UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MUHAMMAD TANVIR; JAMEEL ALGIBHAH; NAVEED SHINWARI; AWAIS SAJJAD, Plaintiffs, v. ERIC H. HOLDER, ATTORNEY GENERAL OF THE UNITED STATES *et al.*, Defendants.	13 Civ. 6951 (RA)

MEMORANDUM OF LAW IN SUPPORT OF THE INDIVIDUAL AGENT DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

PREET BHARARA
United States Attorney
Southern District of New York
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2709/2743
Facsimile: (212) 637-2730

SARAH S. NORMAND
ELLEN BLAIN
Assistant United States Attorneys
– Of Counsel –

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

Defendant federal agents FNU Tanzin, Sanya Garcia, Francisco Artusa,[1] John LNU, Michael Rutkowski, William Gale, John C. Harley III, Steven LNU, Michael LNU, Gregg Grossoehmig, Weysan Dun, James C. Langenberg, and John Does 1-6 and 9-13 (collectively, the "Individual Defendants" or "Agents")[2] respectfully submit this memorandum of law in support of their motion to dismiss the claims asserted against them in their personal capacities, pursuant to Rule 12(b)(1), Rule 12(b)(6) and, as to certain Individual Agent Defendants, Rule 12(b)(2) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

Plaintiffs Muhammad Tanvir, Jameel Algibhah, Naveed Shinwari, and Awais Sajjad (collectively, "Plaintiffs") seek to hold twenty-five federal agents—law enforcement officials responsible for protecting the nation from terrorist attacks—individually liable for unspecified monetary damages, alleging that these agents personally caused Plaintiffs to be included on the government's "No Fly List."[3] Plaintiffs make this allegation despite acknowledging that individual agents have no authority to place anyone on the No Fly List. Plaintiffs nevertheless speculate that these agents must have caused Plaintiffs to be placed on the No Fly List, or to remain on the list, asserting that the agents retaliated against Plaintiffs for purportedly refusing the agents' requests that they serve as informants for the government. At the same time,

---

[1] Agent Artusa is identified as Agent "Artousa" in the Amended Complaint.

[2] Pursuant to the Stipulation and Order filed July 24, 2014, defendants FNU Tanzin, John LNU, Steven LNU, Michael LNU and John Does 1-6 and 9-13 are currently proceeding under the pseudonyms specified in the Amended Complaint. *See* Docket No 30, ¶¶ 1-2. In addition, John Doe 2 is currently proceeding as John Doe 2/3. *See id.* ¶ 1(f). This motion does not address John Does 7-8, as the government to date has not been able to identify those defendants, and they therefore have not been served or had an opportunity to request representation by the Department of Justice to the extent they are sued in their individual capacities.

[3] Plaintiffs' claims against the Individual Defendants in their official capacities are the subject of a separate motion to dismiss.

however, Plaintiffs concede that Shinwari and Sajjad were included on the No Fly List before they ever had any interaction whatsoever with any agent, and Plaintiffs fail to allege that thirteen of the twenty-five agents asked any of the Plaintiffs to serve as informants, or were even present when another agent made such a request.

Plaintiffs' claims that the agents retaliated against Plaintiffs for exercising their First Amendment rights, and that the agents' purported requests that Plaintiffs serve as informants substantially burdened three of the four Plaintiffs' religious exercise, in violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, fail at the threshold. Neither the Supreme Court nor the Second Circuit has recognized a cause of action under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for acts allegedly taken in retaliation for First Amendment-protected conduct. To the contrary, the Supreme Court has repeatedly rejected the creation of new *Bivens* claims. Extending *Bivens* to a new context is particularly inappropriate here, where significant national security considerations counsel against creating a *Bivens* remedy, and where an existing administrative and judicial process provides a means for Plaintiffs to challenge their alleged placement on the No Fly List. Nor can Plaintiffs pursue a claim against the agents in their individual capacities under RFRA. As evidenced by its text and legislative history, and underscored by recent case law, RFRA provides only for "appropriate relief against a government," and does not authorize claims against officers in their personal capacities seeking money damages.

But even if Plaintiffs' putative *Bivens* and RFRA claims were cognizable, however, Plaintiffs fail to state a claim, and the agents are entitled to qualified immunity. With respect to the First Amendment retaliation claim, Plaintiffs fail to plausibly allege any agent's personal involvement in the purported retaliation—Plaintiffs acknowledge in the Amended Complaint that

the agents cannot determine the composition of the No Fly List, that a number of agents had minimal (or no) contact with the Plaintiffs, and that Plaintiffs were able to fly following their interactions with certain agents. This flaw is fatal to any purported *Bivens* claim and also entitles the agents to qualified immunity. Moreover, the alleged constitutional right at issue—an asserted right not to be nominated for consideration for inclusion on a watch list—was not clearly established at the time of the events alleged in the Amended Complaint, further entitling the agents to qualified immunity from Plaintiffs' constitutional claim.

Similarly, Plaintiffs' RFRA claims should be dismissed as to a substantial number of the agents because Plaintiffs fail to allege that those agents ever asked Plaintiffs to work as informants, thus failing to allege those agents' personal involvement in the alleged statutory violation and also entitling those agents to qualified immunity. In addition, all of the agents against whom RFRA claims are asserted are entitled to qualified immunity because it was not (and still is not) clearly established that a request to provide information about one's Muslim American community would substantially burden religious exercise.

In addition, the Court lacks personal jurisdiction over John Doe 12, who allegedly interacted with Sajjad on a single occasion in New Jersey, and all of the agents who allegedly interacted with Shinwari, as the alleged contacts with Shinwari occurred entirely outside New York (in the United Arab Emirates, Virginia and Nebraska). Finally, Tanvir's First Amendment retaliation claims against John Doe 1 and John Doe 2/3 are time-barred.

ALLEGATIONS IN THE COMPLAINT[4]

Plaintiff Muhammad Tanvir

Plaintiff Muhammad Tanvir alleges that he is a lawful permanent resident of the United States, last resided in the United States in Queens, has family in Pakistan, and is a Muslim. *See* Amended Complaint, dated April 22, 2014 ("AC"), ¶¶ 14, 68. Tanvir alleges that he interacted with the following Agents: FNU Tanzin, John Doe 1, John Doe 2/3, Agent Garcia and John LNU. *See id.* ¶¶ 68-113.

Tanvir alleges that FNU Tanzin, John Doe 1 and John Doe 2/3 requested that Tanvir "work for them as an informant," *id.* ¶ 76, and that he refused because he "had sincerely held religious and personal objections to spying on innocent members of his community," *see id.* ¶¶ 77-79, 84. According to the Amended Complaint, he was asked about, among other things, terrorist training camps near the village where he was raised, whether he had any Taliban training, and his rope-climbing skills (including an occasion while he was working as a construction worker when he rappelled from the high floors of a building while other workers cheered him on). *Id.* ¶ 75.

In October 2010, more than a year after his last contact with FNU Tanzin, John Doe 1 or John Doe 2/3, Tanvir allegedly was denied boarding on a flight from Atlanta to New York City. *See id.* ¶ 91. Tanvir alleges that he called Agent Tanzin, who told him that he was "no longer assigned to Tanvir" and to "'cooperate' with the FBI agent who would be contacting him soon." *Id.* ¶ 92. Tanvir alleges that he was contacted two days later by Agent Garcia, who requested a meeting, but that he refused to meet with her. *See id.* ¶ 94. Tanvir alleges that one year later, in

[4] Although Defendants neither confirm nor deny whether any plaintiff is or was on the No Fly List, for purposes of this motion only, Defendants accept as true the well-pleaded factual allegations in the Amended Complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

October 2011, he purchased tickets to fly to Pakistan in November. *See id.* ¶¶ 94, 98. The day before the flight, Agent Garcia allegedly contacted him, met with him and John LNU at a restaurant in Queens, and advised him that she and John LNU "would try to permit him to fly again by obtaining a one-time waiver . . . but that it would take some weeks for them to process the waiver." *Id.* ¶ 102. Tanvir does not allege that either Agent Garcia or John LNU requested that he serve as an informant. Tanvir alleges that on the day of his scheduled flight to Pakistan, Agent Garcia called him and stated that he would not be permitted to fly unless he came to FBI headquarters to take a polygraph test; Tanvir refused and canceled his flight. *See id.* ¶ 104. Thereafter, Tanvir allegedly purchased two more tickets to travel internationally, and both times was denied boarding at the airport. *See id.* ¶¶ 109, 113.

Tanvir filed a DHS TRIP inquiry on September 27, 2011,[5] and ultimately, on March 28, 2013, received a response stating that his travel experience "was most likely caused by a misidentification" and that the government had made updates to its records. *Id.* ¶ 114. Three months later, on June 27, 2013, Tanvir boarded a flight and flew to Pakistan. *See id.* ¶ 115.

Plaintiff Jameel Algibhah

Plaintiff Jameel Algibhah alleges that he is a United States citizen, resides in the Bronx, has family in Yemen, and is a Muslim. *See id.* ¶¶ 15, 118. Algibhah alleges that he interacted with the following Agents: Agent Artusa, John Doe 4 and John Doe 5. *See id.* ¶¶ 119-40.

Algibhah alleges that on December 17, 2009, Agent Artusa and John Doe 4 asked him to "work for them as an informant," but he refused because, like Tanvir, it would "violate[] his sincerely held personal and religious beliefs." *Id.* ¶¶ 121-22. He was asked questions about his

[5] "DHS TRIP" refers to the Department of Homeland Security Traveler Redress Program, established pursuant to 49 U.S.C. § 44926(b), and administered by the Transportation Security Administration, a component of DHS. For a detailed description of the DHS TRIP process, the Individual Defendants respectfully refer the Court to the Memorandum of Law In Support of Defendants' Motion to Dismiss the Official Capacity Claims ("Official Capacity Mem."), dated July 28, 2014, at 4-9.

friends, acquaintances, and individuals with whom he worked and attended college. *See id.* ¶ 120. Algibhah alleges that he was denied boarding on a flight to Yemen six months later, on May 4, 2010, and again on September 19, 2010. *See id.* ¶¶ 125-27.

Almost two years later, in June 2012, Agent Artusa and John Doe 5 allegedly contacted Algibhah, asked whether he knew people from a certain region in Yemen, indicated that they could remove him from the No Fly List, and requested that he "work [for them] as an informant." *Id.* ¶¶ 131-34. Algibhah alleges that he told them that "he needed time to consider their request." *Id.* ¶ 134. Two days later, Algibhah alleges, Agent Artusa called him, again requested that Algibhah serve as an informant and asked to meet with Algibhah "one more time," but did not contact Algibhah again until May 29, 2013. *Id.* On that date, Agent Artusa allegedly called and reiterated his desire to "help[] [Algibhah] get off the No Fly List;" Algibhah directed Agent Artusa to his counsel; and counsel called Agent Artusa, who stated that he was still interested in speaking with Algibhah. *Id.* ¶¶ 139-40.

Algibhah alleges that he filed a DHS TRIP inquiry in May 2010, and received a response on October 28, 2010, stating that "no changes or corrections are warranted at this time." *Id.* ¶¶ 126-28.

Plaintiff Naveed Shinwari

Plaintiff Naveed Shinwari alleges that he is a lawful permanent resident of the United States, currently resides in Connecticut, has family in Afghanistan, and is a Muslim. *See id.* ¶¶ 16, 145. Shinwari alleges that he interacted with the following Agents in the following locations: Steven LNU in Dubai, United Arab Emirates; Agent Harley in Dubai, United Arab Emirates; Michael LNU at Dulles International Airport in Virginia ("Dulles") and in Omaha,

Nebraska; Agent Grossoehmig at Dulles; John Doe 6 in Omaha, Nebraska; Agent Dun in Omaha, Nebraska; and Agent Langenberg in Omaha, Nebraska. *See id.* ¶¶ 146-64.

Shinwari alleges that, while en route from Afghanistan to Omaha on February 26, 2012, he was denied boarding on a connecting flight leaving from Dubai. *See id.*, ¶ 146. He alleges that he was interviewed in Dubai the next day by Steven LNU and Agent Harley, who asked him questions about his background and indicated that they "needed to confer with 'higher-ups in [Washington] D.C.' before allowing [him] to fly back" to the United States. *Id.* ¶¶ 148-50. Shinwari does not allege that either Steven LNU or Agent Harley asked him to work as an informant. Shinwari alleges that, three days later, Agent Harley told him that they had received the "go-ahead," and Shinwari flew to the United States on March 1, 2012. *See id.* ¶ 151. Shinwari alleges that when he arrived at Dulles, Michael LNU and Agent Grossoehmig asked him similar questions about his background; Shinwari does not allege that either Michael LNU or Agent Grossoehmig asked him to work as an informant during this conversation. *See id.* ¶¶ 152-53.

Shinwari alleges that once he returned to Omaha, Michael LNU and John Doe 6 interviewed him twice at his home in March 2012, and both times asked Shinwari to act as an informant; Shinwari declined both times. *See id.* ¶¶ 155-57, 161. Like Tanvir and Algibhah, Shinwari alleges that working as an informant would "violate[] his sincerely held personal and religious beliefs." *Id.* ¶ 157. In between those two interviews, Shinwari alleges that he was denied boarding on a flight from Omaha to Orlando. *See id.* ¶ 158. Also in March 2012, Shinwari allegedly met in Omaha with Agents Dun and Langenberg, who "told him that he could potentially get a one-time waiver." *Id.* ¶¶ 163-64. Shinwari does not allege that either Agent Dun or Agent Langenberg requested that he act as an informant.

Shinwari alleges that he filed a DHS TRIP inquiry on February 26, 2012, and ultimately received a response on December 24, 2013, stating that Shinwari's travel experience "was most likely caused by a misidentification," and that the government had made updates to its records. *See id.* ¶¶ 167-68. Thereafter, on March 19, 2013, Shinwari was able to fly round trip from Connecticut to Nebraska. *See id.* ¶ 169.

Plaintiff Awais Sajjad

Plaintiff Awais Sajjad alleges that he is a lawful permanent resident of the United States, currently resides in Brooklyn as well as Jersey City, New Jersey, and has family in Pakistan. *See id.* ¶¶ 17, 172-73. Sajjad alleges that he interacted with the following Agents in the following locations: John Doe 9 at John F. Kennedy International Airport ("JFK"); John Doe 10 at JFK; Agent Rutkowski in New Jersey; John Doe 11 in New Jersey; John Doe 12 in New Jersey; and John Doe 13 in New Jersey. *See id.* ¶¶ 173-94. Sajjad also alleges that his counsel contacted Agent Rutkowski and Agent Gale by telephone. *See id.* ¶ 191.

Sajjad alleges that on September 14, 2012, he was denied boarding on a flight from JFK to Pakistan and interviewed by John Does 7-10, who "repeatedly reassured [him] that they would be willing to help him get off the No Fly List . . . ." *Id.* ¶ 177. Sajjad alleges that he was asked questions about his background, family, friends, and whether he had ever had any military training or sought to enlist for terrorism training. *See id.* ¶¶ 173-176. Sajjad does not allege that John Does 7-10 asked him to work as an informant.

Sajjad alleges that, on October 24, 2012, Agent Rutkowski and John Doe 11 contacted him at his sister's house in New Jersey, asked him to accompany them to FBI headquarters in New Jersey, questioned him at FBI headquarters, and asked him about, among other things, his last trip to Pakistan in 2011, whether he had watched bomb-making videos on YouTube, and

whether he had ever signed up for or taken military training in Pakistan or ever used guns. *See id.* ¶¶ 179, 183-184. Sajjad alleges that Agent Rutkowski and John Doe 11 requested that Sajjad "work for them" as an informant, and drove him back to his sister's house. *See id.* ¶¶ 179-187. Sajjad alleges that, while he was at FBI headquarters in Newark, John Doe 12 conducted a polygraph examination; Sajjad does not allege that John Doe 12 asked him to work as an informant. *See id.* ¶ 184.

Sajjad alleges that in March 2013, his counsel contacted Agent Rutkowski, who stated that Sajjad must answer the FBI's questions if Sajjad "wanted the FBI to help him get off the No Fly List." *Id.* ¶ 191. Sajjad alleges that, in May 2013, his counsel also contacted Agent Gale, who stated that he "would not get into [questions about Sajjad] over the phone." *Id.* Sajjad does not allege that Agent Gale asked him to work as an informant, much less that he had any personal contact with Agent Gale. *See id*. One year later, on April 4, 2014, Agent Rutkowski and John Doe 13 allegedly approached Sajjad outside his sister's house; Sajjad agreed to accompany them to a nearby diner; and the Agents asked him more questions about his background.

Sajjad alleges that he filed a DHS TRIP inquiry on September 14, 2012. *See id.* ¶ 178. He received a response in December 2012, stating that "no changes or corrections are warranted at this time." *Id*. ¶ 189 (alteration omitted). Sajjad thereafter filed an administrative appeal, which remains pending. *See id.* ¶ 190.

Claims Against the Individual Defendants

Plaintiffs assert two claims against the Individual Defendants in their personal capacities: a First Amendment retaliation claim under *Bivens* and a RFRA claim.[6] A personal capacity claim "seek[s] to impose individual liability upon . . . government officer[s] for [his or her] actions." *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Any damages awarded on a personal capacity claim "will not be payable from the public fisc but rather will come from the pocket of the individual defendant." *Blackburn v. Goodwin*, 608 F.2d 919, 923 (2d Cir. 1979).

In their First Amendment claim, Plaintiffs allege that "[b]y declining to act as informants within their communities, Plaintiffs repeatedly and validly exercised their First Amendment rights to freedom of speech[,] association" and religion, and "because Plaintiffs refused to act as informants," the Agents purportedly retaliated against them by "knowingly, intentionally and unlawfully plac[ing] [or maintaining] Plaintiffs on the No Fly List." AC ¶¶ 200-01. Specifically, Tanvir and Algibhah allege that the following Agents wrongfully placed them on the No Fly List: FNU Tanzin, John Doe 1 and John Doe 2/3 (Tanvir), *see id.* ¶ 96, and Agent Artusa and John Doe 4 (Algibhah), *see id.* ¶ 124. Tanvir, Algibhah, Shinwari and Sajjad allege that the following Agents "kept [them] on the No Fly List": Agent Garcia (Tanvir), *see id.* ¶ 108; Agent Artusa and John Doe 5 (Algibhah), *see id.* ¶ 135; every Agent who interacted with Shinwari, *see id.* ¶ 166; and Agent Rutkowski and John Does 7-13 (Sajjad), *see id.* ¶ 195.[7]

Tanvir, Algibhah and Shinwari also assert a RFRA claim against every Agent who allegedly interacted with them: FNU Tanzin, John LNU, Steven LNU, Michael LNU; Agents

[6] For the Court's convenience, the attached appendix identifies the paragraphs in the Amended Complaint regarding each Agent, the claims asserted against each Agent, and the section(s) of this memorandum of law addressing those claims.

[7] Tanvir and Sajjad do not make any specific allegation regarding John LNU and Agent Gale, the other Agents with whom they allegedly had contact.

Garcia, Artusa, Harley, Grossoehmig, Dun and Langenberg; and John Does 1-6.[8] *See id.*, Second Claim for Relief. Tanvir, Algibhah and Shinwari allege that these Agents forced them "into an impermissible choice between, on the one hand, obeying their sincerely held religious beliefs and being subjected to [placement or retention] on the No Fly List, or, on the other hand, violating their sincerely held religious beliefs in order to avoid [placement or retention] on the No Fly List . . . ." *Id.* ¶ 210. Plaintiffs claim that "[b]y forcing Plaintiffs into this impermissible choice . . . , Defendants placed a substantial burden on Plaintiffs' exercise of their sincerely held religious beliefs in violation of RFRA . . . ." *Id.* ¶ 211.

ARGUMENT

I. THE COURT SHOULD DECLINE TO CREATE A *BIVENS* CLAIM BASED ON FIRST AMENDMENT RETALIATION IN THIS NEW CONTEXT

A. Plaintiffs Seek to Extend *Bivens* to a New Context

In *Bivens*, the Supreme Court held that "violation of [the Fourth Amendment] by a federal agent acting under color of his authority gives rise to a cause of action for damages," despite the absence of any statute authorizing such a damages remedy. 403 U.S. at 389. Unlike civil rights claims against state officials under 42 U.S.C. § 1983, a *Bivens* claim is a judge-made remedy implied by a court directly from the Constitution. *Bivens*, 403 U.S. at 397. A *Bivens* action may be brought only against individuals in their personal capacities, and any damages are payable by the defendant from his or her own personal assets. *Carlson v. Green*, 446 U.S. 14, 21 (1980).

The circumstances that prompted the Supreme Court in *Bivens* to imply a new private action for damages, not expressly authorized by statute, were case-specific. The plaintiff was

[8] Sajjad does not assert a RFRA claim against the Agents who allegedly interacted with him: John Does 7-13 and Agents Rutkowski and Gale. *See id.*, Second Claim for Relief.

subjected to an unlawful search resulting in his arrest. *Bivens*, 403 U.S. at 389-90. The Court implied a damages action directly from the Constitution "to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by" the defendants' conduct. *Corr. Services Corp. v. Malesko*, 534 U.S. 61, 70 (2001). The Court thus invoked its general remedial powers to fashion a remedy for the plaintiff, observing that there were "no special factors counselling hesitation" against creating such a remedy. *Bivens*, 403 U.S. at 396.

The Supreme Court, however, "has been reluctant to extend *Bivens* liability to any new context or new category of defendants." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (internal quotation marks omitted). In the 40 years since *Bivens*, the Supreme Court has repeatedly rejected *Bivens* claims outside the specific context presented in that case, and has extended it only twice—in the context of employment discrimination in violation of the Due Process Clause, *Davis v. Passman*, 442 U.S. 228 (1979), and an Eighth Amendment violation by prison officials, *Carlson*, 446 U.S. at 14. By contrast, the Court has refused to extend *Bivens* to violations of federal employees' First Amendment rights by their employers, *Bush v. Lucas*, 462 U.S. 367 (1983); harms suffered in connection with military service, *United States v. Stanley*, 483 U.S. 669 (1987); denials of Social Security benefits, *Schweiker v. Chilicky*, 487 U.S. 412 (1988); decisions by federal agencies, *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994); private corporations operating under federal contracts, *Malesko*, 534 U.S. at 74; retaliation by federal officials against private landowners, *Wilkie v. Robbins*, 551 U.S. 537 (2007); and employees of private corporations operating under federal contracts, *Minneci v. Pollard*, 132 S. Ct. 617 (2012). *See also Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) ("Since *Carlson* in 1980, the Supreme Court has declined to extend the *Bivens* remedy in any new direction at all."); *Vance v. Rumsfeld*, 701 F.3d 193, 198 (7th Cir. 2012) (noting that the Supreme Court has not created a

new *Bivens* remedy "during the last 32 years—though it has reversed more than a dozen appellate decisions that had created new actions for damages").

Implying a right to sue under *Bivens* is thus "disfavored." *Iqbal*, 556 U.S. at 675; *see also Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012) ("The implication of a *Bivens* action, consistent with the dicta in *Bivens* itself and the later holdings of the Supreme Court and this court, is not something to be undertaken lightly."); *Mirmehdi*, 689 F.3d at 980 (9th Cir. 2012) (a *Bivens* "cause of action 'is *not* an automatic entitlement *no matter what other means there may be* to vindicate a protected interest'") (quoting *Wilkie*, 551 U.S. at 550) (emphasis in *Mirmehdi*), *cert. denied*, 133 S. Ct. 2336 (May 13, 2013). Indeed, "the Supreme Court has warned that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in 'new contexts.'" *Arar v. Ashcroft*, 585 F.3d at 571 (citing *Malesko*, 534 U.S. at 69).

As a threshold matter, therefore, this Court must determine "whether allowing this *Bivens* action to proceed would extend *Bivens* to a 'new context.'" *Arar*, 585 F.3d at 572. "Context" reflects "a potentially recurring scenario that has similar legal and factual components." *Id*. In this case, Plaintiffs seek to assert a *Bivens* claim against the Agents for allegedly nominating them for inclusion on the No Fly List, or failing to affirmatively seek their removal from the No Fly List, purportedly in retaliation for exercising their First Amendment rights. AC ¶¶ 197-204. As a legal matter, "[n]either the Supreme Court nor the Second Circuit has recognized a *Bivens* action for alleged violations of a plaintiff's First Amendment rights." *Zielinski v. DeFreest*, No. 12 Civ. 1160(JPO), 2013 WL 4838833, at *9 (S.D.N.Y. Sept. 10, 2013) (citing *Iqbal*, 556 U.S. at 675 ("[W]e have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment" (citing *Bush v. Lucas*, 462 U.S. 367 (1983))); *Hudson Valley Black Press v. IRS*, 409 F.3d 106, 113 (2d Cir.

2005) (*Bivens* relief not available to taxpayers who allege First Amendment violations based on retaliatory tax audits)). And no court has permitted a *Bivens* claim to proceed for alleged violation of First Amendment or other constitutional rights in the factual context of a law enforcement officer's nomination of an individual to the No Fly List or failure to affirmatively seek their removal from the No Fly List. *Cf. Arar*, 585 F.3d at 572 (defining context of putative *Bivens* claim as "extraordinary rendition"). Plaintiffs thus seek to extend *Bivens* to a new context. *See id*.

B. Special Factors Counsel Hesitation Against a Judicially-Created Remedy

"In order to determine whether to recognize a *Bivens* remedy in a new context, [the Court] must consider: [a] whether there is an alternative remedial scheme available to plaintiff[s]; and [b] whether special factors counsel hesitation in creating a *Bivens* remedy." *Id*. (quotation marks omitted); *see also Wilkie*, 551 U.S. at 550 (a *Bivens* action should be allowed only if there is no alternative, existing process for protecting the constitutional interest at stake; and there are no special factors counseling hesitation against a judicially-created remedy). In this case, the existence of an alternative, existing administrative and judicial process for protecting the interests of persons allegedly on the No Fly List, as well as other special factors, counsel strongly against extending *Bivens* to this new context.[9]

1. Plaintiffs Have an Alternative Administrative and Judicial Process to Challenge Their Alleged Status on the No Fly List

"The presence of a deliberately crafted statutory remedial system is one 'special factor' that precludes a *Bivens* remedy." *Moore v. Glickman*, 113 F.3d 988, 991 (9th Cir. 1997); *see*

[9] Although the existence of special factors bars the creation of a *Bivens* remedy in this context, the Court need not resolve the issue here because—as discussed in Point III below—qualified immunity is dispositive and requires dismissal of all of Plaintiffs' claims against the Agents. *See Reichle v. Howard*, 132 S. Ct. 2088, 2096 n.6 (2012).

also Chilicky, 487 U.S. at 420, 428; *Arar* 585 F.3d at 573. As the D.C. Circuit recently explained, "courts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has not inadvertently omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve *Bivens* remedies." *Davis v. Billington*, 681 F.3d 377, 382 (D.C. Cir. 2012) (citation and internal quotation marks omitted); *see also Chilicky*, 487 U.S. at 423 (special factors doctrine "include[s] an appropriate judicial deference to indications that congressional inaction has not been inadvertent").

In this case, the existence of a system of administrative and judicial remedies for passengers who allege they have been denied boarding or subjected to additional screening at airports counsels hesitation against the judicial creation of a *Bivens* remedy against the Agents in their personal capacities. Congress directed TSA to "establish a timely and fair process for individuals identified [under TSA's passenger prescreening function] to appeal to the Transportation Security Administration and correct any erroneous information." 49 U.S.C. § 44903(j)(2)(G)(i). TSA is required to "establish a procedure to enable airline passengers, who are delayed or prohibited from boarding a flight because the advanced passenger prescreening system determined that they might pose a security threat, to appeal such determination and correct information contained in the system." 49 U.S.C. § 44903(j)(2)(C)(iii)(I). Congress also mandated that "[t]he Secretary of Homeland Security shall establish a timely and fair process for individuals who believe they have been delayed or prohibited from boarding a commercial aircraft because they were wrongly identified as a threat under the regimes utilized by the Transportation Security Administration," 49 U.S.C. § 44926(a), and "shall establish" procedures "to implement, coordinate, and execute the process" for redress, *id*. § 44926(b)(1). TSA is also

required to maintain records for individuals whose information has been corrected through the redress process, to prevent repeated ongoing delays as a result of erroneous information. *See* 49 U.S.C. § 44903(j)(2)(G)(ii) ("maintain a record of . . . misidentified and have corrected erroneous information"); *see also id*. § 44926(b)(2) ("maintain a record of . . . misidentified and . . . corrected erroneous information").

Pursuant to these authorities, TSA administers the DHS TRIP program, through which travelers may request correction of any erroneous information in government records if they believe, *inter alia*, that they have been unfairly or incorrectly delayed or prohibited from boarding an aircraft as a result of TSA's watchlist matching program. 49 C.F.R. § 1560.201. TSA has promulgated regulations governing the DHS TRIP process. 73 Fed. Reg. 64018, 64066 (Oct. 28, 2008); 49 C.F.R. §§ 1560.201-.207. And, indeed, each Plaintiff alleges that he availed himself of the TRIP process. AC ¶¶ 97, 126, 167, 178. In response to their DHS TRIP inquiries, two of the Plaintiffs—Tanvir and Shinwari—were advised that updates to government records had been made, and they were thereafter able to fly. AC ¶¶ 114-15, 168-69.

The redress system mandated by Congress separately includes judicial review of orders pertaining "to security duties and powers designated to be carried out by" TSA. 49 U.S.C. § 46110(a). Parties "disclosing a substantial interest" in such orders may file a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the federal Court of Appeals for the circuit in which the person resides or has as a principal place of business. *Id*. Each of the Plaintiffs was advised that he could seek judicial review pursuant to Section 46110 of TSA's determination of his DHS TRIP inquiry. *See* Declaration of Deborah Moore ("TSA Decl."), Exhs. A-D (DHS TRIP response letters referred to in Amended Complaint); *New York Life Ins. Co. v. United States*, 724 F.3d 256, 258 n.1 (2d Cir. 2013) (court may rely on

documents referred to and relied upon, and therefore incorporated by reference, in complaint), *cert. denied*, 134 S. Ct. 1938 (2014).[10] Plaintiffs elected not to do so, and filed this lawsuit instead, seeking among other things to assert *Bivens* claims against the Agents in their individual capacities.

Notably absent from the system of administrative and judicial remedies established by Congress, however, is any provision for a personal damages remedy against federal officials. As the Supreme Court observed in *Chilicky*, the "absence of statutory relief for a constitutional violation … does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Id*. at 421 (emphasis added). The Court reasoned that where a damages remedy has not "been included in the elaborate remedial scheme designed by Congress," it was not the place of the judiciary to alter the plan crafted by Congress by implying a right of action for damages directly against federal officials in their individual capacities. *Id*. at 414, 429.

The reasoning in *Chilicky* applies with equal force here and bars Plaintiffs' putative *Bivens* claim. As in *Chilicky*, this case "involve[s] policy questions in an area that [has] received careful attention from Congress." *Id*. at 423. In light of Congress's careful attention to the problem of transportation security in the aftermath of the attacks of September 11, 2001, and the need to balance security with the interests of individual passengers, it can hardly be said that the absence of a constitutional damages remedy in this context is inadvertent. *Id*. The Court therefore should decline to create a *Bivens* remedy where Congress has not done so. *Id*. at 426-

[10] The Official Capacity Defendants are separately moving to dismiss the official capacity claims in the Amended Complaint for lack of jurisdiction, because the courts of appeals have "exclusive jurisdiction" to review TSA orders within the scope of Section 46110(a). *See* 49 U.S.C. § 46110(c); Official Capacity Mem. at Pt. I. The Individual Defendants join in the Official Capacity Defendants' motion. *See Merritt v. Shuttle, Inc*., 187 F.3d 263 (2d Cir. 1999) (dismissing *Bivens* claim for lack of subject matter jurisdiction in light of exclusive jurisdiction provision in 49 U.S.C. § 46110(c)).

27 (declining "to create a new substantive legal liability" because Congress was "in a better position to decide whether or not the public interest would be served by creating it").

That plaintiffs challenge the adequacy of the DHS TRIP process, *see* AC ¶¶ 54-62, 216-228, does not suggest that a *Bivens* remedy for damages is available. The Supreme Court has instructed that the adequacy of a particular remedy is irrelevant to the special factors analysis. *See Stanley*, 483 U.S. at 683 ("[I]t is irrelevant to a 'special factors' analysis whether the laws currently on the books afford [plaintiff] . . . an 'adequate' federal remedy for his injuries."). As long as Congress has provided some mechanism for relief—which here includes not only the DHS TRIP process, but also judicial review under 49 U.S.C. § 46110—forecloses a *Bivens* remedy.[11]

2. Other Special Factors Also Counsel Hesitation Against the Judicial Creation of a *Bivens* Claim Here

In addition to the availability of an alternative remedial scheme, other "special factors" that have "counseled hesitation," and therefore foreclosed a *Bivens* remedy, are: military

[11] A district court in Oregon recently concluded that the DHS TRIP redress process violated the plaintiffs' rights under the Due Process Clause and the APA, and directed the government to develop substitute procedures. *See Latif v. Holder*, No. 10 Civ. 750 (BR), 2014 WL 2871346 (D. Or. June 24, 2014). The government is evaluating the *Latif* decision and is scheduled to provide a status report in that case on August 4, 2014. Because the adequacy of an alternative remedy provided by Congress is irrelevant to the special factors analysis, however, the district court's decision in *Latif* does not affect the analysis of whether a *Bivens* claim is available. Moreover, in their Amended Complaint, as in *Latif*, plaintiffs seek relief under the APA. Courts have held that the APA is a comprehensive remedial scheme that precludes recognition of a *Bivens* remedy. *See, e.g.*, *Western Radio Services Co. v. U.S. Forest Servs*., 578 F.3d 1116, 1122-23 (9th Cir. 2009); *Sinclair v. Hawke*, 314 F.3d 934, 940 (8th Cir. 2003); *Miller v. U.S. Dep't of Agr. Farm Servs*. *Agency*, 143 F.3d 1413, 1416 (11th Cir. 1998); *see also Omoniyi v. DHS*, No. 10 Civ. 1344 (DF), 2012 WL 892197, at *10 (S.D.N.Y. Mar. 13, 2012) (declining to extend *Bivens* in light of existence of alternative remedial scheme under Immigration and Nationality Act, which provided that administrative determination at issue could be challenged in federal district court in accordance with the APA). Thus, even if this Court were to conclude that plaintiffs' claims do not fall within the court of appeals' exclusive jurisdiction pursuant to 49 U.S.C. § 46110, *see* Official Capacity Mem. at Pt. I; supra n.10, the existence of an alternative remedial scheme under the APA would independently bar plaintiffs' putative *Bivens* claim. *See Western Radio*, 578 F.3d at 1123 ("[T]he APA leaves no room for *Bivens* claims based on agency action or inaction.").

concerns, separation of powers, national security concerns, and foreign policy concerns. *Arar*, 585 F.3d at 573 (citing cases). In determining whether such special factors exist, the "only relevant threshold—that a factor 'counsels hesitation'—is remarkably low." *Id*. at 574. "[N]o account is taken of countervailing factors that might counsel alacrity or activism." *Arar*, 585 F.3d at 573-74 ("It is at the opposite end of the continuum from the unflagging duty to exercise jurisdiction. . . . 'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to consider."). Several such factors exist here.

In *Arar*, the Second Circuit, sitting *en banc*, held that multiple special factors "sternly" counseled against extending *Bivens* to cases involving "extraordinary rendition" of terrorism suspects. 585 F.3d at 573. The court noted that extraordinary rendition implicated national security and foreign policy, "an area of executive action in which courts have long been *hesitant* to intrude absent congressional authorization." *Id*. at 575 (citations and internal quotation marks omitted; emphasis in original). Such hesitance and reluctance to intrude upon Executive authority in national security matters, the court observed, is counseled by both the constitutional separation of powers and the limited competence of the judiciary in the areas of national security and foreign policy. *Id*. at 575-76. The court found that "[t]hese concerns must counsel hesitation in creating a new damages remedy that Congress has not seen fit to authorize." *Id*. at 576.

The *Arar* court further observed that litigation of *Bivens* claims against the individual federal defendants would implicate classified information, including exchanges among foreign countries on diplomatic, security, and intelligence issues. *Id*. This factor also counseled hesitation against extending *Bivens*, as "[e]ven the probing of these matters entails the risk that other countries will become less willing to cooperate with the United States in sharing

intelligence resources to counter terrorism." *Id*. Relatedly, the court noted that in adjudicating a *Bivens* claim, some documents sought by the plaintiff would have to be redacted, reviewed *in camera*, or otherwise concealed from the public. *Id*. at 576-77. That the court likely would have to rely on information that could not be introduced into the public record further counseled hesitation, given the "preference for open rather than clandestine court proceedings." *Id*. at 577.[12]

Many of the special factors discussed in *Arar* similarly counsel strongly against judicial creation of a *Bivens* remedy against individual federal officers who nominate persons for placement on the No Fly List or who do not affirmatively seek their removal from the No Fly List. As Plaintiffs allege, placement on the list requires a judgment by the Terrorist Screening Center that there is "reasonable suspicion" that an individual is a "known or suspected terrorist," and also satisfies additional heightened criteria, based on "derogatory information" demonstrating that the person "poses a threat of committing a terrorist act with respect to an aircraft." AC ¶¶ 41-42 (alteration omitted); 49 U.S.C. § 114(h) (TSA, "in consultation with other appropriate Federal agencies and air carriers," "use[s] information from government agencies" to identify travelers who may pose a threat to civil aviation or national security, and to "prevent [such] individual[s] from boarding an aircraft"). Such a judgment self-evidently requires consideration of available intelligence information, potentially including intelligence

[12] The Court also noted that litigation of the claims in *Arar* would require inquiry into whether assurances had been provided by the country of rendition, and whether the individual federal defendants had reasonably relied on such assurances, which "would necessarily involve [the Court] in an inquiry into the work of foreign governments and several federal agencies, the nature of certain classified information, and the extent of secret diplomatic relationships." 585 F.3d at 578. The Court also noted the "possibility that such suits will make the government 'vulnerable to 'graymail,' *i.e.*, individual lawsuits brought to induce the [government] to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations,' or otherwise compromise foreign policy efforts." *Id*. at 578-79 (citation and internal quotation marks omitted). These factors further counseled hesitation against judicial creation of a *Bivens* claim in that context. *Id.* at 578, 579.

information provided by foreign governments, much of which is likely to be classified. If Plaintiffs are or were in fact on the No Fly List, the Agents' defense of the lawsuit necessarily would require inquiry into whether the individual Agents had any role in nominating Plaintiffs to the No Fly List and the classified or otherwise protected reasons for TSC's decision to include them on the list. These inquiries would likely implicate classified or otherwise protected information, which counsels hesitation against creating a *Bivens* remedy. *Arar*, 585 F.3d at 576-77; *see also Lebron v. Rumsfeld*, 670 F.3d 540, 553 (4th Cir. 2012) (finding no *Bivens* remedy for U.S. citizen designated an "enemy combatant," where suit "risk[ed] interference with military and intelligence operations on a wide scale" because the government's defense of its policies would likely require testimony "as to the rationale for that policy, the global nature of the terrorist threat it was designed to combat, the specific intelligence that led to the application of that policy to [the plaintiff], [and] where and from whom that intelligence was obtained").

Certainly, the determination whether to allow an individual to fly, when intelligence information provides reason to suspect that the individual may have connections to terrorism, implicates the national security, an area in which, "'unless Congress specifically has provided otherwise, courts traditionally have been *reluctant* to intrude upon the authority of the Executive.'" *Arar*, 585 F.3d at 575 (quoting *Dep't of the Navy v. Egan*, 484 U.S. 518, 529-30 (1988)) (emphasis in *Arar*).[13] This special factor counsels strongly against creation of a *Bivens* remedy against the Agents for allegedly nominating Plaintiffs for placement on, or failing to affirmatively seek their removal from, the No Fly List. *See id.* at 573 (identifying "national

[13] Indeed, although the Second Circuit found it unnecessary to rely on this consideration, it bears noting that determinations regarding whether to place individuals on the No Fly List implicate "policy choices that are by no means easily reached." *Arar*, 585 F.3d at 580; *see also id.* ("Should a person identified as a terrorist by his own country be allowed to board his plane and go on to his destination? Surely, that would raise questions as to what duty is owed to the other passengers and the crew").

security concerns" as a special factor counseling hesitation, and citing *Beattie v. Boeing Co.*, 43 F.3d 559, 563 (10th Cir. 1994)); *accord Lebron*, 670 F.3d at 548-53; *Doe*, 683 F.3d at 395-96; *Ali v. Rumsfeld*, 649 F.3d 762, 773 (D.C. Cir. 2011); *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008). This factor, among the others discussed above, forecloses a *Bivens* remedy in this case. *See Arar*, 585 F.3d at 573.

II. RFRA DOES NOT PROVIDE FOR DAMAGES CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS IN THEIR PERSONAL CAPACITIES

Plaintiffs Tanvir, Algibhah, and Shinwari's purported RFRA claim also fails, as RFRA does not authorize a cause of action for money damages against the Individual Defendants in their personal capacities.[14]

A. The Text of the Statute Does Not Provide for Individual Capacity Suits for Money Damages

Any interpretation of a statute begins with its text, *see Hedges v. Obama*, 724 F.3d 170, 189 (2d Cir. 2013), and the text of RFRA demonstrates that Congress did not intend to authorize suits against government employees in their personal capacities for money damages.

In response to *Employment Division v. Smith*, 494 U.S. 872 (1990), in which "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," Congress passed RFRA with the stated goal of "restor[ing] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)[,] and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)[,] and . . . guarantee[ing] its application in all cases where free exercise of religion is substantially burdened . . . ." 42 U.S.C. § 2000bb.

RFRA provides:

[14] Nor does RFRA create a cause of action for money damages or equitable relief against the Individual Defendants in their official capacities. *See* Official Capacity Mem., Pt. III.

> (a) In general
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
> (b) Exception
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
>
> > (1) is in furtherance of a compelling governmental interest; and
> > (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (c) Judicial relief
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. . . .

42 U.S.C. § 2000bb-1. RFRA further provides that "the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States . . . ." 42 U.S.C. § 2000bb-2(a).

RFRA therefore does not expressly provide for money damages or claims against individuals in their personal capacities, but rather is limited to "appropriate relief against a government." The text and purpose of this language demonstrate that RFRA provides a cause of action only for equitable relief and only against "the government."

The term "government" commonly refers to an entity, not to an individual person employed by the government. *See* Black's Law Dictionary 695 (6th ed. 1990) (defining "government" to "include the federal government and all its agencies and bureaus, state and county governments, and city and township governments"). Consistent with this common meaning, RFRA's definition of "government" is limited to entities of the United States ("a branch, department, agency, instrumentality") and "official[s]" of the United States ("official (or other person acting under color of law)"). 42 U.S.C. § 2000bb-2.

The phrase "official (or other person acting under color of law)," moreover, indicates that government officials may be sued in their official capacities. The word "official" generally refers to official capacity suits, which are suits against the government. *See, e.g., Hafer*, 502 U.S. at 25 (explaining difference between official and individual capacity suits); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994) (suit against a federal employee or officer in his official capacity is a suit against the United States). That RFRA refers to a government official "or other person acting under color of law" does not suggest that Congress intended for government officials to be sued in their personal capacities. In *Stafford v. Briggs*, the Supreme Court interpreted similar language to authorize only official capacity suits. *See* 444 U.S. 527, 535-36 (1980) (finding that 28 U.S.C. § 1391(e), providing that a plaintiff may commence 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 *or under color of legal authority*," did not provide for personal capacity suits for money damages) (emphasis added). The inclusion of the term "official" in the statutory list of actors that constitute covered "government" actors serves to define the range of actors and conduct that can give rise to an official capacity claim that would—consistent with RFRA's statutory scheme—seek "relief against a government." 42 U.S.C. § 2000bb-1(c).

Similarly, under traditional canons of statutory construction, use of the phrase "or other person acting under color of law," following a list of government entities and "officials," indicates that Congress intended to authorize suit only against a government entity. *See, e.g., Commack Self–Serv. Kosher Meats v. Hooker*, 680 F.3d 194, 213 (2d Cir. 2012) ("[T]he court does not look at the statutory language in isolation; rather, the court considers the language in context, with the benefit of the cannons [sic] of statutory construction and legislative history.").

"The traditional canon of construction, *noscitur a sociis*, dictates that words grouped in a list should be given related meaning." *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990) (quotation marks and citations omitted). The canon *ejusdem generis* provides that "where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated." *United States v. Turkette*, 452 U.S. 576, 581 (1981); *see also Sossamon v. Texas*, 131 S. Ct. 1651, 1662 (2011) (construing residual "other" clause "to embrace only objects similar in nature to those objects enumerated by the preceding specific words") (citation omitted). In RFRA's definition of "government," every term that precedes "or other person"—"branch, department, agency, instrumentality, and official"—refers to the government itself and not to an individual. Accordingly, consistent with the canons of *noscitur a sociis* and *ejusdem generis*, the phrase "or other person acting under color of law" should be read in concert with those proceeding terms, and likewise serves only to define the actors that can trigger liability of the "government." *See Stafford*, 444 U.S. at 535-36 (phrase "officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority" authorized suit only against officers or employees acting in their official capacities).

The language of RFRA contrasts sharply with the language of 42 U.S.C. § 1983, which does provide for monetary relief against state officers acting in their personal capacities. *See Hafer*, 502 U.S. at 25. Unlike RFRA, Section 1983 does not refer to the "government," defined to include a list of government entities or officials. It does not use the word "official" at all. Rather, Section 1983 provides that "[e]very person" who acts "under color of any statute, ordinance, regulation, custom, or usage" "shall be liable" "in an action at law" for redress for certain violations. RFRA contains no such reference to the liability of individual persons, but

provides only for "appropriate relief against a government." The Court should not infer from such language that Congress intended to create a cause of action for money damages against individuals in their personal capacities. *See Iqbal*, 556 U.S. at 675 ("implied causes of action are disfavored"). Congress knew how to create a cause of action against individuals in their personal capacities; it did not do so in RFRA.

Importantly, construing the phrase "appropriate relief against the government" to permit an action for money damages against individual federal officials in their personal capacities would yield an absurd and unjust result. *See Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 386 (2d Cir. 2004) ("'A construction of a statute leading to unjust or absurd consequences should be avoided.'") (citation, internal quotation marks and alteration omitted); *see also Troll Co. v. Uneeda Doll Co*., 483 F.3d 150, 160 (2d Cir. 2007) ("[I]t is an elemental principle of statutory construction that an ambiguous statute must be construed to avoid absurd results."). "As courts in this Circuit have recognized," the phrase "appropriate relief against a government" "does not demonstrate the clear intent necessary to effect a congressional abrogation of the government's sovereign immunity from suits for damages." *Johnson v. Killian*, No. 07 Civ. 6641(NRB), 2013 WL 103166, at *3 (S.D.N.Y. Jan. 9, 2013) (citing *Gilmore-Bey v. Coughlin*, 929 F. Supp. 146, 149-51 (S.D.N.Y. 1996); *Commack Self–Service Kosher Meats Inc. v. State of N.Y.*, 954 F. Supp. 65, 67-70 (E.D.N.Y. 1997)); *accord Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 840 (9th Cir. 2012) ("RFRA does not waive the federal government's sovereign immunity from damages"); *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006). Thus, to construe the phrase "appropriate relief against a government" to allow individual capacity claims would make individuals the *only* class of defendants subject to damages suits under RFRA— an "absurd [and] unjust consequence[]" unsupported by the text and unintended

by Congress. *Ehrlich*, 360 F.3d at 386; *see also Johnson*, 2013 WL 103166, at *3 (noting that plaintiff was "only entitled to declaratory or injunctive relief under the RFRA").

Furthermore, because RFRA does not authorize damages claims against the government, to construe the phrase "appropriate relief against a government" to allow damages claims against individuals would improperly vary the meaning of the statute depending on its application. "[T]he meaning of words in a statute cannot change with the statute's application." *United States v. Santos*, 553 U.S. 507, 522 (2008); *see also Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 329 (2000) ("As we have in the past, we refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying."). If RFRA were applied to permit individual capacity suits against federal officials, "appropriate relief" would include money damages when applied to an individual federal official sued in his personal capacity, but not when sued in his official capacity. As the Supreme Court has observed, "[t]o give the[] same words a different meaning for each category would be to invent a statute rather than interpret one." *Clark v. Martinez*, 543 U.S. 371, 378 (2005). A consistent interpretation of the relief available under RFRA is particularly appropriate here, because individual capacity suits impose such "substantial social costs." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (noting that "permitting damages suits against government officials can . . . [create] the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties").

B. RFRA's Companion Statute Does Not Provide for Individual Capacity Suits for Money Damages

The unavailability of individual capacity claims under RFRA is confirmed by the Supreme Court's holding that an almost identical phrase in RFRA's companion statute, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, does

not provide for damages suits against the government—a decision that other courts, including the Second Circuit, have extended to bar monetary claims against individual officials.[15] In *Sossamon*, the plaintiff sued the state, as well as individuals in their official capacities, seeking money damages. The Supreme Court held that RLUIPA does not provide for money damages, concluding that the phrase "'appropriate relief' does not so clearly and unambiguously waive sovereign immunity to private suits for damage that we can 'be certain that the State in fact consents' to such a suit." 131 S. Ct. at 1658-59 (citations omitted). The Court noted that the word "appropriate" "is inherently context-dependent," and that "[t]he context [under RLUIPA] —*where the defendant is a sovereign*—suggests, if anything, that monetary damages are not 'suitable' or 'proper.'" *Id.* at 1659-60 (citation omitted) (emphasis added).

Relying on *Sossamon*, and decisions in several other circuits, the Second Circuit determined that RLUIPA also does not provide for individual capacity claims for money damages. *See Washington v. Gonyea*, 731 F.3d 143, 145 (2d Cir. 2013) ("While *Sossamon* did not decide whether RLUIPA allows individual-capacity suits against state officials, every circuit to have addressed the issue has held that it does not."). It follows that the nearly identical provision in RFRA likewise does not provide for money damages against individuals. *See Redd v. Wright*, 597 F.3d 532, 536 (2d Cir. 2010) (noting that courts interpret RFRA and RLUIPA

[15] After the Supreme Court held RFRA unconstitutional as applied to state and local governments, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress passed RLUIPA, which is almost identical to RFRA, but "less sweeping in scope" and "target[ing] two areas of state and local action": prisons and land use. *Sossamon*, 131 S. Ct. at 1656. Like RFRA, RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise" of a person unless the government demonstrates that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering" that interest. 42 U.S.C. § 2000cc–1(a). RLUIPA also "includes an express private cause of action that is taken from RFRA: 'A person may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.'" *Sossamon*, 131 S. Ct. at 1656 (quoting 42 U.S.C. § 2000cc–2(a)). And also like RFRA, "government" is defined to include any "branch, department, agency, instrumentality, or official," as well as "any other person acting under color of State law." 42 U.S.C. § 2000cc–5(4)(A).

similarly); *see also Lebron,* 670 F.3d at 557 (noting that "RLUIPA mirrors the provisions of RFRA" and "courts commonly apply case law decided under RFRA to issues that arise under RLUIPA and vice versa") (quotation marks and citation omitted); *see also Northcross v. Bd. of Ed. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (noting that where two statutes share both the same language and "a common *raison d'être*," they should be interpreted to have the same meaning) (quotation marks and citation omitted).

That Congress enacted RLUIPA pursuant to its spending clause power, which, along with the absence of an explicit waiver of sovereign immunity, was one factor considered by the Supreme Court in holding that RLUIPA does not provide for individual capacity claims, *see Sossamon*, 131 S. Ct. at 1663, does not suggest that RFRA provides for individual capacity claims. The two statutes share the same purpose and language, neither operates as a waiver of sovereign immunity from money damages, and neither expressly authorizes damages suits against individual federal employees. As a result, they should be interpreted similarly. *Cf. Northcross*, 412 U.S. at 428; *Oklevueha Native Am. Church of Haw.*, 676 F.3d at 840 ("Although the Supreme Court in *Sossamon* considered claims against a state, rather than federal actors, and was therefore guided by the Eleventh Amendment, the Court's interpretation of 'appropriate relief' is also applicable to actions against federal defendants under RFRA. Just like the identical language in RLUIPA, RFRA's authorization of 'appropriate relief' is not an 'unequivocal expression' of the waiver of sovereign immunity to monetary claims.").

C. RFRA's Legislative History Demonstrates That Congress Intended to Create an Equitable Remedy Against Only Government Entities

Legislative history confirms that Congress intended a RFRA claim to lie against the government only, and that "appropriate relief" refers to equitable relief. In explaining the "background and need" for RFRA, the Senate Judiciary Committee stated that the "fundamental

constitutional right" of free religious exercise may be undermined by "*governmental rules* of general applicability which operate to place substantial burdens on individuals' ability to practice their faiths." S. Rep. No. 103-111, 1993 U.S.C.C.A.N. 1892, 1894 (emphasis added); *see also Rweyemamu v. Cote*, 520 F.3d 198, 202 (2d Cir. 2008) ("At bottom, the import of RFRA is that, whatever other statutes may (or may not) say, 'the Federal Government may not, *as a statutory matter*, substantially burden a person's exercise of religion.'") (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006)) (emphasis in *Cote*); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) ("To exceed the 'substantial burden' threshold, *government regulation* must significantly inhibit or constrain conduct or expression that manifests some central tenet of a [plaintiff's] individual beliefs.") (emphasis added). Thus, RFRA's purpose is to afford "appropriate relief" from statutory or regulatory interference, which clearly contemplates injunctive or possibly declaratory relief. Neither the text nor the legislative history suggests that, in enacting RFRA, Congress intended to create a cause of action for money damages against individuals acting in the absence of any government statute, regulation, or official rule of general applicability.[16]

Further, in its report, the Senate Judiciary Committee explicitly stated, "To be absolutely clear, the act does not *expand, contract or alter* the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling governmental interest test prior to *Smith*." S. Rep. No. 103-111, 12, 1993 U.S.C.C.A.N. 1892, 1902 (emphasis added); *see also id.* at 1898 ("The committee expects that the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of

[16] While Plaintiffs allege that the "Agency Defendants tolerated and failed to remedy a pattern and practice" among the Agents, AC ¶ 10, the fact that Plaintiffs are not asserting a RFRA claim against the Agency Defendants underscores the lack of any allegation that the Agents were acting pursuant to an official policy or rule. *See id.* ¶¶ 10, 205-15 (asserting RFRA claims against the Agents only).

religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling governmental interest."). At the time RFRA was passed (and today), the Supreme Court "ha[d] not found an implied damages remedy under the Free Exercise Clause," and had "declined to extend *Bivens* to a claim sounding in the First Amendment." *Iqbal*, 556 U.S. at 675.

Because "Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf," *Wilkie*, 551 U.S. at 562, courts should refrain from inferring an individual capacity claim in the absence of clear Congressional intent, *see Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). Here, the text and legislative history reveal no Congressional intent in RFRA, much less clear intent, to create a cause of action for money damages, let alone an entirely new cause of action against individuals for money damages.[17]

D. The Court Should Not Follow the Few Nonbinding Decisions Holding That RFRA Provides for Individual Liability

The Second Circuit has not addressed whether RFRA provides for individual capacity claims. Nor have the other circuits directly addressed the question, with the possible exception of the Seventh Circuit.[18] In *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), *rev'd on other*

[17] Indeed, in the Cost Estimate provided by the Congressional Budget Office ("CBO"), the CBO Director stated that enactment of RFRA "may affect direct spending because private parties affected by this bill may seek judicial relief; if they successfully claim that their free exercise of religion has been burdened by the federal government, attorney's fees may be awarded and would be paid out of the [Judgment Fund]." 1993 U.S.C.C.A.N. 1892, 1905. Notably absent from the CBO's Cost Estimate is any discussion of money damages or employee indemnification that the government would have to pay, further suggesting that Congress simply did not contemplate awards of money damages under RFRA. *But see* 146 Cong. Rec. E1563 (Sept. 21, 2000) (statement of Rep. Canady) (stating that "Section 4(a) tracks RFRA, creating a private cause of action for damages, injunction, and declaratory judgment, and a defense to liability," but also that "[t]hese claims and defenses lie against a government").

[18] While several circuits have held that defendants were entitled to qualified immunity with respect to RFRA claims, they have not analyzed whether RFRA provides for individual capacity claims for money

grounds, 118 S. Ct. 36 (1997), the court noted that RFRA "says nothing about remedies," but nonetheless concluded that the plaintiff could sue individuals for damages because RFRA defines "government" to include "government employees acting under color of law." *Id*. at 1177. In addition to the fact that *Mack* is no longer good law because it was subsequently reversed on other grounds by the Supreme Court, the *Mack* court explicitly noted that the state defendants in that case had not contested the issue of whether RFRA provides for montary relief against individuals. *Id*. The court therefore did not have the benefit of briefing on the issue, and thus did not have an opportunity to consider the myriad arguments why the "under color of law" language does not transform the terms "government" or "official" into a personal capacity claim. *See supra* Point II.A.

Moreover, *Mack* was decided before the Supreme Court's decision in *Sossamon*, which as noted held that RLUIPA does not authorize suits for money damages. *See* 131 S. Ct. at 1658-59; *supra* at 27-28. Because RFRA and RLIUPA share a common purpose and nearly identical statutory language, the Supreme Court's decision applies with equal force to RFRA. *See supra* at 28-29. And in light of the Second Circuit's decision in *Washington*, which relied on *Sossamon* to find that RLUIPA does not provide for individual capacity claims for money damages, it is

---

damages. In some cases, the defendant appears not to have raised the argument, so the court did not address it. *See, e.g, Rasul v. Myers*, 563 F.3d 527, 533 n.6 (D.C. Cir. 2009) (defendant did not raise the argument and the court did not address it); *Weinberger v. Grimes*, No. 07–6461, 2009 WL 331632, at *5 (6th Cir. Feb. 10, 2009) (same); *see also Redd*, 597 F.3d at 538 (affirming qualified immunity from RLUIPA claim). In other cases, courts have noted that the defendants did not raise the argument, and therefore the courts assumed RFRA's application without analysis. *See, e.g., Daley v. Lappin*, 555 F. App'x 161, 168 (3d Cir. Jan. 29, 2014) (noting that defendants did not dispute availability of damages against government officials in their individual capacities under RFRA); *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1285 (11th Cir. 2012) ("The district court declined to resolve whether RFRA applies to the government when it acts as an employer rather than as sovereign, as do we. Notably, the government does not argue that RFRA is inapplicable. We therefore assume RFRA applies here."). And in other cases, the defendants argued that RFRA does not provide for individual capacity claims, but the courts did not reach the question. *See, e.g., Lebron*, 670 F.3d at 557 (defendant argued that RFRA does not allow for individual capacity claims, but the court did not address the argument but ruled on qualified immunity grounds instead).

inescapable that RFRA likewise does not provide for individual capacity claims for money damages.

Two district courts have also interpreted RFRA to permit individual capacity suits, *see Lepp v. Gonzales*, NO. C-05-0566 VRW, 2005 WL 1867723, at *8 (N.D. Cal. Aug. 2, 2005); *Jama v. U.S. I.N.S.*, 343 F. Supp. 2d 338, 376 (D.N.J. 2004), those decisions are similarly unpersuasive and should not be followed here.

Lepp relied on and adopted the *Jama* decision issued by the District of Court of New Jersey. *See Lepp,* 2005 WL 1867723, at *8 ("The court will not recite *Jama*'s reasoning; it adopts it."). *Jama*, however, rests on three faulty premises. First, the court found that while RFRA "does not explicitly permit individual capacity suits for money damages, it does not explicitly preclude them either," and while Congress has amended RFRA since it was first passed, Congress has not "changed [the] statutory language [to] clarify that damages [are] not available . . . ." 343 F. Supp. 2d at 374-75. This analysis is error, because—despite acknowledging the absence of any express cause of action for damages—the court took it upon itself to infer a monetary damages claim in the absence of an express statutory bar. This holding is squarely contrary to the well-established rule that implied causes of action are "disfavored." *Iqbal*, 556 U.S. at 675.

Second, the *Jama* court found that precluding a money damages award "would seem to be at odds with the general Congressional purpose . . . to re-invigorate protection of free exercise rights" after the Supreme Court's decision in *Smith*. 343 F. Supp. 2d at 374-75. But this general observation does not support making damages claims available; as also noted above, Congress's express purpose in enacting RFRA was to restore the compelling interest test to cases seeking relief from government regulations affecting religious exercise. *See* 42 U.S.C. § 2000bb. This

goal is most logically served by injunctive or declaratory relief, and there is no reason to conclude that monetary claims are needed to effect this purpose. Nor does the legislative history support *Jama*'s interpretation of the Congressional purpose. *See supra* at 29-31.

And third, while noting that "no other court has explicitly theorized *why* money damages are available under RFRA, or held explicitly that they are," the *Jama* court deemed the fact that several courts had analyzed whether defendants were entitled to qualified immunity suggested that those courts had determined *sub silencio* that such relief is available. *Id.* at 375. But given the acknowledged lack of analysis of the issue in the cases on which *Jama* relied, those cases provide scant support for the conclusion that RFRA creates a cause of action for monetary damages against individuals in their personal capacities. The Supreme Court has long observed that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925) (declining to rely on prior cases because "in none of them was the point here at issue suggested or decided"), *cited in Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 125 (2d Cir. 2010) *and Chavis v. Chappius*, 618 F.3d 162, 168 n.5 (2d Cir. 2010); *see also Salinger v. Colting*, 607 F.3d 68, 77 n.6 (2d Cir. 2010) (citing *Webster* and noting that prior Second Circuit decision was not pertinent because issue "was neither raised by the parties nor discussed by either the district court or this Court on appeal"). With the exception of *Mack*, in which the defendants did not contest the issue, the circuit courts either have not been presented with, or have declined to consider, the question whether RFRA provides for individual capacity claims in the wake of *Sossamon*. *See supra* 27-29 & n.18.

Finally, *Jama* and *Lepp* were issued before *Sossamon*, and the cases following *Sossomon*, holding that RFRA's companion statute, RLUIPA, which contains nearly identical remedy

language, does not provide a cause of action for monetary damages either against the government or against individuals personally. *See supra* at 27-29. *Jama* and *Lepp* were also decided before the circuit court decisions holding, in the wake of *Sossamon*, that RFRA's provision for "appropriate relief against a government" does not authorize money damages against the government. *See Oklevueha Native Am. Church of Haw.,* 676 F.3d at 840; *Webman*, 441 F.3d at 1026. Given the body of case law following *Sossamon*, it would be incongruous—and contrary to RFRA's text, purpose and legislative history—to hold that "appropriate relief against the government" nevertheless permits monetary relief against individuals personally, making individuals the *only* persons subject to a money damages award under RFRA. Congress plainly did not intend such a result in authorizing "appropriate relief against a government."

III. QUALIFIED IMMUNITY BARS PLAINTIFFS' CLAIMS

Even if Plaintiffs could pursue individual capacity claims for an alleged First Amendment violation under *Bivens* or under RFRA, Plaintiffs' claims should nevertheless be dismissed because the allegations in the Amended Complaint make clear that the Individual Defendants are entitled to qualified immunity. Plaintiffs fail to plausibly allege that each Individual Defendant violated a constitutional or statutory right, and the alleged constitutional or statutory rights at issue were not clearly established at the time of the events alleged in the Amended Complaint.

A. Legal Standards

1. Rule 12(b)(6)

In deciding a motion to dismiss a complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court applies a "plausibility standard," which is guided by "[t]wo working principles." *Iqbal*, 556 U.S. at 678; *accord Harris v. Mills*, 572 F.3d 66, 71-2 (2d Cir. 2009). First, although the Court must accept non-conclusory factual allegations

in the complaint as true, this "tenet" is "inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678; *accord Harris*, 572 F.3d at 72. As a result,"[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561 (2007) ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."). Second, only complaints that state a "plausible claim for relief" can survive a Rule 12(b)(6) motion to dismiss. *Iqbal*, 556 U.S. at 679. Thus, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

2. Qualified Immunity

The doctrine of qualified immunity "shields 'government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *DiStiso v. Cook*, 691 F.3d 226, 240 (2d Cir. 2012) (quoting *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012)); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine "thus affords government officials 'breathing room' to make reasonable—even if sometimes mistaken—decisions, and 'protects all but the plainly incompetent or those who knowingly violate the law' from liability for damages." *DiStiso*, 691 F.3d at 240 (quoting *Messerschmidt*, 132 S. Ct. at 1244, 1249) (internal citations omitted). It also "recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Davis v. Scherer*, 468 U.S. 183, 195 (1984);

Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).[19] Accordingly, 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." *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

The qualified immunity determination involves two steps, which a court may consider in either order. *See, e.g., Seri v. Bochicchio*, 374 F. App'x 114, 116 (2d Cir. Mar. 30, 2010). One step is to determine whether the facts, as alleged, "make out a violation of a constitutional right." *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009) (citations omitted). The second is a determination of "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* (citation omitted). A right is clearly established when, "at the time of the challenged conduct, '[t]he contours of the 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) (citation omitted). Although "a case directly on point" is not required to clearly establish a right, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.*

And "[e]ven where the law is 'clearly established' and the scope of an official's permissible conduct is 'clearly defined,' the qualified immunity defense also protects an official if it was 'objectively reasonable' for him at the time of the challenged action to believe his acts were lawful.'" *Taravella v. Town of Wolcott*, 599 F.3d 129, 134 (2d Cir. 2010) (citation omitted). Thus, officers are entitled to qualified immunity if "'officers of reasonable competence could disagree' on the legality of the action at issue in its particular factual context." *Walczyk v. Rio*, 496 F.3d 139, 154 (2d Cir. 2007) (citation omitted).

---

[19] A qualified immunity defense can be "successfully asserted in a Rule 12(b)(6) motion" where "the complaint itself establishe[s] the circumstances required as a predicate to a finding of qualified immunity." *McKenna v. Wright*, 386 F.3d 432, 435 (2d Cir. 2004) (internal citation and quotation omitted).

3. Personal Involvement and Causation

In order to "make out a violation of a constitutional right," *Pearson*, 129 S. Ct. at 816, sufficient to state a *Bivens* claim, a plaintiff must specifically allege that the defendant was personally involved in the purportedly unconstitutional conduct. *See Iqbal*, 129 S. Ct. at 1949; *Thomas v. Ashcroft*, 470 F.3d 491, 496-97 (2d Cir. 2006); *Barbera v. Smith*, 836 F.2d 96, 99 (2d Cir. 1987); *Black v. United States*, 534 F.2d 524, 527 (2d Cir. 1976) (holding that *Bivens* claims require allegations of "defendant's direct and personal responsibility for the purportedly unlawful conduct"). Personal participation for purposes of RFRA "is governed by the same legal standard" as constitutional claims. *Kwai Fun Wong v. U.S. I.N.S.*, 373 F.3d 952, 977 (9th Cir. 2004). Therefore, Plaintiffs are obligated to demonstrate that the Individual Defendants committed a constitutional or statutory violation through the Agents' "own misconduct." *Iqbal*, 556 U.S. at 677.

Further, a *Bivens* defendant may be held liable for only "the 'natural consequences' of their actions." *Higazy v. Templeton*, 505 F.3d 161, 175, 177 (2d Cir. 2007) (explaining that a *Bivens* "action to vindicate a constitutional right . . . employs the tort principle of proximate causation"). Therefore, "a person whose initial act is the 'but for' cause of some ultimate harm (*i.e.*, the harm would not have happened but for the initial act) is not legally liable for the harm if an intervening act is a 'superseding cause' that breaks the legal chain of proximate cause." *Zahrey v. Coffey*, 221 F.3d 342, 351 n.7 (2d Cir. 2000) (citation omitted); *see also Townes v. City of New York*, 176 F.3d 138, 147 (2d Cir. 1999) (applying common law definition of superseding cause and citing Restatement (Second) of Torts § 440 (1965)). A superseding cause can include an "intervening exercise of independent judgment." *Zahrey*, 221 F.3d at 351-52 (explaining that while defendants "are liable for consequences caused by 'reasonably foreseeable intervening

forces,'" an intervening act of an independent decision-maker breaks the causal chain).

B. The Agents Are Entitled to Qualified Immunity From Plaintiffs' First Amendment Claim

1. Plaintiffs Fail to Plausibly Allege That Each Agent Was the Cause of, or Personally Involved in, Any First Amendment Violation

Plaintiffs fail to plausibly allege that each Agent defendant was a proximate cause of, or personally involved in, Plaintiffs' alleged inclusion on the No Fly List. Plaintiffs thus fail both to state a *Bivens* claim, *see Iqbal*, 556 U.S. at 679, and to "make out a violation of a constitutional right" by any Individual Defendant, *Pearson*, 555 U.S. at 232, such that the Agents are entitled to qualified immunity as to Plaintiffs' First Amendment claim. *See Deters v. Lafuente*, 368 F.3d 185, 189 (2d Cir. 2004) ("In the absence of a violation of a constitutional right, [defendants] are entitled to qualified immunity as a matter of law.").

a. Elements of a First Amendment Retaliation Claim

The Second Circuit has "described the elements of a First Amendment retaliation claim in several ways, depending on the factual context." *Williams v. Town of Greenburgh*, 535 F.3d 71, 76 (2d Cir. 2008) (evaluating Section 1983 claim). To state a claim for First Amendment retaliation, a plaintiff must generally show: "(1) [the plaintiff] has an interest protected by the First Amendment; (2) defendants' actions were motivated or substantially caused by his exercise of that right; and (3) defendants' actions effectively chilled the exercise of his First Amendment right.'" *Id.* (quoting *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001)). Regarding the third prong, although "First Amendment retaliation plaintiffs must typically allege 'actual chilling,'" *Zherka v. Amicone*, 634 F.3d 642, 645 (2d Cir. 2011), "[c]hilled speech is not the *sine qua non* of a First Amendment claim," *Dorsett v. County of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013) ("A plaintiff has standing if he can show *either* that his speech has been adversely affected

by the government retaliation or that he has suffered some other concrete harm.") (emphasis in original). However, a plaintiff must plead a "clear causal chain" between the exercise of his First Amendment rights and the resultant harm. *Friedl v. City of New York*, 210 F.3d 79, 87 (2d Cir. 2000). A First Amendment retaliation claim "must be 'supported by specific and detailed factual allegations,' not stated 'in wholly conclusory terms.'" *Id.* at 85-86 (quoting *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983)).

b. Plaintiffs Fail to Plausibly Allege That Each Agent's Actions Were a Proximate Cause of Plaintiffs' Alleged Harm

Plaintiffs allege that each of the Individual Defendants, with the exception of John LNU and Agent Gale, either placed or maintained Plaintiffs on the No Fly List in retaliation for Plaintiffs' purported refusal to serve as informants. But at the same time Plaintiffs concede that the Individual Defendants had no authority to place or maintain Plaintiffs on the No Fly List, thus breaking any "clear causal chain" between the Agents' actions and Plaintiffs' asserted harm.

Plaintiffs explicitly allege that the Terrorist Screening Center—and not any individual agent or nominating agency—decides who is included on the No Fly List. According to the Amended Complaint, while "[t]he FBI is . . . one of the agencies empowered to 'nominate' individuals for placement on the No Fly List," AC ¶ 19, "[t]he TSC is responsible for making the final determination whether to add or remove an individual from the No Fly List," *id.* ¶ 20. *See also id.* ("The TSC is responsible for reviewing and accepting nominations to the No Fly List from agencies, including the FBI . . . . The TSC is responsible for making the final determination whether to add or remove an individual from the No Fly List."); *id.* ¶ 41 ("The FBI is one of the primary agencies responsible for making 'nominations' to the TSDB, though a number of other federal agencies may also 'nominate' individuals. . . . The TSC makes the final decision on whether an individual should be placed on the No Fly List."). Further, when an individual

believes that he or she is on the No Fly List and initiates the DHS TRIP process, Plaintiffs allege that "DHS submits the TRIP inquiry to the TSC, which makes the final decision as to whether any action should be taken." *Id.* ¶ 58; *see also id.* ("TSC 'coordinates with' the agency that originally nominated the individual" and the "TSC makes a final determination regarding a particular individual's status on the No Fly List").

Accepting these allegations as true, individual agents may only nominate persons to the No Fly List—they cannot and do not "make[] a final determination" regarding whether to place someone on, or remove someone from, the list. TSC's decision thus necessarily constitutes an intervening event that breaks the causal connection between any purportedly retaliatory nomination and an individual's placement on the list, and no facts supporting a plausible inference to the contrary have been alleged.

In *Taylor v. Brentwood Union Free School District*, 143 F.3d 679, 686 (2d Cir. 1998), for example, the plaintiff teacher alleged that racial animus motivated the defendant principal to report the teacher's actions to the school board, but the court held that the principal was not liable for the plaintiff's termination because the removal decision was made by the school board. The court found that, "based on the record before [the court], there [was] no basis for concluding that any ill motives [defendant] may have had impacted the decision to suspend plaintiff." *Id.* at 687; *see also Jefferies v. Harleston*, 52 F.3d 9, 14 (1995) (finding that college board's decision to terminate a professor was an intervening act breaking the causal chain between defendants' improperly-motivated request that the board vote on the professor's tenure and the professor's dismissal).

Like the school boards in *Taylor* and *Jeffries*, the TSC—by Plaintiffs' own admission—makes an independent decision regarding who is included on the No Fly List. TSC's

independent decision is a superseding cause of the alleged harm. *See, e.g., Townes*, 176 F.3d at 147 ("It is well settled that the chain of causation between a police officer's unlawful arrest and a subsequent conviction and incarceration is broken by the [trial court's] intervening exercise of independent judgment."); *Sunnen v. U.S. Dept. of Health and Human Services*, No. 13 Civ. 1242(PKC), 2013 WL 1290919, at *3 (S.D.N.Y. Mar. 28, 2013) (finding that plaintiff "failed to state a cognizable *Bivens* claim because he does not plausibly allege that any federal officials that he contacted were personally involved with, or had the authority to reverse, the [state agency] decision to revoke his [medical] license"). This conclusion is reinforced by the fact that Plaintiffs nowhere allege that the Agents provided false or misleading information to TSC, highlighting the absence of any causal connection between the Agents' actions and Plaintiffs' alleged inclusion on the No Fly List. *See, e.g., Wray v. City of New York*, 490 F.3d 189, 195 (2d Cir. 2007) (erroneous act by a decision maker who was not misled is not the "legally cognizable result" of underlying investigative abuse).

Even if Plaintiffs could plausibly allege that any particular Individual Defendant had an improper purpose in submitting a Plaintiff's name to TSC for evaluation—which they have not done in the Amended Complaint—"the . . . submission of names to [a government agency]" for inclusion on a watchlist fails to establish an injury sufficient to state a constitutional claim. *Halkin v. Helms*, 690 F.2d 977, 997-98 (D.C. Cir. 1982) (CIA's practice of submitting names to NSA watchlist did not amount to a constitutional violation). Accordingly, because the Amended Complaint establishes that the Agents' actions were divorced from TSC's independent decision-making, Plaintiffs' First Amendment retaliation claim fails to state a claim. In turn, because Plaintiffs fail to state a constitutional claim, the Agents are entitled to qualified immunity. *See, e.g., Pearson*, 555 U.S. at 232 (government employee entitled to qualified immunity where

plaintiff fails to "make out a violation of a constitutional right"); *McCullough v. Wyandanch Union Free School District*, 187 F.3d 272, 280 (2d Cir. 1999) ("Where there is a total absence of evidence of [a violation], there is no basis on which to conclude that the defendant seeking qualified immunity violated clearly established law.") (internal quotation marks omitted).

c. Plaintiffs Fail to Plausibly Allege That FNU Tanzin, Steven LNU, John LNU and Michael LNU; Agents Garcia, Harley, Grossoehmig, Dun, Langenberg, Rutkowski and Gale; and John Does 1-3, 5-6, 9-13 Were Personally Involved in Any Retaliatory Conduct

With regard to a substantial subset of the Individual Defendants, Plaintiffs also fail to state a violation of a constitutional right because they fail to plausibly allege that these Agents were personally involved in any allegedly retaliatory conduct. *See Iqbal*, 556 U.S. at 679. This pleading failure provides an independent reason that these Agents are entitled to qualified immunity with respect to Plaintiffs' First Amendment claim. *See, e.g., McCullough*, 187 F.3d at 280.

John LNU and Steven LNU; Agents Garcia, Harley, Grossoehmig, Dun, Langenberg and Gale; and John Does 9-10 and 12

Plaintiffs' theory of retaliation is premised on the allegation that the Individual Defendants retaliated against Plaintiffs for exercising their alleged First Amendment right not to act as government informants with regard to their American Muslim communities. *See* AC ¶¶ 199-201. But Tanvir, Shinwari and Sajjad have not alleged that John LNU or Steven LNU; Agents Garcia, Harley, Grossoehmig, Dun, Langenberg or Gale; or John Does 9-10 or 12 ever asked them to act as informants, or that that these Agents were even present when anyone else asked Plaintiffs to act as informants. *See id.* ¶¶ 94-104 (Tanvir alleging that he met with John LNU and Agent Garcia, but failing to allege that either asked him to serve as an informant); *id.* ¶¶ 147-50, 152-53, 162-64 (Shinwari alleging that he met with Steven LNU and Agents Harley,

Grossoehmig, Dun and Langenberg, but failing to allege that they asked him to serve as an informant); *id.* ¶¶ 173-77, 184, 191 (Sajjad alleging that he met John Does 9-10 and 12, and that his attorney spoke with Agent Gale, but failing to allege that these Agents asked him to serve as an informant). In the absence of any allegation that these Agents even asked Tanvir, Shinwari or Sajjad to serve as informants—which is the premise of Plaintiffs' First Amendment claim, *see* AC ¶¶ 199-201—it is entirely implausible that the Agents retaliated against those Plaintiffs for their alleged refusal.

Steven LNU, Michael LNU and John LNU; Agents Garcia, Harley, Grossoehmig, Dun, Langenberg, Rutkowski and Gale; and John Does 6 and 9-13

Tanvir's First Amendment claims against John LNU and Agent Garcia, and Shinwari and Sajjad's First Amendment claims against all the Agents who allegedly interacted with them—specifically, Steven LNU and Michael LNU; Agents Harley, Grossoehmig, Dun, Langenberg, Rutkowski and Gale; and John Does 6 and 9-13—also fail because Tanvir, Shinwari and Sajjad allege that they were denied boarding before they had any interaction whatsoever with any of these Agents. Tanvir was denied boarding in Atlanta, before he had any interaction with John LNU or Agent Garcia. *See id.* ¶¶ 91-100. Shinwari was denied boarding in Dubai, before he had his first encounter with any FBI agent. *See id.* ¶¶ 146-48. And Sajjad was denied boarding at JFK, before he was approached by any FBI or DHS agent. *See id.* ¶ 173. It is utterly implausible that Tanvir's, Shinwari's or Sajjad's alleged placement on the No Fly List was in any way motivated by interactions with individuals whom they had never met.

Nor is there any factual allegation that would support a plausible inference that Tanvir, Shinwari or Sajjad remained on the No Fly List because of their later interactions with those Agents, or any acts that those Agents took. As noted above, Plaintiffs concede that TSC, rather than a nominating agency like FBI (much less any individual FBI or DHS agent) makes the

determination that any particular individual should be included on the No Fly List. *See id.* ¶¶ 40-41, 58. Thus, according to the Amended Complaint, if Tanvir, Shinwari or Sajjad were in fact on the No Fly List, well before they ever encountered any of those Individual Defendants, TSC would have made an independent judgment, based on reasonable suspicion, that Tanvir, Shinwari and Sajjad were "known or suspected terrorist[s]," *id.* ¶ 40, and satisfied additional heightened criteria for inclusion on the No Fly List, *id.* ¶ 42 (alleging that "[t]o be properly placed on the No Fly List, an individual must not only be a 'known or suspected terrorist,' but there must be some additional 'derogatory information' demonstrating that the person 'poses a threat of committing a terrorist act with respect to an aircraft'" (alteration omitted)). In light of TSC's independent decision-making, and the fact that they were, according to the Amended Complaint, already on the No Fly List, there is no plausible factual basis to infer that Tanvir, Shinwari or Sajjad remained on the No Fly List because of their subsequent encounters with Steven LNU, Michael LNU or John LNU; Agents Garcia, Harley, Grossoehmig, Dun, Langenberg, Rutkowski or Gale; or John Does 6 or 9-13.

FNU Tanzin, John Does 1-3, Steven LNU, Agent Harley, and Agent Grossoehmig

Tanvir and Shinwari concede that they were allowed to travel after the conclusion of their interactions with the following Agents: FNU Tanzin, John Does 1-3, Steven LNU, Agent Harley, and Agent Grossoehmig. Tanvir alleges that FNU Tanzin and John Does 1-3 questioned him about his Muslim community, and asked him whether he had attended terrorist training camps near his home village or received any training from the Taliban. *See id.* ¶¶ 69-89. However, Tanvir alleges that his last interaction with any of these Agents was in early 2009, and that he was allowed to fly in January 2010. *See id.* He was not denied boarding until October 2010, more than 15 months after his last contact with these Agents. *See id.* ¶¶ 87-91. Shinwari

alleges that Steven LNU and Agent Harley questioned him about his religious activities and associates, and asked whether he had attended any training camps; Shinwari alleges that Agent Grossoehmig asked him "substantially the same questions . . . ." *Id.* ¶¶ 148, 153. However, Shinwari alleges that his last interaction with Steven LNU and Agents Harley and Grossoehmig was in February 2012, and that he was allowed to fly thereafter. *See id.* ¶¶ 147-154. Because Tanvir and Shinwari were able to travel after interacting with these Agents, it is implausible that these Agents caused Tanvir's or Shinwari's alleged placement on the No Fly List. *See Iqbal*, 556 U.S. at 678 ("The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully.").

John LNU

Tanvir also fails to plausibly allege that John LNU retaliated against him by keeping Tanvir on the No Fly List. Tanvir alleges only that John LNU and Agent Garcia interviewed him at a restaurant in Queens, that John LNU asked him questions about his family and his religious and political beliefs, and that John LNU advised Tanvir that he would "try to permit [Tanvir] to fly again by obtaining a one-time waiver that would enable [Tanvir] to visit [Tanvir's] ailing mother" in Pakistan. *Id.* ¶¶ 100-02. Although Tanvir alleges in conclusory fashion that Agent Garcia "kept him on the No Fly List to retaliate against [his] exercise of" First Amendment rights, *id.* ¶ 108, Tanvir does not allege that John LNU had any role in maintaining Tanvir on the List. Indeed, Tanvir does not even allege that John LNU asked Tanvir to work as an informant, although he does allege that John LNU attempted to help Tanvir fly to Pakistan. *See id.* ¶ 102. Tanvir thus fails to allege in any way that John LNU had any personal involvement in any alleged retaliation.

John Doe 1

Tanvir alleges that, in February 2007, John Doe 1 questioned him "for approximately thirty minutes" outside of Tanvir's workplace, and asked him about "an old acquaintance . . . ." *Id.* ¶ 69. Although Tanvir alleges that he also interacted with John Doe 1 on unspecified dates in late January and February 2009, *see id.* ¶¶ 80, 82, this allegation is in error. John Doe 1 retired from government service in November 2007. *See* Declaration of John Doe 1, dated July 22, 2014, ¶¶ 3-4; AC ¶ 69.[20] Accordingly, Tanvir's claim against John Doe 1 is based entirely on an allegation that John Doe 1 participated in one thirty-minute interview conducted outside of Tanvir's workplace; Tanvir thus fails to allege sufficient personal involvement with respect to this Agent to state a *Bivens* claim against him.

John Doe 5

Algibhah's claim against John Doe 5 fails for similar reasons. Algibhah alleges only that John Doe 5 interviewed him on one occasion in June 2012 and requested that he work as an informant, and that Algibhah told John Doe 5 that "he needed time to consider their request," and "assured [John Doe 5] that he would work for [the FBI] as soon as [the Agents] took him off the No Fly List." *Id.* ¶¶ 131-34. Because Algibhah does not allege that he refused John Doe 5's alleged request—and indeed, Algibhah alleges that he signaled to the Agents that he may be receptive to the request—it is not plausible that John Doe 5 retaliated against Algibhah. John Doe 5's lack of personal involvement in Algibhah's alleged maintenance on the No Fly List is

[20] When deciding a motion under Rule 12(b)(6), the court can review the "facts stated on the face of the complaint and in documents appended to the complaint or incorporated in the complaint by reference, as well as to matters of which judicial notice may be taken." *Automated Salvage Transp., Inc. v. Wheelabrator Env't Sys., Inc.*, 155 F.3d 59, 67 (2d Cir. 1998). On such a motion, judicial notice may be taken of a document, including a declaration, where "it is clear on the record that no dispute exists regarding the authenticity or accuracy of the document, and the relevance of the document is undisputed." *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006); *see also CIH Int'l Holdings, LLC v. BT United States, LLC*, 821 F. Supp. 2d 604, 608 n.1 (S.D.N.Y. 2011) (taking judicial notice of a declaration when deciding Rule 12(b)(6) motion).

further illustrated by the fact that Algibhah fails to allege that he was denied boarding on any flight following this encounter.[21]

Agent Harley and Steven LNU

Shinwari's claims against Agent Harley and Steven LNU likewise fail for lack of personal involvement. Shinwari alleges only that, after being denied boarding, he met with Agent Harley and Steven LNU and responded to these Agents' questions for "three to four hours." *Id.* ¶¶ 147-50. Shinwari alleges that the Agents told him that "they needed to confer with 'higher ups in [Washington] D.C.' before allowing Mr. Shinwari to fly back to the United States," and that two days later, Agent Harley informed Shinwari that he could fly. *Id.* ¶¶ 150-51. Thus, not only does Shinwari fail to allege that these Agents requested that he work as an informant, but he also explicitly acknowledges that these Agents assisted in allowing him to fly.

Agent Grossoehmig

Similarly, Shinwari's claim against Agent Grossoehmig fails because Shinwari alleges only that Agent Grossoehmig "escorted him to an interrogation room" at Dulles, and questioned him for two hours in order to "'verify' everything that [Shinwari] told Agents Harley and Steven LNU in Dubai." *Id.* ¶¶ 152-53. Thereafter, Shinwari alleges that he was allowed to fly from Dulles to Nebraska. *See id.* ¶ 154. Shinwari thus fails to allege that Agent Grossoehmig requested that Shinwari serve as an informant, and Shinwari admits that he was allowed to fly immediately after his interaction with Agent Grossoehmig concluded. As a result, Shinwari fails

[21] Algibhah's allegation that John Doe 5 told him that "the Congressmen can't do shit for you; we're the only ones who can take you off the list," AC ¶ 131, is undermined by plaintiffs' own allegations that TSC is responsible for deciding who is on the No Fly List, including in responding to TRIP inquiries. *See supra*, Point III.D.1(b). More saliently for purposes of this motion, that allegation is also irrelevant to the question whether Algibhah plausibly alleges that John Doe 5 played any role in Algibhah's alleged maintenance on the list, because Algibhah alleges that he was already on the list before he ever interacted with John Doe 5, and Algibhah does not allege that he was denied boarding following this interaction.

to plausibly allege that Agent Grossoehmig was personally involved in Shinwari's alleged retaliatory placement or maintenance on the No Fly List, and his claims against this Agent should be dismissed.

Agents Dun and Langenberg

Shinwari's claims against Agents Dun and Langenberg also fail for lack of personal involvement. Shinwari alleges only that he and his counsel met with these Agents on March 21, 2012; that during the meeting, the Agents asked Shinwari "to think about the reasons why he may have been placed on a watch list," and about "videos of religious sermons" that Shinwari had watched on the internet; and that these Agents told Shinwari "that he could potentially get a one-time waiver to travel in an emergency." *Id.* ¶¶ 162-64. Shinwari also alleges that, the next time he purchased an airline ticket after this meeting, he was able to board the flight. *See id.* ¶ 169. Shinwari does not allege that these Agents asked him to serve as an informant, and admits that he was able to fly following his sole interaction with these Agents. Shinwari thus fails to plausibly allege that Agents Dun or Langenberg had any role in his alleged retaliatory placement on the No Fly List.

John Doe 12

Likewise, Sajjad's claim against John Doe 12 fails for lack of personal involvement in any purported retaliation. Sajjad alleges that, after he agreed to Agent Rutkowski and John Doe 11's request that he take a polygraph test at FBI headquarters in Newark, John Doe 12 conducted the polygraph examination through a translator, stepped out of the room, returned with Agent Rutkowski and John Doe 11, and, along with the other two agents, told Sajjad that "the machine detected that he was lying." *See id.* ¶¶ 182, 184-85. Sajjad does not allege that John Doe 12 asked him to serve as an informant, or that John Doe 12 did anything other than conduct a

polygraph test and report the test results to Sajjad. And Sajjad's only interaction with John Doe 12 occurred after he had already been denied boarding at JFK. *See id.* ¶¶ 173, 184. He therefore fails to allege John Doe 12's personal involvement in any alleged retaliation.

Agent Gale

Sajjad's claim against Agent Gale fails for the same reason—Sajjad alleges only that, on May 6, 2013, Sajjad's counsel called Agent Gale and asked "if the agency was contacting [Sajjad] because they wanted to recruit him as an informant" for the government. *Id.* ¶ 191. Gale allegedly responded that "he 'would not get into it over the phone,' and that should not be construed as a 'yes' or a 'no.'" *Id.* As noted above, Sajjad does not allege that Agent Gale requested that Sajjad work as an informant, nor does he allege that Agent Gale spoke with him or asked Sajjad any questions whatsoever, much less that Agent Gale "kept" Sajjad on the No Fly List. *See id.* ¶ 195 (alleging that Agent Rutkowski and John Does 7-13 kept him on the No Fly List, but not mentioning Agent Gale).

* * *

For all of these reasons, Plaintiffs fail to state a plausible *Bivens* claim against these Individual Defendants, and thus Plaintiffs' First Amendment claims should be dismissed. *See Iqbal*, 556 U.S. at 679 (complaint fails to state a claim "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct"); *see also, e.g.*, *Guo Hua Ke v. Morton*, No. 10 Civ. 8671(PGG), 2012 WL 4715211, at *5 (S.D.N.Y. Sept. 30, 2012) (dismissing action where "[t]he allegations in the Amended Complaint are not sufficient to make out a plausible claim that any of the named defendants had any personal involvement" in the allegedly unconstitutional conduct); *Trahan v. DeMarco Case Team*, No. 12-CV-1027 (JS)(ARL), 2012 WL 959792, at *4 (E.D.N.Y. Mar. 19, 2012) (same). For the same reasons,

these Individual Defendants are also entitled to qualified immunity under the first prong of the qualified immunity analysis, because Plaintiffs fail to make out a violation of a constitutional right. *See, e.g, Pearson*, 555 U.S. at 232.

2. The Asserted Rights at Issue Were Not Clearly Established at the Time of the Agents' Alleged Conduct

All of the Agents are also entitled to qualified immunity under the second prong of the qualified immunity analysis, because the alleged First Amendment rights at issue were not clearly established.

As an initial matter, as to John LNU and Steven LNU; Agents Harley, Grossoehmig, Dun, Langenberg, and Gale; and John Does 9-10 and 12, Plaintiffs allege only that these Agents either interviewed the Plaintiffs or responded to inquiries from Plaintiffs' attorneys. *See, e.g.,* AC ¶ 100 (Tanvir "agreed" to meet with John LNU); *id.* ¶¶ 148-49 (Shinwari questioned by Steven LNU and Agent Harley and declined to take a lie detector test); *id.* ¶¶ 152-53 (Shinwari questioned by Agent Grossoehmig at Dulles); *id.* ¶ 162 (Shinwari and his counsel requested a meeting with Agents Dun and Langenberg); *id.* ¶¶ 173-77, 182, 184-185 and 191 (Sajjad questioned by John Does 9 and 10 at JFK; Sajjad polygraphed by John Doe 12; Sajjad's attorney contacted Agent Gale). Plaintiffs do not allege that these Agents asked Plaintiffs during these interviews or interactions with counsel to act as informants or that any of these Agents was responsible for Plaintiffs' alleged inclusion on the No Fly List.

Plaintiffs' purported First Amendment retaliation claim against these Agents is therefore based entirely on the allegation that these Agents either conducted interviews of Plaintiffs or responded to Plaintiffs' attorneys. There is no applicable law, clearly established or otherwise, that these Agents' alleged actions in this context constituted unlawful retaliation for the exercise of First Amendment rights. Specifically, and as noted above, as for John LNU: Tanvir alleges

that, after he was first denied boarding, he met with John LNU and Agent Garcia at a diner in Queens, and that John LNU advised him that he would try to obtain a one-time waiver to allow Tanvir to fly. *See id.* ¶¶ 100-03. Similarly, as for Steven LNU and Agent Harley: Shinwari alleges that, after he was denied boarding, these Agents interviewed Shinwari in Dubai, contacted "higher-ups" in Washington, and received approval for Shinwari to fly to the United States. *Id.* ¶¶ 147-51. Likewise, as for Agent Grossoehmig: Shinwari alleges that Agent Grossoehmig interviewed Shinwari at Dulles and "verif[ied]" what Shinwari had told the Agents in Dubai, and, after this interview concluded, Shinwari was allowed to fly. *Id.* ¶¶ 152-53. As for John Does 9 and 10: Sajjad alleges that after he was denied boarding at JFK, they questioned him about his background and "repeatedly reassured [him] that they would be willing to help him get off the No Fly List . . . ." *Id.* ¶¶ 176-77. And as for John Doe 12 and Agent Gale: Sajjad alleges that John Doe 12 conducted a polygraph examination, and that Agent Gale responded by phone to an inquiry from Sajjad's attorney. *See id.* ¶¶ 184, 191. It was not clearly established that an Agent's interview of an individual who has been denied boarding (or discussion with that individual's attorney), or an offer to assist an individual with travel in this context, would constitute First Amendment retaliation.

Moreover, as for Agents Dun and Langenberg: Shinwari appears to allege that his contacts with these Agents were instigated by him or his counsel. Shinwari alleges that he contacted counsel in March 2012, and on March 21, 2012, he and his counsel met with Agents Dun and Langenberg—suggesting that Shinwari or his counsel requested the meeting with these Agents. *See id.* ¶¶ 162-64. No reasonable officer could possibly conclude that agreeing to meet with an individual and his counsel would amount to retaliation in violation of the First Amendment. Because it was not clearly established that law enforcement officers cannot

conduct an interview of an individual purportedly on a government watch list, these Agents are entitled to qualified immunity with respect to Plaintiffs' First Amendment retaliation claims.

FNU Tanzin, Agent Artusa, and John Does 1, 2/3 and 4 are also entitled to qualified immunity because their alleged conduct did not violate any clearly established constitutional right. Tanvir and Algibhah allege that these Agents "placed" Tanvir and Algibhah on the No Fly List in retaliation for their alleged refusal to become an informant. *See id.* ¶ 90 (Tanvir alleging that FNU Tanzin and John Does 1 and 2/3 "placed [him] on the No Fly List"); *see id.* ¶ 124 (Algibhah alleging the same as to Agent Artusa and John Doe 4). However, as discussed *supra* in Point III.D.1(b), Plaintiffs concede that individual agents may only nominate persons for consideration by the TSC for possible inclusion on the No Fly List, and that the TSC makes the final determination as to whether to include someone on the list. Assuming, therefore, that Plaintiffs' claims against these Agents are based on the Agents' alleged acts of nominating Tanvir and Algibhah for possible inclusion on the No Fly List, these Agents are entitled to qualified immunity because it was not clearly established that submitting an individual's name to the TSC violated any constitutional right. The Individual Defendants are not aware of any court decision recognizing such a right, and indeed, as noted above, one circuit court has found that the mere submission of names to a watchlist does *not* amount to a constitutional violation. *See Halkin*, 690 F.2d at 997-98.

Moreover, courts have found, in other contexts, that there is no constitutional right not to become an informant. *See, e.g., Allah v. Juchenwioz*, 176 F. App'x 187, 189 (2d Cir. Apr. 12, 2006) (defendants entitled to qualified immunity because, even assuming that "an inmate has a constitutional right not to become an informant," it was not clearly established at the time; and noting that "[n]either the Supreme Court nor this Court has ever held that a prisoner enjoys a

constitutional right not to become an informant"); *see also Tennyson v. Rohrbacher*, No. 11-35, 2012 WL 366539, at *6 (W.D. Pa. Jan. 25, 2012) ("Neither the United States Supreme Court nor the Court of Appeals for the Third Circuit ever has held that a prisoner enjoys a constitutional right not to become an informant."); *United States v. Paguio*, 114 F.3d 928, 930 (9th Cir. 1997) (where co-defendant argued that prosecutors indicted her in order to pressure her co-defendant fiancée to cooperate, finding that "[t]here is no constitutional right not to 'snitch'") (citing *United States v. Gardner*, 611 F.2d 770, 773 (9th Cir. 1980)). It thus cannot be said that submitting Plaintiffs' names to the TSC for consideration for the No Fly List, even if based on Plaintiffs' refusal to serve as informants, would violate a clearly established constitutional right. The lack of any clearly established right is an independent basis that entitles FNU Tanzin, Agent Artusa, and John Does 1, 2/3 and 4 to qualified immunity.

Similarly, as to Plaintiffs' claims against the Agents who allegedly "kept" Plaintiffs on the No Fly List—specifically, Steven LNU and Michael LNU; Agents Garcia, Artusa, Harley, Grossoehmig, Dun, Langenberg and Rutkowski; and John Does 5-6 and 9-13—it was also not clearly established that failing to affirmatively recommend to the TSC that an individual be removed from the No Fly List constituted a violation of the individual's constitutional rights. Assuming as true the facts alleged in the Amended Complaint, these Agents would have been aware that TSC had already made an independent determination that Plaintiffs were known or suspected terrorists, and posed a threat of committing a terrorist act with respect to an aircraft. *See* AC ¶ 42. Yet under Plaintiffs' theory, the Agents engaged in unlawful retaliation in violation of Plaintiffs' First Amendment rights by not affirmatively requesting that TSC remove Plaintiffs from the No Fly List after Plaintiffs were interviewed and allegedly refused to serve as informants. *See id.* ¶ 108 (Agent Garcia), ¶ 135 (Agent Artusa and John Doe 5), ¶ 162 (Agents

Dun and Langenberg), ¶ 166 (Shinwari alleges that all Agents who interacted with him "kept him on the No Fly List"), ¶ 195 (Agent Rutkowski and John Does 9-13). No clearly established law required the Agents to make such a request.

Furthermore, it was not—and still is not—clearly established that Plaintiffs had a constitutional right to air travel, further undermining any argument that a "reasonable official would understand that" nominating an individual to the No Fly List, or failing to recommend the individual's removal from the No Fly List, "violates that right." *Jackler v. Byrne*, 658 F.3d 225, 242 (2d Cir. 2011). Plaintiffs allege that the Individual Defendants violated Plaintiffs' general "liberty interest in travel," AC ¶ 201 (alleging that because Plaintiffs "refused to act as informants[,] [the Agents] forced Plaintiffs to choose between their First Amendment rights and their liberty interest in travel"), but fail to identify a liberty interest in air travel specifically. While "[t]he right of interstate travel has repeatedly been recognized as a basic constitutional freedom," *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 254 (1974), and "the right of international travel has been considered to be . . . an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment," *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978), neither the Supreme Court nor the Second Circuit has found a constitutional right to travel by a particular mode of transportation. Rather, while noting that "it would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation, assuming one exists at all," *United States v. Albarado*, 495 F.2d 799, 806-07 (2d Cir. 1974) (citations omitted), the Second Circuit has squarely held that there is no "constitutional right to the most convenient form of travel," *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 54 (2d Cir. 2007).

As a result, while the right to travel as a general matter might have been established at the

time of the events alleged in the Amended Complaint, the right to "the most convenient form of travel," *Town of Southold*, 477 F.3d at 54, was not. Indeed, Tanvir and Shinwari concede that they were able to travel at least domestically, albeit in inconvenient fashion. *See* AC ¶¶ 91-93 (Tanvir was able to travel by bus from Atlanta to New York); *see id.* ¶ 170 (Shinwari alleging that it has been "difficult" —suggesting not impossible—"for him to travel to Virginia").

While not binding here, some district courts outside the Second Circuit have found that there is a "constitutionally-protected liberty interest[] in traveling internationally by air." *Latif v. Holder*, 3:10-CV-00750-BR, 2014 WL 2871346, at *11 (D. Or. June 24, 2014); *Tarhuni v. Holder*, No. 3:13-cv-00001-BR, 2014 WL 1269655, at *12 (D. Or. Mar. 26, 2014); *see also Mohamed v. Holder*, No. 1:11–CV50 (AJT/TRJ), 2014 WL 243115, at *10-14 (E.D. Va. Jan. 22, 2014); *Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545 WHA, 2012 WL 6652362, at *7 (N.D. Cal. Dec. 20, 2012). But district court decisions issued after the alleged conduct at issue plainly do not constitute "clearly established" law. "Only Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established." *Moore v. Vega*, 371 F.3d 110, 114 (2d Cir. 2004); *see, e.g.*, *Juchenwioz*, 176 F. App'x at 189 (noting that district court cases cited in support of plaintiff's claim had not been decided at the time of the alleged conduct, and holding that since neither the Second Circuit nor the Supreme Court had previously found that the constitutional right not to be an informant existed, the right was not "clearly established" at the time of the alleged conduct).[22]

At the very least, "officers of reasonable competence could disagree on the legality" of nominating an individual to the No Fly List, *Walczyk*, 496 F.3d at 154, compelling need to guard

[22] Even for those defendants whose alleged actions occurred outside the Second Circuit, *see infra* Point IV.B, the right to travel by air was also not clearly established in the circuits in which their actions allegedly occurred: the Third Circuit (Agents Rutkowski and Gale, and John Does 11-13), Fourth Circuit (Michael LNU and Agent Grossoehmig), and Eighth Circuit (Michael LNU, Agents Dun and Langenberg, and John Doe 6).

the nation against another terrorist attack by air. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) ("[T]he Government's interest in combating terrorism is an urgent objective of the highest order."); *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation.") (citation omitted). The Agents are therefore entitled to qualified immunity as to Plaintiffs' First Amendment retaliation claim.

C. The Agents Are Entitled to Qualified Immunity From Plaintiffs' RFRA Claim

1. Plaintiffs Fail to Allege That John LNU or Steven LNU; or Agents Garcia, Harley, Grossoehmig, Dun, or Langenberg Violated a Statutory Right

Tanvir and Shinwari fail to state a RFRA claim against John LNU, Steven LNU, and Agents Garcia, Harley, Grossoehmig, Dun, and Langenberg because Plaintiffs fail to plausibly allege that those Agents personally "substantially burdened" Plaintiffs' religious exercise. *See Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996) ("[A] plaintiff alleging a violation of RFRA must demonstrate that his right to the free exercise of religion has been substantially burdened."). This pleading failure also entitles the Agents to qualified immunity as to this claim. *See, e.g., Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277, 1285 (11th Cir. 2012) ("The defense of qualified immunity applies not only to constitutional claims, but also to claims brought for alleged violations of RFRA.") (citing *Rasul v. Myers*, 563 F.3d 527, 533 n.6 (D.C. Cir. 2009) (per curiam)).

Tanvir and Shinwari do not allege that these Agents asked them to serve as informants, nor do Tanvir or Shinwari allege that these Agents were present when anyone else asked them to serve as informants. *See* AC ¶¶ 94-104 (Tanvir alleging that he met with John LNU and Agent Garcia, but failing to allege that either asked him to serve as an informant); *id.* ¶¶ 147-50, 152-53, 162-64 (Shinwari alleging that he met with Steven LNU, Agent Harley, Agent Grossoehmig,

Agent Dun, Agent Langenberg, but failing to allege that they asked him to serve as an informant). Plaintiffs thus do not allege that these Agents were personally involved in presenting Plaintiffs with the allegedly "impermissible choice" between acting as an informant and violating their religious beliefs or being placed on the No Fly List. *Id*. ¶ 210. The RFRA claims against these Agents should be dismissed on this basis alone. *See Iqbal*, 556 U.S. at 683, 693 (government officials "cannot be held liable unless they themselves" engaged in the allegedly improper conduct; "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct"); *Alfaro Motors Inc. v. Ward*, 814 F.2d 883, 886 (2d Cir. 1987) (*Bivens* complaint that does not allege the personal involvement of each defendant is "fatally defective on its face") (internal quotation marks and citations omitted).

2. It Is Not Clearly Established That a Request to Inform on an Individual's Muslim American Community Imposes a Substantial Burden on Religious Exercise

The Agents are also entitled to qualified immunity because it was not clearly established that their alleged conduct amounted to a violation of RFRA. Plaintiffs Tanvir, Algibhah and Shinwari allege that they "did not wish to work as . . . informants[s], in part, because [they] had sincerely held religious and personal objections to spying on innocent members of [their] community." AC ¶ 84 (Tanvir); *see also id.* ¶ 122 (Algibhah); ¶ 157 (Shinwari). But there is no clearly established law that would put any defendant on notice that a request to serve as an informant would substantially burden the exercise of religion.

As an initial matter, the Individual Defendants are not aware of any court that has held, or even suggested, that requesting that an individual inform on his or her American Muslim community (or other faith community) places a substantial burden on religious exercise. The "contours of" the alleged religious burden were therefore not "'sufficiently clear' [such] that

every reasonable official would have understood that what he is doing violates that right." *Al-Kidd*, 131 S. Ct. at 2083. Because there was no precedent clearly establishing that a request to serve as an informant would impose a religious burden in this context, the statutory question was not "beyond debate," *id.*, and holding individuals personally liable for imposing such an alleged burden "would undermine the purpose of qualified immunity." *Ruffins v. Department of Correctional Services*, 701 F. Supp. 2d 385, 403 (E.D.N.Y. 2010) (finding qualified immunity where relevant law was uncertain).

Importantly, neither Tanvir nor Algibhah nor Shinwari alleges that he ever told any Agent that working as an informant would violate his religious beliefs or otherwise interfere with the exercise of his religion. Indeed, Algibhah alleges that, during a June 2012 interaction with Agent Artusa and John Doe 5, he told the agents (without any alleged reference to his religious beliefs) "that he needed time to consider their request." *Id.* ¶ 134. And Tanvir and Shinwari, although they allegedly declined to serve as informants, do not allege that they expressed any religious objection to the request, nor that they made any other statement from which it would have been clear that they had a religious objection. *See id.* ¶¶ 77-78 (Tanvir alleges that he told the Agents that he "was afraid to work in Pakistan as a United States government informant as it seemed like it would be a very dangerous undertaking"); ¶¶ 156, 161 (Shinwari alleges that he told the Agents only that "he would not act as an informant" and that "becoming an informant would put his family in danger").

Plaintiffs' allegations bear no resemblance to cases where courts have found that plaintiffs alleged a substantial burden on religious exercise under RFRA. In *Valdez v. City of New York*, 11 CIV. 05194 (PAC)(DF), 2013 WL 8642169 (S.D.N.Y. Sept. 3, 2013), *report and recommendation adopted,* 2014 WL 2767201 (S.D.N.Y. June 17, 2014), for example, the

plaintiff alleged that a prison guard told plaintiff that he was classified as a Dominican gang member, and thus as a security risk, *because he was a practicing Catholic* of Dominican descent. Plaintiff alleged that in order to change his security classification, he stopped attending mass and relinquished his Bible. *See* 2013 WL 8642169, at *4. Because the plaintiff alleged that the guard "knew that Plaintiff was actively seeking to have his [security] classification removed," the court found that it was "plausible that [the guard] knew that drawing this overt connection between the gang classification and Plaintiff's practice of his religion was likely to cause Plaintiff to feel pressured to give up his religious practices." *Id.* at *14; *see also id.* at *15 ("[I]t is plausible that [the guard] knew that Plaintiff would at least be led to understand that, if he continued practicing his religion, the classification would surely remain in place."); *id.* at *16 ("by making statements that he should have known would pressure Plaintiff to abandon the practice of his Catholic faith, [the guard] substantially burdened Plaintiff's free exercise rights"). Thus, based on plausible allegations that the defendant knew or should have known that he was substantially burdening plaintiff's religious "practice," the court denied the guard's Rule 12(b)(6) motion to dismiss. *See id.*; *see also Jolly*, 76 F.3d at 472 (affirming preliminary injunction where inmate plaintiff refused to submit to a medical test, appearing to have notified prison officials "that accepting artificial substances into the body is a sin under the tenets of Rastafarianism").

Here, by contrast, Tanvir, Algibhah and Shinwari fail to allege at all, much less plausibly, that the Agents "knew . . . . or should have known" that the request to serve as an informant "was likely to cause Plaintiff[s] to feel pressured" to violate a religious belief. *Valdez*, 2013 WL 8642169, at *14-16. These Plaintiffs did not say anything to the Agents to suggest that serving as an informant would violate their religious beliefs, or otherwise interfere with their exercise of religion. It therefore could not have been "apparent" to the Agents that their alleged conduct

violated a right under RFRA. *Anderson*, 483 U.S. at 640; *see also Johnson*, 2013 WL 103166, at *4-5 (defendants entitled to qualified immunity where defendants' implementation of prison's group prayer policy "was not objectively unreasonable, because it was not 'clearly established' in 2007 that Muslim inmates were entitled to participate in group prayer anywhere in the correctional facility, including in their housing units"; therefore defendants did not "transgress any 'bright lines'"); *see also Weinberger v. Grimes*, No. 07-6461, 2009 WL 331632, at *5 (6th Cir. Feb. 10, 2009) (defendant entitled to qualified immunity from plaintiff's RFRA claim where "there is no evidence that [defendant] acted knowingly" when he allegedly substantially burdening plaintiff's religious exercise).[23]

IV. THIS COURT LACKS PERSONAL JURISDICTION OVER STEVEN LNU, MICHAEL LNU, AND AGENTS HARLEY, GROSSOEHMIG, DUN, AND LANGENBERG; AND JOHN DOES 6 AND 12

A. Personal Jurisdiction Standard

On a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2), the plaintiff has the burden of showing that the court has jurisdiction. *See Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34-35 (2d Cir. 2010). Where no evidentiary hearing or trial on the merits has been held, the plaintiff must make "legally sufficient allegations of jurisdiction," including "an averment of facts that, if credited[,] would suffice to establish jurisdiction over the defendant." *Id.* at 35 (citation omitted); *see also Dorchester Financial Securities, Inc. v. Banco*

[23] Furthermore, it is not clearly established now, much less at the time of the alleged conduct, that RFRA allows for the cause of action Plaintiffs assert in this case. At the time of the allegations, the Second Circuit had not, and still has not, addressed whether a cause of action against individual federal employees is available under RFRA. *See Mest v. Naguib*, No. 08-CV-00416A(F), 2010 WL 1644189, at *9 (W.D.N.Y. Mar. 30, 2010) ("[T]o date, neither the Supreme Court, nor any Circuit Court of Appeals, most particularly, the Second Circuit, has recognized a [federal] employee's violation of the [Federal Meat Inspection Act] as constituting a violation of a constitutional right, including a Fifth Amendment due process right. Accordingly, such right was not clearly established when the challenged conduct occurred, and Defendants are entitled to qualified immunity on the *Bivens* claim.").

BRJ, S.A., 722 F.3d 81, 84-85 (2d Cir. 2013) (at pleading stage, plaintiff's allegations must establish "*prima facie* showing" of personal jurisdiction).

To determine whether personal jurisdiction exists over a non-resident in federal question cases, such as this one, *see* AC ¶ 12 (asserting jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 702), district courts in New York engage in a two-step analysis. *See Chloe v. Queen Bee of Beverly Hills*, LLC, 616 F.3d 158, 163 (2d Cir. 2010). The Court must first determine whether the exercise of personal jurisdiction is appropriate under New York's long-arm statute, N.Y. C.P.L.R. § 302. *See id.* C.P.L.R. Section 302 grants personal jurisdiction over a non-resident who: (1) transacts business in New York; (2) commits a tortious act in New York; (3) commits a tortious act outside New York causing injury to a person in New York, if the non-resident "(i) regularly does or solicits business, or engages in any other persistent course of conduct" in New York, or "(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce," N.Y. C.P.L.R. § 302(a)(3); or (4) has real property in New York. *See* N.Y. C.P.L.R. § 302(a); *Thomas*, 470 F.3d at 495. In addition, to establish long-arm jurisdiction under CPLR 302(a)(1) and (a)(4), the plaintiff must allege that the cause of action arises from the defendant's contacts with New York falling into one of those two categories. *See, e.g., Boehner v. Heise*, 410 F. Supp. 2d 228, 236 (S.D.N.Y. 2006) (to assert personal jurisdiction under 302(a)(1), a plaintiff must show that the defendant transacted business within New York, and that "the claim against the defendant arose from that business activity"); *Aluminal Industries, Inc. v. Newtown Commercial Associates*, 89 F.R.D. 326, 329 (S.D.N.Y. 1980) ("CPLR [Section] 302(a)(4) is confined to actions arising from the ownership, use or possession of real property"); *Cerberus Capital Management, L.P. v. Snelling & Snelling, Inc.*, No. 60045/2005, 2005 WL 4441899, at *12 (N.Y. Sup. Ct. Dec. 19,

2005) ("In order to assert jurisdiction under CPLR 302(a)(4), a plaintiff must demonstrate a relationship between the defendants' real property and the plaintiff's causes of action.") (citing *Aluminal Industries*).

"If the long-arm statute permits personal jurisdiction, the second step is to analyze whether personal jurisdiction comports with the Due Process Clause of the United States Constitution." *Chloe*, 616 F.3d at 164. This analysis has two related components: (1) the "minimum contacts" inquiry, involving a determination of whether "the defendant has sufficient contacts with the forum state to justify the court's exercise of personal jurisdiction"; and (2) the "reasonableness" inquiry, involving a determination of "whether the assertion of personal jurisdiction comports with 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

B. Shinwari and Sajjad Cannot Establish Personal Jurisdiction over Steven LNU and Michael LNU; Agents Harley, Grossoehmig, Dun, and Langenberg; or John Does 6 and 12

The Individual Agents' actions pertaining to Shinwari took place entirely outside of New York. Shinwari alleges that he had contact with FBI agents in Dubai, in Virginia (at Dulles Airport), and in Omaha, Nebraska. *See* AC ¶¶ 147-64. Plaintiffs therefore cannot establish personal jurisdiction over Steven LNU and Michael LNU; Agents Harley, Grossoehmig, Dun, and Langenberg; or John Doe 6 under either New York's long-arm statute or the Due Process Clause. Nor can Plaintiffs establish personal jurisdiction over John Doe 12, whose single alleged interaction with Sajjad consisted of a polygraph examination performed in New Jersey. *See id.* ¶¶ 182-84.

Neither Shinwari nor Sajjad can satisfy the requirements of CPLR Section 302(a)(1), because they have not alleged that these Agents "transact[] any business within the state or

contract[] anywhere to supply goods or services in the state," or that the claim against the Agents arose from any such business activity. And, in fact, these Agents engage in no such conduct. *See* Declaration of Michael LNU, dated July 28, 2014 ("Michael LNU Decl."), at ¶ 7; Declaration of Steven LNU, dated July 24, 2014 ("Steven LNU Decl."), at ¶ 6; Declaration of John C. Harley, III, dated July 23, 2014 ("Harley Decl."), at ¶ 6; Declaration of Gregg Grossoehmig, dated July 28, 2014 ("Grosshoemig Decl."), at ¶ 6; Declaration of Weysan Dun, dated July 28, 2014 ("Dun Decl."), at ¶ 6; Declaration of James Langenberg, dated July 28, 2014 ("Langenberg Decl."), at ¶ 6; Declaration of John Doe 6, dated July 28, 2014 ("John Doe 6 Decl."), at ¶ 7; Declaration of John Doe 12, dated July 28, 2014 ("John Doe 12 Decl."), at ¶ 9.

Shinwari and Sajjad also cannot satisfy the requirements of CPLR Section 302(a)(2), because they do not allege that any of these Agents "commit[ted] a tortious act within the state," as all of Shinwari's and Sajjad's alleged contacts with these Agents occurred outside of New York: in Dubai, Virginia, Nebraska, or New Jersey. *See Ballard v. Walker*, No. 11 Civ. 5874(LLS), 2013 WL 6501234, at *1 (S.D.N.Y. Dec. 11, 2013) (finding lack of personal jurisdiction over defendant under Section 302(a) where "the complaint does not even mention that anyone did any of the alleged acts in New York," and thus does not adequately plead that the claims against defendant arise out of actions within New York) (quoting *McGowan v. Smith*, 52 N.Y.2d 268, 271 (1981)).

Nor can Shinwari or Sajjad satisfy the requirements of Section 302(a)(3). Shinwari fails to allege that the Agents committed a tortious act without the state "causing injury . . . within the state," because Shinwari fails to allege that he ever resided in—or even traveled through—New York. *See Faherty v. Fender*, 572 F. Supp. 142, 148-49 (S.D.N.Y. 1983) ("injury within the state for purposes of [Section 302(a)(3)] must be direct, and not remote or consequential").

Similarly, Sajjad fails to allege that John Doe 12 committed a tortious act causing injury "within the state," because Sajjad alleges that his only interaction with John Doe 12 occurred in New Jersey. AC ¶¶ 182-84.[24] And even if Shinwari or Sajjad were to allege that they suffered injury in New York as a result of these Agents' actions, they still cannot satisfy the requirements of Section 302(a)(3), because none of the Agents "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the state, or . . . derives substantial revenue from interstate or international commerce." *See* Michael LNU Decl. at ¶¶ 4-12; Steven LNU Decl. at ¶¶ 4-11; Harley Decl. at ¶ 3-11; Grosshoemig Decl. at ¶¶ 3-11; Dun Decl. at ¶¶ 6-11; Langenberg Decl. at ¶¶ 3-11; John Doe 6 Decl. at ¶¶ 4-12; John Doe 12 Decl. at ¶¶ 4-14.

And neither Shinwari nor Sajjad can satisfy the requirements of Section 302(a)(4), because the cause of action is unrelated to real property, and none of the Agents owns any real property in New York. *See* Michael LNU Decl. at ¶ 11; Steven LNU Decl. at ¶ 10; Harley Decl. at ¶ 10; Grossoehmig Decl. at ¶ 10; Dun Decl. at ¶ 10; Langenberg Decl. at ¶ 10; John Doe 6 Decl. at ¶ 11; John Doe 12 Decl. at ¶ 13.

Because none of these Agents' conduct alleged in the Amended Complaint has any relationship to New York, moreover, allowing this action to proceed against these Agents in New York despite their lack of ties to the State would also violate "traditional notions of fair play and substantial justice." *Int'l Shoe Co.*, 326 U.S. at 316 (quotation marks and citation omitted); *see also Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) ("Where the defendant has had only

[24] The fact that Sajjad was allegedly denied boarding on a flight leaving from JFK does not confer personal jurisdiction over John Doe 12, because that event occurred before his alleged interaction with John Doe 12, and Sajjad does not allege that he experienced any harm in New York after his alleged interaction with John Doe 12. *See* AC ¶¶ 173, 179-84 (alleging that he was denied boarding on September 14, 2012; that he interacted with John Doe 12 on October 24, 2012).

limited contacts with the state it may be appropriate to say that he will be subject to suit in that state only if the plaintiff's injury was proximately caused by those contacts.").

As a result, this Court lacks personal jurisdiction over Steven LNU, Michael LNU, Agents Harley, Grossoehmig, Dun, Langenberg and Gale, and John Does 6 and 12, such that any individual capacity claims against them should be dismissed pursuant to Rule 12(b)(2). *See, e.g., Thomas*, 470 F.3d at 496 (affirming dismissal for lack of personal jurisdiction where six federal agents "were residents of California and assigned to the Los Angeles Field Division during all relevant periods, and the one agent who had worked with [the agency's] New York Field Division was a resident of New Jersey"; and because the "claims against these defendants ar[o]se from acts alleged to have occurred at the time of [the plaintiff's] arrest, which took place in California, and not from any transaction of business within New York"); *compare Davis v. United States*, No. 03 Civ. 1800(NRB), 2004 WL 324880, at *5 (S.D.N.Y. Feb. 19, 2004) (in a *Bivens* case, finding personal jurisdiction over federal agent where plaintiff's arrest—which was "[a]t the center of plaintiff's case"—occurred in New York, and the agent was "present at and participated in plaintiff's arrest").

III. TANVIR'S FIRST AMENDMENT CLAIM AGAINST JOHN DOE 1 AND JOHN DOE 2/3 IS TIME-BARRED

Finally, Tanvir's First Amendment claim against John Does 1 and 2/3 should be dismissed as time-barred.

"The statute of limitations for *Bivens* actions arising in New York is three years." *Tapia-Ortiz v. Doe*, 171 F.3d 150, 151 (2d Cir. 1999). The limitations period begins to run from the date on which the plaintiff knows or has reason to know of the injury that is the basis of his claim. *See Leon v. Murphy*, 988 F.2d 303, 309 (2d Cir. 1993). When a plaintiff names a "John Doe" defendant, moreover, the party must "'exercise due diligence, *prior to* the running of the

statute of limitations, to identify the defendant by name.'" *Hogan v. Fische*, 738 F.3d 509, 519 (2d Cir. 2013) (finding that Fed. R. Civ. P. 15(c)(1)(A) directs district courts in New York to apply N.Y. C.P.L.R. § 1024 when evaluating timeliness of Section 1983 claims against John Does, and allowing John Doe substitutions where a plaintiff timely and diligently sought to identify the defendant by name, and where the allegations "'fairly apprise the party that [he] is the intended defendant'") (quoting *Bumpus v. N.Y.C. Transit Auth*., 883 N.Y.S.2d 99, 104 (N.Y. App. Div. 2009)) (emphasis added). Failure to do so before the expiration of the statute of limitations results in the dismissal of claims against the John Doe defendant. *See, e.g., JCG v. Ercole*, No. 11 Civ. 6844(CM)(JLC), 2014 WL 1630815, at *13-14 (S.D.N.Y. Apr. 24, 2014) (dismissing claims against John Doe defendants where plaintiff "failed to act with due diligence in identifying the John Doe Defendants prior to filing his Original Complaint," and "wait[ed] until the statute of limitations had nearly run to file his complaint"), *report and recommendation adopted*, 2014 WL 2769120 (S.D.N.Y. June 18, 2014).

In this case, Tanvir's last interactions with John Does 1 and 2/3 occurred in February 2007 and February 2009, respectively. *See* AC ¶¶ 69, 82-87.[25] The Amended Complaint alleges that Tanvir was injured when he allegedly was placed on the No Fly List, and he learned of this alleged injury no later than October 2010, when he was first allegedly denied boarding. *See id.* ¶ 91. Thus, his cause of action accrued no later than October 2010, and the statute of limitations as to these Agents expired in October 2013. *See Tapia-Ortiz*, 171 F.3d at 151.

Tanvir filed his orginal complaint on October 1, 2013, naming, among others, one "John Doe" defendant. *See* Docket No. 1. On April 22, 2014, Tanvir, along with the other Plaintiffs,

[25] As noted *supra* at 46, the allegations in the Amended Complaint that John Doe 1 interacted with Tanvir in 2009, *see* AC ¶¶ 82-4, are in error, as John Doe 1 retired from government service on December 31, 2007. *See* John Doe 1 Decl. ¶ 3.

filed the Amended Complaint. *See* Docket No. 15. The Amended Complaint names 13 "John Doe" defendants. *See id.* The original "John Doe" from Tanvir's initial complaint is identified in the Amended Complaint as John Doe 2 (who, pursuant to the parties' stipulation, is now proceeding as John Doe 2/3, *see supra* note 2). *Compare* Docket No. 1 ¶¶ 57-62 (alleging that he interacted with "John Doe" on January 26, 2009) *with* AC ¶ 73 (alleging that he met with John Doe 2 on January 26, 2009). The defendant named in the Amended Complaint as "John Doe 1" was not named in Tanvir's initial complaint filed in October 2010. Accordingly, Tanvir first filed this action against John Doe 1 in April 2014, six months after the applicable statute of limitations expired, and therefore his *Bivens* claims against John Doe 1 should be dismissed.

In addition, Tanvir did not seek the identity of John Doe 1, John Doe 2/3, or any individual identified in the Amended Complaint by a pseudonym, until April 2014, six months after the applicable statute of limitations as to John Doe 2/3 had expired. *See* Docket No. 21 at 2 (advising the Court that, following the filing of the Amended Complaint, "the parties have been working together to develop a protocol for proceeding, in an effort to avoid litigation with regard to the appropriateness of discovery as to the identities of the John Doe defendants"); *see* Declaration of Sarah S. Normand, dated July 28, 2014, at ¶¶ 2-7 (stating that the Plaintiffs first requested the identities of the John Doe defendants on April 23, 2014).

As a result, Tanvir's *Bivens* claims against John Doe 1 and John Doe 2/3 are time-barred and should be dismissed. *See JCG*, 2014 WL 1630815, at *14 ("The events giving rise to Plaintiff's allegations all occurred in mid to late 2008, but 'Plaintiff appears to have expended no efforts at all to identify the Individual Defendants in the three years that followed.'") (quoting *Mabry v. New York City Dept. of Corrections*, No. 05 Civ. 8133(JSR)(JCF), 2008 WL 619003, at *6 (S.D.N.Y. March 7, 2008) (allowing plaintiff to name John Does in an amended complaint

where plaintiff's first complaint was "within the statute of limitations" and she "aggressively sought the identities of the defendants")).

IV. PLAINTIFFS' CLAIMS SEEKING EQUITABLE RELIEF AGAINST THE INDIVIDUAL AGENTS IN THEIR PERSONAL CAPACITIES SHOULD BE DISMISSED

It is well-settled that the real party in interest in an action against federal officers seeking injunctive or declaratory relief is the government. *See, e.g., Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) ("The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter."); *see also Robinson*, 21 F.3d at 510. Here, to the extent Plaintiffs are seeking injunctive and declaratory relief against the Agents, *see* AC, Prayer for Relief, those claims may only proceed, if at all, against the Agents in their official capacities. *See Frank v. Relin*, 1 F.3d 1317, 1326-27 (2d Cir. 1993); *Higazy*, 505 F.3d at 169 (2d Cir. 2007) ("The only remedy available in a Bivens action is an award for monetary damages from defendants in their individual capacities."). Plaintiffs' equitable claims against the Agents in their individual capacities therefore should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1). *See, e.g., Frank,* 1 F.3d at 1326. [26]

[26] Plaintiffs' claims seeking declaratory and injunctive relief against the Agents in their official capacities should likewise be dismissed, as set forth in the Official Capacity Defendants' Motion to Dismiss the First Amended Complaint. *See* Official Capacity Mem. at Pts. I-II.

CONCLUSION

For the foregoing reasons, Plaintiffs' claims against the Agents in their personal capacities should be dismissed.

Dated: New York, New York
July 28, 2014

Respectfully submitted,

PREET BHARARA
United States Attorney
Southern District of New York

/s/ Sarah S. Normand

By: SARAH S. NORMAND
ELLEN BLAIN
Assistant United States Attorneys
86 Chambers Street
New York, New York 10007
Tel.: (212) 637-2709/43
Fax: (212) 637-2730
Email: sarah.normand@usdoj.gov
ellen.blain@usdoj.gov

APPENDIX TO INDIVIDUAL DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT

Plaintiff Muhammad Tanvir

Agent	Allegations in the Complaint	Claims	Addressed in Memorandum of Law*
FNU Tanzin	¶¶ 69-70, 73-79, 81-84, 86-88, 92	First Amendment; RFRA	First Amendment: III.D.1(b) and (c); III.D.2 RFRA: III.E.2
John Doe 1	¶ 69	First Amendment; RFRA	First Amendment: III.D.1(b) and (c); III.D.2 RFRA: III.E.2 Statute of Limitations: V
John Doe 2/3	¶¶ 73-78, 82-84, 86-88	First Amendment; RFRA	First Amendment: III.D.1(b); III.D.2 RFRA: III.E.2 Statute of Limitations: V
Agent Garcia	¶¶ 94, 99-104, 106, 113	First Amendment; RFRA	First Amendment: III.D.1(b) and (c); III.D.2 RFRA: III.E.1 and 2

* In addition to the defenses referenced in this chart, and as discussed in Points I and II of the accompanying memorandum of law, Plaintiffs' purported First Amendment and RFRA claims against all Agents in their individual capacities should be dismissed because (1) there is no recognized *Bivens* claim based on First Amendment retaliation, and (2) RFRA does not provide for claims against federal employees in their personal capacities.

Tanvir (continued) **Agent**	**Allegations in the Complaint**	**Claims**	**Addressed in the Memorandum of Law**
John LNU	¶¶ 100-103, 106	First Amendment; RFRA	First Amendment: III.D.1(b) and (c); III.D.2 RFRA: III.E.1 and 2

Plaintiff Jameel Algibhah

Agent	**Allegations in the Complaint**	**Claims**	**Addressed in Memorandum of Law**
Agent Artusa	¶¶ 119-121, 123, 131-136, 138-141	First Amendment; RFRA	First Amendment: III.D.1(b); III.D.2 RFRA: III.E.2
John Doe 4	¶¶ 119-121	First Amendment; RFRA	First Amendment: III.D.1(b); III.D.2 RFRA: III.E.2
John Doe 5	¶¶ 131-135	First Amendment; RFRA	First Amendment: III.D.1(b) and (c); III.D.2 RFRA: III.E.2

Plaintiff Naveed Shinwari

Agent	Allegations in the Complaint	Claims	Addressed in Memorandum of Law
Steven LNU	¶¶ 147-150	First Amendment; RFRA	First Amendment: III.D.1(b) and (c); III.D.2 RFRA: III.E.1 and 2 Personal Jurisdiction: IV
Agent Harley	¶¶ 148-151	First Amendment; RFRA	First Amendment: III.D.1(b) and (c); III.D.2 RFRA: III.E.1 and 2 Personal Jurisdiction: IV
Michael LNU	¶¶ 152-57, 161	First Amendment; RFRA	First Amendment: III.D.1(b) and (c); III.D.2 RFRA: III.E. 2 Personal Jurisdiction: IV
Agent Grossoehmig	¶¶ 152-53	First Amendment; RFRA	First Amendment: III.D.1(b) and (c); III.D.2 RFRA: III.E.1 and 2 Personal Jurisdiction: IV

Shinwari (continued) **Agent**	**Allegations in the Complaint**	**Claims**	**Addressed in Memorandum of Law**
John Doe 6	¶¶ 155-57, 161	First Amendment; RFRA	First Amendment: III.D.1(b) and (c); III.D.2 RFRA: III.E.2 Personal Jurisdiction: IV
Agent Dun	¶¶ 162-64	First Amendment; RFRA	First Amendment: III.D.1(b) and (c); III.D.2 RFRA: III.E.1 and 2 Personal Jurisdiction: IV
Agent Langenberg	¶¶ 162-65	First Amendment; RFRA	First Amendment: III.D.1(b) and (c); III.D.2 RFRA: III.E.1 and 2 Personal Jurisdiction: IV

Plaintiff Awais Sajjad

Agent	Allegations in the Complaint	Claims	Addressed in Memorandum of Law
John Doe 7	¶¶ *173-75, 177*	*First Amendment*	*N/A*
John Doe 8	¶¶ *173-75, 177*	*First Amendment*	*N/A*
John Doe 9	¶¶ 176-77	First Amendment	III.D.1(b) and (c); III.D.2
John Doe 10	¶¶ 176-77	First Amendment	III.D.1(b) and (c); III.D.2
Agent Rutkowski	¶¶ 179-83, 185-88, 191-94	First Amendment	III.D.1(b) and (c); III.D.2
John Doe 11	¶¶ 179-83, 185-87	First Amendment	III.D.1(b); III.D.2
John Doe 12	¶¶184-85	First Amendment	III.D.1(b) and (c); III.D.2 Personal Jurisdiction: IV
Agent Gale	¶ 191	First Amendment	III.D.1(b) and (c); III.D.2 Personal Jurisdiction: IV
John Doe 13	¶¶ 192-94	First Amendment	III.D.1(b) and (c); III.D.2