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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SYED FARHAJ HASSAN, *et al.*, Plaintiffs, v. THE CITY OF NEW YORK, Defendant	*Document Electronically Filed* Case No. 2:12-cv-03401-SDW-MCA ***ORAL ARGUMENT REQUESTED***

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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PRELIMINARY STATEMENT

This Court should deny the City of New York's motion to dismiss Plaintiffs' First Amended Complaint because the New York City Police Department's massive surveillance program targeting Muslims in New Jersey, including these Plaintiffs, is based solely on religion and without any individualized suspicion of wrongdoing. The NYPD's targeting of Muslims violates some of the most basic civil rights enjoyed by all Americans, including American Muslims. Those protections include: equal protection of the law under the Fourteenth Amendment, free exercise of religion under the First Amendment, and freedom from the effects of the government's disfavoring religion under the Establishment Clause.

The City's policies and practices so clearly violate Plaintiffs' constitutional rights that its brief does not even address the three claims asserted in the First Amended Complaint. Instead, the City first summarily states that surveillance is not *per se* unconstitutional – an observation too obvious to dispute, but one which utterly misapprehends the nature of Plaintiffs' claims. Surveillance is, of course, permissible in certain circumstances, but it cannot be motivated exclusively on the basis of constitutionally protected criteria such as religion. Second, the City claims that Plaintiffs have failed to adequately plead their case, which is a remarkable assertion considering the abundance of specific factual allegations in the complaint, which are based largely upon the NYPD's own documents. The City also provocatively suggests that the events of 9/11 could justify the undifferentiated surveillance of an entire religious community – a startling claim that threatens to upend decades of bedrock constitutional and civil rights principles.

Finally, the City argues that Plaintiffs lack standing to challenge the NYPD's unlawful practices because their injuries resulting from the NYPD's spying are not cognizable. Plaintiffs have sustained a wide range of injuries caused by the NYPD surveillance, including: (i) the

stigma of religious discrimination; (ii) the change and reduction of their religious practices; (iii) the decreased participation by mosque congregants; and (iv) compensatory and nominal monetary damages. Thus, Plaintiffs injuries are a whole different species from the narrow "subjective chill" to expressive activity that the City's brief contends cannot support standing.

The complaint's amply detailed description of the City's explicitly discriminatory surveillance program combined with the range of concrete injuries that program has caused Plaintiffs render the City's motion to dismiss without merit. It should, therefore, be denied.

FACTS

Plaintiffs are Muslim individuals and organizations from all walks of life who have been victims of the NYPD's spying program ("Program") solely because of their faith or religious association. (First Am. Compl. ¶¶ 11-34.) They include New Jersey mosques, Muslim-owned businesses, student associations, and individuals who are members or are otherwise affiliated with those establishments. (*Id.*) As documented in its own reports, since January 2002, defendant City of New York ("NYC" or "the City"), through the NYPD, has conducted a massive targeting, mapping and surveillance program to monitor the lives of Muslims, their businesses, houses of worship, organizations, and schools in New York City and the Eastern Seaboard, with particular emphasis on New Jersey. (*Id.* ¶¶ 36, 38.) The NYPD's spying program targets Plaintiffs and an untold number of other Muslim individuals and entities based purely on religious affiliation, without reason to believe anyone has done anything wrong. (*Id.* ¶ 3.) In its ten years of existence, the Program has not produced a single lead to criminal activity. (*Id.* ¶ 2.)

In New Jersey, the Program focuses on several major hubs of Muslim life, including the City of Newark and the Muslim communities in central New Jersey, including the New Brunswick area. (*Id.* ¶¶ 38, 51.) The NYPD targets Muslim New Jersey residents, businesses,

schools, and organizations, including Plaintiffs, for surveillance because of, and only because of, their Muslim identities. (*Id.* ¶¶38, 42-44).

The NYPD reports show that in addition to targeting Muslims by focusing on mosques, Muslim-owned businesses, schools, and other Muslim-associated organizations, the Program intentionally targets Muslims by using ethnicity as a proxy for faith. (*Id.* ¶ 40.) The Department has designated twenty-eight countries and "American Black Muslim" as "ancestries of interest." (*Id.* ¶ 41.) Those twenty-eight countries constitute about 80% of the world's Muslim population. (*Id.*) However, the Department does not surveil all people and establishments with "ancestries of interest," but expressly chooses to exclude people and establishments with such "ancestries" if they are not Muslim. (*Id.* ¶ 42.) For example, the NYPD does not surveil Egyptians if they are Coptic Christians, Syrians if they are Jewish, or Albanians if they are Catholic or Orthodox Christian. (*Id.*)

The NYPD's Newark report focuses on ethnicity by observing: "There appears to be a sizable and growing non-immigrant, African-American Muslim population." (*Id.* ¶ 43.) No analysis of non-Muslim African-Americans appears in that report. (*Id.*) The Newark report even scrutinizes groups other than the "ancestries of interest" in order to focus on Muslims: "No Muslim component within these [Portuguese and Brazilian] communities was identified, with the exception of one identified location being owned and operated by a Brazilian Muslim of Palestinian descent." (*Id.* ¶ 44.)

The NYPD uses a wide variety of methods to spy on Muslims. (*Id.* ¶ 39.) Among other measures, the NYPD videos, photographs, and infiltrates mosques, Muslim-owned businesses, organizations, and schools, including Plaintiffs. (*Id.* ¶¶ 46-47.) Undercover officers at those locations engage in pretextual conversations to elicit information from proprietors and patrons.

(*Id.* ¶ 39.) And the Department monitors Muslim-affiliated websites, listserves, and chat rooms. (*Id.*)

The Program maps, targets, and surveils virtually every aspect of day-to-day Muslim life. (*Id.* ¶¶ 2, 47.) For example, the NYPD uses undercover officers called "rakers" to surveil locations such as bookstores, bars, cafes, and nightclubs in neighborhoods it believes to be predominantly frequented by Muslims. (*Id.* ¶ 47.) In addition, the Program uses informants called "mosque crawlers" who monitor sermons and conversations in mosques and report back to the NYPD. (*Id.*) Using mosque crawlers, rakers, and other officers and agents, the NYPD compiles surveillance reports noting details such as: flyers posted in shops advertising for Quran tutoring; a picture of a mosque hangs in a grocery store; a restaurant serves "religious Muslims;" customers visit a Dunkin' Donuts after Friday prayer; a restaurant is located near a particular mosque; employees or customers of establishments are observed wearing "traditional clothing;" Muslim prayer mats are hanging on the wall at an Indian restaurant; and a store posts a sign that it will be closed on Friday in observance of Friday prayer. (*Id.*) The NYPD creates numerous separate reports to maintain such details of various cross sections of Muslim communities, based upon geography, sect, and ethnicity. (*Id.* ¶¶ 5, 12, 37, 47, 58.) Many of those reports include maps indicating the locations of mosques, restaurants, retail establishments, and schools owned by or serving Muslims, as well as ethnic populations from heavily Muslim countries. (*Id.* ¶ 53.) For Newark, New Jersey, alone, the Department maintains over twenty such maps. (*Id.* ¶ 3.)

Another method the NYPD uses to track Muslims is inspecting records of name changes and compiling databases of new Muslim converts who take Arabic names, as well as Muslims who take names that are perceived to be "Western." (*Id.* ¶ 55.) The Department does not compile similar information for other kinds of name changes. (*Id.*)

The Program gives special attention to places of worship. The Department has sought to put an informant inside every mosque within a 250-mile radius of New York City and has, in fact, prepared an analytical report on every mosque within 100 miles, including some Plaintiffs. (*Id.* ¶ 47.) The NYPD's mosque crawlers have monitored thousands of prayer services in mosques, collecting detailed information about worshippers simply because they are Muslim, without evidence they engaged in any wrongdoing. (*Id.*) Officers also take photographs and video of license plate numbers and of congregants as they arrive to pray. (*Id.* ¶ 46.) The Department has even mounted surveillance cameras on light poles, aimed at mosques, for the purpose of round-the-clock surveillance. (*Id.*) Officers can control the cameras with their computers and use the footage to help identify worshippers. (*Id.*)

The Department also closely monitors the activities of Muslim Student Associations ("MSAs") at colleges and universities in New York, New Jersey, Connecticut, and Pennsylvania simply because their membership is Muslim. (*Id.* ¶ 49.) On a weekly basis, it prepares an MSA Report, including reports on the MSAs at Rutgers New Brunswick and Rutgers Newark. (*Id.* ¶ 51.) The NYPD even operated a base of operations in an off-campus apartment near Rutgers New Brunswick. (*Id.* ¶ 56.) The MSA reports include the names of professors, scholars, and students without any evidence that they engaged in wrongdoing. (*Id.* ¶ 51.) The Program obtains information about the MSAs by placing informants or undercover officers in all or virtually all MSAs, without any indication whatsoever of criminal activity or connection to wrongdoing. (*Id.* ¶ 49.) NYPD officers also monitor the web sites of Muslim student organizations, troll student chat rooms, and talk to students online. (*Id.* ¶ 50.) Moreover, undercover NYPD officers sometimes pose as students to attend MSA events. (*Id.*) One officer,

for example, went on a rafting trip with an MSA and monitored and recorded how often the student participants on the trip prayed, and that they discussed religious topics. (*Id.*)

Apart from the message sent by the NYPD's blanket surveillance of Muslims itself, the Department has made specific statements that cast guilt on all people of that faith, including Plaintiffs, by suggesting that Muslims pose a special threat to public safety. (*Id.* ¶ 57.) The Newark report analyzes over forty "Locations of Concern," including several Plaintiffs, defined as, among other things, a "location that individuals may find co-conspirators for illegal actions" and a "location that has demonstrated a significant pattern of illegal activities." (*Id.* ¶ 58.) Similarly, the Program's U.S. – Iran report describes organizations believed to pose serious threats to New York City, such as Hezbollah and Hamas, supporters of those organizations and their locations, followed by a list of "Other Shi'a Locations in the vicinity of NYC." (*Id.* ¶ 60.) Those other locations include one Plaintiff mosque and three mosques attended by another Plaintiff, although the report provides no indication of why those locations supposedly pose a threat. (*Id.*) Finally, despite the failure of the Program to produce any leads related to criminal activity, New York City officials, including the Mayor and Police Commissioner, have defended the Program targeting Muslims by stating that it is focused on "threats," attempts to document the "likely whereabouts of terrorists," and is necessary to protect the public's safety. (*Id.* ¶¶ 61, 65.)

Plaintiffs continue to suffer from the NYPD's discriminatory Program in New Jersey because the NYPD continues to conduct broad surveillance of mosques, Muslim businesses, schools and MSAs and the individuals associated with them. (*Id.* ¶ 56.) As part of the Program, NYPD officers frequently go back to surveillance locations to make sure they have not changed, and updating their information is part of their duties and responsibilities. (*Id.* ¶ 64.) Indeed,

New York City officials have made clear that they believe the NYPD's targeting of Muslims for surveillance on the basis of their religion is appropriate and will continue. (*Id.*) Discussing the surveillance, Mayor Bloomberg has stated publicly, "We're doing the right thing. We will continue to do the right thing." (*Id.*) Commissioner Kelly has said, "We're going to continue to do what we have to do to protect the city." (*Id.*) Most recently, an NYPD informant who conducted surveillance of mosques and MSAs went public and described how officers directed him to spy on Muslims without any reason to believe they were doing anything wrong.[1] Katon Dec. ¶ 4.

ARGUMENT

I. THE CITY'S EXPANSIVE PROGRAM TO MAP, TARGET, AND SURVEIL MUSLIM-AFFILIATED BUSINESSES, ORGANIZATIONS, AND INDIVIDUALS IN NEW JERSEY ON THE SOLE BASIS OF THEIR ISLAMIC RELIGIOUS AFFILIATION IS UNCONSTITUTIONAL.

The Plaintiffs in this case – among them an Iraq war veteran, a former Rutgers University student and member of the MSA, and a teacher and former principal of a Muslim grade-school for girls – share just one characteristic: their Islamic religious affiliation. That fact alone – and not an iota of evidence of criminal activity – led the NYPD to map, target and surveil Plaintiffs and countless other New Jersey residents, organizations and businesses.[2]

[1] The facts surrounding the informant who has revealed the NYPD's practices are offered only in connection with NYC's motion to dismiss under Rule 12(b)(1), not the Rule 12(b)(6) motion.

[2] The City's targeting and surveilling of Plaintiffs and other New Jersey Muslims because of their religion triggers strict scrutiny. *See Bd. of Educ. v. Grumet*, 512 U.S. 687, 714 (1994). Strict scrutiny imposes on the City the burden of showing that its religious classifications are "narrowly tailored measures that further compelling governmental interests." *Johnson v. California*, 543 U.S. 499, 505 (2005). The City's motion to dismiss makes no attempt to carry its burden of showing that its expansive, religious based surveillance of New Jersey Muslims meets the exacting strict scrutiny standard, nor could it at the motion-to-dismiss stage, as the application of strict scrutiny typically involves mixed questions of law and fact requiring discovery.

The City argues that law enforcement surveillance is not "per se" unconstitutional. Def. Br. 4-5. This argument misapprehends Plaintiffs' claims.[3] Plaintiffs assert that the City's policy and custom of spying on Muslims exclusively on the basis of their religion – a constitutionally protected class – violates the First and Fourteenth Amendments. It is no defense, therefore, to argue that surveillance is not per se unconstitutional. The Third Circuit explicitly rejected the type of argument the City makes here in *Hall v. Pa. State Police*, 570 F.2d 86 (3d Cir. 1978), a case in which the state police directed banks to "[t]ake photos of any black males or females coming into bank who may look suspicious." 570 F.2d at 88.

> Although it may be assumed that the state may arrange for photographing all suspicious persons entering the bank, *Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate*, 519 F.2d 1335 (3d Cir. 1975), it does not follow that its criterion for selection may be racially based, in the absence of a proven compelling state interest.

Id. at 91. Thus, Plaintiffs' assertion that the City's surveillance targets them based upon their religion states a claim under the Equal Protection Clause of the Fourteenth Amendment just as surely as the plaintiff in *Hall* stated a claim based upon his race, a different protected class, under the identical constitutional provision.

The City's "per se" argument also falls flat with respect to Plaintiffs' claims under the two religion clauses of the First Amendment. It may be constitutional for a city to ban the killing

[3] The City appears to have incorrectly applied a Fourth Amendment analysis to Plaintiffs' Equal Protection and First Amendment claims. The NYPD can conduct surveillance in a manner consistent with the Fourth Amendment, while still violating the Constitution's proscriptions against intentional discrimination under the Equal Protection Clause and, in this case, the First Amendment, by exclusively targeting a particular religious group for that very same surveillance. *See Whren v. U.S.*, 517 U.S. 806, 813 (1996) (holding that, though the Fourth Amendment had not been violated, "the Constitution prohibits selective enforcement of the law based on considerations such as race" and explaining that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.")

of animals when "not for the primary purpose of food consumption," but it becomes unconstitutional under the Free Exercise Clause of the First Amendment when the target of the ban is a particular religious faith. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535 (1993) ("No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.").

Similarly, under the Establishment clause, the Supreme Court has "time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship." *Grumet*, 512 U.S. at 714. Thus, a government may display a Christian version Ten Commandments monument on government property without violating the Establishment Clause, if it is part of a broader display such that the setting does not convey endorsement of religion. *See Van Orden v. Perry*, 545 U.S. 677 (2005). In other contexts, a government's display of the Ten Commandments will constitute an impermissible endorsement[4] of religion. *McCreary County v. ACLU*, 545 U.S. 844, 881 (2005).

Lastly, in Point I of its brief, NYC refers to a press release issued by the New Jersey Attorney General's Office indicating it found no evidence that the NYPD's activities in New Jersey violated New Jersey civil or criminal laws. The portions of the brief referring to this statement, the accompanying paragraph four of opposing counsel's declaration, and the Exhibit B copy of the press release should be stricken from the record and disregarded by the Court for several reasons. Most importantly, a state official's opinion about whether the City violated New Jersey civil or criminal law is wholly irrelevant to the claims before this court. Secondly, an opinion on a matter of law is inadmissible and Plaintiffs' claims do not, in any

[4] The *Van Orden* and *McCreary* cases involve endorsement of religion under the Establishment Clause; however, that clause also mandates that a government practice cannot inhibit or disapprove of religion. *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 284 (3d Cir. 2011).

event, even involve New Jersey law. *See Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 218 (3d Cir. 2006) (legal opinion inadmissible). Lastly, the press release the City puts before the Court is extraneous material that cannot be considered on a motion to dismiss under 12(b)(6).[5] *See* Fed. R. Civ. P. 12(d); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. N.J. 1997) ("As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings.").

II. PLAINTIFFS HAVE STATED A CLAIM THAT THE NYPD'S SPYING PROGRAM TARGETING THEM BASED SOLELY ON THEIR RELIGION VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

The City argues that Plaintiffs' Complaint[6] does not meet the pleading requirements of Rule 8 as interpreted in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to state a claim for intentional discrimination. Yet the City does not even address, let alone analyze, Plaintiffs' numerous allegations regarding the City's overtly discriminatory policy and practice. Instead, the City tosses out a grab bag of hypothetical alternative explanations for its facially discriminatory conduct, as if Plaintiffs' Complaint were being presented to a jury, rather than evaluated for its mere plausibility. Indeed, the City provocatively justifies its undifferentiated and suspicionless surveillance of a large, diverse religious community on little more than the fact that the attacks of September 11, 2001, were perpetrated by a group of Muslims. The City thus effectively proposes that this Court endorse an exception to basic constitutional norms – and unlimited surveillance or other unlawful government conduct – for New Jersey's Muslim citizens.

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[5] Although matters outside the First Amended Complaint may be considered for purposes of the City's 12(b)(1) motion, the Attorney General's statement does not relate to the City's standing argument and, indeed, the brief does not refer to the statement in Point III, the standing section.

[6] All references to "the Complaint" are to Plaintiffs' First Amended Complaint filed Oct. 3, 2012 (Doc. 10).

Neither the logic of *Iqbal* nor its standards for evaluating the plausibility of factual allegations at the pleading stage support dismissal of Plaintiffs well-pled complaint or justify the Program's exclusive reliance on religion. First, the Complaint contains numerous non-conclusory allegations that the City adopted a policy and practice to surveil Muslims exclusively on the basis of their religion. Thus, the Complaint plainly states a plausible claim against the City for intentional discrimination under the First and Fourteenth Amendments pursuant to the pleading standards set forth in *Iqbal* and *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007).

Second, contrary to the City's strained suggestion, *Iqbal's* holding requiring non-conclusory allegations regarding an individual defendant's discriminatory state of mind has no bearing here, where the municipal defendant's discriminatory purpose is actually spelled out in its own documents and could otherwise be easily inferred from the detailed practices alleged. Third, nothing in *Iqbal*/*Twombly*'s articulation of Rule 8 pleading standards requires the Plaintiffs to rule out any conceivable nondiscriminatory explanation for the City's (overtly discriminatory) policy in order to proceed past the motion-to-dismiss stage. The City appears to read the distinct factual context of *Iqbal* to suggest that the September 11th attacks *and nothing more* justifies the adoption of policies and practices that overtly discriminate against Muslims. Such a radical application of *Iqbal* has no support in the law and, if accepted, would undermine decades of elementary civil rights precedent.

A. The First Amended Complaint Easily Satisfies the Pleading Standard of Rule 8 as Interpreted by *Iqbal* and *Twombly*.

The Federal Rules require only "a short and plain statement" of the grounds for the court's jurisdiction and the pleader's entitlement to relief. Fed. R. Civ. P. 8. In evaluating whether plaintiffs have failed to state a claim under Rule 12(b)(6), the court must assume the veracity of well-pled factual allegations, then determine whether they plausibly give rise to

entitlement to relief. *Iqbal*, 556 U.S. at 679. Courts look for "'enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary elements" of a claim for relief. *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556); *see also Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d. Cir. 2009).

The Third Circuit has set forth a three-step process for evaluating the sufficiency of a complaint post-*Iqbal*: "First, we outline the elements a plaintiff must plead to state a claim for relief. Next we peel away those allegations that are no more than conclusions and thus not entitled to the assumption of truth. Finally, we look for well-pled factual allegations, assume their veracity, and then 'determine whether they plausibly give rise to an entitlement to relief.'" *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012)[7] (quoting *Iqbal*, 556 U.S. at 679); *see also Argueta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60, 73 (3d Cir. 2011).

Applying the first of *Bistrian*'s three-step process, the elements of Plaintiffs' claims are straightforward. In order to state a claim for violation of the Equal Protection Clause, Plaintiffs must allege that the City purposefully classified them on account of their religion. *See Washington v. Davis*, 426 U.S. 229, 240 (1976). Similarly, to state a claim under the First Amendment's Free Exercise Clause, a plaintiff must show that a government policy or practice purposefully discriminates on the basis of religion. *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 542 (1993)). A claim under the Establishment Clause requires a showing that the policy or practice symbolically signals disapproval of a particular religion. *Doe v. Indian*

[7] The City cites *Bistrian* as an example of a dismissal of a defendant pursuant to *Iqbal*, City Brief at 5, but fails to acknowledge that the case dismissed claims against only one *of twenty-seven* defendants, finding the claims against that individual too "speculative." Bistrian's claims against the other twenty-six defendants survived, because they were based on well-pled non-conclusory allegations. *See Bistrian*, 696 F.3d at 377.

River Sch. Dist., 653 F.3d 256, 284 (3d Cir. 2011) (citing *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 100 (3d. Cir. 2009). Notably, none of Plaintiffs' claims include an element of animus or malice toward Muslims. The purposeful classification based on faith is the constitutional violation, regardless of the motive underlying the classification.[8]

Following *Bistrian*'s second step, the Complaint does not rely on any conclusory allegations that need to be "peeled away." 696 F.3d at 365. The City's few characterizations of Plaintiffs' allegations as conclusory are inconsequential. Def Br. at 4, 7, 16. Indeed, the pleading provides overwhelming specific allegations of how the NYPD implements its spying program to target Muslims and how Plaintiffs in particular have fallen victim to it – which leads to the third step under *Bistrian*.

Lastly, assuming the truth of Plaintiff's well-pled allegations, the Court determines whether they plausibly give rise to an entitlement to relief. Plaintiffs describe in abundant detail the NYPD's explicit, formalized policy and practice of surveilling Muslims in New Jersey precisely because of their religion and without any individualized suspicion of criminal activity. *See* First. Am. Compl. ¶¶ 36-65. For example, the complaint alleges that the NYPD subjects lead plaintiff Hassan, a U.S. citizen and a decorated veteran of the war in Iraq, to unlawful surveillance because of his religion by targeting his and other specifically named New Jersey

[8] A plaintiff need only allege that a defendant had a discriminatory purpose, which can be shown, as here, by policies and practices that on their face classify on the basis of religion. *See Washington v. Davis*, 426 U.S. at 239-40. Critically, a plaintiff need not show that the alleged classification was motivated by malice to state a claim under Equal Protection principles. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991) (malice is not required to find discriminatory purpose because the classification itself causes "stigma or dishonor" and "contravenes equal protection principles."). The same is true for claims under the Free Exercise and the Establishment Clauses. *See Shrum v. City of Coweta, Oklahoma*, 449 F.3d 1132, 1145 (10th Cir. 2006) ("the Free Exercise Clause is not confined to actions based on animus"); *Doe v. Indian River Sch.*, 653 F.3d at 284 (3d Cir. 2011) (under Establishment Clause, "*[R]egardless of its purpose*," the government practice "cannot symbolically endorse or disapprove of religion.") (internal quotation omitted and emphasis added).

mosques. *Id.* ¶¶ 10-12. The NYPD also targets the Rutgers University chapter of the Muslim Student Association and its student members because of their religious affiliation through the preparation of weekly MSA reports. *Id.* ¶¶ 23-26, 30. The NYPD even spied on a private grade-school attended by African American Muslim girls by photographing it, recording the address, and noting its ethnic composition. *Id.* ¶¶ 31-34.

Perhaps most importantly, the Complaint provides detailed description of the methods the NYPD uses to spy on Muslims, including Plaintiffs. The pleading thoroughly describes, for example, how the Department takes photos and videos of mosques, congregants, and congregants' license plates, plants informants and undercover officers in mosques and Muslim businesses (*Id*. ¶¶ 39, 41, 46), prepares reports and maps of Muslim communities (*id.* ¶¶ 5, 12, 37, 47, 53, 58), and has officers pose as students to monitor how often MSA members pray (*id.* ¶ 50). The Complaint further specifies that when monitoring ethnic communities, the NYPD focuses *exclusively* on their Muslim segments, excluding from surveillance other religious groups such as Egyptians who are Coptic Christians, Syrian Jews, and Catholic and Orthodox Christian Albanians. (*Id.* ¶¶ 42-44.)

Thus, the specificity of Plaintiffs' factual allegations, even when stripped of any conclusory assertions, are more than adequate to plausibly state a claim upon which relief may be granted. Indeed, such specific allegations, along with "smoking gun" evidence from NYPD documents of the purposeful classification of Muslims based solely on religion, are the antithesis of the conclusory, formulaic allegations at issue in *Iqbal*.

B. When a Municipal Defendant Adopts An Overtly Discriminatory Policy and Custom, *Iqbal*'s Holding on Individual Vicarious Liability Does Not Apply.

Plaintiffs' allegations are directed exclusively at the City of New York pursuant to 42 U.S.C. § 1983 and *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 659 (1978). *See* First. Am. Compl. ¶¶ 35, 66-69.

To show liability under §1983 and *Monell* at the pleading stage, a plaintiff need allege only that the defendant's actions: "(1) had a discriminatory effect and (2) were motivated by a discriminatory purpose." *Bradley v. United States*, 299 F.3d 197, 205 (3d Cir. 2002). Thus, "when execution of the government's *policy or custom* . . . inflicts the injury . . . the government as an entity is responsible." *Monell*, 436 U.S. at 694. (emphasis added). Plaintiffs' allegations regarding the City's policy and practice of discriminatory surveillance satisfies this standard for municipal liability. *See* First. Am. Compl. ¶¶ 35-65.

Placing great weight on the Supreme Court's ruling that the *Iqbal* plaintiffs failed to adequately plead that individual supervisory defendants acted with discriminatory intent, the City suggests that, therefore, Plaintiffs must do more than allege the existence of an overtly discriminatory policy in a municipal liability case such as this. The City is confused. To begin, the argument proceeds on the false premise that *Iqbal* was brought against an institutional defendant and thus is somehow akin to the municipal liability claim presented here. *See* Def Br. at 6 (incorrectly stating that *Iqbal* concerned "the purpose of the *FBI's actions*") (emphasis added). In fact, *Iqbal* involved only damages claims against Attorney General John Ashcroft and FBI Director Robert Mueller in their *individual* capacities pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). *See Iqbal*, 556 U.S. at 668.

As such, the cases are in a fundamentally different posture and require entirely different allegations. In *Iqbal*, the plaintiff sought to hold these high-level officials responsible for a

policy of holding "high interest" detainees in harsh conditions "on account of his religion, race and/or national origin." 556 U.S. at 666. The Court explained that, consistent with the law governing individual supervisory liability for religious or racial discrimination, Iqbal had to do more than allege a discriminatory impact against Muslims and Arabs; he had to demonstrate that Ashcroft and Mueller themselves harbored a discriminatory purpose in promulgating their policies. *Id.* at 676-77 (citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). Yet, Iqbal did "not show, or *even intimate* that [Ashcroft and Mueller] purposefully housed detainees in [harsh conditions]" or that they had "labeled him as a person 'of high interest' for impermissible reasons." *Id.* at 683 (emphasis added). With no facts other than Ashcroft's and Mueller's roles as high-level supervisors to support the plaintiff's "threadbare" and "formulaic" legal conclusions, and armed with an "obvious alternative explanation" for the detentions – *i.e.*, a nondiscriminatory intent to detain illegally-present, "high-interest" aliens for valid law enforcement purposes – the Court did not find "plausible" the "purposeful, invidious discrimination respondent asks us to infer" against the individual defendants. *Id.* at 682.

In stark contrast to *Iqbal*, here Plaintiffs seek to hold a municipality liable for an unlawful policy and practice specifically *promulgated* by the City and where Plaintiffs point to a smoking gun – the City's own documents – to allege discriminatory purpose.[9] This is all that is required to state a claim for *Monell* liability. *See Nykiel v. Borough of Sharpsburg Police Dep't*, 778 F.

[9] The stray cases the City cites – which were brought against individuals and not governmental entities – are not to the contrary. For example, in *Argueta*, plaintiffs alleged that Immigration and Customs Enforcement (ICE) as well as individual agents and supervisors were liable for unlawful, warrantless raids of their homes. The Third Circuit held only that Plaintiffs "failed to allege a plausible claim to relief on the basis of [high-level] supervisors' 'knowledge and acquiescence,'" in their subordinates' misconduct, and that there were insufficient allegations to make the required showing that the individual defendants directed the illegal conduct. 643 F.3d at 70. The Court did not address – nor did defendants even attempt to dismiss – claims against ICE as an institutional government defendant; nor could it suggest that an institutional policy of wrongdoing would be insufficient to state a claim.

Supp. 2d 573, 586 (W.D. Pa. 2011) ("When an action against a municipality is based on Section 1983 . . . , although there can be no liability for the municipality based on vicarious liability, it can be held responsible in and of itself when injury is caused by its adopted policy or custom.") (citing *Monell*, 436 U.S. at 659)); *Olivieri v. County of Bucks*, U.S. App. 2012 LEXIS 22098 (3d Cir. Oct. 24, 2012); *Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996).

In sum, unlike in *Iqbal*, here there is no need to infer an individual's discriminatory state of mind. The City's policy and custom targets Muslims and only Muslims because of their religious affiliation; its discriminatory purpose is readily apparent. Plaintiffs' allegations concerning the City's discriminatory intent are therefore plausible as a matter of law. *See Washington v. Davis*, 426 U.S. at 240-41 (1976).

C. The *Iqbal/Twombly* Standard Does Not Require Plaintiffs To Rule Out Any Alternative Explanation For the City's Overt Discrimination In Order To Survive A Motion To Dismiss.

Building on its profound misreading of *Iqbal*, the City argues that, at the pleading stage, a court must dismiss well-pled claims of a municipality's overtly discriminatory policy if defendants can suggest any conceivable alternative excuse for discrimination. This is decidedly not the law.

Iqbal and *Twombly* expressly instruct that pleading "plausibility" does not require demonstrating that a claim is probable. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556. The "plausibility" standard certainly does not permit a court to choose which competing inference is more likely to be true – as that is an evidentiary standard only implicated at trial and after discovery. *See Fowler*, 578 F.3d at 213 ("a well-pled complaint may proceed even if it strikes a savvy judge that actual proof of those facts alleged is improbable and that a recovery is very remote and unlikely") (internal quotations omitted). Because Plaintiffs have made detailed factual and non-conclusory allegations directly attributing misconduct to defendants, this court

need not consider alternative, much less hypothetical, explanations. In the racial or religious discrimination context, district courts in the Third Circuit "do[] not require plaintiffs . . . to include all of the evidence that suggests that the conduct was a result of racially discriminatory intentions rather than the byproduct of some legitimate purpose. . . . Instead, they must simply allege enough facts to nudge the claim into the realm of the plausible." *Major Tours, Inc. v. Colorel*, 720 F. Supp. 2d 587, 606 (D.N.J. 2010) (internal citations omitted). This ends the inquiry.

In any event, the City does not contest Plaintiffs' allegations that they were targeted and surveilled because of their religion, effectively conceding that the allegations are well-pled. The City's silence is unsurprising in light of the fact that virtually all of the Plaintiffs' allegations are based on official NYPD documents. Without a nondiscriminatory explanation for their surveillance of the Plaintiffs, the City argues, in effect, that because Muslim individuals executed the attacks of September 11th, the City may conduct undifferentiated, blunderbuss surveillance of any Muslim, anywhere.

For example, linking all New Jersey Muslims to the acts of a group of fanatics, the City of New York actually makes this astonishing claim: "Plaintiffs allege that the Program was initiated soon after the September 11th terrorist attack. *Thus*, the initiation of the program was more likely in response to the terrorist threat." Def. Br. at 7 (emphasis added). The City also argues, in essence, that because Muslim individuals protested Danish cartoons in Nigeria, Italy and Pakistan,[10] the City may target mosques in Somerset, Muslim-affiliated campus

[10] The City's brief refers to a "widely publicized incident that caused strong reactions," based upon Exhibit C to the Farrell Declaration, which is a composite of media reports. Def. Br. at 8. That exhibit, ¶ 5 of the Farrell Declaration, and the related references in the brief are improper in connection with a 12(b)(6) motion and should be stricken from the record and disregarded by the Court.

organizations in New Brunswick, and Muslim-owned businesses and schools in Newark. Far from defeating Plaintiffs' claims of discriminatory targeting, the City's position makes them all the more plausible. *See Major Tours*, 720 F. Supp. 2d at 606 ("There is no obvious and lawful purpose that explains, for example, why inspectors would target casinos frequented by African Americans for bus safety inspections"); *Gordon v. City of Moreno Valley*, 687 F. Supp. 2d 930, 951-53 (C.D. Cal. 2009) (African American barbershops targeted for code-enforcement plausibly pled equal protection claims against municipality).

To be sure, *Iqbal* itself provides absolutely no support for the City's suggestion that 9/11 justifies otherwise discriminatory policing. In *Iqbal*, the Supreme Court was at pains to point out that defendants had not targeted Muslims as a group, but only individuals who were illegally present in the United States and who had been classified as "high-interest" with "potential connections to those who committed terrorist acts" – law-enforcement characteristics shared by none of the Plaintiffs here. *Iqbal,* 556 U.S. at 682. In fact, the Court specifically noted that Iqbal had *not* alleged that he was classified as "high-interest because of race, religion or national origin." *Id.* More recently, in *Turkmen et al. v. Ashcroft*, No. 02 CV 2307, 2013 U.S. Dist. LEXIS 6042, at *20 (S.D.N.Y. Jan. 15, 2013) – a case which arises out of the same post-9/11 arrests and confinement of unauthorized immigrant Arabs and Muslims that ensnared Iqbal – the court held that detainees alleging grossly punitive conditions of confinement on account of their Muslim beliefs pled "a plausible equal protection claim" against a responsible warden and detention officers. *Id.* at 68. Judge Gleeson pointed not only to allegations of egregious mistreatment and "derogatory anti-Muslim comments," but also to allegations that the detainees were placed in segregated housing "without individualized determinations of dangerousness." *Id.* at 67-68. *Turkmen* thus makes abundantly clear that even unauthorized immigrants arrested

pursuant to investigations directly related to the September 11th attacks cannot be targeted for punishment or discrimination on the basis of their actual or perceived religious beliefs.

At bottom, the City seeks to create an exception – for Muslims – to decades of constitutional law prohibitions on protected class-based policing. The argument is as dangerous as it is novel. Save for some regrettable historical examples, *see Korematsu v. United States*, 323 U.S. 214, 233 (1944), race and religion have never been considered a valid proxy for dangerousness or criminality. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (the appearance of Mexican ancestry "does not justify stopping all Mexican-Americans to ask if they are aliens").

No court should accept what is little more than religious or racial stereotype as a basis for government action. *See Powers*, 499 U.S. at 410 ("We may not accept as a defense to racial discrimination the very stereotype the law condemns."); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control [racial] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect.").[11] To do so would cross the line from ratifying legitimate law enforcement practices to endorsing outright religious discrimination, pulling the court toward "the ugly abyss of racism." *Korematsu v. United States*, 332 U.S. at 233 (Murphy, J., dissenting).

[11] Similarly circular attempts to justify discriminatory classifications on the basis of illegitimate stereotypes have failed. *See, e.g., Oyama et al. v. California*, 332 U.S. 633, 672 (1948) (Black, J., concurring) (equal protection compels rejecting the idea that "some racial characteristic, common to all Japanese aliens . . . makes them unfit to own or use agricultural land in California"); *Craig et al. v. Boren*, 429 U.S. 190, 203 n.14, 203-04 (1976) (rejecting use of "social stereotypes" of "'reckless' young men" to justify establishing "gender-based traffic safety laws" and drinking ages).

III. PLAINTIFFS HAVE ARTICLE III STANDING BECAUSE THEY EACH HAVE SUFFERED AN INJURY IN FACT THAT IS "FAIRLY TRACEABLE" TO DEFENDANT'S SPYING AND IT IS LIKELY THAT THE INJURIES WILL BE REDRESSED BY A FAVORABLE DECISION.

The parties agree that the starting point for the analysis of Plaintiffs' standing is *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *See* Def. Br. at 9. In order to establish the "constitutional minimum of standing," a party must establish three elements:

> First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61 (internal citations omitted) (alterations in original). As discussed fully below, each of the eleven Plaintiffs alleges (1) an injury in fact (2) fairly traceable to the City and not the result of an independent action of a third party (3) that will be redressed by a favorable decision.[12]

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[12] Because Defendant's Rule 12(b)(1) motion to dismiss for lack of standing primarily "contest[s] the sufficiency of the pleadings," *Turicentro v. Am. Airlines*, 303 F.3d 293, 300 n.4 (3d Cir. 2002), and "raises no challenge to the facts alleged in the pleadings," *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 177 (3d Cit. 2000), "the [C]ourt must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Id.* Defendant has submitted a factual declaration with its motion to dismiss, but Defendant relies on only one paragraph of that declaration to contest standing, and only in support of the particular argument that Plaintiffs' injuries are not "fairly traceable" to the Defendant, but rather to the Associated Press. *See* Farrell Decl. ¶ 3 (discussing AP's publication of the reports discussed in the Complaint). Plaintiffs have submitted their own factual declaration solely to respond to this narrow point. *See* Katon Decl. ¶ 2.

That the parties have introduced evidence on this particular point does not transform the entire Rule 12(b)(1) motion from a "facial" challenge into a "factual" one. *See Gould Elecs.*, 220 F.3d at 177 (explaining different standards applicable to each type of challenge). Instead, the Court must continue to accept all allegations in the First Amended Complaint ("FAC") in the light

NYC's standing analysis focuses on cases involving claims under the Free Speech Clause of the First Amendment, which is not among the three constitutional claims asserted by Plaintiffs. Def. Br. at 13-15. Notably, standing "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *Common Cause v. Pennsylvania*, 558 F.3d 249, 262 (3d Cir. 2009) (quoting *Raines v. Byrd*, 521 *U.S.* 811, 818 (1997)). Analysis of standing will depend upon "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth,* 422 U.S. at 500. Thus, a proper analysis of Plaintiffs' standing considers how courts have analyzed standing under the constitutional provisions upon which the Complaint relies: the Equal Protection Clause of the Fourteenth Amendment and the Free Exercise and Establishment Clauses of the First Amendment.[13] *See infra* § III.A.2-4. Regardless, Plaintiffs satisfy the free speech cases upon which NYC relies so heavily. *See infra* § III.A.1.

A. Plaintiffs Have Suffered Injuries In Fact.

1. Law enforcement surveillance can and in this case does give rise to injury in fact sufficient for Article III standing.

The Third Circuit has recognized that injuries resulting from law enforcement surveillance conducted in public spaces can confer standing. *See Anderson v. Davila*, 125 F.3d 148, 160-61 (3d Cir. 1997) (plaintiff suffered cognizable harm resulting from law enforcement

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most favorable to the Plaintiff, although it may supplement its consideration of the FAC with the factual evidence introduced on the narrow point in question. *See id.* (district court "properly accepted allegations of complaint as true" as to all issues except for the one issue with respect to which the defendant "challenge[d] the truthfulness of . . . the allegations in the Complaint").

[13] For example, numerous cases hold that a mere "identifiable trifle" is sufficient injury to confer standing. *See, e.g., Doe v. County of Montgomery*, 41 F.3d 1156, 1159 (7th Cir. 1994); *Saladin v. Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987); *Jones v. Butz*, 374 F. Supp. 1284, 1288 (S.D.N.Y. 1974); *see also Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 177 (3d Cir. Del. 2001) (citing *U.S. v. Students Challenging Regulatory Action Procedures*, 412 U.S. 669, 689 n.14 (1973)).

surveillance outside his home); *Philadelphia Yearly Meeting of Religious Soc'y of Friends v. Tate*, 519 F.2d 1335, 1338-39 (3d Cir. 1975) (chilling effect on First Amendment rights resulting from protest surveillance confers standing when general availability of surveillance materials "could interfere with the job opportunities, careers or travel rights" of plaintiffs and could "dissuade some individuals from becoming members" of organizational plaintiffs); *see also Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 522-23 (9th Cir. 1989) (plaintiff churches sustained injury to challenge government surveillance when they made allegations of a "decrease in congregants' participation in worship services and other religious activities, of the cancellation of a Bible study class, of the diversion of clergy energy from pastoral duties, and of congregants' reluctance to seek pastoral counseling."). The variety of types of injuries that the NYPD surveillance has caused Plaintiffs, as set forth in the Complaint and highlighted below, belie the City's argument that Plaintiffs' injuries amount to no more than a "subjective chill," which courts have found insufficient. *See* Def. Br. at 13-14 (arguing "subjective chill" under the *Laird* line of cases).

The Supreme Court did hold in *Laird v. Tatum*, 408 U.S. 1 (1972), that mere "[a]llegations of a subjective 'chill' [of the exercise of First Amendment rights] are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 13-14. However, that case does not stand for the proposition that surveillance may never be challenged as a constitutional violation, but, instead, it narrowly held that the respondents there lacked standing because they did not show that they had sustained or were immediately in danger of sustaining an injury as a result of the surveillance. *Id.*

Here, Plaintiffs do not allege mere "subjective chill." Plaintiffs Hassan, Mohammed, Doe,[14] and Abdur-Rahim allege that the NYPD surveillance of them has caused cognizable harm to future educational and employment prospects. First Am. Compl. ¶¶ 13, 25, 27, 29, 32. Plaintiffs All Body Shop Inside & Outside and Unity Beef Sausage Company assert that the NYPD's surveillance of their businesses has resulted in a decreased number of customers, and the Council of Imams in New Jersey ("CINJ")[15] alleges that the NYPD surveillance of two of its member mosques has led to a decrease in attendance and in contributions (although they are not seeking compensatory damages). *Id.* ¶¶ 15, 19, 21. Plaintiffs Abdur-Rahim and Abdullah claim compensatory damages due to the loss of value to their home, which appears in the NYPD's Newark report.[16] *Id.* ¶¶ 31-34. Each of these allegations reflects "specific present objective harm or a threat of specific future harm," and thus are injuries in fact. *Laird*, 408 U.S. at 13-14. In particular, allegations of such economic injuries are sufficiently concrete and particularized to establish standing. *Cf. Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 190-91 (3d Cir. 2006) (holding that plaintiffs had standing because their alleged injuries to property values were constitutionally cognizable, concrete, and particularized); *Growth Horizons, Inc. v. Delaware*

[14] Plaintiff Jane Doe has filed under pseudonym. First Am. Compl. ¶ 26. Defendant has agreed that the parties will address this issue, if necessary, after the Court rules on the pending motion to dismiss.

[15] Plaintiffs Council of Imams in New Jersey and MSA National assert associational standing under *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977). Each can demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343. *See* First Am. Compl. ¶¶ 14-17.

[16] *Cf. Baugh Constr. Co. v. Mission Ins. Co.*, 836 F.2d 1164, 1171 (9th Cir. 1988) (diminution in value claim based upon negative publicity regardless of whether property has been sold); Restatement (Second) of Torts § 928 (1977) (plaintiff entitled to difference between value of property before the tort versus after).

County, Pa., 983 F.2d 1277, 1281 (3d Cir. 1993) (noting that a district court has jurisdiction so long as plaintiff has standing to make a non-frivolous claim).

Third Circuit jurisprudence makes clear that a plaintiff who has alleged injury of just the sort complained of by Plaintiffs possesses Article III standing to challenge unlawful surveillance. *See Anderson*, 125 F.3d 148; *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975); *Philadelphia Yearly*, 519 F.2d 1335. In *Anderson*, the Court of Appeals held that an individual surveilled by police in retaliation for engaging in First-Amendment protected activity suffered a cognizable harm. 125 F.3d at 160-61. The Court distinguished the facts in *Anderson* from those in *Laird* because Anderson alleged a harm that was "more specific and less speculative" than had the *Laird* plaintiffs, who had cited merely a "vague fear" that the Army might misuse the information contained in surveillance reports in the future and "were unable to articulate with any specificity the harm that they had suffered or might suffer in the future from the Army's surveillance." *Id.* at 160. Like the plaintiff in *Anderson*, Plaintiffs here have alleged specific harms, discussed herein, that are not merely speculative.

In *Philadelphia Yearly Meeting of Religious Soc'y of Friends*, the plaintiffs alleged that information collected during an investigation conducted by the defendants, that was available to other individuals, governmental agencies, and the media "threatened injury to plaintiffs by way of a chilling of their rights of freedom of speech and associational privacy." *Philadelphia Yearly,* 519 F.2d at 1338. These allegations, the Third Circuit held, gave rise to standing because the "general availability of such materials and lists could interfere with the job opportunities, careers or travel rights of the individual plaintiffs" and the availability of the information "may well dissuade some individuals from becoming members [of the plaintiff organization], or may persuade others to resign their membership." *Id.* Likewise, the Third Circuit, in *Paton*, held that

a student had suffered a cognizable injury and had standing to seek expungement of records where the FBI surveilled the plaintiff and maintained an investigative file about her that could damage her future employment prospects. *Paton*, 524 F.2d. at 868; s*ee also Meese v. Keene*, 481 U.S. 465, 473-74 (1987) (holding that appellee established the threat of cognizable injury because he alleged that, if he exhibited the films characterized as political propaganda, "his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired." (internal quotation marks omitted)).

2. Plaintiffs have been injured by being targeted on the basis of membership in a suspect class and on the basis of classification of a fundamental right, both of which are injuries in fact pursuant to the Equal Protection Clause.

The Supreme Court has made clear that, under the Equal Protection Clause, the "denial of equal treatment," is an "injury in fact." *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993). And a classification based on religion, such as the NYPD spying program targeting Muslims, certainly gives rise to standing. *See generally Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) ("[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)) (internal quotation marks omitted)); *Burlington N. R.R. v. Ford*, 504 U.S. 648, 651 (1992) (noting that classifying on the basis of religion is suspect); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 885 (1985) (noting that a classification drawn upon religion is inherently suspect). That is, that Plaintiffs were subjected to surveillance, and its resulting harms, solely on the basis of their religious identity is an injury in fact sufficient to establish Article III standing. *Cf. Northeastern Fla. Chapter, Associated Gen. Contractors of America*, 508 *U.S.* at 666 ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is

for members of another group . . . [t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier . . . ."). The stigmatization of all Plaintiffs due to the surveillance solely on the basis of their religious identity is also an injury in fact sufficient to establish Plaintiffs' Article III standing. *See Allen v. Wright*, 468 U.S. 737, 755 (1984) (noting that stigma caused by discrimination is sufficient to support standing for "persons who are personally denied equal treatment" (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984)) (internal quotation marks omitted)); *Heckler*, 465 U.S. at 739-40 ("as we have repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group" (internal citation omitted)); *cf. Northeastern Fla. Chapter, Associated Gen. Contractors of America*, 508 U.S. at 666 ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group . . . [t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier . . . ."). Accordingly, the violations of the Equal Protection Clause set forth in the Complaint provide Plaintiffs with standing to challenge the surveillance here at issue.

3. All Plaintiffs have been personally subjected to a policy disfavoring their religion and, in many cases, have altered their behavior as a result, causing injury in fact pursuant to Establishment Clause jurisprudence.

Plaintiffs have standing under the Establishment Clause to challenge any government practice, including the surveillance program here at issue, which singles out their religion for disfavor. The Supreme Court has made it clear that "the requirements for standing to challenge state action under the Establishment Clause . . . do not include proof that particular religious

freedoms are infringed." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 n.9 (1963) (citing *McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961)). Instead, it is sufficient for plaintiffs to be personally and "directly affected" by state conduct that favors or disfavors a religion in violation of the Establishment Clause, without any evidence of tangible harm. *Id.* Thus, for example, in *Schempp*, schoolchildren and parents had standing to bring an Establishment Clause challenge simply because the children were exposed to Bible verses required by state law to be read at the public schools they attended. *Id.*

The doctrine that an individual has standing when exposed to state conduct that favors or disfavors a particular religion remains a vital part of Establishment Clause jurisprudence, and is perhaps most clearly demonstrated in cases brought by plaintiffs challenging religious displays or performances in public settings. *See, e.g.*, *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (assuming *sub silentio* that membership organization had standing to bring challenge to religious displays in public buildings absent any apparent showing of tangible harm); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (same); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (father and his children, who attended local public schools, had standing to challenge religious prayer in those schools); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 259-60 & 261 n.2 (3d Cir. 2011) ((parents, and their children who attended schools in the district, had standing to challenge school district board's policy of opening its meetings with a prayer). In most circuits, plaintiffs have standing to bring such a challenge if they merely encounter the religious display in person. *See Suhre v. Haywood County*, 131 F.3d 1083, 1087 (4th Cir. 1997) (reviewing circuit law and holding that "unwelcome personal contact with a state-sponsored religious display" is sufficient to confer standing); *Murray v. Austin*, 947 F.2d 147, 151-52 (5th Cir. 1991); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1027 (2d Cir. 1989); *Foremaster v. St.*

George, 882 F.2d 1485, 1490-91 (10th Cir. 1989); *Saladin v. Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987) ("a non-economic injury which results from a party's being subjected to unwelcome religious statements can support a standing claim"); *Hawley v. Cleveland*, 773 F.2d 736, 740 (6th Cir. 1985). A minority of courts require, in addition, that a Plaintiff must have modified his or her behavior to avoid or otherwise mitigate the state conduct that violates the principle of neutrality toward religion. *See, e.g.*, *Freedom from Religion Found. v. Zielke*, 845 F.2d 1463, 1467-68 (7th Cir. 1988) (no standing where plaintiffs "concede that they did not alter their behavior in any manner as a result of the Ten Commandments monument").

While the Third Circuit has not decided whether merely encountering a display is sufficient on its own, *ACLU-NJ ex rel. Miller v. Twp. of Wall*, 246 F.3d 258, 265-66 (3d Cir. 2001), it is clear, in any event, that the injury in an Establishment Clause case need not be economic, but is essentially a spiritual one, and that a plaintiff suffers this injury simply as a result of being subjected to a state practice that singles out a religion for favor or disfavor. *See Suhre*, 131 F.3d at 1086 ("[T]he standing inquiry in Establishment Clause cases has been tailored to reflect the kind of injuries Establishment Clause plaintiffs are likely to suffer. . . . [T]he Establishment Clause Plaintiff is not likely to suffer physical injury or pecuniary loss. Rather 'the spiritual, value-laden beliefs of the plaintiffs' are often most directly affected by an alleged establishment of religion." (quoting *ACLU v. Rabun County*, 698 F.2d 1098, 1102 (11th Cir. 1983))).

In the present case, each individual Plaintiff has personally been subject to the NYPD's surveillance targeting New Jersey Muslims on the basis of religion alone – state conduct that clearly singles out a religion for disfavor in violation of the Establishment Clause. Most have

also changed their behavior in some way in order to avoid further NYPD surveillance or to mitigate the negative consequences thereof. Specifically:

- Plaintiff Hassan has attended a number of mosques, each of which has been targeted for surveillance by the NYPD. First. Am. Compl. ¶ 12. He has decreased his attendance at these mosques as a result. *Id.* ¶ 13.

- Plaintiff Muslim Students Association of the U.S. & Canada, Inc. includes two member chapters – at Rutgers Newark and Rutgers New Brunswick – that were specifically targeted for surveillance. *Id.* ¶ 17. Plaintiffs Mohammed and Doe, are members of the Rutgers New Brunswick MSA chapter and are therefore also personally subjected to the NYPD's surveillance. *Id.* ¶¶ 24-29. Each of these individual Plaintiffs has responded to the NYPD's discriminatory surveillance by altering his or her behavior. Thus, Mr. Mohamed now avoids discussing his faith or MSA attendance in public and avoids praying in places where non-Muslims might see him. *Id.* ¶ 25. Ms. Doe no longer discusses religious topics at MSA meetings because she fears those comments may be taken out of context by NYPD officers engaging in discriminatory surveillance. *Id.* ¶ 27.

- Plaintiff CINJ is a membership organization of 12 mosques, largely in the Newark area, at least two of which were subject to NYPD surveillance. *Id.* ¶ 14. Similarly, Plaintiff Muslim Foundation, Inc. owns and operates a mosque in Somerset, New Jersey that was targeted for surveillance. *Id.* ¶ 22. The CINJ mosques have suffered decreased attendance and contributions as a result of the surveillance. *Id.* ¶ 15. And the MFI mosque has changed its religious services and programming as a result of the surveillance, including by deciding not to invite particular individuals to provide religious or spiritual guidance. *Id.* ¶ 23.

Plaintiffs thus amply demonstrate that they have suffered a "personal injury" as a result of the NYPD surveillance program, and are not simply the subject of an undifferentiated spiritual objection indistinguishable from that of a member of the general population. They therefore have standing to bring their Establishment Clause challenge to the NYPD's practices, which single them out as Muslims for disfavor.

4. Plaintiffs have been targeted by a practice that explicitly discriminates on the basis of religion and Plaintiff mosques have experienced a reduction in attendance and have been compelled to change their religious services and programming, injuries in fact to the right to free exercise of religion.

All the Plaintiffs have standing to bring a Free Exercise Challenge insofar as they have been the targets of a policies and practices of the NYPD that explicitly target Muslims based

solely on faith. Those policies and practices are not, therefore, neutral with respect to religion. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534-35 (1993) (official government action that targets religious conduct for distinctive treatment violates Free Exercise Clause). Plaintiffs here, who have been the direct targets of the NYPD's facially discriminatory policy, have standing, just like the plaintiffs in other cases in which courts have considered the constitutionality of similarly discriminatory government conduct. *Cf. Church of Lukumi Babalu Ay*, 508 U.S. at 535-36, 547 (voiding an ordinance that was enacted contrary to the Free Exercise of Religion because religious practice was the only conduct subject to the ordinance); *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("[t]he government may not . . . impose special disabilities on the basis of religious views or religious status"); *McDaniel v. Paty*, 435 U.S. 618 (1978) (holding that provision of law that targeted clergy because of their religious status violated the First Amendment right to the Free Exercise of Religion). Moreover, many of the Plaintiffs have not simply had their religious observance targeted for discrimination, but also have been compelled to curtail or modify their religious practice as a result of the NYPD's discriminatory surveillance. *See* First Am. Compl. ¶¶ 13, 25, 27, 30.

In addition, member mosques of plaintiff CINJ that are included in the NYPD's Newark report, Masjid al-Haqq and Masjid Ali K. Muslim, have suffered a classic First Amendment injury because their attendance has dropped as a result of the surveillance. *Id.* ¶ 15. Further, the MFI mosque has been compelled to significantly alter the content of its religious services and programming, as a direct result of the surveillance. *Id.* ¶ 23. Decreased mosque attendance and effects on religious programming are clearly cognizable injuries for purposes of standing: "Churches, as organizations, suffer a cognizable injury when assertedly illegal government conduct deters their adherents from freely participating in religious activities protected by the

First Amendment." *Presbyterian Church*, 870 F.2d at 522-23 (holding that a church had standing to challenge government surveillance where plaintiffs made allegations of a "decrease in congregants' participation in worship services and other religious activities, of the cancellation of a Bible study class, of the diversion of clergy energy from pastoral duties, and of congregants' reluctance to seek pastoral counseling."); *see also Socialist Workers Party v. Attorney General*, 419 U.S. 1314, 1319 (1974) (Marshall, J., Circuit Justice) (government surveillance "will have the concrete effects of dissuading some [Young Socialist Alliance] delegates from participating actively in the convention and leading to possible loss of employment for those who are identified as being in attendance. . . . The specificity of the injury claimed by the applicants is sufficient, under *Laird*, to satisfy the requirements of Art. III.").[17] Plaintiffs therefore have Article III standing on these additional bases as well.

B. Plaintiffs' injuries are "fairly traceable" to the NYPD's discriminatory practices and are not the result of an independent action of a third party.

Plaintiffs' injuries, just described, are all "fairly traceable" to NYC's facially discriminatory surveillance policy and practice, which senior City officials have reaffirmed, endorsed, and promoted since they were disclosed by the AP. First Am. Compl. ¶ 64. The NYPD's practice of targeting Muslims has also been made public by one of its informants. Katon Dec. ¶ 4. NYC argues, however, that "it is the *disclosure* of the documents by the Associated Press in unredacted form which left in identifying information – not the NYPD's actions – that has caused Plaintiffs' alleged injuries." Def. Br. at 18 (original emphasis). This

[17] In other contexts, courts have held that a forced disclosure of the organization's membership lists must be regarded as entailing the likelihood of a substantial restraint upon the exercise of the members' right to freedom of association where the disclosure would likely "induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958).

argument misunderstands the nature of the "fairly traceable" prong of the standing inquiry, which does not require a direct and unmediated link between an unconstitutional act and a plaintiff's injuries. That is, the mere presence of a third party in the causal chain does not "break the causation requirement" for standing purposes, as the City maintains. To the contrary, Plaintiffs' injuries remain "fairly traceable" to the City because disclosure of its policy and practice caused injury only because the City's policy was unlawful and discriminatory in the first place. Moreover, the notion that a plaintiff lacks standing because the press first reports a previously secret program would impermissibly transform the press's exercise of its First Amendment-protected role into a shield against judicial review of unconstitutional practices, especially in a case where there is no suggestion that the information reported by the press is privileged against use at trial. Regardless, in this case, the AP's role in publicizing the City's discriminatory surveillance policy was quickly eclipsed by senior City officials, who confirmed the existence of the program and endorse its legitimacy.

NYC further suggests that whenever a harm turns on "the independent action of some third party not before the court" there is no Article III standing. Def. Br. at 17 (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)); *Duquesne Light Co. v. EPA*, 166 F.3d 609, 613 (3d Cir. 1999)). But "[t]he fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing." *Warth*, 422 U.S. at 504. Indeed, the cases cited by the City do not stand for the proposition that a plaintiff lacks standing whenever a third party's action is somewhere in the causal chain between the government conduct and the plaintiff's injury. Rather, the "independent action of some third party" only stands as an obstacle to standing where "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*" who in turn harms the plaintiff, as opposed to cases where "the

plaintiff is himself an object of the [government] action (or forgone action) at issue." *Lujan*, 504 U.S. at 560-62 (emphasis in original). Here, the AP was certainly not the object of the City's unlawful policy and practice. The AP is therefore not the kind of "third party" whose presence in the causal chain might create difficulties under the "fairly traceable" prong of the standing inquiry. Instead, in the language of *Lujan*, Plaintiffs are themselves the "object[s] of the [government] action . . . at issue" – *i.e.*, they are the objects of the NYPD's unconstitutionally discriminatory surveillance. And where a plaintiff is the direct object of government conduct, *Lujan* instructs that "there is ordinarily little question that the [government] action or inaction has caused [plaintiff] injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 561-62.

This is clearly illustrated by examining the only two cases cited by the City in support of its argument that Plaintiffs' injuries are not "fairly traceable" to the NYPD, but instead to the AP. In *Simon v. Eastern Kentucky Welfare Rights Organization*, plaintiffs challenged an IRS rule that did not govern the plaintiffs directly, but rather dictated the tax treatment of non-profit hospitals which, plaintiffs argued, would respond to the IRS rule by denying healthcare services to the plaintiffs. *See* 426 U.S. at 28, 42-46. Thus, the hospitals were a "third party" in the sense of being the only party directly regulated by the IRS, and the plaintiffs' injuries were therefore "fairly traceable" to the IRS only if plaintiffs could show that the hospital's decisions to deny them services were based on the IRS rule and not the "result [of] decisions made by the hospitals without regard to tax implications." *Id.* at 42-43. Unlike the plaintiffs in *Simon*, Plaintiffs here are the direct objects of the City's challenged conduct. Indeed, the AP – the supposed "third party" – was in no way a part of the operation of the NYPD's discriminatory policy or practice as the hospitals were in *Simon*.

Duquesne Light Co. v. EPA, also cited by the City, provides even less support for its argument. In that case, an electric utility sought to invalidate certain Pennsylvania Department of Environmental Protection ("PDEP") regulations, approved by the EPA, that would have caused the utility financial injury. 166 F.3d at 611-13. The case was dismissed for lack of standing not simply because only the EPA had jurisdiction to regulate the PDEP, rather than the plaintiff utility, but also because the EPA lacked authority to require PDEP to modify the regulations at issue so as to alleviate plaintiff's financial injury. *Id.* at 613. In other words, the EPA did not inflict the financial injury, could not have prevented it, and had no power to redress it. The case could not be more dissimilar to this one, where the NYPD directly targets Plaintiffs with its unlawful surveillance practices, and where effective redress can only come from the City in the form of an order requiring the City to cease its unconstitutional discrimination and to make Plaintiffs whole by expunging unlawfully gathered records and providing compensatory or nominal damages.

The City's argument that the AP's disclosure of the Program immunizes NYC from liability for its constitutional violations is also contradicted by a number of cases in which courts have had no difficulty in holding that a plaintiff's injuries are "fairly traceable" to a government entity's unlawful conduct notwithstanding the prominent presence of a third party somewhere in the causal chain. *See, e.g.*, *Meese*, 481 U.S. at 472-74 (government label on publication caused reputational injury, despite the fact that the response of third parties to the government's label was direct cause of injury); *Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486, 493-94 (3d Cir. 1999) (plaintiff not hired by employer had standing to challenge government regulations that encouraged affirmative action, even though adverse employment decision was actually made by private employer and not specifically mandated by the challenged regulations); *McKay v. Horn*,

529 F. Supp. 847, 854-55 (D.N.J. 1981) (injury was fairly traceable to federal statute even though injury was directly caused by New Jersey legislature's decision to enact a state statute in response to federal statute); *Camden v. Plotkin*, 466 F. Supp. 44, 48-50 (D.N.J. 1978) (plaintiffs had standing to challenge methodology used by Census Bureau because undercounting of minorities might result in reduced federal aid, even though third-party agency was responsible for making such cuts). Moreover, Plaintiffs are aware of no case decided by any U.S. court – and the City does not cite any – in which the action of a newspaper reporting on a government program was regarded as "independent action of a third party" sufficient to insulate the government from suit by individuals affected by the government policy.

Finally, the AP's exposé on the City's discriminatory surveillance program, which first brought Plaintiffs' injuries to light, was quickly eclipsed by the public statements of senior City officials, who confirmed the existence of the program, praised it, and, indeed, touted it as an important effort to prevent terrorist attacks, thereby reaffirming the deeply stigmatizing and unconstitutional premise of the program that is itself the principal source of Plaintiffs' injuries: that Muslims such as Plaintiffs are properly objects of suspicion simply on account of their religion, and that they will therefore be singled out by law enforcement on that basis. *See* First Am. Compl. ¶¶ 61, 65; Katon Dec. ¶¶ 3,5 (attaching statements of Mayor Bloomberg, Ray Kelly, and Thomas Galati all confirming the program's existence and endorse its legitimacy).

C. <u>Plaintiffs' injuries will be redressed by a favorable decision.</u>

Finally, Plaintiffs satisfy the "redressability" prong of the three-part standing inquiry. NYC's motion to dismiss does not contend that Plaintiffs' injuries would not be redressed by a favorable decision by this Court. In fact, it is evident that Plaintiffs' injuries are redressable by an order requiring the NYPD to cease its unconstitutional discrimination, remove the taint of past illegal surveillance by expunging unlawfully gathered records, and pay compensatory or nominal

damages, as appropriate. Similarly, Plaintiffs' injuries regarding future employment prospects would be redressed by a declaratory judgment that the NYPD's surveillance of them was unconstitutional and an order requiring the NYPD to expunge records. Finally, Plaintiffs' economic injuries – reduced property values and decreased business – would be redressed by compensatory damages against the NYPD.

Additionally, the fact that Plaintiffs' injuries would be redressed by an order against the City further undermines the City's argument that the harms here are not "fairly traceable" to the NYPD's discriminatory policy and practice. Where "[t]he relief requested by the plaintiffs [is] simply the cessation of the allegedly illegal conduct . . . the 'redressability' analysis is identical to the 'fairly traceable' analysis." *Allen,* 468 U.S. at 759 n.24. In the present case, Plaintiffs in fact seek the cessation of the allegedly illegal conduct, along with other relief – expungement and compensatory or nominal damages – that is also tightly connected to the specific violations of law alleged. Indeed, the fact that Plaintiffs' injuries would be redressed by an order against the City is itself strong evidence that those injuries are "fairly traceable" to the City's actions.

IV. PLAINTIFFS HAVE STATED A CLAIM FOR EXPUNGEMENT

Plaintiffs are entitled to the remedy of expungement based upon the NYPD's collection of records on Muslims in violation of the First and Fourteenth Amendments, as set forth fully above in response to NYC's motion to dismiss those claims. Such a remedy is well established when law enforcement creates records through unconstitutional surveillance. In *Paton*, the FBI's Newark office kept a record of a high school student in a file labeled "Subversive Matter-Socialist Workers Party" because she requested information from the Socialist Labor Party as part of an assignment for her Social Studies class. The court reversed summary judgment on the

student's constitutional claims and recognized her standing[18] to seek expungement because "the existence of the records may at a later time become a detriment to her."[19] *Paton*, 524 F.2d at 866, 868; *see also Doe v. U.S. Air Force*, 812 F.2d 738, 741 (D.C. Cir. 1987) ("The federal courts are empowered to order the expungement of Government records where necessary to vindicate rights secured by the Constitution or by statute.")

At this preliminary stage, based upon the strength of Plaintiffs' allegations of unconstitutional surveillance and the harm it caused each of them, Plaintiffs have stated a claim upon which the relief of expungement may be granted. *Paton*, 524 F.2d at 873 ("The scope of such relief will depend on the factual and legal background of the district court's decision and is largely within the discretion of that court."). NYC's motion to dismiss the claim should, therefore, be denied.

[18] The court found that the threatened injury caused by the FBI's retention of her file was "concrete injury" under *Laird* and *Philadelphia Yearly*. *See supra* § III (discussion of *Laird* and *Philadelphia Yearly* cases).

[19] The court recognized the expungement remedy but remanded the case for the parties to further develop the record. *Paton*, 524 F.2d at 867 n.3, 869.

CONCLUSION

For all of the foregoing reasons, the Court should deny the City of New York's Motion to Dismiss in its entirety.

Dated: January 25, 2013
New York, New York

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CERTIFICATE OF SERVICE

I, Baher Azmy, co-counsel to Plaintiffs certifies that on January 25, 2013, I caused to be filed with the clerk of the United States District Court District of New Jersey the Plaintiffs' Brief in Opposition to Motion to Dismiss and the Declaration of Glenn Katon, Esq. with accompanying Exhibits A-F. On January 25, 2013, the foregoing was served on counsel for the Defendants via ECF.

Dated: New York, NY
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