UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MUHAMMAD TANVIR *et al.*, Plaintiffs, v. FNU TANZIN *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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In their opposition, *see* ECF No. 133 ("Pl. Opp."), Plaintiffs fail to carry their burden of identifying any Supreme Court or controlling circuit precedent that clearly established that "attempting to recruit" a person as an informant to provide information about others in the same religious community, using the person's status on the No Fly List or any other incentive, constitutes a substantial burden on religious exercise in violation of RFRA. AC ¶ 215.[1] Indeed, *no* court has found a violation of RFRA under circumstances that are remotely similar to those alleged here. On that basis alone, the Agents are entitled to qualified immunity as a matter of law under Federal Rule of Civil Procedure 12(b)(6). The Agents' qualified immunity motion turns on a pure question of law, for which no discovery is necessary or appropriate. Additionally, because Shinwari fails to allege any basis for exercising personal jurisdiction over the Agents who allegedly interacted with him, those Agents are also entitled to dismissal under Rule 12(b)(2).

I. Defendants' Qualified Immunity Is Clear from the Amended Complaint

Contrary to Plaintiffs' contention, Pl. Opp. 13, no "fact[ual] development is necessary to assess the merits" of the Agents' qualified immunity defense because the facts alleged in the Amended Complaint do not make out a violation of clearly established law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009) ("Where the complaint is deficient under Rule 8, plaintiff is not entitled to discovery, cabined or otherwise."). Plaintiffs' assertion that the qualified immunity analysis is "impossible without discovery," Pl. Opp. 14, is incorrect. To the contrary, "because qualified immunity protects officials not merely from liability but from litigation, that issue *should* be resolved when possible on a motion to dismiss, before the commencement of discovery, to avoid subjecting public officials to time consuming and expensive discovery procedures." *Garcia v.*

[1] This reply uses the same terms defined in the Agents' opening memorandum of law, ECF No. 128 ("Df. Mem.").

Does, 779 F.3d 84, 97 (2d Cir. 2015) (citation and quotation marks omitted; emphasis added); *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866-69 (2017); *Wood v. Moss*, 572 U.S. 744, 764 (2014); *Ashcroft v. al-Kidd*, 563 U.S. 731, 743-44 (2011); *Iqbal*, 556 U.S. at 686; *Ganek v. Leibowitz*, 874 F.3d 73, 77 (2d Cir. 2017); *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 60 (2d Cir. 1999) (all reversing denials of motions to dismiss in whole or in part on qualified immunity grounds); Df. Mem. 16-19.[2] Indeed, the Second Circuit encouraged this Court to evaluate the Agents' qualified immunity on the pleadings in this very case, explicitly noting that "qualified immunity should be resolved at the earliest possible stage in the litigation" and that the defense can be "successfully asserted in a Rule 12(b)(6) motion." *Tanvir v. Tanzin*, 894 F.3d 449, 472 (2d Cir. 2018) (citations and quotation marks omitted).

Ignoring the Second Circuit's instruction, Plaintiffs instead rely on cases that are readily distinguishable.[3] Their assertion that discovery is "necessary to establish the identities of some of

[2] Plaintiffs' suggestion that "just 0.6% of cases" are dismissed at the motion to dismiss stage, Pl. Opp. 23 n.3 (citing Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L. J. 1 (2017)), is also incorrect. The author of the cited study found that of the cases in the small universe of dockets she reviewed (§ 1983 cases in just five judicial districts over a two-year period) in which the author believed a qualified immunity defense *could have been raised*, only 0.6% were dismissed at the pleading stage. 127 Yale L. J. at 2. But qualified immunity was *actually raised* at the pleading stage in less than 14% of those cases. *Id.* at 9, 48 & n.111 (citing Tables 2 and 3). And of the 154 cases the author reviewed where qualified immunity was raised in a motion to dismiss, the defense was denied in only about 30% of the cases; in the remaining cases, the motions were either granted in whole or in part on qualified immunity grounds or other grounds (more than 51%) or not ruled upon (almost 19%). *Id*. at 38 (Table 7).

[3] *See* Pl. Opp. 13 (citing *Walker v. Schult*, 717 F.3d 119, 126, 129-30 (2d Cir. 2013) (denying motion to dismiss on qualified immunity grounds where *pro se* prisoner alleged that, "for approximately twenty-eight months, he was confined in a cell with five other men, with inadequate space and ventilation, stifling heat in the summer and freezing cold in the winter, unsanitary conditions, . . . , insufficient cleaning supplies, a mattress too narrow for him to lie on flat, and noisy, crowded conditions that made sleep difficult and placed him at constant risk . . . from cellmates"); *King v. Simpson*, 189 F.3d 284, 288-89 (2d Cir. 1999) (deciding motion to dismiss on absolute immunity grounds and explicitly declining to decide whether defendants were entitled to qualified immunity); *Kaplan v. County of Orange*, 528 F. Supp. 3d 141, 166 (S.D.N.Y. 2021)

the Defendants," Pl. Opp. 14, highlights how far Plaintiffs are reaching to avoid dismissal. The Agents whose alleged conduct is described in the Amended Complaint have all been identified and served through their counsel. ECF No. 30 ¶ 1. By agreement of the parties, their names have not been revealed to Plaintiffs, and they are proceeding under the John Doe, FNU, and LNU names identified in the Amended Complaint solely for purposes of this motion. *Id.* ¶ 2. No discovery is necessary to identify them, or for any other purpose that would support denying Defendants' motion to dismiss. Rather, because reasonable officers in the Agents' position might not have known that the "*particular* conduct" alleged in the Amended Complaint violated RFRA, the Agents are entitled to qualified immunity as a matter of law. *Abbasi*, 137 S. Ct. at 1866.[4]

A. The Particular Conduct Alleged in the Amended Complaint Did Not Violate Clearly Established Law

To be clearly established, the contours of the right at issue must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)) (quotation marks omitted). Existing precedent must have established "beyond debate" that the defendants' alleged conduct violated the law. *Id.* at 12. Plaintiffs do not dispute that there is no case holding, or even suggesting, that asking an individual to provide information about other individuals in one's religious community, in exchange for assistance with their watchlist status (or

(court could not assess qualified immunity on motion to dismiss because, under Second Circuit law, "to determine whether a mental-health seizure is justified by arguable probable cause, a court must review the specific observations and information available to the officers at the time of a seizure" (citation, quotation marks and alteration omitted))).

[4] Plaintiffs contend that dismissal is warranted only when "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief," Pl. Opp. 23 (quoting *Horn v. Stephenson*, 11 F.4th 163, 170 (2d Cir. 2021)), but the Supreme Court "retire[d]" that standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007), in favor of a plausibility standard.

other favorable treatment), imposes a substantial religious burden under RFRA. Instead, Plaintiffs point to the language of RFRA and general principles of law drawn from cases arising in very different circumstances. But based on the factual allegations in the Amended Complaint, a reasonable officer in the Agents' position would not have known, much less "known for certain," *Abbasi*, 137 S. Ct. at 1867, that his conduct would impose a substantial burden on Plaintiffs' religious exercise. The Agents are therefore immune from Plaintiffs' claims as a matter of law.

1. Plaintiffs Cite Only General Statements of Law That Are Not Particularized to the Conduct Alleged in the Amended Complaint

In arguing that the Agents' alleged conduct was prohibited by clearly established law, Plaintiffs rely on (1) RFRA's general prohibition against imposing a substantial burden on the exercise of religion and (2) cases that, in their view, articulate a general "right to be free from government pressure that forces an individual to violate sincerely held religious beliefs." Pl. Opp. 36. But the Supreme Court has repeatedly stressed that "'clearly established law' should not be defined at [such] a high level of generality." *White v. Pauly*, 137 U.S. 548, 552 (2017) (quoting *al-Kidd*, 563 U.S. at 742) (quotation marks omitted). Rather, "clearly established law must be particularized to the facts of the case. Otherwise, plaintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* (quoting *Anderson v. Creighton*, 438 U.S. 635, 639 (1987)) (quotation marks and alterations omitted).

To begin with, to the extent Plaintiffs suggest that "RFRA itself" was sufficient to put the Agents on notice of the purported illegality of their alleged conduct, Pl. Opp. 36, 37, that is plainly incorrect. RFRA's general prohibition against substantially burdening the exercise of religion provides no guidance about the particular types of conduct that would impose such a burden. Plaintiffs assert that "[s]tatutory provisions in existence at the time of an individual's conduct can

help create 'fair warning' for the officer that their conduct would violate a plaintiff's rights," Pl. Opp. 36 (quoting *Okin v. Village of Cornwall-on-Hudson Police Department*, 577 F.3d 415, 433-34 (2d Cir. 2009)) (quotation marks omitted), but they misunderstand the point the Court was making in *Okin*. There, the Second Circuit did not suggest that the Fifth Amendment itself provided "fair warning" of the illegality of the defendants' alleged conduct. Rather, the Court reasoned that its prior decision in *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1999), "gave defendants fair warning" that their alleged conduct, namely "police conduct that encourages a private citizen to engage in domestic violence, by fostering the belief that his intentionally violent behavior will not be confronted by arrest, punishment, or police interference, gives rise to a substantive due process violation," 577 F.3d at 437. The Court's reference to a statutory provision was to a state law making arrest mandatory in certain domestic violence situations, which the Court noted provided "strong support for the conclusion that the officers should have been aware of the wrongful character of their conduct" in failing to take action on the plaintiff's domestic violence complaint. *Id.* at 436-37 & n.13.

That is a far cry from saying that the general substantial burden standard in RFRA was itself sufficient to provide the Agents "fair warning" that the specific conduct alleged in this case violated the statute. Rather, as in *Okin*, the Court must "look to Supreme Court and Second Circuit precedent existing at the time of the alleged violation," 577 F.3d at 433, to determine whether the particular conduct alleged by Tanvir and Algibhah violated a clearly established right under RFRA. And with regard to the conduct alleged by Shinwari, the Court must look to Supreme Court precedent and controlling cases from the circuits in which the alleged conduct took place. *See Reichle*, 566 U.S. at 665–66 (law not clearly established where neither Supreme Court nor Tenth Circuit, where the incident occurred, had ruled on the issue); *Hope v. Pelzer*, 536 U.S. 730,

743 (2002) (law clearly established where Eleventh Circuit decision sent a clear "message to reasonable officers in that Circuit").[5]

The cases that Plaintiffs claim "clearly established" their rights in this case, Pl. Opp. 36, are "not remotely similar" to this case, and thus could not have provided clear notice that the Agents' alleged conduct violated RFRA. *Messerschmidt v. Millender*, 565 U.S. 535, 555 (2012) (rejecting lower court's reliance on dissimilar case to defeat qualified immunity). None of those cases even arose in the law enforcement context, let alone addressed officers' efforts to recruit informants. Rather, they involved Establishment Clause challenges to prayers during a public school graduation ceremony, *Lee v. Weisman*, 505 U.S. 577 (1992), and state funding of a private alcoholic treatment facility whose program included Alcoholics Anonymous sessions that were religious in nature, *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397 (2d Cir. 2001),[6] and a Free Exercise challenge to the application of state compulsory education laws to Amish students whose religion prevented them from attending school beyond eighth grade, *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[5] Plaintiffs notably do not cite any relevant case law from the Fourth Circuit, where Agents Michael LNU and Grossoehmig allegedly interacted with Shinwari at Dulles Airport in Virginia; or the Eighth Circuit, where Agents Michael LNU, John Doe 6, Dun, and Langenberg allegedly interacted with Shinwari in Nebraska.

[6] Plaintiffs mischaracterize the facts and holding of *DeStefano*. That case did not involve "atheist prisoners . . . pressured to attend support groups," Pl. Opp. 36, but rather "clients" who were at a private treatment facility "of their own volition" and were free to "leave at any time," 247 F.3d at 402. And the Court did not hold that "[p]ressure from government officials rises to the level of a substantial burden when it prevents an individual from participating in religious activity as a matter of a 'genuine personal choice.'" Pl. Opp. 36. To the contrary, the Court explicitly declined to "decide the issue of coercion" because it was not squarely presented. 247 F.3d at 411-12. At most, the Court's discussion of coercion in *DeStefano* was dicta, and thus could not be clearly established law. *See Jones v. Treubig*, 963 F.3d 214, 226 n.7 (2d Cir. 2020) ("we do not rely on any dicta in [a prior opinion] for the purpose of determining clearly established law").

The other cases Plaintiffs cite were issued after the Agents' last alleged interactions with Plaintiffs in November 2011 (Tanvir), March 2012 (Shinwari), and May 2013 (Algibhah). AC ¶¶ 104, 139-40, 162-64; *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Washington v. Gonyea*, 538 F. App'x 23 (2d Cir. Sept. 10, 2013). Those decisions could not have provided any relevant notice to the Agents because they did not "exist[] at the time of the alleged violation." *Okin*, 577 F.3d at 433. Nor could the Second Circuit's unpublished summary order in *Washington* constitute "precedent," even in this circuit, as the order explicitly states that "RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT." 538 F. App'x 23; *see also Cerrone v. Brown*, 246 F.3d 194, 202 (2d Cir. 2001) (an unpublished decision "does not determine whether a right was clearly established"). At any rate, like the other cases cited by Plaintiffs, *Burwell* and *Washington* involved factual circumstances that are very different from this case. *See Burwell*, 573 U.S. at 688-91 (holding that RFRA prohibited the U.S. Department of Health and Human Services from enforcing regulations requiring provision of health-insurance coverage for contraception against closely-held corporations whose owners had religious objections to the required contraception); *Washington*, 538 F. App'x at 26 (liberally construing *pro se* prisoner complaint to state First Amendment retaliation claim where prison officials allegedly severely punished plaintiff for providing religious material to another inmate, while noting that "the contours of the burden standard are not precisely drawn").[7] Those decisions would not have provided notice to the Agents that their particular alleged conduct violated RFRA even if they had existed at the time of the conduct.

[7] Washington was not "forc[ed] . . . to be physically present in a space contrary to [his] beliefs," Pl. Opp. 36, but rather provided a Qu'ran to another inmate and was denied religious services, *see* 538 F. App'x at 26-27.

Contrary to Plaintiffs' contention, Pl. Opp. 38, the Agents are not asking the Court to "define the right too narrowly." Indeed, the cases Plaintiffs cite underscore that the right at issue must be defined with particularity.[8] Here, to have violated a clearly established right under RFRA, the Agents would have to have known that asking Plaintiffs to serve as informants and offering to assist them with their alleged travel issues in exchange for such cooperation would impose a substantial burden on Plaintiffs' exercise of religion. There is no case that would have provided them with such notice. *See White*, 137 U.S. at 552 (reversing denial of immunity where lower court "failed to identify a case where an officer acting in similar circumstances to [the defendant] was held to have violated the Fourth Amendment"); *Fazaga v. FBI*, 965 F.3d 1015, 1061 (9th Cir. 2020) (affirming grant of immunity where "[t]here simply was no case law in 2006 or 2007 that would have put the Agent Defendants on notice that covert surveillance on the basis of religion could violate RFRA"), *reversed on other grounds*, 142 S. Ct. 1051 (2022).

Indeed, the only cases addressing similar allegations have held or suggested that such conduct does *not* violate RFRA. *See El Ali v. Barr*, 473 F. Supp. 3d 479, 527 (D. Md. 2020) (dismissing RFRA claims alleging that "offers to act as informants for the FBI in exchange for resolution of their travel woes substantially burden[ed] [plaintiffs'] free exercise of religion" because "their religious beliefs restrict[ed] bearing false witness and betraying the trust of their religious community"); *Fikre v. FBI*, No. 3:13-cv-00899-BR, 2019 WL 2030724, at *8-9 (D. Or.

[8] *See* Pl. Opp. 22, 38-39 (citing *Vega v. Semple*, 963 F.3d 259, 277-78 (2d Cir. 2020) (prior law established right to be free from toxic substances in prison); *LaBounty v. Coughlin*, 137 F.3d 68, 74 (2d Cir. 1998) (same); *Husain v. Springer*, 494 F.3d 108, 132 (2d Cir. 2007) (prior law established that student newspaper was a limited public forum, that First Amendment prohibited college officials from engaging in viewpoint discrimination in such a forum, and that officials' actions that chilled protected speech within that forum violated First Amendment); *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 253 (2d Cir. 2001) (prior law established that government actors "in the non-seizure, non-prisoner context" could not use "intentionally harmful" and excessive physical force)).

May 8, 2019) (expressing "concerns regarding the pleading adequacy of Plaintiff's RFRA claim" where the plaintiff alleged that the defendants "attempted to use Plaintiff's presence on the No Fly List as leverage to coerce [him] into becoming an informant," but ultimately rejecting claim on timeliness grounds). Plaintiffs' attempt to distinguish *El Ali* is unpersuasive. *See* Pl. Opp. 31-32. Like the defendants in *El Ali*, the Agents here do not contest, for purposes of this motion, that acting as an informant would violate Plaintiffs' sincerely held religious beliefs. And the fact that the *El Ali* plaintiffs' travel difficulties involved being questioned at the border and having their trips disrupted, as opposed to being denied boarding on commercial flights, is immaterial for purposes of the RFRA analysis. The court's reasoning was not premised on the precise nature or extent of plaintiffs' "travel woes," but rather on its conclusion that "the mere offer of a chance to cooperate," in exchange for relief from those difficulties, does not "plac[e] a substantial burden on the exercise of religion sufficient to support a RFRA violation." 473 F. Supp. 3d at 527. The *El Ali* decision illustrates that the law did not clearly prohibit the Agents here from allegedly making similar offers to Plaintiffs.

To be sure, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." Pl. Opp. 35 (quoting *Hope*, 536 U.S. at 741) (quotation marks omitted); *see also* Pl. Opp. 21-22 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997), for the proposition that in some instances "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question"). But "'obvious case[s],' where the unlawfulness of [an official's] conduct is sufficiently clear even though existing precedent does not address similar circumstances," are "rare." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). And the sorts of cases in which this principle has been invoked—for example, where prisoners had been handcuffed for hours to hitching posts, *see Hope*, 536 U.S. at

745-46, or confined for days to feces-covered cells, *see Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam)—highlight its rarity. The alleged conduct of the Agents here bears no resemblance to those egregious scenarios. Moreover, in rejecting the qualified immunity defense in *Hope*, the Supreme Court relied not only on the "obvious cruelty" of the defendants' alleged conduct, but also on Eleventh Circuit precedent establishing the unlawfulness of handcuffing prisoners to fences or cell bars for long periods, as well as a DOJ report condemning the practice. 536 U.S. at 741-46. Plaintiffs have identified no such controlling precedent that would have provided "fair and clear warning" to the Agents that their alleged conduct violated RFRA. *Id.* at 746 (quoting *Lanier*, 520 U.S. at 271).

2. Based on the Facts Alleged in the Amended Complaint, the Agents Could Not Have Known for Certain That Their Alleged Conduct Violated RFRA

The facts alleged in the Amended Complaint show that reasonable officers in the Agents' position would not have known, much less "known for certain," *Abbasi*, 137 S. Ct. at 1867, that asking Plaintiffs to serve as informants, in exchange for relief from their alleged inclusion on the No Fly List, would violate Plaintiffs' religious beliefs or burden their religious exercise. There is no dispute that the Amended Complaint contains no allegation that any Plaintiff ever indicated to any Agent, in words or substance, that his religious beliefs precluded him from providing information about, acting deceptively with, or spying on other individuals in his religious community. To the contrary, the Amended Complaint alleges that Plaintiffs either offered other, non-religious objections to serving as informants (Tanvir and Shinwari), AC ¶¶ 78, 161, or said they would be willing to serve as an informant if they were removed from the No Fly List (Algibhah), AC ¶ 134. Thus, even accepting that Plaintiffs' sincerely held religious beliefs preclude them from serving as informants, according to the facts pleaded in the Amended

Complaint, reasonable officers in the Agents' position would not necessarily have known that Plaintiffs held such beliefs or that serving as an informant would violate them.

Plaintiffs contend that RFRA itself does not require a showing of knowledge or intent. Pl. Opp. 24, 38 n.8. While that may be the case where a plaintiff seeks injunctive relief, *see City of Boerne v. Flores*, 521 U.S. 507, 535 (1997), *superseded on other grounds by statute*, 42 U.S.C. § 2000cc, individual-capacity damages could not be "appropriate relief" for a RFRA violation if the defendants did not themselves have knowledge that they were imposing a substantial burden on religious exercise. *See infra* Point I.B.3. In any event, whether or not RFRA has a knowledge requirement, Plaintiffs' failure to allege facts establishing the Agents' knowledge of their religious objections to serving as informants is plainly relevant to the qualified immunity analysis, because the Agents are immune if a reasonable officer in their position "might not have known for certain" that their conduct violated RFRA. *Abbasi*, 137 S. Ct. at 1867. Plaintiffs concede that the Agents are entitled to immunity unless "every 'reasonable official [in their position] would have understood that what he is doing violates'" RFRA. Pl. Opp. 35 (quoting *al-Kidd*, 563 U.S. at 741).[9]

Plaintiffs' allegations that the Agents in some cases were aware of Plaintiffs' religious affiliations, asked them about their religious communities or beliefs, or were interested in discussions in "Muslim spaces" (by which Plaintiffs presumably means mosques or Islamic websites), Pl. Opp. 37-38, even if true, fail to show that the Agents necessarily would have known that Plaintiffs' religious beliefs precluded them from providing information about other Muslim

[9] Indeed, during the oral argument before the Supreme Court, Plaintiffs' counsel attempted to assuage concerns about whether RFRA requires knowledge or *mens rea* in order to hold an individual official personally liable for damages, *see* Tr. of Oral Arg. 35-36, 52-54, by emphasizing that qualified immunity is available, *see id.* 36-37, 53-54.

individuals in their communities. There is a material difference between knowing that someone is religious and having a law enforcement interest in what others in their particular community may be doing, on the one hand, and knowing the specific details of their religious beliefs and practices, on the other. Nor can such knowledge plausibly be inferred from the Agents' purported "training and experience." Pl. Opp. 38. The paragraphs of the Amended Complaint cited by Plaintiffs (AC ¶¶ 8-10, 36-39, 63-67) do not contain any factual allegations about the Agents' training or experience, but rather concern FBI's alleged efforts more generally to recruit Muslim informants. There are no factual allegations whatsoever from which it could reasonably be inferred that those efforts "would have included briefing FBI employees on features of their targets' faith, likely including the clear Qur'anic prohibition on spying and acting deceptively among Muslims." Pl. Opp. 38. And in a personal-capacity action seeking damages against individual agents, it would be inappropriate to infer from Plaintiffs' generalized allegations that the FBI has "a specialized, decades-long program seeking to infiltrate Muslim communities," Pl. Opp. 38, let alone that these particular Agents received specific religious training through such a program. *See Wood*, 572 U.S. at 763-74 (declining "to infer from alleged instances of misconduct on the part of [agents in other cases] an unwritten policy of the Secret Service to suppress disfavored expression, and then to attribute that supposed policy to all field-level operatives").

It is not uncommon, moreover, for law enforcement agents to solicit cooperation by offering individuals assistance or favorable treatment in their dealings with the government. As the *El Ali* court recently noted in rejecting very similar RFRA claims, virtually all potential law enforcement informants are offered "possible favorable treatment in exchange for helpful information." 473 F. Supp. 3d at 527. The fact that a potential informant has "something to gain, and often something to lose, from saying yes" does not mean that the officer's request is coercive.

Id. Although the potential informant may feel "pressure" to cooperate—in the sense that they strongly desire the favorable treatment that is being offered in exchange—that is the same "Hobson's choice" that is "faced by scores of suspects who enter into cooperation agreements with the government on a daily basis." *Id.* *El Ali* underscores that a reasonable officer would not have believed that offering to help Plaintiffs get relief from their alleged inclusion on the No Fly List, if they agreed to cooperate with law enforcement by serving as informants, would violate Plaintiffs' right under RFRA to be free from substantial burdens on their religious exercise. Certainly, not "*every* reasonable official would have understood that what he is doing violates that right." *Mullenix*, 577 U.S. at 11 (emphasis added).

In sum, Plaintiffs do not allege that they ever indicated to the Agents that serving as an informant would violate their religious beliefs; they do not identify any precedent establishing that asking (or even "pressuring") an individual to provide information about other individuals in his religious community constitutes a substantial burden on religion; and the only cases that have addressed similar allegations held or suggested that such a request does not violate RFRA. Nothing alleged in the Amended Complaint puts this case in the rare category of egregious cases where the violation of federal law was "obvious" even without reference to existing case law. Plaintiffs have therefore failed to allege a violation of clearly established law, and the remaining claims in this action can and should be dismissed on that basis alone. *See Camreta v. Greene*, 563 U.S. 692, 705 (2011) (where "prior case law has not clearly settled the right, and so given officials fair notice of it, the court can simply dismiss the claim for money damages"); *Pearson v. Callahan*, 555 U.S. 223, 243-45 (2009).

B. **Plaintiffs Fail to State a RFRA Claim for Damages Against the Agents**

Although the Court need not reach the other prong of the qualified immunity analysis, Plaintiffs nevertheless urge the Court to decide whether they have stated a RFRA claim, ostensibly to "provide necessary guidance to public officials and set important precedent." Pl. Opp. 15. But in advocating this course, Plaintiffs mischaracterize the nature of the remaining claims in this case. Plaintiffs' brief reads very much like a programmatic challenge to the FBI's use of the No Fly List.[10] Yet Plaintiffs have dismissed their programmatic claims seeking injunctive relief against the FBI (and other agencies). *See* ECF Nos. 105 & 109.[11] They cannot revive those claims now in the guise of RFRA damages claims against the Agents personally. *See Wood*, 572 U.S. at 763-74 (declining to consider allegations of purported viewpoint discrimination by other Secret Service agents not before the court in evaluating qualified immunity of defendant agents).

Nor is it "necessary" for this Court to provide "guidance" to individual agents. Plaintiffs have not shown that similar RFRA pleading issues "frequently arise in cases in which a qualified immunity defense is unavailable." *Pearson*, 555 U.S. at 236. To the contrary, similar issues have

[10] *See, e.g.*, Pl. Opp. 17 (alleging that "[t]he FBI's power over the List has produced a secretive system ripe for abuse"); *id.* at 18 (alleging that "[t]he FBI has not been held accountable for targeting and pressuring Muslims to become informants"). These sections of Plaintiffs' brief are also replete with references to purported factual material that is not contained in the Amended Complaint, Pl. Opp. 17-21, which is not appropriate for consideration on a motion to dismiss. *See Friedl v. City of New York*, 210 F.3d 79, 83–84 (2d Cir. 2000) (court may not consider affidavits or exhibits outside the pleadings, or "factual allegations contained in legal briefs or memoranda," in ruling on Rule 12(b)(6) motion); *Palin v. New York Times Co.*, 940 F.3d 804, 811 (2d Cir. 2019) (court may not rely "on matters outside the pleadings to decide the motion to dismiss").

[11] Plaintiffs also mischaracterize the basis for the dismissal of their programmatic claims. Contrary to Plaintiffs' suggestion, Pl. Opp. 1, they did not receive any relief in this lawsuit to confirm that they are not (or no longer) on the No Fly List. Both Tanvir and Shinwari received responses from DHS-TRIP, and were able to fly, before they even filed the Amended Complaint. AC ¶¶ 114-15, 168-69. And in 2015, after the DHS-TRIP procedures were revised for reasons unrelated to this case, all three Plaintiffs elected to have their DHS-TRIP inquiries re-reviewed under the revised procedures. *See* ECF No. 92. The letters that Plaintiffs received from DHS-TRIP were a result of the application of the revised procedures to their inquiries.

arisen outside the qualified immunity context in at least two recent cases. *See El Ali*, 473 F. Supp. 3d at 527; *Fikre*, 2019 WL 2030724, at *8-9. In this context, principles of judicial restraint and avoidance of advisory opinions outweigh the need to develop an area of the law that is already being developed in cases seeking non-monetary relief against the government. *See Camreta*, 563 U.S. at 705 (noting that "our usual adjudicatory rules suggest that a court should forbear resolving" whether alleged conduct states a constitutional violation). Restraint is especially appropriate in the sensitive and nuanced area of counterterrorism operations.

If the Court does reach the issue, nothing in Plaintiffs' opposition escapes the conclusion that Plaintiffs have failed to state a RFRA claim against the Agents personally, for several reasons. *See* Df. Mem. 35-46. Plaintiffs fail to allege facts showing that each Agent was personally involved in the specific conduct that they claim violated RFRA. Plaintiffs also fail to plausibly allege that they were included on the No Fly List simply due to their refusal (or, in Algibhah's case, initial refusal) to serve as informants. And Plaintiffs' request to impose personal liability on the Agents, even in the absence of any personal involvement or knowledge that their conduct imposed a religious burden, would be an end-run around the principles of sovereign immunity.

1. Plaintiffs Fail to Allege That Agents John Doe 1, Garcia, John LNU, Steven LNU, Harley, Grossoehmig, Dun, or Langenberg Were Personally Involved in Imposing the Alleged Religious Burden

Plaintiffs do not dispute that according to the allegations in the Amended Complaint, Agents John Doe 1, Garcia, John LNU, Steven LNU, Harley, Grossoehmig, Dun, and Langenberg were not present when Plaintiffs allegedly were asked to serve as informants, nor does the Amended Complaint contain any other allegations linking them to such requests. These Agents therefore were not personally involved in the allegedly "impermissible choice" that Plaintiffs claim violated RFRA. *See* Df. Mem. 27-30. Plaintiffs attempt to sidestep this pleading failure by

asserting in broad-brush fashion that "Defendants" generally engaged in "collective conduct" or "coordination" to pressure them to become informants. Pl. Opp. 26-28. But such "categorical references to 'Defendants'" do not "allege, with particularity, facts that demonstrate what *each* defendant did to violate the asserted [statutory] right." *Marcilis v. Township of Redford*, 693 F.3d 589, 596-97 (6th Cir. 2012) (citation and quotation marks omitted; emphasis in original). Rather, "[t]he doctrine of qualified immunity requires an *individualized* analysis of *each* officer's alleged conduct." *S.M. v. Krigbaum*, 808 F.3d 335, 340 (8th Cir. 2015) (citation and quotation marks omitted; emphasis in original). That is because "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Iqbal*, 556 U.S. at 693; *accord Tangreti v. Bachmann*, 983 F.3d 609, 612 (2d Cir. 2020).

Plaintiffs do not address this fundamental point, nor any of the cases in which courts have required plaintiffs to plead the personal involvement of each individual defendant to recover damages under RFRA. *See* Df. Mem. 29 (collecting cases). Instead, Plaintiffs rely on outdated law regarding agents who purportedly "set in motion" a constitutional or statutory violation. Pl. Opp. 26-27. Two of those cases, *Harrison v. Machotosh*, No. CV-91-2417, 1992 WL 135028 (E.D.N.Y. May 28, 1992), and *Morrison v. Lefevre*, 592 F. Supp. 1052 (S.D.N.Y. 1984), were decided before the Supreme Court clarified the standard for personal liability in *Iqbal*. *See* 556 U.S. at 693; *Tangreti*, 983 F.3d at 612 (plaintiff "must directly plead and prove that 'each Government-official defendant, through the official's own individual actions, has violated the Constitution'" (quoting *Iqbal*, 556 U.S. at 676)).[12] The final case on which Plaintiffs rely, *Veeder v. Nutting*, No. 10-CV-665 MAD/CFH, 2013 WL 1337752, *11 (N.D.N.Y. Mar. 29, 2013),

[12] In addition, *Harrison* relied on the "no set of facts" pleading standard, 1992 WL 135028, at *1, that the Supreme Court "retire[d]" in *Twombly*, 550 U.S. at 563. *See* note 4, *supra*.

overruled on other grounds, 588 F. App'x 18 (2d Cir. 2014), also applied a pre-*Iqbal* standard. The court relied on the so-called *Colon* factors to conclude that a supervisory official may be liable if he "set in motion" an illegal search, *see* 2013 WL 1337752, at *8 (citing factors identified in *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995)), but the Second Circuit recently confirmed that *Colon*'s supervisory liability test is no longer valid in light of *Iqbal*, *see Tangreti*, 983 F.3d at 618.[13]

In any event, Plaintiffs fail to allege facts plausibly suggesting that Agents John Doe 1, Garcia, John LNU, Steven LNU, Harley, Grossoehmig, Dun, or Langenberg "set in motion" any RFRA violation. In *Veeder*, for example, the plaintiff alleged that the supervisory officers who set in motion an illegal search of the plaintiff's residence did far more than the Agents here; those officers were present at the search, informed the plaintiff that she and her family must vacate the premises, and rejected the plaintiff's demand that the officers obtain a search warrant. 2013 WL 1337752, at *4-5. In *Harrison*, the court applied the liberal pleading standard for *pro se* litigants—which is inapplicable here—and read the complaint to allege that the defendant captain ordered his subordinates to assault the plaintiff. 1992 WL 135028, at *1-3. And in *Morrison*, the court, following a bench trial, concluded that there was "overwhelming" evidence that the defendant officers "purposeful[ly] create[ed] and use[d] false evidence" to frame the plaintiff for attempting to bring contraband into a correctional facility. 592 F. Supp. at 1056, 1077. By contrast here,

[13] Even before *Iqbal*, general allegations of collective conduct were insufficient to state a personal-capacity claim. *See, e.g., Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008) (rejecting complaint using "either the collective term 'Defendants' or a list of the defendants named individually but with no distinction as to what acts are attributable to whom"); *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001) ("By lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, [the plaintiff's] complaint failed to satisfy [the] minimum standard."); *Rogan v. Menino*, 175 F. 3d 75, 77 (1st Cir. 1999) ("It is axiomatic that the liability of persons sued in their individual capacities . . . must be gauged in terms of their own actions.").

Plaintiffs do not allege any personal involvement by Agents John Doe 1, Garcia, John LNU, Steven LNU, Harley, Grossoehmig, Dun, or Langenberg in the specific conduct they claim violated RFRA.

a. Agents John Doe 1, Garcia, and John LNU

According to the Amended Complaint, Agent John Doe 1 had a single interaction with Tanvir in February 2007, at which no request was made that Tanvir serve as an informant.[14] Plaintiffs note that Agent Tanzin allegedly asked Tanvir to be an informant in a phone call two days later, in which John Doe 1 did not participate. AC ¶ 70. Plaintiffs contend that given the "short period of time" between the two interactions, "a plausible inference can be drawn that John Doe # 1 was involved in the formulation and/or implementation of the larger plan to pressure Mr. Tanvir to become an informant." Pl. Opp. 41 n.11. But Plaintiffs ignore that these two interactions took place in February 2007, after which Tanvir was able to board flights in July 2008, December 2008, July 2009, and January 2010, before first being denied boarding in October 2010. AC ¶¶ 71, 88, 89, 91. Thus, even if it could plausibly be inferred that John Doe 1 was somehow involved in the "formulation" of Agent Tanzin's February 2007 request that Tanvir serve as an informant—and the Amended Complaint contains no such allegation—the allegedly "impermissible choice" did not arise until more than three years later, and more than two years after John Doe 1 retired from the FBI. These alleged facts provide no plausible basis to infer that John Doe 1 had any involvement in allegedly forcing Tanvir to choose between flying or exercising his religion.[15]

[14] Plaintiffs now concede that the references to John Doe 1 in paragraphs 82-84 of the Amended Complaint were erroneous and refer instead to John Doe 2, and that the single meeting in February 2007 was John Doe 1's only interaction with Tanvir. Pl. Opp. 3 n.2, 41 n.11.

[15] The same is true for Agents Tanzin and John Doe 2/3. Their last request that Tanvir serve as an informant was in February 2009, twenty months before Tanvir was first denied boarding in October 2010, and Tanvir flew at least twice in the interim. Df. Mem. 39.

Nor does Tanvir allege any facts suggesting that Agents Garcia or John LNU were personally involved in allegedly pressuring him to choose between flying or serving as an informant. Agent Garcia's first interaction with Tanvir was in October 2010, and John LNU's in November 2011, both years after Agent Tanzin allegedly asked Tanvir to be an informant in February 2007 and December 2008. AC ¶¶ 76, 94, 101. Plaintiffs note that after Tanvir was denied boarding in October 2010, Agent Tanzin allegedly encouraged Tanvir to "cooperate" with the agent who would be contacting him soon, who turned out to be Agent Garcia. Pl. Opp. 27. But Plaintiffs disregard that it was Tanvir who reached out to Agent Tanzin after he was denied boarding, not the other way around, and that Tanzin indicated to Tanvir that he was no longer working on the case. AC ¶ 92. And the only "cooperation" that Agent Garcia and John LNU are alleged to have requested from Tanvir was to sit for an interview and take a polygraph test. AC ¶¶ 94, 99-104. There is no allegation that Tanvir's religious beliefs precluded him from participating in interviews or taking a polygraph test; as alleged, Tanvir had previously answered questions posed by Agents Tanzin and John Does 1 and 2/3. AC ¶¶ 69-70, 75-79.[16] And while Agent Garcia allegedly offered to help Tanvir to fly if he agreed to answer questions, such an offer does not state a claim of substantial religious burden under RFRA, even if Tanvir had plausibly construed the offer as being conditioned on his compliance with Tanzin's much-earlier request to serve as an informant. *See El Ali*, 473 F. Supp. 3d at 527.

[16] Plaintiffs appear to argue that by asking Tanvir to take a polygraph test, the Agents pressured him to become an informant because an FBI Operations Guide identities polygraph tests as one method of evaluating potential human sources. Pl. Opp. 42. But there is absolutely no indication in the Guide (or elsewhere) that polygraph tests are administered only to potential informants, and in any event, Tanvir does not allege that this alleged purpose was conveyed to him. Accordingly, Garcia and John LNU's alleged request that Tanvir take a polygraph test did not amount to a request that Tanvir become an informant, and the FBI Guide could not plausibly have played a role in any alleged pressure Tanvir felt to become an informant.

b. Agents Steven LNU, Harley, Grossoehmig, Dun, and Langenberg

Shinwari similarly fails to plausibly allege that Agents Steven LNU, Harley, Grossoehmig, Dun, or Langenberg had any personal involvement in the allegedly "impermissible choice" between flying and practicing his religion. As an initial matter, Shinwari allegedly was denied boarding before he ever interacted with any Agent, and thus the factual allegations in the Amended Complaint belie any claim that he was "placed" on the No Fly List because he refused to serve as an informant. AC ¶ 146.

With respect to Agents Steven LNU and Harley, who interviewed Shinwari in Dubai after the first time he was denied boarding, the only facts Plaintiffs identify to suggest "coordination" are alleged conversations with "higher ups" in DC. Pl. Opp. 27 (citing AC ¶ 150). But according to Shinwari's own allegations, those conversations were for the purpose of *allowing* Shinwari to board a flight to return back to the United States, without any request or condition that he serve as an informant. AC ¶¶ 147-51. The factual allegations in the Amended Complaint thus show that, rather than pressuring Shinwari, Steven LNU and Harley helped him to fly home, so much so that Shinwari later emailed Harley for assistance when he was denied boarding in Omaha. AC ¶ 161.

Shinwari also fails to plausibly allege that Agents Grossoehmig, Dun, or Langenberg took any steps to "coordinate" to present him with an "impermissible choice" between flying and practicing his religion. Agent Grossoehmig allegedly interacted with Shinwari on a single occasion: an interview at Dulles airport at which no request was made that Shinwari serve as an informant and after which Shinwari was able to fly to Omaha. AC ¶ 152. Agents Dun and Langenberg likewise had a single meeting with Shinwari—which was requested by Shinwari himself—at which no such request was made. AC ¶¶ 162-64. Dun and Langenberg's mere supervisory authority over the investigation is insufficient to show that they had any personal

involvement in the allegedly "impermissible choice" presented to Shinwari. *See Tangreti*, 983 F.3d at 618. And even if Shinwari had construed Dun and Langenberg's alleged offer to help Shinwari to fly as conditioned on his compliance with prior requests—by different Agents—to serve as an informant, that does not state a claim of substantial religious burden under RFRA. *See El Ali*, 473 F. Supp. 3d at 527.

Finally, the mere fact that different Agents allegedly asked Tanvir and Shinwari similar questions about their activities or associations, Pl. Opp. 27, does not suggest that they "coordinated" to pressure those Plaintiffs to choose between flying and practicing their religion. Tanvir alleges he was asked similar questions about his family and his religious and political beliefs, AC ¶ 101, and Shinwari alleges he was asked similar questions about his travel, background, and religious activities, *id.* ¶¶ 148, 153, 155. At most, these allegations might suggest that the Agents coordinated with regard to the questions Plaintiffs would be asked (although, in Tanvir's case, the temporal gap between the questions posed by Agents Tanzin and John Doe 2/3 and those posed by Agents Garcia and John LNU would undermine any inference of coordination). But they do not plausibly suggest any coordination to request that Tanvir or Shinwari provide information about other individuals in their religious communities, let alone to force them to choose between flying and exercising their religion.

2. Plaintiffs Fail to Plausibly Allege That Any Plaintiff Was Placed or Kept on the No Fly List Because He Refused to Serve as an Informant

Plaintiffs' conclusory allegations that they were placed or kept on the No Fly List simply because they refused to provide information about other individuals in their religious communities, *see* AC ¶¶ 90, 124, 159, are implausible. *See* Df. Mem. 32-35. Plaintiffs provide no facts to support their allegations that they would not have been placed or kept on the No Fly List but for their refusal to serve as informants. Their general assertions that each Plaintiff "was not and is not

a 'known or suspected terrorist' or a potential or actual threat to civil aviation," and that the Agents who dealt with him "had no basis to believe" otherwise, AC ¶¶ 108, 135, 166, are entirely conclusory. They are also immaterial. Plaintiffs' own subjective beliefs and understandings cannot establish the beliefs and understandings of the FBI or its agents, let alone the multi-agency TSC (which Plaintiffs specifically allege was the entity responsible for making determinations as to whether individuals were placed on, or removed from, the No Fly List). AC ¶¶ 41, 58.

In the absence of any factual allegations, Plaintiffs ask the Court to infer that the only reason they could have been placed on the No Fly List was because they refused Agents' requests to serve as informants. But the factual allegations in the Amended Complaint show that this inference is implausible. Plaintiffs specifically allege that according to the policy in place at the time, an individual could be placed on the No Fly List only if the individual was a "known or suspected terrorist" and there existed additional "derogatory information" demonstrating that the person "pose[d] a threat of committing a terrorist act with respect to an aircraft." AC ¶ 42; *but see* Df. Mem. 4-5 n.5 (noting that criteria for inclusion were broader). And Plaintiffs also specifically allege that although FBI agents nominated individuals to the list, the TSC was responsible for deciding whether the standards for inclusion were met. AC ¶ 41. Thus, according to the Amended Complaint, if Plaintiffs were in fact on the No Fly List, it would have been necessary not only for an Agent to nominate each Plaintiff for placement on the list, but also for the TSC to determine that each Plaintiff posed a threat of committing a terrorist act. Based upon their own factual allegations, it is implausible that Plaintiffs would have been included on the list simply because they declined to be informants.[17]

[17] Contrary to Plaintiffs' suggestion, Pl. Opp. 32; *see id.* 27-28, 32-33, the Agents are not arguing that the TSC's determinations "br[oke] the causal chain." Their point is rather that the TSC's alleged authority to make No Fly List determinations, based upon specified criteria, undermines

Plaintiffs' allegations here are akin to those the Supreme Court rejected in *Iqbal*. The plaintiff claimed that he was not a suspected terrorist and that the detention conditions he experienced after September 11, 2001, must have been a result of discrimination. 556 U.S. at 668-69. The Court rejected that conclusory allegation as implausible, noting that the factual allegations in the complaint must show more than conduct that is "consistent with" wrongdoing; they must "plausibly establish" a discriminatory purpose. *Id.* at 681. The Court held that the plaintiff's allegation of discriminatory motive, although "consistent with" the facts alleged regarding the plaintiff's detention, was not plausible "given more likely explanations," including the "obvious alternative explanation" that the arrests at issue "were likely lawful and justified by [the] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Id*. at 681-82. Similarly here, there is an "obvious" and far "more likely" explanation for Plaintiffs' alleged inclusion on the No Fly List, other than their mere refusal to serve as informants: that the TSC concluded that the standards for inclusion were met. As in *Iqbal*, Plaintiffs' conclusory allegations about the reasons for their alleged placement or retention on the No Fly List are not plausible. *See also Twombly*, 550 U.S. at 567 (conspiracy claim not plausible where there was "an obvious alternative explanation"); *Collins v. Putt*, 979 F.3d 128, 134-35 (2d Cir. 2020) (plaintiff failed to plausibly allege First Amendment claim where teacher's removal of student's blog post was "most reasonably understood to ensure that the message board was used for its school-sponsored, pedagogical purpose" rather than viewpoint discrimination); *Hayden v. Paterson*, 594 F.3d 150, 167 (2d Cir. 2010) (plaintiffs failed to plausibly plead that felon disenfranchisement law was

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the plausibility of Plaintiffs' conclusory allegations that they were placed on the No Fly List simply because they refused to serve as informants. Plaintiffs offer no response to this point.

enacted with "a discriminatory purpose," where "prisoner disenfranchisement [wa]s more likely the product of legitimate motives than invidious discrimination"); *LLM Bar Exam, LLC v. Barbri, Inc.*, 271 F. Supp. 3d 547, 578 (S.D.N.Y. 2017) (plaintiff failed to plausibly allege Sherman Act conspiracy among law schools to restrain trade by favoring one bar review course over the other, where the "obvious alternative explanation" was that one course was better than the other, defeating "an inference of conspiracy"), *aff'd*, 922 F.3d 136 (2d Cir. 2019).

Setting aside these implausible allegations, "the *most* that is plausibly alleged by the [Amended] Complaint," *Garcia*, 779 F.3d at 96, is that Plaintiffs were offered assistance with their alleged travel difficulties if they agreed to cooperate with law enforcement by providing information. *See* AC ¶ 102 (alleging that Agent Garcia offered to help Tanvir to fly if he agreed to answer questions), ¶¶ 131-34 (alleging that Agents Artousa and John Doe 5 offered to get Algibhah off the No Fly List if he accessed some Islamic websites), ¶ 161 (alleging that Michael LNU and John Doe 6 offered to help Shinwari to fly if he became an informant). But such offers do not state a claim under RFRA. *See El Ali*, 473 F. Supp. 3d at 527.

3. **Damages Against Individual Agents Cannot Be "Appropriate Relief" for the Conduct Alleged in the Amended Complaint**

Even if Plaintiffs had plausibly alleged that they were placed or kept on the No Fly List because they refused to serve as informants—which, as explained above, they have not—they still have not stated a claim for damages against the Agents under RFRA. The Amended Complaint contains no allegation that Plaintiffs ever provided any indication that they had religious objections to serving as informants. Rather, it alleges that Tanvir and Shinwari gave other, non-religious reasons for their refusal and that Algibhah ultimately agreed to serve as an informant. Under these alleged circumstances, damages against the Agents in their personal capacities cannot be "appropriate relief" under RFRA. *See* Df. Mem. 25-27, 30-31. As a matter of law, it would not

be "suitable" or "proper" to impose damages on the individual Agents, to be paid "from [their own] pocket," *Blackburn v. Goodwin*, 608 F.2d 919, 923 (2d Cir. 1979), absent factual allegations plausibly showing that the Agents had knowledge that their alleged actions were likely to impose a substantial burden on Plaintiffs' religious exercise and nonetheless personally participated in imposing the alleged burden. *See Tanzin v. Tanzir*, 141 S. Ct. 486, 491 (2020) ("appropriate" means "[s]pecially fitted or suitable, proper," and "[b]ecause this language is open-ended on its face, what relief is 'appropriate' is inherently context dependent" (citations and quotation marks omitted)). To conclude otherwise would be to allow Plaintiffs to hold individual officials personally liable for an agency's course of conduct. That would effectively be an end-run around sovereign immunity, as neither RFRA nor its companion statute waives sovereign immunity, and thus damages are not "appropriate relief" against states or agencies of the federal government. *See Sossamon v. Texas*, 563 U.S. 277, 285 (2011); *see also, e.g.*, *Webman v. Federal Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006). Having failed to allege that the Agents personally and knowingly imposed a substantial burden on their religious exercise, Plaintiffs essentially seek to recover damages from the Agents for *the FBI's* purported "pattern and practice" of "exploiting" the No Fly List. AC ¶ 10; *see* Pl. Opp. 17-21 & note 10, *supra*. Such relief would not be "appropriate" as a matter of law.

Plaintiffs offer no substantive response to this argument. They do not explain how it could conceivably be appropriate to impose damages against individual agents personally for substantially burdening religious exercise if those agents did not know that their conduct was imposing a religious burden. Instead, Plaintiffs try to defer this question to another day, arguing (in a footnote) that "the inquiry on a motion to dismiss is not whether damages would be appropriate, but rather whether the plaintiffs have stated a claim." Pl. Opp. 26 n.5. But they ignore

that under Rule 12(b)(6), dismissal at the pleading stage is appropriate where the complaint "fail[s] to state a claim *upon which relief can be granted*." Fed. R. Civ. P. 12(b)(6) (emphasis added). Here the requested damages relief may not be granted against the Agents in their individual capacities based upon the well-pleaded factual allegations in the Amended Complaint. Dismissal is therefore appropriate under Rule 12(b)(6).

II. Shinwari Fails to Allege Any Facts Supporting Personal Jurisdiction Over Agents Steven LNU, Harley, Grossoehmig, Michael LNU, John Doe 6, Dun, or Langenberg

In responding to their Rule 12(b)(2) motion, Shinwari bears the burden to make a *prima facie* showing that personal jurisdiction exists over Agents Steven LNU, Harley, Grossoehmig, Michael LNU, John Doe 6, Dun, or Langenberg. *See Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34-5 (2d Cir. 2010). "Such a showing entails making legally sufficient allegations of jurisdiction, including an averment of facts that, if credited[,] would suffice to establish jurisdiction over the defendant." *Id*. at 35 (quotation marks and citation omitted); *see also Chirag v. MT Marida Marguerite Schiffahrts*, 604 F. App'x 16, 18-19 (2d Cir. 2015) (requiring "non-conclusory fact-specific allegations or evidence showing that activity that constitutes the basis of jurisdiction has taken place"). A court "need 'not draw argumentative inferences in favor of a plaintiff who has failed to allege even bare facts' establishing that jurisdiction is proper." *NetSoc, LLC v. Chegg Inc*., No. 18-CV-10262 (RA), 2019 WL 4857340, at *4 (S.D.N.Y. Oct. 2, 2019) (quoting *Smit v. Isiklar Holding A.S.*, 354 F. Supp. 2d 260, 263-64 (S.D.N.Y. 2005)) (further citations omitted).

Shinwari alleges no facts whatsoever that would establish personal jurisdiction over these Agents in New York, much less a *prima facie* showing. Shinwari does not allege that he or the Agents were ever present in or had any contacts at all with New York. Each of the alleged

interactions between Shinwari and the Agents occurred outside New York: in Dubai, Virginia, or Nebraska. *See* AC ¶¶ 147-64. Shinwari does not allege that he or the Agents traveled through New York, that any Agent communicated with others in New York about Shinwari (*compare* AC ¶ 150 (alleging that Agents Steven LNU and Harley indicated they must "confer" with individuals in Washington D.C.)), or that any Agent even mentioned New York. Indeed, "New York" does not appear at all in the section of the Amended Complaint discussing Shinwari's claims. Shinwari not only fails to make "non-conclusory fact-specific allegations" regarding personal jurisdiction, *Chirag*, 604 F. App'x at 18-19, he makes no allegations at all.[18]

Implicitly acknowledging this pleading deficiency, Shinwari ventures that jurisdictional discovery "may" reveal evidence of activities sufficient to confer personal jurisdiction in New York. Pl. Opp. 47. But in the absence of any factual allegations suggesting that these Agents have a connection to New York, jurisdictional discovery is inappropriate. While "[t]he standard for awarding jurisdictional discovery is low," *Universal Trading & Inv. Co. v. Credit Suisse (Guernsey) Ltd*., 560 F. App'x 52, 55 (2d Cir. 2014), discovery may not be used to "fish for . . . grounds of jurisdiction" that Shinwari "ha[s] not alleged," *id.* at 56. Shinwari must at a minimum make "a threshold showing that there is *some basis* for the assertion of jurisdiction." *Bracken v. MH Pillars Inc*., No. 15-CV-7302 (RA), 2016 WL 7496735, at *5 (S.D.N.Y. Dec. 29, 2016) (quoting *Int'l Diamond Importers, Inc. v. Med Art, Inc.*, No. 15-CV-4045(KMW), 2016 WL 1717217, at *2 (S.D.N.Y. Apr. 27, 2016)) (quotation marks omitted; emphasis added). "Mere speculations and hopes are not enough." *Id.* (citation, alteration and quotation marks omitted).

Shinwari does not provide *any* basis to assert jurisdiction in New York over the Agents who allegedly interacted with him, and therefore has not made the threshold showing necessary to

[18] The Agents' declarations confirm their lack of connection to New York. *See* Dkt. Nos. 43-49.

justify discovery. Shinwari ventures that there may have been "coordination" between the Agents and the FBI's New York field office, Pl. Opp. 47, but he provides no factual basis to suggest that any such coordination has in fact "taken place." *Chirag*, 604 F. App'x at 19. His vague assertion that the FBI's purported "program" to recruit Muslim informants "also operated in New York," *id.* (citing AC ¶ 37), does not suggest any basis to exercise jurisdiction in New York over agents whose alleged conduct took place in Dubai, Virginia, or Nebraska. And while those Agents may have communicated with each other or with "higher-ups in DC," *id.* at 47-48 (citing AC ¶¶ 150-51, 153, 155, 161), that does not suggest that they communicated with anyone in New York. The mere fact that the New York field office housed "the FBI's first Joint Terrorism Task Force in the country," which has been called "the granddaddy of them all," Pl. Opp. 48, certainly does not suggest any communication or coordination with anyone in New York. Shinwari himself acknowledges that "the JTTF model" has expanded "to over 100 cities nationwide." *Id.* If Shinwari's conclusory allegations were enough, plaintiffs could obtain discovery in virtually any terrorism-related case against FBI agents, regardless of the location of the agents or events at issue.

In short, Shinwari offers nothing more than "speculations and hopes" that discovery may reveal a basis for jurisdiction over these Agents, which is "not enough." *Bracken*, 2016 WL 7496735, at *6.[19] Subjecting seven Agents to burdensome and intrusive discovery in the absence

[19] By contrast, in the only cases Shinwari cites where discovery was granted, the plaintiffs offered at least some factual basis to support the exercise of jurisdiction in New York. *See* Pl. Opp. 46 (citing *Bracken*, 2016 WL 7496735, at *6 (although a "close question," granting limited discovery where defendant "appear[ed] to be located or incorporated in New York and maintained a New York address")); *id.* at 48 (citing *GTFM Inc. v. Int'l Basic Source, Inc.*, No. 01 CIV 6203(RWS), 2002 WL 42884, at *2 (S.D.N.Y. Jan. 11, 2002) (granting discovery where plaintiff "alleged facts pertaining to jurisdiction and venue")). Jurisdictional discovery was denied in every other case where it was sought. *See* Pl. Opp. 45-46 (citing *Chirag*, 604 F. App'x at 18-19 (denying discovery where plaintiff's only non-conclusory allegation was that "[t]he Subject Vessel . . . regularly calls on ports in Connecticut," and the evidence plaintiff proffered neither supported that allegation nor established a *prima facie* case for jurisdiction); *accord Universal Trading*, 560 F. App'x at 56

of any factual allegation supporting the exercise of jurisdiction "would be an unfair infringement of the liberty of [individuals] not even arguably subject to the jurisdiction of this court." *Ronar, Inc. v. Wallace*, 649 F. Supp. 310, 317-18 (S.D.N.Y. 1986). Nor is Shinwari entitled to discovery merely to test the "accura[cy]" of defendants' declarations, Pl. Opp. 48, the veracity of which must be assumed absent contrary evidence or factual allegations, *Del Med. Imaging Corp. v. CR Tech USA, Inc.*, No. 08 Civ. 8556(LAP)(DFE), 2010 WL 1487994, at *8 (S.D.N.Y. Apr. 13, 2010), which Shinwari has not offered. *See, e.g., Greatship (India) Ltd. v. Marine Logistics Solutions (Marsol) LLC*, No. 11 Civ. 420(RJH), 2012 WL 204102, at *3-7 (S.D.N.Y. Jan. 24, 2012) (denying discovery where complaint made insufficient jurisdictional allegations and defendant submitted declaration demonstrating absence of contacts with New York); *NovelAire Techs. LLC v. Munters AB*, 13 Civ. 472 (CM), 2013 WL 6182938, at *13 (S.D.N.Y. Nov. 21, 2013) (same). Shinwari's request for discovery accordingly should be denied. *See Haber v. United States*, 823 F.3d 746, 754 (2d Cir. 2016) (where request for discovery was "based entirely on conclusory and implausible allegations," plaintiff "did not meet his burden of showing he was entitled to jurisdictional discovery").

Finally, if the Court were inclined to entertain Shinwari's request for discovery, it should first decide the Agents' motion to dismiss on qualified immunity grounds, as immunity should be resolved "at the earliest possible stage in the litigation," *Tanzin*, 894 F.3d at 472 (citation and quotation marks omitted), and before any discovery if possible, *Iqbal*, 556 U.S. at 684-86; *Garcia*, 779 F.3d at 97. Indeed, discovery could potentially implicate difficult and serious privilege

(plaintiffs failed to plead "legally sufficient allegations of jurisdiction"); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 186 (2d Cir. 1998) (plaintiffs' "conclusory" allegation, with "no facts," "did not establish a *prima facie* case" of jurisdiction); *NetSoc*, 2019 WL 4857340, at *4 (plaintiff "failed to allege fact-specific allegations or evidence" of jurisdiction)).

questions involving sensitive national security and law enforcement information. Thus, if the Court does not deny Plaintiffs' application for discovery, the Agents respectfully request that the Court hold the Rule 12(b)(2) motion in abeyance pending disposition of the motion to dismiss the Amended Complaint under Rule 12(b)(6). Df. Mem. 46-48.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Agents' opening memorandum of law, Plaintiffs' RFRA claims against the Individual Defendants in their personal capacities should be dismissed for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) and the doctrine of qualified immunity. Shinwari's claims against Agents Steven LNU, Harley, Grossoehmig, Michael LNU, John Doe 6, Dun, and Langenberg should also be dismissed for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2).

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Respectfully submitted,

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