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VIA ECF

Catherine O'Hagan Wolfe, Clerk
U.S. Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *Tanvir v. Tanzin*, No. 16-1176 (2d Cir.)
Supplemental Reply Letter Brief of Plaintiffs-Appellants

Dear Ms. Wolfe:

Plaintiffs respectfully submit this supplemental reply letter brief in keeping with the Court's orders.

I. Plaintiffs Have Adequately Alleged a Violation of RFRA, and Consideration of Qualified Immunity Is Therefore Premature

Qualified immunity is rarely granted based on a motion to dismiss—even by district courts—because dismissal is only appropriate in the rare case where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004) (quotation marks omitted). This Court has long deferred to lower courts in deciding qualified immunity on a motion for summary judgment in the first instance. *Francis v. Coughlin*, 849 F.2d 778, 780 (2d Cir. 1988) ("When a district court fails to address an immunity defense, it is generally appropriate to remand the case with instructions to rule on the matter.").

Defendants inadvertently highlight several open factual questions which call for further record development before any decision on qualified immunity. For example, Plaintiffs allege that Defendants violated their rights under RFRA in "attempting to recruit Plaintiffs as confidential government informants by resorting to the retaliatory or coercive use of the No Fly List." JA 110 (AC ¶ 214). Plaintiffs plead conduct by each Defendant to substantiate that claim. JA 66, 73 (AC ¶¶ 36–38, 66); JA 74, 75–76, 81 (AC ¶¶ 70, 76, 101) (Mr. Tanvir); JA 85, 89–91 (AC ¶¶ 120–21, 136, 142) (Mr. Algibhah); JA 93–95 (AC ¶¶ 148, 153, 155–56) (Mr. Shinwari). Defendants merely raise concerns that Plaintiffs have not articulated what each Defendant knew and when they knew it. Contrary to Defendants' contention, it is a reasonable inference that officers within the same unit of a single agency—in this case the FBI—coordinate with respect to their investigations.

Defendants' arguments underscore other open questions that the lower court should first address on a motion for summary judgment. For example, the District Court should determine whether Defendants—informed by their counterterrorism training and experience focusing on Muslim communities—were aware that asking Plaintiffs to lie to and spy on their own communities would substantially burden their Muslim faith.[1] The lower court should also determine whether and how

[1] It is worth reiterating that Plaintiffs are not required to show that Defendants acted with intent or knowledge under RFRA. *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) *superseded on*

Defendants placed Plaintiffs on the No Fly List, and whether Defendants gave Plaintiffs one-time waivers in order to board flights back home, despite having already been listed. *See, e.g.*, JA 87–88 (AC ¶¶ 114-15) (Mr. Tanvir); JA 41–42 (AC ¶¶ 164–168) (Mr. Shinwari).

For this Court to answer those questions now would be premature because Plaintiffs are entitled at this stage to "all reasonable inferences" from the facts alleged, including those that "defeat the immunity defense." *Mckenna*, 386 F. 3d at 436. In fact, the majority of cases which Defendants cite in their supplemental brief involve qualified immunity on summary judgment, not on a motion to dismiss.[2] In those few cases where qualified immunity was decided on a motion to dismiss, the issue was fully briefed and decided by the lower courts before decision on appeal.[3] Plaintiffs' arguments are best suited for resolution by the District Court on a motion for summary judgment, with a complete record.

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other grounds by statute, 42 U.S.C. § 2000cc (holding that RFRA liability attaches when "the exercise of religion has been burdened in an incidental way by a law of general application").

[2] *See White v. Pauly*, 137 S. Ct. 548, 550 (2017) (reversing district and circuit courts' denial of qualified immunity on summary judgment motion); *Hunter v. Bryant*, 502 U.S. 224, 226–27, (1991) (same); *Davila v. Gladden*, 777 F.3d 1198, 1212 (11th Cir. 2015) (granting qualified immunity on summary judgment motion); *Raspardo v. Carlone*, 770 F.3d 97, 117–120 (2d Cir. 2014) (reversing district court's denial of qualified immunity on summary judgment motion); *Walczyk v. Rio*, 496 F.3d 139, 163–64 (2d Cir. 2014) (affirming district court's denial of qualified immunity on summary judgment motion); *Redd v. Wright*, 597 F.3d 532, 536–39 (2d Cir. 2010) (affirming district court's finding of qualified immunity on summary judgment motion); *Allah v. Juchenwioz*, 176 F. App'x 187, 188–89 (2d Cir. 2006) (affirming district court's finding of qualified immunity on motion for judgment on pleadings based on findings made in previously-decided summary judgment motion in same case).

[3] *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1852 (2017) (reversing district and circuit courts' denial of qualified immunity on motion to dismiss); *Lebron v. Rumsfeld*, 670 F.3d 540, 547, 557 (4th Cir. 2012) (affirming district court's denial of qualified immunity on motion to dismiss).

II. It Was Clearly Established that Defendants' Conduct Violated Plaintiffs' RFRA Rights

Defendants misconstrue the right Plaintiffs hold out to be clearly established as one under RFRA not to be pressured, through abuse of the No Fly List, to become an informant against others in the same religious community. Because their characterization is "based on the *exact* factual scenario presented," it is therefore "defined too narrowly." *Golodner v. Berliner*, 770 F.3d 196, 206 (2d Cir. 2014) (emphasis added); *see also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (declaring that "officials can still be on notice that their conduct violates established law even in novel factual circumstances"); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (rejecting the idea that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful"). If Defendants' narrow position were adopted, government agents would "invariably receive qualified immunity," which would be at odds with controlling qualified immunity doctrine. *Golodner*, 770 F.3d at 206 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

The Supreme Court has defined "substantial burden" with sufficient clarity to give Defendants fair notice of their proscribed conduct. *See, e.g., Thomas v. Review Board*, 450 U.S. 707, 717–18 (1981) (substantial burden when "condition[ing] receipt of an important benefit upon conduct proscribed by a religious faith, or [denying] such a benefit because of conduct mandated by

religious belief") (quotation marks omitted); *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (substantial burden to "affirmatively compel[an individual], under threat of . . . sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (substantial burden exists where denial of unemployment benefits "forces [petitioner] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand"). Consistent with this jurisprudence, Plaintiffs allege that "Defendants forced Plaintiffs into an impermissible choice between, on the one hand, obeying their sincerely held religious beliefs and being subjected to the punishment of placement or retention on the No Fly List, or, on the other hand, violating their sincerely held religious beliefs in order to avoid being placed on the No Fly List or to secure removal from the No Fly List." JA 110 (AC ¶ 210). The absence of a case with the precise factual circumstances at hand does not immunize Defendants.

The cases cited by Defendants—from the prison and military detention settings—are wholly inapposite because Plaintiffs are neither incarcerated nor in military detention, and, as such, there is no need to balance their statutory rights against the limitations on rights that arise in those circumstances. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (recognizing that limitations on

constitutional rights arise from incarceration and valid penological objectives). The conclusion in *Davila*, that it was not "clearly established under RFRA that a prisoner can get religious property from outside sources," 777 F.3d at 1211–12, is inherently limited to the "necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *O'Lone*, 482 U.S. at 348 (quotation marks omitted). *Lebron* is similarly inapposite, because its holding is expressly limited to "how RFRA applies [in] a military setting." 670 F.3d at 557. Plaintiffs here, by contrast, are clearly entitled to RFRA protection.

Defendants also contend that they are entitled to qualified immunity because it was not clearly established that RFRA provided a cause of action against individual federal officers in their personal capacities. Defs.' Supp. Br. 11 n.3. The qualified immunity standard focuses on the "contours" of a *substantive* right and whether a defendant's conduct "violates that right"—not on the procedural vehicle a plaintiff may use to vindicate the right. *Al-Kidd*, 563 U.S. 731, 741 (2011) (quotation marks omitted).

III. *Abbasi*'s *Bivens* Holding Is Irrelevant to the Statutory Claims at Issue

Finally, Defendants stretch *Abbasi* far beyond the question actually presented and resolved in that case: whether or not *Bivens* reaches a new context. As stressed at oral argument before this Court, this is not a *Bivens* case. In cases

advancing *Bivens* claims like *Abbasi*, courts tread cautiously because Congress has not acted to create any cause of action for damages. With RFRA, Congress surely intended to authorize damages when it acted in 1993, against the backdrop of the interpretive rule laid down by the Supreme Court just a year prior in *Franklin*, and with the express purpose "to provide a claim" against "a government," defined broadly to include federal officials.

To decide if RFRA permits damages against federal officers sued in their individual capacity, this Court must look to Congress's intent at the time RFRA was passed in 1993. The point of Plaintiffs' allusion to § 1983 is simply that Congress believed at the time that it was legislating remedies on that model.[4] Whether a court "would adopt" a given *Bivens* action *today* is irrelevant to Congressional intent in 1993.

[4] According to Defendants, "*Abbasi* observed that while Congress was explicit in providing a damages remedy in § 1983, it has never done so against federal officers." Defs.' Supp. Br. 14. If this is taken to mean Congress has never acknowledged *Bivens* actions nor authorized damages against federal officers, it is incorrect on both fronts. *See, e.g.*, *Carlson v. Green*, 446 U.S. 14, 20 (1979) (when Congress amended FTCA in 1974, it was "crystal clear that it viewed FTCA and *Bivens* as parallel, complementary causes of action"); Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679(b)(2)(A) (1988) (exempting *Bivens* claims from substitution); Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (1996) (creating exhaustion requirement for prison conditions *Bivens* claims); *Tanvir v. Lynch*, 128 F. Supp. 3d 756, 778–779 (S.D.N.Y. 2015) (noting numerous statutes authorizing damages against federal officials).

Respectfully submitted,

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