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10 **UNITED STATES DISTRICT COURT**
11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

12
13 ABDIRAHMAN ADEN KARIYE,
14 MOHAMAD MOUSLLI, and
15 HAMEEM SHAH,

16 *Plaintiffs,*

17 v.

18 ALEJANDRO MAYORKAS,
19 Secretary of the U.S. Department of
20 Homeland Security, in his official
21 capacity; CHRIS MAGNUS,
22 Commissioner of U.S. Customs and
23 Border Protection, in his official
24 capacity; TAE D. JOHNSON, Acting
25 Director of U.S. Immigration and
26 Customs Enforcement, in his official
27 capacity; and STEVE K. FRANCIS,
28 Acting Executive Associate Director,
Homeland Security Investigations, in
his official capacity,

Defendants.

**PLAINTIFFS’ OPPOSITION TO
DEFENDANTS’ MOTION TO
DISMISS**

No. 2:22-cv-01916-FWS-GJS

Hon. Fred W. Slaughter

Hearing

Date: July 28, 2022

Time: 10:00 a.m.

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1 INTRODUCTION

2 “How many times a day do you pray?” “Do you attend mosque?” “Which
3 mosque do you attend?” “Are you Sunni or Shi’a?” These are just some of the deeply
4 personal and religiously intrusive questions that federal border officers require
5 Plaintiffs—three Muslim U.S. citizens—to answer when they return home to the
6 United States from international travel. Border officers ask these questions pursuant
7 to a broader policy and/or practice by U.S. Customs and Border Protection (“CBP”)
8 and Homeland Security Investigations (“HSI”) of targeting Muslim American
9 travelers for questioning about their religious beliefs, practices, and associations, and
10 retaining the answers in a law enforcement database for up to 75 years. This type of
11 intrusive questioning, and the retention of Plaintiffs’ responses, satisfies no
12 legitimate—let alone compelling—government interest. It violates Plaintiffs’ rights
13 to practice their religion without undue government interference and to be treated
14 equally with other Americans.

15 In an effort to close the courthouse doors on Plaintiffs, Defendants urge the
16 Court to invert the bedrock standards that apply on a motion to dismiss under Rule
17 12(b)(6)—to reject Plaintiffs’ well-pled allegations, to decide fact-intensive
18 questions without the benefit of discovery, and to draw every inference in
19 Defendants’ favor. But at this early phase in litigation, the Court must do just the
20 opposite. Each of Plaintiffs’ claims is supported by concrete factual allegations
21 regarding specific instances of religious questioning. Indeed, several of Plaintiffs’
22 claims—under the Establishment Clause, Free Exercise Clause, and Equal
23 Protection Clause—trigger strict scrutiny, which requires that *the government* bear
24 the heavy burden of showing that its religious questioning is narrowly tailored to a
25 compelling interest. Yet Defendants’ brief utterly fails to explain how they will meet
26 that standard—much less establish that a violation of strict scrutiny is implausible.
27 Instead, Defendants repeat the generic refrain that their questioning is justified by
28 the government’s interest in “protecting the U.S. border” and “preventing terrorism.”

1 Not once, however, do Defendants bother to explain *how* religious
2 questioning actually protects the border or prevents terrorism. What is the
3 connection between how many times a Muslim individual prays each day and any
4 potential act of terrorism? Defendants do not say—because there is none. What
5 bearing does a Muslim traveler’s adherence to Sunni or Shi’a religious tenets have
6 on border security? Again, Defendants do not say. To connect such questions to
7 terrorism, Defendants would have to rely on false and offensive stereotypes about
8 Muslims. Well over one billion people worldwide identify as Muslims, and many
9 engage in religious practices such as praying and attending mosque. Suggesting that
10 these practices render Muslims suspect is factually untenable, religiously
11 discriminatory, and deeply stigmatizing to Muslim Americans. And even if
12 Defendants could somehow present evidence demonstrating otherwise, it would not
13 be appropriate at this stage of the litigation. Accepting Plaintiffs’ plausible
14 allegations as true and drawing all reasonable inferences in their favor, as the law
15 requires, Defendants’ motion to dismiss should be denied.

16 **FACTUAL BACKGROUND**

17 Plaintiffs Imam Abdirahman Aden Kariye (“Imam Kariye”), Mohamad
18 Mouslli (“Mr. Mouslli”), and Hameem Shah (“Mr. Shah”) are Muslim U.S. citizens
19 who have been questioned by Defendants’ border officers about their religious
20 beliefs, practices, and associations upon return to the United States from abroad.
21 Compl. ¶¶ 8–10, 31–134. In total, they have experienced ten incidents of religious
22 questioning by border officers at six different ports of entry. *Id.* ¶¶ 31–134.
23 Defendants retain records of Plaintiffs’ responses to these questions in a DHS
24 database called “TECS” for up to 75 years, where they are accessible to officers from
25 over 45,000 law enforcement departments. *Id.* ¶¶ 28–29, 134.

26 The religious questioning takes place during secondary inspection, a
27 procedure by which border officers detain, question, and search certain travelers
28 before they are permitted to enter the country. *Id.* ¶¶ 25–26, 32–60, 74–95, 108–130.

1 When border officers select travelers for secondary inspection, the officers—
2 typically armed and wearing government uniforms—detain the individuals in an area
3 separate from the general inspection area and prohibit them from leaving without
4 officers’ express permission. *Id.* ¶ 26. During these inspections, the officers take
5 possession of the travelers’ passports and conduct searches of their belongings,
6 including their electronic devices. *Id.* ¶¶ 26, 32, 74, 116–32.

7 Border officers have detained Plaintiffs for periods of time ranging from one
8 to seven hours. *Id.* ¶¶ 34, 38, 42, 52, 76, 80, 84, 130. Because of the coercive nature
9 of the secondary inspection environment, Plaintiffs have no meaningful choice but
10 to disclose their religious beliefs, practices, and associations in response to officers’
11 inquiries. *See, e.g., id.* ¶¶ 25–27, 32, 46–50, 74–78, 111–15.

12 Imam Kariye has been subjected to religious questioning during secondary
13 inspection at least five times over the last six years. *Id.* ¶¶ 31–60.¹ In one instance, a
14 CBP officer asked him which mosque he attends and demanded details about his
15 participation in Hajj, an Islamic religious pilgrimage. *Id.* ¶¶ 33–37. On another
16 occasion, border officers asked Imam Kariye to identify what “type” of Muslim he
17 is (“Are you Sunni or Shi’a?” “Are you Salafi or Sufi?”), and then asked him
18 questions regarding his religious education and beliefs, including whether he listens
19 to music and what his views are on a particular Islamic scholar. *Id.* ¶ 47.

20 Mr. Mouslli has been subjected to questioning about his religious beliefs,
21 practices, and associations during secondary inspection at least four times over the
22
23

24 _____
25 ¹ These incidents took place on September 12, 2017, at Seattle-Tacoma International
26 Airport; February 6, 2019, at the Peace Arch Border Crossing; November 24, 2019,
27 at the Ottawa International Airport; August 16, 2020, at the Seattle-Tacoma
28 International Airport; and January 1, 2022, at the Minneapolis-Saint Paul Airport.
Compl. ¶¶ 33–57.

(cont’d)

1 last six years. *Id.* ¶¶ 74–95.² CBP officers have asked him whether he is a Muslim,
2 whether he is Sunni or Shi’a, whether he attends mosque, and how many times a day
3 he prays. *Id.* ¶¶ 77, 81, 85, 90.

4 Mr. Shah was subjected to religious questioning during a secondary inspection
5 on May 7, 2019, at LAX. *Id.* ¶ 108. Border officers searched his belongings and read
6 his personal journal. *Id.* ¶¶ 110–14. When they found references to his faith in his
7 journal, they interrogated him about it: “How religious do you consider yourself?”
8 and “What mosque do you attend?”, among other religious questions. *Id.* ¶¶ 117,
9 127–28. One officer informed Mr. Shah, “I’m asking because of what we found in
10 your journal.” *Id.* ¶ 118. During the encounter, Mr. Shah stated that he did not
11 consent to being searched and otherwise attempted to assert his constitutional rights
12 at least eight times. *Id.* ¶¶ 110, 113, 116, 118, 120, 122, 123, 126. Officers retaliated
13 against him for these objections by intensifying their search and asking additional
14 invasive religious questions. *Id.* ¶¶ 110–30.

15 Border officers’ religious questioning is stigmatizing and deeply humiliating
16 to Plaintiffs, who reasonably perceive the questioning to convey a clear message:
17 The U.S. government views adherence to Islamic religious beliefs and practices as
18 inherently suspicious and bears hostility toward the faith and its followers. *Id.* ¶¶ 65,
19 102, 140. This religious questioning imposes substantial pressure on Plaintiffs to
20 abandon or curb certain visible religious practices while traveling—contrary to their
21 sincerely held religious beliefs—to avoid incurring additional scrutiny and religious
22 questioning. *Id.* ¶¶ 66–70, 103–04, 141–42. For example, while returning home from
23 international travel, Imam Kariye and Mr. Mouslli refrain from physical acts of
24 prayer; Imam Kariye does not wear his Muslim cap and avoids carrying religious
25 texts; and Mr. Shah will no longer carry his religious journal. *Id.* All three men are

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27 ² These incidents took place on August 9, 2018, at a border crossing near Lukeville,
28 Arizona; August 19, 2019, at Los Angeles International Airport (“LAX”); March 11,
2020, at LAX; and June 5, 2021, at LAX. *Id.* ¶¶ 74–93.

1 proud Muslims and experience significant distress as a result of Defendants’
2 coercive religious questioning, the ongoing retention of records documenting their
3 responses to these questions, and the substantial pressure to modify their religious
4 practices. *Id.* ¶¶ 71–72, 105–06, 142–43.

5 The religious questioning of Plaintiffs and retention of their responses is part
6 of a policy and/or practice by Defendants that has persisted for more than a decade.
7 In 2011, DHS received “numerous” complaints from Muslim Americans about such
8 questioning. *Id.* ¶¶ 16–20. In the intervening years, several Muslim Americans have
9 challenged such questioning in court. *See infra* § I (collecting cases). Moreover,
10 Defendants’ written policies expressly permit border officers to question Americans
11 about their religion. *Id.* ¶ 23. For example, DHS policy allows officers to collect and
12 retain information protected by the First Amendment in several circumstances. *See*
13 Memorandum from Kevin K. McAleenan to All DHS Employees at 2,
14 <https://perma.cc/6ZN4-TAKB> (“McAleenan Memo”). U.S. Immigration and
15 Customs Enforcement (“ICE”) requires officers who work at ports of entry to carry
16 a questionnaire to guide their interrogations of travelers, which includes intrusive
17 questions about a traveler’s religious beliefs, practices, and associations. Compl.
18 ¶ 23. In addition, CBP officers are required to create records of every secondary
19 inspection at an airport or land crossing, and officers routinely document Muslim
20 travelers’ responses, including Plaintiffs’ responses, to questions about their
21 religious beliefs, practices, and associations. *See, e.g., id.* ¶¶ 28, 41, 79, 83, 134.
22 Officers input those records into the TECS database, where they are maintained for
23 up to 75 years and accessible to tens of thousands of law enforcement agencies. *Id.*
24 ¶ 29; *see also id.* ¶ 134 (TECS record of Mr. Shah containing information about his
25 religious practice).

26 On March 24, 2022, Plaintiffs filed this lawsuit, seeking: (1) a declaration that
27 the religious questioning of Plaintiffs, and the policies and practices of DHS and
28 CBP set forth in the Complaint, are unlawful; (2) an injunction against further

1 religious questioning of Plaintiffs; (3) expungement of all records collected through
2 religious questioning of Plaintiffs; and (4) expungement of all records collected as a
3 result of retaliatory action against Mr. Shah. On May 31, 2022, Defendants moved
4 to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.
5 *See* Mot. to Dismiss, ECF No. 40-1 (May 31, 2022) (“Defs. Br.”).

6 LEGAL STANDARDS

7 In determining whether Defendants have satisfied their burden on a Rule
8 12(b)(6) motion, the Court must “accept the complaint’s well-pleaded factual
9 allegations as true and construe all inferences in the [Plaintiffs’] favor.” *Ariz.*
10 *Students’ Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016).
11 Defendants’ motion to dismiss must be denied if Plaintiffs have alleged “enough
12 facts to state a claim to relief that is plausible on its face.” *See Bell Atl. Corp. v.*
13 *Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678
14 (2009) (plaintiffs need only plead “factual content that allows the court to draw the
15 reasonable inference that the defendant is liable for the misconduct alleged”). This
16 plausibility standard is not a “probability requirement.” *Starr v. Baca*, 652 F.3d
17 1202, 1217 (9th Cir. 2011) (emphasis in original). Rather, it “simply calls for
18 enough fact to raise a reasonable expectation that discovery will reveal evidence’ to
19 support the allegations.” *Id.* (quoting *Twombly*, 550 U.S. at 556).

20 ARGUMENT

21 **I. Plaintiffs plausibly allege a policy and/or practice of targeting Muslim** 22 **Americans for religious questioning during secondary inspection.**

23 Defendants’ motion to dismiss unspecified claims on the ground that the
24 Complaint does not adequately plead a policy and/or practice of targeting Muslims
25 for religious questioning should be denied. The Complaint plausibly alleges that
26 Defendants have a policy and/or practice of (1) targeting Muslim Americans,
27 including Plaintiffs, for religious questioning; or (2) alternatively, subjecting
28 travelers—regardless of their faith—to religious questioning; and (3) retaining

1 records reflecting answers to such questioning for up to 75 years. Compl. ¶¶ 16–29,
2 31–56, 73–92, 107–34, 152, 160, 169. These allegations establish Plaintiffs’
3 standing to seek declaratory and injunctive relief.

4 Critically, Defendants do not dispute the second and third allegations above.
5 They do not dispute Plaintiffs’ allegation, pled in the alternative, *id.* ¶¶ 152, 160,
6 169, that Defendants have a policy and/or practice of subjecting some travelers,
7 regardless of their faith, to religious questioning. *See* Defs. Br. 1, 16 n.7, 21, 32. Nor
8 do they dispute that Defendants’ policies authorize the retention of records reflecting
9 answers to religious questioning for up to 75 years. Defs. Br. 8. Because Defendants
10 do not dispute the plausibility of these allegations, Plaintiffs may pursue declaratory
11 and equitable relief, including, at a minimum, (1) a declaration that the religious
12 questioning of Plaintiffs, and the policies and practices of Defendants that permit
13 religious questioning in general, are unlawful; (2) an injunction prohibiting the
14 religious questioning of Plaintiffs; and (3) the expungement of records of Plaintiffs’
15 responses to religious questions, which Defendants retain in accordance with their
16 policies. *See, e.g., Fazaga v. FBI*, 965 F.3d 1015, 1053 & n.32 (9th Cir. 2020) (en
17 banc), *rev’d on other grounds*, 142 S. Ct. 1051 (2022) (discussing expungement
18 remedy); *Norman-Bloodsaw v. Lawrence Berkeley Lab’y*, 135 F.3d 1260, 1275 (9th
19 Cir. 1998) (same). Plaintiffs may pursue this relief regardless of whether they have
20 plausibly alleged a policy and/or practice of specifically *targeting Muslims* for
21 religious questioning.

22 However, for the reasons below, Plaintiffs’ allegations concerning
23 Defendants’ policy and/or practice of targeting Muslims are plausible. Accordingly,
24 Plaintiffs may also pursue relief that would specifically declare unlawful the
25 discriminatory targeting of Muslims for religious questioning, and prohibit the
26 religious questioning of Plaintiffs on the ground that it is discriminatory.

27 The Complaint describes a practice or a “pattern of officially
28 sanctioned . . . behavior” involving the targeting of Muslim Americans for religious

1 questioning. *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) (quoting
2 *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985).³ It details ten incidents in
3 which three Muslim Americans were subject to similar religious questioning by
4 numerous different border officers at six different points of entry. Compl. ¶¶ 31–56,
5 73–92, 107–34. It further alleges that this type of religious questioning—targeting
6 Islamic beliefs, practices, and associations—has been an ongoing practice for over
7 a decade, as documented by numerous complaints made by Muslim Americans to
8 DHS. *See id.* ¶¶ 16–30; *see also Cherri v. Mueller*, 951 F. Supp. 2d 918, 933–34
9 (E.D. Mich. 2013) (challenge brought by several Muslim Americans to religious
10 questioning at the border); *El Ali v. Barr*, 473 F. Supp. 3d 479, 524–26 (D. Md.
11 2020) (same); *Janfeshan v. U.S. CBP*, No. 16-cv-6915, 2017 WL 3972461, at *4,
12 *10 (E.D.N.Y. Aug. 21, 2017) (challenge brought by Muslim lawful permanent
13 resident to border search and religious questioning). The Complaint also alleges that
14 non-Muslims are not routinely subject to similar questioning. Compl. ¶¶ 16–24.

15 Under Ninth Circuit case law, the ten similar incidents experienced by the
16 three Plaintiffs at the hands of numerous different border officers, coupled with a
17 history of similar complaints, are plainly sufficient to allege a policy and/or practice
18 of targeting Muslims for religious questioning. *See, e.g., Melendres v. Arpaio*, 695
19 F.3d 990, 995, 999 (9th Cir. 2012) (affirming district court’s finding that defendants
20 engaged in a policy or practice of unconstitutional traffic stops where five plaintiffs

21 ³ *Mayfield’s* “officially sanctioned” dictum originated in *LaDuke*, 762 F.2d at 1324,
22 where the Ninth Circuit was describing one of several district court findings—not
23 imposing a new bar to pleading the likelihood of recurrence of an injury. *See also*
24 *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001) (there are “at least” two ways
to demonstrate that an injury is likely to recur).

25 Insofar as Defendants suggest that a policy or practice is a requirement to name
26 them as defendants in a suit for injunctive relief outside of 42 U.S.C. § 1983, *see*
27 *Defs. Br. 19*, they have cited no law in support of that proposition. And, in any event,
28 Defendants do not dispute that Plaintiffs have plausibly alleged a policy and/or
practice with respect to religious questioning in general and the retention of records.

1 were involved in three incidents); *see also Askins v. U.S. Dep’t of Homeland Sec.*,
2 No. 12-cv-2600, 2013 WL 5462296, at *7 (S.D. Cal. Sept. 30, 2013), *on*
3 *reconsideration in part*, No. 12-cv-2600, 2015 WL 12434362 (S.D. Cal. Jan. 29,
4 2015) (finding a “pattern of officially sanctioned behavior” where “Plaintiffs have
5 plead[ed] two instances of CBP officers improperly searching and seizing the
6 persons and property of two separate individuals at two separate ports of entry”); *see*
7 *also Jibril v. Mayorkas*, 20 F.4th 804, 812 (D.C. Cir. 2021) (holding that plaintiffs
8 had standing to sue heads of government agencies based on two incidents of
9 prolonged detention and intrusive searches); *Cherri*, 951 F. Supp. 2d at 933–34
10 (holding that Muslim Americans adequately stated policy and practice of religious
11 questioning based on allegations similar to those here).⁴

12 Moreover, in the Section 1983 context, the Ninth Circuit has inferred a
13 practice from a pattern of repeated behavior towards a single individual, *see Oyenik*
14 *v. Corizon Health, Inc.*, 696 F. App’x 792, 794 (9th Cir. 2017), and from the
15 involvement of many different officers, *see Henry v. Cnty. of Shasta*, 132 F.3d 512,
16 521 (9th Cir. 1997), *opinion amended on denial of reh’g*, 137 F.3d 1372 (9th Cir.
17 1998). Both factors are present here. *See, e.g.*, Compl. ¶¶ 32, 74, 108. The Ninth
18 Circuit has also been clear that “unofficial” and “informal” policy and practice
19 suffice for liability. *Kirkpatrick v. Cnty. of Washoe*, 843 F.3d 784, 797 (9th Cir.
20 2016); *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1233–35 (9th Cir. 2011).

21 In arguing that Plaintiffs have not plausibly alleged a discriminatory policy or
22 practice, Defendants err in several respects. First, they attack a straw man by

23 _____
24 ⁴ *Melendres* involved additional evidentiary support for the existence of a policy or
25 practice because it was decided on summary judgment, after the benefit of discovery.
26 *See Melendres*, 695 F.3d at 995; *see also Melendres v. Maricopa Cnty.*, No. CV-07-
27 2513-PHX-GMS, 2009 WL 2707241, at *4 (D. Ariz. Aug. 24, 2009) (holding that
28 plaintiffs adequately alleged an unconstitutional policy or practice where the
complaint described “three instances in which five Plaintiffs were subjected to the
challenged conduct”).

1 asserting that Plaintiffs have failed to allege a policy or practice of targeting “all”
2 Muslims for religious questioning. Defs. Br. 1–2. Plaintiffs nowhere claim that
3 Defendants subject all Muslims who cross the border, or even all Muslims referred
4 to secondary inspection, to religious questioning. Rather, Plaintiffs allege that under
5 Defendants’ policy and/or practice, Muslims are routinely targeted and subject to
6 religious questioning, and Plaintiffs are swept up as a result. Compl. ¶¶ 16–24.

7 Second, Defendants maintain that the ten incidents in the Complaint, which
8 Plaintiffs plausibly allege were discriminatory, were consistent with their policies—
9 while also arguing that Plaintiffs’ allegations of discrimination are inconsistent with
10 those policies. Defs. Br. 17–18. Defendants cannot have it both ways. At bottom,
11 given the repeated incidents experienced by Plaintiffs over the past six years, and
12 Defendants’ own admission that their policies permit religious questioning under
13 some circumstances, it is plausible that border officers are, in fact, interpreting the
14 McAleenan Memo and CBP Standards of Conduct to permit the targeting of
15 Muslims for religious questioning. *See* Defs. Br. 16. Indeed, the McAleenan Memo
16 explicitly authorizes the collection, maintenance, and use of “information protected
17 by the First Amendment” in several situations, including where such information “is
18 *relevant to* a criminal, civil, or administrative activity *relating to* a law DHS enforces
19 or administers.” Memo at 2 (emphases added). In practice, this extraordinarily low
20 threshold opens the door to discrimination and bias. And although the memo
21 includes descriptive, prefatory language stating that “DHS does not profile, target,
22 or discriminate against any individual for exercising his or her First Amendment
23 rights,” it does not formally forbid those actions, nor does it provide any guidance
24 about what constitutes religious discrimination. *Compare* Memorandum from Sec’y
25 Napolitano to DHS Component Heads (April 26, 2013), [https://perma.cc/MP7M-](https://perma.cc/MP7M-2SS4)
26 [2SS4](https://perma.cc/MP7M-2SS4) (prohibiting consideration of race and ethnicity unless a compelling
27 government interest is present and the activity is narrowly tailored). Similarly,
28 CBP’s Standards of Conduct make plain that officers may “[p]roperly” take religion

1 into consideration, without providing guidance on when the consideration of religion
2 is improper. *See* Defs. Br. 16 (quoting CBP Standards of Conduct § 7.11.1); *see also*
3 Compl. ¶ 23 (describing ICE questionnaire—which Defendants fail to address—
4 carried by officers at ports of entry and featuring questions about religious beliefs,
5 practices, and associations). In any event, regardless of what Defendants’ policies
6 authorize, a written policy is not dispositive as to the existence of a practice—and
7 Plaintiffs have plainly alleged a discriminatory practice. *See, e.g., Hunter*, 652 F.3d
8 at 1235–36; *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1445 (9th Cir. 1991);
9 *Perez v. Cox*, 788 F. App’x 438, 440–41 (9th Cir. 2019); *Mood v. Cnty. of Orange*,
10 No. SAC 17-762-SVW (KK), 2019 WL 301734, at *7 (C.D. Cal. Jan. 2, 2019),
11 *report and recommendation adopted*, No. SACV 17-762-SVW (KK), 2019 WL
12 296198 (C.D. Cal. Jan. 22, 2019).

13 Third, Defendants err in stating that it is “undisputed” that they have no
14 written policy of targeting Muslims for religious questioning. Defs. Br. 16.
15 Discovery will determine whether Defendants’ discriminatory policies are written
16 or unwritten. But given that Defendants’ public policies plainly permit religious
17 questioning in numerous circumstances, and given the discriminatory practices
18 discussed above, Plaintiffs have plausibly alleged the existence of a discriminatory
19 policy.

20 Finally, because the parties disagree as to whether the ten religious
21 questioning incidents took place pursuant to a policy or practice, the matter requires
22 further factual development and cannot serve as a basis for granting Defendants’
23 motion. Disagreements regarding the existence of a policy or practice and the
24 availability of prospective relief are not properly decided at the pleading stage, but
25 instead, should be resolved based on an evidentiary record. *See, e.g., Lucas v. Cnty.*
26 *of Fresno*, No. 18-cv-01488, 2019 WL 7370418, at *12 (E.D. Cal. Dec. 31, 2019);
27 *Lemus v. Cnty. of Merced*, No. 15-cv-00359, 2016 WL 2930523, at *4 (E.D. Cal.
28 May 19, 2016); *Hiramanek v. Clark*, No. C-13-0228, 2014 WL 107634, at *5 (N.D.

1 Cal. Jan. 10, 2014).

2 **II. Plaintiffs plausibly allege that religious questioning violates their**
3 **constitutional and statutory rights.**

4 **A. Plaintiffs plausibly allege Establishment Clause violations.**

5 To state a valid claim under the Establishment Clause, Plaintiffs need only
6 allege facts showing a plausible violation under any applicable doctrinal test. Here,
7 Plaintiffs have alleged facts plausibly establishing that Defendants’ religious
8 questioning does not withstand strict scrutiny under *Larson v. Valente*, 456 U.S. 228
9 (1982)—the controlling standard where a plaintiff alleges that the government has
10 violated the principle of denominational neutrality. Plaintiffs have also alleged facts
11 showing a plausible violation of the “coercion” test. *See Lee v. Weisman*, 505 U.S.
12 577, 587–88 (1992). In arguing otherwise, Defendants err by disregarding the
13 controlling strict scrutiny standard in *Larson*, ignoring Plaintiffs’ well-pled
14 allegations concerning numerous incidents of religious questioning, and urging this
15 Court to make fact-intensive determinations that are inappropriate on a motion to
16 dismiss.⁵

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19
20 ⁵ Although Plaintiffs do not concede any of Defendants’ arguments with respect to
21 *Lemon v. Kurtzman*, 403 U.S. 602 (1971), Def. Br. 19–23, in light of the Supreme
22 Court’s June 27, 2022, ruling in *Kennedy v. Bremerton School District*, No. 21-418,
23 2022 WL 2295034 (U.S. June 27, 2022), Plaintiffs do not address *Lemon* here. In
24 *Kennedy*, a case that did not implicate denominational targeting or the *Larson* test,
25 the Supreme Court emphasized a “historical practices and understandings” analysis
26 of Establishment Clause violations. *Kennedy*, 2022 WL 2295034, at *14. Applying
27 that lens to this case, there is no legitimate historical practice of singling out one
28 faith for disfavor, as the Court has repeatedly made clear. *See, e.g., Larson*, 456 U.S.
at 244–47; *cf. Kennedy*, 2022 WL 2295034, at *9 n.1. However, Plaintiffs would be
willing to submit supplemental briefing on this issue if the Court so desires.

1 **1. Plaintiffs plausibly allege that Defendants violate the**
2 **principle of denominational neutrality and cannot satisfy**
3 **strict scrutiny under *Larson*.**

4 “The clearest command of the Establishment Clause is that one religious
5 denomination cannot be officially preferred over another.” *Larson*, 456 U.S. at 244.
6 When the government violates this “principle of denominational neutrality,” strict
7 scrutiny applies. *Id.* at 246–47; *see also Cnty. of Allegheny v. ACLU*, 492 U.S. 573,
8 608–09 (1989) (“We have expressly required strict scrutiny of practices suggesting
9 a denominational preference . . . in keeping with the unwavering vigilance that the
10 Constitution requires against any violation of the Establishment Clause.” (internal
11 quotation marks and citations omitted)).

12 Plaintiffs allege that border officers expressly target them for religious
13 questioning because of their Islamic faith, as part of a policy and/or practice of
14 intentionally singling out Muslims for such questioning. *See, e.g.,* Compl. ¶¶ 16–30,
15 65, 102, 140. Accepting Plaintiffs’ well-pled allegations as true—as the Court must
16 on a motion to dismiss—*Larson* should govern the Establishment Clause analysis.
17 *See, e.g., Sklar v. Comm’r*, 282 F.3d 610, 619 (9th Cir. 2002) (applying *Larson*
18 where tax deduction applied only to members of Church of Scientology); *Awad v.*
19 *Ziriaux*, 670 F.3d 1111, 1128 (10th Cir. 2012) (applying *Larson* to proposed state
20 constitutional amendment to ban the use of Sharia law by courts); *Rouser v. White*,
21 630 F. Supp. 2d 1165, 1195 (E.D. Cal. 2009) (holding that where state action
22 discriminates among religions, *Larson* applies).

23 Defendants fail to even mention *Larson*’s strict scrutiny test, asserting instead
24 that Plaintiffs’ claims of religious discrimination are “conclusory.” *See, e.g.,* Defs.
25 Br. 17, 20, 34. But Defendants disregard the actual allegations in the Complaint.
26 Plaintiffs, three Muslim Americans, allege that across ten instances at several
27 different ports of entry, numerous border officers subjected them to similar questions
28 regarding their Islamic faith. *See* Compl. ¶¶ 31–57, 73–93, 107–34. Plaintiffs further

1 allege a long history of similar complaints made by other Muslim Americans, and
2 the fact that Americans of other faiths are not routinely subject to similar
3 questioning. *Id.* ¶¶ 16–24.

4 Furthermore, Plaintiffs’ descriptions of the ten incidents include concrete,
5 detailed facts illustrating Defendants’ denominational targeting of Muslims. They
6 allege that border officers ask questions that specifically target Islamic faith and
7 practice, as opposed to neutral questions that could apply to all faiths. *See, e.g., id.*
8 ¶ 35 (Imam Kariye asked about Hajj and mosque attendance); *id.* ¶ 47 (Imam Kariye
9 asked “Are you Sunni or Shi’a?” “Are you Salafi or Sufi?” and “What are your views
10 on [Islamic scholar] Ibn Taymiyyah?”); *id.* ¶ 77 (Mr. Mouslli asked whether he is
11 Muslim and whether he is Sunni or Shi’a); *id.* ¶ 81 (Mr. Mouslli asked about mosque
12 attendance and daily prayer); *id.* ¶ 117 (Mr. Shah asked “What mosque do you
13 attend?” and “Do you watch Islamic lectures online or on social media?”). A border
14 officer even expressly told Mr. Shah that he was asking him questions about his
15 religion “because of what we found in your journal,” which contained notes
16 regarding Islam. *Id.* ¶¶ 117–18.

17 Given these factual allegations, it is more than plausible that Defendants’
18 border officers engage in express and intentional discrimination on the basis of
19 Plaintiffs’ faith. In the analogous context of equal protection claims, courts have held
20 that allegations concerning border officers’ questions about Islamic religious
21 practice plausibly establish discrimination against Muslims. *See, e.g., Cherri*, 951 F.
22 Supp. 2d at 937 (plaintiffs “sufficiently alleged” that religious questioning was “only
23 applied against Muslims, and not travelers of other faiths”); *El Ali*, 473 F. Supp. 3d
24 at 516–18 (holding that Muslim travelers adequately alleged religious discrimination
25 in watchlisting where CBP interrogated them about their religious beliefs);
26 *Janfeshan*, 2017 WL 3972461, at *10 (CBP agent’s questions about plaintiff’s
27 Muslim faith and ties to Afghanistan raised a reasonable inference that CBP acted
28 on basis of religion and national origin).

1 Because the Complaint plausibly alleges that border officers’ religious
2 questioning discriminates among religions, strict scrutiny applies. *Larson*, 456 U.S.
3 at 246–47. The government bears the burden of showing that its religious
4 questioning is justified by a compelling interest and closely fitted to that interest. *See*
5 *id.* In applying strict scrutiny, “the devil lies in the details.” *See Askins v. Dep’t of*
6 *Homeland Sec.*, 899 F.3d 1035, 1045 (9th Cir. 2018). And critically, because the
7 strict scrutiny analysis is fact-intensive, it is typically inappropriate for resolution on
8 a motion to dismiss. *See Frudden v. Pilling*, 742 F.3d 1199, 1207 (9th Cir. 2014)
9 (“Whether Defendants’ countervailing interest is sufficiently compelling . . . is a
10 question for summary judgment or trial.” (citation omitted)); *Armstrong v. Reynolds*,
11 22 F.4th 1058, 1079 (9th Cir. 2022) (“[A] dispute on the factual merits cannot affect
12 our resolution of this motion to dismiss.”).

13 Dismissal here is especially unwarranted because Defendants’ justifications
14 for religious questioning cannot possibly satisfy strict scrutiny.

15 First, Defendants’ generic appeals to “border security and preventing
16 terrorism,” Defs. Br. 27, do not establish a compelling government interest. *See, e.g.,*
17 *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 438
18 (2006) (the government’s “invocation of such general interests, standing alone, is
19 not enough” under strict scrutiny). To establish such an interest, the government
20 must do more than merely recite potential harms; it must show that the challenged
21 government action “actually furthers” the asserted interest. *Holt v. Hobbs*, 574 U.S.
22 352, 364 (2015). For example, in a case challenging government regulation of video
23 games, the Ninth Circuit held that the government’s interest in preventing
24 psychological harm to minors was compelling in the “abstract,” but was not “legally
25 compelling,” because of the insufficiency of the “evidence the State proffer[ed] of
26 the effect of video games on minors.” *Video Software Dealers Ass’n v.*
27 *Schwarzenegger*, 556 F.3d 950, 961–64 (9th Cir. 2009).

28 Similarly, here, Defendants do not draw any plausible connection between

1 their stated goals and border officers’ intrusive questions about Plaintiffs’ religious
2 beliefs, practices, and associations. Nor can they. How often Muslim Americans
3 pray, whether they attend mosque, and whether they are Sunni or Shi’a has no
4 relevance to “border security” or “[p]reventing the entry of terrorists and instruments
5 of terrorism into the United States.” 6 U.S.C. § 202; Defs. Br. 35. Indeed, whether
6 and how an American practices Islam provides no indicia of whether that person has
7 engaged in *any* immigration or customs-related crime within CBP’s enforcement
8 mandate—or, for that matter, any other unlawful activity. Compl. ¶ 30.

9 Second, even if Defendants could demonstrate that the religious questioning
10 of Plaintiffs “actually furthers” border security and the detection of terrorists, *Holt*,
11 574 U.S. at 364, Defendants cannot meet their burden of showing that this
12 questioning is narrowly tailored to those interests. Narrow tailoring requires the
13 government to “prove that these specific restrictions are the least restrictive means
14 available to further its compelling interest. They cannot do so through general
15 assertions of national security[.]” *Askins*, 899 F.3d at 1044–45; *see also Jones v.*
16 *Slade*, 23 F.4th 1124, 1144 (9th Cir. 2022) (under strict scrutiny, government must
17 show that “it has actually considered and rejected the efficacy of less restrictive
18 measures before adopting the challenged practice”); *Hassan v. City of New York*,
19 804 F.3d 277, 306 (3d Cir. 2015), *as amended* (Feb. 2, 2016) (“No matter how
20 tempting it might be to do otherwise, we must apply the same rigorous standards [of
21 narrow tailoring] even where national security is at stake.”).

22 Defendants fail to establish that asking Plaintiffs other, non-religious
23 questions would not suffice to further the government’s asserted interests—or that
24 Defendants have even considered alternatives to their discriminatory questioning.
25 Although Defendants argue that the religious questioning of Plaintiffs was narrowly
26 tailored because the interrogations were “targeted and individualized” and
27 “focuse[d] only on individuals in specific contexts,” Defs. Br. 27, 35, they do not
28 explain why they would possibly need to know, for example, the precise religious

1 denominations of Plaintiffs, how often Mr. Mouslli prays, or Imam Kariye’s
 2 religious views on music. *See, e.g.*, Compl. ¶¶ 47, 77, 81, 85.⁶ At a minimum, it is
 3 plausible that border officers could perform their duties without inquiring into the
 4 details of Plaintiffs’ religious beliefs, practices, and associations. *See, e.g., Boquist*
 5 *v. Courtney*, 32 F.4th 764, 773 (9th Cir. 2022) (court must accept well-pled
 6 allegations as true and draw all reasonable inferences in plaintiff’s favor). Because
 7 Defendants’ arguments amount to no more than “general assertions of national
 8 security,” *Askins*, 899 F.3d at 1044–45, they are insufficient to meet their burden
 9 under strict scrutiny—particularly at the motion-to-dismiss stage.⁷ Accordingly,
 10 Plaintiffs have stated a violation of the Establishment Clause under *Larson*.

11 **2. Plaintiffs plausibly allege violations of the coercion test.**

12 Given Plaintiffs’ allegations that Defendants’ actions explicitly target them

13 ⁶ Indeed, any security-related conclusions that Defendants draw based on Plaintiffs’
 14 answers to these or similar questions would likely be based on impermissible and
 15 invidious anti-Muslim stereotypes. *Cf. In re Geller*, 751 F.3d 1355, 1357, 1372 (Fed.
 16 Cir. 2014) (holding that trademark creating “a direct association of Islam and its
 17 followers with terrorism” would be disparaging to “to a substantial composite of
 18 American Muslims”); *Bains v. Cambra*, 204 F.3d 964, 975 (9th Cir. 2000)
 (prosecutor improperly promoted stereotype that adherents of Sikhism are
 “predisposed to violence when a family member has been dishonored”).

19 ⁷ Defendants contend that Imam Kariye’s and Mr. Mouslli’s alleged watchlist
 20 placement, and the “Terrorist Related” label on the record of Mr. Shah’s encounter,
 21 somehow justify the religious questioning of Plaintiffs. Defs. Br. 27. Not so.
 22 Plaintiffs are law-abiding citizens whom the government has unfairly cast as
 23 suspicious. Although this lawsuit does not challenge Imam Kariye’s or Mr.
 24 Mouslli’s watchlist placement, it bears emphasis that more than one million people
 are watchlisted—based on a policy standard that does not require concrete facts
 supporting suspicion, and without a meaningful process to clear their names.

25 But even setting those facts aside, the government’s internal labels fail to satisfy
 26 strict scrutiny because, for the reasons discussed above, they fail to establish that
 27 border officers’ questions about Plaintiffs’ religious beliefs, practices, and
 28 associations are narrowly tailored to a compelling government interest. *See also*
infra § II.D (discussing the government’s baseless assertion concerning Mr. Shah).

1 because of their Muslim faith, *Larson* is the most appropriate test for evaluating the
2 plausibility of Plaintiffs’ Establishment Clause claim, and the Court’s inquiry may
3 end there. But if the Court were to conclude otherwise, Plaintiffs also have
4 adequately alleged Establishment Clause violations under the coercion test. While
5 religious coercion by the government is not necessary to prove an Establishment
6 Clause violation, such coercion “strikes at the core of the Establishment Clause of
7 the First Amendment, whatever else the Clause may bar.” *Inouye v. Kemna*, 504
8 F.3d 705, 712 (9th Cir. 2007); *see also Everson v. Bd. of Educ. of Ewing Twp.*, 330
9 U.S. 1, 15–16 (1947) (“No person can be punished for entertaining or professing
10 religious beliefs or disbeliefs, for church attendance or non-attendance.”). Plaintiffs
11 plausibly allege that Defendants’ religious questioning violates the coercion test by
12 subjecting them to mandatory questioning because of their Muslim faith, requiring
13 them to reveal deeply personal religious information, and pressuring them to alter
14 their religious practices. *See, e.g.*, Compl. ¶¶ 33–57, 62–72, 75–92, 96–106,
15 108–143.

16 The secondary inspection setting in which religious questioning occurs is
17 inherently coercive. *See, e.g., id.* ¶¶ 25–27, 32, 46–50, 74–78, 111–15. Border
18 officers typically carry weapons, wear government uniforms, and command
19 travelers to enter and remain in a separated secondary inspection area. *Id.* ¶ 26.
20 Travelers are not free to leave without permission, and officers typically take
21 possession of their passports and conduct physical searches. *Id.* Over the course of
22 hours, during numerous separate interrogations, Defendants’ border officers have
23 asked Plaintiffs granular questions about their religious beliefs, practices, and
24 associations. *See* Compl. ¶¶ 33–54, 75–90, 109–30. These incidents are neither
25 “short” nor “sporadic.” *See* Defs. Br. 23. This coercive environment leaves Plaintiffs
26 no meaningful choice but to profess their religious beliefs in response to border
27 officers’ inquiries. *See, e.g., id.* ¶¶ 27, 46–50; *cf. Lee*, 505 U.S. at 588 (noting “subtle
28 coercive pressures” in the school environment); *Mellen v. Bunting*, 327 F.3d 355,

1 371 (4th Cir. 2003) (similar, in military academy context). Furthermore, Defendants’
 2 interrogations impose substantial pressure on Plaintiffs to forgo certain religious
 3 expression while traveling across the border. *See* Compl. ¶¶ 66–72, 103–06, 141–
 4 43; *see also infra* § II.B.1. Accordingly, Plaintiffs have plausibly alleged that
 5 Defendants’ religious questioning violates the coercion test.⁸

6 **B. Plaintiffs plausibly allege violations of the Free Exercise Clause and**
 7 **RFRA.**

8 The Free Exercise Clause “protect[s] religious observers against unequal
 9 treatment” and against government action that imposes “special disabilities” based
 10 on religious status. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct.
 11 2012, 2019 (2017) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of*
 12 *Hialeah*, 508 U.S. 520, 533, 542 (1993)). Government conduct that treats individuals
 13 unequally because of their religious identity is subject to the “strictest scrutiny” and
 14 must be narrowly tailored to advance a government interest “of the highest order.”
 15 *Id.* at 2019 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). The Religious
 16 Freedom Restoration Act of 1993 (“RFRA”) applies a similar standard to any federal
 17 government action that “substantially burden[s] a person’s exercise of religion even
 18 if the burden results from a rule of general applicability.” 42 U.S.C. § 2000bb-1(a)–
 19 (b) (government must show that its conduct is “the least restrictive means of
 20 furthering that compelling governmental interest”). Plaintiffs have plausibly alleged
 21 free-exercise and RFRA violations by pleading facts showing that Defendants’

22 _____
 23 ⁸ Importantly, while Plaintiffs plausibly allege that they are targeted for religious
 24 questioning because of their Islamic faith, the success of their claim under the
 25 coercion test does not turn on that allegation. As noted above, Plaintiffs have also
 26 alleged, in the alternative, that Defendants improperly subject people of faith to
 27 intrusive questioning. Thus, even if Plaintiffs are not targeted as Muslims, border
 28 officers ask and record their answers to intrusive, irrelevant religious questions. *See*
 Compl. ¶¶ 29, 32–57, 75–92, 114, 117, 128, 134, 139. Such questioning coerces
 Plaintiffs to profess their beliefs and to modify their religious expressions.

(cont’d)

1 religious questioning is not religiously neutral and is not narrowly tailored to a
2 government interest.⁹

3 **1. Plaintiffs plausibly allege a substantial burden on their**
4 **religious exercise.**

5 Defendants argue that Plaintiffs’ RFRA and Free Exercise Clause claims must
6 be dismissed because Plaintiffs have not adequately alleged a “substantial burden”
7 on their religious exercise. Defs. Br. 26–27. But Plaintiffs’ allegations are more than
8 sufficient to establish this burden at the motion-to-dismiss stage.

9 Contrary to Defendants’ argument, Defs. Br. 26, Plaintiffs have plausibly
10 alleged that they are both “forced to choose between following the tenets of their
11 religion and receiving a governmental benefit,” *and* are “coerced to act contrary to
12 their religious beliefs by threat of criminal and civil sanctions.” *Navajo Nation v.*
13 *U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc) (discussing two
14 different frameworks for “substantial burden” under RFRA). The governmental
15 benefit—or in this case, right—that hangs in the balance each time Plaintiffs travel
16 internationally is permission to reenter their own country. If Plaintiffs do not reveal
17 information about their religious beliefs and practices, they risk being subjected to
18 further harassment and detention for an unknown period of time. Moreover, the facts
19 alleged in the Complaint show that border officers implicitly (and even explicitly)
20 threaten Plaintiffs with sanctions for not complying. Plaintiffs have alleged that, due
21 to the coercive context of religious questioning, they reasonably feel that they may

22
23 ⁹To prevail on a free-exercise or RFRA claim, a plaintiff need not show that he was
24 treated unequally because of his *particular* faith. Although Plaintiffs have plausibly
25 alleged that border officers specifically target Muslims for religious questioning,
26 they allege in the alternative, Compl. ¶¶ 156–61, that officers target people of faith
27 based on their religious status. *See Trinity Lutheran*, 137 S. Ct. at 2019. Strict
28 scrutiny applies in either instance. *Cf. id.* at 2019–20. And as explained in the
discussion of Plaintiffs’ Establishment Clause claim, *see supra* § II.A.1, Defendants’
conduct cannot survive strict scrutiny.

1 not leave unless and until they answer Defendants’ questions; that Defendants have
2 threatened to make it harder for at least one Plaintiff (Imam Kariye) if he did not
3 cooperate; and that Defendants retaliated against another (Mr. Shah) because he
4 objected to their questions. *See, e.g.*, Compl. ¶¶ 25–27, 32, 36, 40, 44, 46–50, 74–
5 78, 86, 91, 109–29.

6 This type of direct coercion constitutes a substantial burden on religious
7 exercise. *See Navajo Nation*, 535 F.3d at 1070. But as the Ninth Circuit has more
8 recently made clear, so too does governmental action that “[m]ore
9 subtly . . . impact[s] religious exercise indirectly” by “discouraging
10 an . . . [individual] from doing that which he is religiously compelled or encouraged
11 to do.” *Jones*, 23 F.4th at 1140 (discussing “substantial burden” requirement under
12 a statute that mirrors RFRA). Similarly, in *Naoko Ohno v. Yuko Yasuma*, 723 F.3d
13 984, 1011 (9th Cir. 2013), the Court explained that government conduct constitutes
14 a substantial burden where it has “a tendency to coerce individuals into acting
15 contrary to their religious beliefs” or exerts “substantial pressure on an adherent to
16 modify his behavior and to violate his beliefs.” *See also Fazaga v. FBI*, 965 F.3d
17 1015, 1061–62 (9th Cir. 2020), *rev’d and remanded on other grounds*, 142 S. Ct.
18 1051 (2022) (holding that plaintiffs stated a RFRA claim against government
19 defendants where they “allege[d] that they altered their religious practices,” by, for
20 example, forgoing religious dress and decreasing mosque attendance due to FBI
21 surveillance).¹⁰ Applying *Jones* and *Naoko Ohno*, there is no question that Plaintiffs
22 have plausibly alleged a substantial burden.

23 Indeed, in another case involving the religious questioning of Muslim
24 travelers at the border, the court observed that the “very process of inquiry” into

25 _____
26 ¹⁰ Defendants do not fully describe the holding in *Fazaga*. Defs. Br. 26. While the
27 ruling dismissed certain claims on qualified immunity grounds, it *allowed* plaintiffs’
28 RFRA claim against the government defendants to proceed based on plaintiffs’
allegations of altered religious conduct. *See Fazaga*, 965 F.3d at 1061.

1 sensitive religious matters in an inherently coercive environment can itself constitute
2 a substantial burden. *El Ali*, 473 F. Supp. 3d at 526 (quoting *NLRB v. Cath. Bishop*
3 *of Chicago*, 440 U.S. 490, 502 (1979)). Plaintiffs here have further alleged that
4 Defendants’ coercive questioning resulted in their divulging deeply personal
5 information about their religious beliefs, practices, and associations. Compl. ¶¶ 26–
6 27, 32–55, 64, 74–91, 101, 112–129, 143.

7 In addition, Defendants’ religious questioning has imposed “substantial
8 pressure,” *Naoko Ohno*, 723 F.3d at 1011, on Plaintiffs to modify or abandon
9 specific religious expression and practices at the border, which they would otherwise
10 undertake and sincerely believe they should engage in as part of their faith. Compl.
11 ¶¶ 66–70, 103–105, 141–42. Specifically, because of the coercive nature of
12 Defendants’ religious questioning, Imam Kariye and Mr. Mouslli both refrain from
13 physical acts of prayer in airports and the border when returning from international
14 travel. *Id.* ¶¶ 66–67, 103–105. Imam Kariye also forgoes religious dress and avoids
15 carrying religious texts when returning from international travel. *Id.* ¶¶ 68–70. And
16 due to the pressure of religious questioning, Mr. Shah will no longer travel with his
17 religious journal and will cease documenting his religious thoughts and expression
18 during his foreign travels. *Id.* ¶¶ 141–42. Plaintiffs reasonably feel coerced to take
19 these protective measures, which run contrary to their sincerely held religious
20 beliefs, to avoid incurring additional scrutiny and religious questioning. *See also El*
21 *Ali*, 473 F. Supp. 3d at 526.

22 Although Defendants trivialize Plaintiffs’ protective measures as “subjective
23 chilling effects” that do not impose a substantial burden, Defs. Br. 27, the allegations
24 here go far beyond the generic and subjective chilling effects alleged in the cases
25 relied on by Defendants. *See* Defs. Br. 24–27.¹¹ For example, in *Navajo Nation*, 535

26 _____
27 ¹¹ Contrary to Defendants’ argument, Defs. Br. 25, the religious questioning of
28 Plaintiffs is also “proscriptive or compulsory” within the meaning of *American*
Family Ass’n v. City & County of San Francisco, 277 F.3d 1114, 1124 (9th Cir.

(cont’d)

1 F.3d at 1063, the plaintiffs challenged a government snow-making plan but did not
2 claim any coercion and did not otherwise alter their religious conduct as a result of
3 the plan. They “continue[d] to pray, conduct their religious ceremonies, and collect
4 plants for religious use” despite the artificial snow. *Id.* The “sole effect of the
5 artificial snow” on plaintiffs’ religious exercise was that it undermined their
6 “subjective spiritual experience” by “decreas[ing] the spiritual fulfillment Plaintiffs
7 get from practicing their religion on the mountain.” *Id.* In *American Family*, the
8 complaint did not “allege any specific religious conduct that was affected by the
9 Defendants’ actions.” 277 F.3d at 1124; *see also Cal. Parents for the Equalization*
10 *of Educ. Materials v. Torlakson*, 973 F.3d 1010, 1019 (9th Cir. 2020) (“Appellants
11 failed to allege *any* specific religious conduct that was affected by the Defendants’
12 actions.” (internal quotation marks and citation omitted)); *Cherri*, 951 F. Supp. 2d
13 at 935 (same). Defendants’ reliance on *Dousa v. U.S. Dep’t of Homeland Sec.*, No.
14 19-cv-1255, 2020 WL 434314 (S.D. Cal. Jan. 28, 2020), is also misplaced. There,
15 the plaintiff alleged that she refrained from certain religious activities but did not
16 connect her decision to do so with a “threat of specific future harm.” *Id.* at *8. And
17 in *Vernon*, 27 F.3d at 1394–95, a police officer failed to satisfy his burden at
18 summary judgment because he adduced no evidence that his religious practice was
19 chilled by the existence of a government investigation into his on-duty activities.

20 In contrast to these cases, Plaintiffs allege that Defendants’ religious
21 questioning is compulsory, coercing them to divulge their religious beliefs,
22 practices, and associations. Plaintiffs further identify specific religious practices that
23 are burdened by the government’s conduct, and they allege that they have modified
24 those practices to avoid future harm while traveling back into the United States. *See*

25 _____
26 2002), and the cases it relies on (*Vernon v. City of L.A.*, 27 F.3d 1385, 1394 (9th Cir.
27 1994); *Laird v. Tatum*, 408 U.S. 1, 11, 13 (1972)), which is another reason that
28 Plaintiffs’ protective measures are not based on subjective chill. *See* Compl.
¶¶ 26–27.

1 Compl. ¶¶ 66–70, 103–105, 141–42. That Plaintiffs feel substantial pressure to
2 modify their religious practices is an eminently reasonable response to Defendants’
3 questioning: The questions appear to be aimed at detecting Plaintiffs’ religiosity as
4 Muslims, and, therefore, Plaintiffs have logically concluded that they must avoid or
5 minimize certain Islamic religious acts that could further draw attention to their
6 Muslim identity and risk an extended scope and duration of religious questioning.
7 *See id.*; *see also Fazaga*, 965 F.3d at 1061; *El Ali*, 473 F. Supp. 3d at 526.

8 Defendants’ remaining arguments are unavailing. They contend that
9 Plaintiffs’ claims of substantial pressure and coercion falter because Plaintiffs have
10 not pled that their protective measures, in fact, reduce Defendants’ religious
11 questioning, or that “their religion forbids such modifications.” Defs. Br. 26. But
12 Defendants cite no precedent in support of either proposition, and Plaintiffs are
13 aware of none. Indeed, the latter argument is at odds with RFRA, which applies to
14 “any exercise of religion, whether or not compelled by, or central to, a system of
15 religious belief.” *See* 42 U.S.C. § 2000bb-2 (incorporating 42 U.S.C. § 2000cc-5).
16 In any event, Plaintiffs plausibly allege that Defendants’ questioning is a substantial
17 burden within the meaning of *Navajo Nation*, *Naoko Ohno*, and *Jones*.

18 **2. Plaintiffs are not required to plead a substantial burden under**
19 **the Free Exercise Clause.**

20 Even if the Court were to conclude that Plaintiffs have not adequately pled a
21 substantial burden, it should still reject Defendants’ motion to dismiss Plaintiffs’
22 claim under the Free Exercise Clause. In recent years, the Supreme Court has not
23 applied a “substantial burden” requirement to free-exercise claims challenging
24 governmental conduct that is not religiously neutral or generally applicable. *See*,
25 *e.g.*, *Carson v. Makin*, No. 20-1088, 2022 WL 2203333, at *7 (U.S. June 21, 2022)
26 (state private school funding program prohibited aid for religious education); *Fulton*
27 *v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021) (non-discrimination provision
28 in contract was not neutral and generally applicable vis-à-vis religion); *Tandon v.*

1 *Newsom*, 141 S. Ct. 1294, 1296 (2021) (state’s COVID-19 restrictions treated
2 religious exercise less favorably than secular activities); *Roman Cath. Diocese of*
3 *Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (governor’s executive order restricting
4 gatherings “single[d] out houses of worship for especially harsh treatment”);
5 *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2255 (2020) (state
6 constitutional provision excluded schools from aid programs based on their religious
7 status); *Trinity Lutheran*, 137 S. Ct. at 2021 (same); *Masterpiece Cakeshop v. Colo.*
8 *Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1729 (2018) (holding that petitioner in civil
9 rights proceedings was denied “neutral and respectful consideration” where
10 “treatment of his case ha[d] some elements of a clear and impermissible hostility
11 toward the sincere religious beliefs that motivated his objection”); *see also Kennedy*,
12 2022 WL 2295034, at *9 & n.1 (plaintiff may prove a free exercise violation by
13 showing that official expressions of hostility accompany a policy burdening
14 religious exercise). In not one of these cases does the Supreme Court mention a
15 “substantial burden,” let alone require it to be pled and proven.¹² At most, these
16 cases merely mention—in passing—the “burden” of the challenged government
17 conduct on religious exercise. *See, e.g., Kennedy*, 2022 WL 2295034, at *9 n.1;
18 *Fulton*, 141 S. Ct. at 1876; *Espinoza*, 140 S. Ct. at 2261.¹³

19 Defendants’ argument to the contrary rests on outdated and inapposite case
20 law. *See* Defs. Br. 25. In *American Family*, the Court distinguished between free-
21 exercise claims challenging “an actual regulation or criminal law” and those
22 challenging other governmental conduct, observing that plaintiffs must demonstrate
23 a “substantial burden” for the latter. 277 F.3d at 1124. But subsequent Supreme

24 _____
25 ¹² In contrast, the Court continues to explicitly require a “substantial burden” in
26 RFRA cases, consistent with the statutory text. *See, e.g., Little Sisters of the Poor*
Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

27 ¹³ The Court did not explicitly identify *any* “burden” on the petitioners’ religious
28 exercise in *Carson*, *Masterpiece*, *Tandon*, or *Roman Catholic*.

1 Court decisions do not require a substantial burden in such cases. For example, in
2 *Masterpiece Cakeshop*, 138 S. Ct. at 1729, the challenged conduct involved, in part,
3 offhand remarks made by commission members; and in *Fulton*, 141 S. Ct. at 1881,
4 the relevant government action was a contractual provision. The Ninth Circuit’s
5 opinion in *California Parents*, while more recent, is distinguishable not only because
6 of the patent insufficiency of the pleading, 973 F.3d at 1019, but also because that
7 case did not involve “expressions of hostility,” *Masterpiece Cakeshop*, 138 S. Ct. at
8 1732—a key factor here. *See Kennedy*, 2022 WL 2295034, at *9 n.1; *see also* Compl.
9 ¶¶ 65, 102, 140.

10 Plaintiffs allege that they were targeted for religious questioning because of
11 their religious status, and thus the challenged conduct is not religiously neutral.
12 Plaintiffs further allege that Defendants’ conduct is religiously coercive and imposes
13 on them substantial pressure to alter specific religious practices while traveling into
14 the United States. Under the Supreme Court’s recent decisions, these allegations are
15 enough, and Plaintiffs may proceed on their claim under the Free Exercise Clause.

16 **C. Plaintiffs plausibly allege violations of the First Amendment right**
17 **to free association.**

18 Plaintiffs have plausibly alleged that Defendants’ religious questioning—
19 including questions such as “Are you Sunni or Shi’a?” and “What mosque do you
20 attend?”—violates their right to freedom of association. *See, e.g.*, Compl. ¶¶ 19, 35,
21 47, 77, 81, 85, 90, 117. Where the government compels disclosure of protected
22 associations, its actions are subject to exacting scrutiny, which requires “a
23 substantial relation between the disclosure requirement and a sufficiently important
24 governmental interest,” and that the challenged requirement be “narrowly tailored.”
25 *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021). Here, by
26 compelling Plaintiffs to disclose sensitive associational information and retaining
27 that information for decades, border officers do not further any valid government
28 interest, and their questions are not narrowly tailored to the detection of terrorists.

1 *See supra* § II.A.1.

2 First, Defendants err in suggesting that the right to free association is limited
3 to cases involving “large-scale disclosures of membership rosters.” Defs. Br. 29. To
4 the contrary, several cases uphold the right where the government seeks information
5 about an individual’s associations. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 480–
6 81, 490 (1960) (invalidating law requiring teachers to disclose their associations);
7 *Burse v. United States*, 466 F.2d 1059, 1082–83, 1088 (9th Cir. 1972), *overruled in*
8 *part on other grounds* (affirming refusal to answer grand jury questions on First
9 Amendment grounds); *Clark v. Libr. of Cong.*, 750 F.2d 89, 93–94, 99 (D.C. Cir.
10 1984) (FBI field investigation of an individual based on his associations was
11 unjustified).

12 Second, Defendants are wrong to characterize Plaintiffs’ disclosures about
13 their private religious associations as “extremely limited,” and to argue that Plaintiffs
14 allege no more than “abstract discomfort.” Defs. Br. 29. Far from being “extremely
15 limited,” border officers’ questions go to the core of Plaintiffs’ protected
16 associations, including their precise religious denomination and where they practice
17 their religion. Plaintiffs also describe how border officers’ religious questioning—
18 conducted during hours-long detentions in coercive environments, as a condition of
19 returning home—is humiliating, distressing, and profoundly stigmatizing. *See, e.g.,*
20 Compl. ¶¶ 26–27, 32, 46–52, 65–72, 74–79, 100–06, 115, 137–43. The chilling
21 impact of Plaintiffs’ disclosures is all the more significant because Defendants retain
22 Plaintiffs’ answers to their questions for up to 75 years, share that information in a
23 massive database accessible to tens of thousands of law enforcement departments,
24 and effectively create dossiers on Plaintiffs over time. *Id.* ¶¶ 28–29, 134.
25 Furthermore, to shield against additional questioning, Plaintiffs forgo prayer, the
26 wearing of a kufi, and the carrying of religious texts and a religious journal—
27 external manifestations of Plaintiffs’ religious association. They take these measures
28 to avoid the reprisals of additional scrutiny and religious questioning by border

1 officers. *Id.* ¶¶ 66–71, 103–106, 141–43.

2 Third, even if the Court were to conclude that Plaintiffs allege no more than
3 “abstract discomfort,” Defendants misstate the law in arguing that such discomfort
4 cannot trigger heightened scrutiny. Defs. Br. 29. In *Americans for Prosperity*, the
5 Supreme Court explained that “[e]xacting scrutiny is triggered by ‘state action which
6 may have the effect of curtailing the freedom to associate,’ and by the ‘possible
7 deterrent effect’ of disclosure.” 141 S. Ct. at 2387–88 (emphasis in original) (citation
8 omitted). That standard is easily satisfied here, because the coerced disclosure of
9 religious associations itself imposes an unjustified burden and chill on the right to
10 associate freely, as does the long-term retention of that information. *See*
11 *MacPherson v. I.R.S.*, 803 F.2d 479, 484 (9th Cir. 1986) (“The mere compilation by
12 the government of records describing the exercise of First Amendment
13 freedoms . . . has a chilling effect on such exercise.” (citation omitted)); *see also*
14 *Guan v. Mayorkas*, 530 F. Supp. 3d 237, 266, 272–73 (E.D.N.Y. 2021) (holding that
15 plaintiffs plausibly alleged that CBP questioning of journalists during secondary
16 inspection violated their associational rights).

17 Fourth, Defendants attempt to analogize to Ninth Circuit cases upholding
18 criminal investigative activity that revealed First-Amendment-protected
19 associations, Defs. Br. 28, 30, but each is distinguishable. For example, border
20 officers’ questioning of Plaintiffs as a precondition to entering the country is nothing
21 like the “criminal investigation” at issue in *United States v. Rubio*, and Plaintiffs are
22 not seeking a “prohibition” on law enforcement’s ability to conduct criminal
23 investigations. Defs. Br. 28 (quoting 727 F.2d 786, 791 (9th Cir. 1983)). In *Rubio*,
24 the Court held that a search for indicia of membership in the Hell’s Angels pursuant
25 to a “narrowly drawn” warrant did not violate a suspect’s freedom of association
26 because Fourth Amendment warrant requirements sufficiently protected the
27 suspect’s First Amendment interests. *Id.* at 790–92. Here, of course, border officers
28 have no warrant. In *United States v. Mayer*, 503 F.3d 740, 748 (9th Cir. 2007), an

1 undercover agent initiated investigations into members of the North American
2 Man/Boy Love Association who took part in “group activity” in which “criminal
3 conduct was openly discussed.” Here, Plaintiffs were neither engaging in nor
4 discussing criminal conduct. And in *United States v. Gering*, 716 F.2d 615 (9th Cir.
5 1983), the Court concluded that the government’s investigative technique of
6 “[g]leaning information from the outside of envelopes . . . does not rise to the level
7 of governmentally compelled disclosure.” *Id.* at 619 n.2. This case, by contrast,
8 involves invasive questioning about associations in a coercive environment.

9 Finally, Defendants point to the Fourth Amendment border-search doctrine,
10 *see* Defs. Br. 28, but that doctrine is no help to Defendants because it underscores
11 the narrowness of border officers’ authority. In *United States v. Cano*, the Ninth
12 Circuit emphasized that “border officials have no general authority to search for
13 crime,” and that they are “limited to searching for contraband only.” 934 F.3d 1002,
14 1017–19 (9th Cir. 2019). If it is Defendants’ position that the border-search doctrine
15 governs the warrantless questioning of Plaintiffs at the border, then such questioning
16 should be limited to identity verification and the location of contraband. Religion is
17 irrelevant to both.¹⁴

18 **D. Plaintiff Shah plausibly alleges retaliation in violation of the First**
19 **Amendment.**

20 To state a First Amendment retaliation claim, a plaintiff must plausibly allege

21 _____
22 ¹⁴ Defendants’ reliance on *United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008), is
23 misplaced. Defs. Br. 28. There, the court applied Fourth Amendment doctrine to
24 reject the argument that border searches require “reasonable suspicion” if there is a
25 high risk that expressive material will be exposed. 533 F.3d at 1006. *But see Cano*,
26 934 F.3d at 1007 (requiring reasonable suspicion for forensic cell phone searches).
27 The *Arnold* Court reasoned that the defendant’s proposed test would protect terrorist
28 communications, be unworkable for government agents, and contravene precedent
concerning the relationship between the Fourth and First Amendments. 533 F.3d at
1010. None of those factors are present here, where Plaintiffs seek a prohibition on
religious questioning—not a new Fourth Amendment standard for border searches.

1 that “(1) he was engaged in a constitutionally protected activity, (2) the defendant’s
2 actions would chill a person of ordinary firmness from continuing to engage in the
3 protected activity and (3) the protected activity was a substantial or motivating factor
4 in the defendant’s conduct.” *O’Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016)
5 (citation omitted). Here, Mr. Shah has plausibly alleged that (1) he engaged in
6 constitutionally protected activity—documenting his religious expression and
7 thoughts, and asserting his rights to border officers; (2) border officers subjected him
8 to adverse actions, including religious and other intrusive questioning, extensive
9 searches of his phone and journal, and longer detention, which would chill a person
10 of ordinary firmness; and (3) his religious writing and statements invoking his rights
11 were a substantial factor in the officers’ conduct. Compl. ¶¶ 108–134, 172–75.
12 Accordingly, Mr. Shah’s retaliation claim should proceed.

13 Defendants argue that Mr. Shah failed to allege any adverse action that would
14 chill a person of ordinary firmness because the detention, questioning, and searches
15 were “routine” under the Fourth Amendment. Defs. Br. 31. Not so. As an initial
16 matter, border officers’ computerized scanning of Mr. Shah’s religious journal is
17 much closer to the kind of “computer strip search” that the Ninth Circuit deemed
18 *non-routine* in *Cano*. Compare 934 F.3d at 1015, with Compl. ¶¶ 113–14, 125–27.
19 But more importantly here, even if it were a routine search, that fact would not defeat
20 a retaliation claim. Mr. Shah plausibly alleges that the duration and scope of the
21 inspection were nonetheless retaliatory and would chill a person of ordinary firmness
22 from exercising his First Amendment rights. Indeed, because of the officers’
23 retaliatory actions, Mr. Shah is himself chilled from documenting his religious
24 expression and thoughts while out of the country. *Id.* ¶¶ 141–42.

25 Defendants also argue that Mr. Shah failed to plausibly allege causation
26 because “a CBP officer directed Shah to secondary inspection *before* becoming
27 aware of any of the constitutionally protected activity.” Defs. Br. 32. But Mr. Shah
28 does not allege that the initial choice to subject him to a secondary inspection was

1 retaliatory. Instead, he alleges that *during* the secondary inspection, border officers
2 retaliated against him by prolonging the duration of the inspection and intensifying
3 the searches and questioning. Compl. ¶ 173.

4 Mr. Shah plausibly alleges that border officers acted with a retaliatory motive
5 in taking these adverse actions against him. His claim is supported by an officer’s
6 statement that he was asking intrusive questions “*because of what we found in your*
7 *journal.*” *Id.* ¶ 118. Defendants’ brief completely ignores this statement, which
8 plainly establishes causation. By pleading direct evidence of a retaliatory motive,
9 Mr. Shah has, in fact, surpassed his burden, as a claim for retaliation can survive
10 even if based solely on circumstantial inferences. *Watison v. Carter*, 668 F.3d 1108,
11 1114 (9th Cir. 2012) (“Because direct evidence of retaliatory intent rarely can be
12 pleaded in a complaint, allegation of a chronology of events from which retaliation
13 can be inferred is sufficient to survive dismissal.”).

14 Although Defendants contend that the officers’ conduct was motivated by
15 “efforts to secure the border[,]” Defs. Br. 33, this unexplained and conclusory
16 assertion cannot justify dismissal of Mr. Shah’s well-pled claims. Moreover, even if
17 Defendants were correct about the officers’ motivation, “the mere existence of a
18 legitimate motive . . . is insufficient to mandate dismissal.” *Capp v. Cnty. of San*
19 *Diego*, 940 F.3d 1046, 1056 (9th Cir. 2019); *see also O’Brien*, 818 F.3d at 932
20 (“Otherwise lawful government action may nonetheless be unlawful if motivated by
21 retaliation for having engaged in activity protected under the First Amendment.”);
22 *Boquist*, 32 F.4th at 785 (same).

23 Finally, Defendants are wrong to claim that Mr. Shah exhibited “objectively
24 suspicious behavior” that justified the officers’ actions. Defs. Br. 33. Not only is this
25 claim baseless, but it is inappropriate for resolution on a motion to dismiss. *See*
26 *Armstrong*, 22 F.4th at 1079. In particular, Defendants cite Mr. Shah’s allegation
27 that after being asked invasive, unconstitutional religious questions, he stated he
28 would prefer to go back to Europe rather than continue to be subject to further

1 questioning and searches. Defs. Br. 33 (citing Compl. ¶ 123). Mr. Shah’s desire to
 2 be released from detention should be understood to reflect his extreme discomfort
 3 with the officers’ conduct, rather than any wrongdoing on his part. *See* Compl.
 4 ¶¶ 108–23; *Boquist*, 32 F.4th at 773 (court must draw all reasonable inferences in
 5 plaintiff’s favor). Moreover, Mr. Shah’s purportedly “suspicious” behavior came
 6 *after* the officers commenced their retaliatory conduct. *See* Compl. ¶¶ 109–123.¹⁵

7 **E. Plaintiffs plausibly allege violations of the Fifth Amendment right**
 8 **to equal protection.**

9 Under the right to equal protection, government action discriminating “along
 10 suspect lines like . . . religion” is subject to strict scrutiny. *Burlington Northern*
 11 *Railroad Co. v. Ford*, 504 U.S. 648, 651 (1992). In cases of express discrimination—
 12 “when a state actor explicitly treats an individual differently on the basis of” a
 13 protected class—the government action is “immediately suspect” and the plaintiff
 14 “need not make an extrinsic showing of discriminatory animus or a discriminatory
 15 effect to trigger strict scrutiny.” *Mitchell v. Washington*, 818 F.3d 436, 445–46 (9th
 16 Cir. 2016) (internal quotation marks and citations omitted). Here, Plaintiffs plausibly
 17 allege that border officers expressly targeted them for religious questioning because
 18 they are Muslim, *see supra* § II.A.1, triggering strict scrutiny.

19 Even if the Court were to conclude that Defendants’ religious questioning is
 20 facially neutral, it would still violate the right to equal protection because Plaintiffs
 21 have plausibly alleged that discriminatory intent was “a motivating factor” behind
 22 the questioning. *See Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015)

23 _____
 24 ¹⁵ Defendants attempt to bolster their claim by relying on *Arnold*, 533 F.3d at 1010,
 25 *see* Defs. Br. 33, but that case is readily distinguishable. There, the Court described
 26 *United States v. Ickes*, 393 F.3d 501, 502 (4th Cir. 2005), in which “the inspecting
 27 agent discovered a video camera containing a tape of a tennis match which ‘focused
 28 excessively on a young ball boy,’” and further searches uncovered child
 pornography. 533 F.3d at 1010. Mr. Shah’s request to leave detention is not remotely
 like the discovery of suggestive images on Ickes’s camera.

1 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266
2 (1977)). “A plaintiff may establish discriminatory purpose by ‘produc[ing] direct or
3 circumstantial evidence demonstrating that a discriminatory reason more likely
4 tha[n] not motivated’ the defendant and that the defendant’s actions adversely
5 affected the plaintiff in some way.” *Ballou v. McElvain*, 29 F.4th 413, 422 (9th Cir.
6 2022) (quoting *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir.
7 2016)); *see id.* at 424 (“[A]ny indication of discriminatory motive may suffice’ to
8 allow a disparate treatment claim to survive summary judgment.”) (quoting *Arce*,
9 793 F.3d at 978). Here, the number of incidents alleged, the long history of similar
10 incidents, and the nature of the questions themselves give rise to a reasonable
11 inference that discrimination was a motivating factor in the religious questioning of
12 Plaintiffs. *See Cherri*, 951 F. Supp. 2d at 937; *El Ali*, 473 F. Supp. 3d at 516–18;
13 *Janfeshan*, 2017 WL 3972461, at *10.

14 In arguing to the contrary, Defendants recycle their argument that Plaintiffs’
15 allegations of discrimination are implausible because their policies prohibit it, and
16 that Plaintiffs “have not plausibly alleged any widespread practice that contradicts
17 those policies.” Defs. Br. 34. For the reasons stated in Sections I and II.A.1, *supra*,
18 Defendants are wrong.

19 Defendants also assert that Plaintiffs must “show that a class that is similarly
20 situated has been treated disparately” to state an equal protection claim, and that
21 Plaintiffs have failed to plausibly allege such a class. Defs. Br. 34 (quoting *Ariz.*
22 *Dream Act Coal. v. Brewer*, 855 F.3d 957, 966 (9th Cir. 2017)). But the Ninth Circuit
23 has recently clarified that “a relevant comparator is not an *element* of a disparate
24 treatment claim,” *Ballou*, 29 F.4th at 424–25 (emphasis in original), and its logic
25 applies to Plaintiffs’ express discrimination claim as well. *See also Pacific Shores*
26 *Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1158–59 (9th Cir. 2013)
27 (“[R]equiring anti-discrimination plaintiffs to prove the existence of a better-treated
28 entity would lead to unacceptable results.”). Regardless, Plaintiffs have plausibly

1 alleged that border officers do not routinely subject travelers of other faiths to similar
2 questioning about their religious beliefs and practices. *See, e.g.*, Compl. ¶¶ 16–24.
3 Common sense dictates that border officers do not routinely ask Americans
4 perceived as Christian, for example, whether they are Catholic or Protestant, and
5 how often they pray. *See Iqbal*, 556 U.S. at 679 (“Determining whether a complaint
6 states a plausible claim for relief will . . . be a context-specific task that requires the
7 reviewing court to draw on its judicial experience and common sense.”). Drawing
8 all reasonable inferences in Plaintiffs’ favor, Plaintiffs’ allegations about the
9 treatment of non-Muslims at airports and the border are plausible.

10 Finally, insofar as Defendants suggest that Plaintiffs must allege
11 discrimination against every Muslim traveler to trigger strict scrutiny, Defs. Br. 35,
12 they are mistaken. *See, e.g., Tiwari v. Mattis*, 363 F. Supp. 3d 1154, 1164 (W.D.
13 Wash. 2019) (rejecting “defendant[’s] assert[ion] that, because the discrimination is
14 not complete, it is not subject to strict scrutiny,” as “contrary to equal protection
15 jurisprudence”). Plaintiffs plausibly allege that they are subject to discriminatory
16 questioning because of their religion, a protected classification, and that is enough.

17 **CONCLUSION**

18 For the foregoing reasons, Defendants’ motion to dismiss should be denied.

19
20 Dated: June 27, 2022

Respectfully submitted,

21 AMERICAN CIVIL LIBERTIES UNION
22 FOUNDATION

23 AMERICAN CIVIL LIBERTIES UNION OF
24 MINNESOTA

25 ACLU FOUNDATION OF SOUTHERN
26 CALIFORNIA

27 By: /s/ Ashley Gorski

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