No. 22-1178

IN THE
Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
Petitioners,

v.

YONAS FIKRE,
Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Under the voluntary cessation exception to mootness, a defendant's choice to cease allegedly unlawful conduct does not moot a case unless it is absolutely clear that the challenged activity cannot reasonably be expected to recur.

In this case, Respondent Yonas Fikre challenged his placement on the No Fly List as an unconstitutional deprivation of due process. The government then removed Fikre from the No Fly List while insisting that his placement on the list was "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 when the government remains free to return him to the list for the same reasons and using the same procedures he alleges were unlawful, and when the government has not repudiated its prior decision to place him on the list.

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INTRODUCTION

This Court has long held that when a defendant voluntarily ceases allegedly unlawful conduct, it bears a "heavy burden" of establishing mootness. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007). A defendant must demonstrate it is "absolutely clear that 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 (2000). Recurrence of the challenged conduct need not be certain or even very likely: If dismissal "would permit a resumption of the challenged conduct," the case may not be dismissed as moot. *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012).

Respondent Yonas Fikre is a U.S. citizen who was placed on the No Fly List, a government database for suspected terrorists, for undisclosed reasons and without notice or a hearing. To this day, Fikre does not know why he was listed. He sued, alleging that he was denied the right to travel for unlawful reasons and as a product of unconstitutional procedures. The government responded by removing him from the list, again without explanation, and arguing the case was moot.

The case is not moot. Making it "absolutely clear" that the defendant's conduct "could not reasonably be expected to recur" is a "formidable burden." *Friends of the Earth*, 528 U.S. at 190. To meet it, this Court has required either: (1) a "clearly effective barrier" to the conduct's recurrence, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 457 n.1 (2017) (internal quotation marks omitted); or (2) evidence that

the defendant has repudiated its past conduct, *see Los Angeles County v. Davis*, 440 U.S. 625, 628, 632-33 (1979). These factors are considered together. An effective barrier to recurrence generally obviates the need for repudiation, while repudiation can compensate for a less effective barrier.

Here, the government has demonstrated neither. Instead, it relies on a declaration from an FBI agent stating that Fikre is no longer on the list and "will not be placed on the No Fly List in the future based on the currently available information." Pet. App. 118a. This declaration does not effectively bar recurrence of the challenged conduct or repudiate it in any way.

First, while the government has removed Fikre from the list, it remains free to list him again in the future, including for the same reasons and pursuant to the same procedures Fikre alleges are unlawful. The government is not bound by its declaration and can change its mind at any point. Even if the declaration were binding, however, it promises little. The government has made no commitment to use different procedures if Fikre is placed on the No Fly List in the future—even though Fikre alleges the current procedures are constitutionally defective. And the government is free to relist Fikre for the same type of conduct that caused his initial listing; such future activities are not "currently available information," so the declaration poses no bar to their use.

For example, assume Fikre was placed on the No Fly List in part because of his worship at a Portland-area mosque deemed suspicious by law enforcement. *See id.* 139a. Fikre does not currently attend that mosque. But

if Fikre rejoins that community, nothing would preclude the government from returning Fikre to the No Fly List for that reason.

Fikre also may have been placed on the list for any number of other unknown reasons. Perhaps he attended the wrong lectures, purchased the wrong books, or browsed the wrong websites. He has no way of knowing because the government has not told him; thus he may unwittingly repeat the same type of actions deemed suspicious and end up back on the list for the same reasons. Even so, the government insists he must drop his lawsuit and move forward—never knowing when, how, or if his name will be placed there again.

Second, the government has not repudiated Fikre's placement on the list or the procedures used to list him. Repudiation is not rigidly required to overcome voluntary cessation—and the court of appeals did not hold that it was, despite the government's contrary argument. Instead, as the court of appeals correctly recognized, repudiation is one factor relevant to whether the challenged conduct could recur. Because Fikre has received insufficient future assurances, backwards-looking repudiation would have provided a measure of protection against the government's relapse into past practices. Instead, the government did the opposite: It doubled down, insisting that Fikre was "placed on the No Fly List in accordance with applicable policies and procedures." *Id.* 118a.

The court of appeals thus correctly determined that the government—having neither repudiated its challenged conduct nor erected barriers to its resumption—did not meet its burden. The government

remains "free to return to [its] old ways," *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953), so this case is not moot.

Because a straightforward application of this Court's precedents compels affirmance, the government seeks to evade its burden in the name of national security. But this Court has consistently applied the same voluntary cessation burdens to public and private defendants alike. If anything, the national-security context should make this Court more hesitant to find this case moot. In administering the No Fly List, the government operates under a cloak of secrecy. Both Fikre and the Court must speculate about why he landed on the No Fly List to begin with because the government will not tell us. We must speculate about what conduct might land him there once again because the government will not tell us. And the government possesses enormous discretion to return Fikre to the No Fly List, without explanation or notice, because it has thus far circumvented legal review of that discretion, in both this case and many others, *see infra* at 7-8.

The government's complaint that litigating this case will distract from its counterterrorism mission is nothing more than a request for courts to abdicate their constitutional role. This Court has turned away such requests time and again, recognizing that judicial oversight in the context of national security protects "essential liberties that remain vibrant even in times of security concerns." *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004). The Court should follow suit here, holding the government to the same burden to which it has always been held when it voluntarily ceases challenged conduct

mid-litigation. Because the government has not met that burden, the Court should affirm.

STATEMENT

I. The No Fly List

Since 2003, the United States has maintained the Terrorist Screening Database (the "Watchlist"). Pet. App. 3a. When a U.S. government agency or foreign government wants to list someone, the FBI-managed Terrorist Screening Center determines whether to add that individual, assessing unilaterally and without judicial oversight whether there is "'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 No Fly List is the "most restrictive" component of the Watchlist, reserved for individuals the government believes "pose a threat of committing an act of international or domestic terrorism." *Id.* 4a. Once the Terrorist Screening Center adds someone to the No Fly List, the Transportation Security Administration ("TSA") prevents that individual from boarding commercial aircraft that fly into, out of, or through U.S. airspace. *Id.* A person receives no advance notice that he or she has been listed; and a person can be listed while traveling abroad, which has resulted in some listed individuals being stranded abroad for years at a time. *See, e.g.*, *id.* 136a (describing how a Stanford graduate student, listed while traveling for a conference, was stranded in Malaysia for nine years). In this case, Fikre was stranded abroad for more than four years, harming

both his wellbeing and his personal relationships—including his marriage, which dissolved. *Id.* 148a-152a.

The government has wide latitude in placing individuals on the No Fly List. According to the government, the standard for placement on the Watchlist—a prerequisite to placement on the No Fly List—is "reasonable suspicion," "based on the totality of the circumstances," that an individual "is engaged, has been engaged, or intends to engage[] in conduct constituting, in preparation for, in aid or in furtherance of, or related to, terrorism and/or terrorist activities." Overview of the U.S. Government's Watchlisting Process and Procedures at 4, *Moharam v. FBI*, 21-cv-02607 (D.D.C. Jan. 18, 2022), ECF No. 20-5 Ex. A ("Watchlisting Overview").

In practice, that vague standard permits the government to consider nearly every aspect of an individual's life. As one district court explained, the government "may consider, but may not solely base its decision on, an individual's race, ethnicity, religious affiliation, or beliefs and activities protected by the First Amendment." *Elhady v. Kable*, 391 F. Supp. 3d 562, 569 (E.D. Va. 2019), *rev'd on other grounds*, 993 F.3d 208 (4th Cir. 2021) (internal quotation marks omitted). The government "may also consider an individual's travel history, associates, business associations, international associations, financial transactions, and study of Arabic as information supporting a nomination to the [Watchlist]." *Id.* And placement "does not require any evidence that the person engaged in criminal activity, committed a crime, or will commit a crime in the future."

Id. Indeed, even individuals acquitted of suspected terrorism may still be Watchlisted. *Id.*

The standard for No Fly List placement calls for similar conjecture and requires no proof of past wrongdoing, making it ripe for misuse or error.[1] Individuals may be barred from flying if the government determines they present "a threat" of committing certain acts of terrorism. Watchlisting Overview at 4. Such determinations often follow "a string of subjective, speculative inferences." *Mohamed v. Holder*, 995 F. Supp. 2d 520, 532 (E.D. Va. 2014). As a result, in litigation across the country plaintiffs have alleged that the government wields its discretion over the List to pressure people to become informants, even when those people pose no terrorist threat. *See, e.g.*, *Tanvir v. Tanzin*, 894 F.3d 449, 453 (2d Cir. 2018), *aff'd*, 592 U.S. 43 (2020); *Latif v. Holder*, 28 F. Supp. 3d 1134, 1145-46 (D. Or. 2014).

Just as it is easy for the government to put someone on the No Fly List, it is easy to take someone off. And the government has done so regularly—at least, as here,

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[1] By the government's description, its predictive standards for No Fly List placement "cover not only 'known' terrorists," "but also those who are reasonably suspected of posing a threat, regardless of whether they are known to have concrete plans to engage in the acts the No Fly List is designed to thwart." Defendants' Memorandum of Law in Support of Their Motion for Partial Summary Judgment at 29, *Mohamed v. Holder*, No. 11-cv-50 (E.D. Va. Mar. 4, 2016), ECF No. 225. *See also* Defendants' Cross-Motion for Summary Judgment at 27, *Latif v. Holder*, No. 10-cv-750 (D. Or. May 28, 2015), ECF No. 251 (describing No Fly List placements as "predictive assessments about potential threats").

when faced with litigation. *See, e.g.*, *Long v. Pekoske*, 38 F.4th 417, 422 (4th Cir. 2022) (plaintiff removed from List after district court denied motion to dismiss); *Mokdad v. Sessions*, 876 F.3d 167, 169 (6th Cir. 2017) (plaintiff removed from List after Sixth Circuit reversed dismissal of complaint); *Elhady v. Piehota*, 303 F. Supp. 3d 453, 458 n.2 (E.D. Va. 2017) (three plaintiffs removed from List mid-litigation); *Kovac v. Wray*, No. 18-cv-0110-X, 2023 WL 2430147, at *5 n.47 (N.D. Tex. Mar. 9, 2023) (plaintiff removed from List mid-litigation), *appeal docketed*, No. 23-10284 (5th Cir. Mar. 22, 2023); Letter, *Tanzin v. Tanvir*, No. 13-cv-6951 (S.D.N.Y. June 10, 2015), ECF No. 92 (four plaintiffs removed from List mid-litigation); Letter, *Tarhuni v. Holder*, No. 13-cv-001 (D. Or. Mar. 9, 2015), ECF No. 89-2 (plaintiff removed from List mid-litigation); Letter, *Latif v. Holder*, No. 10-cv-750 (D. Or. Oct. 10, 2014), ECF No. 153-1 (seven plaintiffs removed from List mid-litigation); Declaration of Jason V. Herring, *Jardeneh v. Garland*, No. 18-cv-2415 (D. Md. June 7, 2021), ECF No. 142-1 (five plaintiffs removed from List mid-litigation); Notice of Voluntary Dismissal, *Chebli v. Kable*, No. 21-cv-937 (D.D.C. May 12, 2021), ECF No. 4 (plaintiff removed from List ten days after filing suit); Joint Notice, *Maniar v. Wolf*, No. 19-cv-3826 (D.D.C. July 21, 2020), ECF No. 16-1 (one plaintiff removed from List mid-litigation); Letter, *Maniar v. Wolf*, No. 19-cv-3826 (D.D.C. Sept. 28, 2020), ECF No. 23-5 (second plaintiff removed from List).

Before 2015, individuals could challenge their apparent inclusion on the No Fly List by submitting a complaint to the Department of Homeland Security's Traveler Redress Inquiry Program ("DHS TRIP").

DHS TRIP would advise the complainant by letter that the review was complete without confirming or denying the complainant's No Fly List status. In 2015, the government revised its redress procedures after the procedures were found by a district court to be unlawful. *See Kashem v. Barr*, 941 F.3d 358, 366-67 (9th Cir. 2019). Now, if U.S. citizens and residents ask for information about their placement on the No Fly List, DHS may—but is not required to—provide a letter identifying at a high level of generality the reason(s) "for their listing" and an unclassified "summary of information supporting that listing." Pet. App. 5a.

Even as amended, the revised TRIP procedures require no advance notice and offer inadequate process before a person is placed on the No Fly List. *See generally id.* 164a-169a. Once listed, individuals have no right to access the evidence that led to their nomination. *See* Margaret Hu, *Big Data Blacklisting*, 67 Fla. L. Rev. 1735, 1790 (2015). And the unclassified summaries—when disclosed—are so brief and abstract they provide scant useful information about why an individual was placed on the No Fly List. *See Mohamed v. Holder*, No. 11-CV-50, 2015 WL 4394958, at *13 (E.D. Va. July 16, 2015) ("The government explains that the amount and type of information provided will vary on a case-by-case basis, and in some circumstances, an unclassified summary may not be possible."). In this case, for example, the government informed Fikre only that he had been "identified as an individual who may be a threat to civil aviation or national security"—a tautology that

simply repeats the standard for inclusion on the No Fly List. Pet. App. 34a.[2]

II. Proceedings Below

1. Fikre, an American citizen living in Portland, Oregon, learned that he was on the No Fly List in 2010 while traveling for business in Sudan. Pet. App. 137a-139a. What should have been an ordinary business trip turned into a yearslong nightmare of exile abroad.

The operative complaint alleges that, at the U.S. Embassy in Khartoum, two FBI agents approached Fikre, questioned him about his worship at the as-Saber Mosque in Portland, told him he was on the No Fly List, and offered to remove him if he became a government informant. *Id.* 32a-33a. Fikre refused. *Id.* 33a. Unable to return to the United States, Fikre traveled to the United Arab Emirates, where he was imprisoned, tortured, and again interrogated about his religious community back home. *Id.* He was severely beaten and forced to spend nights on a bare cement floor. *Id.* 144a.

After his eventual release, still unable to fly home, Fikre was forced to seek refuge in Sweden, where a relative lived. *Id.* 148a. In 2013, Fikre filed a DHS TRIP inquiry, but DHS refused to confirm or deny his placement on the No Fly List, stating only that "no changes or corrections [we]re warranted at th[at] time." *Id.* 33a-34a. In 2015, following the change in TRIP

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[2] By contrast, in the rare case in which the government has wanted to keep someone on the No Fly List in the face of litigation, it has disclosed to the court (*in camera* and ex parte) the factual predicate for the No Fly List placement. *See, e.g.*, *Kashem*, 941 F.3d at 367-68.

procedures, 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.* 34a. DHS provided no additional details and refused to identify what conduct led to Fikre's placement on the list. *Id.*

Still on the No Fly List in 2015, Fikre finally returned home when Sweden's government placed him on a private jet bound for Portland. *Id.*

2. In 2013, Fikre filed this suit. *Id.* As relevant here, Fikre alleges that the government violated his right to procedural due process by failing to provide adequate notice of his No Fly List status, the factual basis for that status, or a meaningful opportunity to contest it. *Id.* 164a-167a.[3] Fikre also alleges that his placement on the No Fly List violated his right to substantive due process because the government restricted his right to travel without "any reasonable suspicion that [he] is a known, suspected, or potential terrorist." *Id.* 167a-168a.

In 2016, several months after the district court denied in part the government's motion to dismiss, *Fikre v. FBI*, 142 F. Supp. 3d 1152, 1162 (D. Or. 2015), the government notified Fikre that it had removed him from the No Fly List. Pet. App. 35a, 84a. Fikre amended his

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[3] In all, Fikre has alleged 16 claims, *see* Pet. App. 34a & n.2, but only his substantive and procedural due process claims pertaining to his inclusion on the No Fly List are relevant to the mootness holding under review. Pet. Br. 10. Fikre's other claims have been dismissed, except for a procedural due process claim pertaining to his inclusion on the broader Watchlist. *See id.* 30a. That claim remains to be resolved on remand in the district court. *Id.*

complaint, alleging that the government still "ha[d] not 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 "addressed the procedural defects that caused Fikre's constitutional violation." *Id.* 163a. Fikre continues to seek declaratory and injunctive relief, including a declaratory judgment that his due process rights were violated by his addition to the No Fly List; an order restricting the government from subjecting him to anything other than standard security precautions at airports; an order to remove and expunge his watchlist and No Fly List records; an order requiring the government to provide him with written notice if his name is again added to the No Fly List; and an order requiring the government to disclose the specific reasons he was listed and to repudiate that decision. *Id.* 169a-172a.

At the government's request, the district court dismissed Fikre's amended complaint as moot. *Id.* 35a, 93a-94a. Fikre appealed. In *Fikre v. FBI*, 904 F.3d 1033 (9th Cir. 2018) ("*Fikre I*"), Pet. App. 31a, the court of appeals reversed, holding that the voluntary cessation exception to mootness applied, *id.* 44a.

The court of appeals explained that, while there is "[n]o bright-line rule" separating cases covered by the exception from those that are not, it must be "absolutely clear" that the complained-of activity will not recur. *Id.* 40a (internal quotation marks omitted). Moreover, "the form the governmental action takes is critical" to determining whether a voluntary action renders a case moot. While changes enacted through the "legislative process bespeak … finality," informal executive action

does not, including because it is not permanently entrenched or "governed by any clear or codified procedures." *Id.* 38a (internal quotation marks omitted).

Proceeding from these premises, the court of appeals outlined steps the government could have taken—but did not take—to overcome the voluntary cessation exception. The government, the court explained, could have made "a change in administrative policy that embraced … [Fikre's] arguments" or "repudiat[ed] the decision to add Fikre to the No Fly List." *Id.* 39a, 42a. Or, it could have assured Fikre that any future listing decisions would be "predicated on a new and different factual record." *Id.* 43a (quotation marks omitted). Without these assurances or repudiation of its past conduct, the government's choice to remove Fikre from the list left it "practically and legally free to return to [its] old ways." *Id.* 41a (internal quotation marks and alterations omitted).

3. On remand, the government again moved to dismiss Fikre's complaint as moot. This time, the government provided a declaration of FBI Supervisory Special Agent Christopher Courtright, which stated, in relevant part:

> 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.

Id. 118a.

The district court again dismissed as moot Fikre's No Fly List claims, *see id.* 48a, 51a & n.6, and the court of appeals again reversed, *see Fikre v. FBI*, 35 F.4th 762 (9th Cir. 2022) ("*Fikre II*").

The court of appeals repeated that there is "no bright-line rule" for application of the voluntary cessation exception. *Fikre II*, Pet. App. 20a. The defendant need not in every case renounce its challenged conduct; nor must it necessarily announce a change in policy. *Id.* 16a-17a. But it must provide assurances that, viewed as a whole, "satisfy the heavy burden of making it absolutely clear" that the challenged conduct could not recur. *Id.* 17a.

The court explained that its earlier opinion in *Fikre I* "specified … what the government was required to do" to establish mootness, and it held that the Courtright Declaration fell short. *Id.* 15a. At most, the declaration "assured Fikre only that he does not *currently* meet the criteria for inclusion on the No Fly List." *Id.* 19a. The declaration did not "announc[e] a change in policy" or assure Fikre that he would remain off the list in the future if he "engag[ed] in the same or similar conduct" as before, leaving him vulnerable to relisting "the moment [he] again meets whatever criteria he satisfied initially." *Id.* 19a. The Declaration also did not "renounc[e] the … original decision" to list Fikre. *Id.* 16a-17a. Instead, the government "double[d] down" by defending its decision to place Fikre on the No Fly List as comporting with policy and procedure. *Id.* 17a.

In sum, the Courtright Declaration neither confessed any past error nor provided any safeguards limiting the government's ability to relist Fikre in the future. *Id.* 8a, 17a. Without at least one of those assurances, the government could not "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.* 17a.

SUMMARY OF ARGUMENT

This case continues to present a live controversy under the voluntary cessation exception to mootness.[4]

I. To obtain a dismissal for mootness, a defendant who voluntarily ceases allegedly unlawful conduct must make absolutely clear that the challenged conduct could not reasonably be expected to recur. This Court's precedents establish how to meet that standard: A defendant can point to barriers that prevent the recurrence of the challenged conduct, or a defendant can repudiate the challenged conduct.

Courts consider these two options in combination. To establish mootness, a defendant need not repudiate its past conduct if it shows significant barriers to recurrence. Conversely, a defendant may compensate for the absence of a strong barrier by distancing itself

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[4] Fikre relies solely on the voluntary cessation exception. This brief therefore does not address the "lingering reputational harm" of his placement on the No Fly List as an alternate basis for why his claims are not moot. *See* Pet. Br. 11, 24-31. Whether Fikre's complaint states a claim for violation of procedural due process based on a "stigma-plus" theory remains a merits question for the district court to consider on remand. *See* Pet. App. 30a.

from the challenged conduct. But if the defendant does neither, a court may not find the case moot.

A. As a first option, a defendant can point to barriers that prevent the challenged conduct from recurring—for example, because of a wholesale change in the defendant's practices, or a binding commitment to avoid reinjuring the plaintiff. No matter the form, the barrier must make "'absolutely clear' that [the defendant] could not revert" to its challenged conduct. *Trinity Lutheran*, 582 U.S. at 457 n.1 (quoting *Friends of the Earth*, 528 U.S. at 189). If, by contrast, the defendant's change or commitment "would not preclude" a resumption of the challenged conduct, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), the defendant has not met its burden.

B. The defendant can compensate for the lack of a clearly effective barrier to recurrence by repudiating its challenged conduct. The government argues against a straw man, claiming the court of appeals rigidly required that a defendant renounce the challenged conduct. The Ninth Circuit imposed no such requirement. And no such requirement need be imposed for this Court to affirm.

C. The Court has applied its stringent test for voluntary cessation as rigorously to government defendants as to private litigants. This is sensible given the government's keen interest in the development of precedent, and its greater practical ability and stronger incentive to strategically moot litigation relative to private parties. And there is even greater cause for rigorous application of the test where the plaintiff and courts have no way of knowing when or how the

challenged conduct may recur because of government secrecy.

II. Here, the government has not proven mootness. It has not instated effective barriers to Fikre's relisting. And it has not repudiated Fikre's initial listing.

A. 1. The Courtright Declaration does not erect any legally enforceable barriers to Fikre's relisting. It is non-binding. It may be rescinded or altered at any time. Because the change is not entrenched, as legislative change is, the government must in some other way meet its burden. It has not done so. The mere say-so of an executive official—even one far more senior than a mid-level FBI agent—does not preclude the challenged government conduct from recurring.

2. Even if the Courtright Declaration bound the government, its statement that Fikre will not be placed back on the No Fly List based on "currently available information" is not a barrier to recurrence. Fikre challenges both why and how the government placed him on the No Fly List. To demonstrate that this case is moot, the government therefore must show that neither alleged violation of law could reasonably be expected to recur: that Fikre could not be added to the No Fly List if he does the same things that prompted his initial placement, and that he could not again be subject to the same procedures he challenges as unconstitutional. The Courtright Declaration does neither.

B. The government could have compensated for the lack of any barriers to recurrence by renouncing its initial decision to list Fikre. Instead, it doubled down on that decision. Its continued insistence on the lawfulness

of its conduct underscores that the government has not met its burden to show with absolute clarity that the challenged conduct could not reasonably be expected to recur.

III. The government cannot excuse its failure to meet its "formidable burden" by shifting that burden onto Fikre, relying on the presumption of regularity, or altering its burden based on the national-security context of this case.

A. The government argues that the possibility of Fikre's return to the No Fly List, for any reason, is mere speculation and thus insufficient to keep this case alive. But it is not Fikre's obligation to establish a likelihood of recurrence; it is rather the government's burden to show it is absolutely clear its behavior could not reasonably be expected to recur. It would be especially inappropriate to invert that burden here, where the government has concealed nearly everything about the facts that caused Fikre to be listed. And, in any event, whatever speculation about recurrence is needed here is no greater than in numerous scenarios this Court has found sufficiently probable to maintain a live controversy: The government repeatedly found that Fikre merited inclusion on the No Fly List, and it maintains unfettered discretion to place him back on.

B. The government also asks this Court to ignore the Courtright Declaration's shortcomings in the name of the presumption that public officials act in good faith. But applying settled voluntary cessation doctrine does not require this Court to question the sincerity of the government's motives. The presumption of regularity

makes it no less likely that the conduct Fikre challenges will recur.

C. Deference on national-security grounds also does not excuse the government from its voluntary cessation burden. To the contrary, the government's wide latitude in the national-security realm, coupled with its penchant for secrecy, should make the Court reluctant to conclude that Fikre could not reasonably expect to be restored to the No Fly List.

IV. None of this means that the government had an impossible burden: It could have taken multiple other steps that would have sufficed to establish mootness under applicable precedent. Until it is willing to take those steps, the government must defend this litigation on the merits.

ARGUMENT

I. To Moot A Case Based On Voluntary Cessation, The Defendant Must Establish That Its Challenged Conduct Cannot Reasonably Be Expected To Recur.

"[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). The voluntary cessation of challenged conduct deprives a court of jurisdiction only where the defendant sustains its "'heavy burden of persuading'" the court that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189, 193 (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

This burden is heavy for good reason. Without a "stringent" test, *Friends of the Earth*, 528 U.S. at 189, a defendant would be permitted to temporarily change its conduct, obtain a mootness dismissal, and then resume the challenged conduct, undermining the "'public interest in having the legality of the [defendant's] practices settled,'" *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974) (quoting *W. T. Grant*, 345 U.S. at 633)), and wasting judicial resources, *Friends of the Earth*, 528 U.S. at 191-92.

This Court's precedents teach that a defendant's assurances about the past and the future can shed light on whether the challenged conduct can "reasonably be expected to recur," or whether the defendant is instead "free to return to [its] old ways." *Friends of the Earth*, 528 U.S. at 189. Thus, in determining whether the defendant has established mootness, the Court has time and again considered whether (1) there are effective barriers to recurrence; and (2) the defendant has repudiated the challenged conduct.

These factors are considered in combination: A strong barrier to future recurrence can compensate for a defendant's failure to repudiate past conduct, and vice versa. Where neither is present, the voluntary cessation exception most clearly applies.

A. A Defendant Can Overcome The Voluntary Cessation Exception By Instituting Effective Barriers To Recurrence.

A defendant can overcome the voluntary cessation exception by erecting a "clearly effective barrier that would prevent" it from resuming its challenged conduct

in the future. *Trinity Lutheran*, 582 U.S. at 457 n.1. This barrier must be of such a nature and degree that the defendant "could not revert" to the challenged conduct. *Id.* Such a barrier removes all doubt that the behavior could "reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189-90.

One way a government defendant can satisfy this standard is by making an enduring change in policy or procedure. The more procedure and public accountability required to reverse course, the clearer it is that the challenged conduct could not reasonably be expected to recur. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) ("*NYSRPA I*") (challenge to New York City firearm rule moot where, after the City amended its rule, the State of New York amended governing statute to make the old rule illegal); *cf. Burke v. Barnes*, 479 U.S. 361, 363-64 (1987) (explaining that mootness follows expiration or repeal of challenged law). As the D.C. Circuit has explained, while "[n]o entity of the federal government can ever guarantee that a statute, a regulation, or an executive order, after being repealed or withdrawn, will not be reenacted or reissued," "structural obstacles to reimposing a challenged law—such as a full repeal and the need to undertake new lawmaking—generally moot a case." *Alaska v. U.S. Dep't of Agric.*, 17 F.4th 1224, 1229 n.5 (D.C. Cir. 2021).

A defendant can also satisfy this standard without making an enduring change in policy or procedure, but the barrier must of be of a type that makes it "hard to imagine" recurrence of the challenged conduct. *Already*, 568 U.S. at 94-95. For example, in *Already*, Nike's

covenant not to enforce a trademark against its competitor Already mooted Already's counterclaim to have the trademark declared invalid. 568 U.S. at 89, 92-95. The covenant was "unconditional and irrevocable," it "prohibit[ed] Nike from filing suit," and it covered all "current or previous designs" as well as "colorable imitations." *Id.* at 93. Because the covenant was both binding and broad, "it [was] hard to imagine a scenario" where Nike could assert future infringement claims against Already. *See id.* at 94-95. Nike thus overcame the voluntary cessation exception to mootness.

On the other hand, a defendant's unenforceable assurances—however well founded—and informal, discretionary actions do not suffice. For example, in *Trinity Lutheran*, Missouri's governor announced that the state had stopped discriminating between religious and secular grant applicants. 582 U.S. at 457 n.1. The Court nonetheless concluded that the state had not "carried the 'heavy burden' of making 'absolutely clear' that it could not revert to its policy of excluding religious organizations." *Id.* (quoting *Friends of the Earth*, 528 U.S. at 189). There was "no clearly effective barrier that would prevent the [State] from reinstating its policy in the future," particularly since "the source of the [State's] original policy—the Missouri Supreme Court's interpretation of [a state constitutional provision]"—remained unchanged. *Id.* (alterations omitted).

Similarly, a defendant's "own statement" about its future intent does not moot a case because it does not preclude a "return to [the defendant's] old ways." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). Thus, in *W. T. Grant*, the

defendants' non-binding representations did not satisfy their "heavy" burden to show that "there [was] no reasonable expectation that the wrong will be repeated." 345 U.S. at 630-33 (quotation marks omitted). Likewise, for a government defendant, "actions that can be reversed at the stroke of a pen or otherwise face minimal hurdles to re-enforcement" generally do not moot a case. *Alaska*, 17 F.4th at 1229 n.5; *accord Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68-69 (2020) (per curiam).

And while the government contends that "speculation" about the future recurrence of challenged conduct cannot keep a case live, Brief of Petitioners ("Pet. Br.") 16, that misstates the test. A defendant must show it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 193. In practice, this means assessing whether the defendant "could … revert" to its challenged conduct, *Trinity Lutheran*, 582 U.S. at 457 n.1, or alternatively is "prohibit[ed]" from doing so, *Already*, 568 U.S. at 93. The relevant question is not whether recurrence appears speculative, but instead whether there are obstacles in the path of recurrence.

In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000), for example, the plaintiff closed his nude-dancing establishment and sold the property. The Court nonetheless found a live dispute because the plaintiff's business was "still incorporated under Pennsylvania law" and the plaintiff "*could* again" decide to open a

nude-dancing establishment. *Id.* (emphasis added).[5] And in *Trinity Lutheran*, the case remained live after the governor announced a change in policy, even in the absence of a concrete reason to believe the state was likely to resume the challenged policy—what mattered was that it "*could*." 582 U.S. at 457 n.1 (emphasis added). By contrast, in *Already*, Nike's covenant "*prohibit[ed]*" Nike from again engaging in the challenged conduct, such that it could not "reasonably be expected to recur." 568 U.S. at 93 (emphasis added).

A defendant's voluntary cessation of challenged conduct thus can moot a case when it is absolutely clear the defendant could not revert to its challenged behavior—where it is "prevented," "precluded," or "prohibited" from doing so. But where a defendant has not erected a "clearly effective barrier" to recurrence, *Trinity Lutheran*, 582 U.S. at 457 n.1, more is needed to overcome the voluntary cessation exception.

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[5] The government relies on *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001), to argue "mere 'speculation' ... is insufficient to 'shield [a] case from a mootness determination.'" Pet. Br. 16 (quoting *Waukesha*, 531 U.S. at 283). But this Court declined to apply the voluntary cessation rule in *Waukesha*, because the party whose "conduct sap[ped] the controversy of vitality" stood to "gain nothing from" a dismissal for mootness. *See Waukesha*, 531 U.S. at 283-84 & n.1. Here, like the plaintiff in *City of Erie*, the party that voluntarily ceased its conduct *does* stand to benefit from a mootness dismissal, and all parties agree this case is governed by the voluntary cessation doctrine.

B. A Defendant Can Overcome The Voluntary Cessation Exception By Repudiating Past Conduct.

Even in the absence of formal barriers to recurrence, a defendant can repudiate its past actions to demonstrate it is "absolutely clear" those actions "could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189. This is not to say that repudiation is rigidly required. Rather, as the court of appeals correctly articulated (contrary to the government's characterization, Pet. Br. 11, 23-24), a defendant's "renunciation of its past actions" is one way it can "compensate for the ease with which it may relapse into them." *Fikre I*, Pet. App. 40a.[6]

This Court's precedents confirm the role that repudiation can play in voluntary cessation analysis. In *Davis*, 440 U.S. 625, for example, the Court deemed moot a challenge to Los Angeles County's hiring practices in part because the County had renounced the use of those practices before replacing them altogether. The County acknowledged that its prior use of an unvalidated written civil-service examination "had a disparate adverse impact on minority hiring," frustrating the County's efforts "to increase minority representation." *Id* at 628. Based on these statements, the Court found "no reasonable expectation" the County would resume its use of a hiring practice it now "regarded as unsatisfactory." *Id.* at 632-33.

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[6] The government acknowledges that "repudiation of the challenged conduct might have some evidentiary value" to a court's evaluation of the potential for recurrence. Pet. Br. 23.

More recently, in *NYSRPA I*, 140 S. Ct. 1525, the Court deemed challenges to a firearm ordinance moot after New York City "repealed the law and admitted that it did not actually have any beneficial effect on public safety." *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022) (Alito, J., concurring) (discussing mootness issues in *NYSRPA I*). Such an admission made it less reasonable to expect that the City would reinstate its challenged policy in the future.

Applying these precedents, lower courts regularly find that a defendant's repudiation of its challenged conduct helps demonstrate the conduct cannot reasonably be expected to recur. *See, e.g.*, *Brach v. Newsom*, 38 F.4th 6, 13 (9th Cir. 2022) (challenge to COVID-era school closures mooted where, although the governor of California retained authority to close schools, "the State has unequivocally renounced the use of school closure orders" (internal quotation marks and alterations omitted)), *cert denied*, 143 S. Ct. 854 (2023); *Winsness v. Yocom*, 433 F.3d 727, 736 (10th Cir. 2006) (pre-enforcement challenge to flag-desecration statute moot where the prosecutor "ha[d] foresworn any intention to bring criminal charges against individuals who alter the flag for expressive purposes," and the District Attorney "repudiat[ed] the citation" the plaintiff had received); *Christian Coal. of Ala. v. Cole*, 355 F.3d 1288, 1292-93 (11th Cir. 2004) (case moot following a "genuine" change in defendants' "position regarding the propriety" of the challenged conduct).

Repudiation is not the same as conceding "the merits of the plaintiff's claims." Pet. Br. 22; s*ee also id.* 20-24. A defendant can repudiate its prior conduct for

innumerable reasons—that it was poor policy or too costly, for example. It need not admit legal liability. For example, when this Court vacated as moot the judgment in *Yellen v. United States House of Representatives*, 142 S. Ct. 332 (2021), it did so following President Biden's proclamation that the border wall at issue was "not a serious policy solution" and a "waste of money." Proclamation No. 10,142, 86 Fed. Reg. 7225 (Jan. 20, 2021) (cited in Petition for Writ of Certiorari at 8, *Yellen v. House of Representatives*, No. 20-1738 (U.S. June 11, 2021)).

On the flip side, a defendant's continuing insistence on the correctness of its prior conduct is evidence that, in the absence of effective barriers, the defendant will likely resume that conduct. In *Knox*, a union continued to defend the legality of its "Political Fight-Back fee" through the grant of certiorari. 567 U.S. at 307. However, after certiorari was granted, the union sent a notice offering a refund, and then insisted that the case had become moot. *Id.* Rejecting this argument, the Court emphasized that "since the union continue[d] to defend the legality of the Political Fight-Back fee, it [was] not clear why the union would necessarily refrain from collecting similar fees in the future." *Id.*

Likewise, in *West Virginia v. EPA*, the government's representation that "the EPA ha[d] no intention of enforcing the [challenged] Clean Power Plan" failed to moot the case because the government simultaneously "vigorously defend[ed]" the legality of its prior approach. 142 S. Ct. 2587, 2607 (2022). And in *Parents Involved*, 551 U.S. at 719, the Court found the case live in part because the defendant school district

"vigorously defend[ed] the constitutionality of its … program." *See also Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944); *Roman Cath. Diocese*, 141 S. Ct. at 72 (Gorsuch, J., concurring).

In sum, when a defendant *neither* repudiates its past actions *nor* establishes effective barriers to their future recurrence, the defendant has not carried its burden to demonstrate with absolute clarity that the challenged conduct could not recur. And this is especially true when the defendant not only refuses to repudiate its past conduct but persists in asserting its righteousness.

C. This Court Has Sensibly Applied The Rigorous Standards Of Voluntary Cessation Equally To Public And Private Defendants.

As the government concedes, the same rigorous standard applies to private and government defendants alike. *See* Pet. Br. 14-15 (citing *City of Mesquite*, 455 U.S. at 289 n.10); *see also Trinity Lutheran*, 582 U.S. at 457 n.1; *Parents Involved*, 551 U.S. at 719. A lesser rule for government defendants—sophisticated repeat litigants that often defend against multiple challenges to a single policy in jurisdictions across the country—would allow for the strategic mooting of cases, including to avoid

negative precedent.[7] *See generally* Joseph C. Davis & Nicholas R. Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 Yale L.J. F. 325, 328-29 (2019). It also would undermine the "'public interest in having the legality of the [defendant's] practices settled,'" *DeFunis*, 416 U.S. at 318 (quoting *W. T. Grant*, 345 U.S. at 633), which is "at its peak" in cases in which the government is a defendant, Amicus Brief of the Becket Fund for Religious Liberty at 15.

Moreover, the concerns animating this Court's voluntary cessation doctrine—that defendants may resume the challenged conduct after a dismissal for mootness—apply with particular force against government actors, who frequently change course and generally cannot bind their successors. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005). It is therefore imperative that the standard for voluntary cessation continue to apply at least as rigorously to public defendants as to private ones.

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[7] That the voluntary cessation exception is meant to prevent manipulative conduct does not mean that, in this particular case, applying the exception amounts to a finding that the government acted in bad faith. *See infra* Argument III.B. That said, it hardly can be doubted that the government benefits from maintaining the secrecy of its decisionmaking, that decisionmaking regarding the No Fly List generally operates under a cloak of secrecy, and that mooting a case can protect the government from having to forego such secrecy. This combination of factors makes mooting No Fly List cases particularly suspect.

II. The Government Has Not Met Its Burden To Show That The Conduct Fikre Challenges Cannot Reasonably Be Expected To Recur.

Here, the government has taken insufficient steps to meet its burden under the voluntary cessation doctrine. It has not erected any effective barrier to Fikre's future placement on the No Fly List—including any barrier to the government placing him again on the list for the same reasons he alleges were unlawful, or using the same procedures he alleges were unlawful. And far from renouncing the challenged conduct, it has insisted that Fikre's placement on the list followed applicable procedures. Given this combination of facts, the government has not shown it is "absolutely clear" that "the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190.

The government relies principally on the Courtright Declaration's statement that Fikre will "not be placed on the No Fly List in the future" based on "currently available information." Pet. App. 118a. But nothing about the declaration establishes that the government "could not revert" to the challenged conduct. *Trinity Lutheran*, 582 U.S. at 457 n.1. The declaration is not a binding legal document. It was not executed by a senior official with policymaking authority. And by its own terms it does not preclude Fikre's return to the list for the same reasons or in the same manner he challenges in this lawsuit. Further, the Courtright Declaration's "continue[d] … defen[se] [of] the legality" of the government's choices, *Knox*, 567 U.S. at 307, reinforces the very real possibility of recurrence.

A. There Is No "Clearly Effective Barrier" To Recurrence.

The voluntary cessation doctrine seeks to prevent the recurrence of "allegedly wrongful behavior," *Friends of the Earth*, 528 U.S. at 189, or a "challenged practice," *Trinity Lutheran*, 582 at 457 n.1. Here, Fikre alleges his placement on the No Fly List was wrongful for two principal reasons. Pet. App. 163a. First, Fikre was placed on the No Fly List pursuant to procedures that violated his due process rights: The government gave him no meaningful notice of his No Fly List status, no information about the factual basis for that status, and no genuine opportunity to seek redress. *Id.* 165a, 167a. Second, Fikre was placed on the No Fly List for unlawful reasons: He was added "despite [the government's lack of] any reasonable suspicion that [Fikre] is a known, suspected, or potential terrorist," and with impermissible reliance on his race, national origin, and religious activities. *Id.* 168a. Fikre specifically alleges that the government impermissibly relied on his religious associations in the Muslim community, including at the Portland mosque where he worshiped. *Id.* 139a, 143a, 165a.

The potential recurrence of either alleged violation of due process, procedural or substantive, precludes a finding of mootness. To establish that this case is moot via an effective barrier, the government must show that neither could recur—that is, Fikre could not again be subject to No Fly List procedures he claims are unconstitutional, and could not be added to the No Fly List for the same impermissible reasons. The government has not done so.

1. To begin, the Courtright Declaration is an easily reversible statement of the FBI's intentions as of June 2019, leaving the government "free to return to [its] old ways." *W. T. Grant*, 345 U.S. at 632.

A defendant's unilateral statement of its intent to refrain from challenged conduct generally does not overcome the voluntary cessation exception to mootness. *See supra* Argument I.A. In *Trinity Lutheran*, for example, the governor's press release announcing that religious organizations could begin applying for grants on equal terms with secular organizations did not moot the case in the absence of a "clearly effective barrier" to the resumption of the old policy. 582 U.S. at 457 n.1. By contrast, in *Already*, Nike's "Covenant Not to Sue" was a "judicially enforceable" promise, was "unconditional and irrevocable," and had the effect of "prohibit[ing] Nike from making any claim or any demand" on the plaintiff. 568 U.S. at 92-93. As Nike argued before this Court, the "binding legal force" of its covenant left Nike "no power to re-engage in the allegedly unlawful conduct." Brief of Respondent at 40-41, *Already, LLC v. Nike, Inc.*, No. 11-982 (U.S. Sept. 24, 2012), 2012 WL 4361441.

The Courtright Declaration shares none of the features of Nike's covenant. Instead, like the press release in *Trinity Lutheran*, the declaration vests Fikre with no rights. It places no limits on the government's powers. It bears the name of a mid-level official only, and

the record contains no evidence that officials with authority to relist Fikre would even be aware of it.[8]

Also unlike the covenant in *Already*, the government has identified no consequences if it changes its position—because there would be none. Although a private party might be judicially estopped from contradicting a past sworn declaration, such protections generally do not extend in the same manner to a government litigant. *See Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984) (noting the "well settled" principle that "the Government may not be estopped on the same terms as any other litigant," particularly when carrying out law enforcement functions).

To be sure, this Court has on occasion found that the wholesale abandonment of a government policy—repealed by clear legislative or executive action—moots a case, even though future legislatures and executive bodies are free to reenact the repealed policy. *See NYSRPA I*, 140 S. Ct. at 1526; *Davis*, 440 U.S. at 632-33. So, too, with the string of recent summary vacaturs cited by the government, each of which involved a policy that

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[8] In other contexts, when agencies submit declarations setting forth their positions in litigation, courts regularly expect the statement to be from a senior official. For example, the state-secrets privilege may be invoked only "by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States v. Zubaydah*, 595 U.S. 195, 205 (2022) (quoting *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953)); *see also United States v. Aref*, 533 F.3d 72, 80 (2d Cir. 2008) (discussing similar judicially imposed requirement under the Classified Information Procedures Act).

had either expired or been formally terminated. Pet. Br. 19 (citing *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023) (case mooted by expiration of pandemic-related emergency public-health order); *Yellen*, 142 S. Ct. 332 (case mooted by Presidential Proclamation terminating national emergency with respect to southern border and directing no funds be used to construct border wall); *Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021) (case mooted by DHS termination of Migrant Protection Protocols); *Trump v. Int'l Refugee Assistance*, 583 U.S. 912 (2017) (case mooted by expiration of challenged Executive Order)).

But these decisions are inapposite. In each, the government publicly announced a major policy change or allowed an old policy to lapse. Such changes carry indicia of permanence. And when the government makes such changes, it knows it will be held accountable to the public if it reverses course.[9] In this case, the government has not announced any new No Fly List procedures or professed a commitment to changed ways. Indeed, the Courtright Declaration "provides no explanation for Fikre's inclusion on or removal from the No Fly List and, far from announcing a change in policy regarding inclusion on the No Fly List, indicates that there has

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[9] This public accountability rationale is akin to the Court's rationale in administrative law cases for requiring agencies to articulate a contemporaneous explanation for their actions. *See, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (discussing political accountability as the "functional reason[] for requiring contemporaneous explanations" for agency action); *see generally* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 Yale L.J. 1748 (2021).

been none." Pet. App. 16a. Instead, the declaration is ad-hoc, discretionary executive action without any indicia of permanence. *Alaska*, 17 F.4th at 1229 n.5. It represents a mere "individualized determination untethered to any explanation or change in policy." Pet. App. 15a. There is thus every "sound reason," Pet. Br. 19, to treat the Courtright Declaration differently than a formal repeal of a policy.

2. Even if the government were bound by the Courtright Declaration (or adhered to it in perpetuity), the declaration would not by its own terms protect Fikre from recurrence of the challenged conduct.

First, the government has not shown that, if Fikre is placed back on the list in the future—even for a completely different reason—it will use different procedures. The Courtright Declaration instead reaffirms the propriety of procedures used to place Fikre on the list in the first place. Pet. App. 118a. The procedures Fikre alleges to be constitutionally defective would be used again should he be relisted, thereby risking recurrence of the challenged conduct. *See Vitek v. Jones*, 445 U.S. 480, 487 (1980) (no mootness where it was not "absolutely clear" that plaintiff would not again be subjected to procedures he argued were unconstitutional (internal quotation marks omitted)); *Parents Involved*, 551 U.S. at 719-20 (even after student was admitted to "the school to which transfer was denied," case remained live because student "may again be subject to assignment based on his race").

Second, the government has not pointed to anything that would preclude it from returning Fikre to the No Fly List for the same reasons he claims are unlawful.

The government insists that, because the Courtright Declaration pledges Fikre "will not be placed on the No Fly List in the future based on the currently available information," any placement would necessarily be "based at least in part on *new* information." Pet. Br. 17; *see also id.* 11, 34. And any placement of Fikre on the No Fly List for "new information," the government suggests, "by definition would not constitute a recurrence of the challenged conduct." *Id.* at 17.

The government's position unduly conflates "new information" with "new reasons." The Courtright Declaration may suffice to show the government will not restore Fikre to the No Fly List for the specific things he did in 2010 (whatever those were) that prompted his initial placement. But nothing in the declaration promises that, if Fikre were to do those same or similar things again—*e.g.*, if he were to join the wrong mosque—the government could not restore him to the list. Such a relisting would be based on "new information," but it would repeat the same core violation of law challenged by Fikre, namely that he was added to the No Fly List for an illegitimate reason.

This Court has made clear that the voluntary cessation exception does not require complete identity between the challenged conduct and the actions the defendant may take after a lawsuit is dismissed: The doctrine protects not merely against the recurrence of the "selfsame" conduct, but also new conduct that nonetheless "disadvantage[s]" a plaintiff "in the same fundamental way." *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993). The Courtright Declaration, even if

followed to a T, would not preclude the government from relisting Fikre using the same procedures or for the same reasons. It therefore poses no barrier to recurrence of the challenged conduct.

B. The Government Has Not Compensated For The Absence Of An Effective Barrier To Recurrence By Repudiating Its Past Conduct.

The government could have compensated for the absence of any effective barrier to future recurrence by repudiating Fikre's initial listing. It chose not to.

The Courtright Declaration's statement that Fikre will not be relisted based on "currently available information" is plainly not a repudiation of the decision to place him there in the first instance. It is best read, as the court of appeals read it, as a statement that "something about Fikre" had changed to merit his delisting. Pet. App. 16a. If "something about Fikre" again were to change—for example, if he were once again to engage in the conduct that prompted his placement on the No Fly List—the Courtright Declaration makes clear the government believes it can lawfully relist him.

In fact, the government did the opposite of repudiation, asserting that Fikre's initial listing comported "with applicable policies and procedures," *id.* 118a, and insisting that its No Fly List procedures are constitutional, *id.* 17a; *see generally* Answering Brief for Appellees, *Kashem v. Barr*, No. 17-35634 (9th Cir. Mar. 23, 2018), ECF No. 31. Where, as here, a defendant insists on the lawfulness of its conduct and there is no

barrier to recurrence, this Court "do[es] not dismiss a case as moot." *West Virginia*, 142 S. Ct. at 2607.

III. The Government May Not Be Excused From Its Burden To Show That Its Conduct Cannot Reasonably Be Expected To Recur.

Having failed to demonstrate an effective barrier to recurrence or to repudiate its challenged conduct, the government attempts to evade its burden by arguing that the possibility Fikre will be relisted is speculative, relying on the presumption of regularity, and invoking national security. The Court should reject these arguments.

A. The Government May Not Meet Its Burden By Arguing That The Risk Of Fikre's Relisting Is Speculative.

The government argues the potential for Fikre to be relisted—for any reason—is "mere speculation." Pet. Br. 16 (citations omitted); *see also id.* 33. For this position, the government relies primarily on the passage of time since Fikre was removed while this case has been litigated. This argument distorts the legal standard and is factually incorrect.

1. First, the government cannot invoke "speculation" to shift its burden to Fikre. It is not Fikre's obligation to establish a likelihood of recurrence; rather, the government "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*, 528 U.S. at 190. An alternative rule would confuse mootness with standing. *See id.* ("[T]here are circumstances in which the prospect that a

defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."); *see also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221 (2000) (reversing mootness dismissal where the court of appeals "confused mootness with standing ... and as a result placed the burden of proof on the wrong party" (internal quotation marks omitted)).

As this Court's precedents teach, the likelihood of recurrence in a voluntary cessation case may be relatively low, but if the defendant remains "free to return to [its] old ways," the case is not moot. *W. T. Grant*, 345 U.S. at 632; *see, e.g.*, *Trinity Lutheran*, 582 U.S. at 457 n.1 (case not moot because Missouri "could … revert" to a policy its Governor had publicly ended); *City of Erie*, 529 U.S. at 287-88 (case not moot because of the mere possibility that proprietor of shuttered nude-dancing establishment "could again decide to operate" such an establishment); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538 (1978) (similar).

2. The government tries to circumvent this rule by relying on *Alvarez v. Smith*, 558 U.S. 87 (2009), Pet. Br. 31-32. There, the plaintiffs' challenge to an Illinois criminal forfeiture procedure became moot when their property was returned at the conclusion of forfeiture proceedings. The Court found the plaintiffs would not "likely again prove subject to the State's seizure procedures," 558 U.S. at 93, so any dispute about the lawfulness of those procedures was "unlikely to affect [the] plaintiffs any more than it affects other Illinois citizens," *id.*

But as the government acknowledges, Pet. Br. 32, *Alvarez* is not a voluntary cessation case. Neither party invoked, and the Court did not apply, the voluntary cessation exception because the challenged conduct ended "in the ordinary course"—not due to the federal litigation. 558 U.S. at 95-97; *see also* Transcript of Oral Argument at 58-59, 61-62, *Alvarez v. Smith*, No. 08-351 (U.S. Oct. 14, 2009). Because, as all parties agree, this case involves voluntary cessation, *see* Pet. Br. 14-15, it is not Fikre's obligation to show that he is "likely" to "prove subject to" the same conduct he challenges as unconstitutional. *Alvarez*, 558 U.S. at 93. It is rather the government's "heavy burden" to show that he could not be. *See supra* Argument I.

3. Fikre's case would be a particularly inappropriate case in which to invert the voluntary cessation burden, because the government has refused to disclose why he was placed on the No Fly List. If it were clear to Fikre why he was listed, he could present (and the courts could examine) evidence as to the likelihood he would repeat the conduct, if any, that resulted in his initial listing. *See, e.g.*, *Already*, 568 U.S. at 94 (assessing whether plaintiff was "engage[d] in or ha[d] sufficiently concrete plans to engage in activities" that might prompt Nike to sue). Instead, the government is simultaneously obscuring the reasons for Fikre's listing and expecting him to show that he is likely to engage in the type of conduct that would risk a future relisting. This gainsays "[t]he ordinary rule, based on considerations of fairness," that "does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."

United States v. New York, New Haven & Hartford R.R. Co., 355 U.S. 253, 256 n.5 (1957).

In any event, no great speculation is required to conclude that Fikre may be relisted, despite the passage of time. The government found him to be appropriately listed on multiple occasions. *See*, *e.g.*, Pet. App. 139a (original 2010 listing); *id.* 151a-152a (decisions to keep him on the list in 2013 and 2015); Pet. Br. 3 (explaining that Watchlisting decisions are reviewed biannually). "In estimating the likelihood of an event's occurring in the future, a natural starting point is how often it has occurred in the past." *Clarke v. United States*, 915 F.2d 699, 704 (D.C. Cir. 1990) (en banc). And with respect to the No Fly List specifically, history confirms that, once on the government's radar and in government databases, an individual may well be listed again. *See Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147, 1157-59, 1182 (9th Cir. 2019) (describing repeated relistings of plaintiff who was initially placed on No Fly List in error).

Unlike in *Alvarez*, then, the current dispute *is* "[likely] to affect [Fikre] … more than it affects other … citizens," *Alvarez*, 558 U.S. at 93—particularly since Fikre does not know why he was listed and thus cannot necessarily avoid such conduct in the future.

The possibility of Fikre's relisting is reinforced by the relative ease with which the government can add an individual to the No Fly List. *See supra* at 6-7. The Courtright Declaration identifies no process the government will use to prevent Fikre from being placed back on the List—it promises no annotation to accompany his name in government databases, no

requirement that law enforcement consult with counsel before relisting him, and no alteration to the decisionmaking process that resulted in his first listing. Having erected no effective barrier to recurrence, the government cannot meet its "heavy burden" simply by asserting that the risk is speculative.

4. The government is wrong that the passage of time "alone is strong evidence that [Fikre's] being placed back on the list could not reasonably be expected to recur." Pet. Br. 16 (internal quotation marks omitted). This case is still ongoing. To place significant weight on the passage of time during the pendency of the litigation would be to turn the voluntary cessation exception upside down. The point of the doctrine is to prevent the resumption of challenged conduct "as soon as the case is dismissed." *Knox*, 567 U.S. at 307. That a defendant has refrained from repeating the challenged conduct while it continues to pursue dismissal on mootness grounds is not especially relevant to what the defendant could be expected to do after such a dismissal.

The passage of time can be relevant to the voluntary cessation analysis, but only in circumstances not present here. Take *Davis*: There, the Court found relevant the years that had passed between the County's initial cessation of the challenged hiring practice and its possible reinstatement. *See* 440 U.S. at 632. That passage of time was relevant only because it reflected the County's genuine rejection of the challenged hiring practice, based on its view that it "ha[d] a disparate impact on minority hiring" that "might violate Title VII." *Id.* at 627-28. Here, by contrast, the time that has passed since Fikre was removed from the list cannot be

attributed to the government's recognition of the wrongfulness of his initial placement because the government has never repudiated that placement in the first place.

This Court has never accepted that the passage of time during litigation, in the absence of repudiation, suffices to show with absolute clarity that challenged conduct could not reasonably be expected to recur. It should not do so for the first time in a case where the government has made all relevant decisions in secret.

B. The Presumption Of Regularity Does Not Allow The Government To Evade Its Burden.

The "presumption of regularity" does not make up for the Courtright Declaration's shortcomings. Pet. Br. 17-20. The government invokes that principle to argue that the Court must "presume[] that the government removed [Fikre] from the No Fly List for genuine reasons and in good faith"—rather than out of a strategic desire to moot this case—"and that it will not place [him] back on the list absent new information that justified that course of action." Pet. Br. 18. In other words, the government says, the Court should not doubt that the Courtright Declaration means what it says.

The presumption of regularity has no bearing on this case. The court of appeals expressly declined to question the sincerity of the government's motives, Pet. App. 42a, and applying settled voluntary cessation doctrine would not require this Court to do so, either.

Under settled precedent, a finding that challenged governmental conduct could recur in the future does not

imply that government actors are operating in bad faith to defeat litigation, or nefariously scheming to return to the challenged conduct as soon as they obtain a mootness dismissal. In *Trinity Lutheran*, for example, this Court cast no doubt on the Governor of Missouri's motives when it found the case live because the state "could … revert to its policy of excluding religious organizations." 582 U.S. at 457 n.1. The presumption of regularity played no role in that or any other of the Court's voluntary cessation cases, and it should not here. The key question is not whether a defendant has stopped its challenged conduct to make a case go away, but rather whether the defendant remains free to resume the challenged conduct after the litigation ends. To require that a plaintiff make a "strong showing of bad faith," Pet. Br. 18, would be to displace the government's burden and accord it a more lenient voluntary cessation standard than any other defendant—a proposition this Court has never countenanced for good reason. *See supra* Argument I.C.[10]

Moreover, the problem with the Courtright Declaration is not that the government did not mean what it said. The problem is that, even if the government strictly adheres to the Declaration, it remains "free to return to [its] old ways." *Friends of the Earth*, 528 U.S. at 189 (citation omitted). As noted above, the Courtright Declaration fully permits the government to repeat the violations of law alleged here. It could either (1) add

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[10] Although Fikre does not need to overcome the presumption of regularity to prevail, the government's conduct in No Fly List litigation supports an inference that it has engaged in strategic mooting of claims. *See supra* at 7-8 (collecting cases).

Fikre to the No Fly List in the future for the same type of conduct that resulted in his initial listing, or (2) add Fikre to the No Fly List for doing something else, but subject him to the same unconstitutional procedures. *Supra* Argument II.A.2. The complaint details how an individual can be placed on the No Fly List in a manner that is technically compliant with applicable policies and procedures, but nonetheless unconstitutional. In other words, Fikre alleges violations of due process not because rogue government actors will decline to discharge their duties in good faith, but rather because the governing No Fly List procedures, even if implemented in good faith, are themselves unconstitutional. One need not adopt an "uncharitable reading" of the Courtright Declaration to see that these possibilities are evident. Pet. Br. 20 (citing Pet. App. 19a).

C. The Government's Invocation Of National Security Further Underscores Why This Case Is Not Moot.

Prudential national-security concerns do not alter the legal standard for mootness or the outcome in this case. The government implies without saying that the voluntary cessation standard in national-security cases should be different. *See* Pet. Br. 18, 34-36. But this Court has never announced a different standard for live controversies based on the subject matter in dispute. And not one case the government cites for the proposition that national security dictates this case's outcome involves mootness or voluntary cessation. *See id.*

Instead, the government cites cases involving deference in litigation to factual assessments that are within the unique expertise of the executive branch. *Id.* Those cases are inapposite. They involve deference to a factual statement where the topic is uniquely within the knowledge of government personnel—for example, regarding whether money given to support a terrorist group's nonviolent activities aids those groups' violent activities, *e.g.*, *Holder v. Humanitarian L. Project*, 561 U.S. 1, 33 (2010), or regarding the role of sonar training in combatting threats from enemy submarines, *e.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24-25 (2008).

No such deference is warranted here because the Courtright Declaration makes no assertions of fact. It makes statements about the government's present intention to act. Courts are fully capable of evaluating the government's representations about its own future conduct for voluntary cessation purposes. Such representations do not rest on the "[t]he experience and analysis of the U.S. government." *Humanitarian L. Project*, 51 U.S. at 33. Thus, they are owed no special deference.

Courts also are fully capable of handling sensitive information that, on a case-by-case basis, might need to be evaluated in a No Fly List case. *See, e.g.*, *supra* n.2; *cf. Webster v. Doe*, 486 U.S. 592, 604 (1988) (rejecting CIA director's argument that "judicial review … of constitutional claims will entail extensive 'rummaging around' in the Agency's affairs to the detriment of national security"). They may require counsel to obtain security clearances, use protective orders, and submit

certain information ex parte and *in camera*.[11] These tools ensure sensitive information is handled responsibly. That such tools may be needed in a No Fly List case that is litigated on the merits does not justify altering the standard for whether such a case may be litigated at all.

Similarly, the notion that an otherwise-live case might be deemed moot because it would "distract agencies from carrying out their national security and counterterrorism duties," Pet. Br. 35, contravenes the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). This Court has repeatedly warned that "national-security concerns must not become a talisman used to ward off inconvenient claims." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017); *see also Boumedienne v. Bush*, 553 U.S. 723, 797 (2008) ("Security subsists, too, in fidelity to freedom's first principles."). "[This Court's] precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication

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[11] As the government acknowledges, *see* Pet. Br. 35, it also may seek to invoke the state secrets privilege when it believes disclosing information in litigation could significantly harm national-security interests. *See Zubaydah*, 595 U.S. at 199. Indeed, it has done so in No Fly List cases. *See, e.g.*, *Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 912 (N.D. Cal. 2014); *see also* Declaration of Eric. H. Holder, Jr., *Tarhuni v. Holder*, No. 13-cv-00001-BR (D. Or. Sept. 16, 2014), ECF No. 73. Courts thus have long-established means of addressing the use of sensitive information in litigation; the government does not need a new jurisdictional "escape hatch."

of the judicial role." *Humanitarian L. Project*, 561 U.S. at 34.

If anything, the government's broad national-security discretion supports Fikre's position. The government operates a list that limits the freedoms of U.S. citizens, and it does so without explanation, notice, or advance process. The government enjoys virtually unfettered discretion in this context and deploys it with no burden of transparency or accountability. When all power lies with the government, and exercise of that power is unreviewable, nothing precludes the government from "return[ing] to [its] old ways." *Friends of the Earth*, 528 U.S. at 189. Far from excusing the government of its burden to show that its conduct cannot recur, the secrecy under which the government operates the No Fly List should recommend even greater caution. National security does not make this case moot—it demonstrates why it is live.

IV. The Government Had Other Options To Moot This Case.

The government laments what it characterizes as an impossible burden, arguing that it "should [not] have to" assure Fikre that he will "never be placed on the No Fly List in the future regardless of his actions or new information learned about him." Pet. Br. 34. But there are numerous other steps the government could take to accomplish a dismissal for mootness.

First, it could moot Fikre's substantive due process claim by issuing a more concrete and specific declaration, from a government official with policymaking authority, assuring Fikre that he would not be placed on the No Fly

List again for materially the same reasons or based on the same type of conduct that supported his initial listing. To be sure, such a declaration would still be non-binding, but to minimize the risk of an about-face, the government could explain the basis for Fikre's listing in the declaration or, if necessary, ex parte or *in camera*. *See Kashem*, 941 F.3d at 369. The courts could then determine whether it is absolutely clear that Fikre could not reasonably be expected to be relisted for those same reasons. As for Fikre's procedural due process claim, the government could start by committing that before Fikre can be relisted, the government must use different procedures for him than the procedures he alleges to be unconstitutional; the government could agree to provide him advance notice, an explanation for why he is being relisted, and a hearing.

Second, the government could compensate for the lack of a barrier to recurrence by clearly repudiating its initial decision to place Fikre on the No Fly List, acknowledging that he did not pose a risk of terrorism, that the procedures used to place Fikre on the list were insufficient, or both. Such an acknowledgement would, as the government concedes, support any claim that the challenged conduct cannot reasonably be expected to recur. *See* Pet. Br. 23. And, as noted, it would not require the government to admit liability on Fikre's claims. *See supra* Argument I.B.

As part of its repudiation of Fikre's initial placement on the list, the government could agree to expunge any records reflecting his past listed status and could state in its declaration that Fikre's past No Fly List status will "not be relied upon for any purpose." *See Ibrahim v.*

Dep't of Homeland Sec., 62 F. Supp. 3d 909, 929 (N.D. Cal. 2014) (requiring government to remove all references to plaintiff's erroneous placement on the No Fly List in its databases or annotate databases with a correction); *see* Pet. App. 134a (the government "retains copies of all prior versions of listed persons' records").

Finally, the government could formally change its No Fly List procedures, with some indicia of permanence, to remedy the constitutional violations Fikre has identified. It could adopt stricter criteria for listing, establish safeguards against listing individuals based on constitutionally protected conduct, and/or enhance the procedural protections available to listed individuals. An appropriate combination of these changes would suffice to moot Fikre's claims.

The government may not be willing to do any of these things, which is its prerogative. Its alternative is to defend this litigation on the merits, giving Fikre the chance to seek from the district court the relief that the government has not been willing to provide.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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