UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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SYED FARHAJ HASSAN; THE COUNCIL OF IMAMS IN NEW JERSEY; MUSLIM STUDENTS ASSOCIATION OF THE U.S. AND CANADA, INC.; ALL BODY SHOP INSIDE & OUTSIDE; UNITY BEEF SAUSAGE COMPANY; MUSLIM FOUNDATION INC.; MOIZ MOHAMMED; JANE DOE; SOOFIA TAHIR; ZAIMAH ABDUR-RAHIM; and ABDUL-HAKIM ABDULLAH

Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendant.

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12 Civ 3401 (SDW)(MCA)

ORAL ARGUMENT REQUESTED

DEFENDANT CITY OF NEW YORK'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6) AND 12(B)(1)

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February 25, 2013

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PRELIMINARY STATEMENT

Defendant City of New York ("City") respectfully submits this Reply Memorandum of Law in further support of its motion to dismiss the plaintiffs' first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and 12(b)(1) on the grounds that (i) the first amended complaint fails to pass the "plausibility" test set out by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-680 (2009); and (ii) the first amended complaint fails to allege concrete and particularized injuries to establish standing under Article III of the U.S. Constitution depriving the Court of subject matter jurisdiction.

On defendant's 12(b)(6) motion, the crux of the matter is whether the plaintiffs have satisfied their burden of showing this Court that, applying common sense and judicial experience, the Court should conclude that plaintiffs' assertion -- that all of the NYPD's actions alleged in the first amended complaint were motivated solely based upon religion – is plausible. Plaintiffs have not done this. First, plaintiffs concede that the surveillance complained of in the first amended complaint is by itself constitutional. Thus, no inference can be drawn from the underlying acts to support their assertion of purposeful discrimination. Next, plaintiffs argue that the City had a policy and practice of purposeful discrimination. As explained in our moving papers and below, neither proposition is supported by the allegations in the first amended complaint (or in truth). Plaintiffs also unsuccessfully attempt to distinguish *Ashcroft v. Iqbal*. Contrary to plaintiffs' argument, *Iqbal's* plausibility test is applicable to all civil actions including those against municipalities. At bottom, plaintiffs do not dispute (as they can't) the existence of the terror threat facing New York City, and that therefore the more likely explanation for the City's actions is its effort to prepare for and prevent terrorism, rather than purposeful discrimination against all Muslims based solely upon their religion.

Not surprisingly, plaintiffs also seek to prevent this Court from considering the report of the Attorney General's Office for the State of New Jersey, finding no wrongdoing on the part of the NYPD for the activities about which plaintiffs complain here. Even assuming the Court concludes that the finding is not admissible on this motion, it does not alter the inescapable conclusion that plaintiffs' claim of purposeful discrimination is simply not plausible.

In opposition to defendant's 12(b)(1) motion, plaintiffs fail to establish standing as they have failed to allege sufficient facts to satisfy the required showing that their injuries are concrete and particularized. Plaintiffs' allegations in the first amended complaint of generalized fears based on generalized stigma against Muslims are not enough to establish standing. Finally, plaintiffs' request for expungement should be denied as they have neither stated a claim nor established standing.

POINT I

PLAINTIFFS HAVE FAILED TO SHOW THAT THEIR ASSERTION OF DISCRIMINATORY PURPOSE IS PLAUSIBLE

In their opposition to defendant's motion, plaintiffs argue that their amended complaint satisfies the *Iqbal* plausibility standard because they have pled sufficient factual allegations that the NYPD surveilled[1] Muslims in New Jersey. Opp. Br. 11-14.[2] But the City's motion to

[1] Merriman-Webster, for example, defines surveillance as a "close watch kept over someone or something." While plaintiffs use the terms "surveiled" and "surveillance" in their complaint, many plaintiffs are not alleging facts that rise to the definition of "surveillance." For example, at most it is alleged that a photograph and description of the store of two plaintiffs (All Body Shop and United Beef) appear in the Newark report and the same for two mosques represented by plaintiff Council of Imams. Am. Comp. ¶¶14, 19, 20. Plaintiffs Mohammed, Doe, and Tahir allege only that they were affiliated with a Muslim Student Association that was listed in a report. Am. Comp. ¶¶ 24, 27, 29. Similarly, plaintiff Hassan only alleges that the mosques he attends were identified in an NYPD report. Am. Comp. ¶12. Plaintiffs Abdur-Rahim and Abdullah only claim that a photo and address of a school which is housed in a private residence (where plaintiff Rahim use to work and where she and her husband live) appears in the Newark report. Am. Comp. ¶¶ 31, 32. Thus, while plaintiffs use the term "surveillance" that

dismiss is not directed at the sufficiency of the allegations regarding the NYPD's acts of "surveillance" of Muslims in New Jersey. Rather, the City's motion is directed at the plausibility – or lack thereof – of plaintiffs' conclusory assertion that those otherwise lawful acts by the NYPD were motivated solely on the basis of plaintiffs' religion.

Plaintiffs Cannot Meet the Plausibility Test Because The Underlying Acts of Surveillance are Constitutional And Provide No Inference Of Purposeful Discrimination

Significantly, as plaintiffs concede in their opposition, the NYPD's surveillance complained about in the first amended complaint in and of itself is not unconstitutional. Opp. Br. 1 ("the City first summarily states that surveillance is not per se unconstitutional – an observation too obvious to dispute."). In other words, the NYPD's mapping of restaurants, businesses and mosques, as well as the other allegations of "surveillance" set out in the first amended complaint, are constitutional on their face. At the heart of it, plaintiffs are asking this Court to deem it plausible that each and every otherwise lawful act alleged to be taken by the NYPD in New Jersey was taken for no other reason than to purposefully discriminate against Muslims solely based upon their religion. Opp. Br. 1 ("Surveillance is, of course, permissible in certain circumstances, but it cannot be motivated exclusively on the basis of constitutionally protected criteria such as religion."). Plaintiffs' assertion here is in stark contrast to cases where the underlying acts are unlawful and arguably could be the basis for some inference of discriminatory purpose on the part of defendants. Moreover, even where the Supreme Court was faced with allegations of the arrest, detention, and holding of thousands of Arab Muslim

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conclusory term should be viewed in light of the factual allegations pled which do not equate to surveillance. Any use of those terms in this reply brief is intended to refer to the acts complained about, and not to the true definition of surveillance.

[2] References to "Opp. Br. __" are to Plaintiffs Brief In Opposition to Motion to Dismiss, dated January 25, 2013.

men in highly restrictive conditions of confinement, the Court found plaintiffs' contention that those acts were motivated based upon the detainees' religion not to be plausible. *Iqbal*, 556 U.S. at 680-681.[3] Accordingly, the acts of surveillance alleged provide no support for plaintiffs' assertion of discriminatory purpose.[4]

The "More Likely" Explanation For
the NYPD's Actions Is Its Terrorism Preparation

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[3] Plaintiffs' reliance on *Hall v. Pa. State Police*, 570 F.2d 86 (3d Cir. 1978) is misplaced. *Hall* predates Iqbal and the case involved no discussion of the plausibility of plaintiff's assertion of discriminatory purpose and is therefore not applicable. Moreover, in *Hall* the plaintiff alleged, and attached to his complaint, an explicit written policy promulgated by the state police which stated that any black person entering the bank who may look suspicious should be photographed. The Circuit held that the allegations were enough to state an equal protection claim based upon racial classification. *Id.* at 90-91. Indeed, in its' analysis the Circuit relied on the classic cases of outright explicit racial classification such as *Brown v. Board of Education,* 347 U.S. 483 (1954) and *Loving v. Virginia,* 388 U.S. 1 (1966). *Hall* is clearly not comparable to the facts here, as plaintiffs do not allege that there are photos of any individual plaintiffs (only that of a business or mosque), nor that they were the subject of a criminal investigation. As noted above, in *Hall* there was also no discussion of plausibility or a 'more likely" explanation as discussed in *Iqbal* for the state police's conduct.

[4] The cases plaintiffs rely upon are distinguishable and offer no support to the circumstances present here. Opp. Br. 12 For example, plaintiffs rely on the case of *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) to argue that they have alleged a plausible Free Exercise claim. However, in that case there was no discussion of plausibility as it predates *Iqbal* and *Twombly* and involved an explicit city ordinance that stated no person should place signs or advertisements on poles, trees, curbstones, sidewalks and elsewhere without the permission of the City. Plaintiffs, who were Orthodox Jews brought an action for a preliminary injunction against the City to stop enforcing this ordinance because they claimed they weren't given an exemption, while other religious groups had received one. Here, plaintiffs do not allege that the City enacted any measure that denied the plaintiffs a benefit that was given to others. Moreover, plaintiffs' self imposed burdens are not sufficient to state an injury for standing. *See Laird v Tatum*, 408 US. 1, 10 (plaintiffs' allegation that there was "a present inhibiting effect on their full expression and utilization of their first Amendment rights" did not state a cognizable injury). Similarly, the plaintiffs' reliance on the case of *Doe v. Indian River Sch. Dist.,* 653 F.3d 256 (3d Cir. 2011) is misplaced because that case did not involve a discussion of plausibility and the school district had a policy of opening its meetings with a prayer, which the plaintiffs argued violated the Establishment Clause in that it constituted an explicit government endorsement of Christianity.

Plaintiffs also do not dispute the obvious - that the NYPD has been in a fight to deter and detect terrorism by Islamists radicalized to violence since 9/11 and that terror plots against NYC continue through today. Terrorists don't wear uniforms or carry flags. They operate covertly and will try and blend in so as to not stand out. For example, if faced with a description of a potential Islamist radicalized to violence who is from a particular ethnic group or religious sect, where would the NYPD start to look if it didn't know where that suspect might attempt to blend into the community i.e., the locations of certain businesses and mosques in the Muslim community affiliated with that sect or ethnic group. Similarly, if there is sectarian violence, the NYPD needs to understand where to deploy resources to protect members of the Muslim community who are potentially subject to ricochet violence from abroad. It would be grossly negligent for the NYPD not to have an understanding of the varied mosaic that is the Muslim community to respond to such threats.

Common sense and judicial experience – factors the Supreme Court and this Circuit stated should be considered when determining plausibility -- dictate that the NYPD's acts complained of in the first amended complaint were more likely the result of the NYPD pursuing a legitimate law enforcement purpose than intentional discrimination. *See* Defendants' Moving Brief pp. 6-8; *Iqbal,* 556 U.S. at 679 ("determining whether a complaint states a plausible claim for relief . . . requires the reviewing court to draw on its judicial experience and common sense."); *Id.* at 681 ("given more likely explanations, they do not plausibly establish this [discriminatory] purpose."); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 566-567 (2007) (Supreme Court found that plaintiff failed to state a claim where there was an "obvious alternative explanation" for the alleged conspiracy); *Sec. Police and Fire Professionals of Am. Ret. Fund v. Pfizer, Inc.,* 2012 U.S. Dist. LEXIS 79005, *3 (D.N.J. July 20, 2011 Wigenton, J.)

(applying *Iqbal's* plausibility test and dismissing the complaint pursuant to 12(b)(6) and citing *Iqbal* for the application of common sense and judicial experience).

Plaintiffs, however, are asking this Court to instead find plausible their conclusory assertion that the NYPD's actions were all taken solely to discriminate against Muslims because of their religion (and not taken for the more obvious explanation to deter or detect terrorism). The conclusion that the plaintiffs ask this Court to draw simply does not pass the plausibility test because the facts alleged "do not permit the Court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679.

Plaintiffs' Argument That The Factual Allegations in the Complaint State An Overt Discriminatory Policy or Practice Is Unfounded

Plaintiffs continually make the unsupported assertion in their Opposition Brief that the City has an "overtly discriminatory policy." Opp. Br. at 10, 15, 17. Plaintiffs make this assertion despite conceding that the acts complained about are constitutional on their face. Moreover, nowhere in the first amended complaint is it alleged that the City had a written policy that says the City's purpose is to discriminate against Muslims solely because of their religion. Thus, plaintiffs' repeated conclusory assertions claiming they have alleged an "overtly discriminatory ***policy***" is misleading, inaccurate and unsupported by any factual allegations. Indeed, the decision makers for the City (the Mayor and Police Commissioner) both stated publicly that the NYPD's acts in New Jersey were done for the purpose of the City's anti-terrorism efforts, not for the purpose of discriminating against Muslims based solely on religion.[5]

[5] Notably, plaintiffs allege in the first amended complaint and on this motion that Mayor Bloomberg and Commissioner Kelly have made statements which demonstrate the City's discriminatory purpose. Am. Comp. ¶¶ 64, 65. Katon Dec. ¶ 3(a)-(d). To believe that both the Mayor and Police Commissioner are engaged in a conspiracy to purposefully discriminate against Muslims based solely on religion rather than for the obvious and more likely explanation that the NYPD is acting for the legitimate law enforcement purpose to fight terrorism is not

Thus, despite the bald assertions in their opposition brief, a review of plaintiffs' complaint confirms that there are no allegations regarding a written or stated policy by a decision maker to discriminate based upon religion.

Alternatively, plaintiffs argue that the factual allegations in the complaint sufficiently allege that the City had an "overtly discriminatory ***practice***" based upon the "smoking gun evidence from the NYPD documents." Opp. Br. 14, 18. But calling something a "smoking gun" does not make it one. There is no "smoking gun" evidence of a discriminatory purpose. This is not a case, for example, where improper motive can be inferred from the acts of "surveillance" by themselves. As plaintiffs concede, the "surveillance" alleged in the complaint by itself is not unconstitutional or illegal. Moreover, the Attorney General of New Jersey confirmed that there was no evidence that the NYPD's activities violated any New Jersey civil or criminal laws. [6] Accordingly, this Court would need to find plausible that all the otherwise

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plausible. Moreover, rather than support plaintiffs' position, these statements by the Mayor and Police Commissioner further confirm that there was no policy to discriminate based solely upon religion as both make clear the actions were for anti-terrorism purposes. For example, the statements cited by plaintiffs include: Mayor Bloomberg on radio stating "When there's no lead, you're just trying to get familiar with what's going on, where people might go and where people might be to say something." Declaration of Glenn Katon, dated January 25, 2013 at ¶ 3(a) (hereafter "Katon Dec"); Police Commissioner Raymond Kelly acknowledged that the NYPD created the Newark report, which is described in Plaintiffs' complaint, and stated: "We did that demographic study, if you will, in Newark with the acquiescence, with the knowledge of law enforcement personnel in Newark, and we gave them a copy" and the Police Commissioner added that "I think this is the type of information that helps us do our job. It gives us a total picture, context, of a particular neighborhood." Katon Dec ¶¶ 3(c) and 3(d). Additionally, an AP article dated March 9, 2012 quotes Mayor Bloomberg as having stated: "We don't stop to think about the religion ... we stop to think about the threats and focus our efforts there." Exhibit A to Katon Dec. Another AP article dated February 24, 2012 quotes Mayor Bloomberg having stated: "Everything the NYPD has done is legal, it is appropriate, it is constitutional.." "The NYPD is trying to stop terrorism in the entire region.." Exhibit F to Katon Dec.

[6] In addition to the acts alleged being constitutional on their face, as we stated in our moving papers, the Attorney General's office found no violation of New Jersey civil or criminal laws based upon the allegations of the NYPD conducting surveillance in New Jersey. *See* Exhibit B

lawful actions by the NYPD alleged in the complaint were motivated solely based on religion (and not for the more likely case of the City's anti-terror program) for plaintiffs to satisfy the pleading requirement of purposeful discrimination. That simply is not plausible.

Plaintiffs' assertion of "discriminatory purpose" thus is left hanging on the alleged disparate impact of the NYPD's actions upon Muslims. The Supreme Court, however, has made clear that even though there is a disparate impact, disparate impact is not enough as there must be a disparate impact plus a discriminatory purpose. *See Iqbal*, 556 U.S. at 682 ("It should come as no surprise that a legitimate policy . . . would produce a disparate, incidental impact on Arab Muslims."); *Washington v Davis*, 426 U.S. 229, 239 (1976) ("But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.")[7]

Thus, it is only if the Court finds plausible the conclusory assertion in the complaint that the lawful acts were driven by an intent to discriminate that the plaintiffs plausibly state a claim.

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to Farrell Decl, dated December 6, 2012. Plaintiffs have no substantive response to that finding and instead argue that it should not be considered by this Court. Opp. Br. 9-10. Contrary to plaintiffs' assertion, it has long been established in this Circuit that matters of public record can be considered on a motion to dismiss under FRCP 12(b)(6). *See e.g. Pension Benefit Guar. Corp. v. White Consol. Indus.*, 992 F.2d 1192, 1196 (3d Cir. 1993) (stating that on a motion to dismiss courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record - going on to list matters of public record to include letter decisions of government agencies, and published reports of administrative bodies).

[7] The Supreme Court in *Iqbal* found that "purposeful discrimination requires more than "intent as volition or intent as awareness of consequences." *Iqbal*, 556 U.S. at 676. The Supreme Court held that discriminatory purpose "instead involves a decisionmaker's undertaking a course of action 'because of' not merely 'in spite of' [the action's] adverse effects upon an identifiable group." Id. at 676-677 (citations omitted). Applying that test to the case before it, the Supreme Court held that the "respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin. *Id.* at 677.

As we set out here and in our moving papers, that conclusory assertion is not plausible under *Iqbal* where the more likely explanation for the conduct complained of in the first amended complaint is that it was done as part of the City's anti-terror efforts against the indisputable threat posed constantly against New York City by Islamists radicalized to violence in the post 9/11 era.

Finally, this is not a case where the Court should allow discovery to proceed under the theory that it can always dismiss the case later. Here, plaintiffs have not alleged a plausible claim of purposeful discrimination and the first amended complaint should be dismissed. To allow discovery to proceed under those circumstances would be unfair and burdensome to both defendant City and this Court. Plaintiffs' discovery demands will undoubtedly involve requests for confidential and privileged law enforcement materials maintained by the NYPD's Intelligence Division which will place an unwarranted burden on the City to oppose. *See e.g. In Re The City of New York,* 607 F.3d 923 (2d Cir. 2010) (after several years of litigation over plaintiffs' requests for sensitive NYPD Intelligence Division documents, the Second Circuit granted the City's petition for a writ of mandamus and instructed the District Court to deny plaintiffs' motion to compel the production of the Intelligence Division documents at issue).

Plaintiffs Attempt to Distinguish *Iqbal* On the Basis
That Plaintiffs Are Only Suing the City of New York is Meritless

Plaintiffs argue that *Iqbal's* holding on individual vicarious liability does not apply to municipal defendants. Opp. Br. at 15-17. In so doing, plaintiffs misstate defendants' argument regarding *Iqbal* and the plausibility standard. Quite simply, defendants' argument is that the plausibility standard set out in *Iqbal* applies with equal weight regardless of whether the defendant is an individual or a municipality. *See* e.g., *Rees v. Office of Children and Youth*, 2012 U.S. App. LEXIS 6447, **9-**11 (3d Cir. 2012) (citing *Iqbal* and affirming District Court's dismissal of plaintiff's *Monell* claim against the Office of Children and Youth as the

allegations set forth in plaintiff's complaint were insufficient to establish a policy or custom of deliberate indifference to constitutional rights and plaintiff); *Garcia v. City of Paterson*, 2012 U.S. Dist. LEXIS 132515, *11-*14 (D.N.J. Sept. 17, 2012) (dismissing plaintiff's *Monell* claims against the City of Paterson for failing to allege anything more than conclusory statements that, under *Iqbal*, are legally insufficient); *see also McTernan v. City of York*, 564 F.3d 636, 657-659 (3rd Cir. 2009) (applying *Twombly* and affirming District Court's dismissal of plaintiff's *Monell* claim against the City of York because the allegations in the complaint did not meet the plausibility test). The plausibility standard also applies regardless of the type of claim alleged. *Iqbal* at 684 ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike.") (citations omitted).

Plaintiffs Mischaracterize Defendants Argument
Regarding The Role of A "More Likely Explanation" Under Iqbal

Plaintiffs next argue that the *Iqbal* plausibility standard does not require plaintiffs to rule out any alternative explanation for the City's alleged overt discrimination. Opp. Br. 17-20. First, as demonstrated above, the City does not have an "overt discriminatory policy or practice." Second, plaintiffs misstate defendants' position. The City never argued that the complaint should be dismissed if defendants can suggest "any conceivable alternative excuse." Opp. Br. 17.[8] Rather, the City's position is clear that based upon the Supreme Court's holding in *Iqbal*,

[8] Plaintiffs also make other erroneous characterizations of defendant's position. For example, plaintiffs claim that "the City does not contest Plaintiffs' allegations that they were targeted and surveiled because of their religion, effectively conceding that the allegations are well pled." Opp. Br. 18. Plaintiffs claim is absurd as defendants' motion is directed at plaintiffs' conclusory claim of "purposeful discrimination". Plaintiffs similarly claim that "without a non discriminatory explanation for their surveillance of the Plaintiffs, the City argues, in effect, that because Muslim individuals executed the attacks of 9/11, the City may conduct undifferentiated, blunderbuss surveillance of any Muslim, anywhere." Opp. Br. 18. Plaintiffs obviously mischaracterize defendant's position as the City has offered a more likely non discriminatory purpose for the actions complained of by plaintiffs (*See* Defendant's Moving brief pp. 6-8 and supra herein) and

the Court must employ common sense and judicial experience when assessing the conclusory assertion that the acts complained of were motivated by purposeful discrimination. In conducting that assessment, the Supreme Court has stated that the court should consider whether there are "more likely" explanations to explain the defendant's purpose other than a discriminatory purpose. *See Iqbal*, 556 U.S. at 681 (in assessing the allegations in the complaint that the petitioner's purposefully designated detainees of high interest because of their race, religion, or national origin, the Supreme Court held that "given more likely explanations, they do not plausibly establish this purpose.").[9] Here, common sense and judicial experience dictate that there is a "more likely explanation" than purposeful discrimination, namely – the NYPD's anti-terrorism efforts.[10]

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the City has never said that it can conduct "surveillance" of any Muslim, anywhere. Indeed, all the "surveillance" alleged in the complaint occurred in public and not, for example, inside someone's private residence.

[9] *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009) is inapposite. The only issue there was whether the plaintiff had adequately pled in her complaint that she was an individual with a disability. Unlike in *Fowler*, the plaintiffs allegation here of purposeful discrimination is not self-evident, and as such, the Court needs to look at the facts alleged to determine if that conclusory allegation is plausible.

[10] Plaintiffs' reliance on the case of *Turkmen v. Ashcroft,* 2013 U.S. Dist. LEXIS 6042, *58-*61 (E.D.N.Y. January 15, 2013) is misplaced. *See* Opp. Br. 19-20. Plaintiffs' conveniently omit the fact that the District Court in *Turkmen* dismissed the equal protection claim against the DOJ defendants Ashcroft, Mueller, and Ziglar because those allegations did not meet the plausibility standard set forth in *Iqbal*. *Id.* at *60-*67. Indeed, the complaint in *Turkmen* against the FBI defendants attempted to amplify their equal protection claim with more factual allegations than *Iqbal* (the complaint alleged that the DOJ defendants knew that law enforcement lacked any information tying the detainees to terrorism and that some non-Arab and non-Muslim individuals were treated differently than the other detainees), yet it was still not enough to plausibly suggest that the DOJ defendants purposefully directed the detention of the plaintiffs in harsh conditions of confinement because of their religion. *Id.* While the District Court did hold that the equal protection claim against the warden and other individuals of the detention center was plausible, the very specific allegations against those particular defendants are not close to the allegations which we have in this case. For example, in *Turkmen* the allegations against the MDC defendants showed that the plaintiffs were specifically abused because of their

POINT II

PLAINTIFFS LACK ARTICLE III STANDING BECAUSE THEIR ALLEGATIONS DO NOT ESTABLISH INJURIES IN FACT

Plaintiffs' opposition fails to put forward any case law to demonstrate that their allegations of speculative and generalized fears are enough to establish concrete and particularized injuries to meet standing. [11] Indeed, none of the cases plaintiffs cite in support of their argument that standing needs to be analyzed in the context of their claims for violations of the Equal Protection Clause, Free Exercise Clause and Establishment Clause stand for the proposition that a plaintiff's allegations of "fears" alone satisfy the "injury-in-fact" requirement.[12]

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religion - both verbally (through taunts) and physically (in not being allowed to know what time of day it was to pray), among other things. *Id.* at *66-*68.

[11] This Circuit has recognized that fear of a possible future harm is not sufficient to confer standing. *See e.g. Reilly v. Ceridian Corp.*, 664 F.3d 38, 41-46 (3d Cir. 2011) (affirming District Court's order dismissing plaintiffs' claims for lack of standing because plaintiffs' fears of an increased risk of identity theft as a result of a security breach within defendant's company were not actual or imminent); *Doe v. Nat'l Bd. of Med. Examiners*, 210 Fed. Appx. 157, *160-*161 (3d Cir. 2006) (affirming District Court's dismissal for lack of standing where plaintiff's fear that he may at some point be discriminated against because of his test scores was not actual or imminent); *Brunwasser v. Johns*, 2004 U.S. App. LEXIS 7936 (3d Cir. 2004) (affirming District Court's dismissal for lack of standing where plaintiffs' fear about pursuing various legal issues because doing so may result in the imposition of sanctions against him was merely speculative and not an injury in fact).

[12] Plaintiffs assert in a footnote that a mere "identifiable trifle" is sufficient injury to confer standing. Opp. Br. at 21, n. 13. None of the cases cited stands for the proposition that subjective fears alone are enough to establish an injury in fact. *See e.g. Doe v. County of Montgomery*, 41 F.3d 1156 (7th Cir. 1994) (a permanent metal sign was displayed over the main and most prominent entrance to the courthouse which stated "THE WORLD NEEDS GOD"); *Jones v. Butz*, 374 F.Supp. 1284 (S.D.N.Y. 1974) (statute governed the government's slaughter of animals); *Saladin v. Milledgeville*, 812 F.2d 687 (11th Cir. 1987) (use of the word "Christianity" on the city seal violated the Establishment Clause); *Joint Stock Soc'y v. UDV N.Am., Inc.*, 266 F.3d 164 (3d Cir. 2001) (court found no standing existed but hypothesized that standing would exist if a small amount of the product had actually been shipped under a different name).

Plaintiffs' Allegations Regarding Surveillance Do Not Confer Standing

Plaintiffs purport to satisfy the standing requirements based upon their allegations of "surveillance." But a close look at the cases upon which plaintiffs rely reveals that plaintiffs allegations do not meet the threshold. For example, plaintiffs rely on *Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997) for the proposition that law enforcement surveillance in public places confers standing. Opp. Br. at 22, 25. Plaintiffs' reliance on *Anderson* is misplaced.

In *Anderson* there was a specific finding, after a preliminary injunction hearing, that the surveillance had been conducted solely in response to the plaintiff's filing of an employment discrimination claim. Thus, the plaintiff was found to have articulated a "specific present harm" – i.e., which was the Government's retaliation in response to his filing of an employment discrimination claim. *Id.* at 159-163. Plaintiffs here do not allege (and certainly do not have a finding) that the NYPD's actions were undertaken in retaliation for an exercise of plaintiffs' First Amendment activity. Indeed, the plaintiffs do not allege a First Amendment retaliation claim. Significantly, *Anderson* specifically states, "We begin by conceding that the Government's surveillance of individuals in public places does not, by itself, implicate the Constitution." *Id.* at 160.

Similarly, *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975), is factually distinguishable. In *Paton*, the FBI had ordered the post office to institute a "mail cover" in which the addresses of any individuals corresponding with the Socialist Workers Party ("SWP") were recorded and turned over to the FBI. The plaintiff had written to the SWP. The FBI received plaintiff's information, conducted an investigation of plaintiff, and opened an investigative file about her which was labeled "Subversive Material - Socialist Workers Party" and contained such

information as where she went to school, who her parents were, and their present and former employers. *Id.* at 865. On these allegations, the Court found that this investigative file could endanger plaintiffs' future employment opportunities because plaintiff planned to seek government employment and the FBI conducts security background checks of certain types of potential government employees. Id. at 868. The Court specifically noted that the file's designation as "Subversive Material-Socialist Workers Party" could prove extremely damaging as it might be misunderstood by other government agencies. *Id.* at 868.

Unlike the allegations in *Paton*, here plaintiffs Hassan, Mohammed, Doe, Tahir, Abdur-Rahim, and Abdullah make no allegations about what the NYPD records are alleged to contain about them as indeed they only make the conclusory allegation that, "upon information and belief, the NYPD also maintains records identifying" them as "targets of surveillance or investigation." Am. Comp. ¶72. Aside from this conclusory allegation, the first amended complaint does not contain allegations about what type of information about these plaintiffs is allegedly in the "records." Moreover, despite the disclosure by the Associated Press of documents which precipitated this lawsuit, these plaintiffs do not allege that their names or any other information about them is contained in the documents released by the AP. Nor does the complaint allege that these plaintiffs intend to seek employment from the government or that the existence of these alleged "records" would endanger their future government employment. [13]

[13] While Plaintiff Hassan alleges that he has a "well-founded fear that his security clearance would be jeopardized" (Am. Comp. ¶13), his fear is not based upon the existence of information collected specifically about him but rather based upon his "being closely affiliated with mosques under surveillance by law enforcement." *Id.* In addition to the fact that he is not alleging that there is the existence of the type of file and dissemination as the plaintiff in *Paton* (*Paton*, at 868), Hassan's alleged grievance is the type shared in substantially equal measure by any member of any mosque alleged to have been "surveilled" and thus does not confer standing. *See Paton* at 867 ("the harm must not be a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens") *citing Warth v Seldin*, 422 U.S. 490 (1975).

Plaintiffs the Council of Imams in New Jersey, All Body Shop Inside & Outside, Unity Beef Sausage Company, and Zaimah Abdur-Rahim allege slightly more – that a photo exists with a description of their business or mosque in an NYPD report. Am. Comp. ¶14, 19, 20, 31.[14] Plaintiff MSA also alleges that their names are in a report on schools that contain the names of professors, scholars, and students. Am. Comp. ¶51. Those additional allegations do not save these plaintiffs from a failure to adequately plead concrete and particularized injuries because the photo of an outside of a business, mosque or other building is something that can be found on "Google" or in a phone book. [15] The mere fact that a police "record" demonstrates that the NYPD is aware of the existence of a business, mosque, or student group – facts which are readily available to the public – cannot be enough to confer standing on someone who is in some way associated with that business, mosque, or student group. Moreover, none of these plaintiffs allege that the NYPD "records" about them will endanger their future employment prospects with the government (or otherwise).[16]

Philadelphia Yearly Meeting of Religious Soc'y of Friends v. Tate, 519 F.3d 1335 (3d Cir. 1975) is also distinguishable because in that case, the Court found that the allegations that plaintiffs had standing because the Philadelphia Police Department described on national

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[14] Plaintiff Zaimah Abdur-Rahim alleges that there is a photo and a description of a school she use to teach in with a notation that the school is also a private home (which it turns out is hers but that fact is not alleged to be contained in the police record).

[15] Plaintiff Muslim Foundation Inc. adds the allegation that they were in a report that had the words "subject of surveillance." Am. Comp. ¶22. That designation does not equate with the designation in *Paton* of "Subversive Material-Socialist Workers Party" nor does Muslim Foundation allege that it has a fear that the "record" will be used to harm future government employment.

[16] While plaintiff Abdur-Rahim does allege that she "reasonably fears that her future employment prospects are diminished by working at two schools under surveillance," that is not an allegation that she was individually under surveillance or the type of allegation recognized in *Paton* as establishing standing.

television its political intelligence gathering system and specifically identified various plaintiffs as being the subject of police dossiers. *Id.* at 1338. In addition, the court relied upon the specific allegations in the complaint that "no safeguards exist as to the disposition of or access to the political and personal information contained in the files; that such information is available to other law enforcement agencies and . . . to private employers, to governmental agencies for purposes of considering employment, promotion, granting of licenses, passports, etc., to private political organizations which seek to suppress "subversive" or dissident political activity or views, and to the press. *Id.* at 1337. Notably, just as in *Anderson,* the Circuit followed *Laird* and held that photographing and data gathering at public meetings does not state a claim by itself. *Id.* at 1337-1338.

Unlike in *Philadelphia Yearly*, plaintiffs here merely allege that "these records are likely to command attention from law enforcement officials . . and the public at large to the detriment of the Plaintiffs." Am. Comp. ¶ 72. Significantly, the Third Circuit in *Philadelphia Yearly* held that the exchange of information with other law enforcement agencies was not enough by itself to state a claim. *Id.* at 1338 ("We cannot see where the traditional exchange of information with other law enforcement agencies results in any more objective harm than the original collation of such information.'). Moreover, as alleged in the complaint (and as demonstrated from the press reports submitted by plaintiffs in opposition to the motion to dismiss for lack of standing), the NYPD's "spying program"[17] started in 2002 and, for example, the Newark Report was compiled in 2007. Am. Comp. ¶2, 36; Katon Dec. Exhibit E (article identifying the Newark Report existing in 2007). Yet despite those allegations of the "Program " existing for over ten years,

[17] As we stated in footnote 1 regarding "surveillance", *supra*, use of plaintiffs' terminology alleged in the complaint such as a "spying program" is not a concession as to the existence of any such program and the conclusory term "spying program" should be viewed in the context of the factual allegations pled which do not allege a "spying program."

and the existence of the Newark report for over five years, plaintiffs do not allege an actual injury caused by the records about which they complain.[18]

Plaintiffs Subjective Injuries of Fear Do Not Suddenly Change Into Concrete and Particularized Injuries Because They Are Alleging Violations of The Equal Protection Clause, Free Exercise Clause, And The Establishment Clause

Plaintiffs argument that they have standing under the Equal Protection Clause also fails because none of the cases relied on demonstrate that subjective or generalized fears are injuries in fact. Opp. Br. at 26-27). For example, plaintiffs' reliance on the case of *NorthEastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993) is misplaced because in that case the Supreme Court stated that the "injury in fact" element of standing in an equal protection case arises 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. *Id.* at 666. In *NorthEastern* the barrier was an affirmative action program.[19]

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[18] Plaintiffs' attempt to rely on the case of *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181 (3d Cir. 2006) to show standing for plaintiffs Abdur-Rahim and Abdullah for their alleged diminution in value of their home must be rejected. *Taliaferro* involved a claim brought by neighboring property owners against the town alleging that the construction of a storage facility would blight the neighborhood. Specifically, plaintiffs alleged that because the zoning variance was approved and the storage facility could be erected, it would lower their property values. This was found to be a concrete and particularized injury. Here, there are no such allegations that the City is building, or proposing to build, or regulate on neighboring property. Similarly, plaintiffs' reliance on *Baugh Constr. Co. v. Mission Ins. Co.*, 836 F.2d 1164 (9th Cir. 1988) is equally misplaced. First, it is not controlling authority. Second, *Baugh* involved an insurance dispute between construction companies and their insurance companies. for various actual physical defects in the building. In that case, it was held that part of a building is its' reputation as defect free, and thus, there could be diminution in the value of the building. Again, this is a far cry from the facts here and should not be considered.

[19] Similarly, other cases relied upon by plaintiffs contain other specific barriers which are not alleged in the first amended complaint. Opp. Br. at 26-27 *citing Parents Involved in Cmty. Sch.* (involved race-based assignment plans in schools); *Allen v. Wright* (involved a challenge to the IRS on racial grounds and was a case where the Court found there was both no standing and that the injury was not fairly traceable to the IRS); and *Heckler v. Matthews* (involved a challenge to a government pension scheme that conferred different benefits based on gender).

Similarly, plaintiffs argument that they have standing under the Establishment Clause is erroneous because the cases cited still do not stand for the proposition that subjective and speculative fears are injuries in fact. Opp. Br. at 27-30. Plaintiffs rely, in error, on numerous "demonstration" cases, all of which challenge religious displays and performances in public settings, or cases in which the government restricts or obligates or imposes a duty because of religion. None of those cases are factually similar to the allegations in the first amended complaint.

Finally, plaintiffs argument that they have standing to bring a Free Exercise Challenge also fails. (Opp. Br. at 30-32). Those cases cited to by plaintiffs do not establish that subjective and speculative fears are injuries in fact. For example, the case of *Church of Lukumi Babalu Aye,* 508 U.S. 520 (1993) is factually distinguishable because that case involved voiding an ordinance that the City enacted which prohibited the slaughter of animals for a ritual purpose because it was found that this prohibition prevented plaintiffs from practicing their religion, which was Santeria. Similarly, in the case of *Employment Div. v. Smith*, 494 U.S. 872 (1990) the ordinance at issue involved the state regulating peyote use for sacramental purposes, and in *McDaniel v. Paty*, 435 U.S. 618 (1978) the statute at issue disqualified ministers or priests from serving as legislators. These are all cases where the government explicitly regulated or imposed a barrier to religious conduct. And are distinguishable to the allegations here.[20]

[20] Plaintiffs' reliance on *Presbyterian Church (U.S.A.) v. United States,* 870 F.2d 518 (9th Cir. 1989) should be disregarded as that case is not controlling here. Similarly, plaintiffs' reliance on *Socialist Workers Party v. Attorney General*, 419 U.S. 1314 (1974) is misplaced. In that case, the Socialist Workers Party moved for a preliminary injunction to prevent the FBI from sending informants to their national convention to participate in meetings based on specific knowledge that the FBI admitted it intended to use agents or informants to pose as *bona fide* YSA members at their national convention and engage in disruptive activity.

POINT III

PLAINTIFFS' INJURIES ARE NOT "FAIRLY TRACEABLE" TO THE NYPD

Plaintiffs' attempt to show that their injuries are fairly traceable to the acts of the NYPD fails. Opp. Br. at 32-36. First, plaintiffs argue that because the City has made comments regarding the NYPD's alleged surveillance program, these comments somehow ratify the existence of a facially discriminatory surveillance policy and practice. This is clearly not the case, as none of the NYPD's public comments identified the details of the alleged "program," identified plaintiffs, or identified any of the few facts plaintiffs allege exist in the records.

Second, plaintiffs argue that the AP's disclosure of the documents was only one link in the causal chain and that the NYPD is really the responsible party and so that is enough to confer standing. This argument also fails, because the specific harm plaintiffs allege arose solely from the actual disclosure of the documents by the AP and not by the NYPD. It is those documents that contained the identifying information complained about by the plaintiffs. Accordingly, plaintiffs' alleged injuries are the result of the Associated Press disclosing unredacted documents and not the result of the NYPD.

POINT IV

PLAINTIFFS ARE NOT ENTITLED TO EXPUNGEMENT

For the same reasons put forward in defendant's moving papers and *supra*, plaintiffs are not entitled to either an injunction, a declaratory judgment, or the expungement of records because plaintiffs' have failed to state a plausible claim and plaintiffs lack standing.

CONCLUSION

WHEREFORE, for the reasons set forth previously and above, plaintiffs' first amended complaint should be dismissed in its entirety with prejudice, together with such other and further relief as this Court may deem just and proper.

Dated: New York, New York
February 25, 2013

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CERTIFICATE OF SERVICE

I am a Senior Counsel in the office of MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, attorney for the defendant City of New York. On this date, I electronically filed with the Clerk of the United States District Court, District of New Jersey, the foregoing Defendant's Reply Brief in Further Support of Its Motion to Dismiss the First Amended Complaint, dated February 25, 2013. On this date, the foregoing was served by ECF upon Plaintiffs' counsel.

I certify under penalty of perjury that the foregoing statements are true and correct.

Dated: New York, New York
February 25, 2013

s/ Peter G. Farrell

Peter G. Farrell
Senior Counsel