

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

HAMID HASSAN RAZA; MASJID AL-ANSAR;
ASAD DANDIA; MUSLIMS GIVING BACK;
MASJID AT-TAQWA; MOHAMMAD
ELSHINAWY,

Plaintiffs,

v.

CITY OF NEW YORK; MICHAEL R.
BLOOMBERG, in his official capacity as Mayor
of the City of New York; RAYMOND W.
KELLY, in his official capacity as Police
Commissioner for the City of New York; DAVID
COHEN, in his official capacity as Deputy
Commissioner of Intelligence for the City of New
York,

Defendants.

No. 13-cv-03448-PKC-JMA

Hon. Judge Joan M. Azrack

**PLAINTIFFS' SUPPLEMENTAL BRIEFING
CONCERNING DISPUTED DISCOVERY REQUESTS**

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INTRODUCTION

Plaintiffs allege that the NYPD has singled them out for heightened law enforcement scrutiny on the basis of their Muslim faith. Defendants have served on Plaintiffs sweeping discovery requests probing into their financial and business records. Defendants' requests for financial records are barred by Supreme Court precedent that shields associational information from disclosure under the First Amendment. They are further barred to the extent that Defendants seek information in order to retroactively justify their investigations or surveillance of Plaintiffs. Because these doctrines apply equally to other broad categories of discovery requests served by Defendants, those requests must be denied as well.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Plaintiffs filed their complaint on June 18, 2013, alleging that the NYPD's discriminatory policy and practice of targeting these New York Muslims for heightened law enforcement scrutiny has resulted in harm to their First Amendment-protected religious and expressive activities. On November 22, 2013, Judge Chen ruled that Plaintiffs were entitled to discovery in support of a motion for a preliminary injunction and set a discovery schedule accordingly. *See* Memorandum & Order (Nov. 22, 2013), ECF No. 28. On December 6, 2013, Defendants served Plaintiffs with 64 document requests and 57 interrogatories, which sought wide-ranging information about Plaintiffs' finances, associations, and expressive activities. Plaintiffs objected to the volume, breadth, burden, and relevance of these requests, as well as on First Amendment and privacy grounds, in a letter to Defendants dated December 13, 2013, and in subsequent objections and responses served on January 6, 2014. Starting on January 3, 2014, and over the course of the next three months, the parties met and conferred in person and telephonically in an effort to narrow Defendants' requests.

This Court heard argument on the parties' unresolved disputes concerning Defendants' document requests on March 19. During this hearing, Plaintiffs' counsel explained that two of the six Plaintiffs are asserting an economic harm: Masjid Al-Ansar and Muslims Giving Back. Masjid Al-Ansar has suffered a loss related to the purchase of video recording equipment, with which it records sermons in an effort to prevent any later mischaracterization by the NYPD. Compl. ¶ 51.¹ Separately, as the result of infiltration by an NYPD informant, Muslims Giving Back suffered a decline in donations. Compl. ¶ 107. The other four Plaintiffs do not assert an economic injury.²

The Court reserved judgment and requested briefing on Defendants' requests that broadly seek Plaintiffs' financial and business records. *See* Minute Entry (Mar. 19, 2014), ECF No. 43. Among other things, those requests seek: (1) all bank statements; (2) all tax records; (3) all records relating to revenue, income, gross earnings, expenses, and expenditures; (4) all records relating to any contribution, donation, or grant made *by* the Plaintiff; (5) all records relating to the sale of goods; and (6) all records relating to the Plaintiff's real estate arrangements.³

The Court also reserved judgment on several other disputed issues, including Defendants' requests for information that seek to retroactively justify the NYPD's investigations. As described during the March 19 hearing, Defendants' requests for financial and tax records fall

¹ Plaintiffs have agreed to provide records related to Masjid Al-Ansar's purchase of video recording equipment.

² After the March 19 hearing, Plaintiff Masjid At-Taqwa determined that it will stipulate to the fact that it is not alleging economic loss.

³ *See* Requests Nos. 21, 22, 23, 24, 25, 28, 29, 44, 45, 47, & 64; Interrogatory No. 53. The text of these and other disputed requests is attached hereto as Exhibit A to the Declaration of Mariko Hirose ("Hirose Decl."). The parties are in negotiations concerning Defendants' interrogatories. Plaintiffs object to the interrogatories identified here on the same grounds that they object to Defendants' document requests covering the same subject matter. For that reason, negotiation will not resolve the disputes about these specific interrogatories. In the interests of judicial economy, Plaintiffs include these interrogatories for the Court's consideration.

within this category of retroactive justification. For example, Defendants have stated that they seek Plaintiff Masjid At-Taqwa's financial and business records even in the absence of any claim of economic loss, because these requests allegedly go to the NYPD's law enforcement interest in the mosque. Conference Tr. 61:13–64:2, Mar. 19, 2014.⁴

ARGUMENT

I. The disputed discovery requests impermissibly infringe Plaintiffs' First Amendment and privacy rights.

A. The First Amendment privilege restricts disclosure of protected information.

Binding precedent of the Supreme Court and the Second Circuit holds that a First Amendment privilege applies in civil discovery. These cases make clear that the First Amendment shields a party from discovery requests that would intrude upon its freedom of speech, belief, or association unless the other party can show a “compelling need” for the information sought, including financial records. Thus, in the seminal case of *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), the Supreme Court held that, in the context of a discovery demand, compelled disclosure of associational information would violate the fundamental constitutional right to freedom of belief and association. *See id.* at 462–63 (“It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association.”); *see also N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339 (2d Cir. 1989). Subsequent cases have “consistently applied the right of associational privacy to compelled disclosure through discovery” by recognizing a qualified First Amendment privilege. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee (ISKCON)*, 1985 WL 315, at *9 n.16 (S.D.N.Y. Feb. 28, 1985).

⁴ There has been considerable back-and-forth between the parties concerning disputed requests, including at the March 19 hearing. To aid the Court, Exhibit A to the Hirose Declaration specifies the categories of disputed requests that are addressed by this briefing.

The First Amendment privilege extends to the disclosure of any type of information that may chill protected activity, *see Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2009)—including the “compelled disclosure of the sources or uses of an organization’s funds.” *ISKCON*, 1985 WL 315, at *8; *see also Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (“financial transactions can reveal much about a person’s activities, associations, and beliefs” (internal quotation marks omitted)). As the Supreme Court made clear in *Brown v. Socialist Workers ’74 Campaign Committee (Ohio)*, 459 U.S. 87, 96–98 (1982), the First Amendment’s protections extend even to basic commercial transactions, because disclosure of expenditures to individuals may result in harassment and “cripple” an organization’s “ability to operate effectively.”

The Second Circuit requires that a party asserting the First Amendment privilege simply “articulate some resulting encroachment on their liberties.” *Terry*, 886 F.2d at 1355.⁵ “Mindful of the crucial place speech and associational rights occupy under our constitution, we hasten to add that in making out a *prima facie* case of harm the burden is light.” *Id.*; *see also Local 1814 Int’l Longshoreman’s Ass’n v. Waterfront Comm’n of N.Y. Harbor*, 667 F.2d 267, 272 (2d Cir. 1981) (adopting a “commonsense approach” to the analysis of chilling effects; rejecting defendant’s argument that plaintiffs must show that disclosure would lead to economic or physical harassment).

Once a party articulates an encroachment on its liberties, the burden shifts to the inquiring party to demonstrate “the necessary compelling interest in having discovery.” *Terry*, 886 F.2d at 1355. In contrast to the “light” burden on the party objecting to disclosure of First

⁵ These cases also make clear that plaintiffs do not waive their First Amendment rights by seeking redress in the courts. *See, e.g., ISKCON*, 1985 WL 315, at *9 n.16 (stating that any argument to the contrary “has been explicitly rejected by numerous courts”); *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 954 F. Supp. 2d 127, 139–144 (E.D.N.Y. 2013); *Schiller v. City of N.Y.*, 2006 WL 3592547, at *5 (S.D.N.Y. Dec. 7, 2006).

Amendment-protected information, courts have “consistently emphasized the strictness of the showing that the inquiring party must make,” *ISKCON*, 1985 WL 315, at *8, as “[i]nfringement of First Amendment interests must be kept to a minimum,” *Black Panther Party v. Smith*, 661 F.2d 1243, 1268 (D.C. Cir. 1981), *vacated on other grounds*, 458 U.S. 1118 (1982). To establish a compelling interest, the party seeking disclosure must show that the information is “‘crucial to [its] case,’ or that it goes to the ‘heart of the claims.’” *ISKCON*, 1985 WL 315, at *8 (citations omitted). Applying these standards, Defendants’ discovery requests must be denied.

B. The First Amendment privilege bars Defendants’ requests for Plaintiffs’ protected financial information.

Plaintiffs have more than satisfied their “light” burden of articulating an encroachment on First Amendment-protected activities. *Terry*, 886 F.2d at 1355. The very crux of this lawsuit is Plaintiffs’ claim that Defendants’ discriminatory investigations have bred significant distrust, fear, and anxiety among Plaintiffs and New York’s Muslim communities at large, causing harm to Plaintiffs’ religious beliefs, practices, and associations. *See, e.g.*, Compl. ¶¶ 5, 49, 66, 73, 76, 119, 126, 145, 155, 160. The accompanying declarations from Plaintiffs Muslims Giving Back and Masjid At-Taqwa show that compelled disclosure of their financial documents would further alienate and chill congregants, members, donors and donees, expose Plaintiffs’ “sources and uses of funds” to unwarranted scrutiny, and thereby infringe on Plaintiffs’ rights to free exercise, free speech, and associational privacy.⁶ *ISKCON*, 1985 WL 315, at *9 n.16; Dandia Decl. ¶¶ 3, 7 (detailing harm); Osman Decl. ¶¶ 3, 6–7 (same). Thus, permitting Defendants to access wide-ranging financial records “would have the practical effect of discouraging the exercise of

⁶ Indeed, even if there were “no evidence of past or present misconduct on the part of the [NYPD],” the NYPD has tremendous “power over [Plaintiffs],” for example, the power “to conduct investigations . . . and to bring legal action.” *Australia/E. U.S.A. Shipping Conference v. United States*, 537 F. Supp. 807, 812 (D.D.C. 1982), *vacated on other grounds*, 1986 WL 1165605 (D.C. Cir. Aug. 27, 1986). Such power raises the “possibility of harassment” stemming from disclosure of Plaintiffs’ financial information, and this alone “is a cognizable basis for a chilling effect” in the discovery context. *Id.*

constitutionally protected rights.” *NAACP*, 357 U.S. at 461; *see also ISKCON*, 1985 WL 315, at *9 (plaintiffs made a sufficient First Amendment showing where defendants’ interrogatories “entail[ed] an extensive inquiry into plaintiffs’ associations and their finances,” and plaintiffs’ group was subject to “occasionally overt hostility”).

As a consequence, the burden shifts to Defendants to demonstrate a “compelling need” for the many kinds of financial records they seek. Defendants cannot possibly make such a showing given the claims in this case and the availability of alternatives.⁷ Plaintiffs do not seek damages, but injunctive and declaratory relief. *See* Compl. at 32 (Prayer for Relief). A single Plaintiff—Muslims Giving Back—has alleged a decline in donations. *See id.* ¶¶ 106–07. To enable Defendants to test this allegation, Plaintiffs have offered to produce an itemized compilation of donations received by MGB. In lieu of donor names, Plaintiffs would assign donor IDs, so that Defendants are able to isolate the patterns of individual donors. This compilation would provide sufficient information for Defendants to test the complaint’s discrete allegations concerning MGB’s decline in donations.⁸

Defendants, however, continue to seek information about virtually any type of business or financial activity in which Plaintiffs MGB and Masjid At-Taqwa have engaged. Defendants claim that they have limited their requests, yet they still seek *all* of these Plaintiffs’ bank statements; all documents concerning Plaintiffs’ income, revenue, or gross earnings; all documents concerning Plaintiffs’ expenses or expenditures; all profit and loss statements; and all

⁷ During the parties’ negotiations, Defendants indicated that they will withdraw their broad requests for the financial records of those Plaintiffs who are not asserting a loss in donations, with the exception of Masjid At-Taqwa. To the extent that Defendants maintain their requests for other Plaintiffs’ financial documents, the arguments made here apply to those requests.

⁸ Although Plaintiffs maintain that even anonymized compilations of donations risks revealing First Amendment-protected information about MGB, Plaintiffs have offered this data in an effort to facilitate full and fair litigation of the allegations in the complaint.

general ledger records. Request No. 23. That is only one request. Their other requests for financial records seek, variously, all records relating to the sale of goods, all real estate records, all tax records, and all records of outgoing donations or contributions. *See* Requests Nos. 21, 22, 23, 24, 25, 28, 29, 44, 45, 47 & 64; Interrogatory No. 53.⁹ These requests apply to both MGB and Masjid At-Taqwa, even though MGB has alleged only a decline in donations, and Masjid At-Taqwa is not alleging any economic injury at all.

Defendants have offered a number of theories for the relevance of their sweeping requests. None of these theories meet the threshold showing for relevance, and none satisfy the high burden of a “compelling need” to obtain information protected by the First Amendment.

First, with respect to MGB, Defendants argue that they should be able to examine every inflow or outflow of funds in order to test MGB’s specific allegation that it suffered a decline in *donations*. *See* Compl. ¶ 107; Conference Tr. 64:21–65:22, 71:12–72:17. But Defendants do not need MGB’s bank statements, profit and loss statements, general ledgers, complete tax records, documents concerning the sale of goods, real estate documents, and the other financial materials sought by the requests to assess this claim. *See Dyckoff v. Prime Designs Licensing Ltd.*, 1984 WL 899, at *1 (S.D.N.Y. Sept. 26, 1984) (rejecting request for financial discovery where requesting party “merely asserts that sweeping discovery of [] financial records might produce material that would raise factual issues”); *E.E.O.C. v. First Wireless Group, Inc.*, 225 F.R.D. 404, 406 (E.D.N.Y. 2004) (denying request for tax information where it was sought to test the credibility and veracity of other claims). Defendants even seek individual records for “all contributions, donations, and grants, made by plaintiffs,” despite the fact that these documents

⁹ Defendants requests to Plaintiffs for financial or tax records of the Zam Zam Shop or Taqwa Bookstore are also improper because these are separate entities and not parties to this litigation.

would say little about the organization's overall receipts, and even less about the specific decline in donations that MGB alleges. Request No. 29 (emphasis in original). Like a great many of the requests, the asserted relevance of this discovery is extremely attenuated, while its burden on First Amendment activity is plain.

Similarly, Defendants assert that they are entitled to test the financial health of MGB (and potentially other Plaintiff organizations) because they read Plaintiffs' complaint as asserting that MGB's general financial health declined. *See* Conference Tr. 65:21–67:7. But a years-long inquiry into MGB's general financial health is not relevant to its specific allegations concerning a decline in donations in the period after Shamiur Rahman revealed that he was an NYPD informant and had infiltrated the organization. An example illustrates the point. If a single person X stopped donating to MGB because of NYPD's infiltration of the charity, that constitutes an economic loss even if it occurred at the same time that MGB received an increase in donations from person Y. What matters is that the organization was still worse off than it would have been if person X had continued to donate alongside person Y.¹⁰ Moreover, it cannot be that when a charitable or religious organization claims one source of contributions has been adversely affected by government action, it opens itself up to what is, in effect, a government audit of its finances and its non-profit status. That is particularly true because of the First Amendment implications of such discovery—and the specific claims of NYPD overreaching in this case.

¹⁰ Additionally, to be clear, Plaintiffs' allegations regarding the harm to MGB are not solely reflected in income. The charity is also worse off, as a matter of First Amendment associational harm—as distinct from financial harm—because person X has been driven away from participating in MGB's food drives and other religious activities. Similarly, when an Imam withdrew his support for MGB after NYPD informant Shamiur Rahman's revelations, that deprived MGB of its primary meeting-place and new volunteers. Compl. ¶ 108. These harms are at the heart of Plaintiffs' claims and, as discussed above, Defendants would be able to contest these claims through the donation information Plaintiffs have agreed to provide, and in depositions.

Second, with respect to Masjid At-Taqwa, Defendants assert that they seek wide-ranging financial discovery in order to “corroborate”—or retroactively justify—the NYPD’s decision to investigate the mosque. Given that Masjid At-Taqwa is not alleging an economic loss, these records are plainly irrelevant to the lawsuit. And as discussed *infra*, Section II, Defendants’ attempt to retroactively justify their investigative decisions runs afoul of both equal protection law and Fourth Amendment standards.

Finally, Defendants justify a number of requests on the grounds of standing-related discovery—but Plaintiffs’ standing to bring this lawsuit is not properly in dispute. There is no question that Plaintiffs have a sufficient “personal stake in the outcome of the controversy,” *Horne v. Flores*, 557 U.S. 433, 445 (2009) (quotation omitted), to reach the merits of their discrimination claims: Defendants have indicated that the NYPD Intelligence Division maintains in its files approximately 6,000 pages related to its investigations and surveillance of Plaintiffs.¹¹ Among other relief, Plaintiffs seek the expungement of these police records. Compl. at 32 (Prayer for Relief). This claim for expungement is, by itself, sufficient to establish standing. As the Second Circuit observed in *Tabbaa v. Chertoff*, “Defendants properly do not contest that plaintiffs possess Article III standing based on their demand for expungement.” 509 F.3d 89, 96 n.2 (2d Cir. 2007) (citing *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1152 (D.C. Cir. 2004)); *see also Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C. Cir. 1974). These courts have recognized the harms that arise when individuals’ names and activities are added to law

¹¹ Defendants have acknowledged that each Plaintiff was subject to NYPD surveillance, thus conceding that Plaintiffs have suffered concrete, particularized, and actual injuries that give rise to standing. *See* Answer ¶ 11 (admitting surveillance at Plaintiff Masjid Al-Ansar); ¶ 12 (admitting surveillance of Plaintiff Dandia); ¶ 14 (admitting surveillance at Plaintiff Masjid At-Taqwa); ¶ 15 (admitting surveillance of Plaintiff Elshinawy); ¶¶ 37, 88 (admitting Shamiur Rahman was a confidential informant and attended an FSNYC meeting); ¶ 50 (admitting NYPD personnel have met with Plaintiff Imam Raza); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (setting forth requirements for Article III standing).

enforcement files, and have held that the existence of these records confers standing. *See Tabbaa*, 509 F.3d at 96 n.2; *Hedgepeth*, 386 F.3d at 1152; *Menard*, 498 F.2d at 1023.

In the context of equal protection claims, as here, these records represent an additional injury: they are the concrete product of Defendants' discriminatory conduct, and classification on the basis of religion is a distinct legal injury for standing purposes. *See, e.g., Heckler v. Mathews*, 465 U.S. 728, 738–40 & n.9 (1984) (standing exists where plaintiff alleges unequal treatment based on membership in a protected class); *Allen v. Wright*, 468 U.S. 737, 755 (1984) (standing exists in discrimination suit where stigma is the “direct result of having personally been denied equal treatment”). The NYPD's own records are evidence, for standing purposes, that Plaintiffs were singled out for scrutiny. The question that remains is one that goes to the merits—whether this scrutiny was based on Plaintiffs' religious beliefs or practices. According to Defendants themselves, evidence relevant to that merits question is in the NYPD's own still-undisclosed files, which purport to establish a law enforcement basis for Defendants' investigations. It is not to be found in Plaintiffs' First Amendment-protected financial and tax records.

In short, Defendants' requests for financial records fail to satisfy even the minimal relevance requirements of Federal Rule of Civil Procedure 26(b), let alone the heightened showing required for First Amendment-privileged information. These financial documents are in no way “crucial to the . . . case,” nor do they go to the “heart of the claims.” *ISKCON*, 1985 WL 315, at *8 (internal quotation marks omitted). Those requests should be denied.

C. Plaintiffs' privacy interests in tax records bars their disclosure.

Plaintiffs' non-public tax information is independently subject to heightened protection from discovery. Although tax records are not inherently privileged, “courts are typically reluctant to compel their disclosure,” in part because of “the private nature of the sensitive information

contained therein.” *Melendez v. Primavera Meats, Inc.*, 270 F.R.D. 143 (E.D.N.Y. 2010) (internal quotation marks omitted). When determining whether to compel discovery of an individual’s tax returns, courts apply a two-pronged test: (1) the tax records must be relevant to the subject matter of the action, and (2) a “compelling need” must exist because the information is not readily available from a less intrusive source.” *Id.* The party seeking discovery bears the burden of establishing both prongs. *Id.* Defendants’ requests for tax records fail to meet this test.

Defendants’ Requests Nos. 22 and 64 seek tax information from MGB and Masjid At-Taqwa, including non-public information such as pay stubs, W-2s, and Schedule B to the Form 990, which identifies the names and addresses of contributors to the organization. *See* 26 U.S.C § 6104(d)(3)(A). For the same reasons that these requests fail to satisfy the First Amendment “compelling interest” standard, Defendants have failed to show that the requests are relevant and that a compelling need for the information exists. *See, e.g., Chen v. Republic Rest. Corp.*, 2008 WL 793686, at *2–3 (S.D.N.Y. Mar. 26, 2008) (determining that plaintiff’s tax returns were not discoverable because there were better ways to obtain the specific factual information at issue—the number of hours plaintiff worked). That is especially true because production of tax information is unnecessary. If Defendants wish to test MGB’s allegation about its decline in donations, MGB’s proposed compilation of donation records—in conjunction with opportunities for depositions of the organization’s members—would provide Defendants with the relevant information. *Cf. Sabatelli v. Allied Interstate, Inc.*, 2006 WL 2620385 (E.D.N.Y. Sept. 13, 2006) (in case involving punitive damages claims, party seeking financial records did not show a compelling need because deposition testimony would provide an “adequate picture”). *See* Dandia Decl. ¶¶ 3, 7; Osman Decl. ¶¶ 3, 7, 8.

D. The First Amendment privilege bars Defendants' other requests for protected information.

The Court has under advisement a number of Defendants' discovery requests that go far beyond financial information in demanding material protected by the First Amendment. Just as Defendants' overly broad and unwarranted inquiry into Plaintiffs' financial and tax records shows an insensitivity to Plaintiffs' First Amendment rights, so too do Defendants' similar requests for Plaintiffs' associational information and protected speech. Plaintiffs address here why disclosure of information in response to those requests is also barred, and provide supporting evidence through their declarations.

1. Defendants are not entitled to sensitive associational information.

Defendants have served requests seeking core associational information such as identities of members, congregants, and attendees at charitable events—including the identities of individuals *most* fearful of drawing unwarranted NYPD scrutiny. For instance, Defendants seek:

- The identities of “all persons” at Masjid Al-Ansar who are worried whether they are safe from spying or suspicious of their fellow worshippers. (Interrogatory No. 9)
- The identities of congregants of Masjid At-Taqwa who were intimidated or who suffered anxiety from the NYPD surveillance camera. (Interrogatory No. 27)
- The identities of “all persons” who were active members of MGB's predecessor organization, Fesabeelillah Services of NYC, Inc. (“FSNYC”), or who “regularly attended” its events. (Interrogatory No. 11)
- The identities of “all speakers, invitees, and attendees” at a fundraising event put on by MGB. (Interrogatory No. 17)

See also Requests Nos. 43, 59, & 60; Interrogatories Nos. 5, 6, 8, 10, 12, 18, 19, 20, 25, 28, 34, 37, 38, 43, 44, 45, & 47.¹² Many of these requests amount to complete or partial membership or

¹² Immediately before the March 19 hearing, Defendants proposed converting Request No. 59 into an interrogatory seeking the names of all the attendees at the April 13, 2012 MGB meeting, and converting Request No. 60 into an interrogatory seeking the names of all the FSNYC members who told Mr. Dandia that they would cease activities with the organization. Plaintiffs have consistently objected to providing

congregation lists for the Plaintiff organizations. Even if the information were relevant under Rule 26(b) (and Plaintiffs discuss below why it is not), Defendants cannot show a compelling need for it.

As the Supreme Court has recognized, Plaintiffs' First Amendment interest in their membership information is acute. *See NAACP*, 357 U.S. at 459–63. In analogous contexts, courts have denied requests for precisely this kind of First Amendment-privileged information about members and congregants. For example, in *ISKCON*, 1985 WL 315, at *9, defendants' interrogatories inquired into the plaintiff religious organization's associations, as well as the names of certain members—information that is unquestionably privileged under the First Amendment. Because the defendants were unable to establish a compelling need for the information, the court denied the interrogatories. *See id.* at *17–18; *see also Perry*, 591 F.3d at 1162 n.9 (the First Amendment privilege extends beyond financial information and membership lists; associations have the right “to be free of infringements in their internal affairs”); *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 69 (2006) (disclosures that would make “group membership less attractive” raise First Amendment concerns).

Indeed, even where the requesting party seeks protected associational information that may be relevant, courts have denied requests that fail to satisfy the First Amendment's far more stringent “compelling interest” standard. In *Schiller*, 2006 WL 3592547, at *5–6, another suit against the NYPD, the City's discovery requests sought the names of members of a pacifist organization. The court found the identities of these members were relevant to the claims and defenses at issue; however, it applied the heightened standard for First Amendment-protected information, concluding that “[t]he minimal relevance of a plaintiff's membership in the WRL or

this information on First Amendment grounds and maintain their objections should Defendants seek it through interrogatories.

presence at a WRL planning meeting is insufficient to meet the City's burden of showing a compelling interest in having discovery." *Id.* at *6 (internal quotation marks omitted). The exacting "compelling interest" standard applies with equal force here, where Defendants' requests seek equivalent membership information.

Plaintiffs' declarations attest to the harms that would flow from responding to these requests, which would damage relationships and engender fear across the Plaintiffs' religious associations. *See* Dandia Decl. ¶¶ 5–7 (describing harms and stating "if Muslims Giving Back or I were to disclose information to the NYPD about our members, donors, and people who come to our events, it would be as if we ourselves were acting as NYPD informants"); Osman Decl. ¶¶ 5–8 ("Such a violation of trust would chill our congregants' religious practice and affiliation with us and lead to a further decline in the membership of our congregation"); Elshinawy Decl. ¶¶ 5–7 (harms include that "the communities within which I work and preach would no longer trust me and that would significantly harm my religious goals and activities"); Raza Decl. ¶¶ 5–7 ("[D]isclosure will have a chilling effect on my congregants' religious practices, their religious affiliation with Masjid Al-Ansar and lead to a steeper decline in attendance at the mosque.").

Plaintiffs' fears, and those of their congregants and members, are objectively reasonable in light of the widely-recognized post-9/11 history of discrimination against American Muslims and those who appear to be Muslim. As the Department of Justice's Civil Rights Division has highlighted, that history includes an increase in: hate crimes; employment discrimination; and bullying of and religious discrimination against Muslim students. *See* Hirose Decl. Ex. F, U.S. Dep't of Justice, *Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later* (Oct. 19, 2011), <http://1.usa.gov/1h7jur6>. Mosques, especially, have been subjected to attacks, threats, and even zoning and land-use discrimination by local authorities.

See id. at 7, 11–12; 15 (Pew Research Center Survey finding that “25% of Muslim Americans surveyed said that mosques or Islamic centers in their communities had been the subjects of controversy or hostility”). Religious and charitable organizations would be deterred from challenging unlawful police investigations if, in doing so, they had to subject their members to broad identification and potential inquisition by the very authorities they fear. The First Amendment privilege resolves this dilemma, by shielding Plaintiffs from requests for protected information absent a showing of compelling need by Defendants.

Defendants cannot meet their burden of demonstrating a compelling need for protected religious and other associational information. *See Terry*, 886 F.2d at 1355. In many instances where they seek complete or partial membership lists, Defendants cannot even make a bare showing of relevance to claims or defenses: for example, their demand for the identities of all active members, donors, or regular attendees of MGB’s predecessor organization, FSNYC (Interrogatory No. 11); and their demand for the identities of all persons present at a charitable event hosted by MGB, which as many as 200 people attended (Interrogatory No. 17). For numerous other requests, Defendants seek the identities of congregants, members, or associates affected by the NYPD’s surveillance, including those individuals made most fearful by this police scrutiny. *See, e.g.*, Interrogatories Nos. 8, 9, 10, 18, 25, 27, 28, 34, 43, 44 & 47.

Conclusively for the purposes of the First Amendment analysis, the information Defendants seek is not necessary because Defendants have alternative ways of probing the impact on Plaintiff organizations: namely, through the depositions of mosque leaders and charity board members who observed and experienced those effects firsthand. *See ISKCON*, 1985 WL 315, at *17 (to show a compelling need, the requesting party must show both “central relevance” and “the unavailability of alternative sources of information”); *cf. Gonzales v. Nat’l Broad. Co.*,

Inc., 194 F. 3d 29, 36 (2d Cir. 1999) (in the analogous “reporters’ privilege” line of cases, the Second Circuit determines whether information sought is “reasonably obtainable from other available sources”); *In re Petroleum Prods. Antitrust Litig.*, 680 F. 2d 5, 7–8 (2d Cir. 1982); *In re McCray, Richardson, Santana, Wise, and Salaam Litig.*, 928 F. Supp. 2d 748, 758 (S.D.N.Y. 2013) (in reporter’s privilege case, requesting party failed to show that material was unavailable from other sources because it had not yet deposed plaintiffs).

2. Defendants are not entitled to protected religious or political speech.

The First Amendment’s protections also extend to Defendants’ broad requests for information about Defendants’ religious or political speech. For example, Defendants seek:

- All documents and communications by Plaintiffs concerning “terrorism,” “jihad,” “Califate,” “revolution,” “mujahedeen,” “the war in Afghanistan,” “current events,” “khufar,” or “Inspire.” (Request No. 12)
- All documents and communications between Plaintiff Elshinawy and his father concerning Omar Abdel Rahman, the Al Kifah Refugee Center, or the Islamic Group. (Request No. 30)

As an initial matter, these requests have no bearing on Plaintiffs’ claims or any legitimate defenses. Instead, Defendants seek this information in an effort to justify their investigations of Plaintiffs after the fact. Defendants, however, are not permitted to cast about for new information to support their investigations, as explained more fully below. *See infra*, Section II. But even if the Court were to accept Defendants’ theory of relevance, it would have to deny these requests as overbroad infringements of First Amendment rights. *See also* Requests Nos. 14 & 34.¹³ Discussions that include these topics represent core political and religious speech—news, commentary, and political debate commonly refer to the war in Afghanistan, terrorism, and revolutions. *See* Request No. 12. As Plaintiffs’ declarations attest, disclosure of their day-to-day

¹³ Plaintiffs object to these two requests on the ground that they are overbroad and thus encompass First-Amendment protected speech.

discussions—for periods of years—about their views on foreign affairs, current events, and religious beliefs and practices would further chill them from the exercise of their First Amendment rights. *See* Dandia Decl. ¶ 8 (“[F]or me, the need to combat poverty and promote peace abroad are religious obligations. The NYPD’s requests for this kind of information frighten me.”); Osman Decl. ¶ 9 (“These requests probe into a vast amount of speech activity of the Masjid. . . . This is the type of scrutiny that we wanted to prevent in joining this lawsuit.”); Elshinawy Decl. ¶ 7 (“If I am required to disclose this kind of information, I would be far less likely to speak on any of these matters even though they are part of my religious ministry.”); Raza Decl. ¶ 7 (“[I]n the course of one sermon, I said that “Islam has no place for terrorism,” I condemned those who advocate for violent jihad, and I discussed obesity as the leading cause of death in the United States. Disclosing all of my speech that contained any of those types of statements will mean disclosure to the NYPD of years of my religious speech . . . It will further chill my religious speech going forward if what I say will end up in the NYPD’s files.”).

Defendants have failed to articulate a compelling need for any of this information, particularly in the face of the plain chilling effect it would have on Plaintiffs. *See Schiller*, 2006 WL 3592547 at *7 & n.7 (refusing to order the disclosure of “discussions of ideas and political perspectives”).

E. Neither a protective order nor redactions protect Plaintiffs’ First Amendment interests.

Defendants may argue that the protective order in this matter resolves Plaintiffs’ First Amendment concerns—but that is not the case. Most obviously, if a protective order were sufficient to overcome the First Amendment interest in associational information, *NAACP v. Alabama* would have been decided quite differently. And, indeed, courts in the Second Circuit and elsewhere have expressly rejected the view that a protective order is adequate to protect First

Amendment rights. For example, in *Schiller*, 2006 WL 3592547, at *5 n.5, the City of New York sought meeting minutes from a pacifist organization, arguing that designation of the minutes as “attorneys’-eyes-only” could adequately allay any fear of public disclosure. The court rejected the City’s position, observing that it is “the government itself that Plaintiffs fear, and therefore confining the information to government . . . counsel will hardly assuage those fears or avoid the intimidation that Plaintiffs fear might follow.” *Id.* (quotation marks omitted); *see also Int’l Action Ctr. v. United States*, 207 F.R.D. 1, 2–3 (D.D.C. 2002) (rejecting government’s argument that a protective order would address plaintiffs’ concerns about disclosure of list of contributors).

As in *Schiller* and *International Action Center*, Plaintiffs’ congregants, members, and donors understandably fear government intrusion into their private associations. They fear scrutiny by the NYPD as well as an inquisition by its attorneys. *See* Dandia Decl. ¶ 9; Osman Decl. ¶ 10; Elshinawy Decl. ¶ 8; Raza Decl. ¶ 8. Moreover, in this case, the protective order allows not only Corporation Counsel to access Plaintiffs’ designated material, but it permits an unlimited number of NYPD attorneys and support staff to see that information as well. *See* Protective Order (Mar. 20, 2014), ECF No. 45. This lawsuit challenges discriminatory police practices, including the unwarranted investigation of Plaintiffs and their members. Plaintiffs’ right to seek judicial redress cannot reasonably require that they subject themselves to even more intrusive investigation now, through civil discovery—including identifying, for the NYPD or its attorneys, those congregants and members severely affected and intimidated by police scrutiny.

For similar reasons, redactions alone cannot resolve Plaintiffs’ First Amendment objections. Even if Defendants agree that Plaintiffs can redact the names of congregants and members from, for example, attendance lists and similar documents, the redaction protocols do not address all of Plaintiffs’ assertions of First Amendment privilege. For example, even if MGB

and Masjid At-Taqwa were permitted to redact the identities of individual donees from their business records, the compelled disclosure of expenses would still violate Plaintiffs' First Amendment interest in the underlying financial data—because that data would reveal the *nature* of Plaintiffs' activities and expenditures. *See ISKCON*, 1985 WL 315, at *8 (sources and uses of an organization's funds are protected); Request No. 23 (requesting all documents concerning Plaintiffs' expenditures). Furthermore, several of the discovery requests seek First Amendment-protected information that cannot be redacted in any meaningfully protective manner. *See, e.g.*, Request No. 29 (seeking all documents concerning donations made by plaintiffs, including donee lists); *see also* Hirose Decl., Ex. A (listing interrogatories seeking identities). Thus, these discovery requests must be denied in their entirety.

II. Defendants' wide-ranging requests impermissibly seek information to retroactively justify NYPD conduct.

Defendants' requests for financial information are also improper because they set out to retroactively justify the NYPD's investigations. The same is true of numerous other requests to which Plaintiffs object and which the Court has taken under advisement, including open-ended requests seeking, post-hoc, to connect Plaintiffs to any individual accused of terrorism.¹⁴ In analogous contexts, the case law is clear: when assessing the merits of claims like Plaintiffs', courts determine whether the conduct was lawful at the time it occurred, based on the information law enforcement possessed at that time. Applying this law to the disputes before the Court, these discovery requests must be denied.¹⁵

¹⁴ Plaintiffs do not concede that any of the information Defendants seek through these financial and other requests exists, or that it would justify the NYPD's investigations.

¹⁵ *See* Requests Nos. 5, 6, 11, 12, 13, 21, 22, 23, 24, 25, 28, 29, 30, 43, 44, 45, 47, & 52; Interrogatories Nos. 53, 55, & 56. As discussed in Section I *supra*, some of these requests also raise significant and distinct First Amendment concerns. Other requests, because of their overbreadth, could likewise capture documents that implicate Plaintiffs' First Amendment rights. *See, e.g.*, Requests Nos. 5, 6, 11, & 13.

Cases in both the discrimination and law enforcement contexts make clear that in order to defend their policies and practices in this case, Defendants may rely only on the information they possessed *at the time* they decided to investigate Plaintiffs. For example, in the analogous Title VII context, this court has recognized that an allegedly discriminatory employment decision must be evaluated on the basis of “the information that was available to Defendant at the time of the decision.” *Sarmiento v. Queens College CUNY*, 386 F. Supp. 2d 93, 97, 101, 117 (E.D.N.Y. 2005); *see Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 85 (2d Cir. 2005) (assessing whether evidence in age-discrimination suit was “probative of defendants’ knowledge” as to plaintiff’s age “at the time” of her discharge); *Heilweil v. Mt. Sinai Hosp.*, 32 F.3d 718, 724–25 (2d Cir. 1994) (relevant evidence is “limited to the evidence relied on by the employer at the time the decision was made” (quoting *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985))).

Similarly, when determining whether probable cause exists for an arrest in the law enforcement context, courts consider only “those facts available to the officer at the time of the arrest and immediately before it.” *Caldarola v. Calabrese*, 298 F.3d 156, 162 (2d Cir. 2002) (internal quotation marks omitted); *see also Stansbury v. Wertman*, 721 F.3d 84, 89 (2d Cir. 2013) (same); *Finigan v. Marshall*, 574 F.3d 57, 61–62 (2d Cir. 2009) (the “inquiry is an objective one that focuses on the facts available to the arresting officer at the time of the arrest”); *cf. United States v. Reilly*, 76 F.3d 1271, 1273 (2d Cir. 1996) (rejecting police claim that evidence found after a search was underway could justify good faith exception to the exclusionary rule). These principles apply with equal force to the religious discrimination claims at issue here: the NYPD’s decisions to investigate Plaintiffs must be judged on the information in the NYPD’s files when those investigations were initiated. Defendants cannot use civil discovery

to search for new information about Plaintiffs, in order to avoid the conclusion that they acted pursuant to a discriminatory policy or practice.

This body of law is so well-established that even Defendants admit its application. Conference Tr. 18:22–19:9. They offer two alternative arguments to support their expansive requests, both of which fail.

First, Defendants claim that their need for financial and other information stems from Plaintiffs' refusal to concede, from the outset, the accuracy of the facts in the NYPD's files. Defendants say they simply want to confirm *those* facts. Yet the notion that Defendants simply want to confirm information already in the NYPD's files collapses as soon as one looks at the various requests. The requests are drawn to sweep widely, not to inquire narrowly into facts already known. The requests for Masjid At-Taqwa's financial information are illustrative. As described above, Defendants seek vast amounts of information about Plaintiff Masjid At-Taqwa's finances *regardless* of whether it asserts an economic loss. *See supra*, Section I. (discussing requests seeking virtually every type of business record). These demands for discovery are predicated instead on Defendants' view that Masjid At-Taqwa's financial history allegedly provided a basis for law enforcement scrutiny. Conference Tr. 61:13–64:2. Under Defendants' logic, they are thus entitled to engage in wholesale discovery of Plaintiff's financial information, stretching back more than a decade.

Defendants invoke the same logic with respect to a host of other requests, demanding wide swaths of information that they claim would “corroborate” the NYPD's law enforcement interest in Plaintiffs. But Defendants' goal is transparent—they aim to uncover *new* information that would, in their view, support the NYPD's investigations. For instance, they seek *all* of Plaintiffs' communications “from, to, or concerning” a list of twenty-six individuals, many of

whom are accused of terrorist ties. Request No. 5. It is neither true, nor conceivable, that all six of the Plaintiffs have communicated with or about all of these individuals. Even more generally, they seek all of Plaintiffs communications with *any* person charged or convicted of a terrorism-related offense. Request No. 6. They seek all documents concerning the use of force or violence to effect political change—even though this request would include many history books—and all documents concerning “terrorism,” “the war in Afghanistan,” “revolution,” and a slate of common words. Request Nos. 11, 12, & 13. Despite Defendants’ label, these requests are not merely “corroborating”—they seek to open up entirely new avenues of NYPD investigation.

Defendants’ claim that their requests all go to facts in dispute is false for another reason: Plaintiffs have not yet seen a single one of the NYPD’s investigative files. It may well be that Plaintiffs will not dispute some portion of that information.¹⁶ But until they see those files, Plaintiffs cannot possibly identify which specific facts they will contest. To Defendants, however, that refusal throws open the door to discovery, entitling them to requests reaching far and wide into Plaintiffs’ private affairs. In this way, Defendants seek to force Plaintiffs into an impossible choice: they would have Plaintiffs either concede the accuracy of every fact in the NYPD’s files, sight unseen, or else have Plaintiffs subject themselves to dozens of discovery requests about anything Defendants today claim would support a law enforcement interest.

But this is a false choice. Plaintiffs have proposed an alternative that courts regularly embrace in these circumstances. In particular, discovery on this subset of issues would be resolved through a targeted, sequential process: Defendants would provide access to the NYPD’s investigative materials as currently contemplated and, once Plaintiffs have reviewed those

¹⁶ Nothing in Plaintiffs’ September letters indicates that they intend to dispute every fact in the NYPD’s files, despite Defendants’ attempt to mischaracterize those letters. *See* Ltr. from Pls. to Judge Azrack, Sept. 11, 2013, ECF No. 12; Ltr. from Pls. to Judge Chen, Sept. 12, 2013, ECF No. 13.

documents, the parties would identify the specific facts in dispute. Defendants would then have the opportunity to conduct discovery tailored to the contested facts. Federal Rule of Civil Procedure 26 “vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.” *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). This process allows Defendants to explore facts actually in dispute, while ensuring that they do not seek open-ended discovery to retroactively justify their investigations.

During the March 19 conference, however, Defendants argued that this process would result in Plaintiffs unfairly “cherry picking” factual disputes. In other words, Defendants suggested that if Plaintiffs choose to contest *some* statements in NYPD files, the process by which Plaintiffs select those facts will somehow disadvantage Defendants.

Put simply, this argument defies common sense. Defendants will have the benefit of every fact in the NYPD’s files that Plaintiffs elect not to dispute. By reserving the right to contest NYPD observations that lack a factual basis, Plaintiffs are not “cherry picking”—they are potentially *conceding* the accuracy of some NYPD information, while preserving the ability to challenge inaccuracies in an efficient and targeted way. As described above, Plaintiffs have offered to provide discovery on any facts ultimately in dispute between the parties. Plaintiffs should not be subjected to irrelevant and invasive discovery requests from the outset simply because they refuse to agree, without having seen a single NYPD investigative statement, that the contents of those files are accurate.

Defendants put forward a second, fallback theory for these same requests: they seek information that, in their view, will allow them to “impeach” Plaintiffs’ characters, arguing that their document requests are relevant to “reputational harm.” This argument fails for at least three reasons. First, Plaintiffs’ complaint sets forth claims for discrimination, not defamation; it

specifically alleges the particular reputational harm caused by the NYPD's discriminatory surveillance. *See, e.g.*, Compl. ¶¶ 153, 155 (knowledge and fear that Plaintiff Elshinawy was under NYPD surveillance has affected his relationships with Brooklyn Islamic Center and Masjid Al-Ansar); Compl. ¶ 106 (infiltration by an NYPD informant strained Plaintiff MGB's relationship with Masjid Omar). These allegations, together with many others, go to the core issue for First Amendment liability: the specific ways in which Plaintiffs' religious practice and belief have been targeted and burdened by the NYPD's surveillance. *See, e.g.*, Compl. ¶ 5 (Plaintiff religious leaders are recording their sermons and censoring their speech); Compl. ¶ 5 (attendance has declined at Plaintiff mosques); Compl. ¶ 126 (mosques are including third-party witnesses at counseling sessions out of fear of NYPD informants). These particularized allegations are not a license for Defendants to inquire into all of Plaintiffs' communications or conduct, in an attempt to find something that would impeach Plaintiffs' credibility.

Second, and relatedly, Defendants' requests are not tailored to the discovery of evidence concerning reputation, even in the limited way raised by Plaintiffs' complaint. These requests do not focus on the specific relationships that Plaintiffs allege were damaged by the NYPD's surveillance, such as Plaintiff MGB's relationship with Masjid Omar, or Plaintiff Elshinawy's relationship with Brooklyn Islamic Center. The requests instead venture far afield, seeking what is, in essence, derogatory character evidence. Indeed, Defendants' requests are not directed at *public* information about the Plaintiffs, as one would expect—quite the opposite. They seek Plaintiffs' private financial and business records (*e.g.*, Requests Nos. 23, 24 & 25), and Plaintiffs' private communications and documents (*e.g.*, Requests Nos. 12 & 30). Many of the requests that fall under this umbrella have no apparent bearing on Plaintiffs' reputation at all—for instance, Request No. 45 seeks records of all financial transactions between or among Masjid

At-Taqwa, the Zam Zam Shop, and the Taqwa Bookstore. In reality, this discovery is an attempt to explore Plaintiffs' associations—both business-related and personal—in search of anything damaging. Because Defendants are seeking new evidence to support their surveillance of Plaintiffs, the requests must be denied as an attempt to retroactively justify the NYPD's conduct. By invoking “reputation” in the abstract, Defendants are once again trying to make an end-run around well-established limits on discovery.

Finally, it cannot be that when a plaintiff alleges a stigmatizing injury, such as religious discrimination, defendants are permitted open-ended discovery to obtain any and all evidence of “character” or “reputation.” The Supreme Court has recognized the impact of discrimination on those subjected to unequal treatment through official conduct. *See Heckler*, 465 U.S. at 738–40. The consequence of seeking redress for these injuries cannot be a wide-ranging inquiry into all of a plaintiff's associations—whether to disparage the company he keeps, or to justify that discrimination in hindsight.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the document requests and interrogatories set forth in Exhibit A.

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New York, New York

Respectfully submitted,

/s/ Hina Shamsi

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