14-1688-CV

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

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

Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendant.

ON APPEAL FROM A FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (CIV. NO. 2:12-34-1 (WJM))

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, LATINOJUSTICE PRLDEF, MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, BILL OF RIGHTS DEFENSE COMMITTEE, GARDEN STATE BAR ASSOCIATION, HISPANIC BAR ASSOCIATION OF NEW JERSEY AND ASSOCIATION OF BLACK WOMEN LAWYERS OF NEW JERSEY, IN SUPPORT OF PLAINTIFFS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

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RULE 29(C)(5) STATEMENT

Amici represent that (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person or organization, other than amici curiae themselves, contributed money that was intended to fund preparing or submitting the brief.

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INTEREST OF AMICI CURIAE

Amici Curiae the American Civil Liberties Union of New Jersey, LatinoJustice PRLDEF, Mexican American Legal Defense & Educational Fund, Bill of Rights Defense Committee, Garden State Bar Association, Hispanic Bar Association of New Jersey and Association Of Black Women Lawyers of New Jersey are all civil rights, civil liberties, or professional legal organizations who routinely advocate in our courts for the protection of individual liberties and equal rights without discrimination on the basis of race, ethnicity, religion, gender, sexual orientation, and other invidious classifications. Amici therefore are concerned about the methodology adopted by the district court in holding both that plaintiffs who have alleged that they have been the subject of police surveillance based on their religious faith without any articulable suspicion of wrongdoing do not have standing even to be heard in court, and alternatively that they have failed even at the pleading stage to allege a plausible claim that such conduct violates the Equal Protection Clause of the Constitution.

Counsel for the Plaintiffs and for the Defendant have consented to the filing of this brief pursuant to Fed. R. App. P. 29(a).

ARGUMENT

As explained by Justice Louis Brandeis: "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its

example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). When the government acts as if a particular class of citizens as a whole should be treated with suspicion for one reason or another, it instills that suspicion and fear within its citizenry, to the detriment of the group that the government has singled out for disparate treatment.

In the present case, plaintiffs challenge a government program that appears to single out individuals, businesses and religious organizations based not on their connection to any identified wrongdoing, but rather based on the fact that they belong to a particular religious minority. Amici—all organizations that advocate for civil rights and the rights of minorities—urge this Court to ensure that when civil rights plaintiffs sufficiently allege discrimination claims, they are allowed their day in court.

I. THE DISTRICT COURT MISINTERPRETED *LAIRD V. TATUM* REGARDING THE STANDARDS FOR ESTABLISHING INJURY-IN-FACT.

The district court initially dismissed plaintiffs' action for lack of Article III standing due to the absence of "injury-in-fact," relying exclusively on the Supreme Court's decision in *Laird v. Tatum*, 408 U.S. 1 (1972) to reach this result. Reliance on *Laird* is misplaced for at least two reasons. First, plaintiffs who allege unconstitutional acts of the government *and* who allege cognizable individual harm have sufficient standing to challenge those government actions. Second, the

district court failed to recognize that being subjected to discriminatory treatment is an injury unto itself.

A. Plaintiffs Who Challenge a Government Program Have Standing To Sue If They Adequately Allege that They Themselves Have Been the Subject of, and Harmed By, that Program.

As explained in Appellants' initial brief, reliance on *Laird v. Tatum* in the present case is misplaced. In *Laird*, the Court held that First Amendment rights could not be chilled by "the *mere existence*, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose." *Id.* at 10 (emphasis added); *see also, Clapper v. Amnesty International, USA*, 133 S. Ct. 1138 (2013) (no standing by merely alleging that "there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted . . . at some point.").

Laird is therefore inapplicable when—rather than complaining of the "mere existence" of government surveillance in the abstract or even of an "objectively reasonable likelihood" that they *will* be surveilled—plaintiffs specifically allege that they have *already* been a target of such surveillance. That is the circumstance presented here, and demonstrates that Appellants have a particularized stake in the outcome of this action and are not merely attempting to litigate a generalized policy disagreement with government.

Furthermore, unlike the plaintiffs in *Laird*, Plaintiffs here do not merely complain of the *existence* of a surveillance program; they complain that that program has had particularized and tangible effects on them as targets of that surveillance. Amici therefore agree with Appellants that this case is comparable to this Court's decisions in *Philadelphia Yearly Meeting of Religious Soc. of Friends v. Tate*, 519 F.2d 1335 (3d Cir. 1975), and *Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997), which both explicitly declined to extend the reasoning of *Tatum* to situations in which plaintiffs alleged actual harm to them caused by police surveillance operations.

B. Being Subjected to Discriminatory Treatment by Law Enforcement on Account of Membership in a Constitutionally-Protected Class is an Independent "Injury-in-Fact" that Establishes Standing.

There is an independent—and for Amici who frequently advocate for principles of equal protection—perhaps even more compelling distinction that separates cases such as the one now before this Court from *Laird v. Tatum*. Here, the plaintiffs allege that a government agency instituted a surveillance program directed specifically at individuals and organizations based on their affiliation with a particular faith. When law enforcement singles out some for discriminatory treatment based on their membership in a constitutionally protected class, that action inherently inflicts an independently cognizable injury under the Equal

Protection Clause, regardless of whether there are any tangible repercussions from that surveillance.

As the Supreme Court has made clear in the government benefits context:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. *The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit*.

Northeastern Florida Chapter, Associated General Contractors of America v. Jacksonville, 508 U.S. 656, 666 (1993) (emphasis added) (plaintiffs had standing to challenge ordinance creating set aside for minority businesses regardless of whether they would have been awarded the contract but for the ordinance); *see also Regents of University of California v. Bakke*, 438 U.S. 265, 280-81 n.14 (1978) (Powell, J., announcing the judgment of the Court) (plaintiff had standing to challenge race conscious affirmative action program regardless of whether he would have been admitted to medical school without program).

The same principle applies when government imposes a burden rather than bestows a benefit. "It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved in Community Schools. v. Seattle*

Sch. Dist. No. 1, 551 U.S. 701, 720 (2007). "[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 229-30 (1995)). Thus, the fact that government makes distinctions on the basis of membership in a protected class is, standing alone, *itself* the injury. "The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice. . . ." *Anderson v. Martin*, 375 U.S. 399, 402 (1964) (striking down requirement that candidate's race be listed on ballot).

This Court has also made clear that it is not necessary in the profiling context to make out a Fourth Amendment violation in order to state an Equal Protection claim. *Bradley v. United States*, 299 F. 3d 197, 205 (3d Cir. 2002). Rather, "[t]o make an equal protection claim in the profiling context, [plaintiff is] required to prove that the actions of . . . officials (1) had a discriminatory effect and (2) were motivated by a discriminatory purpose." *Id.* To show discriminatory effect, plaintiff must "show that she is a member of a protected class and that she was treated differently from similarly situated individuals in an unprotected class." *Id.* at 206. Translated to this case, and adapted to the pleading stage, all that plaintiffs need aver in the complaint is that they are members of a protected class

(Muslims) and that they were treated differently from others (i.e. subject to surveillance by a law enforcement agency where others were not) because of membership in that class. Plaintiffs have clearly met this burden.

Overt discrimination by government based upon membership in a suspect, and thus protected class, presents an inherent threat to equal protection of laws. "Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)). "They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw*, 509 U.S. at 643. The Equal Protection Clause endeavors to make our society "free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994). But "even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs." *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part).

For the same reasons, government classifications based on religion "are by their very nature odious to a free people whose institutions are founded upon the

doctrine of equality" and stimulate latent historical prejudices and stereotypes. Especially since the September 11 attacks, Muslim, Arab American, and South Asian communities have been the subject of suspicion, fear and prejudice. But when law enforcement bases its actions on these false and biased stereotypes, the injury is qualitatively different. This is not merely societal stigma, but rather the special type of injury caused by intentional government discrimination towards an identified class of people.

Further, the lessons learned regarding the "destructive effects of racial and ethnic profiling by [a] police agency" in connection with stops of people of color on highways (*see, e.g.*, *Chavez v. Illinois State Police*, 251 F. 3d 612, 656 (7th Cir. 2001); *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996)), should not have to relearned in connection with the targeting of New Jersey mosques and Muslim-owned businesses. As the New Jersey Attorney General observed at the time that racial profiling on the New Jersey Turnpike was acknowledged, "[t]he effect of *any* form of disparate treatment, whether obvious or subtle or intentional or not, is to engender feelings of fear, resentment, hostility, and mistrust by minority citizens." P. Verniero, Attorney General of New Jersey, *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling*, p.7

(Apr. 20, 1999) (available at http://www.state.nj.us/lps/intm_419.pdf).[1] The highly detrimental effects on law enforcement relations with the community is one added reason why profiling or discriminatory targeting of minority groups undermines, rather than enhances, public safety.

Equal protection jurisprudence has come too far to succumb to the notion that intentional governmental discrimination based on race or religious affiliation (or other protected status) is non-justiciable based on a superficial "no harm no foul" rationale. *Any* government practice of making distinctions based on race, religion, or other protected class is too dangerous a threat to equal protection of the laws to pass without substantive judicial review. And where, as here, plaintiffs allege very concrete deleterious consequences to them as a result of the challenged government program, it is all the more apparent that they have alleged injury-in-fact sufficient to establish Article III standing.

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[1] There are already credible indications that the NYPD program at issue here is having such a counterproductive effect. As Michael Ward, the then head of the Newark Division of the FBI candidly stated, as a result of the program the New Jersey Muslim community is "not sure they trust law enforcement in general, they're fearing being watched, they're starting to withdraw their activities," *See* Star-Ledger, *Recent NYPD Spying Uproar Shakes FBI's Foundations in N.J. Terror Intelligence*, Mar. 7, 2012 (available at http://www.nj.com/news/index.ssf/2012/03/recent_nypd_spying_uproar_shak.html).

II. THE GOVERNMENT IS LIABLE FOR HARM THAT RESULTS FROM ITS UNLAWFUL ACTIONS, INCLUDING THE HARM THAT RESULTS FROM THE FORESEEABLE DISCLOSURE OF ITS UNLAWFUL ACTIONS BY THE MEDIA.

The district court also erred when it held that Plaintiffs lacked standing to challenge the government program at issue because their injury arose only following the disclosure of the details of the program by the media. Finding that the "traceability" prong of standing was lacking when the injury-in-fact alleged is "manifestly the product of the independent action of a third party" (JA18 (quoting *Duquesne Light Co. v. U.S. E.P.A.*, 166 F.3d 609, 613 (3d Cir. 1999)), the lower court reasoned that:

> Nowhere in the Complaint do Plaintiffs allege that they suffered harm prior to the *unauthorized* release of the documents by the Associated Press. This confirms that Plaintiffs' alleged injuries flow from the Associated Press's *unauthorized* disclosure of the documents. The harms are not "fairly traceable" to any act of surveillance.

JA18 (emphasis added).

The underlying assumption, that a member of the news media requires "authorization" when reporting on the activities of law enforcement, is an alarming one from a First Amendment perspective. The fact that the Associated Press did what would naturally be expected of a free and independent press, and published detailed descriptions of a newsworthy, controversial and constitutionally suspect government program, does not excuse or insulate the defendant of liability for the

injury caused by its allegedly discriminatory program. Simply put, a government cannot wash its hands of the consequences of its unlawful acts, including the consequences that follow the disclosure of its unlawful acts through the media. This "blame the messenger" rationale is too extreme to be accepted.

First, in order to establish Article III standing at the pleading stage, a plaintiff need not show "proximate causation" in the traditional common law sense. *See*, *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (recognizing "injury produced by determinative or coercive effect upon the action of someone else."); *Pitt News v. Fisher*, 215 F.3d 354, 361 (3d Cir. 2000) ("but for" causation sufficient to establish traceability to establish standing). But even under generally accepted tort principles, "[o]nly where the third party's action is 'so extraordinary as to not have been reasonably foreseeable' might such action constitute a superseding cause." *Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481, 495 (3d Cir. 1985)(quoting *Baker v. Outboard Marine Corp.*, 595 F.2d 176, 184 (3d Cir.1979)); *see*, *Wilson v. American Chain & Cable Co.*, 364 F.2d 558 (3d Cir. 1966) (intervening act must have been so highly extraordinary as not to have been reasonably foreseeable to be a superseding cause).

The publication by the media of the details of a controversial government program—such as the NYPD's covert surveillance program of Muslim individuals and communities—can hardly be classified "so highly extraordinary" as not to be

reasonably foreseeable. It would be unexpected and perhaps extraordinary if the press did *not* report on such a surveillance program, even if it did so without "authorization" from the government (a condition that presupposes a prohibitory power that Defendant does not have). In short, the Associated Press did exactly what the public and the NYPD should have anticipated it would do under these circumstances. And in cases of covert government activity such as occurred here, eventual disclosure by the media of such activity is not "so extraordinary as to not have been reasonably foreseeable." Given the scale and invasiveness of the NYPD program described by the Associated Press, it would have been unreasonable to expect that its existence in New Jersey would remain a secret indefinitely

It is the unlawful and controversial behavior by the defendant that in fact creates the risk that a free press will ultimately "intervene" and report on it. That "intervention" does not break the causal chain. *See generally*, RESTATEMENT (SECOND) OF TORTS § 442A ("Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause").

Even apart from general principles of causation, the reasoning suggested by the district court—that government actors can be relieved of responsibility for covert and unconstitutional conduct whenever a free press reports on it against the

wishes of the government—is indefensible from a First Amendment perspective. A robust and aggressive press that holds government actors accountable is not only reasonably foreseeable in our society; it is to be expected and indeed welcomed, if not by the government, then at least by the public who are informed about the behavior of their agents.

The district court's view of causation could create a perverse result whereby even clear violations of people's constitutional rights based on initially covert government activities would be shielded from judicial review. It is often the case that the harm resulting from covert activities that violate citizens' constitutional rights only arises following the disclosure of the fact that the actions are occurring. Yet, under the district court's reasoning, the victims of those unlawful government acts would lack standing to bring suit until the unlikely event that the government "authorized" disclosure of its activity (or, in criminal cases, when government attempts to use the fruits of its unlawful activities).

Such a rule would effectively compound the constitutional injury by making civil rights plaintiffs effectively bear the cost and consequences of a free press. But "[u]pon the theory that it is in the public interest that information be made available as to what takes place in public affairs, a newspaper has the privilege to report the acts of the executive or administrative officials of government." *Medico v. Time, Inc.*, 643 F.2d 134, 139 (3d Cir. 1981) (internal quotations and citation

omitted) (applying fair reporting privilege in libel action against magazine for "unauthorized" disclosure of plaintiff's secret FBI file). It would make no sense of First Amendment protections if the very act of reporting alleged constitutional misconduct by the press relieves the government of liability for that misconduct.

III. THE DISTRICT COURT ERRED IN FINDING THAT MEMBERSHIP IN A PROTECTED CLASS MUST BE THE "SOLE" FACTOR FOR THE CHALLENGED ACTIONS.

As explained below (see Point IV), the district court should not have engaged in an analysis of the "merits" of Plaintiffs' claims, in which it mistakenly and improperly performed the analysis of *Ashcroft v. Iqbal*. However, since the court did engage in a merits discussion—and given the particular interests of Amici—it is necessary to correct a particularly disturbing error regarding the standards for establishing a discrimination claim. That error is of unique concern to Amici since, if allowed to stand, it could wrongly bar properly pled discrimination and equal protection claims.

The district court below improperly reasoned that "the Plaintiffs in this case have not alleged facts from which it can be plausibly inferred that they were targeted *solely* because of their religion. The *more likely* explanation for the surveillance was a desire to locate budding terrorist conspiracies." JA21 (emphasis added). This misstates the applicable law. There is no requirement that the suspect classification be the "sole" motivating factor. The Supreme Court's

"mixed motive" cases make clear that a plaintiff alleging a constitutional tort need only plead that his protected status was *a* "substantial" or *a* "motivating factor" in the challenged governmental action. Once that is established, the government defendant must show by a preponderance of the evidence that it would have engaged in the same action even absent the plaintiff's membership in the protected class. *See, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (claim by public employee alleging exercise of First Amendment rights, rather than poor performance, led to discharge). This Court generalized the *Mt. Healthy* standard thus:

> In the realm of constitutional law, whenever challenged action would be unlawful if improperly motivated, the Supreme Court has made it clear that the challenged action is invalid *if motivated in part by an impermissible reason* but that the alleged offender is entitled to the defense that it would have taken the same action in the absence of the improper motive.

Gattis v. Snyder, 278 F.3d 222, 234 n.11 (3d Cir. 2002) (applying *Mt. Healthy* tests to prosecutor's peremptory juror challenge allegedly based on race).

Moreover, the rationalization that the NYPD's *ultimate objective* may have been to find terrorists does not justify use of suspect classifications such as religion as a *means* to achieve that objective, absent satisfaction of strict scrutiny. Even otherwise lawful activity of the government is unlawful if done for improper purposes. For example, in the well-known controversy over racial profiling on the

New Jersey Turnpike in which motorists were stopped by New Jersey State Police allegedly due to being persons of color, those motorists may have all being driving over the speed limit or committed some other traffic violation. It is generally not unlawful for an officer to stop someone for driving over the speed limit. However, it is unlawful if the stop was based on race. *See*, *State v. Soto*, 734 A.2d 350 (N.J. Law Div. 1996) (suppressing evidence obtained after valid stop on NJ Turnpike for traffic offense when statistical evidence showed African Americans were 4.85 more likely to be stopped than white motorists also committing traffic violations); *Gibson v. Superintendent of N.J. Dep't of Law & Public. Safety*, 411 F.3d 427, 441 (3d Cir. 2005) (plaintiff claiming he was stopped on Turnpike due to racial profiling states valid equal protection claim). Likewise, in *State v. Maryland*, 167 N.J. 471 (2001), the New Jersey Supreme Court noted that while it was not unlawful for an officer to question a person getting off of a train in a particular municipality, it *was* unlawful to do so if the person was selected for questioning based on his race. *Id.* at 485; *see also, Whren v. United States*, 517 U.S. 806, 813 (1996) ("the Constitution prohibits selective enforcement of the law based on considerations such as race.")

This Court's decision in *Hall v. Pennsylvania State Police*, 570 F.2d 86 (3d Cir. 1978), involved facts directly comparable to those at bar. In *Hall*, the plaintiff challenged a state police directive to local banks to "Take photos of any *black*

males or females coming into bank who may look suspicious." *Id.* at 88 (emphasis added). The plaintiff, an African American bank customer, complained that he was subject to surveillance pursuant to "a governmental directive which calls for a specified activity directed against a group of citizens identified on the basis of race." *Id.* at 89. This Court found that:

> The photography program initiated by the state police is a form of criminal investigation directed against the plaintiff because of his race. *Although it may be assumed that the state may arrange for photographing all suspicious persons entering the bank, it does not follow that its criterion for selection may be racially based, in the absence of a proven compelling state interest.* This is not a situation where suspects are being sought on the basis of descriptions which include race as well as other physical characteristics. No crime was under investigation nor was there any information that a robbery was planned. The police simply instituted a general photographic survey limited to one race, a practice not justifiable on the factual allegations in plaintiff's complaint.

Id. at 91 (emphasis added; internal citation omitted).

That is essentially the issue presented here: even if suspicionless police surveillance is constitutional as a general matter (which Amici do not concede), it is not constitutional if Muslims have been targeted based on their national origin and religion. That the ultimate objective of the NYPD may have been to deter acts of terrorism does not, in and of itself, explain nor justify the use of discriminatory practices to achieve that end.

Obviously, the Defendant (and the Plaintiffs) will have the opportunity through discovery to flesh out the reasons for the actions taken and, at the appropriate stage of litigation, the court will decide whether Defendants targeted Plaintiffs at least in part because of their membership in a protected class, as well as whether Defendants would have taken the same actions regardless of such protected attributes or affiliations. However, at the dismissal stage, based on a proper analysis of standing and the proper burdens of proof for discrimination cases, it is clear that Plaintiffs have far exceeded the required showing to proceed with their claims.

IV. THE DISTRICT COURT MISINTERPRETED THE "PLAUSIBILITY" TEST OF ASHCROFT V. IQBAL, RESULTING IN THE IMPOSITION OF AN IMPROPER BARRIER TO VALID CIVIL RIGHTS CLAIMS.

Even though the district court found that plaintiffs lacked Article III standing and therefore dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), it also, and somewhat inconsistently, effectively issued a ruling on the merits and found that plaintiffs had failed to state a claim under Fed. R. Civ. P. 12(b)(6), citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Apart from the obvious incongruity in *both* denying subject matter jurisdiction *and* ruling on the merits, for numerous additional reasons explained below, the district court erred.

In applying *Ashcroft*, the district court mistakenly interpreted it to inject what amounts to a preliminary credibility determination into consideration of a Fed. R. Civ. P. 12(b)(6) motion. After quoting from *Iqbal*, the district court concluded:

> For similar reasons, the Plaintiffs in this case have not alleged facts from which it can be plausibly inferred that they were targeted *solely* because of their religion. The *more likely explanation* for the surveillance was a desire to locate budding terrorist conspiracies. The most obvious reason for so concluding is that surveillance of the Muslim community began just after the attacks of September 11, 2001. The police could not have monitored New Jersey for Muslim terrorist activities without monitoring the Muslim community itself. While this surveillance Program may have had adverse effects upon the Muslim community after the Associated Press published its articles; the motive for the Program was not *solely* to discriminate against Muslims, but rather to find Muslim terrorists hiding among ordinary, law-abiding Muslims.

JA21-22 (emphasis added).

There are two three independent reasons of concern to Amici why the district court's decision in this regard was erroneous as a matter of law: (1) as a procedural matter, it is premature to consider an affirmative defense of "qualified immunity" before a defendant has even answered the complaint, especially since a municipality does not enjoy qualified immunity, and thus *Ashcroft* is wholly inapplicable to civil rights claims against it, and (2) the district court misapplied *Ashcroft v. Iqbal* by focusing not on the plausibility of *Plaintiffs'* allegations but, rather, on the mere plausibility of *Defendant's* purported rationale for its actions.

And respectfully, it is not for the trial judge to determine on a Rule 12(b)(6) motion whether defendant's explanation for its conduct is "more likely" than that of plaintiffs.

A. Plantiffs Are Not Required to Negate the Existence of Qualified Immunity in Their Complaint.

The sole issue presented in *Ashcroft* was whether General Ashcroft and Director Mueller enjoyed qualified immunity from suit. As the Supreme Court has made clear, qualified immunity is an affirmative defense, and defendant bears the burden of pleading its existence. "It is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful. We see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *see also*, *Crawford-El v. Britton*, 523 U.S. 574, 587 (1998)("qualified immunity is an affirmative defense" and "the burden of pleading it rests with the defendant."). As this Court has stated, *Gomez* teaches that "neither the language of § 1983 nor its legislative history suggests that a plaintiff has the duty to plead facts relevant to a qualified immunity defense in order to state a claim." *Thomas v. Independence Twp.*, 463 F.3d 285, 292 (3d Cir. 2006).

In this case, Defendant City of New York did not and could not plead a defense of qualified immunity, but merely raised *Ashcroft* in its memorandum of

law supporting its motion to dismiss. Although the point is procedural, it is an important one. Civil rights plaintiffs should not be put to the burden of anticipating random affirmative defenses that *might* be raised by defendant, lest they run the risk of being surprised by a legal brief that improperly addresses the sufficiency of a defense not yet pled. That is especially so in this case, since as shown in Part B. below, plaintiffs had no reason to anticipate the City of New York would assert qualified immunity, since as a matter of law such immunity does not exist for municipal defendants.

B. The Qualified Immunity Privilege Conferred Upon Individual Government Officials Does Not Apply to Claims Against Municipalities.

If the City of New York *had* been put to its burden of pleading qualified immunity as a defense, then perhaps the considerable doctrinal confusion in this case would have been avoided, since that defense would have been subject to a speedy motion to strike under Fed. R. Civ. P. 12(f)(2). For it has long been established that unlike individual government officials, municipalities do not enjoy qualified immunity. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 638 (1980); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993) ("unlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983."); *Carver v. Foerster*, 102 F.3d 96, 102 (3d Cir.

1996)("municipalities lacked qualified immunity under Section 1983"). Rather, the potential liability of a municipality is determined instead under the tests laid out in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Civil rights liability attaches to a municipality when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694; *see also, Andrews v. City of Philadelphia*, 895 F. 2d 1469 (3d Cir. 1990).

The district court's legal error is therefore manifest. Even apart from the fact that plaintiff is not seeking exclusively monetary damages, the sole defendant in this case is the City of New York, i.e. a municipality, not an individual official. Since this defendant cannot claim qualified immunity as a matter of law, it follows that *Ashcroft*'s "plausibility" test for determining the viability of a qualified immunity defense is simply irrelevant, and does not provide any basis for dismissing Plaintiffs' claims against the City of New York.

C. Even if Applicable, a Qualified Immunity Defense Would Not Exist When There Are Specific and Sufficient Allegations of a Defendant's Involvement in the Challenged Actions.

As demonstrated above, the qualified immunity analysis of *Ashcroft v. Iqbal* is utterly inapplicable to a civil rights claim against a municipality. Parsing the merits of *Ashcroft*'s plausibility standard is therefore somewhat of an abstract intellectual exercise in this case, but because Amici are concerned that the district

court's substantive analysis might be allowed to stand uncorrected, we address what we believe are its substantive flaws.

Qualified immunity has both an objective and subjective aspect. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Regarding the objective prong, i.e. whether defendant acted reasonably in light of clearly established constitutional rights, this Court has already found that "it has long been a well-settled principle that the state may not selectively enforce the law against racial minorities," and thus has denied the existence of qualified immunity in the context of racial profiling. *Gibson v. Superintendent of N.J. Dep't of Law & Public Safety*, 411 F.3d 427, 441 (3d Cir. 2005). The issue therefore turns on the second subjective element: did defendant subjectively intend to discriminate against the plaintiff on the basis of membership of a suspect class? On this latter issue, the *Ashcroft* Court was careful to describe the precise basis of its holding:

> To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of a "'contract, combination or conspiracy to prevent competitive entry,'" because it thought that claim too chimerical to be maintained. *It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth*.

Ashcroft, 556 U.S. at 681 (emphasis added; internal citations omitted). Thus, *Ashcroft*'s plausibility standard does not mandate dismissal in situations where a

civil rights plaintiff raises specific claims that are supported by concrete allegations.

Ashcroft involved a suit seeking money damages against the then Attorney General and Director of the FBI in their *personal* capacities, for mistreatment that the plaintiff alleges he suffered while detained at the federal Metropolitan Detention Center in Brooklyn ("MDC"). The sole issue before the Court was whether Attorney General Ashcroft and Director Mueller could be held personally liable for money damages for injuries that Iqbal allegedly suffered not because of his detention itself (which Iqbal did not challenge), but due to misconduct by local prison officials while he was detained in the administrative segregation at the MDC. 556 U.S. at 668. The Court readily acknowledged that "Respondent's account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors. But the allegations and pleadings with respect to these actors are not before us here." *Id.* at 666.

Iqbal alleged that Ashcroft and Mueller personally "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement." *Id.* at 666. They both raised the affirmative defense of qualified immunity. 556 U.S. at 668. The Court held that Ashcroft and Muller were entitled to immunity unless "assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible." 556 U.S. at 696. Finding that the

pleadings were too conclusory to allege that Ashcroft and Muller had any personal involvement in Iqbal's mistreatment, the Court found his complaint failed to satisfy the plausibility standard. *Ashcroft*, 556 U.S. at 676-77.

In the present case, the district court's rejection of the Plaintiffs' specific allegations that the NYPD surveillance program targeted Muslims appears to do precisely what the Court in *Ashcroft* instructed not to do: reject a plaintiff's allegations of unconstitutional conduct because the judge believes they are "unrealistic or nonsensical." *Ashcroft*, 556 U.S. at 681. Here, not only are the plaintiffs' factual allegations not extravagant or fanciful, but they are very specific and non-conclusory—indeed vividly so—and thus satisfy *Ashcroft*'s "plausibility" standard, even if it were applicable to this situation.

The district court's conclusion that the "*more likely explanation* for the surveillance was a desire to locate budding terrorist conspiracies," amounts to a weighing of credibility that is improper on a Rule 12(b)(6) motion. The district court engaged in an assessment of the "plausibility" not of the *plaintiff*'s allegations in its allegations, but rather of the *defendant*'s potential defense. This essentially turns the *Ashcroft* analysis on its head, and, if followed, would turn every motion to dismiss an equal protection claim into a judicial prediction on whether defendant's eventual answer might provide a "more likely explanation" for their conduct than the one proffered by plaintiff. It is obviously inappropriate

at the dismissal stage for a judge to make a merits determination not even based on evidence but, rather, what he thinks the "more likely" explanation may turn out to be once a defendant files a responsive pleading. *Ashcroft* clearly does not go nearly that far.

Again using New Jersey's experience with racial profiling as an example, if a court was faced with a motion to dismiss in an action challenging the stops of persons of color on the Turnpike, it would have been inappropriate to dismiss based on the State's proffered justification that there was a valid reason for each traffic stop, i.e., that each person stopped was driving over the speed limit or engaged in some other traffic violation. If the mere articulation of a plausible defense were sufficient to bar equal protection claims from moving forward, then this Court would have reached the opposite result in *Gibson*, 411 F.3d 427, where defendants similarly alleged a valid reason for stopping the black plaintiff on the Turnpike. Future plaintiffs in similar contexts could be improperly denied their right to establish that the defendants' purported assertions were mere pretext or do not fully explain why a select minority was singled out for disparate treatment as part of defendants' policies or practices. *See* Verniero, *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling*, p.4 (racial profiling on the southern portion of New Jersey Turnpike was "real, not imagined").

Finally and more generally, Amici are concerned that the district court's analysis and conclusions would give unintentional succor to the dangerous contention that profiling a particular racial, ethnic or religious community is a sufficiently effective law enforcement tool to justify the discrimination alleged here. In the present case, the NYPD was not attempting to find individuals suspected of committing an actual crime or even engaged in an existing conspiracy to commit a crime. Rather, the program was based on the underlying logic that there is a sufficient correlation between membership in a particular race, ethnicity or religion and propensity to commit a future act of terrorism to justify such targeted surveillance.

Both as a general proposition, and specifically regarding the instant case, that type of reasoning must be rejected. Indeed, after the attacks of September 11, 2001, the courts have rejected the notion that a shared characteristic with the 9/11 terrorists, such as adherence to the Muslim religion or Arab ethnicity,[2] is relevant evidence to show *propensity* to commit a future criminal act. In *Farag v. United States,* 587 F. Supp. 2d 436 (E.D.N.Y. 2008), In *Farag,* the Government argued that plaintiffs' Arab ethnicity and use of the Arabic language were relevant factors

[2] It is of course a common misperception that the Arab American and Muslim communities are largely coterminous, even though the majority of Arab Americans are Christian, and conversely Arabs comprise only a small fraction of Muslims worldwide.

in determining both probable cause and reasonable suspicion, because "all of the persons who participated in the 9/11 terrorist attacks were Middle Eastern males." *Id.*

In an exhaustive opinion, Judge Block examined the precedents on use of race by law enforcement as an indicator of criminal activity, and rejected the "argument that plaintiffs' Arab ethnicity is a relevant consideration [in determining probable cause to detain an airline passenger] premised on the notion that Arabs have a greater *propensity* than non-Arabs toward criminal activity—namely, terrorism." *Id.* at 463.

> Even granting that all of the participants in the 9/11 attacks were Arabs, and even assuming *arguendo* that a large proportion of would-be anti-American terrorists are Arabs, the likelihood that *any given airline passenger* of Arab ethnicity is a terrorist is so negligible that Arab ethnicity has no probative value in a particularized reasonable-suspicion or probable-cause determination.

Id. at 464. The same is true, mutatis mutandis, in this case. Being a member of an discrete and insular minority (in this case being a member of the a Muslim community) is not, in and of itself, evidence of future criminal activity sufficient to warrant even enough reasonable suspicion to warrant a *Terry* stop, much less amount to the type of narrowly tailored compelling state interest that would justify a conscious and systematic program of surveillance based on race, religion, or other such characteristic or affiliation.

The argument that membership in a particular suspect class is relevant to predicting whether that person is committing or will commit a *future* criminal act has also been presented, and soundly rejected, with regard to communities for whom Amici traditionally advocate.[3] Simply put, attempts by law enforcement to advance a "propensity towards guilt by association" rationale that lead to discriminatory surveillance of entire racial, ethnic or, as here, religious communities, are anathema to the Equal Protection Clause, and should be roundly rejected by this Court.

CONCLUSION

For the reasons stated herein, therefore, Amici Curiae respectfully urge this Court to reverse the judgment of the district court in dismissing Plaintiffs claims under Fed R. Civ. P. 12(b)(1) and 12(b)(6), and remand this case for further proceedings.

Respectfully submitted,

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[3] *See, People v. Bower*, 24 Cal.3d 638, 156 Cal. Rptr. 856, 597 P.2d 115, 119 (1979) ("[T]he presence of an individual of one race in an area inhabited primarily by members of another race is not a sufficient basis to suggest that crime is afoot."); *State v. Barber*, 118 Wash. 2d 335, 823 P.2d 1068, 1075 (1992) ("It is the law that racial incongruity, i.e., a person of any race being allegedly 'out of place' in a particular geographic area, should never constitute a finding of reasonable suspicion of criminal activity."); *Phillips v. State*, 781 So.2d 477, 479 (Fla. Dist. Ct. App. 2001) ("Clearly, the fact that a black person is merely walking in a predominantly white neighborhood does not indicate that he has committed, is committing, or is about to commit a crime.").

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July 10, 2014.

CERTIFICATE OF BAR MEMBERSHIP

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

July 10, 2014

Ronald K. Chen

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I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief (as indicated by word processing program, Microsoft Word 2010, Version 14.0.7116.5000) contains 6975 words, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and type style requirements of Rule 32(a)(6) because this brief has been prepared in the proportionally spaced typeface of 14-point Times New Roman.

July 10, 2014

Ronald K. Chen

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I hereby certify that I am filing the foregoing Brief of Amici Curiae electronically via this Court's ECF system and am serving the foregoing Brief of Amici Curiae via this Court's ECF and by electronic mail, upon all counsel of record for the Plaintiffs and Defendant.

July 10, 2014

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