UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HAMID HASSAN RAZA; MASJID AL-ANSAR; ASAD DANDIA; MUSLIMS GIVING BACK; MASJID AT-TAQWA; MOHAMMAD ELSHINAWY,

Plaintiffs,

v.

CITY OF NEW YORK; MICHAEL R. BLOOMBERG, in his official capacity as Mayor of the City of New York; RAYMOND W. KELLY, in his official capacity as Police Commissioner for the City of New York; DAVID COHEN, in his official capacity as Deputy Commissioner of Intelligence for the City of New York,

Defendants.

No. 13-cv-03448-PKC-JMA

Hon. Judge Joan M. Azrack

PLAINTIFFS' REPLY BRIEF CONCERNING INTERROGATORIES CHALLENGED ON GROUNDS OF FIRST AMENDMENT PRIVILEGE AND RETROACTIVE JUSTIFICATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

Courts have long recognized that civil rights plaintiffs do not give up their First Amendment protections simply by bringing a lawsuit to vindicate their rights. A contrary rule would discourage such plaintiffs from seeking relief in the courts, by transforming discovery into a wide-ranging intrusion on protected speech and association. Here, the identities of Plaintiffs' congregants and members are some of the most sensitive information in this case. At its core, this suit concerns the rights of New York Muslims to practice their religion free of NYPD interference, scrutiny, or stigma. The NYPD's conduct has created anxiety, fear, and dislocation among Plaintiffs' members and congregations. Yet Defendants now seek to multiply these harms through their sweeping interrogatories, which together would require Plaintiffs to identify hundreds of worshippers, volunteers, donors, and other New York Muslims to the police. Plaintiffs should not face that kind of catch-22 in order to pursue their constitutional rights in court—and, indeed, Supreme Court and Second Circuit precedent forecloses Defendants' requests for First Amendment information here. Because Defendants have failed to show a compelling need, they are not permitted to obtain the identities of those associated with Plaintiffs by virtue of their religious beliefs or practice.[1]

Granting Plaintiffs the relief they seek would not prevent Defendants from defending this action. Critically, the current dispute is not about evidence that Plaintiffs intend to use at trial, despite Defendants' claims. Plaintiffs have repeatedly informed Defendants that they will provide the identity of any person whose testimony Plaintiffs rely upon and, in response to Defendants' requests, have already provided the names of numerous organizational leaders who have firsthand knowledge of the effects of NYPD surveillance on their religious activities.

[1] Defendants have served 57 interrogatories, many of which include multiple subparts or apply to multiple Plaintiffs, bringing the true total to well over 100 requests. Plaintiffs challenge the interrogatories set forth in Gorski Decl. Ex. A on grounds of First Amendment privilege and/or retroactive justification.

Defendants will have every opportunity to depose and cross-examine these individuals to test Plaintiffs' claims, in addition to the extensive documentary evidence Plaintiffs have already begun to provide. *See* Pl. Br. 15–16 (ECF No. 49). The dispute that remains is whether Defendants may probe far more widely, to investigate and question congregants, members, and associates whose identity is not central to this case—and who justifiably fear further police interference with their religious beliefs and practices.

I. The First Amendment Protects Plaintiffs' Associational Information.

Defendants' interrogatories seek core associational information protected by the First Amendment, as Plaintiffs have previously explained at length. *See, e.g.*, Pl. Br. 12–19. Notably, Defendants do not specifically defend—or even address—a single one of these interrogatories. *See* Def. Br. 3–12 (ECF No. 89). Instead, Defendants simply assert that their dozens of requests are "narrowly-tailored," Def. Br. 2, while ignoring the fact that they have demanded the identities of scores of individuals engaged in protected activities, even where those identities go far beyond the merits of this case.[2] Taken together, the requests seek the equivalent of complete or partial membership lists—and thus are foreclosed by a line of Supreme Court cases. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 462–63 (1958); *Bates v. Little Rock*, 361 U.S. 516, 523 (1960). These and directly applicable Second Circuit cases establish that the First Amendment privilege protects parties from overreaching demands for associational information and bars discovery where the requesting party has failed to show a compelling need.[3]

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[2] For instance, Defendants seek the identities of all active members, donors, or regular attendees of MGB's predecessor organization, FSNYC (Interrog. No. 11), as well as the identity of every Masjid Al-Ansar congregant who worries whether he or she is safe from NYPD spying (Interrog. No. 9) and every Masjid At-Taqwa congregant who has been intimidated by NYPD video surveillance outside the mosque (Interrog. No. 27). These requests and others are anything but narrowly tailored.

[3] Defendants claim that the individual Plaintiffs are categorically barred from asserting a First Amendment privilege because they lack "standing," but that argument is baseless. *See* Def. Br. 6–7. The privilege does not distinguish between groups and individuals. *See, e.g.*, *Schiller v. City of N.Y.*, 2006 WL

A. Plaintiffs have properly invoked the First Amendment privilege to protect associational information and Defendants have failed to demonstrate a compelling need for it.

The Second Circuit has adopted a well-established test to determine whether the First Amendment privilege applies—yet Defendants ignore or distort every element of this standard. *See* Def. Br. 7–12. The Second Circuit requires a party invoking the privilege to articulate "some resulting encroachment on their liberties," precisely as Plaintiffs have done here. *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1355 (2d Cir. 1989); *see* Raza Decl.; Elshinawy Decl.; Dandia Decl.; Osman Decl. For a party to make this prima facie showing, the Second Circuit has emphasized, "the burden is light." *Terry*, 886 F.2d at 1355. Once the initial threshold is met, the burden shifts to the demanding party to demonstrate a "compelling interest" in the discovery. *Id.* *That* burden, by contrast, is applied strictly, *see Int'l Soc'y for Krishna Consciousness, Inc. v. Lee* ("*ISKCON*"), 1985 WL 315, at *8 (S.D.N.Y. Feb. 28, 1985), to ensure that any infringement of First Amendment interests is "kept to a minimum." *Black Panther Party v. Smith*, 661 F.2d 1243, 1268 (D.C. Cir. 1981), *vacated on other grounds*, 458 U.S. 1118 (1982). To satisfy the compelling-need standard, the requesting party must show that the specific information sought is "'crucial to [its] case,' or that it goes to the 'heart of the claims,'" as well as "the unavailability of alternative sources of information." *ISKCON*, 1985 WL 315, at *8, *17.

3592547 (S.D.N.Y. Dec. 7, 2006) (applying privilege to NYPD discovery requests served on individuals). Indeed, it is plain that an individual can engage in protected speech and association quite apart from formal membership in an organization. Moreover, while the overbreadth doctrine expressly permits a party to assert the First Amendment interests of others, Plaintiffs *themselves* will be injured by the damaging effects that disclosure would have on their own ability to engage in protected speech and association. The fact that disclosure implicates the identities of third parties is no bar to the privilege. *See, e.g., Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 97–98 (1982) (applying privilege to information concerning third-party commercial contacts because disclosure could "cripple" the plaintiff's activities). Finally, Defendants' standing argument is especially specious because they themselves have asserted the privacy interests of third parties as a basis for withholding discovery. *See, e.g.*, Def. Opp. to Mot. for Expedited Discovery at 15 (ECF No. 23).

Defendants seek to invert this standard: they would raise an impossibly high bar to invoke the privilege, while excusing themselves from any showing of compelling need. In particular, Defendants exaggerate the initial showing required by the Second Circuit, suggesting that Plaintiffs must put forward even more detailed and "undisputed" evidence of past or present harassment. *See* Def. Br. 9–10. To the contrary, Second Circuit authorities take a "commonsense approach" when analyzing chilling effects, rejecting outright Defendants' claim that Plaintiffs must show a history of past reprisals. *Local 1814 Int'l Longshoremen's Ass'n v. Waterfront Comm'n of N.Y. Harbor*, 667 F.2d 267, 271–72 (2d Cir. 1981); *see Terry*, 886 F.2d at 1355.[4]

Just as importantly, Plaintiffs have more than satisfied their "light" burden of articulating an encroachment on First Amendment-protected activities. *Id.*; *see also* Pl. Br. 12–15. Plaintiffs have submitted declarations detailing how disclosure would directly and substantially affect their ability to engage in protected speech, association, and religious practice. *See* Dandia Decl. ¶¶ 5–7; Osman Decl. ¶¶ 5–8; Elshinawy Decl. ¶¶ 5–7; Raza Decl. ¶¶ 5–7. Far from alleging mere discomfort, as Defendants suggest, Def. Br. 9, Plaintiffs describe the loss and alienation of congregants, members, and religious community that would result.[5] In addition, Plaintiffs have pointed to a documented history of harassment, intimidation, and violence directed at American Muslims and those who appear to be Muslim. *See* Hirose Decl. Ex. F, U.S. Dep't of Justice, Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later (Oct. 19, 2011), http://1.usa.gov/1h7jur6. And Plaintiffs point also to the NYPD's own practice of singling out Muslims for mistreatment and scrutiny. Indeed, the NYPD recently disbanded

[4] Defendants resort to a string of out-of-district cases to support their argument that Plaintiffs have not satisfied their initial burden, Def. Br. 7–12, but all of their cases rejecting the privilege depart from the Second Circuit's standard or involve a far weaker showing than Plaintiffs have provided here, where the claims flow directly from law enforcement targeting based on religious identity, belief, and practice.

[5] Contrary to Defendants' claim, Def. Br. 10, fear of adverse consequences based on immigration status is also accepted evidence of chilling effect and supports a claim of privilege. *See Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 954 F. Supp. 2d 127, 144 n.8 (E.D.N.Y. 2013).

one unit that, for years, engaged in the suspicionless surveillance of Muslim restaurants, businesses, and places of worship. *See* Matt Apuzzo & Joseph Goldstein, *New York Drops Unit That Spied on Muslims*, N.Y. Times, Apr. 15, 2014, http://nyti.ms/1p9gVxq.

Defendants, for their part, fail to show a compelling need for any of their many, wide-ranging requests. *See* Pl. Br. 15–16. They do not address their need for a single one of the interrogatories at issue, relying instead on the generic claim that the requests "seek the identities of persons referred to by Plaintiffs" and therefore "unquestionably go to the heart of Plaintiffs' claims." Def. Br. 13–14. Neither the premise nor the conclusion of that assertion is accurate. Defendants' requests go far beyond individuals identified in the Complaint, and they stray far from the heart of this lawsuit. For example, Defendants seek the identities of all persons present at a community event hosted by MGB, which as many as 200 people attended (Interrog. No. 17). While the Complaint mentions this event in its narrative, Compl. ¶¶ 95–96, it does not refer to every person who attended, nor is that information significant in any way.[6] Defendants also seek the identity of every person who Plaintiff Dandia introduced to NYPD informant Shamiur Rahman in 2012—a list of dozens of individuals, many of whom are members of MGB or congregants at local mosques (Interrog. No. 12). Again, this information has little bearing on the claims or defenses in this case. Ultimately, Defendants' argument is built on the fiction that simply because an event, activity, or group of people is referenced in the Complaint, Defendants have a compelling need to know the identity of every person involved. That argument, however, would not survive the requirements of Rule 26, let alone the First Amendment privilege.

[6] Similarly, Interrogatory No. 19 seeks the identities of MGB members who gathered outside a mosque during a conversation with a confirmed NYPD informant. This exchange is not central to the case, and Defendants have not shown a compelling need for these identities. If Defendants wish to dispute whether this conversation occurred, that information should be available in their own files.

Crucially, Defendants have multiple other avenues available to assess and challenge Plaintiffs' claims of religious discrimination. As explained above, Plaintiffs have already provided the names of mosque leaders, charity board members, and others as responsive to many of Defendants' requests, identifying 25 individuals with firsthand knowledge of the facts at issue. In addition to depositions, Defendants will have at their disposal the evidence elicited by their numerous document requests, not to mention the thousands of pages already in Defendants' files, including the information gathered by their own undercover officers and informants. Defendants make no effort to show that they lack alternative ways of testing the claims actually at issue—and this, by itself, is fatal. *See* Pl. Br. 15–16.

B. Plaintiffs have not "waived" their right to assert a First Amendment privilege.

Ignoring well-established law, Defendants make the extreme argument that Plaintiffs have "waived" their First Amendment privilege by bringing suit. As an initial matter, Defendants' waiver theory is fundamentally inconsistent with the Second Circuit precedent set out above. Far from accepting Defendants' categorical waiver theory, the Second Circuit requires courts to apply a burden-shifting analysis to invocations of First Amendment privilege. Moreover, numerous appellate and district courts have rejected Defendants' exact waiver argument. *See, e.g.*, *Black Panther Party*, 661 F.2d at 1265–66; *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 954 F. Supp. 2d 127, 139–44 (E.D.N.Y. 2013); *Schiller*, 2006 WL 3592547, at *5; *ISKCON*, 1985 WL 315, at *9 n.16.

As a result, it is unsurprising that Defendants have failed to marshal binding or even persuasive authority in support of their waiver argument. Defendants rely primarily on dicta from a 1958 district court opinion, *Indep. Prods. Corp. v. Loew's, Inc.*, 22 F.R.D. 266, 276-77 (S.D.N.Y. May 29, 1958), which pre-dates even *NAACP*, 357 U.S. 449. Defendants' other cases

fare no better. Only one of these cases, an unpublished two-page order, concerns the First Amendment privilege at all: *Ferrone v. Dan Onorato*, 2007 U.S. Dist. LEXIS 31097, at *3–4 (W.D. Pa. Apr. 27, 2007).[7] But *Ferrone*'s waiver analysis relies solely on *Blue Lake Forest Products v. United States*, 75 Fed. Cl. 779, 783–86 (Fed. Cl. 2007)—yet another out-of-circuit case concerning the waiver of the *attorney–client* privilege. In sum, Defendants' extreme position is foreclosed—not supported—by the relevant legal authorities.

For the same reasons, Defendants' fallback argument—that Plaintiffs have "waived" the privilege with respect to certain identities—also fails. *See* Def. Br. 5. Under Second Circuit precedent, whether Defendants are entitled to any particular request for protected information is controlled by the compelling-need analysis. As explained above, Defendants have not established a compelling need for any such information.

In sum, civil rights plaintiffs do not forfeit their First Amendment rights by filing a lawsuit. Rather, the Second Circuit's burden-shifting framework addresses Defendants' precise concerns by permitting discovery where a party has shown a compelling need. This framework—not a waiver rule—addresses the competing interests at stake, in order to ensure that discovery does not improperly intrude on protected speech and association.[8]

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[7] Defendants rely heavily on inapposite cases involving the Fifth Amendment privilege against self-incrimination. This privilege implicates distinctly different policy concerns, as it would permit a plaintiff to conceal potentially criminal misconduct in a civil action. It is unsurprising, therefore, that Defendants' cases arose in far different contexts. *See Guadagni v. N.Y.C. Transit Auth.*, 2009 WL 205050, at *6 (E.D.N.Y. Jan. 27, 2009) (plaintiff could not assert a Fifth Amendment privilege to avoid statutory prerequisite to bringing action in tort); *Mt. Vernon Sav. & Loan Ass'n v. Partidge Assocs.*, 679 F. Supp. 522, 528-29 (D. Md. 1987) (suggesting in dicta that defendants in fraud action might fail to avoid summary judgment on counterclaims where they invoked Fifth Amendment privilege).

[8] Defendants' reliance on *Sherwin-Williams Co. v. Spitzer*, 2005 WL 2128938, at *8–10 (N.D.N.Y. Aug. 24, 2005), to "question" the standing of the institutional Plaintiffs falls flat. *See* Def. Br. 6 n.5. There, the court held: "Unequivocally, [the organizational plaintiff], without a need for particularized proof from its members, has standing as to the Equal Protection Clause cause of action." *Id.* at *8.

II. Defendants' Interrogatories Impermissibly Seek To Retroactively Justify The NYPD's Investigations.

Defendants are not entitled to information that would retroactively justify their investigations. Defendants have conceded this point, *see, e.g.*, Hr'g Tr. 18:22–19:9 (3/19/14), but claim that their wide-ranging requests in search of derogatory information serve other purposes. Yet Defendants cannot circumvent this well-established rule simply by resorting to various other pretexts. *See* Pl. Br. 21–25; Pl. Reply Br. 1, 4–5 (ECF No. 56). Cases in both the discrimination and law enforcement contexts are clear that the only information relevant to Defendants' decision-making is what they knew *at the time* they decided to investigate Plaintiffs.[9] And despite Defendants' claim that Plaintiffs have "failed to point to any legal authority" for their position, Def. Br. 15, Plaintiffs' have offered numerous supporting authorities. *See* Pl. Br. 20–21 (collecting cases). Because Interrogatories No. 26, 53, 55, and 56 ultimately seek to retroactively justify NYPD investigative activity, these interrogatories should be denied.[10]

Recognizing that they cannot openly demand information in order to retroactively justify the NYPD's investigations, Defendants describe their requests as "probative of disputed issues of fact." Def. Br. 16. That is badly misleading for at least two reasons. First, Defendants have made no attempt to show that their requests are tailored to information *already* in the NYPD's files—

[9] Contrary to Defendants' circular argument, Plaintiffs do not "waive" this objection by "questioning whether the NYPD had acted with a legitimate law enforcement purpose." Def. Br. 15. Rather, courts have made clear that the purpose inquiry is, in fact, a limited one in the discrimination and law enforcement contexts: the relevant information is what was available to Defendants at the time of their decision-making, not whatever they might try to unearth after the fact. *See* Pl. Br. 20–21.

[10] Defendants make the new and surprising claim that Plaintiffs failed to assert their retroactive justification objection, *see* Def. Br. 15 n.10, but Plaintiffs have repeatedly stated this objection. For each of the requests at issue, Plaintiffs objected on the basis of "Undue Burden," which was expressly defined to include relevance. *See* Pl. Responses and Objections ¶ 6 (Shammas Decl. Ex. B) (objecting on the ground that the interrogatories "seek information or documents that are not relevant to the subject matter of this action and are not reasonably calculated to lead to the discovery of admissible evidence"). If anything, Plaintiffs' supplemental responses—which Defendants ignore and fail to provide to the Court—made Plaintiffs' objections even clearer. *See* Pl. Suppl. Responses and Objections (Gorski Decl. Ex. B).

let alone specific facts that Plaintiffs intend to contest. Second, because Defendants have produced fewer than 200 pages out of thousands they have admitted are responsive, it is not even possible to know what facts may ultimately be in dispute. By any measure, Defendants' requests are both overbroad and premature. The proper way to address any disputed fact is through the targeted, sequential process that Plaintiffs have proposed and Rule 26 permits. *See* Pl. Br. 22–23.

Defendants' other theories of relevance disregard equal protection doctrine and the permissible scope of discovery. Specifically, Defendants contend that their interrogatories are probative of "credibility[,] reputation and stigma." Def. Br. 16. But to establish their constitutional claims, Plaintiffs need not prove either stigmatic or reputational harm, as they have explained. *See* Pl. Br. 23–25. Once Plaintiffs show the existence of a discriminatory policy or practice, stigmatic harm is presumed. *See* Pl. Reply Br. 1–2 (collecting cases).

Defendants' argument that their requests "constitute[] potential impeachment material" is also simply an attempt to re-label retroactive justification. Def. Br. 16. Defendants are not entitled to any and all discovery that could conceivably undermine Plaintiffs' credibility, and Defendants' interrogatories are not tailored to material concerning truthfulness. Pl. Reply Br. 4.

Finally, Defendants' explanations of their interrogatories are not just confusing, they are contradictory. Plaintiffs respond to each of these arguments in turn:

Interrogatory No. 26: Defendants' argument leaves no doubt that this request is aimed at retroactive justification: they admit that they seek new information about third-parties, Zam Zam Shop and Taqwa Bookstore, because "these entities are believed to have engaged in conduct which warranted policy activity." Def. Br. 16. Moreover, contrary to Defendants' claim, the request does not seek information about Plaintiff Masjid At-Taqwa's structure at all; it instead asks about individuals associated with these *other* entities. This information is irrelevant.

Interrogatory No. 53: As an initial matter, Defendants' request for a complete list of fundraising events and collections is directed to all Plaintiffs, notwithstanding the fact that only MGB is alleging a decline in donations. Insofar as Defendants seek this information from other Plaintiffs, the interrogatory should be denied on retroactive justification or relevance grounds.

For MGB, Plaintiffs offered to provide a list of fundraising events and the amounts collected. However, MGB's response would be limited to the events from March 3, 2012 through September 3, 2012—a limitation consistent with the Court's ruling on Defendants' similar document request. *See* Hr'g Tr. 99:23-24 (3/19/14). Defendants rejected this proposal.[11]

Interrogatory No. 55: Plaintiffs' past and present employers are simply irrelevant to the claims and defenses in this case, and Defendants cannot muster a coherent argument to the contrary. Because this information has no connection to the litigation, it is an impermissible fishing expedition for potentially derogatory information.

Interrogatory No. 56: Plaintiffs' arrest histories, if any, are also irrelevant. Arrest records, to the extent they even exist, cannot be used to retroactively justify the NYPD's investigations now. Defendants' fallback rationales fare no better. Contrary to their suggestion, and as Defendants are well aware, no individual Plaintiff is asserting "economic loss." Defendants' other tenuous theories of relevance, which amount to "character" or "reputation" evidence, should be rejected for all the reasons above. *See also* Pl. Br. 23–25.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Interrogatories, as set forth in the attached Gorski Declaration, Exhibit A.

[11] Because this interrogatory does not seek donor names, Defendants' references to redaction are irrelevant. *See* Def. Br. 16. It is true, however, that Plaintiffs have offered to provide an anonymized compilation of donation information for MGB, rather than *all* financial records as Defendants have demanded. *See* Pl. Br. 6. This compilation would not be limited to a six-month window.

Dated: August 8, 2014
New York, New York

Respectfully submitted,

/s/ Hina Shamsi

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