No. 22-1178

IN THE
Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,

Petitioners,

v.

YONAS FIKRE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When the government removes an individual from the No Fly List during litigation challenging the individual's listing, the case does not end automatically. Rather, the case is moot only if no further relief is possible and, even then, the matter is adjudicated unless the government can overcome the voluntary cessation exception to mootness. Determining whether the government has overcome the exception requires a case-specific analysis of what the government has said and done, including whether the government has repudiated its original decision to place the individual on the list or changed its listing practices, as opposed to merely having exercised individual discretion to remove the individual. In this case, the government has removed Yonas Fikre from the No Fly List while insisting that his placement on the list had been "in accordance with applicable policies and procedures." Pet. App. 118a.

The question presented is whether the government can overcome the voluntary cessation exception to mootness by removing an individual from the No Fly List while at the same time emphasizing that that individual's placement on the list was in accordance with applicable policies and procedures, and without otherwise repudiating its prior decision to place the individual on the list.

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INTRODUCTION

This case stems from the Ninth Circuit's fact-specific application of this Court's well-established precedents on mootness and voluntary cessation. Because the petition raises neither a genuine circuit split nor any unsettled questions of law, it should be denied.

This Court has long held that a defendant must satisfy a heavy burden for its voluntary actions to render a case moot and overcome the voluntary cessation exception. It must be absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur and that interim events have completely and irrevocably eradicated the effects of the alleged violation. The Ninth Circuit straightforwardly applied that precedent to this case.

The case arose when Respondent Yonas Fikre challenged his inclusion in the Terrorist Screening Dataset (the "Watchlist") and on its constituent No Fly List. Fikre sued Petitioners, alleging, inter alia, that his inclusion on the Watchlist and the No Fly List violated his substantive and procedural due process rights, including by subjecting him to reputational harm. During the pendency of the case, the government removed Fikre from the No Fly List but not the Watchlist. The district court dismissed Fikre's claims as moot. The Ninth Circuit reversed and remanded, holding that the government must do more than simply remove an individual from the No Fly List to moot his claims. *See* Pet. App. 43a-44a ("*Fikre I*"). To ensure that the government is not "practically and legally 'free to return to [its] old ways,'" the Ninth Circuit in *Fikre I* explained, the government must "assure[ ] Fikre that he

will not be banned from flying for the same reasons that prompted the government to add him to the list in the first place." *Id.* at 42a. The government may accomplish this through "a change in administrative policy that embrace[s] … [Fikre's] arguments" or by "repudiat[ing] the decision to add Fikre to the No Fly List." *Id.* at 39a, 42a.

On remand, the government submitted a declaration that neither included the information the Ninth Circuit specified nor conceded the wrongfulness of its actions or policies. Instead, the declaration reaffirmed that Fikre deserved No Fly List status by publicly declaring that Fikre's placement on the list had been "in accordance with applicable policies and procedures." Pet. App. 118a. The government also declined to announce any policy changes. Thus, when the case reached the Ninth Circuit a second time, the Ninth Circuit again vacated and remanded. Pet. App. 30a ("*Fikre II*"). Applying law of the case doctrine, it held that the government failed to follow the prior panel's clear instructions. *Id.* at 2a. Because the government insisted that Fikre's placement on the No Fly List had been "in accordance with applicable policies and procedures" and did not assure Fikre that, in the future, he would not be returned to the list for the same reasons and by the same processes the government previously used to list him, the case was not moot. *Id.* at 17a.

Petitioners allege that the Ninth Circuit's decision in *Fikre II* created a circuit split with the Fourth and Sixth Circuits. *See Long v. Pekoske*, 38 F.4th 417 (4th Cir. 2022); *Mokdad v. Sessions*, 876 F.3d 167 (6th Cir. 2017). It did not. The Fourth Circuit in *Long* applied the same

legal framework as the Ninth Circuit in *Fikre I* but came to a different result on different facts, holding that the government's declaration provided appropriate assurances to the petitioner that he would not be returned to the No Fly List for the same reason that prompted his original inclusion. 38 F.4th at 424-25. Notably, in *Long*, the government did not defend its original decision to include Long on the No Fly List but instead "acquiesce[d] to the righteousness" of Long's contentions. *Id.* at 425 (citation omitted). The government did exactly the opposite in Fikre's case.

The Sixth Circuit's opinion in *Mokdad* is even farther afield. There, the sole relief sought was removal from the No Fly List, and the voluntary cessation exception did not apply because the government removed the plaintiff in response to a court order. 876 F.3d at 171. Nothing remotely similar occurred here.

Even if a circuit split does exist, the split is narrow and factbound. The purported split boils down to a dispute over the interpretation of the precise language of two distinct government declarations. The interpretation of those declarations is relevant only when the government removes someone from the No Fly List in an attempt to moot their case. And even then, the dispute concerns only the as-applied, not facial, parts of Fikre's No Fly List claims. Petitioners do not suggest otherwise. They instead exaggerate the importance of these separate, factbound applications of settled doctrine.

If the government wishes to moot this case and overcome the voluntary cessation exception, it can do so by providing assurances to Fikre about the past,

present, and future—by repudiating the *past* decision to include him on the Watchlist and place him on the No Fly List, by stating that there is no *present* basis for his inclusion on the list, and by explaining that any *future* inclusion will not be based on the same facts and processes that previously caused his listing. Requiring past, present, and future assurances to overcome the voluntary cessation exception in No Fly List removal cases is consistent with this Court's longstanding mootness jurisprudence. And contrary to Petitioners' claim, it does not violate the presumption of regularity. The Ninth Circuit explicitly "presume[d that] the government acts in good faith and [did] not impute to it a strategic motive to moot Fikre's suit." *Fikre I*, Pet. App. 42a. Nor does requiring past, present, and future assurances demand that the government admit constitutional error. It requires only that, to moot a case and close the courtroom doors to a plaintiff like Fikre, the government "unambiguous[ly] ren[ounce] … its past actions" to "compensate for the ease with which it may relapse into them." *Id.* at 40a.

Finally, even if the question presented merits the Court's review, this case is a poor vehicle. The Ninth Circuit panel in *Fikre II* straightforwardly applied the holding of the panel in *Fikre I*. The government's real dispute is with that holding, not with *Fikre II*. Furthermore, the government has not provided Fikre with any assurances at all—past, present, or future—regarding his inclusion on the Watchlist. With better

vehicles available in other No Fly List removal cases, this Court should not disrupt the proceedings below.

STATEMENT OF THE CASE

I. Legal Background

Article III of the U.S. Constitution "grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 91 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). When the mootness doctrine applies, the judicial power does not extend to the lawsuit in question. *See* U.S. Const. art. III, § 2, cl. 1.

This Court has recognized several exceptions to the mootness doctrine. Most relevant here is the voluntary cessation exception, which comes into play when a defendant voluntarily ceases the challenged practice before the plaintiff's case is resolved. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1982). A defendant "cannot automatically moot a case simply by ending its unlawful conduct once sued." *Nike*, 568 U.S. at 91. Such a rule would allow any defendant "to return to his old ways." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). This Court has "rightly refused to grant defendants such a powerful weapon." *Id.*

Instead, courts apply a "stringent" test under which "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful

behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000) (citing *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)). The defendant also must show that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979).

The voluntary cessation exception therefore imposes a "heavy burden of persuasion" on a defendant. *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). This Court in *Already, LLC v. Nike, Inc.*, for example, held that Nike's suit against a competitor, and the competitor's counterclaim, were moot and the voluntary cessation exception applied after Nike issued a "Covenant Not to Sue." *Nike*, 568 U.S. at 89, 92-95. The Court reached that conclusion after finding, not only that the covenant was "unconditional and irrevocable," and that it "prohibit[ed] Nike from filing suit," but that it covered "*current* or *previous* designs" and restricted Nike's *future* ability to file suit. *Id.* at 93 (emphasis added). By contrast, in *Mesquite v. Aladdin's Castle, Inc.*, a challenge to a city ordinance was not moot despite the city's decision to repeal the ordinance's "objectional language." 455 U.S. at 289. As the Court explained, the city's voluntary cessation "would not preclude it from reenacting precisely the same provision" if the case were dismissed on mootness grounds. *Id.*

II. Factual Background

Since 2003, the United States has maintained the Terrorist Screening Dataset, a consolidation of several

government terrorist watchlists in one database. Pet. App. 3a. Whenever a U.S. government agency or foreign partner nominates an individual for inclusion on the Watchlist, the FBI-managed Terrorist Screening Center determines whether to add that individual, based on "'reasonable suspicion' that he or she is a known or suspected terrorist." *Id.* (quoting *Kashem v. Barr*, 941 F.3d 358, 365 (9th Cir. 2019)). The Watchlist itself is subdivided into various lists, including the No Fly List. Pet. App. 4a.

The No Fly List is the "most restrictive" list within the Watchlist, reserved for individuals whom the government believes "pose a threat of committing an act of international or domestic terrorism." *Id.* Once the Screening Center adds someone to the No Fly List, the Transportation Security Administration ("TSA") will prevent that individual from boarding commercial aircraft that fly into, out of, or through U.S. airspace. *Id.* Individuals on the Watchlist but not the No Fly List, by contrast, can typically board commercial aircraft after going through an "enhanced security screening[]" protocol. *Id.*

The Department of Homeland Security's Traveler Redress Inquiry Program ("DHS TRIP") is a TSA-administered process that allows "individuals to challenge their inclusion on the No Fly List" and the Watchlist. Pet. App. 5a. If individuals ask for information about their placement on the No Fly List, TSA provides a letter identifying the specific reason(s) "for their listing" and an unclassified "summary of information supporting that listing." *Id. See also* 49 U.S.C. §§ 44903(j)(2)(C)(iii)(I), (j)(2)(G)(i); *id.*

§§ 44926(a), (b)(1); 49 C.F.R. §§ 1560.201, .203, .205, .207. For persons who seek redress through DHS TRIP, the TSA Administrator has discretion to remove individuals from the No Fly List based on the above materials and a report by the Screening Center's Redress Office. Pet. App. 5a.

III. Proceedings Below

In 2018, Yonas Fikre sued the U.S. government for placing and maintaining him on the Watchlist and the No Fly List in violation of his substantive and procedural due process rights. Pet. App. 32a.

Fikre, an American citizen living in Portland, Oregon, discovered that he was on the No Fly List in 2010 while traveling in Sudan. *Id.* Two FBI agents approached Fikre, asked him about his association with a particular mosque in Portland, and offered to remove him from the No Fly List if he became a government informant. Pet. App. 32a-33a. Fikre refused. *Id.* at 33a. Fikre later left Sudan and visited the United Arab Emirates, where he was subsequently imprisoned and tortured for over 100 days. *Id.* After his release, still unable to return to the United States, Fikre sought refuge in Sweden. *Id.* In 2013, he filed a DHS TRIP inquiry, but DHS refused to confirm or deny his placement on the No Fly List. Pet. App. 33a-34a. In 2015, DHS told Fikre that he was (and would remain) on the No Fly List because he had been "identified as an individual who may be a threat to civil aviation or national security." *Id.* at 34a.

In 2015, while Fikre was still on the No Fly List, the Swedish government returned Fikre to Portland by

private jet. Pet. App. 34a, 84a. Prior to his return, Fikre filed suit against the U.S. government, alleging that his placement on the Watchlist and the No Fly List violated his substantive and procedural due process rights to travel and his reputation because, among other reasons, the government listed Fikre only for the purpose of pressuring him to become an FBI informant against his community. *Id.* at 34a-35a & n.2 *See Kent v. Dulles*, 357 U.S. 116, 125 (1958) (recognizing the right to international travel). Fikre asked for injunctive and declaratory relief, including removal from the lists and a declaration by the government that he should not have been placed on the No Fly List. Pet. App. 35a. In 2016, during the course of litigation, the government notified Fikre that he had been removed from the No Fly List. *Id.* at 35a, 84a. The notification was silent as to whether Fikre remained on the Watchlist. *See id.* The district court later dismissed Fikre's claims as moot. Pet. App. 35a, 93a-94a.

Fikre appealed. In *Fikre I*, Pet. App. 31a, the Ninth Circuit reversed, holding both that the removal did not render Fikre's claims moot and that, even if the claims were moot, the government did not overcome the voluntary cessation exception to mootness. *Id.* at 44a.

On mootness, the Ninth Circuit determined that relief remained available for Fikre's claims because his removal from the No Fly List did not "completely and irrevocably eradicate[ ] the effects of the alleged violation[s]." *Id.* at 43a (quoting *Davis*, 440 U.S. at 631). Those harms persisted despite his removal because Fikre's initial placement on the list "stigmatiz[ed] … [him] as a known or suspected terrorist." *Id.* "Absent an

acknowledgment by the government that its investigation revealed Fikre did not belong on the list, and that he will not be returned to the list based on the currently available evidence … acquaintances, business associates, and perhaps even family members are likely to persist in shunning or avoiding him despite his renewed ability to travel," so "vindication" would still have "actual and palpable consequences." *Id.* As a result, the case was not moot. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (internal quotation marks and citations omitted)).

The Ninth Circuit also held that the voluntary cessation exception to mootness applied. The court explained that "the form the governmental action takes is critical" to determining whether a voluntary action can overcome the exception and render a case moot. While changes enacted through the "legislative process bespeak … finality," informal executive action does not, including because it is not permanently entrenched and "is not governed by any clear or codified procedures." *Fikre I*, Pet. App. 38a (internal marks and citations omitted). Thus, for the government to moot a claim through informal executive action, there must be "procedural safeguards insulating the new state of affairs from arbitrary reversal." *Id.* at 40a (citation omitted). The "government's rationale for its changed practice(s)," particularly where that rationale includes an "unambiguous renunciation of its past actions," can be a part of how the government demonstrates that it is not "practically and legally free to return to [its] old ways."

Id. at 40a-41a (internal quotation marks and citations omitted).

Proceeding from those premises, the Ninth Circuit outlined two steps that the government could have taken (but did not) to render Fikre's claims moot and overcome the voluntary cessation exception. First, the government could have explained that Fikre did not initially belong on the list by making "a change in administrative policy that embraced … [Fikre's] arguments" or by otherwise "repudiat[ing] the decision to add Fikre to the No Fly List." *Id.* at 39a, 42a. Second, the government could have assured Fikre that any future listing decisions would be "predicated on a new and different factual record" not previously or currently available to the government. *Id.* at 43a (citation omitted). Without those backward- and forward-looking assurances, the government's choice to remove Fikre from the list left the government "practically and legally free to return to [its] old ways," and the voluntary cessation exception applied. *Id.* at 41a (internal quotation marks, citations, and alterations omitted).

On remand, the government moved again to dismiss Fikre's complaint. This time, the government provided a declaration filed by FBI Supervisory Special Agent Christopher R. Courtright (the "Courtright Declaration") that, in relevant part, included the following statements:

> Plaintiff was placed on the No Fly List in accordance with applicable policies and procedures. Plaintiff was removed from the No Fly List upon the determination that he no longer satisfied the criteria for placement on the No Fly

> List. He will not be placed on the No Fly List in the future based on the currently available information.

Pet. App. 118a.

In light of the Courtright Declaration, the district court held that Fikre's due process claims related to his inclusion on the No Fly List were moot. *See* Pet. App. 48a & n.6.

The Ninth Circuit reversed. It explained that its earlier opinion in *Fikre I* "specified … what the government was required to do" to establish mootness and overcome the voluntary cessation exception. *Fikre II*, Pet. App. 15a. Applying the law of the case doctrine, the court held the Courtright Declaration was insufficient because it did not meet the requirements of *Fikre I*. *Id.* At most, the Courtright Declaration "assured Fikre only that he does not *currently* meet the criteria for inclusion on the No Fly List." *Id.* at 19a. The Declaration did not "renounc[e] the government's original decision" to place Fikre on the list, "announc[e] a change in policy" that would prevent a repeat of his prior listing, or explain why Fikre was once added to the List but no longer qualifies. *Id.* at 16a-17a. In fact, the Declaration indicated that the government made no policy change and "double[d] down" by defending its decision to place Fikre on the No Fly List. *Id.* at 17a. The Declaration even failed to assure Fikre that he would not be banned from flying in the future based on the same facts and processes as before, leaving open the possibility that Fikre could be re-added to the No Fly

List "the moment Fikre again meets whatever criteria he satisfied initially." *Id*. at 19a.

In sum, the Courtright Declaration failed the test laid out in *Fikre I* because it neither acknowledged any past error nor provided any guarantees about the government's future behavior. Without those assurances, the government failed to "satisfy the heavy burden of making it absolutely clear that the government would not in the future return Fikre to the No Fly List for the same reason it placed him there originally." *Id*. at 17a.

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit's Decision Does Not Implicate Any Circuit Split.

There is no good reason for this Court to review the Ninth Circuit's application of mootness and the voluntary cessation doctrine in this case. Although Petitioners allege that *Fikre II* "directly conflicts with decisions of the Fourth and Sixth Circuits," Pet. 10, no such conflict exists. The circuits have reached different conclusions in different cases involving the government's removal of different individuals from the No Fly List, dictated by fact-specific differences in the evidence presented by the government in each case. The cases cited by Petitioners thus implicate only the factbound question of what the government must do or say to establish mootness and overcome the voluntary cessation exception in the specific context of any given No Fly List removal, rather than a question of law.

1. Petitioners rely on an asserted conflict between the Fourth Circuit and the Ninth Circuit. But the two

cases are in harmony, not conflict. In *Long v. Pekoske*, 38 F.4th 417, the Fourth Circuit applied well-settled law on mootness and voluntary cessation to facts that differed from those before the Ninth Circuit in *Fikre II*. *See id.* at 422-23 (citing *Nike*, 568 U.S. at 91). On the basis of those different facts, the Fourth Circuit reached a different conclusion. Indeed, the Fourth Circuit explained that it did not disagree with the Ninth Circuit's doctrinal description of the voluntary cessation exception. *See id.* at 424 ("[W]e agree with the general framework the Ninth Circuit has set out.").

At issue in *Long* was a declaration submitted by FBI Special Agent Jason V. Herring. Supplemental Appendix at Supp. App. 14-15, *Long v. Pekoske*, No. 20-1406 (4th Cir. May 12, 2021), ECF No. 53 ("Herring Declaration"). Unlike the Courtright Declaration in *Fikre II*, in which the FBI insisted that Fikre had been "placed on the No Fly List in accordance with applicable policies and procedures," Pet. App. 118a, the Herring Declaration did not insist that Long was properly placed on the No Fly List. The Herring Declaration's attached exhibit A, a letter from the Department of Homeland Security to Long, noted that Long was "[p]reviously … informed of the TSA Administrator's determination to uphold [his] placement on the No Fly List based on the totality of available information," and that "[t]his letter supersede[d] the letter sent to [him] on April 23, 2019," suggesting that a new assessment led to his removal from the No Fly List. Herring Declaration at Supp. App. 17.

In the Fourth Circuit's view, the declaration and its exhibit reflected that the government had "acquiesced

to the righteousness of Long's contentions" and "removed Long from the list because, as he contends, he doesn't belong on it." *Long*, 38 F.4th at 425 (citation and alteration omitted). This acknowledgement, the Fourth Circuit explained, mooted the lawsuit because any future return of Long to the No Fly List would be based, at least in part, "on a new factual record." *Id.*

In this case, the government has made no such guarantee. Far from "renouncing the government's original decision" to place Fikre on the list, the Courtright Declaration expressly "double[d] down" on the correctness of his placement. *Fikre II*, Pet. App. 16a-17a. Moreover, the Declaration provides no assurances that Fikre will not be returned to the list based on the same facts and processes as before. The Courtright Declaration's reference to "applicable policies and procedures" implies that such procedures have remained the same "from the time Fikre was placed on the No Fly List until now," showing that Fikre's removal did not result from a policy change. *Id.* at 17a-18a. And the Declaration's focus on "*current*" circumstances suggests a "careful choice of words" crafted to preserve the possibility that Fikre can be returned to the list "for the same reasons that prompted the government to add him to the list in the first place." *Id.* at 17a, 19a (citation omitted). For these reasons, the Ninth Circuit concluded that the Courtright Declaration alone "d[id] not fly." *Id.* at 20a.

The distinction between the two declarations was dispositive. The Fourth and Ninth Circuits applied the same legal framework to two different sets of facts and, unsurprisingly, came to different results. As interpreted

in *Long*, the Herring Declaration contained the information the Ninth Circuit required in *Fikre I*: it conceded that Long did not initially belong on the No Fly List, stated that Long is not presently on the list based on "currently available information," and assured him that he would be returned to the No Fly List based "only" "on a new factual record." 38 F.4th at 425 (record citation omitted); Herring Declaration at Supp. App. 14-15. Any split created between the Fourth and the Ninth Circuits boils down to whether they interpretated the language of the specific declarations before them as "acquiesc[ing] to the righteousness of [the plaintiff's] contentions"—not a legal question regarding the standard for overcoming the voluntary cessation exception in No Fly List cases. *Long*, 38 F.4th at 425 (citation omitted); *Fikre II*, Pet. App. 16a.

2. The Sixth Circuit's opinion in *Mokdad v. Sessions*, 876 F.3d 167, is even further afield. There, the plaintiff sued and sought only an injunction ordering the government to remove him from the No Fly List. *Id.* at 168-69. Then, after the district court directed the government to "[i]ssue a letter to Plaintiff and the Court, stating whether or not he is on the No Fly List," the government informed the plaintiff he was not on the No Fly List and would not be placed back on the list based on the currently available information. *Id.* at 171 (record citations omitted). The district court dismissed the case as moot, and the Sixth Circuit affirmed. *Id.* It held that the government's "declaration had resolved the only claim before the court" and that the government issued the declaration in response to a court order, not

entirely of its own "free will," so the voluntary cessation exception did not apply. *Id*. at 170-71.

In other words, the Sixth Circuit's decision turned on two facts: (1) the plaintiff in *Mokdad* sought only injunctive relief (removal from the No Fly List), leaving no live issue for the district court to decide[1]; and (2) the government's actions were not voluntary. Neither of those facts are present in *Fikre II*, eliminating any possibility of a conflict between the Sixth and the Ninth Circuits.

First, to fully vindicate his substantive and procedural due process rights and remedy the reputational harm caused by his placement on the No Fly List and the Watchlist, Fikre seeks injunctive relief requiring "the Government to repudiate its purported decision to list him" on the Watchlist. Pet. App. 60a. As the district court correctly recognized, these claims extend beyond Fikre's removal from the No Fly List and

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[1] The plaintiff in *Mokdad* argued that his case was not moot because, in addition to seeking removal from the No Fly List, he alleged that he "continued to experience unreasonable delays in boarding," "plausibly related to or caused by [his] initial inclusion on the No Fly List or some other watch list." *Mokdad*, 876 F.3d at 170 (record citation omitted). The Sixth Circuit rejected these "new factual allegations" on the case-specific ground that it had, earlier in the case's proceedings, remanded to the district court on the "narrow issue" of "Mokdad's challenge to his alleged placement on the *No Fly List*." *Id*. (citation omitted). "Mokdad's placement on 'some other watch list' was therefore not before the district court." *Id*. Here, by contrast, as discussed further below, Fikre has—since the initiation of this litigation—alleged that his inclusion on the Watchlist, in addition to his placement on the No Fly List, violated his procedural due process rights.

thus persist even though he is not currently included on the No Fly List, unlike the narrow injunctive relief sought in *Mokdad*. *Id.*

Second, the government did not voluntarily remove Mokdad from the No Fly List. *See Mokdad*, 876 F.3d at 171 (noting that the government "made the determination that Mokdad is not currently on the No Fly List to comply with a court order—hardly a voluntary action"). As a result, the voluntary cessation exception did not apply. The Ninth Circuit's application in *Fikre II* of the voluntary cessation exception to mootness cannot be in conflict with an opinion that did not apply that exception in the first instance.

II. The Question Presented Is A Factbound, Narrow Issue Of Limited Significance That Is Within The Government's Control.

In addition to glossing over the meaningful factual distinctions between *Fikre II*, *Long*, and *Mokdad*, Petitioners' question presented—whether the precise words used in the Courtright and Herring Declarations were sufficient to establish mootness—demonstrates how very narrow and factbound the issues implicated by the petition are. The question presented affects only a small number of cases: where a plaintiff challenges his placement on the No Fly List and the government removes him from the list during the litigation. On the government's own telling, the case will have no broader impact on the law of voluntary cessation or even

government operations outside the narrow confines of the No Fly List. *See* Pet. 23-25.

And to the extent the government has a strong interest in overcoming the voluntary cessation exception in this narrow category of cases, the Ninth and Fourth Circuits have outlined what the government must do: it must simply: (1) disavow its past decision to place the plaintiff on the No Fly List, (2) make clear the plaintiff was removed from the list because he does not belong on it, and (3) promise the plaintiff will be placed back on the list based only on a record with materially new facts.[2] In *Long*, the Fourth Circuit concluded that the Herring Declaration provided these assurances. The Courtright Declaration did not.

III. The Ninth Circuit Correctly Held That Fikre's Claims Were Not Mooted By The Courtright Declaration.

The government's unwillingness to make these assurances for Fikre cuts against a finding of mootness and in favor of applying the voluntary cessation doctrine.

Requiring past, present, and future assurances to establish mootness and overcome the voluntary cessation doctrine in No Fly List removal cases is consistent with this Court's mootness jurisprudence. In *W. T. Grant Co.*, 345 U.S. 629 (1953), this Court explained that a case is not moot when "[t]he defendant

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[2] This "future" prong is particularly important in the context of Fikre's right-to-travel substantive due process claim because Fikre alleges that his exercise of his right to travel—which he will continue to exercise—led to his initial inclusion on the No Fly List. *Fikre I*, Pet. App. 34a-35a & n.3.

is free to return to his old ways." *Id.* at 632. *See also, e.g.*, *Nike*, 568 U.S. at 92-93; *Friends of the Earth*, 528 U.S. at 189. The Ninth Circuit looked to that oft-repeated requirement when emphasizing that the "government had neither 'assured Fikre that he will not be banned from flying for the same reasons that prompted the government to add him to the list in the first place' nor 'verified the implementation of procedural safeguards conditioning its ability to revise Fikre's status on the receipt of new information.'" *Fikre II*, Pet. App. 8a (quoting *Fikre I*, Pet. App. 42a).

This Court likewise has imposed on a defendant seeking to overcome the voluntary cessation exception a "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth*, 528 U.S. at 190 (citing *Concentrated Phosphate*, 393 U.S. at 203), requiring it to prove that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation," *Davis*, 440 U.S. at 631. The Ninth Circuit's approach is consistent with this Court's articulation of the heavy burden on a defendant to make clear the conduct will not recur.

Fikre I's framework is also a logical one as applied to these facts. Fikre's underlying claim is that the government wrongfully placed and maintained him on the Watchlist and the No Fly List, causing him to suffer reputational harms. Pet. App. 34a. To render this particular claim moot necessarily requires the government to: (a) renounce or explain its past decision; (b) state that Fikre is not currently on the Watchlist or the No Fly List; and (c) demonstrate that the same facts

and processes used to previously list him will not result in him being re-added to the list. The government has failed to do all three.

Petitioners take particular issue with the first prong: that the government's assurances address Fikre's initial placement on the No Fly List. Pet. 14-15 (arguing that "the voluntary-cessation inquiry is forward-looking, not backward-looking"). But Fikre's stigma-plus claim alleges harm beyond restricted travel. Fikre alleges that he has experienced continued enhanced scrutiny, causing reputational injury. As the Ninth Circuit put it, "[b]ecause acquaintances, business associates, and perhaps even family members are likely to persist in shunning or avoiding him despite his renewed ability to travel, it is plain that vindication in this action would have actual and palpable consequences for Fikre." *Fikre I*, Pet. App. 43a. Without vindication—through repudiation, explanation, or policy change—Fikre remains injured by his past No Fly List placement and his case remains live.

In Petitioners' view, the Courtright Declaration provides the required backward-looking assurance by stating that Fikre will not be placed back on the No Fly List based on "currently available information." Petitioners interpret "currently available information" to "necessarily include[ ] all of the information available in 2010, when [Fikre] was initially placed on the No Fly List." Pet. 13. For this reason, they argue, the Ninth Circuit erred when it characterized the declaration as failing to assure Fikre that he would not be placed back on the List for the same reasons as before. *Id.* at 14, 21-23. *Fikre II* correctly disagreed with that

interpretation in light of the government's other statements, including that it "need not 'declare that plaintiff should not have been placed on the No Fly List even in the past.'" Pet. App. 18a. Indeed, the government candidly stated in the proceedings below that "the Courtright Declaration addressed only 'the Government's *current* assessment of Plaintiff,' not its assessment at 'the point at which Plaintiff was originally nominated.'" *Id.* at 19a. The government cannot now argue the opposite, especially because it acknowledges that facts have changed since Fikre was first placed on the No Fly List in 2010. Instead of relitigating the plain meaning of the word "currently," the government has a far easier route to establishing mootness: it can issue a new declaration and assure Fikre that he may only be placed back on the No Fly List on a new factual record, not for the same reasons as before.

Petitioners are incorrect that such an assurance would require an "admission of liability." Pet. 10-15. Fikre brings constitutional claims, alleging that his placement and maintenance on the No Fly List and the broader Watchlist violated his rights to substantive and procedural due process. Neither the Ninth Circuit in this case nor the Fourth Circuit in *Long* demanded that the government concede that a *constitutional* violation occurred. Indeed, in *Long*, 38 F.4th at 425, the Fourth Circuit interpreted the Herring Declaration as "remov[ing] Long from the list because, as he contends, he doesn't belong on it"—but not conceding "constitutional error." Here, likewise, the Ninth Circuit required only that the government's assurances be such that it would not be free to return to its old ways at the

conclusion of litigation, a standard that could be met with assurances short of an admission of constitutional liability. *See also W. T. Grant Co.*, 345 U.S. at 632; *Nike*, 568 U.S. at 92-93; *Friends of the Earth*, 528 U.S. at 189-90.

Nor does the Ninth Circuit's approach conflict with "the presumption of regularity." *See* Pet. 17. In describing the requirements for establishing mootness and overcoming the voluntary cessation doctrine, the Ninth Circuit explicitly "presume[d that] the government acts in good faith and [did] not impute to it a strategic motive to moot Fikre's suit." *Fikre I*, Pet. App. 42a. Against that backdrop, the court held that the Courtright Declaration was insufficient to carry the government's "'heavy burden' of making it 'absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Fikre II*, Pet. App. 14a (quoting *Fikre I*, Pet. App. 38a, 41a); *see id.* at 17a. As discussed further below, the Ninth Circuit's opinion must be understood in its full context, including in light of its application of the law of the case doctrine. *Id.* at 16a-17a. The Ninth Circuit did not evaluate the Courtright Declaration de novo—its role was limited to assessing whether the government's submission on remand satisfied the requirements imposed by the prior

panel. *Id.* In that narrow context, the court reasonably found that the government's assurances fell short. *Id.*

IV. This Case Is A Poor Vehicle For The Court's Review.

Even if the question presented by Petitioners merited the Court's review, this case would be a particularly poor vehicle to answer it.

1. The government's real dispute is with the holding in *Fikre I*, Pet. App. 31, which the *Fikre II* panel straightforwardly applied as the law of the case. As the Ninth Circuit repeatedly emphasized, it did not make new law in *Fikre II*, but merely applied the prior panel's order. *See* Pet. App. 2a-3a. The Ninth Circuit's holding in *Fikre II* was, in large part, motivated by the government's refusal to comply with the specific instructions of the prior panel: to "assure[] Fikre that he will not be banned from flying for the same reasons that prompted the government to add him to the list in the first place." *Fikre I*, Pet. App. 42a.

Petitioners had every opportunity to appeal *Fikre I* and challenge its legal holding. But the deadline for seeking certiorari from that opinion has long since passed. Granting certiorari to review *Fikre II*—which faithfully applied *Fikre I*—would needlessly embroil the Court in non-direct review of a factbound application of a prior panel's holding. If the Court wishes to evaluate the question presented, a different No Fly List removal case percolating through the judiciary would offer a better, more direct opportunity for review.

2. This case also is a poor vehicle because—apart from Fikre's No Fly List status—the government has

provided Fikre with no assurances at all regarding his Watchlist placement. There is no equivalent to the Courtright Declaration in the record about his Watchlist placement. Further, Fikre alleges that he has experienced continued "non-random, intensive screenings at airports," causing stigma that has "spread throughout [his] local and religious community," in violation of his procedural due process rights. Pet. App. 53a; *Fikre II*, Pet. App. 10a (discussing Fikre's claim that he was subjected to invasive and disparate screening due to his status); *id*. at 28a ("Each of [Fikre's] causes of action pertains both to his past placement on the No Fly List and to his alleged current inclusion in the [Dataset]."). As discussed above, this separate claim will persist regardless of how the voluntary cessation issue with respect to the No Fly List is resolved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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