion" a series of events that resulted in the foreseeable deprivation of the constitutional rights of the Plaintiffs with whom they interacted. *Veeder*, 2013 WL 1337752, at *10–11.

[30] These Defendants are Agents John LNU and Garcia (Mr. Tanvir), Steven LNU, Harley, Grossoehmig, Dun and Langenberg (Mr. Shinwari), and Agents Gale, John Does 9–10, and 12 (Mr. Sajjad).

[31] These Defendants are Agents John LNU and Garcia (Mr. Tanvir), Steven LNU, Michael LNU, Harley, Grossoehmig, Dun and Langenberg (Mr. Shinwari), and Rutkowski, Gale, and John Does 9–13 (Mr. Sajjad).

they were placed on the No Fly List before the respective Special Agent Defendants interacted with them, it is implausible that those Defendants participated in the retaliatory conduct. PC Br. at 44–45. But a Special Agent Defendant's liability can arise from either directly participating in placing a Plaintiff on the No Fly List when the agent knew the facts did not warrant such treatment, or directly participating in keeping a Plaintiff on the No Fly List when the agent knew the facts did not warrant a continuation of such treatment. The absence of an explicit request to become an informant does not defeat the very plausible inference that Special Agent Defendants' prolonged or repeated questioning of Plaintiffs was intended to recruit them. Similarly, the First Amended Complaint also alleges that the Special Agent Defendants *maintained* Plaintiffs on the No Fly List in retaliation for their refusal to become informants.[32] Therefore, taken in the light most favorable to the non-moving party, Plaintiffs have more than plausibly alleged Special Agent Defendants' personal involvement in the retaliatory acts.

6. The TSC's Involvement Does Not Break The Chain Of Causation.

Defendants argue that because the TSC reviews and accepts nominations to the No Fly List, the Special Agent Defendants should be totally insulated from liability despite their own improper actions. PC Br. at 40–43. As a matter of law, however, third-party action does not break a chain of causation if that action was foreseeable. Defendants are and remain liable when they can "reasonably foresee that [their] misconduct [would] contribute to an 'independent' decision that results in a deprivation of liberty." *Zahrey v. Coffey*, 221 F.3d 342, 352 (2d Cir. 2000); *Taylor v. Brentwood Union Free Sch. Dist.*, 143 F.3d 679, 688 (2d Cir. 1998) ("[A] defendant may be held liable for 'those consequences attributable to reasonably foreseeable

[32] For this reason, Agent John LNU's argument at PC. Br. at 46, and Agents John Doe 12 and Gale's arguments at PC. Br. at 49–50, also fail.

intervening forces, including the acts of third parties.'") (quoting *Warner v. Orange Cnty. Dep't of Prob.*, 115 F.3d 1068, 1071 (2d Cir. 1997)); *see also Kerman v. City of N.Y.*, 374 F.3d 93, 126 (2d Cir. 2004) (same). Tort defendants, including those sued in *Bivens* actions, are therefore responsible for the "natural consequences" of their actions. *Higazy v. Templeton*, 505 F3d 161, 175 (2d Cir. 2007) (citing *Monroe v. Pape*, 365 U.S. 167, 187 (1961)).

In circumstances similar to this case, courts have found that third-party action did not break the causal chain. In *Warner v. Orange Cnty. Dep't of Prob.*, for example, the probation department recommended that the plaintiff attend the religious-based Alcoholics Anonymous program ("A.A."), and the sentencing judge subsequently adopted that recommendation. The plaintiff asserted that the A.A. meetings forced him to participate in religious activity in violation of his First Amendment rights. 115 F.3d at 1069. Because of the "high likelihood" that the court would adopt the probation department's recommendation, the district court and the Second Circuit both concluded that the probation department could still be liable for violating the plaintiff's First Amendment rights even after the sentencing judge adopted its recommendation that he attend A.A. *Id.* at 1070–73; *see also Malley v. Briggs*, 475 U.S. 335 (1986) (magistrate judge's approval of police officer's application for a warrant did not shield the officer from liability); *Myers v. Cnty. of Orange*, 157 F.3d 66 (2d Cir. 1998) (despite assistant district attorney's independent decision to prosecute arrestee, police department was liable for its policy of only accepting the first complaint when multiple persons were injured in dispute); *Ross v. Lichtenfeld,* 755 F. Supp. 2d 467, 476 (S.D.N.Y. 2010), *rev'd on other grounds sub nom. Ross v. Breslin*, 693 F.3d 300 (2d Cir. 2012) (ultimate authority of school board to terminate employment did not shield school district superintendent from liability given his recommendation to fire employee).

Similarly, an FBI agent's nomination or recommendation to place someone on the No Fly List when they know that the facts do not warrant such treatment is an essential part of the process. Such nominations or recommendations have more than a "high likelihood" of placing the individual on the No Fly List. In the First Amended Complaint, Plaintiffs allege that the FBI is one of the primary agencies responsible for making "nominations" to the TSDB, AC ¶ 41, and that "the TSC rarely rejects any of the names proposed for the TSDB," *id.* ¶ 47. Although the TSC is "responsible for reviewing and accepting nominations to the No Fly List from agencies, including the FBI," *id.* ¶ 20, the TSC's review and approval is wholly foreseeable and does not constitute an "intervening event" capable of breaking the causal connection between nomination and placement.[33]

Defendants cite several cases to argue that the TSC's actions break the chain of causation, but all of them are inapposite.[34] *See* PC Br. at 41–42. In *Taylor*, an appeal from a judgment upon jury verdict, the plaintiff teacher sued the defendant principal arguing that his one-year suspension from teaching violated his equal protection rights. The defendant principal argued that she was entitled to qualified immunity because she was required to report any teacher

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[33] In fact, the TSC Director stated in a sworn declaration that the TSC rejects only one percent of nominations to the TSDB. Ex. A, Defendants' Objections and Responses to Plaintiff's First Set of Interrogatories at 10-11, *Mohamed v. Holder*. In another case about the No Fly List, it was disclosed that an FBI agent erroneously checked a box on a nomination form, placing and maintaining the plaintiff on the No Fly List for more than eight years. *Id.* at ¶ 49 (citing Ex. E, *Ibrahim*, Findings of Fact, Conclusions of Law, and Order for Relief at 9). These filings corroborate the allegations in the First Amendment Complaint, which must be accepted as true at this stage of the litigation.

[34] The Defendants' reliance on *Halkin v. Helms*, a case in which the plaintiffs sued several CIA agents in their personal capacities for violating their civil rights, is also misplaced. PC Br. at 42. Before deciding the qualified immunity issue, the court had already determined that the state secrets privilege applied. *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982). In light of the state secrets privilege, the court concluded that the plaintiffs would not be able to establish a causal connection between the defendants' conduct and the injuries they suffered. 690 F.2d 977, 997 (D.C. Cir. 1982). By contrast here, even without discovery, Plaintiffs plausibly allege a connection between the Special Agent Defendants' improper use of the No Fly List and the constitutional violations that they suffered. *See also* Ex. M, *Mohamed*, No. 1:11-cv-00050, slip op. at 3 (denying Government's motion to dismiss a case challenging the No Fly List on the grounds of the state secrets privilege).

misconduct to district officials, made no recommendation of her own, and lacked any discretion in the process. 143 F.3d at 682, 686–87. Under these circumstances, the court held that defendant principal took "no part" in the decisions the plaintiff teacher argued constituted a violation of his rights. *Id.* at 687. Here, the allegations in the First Amended Complaint more than plausibly allege that Special Agent Defendants directly participated in the scheme to improperly use the No Fly List to retaliate against Plaintiffs for exercising their First Amendment rights.[35]

The Special Agent Defendants' reliance on *Townes v. City of New York*, *Sunnen v. U.S.D.H.S.*, and *Wray v. City of New York* is also misplaced because these cases actually involved independent, third-party action which broke the chain of causation. PC Br. at 41–42. In *Townes v. City of New York*, the defendant sought money damages for his wrongful conviction from the police officers who unconstitutionally stopped and searched him. The court granted the defendant's motion to dismiss, holding that the trial court exercised its independent judgment in not suppressing the evidence from the search, and as a result, the trial court's decision was the independent proximate cause of his conviction. 176 F.3d 138, 147 (2d Cir. 1999). In *Sunnen v. U.S.D.H.S.*, a *pro se* plaintiff filed an increasingly bizarre series of actions against state and federal government officials. No. 13 Civ. 1242(PKC), 2013 WL 1290919, at *1–2 (S.D.N.Y. Mar. 28, 2013). The district court dismissed his complaint with prejudice, *inter alia*, because the U.S. Department of Health and Human Services had no role in the operation of the New York State Department of Health. *Id.* at *2–3. And in *Wray v. City of New York*, an appeal from summary judgment, the plaintiff argued that his constitutional rights were violated by a police

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[35] For the same reason that the Special Agent Defendants' reliance on *Taylor* is misplaced, so too is their reliance on *Jeffries v. Harleston*. PC Br. at 41. In that case, the Second Circuit explicitly concluded that there was "no reasonable possibility" that the defendants who harbored animus towards the plaintiff "tainted" the majority vote of the board of trustees to limit the plaintiff's term as department chair. 52 F.3d 9, 14 (2d Cir. 1995).

officer's unduly suggestive witness identification that resulted in his wrongful conviction. 490 F.3d 189, 192 (2d Cir. 2007). The Second Circuit held that, even assuming that the lineup was unduly suggestive, superseding acts of the prosecutor and the trial judge caused the asserted constitutional violation. *Id.* at 192, 195 (2d Cir. 2007). Here in contrast, the Special Agent Defendants each had a direct personal role in the concerted effort that caused the violation of Plaintiffs' constitutional and RFRA rights. The Special Agent Defendants abused their authority regarding the No Fly List and personally and directly participated in a scheme to coerce Plaintiffs to become informants and retaliate against them by using the No Fly List when they refused.

C. Plaintiffs' Rights Were Clearly Established.

"A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (quoting *Anderson v. Creighton*, 486 U.S. 635, 640 (1987)). Courts "do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* In fact, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see also United States v. Lanier*, 520 U.S. 259, 270 (1997).

Although the right must be defined at the appropriate level of specificity, *Anderson*, 483 U.S. at 641, government officials and officers can be held liable as long as they have "fair warning" that their conduct was impermissible. *Hope*, 536 U.S. at 741. The Supreme Court has stated that general statements of law are capable of giving "fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has

[not] previously been held unlawful.'" *Lanier*, 520 U.S. at 271 (quoting *Anderson*, 483 U.S. at 640).

The qualified immunity defense is therefore inapplicable in cases like this one, where "the very action in question has previously been held unlawful," and the lawfulness is "apparent" "in the light of pre-existing law." *Husain v. Springer*, 494 F.3d 108, 131 (2d Cir. 2007).

1. Plaintiffs' First Amendment Right To Be Free From Government Retaliation Was Clearly Established.

(a) The Right To Exercise Speech, Association And Religion Free From Retaliation Is Clearly Established.

The Special Agent Defendants wrongfully placed or maintained Plaintiffs on the No Fly List in retaliation for their refusal—on constitutionally-protected speech, associational and religious grounds—to become informants for the FBI. AC ¶¶ 200, 207–209. The Agents' retaliatory acts, which forced Plaintiffs into a choice "between their First Amendment rights and their liberty interest in travel," AC ¶ 201, violated the clearly established right to be free from official retaliation for exercising First Amendment freedoms. *See*, *e.g.*, *Hartman v*, 547 U.S. at 256, 260–61. These rights were clearly established at the time the Special Agent Defendants retaliated against Plaintiffs for at least the following three reasons.

First, the Special Agent Defendants violated the clearly established rule proscribing adverse action against individuals who exercise their right to free speech by placing or maintaining Plaintiffs on the No Fly List in retaliation for their refusal to inform on people in their communities. *See*, *e.g.*, *Hartman*, 547 U.S. at 256, 260–61 ("Official reprisal for protected speech offends the Constitution [because] it threatens to inhibit exercise of the protected right[.]") (internal quotations and citations omitted); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) (recognizing that "[i]t is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of

speech); *Gill v. Pidlypchak*, 389 F.3d 379, 384 (2d Cir. 2004) (recognizing First Amendment retaliation claims). That Plaintiffs here were exercising their right *not* to speak to the Special Agent Defendants and their right not to be compelled to speak to neighbors and fellow members of their Muslim communities in a false and disingenuous manner does not alter the contours of the right—the First Amendment protects "both the right to speak freely, and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (finding unconstitutional the requirement that drivers, as condition of using the roads, display state motto "Live Free or Die" on license plates); *see also W. Va. Bd. of Education v. Barnette*, 319 U.S. 624, 633–634 (1943) (finding unconstitutional the requirement that schoolchildren, as condition of going to school, salute the flag).

Second, clearly established law also protects Plaintiffs' right to be free from retaliation for choosing not to associate with the Special Agent Defendants or members of the Muslim communities Defendants asked Plaintiffs to spy on. *See*, *e.g.*, *Shelton v. Tucker*, 364 U.S. 479, 485–86 (1960) (striking down law compelling teachers, as a condition of employment, to disclose their associational ties because it "impair[s] that teacher's right of association," where the school board had power to retaliate by "terminat[ing] the teacher's employment without bringing charges, without notice, without a hearing, [and] without affording an opportunity to explain."); *NAACP v. Alabama*, 357 U.S. 449, 461–63 (1958) (contempt order penalizing NAACP for refusing to disclose membership list vacated for abridging rights of members to "privacy in [their] associations"); *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (law permitting non-party members to vote in party primary elections violated political parties' "right not to associate" with non-members).

Third, by placing or maintaining Plaintiffs Tanvir, Algibhah and Shinwari on the No Fly List for their *religiously*-motivated refusal to become informants in their own Muslim communities the Special Agent Defendants violated the clearly established right to freely practice religion without fear of retaliation. *Washington v. Gonyea*, 538 F. App'x 23, 26 (2d Cir. 2013) (summary order). The Special Agent Defendants' pressure on these three Plaintiffs to become informants, contrary to their religious beliefs, in order to avoid losing the ability to travel freely substantially burdened their religious exercise in violation of clearly established law. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (striking down law that compelled members of the Amish faith, under threat of sanction, "to perform acts undeniably at odds with fundamental tenets of their religious beliefs"). For instance, by placing Mr. Algibhah on the No Fly List after he declined to visit a mosque and "act like an extremist," Defendants interfered with Mr. Algibhah's "'real choice' about whether to participate in worship or prayer," in violation of firmly established Supreme Court precedent. *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 412 (2d Cir. 2001) (citing cases); *see also Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to . . . participate in religion or its exercise").

(b) Defendants Mischaracterize the Constitutional Rights at Stake.

The Government does not contest Plaintiffs' well-established right to be free from First Amendment retaliation; in fact, Defendants' brief does not address that right at all. Instead, Defendants cherry-pick certain allegations of misconduct and argue why no clearly established freedoms were violated. The Court should reject Defendants' attempt to "[c]haracterize[] the

right too narrowly to the facts of the case" for several reasons. *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 251 (2d Cir. 2001).[36]

First, Defendants argue that some Special Agent Defendants merely interviewed Plaintiffs and never pressured them to serve as informants, and therefore cannot be liable for First Amendment retaliation. PC Br. at 51–52. However, as discussed *supra*, the Special Agent Defendants are more than plausibly alleged to have each taken personal steps in furtherance of and acted in concert towards the shared purpose of coercing Plaintiffs to relinquish their First Amendment rights and serve as informants.

Second, the Special Agent Defendants' contention that the "mere submission of names to a watchlist list does not amount to a constitutional violation" misses the crux of Plaintiffs' claim. PC Br. 53. The Special Agent Defendants violated Plaintiffs' constitutional rights not simply because they placed or maintained them on the No Fly List, but for doing so because of Plaintiffs' exercise of their First Amendment rights. AC ¶ 201 ("Special Agent Defendants . . . placed . . . or maintained Plaintiffs on the No Fly List, *because* Plaintiffs refused to act as informants." (emphasis added)). Defendants also ignore the well-settled rule that "government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right." *Thaddeus–X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999) (*en banc*).

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[36] The Second Circuit has reversed lower court decisions that have construed a right too narrowly and therefore erroneously granted qualified immunity. *See Johnson*, 239 F.3d at 253 (claims asserting a right "'not to be struck by a teacher' construes the right too narrowly"); *LaBounty v. Coughlin*, 137 F.3d 68, 74 (2d Cir. 1998) (district court's description of issue as "right to be free from crumbling asbestos" was overly restrictive when a plaintiff alleged placement in unconstitutional prison conditions); *Husain*, 494 F.3d at 132 (where public college president cancelled student government election in response to content of student newspaper, court held "unlawfulness" of the school president's actions "was 'apparent' 'in the light of pre-existing law,'" despite lack of precedent involving chilling speech by specifically cancelling elections).

Third, the Special Agent Defendants contend that "there is no constitutional right not to become an informant." PC Br. I, at 53–54. Again, Plaintiffs are not suing simply because Special Agent Defendants asked them to become informants; they sue because, after refusing to become informants, Special Agent Defendants retaliated against them.[37]

Fourth, the Special Agent Defendants are wrong in their contention that "it is not clearly established that Plaintiffs had a constitutional right to air travel." PC Br. at 55–57. There is a longstanding, general constitutional right to travel and, more specifically, to air travel. *See Latif*, 2014 WL 2871346, at *11 (D. Or. June 24, 2014) ("[I]nternational travel is not a mere convenience or luxury in this modern world, [it] is a necessary aspect of liberties sacred to members of a free society."); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.").[38] The Special Agent Defendants also misapprehend *Town of Southold*

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[37] The cases Defendants cite in support of their claim that there is "no constitutional right not to become an informant" are inapposite. PC Br. at 53–54. These cases involve claims that prisoner misconduct or criminal charges were brought by correctional officers or prosecutors for retaliatory reasons. Qualified immunity was upheld in three of the cases because there was no proof that the underlying charges were invalid. *See*, *e.g.*, *United States v. Paguio*, 114 F.3d 928, 930 (9th Cir. 1997) ("We can find no precedent for the proposition that prosecution is 'vindictive' . . . so long as the prosecutor has probable cause to believe a defendant committed a crime."); *United States v. Gardner*, 611 F.2d 770, 773 (9th Cir. 1980) (because the defendant "does not assert that the Government had no probable cause to prosecute him on the charges of filing false statements . . . the Government could lawfully seek to induce Gardner [with the threat, during plea negotiations, of the additional false statement charges] to cooperate in another criminal investigation.").

In the remaining case, *Allah v. Juchenwioz*, the plaintiff accused correctional officers of filing a false inmate misconduct report against him in retaliation for his refusal to be recruited as an informant against fellow inmates. 176 F. App'x 187, 188 (2d Cir. Apr. 12, 2006). The Second Circuit did "not address whether the District Court was correct in its previous assessment that an inmate has a constitutional right not to become an informant," but stated in *dicta* that such a right was not clearly established in 1993, when the challenged conduct occurred. *Id.* at 189. *Allah* did not draw any conclusion about whether a similarly-situated plaintiff would have had some sort of clearly established *Bivens* claim after 1993. Moreover, *Allah* arose in the special disciplinary context of a prison—far removed from the circumstances here. Finally, as an unpublished summary order issued prior to January 1, 2007, *Allah* has no precedential value and may not be cited in documents filed with this Court. *See* 2d Cir. R. 32.1.1(a), (b)(2).

[38] Furthermore, Defendants' emphasis on the "right to fly" ignores the stigmatic injury Plaintiffs have suffered in the wake of their placement on the List. *See* AC ¶¶ 219–220 (noting stigmatic effect); ¶¶ 116, 144, 170–71 (alleging that FBI officials repeatedly harassed and pressured Plaintiffs into becoming informants, causing them fear of additional harassment, emotional distress, and personal trauma); *id.* ¶ 171 (Plaintiff Shinwari now

v. Town of E. Hampton. In that case, the Second Circuit did not "squarely h[o]ld that there is no 'constitutional right to the most convenient form of travel.'" PC Br. at 55 (quoting *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 54 (2d Cir. 2007)). In the very same sentence from *Town of Southold*, which the Special Agent Defendants omit, the Second Circuit elaborated that "*minor restrictions* on travel simply do not amount to the denial of a fundamental right." *Id.* (emphasis added). The court in *Town of Southold* ruled that a law restricting high-speed ferry service—while permitting other types of ferries—to and from East Hampton imposed a "minor restriction" on passengers' constitutional right to travel because passengers could still board permitted ferries to East Hampton or take high-speed ferries to destinations near the town and complete the trip by other modes of transportation. *Id.* The restriction imposed by the No Fly List, by contrast, is far more substantial and irremediable because "it actually deters such travel" and "impeding travel is its primary objective." *Id.* at 53 (quoting *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986)).

In arguing that there is no constitutional right to travel, the Special Agent Defendants also misconstrue the constitutional right Plaintiffs allege was violated. Plaintiffs accuse Defendants of unlawfully forcing them to "choose between their First Amendment rights and their liberty interest in travel." AC ¶ 201. By standing on their First Amendment rights, Plaintiffs suffered adverse consequences at the hands of the Special Agent Defendants, among them losing the ability to travel freely. *Id.* ¶ 204. To preserve their constitutionally protected right to travel, Plaintiffs would have had to sacrifice their First Amendment rights. Whether or not the liberty

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reluctant to attend religious services and share his religious and political views with others). And the fact that the Government "shares watchlist information with 22 foreign governments and United States Customs and Border Protection makes recommendations to ship captains as to whether a passenger poses a risk to transportation security," can lead to "further interference with an individual's ability to travel." *Latif v. Holder*, 10-cv-00750, 2013 WL 4592515, at *9 (D. Or. Aug. 28, 2013).

interest in travel is deemed a constitutional right or a privilege does not change the crux of Plaintiffs' constitutional claims, which allege a clearly established right to be free from First Amendment retaliation.[39]

2. Plaintiffs Tanvir's, Algibhah's And Shinwari's Rights Under RFRA Were Clearly Established.

RFRA prohibits substantial burdens on a person's exercise of religion unless that burden (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. §§ 2000bb-1(a)–(b); *see Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430 (2006). For many of the same reasons that these Plaintiffs' right to the free exercise of their religion is clearly established (discussed *supra* at pp. 69–72), so too is their right under RFRA also clearly established.

Defendants place undue emphasis on the question of whether a court has concluded that informing on other members of a community is a substantial burden on the practice of Islam. Courts are not the arbiters of clearly established religious practice, nor are they the only source of information for law enforcement officers about religion. Plaintiffs Tanvir, Algibhah, and Shinwari have alleged that the Special Agent Defendants knew that Plaintiffs were Muslim; and indeed, that is precisely why they targeted them for recruitment, and probed them about their communities and their religious beliefs. *See* AC ¶¶ 36–38, 66; 70, 76, 101 (Mr. Tanvir); 120–21, 136, 142 (Mr. Algibhah); 148, 153, 155–56 (Mr. Shinwari). Defendants' attempted recruitment

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[39] Even if the liberty interest in travel was a "privilege" and not a "right," that would not alter the unconstitutional nature of Defendants' retaliatory acts. Clearly established law proscribes government officials from forcing an individual to choose between their First Amendment rights and a government benefit or privilege. *Lyng v. N.W. Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988) (government action constitutes substantial burden on religious exercise when it "penalize[s] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."); *Alliance for Open Society Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 234 (2d Cir. 2011) ("Compelling speech as a condition of receiving a government benefit cannot be squared with the First Amendment.").

of Plaintiffs is part of the FBI's practice—spanning the past twelve years—of aggressive recruitment and deployment of informants in American Muslim communities. *Id.* ¶ 36. Given this longstanding program and aggressive recruitment, it is a reasonable inference that Special Agent Defendants knew that many Muslims have sincerely held religious objections to informing on their communities writ large. *Id.* ¶ 65. Plaintiffs staunchly resisted Defendants' attempts to recruit them as informants, notwithstanding the severe consequences. *Id.* ¶¶ 70, 77–79, 84, 94 (Mr. Tanvir); 121 (Mr. Algibhah); 156, 161 (Mr. Shinwari).

Defendants' assertion at this point in the proceedings that they did not know that serving as an informant would substantially burden these three Plaintiffs' exercise of religion is disingenuous. It is, of course, a question of fact not suitable for resolution on a motion to dismiss whether Defendants knew that Plaintiffs believed that informing on their communities would violate their religious beliefs, and that placing and maintaining Plaintiffs on the No Fly List would pressure them to do so. On a motion to dismiss, Plaintiffs merely need to plead facts that allow the Court to make a reasonable inference that the defendant is liable. *See Valdez v. City of New York*, 11 CIV 05194 (PAC) (DF), 2013 WL 8642169, at *5, 14 (S.D.N.Y. Sept. 3, 2013), *report and recommendation adopted*, 2014 WL 2767201 (S.D.N.Y. June 17, 2014) (allegation that prison official drew an overt connection between plaintiff's classification as a member of a "security risk group" and observation that he was a practicing Catholic, causing plaintiff to feel pressured to restrict his religious practices, stated free exercise and Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, claims).

Finally, it was clearly established that RFRA protects religious exercise from substantial burdens whether or not the Special Agent Defendants actually knew that Plaintiffs' sincerely held religious beliefs were substantially burdened. Congress' intent in passing RFRA was to

protect religious exercise against "neutral, generally applicable" laws and practices; as RFRA itself declares, "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2). Indeed, RFRA's substantial-burden test is so sweeping that it is more than "even a discriminatory effects or disparate-impact test." *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997), *superseded on other grounds by statute*, 42 U.S.C. § 2000cc. RFRA liability attaches whenever "the exercise of religion has been burdened in an incidental way by a law of general application"; there is no need to show the government actors' intent or knowledge or even that "the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs." *Flores*, 521 U.S. at 535. Defendants are mistaken, therefore, when they contend that they are entitled to qualified immunity because the three Plaintiffs never "told any Agent that working as an informant would violate his religious beliefs or otherwise interfere with the exercise of his religion."[40] PC Br. at 59. The Special Agent Defendants were on notice that

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[40] Defendants' contention that *Valdez v. City of New York*, No. 11 Civ. 05194, 2013 WL 8642169 (S.D.N.Y. Sept. 3, 2013), an unpublished magistrate judge report, imports a knowledge requirement into RFRA is mistaken. *Valdez* dealt instead with whether the plaintiff sufficiently alleged a "causal nexus" between the defendant's conduct and the plaintiff's ability to exercise his religion. *Id.* at *14. The plaintiff-prisoner there sued under the First Amendment and RLUIPA—not RFRA, as Defendants mistakenly claim, PC at 59-60—after he was told by a correctional officer that he was classified as a member of a gang, or "security risk group," due to being, *inter alia*, a practicing Catholic, which made him feel pressure to stop practicing his religion to change his classification. *Id.* at *3-4. Importantly, the *Valdez* plaintiff did not allege that the correctional officer knew that his religious practice was being burdened by virtue of his security risk group classification, *id.* at *14, a pleading burden Defendants seek to impose on Plaintiffs here. *See* PC Br. at 59. Instead, in determining whether the plaintiff had adequately alleged a "causal nexus" between the officer's conduct and the plaintiff's RLUIPA and First Amendment injury, the court drew its own "plausible" inference that, by telling the plaintiff that he was classified as a gang member due, in part, to his religion, the officer's conduct "was likely to cause Plaintiff to feel pressured to give up his religious practices," whether or not he actually knew that was occurring. *Id.* at *14. In other words, the plaintiff did not allege, and the court did not require it to be pled, that the defendant knew or should have known that the plaintiff's religious exercise was substantially burdened. Likewise here, drawing all reasonable inferences in Plaintiffs' favor, it is plausible that the Special Agent Defendants, who are alleged to have targeted American Muslims to inform on their co-religionists and, when they refused, retaliated against them, AC ¶¶ 36-39, 63-67, were "likely to *cause*" Plaintiffs to feel pressured to give up their religious practices, whether or not they *knew* their conduct would have that effect. *Valdez*, 2013 WL 8642169, at *14 (emphasis added). Moreover, the *Valdez* Court, in holding that qualified immunity did not apply, framed the clearly-established right for qualified immunity purposes broadly, noting that "it was clearly established that 'prison officials may not substantially burden inmates'

substantially burdening Plaintiffs' religion, regardless of their intent or knowledge, could violate these Plaintiffs' clearly-established statutory rights.

V. RFRA PROVIDES FOR MONEY DAMAGES CLAIMS AGAINST INDIVIDUAL DEFENDANTS IN THEIR PERSONAL CAPACITIES.

As numerous courts have acknowledged, RFRA's text clearly permits personal capacity suits for damages against government officials. Defendants' position—that damages under RFRA are not "appropriate relief"—has not been adopted by any court.[41] PC Br. at 22–27. Defendants cite no case decided under RFRA as holding such a position. Decisions holding otherwise under a different statute, RLUIPA, do not support the Defendants' position under RFRA here given crucial differences between the two statutes.

A. RFRA's Statutory Text Allows Personal Capacity Suits For Money Damages.

RFRA authorizes Plaintiffs Tanvir, Algibhah and Shinwari to "obtain *appropriate relief* against a government," with "government" defined by the statute as, *inter alia*, an "official (*or other person acting under color of law*) of the United States." 42 U.S.C. § 2000bb-1(c), 2(1) (emphasis added). RFRA applies to "all Federal law, *and the implementation of that law*." 42 U.S.C. § 2000bb–3 (emphasis added). This language is unambiguous: a plaintiff is entitled

rights to religious exercise without some justification.'" *Id.* at *17. Similarly here, the "clearly established right" is that government agents are not allowed to substantially burden a person's religious exercise without justification—not Defendants' narrowly-drawn "right" against being asked to become an informant in one's religious community. *See* PC Br. at 58—59.

[41] As noted *supra* note 24, these Plaintiffs do not seek money damages under RFRA against these Defendants in their official capacities, although do seek equitable relief against them in that capacity. In their personal-capacity brief, Special Agent Defendants erroneously maintain that RFRA does not create a cause of action for "equitable relief" against the official-capacity defendants, PC Br. at 22 n.14, even though, in their official-capacity brief, they concede that Plaintiffs are "entitled to only declaratory or injunctive relief under RFRA." OC Br. at 33 (citing *Johnson v. Killian*, No. 07 Civ. 6641, 2013 WL 103166, at *3 (S.D.N.Y. Jan. 9, 2013)). Assuming Special Agent Defendants' contention was not mistaken, however, the cases on which they rely clearly recognize the availability of equitable relief under RFRA against federal officials sued in their official capacity. OC Br. at 33 (collecting cases).

to "appropriate relief" against a "person acting under color of law," such as FBI agents, whose conduct substantially burdens the plaintiff's religious exercise. When a plaintiff suffers losses as a result of the "person['s]" conduct, it is "appropriate" for courts to award damages. *See*, *e.g.*, *Mack v. O'Leary*, 80 F.3d 1175, 1177 (7th Cir. 1996), *vacated on other grounds*, *O'Leary v. Mack*, 522 U.S. 801 (1997).

1. RFRA Unambiguously Allows Personal Capacity Suits.

RFRA's plain text clearly provides redress against "persons," like Special Agent Defendants here, "acting under color of law" to violate RFRA. 42 U.S.C. § 2000bb-2(21). RFRA's provision of "appropriate relief against," *inter alia*, a "person acting under color of law," is similar to 42 U.S.C. § 1983, which authorizes "redress" against a "person . . . under color of any statute"—language that, as the Special Agent Defendants acknowledge, has long been interpreted to permit an action for money damages against state officials in their personal capacity. PC Br. at 25 (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)). The similarity between the two statutes is so striking, in fact, that the Ninth Circuit, among other courts, has squarely held that the "judicial interpretation of the phrase 'acting under color of law,' as used in 42 U.S.C. § 1983, applies equally in [a] RFRA action." *Sutton v. Providence St. Joseph Med'l Ctr.*, 192 F.3d 826, 834–35 (9th Cir. 1999) (citing cases); *see also*, *e.g.*, *Roman Catholic Diocese of Rockville Centre v. Inc. Vill. of Old Westbury*, No. 09 CV 5195, 2011 WL 666252, at *10 (E.D.N.Y. Feb. 14, 2011) ("RFRA's 'acting under color of law' phrase has been interpreted in the same way as that phrase is used under Section 1983."). Because Congress "used the key phrase [in RFRA]—'acting under color of law'—before in . . . § 1983," *Sutton*, 192 F.3d at 834, it follows that "repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." *Leonard v. Israel Discount Bank*, 199 F.3d 99, 104 (2d Cir. 1999) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)). The

Special Agent Defendants' baseless assertion that RFRA's language "contrasts sharply" with the language in § 1983, (PC Br. at 25), simply cannot be squared with RFRA's text or cases that have construed the statutes side-by-side.

Also significant is RFRA's use of the term "person." In interpreting identical language in § 1983, the Supreme Court found that

> officers sued for damages in their official capacity are not 'persons' for purposes of the suit because they assume the identity of the government that employs them. By contrast, officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term 'person.'

Hafer, 502 U.S. at 27. Congress' use of "person" in RFRA, paralleling the use of the term in § 1983, signals Congress' unmistakable intent to make federal officials liable in personal capacity suits, just as state officials are liable in their personal capacity under § 1983 for violating a person's right to free religious exercise.

This reading of the plain text is also supported by the fact that RFRA defines people who are not technically Government officials ("and other person acting under color of law") as "Government," and thus proper defendants under RFRA. This indicates that RFRA must permit personal capacity suits because such individuals have no "official capacity" in which to be sued. 42 U.S.C. § 2000bb–2(1); *see also*, *e.g.*, *In re Archdiocese of Milwaukee*, 496 B.R. 905, 919 (E.D. Wis. 2013) (holding that committee of unsecured creditors in bankruptcy proceeding was "acting under color of law" for RFRA purposes). Moreover, Congress knows how to specify that a statutory provision applies to government officials only in their "official capacity" when it wants to, and has not done so here. *See*, *e.g.*, 28 U.S.C. § 1391(e) ("A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity . . . may . . . be brought in any judicial district").

The Special Agent Defendants misapprehend *Stafford v. Briggs*, 444 U.S. 527 (1980). PC Br. at 24. The Supreme Court in *Stafford* found that the Mandamus and Venue Act, 28 U.S.C. § 1391(e), which governs venue in common law mandamus actions and contains language similar to RFRA, did not permit personal capacity suits for money damages. 444 U.S. at 535–36. That result is not surprising—a mandamus action is *necessarily* (1) equitable, because it seeks to "compel . . . performance," 28 U.S.C. § 1361, and (2) an official capacity action, because it requires government officials to perform "a plain official duty, requiring no exercise of discretion," *Puerto Rico v. Branstad*, 483 U.S. 219, 227 (1987). Contrary to the type of claim at issue in *Stafford*, RFRA codifies a religious exercise claim for which courts had previously recognized a money damages remedy against government officials acting in their personal capacities. *See Jama v. U.S.I.N.S.*, 343 F. Supp. 2d 338, 374–75 (D.N.J. 2004) (citing § 1983 and *Bivens*).

Defendants' citation to a couple of cherry-picked statements from RFRA's legislative history to argue that "appropriate relief" can only mean equitable relief from "statutory or regulatory interference" is also unavailing. PC Br. at 30. Defendants completely ignore that RFRA's text clearly applies to legislation *as well as individual conduct*, specifying that the statute applies to "all Federal law, *and the implementation of that law*." 42 U.S.C. § 2000bb–3 (emphasis added).

2. "Appropriate Relief" Includes Money Damages.

RFRA's plain text not only permits suits against federal officials in their personal capacity, it also allows for money damages actions against such defendants. RFRA does not specifically define "appropriate relief," which is left "open-ended and ambiguous about what types of relief it includes." *Sossaman v. Texas*, 131 S. Ct. 1651, 1659 (2011) (interpreting identical phrase under RLUIPA). But "Congress is understood to legislate against a background

of common-law . . . principles," *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991), and general legal principles necessarily inform judicial determinations as to what remedies are available to civil plaintiffs. *See*, *e.g.*, *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 420–21 (2009) (concluding that, in light of "general principles of maritime tort law" punitive damages was a remedy available to the plaintiff (internal quotation marks omitted)).

RFRA's reference to "appropriate relief" must encompass damages because of the general remedies principle that damages are the "ordinary remedy" and equitable relief is the exception. *Bivens*, 403 U.S. at 395; *see also Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75–76 (1992) ("Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate.").[42] Indeed, *Franklin* makes clear that, "absent clear direction to the contrary by Congress," federal statutes providing a private right of action authorize all "appropriate relief," including damages, against violators of its substantive terms. 503 U.S. at 70–71, 75–76. This principle was reiterated in *Barnes v. Gorman*, 536 U.S. 181, 185, 187 (2002), which affirmed that "the scope of 'appropriate relief'" includes compensatory damages.

The "inherently context-dependent" nature of the phrase "appropriate relief," *Sossaman*, 131 S. Ct. at 1659, also means that damages are "appropriate" here because of the nature of Plaintiffs Tanvir, Algibhah and Shinwari's RFRA injuries. These Plaintiffs suffered, *inter alia*, "material and economic loss" as a result of certain Defendants' RFRA violations. AC ¶ 215. In this particular "context," only damages—not equitable or injunctive relief—would be "appropriate" to vindicate their statutory rights. *See Franklin*, 503 U.S. at 76, (concluding that

[42] The Special Agent Defendants implicitly accept that other types of relief—namely injunctive and declaratory relief—are available to RFRA plaintiffs, but do not explain why the phrase "appropriate relief" is clear enough as to provide for equitable relief, but too ambiguous with respect to damages. In light of general remedies principles, the presumption should be the reverse. PC. Br. at 23, 30; OC Br. at 33.

monetary damages were "appropriate" because equitable relief offered no redress for the injury suffered).

Plaintiffs' reading of the statute is fully consistent with Congress' intent in drafting RFRA. Congress enacted RFRA to provide "a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc–3(g);[43] *see also Burwell*, 134 S. Ct. at 2760 ("Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty."). Before RFRA existed, courts long recognized § 1983 and *Bivens* claims for money damages against officials who violated religious freedoms. *See*, *e.g.*, *Sutton v. Rasheed*, 323 F.3d 236, 249 & 258 n.38 (3d Cir. 2003) (§ 1983); *Jihaad v. O'Brien*, 645 F.2d 556 (6th Cir. 1981) (*Bivens*). It is "unlikely that Congress would *restrict the kind of remedies* available to plaintiffs who challenge free exercise violations in the same statute it passed to *elevate the kind of scrutiny* to which such challenges would be entitled." *Jama*, 343 F. Supp. 2d at 374–75 (emphasis in original). Moreover, when Congress has intended to exclude damages, it has done so clearly. *See* 5 U.S.C. § 702 (providing that, under the APA, "relief other than money damages" is available against a federal agency to remedy a "legal wrong");[44] 42 U.S.C. § 6395(e)(1) (providing a cause of action for "appropriate relief," but specifying that "[n]othing in this subsection shall authorize any person to recover damages"); 15 U.S.C. § 797(b)(5) (similar). And on numerous occasions, Congress has deemed it necessary to specify that "relief" *includes* injunctive and other equitable relief. *See* 16 U.S.C. § 973i(e) (authorizing the Attorney General to "commence a civil action for appropriate relief, including

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[43] Although this language appears in RLUIPA, Congress intended for it to apply to RFRA as well. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 & n.5 (2014).

[44] The APA expressly excludes "money damages" from the "relief" available against the United States, suggesting that Congress understands the term normally to encompass monetary relief even when the defendant otherwise enjoys sovereign immunity. *See* 5 U.S.C. § 702; *Bowen v. Massachusetts*, 487 U.S. 879, 891–892 (1988) (noting that § 702 waives the United States' sovereign immunity to suit).

permanent or temporary injunction"); *see also* 2 U.S.C. § 437g(a)(6)(A); 8 U.S.C. § 1324a(f)(2); 12 U.S.C. § 1715z–4a(b); 15 U.S.C. § 6309(a). If, as the Special Defendants contend, the term "relief" already connotes equitable relief—and *only* equitable relief—additional explication would be redundant.

Although Plaintiffs' reading of the statute would make individuals "the *only* class of defendants subject to damages suits under RFRA," that is not an "absurd" result, as Defendants argue. PC Br. at 26 (emphasis in original). Instead, it is a necessary consequence of the government's sovereign immunity from suits for damages; it is why § 1983 and *Bivens* permit damages against officials in their personal capacity but not their official capacity.[45] There is nothing "absurd" about damages suits against government officials in their personal capacities for constitutional or statutory violations. Defendants' reading of RFRA, by contrast, would categorically deny monetary relief to plaintiffs who prevail on the merits of their RFRA claim, which would often mean that they would be denied any redress in those instances where "prospective relief accords . . . no remedy at all." *Franklin*, 503 U.S. at 76. In cases where only damages will do, Defendants' reading would effectively shield otherwise unlawful conduct from judicial review.

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[45] Nor is it "unjust." PC Br. at 26. RFRA does not abrogate the qualified immunity to which officials are entitled under common law, and thus that defense remains available to Defendants. It also cannot be "unjust" to seek redress against the very agents accused of violating these Plaintiffs' statutory rights. Nor would it be "unjust" to impose liability even if the Special Agent Defendants did not know they were substantially burdening Plaintiffs' religious exercise, as Defendants imply. PC Br. at 58—60. The predicate for RFRA liability is that "the exercise of religion has been burdened in an incidental way by a law of general application"; there is no need to show intent or that "the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs." *Flores*, 521 U.S. at 535; *see also* 42 U.S.C. § 2000bb(a)(2) (noting that neutral laws "may burden religious exercise").

B. Courts Have Held That RFRA Permits Personal Capacity Suits For Damages.

Several courts have recognized that RFRA's plain text permits the recovery of damages against government officials sued in their personal capacity. Special Agent Defendants do not cite a single case that has held otherwise.[46] In *Mack v. O'Leary*, Judge Posner permitted an individual capacity suit for damages under RFRA against prison officials to proceed, noting that "the Act defines 'government' to include *government* employees acting under color of state law." 80 F.3d 1175, 1177 (7th Cir. 1996). In *Elmagrabhy v. Ashcroft*, the Eastern District of New York held that damages claims under RFRA "reach[] officials acting in their individual capacities." No. 04-1809, 2005 WL 2375202, at *30 n. 27 (E.D.N.Y. Sept. 27, 2005), *dismissed on other grounds sub nom. Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007). The Supreme Court's ruling in *Sossaman* does not alter these decisions, as Defendants erroneously contend. PC Br. at 32. *Sossaman* dealt with official capacity claims in the RLUIPA context, not personal capacity claims in the RFRA context, finding that sovereign immunity barred money damages actions against sovereign defendants. 131 S. Ct. at 1659.

The court in *Jama v. INS* reached the same conclusion as *Mack* and *Elmagrabhy* that RFRA permits the recovery of damages against government officials sued in their personal capacities, reasoning that the inclusion of "other person acting under color of law" in the list of proper defendants "indicates that individual capacity suits must be permitted because no one who is not a government official has an 'official capacity' in which to be sued." 343 F. Supp. 2d at 374. The court also found persuasive the fact that "Congress enacted RFRA because it wanted to

[46] In addition to the cases discussed *infra*, Defendants themselves collect numerous other cases that either assumed the availability of damages as "appropriate relief" in RFRA actions against officials in their personal capacities or declined to rule that such relief was not "appropriate." PC Br. at 31 n.18.

re-invigorate protection of free exercise rights after the Supreme Court in *Smith* diluted the standard used to evaluate claimed violations of those rights." *Id.*

Defendants' claim that *Jama* "rests on three faulty premises" is itself faulty. PC Br. at 33. *First*, *Jama* did not need to "infer" a money damages cause of action under RFRA, as the Special Agent Defendants charge; rather, the court held that the availability of damages is inherent in the statutory phrase "appropriate relief." 343 F. Supp. 2d at 374. *Second*, the *Jama* court's conclusion that Congress intended to provide remedies always available to plaintiffs (including money damages) before *Smith* through RFRA is fully consistent with the statute's purpose to provide "a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). *Third*, Defendants' contention that *Jama* relied on case law that did not fully analyze the issue is irrelevant because these cases were just one of many grounds for the *Jama* court's decision, and the *Jama* court itself was careful to note the limited precedential value of those cases. 343 F. Supp. 2d at 375.

C. RLUIPA Decisions Do Not Dictate The Outcome Under RFRA.

Unable to cite to a single case holding that RFRA precludes damages actions against officials sued in their personal capacity, the Special Agent Defendants turn to cases decided under a different statute, RLUIPA. PC Br. at 27–29. As Defendants themselves admit, RLUIPA is "less sweeping in scope" than RFRA. PC Br. at 28 n.15 (citing *Sossaman*, 131 S. Ct. at 1656). Unlike RFRA, RLUIPA targets state and local conduct, and even then applies to just two areas of state and local action: land use regulation and the treatment of institutionalized persons. *Sossaman*, 131 S. Ct. at 1656. This limited scope is the result of RLUIPA being enacted pursuant to Congress' spending power; RLUIPA liability can therefore only be imposed "on those parties actually receiving the state funds." *Washington v. Gonyea*, 731 F.3d 143, 145 (2d Cir. 2013). While RLUIPA liability can reach state institutions and their employees acting in an

official capacity, it obviously cannot reach officials in their personal capacity because federal funds are not received in that capacity. *See*, *e.g.*, *Rendelman v. Rouse*, 569 F.3d 182, 187–89 (4th Cir. 2009) (holding that "RLUIPA cannot authorize damage actions against private individuals who are not themselves recipients of federal funding.").

RFRA, by contrast, was enacted pursuant to Congress' power under the Necessary and Proper Clause of the Constitution. *Hankins v. Lyght*, 441 F.3d 96, 106 (2d Cir. 2006). The Necessary and Proper Clause "grants Congress broad authority to enact federal legislation," *United States v. Comstock*, 560 U.S. 126, 133 (2010), and its latitude is coextensive with the broad grant of authority given Congress under § 5 of the Fourteenth Amendment, the source of authority for § 1983. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (Congress' § 5 power "includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct"). Moreover, RFRA only applies to federal agencies, officials, and employees, and so avoids the unique federalism issues that arise when federal laws impose conditions on state actors. For this reason, RLUIPA and its case law are irrelevant for purposes of determining whether RFRA permits damages for federal government officials sued in their personal capacities.[47]

The Special Agent Defendants' extensive reliance on *Sossaman*, a case decided under RLUIPA, is misplaced even assuming the statutes are the same—and they are not. Nowhere in *Sossaman* did the court address the availability of monetary damages against officials acting in their personal capacities under RLUIPA, let alone RFRA.

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[47] For this reason, the Special Agent Defendants' reliance on *Washington v. Gonyea* is misplaced. PC Br. at 28. The Second Circuit's decision that RLUIPA does not create a cause of action against state officials acting in their individual capacities was based entirely on the fact that RLUIPA was enacted "pursuant to Congress' spending power," and as such, could only impose individual liability "on those parties actually receiving the state funds." 731 F.3d 143, 145 (2013). RFRA, enacted under the Necessary and Proper Clause, is not subject to that important jurisdictional limitation.

VI. PLAINTIFF TANVIR'S FIRST AMENDMENT CLAIMS AGAINST DEFENDANTS JOHN DOE 1 AND JOHN DOE 2/3 ARE TIMELY.

Mr. Tanvir's First Amendment claim against John Doe 1 and John Doe 2/3 is timely and should not be dismissed under the three-year statute of limitation for *Bivens* actions in New York. Defendants apply an incorrect standard when determining the appropriate start date for the limitations period, assuming that Mr. Tanvir's injury was complete when he first learned that he may have been placed on the No Fly List. *See Leon v. Murphy*, 988 F.2d 303, 309 (2d Cir. 1993). That rule is inapposite here, where Mr. Tanvir's injury was continuing in nature. In these circumstances, the statute of limitations runs from Mr. Tanvir's *most recent injury*, which here took place in November 2012, when Mr. Tanvir was denied boarding as a direct result of John Doe 1's and John Doe 2/3's prior unlawful acts in placing Mr. Tanvir on the No Fly List.

Mr. Tanvir alleges consistently throughout the First Amended Complaint that *all* Defendants who interacted with him participated in a coordinated scheme to place or maintain his name on the No Fly List for improper and unlawful purposes. *See generally* AC ¶¶ 90, 96; *see also* Point III, *supra*. He further alleges that these coordinated unlawful acts resulted in harm beginning in October 2010 when he was first denied boarding and continuing at least through November 2012 when he was prohibited most recently from boarding a plane. AC ¶ 113.

Mr. Tanvir presents a prototypical example of continuing harm caused by a continuing violation, which the Second Circuit has stated will preclude the application of the statute of limitations where "the defendant's conduct causes plaintiff to sustain damages after the time when the statute of limitations would have expired if it commenced at the time of defendant's first act." *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1039 (2d Cir. 1992); *see also Harris v. City of New York*, 186 F.3d 243, 248–250 (2d Cir. 1999) (discussing the elements

of continuing violation as being (1) the existence of an unlawful policy, and (2) non-time-barred acts taken in furtherance of that policy).

While not yet addressing the issue directly, the Second Circuit has suggested that the continuing violation doctrine may apply to a *Bivens* claim if a plaintiff alleges facts indicating "a continuous or ongoing violation of his constitutional rights." *Pino v. Ryan*, 49 F.3d 51, 54 (2d Cir. 1995) (declining to toll the statute of limitations to a *Bivens* claim only because "plaintiff has alleged no facts" supporting such a continuing violation); *see also Devbrow v. Kalu*, 705 F.3d 765, 770 (7th Cir. 2013) ("The continuing nature of the violation . . . meant that the limitations period did not commence when the inmate first discovered his medical problem, but later, *when his constitutional rights were last violated*—that is, when he left the jail." (emphasis added)). Mr. Tanvir alleges just such a continuous, ongoing violation of his constitutional rights, making the Defendants' arguments about Mr. Tanvir's first discovery of his placement on the No Fly List or his last interactions with particular Defendants inapposite. *See* PC Br. at 67.[48] Those dates are not relevant where Defendants directly participated in and set in motion an unlawful act with continuous repercussions and ongoing harm to Mr. Tanvir. *See Pino*, 49 F.3d at 54.

Because Mr. Tanvir has clearly alleged a continuing violation of his First Amendment right resulting in concrete harm in November 2012, that claim is timely under *Bivens*' three-year statute of limitations period in New York.

[48] The Special Agent Defendants note parenthetically that John Doe retired in 2007, and Plaintiffs acknowledge the defendant identified in AC ¶¶ 82–84 may be John Doe 2. *See supra* note 6. Even still, Mr. Tanvir's claim is brought against John Doe 1 in his individual capacity, and his retirement from government service does not start the running of the statute of limitations, for the reasons discussed above.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' motions to dismiss the First Amended Complaint be denied.

Dated: New York, New York
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APPENDIX A

Subject	**Defendants' Briefs**	**Plaintiffs' Opposition Brief ("Opp. Br.")**
Jurisdiction	OC Br. Point I (pp. 15–28)	Opp. Br. Point I (pp. 24–34)
Standing	OC Br. Point II (pp. 28–31)	Opp. Br. Point II (pp. 35–39)
Monetary Relief From Official Capacity Defendants	OC Br. Point III (pp. 32–34)	p. 50 n.24
Bivens	PC Br. Point I (pp. 11–22)	Opp. Br. Point III (pp. 39–52)
RFRA Monetary Damages	PC Br. Point II (pp. 22–35)	Opp. Br. Point V (pp. 78–88)
Qualified Immunity	PC Br. Point III (pp. 35–61)	Opp. Br. Point IV (pp. 52–78)
Personal Jurisdiction	PC Br. Point IV (pp. 61–66)	Stayed per Court's September 16, 2014 Order
Statute of Limitations	PC Br. Point IV (pp. 66–69)	Opp. Br. Point VI (pp. 88–90)
Equitable Relief Against Special Agent Defendants in Personal Capacities	PC Br. Point VI (p. 69)	p. 50 n.24