UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MUHAMMAD TANVIR *et al.*, Plaintiffs, v. FNU TANZIN *et al.*, Defendants.	13 Civ. 6951 (RA)

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

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Defendant federal agents FNU Tanzin, Sanya Garcia, Francisco Artousa, John LNU, Steven LNU, John C. Harley III, Michael LNU, Gregg Grossoehmig, Weysan Dun, James C. Langenberg, and John Does 1-6 (collectively, the "Individual Defendants" or "Agents")[1] respectfully submit this memorandum of law in support of their renewed motion to dismiss the remaining claims in the Amended Complaint, Dkt. No. 15, for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) and the doctrine of qualified immunity. Agents Steven LNU, Harley, Grossoehmig, Michael LNU, John Doe 6, Dun, and Langenberg also renew their motion, pursuant to Federal Rule of Civil Procedure 12(b)(2), to dismiss the claims against them for lack of personal jurisdiction.

PRELIMINARY STATEMENT

The only remaining claims in this action are personal-capacity claims brought by plaintiffs Muhammad Tanvir, Jameel Algibhah, and Naveed Shinwari ("Plaintiffs") against the fifteen remaining Individual Defendants under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1.[2] Both the Supreme Court and the Second Circuit explicitly noted, however, that the Individual Defendants may be entitled to qualified immunity on those claims. *Tanzin v. Tanvir*, 141 S. Ct. 486, 492 n* (2020); *Tanvir v. Tanzin*, 894 F.3d 449, 472 (2d Cir. 2018). The Second Circuit also emphasized that qualified immunity "should be resolved at the earliest possible stage in the litigation," and it can be "successfully asserted in a Rule 12(b)(6) motion." *Tanvir*,

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[1] Pursuant to the Stipulation and Order filed July 24, 2014, defendants FNU Tanzin, John LNU, Steven LNU, Michael LNU and John Does 1-6 are currently proceeding under the pseudonyms specified in the Amended Complaint. *See* Docket No 30, ¶¶ 1-2. John Doe 2 is currently proceeding as John Doe 2/3. *See id.* ¶ 1(f).

[2] Plaintiff Awais Sajjad did not assert any claims under RFRA, *see* Dkt. No. 15, Second Claim for Relief, and thus there are no longer any pending claims against defendants John Does 9-13, Michael Rutowski, or William Gale. John Does 7 and 8 were previously dismissed from this action. *See* Dkt. No. 104 at 36.

894 F.3d at 472. As set forth below, the Individual Defendants are "entitled to dismissal" at the pleading stage because Plaintiffs fail to plausibly "state a claim of violation of clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

To state a claim of violation of clearly established law, Plaintiffs must satisfy a two-pronged test: they must plead facts plausibly showing that each Agent imposed a substantial burden on their religious exercise in violation of RFRA, and they must show it was clearly established at the time that what the Agents were doing violated RFRA. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (describing two-pronged test). A government official is entitled to qualified immunity if "a reasonable officer might not have known for certain that the conduct was unlawful." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017).

Here, the qualified immunity inquiry can be easily resolved on the second prong. Plaintiffs cannot meet their burden to show the law was "clearly established" at the time of the Agents' alleged conduct (or even now) that asking someone to cooperate with law enforcement by providing information about others within the same religious community, or using an individual's watchlist status to encourage them to cooperate, imposes a substantial burden on the individual's exercise of religion in violation of RFRA. Not a single court has found a RFRA violation under circumstances remotely similar to the facts of this case. To the contrary, the only court to have addressed the issue recently held that a request to serve as an informant, even if accompanied by an offer of assistance with watchlisting status, does *not* substantially burden religious exercise. *See El Ali v. Barr*, 473 F. Supp. 3d 479, 527 (D. Md. 2020). At the time of the alleged conduct, there was no precedent even suggesting that the "*particular* conduct" alleged by Plaintiffs violated RFRA, *Abbasi*, 137 S. Ct. at 1866, let alone precedent that would place the statutory question "beyond debate," *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). As Plaintiffs themselves

"emphasize[d]" before the Supreme Court, "the 'qualified immunity defense was created for precisely these circumstances[.]'" *Tanzin*, 141 S. Ct. at 489 492 n* (quoting Tr. of Oral Arg. 42).

Although the Court can and should dismiss the remaining claims on this basis alone, Plaintiffs also fail the first prong of the qualified immunity test, because they fail to plead facts plausibly showing that any Agent imposed a substantial burden on their exercise of religion in violation of RFRA such that an award of money damages against the Agents would be "appropriate relief." 42 U.S.C. § 2000bb-1(c). As to eight of the fifteen Agents, Plaintiffs fail to plausibly allege that they had any personal involvement in the alleged requests that Plaintiffs serve as informants—which is the conduct that Plaintiffs now claim substantially burdened their religious exercise. And according to the allegations in the Amended Complaint, Plaintiffs did not raise any religious objection, to any Agent, about becoming an informant. Instead, two Plaintiffs gave *non*-religious reasons for refusing the requests, and the third Plaintiff said he *would* serve as an informant. Plaintiffs therefore fail to plausibly allege that the Agents who allegedly did ask them to become informants would have known, let alone "known for certain," *Abbasi*, 137 S. Ct. at 1867, that those requests would impose a substantial burden on Plaintiffs' exercise of religion. Nor have Plaintiffs alleged facts to support a plausible claim that any of the Agents placed (or kept) them on the No Fly List because they declined to become informants.

Because Plaintiffs fail to allege facts plausibly showing that any of the Agents violated their clearly established rights under RFRA, each of the Individual Defendants is entitled to dismissal at this juncture without any factual inquiry. Agents Steven LNU, Harley, Grossoehmig, Michael LNU, John Doe 6, Dun, and Langenberg are also entitled to dismissal because the Court lacks personal jurisdiction over them. In light of Plaintiffs' prior motion seeking jurisdictional

discovery, however, these Agents respectfully request that the Court resolve the qualified immunity motion first.

BACKGROUND

A. Allegations in the Amended Complaint[3]

1. The No Fly List

As Plaintiffs acknowledge in the Amended Complaint, the No Fly List is maintained by the Terrorist Screening Center ("TSC"). Amended Complaint, Dkt. No. 15 ("AC"), ¶¶ 20, 40-41. The TSC is a multi-agency organization created to "consolidate the Government's approach to terrorism screening," Homeland Security Presidential Directive 6 (Sept. 16, 2003), and administered by the FBI, AC ¶ 40. At the time of the events at issue in this case, the TSC maintained the Terrorist Screening Database ("TSDB"), a consolidated database of identifying information of persons about whom there is reasonable suspicion that they are known or suspected terrorists. AC ¶ 40."[4] The No Fly List was a subset of the TSDB, composed of individuals who satisfied additional heightened criteria for inclusion. *See id* ¶ 42 (alleging that "[t]o be properly placed on the No Fly List, an individual must be a 'known or suspected terrorist'" and "there must be some additional 'derogatory information'" (alteration omitted)).[5]

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[3] For purposes of this motion only, the Individual Defendants accept as true the well-pleaded factual allegations in the Amended Complaint. *See Iqbal*, 556 U.S. at 678. After the Individual Defendants filed their original motion to dismiss the Amended Complaint, Dkt. No. 39, Plaintiffs declined to seek leave to further amend the complaint, *see* Dkt No. 53.

[4] The terrorist screening information formerly maintained in the TSDB has been migrated to a new system. The TSC no longer uses the term "TSDB" to refer to this dataset.

[5] Although Plaintiffs allege that the derogatory information must "demonstrat[e] that the person 'poses a threat of committing a terrorist act with respect to an aircraft,'" AC ¶ 42, not all of the No Fly List criteria pertain to potential threats to aircraft. Under current guidance, "[a]n individual is placed on the No Fly List when the TSC has 'reasonable suspicion' to believe that he or she represents one of the following: [a] A threat of committing an act of international terrorism (as defined in 18 U.S.C. § 2331(1)) or an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to an aircraft (including a threat of air piracy, or threat to an airline, passenger, or civil

The FBI, in addition to other agencies and departments, nominated individuals known or suspected of being terrorists for inclusion in the TSDB and, if the heightened criteria were satisfied, the No Fly List. *Id.* ¶ 41. The TSC then determined whether those nominations would be accepted. *See id*. ¶ 20 ("The TSC [wa]s responsible for reviewing and accepting nominations to the No Fly List from agencies, including the FBI[,] and for maintaining the list. The TSC [wa]s responsible for making the final determination whether to add or remove an individual from the No Fly List."); *id*. ¶ 41 ("The TSC ma[de] the final decision on whether an individual should be placed on the No Fly List.").

Travelers may file a redress request through the Department of Homeland Security Traveler Redress Inquiry Program ("DHS TRIP") if they believe, *inter alia*, that they have been unfairly or incorrectly delayed or prohibited from boarding an aircraft. 49 C.F.R. §§ 1560.201, 205.[6] During the time period relevant to the Amended Complaint, if DHS TRIP determined that a traveler was an exact or possible match to an identity in the TSDB, DHS TRIP referred the matter to the TSC, "which ma[de] the final decision as to whether any action should be taken." AC ¶ 58;

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aviation security); or [b] A threat of committing an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to the homeland; or [c] A threat of committing an act of international terrorism (as defined in 18 U.S.C. § 2331(1)) against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations (as defined by 10 U.S.C. § 2801(c)(4)), U.S ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government; or [d] A threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so." *Kashem v. Barr*, 941 F.3d 358, 365-66 (9th Cir. 2019).

[6] The Amended Complaint alleges that "DHS is responsible for the TRIP procedures and the administrative appeals from such determinations." AC ¶ 57; *see also* 49 U.S.C. § 44909 (c)(6)(B)(i). The Transportation Security Administration ("TSA"), which is a component of DHS, administers DHS TRIP. *See* 49 U.S.C. § 44903(j)(2)(G)(i) (directing the Administrator of TSA to establish a redress process); 49 C.F.R. §§ 1560.201-.207 (TSA regulations governing DHS TRIP); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998) ("It is well established that a district court may rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6), including . . . statutes.").

see also id. (the "TSC 'coordinate[d] with' the agency that originally nominated the individual," but the "TSC ma[de] a final determination regarding a particular individual's status on the No Fly List").[7] At that time, DHS TRIP responses would "neither confirm nor deny the existence of any No Fly List records relating to an individual," but instead would state "whether or not any such records related to the individual ha[d] been 'modified'" *Id.* ¶ 59; *see also id*. ¶ 62 (noting general U.S. government policy at the time not to "confirm in writing that a person is on or off the No Fly List").

2. Plaintiff Muhammad Tanvir

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

Tanvir alleges that he was first approached by Agents Tanzin and John Doe 1 in February 2007 at his workplace. *Id.* ¶ 69. These Agents asked Tanvir about an old acquaintance who may have attempted to enter the United States illegally. *See id*. This was Tanvir's sole interaction with John Doe 1.[8] Tanvir does not allege that either Tanzin or John Doe 1 asked him to serve as an

[7] In 2015, the government revised its redress procedures for certain individuals on the No Fly List. Among other changes, the TSA Administrator is now the final decisionmaker for U.S. persons on the No Fly List who fully exhaust the DHS TRIP process. Dkt. No. 85 (notifying Court and Plaintiffs of revised redress procedures); *see generally Kashem*, 941 F.3d at 366 (describing changes to DHS TRIP redress process).

[8] Although Tanvir alleges that he also interacted with John Doe 1 on unspecified dates in late January and February 2009, *see id.* ¶ 82, John Doe 1 retired from government service in November 2007. Dkt. No. 42, Declaration of John Doe 1, dated July 22, 2014, ¶¶ 3-4; *see Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006) (on Rule 12(b)(6) motion, judicial notice may be taken of a document, including a declaration, where "it is clear on the record that no dispute exists regarding the authenticity or accuracy of the document," and the relevance of the document is undisputed);

informant during this meeting. Tanvir alleges that, two days later, Tanzin contacted him by telephone and asked him "what people in the Muslim community generally discussed, and whether there was anything that he knew about within the American Muslim community that he 'could share' with the FBI." AC ¶ 70. Tanvir responded that "he did not know of anything that would concern law enforcement." *Id.*

Tanvir acknowledges that he was able to fly on two occasions more than a year after his February 2007 interaction with Agents Tanzin and John Doe 1. He flew to Pakistan in July 2008 and back in December 2008. *Id.* ¶¶ 69-71. Tanvir alleges that upon his return from Pakistan in December 2008, unspecified "government officials" confiscated his passport and "gave him a January 28, 2009 appointment with DHS to pick it up." *Id.* ¶ 71. Tanvir alleges that in January 2009, Tanzin and John Doe 2/3 came to his workplace and asked him to go to the FBI's office at 26 Federal Plaza, and he agreed. *Id.* ¶¶ 73-74. There, the Agents asked Tanvir questions about, among other things, terrorist training camps near the village where he was raised, whether he had any Taliban training, and his rope-climbing skills (including an occasion while he was working as a construction worker when he rappelled from the high floors of a building while other workers cheered him on). *Id.* ¶ 75. Tanvir alleges that Tanzin and John Doe 2/3 requested that Tanvir "work for them as an informant" in Pakistan and Afghanistan, and offered him incentives, such as facilitating his wife's and family's visits from Pakistan to the United States, financially assisting his aging parents in Pakistan to go on religious pilgrimage to Saudi Arabia, and providing him with money, but he refused, telling the Agents that he "was afraid" and it was "very dangerous." *Id.* ¶¶ 76-78. According to Tanvir, Tanzin called him the next day and "threatened" Tanvir, saying

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CIH Int'l Holdings, LLC v. BT United States, LLC, 821 F. Supp. 2d 604, 608 n.1 (S.D.N.Y. 2011) (taking judicial notice of a declaration when deciding Rule 12(b)(6) motion).

that Tanzin would "authorize the release of [Tanvir's] passport if [he] agreed to become an informant," but if he declined, he "would be deported if he went to the airport to pick up his passport." *Id.* ¶ 79. Tanvir again refused the request, but he was still able to retrieve his passport from the airport. *Id.* ¶¶ 79-80. Tanvir alleges that Tanzin thereafter contacted him "multiple times" in January and February 2009 and asked him to be an informant, but he again declined. *Id.* ¶¶ 81-84.[9] Tanvir alleges that he "repeatedly" told the Agents that "if he knew of any criminal activity he would tell them, but that he would not become an informant or seek out such information proactively." *Id.* ¶ 84. "Eventually," Tanvir alleges, Tanzin and John Doe 2/3 asked him to take a polygraph test and threatened to arrest him if he declined; he declined and the Agents left without arresting him. *Id* ¶¶ 86-87. This was Tanvir's last interaction with Tanzin and John Doe 2/3.

Tanvir alleges that he refused to serve as an informant because he "had sincerely held religious and personal objections to spying on innocent members of his community," and that the Agents placed "significant pressure on [him] to violate his sincerely held religious beliefs." *Id.* ¶ 84. But Tanvir does not allege that he ever informed Tanzin or John Doe 2/3—or any other Agent—about his religious objection to serving as an informant. Tanvir also acknowledges that he was able to fly after his interactions with Agents in early 2009, when he was asked, and declined, to become an informant. He flew from the United States to Pakistan in July 2009 and flew back to the United States in January 2010. *Id.* ¶¶ 88-89.

In October 2010, more than a year after his last contact with Agents Tanzin, John Doe 1 or John Doe 2/3, Tanvir allegedly was denied boarding on a domestic flight from Atlanta to New York City. *See id.* ¶ 91. This was the first time Tanvir was allegedly denied boarding. Tanvir

[9] Tanvir alleges that John Doe 1 was present during these contacts in January and February 2009, but as noted, *supra* n.8, John Doe 1 had retired from government service more than a year before.

alleges that he called Tanzin, who told Tanvir that he was "no longer assigned to" Tanvir and to "'cooperate' with the FBI agent who would be contacting him soon." *Id.* ¶ 92. Tanvir alleges that he was contacted two days later by Agent Garcia, who requested a meeting, but Tanvir refused to meet with her. *See id.* ¶ 94.

Tanvir alleges that one year later, in October 2011, he purchased tickets to fly to Pakistan in November 2011. *See id.* ¶ 98. The day before the flight, Garcia allegedly contacted him, and Tanvir met with Garcia and John LNU at a restaurant in Queens. *Id.* ¶¶ 100-01. Garcia and John LNU advised Tanvir that they "would try to permit him to fly again by obtaining a one-time waiver . . . but that it would take some weeks for them to process the waiver." *Id.* ¶ 102.[10] Tanvir does not allege that either Garcia or John LNU requested that he serve as an informant.

Tanvir alleges that on the day of his scheduled flight to Pakistan in November 2011, Agent Garcia called him and stated that he would not be permitted to fly unless he came to FBI headquarters to take a polygraph test; Tanvir refused and canceled his flight. *See id.* ¶ 104. Thereafter, Tanvir allegedly purchased two more tickets to travel internationally, and both times was denied boarding at the airport. *See id.* ¶¶ 109, 113.

Tanvir filed an inquiry with DHS TRIP on September 27, 2011, and ultimately received a response to his inquiry on March 28, 2013, before this lawsuit was filed, stating that his travel experience "was most likely caused by a misidentification" and that the government had "made updates" to its records. *Id.* ¶ 114. Three months later, on June 27, 2013, Tanvir boarded a flight and flew to Pakistan. *See id.* ¶ 115.[11]

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[10] According to the Amended Complaint, after being denied boarding, certain individuals have been granted one-time waivers "to board a single flight to the United States." AC ¶ 55.

[11] After the DHS TRIP procedures were revised in 2015, Tanvir elected to have his DHS TRIP inquiry reopened and reconsidered under the revised procedures, and he was advised that the government knows of no reason why he should be unable to fly. Dkt. No. 92.

3. Plaintiff Jameel Algibhah

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

Algibhah alleges that on December 17, 2009, Agents Artousa and John Doe 4 approached him at work and asked him questions about his friends, acquaintances, and individuals with whom he worked and attended college. *Id.* ¶¶ 119-20. This was Algibhah's sole interaction with John Doe 4. Algibhah alleges that these Agents asked him to "work for them as an informant," "infiltrate a mosque," "participate in certain online Islamic forums," and "inform on his community in his neighborhood," and offered him money and travel assistance for his family in Yemen, but he refused. *Id.* ¶ 121. Algibhah alleges that he declined to work as an informant because, like Tanvir, it would "violate[] his sincerely held personal and religious beliefs." *Id.* ¶¶ 122. But also like Tanvir, Algibhah does not allege that he informed the Agents of the religious basis for his objection.

Algibhah alleges that on May 4, 2010, six months after his interaction with Artousa and John Doe 4, he was denied boarding on a flight to Yemen. *Id.* ¶¶ 125. He alleges that he was denied boarding a second time on September 19, 2010. *See id.* ¶ 127. In January 2012, Algibhah "sought help from his elected representatives," who "reached out to the TSA[.]" *Id.* ¶ 130.

In June 2012, Agents Artousa and John Doe 5 allegedly contacted Algibhah and asked him questions about his "religious practices, his community, his family, his political beliefs, [] the names of websites he visited," the "types of people who go to his mosque," and other "specific information, such as whether he knew people from the region of Hadhramut in Yemen." *Id.* ¶¶ 131-32. According to the Amended Complaint, Artousa and John Doe 5 indicated that they

could remove him from the No Fly List "should their present conversation 'go well'" and if Algibhah "work[ed] for them." *Id.* ¶ 131. Algibhah alleges that John Doe 5 said "Congressmen can't do shit for you; we're the only ones who can take you off the list." *Id.* ¶ 131. Algibhah alleges that Artousa and John Doe 5 asked him to "access some Islamic websites for them," and said he "would need to [] 'act extremist.'" *Id.* ¶ 133. Algibhah does not allege that he raised any religious objection to this request. Rather, he told the Agents "he needed time to consider their request that he work as an informant." *Id.* Algibhah allegedly "assured the agents that he would work for them as soon as they took him off the No Fly List," to which Artousa allegedly replied that Algibhah "didn't need to worry." *Id.* ¶ 134. This was Algibhah's sole interaction with John Doe 5. Two days later, Algibhah alleges, Artousa called him, said it would be "very helpful" if Algibhah served as an informant, and asked to meet with Algibhah "one more time." *Id.* However, Artousa did not contact Algibhah again for nearly a year. *See id.* ¶¶ 134, 139.

On May 29, 2013, Artousa allegedly called Algibhah and reiterated his desire to "help[] [Algibhah] get off the No Fly List." *Id.* ¶ 139. During this call, Algibhah directed Artousa to his counsel; his counsel later called Agent Artousa, who said he was still interested in speaking with Algibhah. *Id.* ¶¶ 139-40.

Algibhah alleges that he filed a DHS TRIP inquiry in May 2010, and received a response on October 28, 2010, stating that "no changes or corrections are warranted at this time." *Id.* ¶¶ 126-28.[12]

[12] After the DHS TRIP procedures were revised in 2015, Algibhah elected to have his DHS TRIP inquiry reopened and reconsidered under the revised procedures, and he was advised that the government knows of no reason why he should be unable to fly. Dkt. No. 92.

4. Plaintiff Naveed Shinwari

Plaintiff Naveed Shinwari alleges that he is a lawful permanent resident of the United States, currently resides in Connecticut, has family in Afghanistan, and is Muslim. *See id.* ¶¶ 16, 145. Shinwari alleges that he interacted with Agents Steven LNU, Harley, Grossoehmig, Michael LNU, John Doe 6, Dun, and Langenberg. *See id.* ¶¶ 146-64.

Shinwari alleges that, while en route from Afghanistan to Omaha, Nebraska, on February 26, 2012, he was denied boarding on a connecting flight leaving from Dubai, United Arab Emirates. *See id.* ¶ 146. He alleges that he was interviewed in Dubai the next day by Agents Steven LNU and Harley, who asked him questions about his background, religious activities, where he had stayed during his trip to Afghanistan, and whether he had associated with any "bad guys" or visited any training camps. *Id.* ¶ 148. Steven LNU and Harley indicated that they "needed to confer with 'higher-ups in [Washington,] D.C.' before allowing [him] to fly back to the United States." *Id.* ¶ 150. Shinwari does not allege that either Steven LNU or Harley asked him to work as an informant. Two days later, Agent Harley allegedly told Shinwari they had received the "go-ahead," and Shinwari flew to the United States on March 1, 2012. *See id.* ¶ 151. This was the last interaction Shinwari had with Agents Steven LNU or Harley.

Shinwari alleges that when he arrived at Dulles International Airport in Virginia, Agents Michael LNU and Grossoehmig asked him similar questions to "verify" what Shinwari told the agents in Dubai. *Id.* ¶¶ 152-53. Shinwari does not allege that either Michael LNU or Grossoehmig asked him to work as an informant during this conversation. This was the sole interaction Shinwari had with Agent Grossoehmig. Shinwari flew from Dulles to Omaha on March 2, 2012. *Id.* ¶ 154.

Shinwari alleges that approximately one week after he returned to Omaha, Agents Michael LNU and John Doe 6 interviewed him at his home and asked him to act as an informant, which

Shinwari declined to do. *See id.*¶¶ 155-56. Like Tanvir and Algibhah, Shinwari alleges that working as an informant would "violate[] his sincerely held personal and religious beliefs." *Id.* ¶ 157. But also like Tanvir and Algibhah, Shinwari does not allege that he ever informed the Agents of the religious basis for his objection.

Shinwari alleges that he was denied boarding on a domestic flight from Omaha to Orlando on March 11, 2012. *Id.* ¶ 158. Shinwari alleges that he emailed Agent Harley "seeking help" the next day, but received no response. *Id.* ¶ 161. According to the Amended Complaint, Michael LNU and John Doe 6 returned to Shinwari's home on March 13, 2012, and again asked him to serve as an informant, offering him "help" and "financial compensation." *Id.* Shinwari told the Agents that "he believed becoming an informant would put his family in danger," but again, he does not allege that he raised any religious objection to becoming an informant. *Id.*

Shinwari alleges that he contacted counsel, and on March 21, 2012, he and his counsel met with two supervisory Agents, Special Agent in Charge Dun and Assistant Special Agent in Charge Langenberg, at the FBI's office in Omaha. *Id.* ¶ 162. Dun and Langenberg allegedly asked Shinwari about videos of religious sermons he had watched on the internet. *Id.* ¶ 163. They asked him to consider why he may have been placed on a watch list, and indicated that he might be able to get a one-time waiver to fly. *Id.* ¶¶ 163-64. Shinwari does not allege that either Dun or Langenberg asked him to serve as an informant. This meeting was the only interaction Shinwari had with Dun and Langenberg.

Shinwari alleges that he filed a DHS TRIP inquiry on February 26, 2012, and ultimately received a response on December 24, 2013, stating that Shinwari's travel experience "was most likely caused by a misidentification," and that the government had "made updates" to its records.

See id. ¶¶ 167-68. On March 19, 2014, Shinwari was able to fly round trip from Connecticut to Nebraska. *See id.* ¶ 169.[13]

5. Plaintiffs' RFRA Claims

Plaintiffs claim that, by asking them to serve as informants, "FBI agents placed significant pressure on [them] to violate [their] sincerely held religious beliefs, substantially burdening [their] exercise of religion." *Id.* ¶¶ 84, 122, 157. They allege that they "sincerely believe that informing to the government on innocent people violates their core religious beliefs." *Id.* ¶ 207. Plaintiffs assert that

> [m]any American Muslims, like many other Americans, and many followers of other religions, have sincerely held religious and other objections against becoming informants in their own communities, particularly when they are asked to inform on the communities as a whole rather than specific individuals reasonably suspected of wrongdoing. Acting as an informant would require them to lie and would interfere with their ability to associate with other members of their communities on their own terms. For these American Muslims, the exercise of Islamic tenets precludes spying on the private lives of others in their communities.

Id. ¶ 65. Plaintiffs allege that the Agents "forced Plaintiffs into an impermissible choice between, on the one hand, obeying their sincerely held religious beliefs and being subjected to . . . the No Fly List, or, on the other hand, violating their sincerely held religious beliefs in order to avoid [the No Fly List]." *Id.* ¶ 210. They claim that by "forcing Plaintiffs into this impermissible choice," the Individual Defendants placed a substantial burden on Plaintiffs' religious exercise in violation of RFRA. *Id.* ¶ 211. Put another way, Plaintiffs allege that by "attempting to recruit Plaintiffs as confidential government informants by resorting to the retaliatory or coercive use of the No Fly List, the [Agents] substantially burdened" Plaintiffs' religious exercise. *Id.* ¶ 214.

[13] After the DHS TRIP procedures were revised in 2015, Shinwari elected to have his DHS TRIP inquiry reopened and reconsidered under the revised procedures, and he was advised that the government knows of no reason why he should be unable to fly. Dkt. No. 92.

B. Procedural History Relevant to Plaintiffs' RFRA Claims

In its Memorandum Opinion issued on September 3, 2015, this Court dismissed Plaintiffs' RFRA claims, holding that the relief afforded by the statute—which provides 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)—does not include money damages against individual federal officials in their personal capacities. Dkt. No. 104 at 2-3, 35. The Court did not address the Agents' qualified immunity arguments.

Plaintiffs appealed the Court's RFRA ruling, and on May 2, 2018, the Second Circuit reversed, concluding that RFRA "permits a plaintiff to recover money damages against federal officials sued in their individual capacities." 894 F.3d at 453. However, "sensitive to the notion that qualified immunity should be resolved at the earliest possible stage in the litigation," and that it can be "successfully asserted in a Rule 12(b)(6) motion," the Second Circuit remanded to this Court to determine in the first instance whether the Individual Defendants are entitled to qualified immunity. *Id.* at 472.

After their petition for rehearing en banc was denied, Dkt. No. 133, the Agents filed a petition for a writ of certiorari, which was granted on November 22, 2019. On December 10, 2020, the Supreme Court affirmed the Second Circuit's decision, holding that RFRA's provision for "'appropriate relief' includes claims for money damages against Government officials in their individual capacities." *Tanzin*, 141 S. Ct. at 489. The Court explicitly noted, however, that "the Government and respondents agree that government officials are entitled to assert a qualified immunity defense" under RFRA. *Id*. at 492 n*.

ARGUMENT

I. PLAINTIFFS' RFRA CLAIMS SHOULD BE DISMISSED BECAUSE THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Courts have long recognized that individual-capacity lawsuits against federal officials give rise to "substantial societal costs," particularly "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). "The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix*, 577 U.S. at 11 (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotation marks omitted)). An officer is immune from liability if "a reasonable officer might not have known for certain that the conduct was unlawful." *Abbasi*, 137 S. Ct. at 1867.

The qualified immunity doctrine reflects the judicial recognition that "officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). Qualified immunity affords officials "breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 563 U.S. at 743. "Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Mullenix,* 577 U.S. at 12 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (quotation marks omitted)); *accord Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

Qualified immunity applies not only to constitutional claims, but also to statutory claims. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (recognizing the availability of qualified immunity for conduct that "does not violate clearly established statutory or constitutional rights"). Numerous courts have recognized that qualified immunity applies to RFRA claims. *See, e.g.*,

Fazaga v. FBI, 965 F.3d 1015, 1061 (9th Cir. 2020), *cert. granted on other grounds*, 141 S. Ct. 2720 (June 7, 2021); *New Doe Child #1 v. Congress of United States*, 891 F.3d 578, 591 (6th Cir. 2018); *Lebron v. Rumsfeld*, 670 F.3d 540, 557 (4th Cir. 2012); *Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277, 1285 (11th Cir. 2012). And as the Supreme Court noted, Plaintiffs have conceded that "government officials are entitled to assert a qualified immunity defense" under RFRA. *Tanzin*, 141 S. Ct. at 492 n.*. "Indeed," the Supreme Court observed, Plaintiffs "emphasize[d] that the 'qualified immunity defense was created for precisely these circumstances,' and is a 'powerful shield' that 'protects all but the plainly incompetent or those who flout clearly established law.'" *Id.* (quoting Plaintiffs' brief and oral argument).[14]

"Qualified immunity should be resolved at the earliest possible stage in the litigation." *Tanvir*, 894 F.3d at 472; *see Wood v. Moss*, 572 U.S. 744, 755 n.4 (2014) ("We have repeatedly stressed the importance of resolving immunity questions at the earliest possible stage of the litigation." (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (internal quotation marks and brackets omitted))). That is because "[t]he basic thrust of the qualified immunity doctrine is to

[14] In urging the Supreme Court to hold that RFRA authorizes personal-capacity suits against federal officials for money damages, Plaintiffs repeatedly invoked the doctrine of qualified immunity. *See* Br. for Respondents at 12 ("An individual whose religious exercise has been substantially burdened by a federal official in violation of RFRA may sue that person in their individual capacity for damages. Congress provided that relief, subject to strong statutory defenses and the powerful shield of qualified immunity."); *id.* at 22 ("The qualified immunity defense was created for precisely these circumstances, and the entire jurisprudence of qualified immunity is evidence that individual capacity suits for damages are commonplace for claims that arose as a result of official action."); Tr. of Oral Arg. at 31 ("Qualified immunity will shield all but those who defy clearly established law."); *id.* at 42 ("[Petitioners] come to court armed with a powerful shield of qualified immunity, which protects all but the plainly incompetent or those who flout clearly established law."); *id.* at 53-54 (invoking the "well-established and robust doctrine of qualified immunity" in response to arguments "about chilling of governmental function and whatnot"); *id.* at 57 ("Petitioners' concerns about damages potentially chilling executive function are identical to those raised in *Hafer v. Melo*. And what the Court held there is true here. Qualified immunity properly addresses those concerns.").

free officials from the concerns of litigation, including avoidance of disruptive discovery." *Iqbal*, 556 U.S. at 685 (quotation marks omitted); *White v. Pauly*, 137 S. Ct. 548, 551 (2017) ("qualified immunity is important to society as a whole" and "is effectively lost if a case is erroneously permitted to go to trial" (quotation marks omitted)); *see also X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 65 (2d Cir. 1999) (qualified immunity protects officers "not just from liability but also from suit on such claims, thereby sparing [them] the necessity of defending by submitting to discovery on the merits or undergoing a trial").

Thus, as the Second Circuit observed, a qualified immunity defense can be "successfully asserted in a Rule 12(b)(6) motion." *Tanvir*, 894 F.3d at 472. Indeed, a defendant official "is *entitled* to dismissal before the commencement of discovery" unless the complaint "state[s] a claim of violation of clearly established law." *Mitchell*, 472 U.S. at 526 (emphasis added); *Abbasi*, 137 S. Ct. at 1865-69; *Iqbal*, 556 U.S. at 678. Specifically, the plaintiff must "plead[] facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *al-Kidd*, 563 U.S. at 735 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Failure at either prong one or prong two of the qualified immunity test is fatal to a plaintiff's claims.

Moreover, as with any motion to dismiss a complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court applies a "plausibility standard," which is guided by "[t]wo working principles." *Iqbal*, 556 U.S. at 678. First, although the Court must accept non-conclusory factual allegations in the complaint as true, this "tenet" is "inapplicable to legal conclusions." *Id.* As a result, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to provide the grounds of his entitlement to

relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (quotation marks and alterations omitted)). Second, only complaints that state a "plausible claim for relief" can survive a Rule 12(b)(6) motion to dismiss. *Iqbal*, 556 U.S. at 679. Thus, "where the well-pleaded facts do not permit the [C]ourt to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

Here, Plaintiffs fail both prongs of the qualified immunity test. They fail to plausibly allege any violation of a clearly established right under RFRA (prong 2), and they fail to plausibly allege that the Individual Defendants imposed a substantial burden on their religious exercise such that an award of money damages against these Agents personally would be "appropriate relief" under the factual circumstances pleaded in the Amended Complaint (prong 1). Because each Plaintiff fails to state a claim of violation of clearly established law against any Agent, the Individual Defendants are "entitled to dismissal" on the pleadings. *Mitchell*, 472 U.S. at 526.

A. PLAINTIFFS FAIL TO PLAUSIBLY ALLEGE VIOLATION OF A CLEARLY ESTABLISHED RIGHT UNDER RFRA

The Court can begin and end with the second prong of the qualified immunity test. Because "prior case law has not clearly settled the right, and so given officials fair notice of it, the [C]ourt can simply dismiss the claim for money damages." *Camreta v. Greene*, 563 U.S. 692, 705 (2011); *see also Pearson*, 555 U.S. at 236, 243-45 (holding that courts have discretion in "deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case," and concluding that defendants were entitled to qualified immunity on the pleadings under second prong).

To be clearly established, the right at issue must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 577 U.S. at 11

(quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)) (quotation marks omitted). The Supreme Court "ha[s] repeatedly told courts . . . not to define clearly established law at a high level of generality." *Id.* (quoting *al-Kidd*, 563 U.S. at 742). Instead, "'the dispositive question is whether the violative nature of *particular* conduct is clearly established.'" *Abbasi*, 137 S. Ct. at 1866 (quoting *Mullenix*, 577 U.S. at 12) (internal quotation marks and alteration omitted); *see also Wesby*, 138 S. Ct. at 590 ("The 'clearly established' standard . . . requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him.").

"This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix*, 577 U.S. at 12 (citation and internal quotation marks omitted). While there need not be "a case directly on point," "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *al-Kidd*, 563 U.S. at 741) (internal quotation marks omitted).

> It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that "every reasonable official" would know.

Wesby, 138 S. Ct. at 590 (citations omitted); *see also Garcia v. Does*, 779 F.3d 84, 92 (2d Cir. 2015) (to determine whether a right is clearly established, courts look to prior Supreme Court and circuit precedent "directly addressing the right at issue" or "clearly foreshadow[ing] a particular ruling on the issue").

Consistent with this direction from the Supreme Court, courts addressing qualified immunity in the RFRA context have focused on whether there was clearly established case law that would have put the defendant officials on notice that the particular conduct alleged by the plaintiff would impose a substantial burden on religious exercise under RFRA. Thus, courts have held that dismissal is appropriate on qualified immunity grounds where there was no law

addressing the application of RFRA in the context of: covert surveillance conducted on the basis of religion, *Fazaga*, 965 F.3d at 1062 (affirming dismissal of RFRA claims against individual agents); a transgender prisoner's request not to be housed with female transgender prisoners to permit "modesty around members of the opposite sex," *Dreiver v. United States*, No. 19-1807(TJK), 2021 WL 1946391, at *4 (D.D.C. May 14, 2021); a prison warden's request to transfer an inmate to a facility where he could better participate in his faith, *Cooper v. True*, No. 16-cv-02900-MJD-KMM, 2017 WL 6375609, at *1, 6 (D. Minn. Nov. 2, 2017), *report and recommendation adopted by* 2017 WL 6372651 (D. Minn. Dec. 12, 2017); a pat-down search of a Muslim female inmate by a male guard, *Brown v. BOP*, No. 3:14-cv-681(RNC), 2017 WL 1234104, at *2 (D. Conn. Mar. 31, 2017); and a prisoner's receipt of "'religious property from outside sources when the religious items available through authorized means are not sufficient to meet the prisoner's religious needs,'" *Fernandez-Torres v. Watts*, No. 2:16-cv-24, 2017 WL 9485591, at *3 (S.D. Ga. Jan. 30, 2017) (quoting *Davila v. Gladden*, 777 F.3d 1198, 1211-12 (11th Cir. 2015)), *report and recommendation adopted by* 2017 WL 1173923 (S.D. Ga. Mar. 29, 2017). *See also Lebron*, 670 F.3d at 557 (defendants entitled to dismissal based upon qualified immunity because "any rights that enemy combatants may have had under RFRA were not clearly established" at the time); *Rasul v. Myers*, 563 F.3d 527, 533 n.6 (D.C. Cir. 2009) (not clearly established that RFRA applied to aliens detained abroad).[15]

[15] By contrast, in RFRA cases where qualified immunity was denied, there was prior circuit precedent addressing very similar conduct or circumstances. *See, e.g.*, *Potts v. Holt*, 617 F. App'x 148, 151 (3d Cir. 2015) (qualified immunity denied because, at the time of the alleged conduct, "it was clearly established in this Circuit that prisoners' general right to freely exercise their religion gives them a more specific right to be served religiously acceptable meals while in prison"); *Smadi v. Michaelis*, No. 19-CV-00217-JPG, 2020 WL 7491296, at *4-6 (S.D. Ill. Dec. 21, 2020) (same where prior circuit precedent established "the right to accommodation for an inmate's idiosyncratic dietary restrictions associated with his religion"); *Bass v. Grottoli*, No. 94 Civ. 3220 (MGC), 1995 WL 565979, at *1, 6 (S.D.N.Y. Sept. 25, 1995) (denying qualified immunity from RFRA claim

Here, Plaintiffs can identify no authority clearly establishing that the "*particular* conduct" alleged in the Amended Complaint violated their rights under RFRA. *Abbasi*, 137 S. Ct. at 1866. Plaintiffs allege that defendants "substantially burdened [their] sincerely held religious beliefs in violation of RFRA" by "attempting to recruit [them] as confidential government informants" through "the retaliatory or coercive use of the No Fly List"; that "[t]he United States government has no compelling interest in requiring Plaintiffs to inform on their religious communities"; and that "[r]equiring Plaintiffs to inform on their religious communities is not the least restrictive means of furthering any compelling government interest." AC ¶¶ 212-214. But there was no law that would have put defendants on notice that RFRA was violated in this "specific context." *Mullenix*, 577 U.S. at 12; *Abbasi* 137 S. Ct. at 1868.

Plaintiffs cannot identify any clearly established precedent that "attempting to recruit" a person as an informant to provide information about others within the same religious community constitutes a substantial burden on religious exercise in violation of RFRA—and certainly not in the unique factual context of the No Fly List. *See Burns v. Martuscello*, 890 F.3d 77, 94 (2d Cir. 2018) (officers entitled to qualified immunity from First Amendment retaliation claims because no prior Second Circuit or Supreme Court precedent held or clearly foreshadowed the decision that "the First Amendment protects the right not to snitch" in the prison context). Nor has any court considered whether the government has a compelling interest in recruiting informants in these circumstances, or whether there are less restrictive means to further any compelling government interest. In short, no court has found a violation of RFRA under circumstances that are remotely similar to those alleged here.

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that prison officials cancelled "numerous Jewish religious services or religious instruction classes," in light of prior circuit precedent clearly establishing that "prisoners have a constitutional right to participate in congregate religious services").

In fact, the few cases that have involved similar allegations suggest that the conduct alleged in the Amended Complaint does *not* violate RFRA. In *El Ali v. Barr*, a district court held that a request to serve as an informant on one's religious community, even if accompanied by an offer of assistance to remove the person from a watchlist, does not in and of itself impose a substantial burden on the exercise of religion. *See* 473 F. Supp. 3d at 527. The plaintiffs in *El Ali* claimed that "offers to act as informants for the FBI in exchange for resolution of their travel woes substantially burden[ed] their free exercise of religion," because "their religious beliefs restrict[ed] bearing false witness and betraying the trust of their religious community," and thus prohibited them from agreeing to serve as informants. 473 F. Supp. 3d at 527. The court held that "a mere 'ask' for assistance in exchange for favorable treatment does not constitute a substantial burden on free exercise." *Id*. The court explained:

> As with all potential law enforcement informants, the relationship begins with an "ask," and possible favorable treatment in exchange for helpful information. Also, as with many "asks," they too begin with the potential informant having something to gain, and often something to lose, from saying yes. Suspects are sometimes paid for their testimony or "work off charges" in exchange for turning on their friends, coworkers, family, and community leaders. This Hobson's choice is the same faced by scores of suspects who enter into cooperation agreements with the government on a daily basis. Plaintiffs' choice is a variation on this theme.

Id. The *El Ali* court dismissed the plaintiffs' RFRA claims premised on alleged requests that they serve as informants, "discern[ing] no principled reason to find the mere offer of a chance to cooperate as placing a substantial burden on the exercise of religion sufficient to support a RFRA violation"—even though the plaintiffs (like Plaintiffs here) had alleged that the agents' requests were accompanied by offers to help with their watchlisting status. *Id*.; *cf. also Fikre v. FBI*, No. 3:13-cv-00899-BR, 2019 WL 2030724, at *8-9 (D. Or. 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).

In the absence of "a case where an officer acting under similar circumstances . . . was held to have violated" RFRA, *White*, 137 S. Ct. at 552, reasonable officials in the Individual Defendants' position might not have known, much less "known for certain," *Abbasi*, 137 S. Ct. at 1867, that their alleged requests that Plaintiffs serve as informants would impose a substantial burden on their religious exercise in violation of RFRA. Even if the Court were persuaded that Plaintiffs have plausibly alleged a substantial burden in this case, the essential purpose of qualified immunity is to avoid penalizing the Individual Defendants for failing to predict future developments in the law. *See Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a [legal] question, it is unfair to subject [individual government defendants] to money damages for picking the losing side of the controversy.").

Moreover, the facts alleged in the Amended Complaint show that Plaintiffs did not raise any religious objection to the requests, which is all the more reason the Agents could not have been on fair notice that their alleged conduct potentially violated RFRA. Tanvir and Shinwari in fact gave non-religious reasons for not wanting to become informants. *See* AC ¶ 78 (Tanvir said he was "afraid" to be an informant because it was "very dangerous"); *id*. ¶ 161 (Shinwari said "becoming an informant would put his family in danger"). And Algibhah said "he needed time to consider the[] request," and then "assured the agents that he would work for them" as soon as he was removed from the No Fly List. *Id*. ¶ 134. Based on the facts alleged, reasonable officers in the Agents' position would not have "known for certain" that their requests would impose a substantial burden on Plaintiffs' exercise of religion in violation of RFRA. *Abbasi*, 137 S. Ct. at 1867; *see also Romero v. Lappin*, No. CIV. 10-35-ART, 2011 WL 3422849, at *4 (E.D. Ky. Aug.

4, 2011) (granting qualified immunity where "[n]either the BOP manual nor any court decisions establish that removing [a] string [from a feather] would interfere with the inmate's religious practices"); *Harrison v. Watts*, 609 F. Supp. 2d 561, 575 (E.D. Va. 2009) (granting qualified immunity where there was "no controlling circuit precedent" on whether the "Nation of Gods and Earths" was a religion and the plaintiff had previously maintained that "the group was not a religion"), *aff'd*, 350 F. App'x 835 (4th Cir. 2009). At the very least, "officials of reasonable competence could disagree" on whether a request to serve as an informant would violate RFRA in this "particular factual context." *Doninger v. Niehoff*, 642 F.3d 334, 353 (2d Cir. 2011) (citations, quotation marks and alterations omitted). The Individual Defendants are therefore immune from Plaintiffs' RFRA claims under the second prong of the qualified immunity test.

B. PLAINTIFFS FAIL TO PLAUSIBLY ALLEGE THAT THE INDIVIDUAL DEFENDANTS VIOLATED THEIR RIGHTS UNDER RFRA, SUCH THAT DAMAGES WOULD BE "APPROPRIATE RELIEF"

Although the Court need not reach the first prong of the qualified immunity test, the Individual Defendants are also entitled to dismissal because Plaintiffs fail to allege facts plausibly showing that any Agent violated their rights under RFRA, such that damages against the Individual Defendants personally would be "appropriate relief."

RFRA provides, in relevant part, that the "Government shall not substantially burden a person's exercise of religion," 42 U.S.C. § 2000bb-1(a), unless it "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest," § 2000bb-1(b). "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." *Id.* § § 2000bb-1(c).

To state a *prima facie* claim under RFRA, a plaintiff must plausibly allege, first, that "the activities the plaintiff claims are burdened by the government action [are] an 'exercise of religion,'" and second, that the government action "'substantially burden[ed]' the plaintiff's exercise of religion." *Fazaga*, 965 F.3d at 1061 (quoting *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc) & 42 U.S.C. § 2000bb-1(a)). A substantial burden "exists where the state 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (quoting *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981)); *see also Fazaga*, 965 F.3d at 1061 (substantial burden exists "when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit," or are "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions" (quotation marks and citation omitted)). "An effect on an individual's 'subjective, emotional religious experience' does not constitute a substantial burden." *Id.* (quoting *Navajo Nation*, 535 F.3d at 1070).[16]

The Individual Defendants are entitled to qualified immunity because Plaintiffs have not pleaded facts plausibly showing any of the Agents imposed a substantial burden on their exercise of religion in violation of RFRA, such that it would be "appropriate" to hold them personally liable for money damages for the overarching government conduct challenged here.[17]

[16] If a plaintiff shows a substantial burden on his or her religious exercise, a defendant can avoid liability by showing "the application of the burden to the individual furthers a compelling state interest and is the least restrictive means of furthering that interest." *Jolly*, 76 F.3d at 477.

[17] As noted *supra* nn.11-13, all three Plaintiff elected to avail themselves of the DHS TRIP procedures as revised in 2015, and were advised that the government knew of no reason why they should be unable to fly. Dkt. No. 92. Plaintiffs voluntarily dismissed their official-capacity claims challenging their alleged placement on the No Fly List. *See* Dkt. Nos. 105, 108, 109.

1. Plaintiffs Fail to Allege Facts Plausibly Showing That Any Agent Personally and Knowingly Imposed a Substantial Burden on Their Religious Exercise

The crux of Plaintiffs' RFRA claim is that the Agents imposed a substantial burden on their religious exercise by "forc[ing] Plaintiffs into an impermissible choice between, on the one hand, obeying their sincerely held religious beliefs and being subjected to . . . the No Fly List, or, on the other hand, violating their sincerely held religious beliefs in order to avoid [the No Fly List]." AC ¶ 210. But according to the factual allegations in the Amended Complaint, eight of the fifteen Agents were not personally involved in any request that Plaintiffs become informants, and the remaining seven Agents were not made aware that Plaintiffs had any religious objection to such a request. Accordingly, even assuming that Plaintiffs have sufficiently alleged that they have a sincerely held religious belief "against becoming informants in their own communities," *id.* ¶ 65, based on the facts alleged in the Amended Complaint, reasonable officers in the Agents' position might not have "known for certain," *Abbasi*, 137 S. Ct. at 1867, that their alleged conduct would substantially burden Plaintiffs' exercise of religion. While, generally speaking, damages are available under RFRA against federal employees (and only federal employees) personally, *Tanzin*, 144 S. Ct. at 489, it would not be "appropriate" to impose damages on an individual official who did not personally and knowingly engage in conduct that violated the statute. Because, based on the allegations of the Amended Complaint, the Agents here did not, they are entitled to qualified immunity.

a. Plaintiffs Fail to Plausibly Allege That Eight of the Agents Were Personally Involved in the Conduct That Allegedly Imposed a Substantial Burden on Their Religious Exercise

The Amended Complaint does not allege that Agents Garcia, John LNU, Steven LNU, Harley, Grossoehmig, Dun, or Langenberg ever asked Plaintiffs to serve as informants or were even present when another Agent made such a request. *See* AC ¶¶ 94-104 (Tanvir alleging that he

met with Garcia and John LNU, but not alleging that they asked him to serve as an informant or were present when another Agent did so); *id.* ¶¶ 147-50, 152-53, 162-64 (Shinwari alleging that he met with Steven LNU, Harley, Grossoehmig, Dun, and Langenberg, but not alleging that they asked him to serve as an informant or were present when another Agent did so). Nor does the Amended Complaint allege that Tanvir was asked to serve as an informant in February 2007, during his sole interaction with John Doe 1. *See* AC ¶ 69. Although Tanvir alleges that John Doe 1 was present during interactions in January and February 2009 in which Agent Tanzin allegedly asked Tanvir to serve as an informant, John Doe 1's declaration establishes beyond any reasonable dispute that he retired from government service in November 2007. *See supra* n.8; *Faulkner*, 463 F.3d at 134 (court may take judicial notice of declaration on Rule 12(b)(6) motion where no dispute as to accuracy, authenticity or relevance); *CIH Int'l Holdings*, 821 F. Supp. 2d at 608 n.1. Tanvir's allegations with regard to John Doe 1's participation in interactions with federal agents in early 2009, more than a year after his retirement, are therefore implausible.

Plaintiffs thus fail to allege (or, as to John Doe 1, plausibly allege) that Agents John Doe 1, Garcia, John LNU, Steven LNU, Harley, Grossoehmig, Dun, or Langenberg had any personal involvement in the conduct that they claim constituted a substantial burden on their religion: the alleged "impermissible choice" between acting as an informant and violating their religious beliefs or being placed or kept on the No Fly List. AC ¶ 210. This failure dooms Plaintiffs' RFRA claims against these Agents.

The Supreme Court has emphasized, in the context of suits brought under *Bivens* and 42 U.S.C. § 1983, that "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Iqbal*, 556 U.S. at 693; *see also Tangreti v. Bachmann*, 983 F.3d 609, 612 (2d Cir. 2020) (plaintiff asserting § 1983 claim "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)). Numerous courts have applied this principle in the RFRA context, requiring the plaintiff to plead facts plausibly showing that each individual defendant was personally involved in the conduct that is alleged to have imposed a substantial burden on religious exercise. *See Bundy v. Sessions*, 812 F. App'x 1, 2 (D.C. Cir. 2020) (requiring plaintiff to plausibly allege each defendant's personal participation in authorizing raid, arrest, and prosecution in order to state a RFRA claim, while noting that plaintiff did not contest the issue); *see also Zirpolo v. Williams*, No. 19-CV-2024-WJM-KMT, 2020 WL 3104078, at *4 (D. Colo. June 11, 2020) (dismissing RFRA claim where plaintiffs failed to allege that "any Defendant, personally, had anything to do with Plaintiffs being unable to access" religious video), *appeal filed sub nom. Colorado Springs Fellowship v. Harper* (10th Cir. July 26, 2021); *Davis v. Fed. Bureau of Prisons*, No. 15-CV-0884-WJM-MJW, 2017 WL 11504857, at *8 (D. Colo. Apr. 7, 2017) (dismissing RFRA claim for failure to allege "how each named defendant was personally involved" in refusing religious services), *aff'd*, 798 F. App'x 274 (10th Cir. 2020); *White v. Sherrod*, No. 07-cv-821-MJR, 2009 WL 196332, at *2 (S.D. Ill. Jan. 28, 2009) (inmate failed to state RFRA claim against warden based on allegedly being prevented from "say[ing] whatever he wishe[d] to say within the context of religious services," because the warden "was not the individual who prevented him from speaking at these services"); *Curry v. Gonzales*, No. 07–0199(JR), 2007 WL 3275298, at *1 (D.D.C. Nov. 6, 2007) (dismissing RFRA and *Bivens* claims where plaintiff failed to allege that "high-level officials were personally and directly involved in the misdeeds"). An award of money damages against an individual in his or her personal capacity would not be "appropriate relief," 42 U.S.C. § 2000bb-1(c), if the individual was not personally involved in the conduct that allegedly violated the statute.

The RFRA claims against Agents John Doe 1, Garcia, John LNU, Steven LNU, Harley, Grossoehmig, Dun, and Langenberg should therefore be dismissed because Plaintiffs fail to allege (or, with regard to John Doe 1, plausibly allege) their personal involvement in the conduct alleged to have violated RFRA.

b. Plaintiffs Fail to Allege Facts Plausibly Showing That the Remaining Seven Agents Would Have Known That Their Requests Would Substantially Burden Plaintiffs' Religious Exercise

Plaintiffs fail to allege facts plausibly showing that Agents Tanzin, Artousa, Michael LNU, or John Does 2/3, 4, 5, or 6 would have known that their alleged requests that Plaintiffs become informants would have any impact—let alone impose a substantial burden—on Plaintiffs' exercise of their religion. The Amended Complaint contains no allegation that Plaintiffs ever made these Agents (or any Agent) aware that they had any religious objection to serving as informants. Rather, Tanvir and Shinwari offered a non-religious reason for their refusal to become informants: that they believed it would be dangerous. *See* AC ¶¶ 78, 161. And Algibhah allegedly said "he needed time to consider the[] request," and later even "assured the agents that he *would* work for them" as soon as he was removed from the No Fly List. *Id.* ¶ 134 (emphasis added). Plaintiffs also acknowledge that individuals can have "other objections," apart from religion, to "becoming informants in their own communities." *Id.* ¶ 65.

In similar circumstances, at least one court has held that an agent's alleged request that a person provide information on other individuals within one's religious community, even if accompanied by an offer of assistance to remove the person from a watchlist, does not state a RFRA claim. *See El Ali*, 473 F. Supp. 3d at 527; *cf. also Fikre*, 2019 WL 2030724, at *8 (expressing "concerns regarding the pleading adequacy" of RFRA claim alleging that agents "attempt[ed] to use Plaintiff's presence on the No Fly List as leverage to coerce [him] into

becoming an informant"). Moreover, courts addressing RFRA claims in other contexts have required the plaintiffs to show that the defendant officials had knowledge that their conduct would burden the plaintiffs' exercise of religion in order to hold them personally liable under RFRA. *See Weinberger v. Grimes*, No. 07-6461, 2009 WL 331632, at *5 (6th Cir. Feb. 10, 2009) (prison official entitled to qualified immunity from RFRA claim where there was no evidence he "acted knowingly in serving [plaintiff] a non-kosher meal"); *May v. Baldwin*, 109 F.3d 557, 562 (9th Cir. 1997) (same where the plaintiff "never asserted a religious interest in his dreadlocks until after the incidents complained of"); *see also Boatwright v. Jacks*, 239 F. Supp. 3d 229, 233–34 (D.D.C. 2017) (same where plaintiff "does not even plausibly suggest that [defendants] *knew* that Boatwright was Muslim or had engaged in any First Amendment-protected activity"). Indeed, if an official did not have knowledge that his or her conduct would impose a substantial religious burden, money damages from the official's own pocket would not be "appropriate relief." 42 U.S.C. § 2000bb-1(c).[18]

At the very least, based on the facts alleged in the Amended Complaint, reasonable officers in these Agents' position might not have "known for certain," *Abbasi*, 137 S. Ct. at 1867, that their alleged requests that Plaintiffs become informants would substantially burden their exercise of religion. The Agents are therefore entitled to qualified immunity. *Id.*; *see also Mullenix*, 577 U.S. at 12 ("qualified immunity protects all but the plainly incompetent or those who *knowingly* violate the law" (emphasis added; citation and quotation marks omitted)).

[18] It is worth noting that during oral argument, Justice Thomas and Justice Kavanaugh asked Plaintiffs' counsel whether RFRA requires knowledge or mens rea in order to hold an individual federal official personally liable for damages. *See* Tr. of Oral Arg. 35-36, 52-54. While counsel asserted that RFRA itself contains no such requirement, he emphasized that qualified immunity is available, *see id.* 36-37, 53-54, as Justice Thomas later noted in his opinion, *Tanzin*, 141 S. Ct. at 492 n.*.

2. Plaintiffs Fail to Allege Facts Plausibly Showing That They Were Placed or Kept on the No Fly List Because They Refused to Serve as Informants

Plaintiffs also fail to allege facts plausibly supporting their conclusory allegations that certain Agents placed or kept them on the No Fly List "because" they refused to serve as informants on their communities. AC ¶¶ 90, 124, 159. To the contrary, the facts alleged in the Amended Complaint suggest an "obvious alternative explanation," *Iqbal*, 556 U.S. at 682: that if Plaintiffs were on the No Fly List, it was because the TSC made a determination that they met the criteria for inclusion.

As Plaintiffs acknowledge in the Amended Complaint, neither the FBI nor individual FBI agents have authority to place or keep individuals on the No Fly List. According to the Amended Complaint, although the FBI is "one of the agencies empowered to 'nominate' individuals for placement on the No Fly List," and "has an ongoing responsibility to notify the TSC of any changes that could affect the validity or reliability of information used to 'nominate' someone to the No Fly List," AC ¶ 19, the multi-agency TSC was "responsible for reviewing and accepting nominations to the No Fly List from agencies, including the FBI[,] and for maintaining the List," *id.* ¶ 20. It was "[t]he TSC," and not the FBI or any individual agent, that was "responsible for making the final determination whether to add or remove an individual from the No Fly List." *Id.*; *accord id.* ¶ 41.[19] To include an individual on the No Fly List, the TSC must have determined,

[19] During the period relevant to the Amended Complaint, when an individual who had been denied boarding sought redress through DHS TRIP, it was also the TSC "which ma[de] the final decision as to whether any action should be taken." *Id.* ¶ 58; *see also id.* ("TSC 'coordinate[d] with' the agency that originally nominated the individual," but "TSC ma[de] a final determination regarding a particular individual's status on the No Fly List"). Under current DHS TRIP procedures (revised in 2015), the TSA Administrator, rather than the TSC, has the final authority to maintain an individual on, or remove an individual from, the No Fly List. *See supra* note 7.

based upon "reasonable suspicion," both that the individual was a "known or suspected terrorist," and that there was additional "derogatory information" about the individual. *Id.* ¶¶ 40-42.

Under Plaintiffs' own allegations, therefore, if they were in fact placed on the No Fly List, the TSC necessarily would have made a determination, based upon "reasonable suspicion," both that they were "known or suspected terrorist[s]," and that there was additional "derogatory information" about them. *See id*. These allegations fundamentally undercut the premise of Plaintiffs' RFRA claim—that each Plaintiff "was placed on the No Fly List" by certain Individual Defendants simply because "he refused" or "declined" "to become an informant against his community and refused to speak or associate further with the agents." AC ¶ 90 (Tanvir), ¶ 124 (Algibhah); *id.* ¶ 159 (alleging that Shinwari "was placed and/or maintained on the No Fly List because he refused the FBI's requests to work as an informant for them against members of his community").

Plaintiffs notably fail to allege any facts to support these allegations, which are made "[u]pon information and belief." AC ¶¶ 90, 124, 159. While each Plaintiff alleges that he "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, those allegations are both conclusory and immaterial. Plaintiffs concede that it was the TSC, and not any individual agent or even the FBI, that made the determination whether to place or keep an individual on the No Fly List, and the TSC could do so based upon a nomination from multiple agencies, including but not limited to the FBI. *Id.* ¶¶ 19-20, 40-41, 58. And Plaintiffs have no way of knowing what information—correct or incorrect—the TSC, FBI or any Individual Agent may have had regarding them.

Indeed, the allegations in the Amended Complaint suggest that the government may well have had some potentially derogatory information about Plaintiffs or their associates. For example, Tanvir acknowledges that he was asked 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 "an old acquaintance whom the FBI agents believed had attempted to enter the United States illegally." AC ¶¶ 69, 75. Algibhah alleges that he was asked about "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. And Shinwari alleges that he was asked "whether he had visited any training camps, where he had stayed during his trip [to Afghanistan], and whether he had traveled to Pakistan," as well as "information about the group of people with whom he had traveled, and the locations where he stayed during his trip." *Id.* ¶¶ 148, 150, 163.

These allegations suggest that if Plaintiffs were in fact placed on the No Fly List, there is a "more likely explanation[]," *Iqbal*, 556 U.S. at 681, than their mere refusal to serve as informants, rendering Plaintiffs' conclusory assertion implausible. In *Iqbal*, the plaintiff alleged that, in the wake of the September 11, 2001 terrorist attacks, various high-level government officials arrested and detained him solely because of his race, religion and national origin. 556 U.S. at 669. The Supreme Court held that even though the plaintiff's allegations, taken as true, were "consistent with" the allegation that the defendants had "purposefully designat[ed] [certain] detainees 'of high interest' because of their race, religion, or national origin," those allegations were not plausible "given more likely explanations." *Id.* at 681. The Court concluded that the arrests "were likely lawful and justified by [the FBI Director's] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts," and that "[a]s between that 'obvious alternative explanation' for the arrests, and the

purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion." *Id.* at 682 (quoting *Twombly*, 550 U.S. at 567).

Similarly here, the allegations in the Amended Complaint suggest that if Plaintiffs were in fact placed on the No Fly List, there is an "obvious alternative explanation," *id.*, other than Plaintiffs' conclusory assertion, based "upon information and belief," that certain Individual Agents placed or kept them on the No Fly List simply because they refused the Agents' requests to become informants, AC ¶¶ 90, 124, 159. Plaintiffs' factual allegations explicitly acknowledge that the TSC, rather than any individual Agent, determined who was placed on the No Fly List, and whether they should be taken off the List, based on a determination that the individual was a known or a suspected terrorist and that there was additional "derogatory information" about them. AC ¶¶ 19-20, 40-41, 58. Plaintiffs also allege that they were asked specific questions about their activities and associates, suggesting that the government may have been in possession of at least some potentially derogatory information about them. AC ¶¶ 69, 75, 83, 120, 132, 148, 150, 163. The facts alleged in the Amended Complaint thus suggest that if Plaintiffs were in fact placed on the No Fly List, it was because the TSC determined that they met the criteria for inclusion.[20] In light of this "obvious alternative explanation," Plaintiffs' conclusory assertion that the Individual Defendants placed them on the List simply because they refused to serve as informants "is not a plausible conclusion." *Iqbal*, 556 U.S. at 682; *see also Fikre*, 2019 WL 2030724, at *9 (questioning whether plaintiff had "pleaded an adequate nexus between his placement and

[20] The merits of any such TSC determination are immaterial to whether Plaintiffs have plausibly stated a RFRA claim against the Individual Defendants, and are not before the Court. Plaintiffs voluntarily dismissed their official-capacity claims challenging their alleged placement on the No Fly List. *See* Dkt. Nos. 105, 108, 109.

maintenance on the No-Fly List and the alleged request that he serve as an informant at his mosque").

C. EACH PLAINTIFF FAILS TO STATE A CLAIM OF VIOLATION OF CLEARLY ESTABLISHED LAW AGAINST ANY INDIVIDUAL DEFENDANT

Because "each Government official" can only be held liable for "his or her own misconduct," *Iqbal*, 556 U.S. at 693, it is necessary to evaluate each Plaintiff's factual allegations with regard to each Individual Defendant to determine whether those allegations plausibly "state a claim of violation of clearly established law." *Mitchell*, 472 U.S. at 526. Based on the facts alleged in the Amended Complaint, Plaintiffs fail to plausibly allege that each Individual Defendant would have "known for certain" that his or her alleged conduct violated RFRA. *Abbasi*, 137 S. Ct. at 1867. The Agents are therefore "entitled to dismissal" on qualified immunity grounds. *Mitchell*, 472 U.S. at 526.

1. Tanvir Fails to State a Claim of Violation of Clearly Established Law

a. Agent John Doe 1

Tanvir alleges that, in February 2007, Agents John Doe 1 and Tanzin questioned him "for approximately thirty minutes" and asked him about "an old acquaintance[.]" *Id.* ¶ 69. Tanvir does not allege that Tanzin or John Doe 1 asked him to serve as an informant during that interaction. According to the allegations in the Amended Complaint, this was Tanvir's sole interaction with John Doe 1 prior to his retirement. Although Tanvir alleges that he also interacted with John Doe 1 on unspecified dates in late January and February 2009, *see id.* ¶¶ 80-83, that allegation is implausible due to John Doe 1's retirement more than a year earlier, in November 2007, *see supra* n.8. Tanvir thus fails to plausibly allege that John Doe 1 had any personal involvement in any

request that he serve as an informant or the purported "impermissible choice" that he claims imposed a substantial burden on his religious exercise. *See Zirpolo*, 2020 WL 3104078, at *4.[21]

Tanvir also fails to plausibly allege any nexus between his interaction with John Doe 1 and his alleged placement on the No Fly List. He acknowledges that he was able to fly four times after his single interaction with John Doe 1 in February 2007: he flew to Pakistan in July 2008 and back in December 2008, and he again flew to Pakistan in July 2009 and back in January 2010. *Id.* ¶¶ 71, 88-89. Indeed, Tanvir was not denied boarding until October 2010—three years and eight months after his one and only interaction with John Doe 1. *Id.* ¶ 91. Tanvir's interaction with John Doe 1 is "simply too far removed" from his subsequent inability to fly to state a RFRA claim against John Doe 1. *Wong v. U.S. I.N.S.*, 373 F.3d 952, 967, 977 (9th Cir. 2004) (dismissing *Bivens* and RFRA claims against INS officials based on plaintiff's conditions of confinement, because the "actions of the named INS officials were simply too far removed from the violations of which Wong complains"); *Cruz v. Fed. at I.C.M. Manhattan, N.Y.*, No. 1:20-CV-4392 (LLS), 2020 WL 3972312, at *5 (S.D.N.Y. July 13, 2020) (dismissing *Bivens* claim where plaintiff failed to "allege any facts that suggest that there was a causal connection between his protected speech or conduct and [the defendant's action]").

In short, Tanvir's claim against John Doe 1 is premised on the allegation that John Doe 1 participated in one thirty-minute interview, during which no one asked Tanvir to be an informant and after which Tanvir was able to fly four times over more than three years. As such, Tanvir fails to plausibly allege that John Doe 1 violated any clearly established law.

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[21] Even if John Doe 1 had been present during the interactions in early 2009 in which Tanvir allegedly was asked to serve as an informant, as discussed *infra* with regard to defendants Tanzin and John Doe 2/3, Tanvir fails to allege facts showing that John Doe 1 would have known (much less known for certain) that serving as an informant would substantially burden Tanvir's religious exercise.

b. Agents Tanzin and John Doe 2/3

Tanvir alleges that he interacted with Agent Tanzin twice in February 2007 and several times in January and February 2009, AC ¶¶ 69-70, 73-79, 81-87, and with Agent John Doe 2/3 in January and February 2009, *id.* ¶¶ 73-78, 86-87. Tanvir alleges that Tanzin and John Doe 2/3 asked him to serve as an informant during a meeting on January 26, 2009, AC ¶ 76, and that Tanzin repeated this request two more times in early 2009, *id.* ¶¶ 79, 83. But Agent Tanzin's and John Doe 2/3's alleged requests that Tanvir serve as an informant along with offers of incentives, such as "facilitating . . . visits from Pakistan to the United States, financially assisting his aging parents in Pakistan to go on religious pilgrimage to Saudi Arabia, and providing him with money," AC ¶ 76, do not in and of themselves constitute a substantial burden on religious exercise in violation of RFRA, *see El Ali*, 473 F. Supp. 3d at 527. "As with all potential law enforcement informants," Tanvir was presented with "something to gain, and . . . something to lose, from saying yes." *Id.* Certainly, there was no existing precedent placing this question "beyond debate." *Mullenix*, 577 U.S. at 12.

Moreover, Tanvir does not allege that he raised any objection based on religion to either Tanzin or John Doe 2/3. Instead, Tanvir asserted other reasons for refusing the request: that he "was afraid to work in Pakistan," that it would be "very dangerous," and that he would be "concerned about his safety." AC ¶ 78; *see also* AC ¶ 65 (acknowledging that individuals may have non-religious reasons for not wanting to serve as informants). Accordingly, Tanvir fails to allege facts plausibly showing that either Tanzin or John Doe 2/3 would have known, much less "known for certain," *Abbasi*, 137 S. Ct. at 1867, that the alleged requests to serve as an informant would burden Tanvir's exercise of his religion. *See Weinberger*, 2009 WL 331632, at *5; *May*, 109 F.3d at 562.

Tanvir also fails to allege facts plausibly establishing a nexus between Tanzin's and John Doe 2/3's alleged requests that he serve as an informant and his alleged placement on the No Fly List. Tanvir acknowledges that, after Tanzin allegedly asked him to serve as an informant in January and February 2009, he was able to fly twice—to Pakistan in July 2009 and back in January 2010. AC ¶¶ 88-89. He was not denied boarding until October 2010, *id.* ¶ 91, more than 22 months after his last interaction with Tanzin or John Doe 2/3. It is simply implausible that Tanvir was denied boarding in October 2010 because he declined to serve as an informant 22 months earlier, having been able to fly to Pakistan and back in the interim. *See, e.g., Wong*, 373 F.3d at 967, 977.

The plausibility of Tanvir's conclusory allegation that Agents Tanzin or John Doe 2/3 placed him on the No Fly List because he refused to serve as an informant, AC ¶ 90, is further undermined by the other factual allegations in the Amended Complaint, including the acknowledgement that the TSC (rather than the FBI or individual agents) was responsible for determining whether an individual was placed or kept on the No Fly List, based on specified criteria. *Id.* ¶¶ 19-20, 40-41, 58. Tanvir also acknowledges that he was asked about his potential involvement with "terrorist training camps," "Taliban training," rope climbing, and an acquaintance whom the Agents believed had entered the United States illegally. AC ¶¶ 69, 75. These factual allegations suggest an "obvious alternative explanation" for Tanvir's alleged placement on the No Fly List, other than his refusal, nearly two years earlier, to serve as an informant. *Iqbal*, 556 U.S. at 682.

Tanvir thus fails to plausibly allege that Tanzin or John Doe 2/3 violated his clearly established rights under RFRA.

c. Agents Garcia and John LNU

Tanvir alleges that he interacted with Agent Garcia in October 2010 and November 2011, AC ¶¶ 94, 99-104, and with Agent John LNU once on November 2, 2011, *id.* ¶¶ 100-103. Tanvir does not allege that either Garcia or John LNU asked him to serve as an informant. Plaintiff's claims against these Agents should be dismissed on this basis alone, as neither Agent personally presented the "impermissible choice" that allegedly imposed a religious burden. *See Zirpolo*, 2020 WL 3104078, at *4.

Moreover, Tanvir was denied boarding in October 2010, before he ever interacted with Garcia or John LNU. AC ¶ 91. It is therefore not plausible that Tanvir was placed on the No Fly List because of any interaction with Garcia or John LNU, much less because he declined a request they never made. *See, e.g., Wong*, 373 F.3d at 967, 977. Nor is it plausible that "Agent Garcia kept [Tanvir] on the No Fly List," "knowing that [he] was wrongfully placed on the No Fly List for his prior refusals to become an informant." AC ¶ 108. Tanvir offers no factual allegations to support his assertion that Garcia had any knowledge of Tanvir's refusals of other Agents' requests, nearly two years earlier, to become an informant, much less that his alleged placement on the No Fly List was supposedly "wrongful," rather than based on a TSC determination that the requisite criteria were met. And Tanvir's allegation that Garcia "kept him on the No Fly List" is directly refuted by his acknowledgment that the TSC, rather than the FBI or any individual FBI agent, would have made that determination during the time period in question. *Id.* ¶¶ 19-20, 40-41, 58.

Garcia's alleged offer to help Tanvir with his travel difficulties in exchange for answering her questions, AC ¶ 94, does not in and of itself constitute a substantial burden on religious exercise, *see El Ali,* 473 F. Supp. 3d at 527, nor was there any existing precedent that this "*particular* conduct" would violate RFRA, *Abbasi*, 137 S. Ct. at 1866. And Tanvir does not allege

that he ever raised any religious objection to Garcia (or any other Agent) about speaking to her or otherwise cooperating with law enforcement, and thus he cannot plausibly show that Garcia or John LNU would have known "for certain" that such a request would burden his religious exercise. *Abbasi*, 137 S. Ct. at 1867; *Weinberger*, 2009 WL 331632, at *5; *May*, 109 F.3d at 562.

Tanvir therefore fails to plausibly allege that Garcia or John LNU violated his clearly established rights under RFRA.

2. Algibhah Fails to State a Claim of Violation of Clearly Established Law

Algibhah alleges that Agents Artousa and John Doe 4 asked him to serve as an informant in December 2009, AC ¶ 121, and that Artousa and John Doe 5 asked again in June 2012, *id.* ¶¶ 131, 133. Like Tanvir, however, Algibhah never raised a religious objection to becoming an informant. Instead, Algibhah allegedly "assured" Artousa and John Doe 5 "that he would work for them as soon as they took him off the No Fly List." *Id.* ¶ 134. Algibhah thus fails to plausibly plead that these Agents would have known (much less "for certain") that their request would impose a substantial burden on Algibhah's exercise of his religion. *Abbasi*, 137 S. Ct. at 1867; *Weinberger*, 2009 WL 331632, at *5; *May*, 109 F.3d at 562. Nor was there any precedent suggesting, much less clearly establishing, that a request to serve as an informant, accompanied by offers of financial assistance or help getting removed from the No Fly List, *see* AC ¶¶ 121, 131, constitutes a substantial religious burden in violation of RFRA. To the contrary, the only court to have decided that question found no RFRA violation in such circumstances. *See El Ali,* 473 F. Supp. 3d at 527.

Algibhah's allegation that Artousa and John Doe 4 placed him on the No Fly List, and that Artousa and John Doe 5 kept him on the List, "because he declined to become an informant against his community and declined to speak or associate further with the agents," AC ¶¶ 124, 135, is not

plausible, in light of the other allegations in the Amended Complaint acknowledging that TSC, rather than the FBI or individual FBI agents, decided who was included on the list based on specified criteria. *Id.* ¶¶ 19-20, 40-41, 58. And the factual allegations in the Amended Complaint suggest an "obvious alternative explanation" for Algibhah's alleged placement on the No Fly List. *Iqbal*, 556 U.S. at 682. Algibhah's allegations that he was asked about the websites he visited and "whether he knew people from the region of Hadhramut in Yemen," AC ¶¶ 120, 132, suggest that if he was on the No Fly List, it was because the government had potentially "derogatory information" about his activities and associations, rather than "because he declined to become an informant," *id.* ¶ 124. *See also id.* ¶ 134 (conceding that Algibhah said he *would* serve as an informant if agents took him off the No Fly List).

Algibhah therefore fails to plausibly allege that Artousa or John Does 4 or 5 violated his clearly established rights under RFRA.

3. Shinwari Fails to State a Claim of Violation of Clearly Established Law

As a threshold matter, Shinwari's allegation that he was "placed" on the No Fly List "because he refused the FBI's requests to work as an informant for them against members of his community," AC ¶ 159, is belied by his allegation that he was denied boarding before interacting with any Agent, *id.* ¶ 146. No Agent could have retaliated against Shinwari for his refusal of a request to be an informant before any Agent had made such a request. Nor does Shinwari plead facts plausibly supporting his alternative allegation that Agents "maintained" or "kept" him on the No Fly List because of his refusal to serve as an informant. *Id.* ¶¶ 159, 166. And he fails to plead facts plausibly showing that any Agent would have known, much less "known for certain," *Abbasi*, 137 S. Ct. at 1867, that asking Shinwari to become an informant would burden his religious exercise.

a. Agents Steven LNU and Harley

Shinwari alleges that, after being denied boarding on a connecting flight from Dubai to Houston on February 26, 2012, he met with Agents Steven LNU and Harley the following day and responded to their questions for "three to four hours." AC ¶¶ 146-50. Shinwari alleges that these Agents told him "they needed to confer with 'higher ups in [Washington,] D.C.' before allowing Mr. Shinwari to fly back to the United States," and that two days later, Agent Harley informed Shinwari that he could fly. *Id.* ¶¶ 150-51. Shinwari then flew from Dubai to Dulles on March 1, 2012. *Id.* ¶ 151-52. This was Shinwari's sole interaction with Steven LNU and Harley.[22]

Shinwari does not allege that either Steven LNU or Harley asked him to serve as an informant. These Agents therefore did not personally present him with the "impermissible choice" that allegedly imposed a substantial burden on his religious exercise in violation of RFRA. *See Zirpolo*, 2020 WL 3104078, at *4. Nor is it plausible that Shinwari was kept on the No Fly List "because" he declined a request these Agents never made. AC ¶¶ 159, 166. If anything, Shinwari's factual allegations show that Harley and Steven LNU facilitated his travel from Dubai to Dulles, *id.* ¶ 151 (alleging that Harley obtained "the 'go-ahead' for him to fly home to the United States"), which is presumably why Shinwari later sought Harley's help when he was unable to board a domestic flight, *id.* ¶ 161.

Shinwari's failure to allege any personal involvement by Steven LNU or Harley in the conduct he claims violated his rights under RFRA requires dismissal of the claims against them based on qualified immunity. *See Zirpolo*, 2020 WL 3104078, at *4.

[22] Shinwari alleges that after he returned to the United States, he emailed Harley "seeking help" to fly from Omaha to Orlando, but Harley did not respond. *Id.* ¶ 161.

b. Agent Grossoehmig

Shinwari alleges that once he landed at Dulles, Agent Grossoehmig (along with Michael LNU) interviewed him at the airport. AC ¶¶ 152-53. Shinwari does not allege that he was asked to serve as an informant during this interview. Shortly after the interview, Shinwari was able to fly to Omaha, arriving on March 2, 2012. *Id.* ¶ 154. This was Shinwari's sole interaction with Grossoehmig.

Like Shinwari's claims against Harley and Steven LNU, his RFRA claim against Grossoehmig should be dismissed because this Agent did not ask Shinwari to be an informant and thus did not personally impose the alleged religious burden. *See Zirpolo*, 2020 WL 3104078, at *4. And because Shinwari was denied boarding in Dubai shortly before interacting with Grossoehmig, and was allowed to fly from Dulles to Omaha shortly after, it is not plausible that he was kept on the No Fly List because of his sole interaction with Grossoehmig, much less "because" he declined a request the Agent never made. Shinwari therefore fails to state a claim that Grossoehmig violated his clearly established rights under RFRA.

c. Agents Michael LNU and John Doe 6

Shinwari alleges that after he flew from Dulles to Omaha, Agents Michael LNU and John Doe 6 twice visited his house in Omaha and both times asked him to be an informant, offering to pay him to do so. AC ¶¶ 155-56, 161. Shinwari did not raise any religious objection to this request. Instead, he told the Agents "that he believed being an informant would put his family in danger," and that "if he had any knowledge about dangerous individuals, he would report that to the FBI." *Id.* ¶ 161. Shinwari thus fails to plausibly plead that Michael LNU and John Doe 6 would have known their request to serve as an informant would impose a substantial burden on Shinwari's religious exercise, *Weinberger*, 2009 WL 331632, at *5; *May*, 109 F.3d at 562, let alone "known

for certain," *Abbasi*, 137 S. Ct. at 1867. A request that an individual serve as an informant, even when accompanied by offers of financial assistance or assistance with watchlisting status, does not in and of itself impose a substantial religious burden. *See El Ali,* 473 F. Supp. 3d at 527. At a minimum, there was no existing precedent placing this question "beyond debate." *Mullenix*, 577 U.S. at 12.

Further, like Tanvir and Algibhah, Shinwari alleges facts suggesting an "obvious alternative explanation" for his alleged placement and maintenance on the No Fly List, *Iqbal*, 556 U.S. at 682, other than his alleged refusal to become an informant, AC ¶ 159. Shinwari alleges that he was asked "whether he had visited any training camps, where he had stayed during his trip [to Afghanistan], and whether he had traveled to Pakistan," as well as "about the group of people with whom he had traveled, and the locations where he stayed during his trip to Afghanistan." *Id.* ¶¶ 148, 150, 163. These allegations, together with the allegations that the TSC decided who was placed or kept on the No Fly List, *id*. ¶¶ 19-20, 40-41, 58, and that Shinwari was denied boarding before he was ever asked to serve as an informant, *id.* ¶ 146, render Shinwari's conclusory assertion that he was put on the List simply because of his refusal to serve as an informant "not a plausible conclusion." *Iqbal*, 556 U.S. at 682.

Shinwari therefore fails to state a claim that Michael LNU or John Doe 6 violated his clearly established rights under RFRA.

d. Agents Dun and Langenberg

At Shinwari's request, he and his counsel met with supervisory Agents Dun and Langenberg on one occasion, on March 21, 2012, at the FBI's Omaha office. AC ¶ 162. Shinwari alleges that Dun and Langenberg "told him that he could potentially get a one-time waiver to travel in an emergency," and he does not allege that either Agent asked him to serve as an informant. *Id.*

¶¶ 163-64. The first time he attempted to fly after this interaction—two years later, on March 19, 2014—he was able to fly. *Id.* ¶ 169.

Shinwari's RFRA claim against Dun and Langenberg should be dismissed because they did not ask Shinwari to be an informant and thus did not personally impose any alleged religious burden. *See Zirpolo*, 2020 WL 3104078, at *4. Nor has Shinwari alleged any facts plausibly showing that Dun or Langenberg had anything to do with his placement on the No Fly List, much less that they "kept" him on the No Fly List "because" he declined a request they never made. AC ¶ 166. To the contrary, Shinwari was denied boarding before he ever met Dun or Langenberg (or any Agent), *id.* ¶ 146, and Shinwari concedes that the TSC determined who was placed on, and removed from, the No Fly List. *Id.* ¶¶ 19-20, 40-41, 58. Shinwari therefore fails to state a claim that Dun or Langenberg violated his clearly established rights under RFRA.

II. AGENTS STEVEN LNU, HARLEY, GROSSOEHMIG, MICHAEL LNU, JOHN DOE 6, DUN, AND LANGENBERG ARE ALSO ENTITLED TO DISMISSAL FOR LACK OF PERSONAL JURISDICTION

Agents Steven LNU, Harley, Grossoehmig, Michael LNU, John Doe 6, Dun, and Langenberg renew their motion to dismiss the Amended Complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). These Agents' arguments regarding personal jurisdiction made in their first motion to dismiss the Amended Complaint, *see* Dkt. No. 39 at 61-66, and the declarations submitted in support, *see* Dkt. Nos. 43-49 (Declarations of Agents John Doe 6, Dun, Grossoehmig, Harley, Langenberg, Michael LNU, and Steven LNU, respectively), are expressly incorporated herein. For the reasons discussed below, however, the Agents respectfully request that the Court first rule on the applicability of qualified immunity, and defer consideration of their renewed Rule 12(b)(2) motion, as the Court did with the initial motion.

After Agents Steven LNU, Harley, Grossoehmig, Michael LNU, John Doe 6, Dun, and Langenberg initially moved to dismiss the Amended Complaint for, *inter alia*, lack of personal jurisdiction, Plaintiffs sought jurisdictional discovery. *See* Dkt. No. 56. The Agents opposed that request because the Amended Complaint contains no factual allegations suggesting that personal jurisdiction exists. *See* Dkt. No 62 ("jurisdictional discovery may not be used to 'fish for . . . grounds of jurisdiction' that plaintiffs 'ha[ve] not alleged'") (quoting *Universal Trading & Inv. Co. v. Credit Suisse (Guernsey) Ltd*., 560 F. App'x 52, 56 (2d Cir. 2014)); *see also* Dkt. No. 65. In the alternative, the Agents requested that the Court stay consideration of their Rule 12(b)(2) motion until it had decided the threshold legal questions, including qualified immunity. *See* Dkt. No. 62 (explaining that if the Court concluded that "individual capacity claim[s] [are not] available under *Bivens* or [RFRA], or that plaintiffs' claims are barred by . . . the doctrine of qualified immunity, the personal jurisdiction issue will be moot") (citing *Chevron Corp. v. Naranjo*, 667 F.3d 232, 246 & n.17 (2d Cir. 2012)). The Court ultimately "defer[red] consideration of the Rule 12(b)(2) aspect of the motion to dismiss until the balance of the motions are resolved." Dkt. No. 69 at 36. The Court explained that, "if the individual agents succeed on *Bivens* and RFRA or the qualified immunity argument raised by all of the agents, the personal jurisdiction arguments raised by the subset of [these] agents will be moot." *Id.* at 37. The Court also noted that "discovery at this juncture may raise a host of difficult privilege and other issues that may well be unnecessary to address." *Id*.

The Court should follow the same approach here. "[Q]ualified immunity should be resolved at the earliest possible stage in the litigation," and where possible, in a Rule 12(b)(6) motion prior to any discovery. *Tanvir*, 894 F.3d at 472 (quotation marks and citation omitted); *see also Iqbal*, 556 U.S. at 684-86; *X-Men*, 196 F.3d at 60 (reversing district court's ruling that granting

qualified immunity "would be premature prior to any discovery" because the defendants' "entitlement to qualified immunity is revealed on the face of the complaint"). As the Court previously concluded, if the Court determines that the Agents are entitled to qualified immunity from Plaintiffs' RFRA claims, the question whether the Court has personal jurisdiction over these Agents would be moot. Accordingly, the Agents respectfully request that the Court rule on the applicability of qualified immunity first, and again defer consideration of the Agents' renewed Rule 12(b)(2) motion (as well as any application for jurisdictional discovery).

CONCLUSION

For the foregoing reasons, 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. Plaintiffs' 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), for the reasons stated in their prior motion to dismiss.

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Respectfully submitted,

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