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12
13 **IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

14 ABDIRAHMAN ADEN KARIYE,
15 *et al.*,

16 *Plaintiffs,*

17 v.

18
19 ALEJANDRO MAYORKAS,
Secretary of the Department of
20 Homeland Security, in his official
capacity, *et al.*,

21 *Defendants.*

CASE NO. 2:22-CV-1916-FWS-GJS

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS THE COMPLAINT**

Honorable Fred W. Slaughter
United States District Judge

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INTRODUCTION

1
2 Department of Homeland Security (DHS) policy states in no uncertain terms
3 that the agency “does not profile, target, or discriminate against any individual for
4 exercising his or her First Amendment rights”—including the right to freely
5 exercise one’s religion. Memo. from Kevin K. McAleenan to All DHS Employees
6 at 1, <https://perma.cc/6ZN4-TAKB> (McAleenan Memo); *see also* Compl. ¶ 23, ECF
7 No. 1. The same policy prohibits questioning and other information-gathering
8 regarding First-Amendment-protected activities, except in specific, limited
9 circumstances, including in furtherance of an authorized law enforcement activity.
10 Consistent with the agency’s statutory mandate, such activity encompasses
11 examining individuals to determine their admissibility into the country; inquiring
12 about their purpose for international travel or items they seek to bring into the
13 country; investigating potential violations of law; and protecting against threats to
14 border security or national security. These directives govern all of DHS, including
15 DHS component agencies U.S. Customs and Border Protection (CBP),
16 U.S. Immigration and Customs Enforcement (ICE), and ICE’s subcomponent,
17 Homeland Security Investigations (HSI).

18 Nonetheless, Plaintiffs assert that these agencies have a secret, unwritten
19 policy or practice—which directly contradicts the public one—of targeting Muslim
20 travelers at the U.S. border, because of their faith, for questioning about their
21 religious practices, beliefs, and associations. They lob these accusations based on
22 three individual Muslim citizens’ alleged isolated experiences, occurring during a
23 handful of U.S. border crossings over the course of five years. Two of these
24 Plaintiffs believe they are stopped and questioned at the border because they are on
25 U.S. government watchlists; the other alleges a single instance of questioning under
26 unique circumstances, which took place over three years ago.

27 Plaintiffs fail to plausibly allege a policy or practice of targeting all Muslims

1 for questioning at the border because of religion based on these few alleged
2 incidents. Instead, at most, they allege discrete and circumstance-dependent
3 instances of religious questioning, which do not plausibly demonstrate any violation
4 of DHS’s policy on religious profiling, targeting, or discrimination. Viewed in
5 context, the allegations instead suggest that the questioning related to CBP and
6 HSI’s law enforcement and border security missions. Many of the alleged questions
7 concern, among other things, travel history, the contents of a Plaintiff’s baggage,
8 and individuals that Plaintiffs associated with while abroad. These types of
9 inquiries are clearly proper at the border, even when they touch upon religion.

10 Plaintiffs also fail to state any plausible claim for relief under the First
11 Amendment or the Religious Freedom Restoration Act (RFRA). First, they have
12 not stated an Establishment Clause violation (Count 1) because they do not plausibly
13 allege that questioning at the border lacked a secular purpose or effect, or that a
14 handful of questions about religious beliefs, practices, and associations demonstrate
15 excessive entanglement with religion. Second, Plaintiffs have not stated a free
16 exercise violation under either the First Amendment (Count 2) or RFRA (Count 6)
17 because they fail to allege that religious questioning during a few border crossings
18 imposed a substantial burden upon their religious exercise. At most, Plaintiffs
19 allege that they voluntarily altered their religious expression while traveling; such
20 allegations of “a subjective chilling effect on free exercise rights [are] not sufficient
21 to constitute a substantial burden.” *Am. Fam. Ass’n, Inc. v. City & Cnty. of S.F.*,
22 277 F.3d 1114, 1124 (9th Cir. 2002). Third, Plaintiffs fail to plausibly allege a
23 violation of their right to associational freedom (Count 3) where they assert no
24 tangible burden—not even a chilling effect—on the associational activities they
25 were allegedly compelled to disclose. Moreover, even if Plaintiffs had properly
26 alleged a substantial burden on their religious exercise or expressive association
27 (and they have not), the questioning alleged here withstands First Amendment

1 scrutiny because it was narrowly tailored to achieve important governmental
2 interests within the scope of DHS’s statutory mandate, which includes securing the
3 U.S. border, preventing terrorism, and investigating potential violations of law.

4 Plaintiff Hameem Shah alone alleges that he was retaliated against for
5 exercising his First Amendment rights during a secondary inspection at the
6 U.S. border (Count 4). He fails to plausibly allege such a claim where the
7 allegations demonstrate that he experienced no retaliatory action that differed in any
8 meaningful way from a typical routine inspection a traveler can expect to experience
9 at secondary. In addition, he fails to demonstrate that any action was *caused* by his
10 expressive activities, where his inspection began before officers learned of them.

11 Finally, Plaintiffs have not plausibly alleged an equal protection claim under
12 the Due Process Clause of the Fifth Amendment (Count 6). They provide no
13 concrete allegations that they were treated unequally as compared to a similarly
14 situated group, or that such unequal treatment occurred because of religion. Nor do
15 they advance any non-conclusory allegation of discriminatory animus. And even
16 assuming Plaintiffs had plausibly alleged each of those elements—which they have
17 not—any religious questioning still would not offend the Fifth Amendment because
18 it was narrowly tailored to achieve a compelling governmental interest.

19 For all of these reasons, as explained further below, the complaint should be
20 dismissed in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6).

21 **STATUTORY AND REGULATORY FRAMEWORK**

22 **A. The Defendant Agencies**

23 Several different components of the federal government work together to
24 protect the United States and its borders from violations of U.S. immigration laws,
25 criminal activity, and terrorist threats. DHS is charged with ensuring compliance
26 with federal laws at the border including those preventing contraband, other illegal
27 goods, and inadmissible persons from entering or exiting the United States. DHS’s

1 border authorities require the inspection of all persons entering the United States,
2 and permit the examination and search of persons, vehicles, baggage, and
3 merchandise to ensure compliance with any law or regulation enforced or
4 administered by DHS and its components, and to determine if the merchandise is
5 subject to duty or being introduced into the United States contrary to law. DHS is
6 also charged with “prevent[ing] terrorist attacks within the United States,” 6 U.S.C.
7 § 111(b)(1)(A), and “reduc[ing] the vulnerability of the United States to terrorism,”
8 *id.* § 111(b)(1)(B); *see also id.* § 202(1) (charging DHS with “[p]reventing the entry
9 of terrorists and the instruments of terrorism into the United States”).

10 Within DHS, CBP serves as the nation’s unified border protection agency.
11 CBP’s responsibilities include, among other things, “[p]reventing the entry of
12 terrorists and instruments of terrorism into the United States”; “[s]ecuring the
13 borders”; “[c]arrying out immigration enforcement functions”; and enforcing
14 customs and agricultural laws, all while “ensuring the speedy, orderly, and efficient
15 flow of lawful traffic and commerce.” 6 U.S.C. § 202; *see* 6 U.S.C. §§ 111, 215,
16 251. To facilitate these functions, numerous statutes and regulations authorize CBP
17 to inspect and search all persons, baggage, conveyances, and merchandise arriving
18 in and departing from the United States. *See, e.g.*, 8 U.S.C. §§ 1225, 1357; 19
19 U.S.C. §§ 482, 1461, 1496, 1499, 1581, 1582; 8 C.F.R. § 287; 19 C.F.R. pt. 162.

20 Also within DHS, ICE is a law enforcement agency that focuses primarily on
21 securing the borders of the United States and safeguarding the country’s
22 immigration system. *See* U.S. Immigration and Customs Enforcement, ICE’s
23 Mission, <https://www.ice.gov/mission>, *permanent link available at*
24 <https://perma.cc/5P3Y-QMZH>.¹ It employs approximately 20,000 officers, agents,
25

26 ¹ Courts may “take judicial notice of matters of public record outside the pleadings.”
27 *Burcham v. City of Los Angeles*, --- F. Supp. ----, 2022 WL 99863, at *3 (C.D. Cal.

1 analysts, and staff to support the nation’s efforts to strengthen border security and
2 prevent the illegal movement of people, goods, and funds into the United States.
3 *See id.* HSI is one of three directorates within ICE and serves as the principal
4 investigative component of DHS. *See* U.S Immigrations and Customs Enforcement,
5 Who We Are, <https://www.ice.gov/about-ice>, *permanent link available at*
6 <https://perma.cc/RM3U-8EZW>. HSI is responsible for investigating, disrupting,
7 and dismantling transnational criminal organizations and terrorist networks that
8 threaten or seek to exploit the customs and immigrations laws of the United States.
9 *See id.* In furtherance of this mission, HSI conducts federal criminal investigations
10 into the illegal cross-border movement of people, goods, money, technology, and
11 other contraband. *Id.* Its investigations cover a wide range of transnational crime,
12 including terrorism, narcotics smuggling, transnational gang activity, child
13 exploitation, human trafficking and smuggling, and money laundering. *Id.*

14 **B. Defendants’ Policies Prohibiting Religious Targeting**

15 DHS and its component agencies all have official policies prohibiting
16 profiling, targeting, and discrimination on the basis of religion. Most notably, in a
17 May 2019 memorandum to all DHS employees (including all CBP and ICE
18 employees), the then-Acting Secretary reiterated that “DHS does not profile, target,
19 or discriminate against any individual for exercising his or her First Amendment
20 rights”—including the free exercise of religion. McAleenan Memo at 1; *see also*
21 Compl. ¶ 23 (referencing “Defendants’ written policies”). The memorandum
22 instructs that “DHS personnel should not pursue by questioning, research or other
23

24 Jan. 7, 2022) (quoting *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir.
25 1988)). This includes information contained on government websites. *See Daniels-*
26 *Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998–99 (9th Cir. 2010). Should the Court
27 wish, Defendants would be happy to separately provide copies of the materials from
government websites referenced in this memorandum.

1 means, information relating to how an individual exercises his or her First
2 Amendment rights” unless certain conditions, such as relevance to a “criminal, civil,
3 or administrative activity relating to a law DHS enforces or administers,” are
4 present. *Id.* at 2. This directive expressly applies to “[i]nformation about an
5 individual’s religious beliefs and practices.” *Id.* at 1. The memorandum points to
6 examples of when “information about First Amendment protected activities is
7 pertinent to, and within the scope of DHS’s administration or enforcement of a
8 statute, regulation, or executive order,” which include when such information
9 “relate[s] to an individual’s occupation, purpose for international travel, or any
10 merchandise he seeks to bring across the border,” and when such information is
11 used “to validate information supplied by an individual or determine whether
12 potential civil, criminal, or administrative violations exist relating to the laws that
13 DHS enforces or administers.” *Id.* at 3.

14 The CBP Standards of Conduct also explicitly prohibit targeting on the basis
15 of religion. *See* Department of Homeland Security, U.S. Customs and Border
16 Protection, CBP Directive 51735-013B (Dec. 9, 2020), [https://perma.cc/83ZD-](https://perma.cc/83ZD-LE5P)
17 [LE5P](https://perma.cc/83ZD-LE5P) (CBP Standards of Conduct). As relevant here, the Standards direct that
18 “[e]mployees will not act or fail to act on an official matter in a manner that
19 improperly takes into consideration an individual’s . . . religion.” *Id.* at § 7.11.1.
20 They also prohibit CBP employees from “mak[ing] abusive, derisive, profane or
21 harassing statements or gestures, or engag[ing] in any other conduct evidencing
22 hatred or invidious prejudice to or about another person or group on account of . . .
23 religion.” *Id.* at 7.11.2. Every CBP employee is required to “know the Standards
24 of Conduct and their application to his or her behavior.” *Id.* at § 6.7.²

25
26 ² The previous version of the CBP Standards of Conduct includes the same
27 requirements. *See* Department of Homeland Security, U.S. Customs and Border

1 **C. U.S. Border Inspections**

2 All travelers seeking to enter the United States must present themselves and
3 their belongings for inspection at the border. 19 U.S.C. §§ 1433(b), 1459(a); 8
4 U.S.C. § 1225(a)(3); 19 C.F.R. § 148.11; 8 C.F.R. § 235.1(a). CBP inspects all
5 travelers entering the United States to ensure that they are legally eligible to enter
6 (as a U.S. citizen or otherwise) and that their belongings are not being introduced
7 into the country contrary to law. A traveler, with or without his or her belongings,
8 is permitted to enter the United States only when those processes are complete.

9 During inspection at a port of entry’s primary arrival location, or “primary,”
10 a CBP officer reviews a traveler’s documentation and any other relevant
11 information about him or her, including pertinent law enforcement information and
12 “lookouts”—including any “wants and warrants” or watchlist matches.³ See
13 Privacy Impact Assessment Update for CBP Border Searches of Electronic Devices,

14 _____
15 Protection, CBP Directive 51735-013A at §§ 5.7, 6.11.1, 6.11.2 (Mar. 13, 2012),
16 <https://perma.cc/2U8V-7VFS>.

17 ³ The DHS Watchlist Service receives a copy of the Terrorist Screening Database
18 (TSDB), a consolidated database maintained by the Federal Bureau of
19 Investigations’s Terrorist Screening Center. See Department of Homeland Security,
20 Privacy Impact Assessment for the Watchlist Service, DHS Reference
21 No. DHS/ALL/PIA-027(d) (July 10, 2020), <https://perma.cc/6H9V-Y4BH>. The
22 TSDB contains the identities of known and suspected terrorists. *Id.* Nominations to
23 the TSDB “must rely upon articulable intelligence or information which creates a
24 reasonable suspicion that the individual is engaged, has been engaged, or intends to
25 engage, in conduct constituting, in preparation for, in aid or in furtherance of, or
26 related to, terrorism and/or terrorist activities.” See *Elhady v. Kable*, 993 F.3d 208,
27 214 (4th Cir. 2021) (citations omitted). As a general matter, the government does
not disclose the watchlist status of any individual; among other things, such status is
protected by the law enforcement privilege, and in some instances, by statute. See
49 U.S.C. § 114(r); see also, e.g., *Blitz v. Napolitano*, 700 F.3d 733, 737 n.5 (4th Cir.
2012).

1 DHS/CBP/PIA-008(a) at 3 & n.8 (Jan. 4, 2018), <https://perma.cc/H456-2XH8> (CBP
2 PIA for Elec. Devices). If the officer determines that traveler warrants additional
3 inspection, he or she will refer the traveler for additional scrutiny, or “secondary
4 inspection.” *Id.* at 3. In the context of air or sea travel, CBP officers may also
5 question travelers who are in the process of obtaining their baggage. *See* U.S.
6 Customs and Border Protection, Privacy Impact Assessment for the TECS System:
7 CBP Primary and Secondary Processing at 4 (Dec. 22, 2010),
8 <https://perma.cc/4BDV-XNTS> (CBP PIA for TECS). This interaction may involve
9 inspection of the traveler and his or her possessions. *Id.*

10 Upon secondary inspection, CBP officers may conduct a basic or advanced
11 search of a traveler’s electronic devices. CBP PIA for Elec. Devices at 3. CBP
12 officers may also notify HSI special agents if they believe further investigation is
13 warranted. *See* ICE, Who We Are, <https://www.ice.gov/about-ice> (describing
14 HSI’s investigative mission). A “basic search” is performed with or without
15 suspicion in the traveler’s presence, and involves a review of information that is
16 “resident upon the device and would ordinarily be visible by scrolling through the
17 phone manually,” including contact lists, text messages, pictures, and video and
18 audio files. *Id.* at 6. An “advanced search” involves connecting a device to external
19 equipment “not merely to gain access to the device, but to review, copy, and/or
20 analyze its contents.” *Id.* If CBP determines following a basic search that no further
21 examination is needed, the electronic device is returned to the traveler, and he or
22 she is free to leave. *Id.* CBP provides passengers whose devices are selected for
23 further examination with a “tear-sheet” providing the reasons an individual may be
24 selected for additional inspection, the bases for CBP’s search authority, an overview
25 of the search process, and resources for travelers who may have questions or
26 complaints. *Id.* at 4, 12; *see* U.S. Customs and Border Protection, Inspection of
27 Electronic Devices Tear-Sheet, <https://perma.cc/JZ4W-7CYF>.

1 Depending on how a traveler enters the United States (by air, sea, or land),
2 CBP collects certain information from and about him or her at various stages of the
3 trip for law enforcement purposes, including admissibility determinations. CBP
4 PIA for TECS at 3. These different types of information collections are physically
5 located within the information technology architecture of TECS, a system of records
6 that includes “temporary and permanent enforcement, inspection, and operational
7 records relevant to the antiterrorism and law enforcement mission of CBP and
8 numerous other federal agencies it supports.”⁴ *Id.* at 2. Among other uses, TECS
9 serves as a data repository to support law enforcement “lookouts,” border screening,
10 and reporting for CBP’s primary and secondary inspection processes. *Id.* Records
11 of all inspections at U.S. ports of entry, including relevant information and results
12 of CBP secondary inspections, are entered into TECS. *Id.* at 4–6. Such records are
13 retained by TECS for a maximum of 75 years. *Id.* at 14.

14 CBP owns and operates TECS; CBP may also share information collected in
15 TECS with certain other DHS components that show a need to know the
16 information, consistent with their missions, *id.* at 15–16, and other federal
17 government agencies that have demonstrated a justifiable need for the information,
18 pursuant to a memorandum of understanding with CBP, *id.* at 16–17. CBP also
19 sometimes grants access to TECS records to outside federal, state, local, tribal, and
20 foreign agencies responsible for law enforcement, counterterrorism, and border
21 security. *Id.* at 17. This is done on a need-to-know basis and for a specific purpose
22 consistent with the TECS Privacy Act Statement of Records Notification. *Id.*

23 Individuals who experience difficulties during travel—including delayed
24

25 ⁴ TECS is not an acronym; the system is an updated and modified version of the
26 former Treasury Enforcement Communications System. The term “TECS”
27 describes both an information-sharing platform encompassing different systems of
records, and the above-described system of records. *See* CBP PIA for TECS at 1.

1 entry into the United States at a port of entry or border crossing—may file an inquiry
2 through the DHS Traveler Redress Inquiry Program (DHS TRIP). *See* DHS TRIP,
3 <https://www.dhs.gov/dhs-trip>, *permanent link available at* [https://perma.cc/RN8P-](https://perma.cc/RN8P-XYUH)
4 XYUH. Upon receipt of a DHS TRIP inquiry, relevant agencies review and make
5 any necessary updates to a traveler’s record. *See id.* After review has concluded,
6 the individual receives a final determination letter. *Id.*

7 PLAINTIFFS’ ALLEGATIONS

8 Plaintiffs are three U.S. citizens who self-identify as Muslim. Compl. ¶¶ 8–
9 10. Each alleges that, on at least one occasion, he has been asked questions related
10 to his religious beliefs, practices, or associations during secondary inspection at a
11 U.S. port of entry or border crossing. *See, e.g., id.* ¶¶ 31–32, 74, 108. Two of
12 Plaintiffs—Abdirahman Aden Kariye and Mohamad Mouslli—allege, upon
13 information and belief, that their questioning arises, in part, from their placement
14 on a “U.S. government watchlist.” *Id.* ¶¶ 58–59, 94–95. Plaintiffs Kariye and
15 Mouslli do not contest their alleged watchlist status here, allege they have
16 challenged it otherwise, or contend that any watchlist placement was improper.

17 Plaintiff Kariye alleges that he has been asked questions pertaining to his
18 religion at five U.S. border crossings between September 2017 and January 2022.
19 *See id.* ¶¶ 33–56. He does not specify how many times he has entered the United
20 States without such questioning. According to him, these questions concerned,
21 among other things, whether upon returning from the Hajj, he had been on the
22 pilgrimage previously, *id.* ¶ 35; his “involvement with a charitable organization
23 affiliated with Muslim communities,” *id.* ¶ 39; whether a sports league in which he
24 coaches was “just for Muslim kids,” *id.* ¶ 43; and “whether he had met a particular
25 friend at a mosque” during a recent trip, *id.* ¶ 54.

26 Plaintiff Mouslli alleges that he has been asked questions regarding religion
27 upon returning from his four most recent international trips, between August 2018

1 and June 2021. *See id.* ¶¶ 75–93. These inquiries allegedly included whether he is
2 Muslim, *id.* ¶ 77; whether he attends a mosque, *id.* ¶¶ 81, 85, 90; and whether he
3 prays every day, *id.* ¶¶ 81, 90.

4 Plaintiff Hameem Shah alleges that he was asked questions about religion
5 upon entry to the United States on one occasion, in May 2019. *See id.* ¶¶ 108–130.
6 He does not specify how many times he crossed the border prior to May 2019
7 without such questioning. He has not traveled internationally since. *Id.* ¶ 135.

8 On that day, Plaintiff Shah alleges that, after he “passed through primary
9 inspection without incident,” a CBP officer at baggage claim requested that Shah
10 accompany him for an inspection. *Id.* ¶ 109. In secondary inspection, two CBP
11 officers searched Shah’s baggage. *Id.* ¶ 111. Shah was carrying a personal journal,
12 which he initially asked the officers not to read. *Id.* ¶¶ 113–14. The journal
13 contained notes related to Shah’s religion and religious associates. *Id.* ¶¶ 114, 128.
14 After reading the journal, officers allegedly asked Shah follow-up questions about
15 his religious beliefs, practices, and associations. *Id.* ¶¶ 117–18, 128. The officers
16 next said they would search Shah’s laptop and phone. *Id.* ¶ 116. Shah said he did
17 not consent and asked for a supervisor. *Id.* After the supervisor arrived, Shah again
18 said he did not consent, and asserted that he “wanted to stand up for his
19 constitutional rights.” *Id.* ¶ 120. The supervisor informed Shah that his reluctance
20 “made the officers more suspicious of him.” *Id.* ¶ 121. Shah then told the supervisor
21 he no longer wanted to enter the United States, and asked to “leave the country and
22 go back to Europe.” *Id.* ¶ 123. The supervisor explained that Shah would have to
23 leave his devices because they had been seized. *Id.*

24 The supervisor then gave Shah the option of unlocking his phone for
25 inspection, or refusing, in which case the officers would hold his laptop and phone
26 “for further examination” and return them later. *Id.* Shah chose to unlock the phone,
27 and an officer searched it manually in Shah’s presence; Shah believes the officer

1 viewed messages, pictures, emails, call history, maps history, internet history,
2 “Airbnb,” and “internal files.” *Id.* ¶¶ 124, 131. Another officer said “he needed to
3 continue looking through [Shah’s] journal using a computer” and left the room with
4 it, which Shah objected to. *Id.* ¶ 125–26. Twenty to thirty minutes later, the officer
5 returned with Shah’s journal and another officer, who Shah believes was an HSI
6 agent.⁵ *Id.* ¶ 127. The HSI agent asked Shah additional questions about his journal,
7 including “the identity of a local imam.” *Id.* ¶ 128. After approximately two hours,
8 Shah left freely with his phone and journal. *Id.* ¶¶ 130–31. In response to a
9 subsequent Freedom of Information Act (FOIA) request, CBP allegedly provided
10 “a redacted document stating that [Shah’s] detention and questioning [were]
11 ‘Terrorist Related.’” *Id.* ¶ 134.

12 Plaintiffs allege that they are asked questions about their religious beliefs,
13 practices, and associations at the U.S. border because they are Muslim, pursuant to
14 a policy or practice of targeting Muslim American travelers for such questioning.⁶
15 *Id.* ¶¶ 1, 62, 99, 137. They assert that this alleged questioning makes them feel
16 anxious, distressed, and stigmatized. *Id.* ¶¶ 72, 106, 143. Plaintiffs also allege that
17 the questioning places pressure upon them to modify their religious practices,
18 including avoiding carrying religious journals or texts while traveling, *id.* ¶¶ 70,
19 141; refraining from praying in airports, *id.* ¶¶ 69, 103–04; and altering their
20 religious dress, *id.* ¶¶ 67–68. Plaintiffs do not, however, allege any direct
21 connection between any of these religious practices and an instance of religious
22 questioning—except Plaintiff Shah’s journal writings. *See id.* ¶¶ 114, 128.

23
24 ⁵ Plaintiffs do not otherwise allege that HSI participated in their questioning; they do
25 not allege that ICE participated in their questioning at all.

26 ⁶ In some instances, Plaintiffs characterize this as a CBP and HSI policy, *see* Compl.
27 ¶ 1; on other occasions they refer to it as a DHS and CBP policy, *see id.* ¶ 4.

1 Plaintiffs collectively raise five causes of action: violation of the First
2 Amendment’s Establishment Clause (Count 1), *id.* ¶¶ 144–53; violation of the First
3 Amendment’s Free Exercise Clause (Count 2), *id.* ¶¶ 154–61; violation of the First
4 Amendment right to free association (Count 3), *id.* ¶¶ 162–70; violation of the Fifth
5 Amendment Due Process Right to Equal Protection (Count 5), *id.* ¶¶ 177–85; and
6 violation of RFRA (Count 6), *id.* ¶¶ 186–89. Plaintiff Shah alone raises a claim of
7 retaliation in violation of the First Amendment (Count 4). *Id.* ¶¶ 171–76.

8 Plaintiffs appear to seek both facial and as-applied relief. They seek a
9 declaration that “the religious questioning of Plaintiffs” and “the policies and
10 practices of DHS and CBP” are unlawful. *Id.* at 35. They also seek an injunction
11 prohibiting DHS and CBP from asking Plaintiffs religious questions during
12 U.S. border inspections, and an order expunging records concerning alleged
13 religious questioning of Plaintiffs and alleged retaliation against Plaintiff Shah. *Id.*

14 LEGAL STANDARDS

15 A. Standard of Review

16 Under Rule 12(b)(6), a court must dismiss a complaint if it fails to state a
17 claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
18 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is
19 plausible on its face.” *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
20 A claim is facially plausible when the plaintiff pleads facts that “allow[] the court
21 to draw the reasonable inference that the defendant is liable for the misconduct
22 alleged.” *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There
23 must be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.*
24 In other words, while courts do not require “heightened fact pleading of specifics,”
25 a plaintiff must allege facts sufficient to “raise a right to relief above the speculative
26 level.” *See Twombly*, 550 U.S. at 547, 555.

27 Establishing the plausibility of a complaint’s allegations is “context-specific”

1 and “requires the reviewing court to draw on its judicial experience and common
2 sense.” *Iqbal*, 556 U.S. at 679. Although a plaintiff’s specific factual allegations
3 may be consistent with his or her claim, a court must assess whether there are other
4 “more likely explanations” for a defendant’s conduct such that the plaintiff’s claims
5 cross the line “from conceivable to plausible.” *Id.* at 680–81 (quoting *Twombly*,
6 550 U.S. at 570).

7 On a Rule 12(b)(6) motion to dismiss, the court accepts all material facts
8 alleged in the complaint as true and construes them in the light most favorable to
9 the plaintiff. *Knieval v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). The court need
10 not accept conclusory allegations, allegations contradicted by exhibits attached to
11 the complaint or matters properly subject to judicial notice, unwarranted deductions
12 of fact, or unreasonable inferences. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629
13 F.3d 992, 998 (9th Cir. 2010).

14 **B. The Federal Government’s Authority at the Border**

15 “Since the founding of our Republic, Congress has granted the Executive
16 plenary authority to conduct routine searches and seizures at the border, without
17 probable cause or a warrant, in order to regulate the collection of duties and to
18 prevent the introduction of contraband into this country.” *United States v. Montoya*
19 *de Hernandez*, 473 U.S. 531, 537 (1985). Accordingly, “searches of persons or
20 packages at the national borders rest on different considerations and different rules
21 of constitutional law from domestic regulations.” *United States v. Ramsey*, 431 U.S.
22 606, 619 (1977). Courts have recognized the Government’s authority at the border
23 to question travelers at length and to conduct wide-ranging, suspicionless searches
24 of travelers, their vehicles, and their luggage and private effects. *See, e.g., United*
25 *States v. Flores-Montano*, 541 U.S. 149, 155–56 (2004) (concluding that the
26 removal, disassembly, and reassembly of a vehicle’s gas tank as part of a border
27 inspection was routine); *Tabbaa v. Chertoff*, 509 F.3d 89, 94–95, 99 (2d Cir. 2007).

1 The Ninth Circuit has specifically recognized that “manual searches of cell phones
2 at the border are reasonable without individualized suspicion.” *United States v.*
3 *Cano*, 934 F.3d 1002, 1016 (9th Cir. 2019); *see also United States v. Cotterman*,
4 709 F.3d 952, 960–61 & n.6 (9th Cir. 2013) (en banc) (affirming that a “simple
5 search” of a traveler’s laptop at the border does not require reasonable suspicion).

6 In light of the Government’s authority and paramount interest in protecting
7 its borders, courts have recognized that travelers crossing the U.S. border have no
8 right to be free of detentions lasting several hours. *See, e.g., Flores-Montano*, 541
9 U.S. at 155 & n.3 (“[D]elays of one to two hours at international borders are to be
10 expected.”); *Tabbaa*, 509 F.3d at 100 (“[C]ommon sense and ordinary human
11 experience’ suggest that it may take up to six hours for CBP to complete the various
12 steps at issue here, including vehicle searches, questioning, and identity verification,
13 all of which we have already found to be routine.”). “[P]ursuant to the long-
14 standing right of the sovereign to protect itself by stopping and examining persons
15 and property crossing into this country,” such searches “are reasonable simply by
16 virtue of the fact that they occur at the border.” *Ramsey*, 431 U.S. at 616.

17 ARGUMENT

18 **A. Plaintiffs Have Not Plausibly Alleged a Policy or Practice of Targeting** 19 **Muslims for Improper Religious Questioning.**

20 The majority of Plaintiffs’ claims depend, at least in part, on allegations that
21 the Defendant agencies allegedly “target Muslim Americans” for questioning about
22 their religious beliefs, practices, and associations. Compl. ¶ 2; *see also id.* ¶¶ 147–
23 48, 157, 165, 180. But Plaintiffs fail to plausibly allege the existence of such a policy
24 or practice. Contrary to Plaintiffs’ allegations, Defendants’ written policies
25 explicitly prohibit targeting, profiling, or discrimination on the basis of religion.
26 Plaintiffs’ conclusory allegations that Defendants have an officially sanctioned
27

1 practice that is diametrically opposed to their stated policies fail to meet the
2 plausibility standard.

3 To properly allege a policy or practice, a plaintiff must either show “that the
4 defendant had, at the time of the injury, a written policy,” or “that the harm is part of
5 a ‘pattern of officially sanctioned . . . behavior, violative of the plaintiffs’ [federal]
6 rights.” *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) (quoting
7 *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001), *overruled on other grounds*
8 *by Johnson v. California*, 543 U.S. 499 (2005)). Plaintiffs here show neither.

9 At the outset, it is undisputed that the Defendant agencies have no written
10 policy of targeting Muslims for questioning about their religious beliefs, practices or
11 associations. Quite the contrary. The official, written policy of DHS—which covers
12 CBP, ICE, and HSI—provides that “DHS does not profile, target, or discriminate
13 against any individual for exercising his or her First Amendment rights”—including
14 the free exercise of religion. McAleenan Memo at 1. The policy mandates that
15 “DHS personnel should not pursue by questioning, research or other means,
16 information relating to how an individual exercises his or her First Amendment
17 rights” unless certain conditions, such as relevancy to a “criminal, civil, or
18 administrative activity relating to a law DHS enforces or administers,” are present.
19 *Id.* at 2. The CBP Standards of Conduct also explicitly prohibit its employees from
20 “act[ing] or fail[ing] to act on an official matter in a manner that improperly takes
21 into consideration an individual’s . . . religion.” CBP Standards of Conduct at
22 § 7.11.1. The complaint points to no contrary written policy.⁷

23
24 ⁷ The complaint references these written policies, alleging that they “permit border
25 officers to question Americans about their religious beliefs, practices, and
26 associations.” *See* Compl. ¶ 23. But Plaintiffs do not assert that they target Muslims.
27 *Id.*; *cf.* McAleenan Memo.

1 Nor have Plaintiffs plausibly alleged that Defendants have an “officially
2 sanctioned” practice of targeting Muslims, in violation of Defendants’ own stated
3 policies. *See Mayfield*, 599 F.3d at 971 (quoting *Armstrong*, 275 F.3d at 861). As
4 an initial matter, Plaintiffs make virtually no attempt to show that this alleged
5 practice exists beyond Plaintiffs, or affects any of the countless other Muslim
6 travelers who enter the United States from abroad each year.⁸ Plaintiffs also do not
7 endeavor, apart from conclusory speculation, to demonstrate that non-Muslim
8 travelers are not also questioned about their religious practices, beliefs, and
9 associations at the border in appropriate circumstances. These omissions alone
10 support dismissal of Plaintiffs’ claims that an official, DHS-wide practice of
11 targeting Muslims—in a manner inconsistent with DHS’s stated policies—exists.

12 Instead, Plaintiffs allege that three Muslim individuals were asked questions
13 regarding their religion during some, but not all, of their U.S. border crossings
14 between 2017 and 2022. These ten collective alleged incidents, occurring over the
15 course of five years, serve as Plaintiffs’ primary purported evidence of an alleged
16 DHS-wide practice. But even assuming that Plaintiffs were questioned as set forth
17 in the complaint, they advance only conclusory allegations to support the claim that
18 this questioning was pursuant to an unstated official practice that defies Defendants’
19 policies, rather than in a neutral manner consistent with them. In urging otherwise,
20 Plaintiffs ask the Court to make the types of “unwarranted deductions of fact” or
21 “unreasonable inferences” that courts are unwilling to make. *See In re Gilead*

22
23 ⁸ Plaintiffs do allege that, more than ten years ago, their counsel and other advocacy
24 organizations “submitted complaints to DHS describing border questioning of
25 Muslim Americans about their religious beliefs and practices.” Compl. ¶ 17. These
26 stale, decade-old allegations do not support the assertion that a policy exists *today*—
27 particularly given that circumstances have changed demonstrably over time,
including DHS’s publication of a policy that explicitly reaffirms its prohibition on
questioning on the basis of religion. *See generally* McAleenan Memo.

1 *Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

2 Plaintiffs’ allegations suggest that such questioning occurred in specific
3 circumstances consistent with Defendants’ policies, and consistent with law. DHS
4 policy recognizes that First-Amendment-protected information is properly gathered
5 where “the information is pertinent to and within the scope of an authorized civil,
6 criminal, or administrative law enforcement activity.” McAleenan Memo. at 3. This
7 includes questions “relating to an individual’s occupation, purpose for international
8 travel, or any merchandise the individual seeks to bring across the border,” in order
9 “to validate information supplied by an individual or determine whether potential . .
10 . violations exist,” or “relating to information regarding an individual indicating a
11 potential violation of a law DHS enforces or administers, or a threat to border
12 security, national security, officer safety, or public safety.” *Id.*

13 The alleged questioning here appears to fit into these categories. For example,
14 Plaintiff Kariye alleges he was asked about his religion upon returning from the Hajj,
15 a well-known religious pilgrimage. Compl. ¶¶ 33–35. Such questions plainly relate
16 to his “purpose for international travel.” *See* McAleenan Memo. at 3. Moreover,
17 Kariye describes himself as an “imam at a local mosque.” Compl. ¶ 8. DHS policy
18 recognizes that questions regarding an individual’s occupation are pertinent to
19 authorized law enforcement activities. *See* McAleenan Memo. at 3. Plaintiffs Kariye
20 and Mouslli both also allege that they are on a watchlist. Compl. ¶¶ 58, 94.
21 Assuming that this allegation is true, it would reasonably lead to certain questions
22 about their activities and associations in connection with investigating possible
23 “threat[s] to border security” or “national security.” *See* McAleenan Memo. at 3.

24 Plaintiff Shah alleges a single secondary inspection, which involved questions
25 stemming directly from a routine search of his belongings, *see* Compl. ¶¶ 113–18,
26 and which was afterwards allegedly labeled “Terrorist Related” in a TECS entry, *id.*
27 ¶ 136. Such questioning was therefore rationally related to what Shah sought to bring

1 across the border, and potentially also to investigating information “indicating a
2 potential violation of a law . . . , or a threat to border security, national security,
3 officer safety, or public safety.” *See* McAleenan Memo. at 3.

4 But even if one or more of these isolated instances of alleged questioning was
5 inconsistent with DHS policy, it would be wholly speculative to attribute that
6 incident to an unstated (and contradictory) official policy of targeting Muslims. That
7 type of isolated “rogue” conduct speaks, at most, to potential individual *violations* of
8 policy, not the existence of a constitutionally infirm policy. The remedy for such
9 instances of non-compliance does not lie in prospective, official-capacity relief
10 against the agency Defendants.

11 Therefore, Plaintiffs’ claims that are based on allegations of an official policy
12 and/or practice cannot proceed. Further, Plaintiffs cannot seek a declaratory
13 judgment that would amount to an advisory opinion about a “policy” that they have
14 not adequately alleged exists. *See* Compl. at 35 (requesting a declaration that “the
15 policies and practices of DHS and CBP described in the complaint” are illegal).

16 **B. Plaintiffs Fail to State a Claim Under the Constitution or RFRA.**

17 Against this backdrop of overall pleading insufficiency, each of Plaintiffs’ six
18 claims also fails to state a claim upon which relief can be granted.

19 **1. Plaintiffs do not plausibly allege an Establishment Clause violation**
20 **(Count 1).**

21 Plaintiffs first claim that Defendants’ alleged questions about their religious
22 beliefs, practices, and associations at the U.S. border violate the Establishment
23 Clause by failing to adhere to “the fundamental principle of denominational
24 neutrality,” that they lack secular purpose or effect, and that they foster excessive
25 entanglement with religion. Compl. ¶¶ 148, 150. In the alternative, Plaintiffs allege
26 that Defendants have a policy or practice of religious questioning of travelers in
27 general, which allegedly suffers from the same deficiencies. *Id.* ¶ 152. But these

1 conclusory allegations fail to state the basic elements of an Establishment Clause
2 claim. Count One should therefore be dismissed. *Accord Cherri v. Mueller*, 951
3 F. Supp. 2d 918, 935–36 (E.D. Mich. 2013) (dismissing claim that alleged religious
4 questioning of Muslims at the border violated the Establishment Clause).

5 The First Amendment’s Establishment Clause provides that “Congress shall
6 make no law respecting an establishment of religion.” U.S. Const. amend. I. “This
7 clause applies not only to official condonement of a particular religion or religious
8 belief, but also to official disapproval or hostility towards religion.” *Am. Fam. Ass’n*,
9 277 F.3d at 1120–21. The test articulated in *Lemon v. Kurtzman*, 403 U.S. 602
10 (1971), “remains the dominant mode of Establishment Clause analysis” in the Ninth
11 Circuit. *Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd.*
12 *of Educ.*, 896 F.3d 1132, 1149 (9th Cir. 2018). Under *Lemon*, “[g]overnment
13 conduct does not violate the Establishment Clause if (1) it has a secular purpose, (2)
14 its principal or primary effect is not to advance or inhibit religion, and (3) it does not
15 foster excessive government entanglement with religion.” *Cholla Ready Mix, Inc. v.*
16 *Civish*, 382 F.3d 969, 975 (9th Cir. 2004). The final two prongs are often “collapsed”
17 into the question of “whether the challenged governmental practice has the effect of
18 endorsing [or disapproving of] religion.” *Johnson v. Poway Unified Sch. Dist.*, 658
19 F.3d 954, 972 (9th Cir. 2011) (quoting *Trunk v. City of San Diego*, 629 F.3d 1099,
20 1106 (9th Cir. 2011)). In Establishment Clause challenges, “[c]ontext is critical
21 when evaluating the government’s conduct.” *Id.* Here, Defendants’ alleged conduct
22 has a secular purpose and effect, and thus satisfies the *Lemon* test.

23 To begin, the first prong—secular purpose—focuses on “whether [the]
24 government’s actual purpose is to endorse or disapprove of religion.” *Kreisner v.*
25 *City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) (quoting *Lynch v. Donnelly*, 465
26 U.S. 668, 690 (1984)). “A practice will stumble on the purpose prong only if it is
27 motivated wholly by an impermissible purpose.” *Am. Fam. Ass’n*, 277 F.3d at 1121

1 (quoting *Kreisner*, 1 F.3d at 782). “Government action . . . satisfies the purpose
2 prong if it is ‘grounded in a secular purpose.’” *Cath. League for Religious & Civ.*
3 *Rts. v. City & Cnty. of S.F.*, 567 F.3d 595, 600 (9th Cir. 2009) (quoting *Vasquez v.*
4 *L.A. Cnty.*, 487 F.3d 1246, 1255 (9th Cir. 2007)). The government’s “stated reasons
5 will generally get deference,” provided that the secular purpose is “genuine.” *Id.*
6 (quoting *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005)). “The eyes that
7 look to purpose belong to an objective observer.” *Id.* at 601 (quoting *McCreary*
8 *Cnty.*, 545 U.S. at 862).

9 Defendants’ alleged conduct easily passes muster here. Plaintiffs claim that
10 Defendants ask either Muslims, or religious individuals in general, about their
11 religious beliefs, practices, and associations in the process of conducting secondary
12 inspections of travelers entering the United States from abroad. *See* Compl. ¶¶ 147,
13 152. Plaintiffs make the conclusory claim, without elaboration, that this questioning
14 “does not have a predominantly secular purpose.” *Id.* ¶ 150. But an objective
15 observer, viewing this alleged questioning in context, would easily conclude that
16 Defendants’ primary purpose is not to “endorse or disapprove of religion,” *see*
17 *Kreisner*, 1 F.3d at 782 (quoting *Lynch*, 465 U.S. at 690), but rather to advance their
18 missions, including securing the U.S. border; preserving national security; and
19 carrying out the laws DHS is charged with enforcing, *see, e.g.*, 6 U.S.C. § 202. This
20 is particularly true given that DHS has an explicit policy setting forth the religion-
21 neutral circumstances that may necessitate questioning about First-Amendment-
22 protected activities in the course of fulfilling its statutory mandate. *See generally*
23 *McAleenan Memo.*

24 Next, when evaluating the effects prong, courts “consider whether the
25 government action has the principal or primary effect of advancing or inhibiting
26 religion.” *Am. Fam. Ass’n*, 277 F.3d at 1122 (quoting *Lemon*, 403 U.S. at 612). The
27 inquiry is “whether it would be objectively reasonable for the government action to

1 be construed as sending primarily a message of either endorsement or disapproval of
2 religion.” *Vernon v. City of L.A.*, 27 F.3d 1385, 1398 (9th Cir. 1994). For example,
3 in *Vernon*, the Ninth Circuit found, in the context of a city’s investigation into
4 whether an officer’s religious views were improperly impacting his performance,
5 that even if “one may infer possible city disapproval of [his] religious beliefs from
6 the direction of the investigation, this cannot objectively be construed as the primary
7 focus or effect of the investigation.” *Id.* at 1398–99. Instead, for a suggestion of
8 disapproval to violate the Establishment Clause, it must “overwhelm” a
9 governmental action’s “secular dimensions.” *Cath. League*, 567 F.3d at 605. The
10 effects inquiry is also undertaken “from the perspective of a ‘reasonable observer.’”
11 *Am. Fam. Ass’n*, 277 F.3d at 1122 (quoting *Kreisner*, 1 F.3d at 784).

12 The alleged religious questioning by Defendants cannot objectively be
13 construed to send primarily a message of disapproval of religion. Instead, the
14 primary effect—consistent with the primary purpose—was to further CBP’s border
15 security mission. Despite the fact that Plaintiffs claim to infer a “stigmatizing
16 message” from questions about their religious beliefs, practices, or associations,
17 Compl. ¶¶ 65, 102, 140, it strains credulity to argue that the *primary* purpose of any
18 such border examination is to disapprove of religion, and not, as DHS has stated, to
19 assess an individual’s admissibility into the country, investigate potential violations
20 of the laws DHS administers, and preserve border and national security. *See*
21 McAleenan Memo. at 3. “[A]ny statements from which disapproval can be inferred
22 [are] only incidental and ancillary.” *Am. Fam. Ass’n*, 277 F.3d at 1122–23; *see also*,
23 *e.g.*, *Cath. League*, 567 F.3d at 605.

24 Finally, as to excessive entanglement, “[s]ome level of interaction between
25 government and religious communities is inevitable; entanglement must be
26 ‘excessive’ to violate the Establishment Clause.” *Cholla Ready Mix*, 382 F.3d
27 at 977. The Ninth Circuit has observed “that the Supreme Court has usually found

1 excessive administrative entanglement in situations involving either state aid to
2 groups affiliated with a religious institution, such as parochial schools, or where
3 religious employees and public employees must work closely together.” *Vernon*, 27
4 F.3d at 1400–01 (citations omitted). “Administrative entanglement typically
5 involves comprehensive, discriminating, and continuing state surveillance of
6 religion.” *Id.* at 1399; *see Lemon*, 403 U.S. at 619 (finding excessive entanglement
7 where the state imposed “pervasive restrictions” on aid to parochial schools,
8 requiring “continuing state surveillance” to ensure compliance). This is distinct from
9 situations such as that in *Vernon*, where no excessive entanglement existed when the
10 city investigated the impact of an individual’s religious beliefs for a specific purpose
11 and limited that investigation to six months, thus avoiding “the reality or the
12 appearance of on-going government interference in church affairs.” 27 F.3d at 1399.

13 The situation here is akin to that in *Vernon*. Plaintiffs raise no allegation of
14 governmental interference in organized religious institutions. Instead, their only
15 particularized allegations point to a handful of relatively short, sporadic interactions
16 between individual Muslims and CBP officers (or once, an HSI agent), each
17 conducted in connection with, and limited to, a specific U.S. border crossing. The
18 alleged examinations sometimes involved only one or two questions concerning
19 religion. *See, e.g.*, Compl. ¶ 43 (alleging Plaintiff Kariye was asked whether a sports
20 league he coached was “just for Muslim kids”); *id.* ¶ 35 (alleging Plaintiff Kariye
21 was asked “which mosque he attends and whether he had been on the Hajj before”).
22 These limited, context-specific interactions do not rise to the level of *excessive*
23 entanglement, and certainly do not constitute “continuing state surveillance” of any
24 one religious organization. *See Vernon*, 27 F.3d at 1399.

25 The Court should dismiss Count One.
26
27

1 **2. Plaintiffs do not plausibly allege a violation of their free exercise**
2 **rights under the First Amendment (Count 2) or RFRA (Count 6).**

3 Plaintiffs next assert violations of their right to free exercise of religion under
4 the Constitution, Compl. ¶¶ 154–61, and RFRA, *id.* ¶¶ 186–89. They allege that
5 Defendants treat Muslims—or in the alternative, religious persons in general—
6 unequally by singling them out for questioning in a manner that is not neutral or
7 generally applicable. *Id.* ¶¶ 157–60. But Plaintiffs do not explain how this alleged
8 questioning imposes any burden on their free exercise of religion. *See id.*; *accord*
9 *Cherri*, 951 F. Supp. 2d at 934–35 (dismissing similar free exercise claims where
10 plaintiffs “ha[d] not established that being queried about their religious practices
11 and beliefs at the border infringes or burdens their ability to freely exercise their
12 religion”). That omission is fatal to both their First Amendment and RFRA claims.
13 And even if it were not, individualized questioning is the least restrictive means of
14 achieving the compelling governmental interest of protecting the U.S. border.

15 The Free Exercise Clause provides that “Congress shall make no law . . .
16 prohibiting the free exercise [of religion].” U.S. Const., amend. I. “The right to
17 freely exercise one’s religion, however, ‘does not relieve an individual of the
18 obligation to comply with a valid and neutral law of general applicability.’”
19 *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Employment*
20 *Div. v. Smith*, 494 U.S. 872, 879 (1990)). “[I]f the object of a law is to infringe
21 upon or restrict practices *because* of their religious motivation,” however, it must
22 be “justified by a compelling interest and . . . narrowly tailored to advance that
23 interest.” *Fazaga v. FBI*, 965 F.3d 1015, 1058 (9th Cir. 2020) (quoting *Church of*
24 *the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)), *reversed*
25 *and remanded on other grounds*, 142 S. Ct. 1051 (2022). To properly plead a Free
26 Exercise claim, plaintiffs must specifically allege a “burden on their religious
27 exercise or practice.” *Cal. Parents for the Equalization of Educ. Materials v.*

1 *Torlakson*, 973 F.3d 1010, 1019 (9th Cir. 2020). In the Free Exercise context, the
2 Ninth Circuit has “continued to apply the *Sherbert* substantial burden test to
3 government conduct that did not involve an actual regulation or criminal law.” *Am.*
4 *Fam. Ass’n*, 277 F.3d at 1124; *see also Cal. Parents*, 973 F.3d at 1019 (confirming
5 the ongoing validity of *American Family Association* and *Vernon*).

6 RFRA provides that the “[g]overnment shall not substantially burden a
7 person’s exercise of religion even if the burden results from a rule of general
8 applicability,” 42 U.S.C. § 2000bb-1(a), unless that burden “is in furtherance of a
9 compelling governmental interest,” and “is the least restrictive means of furthering
10 that . . . interest,” *id.* at § 2000bb-1(b). Thus, “[t]o establish a prima facie RFRA
11 claim,” a plaintiff must demonstrate that (1) “the activities the plaintiff claims are
12 burdened by the government action” are an “exercise of religion,” and (2) that the
13 government action at issue “substantially burden[s]” that exercise of religion.
14 *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc).
15 “If the plaintiff cannot [properly allege] either element, his RFRA claim fails.” *Id.*

16 Where challenged governmental conduct is not a law or regulation, therefore,
17 the burden inquiries under the Free Exercise Clause and RFRA are similar. “Under
18 RFRA, a ‘substantial burden’ is imposed only when individuals are forced to choose
19 between following the tenets of their religion and receiving a governmental benefit,
20 or coerced to act contrary to their religious beliefs by the threat of civil or criminal
21 sanctions.” *Id.* at 1069–70. “Any burden imposed on the exercise of religion short
22 of that . . . is not a ‘substantial burden’ within the meaning of RFRA, and does not
23 require the application of the compelling interest test.” *Id.* “[W]hen [a] challenged
24 government action is neither regulatory, proscriptive or compulsory, alleging a
25 subjective chilling effect on free exercise rights is not sufficient to constitute a
26 substantial burden.” *Am. Fam. Ass’n*, 277 F.3d at 1124.

27

1 For example, in *Vernon*, the Ninth Circuit found that the plaintiff failed to
2 establish a substantial burden where he alleged that “the existence of a government
3 investigation ha[d] discouraged him from pursuing his personal religious beliefs and
4 practices.” *Vernon*, 27 F.3d at 1395. Instead, it held that such “mere subjective
5 chilling effects” were “simply not objectively discernable and are therefore not []
6 cognizable.” *Id.*; accord *Dousa v. DHS*, 2020 WL 434314, at *7–8 (S.D. Cal. Jan.
7 28, 2020) (holding that a Free Exercise challenge was unlikely to succeed on the
8 merits where plaintiff voluntarily “refrained from providing religious counseling and
9 from blessing marriages” based on “subjective chills,” not a government mandate);
10 *see also Fazaga*, 965 F.3d at 1062 (observing that there is “no pertinent case law”
11 indicating that alleged illegal surveillance of Muslims “constitutes a substantial
12 burden upon religious practice”).

13 Plaintiffs here allege neither that they have been forced to choose between
14 their religion and receiving a governmental benefit, nor that they have been forced
15 to act contrary to their religious beliefs due to potential civil or criminal sanctions.
16 Instead, they assert that they either do, or plan to, “modify or curb [their] religious
17 expression and practices . . . when traveling back to the United States from abroad”
18 to avoid questions related to religion. Compl. ¶ 66; *see also id.* ¶¶ 67–70, 103–04,
19 141, 188. Nowhere do Plaintiffs allege, however, that the government coerces or
20 otherwise mandates these behavioral modifications. They do not allege that their
21 religion forbids such modifications. And these modifications have not, according to
22 Plaintiffs, have any effect on their alleged religious questioning. On the one hand,
23 Plaintiffs fail to allege that any religious questioning directly resulted from the
24 religious practices from which they now refrain while returning to the United States
25 (except the religious notes in Plaintiff Shah’s journal). *See id.* ¶¶ 114, 128. And on
26 the other hand, Plaintiffs allege that they continue to be questioned about their
27 religion and will be in the future. *See, e.g., id.* ¶¶ 58, 94, 136. Plaintiffs have

1 therefore failed to assert that the government in some way incentivized them to alter
2 their religious practices. And they allege no impediment to, or consequences arising
3 from, resuming their religious exercise during future travel into the United States.
4 *Accord Dousa*, 2020 WL 434314, at *8. Plaintiffs’ situation is thus analogous to
5 *Vernon* and *Dousa* because the “subjective chilling effects” that allegedly arise from
6 the government investigations alleged here do not impose a substantial burden on
7 Plaintiffs’ exercise of religion. Instead, as in *Dousa*, “any harms felt are not the
8 direct result of government action, but rather a result of [Plaintiffs’] decision[s] to
9 limit [their] religious practices for [their] own subjective reasons.” *See id.*

10 But even if Plaintiffs’ choice to alter their religious practices when returning
11 from travel abroad were deemed a substantial burden on their religious exercise, the
12 questioning alleged here is the least restrictive means of advancing a compelling
13 government interest. There can be no dispute that the government has a compelling
14 interest in protecting its borders and preventing and investigating potential acts of
15 terrorism. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) (“[N]o governmental interest
16 is more compelling than the security of the Nation.”); *Holder v. Humanitarian Law*
17 *Project*, 561 U.S. 1, 28 (2010) (“[T]he Government’s interest in combating terrorism
18 is an urgent objective of the highest order.”); *Flores-Montano*, 541 U.S. at 152; *Al*
19 *Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 980 (9th
20 Cir. 2012) (“[T]he government’s interest in national security cannot be
21 understated.”); *Tabbaa*, 509 F.3d at 103 (“It is undisputed that the government’s
22 interest in protecting the nation from terrorism constitutes a compelling state interest
23 . . .”). The complaint alleges that two individuals on terrorist watchlists, and another
24 who alleges his inspection was labeled “Terrorist Related,” were asked questions,
25 including about their religious beliefs, practices, and associations at the border. *See*
26 *Compl.* ¶¶ 58, 94, 134. The questions Plaintiffs report being asked under those
27 circumstances are targeted and individualized. *See, e.g., id.* ¶¶ 35, 39, 54, 128. Such

1 inquiries constitute the least restrictive means of investigating potential threats to
2 national security at the U.S. border. *Accord Tabbaa*, 509 F.3d at 105–06.

3 Plaintiffs’ free exercise claims therefore must be dismissed.

4 **3. Plaintiffs do not plausibly allege a violation of the First Amendment**
5 **right to freedom of association (Count 3).**

6 Plaintiffs claim that Defendants’ alleged “questioning about their religious
7 associations” violates their right to freedom of association under the First
8 Amendment. Compl. ¶ 164. But such questioning does not impede their
9 associational rights in any meaningful way. It is also plainly intertwined with the
10 compelling governmental interests of securing the border and preserving national
11 security, and narrowly tailored. This claim therefore cannot stand.

12 There is “implicit in the right to engage in activities protected by the First
13 Amendment a corresponding right to associate with others.” *Ams. for Prosperity*
14 *Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *Roberts v. U.S. Jaycees*, 468
15 U.S. 609, 622 (1984)). The Ninth Circuit has made clear that it “strongly disagree[s]
16 with any inference that criminal investigation is somehow prohibited when it
17 interferes with such First Amendment interests.” *United States v. Rubio*, 727 F.2d
18 786, 791 (9th Cir. 1983). It has also “refused to carve out a First Amendment
19 exception” to the border search doctrine. *United States v. Arnold*, 533 F.3d 1003,
20 1010 (9th Cir. 2008). Where a plaintiff demonstrates that disclosure in the context
21 of an investigation imposed an unjustified burden, however, courts have sometimes
22 found First Amendment violations. *See, e.g., NAACP v. Alabama ex rel. Patterson*,
23 357 U.S. 449, 462–63 (1958) (compelled disclosure of membership lists violated the
24 First Amendment where members faced violence and economic reprisal, and the
25 state articulated no justifying offsetting interest); *see also Ams. for Prosperity*
26 *Found.*, 141 S. Ct. at 2388 (disclosure of donor lists resulted in some being
27 “subjected to bomb threats, protests, stalking, and physical violence”). But even

1 where such a burden exists, “compelled disclosure of membership lists violates the
2 Constitution *only* when the investigation would likely impose hardship on
3 associational rights not justified by a compelling interest, or when the investigation
4 lacks a substantial connection to a subject of overriding and compelling state
5 interest.” *United States v. Mayer*, 503 F.3d 740, 748 (9th Cir. 2007) (emphasis
6 added). The Supreme Court more recently described the required showing as “a
7 substantial relation between the disclosure requirement and a sufficiently important
8 governmental interest,” and “narrow[] tailor[ing] to the government’s asserted
9 interest.” *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (quoting *Doe v. Reed*, 561
10 U.S. 186, 196 (2010)).

11 At the outset, the facts Plaintiffs allege here are wholly distinguishable from
12 those analyzed in *Americans for Prosperity Foundation*, or similar cases concerning
13 large-scale disclosure of membership rosters, in both scope and effect. The alleged
14 disclosures Plaintiffs point to are extremely limited. They assert that three
15 individuals, who live in different cities and appear to belong to different religious
16 organizations, have been asked a limited number of questions about their personal
17 associations as part of discrete examinations by CBP officers (and one HSI agent) at
18 the U.S. border over the course of five years. *See, e.g.*, Compl. ¶¶ 39, 54, 81, 85, 90,
19 128. They do not claim that these alleged disclosures have imposed any tangible
20 burden on, caused them to refrain from, or created a chilling effect on, any of these
21 associations. Nor do they claim that the government has taken any action whatsoever
22 as a result of allegedly learning about their associations. The only conceivable harm
23 they claim is their abstract discomfort with disclosure. *See id.* ¶ 72, 106, 140. This
24 cannot, without more, trigger the requirements of narrow tailoring and a sufficiently
25 important state interest. *Cf. Ams. for Prosperity Found.*, 141 S. Ct. at 2388.

26 But even assuming these standards must be met here, they are easily satisfied.
27 As explained above, there can be no dispute that the government has a compelling

1 interest in border security and preventing terrorism. *See supra*, pp. 27–28.
2 Defendants’ alleged questions are both connected to these compelling interests and
3 narrowly tailored. *Accord Tabbaa*, 509 F.3d at 103–05. Plaintiffs’ allegations show
4 that CBP officers (and one HSI agent) asked individualized questions, on a handful
5 of occasions, to three individuals who either claim they are on a watchlist or acted in
6 an objectively suspicious manner during a routine border inspection. *See, e.g.*,
7 Compl. ¶¶ 35, 39, 43, 47, 81, 85, 90, 117, 128. These types of inquiries are similar
8 to specific investigations revealing First-Amendment-protected associations that the
9 Ninth Circuit has previously upheld. *See, e.g., Mayer*, 503 F.3d at 748; *Rubio*, 727
10 F.2d at 791; *United States v. Gering*, 716 F.2d 615, 620 (9th Cir. 1983). They also
11 stand in sharp contrast to the wide-scale disclosures held unconstitutional in
12 *Americans for Prosperity Foundation*. *See* 141 S. Ct. at 2387. Indeed, the Supreme
13 Court acknowledged that result turned, in part, on the fact that the disclosures were
14 “not used to initiate investigations,” *id.* at 2389, and that a targeted request for such
15 information may be appropriate as part of an investigation. *Id.* at 2386–87.

16 Plaintiffs’ First Amendment freedom of association claim must be dismissed.

17 **4. Plaintiff Shah does not plausibly allege retaliation in violation of his**
18 **First Amendment rights (Count 4).**

19 Plaintiff Shah claims that “[t]wo CBP officers and one HSI officer” retaliated
20 against him for writing religious notes in a journal, initially refusing searches of his
21 journal and electronic devices, and stating “that he wanted to stand up for his
22 constitutional rights.” Compl. ¶ 172. The alleged retaliatory actions are “prolonged
23 detention,” “extensive questioning,” and searches of Shah’s journal and cell phone.
24 *Id.* ¶ 173. Because none of these purported “retaliatory” actions differ from what
25 any traveler might expect to experience in secondary inspection, and occurred only
26 after the search of Shah began, he has not stated a claim for retaliation.

27

1 To state such a claim, a plaintiff must plausibly allege: “(1) he engaged in
2 constitutionally protected activity; (2) as a result, he was subjected to adverse action
3 by the defendant that would chill a person of ordinary firmness from continuing to
4 engage in the protected activity; and (3) there was a substantial causal relationship
5 between the constitutionally protected activity and the adverse action.” *Blair v.*
6 *Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010). To ultimately prevail, Plaintiffs
7 must show that any adverse action “would not have been taken absent the retaliatory
8 motive.” *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019). The First Amendment
9 does not protect “rather minor indignit[ies] and de minimis deprivations of benefits
10 and privileges,” only “adverse, retaliatory actions . . . of [such] a nature that would
11 stifle someone from speaking out.” *Blair*, 608 F.3d at 544. The causation element is
12 “understood to be but-for causation.” *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 917
13 (9th Cir. 2012) (quoting *Hartman v. Moore*, 547 U.S. 250, 260 (2006)).

14 Here, assuming *arguendo* that Plaintiff Shah engaged in constitutionally
15 protected activity, the complaint fails to allege either an “adverse action” or a causal
16 relationship between that activity and Defendants’ alleged actions. The type of
17 border inspection Shah alleges has been upheld time and again as “routine” and
18 cannot be reasonably considered an adverse action that would chill a person of
19 ordinary firmness. *See, e.g., Flores-Montano*, 541 U.S. at 155–56; *Tabbaa*, 509 F.3d
20 at 94–95, 99. Specifically, Shah claims that his personal belongings, including his
21 journal and cell phone, were searched and that he was asked questions related to what
22 CBP officers found, including the religious beliefs and associations documented in
23 his journal. Compl. ¶¶ 114–29. But it is consistent with CBP standard practice—
24 with or without suspicion—to question or route to secondary inspection travelers
25 who are in the process of obtaining their baggage. CBP PIA for TECS at 4. This
26 interaction may involve inspection of a traveler’s possessions. *Id.*; *see also, e.g.,*
27 *Cotterman*, 709 F.3d at 967 (“International travelers certainly expect that their

1 property will be searched at the border.”). Also under typical circumstances,
2 secondary inspection may include a basic (manual) search of a traveler’s electronic
3 devices, again without suspicion. CBP PIA for Elec. Devices at 3, 5–6; *see also*
4 *Cano*, 934 F.3d at 1016 (approving such warrantless searches at the border). DHS
5 policy recognizes that questions about First-Amendment protected activities that
6 “relate to . . . any merchandise [an individual] seeks to bring across the border,” or
7 are used “to validate information supplied by an individual or determine whether
8 potential criminal, civil, or administrative violations exist relating to the laws that
9 DHS enforces or administers,” are pertinent to and within the scope of DHS’s border
10 security charge. McAleenan Memo. at 3. In other words, Shah’s stop did not
11 meaningfully differ from any other routine secondary inspection at the border.

12 Nor is the duration of Shah’s alleged two-hour inspection in any way atypical,
13 such that it would deter a reasonable person from engaging in First-Amendment-
14 protected activity. Compl. ¶ 130. The Supreme Court has observed that “delays of
15 one to two hours at international borders are to be expected,” *Flores-Montano*, 541
16 U.S. at 155 & n.3, and the Second Circuit has noted that “common sense and ordinary
17 human experience suggest that it may take up to six hours for CBP to complete” a
18 routine border inspection, *Tabbaa*, 509 F.3d at 100. To underscore the point, the
19 other two Plaintiffs here allege inspections lasting two hours, Compl. ¶¶ 34, 80, 84,
20 89; three hours, *id.* ¶ 38; and in one instance, six to seven hours, *id.* ¶ 76.

21 Shah also fails to plausibly allege causation. Critically, the allegations
22 demonstrate that a CBP officer directed Shah to secondary inspection *before*
23 becoming aware of any of the constitutionally protected activity described in the
24 complaint. Compl. ¶ 109 (“After Mr. Shah passed through primary inspection
25 without incident, a CBP officer . . . stopped him in the baggage retrieval area and
26 asked him to accompany him for a search.”). As explained, once Shah was in the
27 secondary inspection area, he underwent a routine inspection, during which CBP

1 officers and an HSI agent allegedly encountered his protected speech. But the search
2 began prior to their learning of any exercise of First Amendment rights. The but-for
3 cause of Shah’s secondary inspection, therefore, is not his protected speech, but
4 rather the ordinary operation of CBP’s efforts to secure the border. *See Dousa*, 2020
5 WL 434314, at *9 (finding no retaliation where alleged surveillance occurred “not
6 *because of* [plaintiff’s] protected activities, but because of ICE’s statutory mandate
7 to enforce the nation’s immigration laws”). And to the extent that Plaintiff’s
8 behavior or the results of Defendants’ search influenced the course of the inspection,
9 the only reasonable inference is that Defendants were following up on information
10 gathered during the inspection—including Shah’s objectively suspicious behavior—
11 and tailoring their investigation to it. *See* Compl. ¶ 123; *accord, e.g., Arnold*, 533
12 F.3d at 1010 (acknowledging that discovery of suspicious expressive material during
13 a border search may reasonably “prompt[] a more thorough examination”).

14 Plaintiff Shah’s retaliation claim therefore fails.

15 **5. Plaintiffs do not plausibly allege an Equal Protection violation**
16 **(Count 5).**

17 Finally, Plaintiffs fail to plausibly allege a violation of their equal protection
18 rights. *See* Compl. ¶¶ 177–85. This claim is largely co-extensive with Plaintiffs’
19 First Amendment claims, and should be dismissed for similar reasons.

20 The Constitution’s equal protection⁹ guarantee essentially requires “that all
21 persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne*
22 *Living Ctr.*, 473 U.S. 432, 439 (1985). “The first step in equal protection analysis is
23

24 ⁹ Although the equal protection rights upon which Plaintiffs rely arise from the Fifth
25 Amendment’s Due Process Clause, “the approach to Fifth Amendment equal
26 protection claims has always been precisely the same as to equal protection claims
27 under the Fourteenth Amendment.” *Roy v. Barr*, 960 F.3d 1175, 1181 n.3 (9th
Cir. 2020). This memorandum thus cites to cases analyzing both interchangeably.

1 to identify the state’s classification of groups. . . . The next step in equal protection
2 analysis would be to determine the level of scrutiny.” *Country Classic Dairies, Inc.*
3 *v. State of Mont., Dep’t of Com. Milk Control Bureau*, 847 F.2d 593, 596 (9th
4 Cir. 1988). “To prevail on an Equal Protection claim,” a plaintiff “must show that a
5 class that is similarly situated has been treated disparately.” *Ariz. Dream Act Coal.*
6 *v. Brewer*, 855 F.3d 957, 966 (9th Cir. 2017) (citation omitted). In addition,
7 “discriminatory intent is required to show that state action having a disparate impact
8 violates the Equal Protection Clause.” *McLean v. Crabtree*, 173 F.3d 1176, 1185
9 (9th Cir. 1999). The burden is on plaintiffs to show “that discriminatory purpose
10 was a motivating factor” in the challenged government action. *Vil. of Arlington*
11 *Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977). If a plaintiff makes
12 such a showing, the court considers whether the governmental action in question
13 “targets a suspect class or burdens the exercise of a fundamental right.” *United States*
14 *v. Hancock*, 231 F.3d 557, 565 (9th Cir. 2000). If not, the action is constitutional as
15 long as it meets the “highly deferential” rational basis standard. *Id.* at 566. If so,
16 strict scrutiny applies, which requires an action to be “narrowly tailored to serve a
17 compelling governmental interest.” *Honolulu Wkly., Inc. v. Harris*, 298 F.3d 1037,
18 1047 (9th Cir. 2002) (quoting *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001)).

19 Here, Plaintiffs have failed to plausibly allege that they were subject to unequal
20 treatment as compared to a similarly situated group, based on a discriminatory
21 purpose. Plaintiffs offer the conclusory assertions that Defendants question Muslim
22 travelers, but not “adherents of other faiths” about their religion, and that this alleged
23 disparate treatment “is substantially motivated by an intent to discriminate against
24 Muslims.” Compl. ¶ 182. But as explained above, Defendants have explicit policies
25 prohibiting their employees from treating travelers unequally on the basis of religion,
26 and Plaintiffs have not plausibly alleged any widespread practice that contradicts
27 these policies. *See supra*, pp. 5–6, 15–19. Moreover, Plaintiffs make no concrete

1 allegation that Defendants acted with discriminatory intent or harbor any animus
2 towards Muslims.

3 At most, Plaintiffs allege that three Muslim individuals, two of whom believe
4 they are on a watchlist, are stopped and questioned at the U.S. border in a manner
5 different than the broader population of travelers—including other Muslim travelers.
6 Three Plaintiffs alone do not constitute a suspect class. Nor does the alleged
7 questioning burden their religious exercise. *See supra*, pp. 26–27. Such an allegation
8 would therefore be subject only to rational basis review, and Defendants’ mission of
9 securing the border and protecting the nation against terrorist threats plainly satisfies
10 that undemanding standard.

11 But even if Defendants’ alleged actions were subject to strict scrutiny—which
12 Plaintiffs’ deficient allegations do not support—they would nonetheless pass muster.
13 As discussed in the context of Plaintiffs’ free exercise and free association claims,
14 *see supra*, pp. 27–28, 29–30, Defendants’ alleged questioning is both narrowly
15 tailored, as it focuses only on individuals in specific contexts, and asks about only
16 specific events, and serves the compelling governmental interests of border security,
17 combatting terrorism, and investigating potential violations of law.

18 Plaintiffs’ equal protection claim must be dismissed.

19 **CONCLUSION**

20 For the foregoing reasons, the complaint should be dismissed.

21 Dated: May 31, 2022

Respectfully submitted,

22
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