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 OF THE CATO INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE**

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the

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principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual Cato Supreme Court Review.

Consistent with Cato's values, this brief urges the Court to affirm its longstanding case law on the voluntary-cessation exception to mootness and to reject the government's request for a more lenient standard in cases involving public defendants. Constitutional litigation seeking prospective relief against the government provides invaluable protection against the infringement of constitutional rights, including to due process and to travel. This Court has never held that the government should have an easier time mooting live cases against it than a private defendant. Quite the contrary: the Court has applied the same stringent voluntary-cessation standard in all cases, and the reasons underlying the heavy burden imposed on defendants trying to moot a case apply with equal if not greater force when the defendant is a government or public official.

Under that well-established standard, this case is an easy one. The government continues to defend the procedures and considerations that led to its placing Mr. Fikre on the No Fly List, and it hasn't made absolutely clear that Mr. Fikre wouldn't be subject to similar unconstitutional harms if the case were dismissed as moot. The Court should reaffirm its precedent and reject the government's efforts to take live cases presenting important questions of constitutional law away from the federal courts.

SUMMARY OF ARGUMENT

I. When a defendant tries to moot a live case by voluntarily ceasing the challenged practice, it must

satisfy a "stringent" standard by showing it is "'absolutely clear that [its] 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). That heavy burden—proof that is "*absolutely* clear," *id.* (emphasis added)—demands "certainty" that a case is truly moot before it can be dismissed. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). And in an uninterrupted string of cases spanning decades, this Court has applied that same standard even in cases where the defendant invoking voluntary cessation is a government or public official. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 457 n.1 (2017); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007); *City of Mesquite*, 455 U.S. at 289.

The government now asks the Court to adopt a more lenient standard when a government defendant seeks a way out of litigation through voluntary cessation. That argument flies in the face of decades of precedent from this Court. And the two justifications the government offers for that departure are plainly insufficient. The presumption of regularity addresses whether government agents have acted in accordance with established procedures and in good faith. It is not irregular or "improper," Gov't Br. 17-18, for government attorneys to try to moot cases that could produce unfavorable precedent. But it is strategic, and this Court's demanding voluntary-cessation standard serves to counteract precisely that sort of strategic litigation behavior. And whatever effect national-security interests may have on the merits of claims against the government, they are no reason to deprive the federal courts of jurisdiction to hear those claims in the first place—particularly when taking those disputes

out of court will suppress the vital role of the judiciary in enforcing the Constitution's guarantees.

II. This case is not moot. Mr. Fikre has challenged his placement on the No Fly List and the procedures the government used to reach that decision. In both respects, the government has not made "absolutely clear" that the constitutional harms Mr. Fikre has alleged will not recur. *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013). The government relies on a declaration from a public official that Mr. Fikre won't be placed back on the No Fly List based on current information. But the declarant, who is neither a principal nor an inferior officer of the United States, lacks power to bind the government to do anything—especially in an area in which, as the government emphasizes, the executive's discretion is paramount. The government also continues to "vigorously defend[]" (*Parents Involved*, 551 U.S. at 719) not only its initial decision to place Mr. Fikre on the List, but also the allegedly unconstitutional procedures it uses in making such determinations. By continuing to defend the policies that assertedly violated Mr. Fikre's constitutional rights, the government has not made it "clear" that it "would necessarily refrain" from the same practices "in the future." *Knox* v. *Serv. Emps.*, 567 U.S. 298, 307 (2012); *accord, e.g.*, *Trinity Lutheran*, 582 U.S. at 457 n.1.

The Court should affirm.

ARGUMENT

I. The government bears the same burden in proving mootness by voluntary cessation that private defendants do.

The government invites this Court to adopt a watered-down version of the voluntary-cessation doctrine for government defendants. The Court should decline that invitation. The standard for voluntary cessation is high for good reason, and this Court has always applied that rigorous standard to *all* defendants, public and private alike. Neither the presumption of regularity nor national-security interests justify departing from that precedent. Holding government defendants, like all defendants, to the high burden of showing it is absolutely clear the case is moot is indispensable to protecting individual liberty.

A. "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Particularly where a defendant continues to "urge[] the validity" of the challenged practice "and would presumably be free to resume" it if the case were dismissed, the defendant's choice to halt the practice mid-litigation "does not operate to remove a case from the ambit of judicial power." *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 43 (1944). That rule rests on a simple insight: a defendant cannot contrive dismissal of a live controversy properly before a court if he would be "'free to return to his old ways'" after the case goes away. *United States* v. *Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968).

That rule serves important interests. Skeptical review of voluntary cessation deters strategic behavior by litigants. As the Court has cautioned, "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit." *United States* v. *Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952); *accord Knox* v. *Serv. Emps.*, 567 U.S. 298, 307 (2012). It also protects plaintiffs' investment of time and money into mounting challenges to allegedly unlawful practices. This Court has recognized that "[i]t is no small matter to deprive a litigant of the rewards of its efforts" by blessing a defendant's strategic maneuver after litigation is underway. *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216, 224 (2000) (per curiam). And it serves the weighty "public interest in having the legality of [challenged] practices settled"—which is why courts have "rightly refused" to grant defendants what would be "a powerful weapon against public law enforcement" and have demanded far more than statements from defendants that they do not plan to revive the practices. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

Voluntary cessation of challenged conduct will moot a case only if the defendant satisfies a "stringent"—even "formidable"—standard. *Laidlaw*, 528 U.S. at 189-90. The defendant must make it "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* And as the Court has stated repeatedly, that is a "heavy burden." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 457 n.1 (2017) (quoting *Laidlaw*, 528 U.S. at 189); *accord, e.g.*, *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719

(2007); *Adarand*, 528 U.S. at 222; *Concentrated Phosphate*, 393 U.S. at 203; *W.T. Grant*, 345 U.S. at 633.

Across decades, this Court has outlined the many circumstances in which voluntary cessation will not moot a case. A defendant cannot simply discontinue the challenged practice. *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 287 (2000); *Walling*, 323 U.S. at 43. Nor can a defendant secure dismissal merely by "disclaim[ing] any intention to revive" the practice. *W.T. Grant*, 345 U.S. at 633. Not even repeal of a challenged law is sure to moot a case, at least absent "certainty" that the law won't be reenacted upon dismissal of the lawsuit. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Above all, the Court has been skeptical of efforts to moot cases when the defendant continues to "vigorously defend[]" the challenged practice, which indicates at least some possibility that the practice will resume once the dust settles. *Parents Involved*, 551 U.S. at 719; *accord, e.g.*, *Knox*, 567 U.S. at 307.

B. Not once in decades of voluntary-cessation decisions has the Court suggested that a lesser standard applies when the defendant is the government. To the contrary, it has consistently applied the same rigorous standard to private and public defendants alike. Fikre Br. 28-29.

Consider *Trinity Lutheran*. After a church challenged Missouri's policy barring religious organizations from receiving funds for playground resurfacing, the governor announced that the state would allow religious organizations to receive funding on the same terms as secular organizations. 582 U.S. at 457 & n.1. But this Court held that the governor's announcement didn't moot the case, emphasizing that the statement

did not disavow "'the source of the . . . original policy'"—that is, the interpretation of the state constitution that in the state's view had permitted denial of such funding to religious organizations. *Id.* at 457 n.1. Because the state had not identified any "'clearly effective barrier'" that would prevent reinstatement of the challenged policy, it did not carry "the 'heavy burden' of making 'absolutely clear' that it could not revert to its [former] policy." *Id.* This Court in *Trinity Lutheran* drew the "absolutely clear" standard from *Laidlaw*, which addressed a private defendant's voluntary cessation. 528 U.S. at 189.

This Court applied the same rigorous standard to the public defendant in *Parents Involved*. Parents sued a school district for considering race in deciding which students would attend which schools, and the district asserted that it had stopped considering race in response to the litigation. 551 U.S. at 719. Again invoking *Laidlaw*'s "absolutely clear" formulation, the Court determined that the district had not satisfied its "heavy burden" of showing the case was moot. *Id.* Of particular importance was that the school district continued to "vigorously defend[] the constitutionality of its race-based program," which created doubt about whether the program would resume after a ruling in the district's favor. *Id.*

The same high standards dictated the result in *City of Mesquite*. After the plaintiff sued to enjoin as unconstitutionally vague a licensing ordinance that required city officials to assess whether applicants had "connections with criminal elements," the city repealed that challenged language. 455 U.S. at 288. Even so, applying "well settled" voluntary-cessation principles from cases involving private defendants, the Court held that the case was not moot because

nothing would "preclude [the city] from reenacting precisely the same provision" after the litigation had ended. *Id.* at 289; *see id.* at 289 n.10 (citing *Concentrated Phosphate*, 393 U.S. at 203-04, which in turn cites *W.T. Grant*, 345 U.S. at 632).

Even in public-defendant cases found to be moot, the Court has applied the same principles seen in private-defendant cases and emphasized the heavy burden the government faces in invoking its own voluntary cessation of challenged conduct. *E.g.*, *Los Angeles County* v. *Davis*, 440 U.S. 625, 631 (1979) (citing *W.T. Grant*, 345 U.S. at 632). In *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974) (per curiam), for instance, an aspiring law student sued a state law school seeking admission—but by the time the case reached this Court, the student not only had been admitted, but also had registered for his final term. *Id.* at 316-17. Because there was no dispute that the student would complete his legal studies irrespective of any ruling, the Court dismissed the case as moot. *Id.* at 317. It emphasized, however, that if the mootness question had instead turned on the school's "voluntary cessation of the admissions practices complained of," the case would have been properly dismissed "only if it could be said *with assurance* 'that there is no reasonable expectation that the wrong will be repeated.'" *Id.* at 318 (emphasis added) (quoting *W.T. Grant*, 345 U.S. at 633).

C. The government asks this Court to hold, for the first time, that it bears a lighter burden when it seeks dismissal based on voluntary cessation. It bases that proposed rule on the presumption of regularity and national-security concerns. Gov't Br. 17-19. Neither justifies lowering the bar this Court's cases have set.

1. The government first invokes the presumption of regularity, under which "courts sometimes assume that the government has observed procedural requirements or principles." Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 Harv. L. Rev. 2431, 2434 (2018). Although this Court has recognized the presumption in certain contexts for well over a century, *e.g.*, *Moffat* v. *United States*, 112 U.S. 24, 30 (1884), it has never suggested the presumption has anything to do with voluntary cessation. *See* Fikre Br. 43-44.

To the contrary, the Court's mootness decisions are irreconcilable with the notion of deference to the government. In *Trinity Lutheran*, for instance, the state's governor announced that the state was changing its policy. 582 U.S. at 457 n.1. As the government sees things here, this Court should have assumed that the governor's announcement was "for genuine reasons and in good faith" and that the state would not reverse course. Gov't Br. 18. Instead, the Court held the case was not moot because the state hadn't made it "'absolutely clear' that it could not revert to its [former] policy." *Trinity Lutheran*, 582 U.S. at 457 n.1. The Court's holding didn't rest on any finding of bad faith on the governor's part; the presumption of regularity simply had nothing to do with it.

The government suggests that the Court applied something like the presumption of regularity in *DeFunis* by "'accept[ing] . . . representations' from governmental parties" in evaluating whether the case was moot. Gov't Br. 18. It elides, however, that in *DeFunis* the case was moot only because "all parties agree[d]" that the plaintiff's legal studies would be unaffected by any ruling on the school's admissions policies. 416 U.S. at 317. The Court's opinion itself

rejects the government's analytical leap by explaining that mootness "depend[ed] not at all upon a 'voluntary cessation' of the admissions practices," but on the absolute clarity that the student would finish his final term of law school regardless of the appeal's outcome. *Id.* at 318. That leaves the government with no case from this Court that has ever endorsed the rule that public officials can more readily moot a case through voluntary cessation.

True, some lower courts have embraced arguments like the government's, generally on the theory that public defendants deserve "more solicitude" than private parties. *Coral Springs St. Sys., Inc.* v. *City of Sunrise*, 371 F.3d 1320, 1329 (11th Cir. 2004) (quoting *Ragsdale* v. *Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988)); *accord, e.g.*, *Sossamon* v. *Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009). That view runs aground on precedent in two ways, one specific and one general. Specifically, lowering the bar for public defendants is inconsistent with this Court's voluntary-cessation cases that involved government defendants. *Supra* pp. 7-9. And generally, the notion that government litigants deserve "special solicitude" on matters of justiciability has not "played a meaningful role in this Court's decisions" for decades, *United States* v. *Texas*, 599 U.S. 670, 688-89 (2023) (Gorsuch, J., concurring in the judgment), and lacks any sound basis in Article III, *Massachusetts* v. *EPA*, 549 U.S. 497, 536-37 (2007) (Roberts, C.J., dissenting).

It's no surprise this Court has never invoked the presumption of regularity in voluntary-cessation cases. When it comes to voluntary cessation, courts do not ask whether a defendant is acting "for improper reasons" or in "bad faith." Gov't Br. 17-18. It may not be *irregular* or *improper* for government attorneys, in

"discharg[ing] their official duties," *United States* v. *Chem. Found.*, 272 U.S. 1, 15 (1926), to seek dismissal in cases that could produce unfavorable case law on the policies they're charged with defending. But it is *strategic*. *Cf.* Cohen & Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 Fla. St. U. L. Rev. 391, 395-97 (2000). And strategic voluntary cessation of challenged conduct by public defendants could be "a powerful weapon against public law enforcement," and a shield against judicial review of unconstitutional government action, if courts were to dismiss cases even when the defendants would later be "free to return to [their] old ways." *W.T. Grant*, 345 U.S. at 632. The way to address that risk isn't to ask about the government's ulterior motives; it's to apply the same "stringent" standard requiring clear proof that the challenged practice won't recur that applies in all voluntary-cessation cases. *Laidlaw*, 528 U.S. at 189.

2. Nor can the government find a basis for its proposed rule in national-security concerns. Gov't Br. 18. True, when it comes to national security, government decisions may be "highly sensitive and confidential." *Long* v. *Pekoske*, 38 F.4th 417, 426 (4th Cir. 2022). But the government's reliance on national-security interests here amounts to double-counting. If those interests are to affect the outcome, they must do so *on the merits*, when the government defends its "evaluation of the facts" and seeks "respect for [its] conclusions"—for instance, on the theory that it must have leeway "to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010).

Whatever leeway should be afforded the government on the merits, national-security interests "do not warrant abdication of the judicial role." *Holder*, 561 U.S. at 34; *accord, e.g.*, *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 539 (2004); *see* Fikre Br. 45-48. Nothing supports the government's effort to turn a deferential standard of review into a unilateral option to eliminate review altogether. And although the government justifies its rule by invoking policy considerations better addressed to Congress—for instance, the sensitivity of evidence or potential interference with counterterrorism duties—the fact remains that Congress chose to subject No Fly List decisions to judicial review. 49 U.S.C. § 46110. Given that choice, the federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

D. The Court can resolve this appeal by applying longstanding voluntary-cessation standards and rejecting the government's request for a more lenient approach. But if anything, the nature of constitutional litigation suggests the federal courts should be *more*, not less, wary of government attempts to moot cases like this one.

Governments and public officials differ from private defendants in many ways that should put courts on the lookout for less-than-absolutely-clear assertions of mootness. As this Court knows, public officials have "a track record of 'moving the goalposts'" mid-litigation while "retain[ing] authority to reinstate [their challenged policies] at any time." *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam). Government defendants also approach strategic choices of that kind with unique frequency and ability

because they are repeat-player defendants with a high degree of control over their conduct. Davis & Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 Yale L.J.F. 325, 337-39 (2019). And government defendants often experience foundational shifts in the people holding office and in the policy preferences of the constituents they serve, which makes them especially susceptible to changes in position following the dismissal of a lawsuit. *Id.* at 338-40. Again, there's nothing malicious about the array of incentives encouraging government attempts to moot live cases, but the Court's voluntary-cessation case law ensures that those incentives do not result in the federal courts' being wrongfully deprived of jurisdiction over cases properly before them.

Moreover, because the voluntary-cessation doctrine "traces to the principle that a party should not be able to evade judicial review," *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 284 n.1 (2001), courts considering assertions of mootness by government defendants should be particularly mindful of the "public interest in having the legality of the practices settled," *W.T. Grant*, 345 U.S. at 632. Many government defendants are immune from claims for damages, so for plaintiffs whose constitutional rights have been violated, it is often prospective relief or nothing. Such prospective relief "'has long been recognized as the proper means for preventing [the government] from acting unconstitutionally,'" and as a result, this Court's "'established practice . . . [is] to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.'" *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 491 n.2 (2010).

Giving government defendants an easy way to moot unfavorable cases would hinder the federal courts' ability "to say what the law is," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), to the detriment of individual liberty. Constitutional litigation keeps the government honest; it is as much a part of the Nation's political process as the vote and the veto. The government can use every arrow in its quiver when it defends its policies on their merits, but this Court isn't bound to give the government a free pass that it wouldn't give to private defendants.

II. The government has not met its heavy burden to prove mootness.

Under the correct standard, this case is not moot for voluntary cessation. The government has not made "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013). Mr. Fikre challenged both his placement on the No Fly List and the procedures that the Terrorist Screening Center used to designate him as appropriate for inclusion on that list. Pet. App. 164a-69a (¶¶ 154-85); *see* Fikre Br. 31. The government may have taken Mr. Fikre off the List, but particularly given its steady refusal to acknowledge any defect in the decisionmaking process and procedures that put him on the List in the first place, it has not shown to a certainty that he will not be placed back on the List—or, at a minimum, that the government will not use constitutionally defective procedures in making future assessments of his risk.

A. The government removed Mr. Fikre from the No Fly List in 2016, three years after he filed this case. Pet. App. 7a-8a. As the government tells it, surely Mr. Fikre would have been returned to the No

Fly List in the intervening seven years if he had anything to fear about the Terrorist Screening Center's procedures. Gov't Br. 15-16. But the government glosses over perhaps the most important fact: this case has remained live during that entire period, either in the district court or on appeal to the Ninth Circuit. *See* Fikre Br. 42. One need not accuse the government of bad faith to conclude that the calculus might change if the government succeeds in making this case go away. *See Parents Involved*, 551 U.S. at 719. After all, courts "are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2575 (2019).

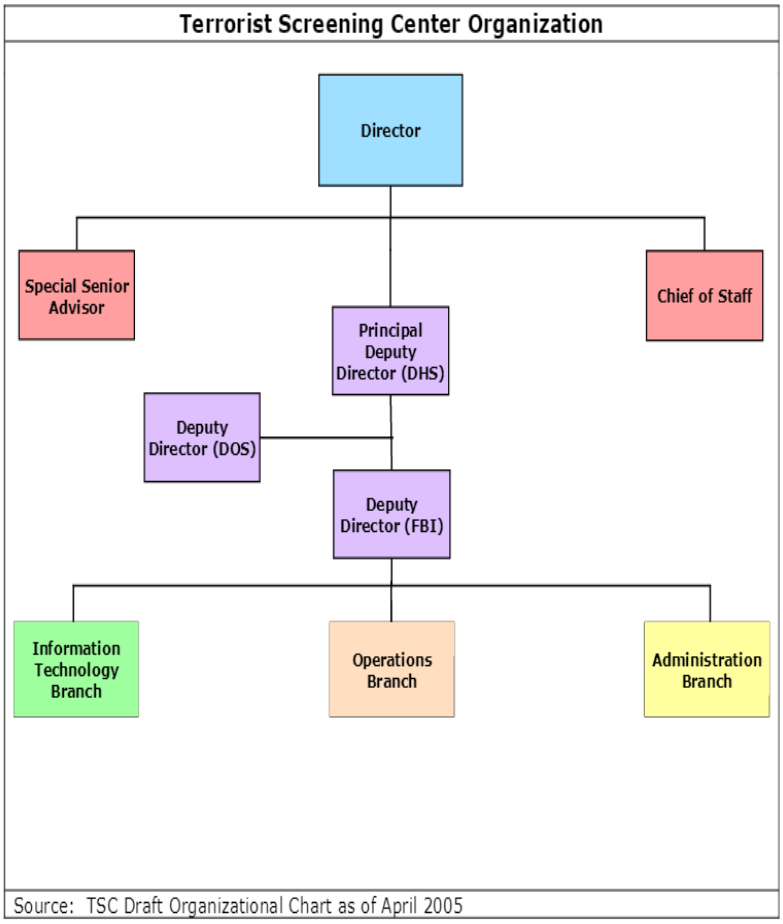
Nor is the government correct that it is too "speculative" that Mr. Fikre will again be considered for inclusion on the No Fly List. Gov't Br. 33. As this Court said in *Laidlaw*, "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." 528 U.S. at 190. This "formidable burden" to prove mootness through voluntary cessation, *id.*, explains why the government is wrong to place so much weight on standing cases like *Clapper* v. *Amnesty International USA*, 568 U.S. 398 (2013), and *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983)—a mismatch that the government tacitly concedes with a "cf." signal, *see* Gov't Br. 33. Just last year, this Court rejected the government's same "flaw[ed]" attempt to minimize its heavy "burden to establish that a once-live case has become moot." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2607 (2022). Because standing requires a higher level of certainty about future conduct to initiate a case than mootness requires to keep a case alive, the government has again "'confused

mootness with standing.'" *Adarand*, 528 U.S. at 221-22 (quoting *Laidlaw*, 528 U.S. at 189).

The government also relies (at 17, 32) on the 2019 declaration of the then-Acting Deputy Director for Operations of the Terrorist Screening Center, Christopher Courtright, who stated that Mr. Fikre "will not be placed on the No Fly List in the future based on the currently available information." Pet. App. 118a. The premise of the government's argument is that Mr. Courtright could "conclusively" commit the federal government not to place Mr. Fikre back on the No Fly List based on the information available in 2019. Gov't Br. 17. But that premise is wrong. Mr. Courtright's declaration—which merely represented the views of one employee, not an officer who could bind the federal government—doesn't provide sufficient certainty that the Center wouldn't return Mr. Fikre to the No Fly List if this case were dismissed as moot.

The Center's place within the Executive Branch makes clear that the declaration is advisory, not binding. The Terrorist Screening Center is part of the Federal Bureau of Investigation, an agency within the Department of Justice. *Ibrahim* v. *DHS*, 538 F.3d 1250, 1254-55 (9th Cir. 2008). In 2003, the Attorney General established the Center on President Bush's instructions. Directive on Integration and Use of Screening Information to Protect Against Terrorism, 39 Weekly Comp. Pres. Docs. 1234, 1234-35 (Sept. 16, 2003), https://tinyurl.com/yc34v7p8. To this day, the Attorney General, in conjunction with the Bureau's Director, appoints the Center's Director. *See, e.g.*, Press Release, FBI, Michael Glasheen Named Director of the Terrorist Screening Center (June 26, 2023),

https://tinyurl.com/28wvmdkf. And the Center's Deputy Directors appear to be hired as employees. U.S. Dep't of Just., Off. of the Inspector Gen., Audit Report 05-27, at 13 (2005), https://tinyurl.com/y5e86j2t. As a result, the government's assertion of voluntary cessation rests on the declaration of an employee who sits three rungs down from his supervising principal officer, the Attorney General:



Id. at 33.

The Deputy Director can't commit the federal government to keep Mr. Fikre off the No Fly List, not even on the basis of "currently available information." Pet. App. 118a. He is not a principal officer—nominated by the President and confirmed by the Senate—who can bind the executive branch to a particular course of action. *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970, 1981 (2021). Nor is he an inferior officer—appointed by the Attorney General in a manner Congress prescribed—that "'exercis[es] significant authority pursuant to the laws of the United States.'" *Lucia* v. *SEC*, 138 S. Ct. 2044, 2051 (2018). Instead, he counts among the federal government's many employees or (in this Court's words) "'lesser functionaries.'" *Id.*

There is no reason to ask whether the then-Acting Deputy Director's declaration was truthful or in good faith. Mootness by voluntary cessation is a question of certainty, and that declaration does not make "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already*, 568 U.S. at 91. The current Deputy Director reports up the chain to the Attorney General subject to the ultimate supervision of the President, who must "discharge his *own* constitutional duty of seeing that the laws be faithfully executed." *Myers* v. *United States*, 272 U.S. 52, 135 (1926) (emphasis added); *see Free Enter. Fund*, 561 U.S. at 492-93. And nothing in the declaration does (or even could) take away the Executive Branch's discretion over the No Fly List. *See Trinity Lutheran*, 582 U.S. at 457 n.1. Whatever the Courtright declaration might say, the Ninth Circuit was right that "the government remain[s] practically and legally 'free to return to [its] old ways' despite abandoning them in the ongoing litigation." Pet. App. 8a (quoting *W.T. Grant*, 345 U.S. at 632).

B. The national-security context (Gov't Br. 34-36) in fact undercuts the government's voluntary cessation. The President has never been shy about asserting broad discretion over national security and foreign affairs under Article II of the Constitution. *E.g.*, *Zivotofsky* v. *Kerry*, 576 U.S. 1, 14-15 (2015); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-20 (1936). The Terrorist Screening Center is one such example—a creation of presidential directive, not congressional statute. So the Center's very existence (and thus its actions as well) remains subject to unilateral presidential control under Article II. *Arthrex*, 141 S. Ct. at 1984. Sometimes the President possesses such inherent authority and has exercised it consistent with the Constitution, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 686 (1981), and sometimes he doesn't or hasn't, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585-86 (1952). Either way, judicial review under Article III serves as an important constraint that reinforces the separation of powers. *Stern* v. *Marshall*, 564 U.S. 462, 482-83 (2011). Those separation-of-powers constraints exist not for their own sake, but "to preserve the liberty of all the people." *Collins* v. *Yellen*, 141 S. Ct. 1761, 1780 (2021). And they would provide little protection if the executive branch could shield programs from judicial scrutiny through the say-so of one employee.

The government even admits that the national-security context undermines its assurances to Mr. Fikre. As it acknowledges, the government "cannot responsibly promise that respondent (or anybody else) will never be placed on the No Fly List in the future regardless of his actions or new information learned about him." Gov't Br. 33-34. No one, of course, is asking the government to make irresponsible promises. But the inability to assure Mr. Fikre

that he won't again be subject to allegedly unconstitutional procedures reveals that the government has not ceased *all* of the challenged conduct. Mr. Fikre claims that the government's procedures for placing people on the No Fly List—not only the placement itself—violate the Due Process Clause. Pet. App. 165a-67a (¶¶ 164-71). The Ninth Circuit observed that the government has not submitted any evidence showing that the requested "procedural safeguards have been implemented." Pet. App. 17a. And as the government candidly admits, it cannot promise that it will not assess Mr. Fikre under these allegedly unconstitutional procedures in the future.

C. The government also misunderstands why its continued refusal to admit wrongdoing or change its procedures matters for mootness. According to the government, the Ninth Circuit "confuse[d] mootness with an admission of liability on the merits" when discussing the government's refusal to "acquiesce to the righteousness of respondent's contentions." Gov't Br. 21 (cleaned up). But the government caricatures the decision below, which never required the government to bend the knee to Mr. Fikre on the merits. Rather, the Ninth Circuit merely recognized the commonsense proposition that a defendant who vigorously defends his past conduct and refuses to change his policies is more likely to do the same thing again in the future. Pet. App. 16a-17a; *see* Fikre Br. 25.

This Court, too, has held that a defendant's continued defense of challenged conduct is relevant to mootness—specifically, to whether the same conduct may recur. In *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), for example, railroad companies defeated the government's claim that they had

used an association to fix prices, dissolved the association in question, and then argued that the government's appeal was moot, "tak[ing] pains to show that such dissolution had no connection or relation whatever with the pendency of this suit." *Id.* at 307-08. But because they did "not admit the illegality of the agreement, nor d[id] they allege their purpose not to enter into a similar one in the immediate future," this Court held that the case was not moot. *Id.* at 308-10. In *W.T. Grant*, this Court again pointed to the defendants' "express refusal to concede that [the challenged agreements] were illegal" in holding that the case remained live even after "the defendants told the court that the [agreements] no longer existed and disclaimed any intention to revive them." 345 U.S. at 633-34. And in *Knox*, this Court rejected mootness where the defendant union "continue[d] to defend the legality of the [challenged] fee," making it "not clear why the union would necessarily refrain from collecting similar fees in the future." 567 U.S. at 307; *accord, e.g.*, *Walling*, 323 U.S. at 43 (not moot where defendant "consistently urged the validity of [the challenged] plan and would presumably be free to resume [its] use").

Like the defendants in *Trans-Missouri Freight*, *W.T. Grant*, *Knox*, and *Walling*, the government has defended the "righteousness" of its conduct in this case. Pet. App. 16a. The government also has done nothing to impede its return to this supposedly righteous course of conduct. *Id.* at 17a. This Court has always required that a defendant's voluntary cessation be paired with some action that erects a "'clearly effective barrier'" against recurrence of the challenged conduct or otherwise repudiates that conduct. *Trinity Lutheran*, 582 U.S. at 457 n.1; *see* Fikre Br. 20-28. Such actions typically change the legal status quo in some way:

- repeal of the offending provision, *e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam); *Kremens* v. *Bartley*, 431 U.S. 119, 126-27 (1977);
- a legally enforceable contract preventing future claims, *Already*, 568 U.S. at 93-94;
- compliance with a court order that "irrevocably eradicated the effects of the alleged violation," *Davis*, 440 U.S. at 631-33; and
- conferral of a benefit that redressed the plaintiff's injury, *DeFunis*, 416 U.S. at 317 ("irrevocabl[e]" admission into final term of law school); *see also, e.g.*, *Alvarez* v. *Smith*, 558 U.S. 87, 93 (2009) (return of seized cars).

In contrast, this Court has repeatedly held that a case is not moot simply because the defendant changes its conduct or announces a new policy as a discretionary matter after being faced with litigation. That holds true for government defendants, *e.g.*, *Trinity Lutheran*, 582 U.S. at 457 n.1; *Parents Involved*, 551 U.S. at 719, just as much as for private defendants, *e.g.*, *Knox*, 567 U.S. at 307; *W.T. Grant*, 345 U.S. at 633.

Here, too, nothing impedes the government from returning to its old ways. The government never swears off its initial placement of Mr. Fikre on the No Fly List. The legal landscape also remains the same. This is not a case where the government must ask Congress to enact a new law, subject to the constraints of bicameralism and presentment, before engaging in the same conduct again. On the contrary, the government retains unfettered authority to use its existing (and allegedly unconstitutional) procedures to assess

Mr. Fikre in the future. And the supposedly mooting event is the mere say-so of an executive-branch employee, not even the authoritative word of the President or Attorney General under Article II. This case is not moot.

CONCLUSION

This Court should affirm the Ninth Circuit's judgment.

Respectfully submitted,

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