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 *AMICUS CURIAE* CONSTITUTIONAL LAW CENTER FOR MUSLIMS IN AMERICA IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the government can overcome the voluntary cessation exception to mootness by removing an individual from the No Fly list without explanation.

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INTEREST OF *AMICUS CURIAE*[1]

The Constitutional Law Center for Muslims in America ("CLCMA" or "*Amicus*") is the legal division of the Muslim Legal Fund of America ("MLFA"*). Amicus*' mission is to protect individuals' constitutional rights that are impacted by national security and immigration policies, as well as civil rights harmed by discrimination based on religion, race, or national origin. Many of *Amicus*' clients are individuals placed on the federal government's terrorist watchlist or No Fly list with little to no explanation given, and limited options for redress. *Amicus* has pursued cases similar to the one before this Court in federal courts across the country. In many instances, the government removes *Amicus*' clients from the No Fly list and then asks the courts to declare the claims moot. Some courts dismiss claims on these grounds, while others allow elements of the cases to proceed, creating confusion and the opportunity for forum shopping.

Amicus files this Brief to alert this Court to the prevalence of this issue across the nation. Upholding the Ninth Circuit's decision in this case will clarify the law nationwide and send a message to the government that it must provide more transparency in these cases. *Amicus*' clients and other No Fly list litigants cannot move forward on their claims and seek redress for alleged constitutional wrongs without the consistency in law and predictability only this Court can provide.

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *Amicus* made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The federal court system was created "to administer justice fairly and impartially, within the jurisdiction established by the Constitution and Congress."[2] When it works as it should, "[n]o higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."[3] The government asks here for the opposite. Instead of the impartial administration of justice, the government asks first that it be able to circumvent many legal standards, including among others those of due process and transparency. It then further asks that this Court be the one to provide it the cover to avoid those legal obligations that the Ninth Circuit Court of Appeals refused to provide it. While certainly legitimate instances do exist which trigger applicable national security concerns by the government, the legal issues present here fall far outside those legitimate instances. By the government's own admission, the facts currently before this Court involve someone who does not present a risk to national security. Why, then, does the government use the phrase "national security" seven times in its Brief? And if the government possesses the utmost confidence that the facts giving rise

2. *About Federal Courts*, U.S. Courts, https://www.uscourts.gov/about-federal-courts#:~:text=The%20U.S.%20Courts%20were%20created,by%20the%20Constitution%20and%20Congress (last visited December 13, 2023).

3. *Chambers v. State of Florida*, 309 U.S. 227, 241 (1940).

to the claim of Yonas Fikre remain firmly in the past, why does it assert a shield of national security to preclude examination of its own actions?

The government agencies in this lawsuit do not want to answer those questions. They ask to have this Court's blessing to avoid the inquiries altogether. Yet this Court bears no obligation to grant these agencies that wish, and in fact bears the responsibility to ensure that all individuals, including Mr. Fikre, "must stand on an equality before the bar of justice in every American court."[4] *Amicus* counsel therefore urges this Court to affirm the ruling of the Ninth Circuit, and to create the unity and predictability in the law that Mr. Fikre, as well as the other individuals discussed in this Brief, deserve.

ARGUMENT

The government in this case asks this Court to merely take its word in the name of national security, and give it preferential treatment not afforded to any other litigants. Yet *Amicus* is familiar with the inconsistency and lack of resolution that results from trusting the government's word when it comes to the Terrorist Screening Dataset ("TSDS") and its subsets, the No Fly list and Selectee list. In *Amicus*' experience, government agencies use "national security" as both sword and shield, harming those who find themselves on a list, while shielding themselves from accusations of any wrongdoing. *Amicus* urges this Court to reject the government's invitation to grant it that protective cloak, and to instead affirm the Ninth Circuit's application of the voluntary cessation

4. *Id.*

doctrine, and allow this case—and others like it across the country—to proceed.

I. National Security as a Sword

American Muslims face heightened scrutiny in the public and private spheres. One way in which the government targets American Muslims is through the TSDS and its subcomponent lists. Many American Muslims have stories about experiencing heightened screening at airports.[5] Besides the immediate travel difficulties presented, inclusion in the TSDS has additional implications as well, with individuals seeing the effects from employment to licensing.[6] The government justifies this treatment by invoking national security, yet since it implemented the TSDS nearly 20 years ago, the threat posed by terrorism has only grown.[7] Meanwhile, hundreds

5. Michael T. Luongo, *Traveling While Muslim Complicates Air Travel*, N.Y. Times (Nov. 7, 2016), https://www.nytimes.com/2016/11/08/business/traveling-while-muslim-complicates-air-travel.html.

6. *Mowery v. Nat'l Geospatial-Intel. Agency*, 42 F.4th 428, 432 (4th Cir. 2022) (describing the allegations that the plaintiff failed to acquire a security clearance and therefore lost a job opportunity because of national security concerns); Plaintiff's Complaint for Declaratory, Injunctive and Other Relief at 4, *Soliman v. Mayorkas*, No. 1:22-cv-79 (D.D.C. Jan. 12, 2022) (alleging that the plaintiff was unable to begin his job because of his presumed status on a watchlist).

7. U.S. Government Accountability Office, *The Rising Threat of Domestic Terrorism in the U.S. and Federal Efforts to Combat It*, (Mar. 2, 2023), https://www.gao.gov/blog/rising-threat-domestic-terrorism-u.s.-and-federal-efforts-combat-it#:~:text=According%20to%20DHS%2C%20there%20were,five%20police%20officers%20in%20Dallas.

of law-abiding American travelers face enhanced security and invasive questioning, damaging their reputation in their communities and costing them countless dollars in missed flights and delays.

Those who suspect their inclusion in the TSDS have only one method of redress: the Department of Homeland Security Traveler Redress Inquiry Program ("DHS TRIP"). This system serves as a central hub for complaints about a wide variety of travel experiences. Those who suspect they are on a watchlist cannot find out whether they are, nor can they refute any purported "derogatory information."[8] Prior to 2015, as set out in this case, neither could those on the No Fly list.[9] Today, U.S. citizens and lawful permanent residents, or "green card" holders, can find out whether they are on the No Fly list, and may then request an unclassified summary of the reasons why. The government often represents that "national security" concerns require it to limit access to responsive information even in these circumstances, and therefore cannot provide much if any substantive information.[10] The government nonetheless continues to

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8. *Safeguarding Privacy and Civil Liberties while Keeping our Skies Safe: Hearing Before the Subcomm. on Transp. Sec. of the H. Comm. on Homeland Sec.*, 113th Cong. (2014) (statement of Christopher M. Piehota, Dir., Terrorist Screening Center).

9. Brief for Petitioner at 3, *FBI v. Fikre*, No. 22-1178 (Nov. 13, 2023) (hereinafter "Govt's Brief").

10. *See generally*, Plaintiffs' Third Amended Complaint for Injunctive, Declaratory, and Other Relief, *Maniar v. Mayorkas*, No. 1:19-cv-03826-EGS (D.D.C. May 1, 2023); Petition for Writ of Mandamus, *Eberle v. Nielsen*, No. 1:19-cv-00486 (D.D.C. Feb 26, 2019); Complaint Seeking Declaratory Relief and Petition for

point to this Redress procedure as fulfilling all due process and other legal requirements, despite the frustration and lack of transparency travelers who use it continue to encounter. *Amicus* presents below just a few examples of the frustrations and lack of transparency encountered by individuals who do try to follow the available procedures.

A. The Jibril Family

In 2018, the Jibril family began a family trip to visit other relatives in Jordan. This trip became far from normal, though, as the seven traveling family members—all U.S. citizens—faced extensive security screening and questioning at domestic and international airports.[11] The screening procedures extended to separating the youngest child, aged two at the time, from his parents and subjecting the other minor children to pat-downs without their parents' consent.[12] Each family member then filed a DHS TRIP complaint. Aside from the youngest plaintiff, who was told his security screening was likely a mistake, none of the remaining six family members received any substantive response beyond the standard letter that the government could "neither confirm nor deny" if they even were on a watchlist, and if anything needed to be or had been done as a result of their complaints.[13] The Jibril

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Writ of Mandamus, *Shaikh v. McAleenan*, No. 1:19-cv-01398-RBW (D.D.C. May 14, 2019); Petition for Writ of Mandamus, *Maniar v. Nielsen*, No. 1:18-cv-01362 (D.D.C. June 7, 2018).

11. *Jibril v. Mayorkas*, 20 F.4th 804, 807 (D.C. Cir. 2021) ("*Jibril II*").

12. *Id.* at 810.

13. *Id.*

family sought recourse in the D.C. District Court, which initially granted the government's motion to dismiss and held that the Jibrils could not demonstrate a sufficient risk of future harm.[14] The D.C. Circuit reversed that holding, determining that the Jibrils did demonstrate a sufficient risk of future harm, and called the government's suggestion at oral argument that the family should just travel again to see what happens next time a "heartless argument."[15] When the case went back to the district court, the government then produced information it had not produced the first time, though apparently had available in its arsenal all along. The government presented an *ex parte* declaration *in camera* to support its new factual challenge in support of dismissal, upon which the district court felt compelled to dismiss the Jibrils' case once again.[16] The district court criticized the "sick sense of delight" the government seemed to find in deploying *ex parte in camera* Declarations that the government acknowledged it possessed during the first round of briefing.[17] Neither the Jibrils nor *Amicus* as their attorneys had access to these Declarations, nor any opportunity to challenge their contents. The government cited vague national security concerns to justify withholding the information contained in the Declarations. The district court expressed doubt that the government had made clear the link between "national security" concerns and these family members,

14. *Jibril v. Wolf*, No. 1:19-cv-2457-RCL, 2020 U.S. Dist. LEXIS 81926, at *13 (D.D.C. May 9, 2020) ("*Jibril I*").

15. *Jibril II* at 817.

16. *Jibril v. Mayorkas*, No. 1:19-cv-2457, 2023 U.S. Dist. LEXIS 32199, at *13 (D.D.C. Feb. 27, 2023) ("*Jibril III*").

17. *Id*. at *15.

especially as to the youngest members, who apparently the government no longer believes present any threats to security or safety. The district court nonetheless deferred to the government's characterization and "reluctantly" dismissed the case yet again.[18] This case presents just one example of how government agencies weaponize "national security" to the detriment of American citizens.

B. Halil Demir

Halil Demir is the Director of a major U.S. non-profit. Mr. Demir's organization serves refugees in the U.S. and abroad, distributes Thanksgiving meals to hundreds in Chicago and other cities, builds numerous water wells around the world, develops schools where needed, and provides disaster aid for calamities ranging from Hurricane Harvey in Texas to earthquakes in Morocco.[19] Mr. Demir predictably travels extensively, both domestically and internationally, as part of his job. But since at least 2016, agents stop Mr. Demir nearly every time he flies.[20] He head-spinningly oscillates from hosting congressional leaders in the Senate office building in the evening, to hours of TSA detention and questioning when he attempts to fly home the next

18. *Id.* at *16. *Amicus* once again appeals the Jibril family's case to the D.C. Circuit, seeking redress for the family's 2018 experiences and the intervening harm caused by the government's lack of transparency.

19. Plaintiff's Amended Complaint Seeking Declaratory Judgment, Injunctive Relief, and Other Damages at 7, *Demir v. Mayorkas*, No. 1:22-cv-07209 (N.D. Ill. Mar. 27, 2023).

20. *Id.* at 6.

morning.[21] This treatment severely limits his ability to do his job effectively, costs him numerous missed flights and delays, and discourages family and friends from wanting to travel with him because of the grave impact on them. He knows the federal agents so well at his home airport of Chicago O'Hare that they know each other by name and shared birthdays. Understandably frustrated by the situation, Mr. Demir filed a DHS TRIP complaint … five separate times.[22] Each time he received the same non-committal answer in response, no substantive information, and each time the treatment continued.[23] The government once again uses "national security" to justify its refusal to provide Mr. Demir with any information about his presumed placement in the TSDS—despite clearing him for several events requiring security checks within the same timeframes.[24] That leaves Mr. Demir with no opportunity to be heard nor to refute any information the government may have against him. *Amicus* represents Mr. Demir in a case pending in the Northern District of Illinois, where he seeks the opportunity to learn the cause of this treatment, clear his name, and fly free of extensive and intrusive impediments.

II. National Security as a Shield

When not using national security as a weapon against American travelers, government agencies use the same claim as a shield from criticism and accusations

21. *Id*. at 7.

22. *Id.* at 11.

23. *Id*.

24. *Id*.

of discriminatory conduct.[25] The government even recognizes in its Brief for the Petitioners to this Court that it seeks to avoid discovery into this matter.[26] It asks this Court to apply a lesser standard to evaluate its voluntary cessation to avoid full review of its allegedly unconstitutional behavior. As described in the Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Neither Party, the government has ample motive to do this, including its status as a repeat litigant before federal courts nationwide, and its interest in maintaining public trust in its actions.[27] This Court should not accept the government's request that it be held to a lower standard than all other litigants simply because it is the government. This "trust us" approach, supported by no more than the bare recital of the phrase "national security," contradicts the rule of law and the intent of the protections provided by our courts.

The government posits that any argument that it would remove an individual from the list who remains a national security concern, simply to moot a pending case, is "inconsistent with the presumption of regularity that attaches to governmental actions."[28] *Amicus* does not necessarily disagree with the characterization of that lacking rationale, but nonetheless doubts the automatic veracity of the denial based on the number of cases in

25. Govt's Brief at 12.

26. *Id.* at 35.

27. Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Neither Party at 9, *FBI v. Fikre*, No. 22-1178 (Nov. 13, 2023) (hereinafter "Becket Fund Brief").

28. Govt's Brief at 18.

which the government removed *Amicus*' clients from a list only after the individuals brought lawsuits. *Amicus* represented an American citizen who in 2018 discovered he was on the No Fly list while mid-trip. This husband and father could not return home to his wife, a Turkish citizen, and his two young U.S. citizen children, living in Turkey with their mother. The citizen in question had no criminal history or mental health concerns, yet experienced extensive travel delays until finding himself unable to board a plane at all.[29] He filed a DHS TRIP complaint in June of 2018; he received notice over three months later that he was, in fact, on the No Fly list, and had the right to request additional information about his placement.[30] By February 2019, having received no further information despite his prompt request for it, he filed a Petition for Writ of Mandamus and asked the D.C. District Court to order the Department of Homeland Security to fulfill its statutory obligation and provide responsive information.[31] On March 26, 2019, one month from the date of filing his Petition, he received notice that DHS removed him from the No Fly list, despite the eight months that lapsed between his DHS TRIP complaint and the filing of the Petition. Nothing else about his situation changed during that period, and the government offered no explanation why he suddenly no longer presented a threat. As he had only sought mandamus relief, he agreed to a voluntary dismissal of the Petition as moot.[32]

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29. Petition for Writ of Mandamus at 1, *Eberle v. Nielsen*, No. 1:19-cv-00486 (D.D.C. Feb 26, 2019).

30. *Id*. at 2.

31. *Id*.

32. Motion for Voluntary Dismissal at 2, *Eberle v. Nielsen*, No. 1:19-cv-00486 (D.D.C. Mar. 28, 2019).

The government uses "national security" to moot cases outside of the No Fly list area as well. Lassana Magassa possessed a Security Identification Display Area ("SIDA") badge as a requirement of his employment with a U.S. airline. After a trip overseas, Dr. Magassa learned that the Transportation Security Agency ("TSA") revoked his SIDA badge without explanation.[33] Without the badge, Dr. Magassa could not perform the essential functions of his position and became constructively discharged.[34] *Amicus* sought additional information from the TSA on Dr. Magassa's behalf, so that he could better defend himself through the Security Threat Assessment ("STA") Redress process; the only documents the government released were highly redacted with the justification of "national security."[35] Dr. Magassa later received a hearing in front of a Coast Guard Administrative Law Judge ("ALJ"), but that bifurcated hearing took place with a public portion that Dr. Magassa and his counsel could attend, and a classified portion that neither Dr. Magassa nor his counsel could attend, despite one of his attorneys possessing Secret level security clearance and the TSA having the ability to grant his counsel the necessary access.[36] To this day, Dr. Magassa does not know what information or evidence the government presented in that classified portion of the hearing, but the ALJ ultimately affirmed the revocation of his SIDA badge because of

33. *Magassa v. Mayorkas*, 52 F.4th 1156, 1159 (9th Cir. 2022).

34. *Id.* at 1160.

35. *Id.*

36. *Id.*

it.[37] *Amicus* filed a lawsuit on Dr. Magassa's behalf to challenge that revocation and seek redress for the harms he suffered while he was unable to work due to his lack of clearance. Suddenly, without any change in Dr. Magassa's circumstances, the government reversed course and granted Dr. Magassa a SIDA badge once again. Though *Amicus* pushed on with the lawsuit to obtain redress for the harms done to Dr. Magassa during the three years that transpired in between the events described above, the government argued the issue was moot because he now possessed a SIDA badge. Once again, the government avoided discovery into its reasons supporting its initial revocation of Dr. Magassa's SIDA badge under the guise of "national security"—for someone it directly recognized no longer presented a national security threat.

III. Due Process Requires More Transparency in the Watchlisting Process

Due process of law serves as a fundamental feature of our judicial system. The Fifth and Fourteenth Amendments protect individuals' rights to be heard before being deprived of a protected interest, known as procedural due process. This Court has determined these amendments also protect substantive due process, under which the government cannot deprive an individual of certain fundamental rights, even with the proper process.[38] The current watchlisting procedures violate both procedural and substantive due process, but the government's invocation of "national security" thus far keeps federal courts from fully reviewing these challenges.

37. *Id.*

38. *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1906 (2018).

When individuals suspect they are included in the TSDS due to repeated security screening or because they were told so by an official, they may submit a DHS TRIP complaint. To be clear, this process represents the *only* method of redress provided to these individuals. Per the government's public procedures, a DHS TRIP complaint receives a review from the TSA, in coordination with other agencies as appropriate.[39] Then, the government makes "any necessary changes" to the TSDS data. However, the individuals who submitted the complaint will not learn any of this, nor do they have any rights of review or to respond to any information about them. Instead, at the end of the review of a complaint by a person on the watchlist, DHS TRIP issues a form letter that informs the individual the review concluded and necessary changes, if any, have been made. At the end of this process, these individuals have no more information than they started with, no explanation for their treatment, and no further method of redress for their concerns. Individuals like Mr. Demir, highlighted above, continue to endure extensive travel difficulties with little hope of change.

The process for those on the No Fly list is not much better. When individuals find themselves prevented from boarding a plane, they may submit a DHS TRIP complaint. If the individual is a U.S. citizen or lawful permanent resident, federal courts mandate that they receive notice of their status on the No Fly list. At that point, the individuals may request further information supporting their placement on the No Fly list, and the government must provide an unclassified summary of the

39. Traveler Redress Inquiry Program, *DHS TRIP Application FAQ*, https://trip.dhs.gov/s/faq-page?language=en_US (last visited Dec. 12, 2023).

reasons. Very often, as described above, that summary provides insufficient substance for the individual to craft a response. *Amicus* represented Ashraf Maniar, a U.S. citizen born in California, who found himself unable to fly to his own wedding because of his presence on the No Fly list.[40] Upon submitting a DHS TRIP complaint and receiving confirmation that he was on the list, he requested additional information in June of 2018. DHS provided no further information to Mr. Maniar until October of 2018, and even then it provided one sentence: "You are on the U.S. Government's No Fly List due to, in part, your association and extensive communication with a known extremist located in the United Kingdom who has supported terrorist organizations."[41] This vague response provided Mr. Maniar, who knows many people in the United Kingdom but none who support terrorism, with no opportunity to substantively respond to the allegation and clear his name. Finally, though nothing substantive changed about his circumstances, the government removed Mr. Maniar from the No Fly list with no substantive explanation.[42] At that point, Mr. Maniar's pending mandamus action in the D.C. District Court became moot. Mr. Maniar's action for redress for the harms caused by his placement on the No Fly list remains ongoing, though the government argues his action became moot as well.[43]

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40. Plaintiffs' Third Amended Complaint for Injunctive, Declaratory, and Other Relief at 6, *Maniar v. Mayorkas*, No. 1:19-cv-03826-EGS (D.D.C. May 1, 2023).

41. *Id*. at 8.

42. *Id*.

43. *Id*.

Based on these experiences of many of its clients, *Amicus* reasonably believes that the government impermissibly uses religion, race, and national origin as proxy for terrorist activity. Further, in December 2022, a Swiss "hacktivist" discovered a 2019 version of the Watchlist and No Fly list, unsecured on an airline's test server.[44] Analysis of these lists show that over thirty percent of the names are Muhammad and related variants (Mohammad, Mohamed, and Ahmed), well-known to be Muslim names, while less than five percent of the U.S. population identifies as Muslim.[45] Other analysis suggests that up to 98% of the entries on the list contain names typically associated with Muslims.[46] Absent a substantive avenue to challenge these procedures, the 2019 list combines with the experiences of many American Muslims to create the impression that the government is using these lists to target individuals based on protected characteristics such as religion, race, national origin, and association. Respondent here challenges what he believes to have been his unlawful placement on the No Fly list based on his race, religion, and association. The government seeks to avoid answering for its actions, by asking this Court to find Respondent's claims moot.

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44. *See* Mikael Thalen & David Covussi, *Exclusive: U.S. Airline accidentally exposes 'No Fly List' on unsecured server*, The Daily Dot (Jan. 19, 2023), https://www.dailydot.com/debug/no-fly-list-us-tsa-unprotected-server-commuteair/.

45. *See, e.g.*, sizeof(cat), *TSA No-Fly list download*, Sizeof.cat (Feb. 16, 2023), https://sizeof.cat/post/tsa-nofly-list-download/.

46. Joseph Stepansky, *'Reeks of profiling': US 'no-fly' list appears to target Muslims*, Al Jazeera (June 21, 2023), https://www.aljazeera.com/news/2023/6/21/reeks-of-profiling-us-no-fly-list-appears-to-target-muslims.

The circular logic required to both believe an individual does not present a threat and that explanation of the circumstances surrounding his treatment would somehow nonetheless weaken national security deserves closer inspection than acceptance on its face.

IV. The Government's Promises Provide No Assurance that the Same Harm Will Not Recur

To avoid the applicability of the voluntary cessation doctrine, the Ninth Circuit suggested the government could execute a declaration establishing that "if [Mr. Fikre] is ever put back on the No Fly List, that determination would necessarily be predicated on a new and different factual record."[47] The Ninth Circuit recognized that "[a]bsent an acknowledgment by the government that its investigation revealed Fikre did not belong on the list, *and* that he will not be returned to the list based on the currently available evidence," Mr. Fikre continued to suffer harm due to stigmatization as being labeled a known or suspected terrorist.[48] Rather than comply with the Ninth Circuit's clearly articulated suggestion, the government instead submitted a declaration asserting that Mr. Fikre "will not be placed on the No Fly List in the future based on the currently available information."[49] In the same declaration, the government reiterated that Mr. Fikre "was placed on the No Fly List in accordance with applicable policies and procedures" and "was removed

47. *Fikre v. FBI*, 904 F.3d 1033, 1040 (9th Cir. 2018) ("*Fikre I*").

48. *Id.* (emphasis added).

49. Courtright Declaration ¶ 5, Pet. App. 118a.

from the No Fly List upon the determination that he no longer satisfied the criteria for placement on the No Fly List."[50] By failing to explain why the government changed its mind about Mr. Fikre's placement on the No Fly list while also refusing to use the language provided by the Ninth Circuit, the declaration fails to provide reasonable assurances that the government will not place Mr. Fikre back on the No Fly list for identical conduct, leaving Mr. Fikre in perpetual limbo regarding his ability to fly.

The government cynically explains that its declaration averring that it will not return Mr. Fikre to the No Fly list "based on the currently available information" makes it "'absolutely clear' that his being placed back on the No Fly List on the same basis that he was initially placed on it . . . 'could not reasonably be expected to recur.'"[51] The government knowingly chose to avoid the words "new and different factual record" despite the Ninth Circuit's direct request for those. Contrary to the government's arguments, "currently available information" does not "necessarily include all of the information available in 2010, when [Fikre] alleges that he was placed on the No Fly List, and in 2016, when he was removed from that list."[52] As the Ninth Circuit recognized, "currently

50. *Id.*

51. Govt's Brief at 17 (citing *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) ("[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.").

52. *Id.*

available information" refers only to Mr. Fikre's current circumstances, which apparently differ from the previous circumstances that led to his placement on the No Fly list.[53] But without identifying the "criteria for placement on the No Fly List" Mr. Fikre previously satisfied and also currently no longer satisfies, neither Mr. Fikre nor the courts can be certain that his future placement on the No Fly List will not derive from the same conduct. Instead, "[s]hould Fikre's circumstances change back to what they were when he was first placed on the No Fly List, he could be placed on the list again for the same reasons that prompted the government to add him to the list in the first place."[54]

In *Amicus*' practice, the government takes great pains to provide no reason why someone lands on the terrorist watchlist or the No Fly list. As discussed above, individuals seeking more information about their placement on either list receive vague or conclusory responses, but when they bring a legal challenge, they then learn they are no longer on the list due to reasons that can only be known by the government under the cover of "national security." Individuals removed from the list without explanation cannot alter their behavior to ensure they remain off the list. A government declaration promising that any future placement will not be based on "currently available information" signifies nothing to the person who does not know why they were placed on the list in the first place.

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53. *See* Pet. App. 118a ("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.").

54. *Fikre v. FBI*, 35 F.4th 762, 772 (9th Cir. 2022) ("*Fikre II*").

In its representation of its clients, *Amicus* then finds itself forced to resort to Freedom of Information Act ("FOIA") requests to, in some rare instances, obtain the government's vague and highly redacted reasons for subjecting someone to heightened screening procedures when traveling. For one of *Amicus*' clients, the government's stated rationale for subjecting him to heightened screening at airports includes matching with "derogatory information," being the subject of "derogatory records," and being subjected to "prior vetting events." Yet neither the client nor counsel has access to any of these reasons. Because the government provides no further detail, *Amicus*' client cannot alter his behavior to get or later remain off the watchlist. Should he be taken off the watchlist without explanation, this client cannot identify which change in his behavior, if any, convinced the government to remove him from the watchlist. A government declaration that promises that any future placement on the watchlist will not be based on "currently available information" means nothing to individuals in this situation, as they remain in the dark about the "currently available information." As a result, clients in these situations never have any assurance that the government will not place them back on the watchlist for conduct that already occurred.

Without explaining why Mr. Fikre was removed from the No Fly list, the government's declaration does not satisfy the government's burden to show that "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."[55] The government's

55. *Already*, 568 U.S. at 91 (citing *Friends of the Earth*, 528 U.S. at 190).

declaration identifies no reason for Mr. Fikre's original placement or removal and no change to its policies and procedures. All that leaves for Mr. Fikre and the courts is the government's discretion, which does not warrant heightened deference or the presumption of good faith in these contexts. *Amicus* respectfully asks this Court to affirm the Ninth Circuit's holding that the Courtright Declaration fails to satisfy the government's burden to show that its apparently erroneous placement of Mr. Fikre on the No Fly list will not recur, and therefore the voluntary cessation doctrine applies to avoid mootness in this case.

CONCLUSION

The powers of administrative agencies have limits. The deference granted to them by courts has equal limitations. No order of Congress permits any federal agency to operate unchecked in a black box, without accountability and with disregard to the laws passed by Congress to protect the citizens of the United States.

The No Fly list should be no different. *Amicus* counsel recognizes the legitimate needs for security procedures and that the public follow rules and regulations while traveling for the safety of all. But the measures taken to ensure that safety must remain consistent with individuals' equal rights to access justice, receive due process, and confront accusers—especially those within government agency authority—and operate consistent with and subject to the rights granted in the Constitution. The agencies here ask for a free pass and no scrutiny. But "courts need not defer to an agency's interpretation, reasonable or

otherwise, of a non-existent grant of power."[56] And no grant of agency power is absolute. The shield these agencies seek to wield is not meant for their protection: this Court holds the strength to wield that shield in its exercise of its duties of "translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."[57] Doing so here, for all citizens who find themselves in the unanswerable predicament of Mr. Fikre and others like him, provides the fair and impartial justice that is all they seek.

Respectfully submitted,

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56. *Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 10 (D.C. Cir. 2000).

57. *Chambers*, 309 U.S. at 241.