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)

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

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Neither the Supreme Court nor the Second Circuit has recognized personal capacity claims under the First Amendment or RFRA,[1] and both courts recognize that *Bivens* remedies are extraordinary and "disfavored" in new contexts. Yet Plaintiffs seek a monetary award from twenty-five separate federal agents individually, on a theory that Plaintiffs' alleged inclusion in the No Fly List violated the First Amendment or RFRA.[2] This Court should decline to extend *Bivens* to the circumstances in this case, particularly in light of the availability of an alternative remedial scheme for challenging Plaintiffs' alleged injury, and other special factors counseling strongly against implying a *Bivens* remedy. The Court should also deny Plaintiffs' request to infer an individual damages claim under RFRA, which would anomalously make individual federal employees the only group of defendants liable for money damages under a statute that permits only "appropriate relief against a Government." The Court can dismiss Plaintiffs' individual capacity claims on these grounds alone.

Even if individual capacity First Amendment or RFRA claims could ever exist, Plaintiffs fail to state a claim against the Agents. Relying on conclusory assertions of "collective action," Plaintiffs effectively concede that they cannot meet their burden of plausibly alleging the personal involvement of each Agent in the violation of a constitutional or statutory right, and the Terrorist Screening Center's acknowledged role in independently determining the composition of the No Fly List defeats any plausible allegation of causation. For these reasons, and because the purported constitutional and statutory rights alleged by Plaintiffs were not clearly established at the time of the conduct at issue, the Agents are entitled to qualified immunity. Plaintiffs' *Bivens*

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[1] This memorandum employs the same abbreviations as the Memorandum of Law in Support of the Official Capacity Defendants' Motion to Dismiss the First Amended Complaint for Lack of Subject Matter Jurisdiction, ("OC Br.") and the Memorandum of Law in Support of the Individual Agent Defendants' Motion to Dismiss the First Amended Complaint ("PC Br."), both dated July 28, 2014.

[2] Plaintiffs undisputedly cannot seek equitable relief from the Individual Agent Defendants in their personal capacities; all equitable claims are against the official capacity defendants, and are the subject of a separate motion.

claims against John Does 1 and 2/3 are also time-barred, and not rescued by the "disfavored" and inapplicable continuing violation doctrine.

ARGUMENT

I. PLAINTIFFS CANNOT SUE THE AGENTS INDIVIDUALLY UNDER *BIVENS*

A. *Bivens* Has Not Been Applied to Claims Like Plaintiffs'

Contrary to Plaintiffs' contention, neither the Supreme Court nor the Second Circuit has recognized a *Bivens* claim that remotely resembles Plaintiffs' claims here. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss ("Pl. Br.") at 39. Plaintiffs principally rely on *Hartman v. Moore*, 547 U.S. 250, 256-57 (2006) (framing issue as "whether a plaintiff in a [First Amendment] retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges"). Although the *Hartman* Court stated, in summary fashion, that "[w]hen the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*," *id.* at 256, the Court did not consider, much less analyze, whether *Bivens* should be extended to such claims under the Court's precedent. The error of Plaintiffs' reading of *Hartman* is confirmed by the fact that, on two subsequent occasions, the Supreme Court has explicitly stated that it has *not* extended *Bivens* to the First Amendment context. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) ("We 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));[3] *see also Reichle v. Howards*, 132 S. Ct. 2088, 2093 n.4 (2012) ("We have never held

[3] Plaintiffs state that the Agents "misconstrue[]" *Bush v. Lucas* as "declin[ing] to extend *Bivens* to a claim sounding in the First Amendment," Pl. Br. at 41, but that is precisely how *Iqbal* described *Bush v. Lucas*. *See also Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) ("We have . . . held against applying the *Bivens* model to claims of First Amendment violations by federal employers." (citing *Bush*)).

that *Bivens* extends to First Amendment claims." (citing *Iqbal* and *Bush v. Lucas*)). Plaintiffs inexplicably ignore this law.[4]

Plaintiffs are not aided by observing "that the *Iqbal* Court assumed without deciding that the respondent's First Amendment claim was actionable under *Bivens.*" Pl. Br. at 42. The *Iqbal* Court *sua sponte* questioned whether *Bivens* supported the types of claims raised there, including a First Amendment claim. 556 U.S. at 675. Although the Court resolved the case based on the pleading issue presented, the Court explicitly declined to decide the *Bivens* issue, and instead merely assumed for purposes of the dispositive pleading standards analysis that such a claim could exist. *Id.* Even as part of this discussion, the Court instructed that implying a right to sue under *Bivens* is "disfavored" and that the Court "has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Id*. (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001), and citing *Wilkie* 551 U.S. at 549-50). Indeed, the Court observed that this "reluctance might well have disposed of respondent's First Amendment claim of religious discrimination," had the petitioners "press[ed] this argument." *Id.*

The principles outlined in *Iqbal* were echoed by the Second Circuit, sitting *en banc*, in *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009). *Arar* observed that "[n]otwithstanding the potential breadth of claims that would serve" the goal of deterring constitutional violations, "the Supreme Court has warned that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in 'new contexts[,]'" *id.* (quoting *Malesko*, 534 U.S. at 69).[5]

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[4] Plaintiffs also cite *Wilkie v. Robbins* for the proposition that the Supreme Court has recognized a First Amendment *Bivens* claim, Pl. Br. at 39, but *Wilkie* recognized that "in most instances we have found a *Bivens* remedy unjustified," and did not list First Amendment claims among those to which the Court had extended *Bivens*. 551 U.S. at 549-50.

[5] In *M.E.S., Inc. v. Snell*, 712 F.3d 666 (2d Cir. 2013), cited in Pl. Br. at 39-40, the issue was whether an alternative remedial scheme precluded implication of a *Bivens* remedy. Although, in distinguishing *Hartman*, *M.E.S.* described *Hartman* as "reiterat[ing] the general availability of a *Bivens* action to sue federal officials for First Amendment retaliation," 712 F.3d at 675, that issue was not litigated by the parties, and the *M.E.S.* court appears to have

Even if First Amendment retaliation claims could generally be brought under *Bivens*, no court has recognized any claim that even remotely resembles Plaintiffs'. Plaintiffs cite distinguishable cases, mainly involving claims against prison or law enforcement officers, that either assumed the existence of a First Amendment *Bivens* claim without deciding the question,[6] addressed the issue in summary fashion or failed to address it at all.[7] Plaintiffs have not identified *any* case in which a court allowed a *Bivens* claim to proceed for alleged First Amendment retaliation, or any other alleged constitutional violation, in connection with the placement of an individual on a watchlist. The No Fly List is not simply a different "retaliatory tool." Pl. Br. at 43. It is a vital component of the United States' counterterrorism efforts, governed by a separate statutory scheme that includes a redress process for individuals denied boarding. This case therefore unquestionably presents a new context.

B. The Court Should Not Extend *Bivens* to This New Context

1. Congress Explicitly Created an Alternative Remedy for Challenges to No Fly List Status

Plaintiffs' claims also should be dismissed for the independent reason that *Bivens* claims are not to be implied where alternative remedial schemes exist. *See* PC Br. at 14-18. Plaintiffs misconstrue the relevant standard. What is required is not an "'alternative, existing process' to

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overlooked the Supreme Court's subsequent statements in *Iqbal* and *Reichle*, which expressly confirmed that the Court has not determined the applicability of *Bivens* in that context. The *dicta* in *M.E.S.* cannot overcome the Supreme Court's explicit pronouncements, and also conflicts with the Second Circuit's *en banc* decision in *Arar*.

[6] *See* Pl. Br. at 40-41 (citing *George v. Rehiel*, 738 F.3d 562, 585 (3d Cir. 2013) (declining to decide issue given defendant airport security personnel's dispositive qualified immunity); *Munsell v. Dep't of Agric.*, 509 F.3d 572, 591 (D.C. Cir. 2007) (in case involving food safety personnel, declining to decide issue because petitioners failed to exhaust administrative remedies)).

[7] *See* Pl. Br. at 40-41 (citing *Bistrian v. Levi*, 696 F.3d 352, 376 n.9 (3d Cir. 2012) (retaliation claims against prison staff); *Burns v. Warden, USP Beaumont*, 482 F. App'x 414, 416 (11th Cir. 2012) (claims against prison officials based on allegedly retaliatory transfer); *Hill v. Lappin*, 630 F.3d 468, 471 (6th Cir. 2010) (retaliation claims against prison staff); *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 14 F.3d 457, 464 n.4 (9th Cir. 1994) (claims against FBI agents relating to allegedly unlawful arrest)). *Engel v. Buchan*, 710 F.3d 698, 708 (7th Cir. 2013), cited in Pl. Br. at 43, did not involve a First Amendment claim at all, but rather an alleged *Brady* violation.

seek damages from [the] Special Agent Defendants," Pl. Br. at 44, but rather that an alternative procedure is available to address Plaintiffs' alleged "harms." *Malesko*, 534 U.S. at 70.

Here the alleged injury is being unlawfully placed on the No Fly List. For that injury, Congress explicitly provided a remedy, directing TSA "establish a timely and fair process" for individuals to seek relief when improperly delayed or prohibited from boarding a commercial flight if wrongly identified as a threat. *See* 49 U.S.C. §§ 44903(j)(2)(C)(iii)(I)&(G)(i). TSA then established the DHS TRIP process by regulation, *see* 49 C.F.R. §§ 1560.201-.207, and individual DHS TRIP determinations are statutorily subject to judicial review. *See* 49 U.S.C. § 46110; OC Br. at Pt. I.

Where Congress has provided for a remedial scheme, and Congress's decision not to include a damages remedy was "not inadvertent," *Shweiker v. Chilicky*, 487 U.S. 412, 423 (1988), the availability of a *Bivens* remedy does not turn on whether a plaintiff finds the remedy Congress provided adequate. Rather, when Congress has provided "*what it considers adequate remedial mechanisms* for constitutional violations that may occur . . . , [courts] have not created additional remedies." *Id.* (emphasis added); *see also Malesko*, 534 U.S. at 69; *Hudson Valley Black Press v. IRS*, 409 F.3d 106, 110 (2d Cir. 2005). Thus, it is immaterial whether the remedy provided by DHS TRIP provides for damages. *See Bush*, 462 U.S. at 388 (no *Bivens* action although Civil Service remedial scheme did not permit damages awards, nor "provide complete relief for the plaintiff"); *Chilicky*, 487 U.S. at 423 (no *Bivens* claim although Social Security laws did not provide for damages); *Hudson Valley Black Press*, 409 F.3d at 110 (same for Internal Revenue Code); *Sugrue v. Derwinski*, 26 F.3d 8 (2d Cir. 1994) (same for veterans' benefits).

Nor does it matter whether DHS TRIP provides a remedy for alleged constitutional violations. Pl. Br. at 44-45; *see Chilicky*, 487 U.S. at 421-22 ("The absence of statutory relief for

a constitutional violation . . . does not . . . necessarily imply that courts should award money damages against the officers responsible for the violation."), *quoted in Malesko*, 534 U.S. at 69. In any event, under 49 U.S.C. § 46110, courts of appeals *can* remedy alleged constitutional violations in connection with an individual's alleged watchlist placement. *See* Official Capacity Defendants' Reply Memorandum of Law ("OC Reply"), at Pt. I.C. That the courts of appeals conduct review based on the administrative record, portions of which may be submitted *ex parte* and *in camera* because they contain national security information, Pl. Br. at 46, does not render the remedy inadequate or ineffective.

Latif and *Ibrahim*, cited at Pl. 46-47, do not advance Plaintiffs' claim. First, even assuming that Section 46110 does not apply to Plaintiffs' claims, a *Bivens* remedy would nonetheless be precluded by the alternative remedial scheme provided in the Administrative Procedure Act, which Plaintiffs have invoked. AC ¶¶ 225-28. Subject to certain exceptions, the APA authorizes judicial review of final agency actions. *See* 5 U.S.C. § 704. Under the APA, courts may "hold unlawful and set aside agency action, findings and conclusions found to be," *inter alia*, "contrary to constitutional right, power, privilege or immunity." *Id*. § 706(2). The APA establishes the forms of relief that are available to parties aggrieved by agency actions, *id*. § 703, which do not include monetary relief, *id*. § 702. Numerous courts have held that the APA generally precludes a *Bivens* remedy. *See, e.g.*, *Western Radio Services Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1122-23 (9th Cir. 2009); *Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005); *Duhring Resource Co. v. U.S. Forest Serv.*, No. 07-0314E, 2009 WL 586429, at

*6 (W.D. Pa. Mar. 6, 2009) (collecting cases); *GasPlus, L.L.C. v. U.S. Dep't of Interior*, 466 F. Supp. 2d 43, 50 (D.D.C. 2006).[8]

Here, Congress explicitly provided a "timely and fair" process for contesting one's watchlist status, subject to judicial review under Section 46110 (or the APA), and thereby expressed its decision to provide for a remedial scheme that excluded damages. Indeed, as Plaintiffs note, Pl. Br. at 47 n.23, Congress specifically considered creating a civil remedy, but elected not to. *See* H.R. Rep. No. 108-724, pt. 5, at 312-13 & nn.191-92 (2004). This is a "plain indication" that Congress made a conscious choice of remedy, and its non-provision of a damages remedy was "not inadvertent." *Hudson Valley Black Press*, 409 F.3d at 112-13.

2. Special Factors Counsel Hesitation in Extending *Bivens* to this Context

Creating a *Bivens* remedy also is inappropriate because other special factors "counsel hesitation" here. The Second Circuit has emphasized that whether a special factor "'counsels hesitation'" is a "remarkably low" threshold. *Arar*, 585 F.3d at 574. Plaintiffs challenge a purported FBI "pattern and practice" of using the No Fly List to coerce American Muslims into becoming informants, and to retaliate against those who refuse. AC ¶¶ 66-67. Setting aside that the Agents deny this allegation, the litigation "would enmesh the courts ineluctably in an assessment of" FBI policy regarding nominations to the No Fly List, "the validity and rationale of that policy and its implementation in this particular case" – all "matters that directly affect . . . national security concerns." *Arar*, 585 F.3d at 575. The national security implications – and, relatedly, the inevitable demands for national security information (and thus the need for the

[8] Although *Wilkie* was not decided on this ground, it provides a "strong indication that the APA constitutes an 'alternative, existing process' for . . . damages claims based on agency actions or inactions." *Western Radio*, 578 F.3d at 1122 (noting that *Wilkie* "observed that the ranch owner had an adequate remedy" under the APA for certain agency actions, but moved on to the "special factors" prong of the analysis because "the plaintiff had only a patchwork of different remedies" for addressing his other claims).

government to protect such information in litigation, including by asserting privileges that may require the use of *ex parte*, *in camera* proceedings) – counsel strongly against implication of a *Bivens* remedy, and easily meet the "remarkably low" threshold. *See id.* at 576-77 (identifying national security and foreign policy concerns, "the sensitivities of . . . classified material," and the "court's reliance on information that cannot be introduced into the public record" as factors counseling hesitation).

There is no merit to Plaintiffs' suggestion that their *Bivens* claims do not implicate national security, but rather arise in the "ordinary context of law enforcement activity." Pl. Br. at 50; *id.* at 51 n.26. As Plaintiffs themselves allege, an individual may not be placed on the No Fly List unless he or she is "a 'known or suspected terrorist,' and there is "additional 'derogatory information' demonstrating that the person 'poses a threat of committing a terrorist act with respect to an aircraft.'" AC ¶ 42 (alteration omitted). At a minimum, if Plaintiffs were in fact denied boarding pursuant to the No Fly List, the Agents likely would have to show reasons why Plaintiffs were nominated for inclusion on the list, including intelligence or other sensitive information, and the Agents' compliance with FBI policies relating to watchlist nominations. This is self-evidently not an "ordinary" law enforcement matter.

Plaintiffs do not dispute that this case is likely to implicate national security information, but instead argue – relying on cases that did not involve or support recognizing a *Bivens* remedy – that other courts have been able to adjudicate cases involving the No Fly List. Pl. Br. at 50-51 (citing *Ibrahim v. DHS* and *Mohamed v. Holder*). This argument fails. First, because neither case presented *Bivens* claims, the courts did not consider whether special factors counseled

hesitation.[9] Second, *Ibrahim* and *Mohamed* only underscore that national security information is likely to be at issue here, and that *ex parte*, *in camera* proceedings may be necessary to determine whether such information is privileged. In each case, the government asserted the state secrets privilege to protect, among other things, national security information associated with any alleged watchlisting placement. In *Ibrahim*, the court upheld the government's state secrets assertion – including as to "the reasons for [Ibrahim's watchlist] nomination" – but was able to adjudicate the plaintiff's claims without reference to privileged information. *See Ibrahim v. DHS*, __ F. Supp. 2d __, 2014 WL 6609111, at *12, *19 (N.D. Cal. Jan. 14, 2014). Here, by contrast, if Plaintiffs were on the No Fly List, the reasons for their nomination would be central to the case. Similarly, although the *Mohamed* court denied, without prejudice, the government's motion to dismiss the action on state secrets grounds, *see* E.D. Va. Dkt. No. 144, the assertion of the state secrets privilege remains pending; the court has directed that materials subject to the claim of privilege be submitted for *ex parte*, *in camera* review, *id.* Dkt. No. 165; and it remains undecided whether the matter can be adjudicated without reference to state secret privileged information.[10]

Finally, Plaintiffs miss the point by arguing that "there is a long history of judicial review of Executive and Legislative decisions related to the conduct of foreign relations and national security." Pl. Br. at 51 (quoting *Arar*, 585 F.3d at 581). Plaintiffs can seek review of their denials of boarding pursuant to 49 U.S.C. § 46110 (or under the APA, if the Court determines that Section 46110 does not apply). *See* OC Br. at Pt. I; OC Reply at Pt. I. The Court should

[9] The Plaintiff in *Mohamed* initially asserted *Bivens* claims, but those claims were dismissed. *See Mohamed v. Holder*, 995 F. Supp. 2d 520, 522-23 (E.D. Va. 2014).

[10] Plaintiffs' citation to the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. III §§ 1-16, is entirely inapposite. CIPA, which is part of Title 18, "applies exclusively to criminal cases," *ACLU v. Dep't of Justice*, 681 F.3d 61, 72 n.9 (2d Cir. 2012), and all of the cases cited by plaintiffs are criminal cases, *see* Pl. Br. at 50.

not, however, create a monetary damages remedy against the Agents in their personal capacities, notwithstanding the availability of other remedies, especially given the serious national security concerns presented by litigation in which individual federal agents must rely on protected and even classified national security information to oppose claims that they are personally liable to allegedly listed individuals.

II. INDIVIDUAL CAPACITY DAMAGES CLAIMS ARE NOT AVAILABLE UNDER RFRA

Plaintiffs similarly fail to establish that they can assert individual capacity claims under RFRA. RFRA does not provide for money damages against the federal government. *See, e.g., Johnson v. Killian*, No. 07 Civ. 6641(NRB), 2013 WL 103166, at *3 (S.D.N.Y. Jan. 9, 2013). RFRA's companion statute, RLUIPA – which contains language almost identical to RFRA's – likewise does not provide for money damages against state governments, and RLUIPA has authoritatively been held not to provide for money damages against state officials. *See Sossamon v. Texas*, 131 S. Ct. 1651, 1660 (2011); *Washington v. Gonyea*, 731 F.3d 143, 145 (2d Cir. 2013). The Court should reject Plaintiffs' illogical argument that RFRA nevertheless brands individual federal employees in their personal capacities the *only* class of defendants subject to suits for money damages under RFRA (or RLUIPA).

A. RFRA's Text Is Silent Regarding Personal Capacity Claims, and a Comparison of RFRA and Section 1983 Demonstrates That RFRA Does Not Permit Personal Capacity Claims

Plaintiffs' contentions distort RFRA's text beyond recognition. RFRA provides that, subject to certain exceptions, the "Government shall not substantially burden a person's exercise of religion," 42 U.S.C. § 2000bb-1(a), and that "[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(c).[11]

Plaintiffs try to bolster their arguments by analogizing to Section 1983, *see* Pl. Br. at 79, but important differences in the two statutes' wording actually show that Congress knows how to authorize individual capacity damages claims when it wants to, and that RFRA's wording is inconsistent with any such intention. Section 1983 states, "*Every person* who, under color of any statute . . . , subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, *shall be liable* to the party injured *in an action at law*, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983 (emphases added). Section 1983 thus explicitly contemplates an "action at law," distinguishes such an action from "suit[s] in equity" or "other . . . proceeding[s]," and provides that "[e]very person" (not "government") who commits a violation "shall be liable." *Id.* This language conveys unambiguously that Section 1983 renders state officials acting under color of law personally liable for money damages. *See, e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

RFRA could have, but did not, do the same. While RFRA uses the words "person" and "under color," it contains no reference to "liab[ility]," much less liability of a "person." Rather, RFRA permits only "appropriate relief" against "a" "government." RFRA uses the term "person acting under color of law" only as a component of the definition of "government," *i.e.*, the party against which "appropriate relief" can be imposed. Because "appropriate relief" does not include monetary damage awards, *see Sossamon*, 131 S. Ct. at 1660; *Johnson*, 2013 WL 103166, at *3, RFRA's reference to a "person acting under color of law" (in its context of authorizing non-monetary relief from substantial burdens on religious exercise) is best understood as permitting

[11] "[T]he 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).

injunctive or declaratory relief (in cases where the court has jurisdiction) to be directed to whatever governmental actor can best effectuate it.[12] The language also clarifies that, in some instances, ostensibly non-governmental actors may nevertheless fall within the definition of "government" and so trigger the application of the statute in the first place. In RFRA, moreover, unlike in Section 1983, the phrase "other person acting under color of law" is the last item on a list of government entities and "official[s]" deemed to fall within the definition of "government." Under traditional canons of statutory construction, the phrase must be read in concert with the preceding terms, providing further support for the conclusion that Congress intended to authorize suit only against a government entity, and did not intend to create a different (monetary) remedy solely for individuals. *See* PC Br. at 24-25; *Wojchowski v. Daines*, 498 F.3d 99, 108 n.8 (2d Cir. 2007).

Plaintiffs ignore these critical differences in the two statutes' language, and erroneously focus on Congress's use of the words "person" and "under color" in isolation, without regard to context or the other words that surround them. *See* Pl. Br. at 79-80. Such a reading should be rejected because it disregards the context and evident purpose of the text. *See Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (court "'will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law'" (citation omitted)).

Moreover, even divorced from their context, the words Plaintiffs emphasize do not bear the weight that Plaintiffs urge. *Stafford* rejected an argument similar to Plaintiffs' here, holding that the phrase "under color of legal authority" does not, by itself, give rise to individual capacity

[12] Although RFRA's provision for "appropriate relief" generally permits equitable relief against federal officials acting in their official capacities, *see Johnson*, 2013 WL 103166, at *3, here Plaintiffs' claims for equitable relief are barred by 49 U.S.C. § 46110, *see* OC Br. at Pt. I, and Plaintiffs Tanvir and Shinwari lack standing to seek such relief, see OC Br. at Pt. II. In this case, therefore, RFRA does not create a cause of action for equitable relief against the defendants in their official capacities. *See* Pl. Br. at 78 n.41 (citing PC Br. at 22 n.14).

claims for money damages. In rejecting the contention that a mandamus and venue statute[13] permits individual capacity money damages actions against federal officials anywhere in the country, *see* 444 U.S. at 544-45, the Court held that the phrase "under color of legal authority" in that statute "was specifically intended only to alleviate the hardships caused by a relatively narrow but nagging problem" of being able to sue federal officials only in Washington, D.C. *Id.* at 539. Likewise, RFRA's reference to an "official (or other person acting under color of law)," as part of the definition of "government," can best, and only, be understood to serve the purposes of ensuring that RFRA covers all government acts, and that courts can craft and impose effective *non-monetary* relief.

Plaintiffs attempt to minimize *Stafford*, seemingly arguing that because the Mandamus and Venue Act is "*necessarily* . . . equitable" and reaches only "official capacity action," Pl. Br. at 81, the Court could not have determined that money damages were available in any event. But Plaintiffs' reading ignores the Court's analysis. The Court found that the statute at issue did not provide for damages claims against individuals both because the statute was equitable in nature, *see* 444 U.S. at 536 ("[l]ooking . . . to 'the whole statute,' . . . [which] is explicitly limited to 'action[s] in the nature of mandamus'"), and based on the nature of the phrase "under color of legal authority," *see id.* n.6 (the "use of the language 'under color of legal authority' is . . . an effort to circumvent the sovereign immunity doctrine"). Accordingly, the mere fact that RFRA contains the phrase "under color of law" does not authorize money damages against individual federal employees.[14]

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[13] That statute provides, in relevant part, "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* . . . may . . . be brought in any judicial district . . . ." 28 U.S.C. § 1391(e)(1) (emphasis added).

[14] The cases cited by Plaintiffs addressing the "under color of law" language, *see* Pl. Br. at 79, are inapposite because they evaluated the phrase solely for the purpose of determining whether a private actor acted "under color

Nor does Congress's use of the term "person" in RFRA provide any logical reason to conclude that federal employees can be sued in both their official and individual capacities. Plaintiffs cite only one case in support of their position, *Hafer v. Melo*, 502 U.S. 21 (1991), but that case actually supports the Agents' reading. *Hafer* distinguished "personal capacity" suits from suits against a "person" in his or her official capacity, and noted that individuals sued in their official capacity are also "persons" under Section 1983. *Id.* (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10 (1989)). *Hafer* thus makes clear that RFRA's use of the term "person" does not reflect an intention to impose personal monetary liability, particularly where RFRA (unlike Section 1983) does not refer to the liability of such persons.

B. "Appropriate Relief Against A Government" Does Not Mean Money Damages Against Individual Federal Employees

Plaintiffs' argument that "appropriate relief" must encompass money damages "because of the general remedies principle that damages are the 'ordinary remedy,'" Pl. Br. at 82, misses the mark. Regardless of any "general" principle, Plaintiffs ignore that courts in this Circuit (as well as the D.C. and Ninth Circuits) have specifically held that money damages are not available under RFRA. *See Johnson*, 2013 WL 103166, at *3 ("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.") (citing *Gilmore-Bey v. Coughlin*, 929 F. Supp. 146, 149-51 (S.D.N.Y. 1996)); *Commack Self–Serv. Kosher Meats Inc. v. New York*, 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

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of law" such that the private actor could be deemed the "government" under RFRA. *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834-36 (9th Cir. 1999); *Roman Catholic Diocese of Rockville Ctr. v. Village of Old Westbury*, No. 09 Civ. 5195 (DRH)(ETB), 2011 WL 666252, at *10 (Bankr. E.D.N.Y. Feb. 14, 2011); *In re Archdiocese of Milwaukee*, 496 B.R. 905, 919 (E.D. Wis. 2013). None of those cases considered whether RFRA's use of "under color of law" indicates that a plaintiff can seek money damages against an individual federal employee.

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) (same).

Plaintiffs put misplaced reliance on *Franklin v. Gwinnett County Public School*, 503 U.S. 60, 75-76 (1992), and *Barnes v. Gorman*, 536 U.S. 181 (2002), for the proposition that the phrase "appropriate relief against a government" necessarily encompasses damages. In both cases, the Supreme Court evaluated "what remedies are available against municipal entities under the *implied* right of action to enforce Title IX of the Education Amendments of 1972, § 202 of the Americans with Disabilities Act of 1990, and § 504 of the Rehabilitation Act of 1973." *Sossamon*, 131 S. Ct. at 1660. As the Supreme Court explained in *Sossamon*, the fact that the cause of action was implied left "no statutory text to interpret," and so "the Court [in *Franklin* and *Barnes*] 'presume[d] the availability of all appropriate remedies unless Congress ha[d] expressly indicated otherwise[.]" *Sossamon* held that such a "presumption . . . is irrelevant to construing the scope of an express waiver of sovereign immunity." 131 S. Ct. at 1660. The Court further noted that "[t]he question here is not whether Congress has given clear direction that it intends to *exclude* a damages remedy, . . . but whether Congress has given clear direction that it intends to *include* a damages remedy," and found that Congress did *not* explicitly provide for money damages under RLUIPA. *Id.* (citations omitted). Accordingly, the courts in this Circuit, as well as each court to have examined the issue in the wake of *Sossamon*, have uniformly held that damages against the government are not available under RFRA. *See Johnson*, 2013 WL 103166, at *3; *see also Sossamon*, 131 S. Ct. at 1660 n.6 ("the same phrase in RFRA had been interpreted not to include damages relief against the Federal Government" (citing *Tinsley v. Pittari*, 952 F. Supp. 384, 389 (N.D. Tex. 1996); *Commack Self–Service Kosher Meats*, 954 F. Supp. at 69)).

Plaintiffs also fail to address the anomalous repercussions that would flow from adopting their interpretation of "appropriate relief against a government." Because RFRA does not authorize damages claims against the government, construing the phrase "appropriate relief against a government" to nevertheless allow damages claims solely against individuals would improperly vary the meaning of the statute depending on its application, making damages available only against one subset of the types of entities and people included in the definition of "government." Such a bizarre outcome would be untethered to the statute's text or purposes, and also violative of the maxim that "the 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).

Plaintiffs' argument would also treat nearly identical language in RFRA and RLUIPA differently.[15] There is no merit to Plaintiffs' argument that RFRA should be interpreted differently from RLUIPA simply because Congress enacted RLUIPA pursuant to the Spending Clause and RFRA pursuant to the Commerce Clause. Pl. Br. at 86-87. The two statutes share the same language and purpose, and neither waives sovereign immunity from money damages. *Sossamon*, 131 S. Ct. at 1663; *Johnson*, 2013 WL 103166, at *3.[16] The identical phrase "appropriate relief against a government" should therefore be given the same interpretation in both statutes, just as the Supreme Court and other courts have held that other identical language in the two statutes must be construed the same way. *See, e.g.*, *Burwell v. Hobby Lobby Stores*,

[15] Indeed, although Plaintiffs argue that cases interpreting RLUIPA are irrelevant to a RFRA analysis, Plaintiffs nevertheless rely on such cases. *See* Pl. Br. at 79 (citing *Roman Catholic Diocese of Rockville Ctr.*, 2011 WL 666252, at *10 (analyzing the phrase "under color" of law as used in RLUIPA)).

[16] RLUIPA mirrors RFRA in all salient respects. Like RFRA, RLUIPA allows individuals to "obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). And like RFRA, the term "government" includes, *inter alia*, "a State, county, municipality, or other governmental entity created under the authority of a State," "any branch, department, agency, instrumentality, or official" thereof, and "any other person acting under color of State law[.]" 42 U.S.C. § 2000cc-5(4)(A).

134 S. Ct. 2751, 2761, 2762 n.5 (2014) (phrase "exercise of religion" in RFRA "must be given the same broad meaning that applies under RLUIPA"); *Oklevueha Native Am. Church of Haw.*, 676 F.3d at 841 (noting that *Sossamon*'s "interpretation of 'appropriate relief' is also applicable to actions against federal defendants under RFRA," and interpreting RFRA's "authorization of 'appropriate relief'" "[j]ust like the identical language in RLUIPA").

Plaintiffs also fail to address the legislative history making clear that Congress did not intend RFRA to expand the scope of relief available prior to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). *See* S. Rep. No. 103-111, 12, 1993 U.S.C.C.A.N. 1892, 1902 (1993) ("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 . . . test prior to *Smith*.").[17] While Plaintiffs complain that the Agents are relying on "cherry-picked" legislative history, Pl. Br. at 81, they proffer no contrary legislative history. And, as remains true today, when RFRA was enacted, 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; *see also supra* Point I. This further demonstrates that Congress did not authorize individual capacity monetary claims when it permitted "appropriate relief against a government" for improper burdens on religious exercise.

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

Plaintiffs rely heavily but unpersuasively on a decision of the Seventh Circuit, *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996), in which the defendants did not even contest whether

[17] *Burwell v. Hobby Lobby*, 134 S. Ct. at 2767, does not change this analysis, as that case addressed only the class of claimants who may seek relief under RFRA, not the scope of "appropriate relief" available under the statute.

RFRA provided for individual capacity claims. Because *Mack* has been reversed on other grounds,[18] it is of questionable if any precedential authority even in the Seventh Circuit; moreover, it did not squarely consider the questions at issue here. As *Mack* observed, the defendant state prison officials in that case did not assert qualified immunity and

> [did] not question the propriety of damages as a remedy for violations of the Act, even though the Religious Freedom Restoration Act says nothing about remedies except that a person whose rights under the Act are violated "may assert that violation as a claim or defense in a judicial proceeding and obtain *appropriate* relief against a government."

Id. at 1177 (quoting 42 U.S.C. § 2000bb–1(c)); PC Br. at 31-32. Although the *Mack* court noted that "[p]revious decisions ha[d] assumed rather than discussed the availability of damages under [RFRA]," and that "there is no indication [in RFRA] of congressional intent to abrogate the states' Eleventh Amendment immunity from suit," the court nevertheless held that because RFRA defines "'government' to include government employees acting under color of state law," the plaintiff "was entitled to sue the prison officials rather than the State of Illinois and does not face the bar of the Eleventh Amendment." *Id.* Thus, while focusing on the Eleventh Amendment issue presented, *Mack* did not explicitly consider whether the phrase "appropriate relief" includes money damages. Indeed, the court expressed skepticism that "appropriate relief against a government" included money damages against individuals. *See id.*

Nor should the Court follow the two district court decisions Plaintiffs cite, *Elmagrabhy v. Ashcroft*, No. 04 Civ. 1809 (JG)(SMG), 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), *dismissed on other grounds sub nom. Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), and *Jama v. INS*, 343 F. Supp. 2d 338, 376 (D.N.J. 2004). Both decisions predate the important decisions in *Sossamon* and *Washington*, in which the Supreme Court and the Second Circuit, respectively, held that

[18] *See* 522 U.S. 801 (2007) (reversing decision after the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), held RFRA unconstitutional as applied to the states).

RLUIPA's almost identical language does not allow damages suits against state governments or state officials in their personal capacities. *See Sossamon*, 131 S. Ct. at 1660; *Washington*, 731 F.3d at 145. Moreover, in *Elmagrabhy*, the court's entire discussion of RFRA appears in one footnote, which stated conclusorily that because the "term 'government' includes "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," RFRA "reaches officials acting in their individual capacities." 2005 WL 2375202, at *30 n.27. For that proposition, the district court cited a single equivocal authority, *Solomon v. Chin*, No. 96 Civ. 2619 (DC), 1997 WL 160643, at *4 (S.D.N.Y. April 7, 1997). But *Solomon* did not even evaluate whether RFRA provides for individual capacity claims; indeed, the plaintiff in that case did not assert a RFRA claim and the parties did not address it. Instead, *Solomon sua sponte* conjectured that the plaintiff may "have a viable claim with respect to [his allegations] under the RFRA," and "deem[ed] the complaint to be amended to assert the RFRA as an alternative theory, subject to further briefing at the appropriate time," which never happened because RFRA was later declared unconstitutional as against the states. 1997 WL 160643, at *4; 1998 WL 473953, at *3 (S.D.N.Y. Aug. 10, 1998).

In *Jama*, meanwhile, the district court enumerated three reasons for its determination that RFRA provides for individual capacity claims: (1) Congress did not explicitly preclude damages claims; (2) Congress intended to "re-invigorate protection of free exercise rights after the Supreme Court['s] [decision] in *Smith*"; and (3) other courts, while not having "explicitly theorized *why* money damages are available under RFRA, or held that they are, have considered (thus assuming the availability of) individual capacity claims for damages under the statute." *Jama*, 343 F. Supp. 2d at 374-75. The Individual Defendants' opening brief explains why each of these reasons is not persuasive, *see* PC Br. at 33-35, and Plaintiffs' responses fall short. First,

contrary to Plaintiffs' suggestion, *see* Pl. Br. at 86, *Jama* did, in fact, "infer" that damages are available under RFRA, as the court itself acknowledged that the statute does not explicitly allow for money damages. *See* 343 F. Supp. 2d at 274. The court thus violated the well-established rule that implied rights of action are "disfavored." *Iqbal*, 556 U.S. at 675. Second, Plaintiffs ignore the *Jama* court's egregious failure to recognize – much less be swayed by – the fact that free exercise jurisprudence prior to *Smith* did not recognize any right to sue individual federal employees for money damages. And third, Plaintiffs cannot escape that *Jama*, as one of its three principal reasons, relied on case law that did not analyze the relevant legal issue. Accordingly, these decisions – none of which is binding – should not be followed.

III. PLAINTIFFS FAIL TO STATE A FIRST AMENDMENT OR RFRA CLAIM AGAINST THE AGENTS

A. Plaintiffs Fail to Satisfy Well-Established Pleading Standards

1. Plaintiffs Must Plausibly Allege Each Agent's Personal Involvement in a Constitutional or Statutory Violation

Implicitly acknowledging that they have failed to allege that each of the twenty-five Individual Agents personally violated Plaintiffs' First Amendment or statutory rights, Plaintiffs resort to the plainly erroneous argument that they do not need to do so, and can instead proceed based on vague and conclusory allegations that the Agents somehow engaged in "collective action" to retaliate against Plaintiffs. Pl. Br. at 57. But the Supreme Court has been crystal clear on this point: "Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676-77 ("[E]ach Government official . . . is only liable for his or her own misconduct."); *see also Raspardo v. Carlone*, 770 F.3d 97, 115 (2d Cir. 2014) ("If a defendant has not *personally* violated a plaintiff's constitutional rights,

the plaintiff cannot succeed on a § 1983 action against the defendant.")[19]; *Arar*, 585 F.3d at 569 (*Bivens* plaintiff must "allege facts indicating that the defendants were personally involved in the claimed constitutional violation"). A plaintiff asserting a RFRA claim likewise must plead that each defendant personally participated in a violation of the statute. *See Kwai Fun Wong v. U.S. I.N.S.*, 373 F.3d 952, 977 (9th Cir. 2004) (RFRA "is governed by the same legal standard" as constitutional claims).

To state a claim for First Amendment retaliation, moreover, a plaintiff must plead that the defendant both had a "discriminatory purpose," *Iqbal*, 556 U.S. at 676, and was a "direct participant" in the constitutional violation, *Terebesi v. Torreso*, 764 F.3d 217, 234 (2d Cir. 2014). While Plaintiffs are correct that a "direct participant" includes "a person who authorizes, orders, or helps others to do the unlawful act," Pl. Br. at 54 (citing *Terebesi*), Plaintiffs must still plausibly allege – *i.e.*, they must allege facts supporting a plausible inference – that each Agent was personally and individually involved in such "authoriz[ing], order[ing], or help[ing]." *See Terebesi*, 764 F.3d at 234-35 (supervisory defendants were "direct participant[s]" in planning allegedly unconstitutional search); *Provost v. City of Newburgh*, 262 F.3d 146, 155-56 (2d Cir. 2001) ("'direct participation' . . . requires intentional participation in the conduct constituting a violation of the victim's rights by one who knew of the facts rendering it illegal"; affirming judgment for supervisory defendant who was not "aware of the facts that made [plaintiff's] arrest unconstitutional"); *compare Gronowski v. Spencer*, 424 F.3d 285, 292-94 (2d Cir. 2005) (finding sufficient evidence that mayor was personally involved in retaliating against plaintiff).

Plaintiffs argue, sweepingly and seemingly without any limitation, that an individual can be liable for "set[ting] in motion" a constitutional violation, Pl. Br. at 54, but they rely on three

[19] Courts interpret the pleading requirements for Section 1983 and *Bivens* claims similarly. *See Tavarez v. Reno*, 54 F.3d 109, 110 (2d Cir. 1995); *Chin v. Bowen*, 833 F.2d 21, 23 (2d Cir. 1987).

inapposite cases, at least one of which is no longer good law. In *Veeder v. Nutting*, No. 10-CV-665 MAD/CFH, 2013 WL 1337752 (N.D.N.Y. Mar. 29, 2013) – which was reversed by the Second Circuit following Plaintiffs' submission in this case, *see* No. 13-1739-CV, 2014 WL 7011945 (2d Cir. Dec. 15, 2014) – the district court found that the defendant did far more than merely "set in motion" the allegedly illegal search: the defendant arrived at the crime scene, informed witnesses he was the lead investigator, interviewed witnesses, and personally sought a witness's consent to a search. *See* 2013 WL 1337752, at *2-5. And the unpublished district court decision *Harrison v. Machotosh*, No. CV-91-2417, 1992 WL 135028 (E.D.N.Y. May 28, 1992), was issued fourteen years before *Iqbal*, which may have "heightened the requirements for showing a supervisor's personal involvement with respect to certain constitutional violations[.]" *Grullon v. City of New Haven*, 720 F.3d 133, 139 (2d Cir. 2013). Moreover, the *Harrison* court's "knew or should have known" standard is inapplicable to a First Amendment retaliation claim, because such a claim requires a plaintiff to do more than allege negligence. *See Iqbal*, 556 U.S. at 676 (requiring "discriminatory purpose"). The third and last case on which Plaintiffs' rely for this point, *Morrison v. Lefevre*, 592 F. Supp. 1052, 1077 (S.D.N.Y. 1984), is similarly unhelpful to Plaintiffs, because (a) it was also issued before *Iqbal*; (b) the court examined a due process claim, which does not require intent; and (c) the court held that while defendants who purposefully "creat[ed] and use[d] false evidence" could be held liable for plaintiff's later prosecution, other defendants whose involvement was "tangential," "distant" and "indifferent" could not.

2. Plaintiffs Fail to Plausibly Allege the "Direct Participation" and "Discriminatory Purpose" of Each Individual Agent, as Required to State a First Amendment Claim

Plaintiffs fail to plausibly allege that *each* of the Individual Agent Defendants "intentional[ly] participat[ed] in the conduct constituting a violation of the victim's rights," "knew of the facts rendering it illegal," and "acted with discriminatory purpose." *Provost*, 262 F.3d at 155; *Iqbal*, 556 U.S. at 676. Instead, Tanvir, Algibhah and Shinwari make identical, conclusory allegations upon information and belief that each Plaintiff was placed on the No Fly List by one or more Agents with whom he interacted (or, in Shinwari's case, by unspecified agents) solely because he refused to become an informant and refused to speak further with the Agents. AC ¶¶ 90 (Tanvir), 124 (Algibhah), 159 (Shinwari). All Plaintiffs further allege, again conclusorily and upon information and belief, that, allegedly knowing that Plaintiffs had been wrongfully placed on the No Fly List, the Agents kept Plaintiffs on the list in retaliation for their alleged decisions not to become informants. AC ¶¶ 96 (Tanvir), 135 (Algibhah), 166 (Shinwari), 195 (Sajjad). These bare allegations are insufficient because they "do not permit the court to infer more than the mere possibility of misconduct . . . ." *Iqbal*, 556 U.S. at 679.

As explained in the Agents' opening brief, *see* PC Br. at 40-51 & App., Plaintiffs' First Amendment claims fail against the following Agents for several reasons: (1) Tanvir, Shinwari and Sajjad do not allege that certain defendants (John LNU; Steven LNU; Agents Garcia, Harley, Grossoehmig, Dun, Langenberg or Gale; or John Does 9-10 or 12) ever asked Plaintiffs to serve as informants, or were present when others asked; (2) Tanvir and Shinwari were able to fly after the conclusion of their interactions with FNU Tanzin, John Does 1-3, Steven LNU, Agent Harley, and Agent Grossoehmig; (3) Tanvir, Shinwari and Sajjad were denied boarding before they ever interacted with many of the defendants (Steven LNU; Michael LNU; Agents Harley,

Grossoehmig, Dun, Langenberg, Rutkowski and Gale; and John Does 6 and 9-13); and (4) certain Agents interacted only briefly with Plaintiffs or only with Plaintiffs' counsel. These pleading failures defeat any plausible inference that each of the twenty-five Agents "intentional[ly] participat[ed]" in the allegedly retaliatory watchlist placement, "knew of the facts rendering it illegal," and "acted with discriminatory purpose." *Provost*, 262 F.3d at 155; *Iqbal*, 556 U.S. at 676.

Plaintiffs miss the point in arguing that "[t]he absence of an explicit request" by some defendants to become an informant does not preclude an inference that "questioning of Plaintiffs was intended to recruit them," Pl. Br. at 64. The crux of Plaintiffs' claim is that the Agents asked Plaintiffs to serve as informants, and retaliated for Plaintiffs' refusals by placing or maintaining Plaintiffs on the No Fly List. *See* AC ¶¶ 201, 203. Plaintiffs' failure to allege that certain Agents ever asked them to serve as informants, or were present when others made such a request, defeats any possible inference that those Agents retaliated when Plaintiffs refused their non-existent requests.

Similarly unpersuasive is Plaintiffs' downplaying of their allegations that Tanvir, Shinwari and Sajjad were denied boarding even before they interacted with certain Agents,[20] or that Tanvir and Shinwari did fly following the conclusion of their interactions with other Agents.[21] *See* Pl. Br. at 63-64. The fact that Plaintiffs were denied boarding *before* interacting with certain Agents defeats any plausible inference that those Agents directly participated in placing Plaintiffs on the No Fly List for any reason, much less a retaliatory one. And the fact that Plaintiffs were able to fly *after* interactions with certain Agents likewise defeats any

[20] Those Agents are Steven LNU, Michael LNU and John LNU; Agents Garcia, Harley, Grossoehmig, Dun, Langenberg, Rutkowski and Gale; and John Does 6 and 9-13.

[21] Those Agents are FNU Tanzin, John Does 1-3, Steven LNU, Agent Harley, and Agent Grossoehmig.

plausible inference that those Agents had any personal role in placing Plaintiffs on the No Fly List. Plaintiffs' sweeping assertion that these Agents "'set in motion' a series of events" leading to constitutional violations, Pl. Br. at 57 n.27, besides being unsupported by individualized factual allegations and contradicted by alleged facts, also fails as premised on the discredited decision in *Veeder*, which is also inapplicable to First Amendment retaliation claims.

Plaintiffs fail to cure this deficiency by conclusorily asserting "a pattern and practice among FBI and other United States government Special Agents" to "unlawfully exploit[]" the No Fly List to retaliate against certain individuals. AC ¶ 10. Such allegations cannot support individual capacity constitutional claims. *See Reynolds v. Barrett*, 685 F.3d 193, 204-06 (2d Cir. 2012) (holding that the "pattern-or-practice framework," which demonstrates that a pattern of discrimination exists in the aggregate, is "ill-suited to the task of identifying which individual defendants engaged in purposeful discrimination" and cannot be imported into the § 1983 context); *Raspardo*, 770 F.3d at 115 ("each defendant is only liable under § 1983 when his own actions are independently sufficient to create a hostile work environment"). And, even setting these legal impediments aside, Plaintiffs' claims are insufficiently factual and specific to state a claim against any individual Agent for any "collective action" or undefined conspiracy. *See Iqbal*, 556 U.S. at 680-81 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *Ciambriello v. County of Nassau*, 292 F.3d 307, 324-25 (2d Cir. 2002) (dismissing vague and conclusory constitutional conspiracy claims).

Plaintiffs' allegations of "discriminatory motive" are similarly insufficient. Plaintiffs baldly assert that the Agents nominated them for inclusion on the No Fly List for the sole purpose of retaliation, Pl. Br. at 57-64, but their allegations regarding the Agents' intent are as conclusory and implausible as those *Iqbal* held were insufficient. *See* 556 U.S. at 680-82.

Plaintiffs allege that four separate sets of federal agents collectively placed or maintained each of the four Plaintiffs on the No Fly List for the sole purpose of retaliating against Plaintiffs for allegedly refusing to serve as informants. But Plaintiffs can make no more than conclusory allegations that any or all of the Agents were motivated solely (or even in part) by Plaintiffs' alleged refusals to cooperate. *See, e.g.,* AC ¶¶ 90, 96. As in *Iqbal*, such "bare assertions" "amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim" – namely, that federal agents retaliated against Plaintiffs by placing them on the No Fly List "'because of,' not merely 'in spite of,'" Plaintiffs' "exercise of [their] constitutionally protected rights." *Iqbal*, 556 U.S. at 681 (quoting *Twombly*, 550 U.S. at 555); AC ¶¶ 135, 166, 195.

Also just as in *Iqbal*, there is an "obvious alternative explanation" for the Agents' alleged actions. *Iqbal*, 556 U.S. at 682. Plaintiffs allege that: (1) each Plaintiff was questioned at various times by different Agents about their activities and associations, including in some cases questions about prior military or terrorist training or knowledge of terrorist training camps,[22] (2) during some of these encounters, each Plaintiff was asked but did not agree to serve as an informant for the FBI, and (3) at some point, either before or after these encounters, each Plaintiff attempted to fly and was denied boarding, allegedly because he was on the No Fly List.

[22] Tanvir alleges that certain Agents asked him about "terrorist training camps near the village where he was raised"; "whether he had any Taliban training"; "where he learned how to climb ropes"; and about "an old acquaintance whom the FBI agents believed had attempted to enter the United States illegally." AC ¶¶ 69, 75. Algibhah alleges that certain Agents asked him about "his friends, his acquaintances, other Muslim students who attended his college, and the names of Muslim friends with whom he worked at a hospital library"; about "his religious practices . . . his political beliefs, and the names of websites he visited"; and "specific information, such as whether he knew people from the region of Hadhramut in Yemen." *Id.* ¶¶ 120, 132. Shinwari alleges that certain Agents asked him "whether he had visited any training camps [in Afghanistan], where he had stayed during his trip, and whether he had traveled to Pakistan"; "information about the group of people with whom he had traveled, and the locations where he stayed during his trip to Afghanistan"; and about "videos of religious sermons that he had watched on the internet." *Id.* ¶¶ 148, 150, 163. Sajjad alleges that certain Agents asked him "whether he had any military training or ever sought to enlist for terrorism training"; about "his last trip to Pakistan in 2011, why he went and which cities he visited on that trip"; whether "he had watched bomb-making videos on YouTube"; and whether he had "signed up for or taken military training in Pakistan and whether he had ever used any guns." *Id*. ¶¶ 176, 179, 183, 184.

From these allegations, Plaintiffs ask the Court to infer that each Agent nominated them for inclusion on the No Fly List, and did so *solely* because of their alleged refusals to serve as informants. But even taking their limited non-conclusory, factual allegations as true, the Agents' alleged activities are entirely consistent with the "obvious alternative explanation" that the Agents' actions were undertaken in the conduct of legitimate law enforcement activities and not because of the "invidious discrimination [Plaintiffs] ask[] [this Court] to infer." *Iqbal*, 556 U.S. at 682.

Following the terrorist attacks of September 11, 2001, the President directed the Attorney General to "establish an organization to consolidate the Government's approach to terrorism," and directed the FBI and other agencies to "provide to [what would become the TSC] on an ongoing basis all" information "in their possession, custody, or control" about "individuals known or appropriately suspected to be or have been engaged in conduct constituting, in preparation for, in aid of, or related to terrorism." Homeland Security Presidential Directive ("HSPD")-6, dated September 16, 2003; *see also* Declaration of Rushmi Bhaskaran, dated Nov. 13, 2014 (Dkt. No. 74), Exh. H (Memorandum of Understanding). Even if one or more of the Agents nominated each Plaintiff for inclusion on the No Fly List, Plaintiffs have not alleged a factual, non-conclusory basis to infer that such nominations were not the result of legitimate law enforcement investigations. *See Iqbal*, 556 U.S. at 682. Plaintiffs' allegations fail to "'nudg[e]'" their claims "'across the line from conceivable to plausible.'" *Id.* at 683 (quoting *Twombly*, 550 U.S. at 570).

3. Plaintiffs Fail to State a RFRA Claim

Plaintiffs also fail to plausibly allege a RFRA claim against the Agents who allegedly interacted with Tanvir, Shinwari and Algibhah.[23] First, Plaintiffs make the astounding assertion that these Agents can be held *personally liable* under RFRA even if they had no knowledge or intent whatsoever that their actions would substantially burden Plaintiffs' religious exercise. Pl. Br. at 77-78 ("The Special Agents were on notice that substantially burdening Plaintiffs' religion, without their intent or knowledge, could violate these Plaintiffs' clearly-established statutory rights."). As a threshold matter, Plaintiffs' argument on this point underscores why RFRA does *not* permit individual capacity claims. In support of their assertion that they need not plead knowledge to state an individual capacity claim under RFRA, Plaintiffs rely on the Supreme Court's observation in *City of Boerne*, 521 U.S. at 535, that RFRA generally applies when "the exercise of religion has been burdened in an incidental way *by a law of general application*," without regard to the intent of the law or the government actors involved. But the very language quoted by Plaintiffs refers to "a law of general application," which is precisely the context that RFRA was passed to address. Pl. Br. at 76-77 (acknowledging that "Congress' intent in passing RFRA was to protect religious exercise against 'neutral, generally applicable' laws and practices"). Nothing in RFRA, or the Supreme Court's decision in *City of Boerne*, suggests that an individual could ever be subjected to personal monetary liability for his own actions, much less without any showing that the individual had any knowledge that he was violating RFRA; imposing such liability would be unjustified and unrelated to RFRA's goal of protecting against the burdensome application of any "neutral, generally applicable law or practice." Indeed, *City of Boerne* involved claims asserted against a government entity, and not

[23] Plaintiff Sajjad does not assert a RFRA claim against the Agents with whom he allegedly interacted: John Does 7-13 and Agents Rutkowski and Gale.

individuals sued in their personal capacities, and so did not examine RFRA for the extraordinary proposition Plaintiffs urge. *See* 521 U.S. at 511 (challenging "[a] decision by local zoning authorities to deny a church a building permit").

And, contrary to Plaintiffs' claim, Pl. Br. at 77 n.40, the court in *Valdez v. City of New York*, No. 11 Civ. 05194, 2013 WL 8642169, at *14 (S.D.N.Y. Sept. 3, 2013), *report and recommendation accepted*, 2014 WL 2767201 (S.D.N.Y. June 17, 2014), plainly required the plaintiff inmate, in order to state a RLUIPA claim, to plausibly allege that the defendant had knowledge that his conduct could violate the statute. The court found that the plaintiff had met this burden by alleging specific statements by the defendant that drew an "overt connection" between the plaintiff's gang classification and the plaintiff's religious practice. Such statements, the court concluded, plausibly alleged "*that [the defendant] 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." 2013 WL 8642169, at *14 (emphasis added)[24]; *cf. also Graham v. Mahmood*, No. 05 Civ. 10071(NRB), 2008 WL 1849167, at *10 (S.D.N.Y. Apr. 22, 2008) (imposing and deeming satisfied a knowledge element in RLUIPA claim against an individual prison guard defendant, but dismissing for lack of a substantial burden). Of course, requiring Plaintiffs to plead the defendant's knowledge makes obvious sense, for it would be patently unfair to hold an individual defendant personally liable for substantially burdening religious exercise in the absence of plausible allegations that the defendant knew that his actions would impose such a burden.

[24] Contrary to Plaintiffs' argument, the court did not make this ruling in the course of a "causal nexus" inquiry. *See* Pl. Br. at 77 n.40. Rather, the court first held that the plaintiff had adequately alleged that the defendant imposed a substantial religious burden (in part because the plaintiff plausibly pled the defendant's knowledge), and *then* rejected the defendant's argument that there was no causal nexus between the defendant's actions and the plaintiff's alleged harm. *See* 2013 WL 8642169, at *14-15.

Here, in stark contrast to *Valdez*, Plaintiffs have alleged no facts supporting an inference that an "overt connection" was ever drawn – by the Agents or by Plaintiffs – between the alleged requests that Plaintiffs serve as informants for the FBI and their exercise of religion. Indeed, there is no allegation in the amended complaint that Tanvir, Shinwari or Algibhah ever said anything that would have alerted any of the Agents with whom they interacted that serving as an informant would violate their religious beliefs or otherwise burden their practice of religion. Plaintiffs' new argument that there is "a reasonable inference that [the] Special Agent Defendants knew that many Muslims have sincerely held religious objections to informing on their communities writ large," is pure speculation,[25] and thus insufficient to avoid dismissal. *See Iqbal*, 556 U.S. at 676.

Plaintiffs' RFRA claims against John LNU, Steven LNU, and Agents Garcia, Harley, Grossoehmig, Dun, and Langenberg, suffer from an additional pleading defect: they fail to allege that these Agents were personally involved in the alleged RFRA violation. Plaintiffs contend that RFRA was violated when they were allegedly given an "impermissible choice" between serving as informants or adhering to their beliefs, AC ¶¶ 210-11, but Plaintiffs do not allege that these Agents asked, or were present when anyone asked, Plaintiffs to serve as informants. Plaintiffs therefore have failed to plead facts supporting a plausible inference that these Agents personally participated in substantially burdening Plaintiffs' religious exercise.

B. TSC's Independent Decisions Regarding the Composition of the No Fly List Break Any Chain of Causation

Plaintiffs also have not overcome the Agents' showing that TSC's independent determination of the composition of the No Fly List is a superseding cause that breaks any "clear

[25] It is also nowhere pled in the amended complaint, and thus cannot be considered in resolving the instant motion to dismiss. *See, e.g., Wright v. Ernst & Young LLP,* 152 F.3d 169, 178 (2d Cir. 1998).

causal chain" between the Agents' alleged actions and Plaintiffs' alleged placement on the No Fly List. *Friedl v. City of New York*, 210 F.3d 79, 87 (2d Cir. 2000); PC Br. at 40-43. While *Bivens* defendants may be held liable for "the 'natural consequences' of their actions," *Higazy v. Templeton*, 505 F.3d 161, 175, 177 (2d Cir. 2007), a superseding cause, such as an act of independent judgment, can "break[] the legal chain of proximate cause." *Zahrey v. Coffey*, 221 F.3d 342, 351 n.7 (2d Cir. 2000).

Here, according to the amended complaint, while FBI agents submit names to the TSC, it is TSC personnel – and not the Agents – who review the nominations and decide whom to include or maintain on the list. *See* AC ¶ 19-20, 41, 58.[26] Plaintiffs' principal argument seems to be that TSC nevertheless is not an independent decision-maker, and that the Agents "each had a direct personal role" in allegedly placing or maintaining Plaintiffs on the No Fly List. *See* Pl. Br. at 66, 68. But whatever the Agents' role (if any), Plaintiffs' own allegations acknowledge TSC's independent decision-making role, and they cannot amend their pleading (which they elected not to amend, *see* Dkt. No. 53) by making contrary statements in their brief. *See Wright,* 152 F.3d at 178.

Plaintiffs question whether TSC is an independent decision-maker based on an alleged low percentage of TSC rejections of nominations to the TSDB. Pl. Br. at 66 n.33. Plaintiffs improperly rely on matters outside the amended complaint in response to the Agents' motion under Fed. R. Civ. P. 12(b)(6). *See Danaher Corp. v. Travelers Indem. Co*., No. 10 Civ. 121(JPO), 2014 WL 1133472, at *6 n.5 (S.D.N.Y. Mar. 21, 2014) (declining to consider

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[26] In the context of the DHS TRIP process, TSA also reviews watchlist status in coordination with other appropriate federal agencies. *See* 49 C.F.R. §§ 1560.201-.207; *see also* Complaint, dated October 1, 2013 (Dkt. No. 1), ¶ 46 ("The TSA is responsible for implementing the results of the TRIP process."). Like TSC's initial watchlist placement decisions, DHS TRIP determinations regarding watchlist status are also the result of an independent evaluation of available relevant information, and not dictated by nominating agents.

documents plaintiff cited "to shore up its deficient pleading").[27] In any event, as Plaintiffs themselves acknowledge, AC ¶¶ 41-42, the No Fly List contains only a subset of the individuals selected for inclusion in the TSDB, and thus the acceptance rate to the TSDB sheds no light on the acceptance rate to the No Fly List. Moreover, Plaintiffs appear to rely on interrogatory responses in another case that were signed by the TSC Deputy Director, *see Mohamed v. Holder*, 11-50 (E.D.V.A.), Docket No. 91-3, but mischaracterize the data, *see id.* Docket No. 163-1, at 7-8. Of more fundamental legal importance, TSC's acceptance rate is irrelevant to whether TSC independently reviews nominations in a way that breaks the causal chain.[28] Thus, whether or not the Court permits Plaintiffs' reference to material outside the pleadings, Plaintiffs cannot overcome the reality reflected in their own pleading: TSC makes an independent decision on watchlisting nominations that breaks the chain of causation that would be required to hold a nominating agent liable.

Plaintiffs rely on cases that turned on factual considerations not present here, and that therefore do not rescue Plaintiffs' claims. In one, the plaintiff suffered harm "immediately upon" the defendant's action and not the intervening decision-maker's action. *See Warner v. Orange County Dep't of Probation*, 115 F.3d 1068 (2d Cir. 1997) (harm after defendant probation officer directed plaintiff to comply with allegedly discriminatory probation condition); *contrast Taylor v. Brentwood Union Free Sch. Dist.*, 143 F.3d 679, 688 (2d Cir. 1998) (distinguishing *Warner*; plaintiff teacher suffered harm "immediately upon" hearing panel's suspension decision, not from principal's having referred teacher to panel). In another case Plaintiffs invoke, the

[27] The Second Circuit has explicitly rejected the notion that a court in deciding a Rule 12(b)(6) motion can consider any document of which a plaintiff "had notice." Pl. Br. at 4 n.5; *see Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153-55 (2d Cir. 2002).

[28] Indeed, to the extent the Court considers Plaintiffs' beyond-the-pleadings contention, the TSC Deputy Director's declaration, to which the interrogatory responses refer, explains that the TSC review process operates as Plaintiffs describe it in their amended complaint: TSC conducts an independent review of both agency nominations and modifications. *See id.*, Declaration of G. Clayton Grigg, dated May 27, 2014, Docket No. 102-2.

defendant played an active role in the allegedly independent decision-maker's action. *See Ross v. Litchenfeld*, 755 F. Supp. 2d 467, 476 (S.D.N.Y. 2010) (defendant school supervisor could be liable for board's suspension of a school employee, because he "took a much more active role in the events leading to [plaintiff's] termination [than the principal in *Taylor*]," by, *inter alia*, recommending termination, discussing case with Board, and correcting Board's procedural mistake), *rev'd on other grounds sub nom. Ross v. Breslin*, 693 F.3d 300 (2d Cir. 2012). Another case Plaintiffs cite is inapposite because the defendant there allegedly brought about the complained-of decision by providing incomplete information to the decision-maker. *See Myers v. County of Orange*, 157 F.3d 66, 74 (2d Cir. 1998) (prosecutor's decision to pursue charges did not break causal chain because city's policy of accepting only the complainant's version of the crime undermined independence of prosecutor's decision).[29]

Here, by contrast, Plaintiffs allege that they suffered harm "immediately upon" their alleged placement on the No Fly List, not "immediately upon" any Agent's alleged nomination of Plaintiffs to the TSC. *See* AC ¶¶ 116-17, 143-44, 170-71, 196. Thus, like the principal's action in *Taylor*, the Agents' actions here did not "immediately" cause Plaintiffs' alleged harm; rather, TSC's superseding act of independent judgment broke the causal chain. *See Taylor*, 143 F.3d at 688. Moreover, unlike plaintiffs in *Ross* and *Myers*, Plaintiffs make no allegations whatsoever that the Agents interacted with TSC personnel, or tainted TSC's decision-making by providing incomplete or inaccurate information, or by any other means.

[29] *Malley v. Briggs*, 475 U.S. 335 (1986), is also inapposite. There, the Supreme Court merely declined to recognize absolute immunity for officers who presented a judge with a complaint and supporting affidavit that allegedly failed to establish probable cause. *See* 475 U.S at 339-46; *see also id.* at 345 n.7 (noting that "[p]etitioner has not pressed the argument" regarding causation). Furthermore, the petitioner raised a Fourth Amendment claim, which, unlike a First Amendment Claim, does not contain an intent requirement.

IV. THE AGENTS ARE ENTITLED TO QUALIFIED IMMUNITY

A qualified immunity defense can be "successfully asserted in a Rule 12(b)(6) motion" where, as here, "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). Plaintiffs contend that the Court should nevertheless defer resolving the Agents' qualified immunity motion. *See* Pl. Br. at 53. But the Supreme Court in *Iqbal* rejected an identical argument, recognizing that qualified immunity should be decided at the "earliest possible" opportunity, and that even limited discovery in the counterterrorism area presents serious concerns and distracts officials from their critical work. *See* 556 U.S. at 685; *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001). The law is clear that the claims against the Agents should be dismissed as early as possible, and it is possible now.

A. The Agents Are Immune from Plaintiffs' First Amendment Claim

Because Plaintiffs have failed to "make out a violation of a constitutional right," *see supra* Point III, the Agents are entitled to qualified immunity under the first prong of the qualified immunity analysis. *Pearson v. Callahan*, 555 U.S. 223, 227-43 (2009).

The Agents are also entitled to qualified immunity under the second prong of the analysis, because the rights at issue were not clearly established. *See id.* at 232. Plaintiffs ask this Court to characterize the rights at issue too broadly – as the general rights to free speech, to "be free from retaliation," and to "freely practice religion without fear of retaliation." Pl. Br. at 70-71. But, were the Court to do so, "the concept of qualified immunity would become meaningless." *Zahrey*, 221 F.3d at 348-49; *see also Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (if the right is defined too broadly, plaintiffs could "convert the rule of qualified

immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights").

"[D]etermining whether a right is 'clearly established'" "is not subject to mathematical precision." *Johnson v. Newburgh Enlarged School Dist.*, 239 F.3d 246, 250-51 (2d Cir. 2001). Just as "[c]haracterizing the right too narrowly to the facts of the case might permit government actors to escape personal liability, . . . doing so too broadly risks permitting unwarranted imposition of monetary liability." *Id.* at 251. The Second Circuit thus provides "[t]wo principles [to] guide [the] analysis": first, "a court must consider 'not what a lawyer would learn or intuit from researching case law, but what a reasonable person in [the government actor's] position should know' about the appropriateness of his conduct under federal law." *Id.* (citation omitted). "Second, the absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established." *Id.* (citation omitted). Yet, even where a right is "clearly established," if a reasonable official would not have understood that his or her conduct was within the scope of that right, the official is still entitled to qualified immunity. *See LaBounty v. Coughlin*, 137 F.3d 68, 73 (2d Cir. 1998). "[R]easonableness is judged against the backdrop of the law at the time of the conduct," and "this inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (citation omitted).

Here, Plaintiffs ask the Court to hold that "a reasonable person" in each Agent's position would have known that the following actions constituted retaliation for Plaintiffs' exercise of a First Amendment right: (a) conducting interviews of Plaintiffs (in which Plaintiffs may or may not have been asked to serve as informants); (b) submitting a name for possible inclusion on a watchlist (despite Plaintiffs' acknowledgment that the Agents have no authority to determine the

composition of the watchlist); and/or (c) failing to affirmatively recommend that Plaintiffs should be removed from the watchlist (when the TSC has already determined that the person belongs on the list). There is simply no precedent defining these rights such that any "reasonable official would understand that what he is doing" – allegedly interviewing individuals suspected of posing a terrorist threat, and recommending their inclusion on, or failing to recommend their removal from, a government watchlist, where another agency is responsible for deciding whether the individuals belong on the list – "violates that right." *LaBounty*, 137 F.3d at 73.

Plaintiffs' argument is also flawed because it disregards the specific factual allegations regarding each Agent's actions, and instead focuses only on the Agents' conclusorily alleged motivation. *See* Pl. Br. at 72 (arguing that "government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right" (citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 386 (6th Cir. 1999) (en banc))). But Plaintiffs misconstrue the nature of the qualified immunity defense. An Agent's purported motivation is irrelevant to whether the rights, as pled, were clearly established. In *Thaddeus-X*, for example, the Sixth Circuit did not examine whether the defendants were entitled to qualified immunity, *see id.* at 403 n.18, but rather examined what showing of constitutional violation was sufficient to withstand a motion for summary judgment, *see id.* at 386. In fact, *Thaddeus-X* explicitly acknowledged that "evidence of improper motive is irrelevant on the issue of qualified immunity[.]" *Id.* (quoting *Crawford-El v. Britton*, 523 U.S. 574, 589 (1998)). As a result, Plaintiffs' allegations regarding motive are relevant only to whether Plaintiffs have adequately pled a First Amendment retaliation claim (which they have not, *see supra* Point III.A) – not to whether the Agents are entitled to qualified immunity.

Plaintiffs also mischaracterize the nature and existence of the constitutional right to travel. The Agents do not dispute that the right to travel *as a general matter* may have been clearly established at the time of the events alleged in the amended complaint. *See* PC Br. at 55-56. What was not clearly established was the right to travel by air. Neither the Supreme Court nor the Second Circuit has recognized such a right; the district court decisions that have recognized such a right are from outside this Circuit, and most of those decisions were issued after the time of the events alleged here. *See id.* at 56 (collecting cases). In fact, the courts of appeals have consistently held that, in the context of interstate travel, the right to travel does not include a right to travel by a particular mode of transportation, and that a restriction on one mode of transportation does not amount to a constitutionally cognizable deprivation of that right. *See, e.g., Gilmore v. Gonzales*, 435 F.3d 1125, 1136 (9th Cir. 2006) (no "fundamental right to travel by airplane" despite mode's convenience). Thus, if the inability to board an airplane does not amount to a constitutional deprivation in the context of interstate travel – which, unlike international travel, is a fundamental right, *see Saenz v. Roe*, 526 U.S. 489, 498-99 (1999) – it should not be a constitutional deprivation in the less-protected context of international travel. At the very least, "officers of reasonable competence could disagree on the legality" of nominating to the No Fly List a person suspected of posing a terrorist threat. *Walczyk v. Rio*, 496 F.3d 139, 154 (2d Cir. 2007).

B. The Agents Are Immune from Plaintiffs' RFRA Claim

For the reasons discussed *supra* in Point III.A.3, Plaintiffs fail to state a claim under RFRA, thus entitling the Agents who interacted with Tanvir, Shinwari and Algibhah to qualified immunity. *See Pearson*, 555 U.S. at 232; PC Br. at 31 n.18 (citing cases applying qualified immunity doctrine to RFRA and RLUIPA claims against individuals).

Those Agents are also entitled to qualified immunity because it was not clearly established that Plaintiffs had any right under RFRA not to be asked to serve as government informants – the "substantial burden" that Plaintiffs allege here. AC ¶ 211. As discussed above, Plaintiffs seek to impose an impossibly high burden on federal officers, arguing that a federal official can be held personally liable for money damages for allegedly "substantially burdening" another's religious exercise – even where the official did not know, and had no reason to know, that he *was* in fact substantially burdening anyone's religious exercise. *See* Pl. Br. at 76-77. This strict liability proposal is entirely inconsistent with the doctrine of qualified immunity, in which government officials are shielded from liability where 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) (citation omitted). Because a reasonable officer in the Agents' position could have believed that asking Plaintiffs to serve as informants did not violate RFRA, the Agents are entitled to qualified immunity. *Walczyk*, 496 F.3d at 154.

V. TANVIR'S FIRST AMENDMENT CLAIMS AGAINST JOHN DOE 1 AND JOHN DOE 2/3 ARE TIME-BARRED

Plaintiffs' attempt to circumvent the statute of limitations by invoking the continuing violation doctrine fails, both because the Second Circuit has not applied the doctrine to *Bivens* claims, and because the doctrine is inapplicable to the circumstances of this case.

The continuing violation doctrine is an "exception to the normal knew-or-should-have-known accrual date of a discrimination claim," and applies "when 'there is evidence of an ongoing discriminatory policy or practice, such as use of discriminatory seniority lists or employment tests.'" *Harris v. City of New York*, 186 F.3d 243, 248 (2d Cir. 1999) (citation omitted). While the Second Circuit has applied this doctrine to an Eighth Amendment claim

under Section 1983, it has not addressed whether the doctrine applies to *Bivens* actions. *See Shomo v. City of New York,* 579 F.3d 176, 182 (2d Cir. 2009). In fact, "the continuing violation doctrine 'is heavily disfavored in the Second Circuit' and courts have been 'loath' to apply it absent a showing of 'compelling circumstances.'" *Trinidad v. New York City Dep't of Corr.*, 423 F. Supp. 2d 151, 165 n.11 (S.D.N.Y. 2006) (citations omitted); *see also Sanusi v. DHS*, No. 06 CV 2929 SJ JMA, 2014 WL 1310344, at *5 (E.D.N.Y. Mar. 31, 2014) ("district courts in this circuit generally disfavor the expansion of the doctrine").

While Plaintiffs contend that the "Second Circuit has *suggested* that the continuing violation doctrine may apply to *Bivens* actions," Pl. Br. at 89 (emphasis added) (citing *Pino v. Ryan*, 49 F.3d 51 (2d Cir. 1995)), *Pino* involved a Section 1983 claim, and did not consider the applicability of the continuing violation doctrine in the absence of allegations "indicating a continuous or ongoing" constitutional violation harming the plaintiff. 49 F.3d at542; *see also Barbaro v. U.S. ex rel. Federal Bureau of Prisons FCI Otisville,* 521 F. Supp. 2d 276, 281 n.4 (S.D.N.Y. 2007) (noting *Pino* "did not . . . address" continuing violation doctrine).

Even if this doctrine could apply to *Bivens* claims, however, it is entirely inapplicable here. First, the doctrine cannot be used to support claims against any individual by aggregating separate acts taken by separate defendants. *See Shomo*, 579 F.3d at 181-85 (in case involving Section 1983 municipal and individual liability, dismissing defendants who allegedly acted within scope of continuing violation but outside limitations period); *see also Crenshaw v. Syed*, No. 9:10–CV–0244 (GLS/GHL), 2011 WL 2975687, at *4 (N.D.N.Y. Mar. 8, 2011) (applying *Shomo*; act by "*someone*" within limitations period insufficient unless "*the defendant* committed a wrongful act within the statute of limitations period"); *Gonzalez v. Wright*, 665 F. Supp. 2d 334, 350 (S.D.N.Y. 2009) (same).

Second, the doctrine is intended to apply to a "specific ongoing" "polic[y] or practice[]," *Cornwell v. Robinson*, 23 F.3d 694, 704 (2d Cir. 1994), "such as use of discriminatory seniority lists or employment tests," *Harris*, 186 F.3d at 248, or a hostile work environment with pervasive instances of discrimination in a particular office, *see National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 120 (2002), and not to the "discrete incidents," *Cornwell*, 23 F.3d at 704, of retaliation that Plaintiffs' allege here: twenty-five different Agents, working in separate offices in separate parts of the country (and the world) and interacting with four separate, unrelated individuals. Thus, Plaintiffs' assertion of a timely First Amendment claim only as to some Agents (FNU Tanzin, John LNU and Agent Garcia) cannot resurrect the untimely First Amendment claims against other Agents (John Does 1[30] and 2/3). Tanvir's First Amendment claims against John Does 1 and 2/3 therefore should be dismissed as time-barred.

CONCLUSION

Plaintiffs' personal capacity claims against the Agents should be dismissed.[31]

Dated: New York, New York
January 22, 2015

Respectfully submitted,

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[30] Plaintiffs do not dispute that the amended complaint contains an error, and that John Doe 1 last interacted with Tanvir in February 2007. *See* Pl. Br. at 89 n.48. Thus, Tanvir's claim against John Doe 1 accrued in October 2010 and expired in October 2013, and Tanvir did not file this action against John Doe 1 until April 2014. *See* PC Br. at 67-68. Contrary to Plaintiffs' assertion, *see* Pl. Br. at 89 n.48, John Doe 1 does not claim that his retirement "start[ed] the running of the statute of limitations," but rather that he could not have engaged in any relevant conduct after his retirement in December 2007.

[31] Defendants Steven LNU and Michael LNU, Agents Harley, Grossoehmig, Dun and Langenberg, and John Does 6 and 12 reserve all arguments in support of their motion to dismiss Plaintiffs' claims against them for lack of personal jurisdiction, which motion was stayed by the Court's September 16, 2014, order pending the Court's disposition of the remaining motions to dismiss.