U.S. Department of Justice

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July 24, 2017

By Electronic Case Filing
The Honorable Catherine O'Hagan Wolfe
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: *Tanvir v. Tanzin*, No. 16-1176 (2d Cir.)

Dear Ms. Wolfe:

Defendants-appellants ("defendants" or the "agents") respectfully submit this letter brief in response to the Court's Order of July 6, 2017, directing the parties to address "whether, assuming *arguendo* that [the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"),] authorizes suits against officers in their individual capacities, defendants-appellees would be entitled to qualified immunity," and "whether *Ziglar v. Abbasi*, [137 S. Ct. 1843 (2017)], applies in any relevant way to this question or the other questions presented in this case on appeal."

Defendants are entitled to qualified immunity for two reasons. First, plaintiffs-appellants ("plaintiffs") fail to plausibly allege that defendants knowingly imposed a substantial burden on the exercise of their Muslim religion in violation of RFRA. Plaintiffs allege that defendants substantially burdened their religious

exercise by allegedly using the No Fly List to induce plaintiffs to serve as informants within their Muslim-American communities. But according to the complaint, eight of the agents had no personal involvement in the alleged requests that plaintiffs become informants, and plaintiffs never advised or suggested to the remaining agents that acting as an informant would impose any burden on their religious exercise. In addition, two of the plaintiffs were able to fly shortly after they allegedly refused to become informants, further defeating any plausible inference that the agents' requests imposed a substantial burden.

Second, it was not clearly established that asking someone to become an informant and provide information about others in his religious community, or using the No Fly List for that purpose, violates RFRA. *Abbasi* makes clear that a defendant law enforcement officer is entitled to qualified immunity if he "might not have known for certain that the conduct was unlawful." 137 S. Ct. at 1867. No court has held RFRA to apply to conduct that is remotely similar to the conduct alleged here. The agents therefore could not have known for certain that their conduct violated RFRA, and they are immune from plaintiffs' claims. *See id.*

Abbasi also supports defendants' reading of RFRA. The decision reinforces the principle that courts must be cautious about implying causes of action not explicit in statutory text, and further rebuts plaintiffs' argument that the Court should assume a damages remedy unless Congress explicitly provides otherwise. *Abbasi* also

undermines plaintiffs' argument that the Court should recognize a damages remedy under RFRA because Congress was aware that First Amendment free-exercise claims were available against state officers under 42 U.S.C. § 1983, or supposedly against federal officers under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

I. Defendants Are Entitled To Qualified Immunity

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal quotation marks omitted)). Qualified immunity affords officials "breathing room to make reasonable but mistaken judgments about open legal questions," *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011), and protects "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Qualified immunity should be decided "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Indeed, the Supreme Court in recent years has "issued a number of opinions reversing federal courts in qualified immunity cases," finding it "necessary both because qualified immunity is important to society as a whole and because as an immunity from suit, qualified immunity is

effectively lost if a case is erroneously permitted to go to trial." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (internal quotation marks and citations omitted); *see also Abbasi*, 137 S. Ct. at 1865-69 (reversing denial of qualified immunity on claims under 42 U.S.C. § 1985(3)).

Here, plaintiffs have not plausibly alleged that defendants violated their rights under RFRA, nor would reasonable officers in defendants' position have "known for certain" that their alleged conduct violated the statute. *Abbasi*, 137 S. Ct. at 1867. Defendants are therefore immune from plaintiffs' claims under RFRA.

A. Plaintiffs Have Not Plausibly Alleged That Defendants Violated Their Rights Under RFRA

RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it is "the least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. §2000bb-1. To plead a violation of RFRA, plaintiffs must allege that defendants knowingly violated their rights under the statute. *See Weinberger v. Grimes*, No. 07-6461, 2009 WL 331632, at *5 (6th Cir. Feb. 10, 2009) (affirming dismissal of RFRA claim where plaintiff failed to allege that the defendant prison chaplain "acted knowingly" in serving plaintiff a non-kosher meal).

Plaintiffs allege that "the Special Agent Defendants" as an undifferentiated group "substantially burdened their sincerely held religious beliefs in violation of RFRA" by "attempting to recruit them as confidential government informants by

resorting to the retaliatory or coercive use of the No Fly List." JA 110 (¶ 214). Specifically, plaintiffs claim that "Defendants instructed and pressured" them "to infiltrate their religious communities as government informants" and "to report their observations to the FBI." JA 109 (¶ 209). According to the complaint, "Defendants" "forc[ed]" plaintiffs into an "impermissible choice" between violating their religious beliefs or being placed or maintained on the No Fly List. JA 110 (¶ 211); *see also* JA 77-78, 85-86, 95-96.

Such conclusory group pleading, however, is insufficient to state a claim under RFRA. Plaintiffs must identify what "each" of the defendants has done, through his or her "own individual actions," to violate the law. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Focusing on the facts alleged as to each agent, which are summarized in relevant part in the Addendum to this letter brief, it is clear that plaintiffs have not met this standard.

With regard to eight of the fifteen defendants—Agents John Doe 1, Sanya Garcia, John LNU, John C. Harley III, Steven LNU, Gregg Grossoehmig, Weysan Dun, and James C. Langenberg—plaintiffs make no allegation that those agents ever asked any plaintiff to serve as an informant, or even were present when another agent made such a request. *See* JA 80-81, 92-97. Because these eight defendants played no role in the conduct that plaintiffs allege imposed a substantial burden on their religious exercise, they are entitled to qualified immunity. *See Raspardo v. Carlone*,

770 F.3d 97, 115 (2d Cir. 2014) (defendant immune where plaintiff failed to allege that defendant was personally involved in alleged violation of law).

Plaintiffs also fail to plead facts to plausibly suggest that the remaining seven defendants—Agents FNU Tanzin, Francisco Artusa, Michael LNU, and John Does 2/3 and 4-6—knowingly violated RFRA when they allegedly attempted to recruit plaintiffs to serve as informants. There is no allegation that plaintiffs ever advised or suggested to those agents that serving as an informant would burden—much less substantially burden—the exercise of their religion. To the contrary, according to the complaint, plaintiff Algibhah first simply refused to be an informant, JA 85 (¶ 121), then allegedly told the agents that "he needed time to consider their request that he work as an informant," and then "assured the agents that he would work for them as soon as they took him off the No Fly List," JA 88 (¶ 134). Plaintiff Tanvir allegedly told the agents "that he did not want to become an informant," explaining that "it seemed like it would be a very dangerous undertaking," and he was "concerned about his safety" JA 76 (¶¶ 77-79). Plaintiff Shinwari alleges that he "told the agents that he would not work as an informant," JA 95 (¶ 156), explaining that "he believed becoming an informant would put his family in danger," JA 97 (¶ 161).

Although the complaint alleges that plaintiffs had religious objections to serving as informants, JA 77, 85-86, 95-96 (¶¶ 84, 122, 157), there is no allegation

that they ever conveyed this information to the agents. Nor did plaintiffs supplement their allegations on this point when given an opportunity to do so. *See* JA 17 (Dkt. No. 53). Thus, on the facts alleged, the agents would not reasonably have known that asking plaintiffs to serve as informants would burden the exercise of their religion.

In addition, plaintiffs Tanvir and Shinwari acknowledge that after the conclusion of their interactions with Agents FNU Tanzin, Michael LNU and John Doe 2/3 and 6, in which plaintiffs allegedly refused to serve as informants, Tanvir and Shinwari were able to fly. *See* JA 77-78 (Tanvir flew to Pakistan after second interation with FNU Tanzin, as well as after last interaction with FNU Tanzin and John Doe 2/3); JA 94-97 (Shinwari flew domestically after last interactions with Michael LNU and John Doe 6).[1] It is therefore implausible that these agents substantially burdened plaintiffs' religious exercise by "forcing them" to choose between serving as informants and being placed or remaining on the No Fly List, as

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[1] Similarly, Tanvir and Shinwari were able to fly after they interacted with Agents John Doe 1, Steven LNU, Harley, Grossoehmig, Dun and Langenberg—none of whom ever sought to recruit plaintiffs as informants. *See* JA 74 (Tanvir flew to Pakistan after meeting with John Doe 1); JA 92-94 (Shinwari flew from Dubai to Dulles after meeting with Steven LNU and Harley); JA 94-95 (Shinwari flew from Dulles to Omaha after meeting with Grossoehmig); JA 97, 99 (Shinwari flew from Connecticut to Omaha after meeting with Dun and Langenberg).

plaintiffs allege. JA 110, 77-78, 85-86, 95-96; *see Iqbal*, 556 U.S. at 682 (allegations must "give rise to a plausible inference" that unlawful act occurred).

B. It Was Not Clearly Established at the Time That Defendants' Alleged Conduct Violated RFRA

Even if plaintiffs had plausibly alleged a violation of their rights under RFRA, defendants are still entitled to qualified immunity because it was not clearly established at the time that their alleged conduct violated RFRA.

The Supreme Court "has repeatedly told courts . . . not to define clearly established law at a high level of generality." *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 742). Instead, "'the dispositive question is whether the violative nature of *particular* conduct is clearly established.'" *Abbasi*, 137 S. Ct. at 1866 (quoting *Mullenix*, 136 S. Ct. at 308) (internal quotation marks and alteration omitted). "This inquiry must be undertaken in light of the specific context of the case, not as a broad proposition." *Mullenix*, 136 F.3d at 308 (citation and internal quotation marks omitted). While there need not be "a case directly on point," "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *al-Kidd*, 563 U.S. at 741) (internal quotation marks omitted).

In other words, the constitutional or statutory right at issue must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 136 S. Ct. at 308 (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)) (internal quotation marks omitted). As the

Supreme Court put it in *Abbasi*, the officer is immune "if a reasonable officer might not have *known for certain* that the conduct was unlawful." *Abbasi*, 137 S. Ct. at 1867 (emphasis added); *see also Walczyk v. Rio*, 496 F.3d 139, 154 (2d Cir. 2007) (defendant entitled to immunity if "officers of reasonable competence could disagree on the legality" of the alleged conduct).

Here, defendants would not have known for certain that the particular conduct alleged by plaintiffs was unlawful. Plaintiffs allege that defendants "substantially burdened [their] sincerely held religious beliefs in violation of RFRA" by "attempting to recruit them as confidential government informants" through "the retaliatory or coercive use of the No Fly List"; that the United States government has no "compelling interest in requiring Plaintiffs to inform on their religious communities"; and that "[r]equiring Plaintiffs to inform on their religious communities is not the least restrictive means of furthering any compelling government interest." JA 110 (¶¶ 212-214).

There is simply no law that would have put defendants on notice that RFRA was violated in this "specific context." *Mullenix*, 136 S. Ct. at 308; *Abbasi* 137 S. Ct. at 1868. No court has held that "attempting to recruit" a person as an informant to provide information about others within the same religious community constitutes a substantial burden on religious exercise in violation of RFRA—and certainly not

in the unique factual context of the No Fly List. JA 110 (¶ 214).[2] Nor has any court considered whether the government has a compelling interest in recruiting informants in these circumstances, or whether there are less restrictive means to further any compelling government interest. In short, no court has found a violation of RFRA under circumstances that are remotely similar to those alleged here.

In the absence of "a case where an officer acting under similar circumstances . . . was held to have violated" RFRA, *White*, 137 S. Ct. at 552, agents in defendants' position could not have known that their alleged requests that plaintiffs serve as informants would be unlawful, much less "have known for certain," *Abbasi*, 137 S. Ct. at 1867. At the very least, officers of reasonable competence could disagree about the legality of such a request. *See Walczyk*, 496 F.3d at 154. Defendants are therefore immune from plaintiffs' RFRA claims. *See Davila v. Gladden*, 777 F.3d 1198, 1211-12 (11th Cir. 2015) (officers entitled to qualified immunity because it

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[2] In other contexts, courts have observed that "[t]here is no constitutional right not to 'snitch.'" *United States v. Paguio*, 114 F.3d 928, 930 (9th Cir. 1997) (addressing argument that prosecutors indicted defendant in order to pressure her co-defendant fiancé to cooperate (citing *United States v. Gardner*, 611 F.2d 770, 773 (9th Cir. 1980)). *See also Allah v. Juchenwioz*, 176 F. App'x 187, 189 (2d Cir. Apr. 12, 2006) (noting that "[n]either the Supreme Court nor this Court has ever held that a prisoner enjoys a constitutional right not to become an informant," and holding defendants entitled to qualified immunity because, even assuming such a right existed, it was not clearly established at the time); *Tennyson v. Rohrbacher*, No. 11-35, 2012 WL 366539, at *6 (W.D. Pa. Jan. 25, 2012) ("Neither the United States Supreme Court nor the Court of Appeals for the Third Circuit ever has held that a prisoner enjoys a constitutional right not to become an informant.").

was not "clearly established under RFRA that a prisoner can get religious property from outside sources"); *Lebron v. Rumsfeld*, 670 F.3d 540, 557 (4th Cir. 2012) (defendants entitled to qualified immunity because "any rights that enemy combatants may have had under RFRA were not clearly established" at the time); *cf. Redd v. Wright*, 597 F.3d 532, 536 (2d Cir. 2010) (defendants entitled to qualified immunity from First Amendment free-exercise claims because "[a]t the time [plaintiff] was confined in [medical] hold [for more than one year], it had not been clearly established by either the Supreme Court or this court" that the policy was unlawful, even though the court previously held that a three-year confinement was).[3]

II. *Abbasi* Supports Defendants' Reading of RFRA

In *Abbasi*, the Supreme Court declined to recognize an implied cause of action for money damages for alleged constitutional violations against former executive branch officials, clarifying *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The Court placed strict limits on allowing *Bivens* actions where the claims differ meaningfully "from previous *Bivens* cases decided by [the Supreme Court]." 137 S. Ct. at 1859-60. This aspect of *Abbasi* concerns whether courts may

[3] Moreover, at the time of the alleged conduct, neither the Supreme Court nor any Court of Appeals (other than a Seventh Circuit decision that was later reversed) had held that RFRA provides a cause of action against individual federal officials in their personal capacities. For that additional reason, "it would [have been] difficult for officials [in defendants' position] reasonably to anticipate when their conduct may give rise to liability for damages." *Abbasi*, 137 S. Ct. at 1867 (quotation marks omitted).

infer a cause of action for damages under the Constitution, while this case concerns whether Congress created a cause of action for damages in a statute. Nevertheless, *Abbasi* supports defendants' position in two ways.

First, *Abbasi* reiterates and strengthens the Supreme Court's prior holdings that courts must be "cautious" about "imply[ing] causes of action not explicit in the statutory text itself." 137 S. Ct. at 1855. The Court emphasized its departure from the "*ancien regime*," where "the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose." *Id.* (citations omitted). In more recent years—roughly, the period since 1975—the Court has taken a far more restrained approach to determining whether an implied remedy exists in a statute. *Id.* *Abbasi* observed that "[w]hen Congress enacts a statute, there are specific procedures and times for considering . . . the proper means for its enforcement. It is logical, then, to assume that Congress will be explicit if it intends to create a private cause of action." *Id.* at 1856. Therefore, under the Court's current approach, "the statute itself [must] display an intent to create a private remedy," or that remedy does not exist and may not be created by the courts. *Id.* (citation and internal quotation marks omitted).

As defendants explained in their brief (Defs.' Br. 36-39), these principles defeat several of plaintiffs' arguments. In particular, plaintiffs adopt the approach that *Abbasi* emphasized has been rejected: they argue that RFRA provides for a

damages remedy against federal officials in their personal capacities because "there are no express indications in the statute that Congress intended to exclude money damages," and a damages remedy is needed to effectuate RFRA's purpose. (Pls.' Br. 29-31, 36-41). But *Abbasi* states that the Court will only find a remedy when Congress affirmatively shows its intent to provide one, and courts should no longer "provide such remedies as are necessary to make effective a statute's purpose." 137 S. Ct. at 1855. In addition, *Abbasi* restates the point defendants made in their brief (Defs.' Br. 39) that a damages remedy against individual federal officers in their personal capacities imposes "substantial costs, in the form of defense and indemnification," as well as burdens "resulting from the discovery and trial process." 137 S. Ct. at 1856. That further counsels hesitation when deciding whether to recognize a damages remedy against individual officers.

Second, plaintiffs' argument depends in part on their contention that a *Bivens* action had existed against federal officers for First Amendment free-exercise violations before the decision in *Employment Division v. Smith*. (Pls.' Reply Br. 20-21). While *Abbasi* does not directly address that question, its stringent limits on the creation of *Bivens* claims, and its narrow view of the contexts in which *Bivens* claims have been recognized, strongly suggest that no court would adopt a *Bivens* remedy for a free-exercise violation. (*See* Defs.' Br. 35-36 & n.20). Similarly, plaintiffs have argued that the existence of a remedy against state officers for free-exercise

violations under 42 U.S.C. § 1983 suggests Congress intended RFRA to provide a similar remedy for damages against federal officers. But *Abbasi* observed that while Congress was explicit in providing a damages remedy in § 1983, it has never done so against federal officers; and it suggested that, absent congressional action, the courts should not "keep expanding *Bivens* until it became the substantial equivalent of § 1983." 137 S. Ct. at 1854-55. Unlike in § 1983, Congress has not explicitly provided a damages remedy in RFRA (Defs.' Br. 20-22), and *Abbasi* underscores that this Court therefore should not imply one. 137 S. Ct. at 1855.

Respectfully,

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TANVIR V. TANZIN, 16-1176, ADDENDUM

Plaintiff Muhammad Tanvir

Agent	Allegations in the Complaint	Complaint
FNU Tanzin	Asked Tanvir to work as an informant and Tanvir responded that it was "dangerous"; Tanvir flew to Pakistan after second interaction with FNU Tanzin and again after last interaction.	¶¶ 69-70, 73-79, 81-84, 86-88, 92
John Doe 1	Did not ask and was not present when another agent allegedly asked Tanvir to work as an informant; Tanvir flew to Pakistan after last interaction.	¶ 69
John Doe 2/3[1]	Asked Tanvir to work as an informant and Tanvir responded that it was "dangerous"; Tanvir flew to Pakistan after last interaction.	¶¶ 73-78, 82-84 86-88
Garcia	Did not ask and was not present when another agent allegedly asked Tanvir to work as an informant.	¶¶ 94, 99-104, 106, 113
John LNU	Did not ask and was not present when another agent allegedly asked Tanvir to work as an informant.	¶¶ 100-103, 106

Plaintiff Jameel Algibhah

Agent	Allegations in Complaint	Complaint
Artusa	Allegedly asked Algibhah to work as an informant; Algibhah first told "the FBI agents that he would not become an informant" and later responded that "he needed time to consider their request" and "would work for them as soon as they took him off the No Fly List."	¶¶ 119-121, 123, 131-136, 138-141
John Doe 4	Allegedly asked Algibhah to work as an informant and Algibhah told "the FBI agents that he would not become an informant."	¶¶ 119-121
John Doe 5	Allegedly asked Algibhah to work as an informant and Algibhah responded that "he needed time to consider their request" and "would work for them as soon as they took him off the No Fly List."	¶¶ 131-135

Plaintiff Naveed Shinwari

Agent	Allegations in Complaint	Complaint
Steven LNU and Harley	Did not ask and was not present when another agent allegedly asked Shinwari to work as an informant; Shinwari flew from Dubai to Dulles after last interaction.	¶¶ 147-151
Michael LNU	Allegedly asked Shinwari to work as an informant and Shinwari said that he "would not act as an informant" and that it "would put his family in danger"; Shinwari flew from Connecticut to Nebraska after last interaction.	¶¶ 152-57, 161
Grossoehmig	Did not ask and was not present when another agent allegedly asked Shinwari to work as an informant; Shinwari flew from Dulles to Nebraska after last interaction.	¶¶ 152-53
John Doe 6	Allegedly asked Shinwari to work as an informant and Shinwari said that he "would not act as an informant" and that it "would put his family in danger"; Shinwari flew from Connecticut to Nebraska after last interaction.	¶¶ 155-57, 161
Dun and Langenberg	Did not ask and was not present when another agent allegedly asked Shinwari to work as an informant; Shinwari flew from Connecticut to Nebraska after last interaction.	¶¶ 162-64

[1] John Doe 2 is currently proceeding as John Doe 2/3. *See* Dist. Ct. ECF Dkt. No. 30 ¶ 1(f). Paragraphs 82-84 appear to contain allegations related to John Doe 2/3 rather than John Doe 1. *See* Dist. Ct. ECF Dkt. No. 73 at 10 n.6.