

NATIONAL SECURITY
PROJECT



September 11, 2013

BY ECF

Honorable Joan M. Azrack
United States Magistrate Judge
United States District Court for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Raza et al. v. City of New York et al.*
Case No. 13-cv-03448-PKC-JMA

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Dear Judge Azrack:

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

On behalf of Plaintiffs, who are New York Muslims subjected to unlawful and ongoing New York City Police Department (“NYPD”) surveillance on the basis of their religion and without any evidence of wrongdoing, we write to oppose Defendants’ September 10 request for bifurcated discovery. We also write to inform the Court that Plaintiffs intend to seek limited discovery in support of a motion for a preliminary injunction. Plaintiffs are separately writing to Judge Chen to request a pre-motion conference regarding their preliminary injunction motion.

We recognize that the Court’s Individual Rules discourage letters or formal motions regarding the substance of discovery disputes without prior authorization, but we are compelled to respond to Defendants’ September 10 letter.¹ For the reasons set forth below, Defendants’ discovery proposal is unmerited and unreasonable. It also vilifies our clients through inflammatory insinuation and innuendo, suggesting that Plaintiffs are worthy of criminal investigation on the basis of First Amendment-protected speech, activities, or attenuated—and unwitting—association alone. This strategy is a deliberate

¹ Defendants’ September 10 discovery proposal expresses purported concern for waste of judicial resources, but that concern is belied by Defendants’ refusal to confer with Plaintiffs before filing their discovery letter. Plaintiffs’ counsel first called Defendants’ counsel on August 22, to confer on a schedule for motion practice or a discovery plan—to no avail. On the morning of September 6, Plaintiffs’ counsel again offered to confer, and again Defendants’ counsel refused to discuss how Defendants would proceed in this action, let alone a discovery plan. Given this backdrop, Defendants’ September 10 letter appears to be, most of all, a vehicle for Defendants to put stigmatizing aspersions about Plaintiffs into the public record.

distraction at best; at worst, it verges on the very type of discriminatory and meritless profiling at the heart of this lawsuit.

Proceedings

On June 18, 2013, Plaintiffs filed their complaint alleging that, since 2002, the NYPD has engaged in an unlawful policy of religious profiling and suspicionless surveillance of New York's Muslims, including Plaintiffs. As documented extensively in the NYPD's own records, its Intelligence Division has singled out Muslim religious and community leaders, mosques, organizations, businesses, and individuals for pervasive surveillance that is not visited upon the public at large or upon institutions or individuals belonging to any other faith.² The NYPD's surveillance program violates the First and Fourteenth Amendments of the U.S. Constitution, as well as Article I, § 3 of the New York State Constitution.

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Defendants filed their answer on September 9, 2013.

Plaintiffs are notifying Judge Chen (with a copy to your Chambers) that they intend to file a motion for a preliminary injunction, requesting that the Court (1) order the NYPD to segregate all existing records related to Plaintiffs' religious identity, speech, beliefs, and practices that are not supported by any individualized suspicion of Plaintiffs' wrongdoing, and prohibit any use or dissemination of such records; and (ii) enjoin the NYPD from any investigation of Plaintiffs that is based solely or predominantly on their religion. Plaintiffs are requesting a pre-motion conference before Judge Chen to determine an appropriate schedule for expedited discovery in support of Plaintiffs' motion and briefing.

Plaintiffs' motion and proposed discovery render Defendants' bifurcated discovery proposal unnecessary. For the reasons set forth below, it is also unmerited.

Defendants' Discovery Proposal

In their September 10 letter, Defendants ask the Court to divide discovery into two phases. The first phase would involve discovery as to standing issues and "which [of the Plaintiffs], if any, has suffered a constitutional violation." Defs.' Letter at 2. In the second phase, the parties would conduct discovery as to "the question of the NYPD's general investigative policies and practices." *Id.* Defendants assert that focusing first on the "individual alleged constitutional violations" will allow for a more efficient resolution of the case. *Id.* But Defendants' request is entirely self-serving and fundamentally mischaracterizes

² NYPD documents confirming these allegations are available at <http://www.ap.org/media-center/nypd/investigation>, and at http://enemieswithinbook.com/document_legend/.

the nature of Plaintiffs' constitutional claims. Contrary to Defendants' assertions, Plaintiffs' standing is not in question in this suit, and the constitutional violations they allege are inextricably linked to the NYPD's discriminatory policies.

As a preliminary matter, isolated discovery into questions of standing is unwarranted. Among other forms of relief, Plaintiffs' Complaint seeks the expungement of all records concerning Plaintiffs that the NYPD created and maintained as a result of its unconstitutional and unlawful practices. Compl., Prayer for Relief ¶ 3. This well-pled request alone suffices to establish standing. *See, e.g., Tabbaa v. Chertoff*, 509 F.3d 89, 96 n.2 (2d Cir. 2007) ("Defendants properly do not contest that plaintiffs possess Article III standing based on their demand for expungement."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (setting forth requirements for Article III standing).

Furthermore, by acknowledging that each Plaintiff was subject to NYPD surveillance, Defendants' Answer and September 10 letter concede that Plaintiffs have suffered concrete, particularized, and actual injuries that give rise to standing. *See* Answer ¶ 11 (admitting surveillance at Plaintiff Masjid Al-Ansar); ¶ 12 (admitting surveillance of Plaintiff Dandia); ¶ 14 (admitting surveillance at Plaintiff Masjid At-Taqwa); ¶ 15 (admitting surveillance of Plaintiff Elshinawy); ¶ 37 (admitting that Shamiur Rahman was a confidential informant); ¶ 50 (admitting that NYPD personnel have met with Plaintiff Imam Raza); ¶ 88 (admitting that Rahman was present at an FSNYC meeting); Defs.' Letter at 2–5.

In addition, Plaintiffs have alleged myriad concrete and particularized harms resulting from knowledge and justifiable fear of unconstitutional NYPD spying. For example, Plaintiffs who are religious leaders and mosques have curtailed religious guidance and personal counseling, and have had to record sermons for fear that NYPD officers or informants will take their statements out of context. *See* Compl. ¶¶ 5, 45–76, 113–33. At the Plaintiff mosques, knowledge and justifiable fear of NYPD surveillance have also diminished congregants' attendance, prompted distrust of newcomers out of concern that they are NYPD informants, and prevented the mosques from fulfilling their mission of serving as religious sanctuaries. *See* Compl. ¶ 5, 76, 133; *see also Presbyterian Church v. United States*, 870 F.2d 518, 521–22 (9th Cir. 1989) (where plaintiff churches alleged that federal officers surreptitiously recorded church services and members withdrew from active participation, the court held that plaintiffs adequately alleged injury). Likewise, knowledge and justifiable fear of NYPD surveillance have diminished the ability of Plaintiffs Dandia and Muslims Giving Back to raise funds, interfering with their mission of promoting and providing charity to needy New Yorkers in fulfillment of one of Islam's primary tenets. *See* Compl. ¶ 5, 77–112. Plaintiff Elshinawy's reputation as someone under NYPD surveillance has impacted the content of his lectures and diminished the audiences for those lectures as well as his relationships with others in his community. *See* Compl. ¶ 105, 148–160; *see also, e.g., Riggs v. City of Albuquerque*, 916 F.2d 582, 585 (10th Cir. 1990) (plaintiffs' challenge to local police department's

surveillance was justiciable where plaintiffs alleged harm to their reputations in the community).

Defendants' arguments in support of bifurcated discovery on fact issues concerning Plaintiffs' constitutional claims are equally meritless. Defendants are not justified in seeking to delay Plaintiffs' discovery concerning the NYPD's "investigative policies and practices," which bear directly on Plaintiffs' "individual alleged constitutional violations." Defs.' Letter at 2. Specifically, Plaintiffs' equal protection claims are based on the fact that Defendants treated New York Muslims discriminatorily. Discovery into the NYPD's purpose and intent with respect to its surveillance policies is thus critical to establishing the constitutional violations that Plaintiffs assert. *See, e.g., Phillips v. Girdich*, 408 F.3d 124, 129 (2d Cir. 2005) ("To prove a violation of the Equal Protection Clause . . . a plaintiff must demonstrate that he was treated differently than others similarly situated as a result of intentional or purposeful discrimination."). Similarly, Plaintiffs' Free Exercise claims under the First Amendment of the U.S. Constitution and Article I, § 3 of the New York State Constitution are based upon the contention that Defendants' program of suspicionless surveillance of Muslims was not a neutral, generally applicable policy, and was thus impermissible. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 542 (1993); *Catholic Charities v. Serio*, 7 N.Y.3d 510, 525 (N.Y. 2006). In *Lukumi*, the Court's neutrality analysis included a consideration of "the effect of a law in its real operation," which is "strong evidence of its object." 508 U.S. at 535. In this case, evidence of the NYPD's discriminatory targeting of Muslims—the surveillance policy "in its real operation"—is directly relevant to Plaintiffs' constitutional claims.

Discovery into the NYPD's monitoring of Muslim individuals and communities is also critical to other elements of Plaintiffs' constitutional claims. Because Plaintiffs' equal protection claims are subject to strict scrutiny, this discovery will determine the extent to which the NYPD's suspicionless surveillance served a compelling state interest and was narrowly tailored. *See, e.g., Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987) ("laws discriminating among religions are subject to strict scrutiny"); *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) (noting that religion is a suspect classification). Likewise, because Plaintiffs allege that the NYPD's surveillance policy discriminates among religions and is neither neutral nor generally applicable, their Establishment Clause and Free Exercise claims are also subject to strict scrutiny. *See, e.g., Larson v. Valente*, 456 U.S. 228, 246, 252 (1982); *Lukumi*, 508 U.S. at 546.³

³ Even if the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), governs the Establishment Clause analysis, Plaintiffs would be entitled to discover evidence about the NYPD's practices, which would speak to the surveillance policy's purpose, effect, and degree of government entanglement with religion.

Because any factual development of Plaintiffs' constitutional claims necessarily involves discovery as to the NYPD's surveillance practices, the proposed bifurcation is impractical, unreasonable, and illogical. In short, Defendants are not entitled to bifurcate discovery in a manner that would allow them to divorce their surveillance of Plaintiffs from the programmatic religious discrimination at the core of this lawsuit. Indeed, Plaintiffs would be gravely disadvantaged by a process that forbids the discovery of relevant evidence—especially as to the scope of the surveillance policy and Defendants' discriminatory intent—until *after* the NYPD pursues one-sided discovery. By proposing a bifurcated discovery and summary judgment schedule, Defendants are creating an end-run around the constitutional claims at the core of this case.

We respectfully request that the Court reject Defendants' proposal.

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Respectfully submitted,



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