No. 23-55790

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

ABDIRAHMAN ADEN KARIYE, MOHAMAD MOUSLLI, and HAMEEM SHAH,

*Plaintiffs–Appellants*,

v.

ALEJANDRO MAYORKAS, Secretary of the U.S. Department of Homeland Security, in his official capacity; TROY MILLER, Acting Commissioner of U.S. Customs and Border Protection, in his official capacity; PATRICK J. LECHLEITNER, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; and KATRINA W. BERGER, Executive Associate Director, Homeland Security Investigations, in her official capacity,

*Defendants–Appellees*.

On Appeal from the United States District Court
for the Central District of California
No. 2:22-cv-01916
Hon. Fred W. Slaughter

# APPELLANTS' REPLY BRIEF

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## INTRODUCTION

When Plaintiffs Imam Abdirahman Aden Kariye, Mohamad Mouslli, and Hameem Shah return home to the United States from abroad, border officers subject them to demeaning, stigmatizing, and intensely personal questions about their faith. These questions are in no way tailored to border security or targeted at unlawful activity. They instead focus explicitly on Plaintiffs' constitutionally protected religious beliefs and practices, in violation of the First Amendment, the Fifth Amendment right to equal protection, and the Religious Freedom Restoration Act ("RFRA").

Defendants do not argue that their questions are lawful—for good reason. There is simply no defense for requiring U.S. citizens to inform border officers how many times a day they pray, whether they attend a mosque, or whether they are Sunni or Shi'a.

Rather than contest Plaintiffs' claims on the merits, Defendants argue only that Plaintiffs did not plausibly allege a "policy or practice" of targeting Muslims for religious questioning at the border. Defendants are wrong. As a threshold matter, Defendants never explain why they believe a policy or practice is a required element of Plaintiffs' pleading. This is not a suit against municipal defendants under 42 U.S.C. § 1983; it is a suit against federal defendants, based on *Ex parte Young* and RFRA. Likewise, to the extent Defendants imply that a policy or practice is

necessary to establish standing to seek prospective relief, they did not move to dismiss under Rule 12(b)(1), and their briefing nowhere mentions standing. But even if a policy, practice, or its equivalent is required to establish that the questioning is likely to recur, Plaintiffs have easily met their burden. Plaintiffs recount *scores* of incidents of religious questioning of Muslims, including ten instances that they personally experienced, dozens that Defendants themselves purported to investigate, and over twenty incidents alleged by other Muslim Americans in lawsuits like this one. Plaintiffs also point to an ICE questionnaire, carried by officers who work at ports of entry to guide their interrogations of travelers, that features intrusive questions about religion. These allegations are more than sufficient to establish a policy and/or practice of religious questioning under this Court's precedents, as the district court correctly held. *See* ER-32.

Although Defendants contend that their written policies forbid religious discrimination, that argument is both inaccurate and beside the point. Neither policy prohibits religious questioning or explains what constitutes impermissible religious discrimination. Indeed, one of the policies expressly authorizes DHS to collect, under an extraordinarily low standard, information protected by the First Amendment. But even if Defendants' written policies forbade religious discrimination, Plaintiffs have still alleged a *practice* of discriminatory religious questioning, and this Court has held that the existence of a written policy does not

preclude a practice.

Defendants also ignore two sets of claims that in no way depend on a policy or practice of targeting Muslims. First, Plaintiffs seek expungement of records reflecting their responses to unlawful religious questioning, and Mr. Shah seeks expungement of records collected as a result of unlawful retaliation. There is no dispute that Defendants retain answers to questions asked during secondary inspection—including answers to religious questions—for up to 75 years. The retention and dissemination of these records by Defendants are ongoing harms that confer standing, regardless of whether religious questioning is likely to recur or whether Defendants have a policy or practice of singling out Muslims. Second, Defendants ignore Plaintiffs' alternative pleading: border officers broadly subject travelers of faith to religious questioning. Given Defendants' waiver of arguments on the merits, Plaintiffs' expungement claims and alternative pleading independently require reversal.

Defendants have failed to establish any ground for dismissal. For the reasons below, this Court should reverse the district court's decision and judgment and remand the case for discovery.

## ARGUMENT

### I. Plaintiffs have plausibly alleged that Defendants have a policy and/or practice of subjecting Muslim Americans to religious questioning at the border.

#### A. Plaintiffs detail scores of incidents of religious questioning, which is more than sufficient to establish a policy and/or practice.

Defendants' argument that Plaintiffs have not adequately alleged a policy or practice is entirely at odds with this Court's precedents, which hold that as few as five, four, and even three incidents of challenged conduct can constitute a "practice." Here, Plaintiffs allege that they personally experienced ten incidents of religious questioning at the border, describe internal DHS investigations into dozens of additional complaints about the religious questioning of Muslims, and cite more than twenty incidents from other Muslim Americans who have brought lawsuits like this one. These incidents plainly establish a policy and/or practice of subjecting Muslim Americans to religious questioning.

Imam Kariye, Mr. Mouslli, and Mr. Shah have endured religious questioning on ten different occasions, at six different ports of entry, and at the hands of more than twenty border officers. ER-84–89, 95–98, 102–06. The questioning has occurred at land borders and at airports. *Id.* It took place in Washington, in California, in Minnesota, in Arizona, and at a CBP preclearance area in Canada. *Id.* No matter the location, the questions pried into Plaintiffs' deeply personal religious beliefs and practices. For example, border officers asked Plaintiffs about their level

of religious observance (How religious do you consider yourself? How many times a day do you pray? Do you pray every day?); their constitutionally protected religious associations (What type of Muslim are you? Are you Sunni or Shi'a? Are you Salafi or Sufi? Do you attend a mosque? What mosque do you attend?); and other aspects of their protected religious beliefs and practices (Where did you study Islam? How is knowledge transmitted in Islam?). ER-85–89, 96–98, 103. Officers retain the responses to such questioning in a DHS database called "TECS," which is shared with thousands of government and law enforcement officers across federal, state, and local agencies. ER-79–80.

The allegations in the amended complaint are not limited to the religious questioning Plaintiffs personally experienced. Plaintiffs also describe investigations by an internal DHS office—the Office for Civil Rights & Civil Liberties ("DHS CRCL")—into complaints about religious questioning at the border. In 2011, DHS CRCL wrote a letter to civil society organizations stating that it had received a "number of complaints" alleging that CBP officers asked about religious affiliations and practices during border screenings. ER-76–77. In a memorandum published the same day, the DHS office detailed "numerous accounts" of such questioning at various ports of entry, including in Boston, Buffalo, Miami, Seattle, Detroit, Atlanta, and New York City. ER-77. In 2019, DHS CRCL issued another memorandum, this time acknowledging that it had received *dozens* of complaints of religious

questioning. *Id.* And a DHS CRCL compliance report noted that as of 2020, the office was investigating several allegations of religious questioning. *Id.* The 2011 and 2019 memos detail strikingly similar questions to those asked of Plaintiffs, including whether the person attends a mosque, how frequently they pray, and whether they are Sunni or Shi'a. *Id.*

And there is still more. Twenty-one Muslim Americans have challenged such religious questioning in other lawsuits. *See Cherri v. Mueller*, 951 F. Supp. 2d 918, 924, 933–34 (E.D. Mich. 2013) (four plaintiffs); *El Ali v. Barr*, 473 F. Supp. 3d 479, 517, 524–26, 526 n.23 (D. Md. 2020) (sixteen plaintiffs); *Janfeshan v. U.S. Customs & Border Prot.*, No. 16-cv-6915-ARR, 2017 WL 3972461, at *10 (E.D.N.Y. Aug. 21, 2017) (one plaintiff); *see also* Pls. Br. 10 (describing these lawsuits). Collectively, these suits challenge religious questioning by multiple border officers at ports of entry across the country. The questions asked of the plaintiffs are almost identical to those at issue here. *See* Pls. Br. 21 (detailing the religious questions in each lawsuit).[1] Plaintiffs have also pointed to an ICE questionnaire, carried by officers who work at ports of entry, which includes questions addressing a traveler's religious beliefs, practices, and associations. ER-78.

[1] Since the district court's decision, multiple additional incidents of unlawful religious questioning have been alleged in at least one other lawsuit. *See* Compl., *Khairullah v. Garland*, No. 23-cv-30095, ECF No. 1 (D. Mass. Sept. 18, 2023).

Defendants' only argument in this appeal is that, despite these detailed allegations, Plaintiffs have not adequately pled that Defendants have a policy or practice of targeting Muslim Americans for religious questioning at the border. Defs. Br. 16–29. Although Defendants put all their eggs in this basket, they fail to explain why Plaintiffs—in a suit for injunctive relief against federal defendants under *Ex parte Young*, 209 U.S. 123 (1908)—are *required* to allege a policy or practice in the first place. The five cases they cite address either (1) standing doctrine and the likelihood of recurrence of an injury, or (2) what Defendants term the "analogous context" of municipal liability. Defs. Br. 17–18. Yet Defendants did not move to dismiss pursuant to Rule 12(b)(1) and (rightly) do not challenge Plaintiffs' standing. While Plaintiffs must plausibly allege that religious questioning is likely to recur for standing to seek an injunction limiting the questioning, the amended complaint easily clears that bar. With respect to the municipal liability cases, Defendants do not—and cannot—explain why these decisions would require Plaintiffs here to allege a policy or practice to state a claim. Regardless, Plaintiffs have more than established a policy and/or practice of religious questioning under both lines of precedent.[2]

[2] Presumably because Plaintiffs so clearly demonstrate a "practice" of subjecting Muslim Americans to religious questioning at the border, Defendants repeatedly focus their arguments on whether Plaintiffs have pled an "official policy," *see, e.g.*, Defs. Br. 14—but no case requires a plaintiff to plead *both* a policy and a practice. Moreover, the lines between "policy" and "practice," or "official" and "unofficial,"

To take Defendants' standing cases first, *Melendres v. Arpaio*, 695 F.3d 990, 998 (9th Cir. 2012), squarely supports the conclusion that Plaintiffs' injuries are likely to recur. *Contra* Defs. Br. 17–18. In *Melendres*, this Court held that a plaintiff may establish that an injury is likely to recur where, for example, "the harm is part of a 'pattern of officially sanctioned behavior.'" 695 F.3d 990, 998 (9th Cir. 2012) (quoting *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001)). *Melendres* affirmed the district court's finding that a sheriff and his office engaged in a "pattern or practice" of unconstitutional traffic stops where five plaintiffs were involved in *three* incidents of the challenged conduct by police officers. 695 F.3d at 995, 998. Plaintiffs' allegations here, which refer to scores of incidents of religious questioning, far exceed that. And, like the plaintiffs in *Melendres*, who pointed to the defendants' broad claim of authority to detain persons suspected of immigration violations, *id.* at 998, Plaintiffs here have pointed to Defendants' broad claims of authority to ask religious questions at the border, *see* Section I.B, *infra*—facts that further substantiate Plaintiffs' standing.[3]

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are not always distinct. *See, e.g., Kirkpatrick v. Cnty. of Washoe*, 843 F.3d 784, 797 (9th Cir. 2016) (en banc) (reversing summary judgment on ground that the defendant county may have maintained an "unconstitutional, unofficial policy"); *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1233–35 (9th Cir. 2011) (discussing possibility of "informal but widespread custom of using excessive force"). In any event, Plaintiffs have plausibly pled an official policy as well. *See* Section I.B, *infra*.

[3] The "pattern of officially sanctioned behavior" language originated in *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985). There, the Court used "officially

Additional decisions from this Court and others confirm that Plaintiffs adequately allege a pattern or practice sufficient for standing. *See B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 974 (9th Cir. 2019) (holding that allegations that the plaintiff was deprived of medical care on at least five occasions and that defendants had a practice of failing to provide others with proper treatment was enough to allege "a pattern of officially sanctioned behavior" for purposes of standing); *Askins v. U.S. Dep't of Homeland Sec.*, No. 12-cv-2600-BLM, 2013 WL 5462296, at *7 (S.D. Cal. Sept. 30, 2013) (finding a "pattern of officially sanctioned behavior" where "Plaintiffs have plead[ed] two instances of CBP officers improperly searching and seizing the persons and property of two separate individuals at two separate ports of entry"), *reconsidered in part on other grounds*, 2015 WL 12434362 (S.D. Cal. Jan. 29, 2015); *Solano v. U.S. Immigr. & Customs Enf't*, No. 21-cv-01576-AB, 2021 WL 4539860, at *5 (C.D. Cal. Sept. 1, 2021) (holding that allegations of "numerous instances" of the challenged conduct were enough to allege a "policy or practice" under *Melendres*); *Cherri*, 951 F. Supp. 2d at 934 (holding that allegations of

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sanctioned" to describe one of several district court findings; contrary to Defendants' suggestion here, Defs. Br. 17, Plaintiffs are not required to establish *more* than a pattern or practice to show the likelihood of recurrence of injury. *LaDuke*, 762 F.2d at 1324 ("The Supreme Court has repeatedly upheld the appropriateness of federal injunctive relief to combat a 'pattern' of illicit law enforcement behavior."); *see also Armstrong*, 275 F.3d at 861 ("[t]here are *at least* two ways" to show likelihood of recurrence (emphasis added)).

religious questioning by four plaintiffs and the DHS CRCL investigations of numerous other complaints were sufficient to show an "official policy, custom and practice" for purposes of standing); *see also Jibril v. Mayorkas*, 20 F.4th 804, 812 (D.C. Cir. 2021) (holding that plaintiffs had standing to sue heads of government agencies where they alleged watchlist placement and two incidents of prolonged border detention).

Defendants also cite *LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985), Defs. Br. 18, for the basic proposition that "isolated incidents" should be distinguished from "patterns of misbehavior" for the purposes of assessing standing. *LaDuke*, 762 F.2d at 1324. But Plaintiffs' allegations easily rise to the level of a "pattern of misbehavior." For example, in the portion of the decision that Defendants reference, the Court relied on *Allee v. Medrano*, 416 U.S. 802, 805–09, 815 (1974), which held that approximately two dozen incidents constituted a "pattern." Here, Plaintiffs cite scores of incidents—more than enough to demonstrate a pattern or practice.

With respect to cases concerning municipal liability under Section 1983, Defendants fare no better. Defs. Br. 18. Again, these cases are inapposite: Plaintiffs' claims here, against federal Defendants, are based on equitable causes of action, *Ex parte Young*, and RFRA—not Section 1983. *See Rounds v. Clements*, 495 F. App'x 938, 941 (10th Cir. 2012) (Gorsuch, J.) (explaining that municipal liability claims

under Section 1983 require a plaintiff to establish a "policy or custom," whereas *Ex parte Young* claims do not); *Spann v. Hannah*, No. 20-3027, 2020 WL 8020457, at *3 (6th Cir. Sept. 10, 2020) (similar). But even if the municipal liability standard applied, Plaintiffs have exceeded the bar for pleading a policy and/or practice.

Under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and its progeny, municipal liability may be established through a "longstanding practice or custom." *Gordon v. Cnty. of Orange*, 6 F.4th 961, 973 (9th Cir. 2021). Although this Court has "not established what number of similar incidents would be sufficient to constitute a custom or policy" in *Monell* cases, *Oyenik v. Corizon Health Inc.*, 696 F. App'x 792, 794 (9th Cir. 2017) (unpublished), Plaintiffs have surely surpassed whatever number is necessary. For instance, in *Henry v. County of Shasta*, this Court considered whether, on summary judgment, the plaintiff presented sufficient evidence of a county policy or custom of violating the constitutional rights of people stopped for traffic violations who demand to be taken before a magistrate. 132 F.3d 512, 518 (9th Cir. 1997), *op. amended on denial of reh'g*, 137 F.3d 1372 (9th Cir. 1998). In holding that the plaintiff had raised a triable issue as to the existence of a policy or custom, the Court considered four factors: (1) the plaintiff introduced evidence as to four instances of such treatment; (2) two of the incidents occurred within two-and-a-half months of each other, showing the treatment was not an isolated event; (3) two of the incidents occurred seven years apart, demonstrating

the practice was longstanding; and (4) multiple officials, some acting in concert and others acting independently, participated in the allegedly unconstitutional abuse. *Id.* at 518–21.

Even though Imam Kariye, Mr. Mouslli, and Mr. Shah have not had the benefit of discovery, their allegations are still more than sufficient under *Henry*. First, they describe scores of incidents: ten involving their own experiences, dozens cited by DHS CRCL, and twenty-one alleged by plaintiffs in other lawsuits. Second, several of the incidents occurred close in time to one another, demonstrating that they are not isolated occurrences.[4] Third, Plaintiffs also describe incidents occurring over more than a decade. DHS CRCL issued a memo about "numerous accounts" of religious questioning in May 2011, and Plaintiffs allege incidents through December 31, 2021. ER-77, 88–89. That is enough to show the longstanding nature of the policy and/or practice. And fourth, more than twenty border officers were involved in just the ten incidents that Plaintiffs personally experienced. Some of those border officers questioned Plaintiffs alone, ER-86–89, while others worked in concert with one another, ER-87–88, 96, 102–05. Under *Henry*, and especially on a motion to dismiss, Plaintiffs satisfy *Monell*'s "longstanding practice or custom" standard. *See*

[4] For example, three months after Imam Kariye was subjected to religious questioning at a land border near Blaine, Washington, Mr. Shah was subjected to such questioning at LAX. ER-85–86, 102–05. And three months after that, Mr. Mouslli was targeted for such questioning, also at LAX. ER-96–97.

*also, e.g.*, *Menotti v. City of Seattle*, 409 F.3d 1113, 1147–48 (9th Cir. 2005) (holding that policy may be inferred from five incidents, officer statements, and the absence of evidence that officers were reprimanded for engaging in the challenged conduct); *McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir. 1986) ("McRorie alleges that guards seriously injured him and twenty-eight other prisoners during the shakedown and that Sergeant Dunn was acting under orders of his superiors. If proved, these acts reflect . . . [a] policy or custom.").

The three municipal liability cases Defendants cite do not counsel otherwise. Defs. Br. 18. Defendants reference these cases for the unremarkable proposition that a plaintiff "cannot allege a widespread practice or custom based on 'isolated or sporadic incidents.'" *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 884 (9th Cir. 2022) (quoting *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996)); *see also Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999) (noting that a "single constitutional deprivation ordinarily is insufficient"). Plaintiffs do not disagree. What the three decisions make clear is that Plaintiffs have alleged far more than what this Court has held is insufficient. *See Sabra*, 44 F.4th at 883–84 (holding that challenged portions of a community college course not alleged to have been taught more than once was "little more than isolated or sporadic"); *Trevino*, 99 F.3d at 918–19 (maintaining that the one incident experienced by the plaintiff and five "indirect[ly]"-related incidents were insufficient); *Christie*, 176 F.3d at 1235

(holding that what the plaintiffs admitted was "unique treatment" by the county official could not be a longstanding custom or practice). Here, Plaintiffs have described dozens of nearly identical incidents of religious questioning, far surpassing the single and isolated instances in *Sabra*, *Trevino*, and *Christie*.[5]

### B. Defendants' written policies support Plaintiffs' showing of a policy and/or practice of religious questioning.

Defendants assert that DHS and CBP have written policies prohibiting religious discrimination, and that these undermine Plaintiffs' allegations of a policy and/or practice of subjecting Muslim Americans to religious questioning. Defs. Br. 13, 17, 26–27. For three reasons, Defendants are wrong.

First, even if the written DHS and CBP policies forbid discrimination as Defendants claim—and they do not, as discussed below—Plaintiffs have plausibly alleged that Defendants have a *practice* of discriminatory religious questioning. As this Court has held, and as common sense dictates, a written policy prohibiting certain conduct does not preclude the *practice* of that conduct. *See, e.g.*, *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1235 (9th Cir. 2011) (holding that "repeated constitutional violations" could support "an inference that an informal but widespread custom of using excessive force existed at the jail" despite "a formal

[5] Defendants also claim that "Plaintiffs' opening brief does not attempt to defend the district court's holding that they have 'sufficiently alleged the existence of an official practice, policy, or custom[.]'" Defs. Br. 26. That is incorrect. Plaintiffs devote an entire section of their opening brief to the topic. *See* Pls. Br. 10–12.

written policy barring the use of excessive force"); *Scanlon v. Cnty. of Los Angeles*, 92 F.4th 781, 813 (9th Cir. 2024) ("[A] jury could find that the Department's policy governing the preparation of warrant applications is insufficient *in practice* to protect the constitutional rights of parents." (emphasis in original)); *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1445 (9th Cir. 1991) (routine failure to follow policy itself "constitutes a custom or policy which overrides, for *Monell* purposes, the general policy"); *Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986) ("[W]hile the city provided rules and regulations for the operation of its police department, these rules were violated on numerous occasions. . . . [This] is precisely the type of informal policy or custom that is actionable."); *Mood v. Cnty. of Orange*, No. 17-cv-762-SVW (KK), 2019 WL 301734, at *7 (C.D. Cal. Jan. 2, 2019) ("Defendant's attempt to rely on the language of the written policy is not persuasive where, as here, it appears the written policy is disregarded."), *report and recommendation adopted*, 2019 WL 296198 (C.D. Cal. Jan. 22, 2019). If it were otherwise, agencies could shield themselves from liability in civil rights suits simply by printing endless policies.

Second, Defendants' policies do not actually prohibit discriminatory religious questioning, despite Defendants' claims to the contrary.[6] Pls. Br. 11. The first policy,

[6] Plaintiffs agree that the district court properly took judicial notice of the *existence* of these policies. *Contra* Defs. Br. 15, 17, 26–27. However, Plaintiffs strongly dispute the effect of these policies on the conduct at issue in this lawsuit.

the DHS Memorandum, explicitly authorizes the collection, maintenance, and use of "information protected by the First Amendment" in several situations, including where such information "is *relevant to* a criminal, civil, or administrative activity *relating* to a law DHS enforces or administers." SER-8 (emphases added). In practice, this extraordinarily low threshold opens the door to discrimination and bias. And although the memo includes prefatory text asserting that "DHS does not profile, target, or discriminate against any individual for exercising his or her First Amendment rights," it does not formally forbid those actions, nor does it provide any guidance whatsoever about what constitutes religious discrimination. *Compare id.* at SER-7 (standardless prefatory language), *with* Memorandum from Sec'y Napolitano to DHS Component Heads, at 1 (Apr. 26, 2013), https://perma.cc/MP7M-2SS4 (prohibiting consideration of race and ethnicity unless a compelling government interest is present and the consideration is narrowly tailored). The mere assertion that "DHS does not . . . discriminate" is not a meaningful anti-discrimination policy. The second policy, the CBP Standards of Conduct, makes plain that officers may "[]properly" take religion into consideration,

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The district court did not take judicial notice of the effects of these policies—let alone make factual findings concerning that issue—nor could it. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998–1003 (9th Cir. 2018) (judicial notice is improper when "there is a reasonable dispute as to what [a document] establishes" (internal citation omitted)).

without providing guidance on when the consideration of religion is improper. SER-22. At bottom, neither policy explains what constitutes religious discrimination, and neither protects Plaintiffs from discriminatory religious questioning.

Third, Plaintiffs identified a written policy of Defendants that expressly encourages religious questioning. ICE, a component of DHS, requires officers who work at ports of entry to carry a questionnaire—which includes intrusive questions about a traveler's religious beliefs, practices, and associations—to guide their interrogations of travelers. *See* Pls. Br. 11 (citing ER-78). Far from prohibiting religious discrimination, this written policy incentivizes it. It also independently supports the existence of a policy and/or practice of religious questioning.

For these reasons, Plaintiffs' allegations far exceed what the Supreme Court held insufficient in *Iqbal*. *See* Defs. Br. 14, 19–21, 24, 28–29 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 680–82 (2009)). There, the Court held that the plaintiff's "sole[]" allegation that defendants "adopt[ed] a policy" approving the challenged conduct failed to establish purposeful discrimination sufficient to overcome qualified immunity. *Iqbal*, 556 U.S. at 682–83. Here, in contrast, Plaintiffs are pointing to Defendants' policy *and practice* to show that religious questioning is likely to recur—and they have readily met their burden by citing scores of incidents over more than a decade; identifying policies that expressly permit religious

questioning and invite discrimination; and describing the ICE questionnaire featuring religious questions.

### C. Defendants' attempts to minimize the ten incidents involving Plaintiffs are unavailing.

Given that this Court has found a pattern or practice in cases involving as few as three incidents of challenged conduct, Defendants spend considerable ink attempting to discount the ten incidents of religious questioning of Plaintiffs. These attempts all fail.

Defendants first argue that none of the Plaintiffs were targeted for religious questioning because of their religion, but rather for neutral, nondiscriminatory reasons: placement on the terrorism watchlist (Imam Kariye and Mr. Mouslli) and purportedly suspicious behavior during secondary screening (Mr. Shah). Defs. Br. 14–15, 18–22, 28. But these "reasons" are no reasons at all. Even if one's watchlist status or conduct during screening may justify additional questioning at the border, neither explains why Plaintiffs were asked *religious* questions—questions explicitly focused on their faith. *See* Pls. Br. 3, 23–26, 29, 34–35, 52, 57. There is no justification for asking a traveler, for example, how many times a day they pray, whether they attend mosque, and whether they are Sunni or Shi'a, particularly when the traveler—like Plaintiffs—has no ties to terrorism or other criminal activity.

Any argument to the contrary rests on false and abhorrent stereotypes about

Muslims, and wrongly treats Muslim religiosity as a proxy for a terrorist threat. As the amended complaint explains, there are 3.45 million Muslims living in the United States. ER-80–81. There is no connection between terrorism and whether a Muslim person prays every day, or whether he adheres to Sunni or Shi'a religious tenets. ER-80–81, 93, 100; Pls. Br. 3, 6, 27, 30.

Moreover, Defendants fail to counter Plaintiffs' well-pled allegations that Imam Kariye and Mr. Mouslli were on the watchlist in error; that Mr. Shah's behavior reflected his desire to keep his journal private and to invoke his rights; and that Mr. Shah's journal contained peaceful, non-violent notes about his religious beliefs and practices. ER-89, 98, 102–04. Defendants merely argue that—at least with respect to watchlist placement—these are legal conclusions that do not benefit from the presumption of truth under *Iqbal*. Defs. Br. 14–15, 27–28 (citing *Iqbal*, 556 U.S. at 678, 681–82).

But they are not empty legal conclusions; they are based on well-pled facts. *See Iqbal*, 556 U.S. at 679. To support Imam Kariye and Mr. Mouslli's contentions that they were placed on the watchlist in error, they allege that they do not have criminal records, that they have never participated in nor advocated for violence or terrorism, and that their religious activities are entirely peaceful with no connection to terrorism or other violent or criminal activity. ER-80–81, 89, 98. They also explain that the watchlist is riddled with errors, given that, as the government

acknowledges, "concrete facts are not necessary" for placement, and individuals may be added if watchlisting agencies suspect that they might be suspicious—a low and circular evidentiary standard. ER-89–91. Accepting that Imam Kariye and Mr. Mouslli were placed on the watchlist in error, as the Court must on a motion to dismiss, is yet another reason that watchlisting cannot serve as a neutral justification for the religious questioning.

And with respect to Mr. Shah, what Defendants characterize as "suspicious" behavior, *see* Defs. Br. 14–15, 21–22, 28, were actually innocuous attempts to keep his personal journal private and to invoke his rights, *see* ER-102–04. His journal included "notes about his religious beliefs and practices, which are rooted in peace and nonviolence." ER-102–03. Moreover, as the amended complaint explains, Mr. Shah has no criminal record and no connection to terrorism. ER-106. Accepting these well-pled facts as true, Defendants' purportedly neutral explanation cannot serve as a justification for his religious questioning.

Defendants next argue that their questions can otherwise be justified as related to occupation, purpose of travel, and the nature of domestic associations. Defs. Br. 20. But as Plaintiffs have explained, Defendants could readily obtain information about occupation and purpose of travel by asking neutral questions, as opposed to questions expressly targeting Plaintiffs' faith. *See* Pls. Br. 16, 30–31, 36, 51; ER-113, 115, 117–18, 119. As to the third objective, Defendants are not permitted

to pry into constitutionally protected "domestic associations" unless they satisfy exacting scrutiny, Pls. Br. 50–53—and they have waived any argument that their religious questions meet this standard, *see* Section IV, *infra*.

Moreover, even on Defendants' theory, only a fraction of the questions at issue remotely implicate Plaintiffs' occupation, purpose of travel, or domestic associations. Defendants entirely fail to explain questions like:

- How many times a day do you pray?
- Do you pray every day?
- What type of Muslim are you?
- How religious do you consider yourself?

ER-85–89, 96–98, 103.

Most importantly, Defendants' half-hearted explanations do not preclude the plausibility of Plaintiffs' position—that the ten incidents involving Plaintiffs are part of a policy and/or practice of subjecting Muslim Americans to unlawful religious questioning at the border. The Court is required to "accept the complaint's well-pleaded factual allegations as true and construe all inferences in the [plaintiffs'] favor." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016). If there are "two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202,

1216 (9th Cir. 2011). Nothing in Defendants' arguments renders Plaintiffs' allegations *implausible*. Thus, even if the Court finds Defendants' alternative explanations plausible, Plaintiffs' claims remain viable.[7]

### D. Defendants' attempts to minimize dozens of additional incidents of religious questioning are unavailing.

Although Defendants try to brush aside the dozens of complaints of religious questioning received and investigated by DHS CRCL over the years—ranging from "numerous accounts" memorialized in 2011 to dozens of complaints described in 2019 and subsequently—they cannot dispute that these additional incidents bolster Plaintiffs' showing of a policy and/or practice. *See* ER-76–77. And critically, Defendants have nothing to say about the more than twenty incidents alleged by Muslim Americans in lawsuits similar to this one. *See Cherri*, 951 F. Supp. at 933–34; *El Ali*, 473 F. Supp. 3d at 524–26, 526 n.23; *Janfeshan*, 2017 WL 3972461, at *10.

With respect to the complaints filed with DHS, Defendants argue that these accounts demonstrate only that complaints were lodged and investigated, but not that

[7] Defendants also attempt to discount Plaintiffs' religious questioning by noting that it occurred "during some but not all of their U.S. border crossings." Defs. Br. 18. But nowhere do Plaintiffs claim that Defendants subject all Muslim Americans, or even all Muslim Americans referred to secondary inspection, to religious questioning. Plaintiffs instead allege that under Defendants' policy and/or practice, Muslim Americans are routinely subjected to religious questioning during secondary inspection, and Plaintiffs have been swept up as a result. *See* ER-78.

they resulted from an officially sanctioned policy of targeting Muslims. Defs. Br. 23. However, for the reasons discussed in Section I.A, *supra*, the large number of incidents is more than enough under the case law to support the existence of an officially sanctioned policy *or* practice.

Defendants next argue that the break in time between the 2011 DHS CRCL memorandum and Plaintiffs' "years-later experiences" could not plausibly support "an inference of a longstanding DHS-wide policy of discrimination." Defs. Br. 23. But when the allegations from the three other lawsuits are considered, any break in time vanishes. *See, e.g.*, First Am. Compl., *El Ali v. Barr*, No. 18-cv-2415, ECF No. 48 (D. Md. Mar. 22, 2019) (including allegations of religious questioning in the intervening years). Regardless, this Court has held that a seven-year break in time between incidents "evidences that the policy was a long-standing one." *Henry*, 132 F.3d at 519. As in *Henry*, even if there were a break in time, that would serve to demonstrate the longstanding nature of the policy and/or practice.

Finally, Defendants contend that DHS's investigation of religious questioning undermines the existence of an officially sanctioned policy or practice. Defs. Br. 23–24. But the fact that religious questioning continued even *after* DHS's investigations firmly supports Plaintiffs' position. The vast majority of the incidents described in the amended complaint took place after the 2011 investigations, and Defendants' policy and/or practice continued even after the 2019 and 2020 reporting. *See Larez*

*v. City of Los Angeles*, 946 F.2d 630, 647 (9th Cir. 1991) (holding that a jury could find a "policy or custom" from the failure to take remedial steps after "complaint investigations"); *Ricciuti v. N.Y.C. Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991) (holding that a policy may be inferred from evidence that a municipality "failed to make any *meaningful* investigation into charges that police officers had used excessive force." (emphasis added)). Put another way, Plaintiffs have more than alleged a policy and/or practice given the dozens of incidents alleged by Plaintiffs, many of which occurred after DHS purportedly investigated the practice.

## II. Regardless of any policy or practice, Plaintiffs may pursue their expungement claims.

Even if this Court were to find that Plaintiffs have not plausibly alleged a policy and/or practice of subjecting Muslim Americans to religious questioning at the border, Plaintiffs are entitled to expungement of records reflecting their responses to unlawful religious questions, and Mr. Shah is entitled to expungement of records collected as a result of unlawful retaliation. *See* ER-74–75, 119; Pls. Br. 12.

Defendants' argument that Plaintiffs have not adequately alleged a policy and/or practice of religious questioning is of no moment to Plaintiffs' expungement claims. It is undisputed that Defendants retain records of Plaintiffs' responses to the religious questions described in the complaint; that these records are stored in the TECS database; and that the TECS database is shared with thousands of law

enforcement officers. ER-79–80, 106; Pls. Br. 8, 12. Because the retention and dissemination of these unlawfully collected records is itself an ongoing injury, Plaintiffs have standing to pursue expungement, regardless of whether the questioning is likely to recur. *See, e.g.*, *Mayfield v. United States*, 599 F.3d 964, 970–71 (9th Cir. 2010) (plaintiff suffered "present, on-going injury" due to the government's retention of material derived from alleged unlawful seizure); *see also, e.g.*, *ACLU v. Clapper*, 785 F.3d 787, 801 (2d Cir. 2015) ("[A]ppellants surely have standing to allege injury from the collection, and maintenance in a government database, of records relating to them."); *Malik v. U.S. Dep't of Homeland Sec.*, 78 F.4th 191, 198–99 (5th Cir. 2023) ("DHS's ongoing possession of Malik's data plausibly constitutes an ongoing injury."); *Guan v. Mayorkas*, 530 F. Supp. 3d 237, 262 (E.D.N.Y. 2021) ("The CBP's retention of records from the searches itself also constitutes an independent harm.").

Last year, in *Phillips v. U.S. Customs & Border Protection*, 74 F.4th 986 (9th Cir. 2023), this Court elaborated on the test for standing to pursue expungement. It recognized that the retention of records confers standing where the illegally obtained information is likely to be released to third parties or is highly sensitive. *Id.* at 992, 996 (citing, *inter alia*, *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021)). Both factors are present here: Defendants share the TECS database with federal, state, and local law enforcement agencies, *see* ER-79–80, 106; Pls. Br. 8, 12, and information

about Plaintiffs' personal faith is "so sensitive" that government retention of the information is "highly offensive to a reasonable person," 74 F.4th at 996. Accordingly, even setting aside Defendants' policy and/or practice of religious questioning, Plaintiffs have plausibly alleged standing to pursue their expungement claims. For this reason alone, the district court's decision should be reversed.[8]

## III. Plaintiffs have also plausibly alleged policies and/or practices of broadly subjecting travelers of faith to religious questioning and retaining answers to religious questions for up to 75 years.

Plaintiffs' amended complaint does not only allege a policy and/or practice of subjecting Muslim Americans to religious questioning at the border. It also alleges, in the alternative, that Defendants have a policy and/or practice of subjecting travelers of faith to questioning about their religious beliefs, practices, and associations during secondary inspections. ER-76–80, 93, 100, 108–09, 111–19; Pls. Br. 53 n.13. And it alleges that Defendants have a policy and/or practice of retaining responses to this questioning for up to 75 years. ER-74–75, 78–80, 92–93, 100, 107–09, 111–19; Pls. Br. 3, 8, 12.

Defendants do not contest the plausibility of these allegations. Plaintiffs may accordingly pursue declaratory and equitable relief, including, at a minimum, (1) a

[8] While Plaintiffs recognize that *Phillips* is controlling law, Plaintiffs note their objection to the application of *TransUnion*—which addresses standing in cases alleging *statutory* violations—to constitutional challenges, like the ones at issue here. Regardless, Plaintiffs' expungement claims plainly satisfy the standing tests articulated in *Phillips*.

declaration that the religious questioning of Plaintiffs alleged in the amended complaint, and the policy and/or practice of general religious questioning, are unlawful; (2) an injunction prohibiting Defendants from subjecting Plaintiffs to the types of religious questions alleged in the amended complaint; and (3) the expungement of records of Plaintiffs' responses to religious questions. Plaintiffs may pursue this relief regardless of whether they have plausibly alleged a policy and/or practice of specifically targeting Muslims for religious questioning.

## IV. Defendants have waived any challenge to the merits of Plaintiffs' claims.

Defendants do not contest any of Plaintiffs' arguments on the merits of their five claims, nor do they contest that the district court erred in its merits analysis. They expressly concede that, if the Court does not find in their favor on the one argument they raise, "the correct disposition of this appeal would be a remand for factual development and eventual motions for summary judgment." Defs. Br. 25 n.5. Because Defendants deliberately chose not to assert arguments on the merits, they have waived their ability to do so. *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 538 U.S. 17, 20 n.1 (2017) (distinguishing waiver and forfeiture; waiver involves the "intentional relinquishment or abandonment of a known right"); *see also, e.g.*, *United States v. Dreyer*, 804 F.3d 1266, 1277–78 (9th Cir. 2015) (appellee generally "waives any argument it fails to raise in its answering brief"); *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (appellee "failed to address prejudice in his

answering brief" and "therefore waived the argument").[9]

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the district court's decision and judgment dismissing claims II through VI of the amended complaint and remand the case for discovery.

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Respectfully submitted,

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[9] Although Defendants do not address it, an en banc panel of this Court recently decided *Apache Stronghold v. United States*, 95 F.4th 608 (9th Cir. Mar. 1, 2024) (en banc), *amended by* 2024 WL 2161639 (9th Cir. May 14, 2024). For the reasons set forth in Plaintiffs' opening brief, *see* Pls. Br. 44–49, Plaintiffs have plausibly alleged a substantial burden under both *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc), and *Apache Stronghold*'s more relaxed standard. The questioning here "discriminates" against Plaintiffs as Muslims, "penalizes" them as Muslims, and "den[ies] them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Apache Stronghold*, 2024 WL 2161639, at *4, *10 (citation omitted). Defendants do not argue otherwise.

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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