No. 14-1688

In the United States Court Of Appeals for the Third Circuit

Syed Farhaj Hassan, et al.,
Plaintiffs-Appellants,

v.

City of New York,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of New Jersey, Judge William J. Martini

Brief of *Amicus Curiae* Americans United for Separation of Church and State, In Support of Appellants and Reversal

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Identity and Interests of *Amicus Curiae*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that seeks to (1) advance the free-exercise rights of individuals and religious communities to worship as they see fit, and (2) preserve the separation of church and state as a vital component of democratic government. Americans United was founded in 1947 and has more than 120,000 members and supporters.[1]

Americans United litigates a broad range of cases, in both federal trial and appellate courts, challenging government practices that violate the Establishment Clause, including practices that single out particular religions for favor or disfavor. For instance, Americans United joined an *amicus* brief in support of the plaintiff in *Awad v. Ziriax,* 670 F.3d 1111 (10th Cir. 2012), a challenge to an Oklahoma law that drew on negative stereotypes to single out Muslims for disfavored treatment.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* states the following: (1) no party's counsel authored this brief in whole or in part, and (2) no party, party's counsel, or person other than *amicus*, its members, or its counsel, contributed money intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

Summary of Argument

The New York City Police Department has subjected Plaintiffs to the stigma of unequal treatment on the basis of religion, and has diminished their ability to participate in the nation's religious, commercial, educational, and civic life. Plaintiffs allege that NYPD has targeted New Jersey Muslims for surveillance: "It has conducted surveillance of at least twenty mosques, fourteen restaurants, eleven retail stores, two grade schools and two Muslim Student Associations," in addition to numerous "individuals who own, operate, and visit those establishments." JA-24 ¶ 3. The complaint's allegations reveal both the scope of the program and extent of the intrusion: "[NYPD] has, among other measures, taken video and photographs at mosques, Muslim-owned business, and schools. It has sent undercover officers to those locations to engage in pretextual conversations to elicit information from proprietors and patrons. And it has planted informants in mosques, and monitored websites, listserves, and chat rooms." JA-38–39 ¶ 39. NYPD has made use of "'rakers' to monitor daily life in neighborhoods it believes to be heavily Muslim" and "'mosque crawlers' who monitor sermons and conversations in mosques and report back to

the NYPD." JA-41 ¶ 47. NYPD conducts this surveillance without specific reason to suspect wrongdoing, and it does not target any other religious group for similar surveillance. JA-38 ¶ 37.

In addition to violating the Free Exercise Clause and the Equal Protection Clause, NYPD's practices are clear violations of the Establishment Clause. Plaintiffs have standing to bring those claims, and the district court should not have dismissed them on the merits either.

First, Plaintiffs have standing to pursue their Establishment Clause claims. As Plaintiffs' brief explains, the district court overlooked the specific religious, commercial, educational, and civic injuries that Plaintiffs have suffered and are continuing to suffer as a result of NYPD's surveillance. Even without those specific injuries, however, Plaintiffs would still have standing to vindicate their rights under the Establishment Clause—which has long protected not only against pecuniary harms, but also against the stigma and exclusion that arises when the government targets a citizen on the basis of religion.

Second, Plaintiffs have alleged facts that demonstrate a violation of the Establishment Clause, which prohibits the government from

favoring or disfavoring members of a particular religion. Plaintiffs allege, and NYPD does not dispute, that the surveillance singles out Muslims; even the district court recognized as much. Rather than require NYPD to satisfy strict scrutiny—which it could not have done on the pleadings—the district court dismissed the complaint on the ground that indiscriminate surveillance of Muslims was necessary because certain Muslims conducted the September 11 attacks. But this rationale hardly justifies classifying Americans on the basis of their religious beliefs, and reinforces the insidious stereotype that Muslims are inherently suspicious.

Finally, both Plaintiffs' Article III standing and the Establishment Clause violations are especially clear because NYPD's conduct has compromised Plaintiffs' ability to participate in religious, commercial, educational, and civic life. The surveillance has deterred Plaintiffs from worshipping, made it harder for them to do business, interfered with their schooling and teaching, and even jeopardized one Plaintiff's ability to serve his country. These are precisely the type of harms that the Establishment Clause seeks to prevent.

Plaintiffs are entitled to participate fully in American life without the stigma and stereotypes embodied by NYPD's surveillance. The district court's judgment should be reversed.

Argument

I. Plaintiffs Have Article III Standing To Pursue Their Establishment Clause Claims.

The district court not only rejected Plaintiffs' claims on the merits, but also held that they could not even be brought in federal court in the first place. We agree with Plaintiffs that the district court erred in overlooking the plaintiffs' detailed allegations of concrete injury and in concluding that the media—rather than the surveillance—was the source of those injuries. *See* Appellants' Br. 12–29.

Even if Plaintiffs had not identified this wide range of specific professional, associational, and pecuniary harms, the district court's judgment also overlooked the well-settled rules governing Article III standing to challenge violations of the Establishment Clause. Allegations of injury in Establishment Clause cases often involve "non-economic interests of a spiritual … nature." *Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1049 (9th Cir. 2010) (quotation marks omitted). As the Fourth

Circuit has explained, "[f]eelings of marginalization and exclusion are cognizable forms of injury," as is "a message to non-adherents of a particular religion that they are *outsiders,* not full members of the political community." *Moss v. Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012) (quotation marks omitted). Thus, in *Catholic League*, the Ninth Circuit allowed the plaintiffs to challenge a non-binding resolution critical of Catholicism, concluding that they suffered a cognizable injury because they were "directly stigmatized … leav[ing] them feeling like second-class citizens" and were "sen[t] a clear message that they are outsiders, not full members of the political community." 624 F.3d at 1052–53.

The concrete injuries alleged here also exceed those alleged in *Awad v. Ziriax,* 670 F.3d 1111 (10th Cir. 2012), where the Tenth Circuit upheld a decision enjoining application of Oklahoma's so-called anti-Shariah law, which singled out Muslims for disfavored treatment. In that case, the plaintiff had alleged "that the amendment threatens him with noneconomic injuries." *Id.* at 1122. The Tenth Circuit held that the plaintiff had Article III standing because of the law's "directive of exclusion and disfavored treatment of a particular religious tradition."

Id. at 1123. Here, not only did the surveillance single out Muslims for disfavored treatment, but it also caused a range of practical harms and has deterred Plaintiffs from freely practicing their faith. *See* Appellants' Br. 16–21; *see also* Section III below.

More generally, the Supreme Court has recognized that "discrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (citation and quotation marks omitted). The resulting injuries are just as concrete—and the need for judicial review just as strong—when the discrimination aims at citizens' exercise of their faith.

II. NYPD Violated The Establishment Clause By Singling Out Muslims For Surveillance.

By singling out Muslims for surveillance, NYPD flouted the most fundamental Establishment Clause rules. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244

(1982). No government body "can … prefer one religion over another," *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947), or "single[ ] out a particular religious sect for special treatment." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1994). "This prohibition is absolute," *Larson*, 456 U.S. at 246 (quotation marks omitted), as "the Establishment Clause forbids subtle departures from neutrality … as well as obvious abuses." *Gillette v. United States*, 401 U.S. 437, 452 (1971).

The district court did not dispute that the program singled out Muslims. *See* JA-21 ("The police could not have monitored New Jersey for Muslim terrorist activities without *monitoring the Muslim community itself*." (emphasis added)). But the court then concluded that "the motive for the [surveillance] was not *solely* to discriminate against Muslims, but rather to find Muslim terrorists hiding among ordinary, law-abiding Muslims." JA-22 (emphasis added). In so doing, the district court assumed that intentional discrimination against members of a particular religious group should be upheld—at the pleading stage, no less—as long as the intentional discrimination was motivated by "a desire to locate budding terrorist conspiracies." JA-21.

But the requirement of equal treatment does evaporate once a judge peers into the discriminator's soul. The Supreme Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications." *Johnson v. California*, 543 U.S. 499, 505 (2005). As Plaintiffs detail, the district court's analysis is at odds with well-settled law governing intentional discrimination under the Equal Protection Clause. Appellants Br. 31–34.

That same form of analysis—and the same level of scrutiny—applies to religious classifications under the Establishment Clause as well. Indeed, courts have long recognized that the Establishment Clause requirement of "[n]eutrality in its application requires an equal protection mode of analysis." *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring); *see also, e.g.*, *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1239 (11th Cir. 2004) ("Simply put, to deny equal treatment to a church or a synagogue … is impermissible based on the precepts of the Free Exercise, Establishment and Equal Protection Clauses."); *Rupert v. Dir., U.S. Fish & Wildlife Serv.*, 957 F.2d 32, 34 (1st Cir. 1992) ("[E]qual protection principles 'overarch' the tests of the religion clauses."); *Peyote Way Church of God, Inc. v.*

Thornburgh, 922 F.2d 1210, 1217 (5th Cir. 1991) (Equal protection analysis applies when a statute "facially singles out one religion."); *Olsen v. DEA*, 878 F.2d 1458, 1463 n.5 (D.C. Cir. 1989) ("[I]n cases of this character establishment clause and equal protection analyses converge."). Together, "the Free Exercise Clause, the Establishment Clause ... and the Equal Protection Clause as applied to religion … all speak with one voice on this point: Absent *the most unusual circumstances*, one's religion ought not affect one's legal rights or duties or benefits." *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring) (emphasis added).

Thus, the Supreme Court has explained that a "law[that] discriminat[es] among religions [is] subject to strict scrutiny." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987) (emphasis omitted). And given the risk that government officials will act on negative stereotypes of religious minorities, the application of rigorous scrutiny is especially important when the government denies equal treatment to "small, new or unpopular denominations." *Larson,* 456 U.S. at 245.

The district court was also incorrect to conclude that *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), relieved the government of its obligation to show that its intentional targeting of Muslims was the least restrictive means of fulfilling a compelling governmental interest. In *Iqbal*, the Supreme Court concluded that the plaintiffs' complaint had not adequately pled an equal-protection violation based on allegations of disparate impact, because the "more likely explanation" for the facts alleged was that "a legitimate policy directing law enforcement to arrest and detain individuals *because of their suspected link* to the [September 11] attacks would produce a disparate, incidental impact on Arab Muslims, *even though the purpose of the policy was to target neither Arabs nor Muslims*." *Id.* at 682 (emphasis added). Here, however, the complaint documents disparate treatment—the intentional targeting of Muslims—not mere disparate impact; actual disparate treatment is not authorized even when motivated by law-enforcement concerns.

This is not the first time that government entities have singled out a particular religion based on negative stereotypes. In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), the Supreme Court prohibited a city from applying an ordinance, limiting public addresses in public parks,

in a manner that treated "a religious service of Jehovah's Witnesses … differently than a religious service of other sects." *Id.* at 69. This practice, the Court explained, "amounts to the state preferring some religious groups over this one." *Id.* The Court has likewise invalidated the denial of permits for Jehovah's Witnesses to use a park for worship services when "[t]he only questions asked of the Witnesses at the hearing pertained to their alleged refusal to salute the flag, their views on the Bible, and other issues irrelevant to the unencumbered use of the public parks." *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951).

Even in times of war, the Supreme Court has recognized the difference between unlawful conduct, on the one hand, and peaceful religious exercise on the other. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), the Court considered a challenge to a law that prohibited Jehovah's Witnesses from distributing literature door to door. In invalidating the law, the Court acknowledged that "Jehovah's Witnesses are not above the law." *Id.* at 116 (quotation marks omitted). But that did not end the inquiry:

> [T]he present ordinance is not directed to the problems with which the police power of the state is free to deal. It does not cover, and petitioners are not charged with, breaches of the peace. They are pursuing their solicitations peacefully and quietly. Petitioners, moreover, are not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation.

Id. And because the law targeted protected conduct, the Court applied strict scrutiny, concluding that "the present ordinance is not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations." *Id.*

The district court asserted that the City's practices "grow out of the … tensions between security and the treatment of Muslims." JA-21. In short, rather than subject religious discrimination to the strict scrutiny it deserves, the district court defaulted to the very religious stereotyping that the Establishment Clause is designed to eliminate. Ultimately, "[t]he danger of stigma and stirred animosities is no less for religious line-drawing than for racial." *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring).

III. By Targeting Muslims For Surveillance, NYPD Has Diminished Plaintiffs' Standing In Religious, Commercial, Educational, And Civic Life.

Plaintiffs' Article III standing to assert Establishment Clause concerns, and their Establishment Clause claims themselves, are

especially strong because NYPD's conduct has diminished their ability to participate fully as citizens without regard to their religion. "The Establishment Clause, at the very least, prohibits government from … making adherence to a religion relevant in any way to a person's standing in the political community." *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593–94 (1989) (quotation marks omitted). Here, NYPD's surveillance has thwarted Plaintiffs' ability to participate as equals in religious, commercial, educational, and civic life.

First, NYPD's surveillance has made it harder for Plaintiffs to worship. Plaintiff Syed Farhaj Hassan "has decreased his mosque attendance significantly since learning that the mosques he attends have been under surveillance by the NYPD." JA-27–28 ¶ 13. Plaintiff Moiz Mohammed now "avoid[s] praying in places where non-Muslims might see him doing so." JA-33 ¶ 25. Plaintiff Soofia Tahir started praying "in very remote areas of the buildings in which she studied and worked on campus to try to avoid NYPD surveillance because of the uniquely visible way in which Muslims pray." JA-35 ¶ 30. A mosque operated by Plaintiff Muslim Foundation Inc. has been forced to curtail

its religious and educational programming to avoid attracting the attention of law enforcement. JA-31–32 ¶ 23. And two mosques that are members of Plaintiff Council of Imams in New Jersey have seen diminished attendance and financial support as a result of the surveillance. JA-28–29 ¶ 15.

Second, NYPD's surveillance has made it harder for Plaintiffs to participate in the nation's commercial life. The surveillance has scared away customers of Plaintiff All Shop Body Inside & Outside; "some customers have told the owners by telephone that they did not feel comfortable visiting the location because of the threat of NYPD surveillance." JA-30 ¶ 19. The same is true of Plaintiff Unity Beef Sausage Company; business has decreased, and "[s]ome customers have called to ask the owner about the NYPD's surveillance and told him they are no longer comfortable visiting the store." JA-31 ¶ 21. The owner of that company likewise "fears conducting his legitimate business; he is concerned that anyone who comes in or looks at him from across the street might be an NYPD spy." *Id.* And the surveillance has reduced the value of the home of Plaintiffs Zaimah Abdur-Rahim and Abdul-Hakim Abdullah. JA-36 ¶ 32, JA-36–37 ¶ 34.

Third, NYPD's surveillance has made it harder for Plaintiffs to participate fully as students and teachers. For instance, Plaintiff Moiz Mohammed now avoids publicly discussing his faith or his participation in the Muslim Students Association. JA-33 ¶ 25. Plaintiff Jane Doe "no longer discusses religious topics at [Muslim Student Association] meetings" to avoid attracting the attention of those, including law enforcement, who are suspicious of her religion. JA-33–34 ¶ 27. Plaintiff Soofia Tahir "curtailed discussions of religion and politics while on the Rutgers campus" in order to avoid NYPD scrutiny. JA-35 ¶ 30. And Plaintiff Muslim Students Association will have greater difficulty attracting student members on the Rutgers University campus. JA-29–30 ¶ 17.

Moreover, Plaintiff Zaimah Abdur-Rahim is a teacher at Al Hidaayah Academy, and was the principal of Al Muslimaat Academy; both were spied on by NYPD. JA-35–36 ¶¶ 31–32. Among other things, she "is especially concerned with [NYPD's] spying at [Al Muslimaat Academy] because she and the all-female population of students there did not wear head coverings while attending classes"; one of her and her students' "most sacred religious tenets is modesty, their practice of

which requires them to always keep their heads covered in the presence of men or boys." JA-36 ¶ 33.

Finally, and perhaps most ironically, the surveillance may prevent Plaintiff Syed Farhaj Hassan from serving and defending his country. Mr. Hassan has served in the U.S. Army Reserves since September 2001; he has been deployed to Iraq and has received multiple honors for his service. JA-27 ¶ 11. The stigma resulting from a law-enforcement investigation could not only diminish the trust placed in him by his fellow soldiers and commanding officers, but could also jeopardize his security clearance—and, in turn, his career. JA-27–28 ¶ 13.

This type of surveillance, based on this manner of stereotyping, undermines not only the Plaintiffs' religious freedom, but also our democracy. "An auspicious aspect of our pluralistic society is its rich religious diversity. The essential purpose of the Establishment Clause reflects this pluralism." *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 930 (3d Cir. 1980). And "[w]hen … religious lines are drawn by the State, the … multireligious communities that our Constitution seeks to weld together as one become separatist; … that system is at war with the democratic ideal." *Shaw v. Reno*, 509 U.S. 630, 648–49 (1993)

(quotation marks omitted). This is precisely the harm that the Establishment Clause seeks to avoid.

Conclusion

The district court's judgment should be reversed.

Respectfully submitted,

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July 10, 2014

Certificate of Compliance

I hereby certify to the following:

1. I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

2. The text of the electronic brief is identical to the text of the paper copies to be filed with the Court.

3. The electronic brief has been scanned for viruses using ClamXav 2.6.4, and was found to be virus-free.

4. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 3,289 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

5. This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it was prepared in Microsoft Word, Century Schoolbook, 14-point font.

/s/ Gregory M. Lipper

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Gregory M. Lipper

Certificate of Service

On July 10, 2014, I electronically filed this brief of *amicus curiae* with the Clerk of this Court through the appellate CM/ECF system and will send ten paper copies of the brief to the Court by Federal Express.

The participants in the case are registered CM/ECF users, and service will be accomplished through the appellate CM/ECF system.

/s/ Gregory M. Lipper

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