

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, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California

BRIEF FOR APPELLEES

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STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. § 1331. ER-75. The district court dismissed plaintiffs' complaint on July 19, 2023, ER-7–68, and entered final judgment on September 5, 2023, ER-6. Plaintiffs filed a timely notice of appeal on September 18, 2023. ER-232. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The policies of the U.S. Department of Homeland Security (DHS) prohibit “profil[ing], target[ing], or discriminat[ing] against any individual for exercising his or her First Amendment rights.” SER-7. The questions presented are:

(1) whether plaintiffs' complaint adequately alleges that DHS nevertheless has an officially sanctioned policy or pattern of targeting Muslim Americans for religious questioning at the international border;

(2) whether the complaint adequately alleges that DHS's religious questioning of plaintiffs on ten occasions over five years during their U.S. border crossings violates equal-protection principles, the Religious Freedom Restoration Act (RFRA), and the First Amendment's Free Exercise and Free Association Clauses; and

(3) whether the complaint adequately alleges that DHS subjected one plaintiff to religious questioning in retaliation for his First Amendment-protected speech.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

“Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border.” *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). Today, these functions are principally performed by two components of the Department of Homeland Security: U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE). CBP and ICE have broad authority to inspect and examine all individuals and merchandise entering or departing from the United States, including all types of personal property. CBP and ICE also have authority to enforce laws related to immigration, customs, border security, national security, and terrorism (among other subjects). *See generally, e.g.*, 6 U.S.C. § 211; 8 U.S.C. §§ 1225, 1357; 19 U.S.C. §§ 482, 507, 1461, 1496, 1581, 1582, 1589a, 1595a; 19 C.F.R. §§ 161.2, 162.6; 22 C.F.R. § 127.4.

Every traveler seeking to enter the United States at an international border must present themselves and their belongings for inspection. 8 U.S.C. § 1225(a)(3); 19 U.S.C. §§ 1433(b), 1459(a); 8 C.F.R. § 235.1(a); 19

C.F.R. § 148.11. CBP may inspect all such travelers to confirm that they are eligible to enter the country and to ensure that they are not attempting to bring goods into the country unlawfully. Privacy Impact Assessment Update for CBP Border Searches of Electronic Devices (Border Searches PIA), DHS/CBP/PIA-008(a), at 3 & n.8 (Jan. 4, 2018), <https://perma.cc/H456-2XH8>. During primary inspection, CBP may review a traveler’s documentation and any other relevant information. *Id.* The traveler may be referred to secondary inspection for a variety of reasons, including random selection, *see Ghedi v. Mayorkas*, 16 F.4th 456, 460 (5th Cir. 2021), or if CBP determines that the traveler warrants additional scrutiny, Border Searches PIA at 3. Additional scrutiny may be warranted if, for example, the traveler appears in the Terrorist Screening Dataset (TSDS), the federal government’s consolidated watchlist of known or suspected terrorists. *Id.*¹ Nominations to the TSDS “must rely upon ‘articulable intelligence or information which creates a reasonable suspicion that the individual is engaged * * * or intends to engage’” in terrorist-related activities. *Elhady v. Kable*, 993 F.3d 208, 214 (4th Cir. 2021) (quoting

¹ The TSDS was formerly known as the Terrorist Screening Database (TSDB), which is the term used in the record. *See Ahmed v. Kable*, 2023 WL 6215024, at *2 n.4 (D.D.C. Sept. 25, 2023).

declaration of Timothy Groh, Deputy Director for Operations at the Terrorist Screening Center).

Plaintiffs allege that secondary inspections are conducted by armed officers in separate rooms. ER-78–79. They allege that, during secondary inspections, officers prevent travelers from leaving, confiscate travelers’ passports, search travelers and their belongings, and require access to travelers’ electronic devices. ER-79. They allege that CBP officers create a record of every secondary inspection that takes place at an airport’s port of entry, which may include travelers’ responses to the questions they were asked. ER-79–80. And they allege that CBP maintains these records in a database accessible to other law enforcement agencies. ER-80.

DHS’s written policies expressly prohibit any form of religious discrimination. In a May 2019 memorandum to all DHS personnel, the Acting Secretary of Homeland Security made clear that “DHS does not profile, target, or discriminate against any individual for exercising his or her First Amendment rights,” including the free exercise of religion. SER-7. The memorandum specifically prohibits DHS personnel from pursuing, recording, and using “information relating to how an individual exercises his or her First Amendment rights—including “[i]nformation about an individual’s religious beliefs and practices.” SER-7–8. The only exceptions

to that prohibition are (a) if collecting information on First Amendment activity “is expressly authorized by a federal statute,” (b) if the individual “voluntarily provides it,” or (c) if the information is “pertinent to and within the scope of” law enforcement activity. SER-8–9. Under that last exception, DHS personnel may, for example, “[d]ocument questions and responses relating to an individual’s occupation [and] purpose for international travel.” SER-9. They may also ask about protected First Amendment activity “to the extent that it may facilitate an individual’s travel,” such as by “validating a visa based on a religious purpose” or by ensuring that “a reasonable accommodation for an individual’s religious beliefs would be appropriate.” SER-9. And they may document “questions, responses, or other information” to “validate information supplied by an individual,” or to determine if there might be a violation of “laws that DHS enforces or administers.” SER-9.

CBP’s Standards of Conduct likewise prohibit CBP personnel from “act[ing] or fail[ing] to act on an official matter in a manner which improperly takes into consideration * * * religion.” SER-22. CBP personnel are expressly barred from “mak[ing] abusive, derisive, profane, or harassing statements or gestures, or engag[ing] in any other conduct evidencing hatred or invidious prejudice to or about another person or

group on account of * * * religion.” SER-22. All CBP personnel are required to “know the Standards of Conduct and their application to his or her behavior.” SER-14.

B. Factual Background

Plaintiffs are three U.S. citizens who are practicing Muslims. ER-75. Plaintiff Abdirahman Aden Kariye is an imam at a mosque. ER-12. The complaint alleges that, during secondary screening, CBP officers questioned him about his faith five times between 2017 and 2021. *See generally* ER-84–89. The questions allegedly concerned, among other things, whether (upon returning from the Hajj) he had been on the pilgrimage previously, ER-85; his “involvement with a charitable organization affiliated with Muslim communities,” ER-86; whether a sports league in which he coaches was “just for Muslim kids,” ER-86–87; the “nature and strength of his religious beliefs and practices,” ER-88; and “whether he had met a particular friend at a mosque” during a recent trip, ER-89. Imam Kariye alleges that he was on the government’s terrorism watchlist from 2013 through May 2022. ER-89, ER-91.²

² The government generally does not disclose the watchlist status of any individual. This brief’s discussion of Imam Kariye and Mouslli’s watchlist status is based exclusively on the allegations in plaintiffs’ complaint.

Plaintiff Mohamad Mouslli alleges that CBP officers subjected him to four instances of religious questioning between 2018 and 2021. *See generally* ER-95-98. These questions allegedly concerned, among other things, “whether he is Sunni or Shi’a,” ER-96, “whether he attends a mosque,” ER-96, and “how many times a day he prays,” ER-96. Mouslli further alleges that the U.S. government has placed him on the terrorism watchlist. ER-98.

Plaintiff Hameem Shah alleges that CBP and DHS officers subjected him to a single instance of religious questioning in May 2019, at Los Angeles International Airport. ER-102. Shah claims that, after being randomly selected for secondary screening, the officers searched his belongings and found a personal journal. ER-102. Shah told the officers “that the notebook was a personal journal and asked” them not to read it, but the officers read the journal anyway. ER-103. The journal “contained notes about his religious beliefs and practices,” “to-do lists for household and work tasks,” “notes about business lectures he listens to in his free time,” and “notes about a popular podcast on travel and entrepreneurship.” ER-102–103. Shah alleges that the officers “pointed out that many of the notes * * * were related to religion,” and asked Shah “why and where he had taken the notes and whether he had traveled in the Middle East” to “make

sure Mr. Shah was a ‘safe person.’” ER-103. Shah was also allegedly asked whether he was religious, what mosque he attended, and if he watched Islamic lectures. ER-103. When Shah demanded to know why he was being asked these questions, an officer said, “I’m asking because of what we found in your journal.” ER-103.

During the inspection, Shah refused to allow the officers to search his electronic devices because he wanted to “stand up for his constitutional rights.” ER-104. He alleges that a CBP supervisor told him that “his reluctance to allow inspection of his devices had made the officers more suspicious of him.” ER-104. Shah then told the supervisor that “he no longer wished to enter the United States” and wanted to “leave the country and go back to Europe.” ER-104. The supervisor responded that Shah could not take his electronic devices with him and had two choices: either to allow the officers to inspect the devices in his presence or to allow the officers to retain the devices for further examination and return them to him later. ER-104. Shah permitted the inspection. ER-104. The officers also asked Shah more questions about his religious associations, including the identity of a local imam in the Phoenix area (where Shah was from). ER-105. Eventually, after about two hours, the officers returned his passport and allowed him to leave. ER-105.

Shah asked for, and the government produced, the incident report arising from this encounter, which states:

During examination of his belongings, subject was very cautious and focused on his journal that was found in his hand carry. Subject demanded for us not to read his journal because he felt that it was an invasion of his privacy. [Redacted] Upon reading the journal, some notes regarding his work and religion were found. Subject stated he's self-employed working as a financial trader. Subject didn't want to elaborate on the type of work he does but just mentioned that he is able to work remotely. Subject's notes regarding his religion (Islam) seemed to be passages from an individual he calls [redacted]. Subject stated that he is the Imam at the Islamic Center of the North East Valley located in Scottsdale, AZ. Subject mentioned that he also goes to another mosque but refused to provide the name. Subject claimed he's a devote[d] Sunni Muslim.

ER-106 (first and second alterations in original).

All plaintiffs claim that the religious questioning they experienced has caused them to “modify[] or curb[]” their “religious expression and practices, contrary to [their] sincere religious beliefs.” ER-93. For example, Imam Kariye alleges that he no longer wears religious headwear when traveling home to the United States, does not pray kneeling toward Mecca when “at the airport and the border,” and does not travel with religious texts. ER-93–94; *see* ER-100–101, 108–109 (advancing similar allegations).

C. Prior Proceedings

Plaintiffs filed this lawsuit in federal district court. Plaintiffs named as defendants the DHS Secretary, the CBP Commissioner, the ICE Director, and the acting head of Homeland Security Investigations (a subcomponent of ICE), all in their official capacities. ER-72, ER-75–76. Plaintiffs did not sue any of the DHS personnel who questioned them.

Plaintiffs' complaint does not challenge plaintiffs' selection for secondary inspection, Br. 25 n.5, or the alleged placement of Imam Kariye and Mouslli on the terrorism watchlist, ER-47 n.4. Instead, the complaint alleges that DHS has a "policy and/or practice of intentionally targeting selected Muslims (or individuals perceived to be Muslim) for religious questioning," ER-78, in violation of equal-protection principles, the Religious Freedom Restoration Act (RFRA), and the First Amendment's Free Exercise and Free Association Clauses. ER-111–119. Plaintiff Shah separately contends that DHS personnel impermissibly retaliated against him for his First Amendment-protected speech. ER-115–116. The complaint seeks various forms of equitable relief, including a permanent injunction barring DHS from "questioning Plaintiffs about their religious

beliefs, practices, and First Amendment-protected religious associations during future border inspections.” ER-119.³

The district court dismissed the complaint for failure to state a claim. At the outset, the court held that plaintiffs had “sufficiently alleged the existence of an official practice, policy[,] or custom of targeting Muslim Americans for religious questioning and retaining their responses.” ER-32. The court based this conclusion on four allegations in the complaint: (1) that plaintiffs had “experienced religious questioning on ten different occasions and had their responses recorded”; (2) that DHS “has acknowledged receiving numerous complaints about religious questioning at the border”; (3) that DHS has “issued memoranda on the subject”; and (4) that DHS has “acknowledged the existence of an internal investigation into border officers’ questioning of Muslims regarding their religious practices.” ER-32. The court reached this conclusion despite acknowledging that both DHS and CBP have written policies that expressly

³ The district court dismissed plaintiffs’ initial complaint without prejudice and with leave to amend. ER-191. The operative complaint is plaintiffs’ First Amended Complaint. ER-72–120. In that complaint, plaintiffs argued that the government’s conduct violates the Establishment Clause. ER-109–111. The district court dismissed that claim, ER-32–37, and plaintiffs have not challenged that portion of the judgment on appeal, Br. 12 n.3.

forbid employees from discriminating based on religion. *See* ER-28; SER-7–10 (DHS policy); SER-12, SER-22 (CBP Policy).

The court nevertheless rejected all of plaintiffs’ claims. The court dismissed the Equal Protection claim because plaintiffs “have not sufficiently alleged a plausible factual basis for inferring that” the government’s religious questioning was “undertaken because of Plaintiffs’ religion.” ER-60. To the contrary, the court concluded that Imam Kariye and Mouslli were questioned because of their alleged presence on the terrorism watchlist, ER-60–61, and that Shah was questioned due to his suspicious behavior during a routine search, ER-61–63. The court dismissed the Free Association claim for similar reasons. ER-49–52. The court dismissed the Free Exercise and RFRA claims because, it concluded, plaintiffs failed to allege a substantial burden on their religious beliefs, ER-39–45, 64–67, and because the religious questioning of plaintiffs was a “narrowly tailored means of advancing a compelling government interest,” ER-45–46, ER-67. And the court dismissed Shah’s retaliation claim because the complaint establishes only that Shah was questioned due to “information learned in [a] routine search,” during which Shah behaved suspiciously, “rather than as retaliation for” Shah’s First Amendment-protected activities. ER-57. The court dismissed the complaint with leave

to amend, ER-68—plaintiffs chose not to amend and instead appealed the judgment to this Court. ER-232.

SUMMARY OF ARGUMENT

All of plaintiffs' claims rest on one key allegation: that DHS and two of its component agencies, CBP and ICE, have a policy of targeting Muslims for religious questioning at the Nation's international border. But both DHS and CBP have written policies prohibiting such invidious discrimination, and the district court judicially noticed documents reflecting these policies. And as plaintiffs' complaint demonstrates, both agencies have a track record of investigating—not condoning—alleged violations of those policies.

Given that, plaintiffs had the burden to plead factual allegations sufficient to plausibly allege that the agencies have a secret, unwritten, yet officially sanctioned policy—which directly contradicts their written ones—of targeting Muslim travelers for religious questioning. Plaintiffs failed to meet that burden, and the district court erred in holding that the complaint plausibly alleges the existence of a secret, officially sanctioned policy. This Court should reject that erroneous conclusion and affirm the judgment on the ground that plaintiffs failed to plausibly plead the existence of an

official policy—an argument that the government repeatedly advanced below.

The district court’s holding rests principally on the three plaintiffs’ allegations that they experienced religious questioning ten times between 2017 and 2021. But plaintiffs cannot allege a widespread practice or custom based on a few isolated incidents. And more specifically, the incidents alleged do not support an inference that plaintiffs were targeted based on their religion, much less an inference that they were targeted on account of a discriminatory policy. As the district court elsewhere recognized, the complaint itself provides justifiable, neutral reasons why plaintiffs were questioned that have nothing to do with their religion. Imam Kariye and Mouslli allege that they were on a government watchlist the nine times they were questioned, and that watchlist status—wholly independent of their religion—is a neutral and justifiable basis for concern about their potential ties to terrorism. And Shah’s allegations make clear that his single incident of questioning occurred because he acted suspiciously and refused to submit to routine inspection procedures that govern all travelers selected for secondary inspection. At most, these allegations are merely “consistent with” an allegation that plaintiffs were targeted pursuant to a discriminatory policy. *See Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). But

“discrimination is not a plausible conclusion” when “obvious alternative explanation[s]” exist—as they do here. *Id.* at 682. Indeed, the other allegations cited by the district court underscore that religious targeting is antithetical to DHS’s policies and instances of religious targeting warrant official investigation, not official approval.

Plaintiffs’ contrary arguments lack merit. The district court’s decision to judicially notice the existence of DHS and CBP’s written policies was entirely proper because there is no reasonable dispute that the policies exist. Plaintiffs’ allegations that they do not satisfy the legal standard for watchlist inclusion are legal conclusions that do not benefit from the presumption of truth—especially when plaintiffs have not challenged the lawfulness of their alleged watchlist placement, *see* ER-119–120 (complaint’s request for relief). Shah’s assertion that he was questioned in retaliation for the substance of his beliefs misapprehends the nondiscriminatory reasons for his questioning which he alleges in the complaint: namely, his suspicious behavior in response to routine questioning. And plaintiffs’ suggestion that the questions they were asked bear no relationship to any governmental interest is beside the point. Because neutral, nondiscriminatory reasons provide an obvious alternative explanation for the questioning they experienced, plaintiffs have failed to

nudge their allegations of an officially sanctioned policy of discrimination from conceivable to plausible.

STANDARD OF REVIEW

The district court's dismissal of a complaint for failure to state a claim is reviewed de novo, "crediting all factual allegations in the complaint as true and construing the pleadings in the light most favorable to * * * the non-moving party." *Tingley v. Ferguson*, 47 F.4th 1055, 1066 (9th Cir. 2022).

ARGUMENT

THIS COURT SHOULD AFFIRM THE JUDGMENT BECAUSE PLAINTIFFS HAVE NOT PLAUSIBLY ALLEGED THAT DEFENDANTS HAVE A POLICY OF TARGETING MUSLIMS FOR RELIGIOUS QUESTIONING AT THE BORDER.

Plaintiffs have failed to plausibly allege that the federal government has a policy of targeting Muslim Americans for religious questioning at the Nation's international borders. That failure is fatal to all of plaintiffs' claims for equitable relief against the official-capacity defendants they have sued. The Court should therefore affirm the judgment on this ground, which the government repeatedly advanced during district court proceedings. *See Ranza v. Nike, Inc.*, 793 F.3d 1059, 1076 (9th Cir. 2015) ("We may affirm * * * on any ground raised below and fairly supported by the record." (quotation marks omitted)).

A. Plaintiffs Have Not Plausibly Alleged the Existence of an Officially Sanctioned Policy of Targeting Muslims for Religious Questioning.

To mount a challenge based on an allegedly discriminatory policy or practice, a plaintiff must show one of two things: that “the defendant had, at the time of the injury, a written policy, and that the injury stems from that policy,” or “that the harm is part of a ‘pattern of officially sanctioned * * * behavior, violative of the plaintiffs’ [federal] rights.’” *Melendres v. Arpaio*, 695 F.3d 990, 997-98 (9th Cir. 2012) (quotation marks omitted).

The district court did not find, and plaintiffs cannot plausibly allege, that the government has a written policy of targeting Muslims for religious questioning. Indeed, both DHS and CBP have adopted written policies expressly *forbidding* employees from discriminating against anyone based on religion. SER-7–10, SER-22. The court properly took judicial notice of these policies, ER-28, which constitute “official information posted on a governmental website” whose “accuracy” cannot reasonably be disputed, *Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 727 n.3 (9th Cir. 2015).

The district court nevertheless concluded that, notwithstanding the government’s actual policies, plaintiffs have plausibly alleged the existence of a secret, unwritten, yet officially sanctioned policy of targeting Muslims

for religious questioning because of their Muslim faith. ER-32. This conclusion rests principally on the three plaintiffs' allegations that they "experienced religious questioning on ten different occasions and had their responses recorded" between 2017 and 2021. ER-32. But it is not plausible to infer the existence of an agency-wide, unwritten policy from ten incidents over five years involving three travelers during some but not all of their U.S. border crossings. *See* ER-107 (alleging that Shah has "traveled internationally frequently," without allegations of other incidents). *Cf. Sabra v. Maricopa County Comm. Coll. Dist.*, 44 F.4th 867, 884 (9th Cir. 2022) (holding that "Plaintiffs cannot allege a widespread practice or custom based on 'isolated or sporadic incidents'" in the analogous context of "[e]stablishing municipal liability through the existence of a longstanding practice or custom" (quoting *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996)); *accord Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999) ("A single constitutional deprivation ordinarily is insufficient to establish a longstanding practice or custom."); *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985) (distinguishing "patterns of misbehavior" from "isolated incidents").

Moreover, even if an officially sanctioned policy could be inferred from isolated incidents as a theoretical matter, the ten incidents alleged

here would not support an inference that plaintiffs were targeted because of their religion—much less an inference that plaintiffs were targeted pursuant to an officially sanctioned policy of anti-Muslim discrimination. Instead, the “obvious alternative explanation,” *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009), is that plaintiffs were questioned for neutral, nondiscriminatory reasons, *i.e.*, their alleged placement on the terrorism watchlist and their behavior during secondary screening.

With respect to Imam Kariye and Mouslli, plaintiffs’ complaint “links” Imam Kariye and Mouslli’s alleged “placement on government watchlists to their experiences during international travel.” ER-61. Indeed, all nine of the border inspections they describe in their complaint occurred while they allegedly had watchlist status.⁴ These watchlists of “known or suspected terrorists” are an essential tool for protecting national security. ER-47 n.4. Plaintiffs’ presence on a watchlist is a neutral and justifiable basis for questioning during a border inspection that is wholly independent of plaintiffs’ religion. *See Abdi v. Wray*, 942 F.3d 1019, 1032 (10th Cir. 2019) (explaining that “the government may impose reasonable restrictions on

⁴ Imam Kariye alleges that he was on a terrorist watchlist from 2013 to 2022, ER-47, and he alleges that he was questioned five times between 2017 to 2021, ER-12–16. Mouslli alleges that he has been on a terrorist watchlist since 2017, ER-47, and alleges that he was questioned four times between 2018 and 2021, ER-18–20.

* * * a citizen’s right to travel internationally” including “extra security measures” due to a person’s “placement on the Selectee List”).

Furthermore, it was reasonable for CBP officers to ask plaintiffs about their religious beliefs and associations when evaluating the extent of the threat plaintiffs may have posed. Such questions, after all, shed light on neutral considerations relevant to the officers’ law-enforcement mission. For example, CBP officers questioned Imam Kariye about his beliefs and his participation in the Hajj upon his return from the pilgrimage, which plainly relate to his purpose for traveling abroad. *See* ER-85. Religious questions are also relevant to Imam Kariye’s occupation as the imam of a mosque, *see* ER-84, and to the nature of both plaintiffs’ domestic associations.

At most, plaintiffs’ allegations are “consistent with” the conclusion that they were targeted pursuant to a discriminatory policy. *See Iqbal*, 556 U.S. at 681. But plaintiffs’ alleged watchlist status is the “more likely explanation[]” for why such questioning occurred. *Id.*; *accord Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007) (dismissing complaint because allegations of conduct “consistent with conspiracy” to violate the antitrust laws do not support the inference of illegality when such conduct is “just as much in line with a wide swath of rational and competitive business strategy”). As between this “obvious alternative explanation” and the

“purposeful, invidious discrimination” plaintiffs urge the Court to infer, “discrimination is not a plausible conclusion.” *Iqbal*, 556 U.S. at 682.

The same is true for the single incident of religious questioning alleged by Shah. As the complaint’s allegations make clear, the questioning to which Shah objects began only after Shah displayed his reluctance to submit to ordinary and generally applicable border inspection procedures. The encounter began when Shah was lawfully selected for secondary inspection. This routine procedure reflects the government’s unquestioned authority to subject all travelers at an international border to wide-ranging searches of their persons and belongings without individualized suspicion. *See, e.g., United States v. Flores-Montano*, 541 U.S. 149, 155-56 (2004); *United States v. Cotterman*, 709 F.3d 952, 960-61 & n.6 (9th Cir. 2013) (en banc). Given the “long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country,” such searches “are reasonable simply by virtue of the fact that they occur at the border.” *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

Notwithstanding the routine nature of this inspection, Shah told the officers that “he did not wish to be searched.” ER-102. When the inspection uncovered a closed notebook, Shah responded “that the notebook was a personal journal” and demanded that the officers refrain

from reading it. ER-103; *see* ER-106 (quoting incident report stating that Shah was “very cautious and focused on his journal that was found in his hand carry”). It was therefore reasonable for the officers to question Shah about the material he wished to conceal—which included, among other things, “notes about his religious beliefs and practices” and “work tasks.” ER-102–103. When the officers asked about his work, Shah described himself as a self-employed “financial trader” but otherwise “didn’t want to elaborate on the type of work he does” other than “he is able to work remotely.” ER-106. The officers also allegedly asked Shah questions about his religion, and when Shah asked why they were doing so, they allegedly explained it was “because of what [they] found in [his] journal”—the journal Shah had asked them not to examine. ER-103. Shah’s suspicious behavior continued. When the officers informed Shah that they needed to inspect his electronic devices, Shah “told the supervisor that he no longer wished to enter the United States and wanted instead to return to the transit area so that he could leave the country and go back to Europe.” ER-104. Considering the allegations as a whole, the complaint does not support an inference that Shah’s inspection occurred for discriminatory reasons, but rather because Shah behaved suspiciously. Nor does Shah’s single experience supply a plausible basis for concluding that DHS has an

illicit but officially sanctioned policy of targeting Muslims for religious questioning.

To buttress its analysis, the district court emphasized that DHS has received “numerous complaints about religious questioning at the border.” ER-32. But these allegations demonstrate only that complaints about religious questioning were filed and that DHS investigated those complaints. ER-32, ER-76–77. They do not support the inference that the questioning in those complaints resulted from an officially sanctioned policy of targeting Muslims because of their religion (as opposed to neutral non-religious justifications, such as placement on a watchlist or suspicious behavior at a checkpoint). And the district court pointed to nothing in the time between these 2011 complaints and plaintiffs’ years-later experiences that could plausibly support an inference of a longstanding DHS-wide policy of discrimination. These allegations, therefore, are “merely consistent with” the conclusion that such a policy exists, and “stop[] short of the line between possibility and plausibility.” *See Twombly*, 550 U.S. at 557.

The district court also emphasized that, in 2011, DHS “acknowledged the existence of an internal investigation into border officers’ questioning of Muslims regarding their religious practices.” ER-32. But that undermines

the court’s inference of an officially sanctioned policy of discrimination. The fact that DHS investigated allegations of religious targeting—an investigation DHS suspended only due the pendency of litigation, ER-9—demonstrates only that religious targeting is antithetical to DHS’s policies and that DHS takes allegations of such targeting seriously. Indeed, the complaint further acknowledges that, as of 2020, DHS was actively “reviewing numerous allegations of CBP questioning at ports of entry.” ER-9. The “more likely explanation[.]” of these allegations, *Iqbal*, 556 U.S. at 681, is that any instance of a CBP officer intentionally targeting Muslims because of their religion is contrary to official policies and warrants official investigation.

Plaintiffs’ pleading failures are fatal to their claims. Plaintiffs’ complaint expressly ties all but one of those claims to the premise that defendants—high-level governmental officials at DHS, CBP, and ICE who have been sued in their official capacities and who did not personally participate in any of plaintiffs’ border inspections—have given official sanction to a policy of targeting Muslims for religious questioning. *See* ER-112 (alleging Free Exercise violation for “a policy and/or practice of singling out and targeting Muslims, including Plaintiffs, for religious questioning during secondary inspections because of their adherence to Islam”);

ER-114 (same for Free Association claim); ER-117 (same for equal-protection claim); ER-118–119 (attributing conduct of border officers to defendants for RFRA claim). In the absence of any plausible allegation that defendants and the agencies they oversee have sanctioned such discriminatory treatment, the judgment of dismissal should be affirmed. The only claim that plaintiffs do not expressly link to the existence of such a policy is Shah’s retaliation claim, which alleges that three DHS officers “retaliat[ed] against him for exercising his constitutionally protected rights to freedom of religion and freedom of speech.” ER-115. But Shah has failed to show how he could maintain *any* such claim against the official-capacity defendants except by alleging that the individual officers’ conduct was pursuant to an alleged unwritten but officially sanctioned policy. As explained, *supra* pp. 16-24, the complaint does not provide a plausible basis for making that inference.⁵

Even if plaintiffs have adequately alleged that individual officers violated the Constitution or RFRA during some or all of the ten border inspections, the complaint would—at most—seek relief against the

⁵ If the Court were to disagree and hold that the complaint plausibly alleges an unwritten, officially sanctioned policy, the correct disposition of this appeal would be a remand for factual development and eventual motions for summary judgment.

individual officers who allegedly infringed plaintiffs' rights in defiance of DHS and CBP policy. Whatever remedies might lie against those individual officers, allegations of individual misconduct do not support plaintiffs' demand for injunctive relief binding DHS, CBP, and ICE. *See* ER-119–120.

B. Plaintiffs' Counterarguments Lack Merit.

Plaintiffs' opening brief does not attempt to defend the district court's holding that they have "sufficiently alleged the existence of an official practice, policy or custom of targeting Muslim Americans for religious questioning based on a pattern of officially sanctioned behavior." ER-32. Plaintiffs argue (Br. 11 n.2), however, that the court should not have taken judicial notice of DHS and CBP's written policies because they do not believe the policies are implemented in practice. But the court did not notice those policies for that substantive proposition; it simply noticed the fact of the policies' existence, since the policies are official agency documents made publicly available on websites run by governmental agencies. ER-28; *accord Arizona Libertarian Party*, 798 F.3d at 727 n.3 ("We may take judicial notice of 'official information posted on a governmental website, the accuracy of which [is] undisputed.'"). There is no reasonable dispute that the DHS and CBP policies actually exist, and it is

plaintiffs' burden to plead facts plausibly demonstrating that the agencies actually approve of secret, contrary policies.

Plaintiffs separately challenge the district court's apparent recognition that their allegations respecting the ten discrete instances of alleged religious questioning are insufficient to state any constitutional or statutory claim. For example, they argue (Br. 33-34) that the alleged presence of Imam Kariye and Mouslli on a terrorism watchlist does not supply an obvious alternative explanation for the questioning they experienced, positing that the watchlists may have inadequacies. *Id.* But as the district court acknowledged, plaintiffs' complaint has challenged neither the legality of the watchlists nor the legality of plaintiffs' alleged placement on one. ER-47 n.4. Indeed, the watchlists' constitutionality has been overwhelmingly upheld by the courts of appeals. *E.g.*, *Beydoun v. Sessions*, 871 F.3d 459, 467-68 (6th Cir. 2017); *Abdi v. Wray*, 942 F.3d at 1030-34; *Elhady v. Kable*, 993 F.3d 208, 215-17 (4th Cir. 2021); *Ghedi v. Mayorkas*, 16 F.4th 456, 466-67 (5th Cir. 2021). Plaintiffs do not seek relief based on their intimations that their watchlist placement was mistaken. ER-119–120. And plaintiffs' allegations that they do not satisfy the legal standard for watchlist inclusion are legal conclusions that do not benefit from the presumption of truth. *Iqbal*, 556 U.S. at 678 (“[T]he tenet

that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”).

Plaintiffs also argue (Br. 25) that “the contents of Mr. Shah’s journal do not explain why he was asked questions about his religion.” But that misapprehends the nondiscriminatory explanation that is evident on the face of the complaint. As the officers explained to Shah and as the incident report makes clear, Shah’s religious questioning was triggered not by the substance of his beliefs (as set forth in his journal) but by his evasive and suspicious refusal to comply with routine inspection procedures—including his evident desire to conceal the journal’s contents from inspection. *Supra* pp. 21-22.

Finally, plaintiffs allege (Br. 23, 24-25) that the questions they were asked bear no relationship to the detection of terrorism or any other governmental interest. But even if that were true, this allegation is beside the point. Plaintiffs cannot plausibly allege that they were questioned pursuant to an officially sanctioned discriminatory policy if an obvious alternative explanation exists. *Iqbal*, 556 U.S. at 680, 682. And based on plaintiffs’ own allegations, the “more likely explanation,” *id.* at 681, for plaintiffs’ treatment is their watchlist status (for Imam Kariye and Mouslli) and their suspicious behavior (for Shah). Because these neutral,

nondiscriminatory reasons provide an “obvious alternative explanation” for plaintiffs’ questioning, the complaint fails to “nudge[]” their “claims of invidious discrimination across the line from conceivable to plausible.” *Id.* at 680, 682 (quotation marks omitted).

CONCLUSION

The district court’s judgment should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

We know of no related case pending in this Court.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,840 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Georgia 14-point font, a proportionally spaced typeface.

/s/ Daniel Aguilar

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