

14-1688

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IN THE  
**United States Court of Appeals**  
FOR THE THIRD CIRCUIT

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

THE CITY OF NEW YORK,  
  
*Respondent.*

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*On Appeal from the United States District Court  
for the District of New Jersey*

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***AMICUS CURIAE BRIEF FOR BRENNAN CENTER FOR  
JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS***

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## Statement of Interest<sup>1</sup>

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute focused on fundamental issues of democracy and justice, including the intersection of national security and civil liberties. The Center's Liberty and National Security Program seeks to ensure that our nation's commitment to national security respects constitutional values and the rule of law through in-depth research, innovative policy recommendations, litigation, and public advocacy. The Brennan Center is particularly concerned with the effects that surveillance programs targeting Muslim communities have on privacy, First Amendment freedoms, and the Equal Protection Clause.

As part of this effort, the Center has researched and published a series of reports on how law enforcement and intelligence agencies collect, share, and retain information about Americans for national security purposes. Three of these reports particularly examine the practices of the New York City Police Department. See Michael Price, National Security and Local Police (2013); Faiza Patel & Andrew Sullivan, A Proposal for an NYPD Inspector General (2012); Faiza Patel, Rethinking Radicalization (2011).

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<sup>1</sup> This amicus curiae brief is filed with the consent of all parties to this proceeding. No party's counsel authored any portion of this brief. No party or party's counsel contributed money intended to fund this brief's preparation or submission. No person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund this brief's preparation or submission. This brief does not purport to represent the position of NYU School of Law.

## Summary of Argument

The New York City Police Department (NYPD) has a history of bias-based spying on First Amendment activity. Over the last century, it has regularly deployed ethnic and racial stereotypes as a pretext for intelligence activities designed to disrupt groups it deemed a threat. Following the attacks of 9/11, the Department appears to have done it again. This time, the NYPD targeted Muslim communities in New Jersey and New York on the premise that monitoring ordinary Muslims is a strategy to prevent terrorism. And it did so despite reams of empirical research debunking the idea that religion is a valid predictor of terrorism. Consequently, the NYPD continues to conduct wholesale monitoring of Muslims in mosques, bookstores, and cafes, causing serious harms with no valid security rationale.

There are two important points that should inform the court's "context-specific" analysis, as well as its "experience and common sense" in deciding this case. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). The first is the NYPD's long history of discriminatory surveillance. The second is the lack of scientific evidence to support the NYPD's purported explanation for its intelligence activities in New Jersey. With this background in mind, the facts alleged in the First Amended Complaint are quite plausible and more than sufficient to defeat a motion to dismiss.

## Argument

Under Iqbal, a complaint should be dismissed if the court determines, in light of its experience and common sense, that the facts alleged, taken as true, do not present a plausible claim for relief. Id. at 678–79 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The district court in this case invoked the Supreme Court’s decision in Iqbal to support its own “experience and common sense.” Id. at 679. But without any independent analysis, it mistakenly substituted the facts of Iqbal for the very different facts in this case. See Hassan v. City of New York, No. 12-cv-3401, 2014 WL 654604, at \*7 (D.N.J. Feb. 20, 2014) (quoting facts in Iqbal to explain why Plaintiffs failed to state a claim for relief).

Though the Plaintiffs in both cases are Muslim, the similarity ends there. First, the NYPD is not the FBI; the organizations’ activities and approaches to counterterrorism differ in relevant respects.<sup>2</sup> Second, this case does not involve a single arrest in the aftermath of 9/11. It relates to the more than decade-old NYPD

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<sup>2</sup> After 9/11, the FBI has often disagreed with the NYPD’s tactics, including the NYPD’s designation of mosques as Terrorism Enterprise Investigations (TEIs) and its use of informants in several terrorism cases. See, e.g., Adam Goldman & Matt Apuzzo, NYPD Designates Mosques as Terrorism Organizations, Associated Press (Aug. 23, 2013), <http://bit.ly/1kYyzBb> (stating the NYPD has opened at least a dozen TEIs, while the FBI has opened none); Samantha Henry, NJ FBI: NYPD Monitoring Damaged Public Trust, Associated Press (Mar. 7, 2012), <http://bit.ly/VBr8b7> (quoting the top FBI official in New Jersey as saying that the NYPD’s surveillance of Muslims in the state has hindered investigations and created “additional risks” in counterterrorism); William K. Rashbaum, Informer’s Role in Terror Case Is Said to Have Deterred F.B.I., N.Y. Times (Nov. 21, 2011), available at <http://nyti.ms/1iPcI1r> (discussing the FBI declining to participate in an NYPD counterterror operation).



surveillance program targeting potentially hundreds of thousands of American Muslims in New Jersey, New York, Pennsylvania, and Connecticut. First Am. Compl. ¶¶ 2–6, 49. Moreover, the NYPD’s purported rationale for this program is a debunked and discriminatory conception of terrorist violence, a fact that provides important context in evaluating the plausibility of the Plaintiffs’ complaint.

**I. The NYPD has Frequently Failed to Conduct its Surveillance Programs in Accordance with Constitutional Protections**

**A. The NYPD Has Spied on Activists Based on Their Lawful First Amendment Activities for More than a Century**

Since the start of the twentieth century, the NYPD has repeatedly targeted groups and individuals based on their lawful First Amendment activities, rather than suspicion of criminal conduct. Moreover, in selecting which groups to single out for surveillance and in justifying its activities, the NYPD has often relied on stereotypes about those groups as a proxy for dangerousness.

Beginning in the early 1900s, the NYPD created intelligence squads (e.g., the “Italian Squad,” the “Anarchist Squad,” and the “Bomb Squad”) to investigate “enemies of the government.” See Frank Donner, Protectors of Privilege: Red Squads and Police Repression in Urban America 30–31 (1990). Italian communities in New York City were targeted based on the assumption that Italians must have ties to organized crime. Id. The police labeled laborers and union organizers as “socialists” and “communists” because they advocated for workers’ rights, which the NYPD viewed as a threat to society. See id.; see also Sam

Roberts, Keeping Tabs, Just in Case, N.Y. Times (Apr. 6, 2014), <http://nyti.ms/U3fd4J> (“[T]he [bomb] squad went on to focus on communists, socialists, anarchists, fascists, labor agitators, advocates of birth control and civil rights, antiwar protesters and other ‘enemies of government.’”). During the 1920s and 1930s, the NYPD escalated its activities to disrupt dissenting voices, leading to the creation of dossiers on alleged communists and other leftists in New York and elsewhere without any suspicion of criminal activity. See, e.g., Donner, supra, at 47–48; Roberts; Reds and Pacifists Clash in Union Sq., N.Y. Times, Nov. 11, 1928, at 5, available at <http://nyti.ms/1m3E0Ap> (reporting on police disruption of a counter-protest and chasing communists away from Union Square); 50 Reds Bagged in Night Raids Here, N.Y. Times, Jan. 6, 1920, at 1, available at <http://nyti.ms/1owKwiR> (reporting on mass arrests of communists without suspicion of criminal activity, leading to deportation proceedings for several hundred foreigners and release for American citizens whose arrests were “a mistake”). The NYPD also actively spied on and conducted mass arrests of people protesting high unemployment rates during the Great Depression. Donner, supra, at 48; see also Hays Says Police Only Aid Red Cause, N.Y. Times, Mar. 30, 1930, at 23, available at <http://nyti.ms/1sSSSpZ> (alleging NYPD officers served as agents provocateurs at a communist march).

By the 1960s, the NYPD had turned its attention to liberal political activists, African American communities, and anti-Vietnam War protesters. The police

further expanded their intelligence operations by inserting undercover officers and agents provocateurs into civil liberties organizations and political groups to monitor and disrupt their activities. See, e.g., Matt Apuzzo & Adam Goldman, Enemies Within 42 (2013) (discussing three undercover NYPD officers infiltrating the Black Panthers in New York City to serve as “founding fathers” of the group and “buil[ding] files on everyone who signed up.”); Leonard Levitt, NYPD Confidential 239 (2009) (“Some undercover detectives who had infiltrated political groups encouraged them to commit unlawful acts.”); Donner, supra, 187 (quoting undercover officer’s testimony that the NYPD had him infiltrate the Black Panthers “to beat these people down[.]”); Michael Stern, Liberties Union Scores Police for Columbia Acts, N.Y. Times, June 3, 1969, at 33, available at <http://nyti.ms/1uymYuA>; Will Lissner, “Yip-In” Arrests Called Illegal, N.Y. Times, Apr. 20, 1968, at 30, available at <http://nyti.ms/1pBwmji>; Charles Grutzner, Rights Abuse Seen in Queens Seizure, N.Y. Times, Sept. 28, 1966, at 77, available at <http://nyti.ms/1lsRgiR>.

In response to the escalation in policing of First Amendment-protected activities in the 1960s and 1970s, New Yorkers filed a class action against the NYPD over its surveillance practices. Handschu v. Special Servs. Div., 349 F. Supp. 766, 768–69 (S.D.N.Y. 1972). The representative Plaintiffs were members of groups like the Black Panthers and Vietnam War protesters who had been subjects of surveillance and infiltration by the NYPD. The Handschu class action

culminated in a consent decree in 1985. Handschu v. Special Servs. Div., 605 F. Supp. 1384 (S.D.N.Y. 1985), aff'd, 787 F.2d 828 (2d Cir. 1986). The agreement covered all people and groups residing or present in New York City who “engage in or have engaged in lawful political, religious, educational[,] or social activities” and who were, are, or may be subject to infiltration, coercion, surveillance, provocation to violence, or recruitment to act as police informants by the NYPD. Id. at 1388.

In approving the agreement, the judge said the NYPD’s history and surveillance practices “raise[d] . . . an unmistakable red flag of potential, if not actual, constitutional violations.” Id. at 1396. The agreement imposed restrictions on the NYPD’s surveillance of First Amendment-protected activities and established guidelines for such investigations. Specifically, it required the NYPD to demonstrate that a person or group involved in lawful First Amendment activity had engaged, was engaging, or would engage in criminal conduct prior to targeting that person or group for surveillance. Id. at 1389–92, 1421. It also established the Handschu Authority, a three-member panel tasked with reviewing investigations of political activities and investigating complaints about such investigations. Id. at 1390.<sup>3</sup>

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<sup>3</sup> Between 1985 and 2003, complaints about the NYPD’s surveillance tactics were made according to the process laid out in the Handschu consent decree, which included a requirement that “cure letters” be submitted to the Handschu Authority prior to court proceedings. Based on a review of available documents from this period, there were at least ten cure letters submitted, resulting in extensive back-

## **B. The NYPD's Record of Suspicionless Policing Extends to More Recent History**

In the wake of 9/11, the NYPD asked for, and the court allowed, some leeway in the Handschu guidelines, which the Department claimed was necessary to track down terrorists. Handschu v. Special Servs. Div., 273 F. Supp. 2d 327 (S.D.N.Y. 2003). But within months, the NYPD was engaging in actions that abused the leeway it had been given. Handschu v. Special Servs. Div., 288 F. Supp. 2d 411, 414 (S.D.N.Y. 2003).

During February and March 2003, the NYPD disrupted several large rallies in New York City to protest the American invasion of Iraq that thousands of people attended. See, e.g., Robert D. McFadden, Threats and Responses: Overview; From New York to Melbourne, Cries for Peace, N.Y. Times (Feb. 16, 2003), available at <http://nyti.ms/1lLm8eD>. Prior to the first rally in February 2003, the NYPD developed a “Demonstration Debriefing Form” to guide questioning of arrested individuals; the NYPD prepared the form knowing and intending that it would arrest people at the protests. See Handschu, 288 F. Supp. 2d at 413 (internal quotation marks and citations omitted). After arresting 274 people at the first rally “for conduct ranging from blocking traffic to assault on police officers[,]” plainclothes NYPD officers asked arrestees many personal questions

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and-forth between class counsel and the NYPD, some NYPD-initiated reforms, and a court opinion finding violations of the guidelines. See, e.g., Handschu v. Special Servs. Div., 737 F. Supp. 1289 (S.D.N.Y. 1989); William K. Rashbaum, Police Stop Collecting Data on Protestors' Politics, N.Y. Times (Apr. 10, 2003), available at <http://nyti.ms/1oaxJzO>.

about non-criminal activity. Id. at 414 (listing questions, including “Do you hate George Bush?”, “Do you do any kind of political work?”, “What are your political affiliations?”, and “Have you ever been to Africa?”).

Responding to the NYPD’s actions, the federal judge in charge of the Handschu case disapproved of how “demonstrators against the war in Iraq were interrogated.” Benjamin Weiser, Judge Criticizes Police Methods of Questioning War Protesters, N.Y. Times (Aug. 8, 2003), available at <http://nyti.ms/1y9OlzK>; see also Handschu, 288 F. Supp. 2d at 414. Consequently, the judge reinstated some of the recently relaxed guidelines and rebuked the NYPD for the “display of operational ignorance on the part of [its] highest officials with respect to [] investigatory technique[s] resonant with constitutional overtones[.]”<sup>4</sup> Handschu, 288 F. Supp. 2d at 418–19. He also reminded civil liberties groups they could seek to hold the city in contempt of court for Handschu violations. Id.

Despite the admonishment, the NYPD continued to spy on groups engaging in First Amendment-protected activities. Handschu v. Special Servs. Div., No. 71-cv-2203, 2007 WL 1711775, at \*5–\*6 (S.D.N.Y. June 13, 2007) (discussing surveillance of demonstrations by Coalition for the Homeless, anti-Iraq War protesters, and cyclists). Moreover, the NYPD sought to hide its practices from the

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<sup>4</sup> In a separate but similar instance, the NYPD targeted and wrongfully arrested more than 1800 Iraq War protesters during the 2004 Republican National Convention. See Dinler v. City of New York, No. 04-cv-7921, 2012 WL 4513352, at \*1 (S.D.N.Y. Sept. 30, 2012) (finding that mass arrests of protesters were made without individualized probable cause).

court and class counsel. For example, the NYPD quietly changed its rules for videotaping political activity while continuing to litigate the validity of a defunct policy on the same subject, all in a gambit to avoid discovery and further legal scrutiny. See Handschu v. Police Dep't of the City of New York, 679 F. Supp. 2d 488, 500–01, 504 (S.D.N.Y. 2010) (calling the NYPD’s counsel’s conduct “deplorable” though not sanctionable and ordering the NYPD to inform class counsel and the court of subsequent changes to policies on recording political activity to ensure policies are consonant with the guidelines).

Recently, class counsel in the Handschu case moved to enjoin the NYPD’s surveillance of Muslims in New York City. That litigation revolves around the same type of bias-based surveillance at issue this case, although the issue in Handschu is whether the NYPD violated the guidelines, not the Constitution itself.<sup>5</sup> With more than four decades of experience overseeing NYPD intelligence operations, the Handschu judge has determined that class counsel’s claims merit discovery. See, e.g., Handschu v. Special Servs. Div., No. 71-cv-2203, 2014 WL 407103, at \*4 (S.D.N.Y. Jan. 30, 2014) (finding class counsel’s “motion on behalf of the Muslim community presents issues worthy of further litigation which entitle

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<sup>5</sup> Unlike the constitutional violations alleged in this case, the current Handschu litigation focuses on allegations that the NYPD has failed to abide by the requirements of the guidelines, which require Investigative Statements be prepared prior to an investigation that contain “reasonable indication[s]” of criminal activity on the part of the target. Handschu v. Special Servs. Div., No. 71-cv-2203, 2013 WL 4767815, at \*1–\*2 (S.D.N.Y. Aug. 29, 2013).

Class Counsel to further discovery in aid of their claims”); Handschu v. Special Servs. Div., No. 71-cv-2203, 2013 WL 4767815, at \*1 (S.D.N.Y. Aug. 29, 2013).

Moreover, another federal judge recently determined that the NYPD used bias as a proxy for dangerousness in the “stop and frisk” context. See Floyd v. City of New York, 959 F. Supp. 2d 540, 587 (S.D.N.Y. 2013) (finding the NYPD was operating on the discriminatory assumption that some “racial groups have a greater tendency to appear suspicious than members of other racial groups” in the stop-and-frisk context, and saying that the NYPD’s justifications for its policies are “especially troubling” because they “echo[] the stereotype that black men are more likely to engage in criminal conduct than others”).

The NYPD’s past behavior, coupled with other judicial findings that the NYPD has recently engaged in bias-based policing tactics, underscore the plausibility of the Plaintiffs’ claim for relief.

## **II. The NYPD Bases Its Muslim Surveillance Program on a Crude and Scientifically Debunked Stereotype of Islam**

The NYPD’s surveillance of Muslim communities in New Jersey is the latest in a long line of discriminatory policing tactics. The NYPD claims that it is looking for “Islamist[s] radicalized to violence.” Def.’s Mot. to Dismiss 7. But a closer look at whom the NYPD thinks might be “radicalized” reveals a pernicious myth that links deepening Islamic religious convictions to the propensity to commit violence, like a religious “conveyor belt.” Mitchell D. Silber & Arvin Bhatt, N.Y.P.D. Intelligence Div., Radicalization in the West: The Homegrown Threat 73



(2007), available at <http://bit.ly/1xu2UwI>. The NYPD calls it a theory. But, like the stereotypes and prejudices that have animated the NYPD's discriminatory policing for a century, it is no more than a hollow pretext to justify the surveillance of Muslim communities, invoked long after it has been debunked by empirical research.

**A. The NYPD Erroneously Linked Islam and Terrorism in Its Discredited Report on Radicalization**

Five years after starting its Muslim surveillance program in New Jersey and elsewhere, the NYPD published a post-hoc report that purported to “model” how individuals become terrorists. Silber & Bhatt (2007), supra, at 21. The Department stated that there is a four-step “radicalization” process by which unremarkable individuals transform into dangerous terrorists by embracing “Salafi Islam.” Id. at 8. It found that each step “is unique and has specific signatures associated with it.” Id. at 19. According to the NYPD, those displaying “pre-radicalization signatures” are “[m]ale Muslims . . . [u]nder the age of 35” with “ordinary lives and jobs.” Id. at 23. As these individuals progress through the radicalization process, they display “key indicators,” including “[r]egular [a]ttendance at a Salafi mosque[,] . . . [w]earing traditional Islamic clothing, growing a beard[,] . . . [or] [b]ecoming involved in social activism and community issues.” Id. at 31. Those who are radicalizing will congregate at “radicalization incubators,” like “mosques, . . . cab driver hangouts, flophouses, prisons, student associations, non-

governmental organizations, hookah (water pipe) bars, butcher shops[,] and book stores.” Id. at 20.

In short, the NYPD’s purported “signatures” of potential terrorists are (1) being a young, male Muslim, (2) participating in Muslim community life, and (3) expressing Islamic religious views. Id. at 20, 23, 31. According to the NYPD, even if someone displaying these signatures does not become a terrorist, it “does not mean . . . he or she is no longer a threat.” Id. at 84. Instead, they have entered the one-way “funnel” of radicalization, even if all they do is grow a beard or wear traditional clothing. Id. at 31, 84. In other words, by practicing Islam, you can earn the NYPD’s suspicion for life.

The NYPD report was originally intended to “to assist policymakers and law enforcement officials . . . by providing a thorough understanding of the kind of threat we face domestically.” Id. at 2. Upon its release, however, the report was immediately and consistently challenged for its many methodological problems and biased conclusions. See, e.g., Marc Sageman, The Stagnation in Terrorism Research, *Terrorism & Pol. Violence* 1, 4 (2014), <http://bit.ly/1rwhpiZ> (former NYPD consultant finding the NYPD model is “vague, simplistic, and did not stand up to close empirical scrutiny”); Randy Borum, Radicalization into Violent Extremism II: A Review of Conceptual Models and Empirical Research, 4 *J. Strategic Security* 37, 43 (2011); Mark Sedgwick, The Concept of Radicalization as a Source of Confusion, 22 *Terrorism & Pol. Violence* 479, 483 (2010); Muslim

American Civil Liberties Coalition (MACLC), Counterterrorism Policy: MACLC's Critique of the NYPD's Report on Homegrown Radicalism 8 (2008).

The NYPD report focused exclusively on religion as a predictor of terrorism, despite available empirical research to the contrary. According to the NYPD, individuals turn to terrorism because they are “looking for an identity and a cause and unfortunately, often find[] them in the extremist Islam.” Silber & Bhatt (2007), supra, at 8. But peer-reviewed empirical studies available at the time of the NYPD report revealed, at best, “rather weak links” between religious identity and terrorism. Tim Krieger & Daniel Meierrieks, What Causes Terrorism?, 147 Pub. Choice 3, 8 (2011) (reviewing eighteen empirical studies from 1998 to 2007). In fact, religion alone has *never* been found to explain terrorist violence. Id. at 20–22. Had the NYPD read the available social science literature before drafting its report, it would have found that “personal religiosity [is] an insufficient indicator of . . . whether someone supports terrorist tactics.” Jeroen Gunning & Richard Jackson, What's So “Religious” About “Religious Terrorism”?, 4 Critical Stud. on Terrorism 369, 381 (2011) (reviewing nineteen studies from 1985 to 2007).

It is unsurprising that the NYPD came to incorrect conclusions—it relied on a sample of only five terrorism cases, all of which took place overseas, to develop a predictive model for terrorism in the United States. Silber & Bhatt (2007), supra, at 21. In contrast, serious academic studies available at the time of the report's drafting typically examined several hundred interviews, biographies, or surveys

before putting forward even tentative theories to explain, rather than predict, terrorist violence. E.g., Borum, supra, at 46–55.

Furthermore, the NYPD made no effort to compare its five terrorist groups to non-terrorists to see if purported “signatures” of radicalization could actually distinguish between Islamic terrorists and ordinary Muslims. Instead, the police simply asserted that the commonalities between its five hand-picked cases “provide[d] a tool for predictability.” Silber & Bhatt (2007), supra, at 7. The report drew conclusions about Islamic terrorists “based on looking at the outliers without comparing them to the hundreds of thousands of people who . . . came into contact with the same people, read the same books, and had the same background.” Jamie Bartlett & Carl Miller, The Edge of Violence: Towards Telling the Difference Between Violent and Non-Violent Radicalization, 24 *Terrorism & Pol. Violence* 1, 1 (2012). Simply put, “just because all the cases in a sample of five terrorists have beards does not mean that every person with a beard [] is a terrorist.” MACLC, supra, at 8.

In 2009, the NYPD quietly issued a revised version of the report with a “Statement of Clarification.” Mitchell D. Silber & Arvin Bhatt, Radicalization in the West: The Homegrown Threat 11 (2009), <http://on.nyc.gov/1o1c9Pd>.<sup>6</sup> In a two-page preface, the NYPD said the report was not policy prescriptive and that the

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<sup>6</sup> Although the revised version of the report appears on the City’s primary website, the 2007 version of the report remains posted on NYPD Shield, the Department’s private-public partnership website for counterterrorism. See Silber & Bhatt (2007), supra.

NYPD does not equate Islam with violence. Id. Despite these caveats, the central finding (indeed, the entire text) of the 2007 report went unchanged: that Islamic religiosity is a warning sign of terrorism. Id. at 9. Even when confronted with scientific evidence to the contrary, the NYPD has refused to disavow the report and adhered to its conviction that religious Muslims are potential “mentors and agents of influence to those who might become the terrorists of tomorrow.” Id. at 86. This misunderstanding of domestic terrorism is not a neutral, investigative basis for surveillance. It is bias purporting to establish a proxy for dangerousness.

**B. There Is No Predictive Model of Terrorist Violence that Could Justify a Blanket Surveillance Program**

In addition to debunking the notion that religiosity correlates with terrorism, social science has more broadly undermined the idea that there is any consistent, linear, or predictable path to terrorist violence. Despite this, the NYPD continues to assert that spying exclusively on Muslims is “more likely” explained away as an effort to find terrorists. Def.’s Reply 4–6. A critical examination of the empirical research on the causes of terrorism dispels the fiction that there is any one step-by-step process that would allow police to anticipate who will become a terrorist, much less fashion a surveillance program to “deter or detect” such individuals. Id.

In a review of more than twenty peer-reviewed empirical studies, researchers found that a combination of social pressure, rewards, grievances, and a passion for change were all required in order to explain how individuals turned to terrorist

violence.<sup>7</sup> Todd C. Helmus, Why and How Some People Become Terrorists, in Rand Corp., Social Science for Counterterrorism: Putting the Pieces Together 71, 95 (Paul K. Davis & Kim Cragin, eds., 2009). An in-depth empirical study echoed this finding: a variety of social pressures and political grievances led individuals to terrorism, not any single demographic factor like religion. Jamie Bartlett et al., Demos, The Edge of Violence: A Radical Approach to Extremism 12 (2010). This study in particular emphasized the importance of its control group to distinguish violent terrorists from those who hold extreme beliefs but are nonviolent. Id. at 8. In fact, it determined that “[m]any radicals, and indeed young Muslims, supported the application of Sharia law and the Caliphate” but were not inclined to violence. Id. at 11. A major insight of this study is that “there remains no grand theory: there is no typical terrorist profile, neither is there a typical journey [from adopting radical beliefs] into violence.” Id. at 20.

Empirical research shows that there are several, interrelated factors that lead to terrorism. A review of thirty-one studies discovered a total of fourteen “potential determinates” of terrorism, all of which were found to act in some combination with one another. Krieger & Meierrieks, supra, at 5. Religion was on the list, but it was never the sole determinate of terrorist violence. Id. at 20–22. Importantly, empirical research on terrorism is “illustrative rather than predictive, [and] the

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<sup>7</sup> The NYPD report is seriously out of step with these empirical findings. Silber & Bhatt (2009), supra, at 7 (“[T]he transformation of a Western-based individual to a terrorist is not triggered by oppression, suffering, revenge, or desperation.”).

findings should not be used as the basis for profiling terrorists and radicals.” Bartlett et al. (2010), supra, at 9. Even when rigorous research methods can identify potential causes of terrorism, no single cause or combination of causes can predict who will become a terrorist. Id.; Helmus, supra, at 42.

Despite the mounting evidence, the NYPD continues to treat religion as a proxy for terrorist tendencies. Its ongoing reliance on an unsupported and discredited theory of “radicalization” undermines any claim that the NYPD’s surveillance activities are a legitimate counterterrorism strategy. Viewed in light of the NYPD’s track record of bias-based policing and the available scientific evidence, one’s “experience and common sense” should weigh in favor of finding the Plaintiffs’ claims are plausible.

### **Conclusion**

The Plaintiffs in this case have stated a plausible claim that the NYPD’s surveillance program is emblematic of bias-based policing tactics, not a legitimate counterterrorism strategy. As the NYPD has done in the past, “[u]nverified political stereotypes about target groups [have been] substituted for real evidence of individual guilt . . . and the [] proof of criminal acts [is replaced] by vague and deceptive evidence of an intent to act.” Donner, supra, at 190–91. Radicalization is a thin veil for the harmful stereotype that all Muslims should be treated as potential terrorists because some terrorists are Muslim. The NYPD has routinely ignored proof to the contrary, just as it has with similar disfavored groups in the past.

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### Combined Certifications

Michael W. Price, counsel of record for Amicus Curiae, hereby certifies that:

1. In accordance with Third Circuit Local Appellate Rule 28.3(d), I am a member in good standing of the bar of the Third Circuit.
2. This brief is in compliance with Fed. R. App. P. 32(a)(7)(B). This brief was prepared on a computer using Microsoft Word 2011. The font is Times New Roman, 14-point, double-spaced. The word count of the body of the brief, including footnotes and point headings, as calculated by Microsoft Word 2011, is 4344 words.
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