No. 22-1178

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
PETITIONERS

v.

YONAS FIKRE

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

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In conflict with the Fourth and Sixth Circuits, the Ninth Circuit held that respondent's No Fly List claims seeking equitable relief are not moot—even though he is no longer on that list and his being placed back on the list is not reasonably likely to recur—because the government refused to "acquiesce[] to the righteousness" of respondent's contention that he never belonged on the list in the first place. Pet. App. 16a (citation omitted). That reasoning—and respondent's insistence that the government repudiate its *past* conduct in order to moot his claim for prospective relief—improperly confuses mootness with the merits. And respondent's attempt to minimize the circuit conflict is irreconcilable with the Fourth Circuit's own repeated acknowledgment of its disagreement with the court of appeals here. The court's erroneous decision not only violates Article

III, but will needlessly entangle courts and litigants in disputes about the disclosure of classified information in national-security cases. This Court's review is warranted.

A. The Lower Court's Decision Is Incorrect

1. As the government has explained (Pet. 10-18), the court of appeals erred in holding that respondent's No Fly List claims were not moot on the ground that the government has not "acquiesced to the righteousness of [respondent's] contentions." Pet. App. 16a (brackets and citation omitted). Respondent doubles down on the court's error, repeatedly stating that mootness under the "voluntary cessation doctrine" requires a defendant to provide "*past*, present, and future assurances." Br. in Opp. 19 (emphasis added); see *id.* at 3, 4, 13, 20. Under respondent's (and the court of appeals') view of the law, the government must "repudiat[e] the *past* decision to * * * place [respondent] on the No Fly List" to establish mootness. *Id.* at 4.

That view fundamentally confuses mootness with the merits and confirms the need for this Court's review. Mootness in a suit like this one for equitable relief is about the future, not the past. When a defendant voluntarily ceases the challenged conduct, a claim for prospective relief is moot as long as "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted). If the defendant makes that showing, the claim is moot "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit." *Ibid.* That is why the counterclaim for trademark invalidity in *Already* was moot even though Nike did not repudiate its past position that it held a valid and enforceable

trademark. Nike's covenant not to sue Already mooted the case because it meant that a trademark dispute between the parties "could not reasonably be expected to recur" *in the future*—regardless of whether Nike agreed that its *past* trademark infringement suit was unjustified. *Ibid.* (citation omitted).

Here, respondent's No Fly List claims are moot because he was removed from that list more than seven years ago and the government executed the Courtright declaration stating that he will not be returned to the list "based on the currently available information." Pet. App. 118a. That declaration makes clear that respondent's being returned to the list cannot reasonably be expected to recur, much less on the basis of the currently available information; he would be placed back on the No Fly List only if *new* information comes to light that warrants that step for national-security reasons. It is thus irrelevant whether the government agrees that respondent's initial placement on the list in 2010 was unwarranted, as respondent alleges. Any lingering dispute over that past placement "is no longer embedded in any actual controversy about [respondent's] particular legal rights." *Already*, 568 U.S. at 91 (citation omitted).

2. Respondent states that a requirement that the government "repudiat[e] the *past* decision to * * * place [respondent] on the No Fly List," Br. in Opp. 4, does not necessarily "require an 'admission of liability'" because he "brings constitutional claims," and the government might be able to repudiate its past decision "with assurances short of an admission of constitutional liability," *id.* at 22-23 (citation omitted). That is a non sequitur. Even if the government could craft a declaration that carefully walked a line between repudiating its past decision and avoiding an admission of liability, re-

quiring that needle-threading exercise still would incorrectly focus on the propriety of past conduct instead of the likelihood that the conduct will recur in the future. The trademark claim and counterclaim in *Already* no doubt included multiple elements (priority of use, registration, likelihood of confusion, etc.), but Nike was not required to acquiesce to the righteousness of Already's contentions as to *any* of those elements, even if doing so with respect to a subset would fall short of a complete admission of liability. The Court instead focused solely on whether the trademark dispute was reasonably likely to recur in the future.

3. Respondent contends (Br. in Opp. 20-21) that a focus on the past is "logical" because "he has experienced continued enhanced scrutiny [before air travel], causing reputational injury," and that "[w]ithout vindication" of his reputational interests, he "remains injured by his past No Fly List placement." That contention lacks merit. As a threshold matter, it conflates respondent's separate claims regarding his placement on the Selectee List, which can result in enhanced security screenings when traveling, see Pet. 2, and his No Fly List claims, which are the subject of the court of appeals' mootness holding.

More important, as the government already has pointed out, respondent "cannot avoid mootness by alleging lingering reputational harm stemming from his former placement on the No Fly List when any claim challenging that former placement is itself moot." Pet. 24; see *Spencer* v. *Kemna*, 523 U.S. 1, 16 n.8 (1998) (explaining that an "'interest in vindicating reputation'" is not "'constitutionally sufficient' to avoid mootness") (brackets, citation, and ellipses omitted). That is because an "interest in reputation," standing alone, "is

neither 'liberty' nor 'property'" within the meaning of the Due Process Clause. *Paul* v. *Davis*, 424 U.S. 693, 712 (1976). Accordingly, any so-called "stigma plus" due-process claim must assert the ongoing deprivation of a cognizable liberty interest in addition to reputational harm. See Pet. App. 26a. Respondent's No Fly List claims assert interests in the procedures used to add him to that list and in a substantive right to travel. See *id.* at 27a, 164a-169a. But any injury to those interests has been cured since respondent was removed from the No Fly List. And when, as here, the "only legally cognizable injury * * * is now gone and * * * cannot reasonably be expected to recur," *Already*, 568 U.S. at 100, the *non*-cognizable reputational harm itself cannot keep the due-process claims alive. See *Spencer*, 523 U.S. at 16 n.8. The brief in opposition neither addresses those points nor even cites *Spencer* or *Paul*.

Respondent's reliance (Br. in Opp. 6, 20) on *County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979), is misplaced. There, the Court stated that a case becomes moot under principles of voluntary cessation if, among other requirements, "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* at 631 (citation and ellipsis omitted). The Court in *Davis* held that a class-wide challenge to allegedly discriminatory hiring practices was moot in part because there was no evidence that, for example, "any minority job applicant was excluded from employment" or "any prospective minority job applicant was deterred from applying for employment" because of those practices. *Id.* at 633.

Davis does not help respondent here because the "effects" to be "eradicated" must be *legally cognizable* effects. 440 U.S. at 631. A candidate who was not hired

as a result of the discriminatory practices in *Davis* would have had an ongoing legally cognizable injury—the lack of a job—that could be redressed in part by an injunction requiring the county to reconsider his application anew. By contrast, respondent here alleges only a reputational injury that is *not* legally cognizable due to his former placement on the No Fly List; his legally cognizable procedural and substantive injuries have been completely eradicated by his removal from that list.

4. Finally, the government has explained (Pet. 17-18) that the court of appeals' reasoning is in serious tension with the presumption of regularity generally afforded to governmental actions because it presupposes that the government was willing to take respondent off the No Fly List and risk harm to national security simply to moot this case. Respondent observes that the court stated that it "presumed that the government acts in good faith and did not impute to it a strategic motive to moot [respondent's] suit." Br. in Opp. 23 (brackets and citation omitted); see Pet. App. 42a. But that was in the court's 2018 opinion, when the court suggested that the government could establish mootness on remand by "execut[ing] a declaration to th[e] effect" that "if [respondent] is ever put back on the No Fly List, that determination would 'necessarily be predicated on a new and different factual record.'" Pet. App. 43a (ellipsis omitted).

The government on remand executed precisely such a declaration, stating that respondent "will not be placed on the No Fly List in the future based on the currently available information." Pet. App. 118a. That logically and necessarily means that if respondent is ever returned to the No Fly List, it would be based on

new information (which by definition is not "currently available"). Yet in its most recent opinion, the court of appeals implausibly read the declaration as reflecting a "careful choice of words" designed to permit the government to "remain[] practically and legally 'free to return to its old ways.'" *Id.* at 19a (brackets and citation omitted). That uncharitable reading is at odds with the presumption of regularity and this Court's general acceptance of similar governmental declarations. See Pet. 17-18.

B. This Court's Review Is Warranted

1. The government has explained (Pet. 18-21) that the court of appeals' decision conflicts with the Fourth Circuit's decision in *Long* v. *Pekoske*, 38 F.4th 417 (2022), and the Sixth Circuit's decision in *Mokdad* v. *Sessions*, 876 F.3d 167 (2017), both of which found similar No Fly List claims moot upon the execution of declarations materially identical to the one in this case. The government also has explained (Pet. 21-23) that respondent's attempts in the lower court to recast the circuit conflict as factbound lack merit and cannot be reconciled with *Long*'s own recognition of the conflict.

Respondent largely repeats (Br. in Opp. 13-18) those meritless arguments in this Court. Respondent correctly observes (*id.* at 14) that the Fourth Circuit in *Long* "agree[d] with the *general* framework the Ninth Circuit ha[d] set out" in the decision below, 38 F.4th at 424 (emphasis added)—but he overlooks that in the very same sentence, *Long* made clear that the Ninth Circuit's "strict application of that standard under these circumstances demands too much of the government," *ibid.* Indeed, respondent's assertion that *Long* and the decision below are in accord would come as a surprise to the Fourth Circuit, which emphasized its disagree-

ment with the Ninth Circuit at least three separate times. See *ibid.* (the Ninth Circuit standard "demands too much"); *id.* at 424-425 (the "Ninth Circuit again * * * goes too far"); *id.* at 425 ("unlike the Ninth Circuit").

Respondent likewise errs in contending (Br. in Opp. 15) that the difference in outcomes in *Long* and the decision below is attributable solely to "[t]he distinction between the two declarations." The declarations are virtually identical with respect to the relevant text. See Pet. 21 (quoting both declarations). Citing the Courtright declaration's statement that respondent had been "placed on the No Fly List in accordance with applicable policies and procedures," Pet. App. 118a, respondent asserts that in contrast, the *Long* declaration "conceded that Long did not initially belong on the No Fly List," Br. in Opp. 16.

That is incorrect. The *Long* declaration makes no such concession; to the contrary, it attaches and incorporates by reference a letter to Long stating that the agency had previously "upheld his placement on the No Fly List" but was removing him now only after "recently be[ing] advised" of "the currently available information." C.A. Supp. App. at 17, *Long*, *supra* (No. 20-1406). Indeed, *Long* made clear that the supposed distinctions on which respondent relies were irrelevant to its analysis, observing that "the government offered Long *nearly identical* assurances to those it gave [respondent]." 38 F.4th at 425 (emphasis added). That respondent and the Ninth Circuit would find *dispositive* language that the Fourth Circuit found *irrelevant* neatly illustrates their disagreement as to the legal requirements to establish mootness in these circumstances.

Respondent's attempt (Br. in Opp. 16-18) to downplay the conflict with *Mokdad* likewise fails. Respondent asserts that unlike the *Mokdad* plaintiff, he seeks "injunctive relief requiring 'the Government to repudiate its purported decision to list him' on the Watchlist." *Id.* at 17 (citation omitted). That assertion once again conflates respondent's No Fly List and Selectee List claims. And if accepted, the argument would mean that any litigant who has challenged conduct that has ceased and cannot reasonably be expected to recur could keep his claims alive simply by asking for an injunction that the defendant repudiate its past conduct. This Court should not endorse such an end run around Article III's strictures.

2. Respondent errs in suggesting (Br. in Opp. 18-19) that the question presented is factbound and lacks importance. The suggestion that the issue is factbound relies on the same erroneous characterization of the circuit conflict as turning on (illusory) factual distinctions between this case, *Long*, and *Mokdad*. As for importance, this Court has explained that "no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 408 (2013) (brackets and citation omitted). The Court thus often grants review to address questions related to Article III mootness. See, *e.g.*, *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792 (2021); *Campbell-Ewald Co.* v. *Gomez*, 577 U.S. 153 (2016); *Chafin* v. *Chafin*, 568 U.S. 165 (2013); *Already*, *supra*.

Indeed, the specific circumstance where a plaintiff challenging his placement on the No Fly List (or other watchlist) is removed from that list during litigation

arises with some frequency. See, *e.g.*, *Tarhuni* v. *Sessions*, 692 Fed. Appx. 477 (9th Cir. 2017) (mem.), *Kovac* v. *Wray*, 449 F. Supp. 3d 649 (N.D. Tex. 2020); *Bosnic* v. *Wray*, 2018 WL 3651382 (M.D. Fla. 2018); *Latif* v. *Holder*, 2015 WL 1883890 (D. Or. 2015) (involving seven such plaintiffs); see also C.A. Pet. for Reh'g at 10-11, *Long*, *supra* (No. 20-1406) (identifying four additional such plaintiffs). And as the government has pointed out (Pet. 24-25), allowing such claims to proceed to discovery would, in addition to being inconsistent with Article III, needlessly entangle courts and parties in protracted disputes about the disclosure of classified and other sensitive information in matters involving national security. Those factors underscore the importance of the mootness issue in this national-security context.

3. Respondent's vehicle arguments (Br. in Opp. 24-25) lack merit. Respondent contends (*id.* at 24) that this case is a bad vehicle because the government's "real dispute" is with the court of appeals' 2018 ruling, which the most recent ruling "applied as the law of the case." That contention is unsound. This Court routinely "consider[s] questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *Major League Baseball Players Association* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001).

And there was good reason for the government not to seek certiorari in 2018. Despite the 2018 decision's erroneous legal reasoning, the court of appeals expressly suggested that the filing of a declaration similar to the one filed in *Mokdad* would be sufficient to establish mootness here. See Pet. App. 43a. The government understandably took that course on remand rather than

burden this Court with a request for immediate review. And that course was initially vindicated by the district court, which accepted the Courtright declaration as sufficient and dismissed respondent's No Fly List claims as moot. It was only on appeal from that dismissal that the court of appeals made clear for the first time that it did *not* view a declaration materially identical to the one in *Mokdad* as sufficient—thereby cementing the circuit conflict and providing a concrete illustration of the erroneous "acquiesce to the righteousness" requirement it had fashioned.

Contrary to respondent's assertions (Br. in Opp. 24-25), his Selectee List claims would not complicate this Court's review. The district court dismissed those claims on the merits, not on mootness grounds, see Pet. App. 65a-73a, and those claims thus have no bearing on whether the separate No Fly List claims are moot. Moreover, the court of appeals reversed the dismissal of the Selectee List claims solely because it found the No Fly List claims not to be moot, see *id.* at 27a-28a, and respondent has not cross-petitioned for an expansion of that relief. Accordingly, a ruling from this Court that the No Fly List claims are indeed moot would likely resolve the entire case.

Respectfully submitted.

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