No. 23-55790

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ABDIRAHMAN ADEN KARIYE, MOHAMAD MOUSLLI, and HAMEEM SHAH,

Plaintiffs–Appellants,

v.

ALEJANDRO MAYORKAS, Secretary of the U.S. Department of Homeland Security, in his official capacity; TROY MILLER, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity; PATRICK J. LECHLEITNER, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; and KATRINA W. BERGER, Executive Associate Director, Homeland Security Investigations, in her official capacity,

Defendants–Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:22-cv-01916
Hon. Fred W. Slaughter

APPELLANTS' OPENING BRIEF

Ashley Gorski
Sara Robinson
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2500
agorski@aclu.org

Mohammad Tajsar
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West 8th Street
Los Angeles, CA 90017
Tel: (213) 977-9500
mtajsar@aclusocal.org

Counsel for Plaintiffs–Appellants
(additional counsel on next page)

Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, NW Suite 600
Washington, DC 20005
Tel: (202) 675-2330
dmach@aclu.org

Teresa Nelson
AMERICAN CIVIL LIBERTIES
UNION OF MINNESOTA
P.O. Box 14720
Minneapolis, MN 55415
Tel: (651) 645-4097
tnelson@aclu-mn.org

John Hemann
Hannah Pollack
Liz Sanchez Santiago
COOLEY LLP
3 Embarcadero Center, Floor 20
San Francisco, CA 94111
Tel: (415) 693-2000
jhemann@cooley.com

Brett H. De Jarnette
COOLEY LLP
3175 Hanover Street
Palo Alto, CA 94304
Tel: (650) 843-5000
bdejarnette@cooley.com

Counsel for Plaintiffs–Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331. The court entered an order granting Defendants' motion to dismiss the amended complaint on July 19, 2023, with leave to further amend the complaint. ER-7–68. Plaintiffs elected not to amend their complaint a second time and requested entry of judgment to permit an appeal. ER-69–71. The court entered judgment on September 5, 2023, ER-4–6, and Plaintiffs timely filed a notice of appeal on September 18, 2023, ER-230–32. This Court has appellate jurisdiction over the district court's final decision pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

This appeal presents the following issues:

(1) Whether Plaintiffs' detailed factual allegations that Defendants' border officers single them out for religious questioning because they are Muslim, ask discriminatory questions about their religious beliefs and practices in a coercive environment, and retain their responses for decades plausibly stated (a) Fifth Amendment equal protection violations, (b) First Amendment free exercise violations, (c) Religious Freedom Restoration Act violations, and (d) First Amendment freedom of association violations, and

(2) Whether Plaintiff Hameem Shah's detailed factual allegations that

Defendants' border officers subjected him to adverse treatment because of his religious writings and invocation of his rights plausibly stated a First Amendment retaliation claim.

STATEMENT OF ADDENDUM

An addendum with the text of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, is included at the end of this brief. *See* Ninth Cir. R. 28-2.7.

INTRODUCTION

"Are you Catholic or Protestant?" "Do you attend church?" "How often do you read the Bible?" When Christian Americans return to the United States from travel abroad, U.S. border officers do not routinely ask them these questions, for good reason: the inquiries would be considered invasive and demeaning, irrelevant to border security, and patently unconstitutional. Yet Plaintiffs—three ordinary, law-abiding U.S. citizens—are singled out for precisely these types of stigmatizing questions when they return home from travel abroad, simply because they are Muslim. During coercive, protracted encounters, border officers require Plaintiffs to answer deeply personal questions about their Islamic religious practice and beliefs, such as "How many times a day do you pray?" "Do you attend mosque?" and "Are you Sunni or Shi'a?"

These are not questions about unlawful activity that incidentally implicate religion; instead, the questions challenged here are solely and expressly targeted at

Plaintiffs' faith, and they go directly to the heart of constitutionally protected beliefs and conduct. Border officers ask these questions pursuant to a broader policy and/or practice by Defendants—the heads of the Department of Homeland Security, Customs and Border Protection, Immigration and Customs Enforcement, and Homeland Security Investigations—of targeting Muslim American travelers for religious questioning and retaining the answers in a law enforcement database for up to 75 years. This questioning violates Plaintiffs' rights to practice their faith without undue government intrusion and to be treated equally with other Americans. And it is contrary to core American values of respecting diverse religious beliefs and practices.

Below, Defendants attempted to justify their questioning through vague invocations of the government's interest in "protecting its borders" and "preventing the entry of terrorists." But they failed to explain how the *religious* questions posed in this case actually protect the border or prevent terrorism. What is the connection between how many times a Muslim person prays each day and any potential act of terrorism? Defendants did not say—because there is none. What bearing does a Muslim person's adherence to Sunni or Shi'a religious tenets have on border security? Again, Defendants did not say. To connect such questions to terrorism, Defendants would have to argue that a Muslim who prays more is more likely to commit an act of terrorism, or that simply being Sunni or Shi'a is predictive of

terrorism—perpetuating false and offensive stereotypes about Muslims that the Constitution prevents the government from acting upon. More than three million Americans identify as Muslims, and many engage in religious practices such as praying and attending mosque. Suggesting that these practices render Muslims suspect is factually untenable, blatantly discriminatory, and profoundly stigmatizing to Muslim Americans. And even if Defendants could somehow present evidence demonstrating otherwise, the district court could not consider and credit it on a motion to dismiss.

Although the district court held, correctly, that Plaintiffs had plausibly alleged a policy and/or practice by Defendants of targeting Muslim American travelers for religious questioning, the court nevertheless granted Defendants' motion to dismiss. In doing so, the court improperly rejected many of Plaintiffs' allegations and ignored several others. It certainly did not credit Plaintiffs' well-pled allegations as true, as is required at this stage of the litigation, and it repeatedly drew inferences in Defendants' favor. Time and again, the court also misapplied the plausibility standard and misunderstood the legal elements of Plaintiffs' claims. Plaintiffs have plausibly alleged that Defendants' religious questioning is unlawful, and Plaintiff Shah has plausibly alleged a First Amendment retaliation claim. The district court's dismissal of the Amended Complaint and judgment in favor of Defendants should be reversed.

STATEMENT OF THE CASE

Plaintiffs Imam Abdirahman Aden Kariye, Mohamad Mouslli, and Hameem Shah are U.S. citizens and Muslim. ER-84, 95, 102. Iman Kariye is a prominent member of the Minnesota Muslim and interfaith communities, as well as an active participant in civic life and charitable endeavors. ER-84. Mr. Mouslli lives in Arizona with his wife and three children and works in commercial real estate. ER-95. Mr. Shah lives in Texas and works in financial services. ER-102. Plaintiffs do not have criminal records. ER-89, 98, 106. They have never participated in nor advocated for violence or terrorism, and have never been accused by any government agency of doing so. *Id.*[1] Like millions of other Americans, Plaintiffs participate in peaceful religious activities that have no connection to terrorism or any other violent or criminal activity. ER-80–81. Nevertheless, border officers subject Plaintiffs to invasive questions regarding their Islamic religious beliefs and practices when they return to the United States from travel abroad. *See* ER-76–78.

[1] At the time of the incidents described in the Amended Complaint, Imam Kariye and Mr. Mouslli allege that they were unjustly and improperly placed on the U.S. government's master watchlist. ER-89, 98. Mr. Mouslli believes he is still on the watchlist. ER-91, 99. In the watchlisting system, errors and reliance on unjustified suspicion are common because the standard for placement on the watchlist is remarkably low (and circular): suspicion that an individual might be suspicious. ER-89–91. Under the government's watchlisting guidance, "concrete facts are not necessary" to satisfy the standard, and uncorroborated information of questionable or even doubtful reliability can serve as the basis for watchlisting an individual. ER-90.

I. Islamic Religious Belief and Practice in the United States

There are nearly two billion Muslim people worldwide, and approximately 3.45 million Muslims living in the United States. ER-80–81. According to a 2017 Pew Research survey, approximately 59 percent of Muslim Americans pray daily, and 43 percent attend religious services weekly. *Id.* Prayer and mosque attendance—just like prayer and attendance at houses of worship in any religion—are peaceful religious activities. *Id.*

Fifty-five percent of Muslim Americans identify as Sunni and 16 percent as Shi'a. ER-81. Affiliation with either sect reflects a particular set of religious beliefs, just as Protestants have certain faith tenets that differ from Catholics, and Orthodox Jews subscribe to some different beliefs and practices than Reform Jews. *Id.* Whether a Muslim identifies as Sunni or Shi'a does not indicate any relationship to violence or other unlawful activity. *Id.* In fact, despite decades of research, there is no scientifically valid model or profile that can predict whether an individual will commit an act of terrorism. *Id.* Religiosity of any kind, including Muslim religiosity, is not predictive of violence or terrorism. *Id.* Indeed, it is exceedingly rare for Muslim Americans to commit terrorist acts. *Id.* Islamic religious belief and practice also are not in any way indicative of immigration or customs-related crime, nor any other unlawful activity. *Id.*

In recent years, U.S. national security policies and practices have

disproportionately and wrongly targeted Muslim Americans. *Id.* In addition, prominent U.S. politicians have made public statements casting doubt on the patriotism of Muslim Americans, unfairly stigmatizing adherents of Islam. *Id.* These factors contribute to a widespread and harmful misperception that Islamic belief and practice are associated with wrongdoing or terrorism. *Id.*

II. Defendants' Religious Questioning of Plaintiffs

Border officers have questioned Imam Kariye, Mr. Mouslli, and Mr. Shah about their religious beliefs, practices, and associations upon return to the United States from travel abroad on ten different occasions at six different ports of entry. ER-84–89, 95–98, 102–06. These questions, which pry into Plaintiffs' personal adherence to specific Islamic beliefs and practices, have included the following:

- How many times a day do you pray?
- Do you pray every day?
- What type of Muslim are you?
- Are you Sunni or Shi'a?
- Are you Salafi or Sufi?
- Do you attend a mosque?
- What mosque do you attend?
- How religious do you consider yourself?
- Where did you study Islam?

- Do you watch Islamic lectures online or on social media?

ER-85–89, 96–98, 103. Defendants retain records of Plaintiffs' responses to religious questions in a Department of Homeland Security ("DHS") database called "TECS" for up to 75 years, where they are accessible to thousands of government and law enforcement officers across federal, state, and local agencies. ER-79–80.

The religious questioning of Plaintiffs takes place during secondary inspection, a procedure whereby border officers detain, question, and search certain travelers before they are permitted to enter the country. ER-78, 85–89, 96–98, 102. When border officers select travelers for secondary inspection, the officers—typically armed and wearing government uniforms—detain the individuals in a space separate from the general inspection area and prohibit them from leaving without officers' express permission. ER-78. During these inspections, the officers take possession of the travelers' passports and conduct searches of their belongings, including their electronic devices. *Id.*

Because of the coercive nature of the secondary inspection environment, Plaintiffs have no meaningful choice but to disclose their religious beliefs, practices, and associations in response to officers' inquiries. *See, e.g.*, ER-78–79, 84–89, 95–98, 102.

In addition, border officers have deployed religious questioning as part of a broader set of retaliatory actions against one Plaintiff for documenting his religious

expression and asserting his rights. On May 7, 2019, at LAX, Mr. Shah was subject to secondary inspection. ER-102–06. During the encounter, Mr. Shah stated that he did not consent to being searched and otherwise attempted to assert his constitutional rights at least eight times. ER-102–04. Over Mr. Shah's objections, border officers searched his personal journal. ER-102–03. The journal contained notes about his religious beliefs and practices, which are entirely peaceful and nonviolent in nature. *Id.* None of the contents of Mr. Shah's journal related to violence or terrorism. ER-106–07. After reading the journal, officers nevertheless asked Mr. Shah invasive religious questions, and one officer informed Mr. Shah, "I'm asking because of what we found in your journal." ER-103. The officers further retaliated against him for his possession of the journal and his verbal invocations of his rights by intensifying their search, asking additional invasive religious questions, and prolonging Mr. Shah's detention. ER-103–05.

Plaintiffs are proud Muslim Americans who object to the invasive and humiliating questioning they experience at the border merely because they are Muslim. ER-94–95, 101, 108–09. Defendants' religious questioning has forced them to modify their religious practices while traveling—contrary to their sincerely held religious beliefs—to avoid calling attention to their faith and incurring additional scrutiny and religious questioning by border officers. ER-93–95, 100–01, 108–09. For example, while traveling through ports of entry, Imam Kariye and Mr. Mouslli

refrain from physical acts of prayer; Imam Kariye avoids carrying religious texts and does not wear his kufi, a religious head-covering that would immediately identify him as Muslim; and Mr. Shah will no longer carry his religious journal. *Id.*

III. Defendants' Policy and Practice of Subjecting Muslim Americans to Religious Questioning at the Border

The religious questioning of Plaintiffs and retention of their responses is part of a policy and/or practice by Defendants of targeting Muslim American travelers for religious questioning and retaining their responses in government databases. ER-76–80; *see also* ER-30–32 (holding that Plaintiffs adequately pled existence of a policy or practice). That policy and/or practice has persisted for more than a decade. ER-76–77. In 2011, DHS received "numerous" complaints from Muslim Americans about similar questioning regarding religious beliefs, practices, and associations. ER-77. In the intervening years, nearly two dozen Muslim Americans have challenged such questioning in court. *See Cherri v. Mueller*, 951 F. Supp. 2d 918, 933–34 (E.D. Mich. 2013); *El Ali v. Barr*, 473 F. Supp. 3d 479, 524–26 (D. Md. 2020); *Janfeshan v. U.S. Customs & Border Prot.*, No. 16-cv-6915, 2017 WL 3972461, at *10 (E.D.N.Y. Aug. 21, 2017). In 2019, an internal DHS office, the Office for Civil Rights & Civil Liberties ("CRCL"), issued a memorandum acknowledging that DHS had received dozens of complaints about Customs and Border Protection ("CBP") questioning travelers regarding their religious beliefs and practices, including questioning about whether travelers are affiliated with Sunni or

Shi'a Islam, whether they are affiliated with a particular house of worship, and how frequently they pray. ER-77. And as of 2020, DHS CRCL was investigating numerous allegations that "CBP officers at ports of entry have inappropriately questioned travelers about their religious beliefs and practices." *Id.*; DHS CRCL, Compliance Branch Report for FY2020 Q1 and Q2 (2020), https://perma.cc/875B-GFKE.

Defendants' written policies expressly permit border officers to question Americans about their religion. ER-78. For example, DHS policy allows officers to collect and retain information protected by the First Amendment in several circumstances. *See* Memorandum from Kevin K. McAleenan to All DHS Employees at 2 (May 17, 2019), https://perma.cc/6ZN4-TAKB ("McAleenan Memo").[2] U.S. Immigration and Customs Enforcement ("ICE") requires officers who work at ports of entry to carry a questionnaire, which includes intrusive questions about a traveler's religious beliefs, practices, and associations, to guide their interrogations of travelers. ER-78.

CBP officers create records of every secondary inspection at an airport or land crossing, and thus the policy and/or practice of singling out Muslim travelers for

[2] Plaintiffs dispute the accuracy of the McAleenan Memo's vague, unverified, and self-serving assertion that "DHS does not profile, target, or discriminate against any individual for exercising his or her First Amendment rights." McAleenan Memo at 1. A court "cannot take judicial notice of disputed facts contained in [] public records." *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 998–1003 (9th Cir. 2018).

religious questioning during secondary inspection involves routinely documenting these travelers' responses to questions about their religious beliefs and practices. *See* ER-79–80, 85–89, 96–98, 106. Officers then input those records into the TECS database, where they are maintained for up to 75 years and are accessible to thousands of law enforcement officers across federal, state, and local agencies. ER-79–80; *see also* ER-106 (TECS record of Mr. Shah containing information about his religious practice).

IV. Procedural History

On March 24, 2022, Plaintiffs filed this lawsuit, seeking: (1) a declaration that the religious questioning of Plaintiffs, and the policies and practices of Defendants set forth in the Complaint, are unlawful; (2) an injunction against further unlawful religious questioning of Plaintiffs; (3) expungement of all records collected through unlawful religious questioning of Plaintiffs; and (4) expungement of all records collected as a result of retaliatory action against Mr. Shah. *See* ER-192–229. Plaintiffs challenged Defendants' religious questioning on five grounds: violation of the Establishment Clause (Claim I);[3] violation of the Free Exercise Clause (Claim II); violation of the First Amendment right to free association (Claim III); violation of the Fifth Amendment due process right to equal protection (Claim V); and violation of the Religious Freedom Restoration Act (Claim VI). Mr. Shah also

[3] Plaintiffs are not pursuing this claim on appeal.

challenged retaliatory actions by border officers as a separate First Amendment violation (Claim IV).

Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), ER-236 (ECF No. 40), and the court granted the motion with leave to amend, ER-121–91. On November 14, 2022, Plaintiffs filed an amended complaint. ER-72–120. Defendants again moved to dismiss. ER-237 (ECF No. 68). On July 19, 2023, the court dismissed the complaint with leave to amend. ER-7–68. Plaintiffs elected not to amend the complaint, ER-69–71; the court entered judgment in favor of Defendants on September 5, 2023, ER-4; and Plaintiffs timely filed this appeal, ER-230.

SUMMARY OF THE ARGUMENT

The Amended Complaint describes how, during secondary inspections, border officers single out Plaintiffs for religious questioning because they are Muslim; subject them to intrusive and demeaning questions about their faith in a coercive environment; and retain Plaintiffs' responses in government databases for decades. Plaintiffs detail ten different incidents of religious questioning at six ports of entry, refer to dozens of similar complaints from other Muslims, and describe internal DHS investigations into complaints about religious questioning at the border.

The district court correctly held that these allegations plausibly establish "the

existence of an official practice, policy, or custom of targeting Muslim Americans for religious questioning." ER-32. The district court fundamentally erred, however, in concluding that Plaintiffs had not stated any legal violations resulting from this policy and/or practice. Plaintiffs have plausibly stated the following claims:

Fifth Amendment equal protection violations: The religious questioning at issue involves express discrimination against Muslims that fails strict scrutiny, and, separately, discriminatory intent is a motivating factor behind this questioning.

First Amendment Free Exercise Clause violations: Defendants' conduct is neither religiously neutral nor generally applicable because it specifically targets Muslims for religious questioning, and it evinces hostility toward Islam. The discriminatory policy and/or practice of religious questioning fails strict scrutiny.

Religious Freedom and Restoration Act ("RFRA") violations: Defendants' religious questioning imposes a substantial burden on Plaintiffs' religious practice because they are forced to choose between following the tenets of their religion and receiving a governmental benefit: CBP's permission to reenter the country without protracted, unjustified, and demeaning questioning regarding their religious beliefs, practices, and identities—just like any other U.S. citizen. Plaintiffs are also coerced to act contrary to their religious beliefs by the threat of additional religious questioning, which functions as a sanction.

First Amendment violations of associational rights: Defendants' religious questioning compels disclosure of protected associations. Border officers ask Plaintiffs in a coercive environment whether they are Muslim, whether they are Sunni or Shi'a, whether they are Salafi or Sufi, whether they attend a mosque, and what mosque they attend. There is no substantial relationship between these questions and a sufficiently important governmental interest, and the questioning is not narrowly tailored.

Plaintiff Shah's First Amendment retaliation claim: Border officers retaliated against Mr. Shah for peaceful, nonviolent religious writings in his journal and his oral statements invoking his rights. They subjected him to religious questioning, extensive searches of his phone and journal, and a longer detention at the border than he otherwise would have experienced, each of which would chill a person of ordinary firmness from carrying a religious journal during international travel and from invoking his rights during detention.

In holding that Plaintiffs failed to state any legal claim, the district court repeatedly inverted the legal standards governing a motion to dismiss. At nearly every turn, the court ignored or questioned the truth of Plaintiffs' allegations and drew inferences in favor of Defendants. Most importantly, Plaintiffs plausibly allege that they are subject to religious questioning because they are Muslim. But in its analysis of the merits, the district court speculated and hypothesized about facts

outside of the four corners of the complaint to reject that core allegation.

The district court also failed to properly apply the plausibility standard. As this Court has explained, when evaluating a defendant's arguments on a motion to dismiss, the question is whether those arguments render the plaintiff's allegations *implausible*. If both the plaintiff's and the defendant's claims are plausible, the complaint survives. Here, however, the district court did not apply that test—as shown, for example, by its explicit focus on the plausibility of Defendants' arguments.

The district court further erred by holding that Defendants' religious questioning satisfies strict scrutiny. Because strict scrutiny is a fact-intensive inquiry, it is almost never resolved in the movant's favor on a motion to dismiss. In any case, it is plainly plausible that Defendants' questions are not narrowly tailored, and that other types of questions—for example, ones specifically focused on unlawful activity—would be a less restrictive means of furthering the government's interests. Yet the district court simply accepted Defendants' assertions that the religious questions at issue help to protect the border and prevent terrorism, without considering Plaintiffs' allegations that the questions are not, in fact, the least restrictive means of doing so. This Court has held that generic invocations of "national security" cannot satisfy strict scrutiny, and, here, Defendants never explained *how* the religious questions asked of Plaintiffs are necessary to advance a

compelling interest.

These errors pervade the district court's analysis of each of Plaintiffs' claims. Accepting the truth of Plaintiffs' well-pled allegations, including their allegation that Islamic religious belief and practice are not inherently indicative of terrorism or other criminal activity, the district court's decision should be reversed.

STANDARD OF REVIEW

The Court reviews a district court's order granting a motion to dismiss de novo. *Hunley v. Instagram, LLC*, 73 F.4th 1060, 1068 (9th Cir. 2023). To survive a motion to dismiss, plaintiffs need only allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (emphasis added); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This plausibility standard is not a "probability requirement." *Starr v. Baca*, 652 F.3d 1202, 1217 (9th Cir. 2011). Rather, it "'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence' to support the allegations." *Id.* (quoting *Twombly*, 550 U.S. at 556). The Court is required to "accept the complaint's well-pleaded factual allegations as true and construe all inferences in the [plaintiffs'] favor." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). In the event that there are "two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule

12(b)(6).” *Starr*, 652 F.3d at 1216.

ARGUMENT

I. Plaintiffs have plausibly alleged Fifth Amendment equal protection violations.

The Fifth Amendment guarantees the right to equal protection under the law, and government action expressly discriminating “along suspect lines like . . . religion” is subject to strict scrutiny. *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992). The Fifth Amendment also forbids federal government policies and practices that are motivated, even in part, by a discriminatory purpose. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (discussing the “motivating factor” test). Plaintiffs have stated an equal protection claim because they have plausibly alleged that the religious questioning at issue involves express discrimination that fails strict scrutiny, and, separately, that discriminatory intent is a motivating factor behind this questioning. In holding otherwise, the district court failed to credit Plaintiffs’ well-pled allegations as true, ignored several of Plaintiffs’ allegations, improperly drew inferences in Defendants’ favor, misapplied the plausibility standard, and misunderstood bedrock equal protection doctrine.

A. Plaintiffs have plausibly alleged express and intentional discrimination based on religion.

Plaintiffs have plausibly pled that Defendants violate the Fifth Amendment

right to equal protection in two ways. First, Plaintiffs have alleged that Defendants have a policy and/or practice of expressly targeting Muslims for religious questioning, asking questions explicitly about their religion, and retaining the answers in government databases. *See* pages 10–12, *supra*. In cases of express discrimination—"when a state actor explicitly treats an individual differently on the basis of" a protected class, such as religion—the government action is "immediately suspect" and triggers strict scrutiny. *Mitchell v. Washington*, 818 F.3d 436, 445–46 (9th Cir. 2016) (internal quotation marks and citations omitted). In these cases, the plaintiff "need not make an extrinsic showing of discriminatory animus or a discriminatory effect." *Id.* Policies or practices like religious questioning that "permit the consideration of [membership in a protected class] as one factor among others in making law enforcement decisions" are expressly discriminatory. *See Melendres v. Arpaio*, 989 F. Supp. 2d 822, 902 (D. Ariz. 2013), *aff'd in part, vacated in part*, 784 F.3d 1254 (9th Cir. 2015).

Second, Plaintiffs have also stated an equal protection claim under *Arlington Heights*, 429 U.S. at 266, by plausibly alleging that the government's conduct was motivated, at least in part, by discriminatory intent. Critically, a plaintiff "does not have to prove that the discriminatory purpose was the sole purpose of the challenged action, but only that it was a 'motivating factor.'" *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015) (quoting *Arlington Heights*, 429 U.S. at 266); *see also id.* at 977–

78 (an *Arlington Heights* plaintiff need only provide "'very little'" evidence of discriminatory motive to survive even summary judgment) (quoting *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 (9th Cir. 2013)).

In support of both types of equal protection claims, Plaintiffs allege that across ten instances at six different ports of entry, numerous border officers subjected them to similar questions regarding their Islamic faith, and that this questioning is conducted pursuant to a policy and/or practice of targeting Muslim American travelers for questioning and retaining their responses for decades. ER-76–80, 84–89, 95–98, 102–06. Plaintiffs further allege a long history of analogous complaints and lawsuits by other Muslim Americans. ER-76–78; DHS CRCL, Compliance Branch Report, *supra*. Moreover, the content of the border officers' questions is expressly discriminatory and demonstrates the targeting of Muslim travelers. Rather than asking Plaintiffs only neutral questions that could apply to travelers of any faith, officers routinely ask pointed questions about Islamic religious beliefs and practices. *See, e.g.*, ER-87–88, 96–98, 103 (describing questions regarding mosque attendance, prayer frequency, and belief in particular sects of Islam). These allegations establish both express and intentional discrimination.

In three other cases, courts have considered almost identical factual allegations concerning the questioning of Muslim travelers by border officers, and, in each case, the court held that the plaintiffs plausibly stated an equal protection

claim. In *El Ali v. Barr*, 473 F. Supp. 3d 479 (D. Md. 2020), plaintiffs' allegations that they were questioned about "religious pilgrimages, learning Arabic, attending mosques, affiliations with Muslim organizations, religious donations, and associations with other Muslims" plausibly established purposeful discrimination. *Id.* at 516–17 (internal quotation marks omitted). In *Janfeshan v. U.S. Customs & Border Prot.*, No. 16-cv-6915-ARR-LB, 2017 WL 3972461 (E.D.N.Y. Aug. 21, 2017), the court held that questions like "What kind of Muslim are you?" or whether plaintiff was "a beginner, intermediate, or advanced level" Muslim, "raise a reasonable inference that CBP's actions towards [plaintiff] were motivated at least in part by his religion." *Id.* at *9–10. And in *Cherri v. Mueller*, 951 F. Supp. 2d 918 (E.D. Mich. 2013), the court found that plaintiffs' allegations—which included being asked questions like "How many times a day do you pray?" and "Who is your religious leader?"—were sufficient to survive a motion to dismiss. *Id.* at 924, 937. The religious questioning of Plaintiffs here mirrors that in *El Ali*, *Janfeshan*, and *Cherri*, and likewise supports the conclusion that Plaintiffs have plausibly stated an equal protection claim.

B. The district court erred in holding that Plaintiffs did not plausibly allege discrimination based on religion.

Initially, the district court acknowledged that Plaintiffs plausibly alleged discriminatory treatment because of their faith, observing that "Plaintiffs have sufficiently alleged that they 'as members of a certain group [are] being treated

differently from other persons based on membership in that group.'" ER-59–60 (citation omitted). The court also acknowledged, correctly, that "Plaintiffs have sufficiently alleged the existence of an official practice, policy or custom of targeting Muslim Americans for religious questioning and retaining their responses[.]" ER-32 (analyzing standing). Despite these conclusions, however, the court ultimately held that Plaintiffs had not sufficiently alleged that the religious questioning is "because of Plaintiffs' religion." ER-60. In the course of its contradictory analysis, the district court erred in several respects.

First, the court failed to accept Plaintiffs' well-pled allegations as true, as required on a motion to dismiss. Plaintiffs alleged that they were "being treated differently" based on their religion, *see* ER-59–60, pursuant to a broader policy and/or practice of expressly targeting Muslims for religious questioning and asking questions solely and explicitly focused on their religion, *see* ER-32. Plaintiffs supported these allegations with copious detail. *See, e.g.*, ER-76–80, 84–89, 95–98, 102–03, 105–06.

Yet the district court's equal protection analysis *entirely ignored* Plaintiffs' express discrimination claim. *See* ER-58–63. And with respect to Plaintiffs' discriminatory-intent claim under *Arlington Heights*, the court simply rejected Plaintiffs' allegations that Defendants' policy and/or practice of singling out Muslims for religious questioning and the content of the questions themselves evince

a discriminatory motive. *See, e.g.*, ER-76–80, 84–89, 95–98, 102–03, 105–06. Instead, the court speculated that Defendants' religious questioning of Imam Kariye and Mr. Mouslli was due to their watchlist status. *See* ER-60–61. But nowhere did Defendants (or the district court) explain how Plaintiffs' watchlist status would justify the specific *religious* questions asked of them, and in such a way as to preclude the plausibility of any discriminatory motive.[4] The district court similarly speculated that the questioning of Mr. Shah was due to the contents of his journal, *see* ER-63—ignoring his specific allegations that nothing in his journal related to violence or terrorism, and that his religious practice is rooted in peace and nonviolence, ER-102–03, 106. Not only did the court refuse to accept Plaintiffs' well-pled allegations, but, as further discussed below, its alternative explanations for Defendants' conduct were predicated on legal and logical errors.

Second, the court failed to recognize that, under *Arlington Heights*, Plaintiffs need only allege that discrimination was "a motivating factor" behind the government's action—not that discrimination was the "dominant" or "primary" cause. 429 U.S. at 265. Even if Defendants had multiple motivations for religious

[4] Notably, the district court also ignored Imam Kariye's and Mr. Mouslli's allegations that their watchlist placement was improper. *See* ER-89, 98. The implications of the court's ruling are extreme: under its logic, religious questioning can *never* be challenged on equal protection grounds by someone on the U.S. government's watchlist—even when that person is on the watchlist in error.

questioning, that fact would not render Plaintiffs' discrimination claim implausible. *See, e.g.*, *Flores v. Pierce*, 617 F.2d 1386, 1389 (9th Cir. 1980) (upholding verdict in favor of plaintiffs in equal protection suit where defendants' actions were "based *in part* on reports that referred to explicit racial characteristics" (emphasis added)); *Melendres*, 989 F. Supp. 2d at 901 (similar).

Third, the court erred by improperly drawing inferences in favor of Defendants—the opposite of what it was required to do on a motion to dismiss. Indeed, the court was explicit: it "f[ound] that the facts as alleged *raise the inference* that Plaintiffs Kariye and Mouslli experienced . . . religious questioning because of their placement on government watchlists." ER-61 (emphasis added). But at the motion-to-dismiss stage, the court was obliged to evaluate the plausibility of the amended complaint with all inferences drawn in Plaintiffs' favor. *See, e.g.*, *Ariz. Students' Ass'n*, 824 F.3d at 864. Of course, there was no need to draw an inference on this point at all: Plaintiffs specifically alleged, with detailed supporting facts, that they were subjected to religious questioning because they are Muslim and because Defendants have an official policy and/or practice of singling out Muslims for such questioning.

Fourth, the court's proffered alternative causes for the challenged questioning do not logically explain why Plaintiffs were asked *religious* questions. The court concluded that Imam Kariye and Mr. Mouslli were asked questions about their

religious beliefs and practices because of their watchlist status, *see* ER-60–61, but it did not—and could not—explain why watchlist status would result in the particular religious questions that Plaintiffs were asked, such as "How many times a day do you pray?" and "Are you Sunni or Shi'a?" While placement on a watchlist could be a cause for secondary inspection, it does not explain why a traveler would be asked intrusive questions *about his personal religious beliefs* once he is in secondary inspection, rather than being asked questions relevant to border security.[5]

Similarly, the contents of Mr. Shah's journal do not explain why he was asked questions about his religion. *Contra* ER-63. Mr. Shah has plausibly alleged that he has no connection to terrorism, and that the contents of his journal had nothing to do with terrorism or other criminal activity. ER-102–03, 106. Instead, the journal included "notes about his religious beliefs and practices, which are rooted in peace and nonviolence." ER-102–03. The court was required to accept the truth of these well-pled allegations. *See, e.g.*, *Ariz. Students' Ass'n*, 824 F.3d at 864. Innocuous notes about Islamic religious belief and practice would not provide any basis for border officers to question Mr. Shah about that belief and practice, just as a Christian American's scripture journal would not justify questions about that traveler's faith.

[5] As Plaintiffs explained to the district court, they do not challenge their selection for secondary inspection, even though such inspection was unwarranted. *Contra* ER-60. Rather, Plaintiffs allege that, once selected, they were singled out for discriminatory questioning regarding their religious beliefs and practices. *See* ER-84–89, 95–98, 102–06.

Fifth, the district court failed to properly apply the plausibility standard. As this Court explained in *Starr*, "If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6). Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *im*plausible." 652 F.3d at 1216 (emphasis in original); *see also Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1159–60 (9th Cir. 2022) (same). Nothing in Defendants' arguments rendered *implausible* Plaintiffs' allegations that discrimination was a "motivating factor" behind the religious questioning.

Finally, the court erred in reasoning that because "further inspection" of Mr. Shah may have been permissible under the Fourth Amendment, that fact would foreclose an equal protection claim under the Fifth Amendment. *See* ER-63. But that is not the law. Government conduct may satisfy the Fourth Amendment and still violate the right to equal protection. *See, e.g.*, *Whren v. United States*, 517 U.S. 806, 813 (1996); *Cross v. City & Cnty. of San Francisco*, 386 F. Supp. 3d 1132, 1149 (N.D. Cal. 2019); *Ballew v. City of Pasadena*, 642 F. Supp. 3d 1146, 1168 (C.D. Cal. 2022) ("[A] traffic stop motivated, at least in part, by race still constitutes an equal protection violation, even if the officers also had a legitimate basis for the stop[.]"). The scope of border officers' authority under the Fourth Amendment is

beside the point here, as Mr. Shah plausibly alleged that officers asked him religious questions because of his Islamic faith—not for any compelling or even legitimate government purposes.

At bottom, Defendants' religious questioning and targeting of Muslim Americans rest on assumptions about the inherent suspiciousness of Islamic faith and practice. By prying into mosque attendance, frequency of prayer, and other aspects of protected religious belief and practice, Defendants demonstrate an intent to treat Muslims differently from non-Muslims, and their questions are rooted in discriminatory beliefs about Islam. *See* ER-78, 80–81, 93, 100. Defendants' questions reflect an inaccurate and harmful view that Muslim religiosity is a proxy for a terrorist threat. *See id.* It is, at a minimum, plausible that these discriminatory views are a motivating factor in the questioning of Plaintiffs about their Islamic religious beliefs and practices.

C. Plaintiffs have plausibly alleged that Defendants' express religious discrimination does not survive strict scrutiny.

Strict scrutiny applies to Plaintiffs' claim that Defendants expressly target Muslim Americans for religious questioning and ask questions solely and explicitly focused on their faith.[6] Under strict scrutiny, the government ultimately bears the

[6] Contrary to the district court's suggestion, ER-63, where a plaintiff plausibly alleges that discrimination was "a motivating factor" behind government conduct, the plaintiff need not also allege that the conduct would fail strict scrutiny. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); Erwin Chemerinsky,

heavy burden of showing that its religious questioning is justified by a compelling interest and is narrowly tailored to that interest. *See Harrington v. Scribner*, 785 F.3d 1299, 1307 (9th Cir. 2015). At the motion-to-dismiss phase, a plaintiff's allegations that the government cannot meet this high burden need only be "plausible." *See Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

Here, Plaintiffs have plausibly alleged that Defendants would not be able to meet their burden to show that religious questioning—the targeting of Muslim Americans, the substance of the religious questions, and the decades-long retention of responses to these questions—satisfies strict scrutiny. Even though strict scrutiny requires a fact-intensive analysis and is virtually never resolved in the movant's favor on a motion to dismiss, the district court held that "Defendants' questioning is a narrowly tailored means of advancing a compelling government interest." ER-45; *see* ER-45–49 (addressing strict scrutiny within the free exercise analysis); ER-63 (declining to address strict scrutiny within the equal protection analysis). For the reasons below, the court's holding was in error.

Constitutional Law: Principes and Policies at 747 (5th ed. 2015) (explaining that courts apply a burden-shifting framework to *Arlington Heights* claims, not strict scrutiny); *Ramirez v. City of San Jose*, No. 21-cv-08127-VKD, 2022 WL 3139521, at *7 (N.D. Cal. Aug. 5, 2022) (denying motion to dismiss where plaintiff plausibly alleged that discrimination was a motivating factor in government conduct, without requiring plaintiff to plead an additional element); *Harper v. Cnty. of Monterey*, No. 18-cv-03695-YGR, 2020 WL 3833393, at *1 (N.D. Cal. July 8, 2020) (same); *Cherri*, 951 F. Supp. 2d at 937 (same).

1. It is plausible that Defendants' religious questioning is not narrowly tailored to a compelling government interest.

Strict scrutiny requires the government to "prove that [its] specific restrictions are the least restrictive means available to further its compelling interest. They cannot do so through general assertions of national security." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1045 (9th Cir. 2018). As the Supreme Court has recognized, "[t]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *City of Indianapolis v. Edmond*, 531 U.S. 32, 33, 42 (2000); *see also Hassan v. City of New York*, 804 F.3d 277, 306 (3d Cir. 2015), *as amended* (Feb. 2, 2016) ("No matter how tempting it might be to do otherwise, we must apply the same rigorous standards [of strict scrutiny] even where national security is at stake.").

As part of this test, the government must show that the challenged conduct "actually furthers" its asserted interest. *See Holt v. Hobbs*, 574 U.S. 352, 364 (2015) ("[I]t is hard to swallow the argument that denying petitioner a ½–inch beard actually furthers the Department's interest in rooting out contraband."). While the government undoubtedly has an interest in protecting its borders and interdicting terrorists, Defendants have failed to explain how the specific religious questions asked of Plaintiffs actually advance their border-security objectives.

With respect to narrow tailoring, Defendants did not even attempt to argue

that their targeting of Muslim Americans or their decades-long retention of responses to religious questioning is narrowly tailored. On the substance of the questions, Defendants failed to overcome Plaintiffs' plausible allegations that asking other, non-religious questions would suffice to further the government's asserted interests. Defendants did not explain why they would possibly need to know, for example, the number of times a day Mr. Mouslli prays, ER-96–97, whether Imam Kariye is Sunni or Shi'a, ER-87–88, or how religious Mr. Shah considers himself, ER-103. Nor did Defendants discuss the efficacy of less restrictive measures. *See Jones v. Slade*, 23 F.4th 1124, 1144 (9th Cir. 2022) (government must show that it "has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice" (citation omitted)). At a minimum, it is plausible that border officers could perform their duties without inquiring into the details of, *e.g.*, Plaintiffs' prayer frequency and sect. This is especially true because, as Plaintiffs explained at length in the Amended Complaint, Islamic beliefs and practices are not themselves indicative of terrorism or any other wrongdoing, ER-80–81, and Plaintiffs are law-abiding citizens with no criminal records and no connection to terrorism, ER-89–91, 98, 106.

If Defendants have reason to believe that a traveler is involved in terrorist acts or other criminal activity within CBP's enforcement mandate, they can, of course, ask questions concerning the facts of that activity. But what Plaintiffs experience

when coming home to the United States is altogether different. Border officers single them out as Muslims and conduct fishing expeditions into their constitutionally protected beliefs—subjecting them to intrusive, stigmatizing, and demeaning questions that are entirely irrelevant to border security, and that are instead predicated on unfounded assumptions and loathsome stereotypes regarding the practice of Islam and terrorism. *See, e.g.*, ER-80–81, 84–89, 92–98, 99–103, 105–09.

Defendants' policy and/or practice of targeting Muslim American travelers and asking them unnecessary religious questions is not closely fitted—indeed, not fitted at all—to the government's interests in protecting the border and preventing terrorism. Other types of questions, specifically focused on unlawful activity, would be a less restrictive means of furthering those interests. Because Defendants' arguments to the contrary involved no more than "general assertions of national security," *Askins*, 899 F.3d at 1044–45, they were insufficient to render Plaintiffs' allegations implausible, *see Starr*, 652 F.3d at 1216–17.

2. The district court erred in its strict scrutiny analysis.

Despite the lack of an evidentiary record, and despite its obligation to accept Plaintiffs' well-pled allegations as true and to draw all inferences in Plaintiffs' favor, the district court held that Defendants' religious questioning is narrowly tailored to the government's interest in "protecting its borders and investigating and preventing potential acts of terrorism." ER-45–46. This was error.

Because strict scrutiny is a fact-intensive inquiry, it is virtually never resolved in the movant's favor on a motion to dismiss. Instead, the issue is more appropriately addressed on a well-developed factual record at summary judgment or trial. *See, e.g.*, *Frudden v. Pilling*, 742 F.3d 1199, 1207 (9th Cir. 2014) (scrutiny analysis is "a question for summary judgment or trial"); *Witt v. Dep't of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (remanding so the district court could develop the record to properly consider the scrutiny analysis); *Hassan*, 804 F.3d at 307 ("[B]ecause Plaintiffs have plausibly alleged that the City engaged in intentional discrimination against a protected class, and because that classification creates a presumption of unconstitutionality that remains the City's obligation to rebut, Plaintiffs have stated a claim under the Equal Protection Clause[.]"); *NAACP of San Jose/Silicon Valley v. City of San Jose*, 562 F. Supp. 3d 382, 400 (N.D. Cal. 2021) (where the court has no evidentiary record, it lacks "adequate means" of determining whether challenged conduct is narrowly tailored); *Morris v. Pompeo*, No. 19-cv-00569-GMN, 2020 WL 6875208, at *8 (D. Nev. Nov. 23, 2020); *Duronslet v. Cnty. of Los Angeles*, 266 F. Supp. 3d 1213, 1223 (C.D. Cal. 2017) (whether government action can survive heightened scrutiny is a "fact-dependent inquir[y] that [is] unsuitable for resolution at the pleading stage").

More generally, a plaintiff is not required to "allege facts negating issues on which the defendant carries the burden of proof"—such as establishing that the

government's conduct was narrowly tailored. *See Duronslet*, 266 F. Supp. 3d at 1223 (citing *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014), and *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014)); *cf. Nayab v. Cap. One Bank*, 942 F.3d 480, 494 (9th Cir. 2019) (it is not a plaintiff's burden to establish the absence of a fact where doing so would impose a difficult or impossible task, and where evidence on the issue could readily be produced by defendants). Nevertheless, the district court demanded in error that Plaintiffs do so, while improperly rejecting Plaintiffs' well-pled allegations. *See* ER-45–49.

The district court's strict scrutiny analysis rested on two additional errors that pervade the opinion: it reasoned that Defendants' religious questioning is "narrowly tailored" because Imam Kariye and Mr. Mouslli were watchlisted, and because Mr. Shah's journal included notes related to his religious practice. *See id.* In arriving at these conclusions, the court again failed to treat Plaintiffs' well-pled allegations as true, ignored key allegations, and failed to draw inferences in Plaintiffs' favor.

With respect to Imam Kariye and Mr. Mouslli, the district court's analysis omitted any discussion of the following allegations: both Plaintiffs were unjustly and improperly placed on the U.S. government's watchlist. They have no criminal record and no ties to terrorist activity. Neither has participated in nor advocated for any acts of violence, and neither has been accused by any government agency of doing so. *Compare* ER-89, 98, *with* ER-46–48. The bar for placement on the watchlist is

extraordinarily low—in essence, suspicion that an individual might be suspicious. ER-90. Under the government's own rules, concrete facts are not necessary to meet this standard. *Id.* Because the standard for placement on the watchlist is hollow and circular, government errors and reliance on unjustified suspicion are common. *Id.* Although some courts have upheld the legality of the watchlist as a general matter, ER-47 n.4, that does not undermine the plausibility of Plaintiffs' allegations that their specific placement was improper.[7]

But more importantly, questions about the details of Plaintiffs' religious practice are simply irrelevant—and certainly not necessary—to the detection of terrorism. Even if Plaintiffs' watchlist placement met the low threshold of suspicion-about-suspiciousness, it cannot be the case that watchlist status gives the government *carte blanche* to ask an American any questions whatsoever about his religion—particularly where, as here, those questions are unnecessary and the traveler has no

[7] As a Senate oversight committee recently concluded, the standard for watchlisting an individual "entails a significant risk of error because it does not require it be more probable than not that an individual is involved in terrorism-related activities." S. Comm. on Homeland Sec. & Gov. Affs., 118th Cong., *Mislabeled as a Threat: How the Terrorist Watchlist & Government Screening Practices Impact Americans* 31 (Dec. 2023). While this case does not include a legal claim challenging Imam Kariye's or Mr. Mouslli's watchlist status, *see* ER-47 n.4, the errors in the watchlisting system provide additional context for why Defendants' religious questioning of Imam Kariye and Mr. Mouslli is unlawful. Notably, the government removed Imam Kariye from the watchlist in May 2022, in response to this litigation. ER-91.

ties to terrorism. The fact that a person is on a watchlist does not end the inquiry into whether a border stop violated his constitutional rights. *See*, *e.g.*, *El Ali*, 473 F. Supp. 3d at 515–24 (holding that watchlisted plaintiffs plausibly alleged First Amendment, Fourth Amendment, and equal protection claims); *Wilwal v. Nielsen*, 346 F. Supp. 3d 1290, 1304–06 (D. Minn. 2018) (denying motion to dismiss constitutional claims relating to border search of watchlisted person).

With respect to Mr. Shah, the district court's analysis omitted any discussion of his allegations that he is a law-abiding citizen with no criminal record and no connection to terrorism; that the contents of his journal had nothing to do with criminal activity or terrorism; and that his religious beliefs are rooted in peace and nonviolence. *Compare* ER-102–03, 106, *with* ER-48. Accepting these allegations as true means that there was nothing suspicious in Mr. Shah's journal that could have possibly justified questions about his religious beliefs and practices—let alone the particular questions he was asked, such as "How religious do you consider yourself?" and "What mosque do you attend?" *Contra* ER-48. The district court also noted that the incident report related to the detention and questioning of Mr. Shah was labeled "Terrorist Related," *see id.*; ER-106, but border officers' post-hoc application of this label to their report cannot justify the breadth and intrusiveness of the particular questions they asked—especially given that Mr. Shah has no ties to terrorism. ER-106. It is more than plausible that this label was inappropriate and

unjustified. If anything, it is evidence of Defendants' discriminatory treatment of Mr. Shah because he is Muslim. ER-107.

Furthermore, the district court's analysis reveals a fundamental misunderstanding about the governing legal standard and the basis for Plaintiffs' claims. The court concluded that it was "implausible . . . that questioning Plaintiffs 'does not help to protect the border or prevent terrorism.'" ER-47. But Plaintiffs have never argued that border questioning, in general, does not help protect the border or prevent terrorism. Plaintiffs argue that the *religious* questioning alleged in the complaint was not *narrowly tailored*. It is, at a minimum, plausible that border officers could have engaged in other, neutral lines of questioning, rather than discriminating against Plaintiffs and targeting them for religious questions because they are Muslim.

Finally, contrary to the district court's analysis, *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007), does not support dismissal. *See* ER-48. In that case, at *summary judgment*, the court concluded that questioning of attendees of an Islamic conference was narrowly tailored because the government presented evidence of intelligence information raising "specific concerns" about the conference. *Tabbaa*, 509 F.3d at 93, 106. The record included evidence that CBP had intelligence information that the conference "*would serve* as a possible meeting point for terrorists to coordinate operations, and raise funds intended for terrorist activities, as well as exchange ideas

and documents, including travel or identification documents such as passports or driver's licenses." *Id.* at 93 (emphasis in original) (internal quotation marks omitted). No comparable evidence has been presented here, nor would such evidence be considered in deciding a motion to dismiss.[8]

For these reasons, Plaintiffs should be permitted to proceed on their equal protection claims.

II. Plaintiffs have plausibly alleged free exercise and RFRA violations.

The Free Exercise Clause "'protect[s] religious observers against unequal treatment'" that imposes "'special disabilities'" based on "'religious status.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 542 (1993)). When the government acts in a manner that is not neutral or generally applicable vis-à-vis religion, the conduct "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531–32. Plaintiffs here have plausibly alleged free exercise violations by pleading facts showing that (1) Defendants' conduct is not religiously neutral because it specifically targets Muslims for discriminatory religious questioning, and (2) this policy and/or practice is not narrowly tailored to a

[8] Additionally, *Tabbaa* was not an equal protection case and did not analyze whether intelligence information would permit border officers to target Muslims for questioning about their religious beliefs and practices because they are Muslim.

compelling government interest. *See id.*

Where, as here, plaintiffs allege that officials have singled them out for discriminatory treatment based on their faith or religious identity, or that the government has acted in a manner hostile to a particular religion, plaintiffs need not show a "substantial burden" on religious practice to state a free exercise claim. *See, e.g.*, *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 686 (9th Cir. 2023) (en banc) (discussing types of free exercise claims). But even if a substantial burden were required, Plaintiffs *have* plausibly alleged such a burden. Plaintiffs have also stated a claim under the Religious Freedom Restoration Act, which applies strict scrutiny to any federal government action that "substantially burden[s] a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a)–(b).

A. Because Plaintiffs challenge government discrimination against one faith, the district court erred in holding that Plaintiffs must allege a "substantial burden" under the Free Exercise Clause.

By requiring Plaintiffs to allege a "substantial burden" on their religious practice to state their free exercise claim, *see* ER-38–39, the district court plainly erred. Its holding was at odds with Supreme Court precedent, the law of this Court, and the law of other circuits. Because Plaintiffs are challenging the government's targeting of Muslims for unequal treatment, Plaintiffs need not also allege a substantial burden—though they have done so. *See* Section II.B, *infra*.

In *Lukumi*, the Supreme Court held that government action that is not neutral or generally applicable, and instead targets or singles out one faith for disfavor, is subject to strict scrutiny under the Free Exercise Clause. *See* 508 U.S. at 531, 535, 546 (applying strict scrutiny to an "impermissible attempt to target [the] petitioners and their religious practices") (internal quotation marks and citation omitted). In cases challenging this type of government conduct, plaintiffs need not allege a *substantial* burden. Rather, plaintiffs may establish a free exercise violation "by showing that a government entity has burdened [their] sincere religious practice pursuant to a policy that is not neutral or generally applicable," and "[f]ailing either the neutrality or general applicability test is sufficient to trigger strict scrutiny." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525–26 (2022) (internal quotation marks omitted).

Over the last five years, the Supreme Court has evaluated free exercise challenges to non-neutral government conduct eight times. The Court did not, in any of those cases, require a showing of a "substantial burden." *See id.*; *Carson v. Makin*, 596 U.S. 767, 780–81 (2022); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021); *Tandon v. Newsom*, 593 U.S. 61, 62–64 (2021) (per curiam); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16–18 (2020); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2255 (2020); *Trinity Lutheran*, 582 U.S. 449, 460–62; *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617, 634–40 (2018).

Similarly, this Court has recently issued several free exercise opinions in which it found that the government targeted a faith for disfavor, and, accordingly, did not require plaintiffs to show a substantial burden—including an en banc decision just last year. *See Fellowship of Christian Athletes*, 82 F.4th at 686; *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152 (9th Cir. 2022); *Fazaga v. FBI*, 965 F.3d 1015 (9th Cir. 2020), *rev'd and remanded on other grounds*, 595 U.S. 344 (2022). Although *Fellowship of Christian Athletes* post-dated the district court's opinion, the district court erred by ignoring both *Waln* and *Fazaga* in its free exercise analysis. *See* ER-37–45.

In *Fellowship of Christian Athletes*, this Court applied strict scrutiny to a school district's decision to revoke a student club's official status, reasoning that the decision was not neutral, not generally applicable, and based on anti-religious animus. 82 F.4th at 686–93. In articulating the legal standards for a free exercise claim, the Court said nothing about a "substantial burden," *id.* at 686, and nowhere did it consider whether the school district's decision imposed a substantial burden on the students' religious beliefs. Similarly, in *Waln*, where the plaintiff had demonstrated that a school district policy was "not generally applicable because it was enforced in a selective manner," the Court held that there was "'a First Amendment violation unless the government can satisfy strict scrutiny.'" 54 F.4th at 1161 (quoting *Kennedy*, 597 U.S. at 525). The Court did not inquire as to whether

the discriminatory policy imposed a substantial burden. *See id.* And in *Fazaga*, the Court explained that because "Plaintiffs' allegations relate not to neutral and generally applicable government action, but to conduct motivated by intentional discrimination against Plaintiffs because of their Muslim faith," strict scrutiny applied, "*[r]egardless of the magnitude of the burden imposed*." 965 F.3d at 1058 (emphasis added).[9] *See also Kravitz v. Purcell*, 87 F.4th 111, 124 (2d Cir. 2023) ("When we are considering government policies that are not neutral and generally applicable—that is, policies that discriminate against religion rather than burden it incidentally—there is no justification for requiring a plaintiff to make a threshold showing of substantial burden."); *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849–50 (3d Cir. 1994) (explaining why a plaintiff need not show a substantial burden where government action is not neutral toward religion).

Instead of looking to recent precedent, the district court erroneously relied on an older and inapposite case: *American Family Ass'n, Inc. v. City & County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002). *See* ER-41–42.[10] In *American Family,* the

[9] The Court's opinion in *Fazaga* was not vacated by the Supreme Court, and this portion of the decision remains controlling law.

[10] The district court also cited *California Parents for the Equalization of Educational Materials v. Torlakson*, 973 F.3d 1010 (9th Cir. 2020), but quoted from this Court's summary of the district court's holding, not the actual appellate analysis. *Compare* ER-38, *with Cal. Parents*, 973 F.3d at 1016. This Court's analysis does not mention, much less require, a "substantial burden." *See id.* at 1019–20. Instead, this Court required mere "interference" with free exercise, *id.* at 1020—a

plaintiffs challenged non-binding resolutions and a public letter written by local officials as allegedly anti-religious. 277 F.3d at 1119–20. The Court required the plaintiffs to demonstrate a substantial burden for their free exercise claim, reasoning that, "in this case, there is no actual 'law' at issue" and "there does not appear to be any case in this circuit applying [*Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990)] or *Lukumi* to some non-regulatory or non-compulsory governmental action—in other words, to something other than an actual law." *Id.* at 1124.

But *American Family* was decided in 2002, and in the last 22 years, this Court has repeatedly applied *Lukumi* to government conduct, not only "an actual law." *Fellowship of Christian Athletes* concerned a school district's decision to strip a student club of official recognition, 82 F.4th at 671; *Waln* involved a school district's selective enforcement of a dress code policy, 54 F.4th at 1161; and *Fazaga* was a challenge to government surveillance practices, 965 F.3d at 1058. None of these cases required the plaintiffs to establish a substantial burden to state a free exercise claim. *See also Fulton*, 141 S. Ct. at 1877 (not requiring a substantial burden where plaintiffs challenged city's refusal to contract with a Catholic foster-care agency, *i.e.*, non-compulsory government conduct).

Even setting that aside, Plaintiffs here—unlike the plaintiffs in *American*

---

requirement consistent with the general obligation for a plaintiff to establish injury-in-fact.

Family—allege compulsory government conduct. Border officers confront Plaintiffs, seize their passports and belongings, and then single them out for religious questioning because they are Muslim—coercing them to respond to intrusive, discriminatory, non-neutral questions about their faith. ER-78–79. This is precisely the type of government conduct that triggers strict scrutiny, regardless of the magnitude of the burden imposed.

Finally, Plaintiffs have also plausibly alleged a free exercise violation under the hostility principles set forth in *Masterpiece Cakeshop*, 584 U.S. at 639–40, and the district court erred by ignoring these arguments. In *Masterpiece Cakeshop*, the Supreme Court explained that official religious hostility in carrying out the law is "inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *See id.* at 640; *see also Lukumi*, 508 U.S. at 534 ("The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."). Here, while border officers are charged with enforcing various laws governing entry to United States, they may not do so with animus or suspicion toward certain travelers based on the travelers' faith. Officers' discriminatory interrogations of Plaintiffs regarding their Islamic beliefs and practices demonstrate hostility toward Islam, and their questions convey the message that the U.S. government views Islam as inherently suspicious and threatening to the United States. ER-80–81, 93, 100, 108. Such hostility to religion is inconsistent with

the principles of religious freedom on which this country was founded, and it constitutes a plain violation of the Free Exercise Clause.

B. The district court erred in holding that Plaintiffs failed to allege a "substantial burden" on their religious practice.

Even if Plaintiffs were required to allege a substantial burden to pursue their free exercise challenge to Defendants' discriminatory religious questioning, they have plausibly done so—both for First Amendment purposes and under RFRA, which imposes a statutory substantial-burden requirement. 42 U.S.C. § 2000bb–1(a)-(b). The government substantially burdens religious exercise "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." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc). By singling out Muslims and subjecting them to intrusive questions about their religious practice and beliefs, border officers coerce Plaintiffs into making two untenable choices, both of which are prohibited by *Navajo Nation*.

First, Defendants force Plaintiffs to choose between (1) being Muslim and, as a consequence of their religious status, being targeted for and subjected to religious questioning, or (2) abandoning their Islamic identities and beliefs so that they may receive CBP's permission to reenter the country without undergoing religious questioning. This questioning can be understood both as a denial of a "government

benefit" and the imposition of a "sanction[]" within the meaning of *Navajo Nation*. *See* 535 F.3d at 1070. The government benefit at issue is not the Plaintiffs' ability to reenter the United States, but rather the ability to do so without protracted, unjustified, and demeaning questioning regarding their religious beliefs and practices—just like any other traveler. At the same time, religious questioning functions as a sanction, penalizing Plaintiffs for being Muslim. Moreover, Plaintiff Imam Kariye was directly threatened with additional sanctions when a CBP officer told him that if he did not cooperate, CBP would make things harder for him during future travel. ER-88.

Second, Defendants force Plaintiffs to choose between (1) engaging in visible displays of Muslim religiosity, which draw even more attention from border officers and thus risk additional religious questioning, and (2) refraining from such visible displays of religiosity and avoiding additional religious questioning. This, too, is a substantial burden. Because Defendants' coercive questioning is aimed at gauging Plaintiffs' religiosity as Muslims, Plaintiffs are pressured to avoid or minimize central acts of faith that will increase attention to their Muslim identities and religiosity and risk extending the scope and duration of religious questioning. Indeed, because of the coercive nature of Defendants' religious questioning, Imam Kariye and Mr. Mouslli both refrain from physical acts of prayer in airports or the border when returning from international travel. ER-93–94, 100–01. Imam Kariye

also forgoes religious attire and avoids carrying religious texts when returning home from abroad. ER-93–95. And due to the pressure of religious questioning, Mr. Shah will no longer travel with his religious journal and will cease documenting his religious thoughts and expression during his travels abroad. ER-108–09. These coerced changes in Plaintiffs' religious practices constitute a substantial burden. *See Navajo Nation*, 535 F.3d at 1069 n.11 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981)); *see also Fazaga*, 965 F.3d at 1062 (holding that, where plaintiffs changed religious practices to avoid governmental scrutiny, "the complaint substantively state[d] a RFRA claim against the Government Defendants").[11]

In rejecting Plaintiffs' allegations concerning these substantial burdens, the

[11] Although Plaintiffs have plausibly alleged a substantial burden under *Navajo Nation*, that standard should be understood in light of *Ohno v. Yasuma*, 723 F.3d 984 (9th Cir. 2013), and *Jones v. Slade*, 23 F.4th 1124 (9th Cir. 2022), which post-date *Navajo Nation* and clarify what constitutes a substantial burden. Under *Ohno*, government conduct imposes a substantial burden where it has a "tendency" to "coerce individuals into acting contrary to their religious beliefs." 723 F.3d at 1011. Under *Jones*, so too does government conduct that "[m]ore subtly" and "indirectly" impacts religious exercise by "discouraging" a person "from doing that which he is religiously compelled or encouraged to do." 23 F.4th at 1140 (discussing statute that mirrors RFRA). Since the Court has vacated its decision in *Apache Stronghold v. United States*, 38 F.4th 742, 753–68 (9th Cir. 2022), *vacated*, 56 F.4th 636 (9th Cir. 2022), both *Ohno* and *Jones* remain relevant. In any event, Plaintiffs have plausibly alleged a substantial burden under any understanding of the requirement.

district court committed several errors. First, the court held that there is no relevant government "benefit" at the border because the freedom to travel abroad may be regulated by the government. ER-44. But the government's general authority to regulate international travel is beside the point. The First Amendment prohibits discriminatory infringements on Muslim American travelers' rights, and the benefit to Plaintiffs is the ability to reenter without unmerited religious questioning, delay, and humiliation. The district court also relied on *Warsoldier v. Woodford*, 418 F.3d 989, 995–96 (9th Cir. 2005), for the proposition that Plaintiffs identified no relevant "sanction." ER-44–45. But in *Warsoldier*, one of the sanctions—confinement of a prisoner to his cell as a coercive measure—is in fact analogous to the punishment of Plaintiffs here, who are routinely subjected to religious questioning while confined for hours at a time at the border. *See, e.g.*, ER-85, 87 (discussing how border officers confined Imam Kariye to a windowless room for hours).

The district court was also wrong to characterize the burdens Plaintiffs experience as "subjective chilling effects." ER-39–42. The phrase "subjective chill" has its origins in *Laird v. Tatum*, where the plaintiffs challenged an Army data-gathering program—the "principal sources" for which were "news media and publications in general circulation"—on the sole ground that they were chilled "merely from the . . . knowledge" of this program. 408 U.S. 1, 6, 10–11, 13 (1972). The plaintiffs did not allege that the data-collection was itself unlawful, and they

"'complain[ed] of no specific action of the Army against them.'" *Id.* at 9 (quoting *Tatum v. Laird*, 444 F.2d 947, 953 (D.C. Cir. 1971)). By contrast, here, Defendants' questioning and collection of data about Plaintiffs' private religious beliefs and practices directly interferes with Plaintiffs' First Amendment rights. Plaintiffs are confronted, in person, by armed border officers who detain them in a coercive environment; are subjected to compulsory and stigmatizing questioning about their faith; and are penalized for being Muslim—a far cry from the subjective chilling effects in *Laird* and its progeny.[12]

The district court's "subjective chill" discussion also relied erroneously on *Dousa v. U.S. Dep't of Homeland Sec.*, No. 19-cv-1255-LAB, 2020 WL 434314 (S.D. Cal. Jan. 28, 2020). *See* ER-42. But there, the district court *denied* the defendant's motion to dismiss and allowed the free exercise claim to proceed. *See Dousa*, 2020 WL 434314 at *11. While the court also simultaneously denied a preliminary injunction because the evidence at that early stage of the litigation showed that the only harm was a subjective chill, the court nevertheless recognized

[12] Moreover, as a doctrinal matter, the district court improperly short-circuited its free exercise analysis by focusing on "subjective chill." ER-42. Given the discriminatory questioning of Plaintiffs—which, as the district court held, is a burden sufficient to confer standing—*Kennedy*, 597 U.S. at 525, *Fellowship of Christian Athletes*, 82 F.4th at 687, and *Fazaga*, 965 F.3d at 1058, require the Court to apply strict scrutiny. Even if the Court were to disagree and apply the older framework of *American Family*, 277 F.3d at 1124, the questioning here is compulsory, and accordingly, strict scrutiny applies.

that the plaintiff had plausibly alleged a substantial burden for purposes of a motion to dismiss, and that further development of the record could allow her to prove her claim. *Id.* at *6, *11. Plaintiffs should be afforded a similar opportunity here, especially because the substantial burden alleged by Dousa was based on generalized surveillance, *see Dousa*, 2020 WL 434314 at *2, whereas Plaintiffs in this case allege direct and coercive questioning by border officers.

The district court also erred in relying on *Vernon v. City of Los Angeles*, 27 F.3d 1385 (9th Cir. 1994), which is entirely inapposite. *See* ER-39–40. First, *Vernon* was decided on *summary judgment*, not a motion to dismiss. *See* 27 F.3d at 1390. At that stage of litigation, the plaintiff could not rely on plausible allegations, but instead, needed to produce actual evidence of the substantial burden. *Id.* He failed to do so. *Id.* Second, the court's conclusion that the plaintiff merely alleged a subjective chill was informed by the fact that "no specific inquiry was made into [his] religious beliefs." *Id.* Indeed, there was no indication that government investigators interacted with the plaintiff at all. *See id.* Given its significantly different procedural posture and facts, *Vernon* does not support dismissal here.

Plaintiffs have plausibly alleged a substantial burden on their religious practice, in addition to plausibly alleging government conduct that singles them out for disfavor and is hostile to their Islamic faith. Under either mode of analysis, strict scrutiny is triggered. And because Plaintiffs have plausibly alleged that Defendants

will be unable to meet their heavy burden under strict scrutiny, *see* Section I.C, *supra*, Plaintiffs have adequately stated both free exercise and RFRA claims.

III. Plaintiffs have plausibly alleged violations of their associational rights.

The Supreme Court has "'long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.'" *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). Thus, where the government compels disclosure of protected associations, its actions are subject to "exacting scrutiny." In the context of associational rights, this standard requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," and that the challenged requirement be "narrowly tailored." *Id.* at 2383.

Here, Defendants infringe on associational rights by pointedly asking Plaintiffs in a coercive environment whether they are Muslim, whether they are Sunni or Shi'a, whether they are Salafi or Sufi, whether they attend a mosque, and what mosque they attend. ER-85, 87, 89, 96–98, 103. *See, e.g.*, *Shelton v. Tucker*, 364 U.S. 479, 480–81, 490 (1960) (invalidating law requiring teachers to disclose their associations); *Bursey v. United States*, 466 F.2d 1059, 1082–83, 1088 (9th Cir. 1972) (affirming refusal to answer grand jury questions on First Amendment grounds); *Clark v. Libr. of Cong.*, 750 F.2d 89, 93–94, 99 (D.C. Cir. 1984) (FBI field

investigation of an individual based on his associations was unjustified); *Guan v. Mayorkas*, 530 F. Supp. 3d 237, 266, 272–73 (E.D.N.Y. 2021) (holding that plaintiffs plausibly alleged that CBP questioning of journalists regarding their associations during secondary inspection violated their associational rights).

By compelling disclosures in response to these specific questions and retaining that information for decades, Defendants interfere with Plaintiffs' associational rights, and Plaintiffs have plausibly alleged that this questioning fails exacting scrutiny. Rather than asking Plaintiffs these particular questions, which go to the heart of constitutionally protected religious associations, border officers could instead ask, where appropriate, questions designed to obtain information about *unlawful activity*. Even if questions about unlawful activity implicated religious association, the questions could be narrowly tailored to focus on the traveler's knowledge of the activity or suspect. Here, however, border officers ask Plaintiffs extraordinarily intrusive questions about their personal religious associations writ large. *See also* Section I.C, *supra* (explaining why Defendants' religious questions are not narrowly tailored).

The district court's holding that Plaintiffs failed to state a violation of their associational rights, ER-50–52, was wrong for several reasons. As an initial matter, the court misstated the relevant legal standard. In the context of compelled disclosure claims, exacting scrutiny does not require "only" a substantial relation between the

disclosure requirement and a sufficiently important government interest, *contra* ER-52; it also requires the application of narrow tailoring, *see Ams. for Prosperity Found*, 141 S. Ct. at 2383. Defendants' questions fail both tests.

With respect to the "substantial relation" requirement, Plaintiffs have plausibly alleged that there is no relationship between the compelled disclosure of *religious* affiliations and the government's interests in border and national security. *See* ER-80–81, 89–91, 98, 106. The district court offered its own guesses as to why Plaintiffs were asked religious questions, which involved repeating the same errors that it made in its narrow-tailoring analysis. *Compare* ER-50–51, *with* Section I.C.2, *supra* (discussing errors). Not only did the court reject Plaintiffs' well-pled allegations, but it failed to explain the relationship between the government's objectives and *religious* questioning—let alone in such a way as to render Plaintiffs' allegations implausible.

The court also erred in its application of *Iqbal*'s plausibility standard. *See* ER-51. It simply accepted Defendants' argument that "questions about Plaintiff Kariye's associations could *plausibly* be considered questions related to his occupation because he works as an 'imam at a mosque.'" *Id.* (emphasis added). But under *Iqbal*, the relevant issue is not whether Defendants' argument is "plausible." Rather, the relevant issue is whether *Plaintiffs*' allegations—that there is no substantial relation between the questions and a compelling interest, and that

Defendants' questions are not narrowly tailored—are plausible. *See, e.g.*, *Starr*, 652 F.3d at 1216–17 ("If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss[.]"). Plaintiffs' allegations are more than plausible. *See* ER-80–81, 89–91, 98, 106 (alleging absence of relationship between the compelled disclosure of religious affiliations and the government's interests in border security).

Defendants' argument about Imam Kariye's occupation also fails on its own terms. Even assuming that CBP has authority to ask a traveler to name his occupation for the purpose of verifying his identity, that does not give CBP free rein to interrogate U.S. citizens on any matter that might conceivably have some nexus to their occupation. And where, as here, border officers' questions intrude on First Amendment associational rights, exacting scrutiny applies. As this Court has explained, "[w]hen First Amendment interests are at stake, the government must use a scalpel, not an ax." *Bursey*, 466 F.2d at 1088.

Accordingly, Plaintiffs have stated violations of their First Amendment associational rights.[13]

[13] With respect to the claims brought by all three Plaintiffs, the district court also erred in rejecting as implausible Plaintiffs' alternative pleading—that Defendants have a policy and/or practice of broadly subjecting travelers of faith to questions about their religious beliefs, practices, and associations. *See* ER-32. The experiences of Plaintiffs and others, as well as the government documents and policies cited by

IV. Plaintiff Shah has plausibly alleged a retaliation claim.

To state a First Amendment retaliation claim, a plaintiff must plausibly allege that "(1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct." *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016) (citation omitted). Here, Mr. Shah plausibly alleged each of those elements.

First, it is plain that Mr. Shah's religious writings in his journal and oral statements invoking his rights are constitutionally protected activity. *See* ER-102–06; ER-53 (collecting cases).

Second, Mr. Shah has plausibly alleged that border officers subjected him to adverse actions, including religious and other intrusive questioning, extensive searches of his phone and journal, and a longer detention than he otherwise would have experienced—each of which would chill a person of ordinary firmness. *See* ER-102–06. Notably, Mr. Shah does not challenge the officers' decision to subject him to a secondary inspection. Instead, he asserts that once the inspection was underway, the border officers intensified their questioning and searches, and extended the duration of his detention, in retaliation for his protected speech and

---

Plaintiffs, also provide support for this alternative pleading. *See, e.g.*, ER-76–80, 111–12, 114.

religious practice. *See id.* It is plausible that a person of ordinary firmness would be chilled from engaging in protected speech because that speech resulted in additional religious questioning and a more invasive, prolonged, and humiliating secondary inspection than otherwise would have occurred.

The district court erred in its evaluation of this element by engaging in misplaced Fourth Amendment analysis. *See* ER-54–57. For purposes of a First Amendment retaliation claim, it does not matter that the inspection may have been legal under the Fourth Amendment. "Otherwise lawful government action," such as a search that satisfies the Fourth Amendment, "may nonetheless be unlawful if motivated by retaliation for having engaged in activity protected under the First Amendment." *See O'Brien*, 818 F.3d at 932; *Boquist v. Courtney*, 32 F.4th 764, 785 (9th Cir. 2022) (argument that retaliatory action against plaintiff was legal because it consisted of "a reasonable time, place, and manner restriction . . . misses the point"). Thus, the district court's extended discussion of whether the inspection was "routine" within the meaning of the Fourth Amendment was irrelevant. *See* ER-54–57. "Routine" is a "term of art in Fourth Amendment jurisprudence" concerning border searches, and merely signifies that a warrant is not required. *Guan*, 530 F. Supp. 3d at 264, n.23; *see also United States v. Cano*, 934 F.3d 1002, 1015–16 (9th Cir. 2019) (discussing the differences between routine and nonroutine searches under the Fourth Amendment). It does not mean "insignificant" or "inconsequential"

for First Amendment purposes. "[T]he First Amendment requires a different analysis, applying different legal standards, than distinguishing what is and is not routine in the Fourth Amendment border context." *Tabbaa*, 509 F.3d at 102 n.4. Regardless of whether border officers' search was "routine" under the Fourth Amendment, Mr. Shah has plausibly alleged the second element of his retaliation claim.

Third, Mr. Shah has plausibly alleged that his religious writings and statements invoking his rights were a substantial or motivating factor in the officers' conduct. The plausibility of this claim is supported by specific allegations, including an officer's statement that he was asking intrusive questions "because of what we found in your journal." *See* ER-102–06.

In holding that Mr. Shah did not adequately allege causation, the district court failed to credit Mr. Shah's allegations as true, and instead speculated about alternative, non-retaliatory explanations for the officers' conduct. *See* ER-57. The court asserted that "the [Amended Complaint] plausibly alleges that the questions resulted from the information learned in the routine search rather than as retaliation for Plaintiff Shah maintaining a personal journal or speaking with border officers." *Id.* But the motion-to-dismiss analysis should be focused on the plausibility of the plaintiff's claim, not whether an alternative explanation may also be plausible. *See Starr*, 652 F.3d at 1216; *Waln*, 54 F.4th at 1159–60.

Moreover, there is simply no reason why Mr. Shah's journal, containing "notes about his religious beliefs and practices, which are rooted in peace and nonviolence," ER-102–03, should have aroused suspicion or prompted follow-up questions regarding Mr. Shah's religion. *See* Sections I.B & I.C.2, *supra*. Indeed, if Mr. Shah were Christian and his journal included meditations on the life of Jesus, it is difficult to imagine why border officers would perceive the need to ask follow-up questions about those religious beliefs.

Finally, even if non-retaliatory factors influenced the officers' decisions regarding the length and intrusiveness of the inspection, Mr. Shah need only allege that retaliatory animus was a "substantial or motivating" factor in the officers' conduct, not the sole factor. *See O'Brien*, 818 F.3d at 932. More generally, questions about the officers' motives are inappropriate for resolution in Defendants' favor on a motion to dismiss. *See Boquist*, 32 F.4th at 785 (9th Cir. 2022) (Defendants' claim that they acted with a non-retaliatory motive was "not grounds for dismissal at the pleading stage"); *Parrish v. Solis*, No. 11-cv-01438, 2014 WL 1921154, at *7 (N.D. Cal. May 13, 2014) (Defendants' asserted non-retaliatory motive was "irrelevant at the motion to dismiss stage" because it "ignores Plaintiff's factual allegations").

Thus, Mr. Shah should be permitted to proceed on his retaliation claim.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse

the district court's decision and judgment dismissing Counts II through VI of the Amended Complaint.

Date: January 26, 2024

Respectfully submitted,

s/ *Ashley Gorski*

Ashley Gorski
Sara Robinson
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2500
agorski@aclu.org

Mohammad Tajsar
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West 8th Street
Los Angeles, CA 90017
Tel: (213) 977-9500
mtajsar@aclusocal.org

Daniel Mach
Heather L. Weaver
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW Suite 600
Washington, DC 20005
Tel: (202) 675-2330
dmach@aclu.org

Teresa Nelson
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA
P.O. Box 14720
Minneapolis, MN 55415
Tel: (651) 645-4097
tnelson@aclu-mn.org

John Hemann
Hannah Pollack
Liz Sanchez Santiago
COOLEY LLP
3 Embarcadero Center, Floor 20
San Francisco, CA 94111
Tel: (415) 693-2000
jhemann@cooley.com

Brett H. De Jarnette
COOLEY LLP
3175 Hanover Street
Palo Alto, CA 94304
Tel: (650) 843-5000
bdejarnette@cooley.com

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 23-55790

The undersigned attorney or self-represented party states the following:

- (•) I am unaware of any related cases currently pending in this court.
- ( ) I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.
- ( ) I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature s/Ashley Gorski **Date** Jan. 26, 2024

*(use "*s/[typed name]*" to sign electronically-filed documents)*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 23-55790

I am the attorney or self-represented party.

This brief contains 13,552 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (●) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - [ ] it is a joint brief submitted by separately represented parties.
  - [ ] a party or parties are filing a single brief in response to multiple briefs.
  - [ ] a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated [ ].
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Ashley Gorski **Date** Jan. 26, 2024
*(use "*s/[typed name]*" to sign electronically-filed documents)*

ADDENDUM

Table of Contents

42 U.S.C. 2000bb-1

(a) In general
Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception
Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief
A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C.§ 2000bb-2

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;
(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;
(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and
(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc–5 of this title.

42 U.S.C. § 2000bb-3

(a) In general
This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction
Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected
Nothing in this chapter shall be construed to authorize any government to burden any religious belief.