

No. 23-55790

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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ABDIRAHMAN ADEN KARIYE, *et al.*,  
*Plaintiffs-Appellants,*

v.

ALEJANDRO MAYORKAS, *et al.*,  
*Defendants-Appellees.*

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

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**BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,  
BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE, INTERFAITH  
ALLIANCE, NATIONAL CONFERENCE OF JEWISH WOMEN, AND UNITARIAN  
UNIVERSALIST ASSOCIATION AS *AMICI CURIAE* SUPPORTING  
APPELLANT AND REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

*Amici* are nonprofit corporations. They have no parent corporations, and no publicly held corporation owns any portion of any of them.

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## INTERESTS OF THE *AMICI CURIAE*<sup>1</sup>

Americans United for Separation of Church and State is a national, nonpartisan organization that for over seventy-five years has brought together people of all faiths and the nonreligious who share a deep commitment to religious freedom. Americans United has participated as counsel or amicus curiae in the leading church-state cases decided by the courts of appeals and the Supreme Court. *See, e.g., Garrick v. Moody Bible Inst.*, No. 21-2683 (7th Cir. argued Dec. 5, 2023); *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 76 F.4th 962 (9th Cir. 2023), *petition for reh'g or reh'g en banc filed*; *Belya v. Kapral*, 45 F.4th 621 (2d Cir. 2022), *cert. denied*, 143 S.Ct. 2609 (2023). Consistent with our support for the separation of church and state, Americans United has long fought to uphold the First Amendment guarantees that prohibit the government from favoring, disfavoring, or punishing based on one's beliefs with respect to religion.

Bend the Arc: A Jewish Partnership for Justice is the nation's leading progressive Jewish voice empowering Jewish Americans to advocate for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond

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<sup>1</sup> *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Interfaith Alliance is a network of people of diverse faiths and beliefs from across the country working together to build a resilient democracy and fulfill America's promise of religious freedom and civil rights not just for some, but for all. Interfaith Alliance mobilizes powerful coalitions to challenge Christian nationalism and religious extremism, while fostering a better understanding of the healthy boundaries between religion and government. Interfaith Alliance advocates at all levels of government for an equitable and just America where the freedoms of belief and religious practice are protected, and where all persons are treated with dignity and have the opportunity to thrive.

National Council of Jewish Women is a grassroots organization of volunteers that advocates and strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms.

The Unitarian Universalist Association is a religious denomination formed in 1961 by the union of the American Unitarian Association and the Universalist Church of America, two denominations with deep roots in American history. Its membership today comprises more than 1,000

congregations nationwide, ranging from those recently organized to many of America's founding churches, first gathered by the Pilgrims and Puritans in the 1600s. The UUA opposes interference with the free exercise of a person's belief, and promotes a free and responsible search for truth and meaning for every person.

## INTRODUCTION

The Free Exercise Clause of the First Amendment protects the rights of all Americans to believe, practice, and associate according to their religion without undue government interference. This case concerns a government practice that flies in the face of that promise.

Appellants allege that Customs and Border Protection officers single out Muslim American travelers for invasive religious questioning regarding their Islamic beliefs, practices, and associations. Amici write to underscore two respects in which CBP's conduct flouts fundamental principles of the Free Exercise Clause that have guided our nation since its founding.

First, this is a straightforward case of religious discrimination. The Free Exercise Clause does not permit the government to intentionally target a religious group for unfavorable treatment. But CBP is treating Muslim Americans unfavorably simply because they are Muslims. That discrimination is fundamentally incompatible with the free exercise of religion and stigmatizes Muslim Americans.

Second, the unfavorable treatment at issue—invasive religious questioning—is an unwarranted government intrusion into the private sphere of personal religious conscience. It is not, and has never been, the U.S. government’s business to coercively question citizens about personal religious matters like prayer and mosque attendance. Compelled disclosure of religious beliefs, practices, and associations violates core Free Exercise Clause principles.

CBP’s conduct would be permissible only under exceedingly rare circumstances in which discriminatory religious questioning was narrowly tailored to a compelling government interest. Those circumstances are not present here.

The singling-out of Muslim Americans is wholly unjustified and anathema to religious freedom. To protect core principles of religious liberty—religious equality and privacy—this Court should reverse the district court’s dismissal and allow this suit to proceed.

## ARGUMENT

**CBP’s practice of subjecting Muslim Americans to religious questioning violates the Free Exercise Clause.**

**A. CBP’s religious questioning discriminates against Muslim Americans.**

The clear command of the Free Exercise Clause is that the government respect the diverse religious beliefs and practices of all people. Accordingly,

“[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Here, Appellants alleged that they were singled out for unfavorable treatment as a penalty for practicing a minority religion. This clear violation of the “fundamental nonpersecution principle,” *id.* at 523, is contrary to our nation’s history of religious freedom, is particularly egregious because it singles out a minority religion for mistreatment, and, as a result, inflicts significant dignitary harm on Muslim Americans.

1. *The Founders drafted the Free Exercise Clause to prevent government discrimination against religious minorities.*

CBP’s discrimination against Muslim Americans conflicts with the intent of the Founders of our nation. The Free Exercise Clause was drafted against the backdrop of an ugly history of persecution of religious minorities both in England and the colonies. The First Amendment’s religious protections “reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). So in drafting the Free Exercise Clause, the Founders were “specially concerned with the plight of minority religions.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 n.4 (2002)

(Thomas, J., concurring) (quoting Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1159 (1991)).

Many early migrants to the American colonies were fleeing religious persecution in England. See *Everson*, 330 U.S. at 8. For much of the seventeenth and eighteenth centuries, England was the site of religious “turmoil, civil strife, and persecutions.” *Id.* Members of minority religious groups “were sometimes imprisoned, mutilated, degraded by humiliating pillories, exiled and even killed for their views.” *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 149 (1961) (Black, J., dissenting). These persecutions motivated members of minority groups to set out for the New World, “filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose.” *Engel v. Vitale*, 370 U.S. 421, 434 (1962).

Unfortunately, religious discrimination persisted in the colonies. Most of the colonies maintained an official state church and punished religious dissidents, including Catholics, Jews, Quakers, and Baptists. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1422-25 (1990). In some colonies, “[p]unishments were prescribed for . . . entertaining heretical opinions.” *Reynolds v. United States*, 98 U.S. 145, 162-63 (1878).

Rhode Island stood out as an exception because of its protections for religious minorities. See Erwin Chemerinsky, *No, It Is Not A Christian Nation, and It Never Has Been and Should Not Be One*, 26 Roger Williams U. L. Rev. 404, 408 (2021). The colony’s 1663 charter stated: “No person . . . shall be any-wise molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion, and do not actually disturb the peace of our said colony[.]” Charter of Rhode Island and Providence Plantations (1663), <https://bit.ly/3vXfy0e>.

Over a century later, Thomas Jefferson and James Madison—the two Founders most influential in the drafting and ratification of the Free Exercise and Establishment Clauses—embraced ideals similar to Rhode Island’s, rejecting the religious persecutions of England and the colonies. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 214 (1963). They advocated for religious liberty for all Americans, with particular concern for the rights of minority religions. *Id.*

Jefferson wrote a Virginia religious-freedom bill that would become a model for the Free Exercise Clause. The bill required that “our civil rights have no dependence on our religious opinions” and that no person should “be enforced, restrained, molested, or burthened, in his body or goods, nor . . . suffer on account of his religious opinions or belief.” A Bill for Establishing Religious Freedom, H.D. 82, 1779 Gen. Assemb. (Va. 1786),

Nat'l Archives, <https://bit.ly/3HueJOU>. Jefferson later wrote that the bill “was meant to be universal . . . to comprehend, within the mantle of its protection . . . every denomination.” Timothy L. Hall, *Religion, Equality, and Difference*, 65 Temp. L. Rev. 1, 14 (1992) (quoting Thomas Jefferson, *Autobiography*, in *Thomas Jefferson: Complete Writings* 40 (Library of America ed., 1984)).

Advocating for the passage of Jefferson’s bill, Madison wrote that protections of religious freedom were necessary because otherwise, “the majority may trespass on the rights of the minority.” James Madison, *Memorial and Remonstrance Against Religious Assessments* (ca. June 20, 1785), Nat'l Archives, <https://bit.ly/3u75qBn>. He objected to any government preference for one religion over another, stating that such preferences “degrade[] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.” *Id.*

Virginia adopted the bill, and its ideals were replicated in the First Amendment and made binding upon the new United States. *See Everson*, 330 U.S. at 13. Religious freedom “was indispensable in a country whose people came from the four quarters of the earth and brought with them a diversity of religious opinion.” *Schempp*, 374 U.S. at 214. In this new nation, “[o]ur forebears resolved that . . . each individual would enjoy the right to

... have his religious practices treated with respect.” *Shurtleff v. City of Boston*, 596 U.S. 243, 285 (2022) (Gorsuch, J., concurring).

2. *CBP’s overt targeting of Muslim Americans is a particularly egregious form of religious discrimination.*

CBP’s targeting of Muslim Americans for religious questioning harkens back to the historical religious discrimination that the Founders so strongly opposed. As Appellants explain, CBP has a practice of questioning Muslim Americans about their private religious beliefs, practices, and associations. See Appellant’s Br. 10-12. CBP officers do not subject other travelers to this treatment—religious questioning is targeted at Muslims because they are Muslim. See ER78 ¶ 25. This discrimination betrays the First Amendment’s promise of religious freedom for all, failing to meet even the “minimum requirement of neutrality.” See *Lukumi*, 508 U.S. at 533.

Many Free Exercise cases involve “subtle departures from neutrality.” *Id.* at 534 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). This case is not subtle. Appellants plausibly allege that the government is intentionally inflicting a punishment on a specific religious denomination. See Appellants’ Br. 18-27. Persecution for practicing a minority faith is the type of repressive practice the Founders “fervently wished to stamp out.” *Everson*, 330 U.S. at 8.

CBP's targeted religious questioning is far more discriminatory than the government conduct at issue in many of the recent cases where the Supreme Court found free-exercise violations. For example, in *Fulton v. City of Philadelphia*, the Court concluded that an anti-discrimination provision in a city contract with a religiously affiliated foster-care agency violated the Free Exercise Clause as applied to the agency because the contract authorized the city to make discretionary exemptions from the provision, even though there was no evidence that the city had ever done so. 141 S.Ct. 1868, 1878-79 (2021). The objectionable contract provision did not name or target any religious group. *See id.* In *Kennedy v. Bremerton School District*, the Court ruled that a school district violated a football coach's free-exercise rights by prohibiting him from engaging in postgame "private, personal" prayers while simultaneously allowing coaches to engage in other private, personal postgame conduct that was nonreligious. 597 U.S. 507, 525-27 (2022). There was no suggestion that the policy targeted the coach because of his particular religious denomination. *See id.* In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the free-exercise violation consisted of isolated comments by members of a state commission that were "susceptible of different interpretations" but, in context, were understood to be "inappropriate and dismissive comments" about the plaintiff's religious beliefs. 584 U.S. 617, 635 (2018). As these more subtle forms of

discrimination have been ruled to violate the Free Exercise Clause, the overt discrimination here must too.

The hostility towards Islam in this case is clear. When an armed border officer takes a traveler aside upon entry into the United States, orders him into a separate area, searches his belongings, and questions him about his Islamic religious beliefs, practices, and associations, a message is sent: The government views Islam as a suspect religion. *See* ER78-79 ¶¶ 26-28. These questions are not asked out of idle curiosity in a neutral environment. They are asked by CBP officers ostensibly acting to protect the border. By asking invasive religious questions to Muslims in a coercive, border-security setting, CBP officers communicate that they see some connection between Islam and national-security concerns. And by doing so, they “degrade[]” Muslim Americans “from the equal rank of Citizens.” *See* Madison, *Memorial and Remonstrance*.

3. *CBP’s discriminatory religious questioning inflicts dignitary harm on Muslim Americans.*

The district court overlooked the dignitary harm of unequal treatment in its conclusion that Appellants failed to allege a substantial burden on their religious exercise. To the extent that Appellants are required to allege a substantial burden as part of their Free Exercise claim, this Court should recognize, as part of that analysis, that the stigma of being discriminated

against for belonging to a certain religious denomination inherently burdens free exercise.

Government discrimination imparts a cognizable stigma and humiliation “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.” *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). Thus, discrimination “can cause serious . . . injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.” *Id.* at 739-40.

Because religion is such a deeply personal subject, the stigma of unequal treatment has a unique resonance when the government singles out a particular religious denomination. As the Tenth Circuit explained in *Awad v. Ziriax*, an official “directive of exclusion and disfavored treatment of a particular religious . . . tradition” causes an injury “significantly beyond a ‘psychological consequence’ from disagreement with observed government conduct, . . . ‘hurt feelings’ from a presidential proclamation requesting citizens to pray, . . . or ‘a person’s deep and genuine offense to a defendant’s actions.” 670 F.3d 1111, 1123 (10th Cir. 2012) (quoting first *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982), then *Freedom From Religion Found., Inc. v. Obama*,

641 F.3d 803, 807 (7th Cir. 2011), then *Cath. League for Religious & C.R. v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1062 (9th Cir. 2010) (en banc) (Graber, J., dissenting)). CBP’s discriminatory actions here similarly “target and condemn a specific religion.” *Id.* at 1122.

That the discrimination occurred in the law-enforcement context exacerbates the stigma. In a case involving police traffic stops, this Court explained, “[s]tops based on race or ethnic appearance . . . send a clear message that those who are not white enjoy a lesser degree of constitutional protection—that they are in effect assumed to be potential criminals first and individuals second.” *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000). A similar message is sent to Muslim Americans by subjecting them to religious questioning at the border. And the national-security context only heightens the stigma: “[I]t is hard to imagine a greater stigma than being associated with terrorism in our post-9/11 world.” *Coker v. Barr*, No. 19-cv-02486, 2020 WL 9812034, at \*8 (D. Colo. Sept. 15, 2020).

The dignitary harm caused by CBP’s targeting of Muslim Americans for coercive religious questioning is distinct from the “subjective chilling effect” alleged in *American Family Association, Inc. v. City & County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002). There, the San Francisco Board of Supervisors sent a letter and passed two nonbinding resolutions “call[ing] for the Religious Right to take accountability for the impact of

their long-standing rhetoric denouncing gays and lesbians.” *Id.* at 1119. As the Court observed, there was “no actual or threatened imposition of government power or sanction.” *Id.* at 1125. This case differs because CBP is not criticizing a particular action taken by some Muslim Americans that harms others in the community. It is treating Muslims differently from others because they are Muslim. But more to the point, CBP questioning is an imposition of government power. Muslim American travelers are having direct interactions with armed government officials who are recording their answers and storing them in government databases for decades. Although not every example of offense to a person’s religious sensibilities is a substantial burden, discriminatory treatment in an interaction with a law-enforcement officer plainly is.

**B. CBP’s religious questioning intrudes on the privacy of personal religious conscience.**

Privacy of personal religious conscience is the second core principle of the right to free exercise of religion violated by CBP. In the United States, religious beliefs, practices, and associations are “the inviolable citadel of the individual heart and mind.” *Schempp*, 374 U.S. at 226. CBP’s religious questioning intrudes on that citadel.

1. *The Founders drafted the Free Exercise Clause to protect the privacy of religious beliefs, practices, and associations.*

The First Amendment’s Religion Clauses were based on the Founders’ belief that “religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.” *Engel*, 370 U.S. at 432 (quoting Madison, *Memorial and Remonstrance*). This principle stems from Enlightenment ideals, and in particular, the writings of John Locke. See Steven J. Heyman, *The Light of Nature: John Locke, Natural Rights, and the Origins of American Religious Liberty*, 101 Marq. L. Rev. 705, 749 (2018). Locke’s *A Letter Concerning Toleration* described religion as a matter of personal conscience, entirely separate from the interest of the state. *Id.* In Locke’s conception, faith was an “inward” matter that should be shielded from government interference. *Id.* (quoting John Locke, *A Letter Concerning Toleration* 13 (William Popple trans., 2d ed. 1690), in *John Locke: A Letter Concerning Toleration and Other Writings* (Mark Goldie ed., Liberty Fund 2010)).

Madison’s *Memorial and Remonstrance* emphasized the Lockean concept of personal religious conscience. He wrote, “[t]he Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.” Madison, *Memorial and Remonstrance*. Madison described the personal religious

conscience as an “unalienable right” because it concerned a person’s “duty towards the Creator.” *Id.* He thus concluded, “[r]eligion is wholly exempt from [the government’s] cognizance.” *Id.*

Similarly, in an oft-cited 1802 letter to the Danbury Baptist Association, Jefferson wrote, “[r]eligion is a matter which lies solely between man and his god.” Thomas Jefferson, *Letter to the Danbury Baptist Association* (1802), <https://bit.ly/3S9zRif>. A person thus “owes account to none other for his faith or his worship.” *Id.*

2. *CBP’s religious questioning compels Muslim Americans to disclose their private religious thoughts to the government.*

In keeping with Enlightenment ideals, the U.S. government normally does not coerce citizens into disclosing their private religious beliefs, practices, and associations. It would be strange, in a country that believes a person “owes account to none other for his faith,” *see id.*, to require Americans to routinely disclose details about their faith to the government.

While some countries ask citizens about their religion as part of their census, the U.S. census has never included a mandatory question about individual religious beliefs, practices, or associations. *See* Jeff Diamant and Rebecca Leppert, Pew Research Center, *Why the U.S. census doesn’t ask Americans about their religion* (Apr. 12, 2023), <https://pewrsr.ch/47R5YcA>.

Nor does any other routine interaction between citizens and the government require a citizen to disclose religious information. Religion is exempt from the government's cognizance.

Because compelled disclosure of religious beliefs and practices is so far outside American tradition and inconsistent with our basic values, the question of when it is permitted has rarely come before the courts. But the Supreme Court has had several occasions to consider compelled disclosure in the context of the right to freedom of association, and has “repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *see also Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2383 (2021); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982).

Americans are protected from compelled disclosure of their associations because the Court recognizes a “vital relationship between freedom to associate and privacy in one's associations.” *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *see also Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960) (“[T]o compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.”). Put simply, “when a State attempts to make inquiries about a person's

beliefs or associations, its power is limited by the First Amendment.” *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971).

There is a similarly vital relationship between freedom of religion and privacy in one’s religious beliefs, practices, and associations. After all, religion is “solely between man and his god.” See Jefferson, *Letter to the Danbury Baptist Association*. At a minimum, religious beliefs, practices, and associations surely are entitled the same privacy as secular associations.

**C. CBP’s religious questioning is not narrowly tailored to a compelling government interest.**

Because CBP’s practice of targeting Muslims for religious questioning collides with free-exercise rights, it must withstand “the most rigorous of scrutiny,” *Lukumi*, 508 U.S. at 546—a standard it will be unable to meet. The burden is on the government to establish that discriminatory religious questioning “advance[s] ‘interests of the highest order’” and is “narrowly tailored in pursuit of those interests.” *Id.* (citing *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)). The singling-out of a group for disfavor based on religion could survive strict scrutiny, if at all, “only in rare cases.” *Id.* at 546; see also *Bd. of Educ. v. Grumet*, 512 U.S. 687, 715 (1994) (O’Connor, J., concurring in part) (“Absent the most unusual circumstances, one’s religion ought not affect one’s legal rights or duties or benefits.”). That is especially so when

the government relies on harmful stereotypes. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“[T]he purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race.”).

The government’s assertion that its religious questioning is narrowly tailored to national-security interests wrongly presupposes a national-security interest in the private religious beliefs, practices, and associations of Muslim Americans. Below, the government never articulated a precise rationale for making this assumption. Instead, it gestured toward the fact that two of the Appellants were on a deeply flawed government watchlist and that one Appellant was carrying a journal containing notes about his religious beliefs. *See* Defs.’ Mot. to Dismiss Am. Compl., *Kariye v. Mayorkas*, 2:22-cv-1916, at \*23-25 (C.D. Cal. Dec. 27, 2022), ECF No. 68. But at the motion-to-dismiss phase, the court must accept the truth of Plaintiffs’ allegations that there was no reasonable basis for suspicion. *See* Appellants’ Br. 31.

Even assuming the government had some legitimate suspicions regarding the Appellants that justified questioning them, that does not mean *religious* questioning satisfies strict scrutiny. *See id.* at 34-35. For example, the government cannot not explain why a person’s name being on a watchlist would mean that asking him how many times a day he prays is narrowly tailored to national security. It is difficult to imagine any set of

facts that would make an inquiry into personal prayer practices necessary for national-security reasons. And if such unusual circumstances do exist, they are not evident on the face of the complaint. So it will be up to the government to explain those circumstances at summary judgment or trial, not the motion-to-dismiss phase. *See id.* 32-33.

Underlying the government's national-security argument are prejudices linking Islam with terrorism that have plagued Muslim Americans since 9/11. It is deeply troubling that the government is asserting, without explanation, that a Muslim American's private, peaceful religious practices are a national-security matter. If Muslim Americans' prayer and mosque attendance were to be deemed national-security matters, what other actions could the government take to regulate, surveil, and penalize those forms of religious exercise? The district court erred by deferring to this national-security rationale without interrogating what assumptions and prejudices it relied upon.

## CONCLUSION

CBP's discriminatory and invasive questioning of Muslim Americans betrays our Founders' commitment to religious liberty, equality, and privacy. The judgment of the district court should be reversed.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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