MICHAEL A. CARDOZO
Corporation Counsel

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

Peter G. Farrell
Senior Counsel
Tel: (212) 356-3532
Fax: (212) 788-9776

September 19, 2013

BY ECF
Honorable Pamela K. Chen
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Raza et al v. City of New York et al, 13 Civ. 3448 (PKC)(JMA)

Dear Judge Chen:

I am a Senior Counsel in the office of Michael A. Cardozo, Corporation Counsel of the City of New York and submit this letter on behalf of defendants in response to plaintiffs' September 12th letter. Plaintiffs request a pre-motion conference at which they intend to seek "expedited discovery" to support a future motion for a preliminary injunction. For the following reasons, plaintiffs' request should be denied.

Plaintiffs' Late Request Belies Their Need for Expedited Discovery

On September 10, 2013 (the day after filing their Answer), defendants wrote Magistrate Judge Joan M. Azrack to request that discovery be bifurcated to focus first on plaintiffs' individual claims before turning to the potentially massive and contentious *Monell*-related discovery. *See* attached letter dated September 10, 2013 (D.E. 11). Defendants advised the Court that at the conclusion of the first stage of discovery they intend to move for summary judgment. Magistrate Judge Azrack held a conference on September 12, 2013 and stated a decision would be forthcoming on defendants' request for bifurcated discovery.

Only after defendants requested a bifurcated discovery plan, did plaintiffs raise the possibility of their seeking a preliminary injunction and their request for expedited discovery. Plaintiffs' complaint (filed in June 2013) does not request a preliminary injunction. Moreover, the allegations that underlie the claims in this case have been the subject of widespread press coverage by the Associated Press as far back as 2011 and co-counsel in this matter, Arthur Eisenberg of the New York Civil Liberties Union, is counsel in the case of *Handschu v. Special*

Servs. Div. (pending in the S.D.N.Y.) which involves similar allegations against the NYPD and in which litigation has been proceeding since October 2011. Indeed, plaintiffs specifically allege that they believe they have been under surveillance for years. *See, e.g.,* Complaint ¶¶ 10-15, 48, 50, 54, 90, 116, 136, 143, 145. In sum, there was never any indication of urgency by plaintiffs until after the defendants requested that discovery be bifurcated.

Plaintiffs do not explain why they now suddenly require expedited discovery and a preliminary injunction after choosing not to pursue such relief at any time over the past several years. Accordingly, plaintiffs' request should be denied as the supposed need is belied by plaintiffs' belated request, which is nothing more than a reaction to defendants' request for bifurcated discovery and stated intention to seek summary judgment prior to *Monell* discovery. *See Citibank, N.A. v. CityTrust,* 756 F.2d 273, 276-277 (2d Cir. 1985) (reversing district court's grant of a preliminary injunction and stating "preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights.").

Plaintiffs Cannot Show Irreparable Harm

In addition to plaintiffs' delay in seeking a preliminary injunction, there are additional reasons that demonstrate plaintiffs are not facing any irreparable harm. For example, plaintiffs' alleged damages are grounded on claims that plaintiffs have modified their conduct in response to perceived NYPD surveillance. These are precisely the sort of conjectural damages, caused by nothing more than perceived scrutiny, that are "not sufficient to establish real and imminent irreparable harm." *See Latino Officers Ass'n v. Safir*, 170 F.3d 167, 171 (2d Cir. 1999). In *Safir*, a police department policy required that any officer wishing to speak before an audience on police practices notify the department in advance and provide an after-the-fact written summary of his comments. *Id.* While the Second Circuit acknowledged that such scrutiny may make some officers reluctant to speak, the harm was too theoretical to rise to the level of irreparable harm. *Id.*

Plaintiffs' suggestion that the Court may presume irreparable harm ignores recent Supreme Court and Second Circuit case law. *See Salinger v. Colting*, 607 F.3d 68, 78, n.7 (2d Cir. 2010) (suggesting that, in light of recent Supreme Court precedent, a court may never presume irreparable harm). Even prior to *Salinger*, the Second Circuit was clear that a court could only presume irreparable harm on alleged First Amendment violations if the alleged violations were the result of a regulatory scheme's direct limitation on speech. *Se e Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349-50 (2d Cir. 2003). Here, there is no allegation that the NYPD has done anything that directly curtails plaintiffs' religious freedom. The alleged NYPD "surveillance" does not mandate or prohibit action by plaintiffs. Indeed, the Supreme Court has found that public surveillance and the information collected therefrom does not create a constitutional violation. *See Laird v. Tatum*, 408 U.S. 1 (1972) (a challenge to the Army's surveillance program alleging individuals were continually surveilled and information about them was collected and stored in computer banks was dismissed as plaintiffs' allegations of injury were self-imposed); *Handschu v. Special Servs. Div.,* 475 F.Supp.2d 331, 354-357 (S.D.N.Y. 2007) (summarizing Second Circuit cases following *Laird); Handschu v. Special Servs. Div.,* 349 F.Supp.766, 769 (S.D.N.Y. 1972) ("The use of informers and infiltrators does

not give rise to any claim of violation of constitutional rights"). Moreover, there is no allegation, nor can there be, that the NYPD used any information it collected to harm plaintiffs.

Plaintiffs Cannot Show A Likelihood of Success on The Merits

Plaintiffs cannot show a likelihood of success on the merits. As demonstrated in defendants' letter to the Court of September 10, 2013, plaintiffs will not be able to show a substantial likelihood of success on the merits. The facts will show that the NYPD's actions as they affected plaintiffs were taken for legitimate law enforcement reasons, not for any alleged discriminatory purpose. We respectfully request the Court to review defendants September 10, 2013 letter attached hereto which undermines plaintiffs' claim to a likelihood of success on the merits in this case.

Plaintiffs' Request For Preliminary Relief Is Flawed on Its Face

Plaintiffs' requested relief is flawed for several additional reasons. First, plaintiffs' request to enjoin the NYPD from conducting any investigation based solely on religion violates F.R.C.P. 65(d) as it is vague, overbroad, and amounts to no more than a "simple command that the defendant obey the law." *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 144-145 (2d Cir. 2011) (finding that an injunction imposing an obligation to act in accordance with all applicable laws pertaining to firearms overbroad as an injunction "must be more specific than a simple command that the defendant obey the law."); *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 51 (2d Cir. 1996) (an injunction to restrain a person from making threats of "spurious lawsuits" was not "narrowly tailored", was "overbroad" in violation of Rule 65[d] specificity requirements, and amounted to a simple command that the defendant obey the law).

Plaintiffs' request that the Court order the NYPD to "segregate" all records "related to Plaintiffs' religious identity, speech, beliefs and practices that are not supported by any individualized suspicion of wrongdoing" is vague and compliance would be almost impossible. As an initial matter, the lawful collection and retention of information is not unconstitutional. *See Laird v. Tatum*, 408 U.S. 1 (1972) (the Supreme Court held that the gathering of information by lawful means for lawful purposes caused no injury and did not give rise to a justiciable case); *Philadelphia Yearly Meeting of Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1337-1338 (3d Cir. 1975) (mere police photographing and data gathering at public meetings "without more, is legally unobjectionable and creates at best a so-called subjective chill..."). Moreover, plaintiffs' request to segregate records is impracticable because, as demonstrated in their September 10th letter, defendants had legitimate law enforcement reasons for collecting and maintaining information related to plaintiffs and to impose plaintiffs' proposed relief would require individual, subjective determinations on a document by document basis. Plaintiffs' request is the epitome of a vague and not narrowly-tailored injunction in violation of Rule 65(d). *See, e.g., Peregrine Myanmar Ltd.*, 89 F.3d at 52 (rejecting request to defendants to "take all other reasonably needful actions"); *In re Worldcom, Inc. Sec. Litig*, No. 02 Civ. 3288, 2007 U.S. Dist. LEXIS 76272, at *11 (S.D.N.Y. Oct. 16, 2007) ("Rule 65 is concerned with vagueness insofar as a vague injunction poses 'the threat of a contempt citation for violation of an order so

vague that an enjoined party may unwittingly and unintentionally transcend its bounds.'") (quoting S*anders v. Air Line Pilots Ass'n, Int'l*, 473 F.2d 244, 247 (2d Cir. 1972)).[1]

Conclusion

For the above-mentioned reasons, the Court should deny plaintiffs' request for expedited discovery.

Respectfully Submitted,

/s
Peter G. Farrell
Senior Counsel

cc by ECF: Plaintiffs' Counsel
Honorable Joan M. Azrack

[1] Plaintiffs' attempt to obtain expedited discovery through an order to show cause is also procedurally improper under Local Rule 6.1(d) which provides: "[n]o *ex parte* order, or order to show cause to bring on a motion, will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why a procedure other than by notice of motion is necessary, and stating whether a previous application for similar relief has been made."

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BY ECF
Honorable Joan M. Azrack
United States Magistrate Judge
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Eastern District of New York
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Brooklyn, New York 11201

Re: Raza et al v. City of New York et al, 13 Civ. 3448 (PKC)(JMA)

Dear Judge Azrack:

I am a Senior Counsel in the office of Michael A. Cardozo, Corporation Counsel of the City of New York and submit this letter on behalf of defendants in anticipation of the initial conference scheduled before Your Honor on September 12, 2013 in the above-referenced case.

Plaintiffs, consisting of three individuals and three organizations, allege that they have been surveilled by the New York City Police Department ("NYPD") without a legitimate law enforcement purpose. Plaintiffs allege that the NYPD engaged in religious profiling in violation of their rights under the First Amendment (free exercise of religion and establishment clause) and Fourteenth Amendment (equal protection).[1] Plaintiffs further allege that since 2002 the NYPD has engaged in an unlawful policy and practice of religious profiling and surveillance of Muslim New Yorkers. Defendants filed their answer to the complaint on September 9, 2013.

The complaint names as defendants the City of New York and three individuals, all sued in their official capacity.[2] Plaintiffs' complaint thus does not seek a judgment against the three individual defendants but rather a judgment against the City based on the alleged unlawful policy, *i.e.*, a *Monell* claim against the City of New York.

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[1]Plaintiffs also assert a related violation of the New York State Constitution right to free exercise of religion. Complaint ¶ 163.

[2]Suits against individuals in their official capacity are deemed suits against the City. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

In order for plaintiffs to succeed on their *Monell* claim, plaintiffs must first show that an underlying constitutional violation occurred against them before reaching the question of whether or not the City of New York is liable. *See Askins v. Doe,* 2013 U.S. App. LEXIS 17644, *10-*11 (2d Cir. 2013) ("Unless a plaintiff shows that he has been the victim of a federal law tort committed by persons for whose conduct the municipality can be responsible, there is no basis for holding the municipality liable."). Defendants respectfully submit that the most reasonable course to take in this case is to first conduct discovery as to which, if any, of these six plaintiffs has standing to sue and which, if any, has suffered a constitutional violation before embarking on the question of the NYPD's general investigative policies and practices. The broader *Monell* issue will undoubtedly entail requests for far-reaching and widespread disclosure on unrelated and confidential counterterrorism and criminal investigations.

Unless discovery is bifurcated in this way, the discovery process will open up innumerable discovery disputes regarding the law enforcement privilege and waste judicial resources. *See , e.g., Dinler v. City of New York (In re City of New York),* 607 F.3d 923, 944-945 (2d Cir. 2010) (where a discovery dispute resulted in the extraordinary relief of a writ of mandamus holding that the law enforcement privilege applied to certain intelligence documents as they contained information regarding law enforcement techniques and procedures, the identity of undercover officers, and the disclosure of these reports would undermine the safety of law enforcement personnel and the ability of a law enforcement agency to conduct investigations).

Bifurcating discovery to focus first on the individual alleged constitutional violations will also allow for a more efficient resolution of the merits of the case because, at the conclusion of that discovery, defendants intend to move for summary judgment. The summary judgment motion would be directed at both the merits of plaintiffs' individual claimed constitutional violations as well as their legal standing to bring those claims.

We are confident that the undisputed facts, some of which are summarized below, will demonstrate that the NYPD's actions as they affected plaintiffs were undertaken in furtherance of the legitimate government interest of investigating and deterring potential unlawful activity, not any kind of unlawful religious profiling. The information summarized below is public information or was obtained by the NYPD during the course of specific authorized investigations. It was not the result of any systemic surveillance or unpredicated monitoring. Nor did the NYPD target mosques wholesale for surveillance simply because the attendees were Muslim; rather, the NYPD followed leads suggesting that certain individuals in certain mosques may be engaging in criminal, and possibly terrorist, activity, and investigated those individuals where they happened to be, including, at times, in certain mosques.

We are prepared to provide the Court with additional information about plaintiffs in a sealed filing after the entry of a confidentiality order.

Regarding Plaintiff Masjid At Taqwa

The NYPD's investigation of certain individuals associated with Plaintiff Masjid At Taqwa was based upon information about their lengthy history of suspected criminal activity, some of it terroristic in nature. This information includes but is not limited to: illegal weapons trafficking by members of the mosque's security team and the mosque caretaker both within the

mosque and at the store adjacent; illegal weapons trafficking by certain attendees of the mosque; allegations that the mosque ran a "gun club"; and allegations that the assistant Imam had earmarked portions of over $200,000 raised in the mosque to a number of US Government-designated terrorist organizations.

Certain individuals associated with Masjid At Taqwa have historical ties to terrorism. The mosque's Imam, Siraj Wahhaj, was named by the US Attorney for the Southern District of New York as an unindicted co-conspirator in a plot to bomb a number of New York City landmarks in the mid-1990s (the "Landmarks Plot"). Omar Abdel Rahman, known as the "Blind Sheikh," who is serving a life sentence in federal prison for his role in the Landmarks Plot, lectured at Masjid At Taqwa. Wahhaj testified as a character witness for Abdel Rahman during Abdel Rahman's terrorism trial. Wahhaj also testified as a character witness for Clement Hampton El, a Masjid At Taqwa attendee who was convicted as one of the Blind Sheikh's co-conspirators in the Landmarks Plot.

Members of the mosque's security team have instructed individuals on how to disarm police officers and have led martial arts classes involving individuals convicted on terrorism charges. Since at least 2003, Masjid At Taqwa members have participated in and sponsored paintball exercises and survival training outside New York City, activities which have been carried out for training purposes by violent extremists in multiple terrorism cases in the United States and abroad—such as the "Virginia Jihad" case, the Fort Dix plot, the 7/7 attacks in London, and the UK fertilizer bomb plot ("Operation Awakening"). On one of these outings, the leader of Masjid At Taqwa's security team instructed the members of his paintball team to "form up, jihad assassins" and called them his "jihad warriors". Farooque Ahmed, who is currently incarcerated after pleading guilty to terrorism charges in connection with a plot to bomb the Washington, DC metro, promoted and participated in at least one of these trips.

Regarding Plaintiffs Masjid Al Ansar and Hamid Raza

The NYPD's investigation of Abdel Hameed Shehadeh, who attempted to travel to Pakistan to join al-Qaeda or the Taliban in June of 2008, included Shehadeh's activities at Plaintiff Masjid Al Ansar, at which Plaintiff Hamid Raza serves as Imam. Shehadeh, who was among the group of founders of Masjid Al Ansar, regularly attended the mosque, helped raise funds for the mosque, and was an administrator of its website. In 2013, he was convicted of making false statements to federal agents concerning his intent to travel to Pakistan to join al-Qaeda or the Taliban in order to wage jihad against US military forces.

In the course of its investigation of Shehadeh, the NYPD learned that other individuals under investigation by the NYPD played a role at Masjid Al Ansar. Plaintiff Mohammad Elshinawy, discussed in greater detail below, became a regular lecturer at Masjid Al Ansar and his lectures were popular with Shehadeh and other Masjid Al Ansar attendees, including Plaintiff Asad Dandia, also discussed below.

The NYPD had information that another regular lecturer at Masjid Al Ansar, Hesham Elashry, was close to both Shehadeh and Elshinawy and was an acolyte of Omar Abdel Rahman. Before Abdel Rahman's arrest and conviction on terrorism charges, Elashry reportedly preached together with Abdel Rahman in New York City. Currently located in Egypt, Elashry has stated in

media interviews that if Abdel Rahman is not released from prison, America will be brought down and he has warned that there will be terrorism against America in response to the Egyptian military's actions against the Muslim Brotherhood, which he blames on the United States.

A number of individuals convicted on terrorism charges have attended lectures by leaders of Masjid Al Ansar. In addition to Shehadeh, Agron Hasbajrami pleaded guilty in April 2012 to providing material support to terrorism after seeking to travel to Pakistan to join a jihadist fighting group; in March 2011 Carlos Almonte and Mohammed Alessa pleaded guilty to conspiring to murder persons outside the United States in support of the al-Qaeda linked group al-Shabaab; Najibullah Zazi, Zarein Ahmedzay, and Adis Medunjanin, were convicted of multiple federal terrorism offenses in connection with providing material support to al-Qaeda and an al-Qaeda directed plot to conduct coordinated suicide attacks in the New York City subway system in 2009; and Wesam Elhanafi and Sabir Hasanoff pleaded guilty to providing material support to al-Qaeda in 2012.

Regarding Plaintiff Mohammad Elshinawy

The NYPD's investigation of Plaintiff Mohammad Elshinawy is based on information that he has made statements and conducted activities in support of violent jihad. In 2005, Elshinawy led a paintball trip with members of NYC-based Muslim Student Associations which he characterized as training for jihad. In 2006 an individual with direct access to Elshinawy described him as becoming radicalized, spending hours on Islamic websites downloading the most extreme parts of speeches by radical clerics. In 2008, Elshinawy helped organize a camping trip in New Jersey in which participants engaged in martial arts, physical training, and agility drills such as tying long ropes between trees in a webbed formation under which to crawl or between which to run, and forcing one another underwater in a swimming pool for extended periods of time. Campground staff voiced their concern to the NYPD about these activities, which they described as secretive and highly unusual. In his public lectures, including at Masjid At Taqwa, Elshinawy made statements encouraging attendees to follow in the footsteps of Muslims who died while participating in violent jihad against non-Muslims.

According to media reports, the Federal Bureau of Investigation also investigated Elshinawy for his possible role recruiting others to travel overseas to train or fight alongside extremist elements. Abdel Hameed Shehadeh, Agron Hasbajrami, Carlos Almonte, and Mohammed Alessa, all mentioned above, attended Elshinawy's lectures at Masjid Al Ansar and elsewhere.

Elshinawy's status as a suspected sanctioner of violent extremism is strengthened by his familial ties to terrorism. Elshinawy's father Ali Elshinawy was a close associate of Omar Abdel Rahman and a fellow member of Gamaa Islamiyya—a US Government-designated terrorist organization. Ali Elshinawy and Osama Elshinawy, an older brother of Mohammad Elshinawy, were both named by the US Attorney for the Southern District of New York as unindicted co-conspirators in the Landmarks Plot.

Regarding Plaintiffs Asad Dandia and Muslims Giving Back

The NYPD obtained information regarding statements Dandia made in support of violent jihad, as well as allegations that Dandia attempted to organize a trip to Pakistan in 2011 to train and fight alongside extremist elements there. Dandia, who is the Vice President of the charity Muslims Giving Back, repeatedly has expressed his appreciation and support for individuals associated with al-Qaeda—in particular the now-deceased former external operations commander of al-Qaeda in the Arabian Peninsula, Anwar al-Awlaki—and he has advocated for violence against Shiite Muslims. Dandia's close associate Justin Kaliebe, with whom Dandia allegedly planned to travel to Pakistan in 2011, pleaded guilty in February 2013 to attempting to provide material support to terrorism in connection with plans to join al-Qaeda in the Arabian Peninsula in Yemen. Before Elshinawy's travel to Egypt, Dandia regularly attended Mohammad Elshinawy's lectures.

Anticipated Dispositive Motion Practice

After the proposed bifurcated discovery, defendants intend to move for summary judgment to show plaintiffs have not suffered a constitutional violation. The material undisputed facts will demonstrate that the NYPD's investigation was to serve the government's legitimate interest in preventing unlawful conduct and not taken for any alleged discriminatory purpose. Plaintiffs' equal protection claim fails as a result. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"). Plaintiffs' free exercise of religion and establishment clause claims will similarly fail because investigations into possible unlawful conduct are neutral and generally applicable and plaintiffs' free exercise of religion has not been substantially burdened. *See, e.g., Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 876-888 (1990) (statute found to be neutral and generally applicable and did not substantially burden the plaintiffs' free exercise of religion); *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 205-210 (2d Cir. 2012) (law labeling certain foods as kosher did not violate the establishment clause because it had a secular purpose, it did not advance or inhibit religion, and did not foster an excessive government entanglement with religion).

Defendants also expect to move for summary judgment on the basis of standing. Various plaintiffs have not suffered a cognizable injury, and many of the claimed injuries are self-induced. *See Fifth Ave. Peace Parade Comm v. Gray*, 480 F.2d 326, 15-20 (2d Cir. 1973) (where plaintiffs alleged that the FBI had surveilled them by compiling lists and taking photographs and disseminating information, the Second Circuit held that their apprehension of any future misuse of information was merely speculative, and "self-induced" as there was no showing of any misuse of information, or indeed that the surveillance had taken place).

Conclusion

Defendants intend to raise their proposal for bifurcated discovery with the Court at the conference scheduled for September 12, 2013.

Respectfully Submitted,

/s
Peter G. Farrell
Senior Counsel

cc by ECF: Honorable Pamela K. Chen
Hina Shamsi, Esq.
Nusrat J. Choudhury, Esq.
Patrick Toomey, Esq.
Ramzi Kassem, Esq.
Diala Shamas, Esq.
Arthur N. Eisenberg, Esq.
Mariko Hirose, Esq.