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Ahmed Al Rawi

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**BLOCKING FAITH: HOW AMERICAN MUSLIMS ARE
CHILLED THROUGH THE NEW ANTI-MUSLIM STATUTES
AND THE SECURITY AGENCIES' SURVEILLANCE IN THE
ERA OF DIGITAL POLICING**

*Ahmed Al Rawi**

ABSTRACT

This Article explores the legal repercussions resulting from the new wave of anti-Muslim statutes and the state monitoring operations on American Muslims' First Amendment rights. This Article argues that the U.S. government security agencies' surveillance operations (actions) that target American Muslims' religious activities and the new anti-Muslim statutes (laws) established in various states are clear violations of Muslim Americans' First Amendment rights.

* Ahmed Al Rawi is a Ph.D. candidate at the Donald P. Bellisario College of Communications at Penn State. Al Rawi's research interests are twofold: (1) Surveillance, Privacy, & the Implications of ICTs and (2) Broadband Policy, Platform Infrastructures, and ICTs. Al Rawi's research offers theoretical contributions in terms of law, policy, and regulation concerning emerging technology and broadband policy and deployment that intersect with the implication of ICTs in the fields of telecommunications and the media industry, not only in the United States but also internationally.

I. INTRODUCTION

The ongoing violation of the freedom of religion of American Muslims resulting from the U.S. government's two types of *chilling effects* (actions and laws) is a critical subject that needs to be discussed with the public. During the McCarthy era, the Supreme Court defined the chilling effect as any action or law that might hinder individuals from exercising their First Amendment rights in the U.S.¹ The surveillance operations by U.S. intelligence agencies on American Muslims' religious activities are the first type of chilling effect (action) on this minority religious group, and they are carried out due to fear of Muslim individuals.² Furthermore, the new wave of anti-Muslim statutes, such as Andy's law and anti-Sharia laws established in different states, are the second type of chilling effect—laws. These laws can lead to confusion among Muslim individuals about the limitation between exercising their freedom of religion and the punishment they could face for violating new statutes.³

This Article argues that the U.S. government security agencies' surveillance operations (actions) that target American Muslims' religious activities and the new anti-Muslim statutes (laws) established in various states are clear violations of Muslim Americans' First Amendment right of freedom of religion. Additionally, this Article suggests the following three points to alleviate the chilling-effect problem imposed by the U.S. government on American Muslims. First, a legal framework must be implemented that balances national security concerns with the constitutionally protected rights held by the Islamic community, in order to avoid confusion when courts make rulings on these types of cases. Second, lawmakers need to revise the anti-Muslim laws to avoid the threat to American Muslims for exercising their freedom of religion. Third, there needs to be

¹ *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964). In 1955, during the McCarthy era, Washington State passed an oath law requiring employees to swear not to join communist parties. Faculty members at the University of Washington filed a lawsuit to overturn the law, claiming that it restricts their First Amendment right due to their fear of government reprisal. In 1964, the Supreme Court ruled in the case of *Baggett v. Bullitt* that such a law results in a chilling effect that could hinder people from practicing their First Amendment rights freely.

² See generally Eric Lane, *On Madison, Muslims, and the New York City Police Department*, 40 HOFSTRA L. REV. 689, 699 (2012).

³ *Anti-Muslim Legislation*, <https://belonging.berkeley.edu/islamophobia/anti-muslim-legislation-interactive-map> (last visited June 1, 2023).

transparency concerning Executive Order 12,333, which has highly influenced the chilling-effect problem on American Muslims.

The next section of this Article discusses the chilling effect problem on American Muslims by touching on two points: (1) the violation of American Muslims' freedom of religion through the surveillance operations by U.S. security agencies; and (2) the violation of the American Muslims' freedom of religion through establishing anti-Muslim laws. Then, section three of this article discusses contemporary court cases related to the problem of the chilling effect and the violation of Muslims' freedom of religion by the U.S. government. Section four explains how the state secrets privilege works to violate Muslims' freedom of religion. Section five suggests legal frameworks to avoid confusion in court cases related to surveillance of American Muslims by U.S. government security agencies. Section six proposes revising the anti-Muslim laws to limit any possible violation of American Muslims' freedom of religion. Accordingly, section seven discusses the need for transparency regarding Executive Order 12,333 to reduce the chilling effect of legal problems on American Muslims.

II. A SURVEY OF THE CHILLING EFFECT ON AMERICAN MUSLIMS

[T]he opinions of men are not the object of civil government, nor under its jurisdiction: That to suffer the civil [m]agistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty.⁴

With these few sentences, Thomas Jefferson set the tone for our Founding Fathers, illustrating how the freedom of religion could be abused when the government interferes with individuals' opinions related to practicing their religion.⁵ Freedom of religion is one of the

⁴ See PRINCETON UNIV. PRESS, *The Papers of Jefferson*, in 5 THE FOUNDERS' CONST. 305 (Julian P. Boyd et al. eds., 1950), http://press-pubs.uchicago.edu/founders/documents/amendI_religions37.html.

⁵ See Aaron J. Walayat, *Adams and Jefferson: American Religion and the Ancient Constitution*, 11 FAULKNER L. REV. 215, 245 (2020); Mark David Hall, *America's Founders, Religious Liberty, and the Common Good*, 15 U. ST. THOMAS L.J. 642,

most important rights given to U.S. citizens; the First Amendment to the U.S. Constitution protects freedom of religion from governmental interference.⁶ All American citizens must be given the freedom to exercise their religion freely without any undue restrictions from the government.⁷ From the early discussions about the First Amendment, the freedom of religion has been given the same importance as the freedoms of speech and assembly in the U.S.⁸ Unfortunately, many U.S. minority citizens' freedom of religion rights have been violated over the history of the U.S.⁹ American Muslims are among those U.S. minority citizens who have been facing a clear violation of their freedom of religion.¹⁰ The peak of violations against American Muslims' First Amendment rights of freedom of religion started after 9/11 and continues to today.¹¹ American Muslims have been facing numerous disturbances to their religious freedoms, including, but not limited to, attacks on mosques and Islamic Society centers, violent

660 (2019); Matthew Crow, *Thomas Jefferson and the Uses of Equity*, 33 L. & HIST. REV. 151, 163 (2015).

⁶ See, e.g., Gary J. Simson, *The First Amendment and Religion*, 11 CORNELL L. F. 2, 11 (1985); Joscelyn A. Gorsline, Comment, *Reconciling First Amendment Freedom of Speech with Freedom of Religion & Peaceful Assembly*, 14 T.M. COOLEY J. PRAC. & CLINICAL L. 1, 10 (2011).

⁷ See Bradley S. Tupi, *Religious Freedom and the First Amendment*, 45 DUQ. L. REV. 195, 217 (2007).

⁸ See Robert W. McMenamain, *Religion and the First Amendment*, 54 TEX. BAR J. 1236, 1239 (1991); Burt Neuborne & Michael C. Dorf, *First Amendment Freedom of Speech and Religion—October 2009 Term*, 27 TOURO L. REV. 63, 78 (2011); Jeffrey L. Oldham, *Constitutional Religion: A Survey of First Amendment Definitions of Religion*, 6 TEX. F. ON CIV. LIBERTIES & CIV. RTS. 117, 168 (2001); see also Symposium, *Religious Freedom and the First Amendment*, 7 CHRISTIAN LEGAL SOC'Y Q. 17, 24 (1986).

⁹ See George Anastaplo, *The Religion Clauses of the First Amendment*, 11 MEM. ST. U. L. REV. 151, 158 (1981).

¹⁰ In the United States, American Muslims face different types of violations to their freedom of religion despite the existence of the First Amendment, which protects the exercise of all types of religions for all U.S. citizens regardless of their faith. The most notable violation of the freedom of religion of American Muslims is the physical and electronic surveillance by government security agencies. See Asma Uddin, *The First Amendment: Religious Freedom for All, Including Muslims*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 73, 78 (2013).

¹¹ See Kristin Moye Pruszynski, *Living in a Post 9/11 World: Religious Discrimination Against Muslims*, 2 PHX. L. REV. 361, 363 (2009); Douwe Korff, *Terrorism and the Proportionality of Internet Surveillance*, 6 EUR. J. CRIMINOLOGY 119, 127 (2009).

events in many states in the U.S, and several other instances.¹² Yet, the most critical violations of American Muslims' freedom of religion result from the practices of the U.S. government. Specifically, American Muslims continuously experienced a chilling effect as a result of particular practices conducted by the U.S. government, which led to a violation of the First Amendment rights of this minority group.¹³ However, before discussing the negative effects that the practices of the U.S. government had on American Muslims, a brief definition and background information about the chilling effect must be introduced in order to comprehend the subsequent discussions of these violations of the freedom of religion. Therefore, the next subsection will shed light on the definition of the chilling effect jurisprudence by the U.S. under the lens of the U.S. Supreme Court.

A. The Chilling Effect Elucidated

Deterrence is the essence behind the simplest meaning of the chilling effect.¹⁴ While one could mention that *individuals* are deterred, it seems more accurate to mention an *activity* is deterred. Of course, the two concepts overlap with each other in terms of activity that could be chilled if individuals are deterred from practicing that activity. Although people's decision to not engage in certain activities could be influenced by different incentives, scholar Frederick Schauer mentioned that "in law, the acknowledged basis of deterrence is the fear of punishment—be it by fine, imprisonment, imposition of civil liability, or deprivation of governmental benefit."¹⁵ Therefore, individuals could be deterred, or their activities might be chilled as a

¹² After the September 11 events, American Muslims' religious activities have been abused by the surveillance processes of the U.S. intelligence agencies, which involve monitoring mosques and Islamic Society centers in different states. See Gwendolyn Zoharah Simmons, *From Muslims in America to American Muslims*, 10 J. ISLAMIC L. & CULTURE 254, 278-81 (2008); Mohamed Nimer, *Muslims in America After 9-11*, 7 J. ISLAMIC L. & CULTURE 1, 18-19 (2002).

¹³ The chilling effect is considered a critical problem that raises issues related to the First Amendment rights of American Muslims, particularly their freedom of religion. Different types of violations of Muslims' First Amendment rights also occurred due to the electronic surveillance of social media and prayer apps. See Katelyn Ringrose, Note, *Religious Profiling: When Government Surveillance Violates the First and Fourth Amendments*, 2019 U. ILL. L. REV. ONLINE 1, 3 (2019).

¹⁴ See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 693 (1978).

¹⁵ *Id.* at 689.

result of threatening physical processes or virtually by a governmental statute.¹⁶ This could be a broad illustration of the term “chilling.”

In fact, the “chilling effect” term could be applicable when religion is regulated by a statute or restricted by governmental action. At the same time, there are no barriers preventing such regulation or action from doing so. In these two cases, *unjust* chilling occurs on a constitutionally shielded activity rather than *gentle* deterrence. Such *unjust* chilling could be traced back to the history of the Supreme Court’s analysis of the chilling effect. In fact, the chilling effect doctrine was originally established by the Supreme Court during the McCarthy era, which defined the chilling effect as any U.S. government action or law that might result in hindering individuals’ exercising of First Amendment rights.¹⁷ During the 1960s, the chilling effect doctrine was used by the Supreme Court in the notable case *Baggett v. Bullitt*¹⁸ for an argument related to a First Amendment violation.¹⁹ In *Baggett*’s case, the Supreme Court addressed individuals’ fear of government punishment as a factor that could chill

¹⁶ See Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465, 479 (2015); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1638 (2013); Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1471, 1473 (2013); Robert L. Spellman, *Avoiding the Chilling Effect: News Media Tort and First Amendment Insurance*, 7 COMM. & L. 13, 27 (1985); William E. Lee, *The Unwilling Listener: Hill v. Colorado’s Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387, 388 (2002); Jennifer L. Bruneau, *Injury-in-Fact in Chilling Effect Challenges to Public University Speech Codes*, 64 CATH. U.L. REV. 975, 976 (2015); Lisa Avalos, *The Chilling Effect: The Politics of Charging Rape Complaints with False Reporting*, 83 BROOK. L. REV. 807 (2018).

¹⁷ See Frank Askin, *Chilling Effect*, THE FIRST AMEND. ENCYC., <https://www.mtsu.edu/first-amendment/article/897/chilling-effect> (last visited Feb. 13, 2023); Brandice Canes-Wrone & Michael C. Dorf, *Measuring the Chilling Effect*, 90 N.Y.U. L. REV. 1095, 1098 (2015); Anna V. Pinchuk, *Countering Free Speech: CVE Pilot Programs’ Chilling Effect on Protected Speech and Expression*, 68 SYRACUSE L. REV. 661, 677 (2018); Jonathon W. Penney, *Understanding Chilling Effects*, 106 MINN. L. REV. 1451, 1464-65 (2022); Gayle Horn, *Online Searches and Offline Challenges: The Chilling Effect, Anonymity and the New FBI Guidelines*, 60 N.Y.U. ANN. SURV. AM. L. 735, 751 (2005); Michael N. Dolich, *Alleging a First Amendment Chilling Effect to Create a Plaintiff’s Standing: A Practical Approach*, 43 DRAKE L. REV. 175, 176 (1994); see also Richard P. Mauro, *The Chilling Effect That the Threat of Sanctions Can Have on Effective Representation in Capital Cases*, 36 HOFSTRA L. REV. 417, 422 (2007).

¹⁸ 377 U.S. 360 (1964)

¹⁹ *Id.* at 365.

individuals and deter them from speaking freely.²⁰ The Supreme Court discussed how a government law could deter individuals from practicing their constitutional rights, such as the freedom of speech that is protected under the First Amendment.²¹ In subsequent years, the chilling effect doctrine was employed by judges in various court cases to shield U.S. citizens from U.S. government actions or laws that could abuse the First Amendment rights of U.S. citizens.²² In cases like *Lamont v. Postmaster General*²³ and *Dombrowski v. Pfister*,²⁴ the Supreme Court used the term “chilling effect” to analyze issues of deterring individuals from practicing their First Amendment rights freely.²⁵ From another aspect, legal scholars linked the chilling effect to the *fear* factor that might occur from U.S. government practices, including the surveillance operations of individuals.²⁶ These scholars shed light on important court cases related to the history of the violation of the First Amendment rights of religious minorities, such as Jewish and Muslim Americans, in the U.S. courts, with an explanation of the fear factor of the individuals that could result in the chilling effect.²⁷ Among many interesting studies, scholars Diala

²⁰ See generally Sean V. Grindlay, *May a Judge Be a Scoutmaster—Dale, White, and the New Model Code of Judicial Conduct*, 5 AVE MARIA L. REV. 555, 562 (2007).

²¹ *Id.*

²² For more details about the Supreme Court’s reference to the chilling effect, see generally *Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301 (1965); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Laird v. Tatum*, 408 U.S. 1 (1972); Kendrick, *supra* note 16, at 1633; Brenda T. Simensky, *Chilling Effect on First Amendment Rights*, 40 BROOK. L. REV. 1097 (1974).

²³ 381 U.S. 301, 311 (1965).

²⁴ 380 U.S. 479, 482 (1965).

²⁵ See *Lamont*, 381 U.S. at 307; see also *Dombrowski*, 380 U.S. at 486. In 1964, the Supreme Court ruled in the case of *Baggett v. Bullitt* that an oath law in Washington, D.C., results in a chilling effect that could hinder people from practicing their First Amendment rights freely. In *Lamont v. Postmaster Gen.*, the Supreme Court struck down the Postal Service Act of 1962, which required the postmaster general to detain the mail of individuals suspected of joining communist groups.

²⁶ See Ringrose, *supra* note 13.

²⁷ Scholar Katelyn Ringrose stated that “[g]overnment monitoring, however, did not end in the Old World, and numerous American religious groups have since experienced persecution in the form of surveillance pressuring them to abandon their beliefs out of fear and discomfort. Religious minorities that have been affected by government monitoring include Fundamentalist Mormons who have been subjected to both state and federal monitoring due to stigma surrounding polygamy; the FBI’s monitoring and attempted delegitimization of Reverend Martin Luther King, Jr. and other members of the black clergy; and the 20th century surveillance of Jewish and

Shamas and Nermeen Arastu conducted a study in 2013 that examined the perspectives of Muslim communities in New York City regarding the New York Police Department's (NYPD) electronic surveillance of this minority group.²⁸ The following findings of this study could be used as a summary of the aforementioned "chilling effect" and its relation to the possible violation of American Muslims' freedom of religion:

[T]he findings highlight[] the impact of NYPD surveillance on religious life and expression. Interviewees felt that the NYPD's spotlight on American Muslims' practice of their faith, their degree of religiosity, and their places of worship disrupted and suppressed their ability to practice freely. Many also indicated that within heterogeneous Muslim communities, this has resulted in the suppression of certain practices of Islam more than others. Interviews also highlighted the atmosphere of tension, mistrust, and suspicion that permeat[ed] Muslim religious places – which the NYPD has infiltrated with informants and undercover agents, deeming them "hot spots." These law enforcement policies have deeply affected the way [the] Muslim faith is experienced and practiced in New York City.²⁹

However, in this manuscript, the chilling effects on American Muslims will focus on the two types of practices by the U.S. government: the *actions* and the *laws*. Specifically, the actions of the U.S. government that could result in a chilling effect on American Muslims could be seen through government security agencies such as the Federal Bureau of Investigation (FBI) and National Security Agency (NSA) and their surveillance operations on this minority group.³⁰ Furthermore, anti-Muslim laws that are established in different states could be seen as

Quaker communities. Following the attacks on September 11th, 2001, however, no minority community has been as deeply affected as American-Muslims." *Id.* at 1.

²⁸ See DIALA SHAMAS & NERMEEN ARASTU, MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS 12-23 (2012).

²⁹ *Id.* at 5.

³⁰ See Matthew A. Wasserman, Note, *First Amendment Limitations on Police Surveillance: The Case of the Muslim Surveillance Program*, 90 N.Y.U. L. REV. 1786, 1794-95 (2015).

laws that cause chilling effects on this minority group.³¹ The next two subsections will explore the practices of the U.S. government on American Muslims (actions and laws) that are considered a serious threat to the First Amendment rights of this minority group.

B. The Violation of the American Muslims' Freedom of Religion Through the Surveillance Operations of U.S. Security Agencies

In the U.S., the surveillance operations by government security agencies could be divided into two types: physical and virtual (or remote) surveillance.³² Previously, government security agencies used to physically search people's houses and seize physical personal property, such as books, pictures, and other physical materials.³³ Furthermore, government security agencies physically control suspects' movements by assigning agents to conduct in-person surveillance processes.³⁴ In the modern age, with the development of technology, government security agencies have started to virtually or

³¹ *Id.* at 1786.

³² See generally Steven Effman, *Electronic Surveillance in America- An Overview*, 3 STUDENT L. 18, 19 (1975); Susan J. Drucker & Gary Gumpert, *Surveillance, Security in Post September 11th America*, 39 FREE SPEECH Y.B. 83, 87 (2001); Shahab Mossavar-Rahmani, Note, *The Protect America Act: One Nation Under Surveillance*, 29 LOY. L.A. ENT. L. REV. 133, 137 (2008); James S. Bowen, *Who's Watching the Watcher: The Law of Conspiracy in the Context of the FBI's Record of Surveillance of Black Folk in America*, 21 W. ST. U.L. REV. 219, 228 (1993); Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 253 (2008).

³³ See Kimberly A. Strang, *Foreign Search and Seizure: The Fourth Amendment at Large*, 25 SAN DIEGO L. REV. 609, 623 (1988); William C. Brafford, Jr., *Search and Seizure Under the Fourth Amendment*, 43 KY. L.J. 429, 431 (1955); Melinda Roberts, *The Emergency Doctrine, Civil Search and Seizure, and the Fourth Amendment*, 43 FORDHAM L. REV. 571, 578 (1975); Mario Porzio, *Constitutional Law: Search, Seizure, and the Fourth Amendment*, 1 S.U. L. REV. 209, 216 (1975); *Legislative Proposals to Update the Foreign Intelligence Surveillance Act (FISA): Hearing on H.R. 109-136 Before the Subcomm. On Crime Terrorism, and Homeland Security & H. Comm. on The Judiciary*, 109th Cong. 1 (2006) [hereinafter *FISA Hearing*] (statement of Robert C. Scott, Member of H. Comm. The Judiciary).

³⁴ See generally Wasserman, *supra* note 30; Debbie Bermudez Sanabria, Note, *Advances in Police Techniques and the Effects on "Search and Seizure" Under the Fourth Amendment*, 61 REV. JUR. U. P.R. 321, 326-27 (1992); E. G. Trimble, *Search and Seizure Under the Fourth Amendment as Interpreted by the United States Supreme Court*, 42 KY. L.J. 196, 431 (1954); Theodore W. Brin, *The Fourth Amendment Adrift: Search and Seizure on the High Seas*, 26 LOY. L. REV. 1017, 1119 (1980).

remotely search individuals' private data through the Internet or third parties, such as telecommunication or digital media companies like social media networks.³⁵ As a result, a big transition happened from basic and mundane physical surveillance to remote, or virtual, surveillance by government security agencies.³⁶

In fact, the Internet and technology helped government security agencies' surveillance operations become much easier than before.³⁷ All the government security agencies need to do is control individuals' activities online and through electronic devices to gain more information about their daily activities.³⁸ In the American Muslim surveillance cases, the U.S. government security agencies focused their physical and electronic surveillance operations of the religious minority's activities on the Islamic Society centers and mosques, Islamic websites, and digital prayer apps.³⁹ The U.S. government security agencies' surveillance of American Muslims surged in the aftermath of September 11, 2001.⁴⁰ Under President George W. Bush's administration, the U.S. government decided to give government security agencies broad power to monitor individuals' activities.⁴¹ The USA PATRIOT Act is one of the prominent acts

³⁵ See Susan Freiwald, *Electronic Surveillance at the Virtual Border*, 78 MISS. L.J. 329 *passim* (2008); see also *Reauthorization of The Patriot Act: Hearing on H.R. 112-14 Before the Subcomm. On Crime Terrorism, and Homeland Security & H. Comm. on The Judiciary*, 112th Cong. (2011) (statement of Robert C. "Bobby" Scott, Member of H. Comm. The Judiciary); Henry Lininger & Tom Lininger, *Unlocking the Virtual Cage of Wildlife Surveillance*, 27 DUKE ENV'T L. & POL'Y F. 207, 216, 239 (2017); Susan E. Brenner, *Fourth Amendment Future: Remote Computer Searches and the Use of Virtual Force*, 81 MISS. L.J. 1229, 1241-43 (2012).

³⁶ See Jonathan Manes, *Secrecy & Evasion in Police Surveillance Technology*, 34 BERKELEY TECH. L.J. 503, 505 (2019); Patricia L. Bellia, *The Memory Gap in Surveillance Law*, 75 U. CHI. L. REV. 137 *passim* (2008).

³⁷ Bruce Phillips, *Privacy in a Surveillance Society*, 46 U.N.B.L.J. 127, 129 (1997).

³⁸ See ROBERT A. FIATAL, MINIMIZATION REQUIREMENTS IN ELECTRONIC SURVEILLANCE 24 (1987); Note, *The Foreign Intelligence Surveillance Act: Legislating a Judicial Role in National Security Surveillance*, 78 MICH. L. REV. 1116 *passim* (1980); Brian L. Owsley, *Spies in the Skies: Dirtboxes and Airplane Electronic Surveillance*, 113 MICH. L. REV. 75 *passim* (2014).

³⁹ See Wasserman, *supra* note 30.

⁴⁰ *Id.*

⁴¹ See, e.g., Khaled A. Beydoun, *Between Indigence, Islamophobia, and Erasure: Poor and Muslim in "War on Terror" America*, 104 CAL. L. REV. 1463 *passim* (2016); Liam Braber, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451 *passim* (2002); Teresa A. Miller,

passed during the Bush administration that allow security agencies to surveil individuals, mainly Muslims, without obtaining a warrant from the court permitting them to do so.⁴² In fact, the U.S. government put Muslims under a magnifier by letting security agencies monitor their activities, especially those activities within American borders.⁴³ The U.S. government incorrectly believes that Muslims, due to their religious beliefs, might pose a threat to American society.⁴⁴ Therefore, security agencies continuously surveil them to protect the U.S. from any possible threat they might pose to the American people.⁴⁵

The most important aspect about the surveillance of American Muslims is the recruiting of people for surveillance purposes.⁴⁶ Those being recruited claim that they have converted to Islam in order to mislead people about their surveillance operations on Muslims.⁴⁷ Moreover, such recruits are joining Muslim prayers in mosques and other Muslim activities in Islamic Society centers and are hiding

Blurring the Boundaries Between Immigration and Crime Control After Sept. 11th, 25 B.C. THIRD WORLD L.J. 81 *passim* (2005); *see also* Wasserman, *supra* note 30.

⁴² USA PATRIOT Act of 2001, Pub. L. No. 107-56 (2001).

⁴³ Scott Alexander, *Inalienable Rights? Muslims in the U.S. Since September 11th*, 7 J. ISLAMIC L. & CULTURE 103 (2002) (The U.S. government security agencies such as the CIA, FBI, and the NSA increased their scrutiny on Muslim individuals, including American citizens, after 9/11. The Bush administration gave the government security agencies flexibility when surveilling Muslims within the U.S.); *see* Sohail Wahedi, *American Muslims: The Untouchables of American Constitutional Democracy?*, 56 IDAHO L. REV. 305 *passim* (2020).

⁴⁴ *See, e.g.*, Wasserman, *supra* note 30, at 1789; Heena Musabji & Christina Abraham, *The Threat to Civil Liberties and Its Effect on Muslims in America*, 1 DEPAUL J. FOR SOC. JUST. 83, 88 (2007); Amara S. Chaudhry-Kravitz, *Is Brown the New Black?: American Muslims, Inherent Propensity for Violence, and America's Racial History*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 3, 24 (2014).

⁴⁵ David Lyon & Kevin D. Haggerty, *The Surveillance Legacies of 9/11: Recalling, Reflecting on, and Rethinking Surveillance in the Security Era*, 27 CAN. J.L. & SOC. 291 (2012) (The U.S. government security agencies justify their massive surveillance operations on Muslims communities in the U.S. by claiming that Muslim individuals might threaten the American society. The U.S. government security agencies alleged that such surveillance and control operations will help prevent any possible terrorist attack that might harm the American people.); *see* Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 375, 379 (2007).

⁴⁶ *See* Federal Bureau of Investigation v. Fazaga, 142 S. Ct. 1051, 1058 (2022) (In this case, the FBI recruited a person called Craig Monteilh to surveil the Muslim community in Orange County, California, for almost two years.).

⁴⁷ *Id.* at 88.

behind the claim of having converted to Islam.⁴⁸ Many of those secret agents have even planted devices inside mosques and Islamic Society centers for surveillance purposes.⁴⁹

In addition, Muslims' digital prayer apps are being used as a new surveillance tool by the U.S. government to monitor their spiritual activities.⁵⁰ Through these digital prayer apps, Muslims read the Quran, read the speeches of the prophet Mohamed, and do much more.⁵¹ The case of surveilling Muslim religious activities virtually/electronically through the Muslim Pro app aptly illustrates how U.S. security agencies can use digital prayers to monitor individuals in this minority group.⁵² Thus, we have witnessed a massive surveillance program against the religious activities of Muslim users of this app.⁵³ At the end of 2020, one news report confirmed that the U.S. Special Operations Command (USSOCOM) surveilled American Muslims through the Muslim Pro app.⁵⁴ The massive surveillance operations by USSOCOM through the Muslim Pro app were confirmed by Commander Tim Hawkins: "Our access to the software is used to support Special Operations Forces mission

⁴⁸ *Id.* at 89.

⁴⁹ *Id.* at 94 (In Fazaga's case, Craig Monteilh, a man the FBI recruited to conduct surveillance operations on the Muslim community in California, admitted that he plugged in small surveillance cameras and recording devices inside the Islamic Society centers of Orange County, California.).

⁵⁰ Johana Bhuiyan, *Muslims Reel Over a Prayer App that Sold User Data: 'A Betrayal from Within our Own Community'*, L.A. TIMES (Nov. 23, 2020, 11:57 AM), <https://www.latimes.com/business/technology/story/2020-11-23/muslim-pro-data-location-sales-military-contractors>.

⁵¹ Ameena Qobrtay, *On the Front Lines: Muslim Pro Data Sharing Fearful Reminder of Tech's Overreach*, THE DAILY TARGUM (Nov. 23, 2020, 12:00 AM), <https://dailytargum.com/article/2020/11/on-the-front-lines-muslim-pro-data-sharing-fearful-reminder-of-techs>.

⁵² Muslim Pro app has been downloaded over fifty million times, mostly on accounts belonging to Muslims. Gabrielle Canon, *ACLU Files Request Over Data US Collected via Muslim App Used by Millions*, THE GUARDIAN (Dec. 3, 2020, 4:34 PM), <https://www.theguardian.com/us-news/2020/dec/03/aclu-seeks-release-records-data-us-collected-via-muslim-app-used-millions>.

⁵³ Dawn Geske, *Muslim Pro App Users' Information May Have Been Harvested by US Military*, UNIV. WIRE (Nov. 16, 2020, 7:37 PM), <https://www.ibtimes.com/muslim-pro-app-users-information-may-have-been-harvested-us-military-3083342>.

⁵⁴ Joseph Cox, *How the U.S. Military Buys Location Data from Ordinary Apps*, TECH BY VICE (Nov. 16, 2020, 10:35 AM), <https://www.vice.com/en/article/jgqm5x/us-military-location-data-xmode-locate-x>.

requirements overseas. We strictly adhere to established procedures and policies for protecting the privacy, civil liberties, constitutional and legal rights of American citizens.”⁵⁵ However, such surveillance processes conducted by USSOCOM on Muslim users might create a state of fear or discomfort among Muslims while they practice their religion through these digital prayer apps. Indeed, a state of fear or anxiety among Muslim users appeared to occur, as news outlets mentioned that Muslim Pro app users started to delete their accounts: “Users have been deleting Muslim Pro from their devices this week out of anger and fear, with many left seeking alternatives.”⁵⁶

In sum, the *fear* factor existed in both cases: the physical and electronic surveillance operations of the U.S. government security agencies on American Muslims.⁵⁷ American Muslim individuals indicated they feel afraid of the U.S. government security agencies’ surveillance processes on them.⁵⁸ Such monitoring processes and actions by the U.S. security agencies threaten the free exercise of one of the First Amendment rights (freedom of religion) of this minority group. Unfortunately, the *fear* of American Muslims that occurred due to such electronic and physical surveillance by U.S. security agencies could lead to a chilling effect. The surveillance processes of the security agencies “chill” Muslim individuals and deter them from practicing their religious activities freely.⁵⁹ Contemporary court cases about the U.S. government security agencies’ physical and electronic surveillance of American Muslims will be discussed in detail in the subsequent pages to show examples of the chilling effect on this minority group.

⁵⁵ Sheharyar A. Saeed, *Popular Apps Caught Sharing User’s Location Data with US Military*, TECHENGAGE (June 6, 2021), <https://techengage.com/popular-apps-caught-sharing-users-location-data-with-us-military/>.

⁵⁶ Aliya Karim, *People Are Deleting This Prayer App After Learning Data Was Shared With U.S. Military*, NOW THIS NEWS (Nov. 19, 2020, 6:19 PM), <https://nowthisnews.com/news/people-are-deleting-the-muslim-pro-prayer-app-after-learning-data-was-shared-with-us-military>.

⁵⁷ See Ringrose, *supra* note 13, at 32.

⁵⁸ See *National Security*, *infra* note 97. The surveillance processes by the U.S. security agencies result in fear and anxiety among Muslims, which hinders them from practicing their religion freely.

⁵⁹ Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465 (2015).

C. The Violation of American Muslims' Freedom of Religion Through Establishing Anti-Muslim Religion Laws

One clear violation of American Muslims' freedom of religion that appears to have increased in the last decade is the establishment of anti-Muslim religion laws.⁶⁰ Different states either have established or are in the process of establishing anti-Muslim religion laws that impact the freedom of religion of American Muslims.⁶¹ A prominent example of this phenomenon could be seen in the Oklahoma state establishment of the anti-Sharia law back in 2012.⁶² Oklahoma's anti-Sharia law prevents judges in Oklahoma courts from using Sharia laws in their decisions.⁶³ Lawmakers justified Oklahoma's anti-Sharia law with the notion that Sharia law is considered foreign law that might have an effect on American laws.⁶⁴ Particularly, Oklahoma's lawmakers believe that foreign laws might impact and intersect with U.S. citizens' civil rights. Furthermore, Oklahoma's anti-Sharia law violates the freedom of religion of American Muslims.⁶⁵ The case of *Awad v.*

⁶⁰ See, e.g., *Bans on Sharia and International Law*, ACLU (Apr. 10, 2022), <https://www.aclu.org/bans-sharia-and-international-law?redirect=religion-belief/bans-sharia-and-international-law>; Steven M. Rosato, Note, *Saving Oklahoma's "Save Our State" Amendment: Sharia Law in the West and Suggestions to Protect Similar State Legislation from Constitutional Attack*, 44 SETON HALL L. REV. 659, 664 (2014).

⁶¹ See generally Eugene Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 OKLA. L. REV. 431 (2014).

⁶² *Id.* at 79.

⁶³ *Id.* at 82.

⁶⁴ *Id.* at 88.

⁶⁵ See, e.g., Muhammad Elsayed, *Contracting into Religious Law: Anti-Sharia Enactments and the Establishment and Free Exercise Clauses*, 20 GEO. MASON L. REV. 937 (2013); Ross Johnson, *A Monolithic Threat: The Anti-Sharia Movement and America's Counter-Subversive Tradition*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 183 (2012); Carlo A. Pedrioli, *Constructing the Other: U.S. Muslims, Anti-Sharia Law, and the Constitutional Consequences of Volatile Intercultural Rhetoric*, 22 S. CAL. INTERDISC. L.J. 65 (2012); Isabelle Canaan, *In Bad Faith: Anti-Sharia Laws, the Constitution, and the Limits of Religious Freedom*, 21 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 248 (2021); Sarah Topy, *Sharia Law in the Sooner State and Beyond: How the First Amendment Impacts the Future of Anti-Sharia Law Statutes*, 80 U. CIN. L. REV. 617 (2011); Lee Ann Bambach, *Save us from "Save Our State": Anti-Sharia Legislative Efforts across the United States and Their Impact*, 13 J. ISLAMIC L. & CULTURE 72 (2011); Andrew L. Milne, *Sharia and Anti-Sharia: Ethical Challenges for the Cross-Cultural Lawyer Representing Muslim Women*, 57 S. TEX. L. REV. 449 (2016); Katherine A. Sanoja, *The Impact of "Anti-Sharia"*

*Ziriak et al.*⁶⁶ is a prominent example discussing the anti-Sharia law's violation of the freedom of religion of American Muslims.⁶⁷ The Tenth Circuit ultimately found that Oklahoma's anti-Sharia law violated the Establishment Clause of the Constitution.⁶⁸ Muneer Awad, an American Muslim and a member of the Islamic Society in Oklahoma, filed the lawsuit that led to the Tenth Circuit's decision.⁶⁹ Awad argued the following:

[T]he amendment tramples the free exercise rights of a disfavored minority faith, restricting the ability of Mr. Awad and his fellow Muslims in Oklahoma to execute valid wills, assert religious liberty claims under the Oklahoma Religious Freedom Act, and enjoy equal access to the judicial system. The lawsuit also asserts that the "Save Our State Amendment" undercuts a central concern of the Establishment Clause of the First Amendment, sending an unmistakable message that Muslims are religious and political outsiders.⁷⁰

Oklahoma was not alone; many other states passed similar anti-Sharia laws that jeopardized Muslims' freedom of religion in the U.S.⁷¹ For instance, the State of Alabama attempted to pass Andy's Law, which would have provided for broad civil liability in the event of a

Legislation on Arbitration and Why Judge Nielsen in Florida Got it Right, 8 FIU L. REV. 181 (2012); Kimberly Karseboom, *Sharia Law and America: The Constitutionality of Prohibiting the Consideration of Sharia Law in American Courts*, 10 GEO. J.L. & PUB. POL'Y 663 (2012).

⁶⁶ 670 F.3d 1111, 1119 (10th Cir. 2012).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1118-19;

⁷⁰ See ACLU, *supra* note 60.

⁷¹ *Tracking Anti-Muslim Legislation Across the U.S.*, S. POVERTY L. CTR., <https://www.splcenter.org/data-projects/tracking-anti-muslim-legislation-across-us> (last visited Feb. 19, 2023); Martha F. Davis & Emily Abraham, *Oklahoma's Anti-Sharia and Other Antitransnational Law Proposals: A Backgrounder for Domestic Rights Advocates*, 45 CLEARINGHOUSE REV. 243, 247 (2011).

terrorist attack.⁷² Nonetheless, seven other states have passed their own versions of Andy's law.⁷³

The most important aspect of the anti-Muslim laws mentioned above is that they tend to confuse American Muslims regarding the limits between exercising their freedom of religion and violating U.S. laws by engaging in peaceful religious activities.⁷⁴ For instance, Sharia law requires Muslims to go to mosques every Friday to pray.⁷⁵ At the same time, the arguments under the Sharia that require every Muslim to attend Friday prayers are prohibited from being used in many court cases related to the surveillance conducted by the security agencies on this minority religious group.⁷⁶ Specifically, judges do not accept the fact that under the Islamic Sharia law, all Muslims must attend Friday prayers.⁷⁷ Furthermore, judges have found that some Muslim activities during Friday prayers could be considered suspicious and that the Sharia law must not be considered when ruling on such suspicious activities.⁷⁸ Therefore, preventing American Muslims from using the Sharia law in courts to justify their Islamic religious activities may be unfair. In fact, Muslims justify their religious activities by asserting that these activities are required of them by Islam and Sharia law. However, the most critical point in establishing the anti-Muslim nature of such laws, especially those hostile to Sharia, is that the new wave of anti-Muslim laws in various states that prevent this minority religious group from justifying its peaceful religious activities (e.g., Friday prayers) in U.S. courts may

⁷² Steven Piggott, *Andy's Law Fails in Alabama, but the Anti-Muslim Legislation Has Passed in Seven States to Date*, S. POVERTY LAW CTR., <https://www.splcenter.org/hatewatch/2018/03/22/andy-s-law-fails-alabama-anti-muslim-legislation-has-passed-seven-states-date> (last visited Feb. 19, 2023) (explaining that even houses of worship can get dragged into civil litigation if one of their members commits a terrorist attack).

⁷³ *Id.*

⁷⁴ See Ringrose, *supra* note 13.

⁷⁵ Sharia law requires Muslims to go to mosques every Friday to pray. Also, under Sharia law, it is a major sin for a Muslim to not attend two consecutive Friday prayers. Therefore, Sharia law emphasizes attending every Friday prayer, with an exception for when a Muslim individual is sick. See Sarah M. Fallon, *Justice for All: American Muslims, Sharia Law, and Maintaining Comity Within American Jurisprudence*, 36 B.C. INT'L & COMP. L. REV. 153 (2013).

⁷⁶ See Pedrioli, *supra* note 65.

⁷⁷ *Id.*

⁷⁸ *Id.*

make Muslims afraid to practice their religion freely.⁷⁹ Specifically, American Muslims might be *afraid* of being punished if the Sharia law argument is not accepted by judges as a justification for their religious activities.⁸⁰ Therefore, in order to link the definition of the *chilling effect* with the anti-Muslim laws, the fears of Muslims, in this case, result from the state laws (e.g., anti-Sharia law and Andy's Law) that could threaten the First Amendment rights (specifically the freedom of religion) of this minority group. As a result, a possible *chilling effect* might occur due to the establishment of anti-Muslim laws in various states.

The following section will shed light on modern court cases that illustrate the chilling effect on American Muslims through the *actions* and *laws* of the U.S. government as represented by the surveillance operations conducted by security agencies and the anti-Muslim laws.

III. CONTEMPORARY COURT CASES

A. *Federal Bureau of Investigation v. Fazaga*, 595 U.S. 344 (2022)

Fazaga is one of the most recent decisions illustrating the U.S. government security agencies' surveillance of American Muslims.⁸¹ This case goes back to 2006, when the FBI started massive surveillance operations in California called "Operation Flex."⁸² The plaintiffs in *Fazaga's* case are American Muslims residing in Orange County, California.⁸³ The FBI focused its surveillance operations on Islamic Society centers and mosques in Orange County, California, where a

⁷⁹ See Sherman A. Jackson, *Islamic Law, Muslims and American Politics*, 22 ISLAMIC L. & SOC'Y 253 (2015).

⁸⁰ See ACLU, *supra* note 60.

⁸¹ See Lucas Scarasso, *Constitutional or Common Law: Examining the Potential Groundings of the State Secrets Privilege in the American Legal System after Fazaga v. Federal Bureau of Investigation*, 2019 U. ILL. L. REV. 123, 129 (2019). American Muslims might fear the penalties or punishment if the justification for their practice of religion is due to Sharia law not being accepted in the courts. Thus, American Muslims might be prevented from practicing their religion as a result of opposing the Sharia law in the courts.

⁸² *Id.* at 82.

⁸³ See Christina Ferreiro, *Fazaga v. FBI: Putting the Force Back in the Foreign Intelligence Surveillance Act*, 11 U. MIA. RACE & SOC. JUST. L. REV. 76, 78 (2020).

large number of Muslims practice their religion.⁸⁴ In Fazaga's case, the FBI conducted two types of surveillance, physical and electronic, on American Muslims.⁸⁵ For the physical or in-person surveillance, the FBI recruited a man named Craig Monteilh to monitor the American Muslim community in Orange County, California.⁸⁶ Mr. Monteilh was able to convince the Islamic Society members of Irvine that he had converted to Islam.⁸⁷ Later on, Mr. Monteilh started to attend the Friday prayers with Muslims in the mosque of Omar Al Farouq in Orange County, California.⁸⁸ The plaintiffs in this case, represented by Yassir Fazaga, Ali Malik, and Yasser Abdel Rahim, alleged that they saw Monteilh plugging in small surveillance cameras inside the mosque.⁸⁹ Furthermore, the plaintiffs also found recording devices inside the Islamic Center of Irvine and accused Monteilh of plugging in these devices.⁹⁰ The plaintiffs in *Fazaga* informed the police about the surveillance devices that Monteilh had allegedly plugged in at the mosque and the Islamic Center of Irvine.⁹¹ Yet,

⁸⁴ See Kelsey Dallas, *Muslims Face Setback in Challenge to FBI Surveillance*, DESERT NEWS (Mar. 4, 2022), <https://www.deseret.com/faith/2022/3/4/22959022/muslims-face-setback-in-challenge-to-fbi-surveillance-fazaga-supreme-court>.

⁸⁵ See Charles Eric Hintz, *Pleading for Justice: Why We Need a More Exacting Federal Criminal Pleading Standard*, 52 SETON HALL L. REV. 711, 718 (2022).

⁸⁶ *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1026 (9th Cir. 2020), *rev'd sub nom.* *Fed. Bureau of Investigation v. Fazaga*, 595 U.S. 344 (2022).

⁸⁷ Craig Monteilh worked with the FBI for more than one year to surveil the Muslim community in Orange County, California. Monteilh was able to plant surveillance cameras and recording devices in the Islamic Society Center of Irvine after he joined Muslim members in Orange County by claiming that he wanted to convert to Islam. See, e.g., Amna Akbar, *Policing Radicalization*, 3 U.C. IRVINE L. REV. 809 (2013); Diala Shamas, *A Nation of Informants: Reining in Post-9/11 Coercion of Intelligence Informants*, 83 BROOK. L. REV. 1175 (2018); Aziz Z. Huq, *The Social Production of National Security*, 98 CORNELL L. REV. 637 (2013).

⁸⁸ See, e.g., Robert Barnes, *Supreme Court Considers if State Secrets Claim Can End Muslim Men's Lawsuit Against FBI: During Operation Flex, the Bureau used an Undercover Agent to Surveil Southern California Islamic Centers*, WASH. POST (Nov. 8, 2021), https://www.washingtonpost.com/politics/courts_law/supreme-court-fbi-mosques/2021/11/08/4fbc6b26-409d-11ec-a88e-2aa4632af69b_story.html; Maryam Jamshidi, *The Discriminatory Executive and the Rule of Law*, 92 U. COLO. L. REV. 77 (2021).

⁸⁹ See Wasserman, *supra* note 30.

⁹⁰ *Id.*

⁹¹ *Id.* Muslim community members in Orange County saw Monteilh carrying recording devices and small surveillance cameras during the Friday prayers.

Monteilh rejected the allegations of the American Muslims, mentioning that he did not plug in any of the surveillance devices in the mosque or the Islamic Center of Irvine.⁹² In 2008, Monteilh was arrested by the police, who accused him of selling drugs.⁹³ During the interrogation, Monteilh confessed that apart from the FBI surveillance operation on the American Muslim community in Orange County, California, he plugged surveillance devices into the mosque and the Islamic Center of Irvine.⁹⁴ The plaintiffs also claimed that the FBI conducted electronic surveillance on American Muslims through the Islamic Center of Irvine's website.⁹⁵

In *Fazaga*, the plaintiffs alleged that the FBI violated three constitutional rights of the American Muslim community of Orange County, California—the First, Fourth, and Fifth Amendments.⁹⁶ For the First Amendment right, the plaintiffs alleged that the FBI surveillance operations violated their freedoms of religion and speech.⁹⁷ Plaintiffs Fazaga and Malik argued that the FBI's surveillance operations threatened their freedom of religion through the *fear* that they felt as a result of such actions (controlling processes).⁹⁸

These *acts* caused deep harm to the plaintiffs and many other members of their community. Plaintiff Fazaga, a religious leader and licensed therapist, was forced to restrict the *counseling* he provided to his congregants for *fear* it was no longer private.⁹⁹ Plaintiffs Malik and Abdel Rahim grew *afraid to practice their faith* openly and attend

Muslim community members mentioned that Monteilh denied carrying these devices when asked about them.

⁹² *Id.* See Steven D. Schwinn, *Does Section 1806(f) of the Foreign Intelligence Surveillance Act, Which Requires Certain Judicial Procedures When the Government Seeks to Protect Evidence in Certain Cases Involving the National Security, Displace the State Secrets Privilege?* (20-828), 49 PREVIEW U.S. SUP. CT. CAS. 18 (1).

⁹³ See Pedrioli, *supra* note 65.

⁹⁴ *Id.* at 44. In 2008, the police arrested Monteilh and found that he was guilty of selling drugs in the period from 2005 to 2007.

⁹⁵ See *id.* at 45.

⁹⁶ See *id.* at 47.

⁹⁷ *Id.* at 53. See Emily Berman, *Regulating Domestic Intelligence Collection*, 71 WASH. & LEE L. REV. 3 (2014).

⁹⁸ See *National Security-Surveillance-Ninth Circuit Holds That FISA Displaces the State Secrets Privilege for Electronic Surveillance-Fazaga v. FBI*, 916 F.3d 1202 (9th Cir. 2019), 133 HARV. L. REV. 1774 (2020).

⁹⁹ See Scarasso, *supra* note 81.

the mosques the informant had infiltrated.¹⁰⁰ Not only is the word *fear* indicated by the plaintiffs, but also the *acts* mentioned in this case reflect the FBI surveillance operations on the American Muslims in Orange County, California.¹⁰¹ In *Fazaga*, the FBI surveillance operation led to fear among the American Muslim plaintiffs, who indicated that they reduced their religious activities.¹⁰²

However, the FBI argued that its surveillance operations on American Muslims were legal under the claim of the “state secrets privilege.”¹⁰³ The state secrets privilege is a law providing the U.S. government the ability to withhold information from judges or other parties for the sake of avoiding any possible threat to the national security of the U.S.¹⁰⁴

¹⁰⁰ Brief for the Respondents at 1, *Federal Bureau of Investigation v. Fazaga*, 595 U.S. 344 (Mar. 4, 2022) (No. 20-828), at 1.

¹⁰¹ See Pedrioli, *supra* note 65, at 67.

¹⁰² Malik, one of the plaintiffs in *Fazaga*, stated that he stopped going to the Friday prayers in the mosque of Omar Al Farouq immediately after he knew that the FBI surveilled the mosque and the Islamic Center in Orange County, California. Like many other American Muslim plaintiffs in this case, Malik expressed his feelings of fear towards the surveillance processes of the FBI on the Muslim community in Orange County. As a result, the American Muslim plaintiffs in *Fazaga* mentioned that the FBI surveillance operations hindered them from practicing their freedom of religion. See Jesslin Wooliver, *Want to Know a Secret? Electronic Surveillance, National Security, and the Role of the Foreign Intelligence Surveillance Act*, 61 B.C. L. REV. E. SUPP. II. 393 (2020).

¹⁰³ The state secrets privilege is a doctrine that has been used many times by the U.S. government security agencies in the courts to justify the legality of their surveillance operations on individuals. See, e.g., Scarasso, *supra* note 81; *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991).

¹⁰⁴ See, e.g., J. Steven Gardner, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567 (1994); Emily Simpson, *Nothing is So Oppressive as a Secret: Recommendations for Reforming the State Secrets Privilege*, 80 TEMP. L. REV. 561 (2007); Christopher Brancart, *Rethinking the State Secrets Privilege*, 9 WHITTIER L. REV. 1 (1987); Ahmad A. Chehab, *The Bush and Obama Administrations' Invocation of the State Secret Privilege in National Security Litigation: A Proposal for Robust Judicial Review*, 57 WAYNE L. REV. 335 (2011); Julie Prouty, *How Secret Is the Service: Exploring the Validity and Legality of a Secret Service Testimonial Privilege*, 104 DICK. L. REV. 227 (1999); Thomas Baudesson & Peter Rosher, *Le Secret Professionnel Face Au Legal Privilege: Professional Secrecy Versus Legal Privilege*, RDAI/IBLJ, N° 1, 2006, http://www.cercle-du-barreau.org/files/SECRET_ET_PRIVILEGE.2.pdf; Lee Tien, *Litigating the State Secrets Privilege*, 42 CASE W. RES. J. INT'L L. 675 (2010); Amanda Frost & Justin Florence, *Reforming the State Secrets Privilege*, 3 ADVANCE 111 (2009).

However, *Fazaga* was reviewed at three different court levels: the U.S. District Court for the Central District of California, the U.S. Court of Appeals for the Ninth Circuit, and the Supreme Court of the U.S.¹⁰⁵ At the district court level, the judge ruled in favor of the FBI, stating that any U.S. government security agency could use the state secrets privilege to avoid revealing important information related to the national security of the U.S.¹⁰⁶ *Fazaga* appealed to the U.S. Court of Appeals for the Ninth Circuit.¹⁰⁷ The American Muslim plaintiffs believed that requiring the FBI to reveal evidence could show that the FBI performed illegal actions.¹⁰⁸ The plaintiffs continued to allege that the FBI violated their freedoms of religion and speech due to the FBI surveillance operations in Orange County, California.¹⁰⁹ In the circuit court, the judge reversed the ruling of the district court, stating that the FBI violated the Foreign Intelligence Surveillance Act (FISA) surveillance procedure, including section 1806.¹¹⁰ The FBI then appealed to the Supreme Court of the U.S., claiming that its surveillance operation on the Muslim community in Orange County, California, was legal and based on facts it would prefer not to reveal to the public under the state secrets privilege.¹¹¹ The Supreme Court remanded the case to the Ninth Circuit.¹¹² The Supreme Court stated that the state secrets privilege must not be replaced with the FISA Act and section 1806.¹¹³ It gave the following reasons for remanding *Fazaga*:

First, the FISA text lacked any reference to the state secrets privilege, suggesting that its passage did not alter the privilege at all. Regardless of whether the privilege arises from common law or the Constitution, Congress could not have abrogated it without clear

¹⁰⁵ See Pedrioli, *supra* note 65.

¹⁰⁶ See generally Scarasso, *supra* note 81.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1052 (9th Cir. 2020), *rev'd sub nom. Fed. Bureau of Investigation v. Fazaga*, 595 U.S. 344 (2022).

¹¹¹ See Brief for the Respondents, *supra* note 100, at 1-2; see also Pedrioli, *supra* note 65. FISA requires security agencies to obtain a warrant before conducting surveillance on individuals. Besides FISA, the Foreign Intelligence Surveillance Court (FISC) controls requests for surveillance warrants.

¹¹² *Fazaga*, 595 U.S. at 359.

¹¹³ *Id.*

statutory language. Second, § 1806(f), which provides a procedure under which a trial-level court may consider the legality of electronic surveillance conducted under FISA, is not incompatible with the state secrets privilege. Both involve different inquiries, award different forms of relief, and comprise different procedures.¹¹⁴

Clearly, the Supreme Court indicates that the state secrets privilege must supersede the FISA Act.

Fazaga revealed three critical problems that need to be addressed. First, there was the chilling effect resulting from the *action* of the U.S. government security agencies' surveillance operations on American Muslims. This might lead to a serious threat to the right to freedom of religion of this minority group. Second, there is clear confusion in the U.S. courts regarding the surveillance cases on American Muslims by the security agencies. This confusion clearly showed up in the three different court levels in *Fazaga* (the district court, U.S. Court of Appeals for the Ninth Circuit, and the Supreme Court). In these three different court levels, rulings were based on different perspectives related to the state secrets privilege. Therefore, a general legal framework might need to be established regarding the surveillance of American Muslims by the security agencies and the violation of the freedom of religion right of this minority group. This Article will discuss such legal framework recommendations in the subsequent sections. Third, the state secrets privilege itself appeared to be another critical problem related to the violation of the freedom of religion of American Muslims that resulted from the surveillance processes of the security agencies. This Article will also discuss the state secrets privilege issue in the following sections.

B. *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015)

Hassan is another important contemporary case related to the surveillance of American Muslims by U.S. government security agencies.¹¹⁵ The facts of *Hassan's* case link back to the aftermath of

¹¹⁴ *Federal Bureau of Investigation v. Fazaga*, OYEZ, <https://www.oyez.org/cases/2021/20-828> (last visited Apr. 24, 2022).

¹¹⁵ See, e.g., *Hassan v. City of N.Y.*, 804 F.3d 277, 297 (3d Cir. 2015).

9/11, when security agencies, including the New York Police Department (NYPD), took power from the U.S. government in order to fight terrorism under the claim of protecting the U.S. from any possible threat.¹¹⁶ In 2011, news reports revealed a secret surveillance operation launched by the NYPD in 2001 that targeted the Muslim community in New York City.¹¹⁷ In *Hassan*, the NYPD surveilled American Muslim individuals electronically and physically in different ways.¹¹⁸ Specifically, the NYPD surveilled phone calls and online activities of Muslim residents of New York City.¹¹⁹ Furthermore, the Islamic Society centers, mosques, and halal food markets in New York City were surveilled by the NYPD after the 9/11 events back in 2001.¹²⁰ In *Hassan*'s case, the NYPD used undercover agents to surveil American Muslims' religious activities in the mosques and Islamic Society centers in New York City.¹²¹

In this case, American Muslims filed a lawsuit against the NYPD, claiming that the latter violated their First and Fourteenth Amendment rights due to the surveillance operations conducted on the Muslim community in New York City.¹²² The plaintiffs claimed that they found surveillance cameras and recording devices inside the mosques and Islamic Society centers in New York City.¹²³ The plaintiffs alleged that NYPD secret agents used these devices to surveil the religious activities of the Muslim individuals inside the mosques.¹²⁴

Judges William J. Martini and the three-judge panel of Judges Thomas L. Ambro, Julio M. Fuentes, and Jane Richards Roth presided over *Hassan* in the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit, respectively, to determine whether or not the NYPD violated the First and Fourteenth Amendment rights of the American Muslims residing

¹¹⁶ *Id.* See, e.g., Steven E. Miller, *Terrifying Thoughts: Power, Order, and Terror After 9/11*, 11 GLOB. GOVERNANCE 247 (2005); David C. Vladeck, *Litigating National Security Cases in the Aftermath of 9/11*, 2 J. NAT'L SEC. L. & POL'Y 165 (2006).

¹¹⁷ See SHAMAS & ARASTU, *supra* note 27, at 4.

¹¹⁸ *Hassan*, 804 F.3d at 285.

¹¹⁹ *Id.*

¹²⁰ See *Anti-Muslim Activities*, *supra* note 3.

¹²¹ *Hassan*, 804 F.3d at 285.

¹²² *Id.* at 284.

¹²³ *Id.* at 285.

¹²⁴ See generally Madiha Shahabuddin, *The More Muslim You Are, the More Trouble You Can Be: How Government Surveillance of Muslim Americans Violates First Amendment Rights*, 18 CHAP. L. REV. 577 (2015).

in New York City.¹²⁵ At the district court, Judge William J. Martini *dismissed* the claim of the plaintiffs, stating that the NYPD surveillance operations on the Muslim communities in New York City were necessary for security purposes.¹²⁶ At the same time, the NYPD did not reveal the reasons or the evidence behind their surveillance operations on American Muslims to the district court in order to illustrate whether or not the Muslim plaintiffs must be surveilled for the sake of national security.¹²⁷ Furthermore, the district court ruled that under the state secrets privilege, the NYPD was able to hide the collected information about the Muslim community in New York City.¹²⁸ The district court mentioned that the NYPD revealing critical information about the Muslim community might pose a threat to the national security of the U.S.¹²⁹

Muslims appealed to the circuit court to calm the fear that resulted from the surveillance operations of the NYPD on the Muslim community in New York City.¹³⁰ The plaintiffs in Hassan's case mentioned that they avoided practicing their religion, such as worshipping in the mosque, after they heard about the NYPD surveillance processes in New York City.¹³¹ In this case, the American Muslim plaintiffs mentioned the following:

Plaintiffs Moiz Mohammed, Jane Doe, and Soofia Tahir state that they now avoid (or have avoided) discussing their faith openly or at MSA [Muslim Students Association] meetings for fear of being watched and documented, and Plaintiff Mohammad

¹²⁵ See Ziriax, *supra* note 65, at 288. In June 2012, Plaintiffs sued the City pursuant to 42 U.S.C. § 1983 and *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), for discriminating against them as Muslims in violation of the Free Exercise and Establishment Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

¹²⁴ *Hassan*, 804 F.3d at 288-89.

¹²⁷ *Id.*

¹²⁸ *Id.* (The district court mentioned that security agencies must give priority to hiding any sensitive information related to the national security of the United States. Yet, in *Hassan*, the plaintiffs argued that many Muslims residing in New York City were practicing their religion peaceably (e.g., going to the mosques for worship). Moreover, the plaintiff in *Hassan* wanted the NYPD to show evidence that could convict Muslims of doing acts that could threaten the national security of the United States.).

¹²⁹ *Id.*

¹³⁰ Wasserman, *supra* note 30.

¹³¹ *Hassan*, 804 F.3d at 812.

[sic] alleges that “[t]he stigma now attached to being a Muslim member of the MSA has caused [him] to avoid discussing his faith or his MSA participation in public and to avoid praying in places where non-Muslims might see him doing so.”¹³²

Subsequently, the Third Circuit reversed the decision of the district court.¹³³ Judge William J. Martini ruled on a settlement in this case.¹³⁴ In the settlement, the NYPD agreed to address three main subjects related to the Muslim community in New York City.¹³⁵ First, the NYPD promised to avoid getting involved in spying operations on Muslim individuals, especially around the mosques and the Islamic Society centers in New York City.¹³⁶ Second, the NYPD agreed to discuss the concerns of the Muslim community in New York regarding the NYPD’s future surveillance operations that could be conducted on Muslim individuals.¹³⁷ Third, the NYPD agreed to compensate the halal food market and other businesses for loss of income.¹³⁸

There are three critical aspects of *Hassan* that are similar to *Fazaga*. The first is the difference in ruling between the district court and the appellate court.¹³⁹ The second is the chilling effect represented through the fear of practicing Islam freely that was expressed by American Muslims.¹⁴⁰ Finally, the third aspect is the state secrets privilege, which appears to be the pretext used by the U.S. government security agencies to cover the legal issues that might result from their surveillance operations on American Muslims.¹⁴¹ The next section will discuss the problem of the state secrets privilege as an exception given to the U.S. security agencies while surveilling American Muslims, which might impact the ability of this minority group to exercise freedom of religion.

¹³² *Id.* at 288 (citations omitted).

¹³³ *Id.*

¹³⁴ *Id.* at 291.

¹³⁵ Colin Moynihan, *Last Suit Accusing N.Y.P.D. of Spying on Muslims Is Settled*, N.Y. TIMES (Apr. 5, 2018), <https://www.nytimes.com/2018/04/05/nyregion/last-suit-accusing-nypd-of-spying-on-muslims-is-settled.html>.

¹³⁶ *Id.*

¹³⁷ *Hassan*, 804 F.3d at 294.

¹³⁸ *Id.* at 287.

¹³⁹ *Id.* at 284.

¹⁴⁰ *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1062 (9th Cir. 2020), *rev’d sub nom. Fed. Bureau of Investigation v. Fazaga*, 595 U.S. 344 (2022).

¹⁴¹ *See Wooliver, supra* note 102.

IV. THE EXCEPTIONALISM OF THE STATE SECRETS PRIVILEGE

The state secrets privilege is law that suggests that the U.S. government has the right to block the release of information in any lawsuit in which there is a risk of harm that could impact the national security of the U.S.¹⁴² The state secrets privilege argument appeared in the early twentieth century in the U.S. Supreme Court case *United States v. Reynolds*,¹⁴³ in which Chief Justice Fred M. Vinson stated that the U.S. government could withhold critical information from the public in order to protect the national security of the U.S.¹⁴⁴ However, the zenith of state secrets privilege use in the U.S. courts has been from the aftermath of 9/11 up until the present day.¹⁴⁵ During this time, in

¹⁴² See, e.g., James Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966); Christopher Brancart, *Rethinking the State Secrets Privilege*, 9 WHITTIER L. REV. 1 (1987); Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931 (2007); Sudha Setty, *Judicial Formalism and the State Secrets Privilege*, 38 WM. MITCHELL L. REV. 1629 (2012); Frank Corrado, *The Problem of the 'State Secrets' Privilege*, 260-OCT. N.J. LAW. 9 (2009); Robert M. Chesney, *Legislative Reform of the State Secrets Privilege*, 13 ROGER WILLIAMS U. L. REV. 443 (2008); Danielle L. Nottea, *The State Secrets Privilege: Distinguishing State Secrets in the Age of Information*, 42 SW. L. REV. 701 (2013); Holly Wells, Note, *The State Secrets Privilege: Overuse Causing Unintended Consequences*, 50 ARIZ. L. REV. 967 (2008); Laura K. Mehalko, *Hooded: Binyam Mohamed and the State Secrets Privilege*, 34 B.C. INT'L & COMPAR. L. REV. 81 (2011); Barry A. Stulberg, *State Secrets Privilege: The Executive Caprice Runs Rampant*, 9 LOY. L.A. INT'L & COMPAR. L. REV. 445 (1987).

¹⁴³ 345 U.S. 1 (1953); see also *United States v. Reynolds*,

<https://www.oyez.org/cases/1940-1955/345us1> (last visited June 1, 2023).

¹⁴⁴ *United States v. Reynolds*, 345 U.S. 1, 7-8, 11 (1953); see also Joshua B. Fischman, *Politics and Authority in the U.S. Supreme Court*, 104 CORNELL L. REV. 1513 (2019); James R. Ahrens, *Decisions-U.S. Supreme Court*, 40 J. KAN. BAR ASS'N 211 (1971); Jared Perkins, *The State Secrets Privilege and the Abdication of Oversight*, 21 BYU J. PUB. L. 235 (2007); Sean Michael Ward, Note, *The State Secrets Protection Act (SSPA): Statutory Reform of the State Secrets Privilege*, 7 GEO. J.L. & PUB. POL'Y 681 (2009); Beth George, Note, *An Administrative Law Approach to Reforming the State Secrets Privilege*, 84 N.Y.U. L. REV. 1691 (2009); Lucien J. Dhooge, *The State Secrets Privilege and Corporate Complicity in Extraordinary Rendition*, 37 GA. J. INT'L & COMPAR. L. 469 (2009); Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 PACE L. REV. 778 (2010).

¹⁴⁵ See, e.g., Bob Kemper, *Privilege or a Free Pass-Higher Standards Sought for State Secrets Privilege*, 24 WASH. L. 24 (2009); Brittany Aldredge, *Worst Kept Secrets of the Federal Government: Failure to Reform the State Secrets Privilege*,

many court cases, and especially those related to surveillance issues on individuals, the government used the state secrets privilege to evade responsibility for its illegal surveillance activities.¹⁴⁶ Unfortunately, the U.S. government also used the state secrets privilege in many court cases related to alleged violations of the freedom of religion of American Muslims to justify its illegal surveillance operations on this minority group.¹⁴⁷ *United States v. Al-Timimi*¹⁴⁸ is among the earliest court cases in which the U.S. government used the state secrets privilege as an excuse to surveil young American Muslims.¹⁴⁹ In this instance, the FBI secretly surveilled the religious activities of an American youth of Iraqi immigrant parents called Al-Timimi along with other Muslims who were U.S. citizens.¹⁵⁰ Before the United States District Court for the Eastern District of Virginia, the FBI justified its surveillance operation as a way to prevent Al-Timimi and other American Muslims from committing a terrorist attack.¹⁵¹ Furthermore, when Al-Timimi asked the state to reveal the collected information that was used to condemn him for committing an illegal action, the FBI used the state secrets privilege to withhold it.¹⁵² The authorities claimed that disclosing such information could harm the national security of the U.S.¹⁵³ As a result, based on the state secrets

25 FED. CIR. BAR J. 343 (2016); Michael H. Page, *Judging Without the Facts: A Schematic for Reviewing State Secrets Privilege Claims*, 93 CORNELL L. REV. 1243 (2008); David Rudenstine, *The Courts and National Security: The Ordeal of the State Secrets Privilege*, 44 U. BALT. L. REV. 37 (2014).

¹⁴⁶ See, e.g., *United States v. Al-Timimi*, No. 1:04-cr-385, 2020 WL 4810120 (E.D. Va. Aug. 18, 2020); *Tenet v. Doe*, 544 U.S. 1 (2005); *Gen. Dynamics Corp. v. United States*, 563 U.S. 478 (2011); *United States v. Husayn*, No. 20-827, 595 U.S. 195 (U.S. March 3, 2022); *Raza v. City of N.Y.*, 998 F. Supp. 2d 70 (E.D.N.Y. 2013); David L. Applegate, *State Secrets Privilege in the United States-The Price of Security*, 23-JAN CBA REC. 32 (2009); Rita Glasionov, *In Furtherance of Transparency and Litigants' Rights: Reforming the State Secrets Privilege*, 77 GEO. WASH. L. REV. 458 (2009).

¹⁴⁷ See Ferreiro, *supra* note 83.

¹⁴⁸ 2015 U.S. App. LEXIS 23053 (4th Cir. 2015).

¹⁴⁹ See Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655 (2009).

¹⁵⁰ *Al-Timimi*, 2015 U.S. App. LEXIS 23053, at *4-6.

¹⁵¹ Michael J. Sherman, *Brandenburg v. Twitter*, 28 GEO. MASON U. CIV. RTS. L.J. 127 (2018).

¹⁵² *Al-Timimi*, 2015 U.S. App. LEXIS 23053, at *2-3.

¹⁵³ The FBI alleged that it needed to hide the collected data about Al-Timimi due to the sensitivity of this information, which might cause harm to the national security of the United States. See generally *id.*

privilege, the district court gave an exception to the FBI that protected its agents from facing consequences for having violated someone's religious freedom.¹⁵⁴

After Al-Timimi's case, many similar court cases have been used by U.S. government security agencies to evade legal responsibility for their surveillance processes on American Muslim individuals.¹⁵⁵ Among the many court cases which involve the argument of the state secrets privilege by the U.S. government security agencies against American Muslims is the recent case that is discussed in this paper, *Federal Bureau of Investigation v. Fazaga*.¹⁵⁶ In this case, the district court relied on the state secrets privilege as an exception given to the FBI to protect its agents from the violation of the American Muslim plaintiffs' religion.¹⁵⁷ As a result, the district court dismissed the plaintiffs' allegation based on the state secrets privilege.¹⁵⁸ Furthermore, the Supreme Court also relied on the state secrets privilege claim of the FBI in *Fazaga*, which was eventually remanded to the U.S. Court of Appeals for the Ninth Circuit.¹⁵⁹ However, *Fazaga* has a conflict between two different laws: the common law of privileged state secrets and FISA § 1806.¹⁶⁰ The Supreme Court addressed that conflict and determined that privileged state secrets prevail.¹⁶¹ This prevents *Fazaga* (the American Muslim

¹⁵⁴ *Id.*

¹⁵⁵ *Hassan v. City of N.Y.*, 804 F.3d 277 (3d Cir. 2015).

¹⁵⁶ *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015 (9th Cir. 2020), *rev'd sub nom.* *Fed. Bureau of Investigation v. Fazaga*, 595 U.S. 344 (2022).

¹⁵⁷ *Fazaga*, 595 U.S. at 347-48.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 359.

¹⁶⁰ *See, e.g.*, Charles J. Dunlap, Jr., *Tightrope Act: Can New FISA Court Reforms Address Privacy Concerns Without Impeding Anti-Terrorism Efforts?*, 99 JUDICATURE 2 (2015); Stephen Gemar, *A Crucial Aspect of National Security in Need of Reform: Section 702 of the FISA Amendments Act*, 65 S.D. L. REV. 489 (2020); Liz Clark Rinehart, *Clapper v. Amnesty International USA: Allowing the FISA Amendments Act of 2008 to Turn "Incidentally" into "Certainly"*, 73 MD. L. REV. 1018 (2014); Stephanie Cooper Blum, *What Really is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform*, 18 B.U. PUB. INT. L.J. 269 (2009).

¹⁶¹ *See National Security*, *supra* note 97. *Fazaga* and his colleagues merely suspected that a government informant was spying on them and requested information about the suspicious person from the FBI. The FBI refused to hand over the information because it was a "privileged" state secret, which the government could do if it thought that requested documents could damage national security or criminal investigations. *Fazaga* said that he should be allowed to view the documents "in camera" (seeing

plaintiff) from seeing the requested documents. In fact, the Supreme Court said several times that it was a *narrow* ruling about the legal contradiction, and it was not considering whether there were any other ways for Fazaga to get the requested information.¹⁶² Hence, the Supreme Court remanded the case to the Ninth Circuit;¹⁶³ Fazaga can continue there if he wishes, but it may not be worth it, given that the court may rely on state secrets privilege as a justification given to the FBI to shield its agents from allegations of violating the plaintiffs' religious rights. However, in the other case discussed in this paper, *Hassan v. City of New York*,¹⁶⁴ the NYPD also used the claim of the state secrets privilege to evade the legal responsibility of violating the freedom of religion of American Muslims in New York City.¹⁶⁵ As a result, relying on the state secret argument by the NYPD, the district court dismissed the claim of the American Muslim plaintiffs in *Hassan*.¹⁶⁶

The current use by the U.S. government of the state secrets privilege in court cases related to the violation of American Muslims' freedom of religion is problematic. Specifically, the problem lies in that the U.S. government can claim that anything is a privileged state secret, and there is no way for anyone to evaluate how that decision was made. In other words, documents are secret because the government said they should be secret, and that is the end. Moreover, the violation of many peaceful religious activities of American Muslims by the U.S. government will be excused under the *exceptionalism* of the state secrets privilege given by the courts to the state. Most importantly, the *chilling effect* that occurs as a result of the U.S. government security agencies' surveillance operations of American Muslims' religious activities could consider *exceptionalism*

them with his own eyes) and "ex parte" (without the FBI being there) and said this was required under Sec. 1806 of FISA. Thus, a conflict between two different laws occurred in this case: the common law of privileged state secrets vs. Sec. 1806 of FISA.

¹⁶² See Pedrioli, *supra* note 65. The Supreme Court indicated that any state secret information must not be revealed to the public to avoid harming national security. *Id.*

¹⁶³ *Id.* The Supreme Court indicated that there was no way that Fazaga could see the information due to the possible harm to national security in case this information was revealed to the plaintiff. *Id.*

¹⁶⁴ 804 F.3d 277 (3d Cir. 2015).

¹⁶⁵ *Id.* at 288-89.

¹⁶⁶ *Id.*

under the argument of the state secrets privilege that claims to protect the national security of the U.S. Therefore, U.S. lawmakers must revise the state secrets privilege used by the government in court cases that relate to the violation of American Muslims' freedom of religion.

V. LEGAL FRAMEWORK RECOMMENDATION REGARDING THE SURVEILLANCE OF THE AMERICAN MUSLIMS BY U.S. GOVERNMENT SECURITY AGENCIES

The difference in the judges' rulings among different court levels in cases related to the U.S. government security agencies' surveillance of American Muslims is a critical problem that needs to be discussed. In modern court cases related to the surveillance of American Muslims, the rulings of judges come in the following repetitive forms: dismissing the plaintiffs' allegation, reversing the decision, or remanding the case to the lower court.¹⁶⁷ One of the most critical problems associated with such decisions is related to the argument on the state secrets privilege given by U.S. government security agencies at some court levels.¹⁶⁸ At some court levels, the judges' rulings rely on the fact that the U.S. security agencies need to withhold collected information about American Muslims during surveillance operations in order to protect U.S. national security rather than disclose any of the gathered information to the public.¹⁶⁹ Other judges rely on FISA to determine the legality of the U.S. government security agencies' surveillance of American Muslims.¹⁷⁰ Specifically, some judges' rulings indicate that FISA must supersede the state secrets privilege.¹⁷¹ In a nutshell, these judges' rulings indicate that under FISA, government security agencies must reveal any

¹⁶⁷ See *Hassan v. City of N.Y.*, 804 F.3d 277 (3d Cir. 2015).

¹⁶⁸ See generally Ferreiro, *supra* note 83. Note that in Hassan's case, the Third Circuit Court of Appeals reversed the ruling of the District Court. This confirms that there is a difference in the judges' rulings among different courts regarding surveilling American Muslims.

¹⁶⁹ See, e.g., Alana Mattei, *Privilege in Peril: U.S. v. Zubaydah and the State Secrets Privilege*, 17 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 195 (2022). But see, e.g., Jason A. Crook, *From the Civil War to the War on Terror: The Evolution and Application of the State Secrets Privilege*, 72 ALB. L. REV. 57, 65-66 (2009).

¹⁷⁰ The circuit courts ruled in *Fazaga* and *Hassan*. In both cases, the judges looked at how the FBI and the NYPD applied the FISA Act procedure while conducting surveillance on American Muslims. See, e.g., Scarasso, *supra* note 81, at 125-26.

¹⁷¹ *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1053 (9th Cir. 2020), *rev'd sub nom.* *Fed. Bureau of Investigation v. Fazaga*, 595 U.S. 344 (2022).

information related to surveillance processes, despite the fact that some of the information must remain secret and protected by the secret privilege for security purposes.

Fazaga could be used as a clear example of the disagreement among different court levels' rulings in the cases related to the surveillance of American Muslims. At the district court level, the judge dismissed the allegation of the American Muslim plaintiffs, relying on the FBI argument under the state secrets privilege.¹⁷² Specifically, the FBI mentioned that it surveilled the American Muslim community in Orange County, California, based on secret information condemning Muslim individuals attempting to conduct an outlawed action.¹⁷³ However, relying on the state secret privilege, the FBI did not reveal the evidence or the information to the public at the district court level to assert its claim regarding how Muslim individuals were planning to conduct an outlawed action.¹⁷⁴ The district court *dismissed* the American Muslim plaintiffs' claim and ruled in favor of the FBI.¹⁷⁵ At the circuit court level, the judge *reversed* the decision of the district court, stating that FISA § 1806 must supersede the state secrets privilege.¹⁷⁶ However, at the Supreme Court level, the judge *remanded* the case to the circuit court, stating that the state secrets privilege must supersede FISA.¹⁷⁷

Hassan's case also involves a difference in opinion between the district and circuit court levels. At the district court level, the judge *dismissed* the claim of the American Muslim plaintiffs, stating that the NYPD surveillance processes in the mosques and Islamic Society centers were initiated based on secret information collected on Muslim individuals in New York City suspecting them of illegal actions.¹⁷⁸ The district court gave priority to the NYPD surveillance operation on the American Muslim community in New York City under the argument of the state secrets privilege.¹⁷⁹ However, at the circuit court level, the judge reversed the ruling of the district court, stating that the NYPD violated FISA, ultimately breaching First Amendment rights, including the freedom of religion of American Muslim residents of

¹⁷² *Id.* at 1055.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1057.

¹⁷⁵ *Id.* at 1059

¹⁷⁶ *Id.* at 1064.

¹⁷⁷ OYEZ, *supra* note 114, at 17.

¹⁷⁸ Hassan v. City of N.Y., 804 F.3d 277, 289 (3d Cir. 2015).

¹⁷⁹ *Id.* at 292.

New York City.¹⁸⁰ Furthermore, in addition to *Fazaga* and *Hassan*, many more court cases have involved contradicting opinions in the judges' rulings related to the surveillance of American Muslims based on the state secrets privilege.¹⁸¹ *Raza v. City of New York*¹⁸² is another prominent example of such disagreement among different court levels regarding surveillance issues involving American Muslims.

As a result, judges must reassess the rules of the court cases related to the U.S. government security agencies' surveillance of American Muslims and related legal issues. The confusion between the state secrets privilege and FISA, including § 1806, impacted the rulings on these cases.¹⁸³ Specifically, American Muslims' First Amendment rights, including freedom of religion, are impacted by the U.S. government security agencies giving priority to surveilling Muslim individuals by relying on the state secrets privilege for the sake of protecting the national security of the U.S.¹⁸⁴ Besides, the ruling at some court levels based only on the FISA surveillance procedure is not enough to discern whether or not American Muslims' freedom of religion is violated by the U.S. government security agencies.¹⁸⁵ The arguments of the state secrets privilege and FISA surveillance procedure are hampering recognition of the violation of American Muslims' freedom of religion, represented by the *chilling effect* that has occurred as a result of such illegal surveillance operations on this minority group.¹⁸⁶ Furthermore, judges must find a new legal framework that examines the new type of surveillance issue—the chilling effect—on American Muslims while examining such contemporary surveillance cases in the courts. The leitmotif represented by the *fear* factor that is explicitly expressed by the American Muslim plaintiffs in the court cases discussed in this paper indicates that the action of the U.S. government security agencies is

¹⁸⁰ *Id.* at 289.

¹⁸¹ *See, e.g.*, *Raza v. City of N.Y.*, 998 F. Supp. 2d 70, 73 (E.D.N.Y. 2013); Jonathan Hafetz, *A Problem of Standards?: Another Perspective on Secret Law*, 57 WM. & MARY L. REV. 2141 (2016); Sean Michael Ward, *The State Secrets Protection Act (SSPA): Statutory Reform of the State Secrets Privilege*, 7 GEO. J.L. & PUB. POL'Y 681 (2009).

¹⁸² 998 F. Supp. 2d 70 (E.D.N.Y. 2013).

¹⁸³ *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1053 (9th Cir. 2020), *rev'd sub nom.* *Fed. Bureau of Investigation v. Fazaga*, 595 U.S. 344 (2022).

¹⁸⁴ *Id.* at 1058.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1059.

threatening the First Amendment rights of this minority group—mainly the freedom of religion.¹⁸⁷ Therefore, judges must consider the chilling effect’s impact on American Muslims’ freedom of religion while analyzing the surveillance cases by the security agencies.

VI. THE NEED TO REVISE ANTI-MUSLIM LAWS

The legal problems resulting from the current state statutes’ anti-Muslim laws, such as Andy’s and anti-Sharia laws, brought to the attention of journalists and legal experts the possible violation of the First Amendment rights of American Muslims, particularly freedom of religion.¹⁸⁸ The American Civil Liberties Union (ACLU) was the first legal group that commented on the proliferation of anti-Muslim laws back in 2017, when anti-Sharia laws were enacted in fourteen states and proposed in forty-three others.¹⁸⁹ Some legal experts mentioned that the new wave of anti-Muslim religion laws could survive if it were linked to the argument of national security of the U.S. but that it also might pose a threat to exercising the freedom of religion for American Muslims.¹⁹⁰ Precisely, legal experts illustrated that the justification of the Islamic law requirements about religious practices (e.g., attending Friday prayers) might not be acceptable to the courts, especially in cases that involved surveillance of Muslim religious activities.¹⁹¹ For instance, in the case of *Raza v. City of New York*, the district court did

¹⁸⁷ *Id.* at 1053.

¹⁸⁸ See, e.g., Dustin Gardiner and Mark Olalde, *These Copycat Bills on Sharia Law and Terrorism Have No Effect. Why do States Keep Passing Them?* USA TODAY (July 17, 2019), <https://www.usatoday.com/in-depth/news/investigations/2019/07/17/islam-sharia-law-how-far-right-group-gets-model-bills-passed/1636199001/>; Mark Aaron Goldfeder, *There Is a Place for Muslims in America: On Different Understandings of Neutrality*, 93 NOTRE DAME L. REV. 59 (2018).

¹⁸⁹ Swathi Shanmugasundaram, *Anti-Sharia Law Bills in the United States*, S. POVERTY L. CTR. (Feb. 5, 2018), <https://www.splcenter.org/hatewatch/2018/02/05/anti-sharia-law-bills-united-states> (“Since 2010, 201 anti-Sharia law bills have been introduced in [forty-three] states. In 2017 alone, [fourteen] states introduced an anti-Sharia law bill, with Texas and Arkansas enacting the legislation.”).

¹⁹⁰ See, e.g., Patrick Strickland, *US: Are ‘Anti-Sharia’ Bills Legalizing Islamophobia?*, AL JAZEERA (Oct. 1, 2017) <https://www.aljazeera.com/news/2017/10/1/us-are-anti-sharia-bills-legalising-islamophobia/> (“At least 194 bills were sought to criminalize Islamic law in the United States between 2010 and 2016, report says.”).

¹⁹¹ *Id.*

not accept the justification of the American Muslim plaintiffs, who stated that they were attending Friday prayers because of the Sharia requirements.¹⁹² The district court mentioned that the NYPD was surveilling the religious activities of Muslim individuals who were suspected of committing illegal acts that could pose a threat to the national security of the U.S.¹⁹³ Furthermore, the district court stated that protecting national security must come before the Islamic law requirements for religious activities.¹⁹⁴ However, the critical problem lies in that some states, including Tennessee, explicitly linked Islamic laws, such as Sharia, to terrorism and jihad by Muslims:

The threat from sharia-based jihad and terrorism presents a real and present danger to the lawful governance of this state and to the peaceful enjoyment of citizenship by the residents of this state;” adding, it further authorizes the attorney general to designate “Sharia organizations,” defined as “two (2) or more persons conspiring to support, or acting in concert in support of, sharia or in furtherance of the imposition of sharia within any state or territory of the [US]. Anyone who provides material support or resources to a designated Sharia organization could be charged with a felony and face up to [fifteen] years in jail.¹⁹⁵

Such a clear declaration of the anti-Muslim religion laws might pose a real threat to the freedom of religion of this minority group in the U.S. Specifically, the new wave of anti-Muslim laws in different states might hinder Muslims from practicing their religion freely due to the fear of punishment or the penalty resulting from these laws.¹⁹⁶ In fact, the anti-Muslim religion statutes in different states made Muslim individuals torn between practicing their freedom of religion

¹⁹² Raza v. City of N.Y., 998 F. Supp. 2d 70 (E.D.N.Y. 2013).

¹⁹³ *Id.* at 84. Raza, along with many other American Muslim plaintiffs in this case, explained to the judge that he had to attend Friday prayers as a requirement of Sharia law. Despite Raza’s claim that all the religious activities inside the mosque were peaceable, the district court gave priority to the NYPD surveillance operation under the claim of protecting the national security of the United States.

¹⁹⁴ Nuzhat Chowdhury, *I, Spy (But Only on You): Raza v. City of New York, the Civil Rights Disaster of Religious & Ethnic-Based Surveillance, and the National Security Excuse*, 46 COLUM. HUM. RTS. L. REV. 278 (2015).

¹⁹⁵ Shanmugasundaram, *supra* note 189, at 26.

¹⁹⁶ Raza, 998 F. Supp. 2d at 70.

and abiding by the state laws that support the security agencies' surveillance operations under the claim of the war on terror.¹⁹⁷ Therefore, this paper argues that the anti-Muslim religion laws must be revised by U.S. lawmakers in order to ensure the protection of American Muslims' freedom of religion from any violations that could happen, especially the chilling effect on this minority group. U.S. lawmakers must walk the line between the state laws that support the security agencies' war on terror and the need to protect the constitutional rights of peaceable American Muslims and their religious activities. U.S. lawmakers must allow American Muslims to practice their freedom of religion by restricting any anti-Muslim state or federal laws that directly hinder Muslims' religious activities.

VII. TRANSPARENCY REQUIRED REGARDING EXECUTIVE ORDER 12,333 TO REDUCE THE CHILLING EFFECT ON AMERICAN MUSLIMS

In 1981, President Ronald Reagan established Executive Order ("E.O.") 12,333, called the United States Intelligence Activities, which has become a privileged legal document that gives U.S. security agencies the power to conduct surveillance on U.S. citizens.¹⁹⁸ In 2004 and 2008, E.O. 12,333 was amended to give security agencies more flexibility while conducting surveillance on individuals in the U.S.¹⁹⁹

¹⁹⁷ Gwendolyn Zoharah Simmons, *From Muslims in America to American Muslims*, 10 J. ISLAMIC L. & CULTURE 254 (2008).

¹⁹⁸ See, e.g., Charlotte J. Wen, *Secrecy, Standing, and Executive Order 12,333*, 89 S. CAL. L. REV. 1099 (2016); Bretton G. Sciaroni, *The Theory and Practice of Executive Branch Intelligence Oversight*, 12 HARV. J.L. & PUB. POL'Y 397 (1989); Tyler J. Harder, *Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law*, 172 MIL. L. REV. 1 (2002); Jonathan W. Gannon, *From Executive Order to Judicial Approval: Tracing the History of Surveillance of U.S. Persons Abroad in Light of Recent Terrorism Investigations*, 6 J. NAT'L SEC. L. & POL'Y 59 (2012); Jonathan Ulrich, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029 (2005).

¹⁹⁹ See, e.g., Mark M. Jaycox, *No Oversight, No Limits, No Worries: A Primer on Presidential Spying and Executive Order 12,333*, 12 HARV. NAT'L SEC. J. 58 (2021); Taran Molloy, *Qassem Soleimani, Targeted Killing of State Actors, and Executive Order 12,333*, 52 VICTORIA U. WELLINGTON L. REV. 163 (2021); Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633 (2016); Diana Lee, Paulina Perlin & Joe Schottenfeld, *Gathering Intelligence: Drifting Meaning and the Modern Surveillance Apparatus*, 10 J. NAT'L SEC. L. & POL'Y 77 (2019); Emily Berman, *Regulating Domestic Intelligence Collection*, 71 WASH. & LEE L. REV. 3 (2014).

Furthermore, some other legal organizations and individual experts mentioned that E.O. 12,333 lacks transparency regarding disclosing the procedure for conducting surveillance operations by the security agencies.²⁰⁰ For instance, in 2017, the ACLU filed a lawsuit against the National Security Agency (NSA) asking the latter to disclose the procedure for conducting its surveillance processes under E.O. 12,333.²⁰¹ The ACLU mentioned that E.O. 12,333 procedures for conducting surveillance by the NSA on individuals are unclear and may raise legal issues related to First Amendment rights, including the freedoms of religion and speech.²⁰² The main problem lies in the fact that E.O. 12,333 is considered a regulation that has broad restrictions not specifically directed to the freedom of religion, which is protected by the First Amendment.²⁰³ Hence, a chilling effect might occur, resulting from the broad restrictions of E.O. 12,333 that are deterring Muslim individuals from practicing their religious activities freely. Justice Felix Frankfurter discussed the chilling effect in the well-known case of *Wieman v. Updegraff*²⁰⁴ by mentioning that the chilling effect “occurs when individuals seeking to engage in activity protected by the First Amendment are deterred from so doing by governmental regulations not specifically directed at that protected activity.”²⁰⁵ Therefore, greater transparency of E.O. 12,333 will help to decrease the chilling effect problem related to Muslim individuals exercising their freedom of religion, which results from the U.S. government security agencies’ surveillance operations on this minority group.

Over many years, the Supreme Court has discussed the issue of overbroad laws that might produce the chilling effect problem.²⁰⁶ Historically, the Supreme Court has struck down many laws that were considered broad and unclear, and which might have produced chilling effects, such as the Louisiana Subversive Activities and Communist

²⁰⁰ Paulina Perlin, *ACLU v. NSA: How Greater Transparency Can Reduce the Chilling Effects of Mass Surveillance*, YALE L. SCH. (Dec. 6, 2017), <https://law.yale.edu/mfia/case-disclosed/aclu-v-nsa-how-greater-transparency-can-reduce-chilling-effects-mass-surveillance>.

²⁰¹ Am. Civ. Liberties Union v. Nat’l Sec. Agency, No. 13 Civ. 09198 (KMW) (JCF), 2017 WL 1155910, at *2 (S.D.N.Y. Mar. 27, 2017).

²⁰² *Id.* at *1-3.

²⁰³ *Id.* at *1.

²⁰⁴ 344 U.S. 183 (1952).

²⁰⁵ Perlin, *supra* note 200.

²⁰⁶ Gerald Walpin, *Five Justices Have Transformed the First Amendment’s Freedom of Religion to Freedom from Religion*, 31 TOURO L. REV. 187, 189 (2015).

Control Law in the case *Dombrowski v. Pfister*.²⁰⁷ In the *Dombrowski* case, the Supreme Court maintained that the Louisiana Subversive Activities and Communist Control Law might restrict the exercising of freedom of speech due to the chilling effect that could occur as a result of the vagueness of this law.²⁰⁸ Moreover, in *Dombrowski*, the Supreme Court gave employees the right to speak freely against the criminal liability of the Louisiana Subversive Activities and Communist Control Law.²⁰⁹ The other problem related to the transparency of E.O. 12,333 is that surveillance processes conducted by the U.S. government security agencies under this order do not go under a court review process like FISA.²¹⁰ E.O. 12,333 is operating through the executive branch under a vague surveillance procedure that might produce a chilling effect.²¹¹ Scholar Paulina Perlin, in her article *ACLU v. NSA: How Greater Transparency Can Reduce the Chilling Effects of Mass Surveillance*,²¹² states the following about E.O. 12,333 and its transparency regarding the surveillance procedure:

The government's authority to conduct surveillance—particularly in the context of E.O. 12,333, which, unlike programs under the Foreign Intelligence Surveillance Act, is not subject to oversight or court review—is notoriously broad and discretionary, operating almost entirely at the executive branch's will. As the ACLU and MFIA demonstrated in their briefing documents, and as many other national security experts have argued, we don't know much about programs under E.O. 12,333. Knowledge of how much data is being swept, how this data is used, and how the NSA and other government agencies interpret their power under E.O. 12,333, among other questions, remains inexact at best.²¹³

This Article does not say that E.O. 12,333 is unconstitutional. Rather, this Article argues that E.O. 12,333 needs more transparency

²⁰⁷ 380 U.S. 479, 483 (1965).

²⁰⁸ *Id.* at 486.

²⁰⁹ *Id.* at 489.

²¹⁰ Perlin, *supra* note 200.

²¹¹ *Id.*

²¹² Perlin, *supra* note 200; *see also* Am. Civ. Liberties Union v. Nat'l Sec. Agency, 493 F.3d 644 (6th Cir. 2007).

²¹³ Perlin, *supra* note 200.

regarding the surveillance procedure by the U.S. government security agencies, especially on American Muslims' religious activities.²¹⁴ Furthermore, increasing the transparency could help in reducing the chilling effect problem that is occurring as a result of the vague surveillance procedure of this order, which eventually might restrict Muslim individuals from freely exercising their freedom of religion.

VIII. CONCLUSION

The *actions* and the *laws* of the U.S. government, represented by security agencies' surveillance operations of American Muslims and anti-Muslim statutes established by different states, raise a serious concern related to the *chilling effect* problem threatening the freedom of religious rights of this minority group in the U.S. The ongoing random electronic and physical surveillance operations by the U.S. government security agencies of American Muslims' religious activities illustrates the dangers of the chilling effect problem of this minority religious group.²¹⁵ The problem lies in the fact that these surveillance processes on American Muslims are conducted neither with restrictions nor with any transparency as to the surveillance procedures followed by security agencies.²¹⁶ Relying on an untenable presumption, the U.S. government alleged that Muslims' religious beliefs might pose a threat to the national security of the U.S.²¹⁷ This presumption has been used to justify increased surveillance and control of Muslim religious activities by U.S. security agencies.²¹⁸ As a result,

²¹⁴ Wen, *supra* note 198.

²¹⁵ See Ringrose, *supra* note 13, at 135.

²¹⁶ See, e.g., Halina Parafianowicz, *The U.S. in the Age of Terrorism: Security, Justice and Civil Rights*, 10 BIALSTOCKIE STUDIA PRAWNICZE 171 (2011); Sameer Ahmed, *The Religious Right to Refuse Service: Accommodating Muslims in a Christian America*, 7 ALB. GOV'T L. REV. 379 (2014); Amany R. Hacking, *A New Dawn for Muslims: Asserting Their Civil Rights in Post-9/11 America*, 54 ST. LOUIS U. L.J. 917 (2010); Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1 (2014); Khaled A. Beydoun, *On Islamophobia, Immigration, and the "Muslims Bans"*, 43 OHIO N.U. L. REV. 443 (2017); Jeffrey Monaghan, *Terror Carceralism: Surveillance, Security Governance and De/Civilization*, 15 PUNISHMENT & SOC'Y 3 (2013); James P. Walsh, *Border Theatre and Security Spectacles: Surveillance, Mobility and Reality-Based Television*, 11 CRIME MEDIA CULTURE 201 (2015).

²¹⁷ See Lane, *supra* note 2, at 84.

²¹⁸ See, e.g., Wayne McCormack, *U.S. Judicial Independence: Victim in the "War on Terror"*, 71 WASH. & LEE L. REV. 305 (2014); Christopher Slobogin, *Standing*

the surveillance operations of U.S. government security agencies on American Muslims (i.e., action) are considered a real threat to exercising the freedom of religion for this minority group. Moreover, the anti-Muslim statutes established by various states are a second type of chilling effect that hinders American Muslims from practicing their religion freely without any obstacles. Specifically, the new wave of anti-Muslim statutes in different states has made American Muslims self-control their religious activities in order to avoid punishment for violating the new statutes. The anti-Sharia and Andy's laws are clear current examples of laws that have chilling effects on American Muslims.²¹⁹

The contemporary court cases discussed in this article, *Fazaga* and *Hassan*, are clear examples of the chilling effects American Muslim communities face in the U.S. as a result of security agencies' surveillance operations. Furthermore, the court cases discussed in this manuscript show the state of chaos in the U.S. courts regarding the surveillance of American Muslims. The reversing, remanding, and dismissing of rulings among different court levels illustrate the lack of a framework that could be used by judges while ruling in modern surveillance court cases related to violations of the freedom of religion rights of American Muslims.²²⁰

The exceptionalism of the state secrets privilege is another major problem related to the chilling effects on American Muslims' religious activities. Specifically, in the courts, the U.S. government security agencies hide evidence of their surveillance operations on American Muslims and rely on the state secrets privilege claim.²²¹ The U.S. government security agencies state that disclosing sensitive and secret information to the public could harm national security.²²² Besides, the U.S. security agencies claim that they have the right to hide this evidence from the public under the state secrets privilege for

and Covert Surveillance, 42 PEPP. L. REV. 517 (2015); Amit K. Chhabra, *FISA Surveillance and Aliens*, 82 FORDHAM L. REV. RES. GESTAE 17 (2014).

²¹⁹ See Piggott, *supra* note 72, at 94.

²²⁰ See *Hassan v. City of N.Y.*, 804 F.3d 277 (3d Cir. 2015). In *Hassan's* case, the Third Circuit Court of Appeals reversed the rule of the district court. In this case, the judges in these two different court levels had different opinions about the surveillance of Muslims by the New York Police Department.

²²¹ Wooliver, *supra* note 102.

²²² *Id.* at 68.

the sake of protecting the national security of the U.S.²²³ The problem here is that the U.S. government can claim that anything is a privileged state secret, and there is no way for anyone to evaluate how that decision was made. Thus, documents are secret because the government says they should be secret—period. The use of the state secrets privilege by government security agencies can be seen in many cases related to the surveillance of Muslims in recent years.²²⁴ *Fazaga* has been considered among recent controversial cases regarding the use of state secrets privilege on American Muslims.²²⁵ *Fazaga*, like many others related to the surveillance of American Muslims, shows the problem of security agencies using the state secrets privilege in any lawsuit.²²⁶ In particular, under the state secrets privilege claim, the security agencies could be excused from any legal liability when violating the freedom of religion of American Muslims.²²⁷ U.S. lawmakers must therefore review the use of state secrets privilege in lawsuits, especially those related to the violation of American Muslims' freedom of religion resulting from the security agencies' surveillance of this minority group.

From another perspective, this paper suggests a legal framework regarding the surveillance of American Muslims by U.S. government security agencies in order to resolve the confusion of judges in surveillance court cases. The main issue is related to how different courts analyze and view the security agencies' surveillance cases of Muslims from different angles. While judges at the district court level rely on state secrets privileges, other judges rely on FISA to analyze the surveillance methods of security agencies.²²⁸ Regarding this confusion at different court levels by different judges, an essential legal question that could solve it could be seen in *Fazaga*: “Does Section 1806(f) of the Foreign Intelligence Surveillance Act of 1978 displace the state-secrets privilege and authorize a district court to

²²³ See, e.g., Chad P. Bown, *Export Controls: America's Other National Security Threat*, 30 DUKE J. COMPAR. & INT'L L. 283 (2020); Aaron Ettinger, *Trump's National Security Strategy: "America First" Meets the Establishment*, 73 INT'L J. 474 (2018); Kyle L. Greene, *National Security Rules: America's Constitution of Law and War*, 73 ME. L. REV. 271 (2021).

²²⁴ See *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1052 n.31 (9th Cir. 2020), *rev'd sub nom. Fed. Bureau of Investigation v. Fazaga*, 595 U.S. 344 (2022)

²²⁵ *Id.* at 1024.

²²⁶ *Id.*

²²⁷ See generally Healy, *supra* note 149.

²²⁸ See *Fazaga*, 965 F.3d at 1052 n.31.

resolve the merits of a lawsuit challenging the lawfulness of government surveillance by considering the privileged evidence?”²²⁹ Therefore, this paper suggests that judges must thoroughly examine the chilling effect and its impact on American Muslims’ freedom of religion while analyzing the surveillance cases involving security agencies and this minority group.

This paper also suggests the need for revising anti-Muslim laws that are considered a part of the chilling effect and a violation of American Muslims’ freedom of religion. The new wave of anti-Muslim laws in many states might lead Muslims to become afraid of practicing their religion freely due to the fact that these anti-religious laws prevent Muslims from freely and peacefully worshipping.²³⁰ Since 2010, a wave of enacted and proposed anti-Sharia laws has arisen in different states.²³¹ In many states that enacted anti-Sharia laws, those states considered adherence to Sharia law a real threat to the national security of the U.S.²³² States like Tennessee clearly communicated their belief that Sharia law encourages jihad and terroristic actions and therefore must be banned.²³³ The problem lies in the fact that banning Sharia law through enacted anti-Sharia laws means restricting Muslims from practicing their religion freely, such as worshipping and going to mosques to practice certain religious deeds. Therefore, this Article argues that the anti-Muslim laws must be revised by U.S. lawmakers in order to guarantee the protection of American Muslims’ freedom of religion, especially in cases involving the chilling effect.

This Article also suggests the need for more transparency regarding Executive Order 12,333 in order to reduce the chilling effect on American Muslims. The main problem centers on the fact that E.O. 12,333 is considered a regulation that has vague and broad restrictions not particularly directed to the freedom of religion that is protected by the First Amendment.²³⁴ Such governmental restrictions might *deter*

²²⁹ *Federal Bureau of Investigation v. Fazaga*, OYEZ, *supra* note 114.

²³⁰ *See Bans on Sharia and International Law*, *supra* note 60. The new wave of anti-Muslim laws in different states might hinder Muslims from practicing their religion freely due to the fear of punishment or the penalty resulting from these laws.

²³¹ *See generally* Shanmugasundaram, *supra* note 189.

²³² *See* the S. Poverty L. Ctr. Database for details about the full list of the enacted anti-Sharia law states, available at <https://www.splcenter.org/data-projects/tracking-anti-muslim-legislation-across-us>.

²³³ *See generally* Shanmugasundaram, *supra* note 189.

²³⁴ *See* Wen, *supra* note 198.

Muslims from practicing their religion freely. Consequently, a chilling effect might exist and raise legal concerns about violating the freedom to practice Islam that is protected under the First Amendment rights. Therefore, this Article recommends that E.O. 12,333 needs more transparency regarding the surveillance procedure by the U.S. government security agencies, especially regarding American Muslims' religious activities. Additionally, this Article illustrates that increasing the transparency of E.O. 12,333 could help in decreasing the chilling effect problem that occurs as a result of the ambiguous surveillance procedure of this order.

Lastly, this Article recommends that U.S. lawmakers pay attention to the freedom of religion violation of American Muslims through the two contemporary types of the chilling effect: actions and laws. As the violation of the freedom of religion of minorities has happened in the U.S. throughout its history, judges and U.S. lawmakers need to see the real problem of the freedom of religion violation on American Muslims without paying attention to race or religious background, as Judge Thomas L. Ambro stated in *Hassan*:

We have been down similar roads before. Jewish-Americans during the Red Scare, African Americans during the Civil Rights Movement, and Japanese-Americans during World War II are examples that readily spring to mind. We are left to wonder why we cannot see with foresight what we see so clearly with hindsight—that loyalty is a matter of the heart and mind, not race, creed, or color.²³⁵

Not surprisingly, the history of the U.S. reveals abuses of minorities' civil rights that still exist today and need to be eradicated.

²³⁵ See Faiza Patel, *What the Third Circuit Said in Hassan v. City of New York*, JUST SEC. (Oct. 14, 2015), <https://www.justsecurity.org/26827/circuit-hassan-v-city-york/>.