

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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FEDERAL BUREAU OF INVESTIGATION, )  
ET AL., )  
                                Petitioners, )  
                                v. ) No. 22-1178  
YONAS FIKRE, )  
                                Respondent. )  
- - - - -

Pages: 1 through 88  
Place: Washington, D.C.  
Date: January 8, 2024

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3   FEDERAL BUREAU OF INVESTIGATION,   )  
4   ET AL.,                                    )  
5                                    Petitioners,                    )  
6                                    v.                                    ) No. 22-1178  
7   YONAS FIKRE,                            )  
8                                    Respondent.                    )  
9   - - - - -  
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12                                    Washington, D.C.  
13                                    Monday, January 8, 2024  
14  
15           The above-entitled matter came on for oral  
16   argument before the Supreme Court of the United States  
17   at 11:47 a.m.  
18  
19   APPEARANCES:  
20   SOPAN JOSHI, Assistant to the Solicitor General,  
21           Department of Justice, Washington, D.C.; on behalf  
22           of the Petitioners.  
23   GADEIR ABBAS, ESQUIRE, Washington, D.C.; on behalf of  
24           the Respondent.  
25

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P R O C E E D I N G S

(11:47 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 22-1178, the Federal Bureau of Investigation versus Yonas Fikre.

Mr. Joshi.

ORAL ARGUMENT OF SOPAN JOSHI  
ON BEHALF OF THE PETITIONERS

MR. JOSHI: Mr. Chief Justice, and may it please the Court:

Respondent's No Fly List claims are moot. He's not on the list. He hasn't been on the list in eight years. And he won't be put back on the list in the future based on the currently available information. That makes it absolutely clear that his return to the list for the same reasons he was put on it initially can't reasonably be expected to recur.

Now the Ninth Circuit thought the claims weren't moot because the government hadn't acquiesced to the righteousness of his contentions. That fundamentally confuses mootness with the merits. As this Court has explained, a case can be moot no matter how vehemently the parties dispute the conduct that

1 gave rise to the lawsuit.

2           Respondent's new test isn't much  
3 better because it too can be satisfied solely by  
4 repudiation of the past conduct. And that  
5 persistent focus on repudiation and the past I  
6 think lays bare what's really going on in this  
7 case. The complaint isn't really concerned  
8 about Respondent's potentially being put back on  
9 the No Fly List in the future. What Respondent  
10 wants is vindication for his past placement.

11           But that vindication could come only  
12 through an advisory opinion. There is no  
13 prospective relief of any kind that could  
14 actually redress any cognizable injury that  
15 Respondent currently suffers or imminently will  
16 suffer.

17           Remember, mootness implements Article  
18 III's case or controversy requirement. The  
19 voluntary cessation exception purpose is rooted  
20 in preventing gamesmanship or docket  
21 manipulation in an attempt to avoid judicial  
22 review. But that's clearly not what's going on  
23 in this case, and it's not what's going on in  
24 other cases either.

25           The government has litigated many No

1 Fly List claims to judgment. This case,  
2 however, is 11 years old and Respondent has been  
3 off the list for the past eight of them. There  
4 simply isn't a live case or controversy any  
5 longer, and this Court should hold as much.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Well, the Respondent  
8 was also concerned about the propriety of the  
9 procedures that were used to put him on the list  
10 to begin with and challenged that.

11 So how does the declaration that you  
12 all used, how does that change the procedures  
13 that he thought were violative of his rights?

14 MR. JOSHI: So two responses.

15 As far as a procedural challenge goes,  
16 number one, for the post-deprivation procedures,  
17 those have actually already changed since the  
18 time he was first on the list.

19 I take the point that maybe he wants  
20 some pre-deprivation procedures. Those haven't  
21 changed. But I think Alvarez pretty squarely  
22 forecloses that challenge. In Alvarez, it was  
23 the same thing. The plaintiffs in that case  
24 complained about the procedures used to deprive  
25 them of property and the procedures to get their

1 property back. After their property was  
2 returned to them, the procedures hadn't changed,  
3 but this Court held that the -- that the  
4 challenge was moot.

5 And I think that just goes back  
6 fundamentally to the -- the principle behind  
7 Article III standing and mootness, which is you  
8 can't -- you no longer have a live challenge to  
9 procedures if, substantively, you're not  
10 subjected to those procedures or can't show that  
11 it's imminent that you're going to be subjected  
12 to those procedures. Procedures in a vacuum  
13 just can't be challenged.

14 JUSTICE THOMAS: But how would we  
15 know, for example, and how would he know that  
16 you have not -- that any circumstances or any  
17 procedures are different if he's put on the list  
18 in the future when we don't know the procedures  
19 or the circumstances that got him on the list?

20 MR. JOSHI: So let me take those two  
21 separately. With the procedures, again, I'll --  
22 I'll just say procedures in a vacuum you can't  
23 challenge unless you're substantively going to  
24 be subjected to them. So then that's --

25 JUSTICE THOMAS: Yeah, I understand

1 that, but we know nothing. We don't -- how  
2 would he know a year from now if he is on the  
3 list with the same procedures or different  
4 procedures or different facts when he doesn't  
5 know why he was on the list in the first  
6 instance?

7 MR. JOSHI: Yeah. So -- so that's the  
8 key. He does know why he's on the list, and  
9 we've -- we've made this public, which is the  
10 standard to be on the No Fly List, in addition  
11 to reasonable suspicion that you're a known or  
12 suspected terrorist, is also you must pose a  
13 threat of conducting or engaging in one of four  
14 enumerated acts of terrorism, international  
15 terrorism or domestic terrorism or a violent act  
16 of terrorism. He was told that he was put on  
17 the list because he posed a threat of engaging  
18 in or conducting a violent act of terrorism and  
19 was operationally capable of doing so.

20 Now I appreciate the fact that he --  
21 you know, that the -- the information on which  
22 that determination was based is classified and  
23 that we don't reveal that for obvious reasons.  
24 It's based on a totality of information at the  
25 time the decision is made. But that is the



1 threshold determination, only people who satisfy  
2 that, and so we know exactly what those criteria  
3 are.

4 JUSTICE SOTOMAYOR: Can I give you a  
5 hypothetical? He does a fundraiser for his  
6 mosque. He has no idea that the mosque is under  
7 suspicion. You put him on the No Fly List. You  
8 now give him this declaration that says on the  
9 -- we're not going to put you on the No Fly List  
10 for anything that's happened in the past.  
11 Tomorrow he holds another fundraiser for the  
12 same mosque. Can you put him back on the list  
13 under this declaration?

14 MR. JOSHI: So I -- again, I would  
15 want to know more about exactly --

16 JUSTICE SOTOMAYOR: There is nothing  
17 more. You put him on because he did a  
18 fundraiser for this mosque. Will this  
19 declaration stop you tomorrow from putting him  
20 on the list for doing a fundraiser for that  
21 mosque?

22 MR. JOSHI: So I'll answer you  
23 directly, but I need to -- I feel compelled to,  
24 despite the premise --

25 JUSTICE SOTOMAYOR: All of the -- all

1 of the facts are the same.

2 MR. JOSHI: We -- we --

3 JUSTICE SOTOMAYOR: Just answer the  
4 question.

5 MR. JOSHI: No Fly List determinations  
6 are not made with respect to any particular  
7 event, conduct, anything. They are always based  
8 on a totality of the information.

9 JUSTICE SOTOMAYOR: So answer the  
10 question. Can you put him on the list for doing  
11 the fundraiser the next day for the same mosque?

12 MR. JOSHI: By hypothesis, if your  
13 suggestion is that somehow the fundraiser is to  
14 fund terrorism -- I mean, I -- I -- I -- I don't  
15 want to jump into a hypothetical where --

16 JUSTICE SOTOMAYOR: That's the --  
17 that's the point, isn't it?

18 MR. JOSHI: Huh?

19 JUSTICE SOTOMAYOR: That without a  
20 declaration that basically says, for this  
21 activity, whatever that might be, we're not  
22 going to put him on the fly list, then how is  
23 the case mooted?

24 MR. JOSHI: I -- I don't think  
25 activity is the right unit of analysis. When

1 you're trying to decide whether something is  
2 moot --

3 JUSTICE SOTOMAYOR: Well, but the  
4 charge is terrorism activity or the threat  
5 thereof. So it's all about activity.

6 MR. JOSHI: Yes. But it's based on a  
7 totality of information, and the standard is  
8 poses a threat of conducting in or engaging one  
9 of four enumerated acts of terrorism. I don't  
10 think it's reasonable to expect that someone  
11 will engage in those acts. And what Respondent  
12 has is a declaration saying, as of this date or  
13 when you were taken off the list, you were taken  
14 off not as a matter of grace, not because we  
15 think you belong on the list but we're just  
16 taking you off anyway, but was taken off because  
17 he did not satisfy the criteria. He did not --

18 JUSTICE ALITO: Well, Mr. Joshi -- I'm  
19 sorry. Finish your sentence. I -- I do find  
20 this a very perplexing case because you -- you  
21 have to show, in order to establish that the  
22 case is moot, that putting it in maybe simpler  
23 terms than we have used in our opinions, it's  
24 very unlikely or maybe very, very unlikely that  
25 he will again be put on the No Fly List. Do you

1 agree with that?

2 MR. JOSHI: I think the language is  
3 reasonable expectation of recurrence.

4 JUSTICE ALITO: Well, it's a strange  
5 formulation where it says that you have to be  
6 absolutely certain that there's not a reasonable  
7 expectation. I don't really know how to put --

8 MR. JOSHI: Well --

9 JUSTICE ALITO: -- those two things  
10 together, but let's just say it's some degree of  
11 unlikelihood, okay?

12 It's hard to say how -- hard to tell  
13 how you can prove that without -- convince us of  
14 that without knowing why he was put on in the  
15 first place and why he was taken off.

16 It's a -- you know, as you say, it's  
17 based on the totality of the circumstances. So  
18 there is the possibility that any additional  
19 relevant circumstance could be just the thing  
20 that tips the balance and he could be put back  
21 on.

22 MR. JOSHI: So --

23 JUSTICE ALITO: So that's -- that's  
24 why I'm perplexed by your mootness argument.

25 But I'm equally perplexed by the fact

1 because you have the burden of showing mootness.  
2 But the plaintiff has the burden of showing  
3 standing.

4 So I'm not quite sure what good it  
5 would do the Petitioner -- I'm sorry, the  
6 Respondent if we say, well, the case isn't moot  
7 because the government hasn't proven that it's  
8 very unlikely that you'll be put back on, but  
9 once you get back in district court, you're not  
10 going to be able to prove that you have standing  
11 for purposes of injunctive relief because your  
12 -- your -- your claim that you're going to be --  
13 you may be put back on is entirely speculative.  
14 So, anyway, that's why I find it perplexing.

15 MR. JOSHI: I -- I -- I take the  
16 point. So let me try and address both pieces of  
17 that.

18 First, as to, you know, the  
19 probability of recurrence or whatever, yes, it  
20 is our burden. We -- we agree with that. We  
21 acknowledge that.

22 I guess what I would say is I would  
23 fall back on the fact that the standard is poses  
24 a threat of engaging in one of four enumerated  
25 acts of terrorism, that this is a U.S. person

1 who's the plaintiff. And I would fall back on  
2 this Court's case law such as Lyons saying that  
3 for Article III purposes, it is unreasonable to  
4 expect a plaintiff to engage in illegal conduct  
5 again. And in the case of Lyons, even to simply  
6 be arrested by LAPD again, that was unreasonable  
7 to expect.

8           If that's true for Article III  
9 purposes, I think you should be just as hesitant  
10 to expect a U.S. person to engage or to pose a  
11 threat of engaging in one of the four enumerated  
12 acts of terrorism.

13           JUSTICE SOTOMAYOR: How can someone  
14 tell you that they're not going to engage in a  
15 terrorist activity if they don't know what  
16 terrorist activity it is that you claim they  
17 did? How can I reasonably be expected to say  
18 I'm not going to do X when I don't know what X  
19 is?

20           MR. JOSHI: Again, it's -- I don't  
21 think it's reasonable to expect anyone to pose a  
22 threat of engaging in international terrorism in  
23 that --

24           JUSTICE KAGAN: I mean, Mr. Joshi,  
25 you're -- you're -- you're arguing the merits of

1 the case. You obviously think that you have  
2 good reasons for putting people on the list.  
3 And, you know, on the other hand, the -- the  
4 suit, the whole gravamen of the complaint, is  
5 that you were not using good reasons. And we  
6 can't decide the merits of the case.

7 I think that Justice Sotomayor's  
8 hypothetical is an extremely important one  
9 because it really asks, what does this  
10 declaration commit you to?

11 The declaration clearly says that you  
12 can't use any facts that you know of now, so any  
13 facts that have happened in the past cannot be  
14 used to -- to relist Mr. Fikre.

15 But the question that she's asking is,  
16 if he does the same kinds of things, if he meets  
17 with the same kinds of people, if he associates  
18 with the same kinds of organizations, can those  
19 same kinds of activities that put him on the  
20 list before put him on the list again?

21 And I do think that you have to give a  
22 kind of yes-or-no answer to that question so  
23 that we can figure out what this declaration  
24 does and does not commit you to.

25 MR. JOSHI: Yeah. So, if you want a

1 yes-or-no answer, my answer is yes because --

2 JUSTICE KAGAN: Yes what?

3 MR. JOSHI: Yes --

4 JUSTICE KAVANAUGH: He can go back on?

5 JUSTICE KAGAN: Yes, you can put him  
6 back on --

7 MR. JOSHI: Correct.

8 JUSTICE KAGAN: -- for the same kinds  
9 of activities?

10 MR. JOSHI: For the same kinds of,  
11 yes, because a repetition of conduct carries  
12 different significance from just initially  
13 engaging in it once and perhaps even renouncing  
14 it, right? A repetition carries a different  
15 significance. And that has to be true in -- in  
16 the national security space.

17 And, again, I stress it's never --

18 JUSTICE KAGAN: So, if he thinks -- if  
19 the gravamen of his complaint is that you put  
20 him on the list for First Amendment protected  
21 activities, let's say that's part of his  
22 complaint at any rate, you know, that -- that he  
23 associated with certain people or organizations  
24 and -- and that he stopped associating with  
25 those people or organizations and you took him



1 off the list.

2 But then he starts again, and, after  
3 all, he doesn't even know which organizations or  
4 people he wasn't supposed to associate with in  
5 your mind, but regardless, he starts again, and  
6 then you put him back on the list.

7 At that point, I think how can you  
8 have satisfied our standard?

9 MR. JOSHI: I think because there's a  
10 difference between an allegation of what we did  
11 in the past or what he might have done in the  
12 past and an expectation that he's going to  
13 satisfy the standard for No Fly List inclusion  
14 in the future.

15 And -- and I take the point that he's  
16 worried that he's going to do the same things  
17 and -- and land back on it. I understand that.  
18 But I think this Court's case law has drawn that  
19 distinction.

20 So even if his claim and no court has  
21 decided, I agree it's the merits, that our  
22 placement of him at time one, whenever that was,  
23 was unlawful for whatever reason, procedural or  
24 substantive, the question for mootness purposes  
25 is could -- could he be expected to be placed

1 back on the list at a future time.

2 JUSTICE KAVANAUGH: But doesn't that  
3 depend on him knowing, as Justice Sotomayor  
4 said, what might put him back on? Because, if  
5 you're assessing is it reasonably likely to  
6 recur and you don't know what it is that could  
7 put you back on, it's a little hard to even make  
8 the assessment. Or am I missing something  
9 there?

10 MR. JOSHI: So I -- I'll have two  
11 answers. One, I -- I want to push back on the  
12 fact that he needs to know what it is. I -- I  
13 think maybe what you meant is a court to assess  
14 it.

15 But, on that front, I guess I would  
16 say no. I mean, you didn't need to know, for  
17 example, Mr. Lyons didn't need to say, well, I  
18 don't know what's going to get me illegally  
19 arrested again. The cops are out, you know,  
20 choke holding me all the time. But that's not  
21 how you analyze it.

22 Even if you would take that allegation  
23 as true for analyzing his past choke hold  
24 complaint, you wouldn't expect him to be held in  
25 a choke hold in the future. Just as a matter of

1 law, you say we are not going to base Article  
2 III on an expectation that the plaintiff is  
3 going to do something illegal or do something to  
4 get arrested, and if he does, then he'll have a  
5 live case at that point.

6 I think the same analysis would work  
7 --

8 JUSTICE KAVANAUGH: But what -- let me  
9 just stop you there. It's not -- the way this  
10 works, you know better than I, is not doing  
11 something illegal. It's an email. It's a  
12 meeting with someone. It's something that only  
13 in combination with all the other connect the  
14 dots, to use the phrase post-9/11, looks more  
15 suspicious and gets you on the list.

16 So it's --

17 MR. JOSHI: You're exactly right  
18 right. It is always based on a totality of  
19 information. It is never -- you know, it's  
20 almost never going to be one single thing. And  
21 as I'm -- just categorically, I can say we have  
22 filed declarations in this and certainly in  
23 other cases saying it's never on the basis of  
24 First Amendment protected activity.

25 So it is going to be based on a

1       totality of circumstances. So I think the right  
2       unit of analysis for figuring out the likelihood  
3       of recurrence has to be, well, what's the  
4       standard? And this is a U.S. person would have  
5       to pose a risk, a threat, excuse me, of  
6       conducting or engaging in one of these four  
7       enumerated acts of terrorism. And that --

8                     JUSTICE JACKSON: But, Mr. Joshi --

9                     JUSTICE KAVANAUGH: Are you just  
10       saying that's --

11                    CHIEF JUSTICE ROBERTS: But suppose --

12                    JUSTICE KAVANAUGH: -- are you saying  
13       that's unlikely?

14                    MR. JOSHI: It's a very rare thing.  
15       There are very, very, very few U.S. persons on  
16       the No Fly List who satisfy that criteria. It's  
17       exceedingly rare. And I take the point that he  
18       satisfied it in the past and we continue to  
19       believe he satisfied it in the past.

20                    JUSTICE KAVANAUGH: Right. I mean, he  
21       was in a prison in UAE for months, right? I  
22       mean, he's not the average -- you know, that's  
23       not a usual circumstance of a U.S. person, I  
24       guess.

25                    MR. JOSHI: And for Article III

1 purposes, I think this Court has always been  
2 reluctant to rely on past instances in order to  
3 --

4 JUSTICE JACKSON: But, Mr. Joshi, this  
5 is not sort of a general Article III. I guess  
6 I'm -- I'm a little confused about your  
7 references to Lyons. Was that a mootness case?

8 MR. JOSHI: It was a standing case.

9 JUSTICE JACKSON: All right. So I  
10 understand here that what we're really talking  
11 about is the extent to which the government can  
12 rely on voluntary cessation to claim that he no  
13 longer has a -- a claim. And I think that's  
14 slightly different than an analysis of whether  
15 or not he would have had standing to bring this  
16 in, you know, under these circumstances if -- if  
17 for no other reason than the standing sort of  
18 analysis is on him, right? I mean, it's his  
19 burden to show that he was injured, et cetera,  
20 et cetera.

21 Here, he's brought a claim. The  
22 government, I -- I didn't take you to be saying  
23 that there's something wrong with his claim in  
24 its inception, but the government is now arguing  
25 that the claim is no longer live because of

1 mootness because they have removed him from the  
2 list.

3           And our standard for that is the  
4 Laidlaw, you know, standard that we're talking  
5 about. And so I guess I'm, keeping all of that  
6 framework in mind, wanting to understand why the  
7 government's argument about, well, this is on  
8 the totality of the circumstances and he could  
9 possibly be put back on the list, why haven't  
10 you just talked yourself out of the standard?

11           I mean, you -- you -- you just in  
12 response to my colleagues suggested that he  
13 could be put back on the list if he started  
14 giving money to this organization again. So  
15 that sounds like you lose under the Laidlaw  
16 standard, doesn't it?

17           MR. JOSHI: No, it -- it does not  
18 because the -- the standard is reasonable  
19 expectation of recurrence. It's got to be  
20 reasonable.

21           And -- and I take the point that we  
22 have the absolutely clear, the reasonable. But,  
23 I mean, if I told you you have a hundred percent  
24 chance of having a 50 percent shot at victory,  
25 that's still 50 percent.

1 JUSTICE JACKSON: Right. But what  
2 makes this --

3 MR. JOSHI: Right.

4 JUSTICE JACKSON: -- what makes this  
5 different from -- from Lyons is the  
6 reasonableness of Justice Sotomayor's  
7 hypothetical, right? The conduct at issue here  
8 is not the reasonableness that he will commit  
9 another crime or the, you know, reasonableness  
10 that the police will react in a certain way.

11 The conduct at issue here, I think, is  
12 the reasonableness that he will support a mosque  
13 again in -- am I wrong about that?

14 MR. JOSHI: Yes.

15 JUSTICE JACKSON: Okay.

16 MR. JOSHI: I would push back on that.

17 JUSTICE JACKSON: Okay.

18 MR. JOSHI: The -- the reasonableness  
19 is that he poses a threat of engaging in one of  
20 four enumerated acts of terrorism.

21 JUSTICE JACKSON: But you previously  
22 assessed in her hypothetical that he did that  
23 when he gave money to a mosque or raised -- had  
24 a fundraiser to a mosque, right?

25 MR. JOSHI: And that's why I pushed

1 back on the premise when she asked me that  
2 question, because it's never about doing any one  
3 thing. It's always a totality of circumstances,  
4 not even necessarily things that the individual  
5 him- or herself says or does.

6 JUSTICE KAGAN: Well, I don't think  
7 that that helps you very much. Let's say it's a  
8 totality of the circumstances. There are five  
9 circumstances. Then he stopped doing one of  
10 them, and you thought now there are only four  
11 circumstances, and it was the fifth one that  
12 pushed us over the edge, so we're going to take  
13 him off the list. And now he starts doing the  
14 fifth again. So now we say, well, the totality  
15 of the circumstances, he's back on the list.

16 I don't think it really helps in the  
17 end that it's a multi-factor inquiry. At some  
18 point, you're making a judgment about conduct  
19 that puts you on the list. And the problem here  
20 is that you're -- you basically just admitted,  
21 conceded, that the same conduct, if he  
22 participated in it again, could put him back on  
23 the list. So, once that's true, I don't really  
24 see where the mootness argument is.

25 MR. JOSHI: And I think that if you



1 take -- if you accept that argument, Justice  
2 Kagan, I think you would essentially conclude  
3 that no No Fly List claim ever could be moot,  
4 and the voluntary cessation exception, the  
5 judge-made exception, to Article III would  
6 swallow the mootness rule. I don't --

7 JUSTICE KAVANAUGH: I think that might  
8 be right, I mean -- I mean, just based on the  
9 theory of the other side, though, because you're  
10 not going to have the information to know  
11 whether the person might engage in the --  
12 Justice Kagan's hypothetical, the fifth --

13 MR. JOSHI: So --

14 JUSTICE KAVANAUGH: -- the fifth piece  
15 of it again.

16 MR. JOSHI: Yeah. So --

17 JUSTICE KAVANAUGH: It would be silly  
18 for the government to say, oh, this person is  
19 never going to be on the list again. That would  
20 be --

21 JUSTICE KAGAN: Irresponsible.

22 JUSTICE KAVANAUGH: -- that would be  
23 totally irresponsible, right?

24 MR. JOSHI: Right. So, I mean, I  
25 think, again, it's -- he says -- his argument is

1 that he doesn't know what put him on the list.  
2 But, if that's -- if that's the claim, then I --  
3 I think, you know, you -- you would -- I think  
4 the voluntary cessation exception really would  
5 swallow the rule.

6 So, to get back to something I  
7 mentioned to you earlier, Justice Kavanaugh, you  
8 know, what if, for example, a court were to see  
9 this information and determine, oh, it's very  
10 unlikely for it to recur, I think, on  
11 Respondent's argument, the case still wouldn't  
12 be moot because he wouldn't know.

13 JUSTICE KAVANAUGH: Right.

14 MR. JOSHI: And so it would always  
15 have to get to the merits.

16 JUSTICE KAVANAUGH: No, I think it's  
17 -- yeah, if the court knew. The problem is, for  
18 us, to try to assess --

19 MR. JOSHI: Yeah.

20 JUSTICE KAVANAUGH: -- the standard  
21 that you and Justice Alito were discussing is  
22 very challenging --

23 MR. JOSHI: It is, but --

24 JUSTICE KAVANAUGH: -- when we are in  
25 the dark about what's going on.

1                   MR. JOSHI: I take the point, but --  
2                   but -- but imagine this. I mean, like, imagine  
3                   if a court actually were to review it. Remember  
4                   these are all very rare circumstances to begin  
5                   with, right? It's a U.S. person posing a threat  
6                   of engaging in terrorism. It's very rare that  
7                   it happened. These are very rare circumstances  
8                   that would lead to it.

9                   I'm not sure, even if a court were --

10                  JUSTICE KAVANAUGH: But he's on the  
11                  list before. Oh, keep going.

12                  MR. JOSHI: No, that's true.

13                  JUSTICE KAVANAUGH: I -- yeah.

14                  MR. JOSHI: He was on the list before.  
15                  But, if a court were to review it and say, okay,  
16                  I see why he was on the list before, okay, I now  
17                  see why he was taken off, I'm not sure the -- a  
18                  court really has the intelligence assessment and  
19                  institutional competence to determine whether  
20                  these extremely rare events and rare  
21                  combinations of circumstances are likely to  
22                  recur in the future.

23                  So I would guess at that point --

24                  JUSTICE KAVANAUGH: So which way do we  
25                  go then?

1           MR. JOSHI: I think you would go with,  
2 well, presumption of regularity. The government  
3 doesn't put people on the list unless they  
4 satisfy the threshold, just like we don't assume  
5 people will engage in illegal --

6           JUSTICE KAVANAUGH: That's not really  
7 the standard. The standard is whether it's  
8 reasonably likely to recur.

9           MR. JOSHI: Right. And --

10          JUSTICE KAVANAUGH: And that depends  
11 on your assessment of the person's activity, and  
12 that's a complete wild card.

13          MR. JOSHI: I --

14          JUSTICE KAVANAUGH: If the person's  
15 been on the list before, all your stuff about  
16 it's very rare kind of drops out.

17          MR. JOSHI: I --

18          JUSTICE KAVANAUGH: It's a total wild  
19 card whether the person's going to send an email  
20 to, you know, al Qaeda in West Africa again if  
21 they've done it before.

22          MR. JOSHI: I -- I take the point, but  
23 this Court, for Article III purposes, has  
24 frequently said that past instances of  
25 misconduct by the plaintiff do not allow us to

1 infer that he'll engage in that misconduct  
2 again.

3 JUSTICE JACKSON: But wouldn't the  
4 government have to at the very least say  
5 something like our criteria for making this  
6 determination has changed so that we understand,  
7 like, that's what reduces the likelihood that  
8 he's going to be put on again, because, in the  
9 past, when we looked at it, we had five  
10 criteria, and now today we have only three, and  
11 so maybe the government can argue this is moot  
12 because we've changed the way in which we  
13 evaluate the circumstances.

14 MR. JOSHI: So that would certainly  
15 moot a case, but I think here it also moots it  
16 because these intelligence -- in the dynamic  
17 intelligence environment, every decision or  
18 delisting decision looks at the totality of  
19 circumstances at the point in time.

20 And he was taken off not as a matter  
21 of grace. This isn't like the union fee return  
22 in Knox. It's not, you know -- this is -- it's  
23 not like the governor allowing the churches to  
24 get the playground funds in -- in the Trinity  
25 case --

1 JUSTICE JACKSON: So it's not the  
2 special individualized treatment. I was going  
3 to ask you about that --

4 MR. JOSHI: No. No.

5 JUSTICE JACKSON: -- because --

6 MR. JOSHI: He was taken off because  
7 he no longer posed a threat of engaging in one  
8 of those four acts of terrorism. He no longer  
9 satisfied the criteria. That was in 2016. It's  
10 now 2024. So, to the extent there's a concern  
11 that he doesn't know what got him on the list,  
12 he doesn't know if he'll repeat the conduct, I  
13 think time has belied that contention. If it  
14 were some sort of innocuous act, presumably, we  
15 would put him back on it.

16 JUSTICE BARRETT: Mr. --

17 JUSTICE KAVANAUGH: Would your  
18 argument be different if it were just a year  
19 after?

20 MR. JOSHI: Not necessarily. I think  
21 the -- the eight years underscores the fact that  
22 these sorts of determinations are sticky, and I  
23 think the declaration makes it sort of sticky,  
24 and I think it makes it sticky enough,  
25 especially in this context where the standard is

1 reasonable expectation --

2 JUSTICE GORSUCH: Well, counsel --

3 MR. JOSHI: -- to say let's not  
4 reasonably expect someone to pose a threat of  
5 engaging in --

6 JUSTICE GORSUCH: Counsel, why -- I'm  
7 sorry.

8 JUSTICE BARRETT: No, no.

9 JUSTICE GORSUCH: No, please go ahead.

10 JUSTICE BARRETT: I was just going to  
11 ask you, do you have any response to the  
12 Respondent's argument that Mr. Courtright  
13 doesn't even really have the ability to bind the  
14 government?

15 MR. JOSHI: So we -- we -- it was a  
16 declaration filed in court under penalty of  
17 perjury. Of course, a future president could  
18 come in and withdraw it. But the same is true  
19 of his repudiation request as well. If Mr.  
20 Courtright had repudiated the past placement, a  
21 future president could come in and say --

22 JUSTICE BARRETT: What about the point  
23 -- I think their point was also that he was  
24 mid-level. I mean, this wasn't a declaration  
25 from someone who had more authority.

1                   MR. JOSHI: I -- I'm not sure about  
2                   that. He was -- he was the acting deputy  
3                   director of the TSC. There was no one higher in  
4                   TSC other than the -- the director himself. And  
5                   there's -- you know, I don't think there's any  
6                   reason to believe that he didn't bind TSC at the  
7                   time he made the declaration.

8                   CHIEF JUSTICE ROBERTS: Thank you,  
9                   counsel.

10                  Justice Thomas?

11                  Justice Alito?

12                  JUSTICE ALITO: Well, you never really  
13                  got a chance to answer the second part of my  
14                  question about standing. Could you address  
15                  that? What sense does it make to say Mr. Fikre  
16                  wins on voluntary cessation because you can't  
17                  prove that it's very unlikely that he will be  
18                  put back on if he does some additional thing,  
19                  but on standing, he will be unable to show, as  
20                  required by Clapper and other cases, that he has  
21                  standing for purposes of injunctive relief  
22                  because he can't show that he's under an  
23                  imminent threat?

24                  MR. JOSHI: I agree completely. He's  
25                  not going to be able to show what's required to



1 get injunctive relief. And, as we point out in  
2 our opening brief, Respondent seems to have  
3 abandoned the argument. He's not going to be  
4 able to get a declaration either because a  
5 declaration has to be forward-looking, and at  
6 the moment, there is no live case or  
7 controversy. So even if you were to -- to say  
8 that the case isn't moot, I don't think he would  
9 be entitled to any relief at the end of the day,  
10 which I think just underscores why the case is  
11 moot.

12 I mean, mootness and standing are both  
13 attempts to implement Article III's case or  
14 controversy requirement. I understand that  
15 mootness is a little more relaxed than standing,  
16 but both of the exceptions that make it a little  
17 more relaxed are all about evading review,  
18 either because the challenged action by its  
19 nature is so evanescent that ordinary judicial  
20 review won't complete or because of docket  
21 manipulation and gamesmanship.

22 JUSTICE ALITO: Well, is the upshot of  
23 what you've said that Article III can't be  
24 satisfied in this case unless the -- the basis  
25 for putting him on in the first place and taking

1 him off later is disclosed at least to the  
2 judge? And so that's what this is all about.  
3 I'll ask your -- your -- your -- your friend  
4 whether that's his understanding.

5 Are we going to say that this  
6 sensitive information that you don't want to  
7 disclose has to be disclosed in any case in  
8 which somebody who has been on the No Fly List  
9 wants to contest that?

10 MR. JOSHI: Yeah, and that's precisely  
11 what we're trying to avoid here. And we think  
12 this is exactly the kind of circumstance where  
13 the presumption of regularity in national  
14 security does play a role in that evaluation of  
15 facts.

16 Now a court could look at all the  
17 classified evidence and then determine whether  
18 it's likely to recur -- reasonably expect to  
19 recur or not, or can just hold as a matter of  
20 law the government is fulfilling its national  
21 security responsibilities in good faith, it's  
22 evaluating people against the standard  
23 correctly, and even if the allegation is that it  
24 didn't do that at time one, we -- we cannot  
25 reasonably expect the government to fall down

1 and act in bad faith at time two.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Sotomayor?

4 JUSTICE SOTOMAYOR: I -- I -- I think  
5 you're right that he's given up injunction, but  
6 he wants a declaration. You don't think a  
7 declaration that said he wasn't -- he attended a  
8 mosque, that wasn't enough to put him on the  
9 list would help so that he could go back to the  
10 same mosque?

11 MR. JOSHI: No. A -- a -- a dec --  
12 the only thing -- first of all, a declaration  
13 wouldn't presumably reveal classified  
14 information, but --

15 JUSTICE SOTOMAYOR: It wouldn't. But  
16 it would -- it would basically say whatever  
17 ground that the court has looked at wasn't  
18 sufficient to put him on the list, so if he  
19 repeats that conduct, he won't be put at risk.

20 MR. JOSHI: So, again, we think the  
21 Courtright declaration actually tells that to  
22 him, that he's not going to be put back on the  
23 list --

24 JUSTICE SOTOMAYOR: No, because you --

25 MR. JOSHI: -- based on the currently

1 available information.

2 JUSTICE SOTOMAYOR: -- we can go -- we  
3 go -- go back to the fundraising. But, anyway.

4 MR. JOSHI: Well, but --

5 JUSTICE SOTOMAYOR: Okay. Thank you,  
6 counsel.

7 MR. JOSHI: -- but -- but a  
8 declaration about the past is inappropriate. We  
9 cite several cases in our opening brief. Green  
10 against Mansour is probably the best one.

11 There's no such thing as declaratory  
12 relief that past conduct was unlawful. It has  
13 to affect your current rights or your future  
14 rights going forward, and for the same reason,  
15 that case was moot.

16 JUSTICE SOTOMAYOR: That you won't  
17 arrest him for the same thing I think affects  
18 that, but okay.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: Is the government able  
21 to say anything about how this relisting occurs  
22 or -- or, more particularly, about how often it  
23 occurs? In other words, are -- are -- are --  
24 are you capable of telling us anything about  
25 when you're taken off a list, how often is

1 somebody put back on a list?

2 MR. JOSHI: Unfortunately, I -- I  
3 can't tell you that information. I don't have  
4 it. I would have to imagine that in the 20-some  
5 years the No Fly List has been in existence,  
6 surely there have been some individuals who were  
7 at one time listed, removed, and then listed  
8 again.

9 I -- I'm -- I'm unaware of any claim  
10 for the litigated cases, and there are several  
11 dozen of them. I'm unaware of any claim there  
12 of someone who was on the list, taken off the  
13 list, and then put back on. That is just not  
14 something that we have seen in, again, years and  
15 years of this kind of litigation.

16 JUSTICE KAGAN: And Justice Alito  
17 mentioned the possibility of just going before a  
18 judge in camera. Has the government ever  
19 thought that that's a possible way to -- to  
20 figure this difficult problem out?

21 You know, you're -- you're not  
22 disclosing it to the world. You tell the judge,  
23 here's what got him on the list. Here's why we  
24 think he's not going back on the list.

25 MR. JOSHI: Yeah. So, obviously,

1 we've done that in the cases we've taken to --  
2 to judgment, but that's been on the merits. So  
3 I gather your question is, well, what if it's  
4 just for the limited purpose first of mootness.

5 JUSTICE KAGAN: Yeah. In other words,  
6 you're saying there's -- there's -- that he  
7 hasn't satisfied the standard. It's not going  
8 to recur again. He's saying, I don't know. It  
9 seems like it might recur again because I don't  
10 know why you took me off the list.

11 You go to the judge and you say,  
12 judge, here's why he was on the list, here's why  
13 he's not on the list anymore, here's why we  
14 don't think he's going back on the list.

15 MR. JOSHI: Yeah. So we -- we  
16 haven't -- we haven't done that yet. I don't  
17 think any case has -- has attempted that yet. I  
18 will say, though, that I'm -- I'm -- I would be  
19 hesitant to embrace that kind of solution.

20 I think, as this Court recognized in  
21 Abu Zubaydah and other cases, even the  
22 disclosure ex parte and in camera of highly  
23 sensitive information, classified information,  
24 itself works a harm on the government and the  
25 public and national security interests, so you

1 want to limit the circumstances in which you do  
2 it to where it's really necessary and where the  
3 inquiry is not an actual evaluation by the court  
4 as to substantively whether we -- whether he was  
5 appropriately put on the list, not in -- you  
6 know, for protected conduct, et cetera, which is  
7 a merits question, when the question is simply  
8 we all agree he's not on the list now, hasn't  
9 been on the list, is assured he's not going to  
10 be put back on the list based on what we know  
11 about him, so now we're just speculating, well,  
12 is it possible he'll be put back on the list in  
13 the future --

14 JUSTICE KAGAN: Well, that suggests --

15 MR. JOSHI: -- I'm not --

16 JUSTICE KAGAN: -- that we're not  
17 committed to our voluntary cessation rule, which  
18 I think we've given every indication we are  
19 extremely committed to.

20 MR. JOSHI: No, you are. But -- but  
21 the inquiry, of course, is going to be like, is  
22 it reasonably expected to occur in the future?  
23 And precisely because it's based on a totality  
24 of circumstances that's ever changing, that even  
25 the passage of time itself can cause information

1 that once seemed suspicious not to appear so  
2 anymore, the lack of corroboration can change  
3 how you view things.

4 Because of that, I think a court just  
5 from institutional competence would have a very  
6 difficult time making that kind of judgment. It  
7 makes much more sense to me to say, look, there  
8 is a standard, it's posing a threat of engaging  
9 in one of these four acts of terrorism. We  
10 should just say --

11 JUSTICE KAGAN: Thank you, Mr. Joshi.

12 MR. JOSHI: -- that that's just  
13 unlikely to happen.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Gorsuch?

16 JUSTICE GORSUCH: I wanted to follow  
17 up actually on Justice Kagan's question.  
18 That's where I was headed earlier too.

19 We have an American citizen here who  
20 was for years sometime, I don't remember exactly  
21 how long, forced to live abroad and fearful  
22 about coming home because he didn't know what he  
23 was being accused of.

24 Now the government may very well have  
25 had good reasons. I don't for a second mean to



1 suggest otherwise. But an American citizen  
2 normally has a right to what's been called every  
3 man's evidence against him. That's due process.  
4 That's a pillar of our democracy.

5 And, here, the government says, no,  
6 you don't get that evidence. I understand. But  
7 Justice Kagan suggests an alternative, which is  
8 at least share it with the judge. At least  
9 share the facts with the judge and maybe with  
10 cleared counsel. And you can do it in a SCIF.  
11 There are a lot of them. I imagine you spent a  
12 fair amount of time in a SCIF preparing for this  
13 case.

14 And the government does that all the  
15 time under -- under the Foreign Intelligence  
16 Surveillance Act, under CEPA. Why is it too  
17 much to expect with respect to an American  
18 citizen who's being denied every man's evidence  
19 that -- that the federal government do at least  
20 that when -- when -- when his fundamental  
21 liberty, the right to travel, is at stake?

22 MR. JOSHI: So a couple responses,  
23 Justice Gorsuch.

24 First, I -- I do need to push back on  
25 the narrative that he was somehow stranded

1 overseas or forced to live overseas. Even  
2 someone on the No Fly List can get --

3 JUSTICE GORSUCH: That's -- that's  
4 what he alleges.

5 MR. JOSHI: I -- I understand. But --

6 JUSTICE GORSUCH: And we have to take  
7 that as true at this stage.

8 MR. JOSHI: But -- but I just want to  
9 make it clear for the Court that the reason he  
10 came back in 2015 is because, even though he was  
11 on the No Fly List, is he had a one-time waiver.  
12 These are available to any American citizen  
13 who's overseas on the No Fly List. That's  
14 exactly how he came back.

15 I presume the reason he didn't seek  
16 one for the years -- for the four years he was  
17 in Sweden is because he had a pending Swedish  
18 asylum application. I don't know how Swedish  
19 law works, but I would imagine if he voluntarily  
20 returned that that might affect it.

21 So I just want to resist the -- the  
22 premise that he was stranded overseas. He could  
23 have come back with the one-time waiver, which  
24 he, when he requested it, was able to come back.

25 The second piece of your question is

1 I -- I -- I think the judge in this case, the  
2 district court in this case, sensibly realized  
3 that he's not on the list and he's been assured  
4 he won't be put back on the list based on  
5 the currently available --

6 JUSTICE GORSUCH: I -- I'm not asking  
7 about the district court judge. I'm asking the  
8 position of the executive branch. And, again,  
9 whether he might have had a one -- one ticket  
10 out of jail free card, but his right to travel  
11 was thereafter barred or whether he didn't is  
12 immaterial.

13 It's his right to travel, his right to  
14 every man's evidence. And is it when those two  
15 things at stake, is it too much to ask the  
16 federal government to share with the district  
17 court in a SCIF enough information to be able to  
18 assess the mootness question? Perhaps even  
19 share it with cleared counsel as it does in so  
20 many other circumstances under other statutory  
21 regimes. Why is that too much to ask the  
22 executive branch?

23 MR. JOSHI: So that is exactly what we  
24 do when these cases get to the merits. If he  
25 had remained on the No Fly List, that's what

1 would have happened. That's what happens in the  
2 other cases. There's no question, Justice  
3 Gorsuch.

4 My only point is, in the mootness  
5 context, there has been no district court that  
6 has attempted to invoke those kinds of  
7 procedures. We haven't faced that. And the  
8 reason I think is that mootness, the Article III  
9 inquiry, is different from the merits inquiry.

10 For the Article III, you're trying to  
11 make a predictive judgment about expectation,  
12 and when the standard is threat of engaging in  
13 terrorism, I think district courts have sensibly  
14 realized that that is just not reasonably  
15 expected to occur and we shouldn't think it  
16 would for the same reason we wouldn't think Mr.  
17 Lyons would be arrested again.

18 JUSTICE GORSUCH: So -- so, if -- if I  
19 can summarize, I think your argument is it's not  
20 necessary here, even though it often is in the  
21 merits?

22 MR. JOSHI: That's correct.

23 JUSTICE GORSUCH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Kavanaugh?

1 JUSTICE KAVANAUGH: I'm generally  
2 sympathetic to the idea that you don't want to  
3 disclose information, national security  
4 information, but I think you've said multiple  
5 times you already do that when the case goes to  
6 the merits in these kinds of situations. So I'm  
7 not sure that's a particular concern if you have  
8 to do it in a few more cases to establish  
9 mootness, but correct me if --

10 MR. JOSHI: Well, if you accept  
11 Respondent's submission in this case or the  
12 Ninth Circuit's, it's not just going to be a few  
13 more cases; it's going to be literally anyone  
14 who's ever on the No Fly List, the claims could  
15 never moot out unless we --

16 JUSTICE KAVANAUGH: Right.

17 MR. JOSHI: -- revealed the  
18 information, then, you know, there is a point of  
19 minimization. Even, you know, when we have to  
20 reveal the information --

21 JUSTICE KAVANAUGH: I agree.

22 MR. JOSHI: -- we do it, but we don't  
23 want to -- that doesn't mean we do it all the  
24 time.

25 JUSTICE KAVANAUGH: I -- I'm very

1 sympathetic to that, so I -- I accept that.

2           Okay. On the -- on -- I'm sympathetic  
3 to your mootness argument, although I might not  
4 have sounded like it, but the reason I'm having  
5 trouble is to squeeze this kind of situation  
6 into the test we use I find very -- very  
7 difficult.

8           So -- and there are two different  
9 kinds of scenarios someone could come off the No  
10 Fly List that I think might affect how at least  
11 I instinctively look at this. One would be we  
12 made a mistake, it's the wrong name, person had  
13 the same name. This happens. And someone comes  
14 off the No Fly List because it was some -- you  
15 know, you had nothing to do with anything and  
16 your name was the same as someone who does,  
17 okay? If you said that, then mootness seems  
18 like very easy to establish under the standard  
19 that we have.

20           When it's this kind of, well,  
21 connecting the dots situation, it's much harder,  
22 I think, to squeeze it into reasonably expected  
23 to recur because we just have no idea.

24           MR. JOSHI: Yeah. So two -- two  
25 responses to that.

1           One, I -- I think you hit the nail on  
2 the head with the dynamic nature of these  
3 things. It's not like, you know, the churches  
4 either are or aren't entitled --

5           JUSTICE KAVANAUGH: Yes.

6           MR. JOSHI: -- to a grant under the  
7 First Amendment. The union fees either are or  
8 aren't, you know, chargeable under the First  
9 Amendment.

10           Here, it's -- it's not static like  
11 that. It's not like, if you're an individual,  
12 you either always belong on or always belong off  
13 the No Fly List. It's at the moment, do you  
14 pose a threat of engaging in terrorism. And an  
15 individual might pose that threat before 2016,  
16 not pose it since 2016, and, you know, in -- in  
17 2050 might pose it again. Who knows? But you  
18 can never know that, right? And I think that  
19 you're right, that is a distinction here.

20           And so then the second part of my  
21 answer is I think we need to remember that  
22 voluntary cessation is a judge-made exception to  
23 Article III. We're still -- we're always  
24 implementing Article III. And I think,  
25 therefore, it's critical not to stray or become

1 untethered from the purposes of the voluntary  
2 cessation doctrine and why this Court developed  
3 it. It was to prevent gamesmanship and docket  
4 manipulation to avoid judicial review,  
5 post-certiorari maneuvers, other sorts of  
6 things.

7           That's not what's going on in this  
8 case. We did not take him off the list in an  
9 attempt to evade judicial review. And I think  
10 that should be the touchstone for how you apply  
11 the reasonable expectation of recurrence or  
12 whatever the language is for voluntary  
13 cessation. Don't untether it from the purposes  
14 for which the doctrine was developed, because,  
15 at all times, it -- mootness should not stray so  
16 far from Article III that they become completely  
17 disconnected.

18           And, here, he's not on the list. He  
19 hasn't been on the list in eight years. There  
20 just simply isn't a live case or controversy  
21 about his placement on the No Fly List any  
22 longer. And in the unlikely event he's put back  
23 on the No Fly List in the future, he can bring a  
24 challenge at that time.

25           JUSTICE KAVANAUGH: Thank you.



1 CHIEF JUSTICE ROBERTS: Justice  
2 Barrett?

3 JUSTICE BARRETT: Mr. Joshi, could you  
4 address the claim made by Respondent and some of  
5 the amici that the government, in fact, is  
6 strategically mooted these cases by dismissing  
7 them?

8 MR. JOSHI: Yeah. We strongly  
9 disagree with that, and I don't think the  
10 evidence they cite actually supports the claim.  
11 I think the ACLU's brief is probably the most  
12 comprehensive on this front, but if you look at  
13 the ACLU's brief, what they say is -- you know,  
14 sometimes, I -- I think it's about half or  
15 something like that, roughly, of these  
16 plaintiffs are removed from the No Fly List  
17 during the litigation.

18 Of course, that's the -- that's how  
19 many U.S. persons are removed from the No Fly  
20 List, just based on the administrative redress  
21 process, which is what we think is happening.  
22 So ACLU documents that, well, some of these  
23 plaintiffs are removed before any briefs are  
24 filed, and then some are removed after the  
25 briefs are filed but before a district court

1 decision. And then some are removed after the  
2 decision. Some are removed on appeal.

3 And I look at all that and I think,  
4 well, that makes sense because they're removed  
5 as an outcome of the administrative redress  
6 process and where the agency takes a fresh look  
7 at the file and says we now no longer believe  
8 they pose a risk of engaging in the terrorist  
9 activities.

10 If we were strategically mooting, you  
11 might expect the removals to all come at, like,  
12 the same point in litigation or with a certain  
13 kind of litigation trigger. But that's just not  
14 what's going on at all. And, of course, we have  
15 litigated several No Fly List claims to  
16 judgment, which wouldn't make sense if we were  
17 trying to engage in strategic mooting.

18 So I think, if you look at the  
19 universe of cases, what is apparent is that in  
20 all of the cases cited by Respondent and I think  
21 in ACLU's appendix, redress proceedings were in  
22 parallel to the litigation, and I think it's  
23 natural to expect that sometimes those  
24 individuals will be removed as a result of the  
25 redress process.

1                   I strongly dispute any notion that  
2 we're engaged in strategic mooting, and we have  
3 filed declarations from people occupying the  
4 same position as Courtright, not in this case  
5 but in follow-on cases, that say we never place  
6 someone on the No Fly List or remove them from  
7 the No Fly List because of litigation concerns.  
8 And I think that's entitled to deference and --  
9 and respect.

10                   CHIEF JUSTICE ROBERTS: Justice  
11 Jackson?

12                   JUSTICE JACKSON: So I just want to be  
13 clear. Are you asking for a special mootness  
14 rule for the national security context?

15                   MR. JOSHI: No.

16                   JUSTICE JACKSON: Are we doing some  
17 sort of a carveout for national security?

18                   MR. JOSHI: No, quite the opposite. I  
19 -- we rely extensively, I didn't think it was  
20 possible to rely more heavily, on a case than we  
21 do on -- than on *Already*. That was a case  
22 involving private parties. We think exactly the  
23 same rule applies.

24                   We do think the national security  
25 context does matter for an evaluation of the

1 facts on the ground. I think it's Respondent  
2 who would have a heightened rule for government  
3 officials.

4 JUSTICE JACKSON: But I guess you keep  
5 -- your argument when you've -- in response to  
6 other people on the panel has been there's  
7 something about a threat of engaging in  
8 terrorism that is the thing that makes this  
9 situation one in which we can say with  
10 confidence that it won't reoccur. So that  
11 sounds to me like it's pivotal to your argument  
12 that the Laidlaw standard is satisfied because  
13 of the nature of what is going on in this case.

14 MR. JOSHI: Right. The standard is  
15 the same. It's the reasonable expectation of  
16 recurrence. So we are not asking for a  
17 different legal test in the national security  
18 context.

19 My point is that where the thing that  
20 has to recur is that an individual poses a  
21 threat of engaging in one of four enumerated  
22 acts of terrorism, that a court should hold is  
23 just not likely to recur --

24 JUSTICE JACKSON: But doesn't -- but  
25 aren't you skipping over the government's

1 assessment of whether or not that's happening  
2 and the basis upon which the government is  
3 making that assessment?

4           So this is what I mean, right? The  
5 government doesn't -- you keep saying it's a  
6 totality of circumstances analysis. And I  
7 appreciate that. But, according to the  
8 declaration and everything we understand, the  
9 government is making that assessment on the  
10 basis of certain criteria.

11           Am I right about that?

12           MR. JOSHI: I've told you the  
13 criteria.

14           JUSTICE JACKSON: No, no, no. I mean  
15 even more than that, right? That there's a list  
16 -- like you say in the declaration -- I'm just  
17 trying to find it.

18           MR. JOSHI: It's on 118a.

19           JUSTICE JACKSON: 118. Thank you. In  
20 the declaration, that he was placed on the --  
21 the No Fly List in accordance with applicable  
22 policies and procedures.

23           So there is some policy that the  
24 government looks at in each case when it's  
25 assessing on the totality of the circumstances

1 whether or not a person qualifies, right?

2 MR. JOSHI: So the -- the policy as  
3 referred to there is the standard I just gave  
4 you.

5 JUSTICE JACKSON: It's that level of  
6 generality? A person can't make an argument  
7 that the government, in applying that standard,  
8 has used certain criteria that I'm challenging  
9 with respect to my application?

10 MR. JOSHI: No, I've -- I've given you  
11 the criteria for placement on the No Fly List.  
12 You also have to satisfy placement on the  
13 broader Watchlist, which is reasonable suspicion  
14 that you are -- they call it a KST, a Known or  
15 Suspected Terrorist. But --

16 JUSTICE JACKSON: All right. So, if a  
17 person wants to argue in their claim that  
18 they're bringing in their lawsuit is that the  
19 government was mistaken about its assessment  
20 that my conduct qualified under the standard  
21 that you have articulated, and then the  
22 government said -- does not say we've changed  
23 the way we looked at what you did before, we've  
24 changed the criteria that we used to assess it  
25 or anything, the government just says, okay,

1 you're now off the list and we think the case is  
2 moot as a result, why -- why does the court have  
3 some sort of reassurance that that -- that the  
4 government wouldn't look at the situation down  
5 the line and make the same assessment?

6 MR. JOSHI: Because, in this case, if  
7 -- if it's as you just said, if I heard you  
8 right, then -- then I agree, that would pose a  
9 much tougher case.

10 But, here, we have two additional  
11 things. One, the Courtright declaration that we  
12 were just reading makes clear that he was  
13 removed from the list not just as a matter of  
14 grace or because, you know, we wanted to moot  
15 out the litigation, but he was removed from the  
16 list because he substantively didn't satisfy the  
17 criteria anymore. And that, under the  
18 presumption of good faith and national security,  
19 is entitled to respect as, you know, and -- and  
20 absent some strong showing of bad faith.

21 And then, second, the Courtright  
22 declaration says: And we're not going to  
23 reconsider this decision because you won't be  
24 put back on the No Fly List based on the  
25 currently available information.

1                   So it adds a stickiness to that  
2                   determination. So it's not a matter of grace,  
3                   and it's sticky and so isn't likely going to be  
4                   revoked in the future.

5                   JUSTICE JACKSON: All right. Let me  
6                   ask you about the standing question real quick.  
7                   Does the government dispute that Mr. Fikre had  
8                   standing at the time that he filed his suit in  
9                   2013?

10                  MR. JOSHI: No.

11                  JUSTICE JACKSON: All right. So he  
12                  did. And don't we ordinarily assess standing at  
13                  the time the person brings the lawsuit? If you  
14                  have standing to bring -- to file the lawsuit,  
15                  then, to the extent your circumstances change,  
16                  we now move into the realm of evaluating it  
17                  under mootness, right?

18                  MR. JOSHI: That's correct, but I'll  
19                  point out that Already, which was a case about  
20                  mootness, did mention that, you know, in these  
21                  circumstances where the -- the claim is no  
22                  longer really live, that cases like Lyons and  
23                  Article III apply with equal force, that a  
24                  litigant cannot just rely on speculative  
25                  injuries to keep the case alive.



1           So mootness and standing should not be  
2     interpreted to be that different from each other  
3     because both are implementing Article III's case  
4     or controversy requirement. And that's why, as  
5     I was mentioning to Justice Kavanaugh earlier, I  
6     think, we -- we shouldn't interpret the two  
7     exceptions to -- to mootness that make it more  
8     flexible than standing unmoored from the  
9     purposes for which those exceptions were  
10    developed, which was really evasion of judicial  
11    review and, in particular, with voluntary  
12    cessation.

13           JUSTICE JACKSON: But isn't -- isn't  
14    -- I mean, Justice Scalia suggested that the  
15    voluntary cessation exception really is about  
16    whether or not the case is moot to begin with.  
17    It's not as though we're accepting that it's  
18    moot under a circumstance in which the  
19    government takes him off the No Fly List and  
20    then we're looking at is there an exception to  
21    mootness in this situation.

22           Instead, we're saying has the  
23    government actually mooted the case when it  
24    takes him off the No Fly List, right?

25           MR. JOSHI: Well, I'm not sure about

1 that. I mean, Justice Scalia dissented in  
2 Friends of the Earth.

3 JUSTICE JACKSON: Yes, he did.

4 MR. JOSHI: And he actually would have  
5 accepted the mootness as just standing in a --  
6 in a time frame. And so, if you accept that,  
7 we're happy if you accept that because we  
8 definitely win this case then. There is no  
9 question that if Respondent had filed his suit  
10 the day after being removed from the No Fly  
11 List, he wouldn't have had standing at all and  
12 -- and there would be no Article III  
13 jurisdiction there.

14 So, really, his -- the -- the -- to  
15 keep his No Fly List claims alive really does  
16 depend on this delta between mootness and  
17 standing, even though both implement Article  
18 III. And the only way to get there is through  
19 voluntary cessation. And, there, I think you  
20 shouldn't interpret it to be so unmoored from  
21 its purposes that --

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Mr. Abbas?

1 ORAL ARGUMENT OF GADEIR ABBAS  
2 ON BEHALF OF THE RESPONDENT

3 MR. ABBAS: Mr. Chief Justice, and may  
4 it please the Court:

5 The government agrees that when a  
6 defendant voluntarily ceases conduct challenged  
7 in litigation, it has a heavy burden to make  
8 absolutely clear that the conduct could not  
9 reasonably be expected to recur. But the  
10 Courtright declaration just promises Mr. Fikre  
11 that he won't be put back on the No Fly List  
12 based on currently available information.

13 That's in -- inadequate for three  
14 reasons. First, if our client was previously  
15 listed for attending the wrong mosque and  
16 attends that same mosque this year, the  
17 declaration would allow the government to relist  
18 him. It gets worse.

19 Even if he doesn't attend again, but  
20 the government gets new suspicion-inducing  
21 information not about Yonas but about the mosque  
22 itself, the -- the declaration likewise allows  
23 the government to relist. Any new fact not  
24 currently known to the government would allow  
25 Yonas to be relisted, consistent with the

1 declaration.

2           And if he is relisted in either of  
3 those ways, that's recurrence of the challenged  
4 conduct. He is disadvantaged in the same  
5 fundamental way his complaint was meant to  
6 redress.

7           Imagine if Nike had promised Already  
8 not to bring any trademark claim based on  
9 currently available information but could sue  
10 for infringement based on new information.  
11 Under those facts, the Court couldn't have  
12 concluded that Already could move on with its  
13 business free from suit.

14           Second, the Courtright declaration  
15 does nothing to guarantee Fikre notice or a  
16 hearing if he is relisted and, therefore, does  
17 not address his procedural due process claim at  
18 all.

19           The government's response is that he  
20 has no current plans to relist him, but the  
21 government insists on retaining the right to do  
22 so. And that's its prerogative, but if it does  
23 relist him, there is a hundred percent certainty  
24 that his procedural claim will recur.

25           Third, because the government hasn't

1 disclosed either to Yonas or a court why he is  
2 listed -- why he was listed, a court can't  
3 possibly say anything clearly at all about  
4 whether recurrence is reasonably likely or not,  
5 and Mr. Fikre cannot move on with his life in  
6 the way the lawsuit was meant to allow.

7 He doesn't know why he was listed. He  
8 doesn't know what might cause him to be  
9 relisted. He doesn't know if the next time he  
10 worships at a mosque or travels abroad he might  
11 be relisted, massively disrupting his life once  
12 again.

13 Mr. Fikre is peaceful, a law-abiding  
14 U.S. citizen. He has a live controversy against  
15 the government and seeks only to litigate that  
16 case on the merits. That's it.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: How would the  
19 government's declaration have to be amend --  
20 amended in order to satisfy your notion of  
21 mootness?

22 MR. ABBAS: Yes, Your Honor. For the  
23 substantive due process claim, if the government  
24 submitted a declaration either to us or to the  
25 Court itself disclosing the reasons and made a

1 promise that matched up with those reasons not  
2 to repeat them or invoke them or similar ones to  
3 them, we think that that could moot the  
4 substantive due process claim.

5 For the procedural due process claim,  
6 if the government describes, okay, we didn't  
7 have notice, now there's notice, you didn't have  
8 a meaningful opportunity to rebut the evidence  
9 against you, now here's a meaningful opportunity  
10 to rebut the evidence against you, in doing  
11 that, they would be able to moot the procedural  
12 due process claim.

13 JUSTICE THOMAS: So you actually --  
14 you want repudiation then?

15 MR. ABBAS: No, Your Honor, we don't  
16 believe that repudiation is required. We don't  
17 think that the Ninth Circuit required  
18 repudiation. But what we do is we agree with  
19 the government that repudiation is one kind of  
20 evidence that -- that shows that the likelihood  
21 of recurrence is lower.

22 And, here, the evidence is not  
23 neutral. The government didn't take no position  
24 on its past conduct. They doubled down. And so  
25 that counts against the government in meeting

1 its burden.

2 CHIEF JUSTICE ROBERTS: It -- it  
3 surely would be irresponsible for the government  
4 to say we're not going to put him on the No Fly  
5 List no matter what?

6 MR. ABBAS: Yes, Your Honor.

7 CHIEF JUSTICE ROBERTS: We put him on  
8 earlier for some particular reason, we've now  
9 found out he has a nuclear weapon, but we said  
10 we wouldn't put him on, so we're not going to  
11 put him on. I don't see how you can ask them to  
12 say anything more than what they've said.

13 Now maybe we'll decide that that's not  
14 enough, but you can't really expect them to say  
15 more than that. He's not on the list, as for --  
16 as far as we know, any other reason he's not --  
17 we're not on going to put him on the list for  
18 the same reasons.

19 MR. ABBAS: Well, for example, Your  
20 Honor, they could moot the procedural due  
21 process claim without disclosing any reasons at  
22 all about why Mr. Fikre was put on the list  
23 because that just deals with the procedures  
24 itself.

25 On the -- on the substance -- on the

1 reasons, you're right, Your Honor, that it's --  
2 it's -- it's up to the government to decide  
3 whether to disclose or not to disclose. And if  
4 the government chooses not to disclose, that  
5 doesn't mean that they've lost the case.  
6 Instead, it just means that they have to defend  
7 it on the merits.

8 CHIEF JUSTICE ROBERTS: Well, I  
9 appreciate that -- you're right, but that's not  
10 what I was saying. I want to know, am I right  
11 about the idea that there's no way they could  
12 issue -- say anything about what the future  
13 would hold in terms of the national security  
14 interests?

15 They can't say you've got a, you know,  
16 free pass, whatever you want to do, we're not  
17 going to put you on the No Fly List?

18 MR. ABBAS: Of course not, Your Honor.  
19 And I think the government has made it easy by  
20 saying nothing at all about what it'll do in the  
21 future, but it could have made a limited  
22 promise. It could have said we disclosed -- we  
23 put him on the list for a mistake, and now we've  
24 addressed that mistake, and we think that this  
25 explanation shows that that mistake is unlikely



1 to recur, or they said we disclose the reasons,  
2 we identified that they're illegal in X, Y, and  
3 Z manner, that's against our policy.

4 So they --

5 CHIEF JUSTICE ROBERTS: Well, but  
6 you're -- that's where I wonder if you're going  
7 back to the situation where you're insisting on  
8 a statement to the effect that they were wrong.  
9 It was -- in fact, you said it was a mistake or  
10 -- or whatever.

11 And mootness has never required that  
12 type of determination or that type of assertion.  
13 It's just solely -- it's forward-looking and  
14 that's the only -- you're not entitled to, to  
15 establish mootness, a determination that what  
16 they did in the past was wrong.

17 MR. ABBAS: Yes, Your Honor, we agree  
18 with that, that repudiation is not required.  
19 But repudiation is forward-looking, even though  
20 it deals with the past for one. If -- if a  
21 party acknowledges that what they did was  
22 illegal, was wrong, or perhaps was not what they  
23 would want to do or how they want their program  
24 to work, that -- that's an example of a  
25 government moving away from its prior decision.

1           And the -- the -- the humble fact, the  
2           humble point, jurisprudential point of  
3           repudiation is that a party that steps away from  
4           what it's done in the past is less likely to  
5           repeat that behavior in the future. And that's  
6           --

7           CHIEF JUSTICE ROBERTS: Well, but in  
8           Already, we said no matter how vigorous the  
9           dispute remains between the parties, that's not  
10          the question.

11          MR. ABBAS: Yeah -- yes. And in  
12          Already, the -- Nike had made a promise to  
13          Already that covered every shoe that it's  
14          currently making, every shoe that it had made in  
15          the past, and any future imitation of those  
16          shoes.

17          That would be like, instead of the  
18          Courtright declaration saying currently  
19          available information, it would have said we  
20          disclose here are the reasons we put you on a  
21          list, we promise not to use those same reasons  
22          again in the future and enumerated them. That's  
23          not what the government did here.

24          And because the government didn't take  
25          -- didn't do -- didn't take one step towards

1 Your Honor's position, it -- it -- it -- it  
2 simplifies this Court's analysis. There's --  
3 there's simply no repudiation. There's an  
4 embrace of their past conduct.

5 JUSTICE KAVANAUGH: Does that mean  
6 that if you're on the No Fly List, your case is  
7 never moot if the government is unwilling to say  
8 more than it said here?

9 MR. ABBAS: No, Your Honor. If -- if  
10 we were bringing this case today, I think that  
11 we wouldn't be able to make out standing. And  
12 so this is -- this case deals with a unique  
13 situation which, in my colleague's telling, is  
14 -- is -- is rare, where a person files a lawsuit  
15 and, at the time they file the lawsuit,  
16 everybody agrees they're on the No Fly List and  
17 there's standing.

18 During the course of litigation, the  
19 government removes that person from the No Fly  
20 List. That doesn't make the case moot. That  
21 triggers the application of this Court's  
22 voluntary cessation doctrine to determine  
23 whether it is moot or isn't moot.

24 The application of the voluntary  
25 cessation doctrine is demanding. It assigns the

1 government -- it assigns the party moving for  
2 mootness the burden, and it uses this language  
3 over and over and over again, absolutely clear.  
4 And I think, Your Honor, that the failure to  
5 disclose the reasons for the listing  
6 short-circuits this Court's analysis of whether  
7 or not they've met their burden. The --

8 JUSTICE KAVANAUGH: You said, if it  
9 were filed today, there would be no standing.  
10 Can you explain why you think that?

11 MR. ABBAS: I think, Your Honor, we  
12 fit within the situation described in Laidlaw  
13 where sometimes, when you're making a projection  
14 of what's going to happen in the future, you --  
15 the -- the -- the showing that you have to make  
16 to demonstrate standing is going to be higher  
17 than the showing that you have to make to defeat  
18 mootness.

19 Here, in this case, we're -- we think  
20 that the -- where the burden is assigned is  
21 important and -- and what the case turns on.

22 JUSTICE JACKSON: Isn't the answer  
23 also that there's just like no basic  
24 redressability from the standing standpoint at  
25 this point in time? So, in other words, he's

1 off the list now. If he showed up in court  
2 tomorrow not on the list, initiating a lawsuit  
3 and asking to be taken off the No Fly List as  
4 one of his, you know -- or even perhaps a  
5 declaration that when he was previously on the  
6 No Fly List, that was a problem, I would think  
7 there would be a legitimate argument on the  
8 government's part that he had no standing to  
9 proceed.

10 But what saves you in this case is  
11 that he actually initiated this when he did have  
12 standing. And the government concedes that.  
13 And so now the whole exercise becomes under what  
14 circumstance can the government stop the case  
15 that was already in motion at the time that it  
16 was legitimately -- you know, stop a case that  
17 was legitimately started pursuant to Article  
18 III. It's on the government then to show that  
19 this is now moot as a result of something that  
20 they did.

21 MR. ABBAS: Yes, Your Honor, it is on  
22 the government. And -- and -- and, here, what  
23 -- what underscores Your Honor's point is that  
24 Yonas Fikre doesn't -- he was living his  
25 law-abiding everyday life when the government

1 put him on the No Fly List. He still doesn't  
2 know why he was put on the No Fly List.

3 And so I think that is -- because the  
4 No Fly List operates under that cloak of  
5 secrecy, that that creates a problem for them  
6 meeting their burden.

7 JUSTICE ALITO: Can I --

8 JUSTICE SOTOMAYOR: Would you answer  
9 --

10 JUSTICE ALITO: -- come back to the  
11 question of what might be said in a declaration  
12 that would be sufficient to show that it was  
13 sufficiently unlikely that he would be put back  
14 on the list? Short of repudiation or a change  
15 of circumstances, am I correct that your answer  
16 is that there must be a disclosure of the  
17 reasons why he was on in the first place?

18 MR. ABBAS: For the substantive due  
19 process claim, yes, Your Honor, we think that a  
20 disclosure of some kind is the only way for  
21 establishing a baseline that the court can then  
22 compare a promise to.

23 JUSTICE ALITO: And suppose that's  
24 disclosed and you see, well, there was this  
25 combination of factors and the government

1       inferred from that that the standard was met.  
2       Why would -- what kind of guarantee would that  
3       provide in the future that he would not be put  
4       back on if just one additional relevant factor  
5       were added? What would that achieve?

6               MR. ABBAS: Yeah, it would depend,  
7       Your Honor, on the reasons that were disclosed.  
8       And I know, Your Honor, that's a frustrating  
9       answer to have to provide, but it -- but it  
10      turns on the reasons because, depending on what  
11      those reasons are, the court could reach a  
12      conclusion that recurrence is very likely  
13      because this is the normal and typical operation  
14      of the program, perhaps the program allows for  
15      the consideration of unlawful reasons, or it was  
16      aberrational, there was some kind of exceptional  
17      circumstance that gave rise to his listing.

18             And the effectiveness of the  
19      declaration would be -- would depend on the --  
20      the reasons disclosed.

21             JUSTICE ALITO: Well, what if there  
22      are no unlawful reasons? Is that central to  
23      your argument, that there was an unlawful reason  
24      that he was put on for a reason that violates  
25      his free exercise right?

1           MR. ABBAS: At the voluntary cessation  
2 stage, Your Honor, it's just the challenged  
3 conduct. The court can defer its adjudication  
4 of the lawfulness of the procedures, the  
5 lawfulness of the reasons to the merits. Right  
6 now, yes, we challenged the reasons why they  
7 listed him and we challenged the procedures why  
8 they listed him.

9           JUSTICE ALITO: But you -- you  
10 challenged the lawfulness of -- of individual  
11 reasons or you challenged the conclusion that  
12 the evidence that was available to the  
13 government was insufficient -- was sufficient to  
14 satisfy the -- the -- the standard? Which or  
15 both?

16           MR. ABBAS: It could be both, Your  
17 Honor. Both in the sense that the government  
18 used the bare fact, for example, of his lawful,  
19 peaceful associations in his religious community  
20 as a basis for his listing, or it could be that  
21 the standard was inadequate -- was so low that  
22 it allowed anything to sail right through to the  
23 list.

24           JUSTICE KAGAN: If -- if --

25           JUSTICE SOTOMAYOR: Can -- go ahead.



1                   JUSTICE KAGAN:  If -- if we thought  
2                   that a reasonable way to deal with this really  
3                   quite difficult situation is for the government  
4                   to do what it does on the merits part of the  
5                   cases and go in and tell the judge in -- in  
6                   camera why the person was listed and why the  
7                   person was taken off and what it has to say  
8                   about why the person won't be taken off, do you  
9                   know anything about how that process works?  Is  
10                  -- is counsel part of that process typically  
11                  when it's a substantive issue?  And do you want  
12                  to say anything about whether counsel has to be  
13                  part of that process?

14                  MR. ABBAS:  Sure, Your Honor.  A few  
15                  thoughts.

16                  The government, generally speaking,  
17                  does provide some kind of explanation as to the  
18                  reasons for a person's watchlisting publicly  
19                  even.  And so this is an exceptional case where  
20                  they provided no information at all.

21                  In -- in other watchlist cases, the  
22                  government, for example, in *Latif v. Holder*,  
23                  provided an extensive series of ex parte in  
24                  camera declarations to supplement some of the  
25                  public descriptions, and I believe there was a

1 mixture of access that was provided to counsel  
2 in -- in that case.

3 But some of the information that gets  
4 disclosed ends up being designated as sensitive  
5 security information. We've gotten cleared on  
6 that -- on that basis.

7 But, you know -- so there are all  
8 those options, but the government had all those  
9 options before they got to this Court. And so,  
10 before 2018, they decided -- in the first  
11 application of voluntary cessation doctrine to  
12 this case, they didn't provide any declaration.  
13 After the first application, they provided this  
14 declaration.

15 And so we think that the -- the  
16 government had the opportunity to muster what  
17 evidence it wanted on -- on the mootness  
18 question, and it's provided this to the Court.

19 JUSTICE GORSUCH: Have -- have you --  
20 have you suggested any of these alternatives or  
21 offered to reach an accommodation with the  
22 government in this case in this fashion?

23 MR. ABBAS: I believe there's a --  
24 there is a protective order in place currently  
25 at the -- or there was --

1 JUSTICE GORSUCH: Beyond a standard  
2 protective order, have you -- have you made any  
3 attempts to settle this case with the  
4 government?

5 MR. ABBAS: Yes, Your Honor, we have.  
6 We've done -- I think, before the Ninth  
7 Circuit's decision, there was a mediation, and  
8 the mediation was in part about what is the  
9 government willing to say, and it turns out that  
10 the government is not willing to say a word more  
11 than what's in the Courtright declaration.

12 JUSTICE GORSUCH: Worth a try.  
13 (Laughter.)

14 JUSTICE SOTOMAYOR: Can we go back to  
15 Justice Alito's earlier question of your -- of  
16 the opposing side? What's the remedy you're  
17 seeking and how do you have standing for that  
18 remedy?

19 MR. ABBAS: Yes.

20 JUSTICE SOTOMAYOR: Let's clarify.  
21 Are you seeking an injunction? Are you seeking  
22 just a declaration? And why would the  
23 declaration not violate the law that the other  
24 side claims it would?

25 MR. ABBAS: Yes, Your Honor. We're --

1 we're seeking an injunction and a declaratory  
2 judgment.

3           The -- the injunction is the same  
4 injunction that we saw at the beginning of the  
5 case to prevent the government from using the  
6 unlawful reasons that it did to list him and  
7 from using the same unlawful procedures that it  
8 did previously.

9           And the reason that injunction is  
10 still viable and live is because the voluntary  
11 cessation doctrine isn't -- isn't exactly an  
12 exception to mootness. It's when mootness  
13 exists. And so, here, Mr. Fikre has an interest  
14 in the government not returning to its old ways,  
15 and so it maintains the interest in the  
16 injunction.

17           But there's even more concrete things.  
18 The government, by standing by its prior  
19 decision, indicates an interest in continuing to  
20 use his past No Fly List status in the future.  
21 Among many of the things that the government is  
22 likely to consider about Yonas Fikre when it  
23 runs into him in the future is the fact that the  
24 government for a period of five years put him on  
25 the No Fly List. And so the Court, this Court

1 or another, lower courts, can order the  
2 government to not use his past No Fly List  
3 status for any particular purpose.

4           Annotate the records, that's something  
5 that the government has been ordered to do by a  
6 court in -- after the only No Fly List trial in  
7 this nation's history in Ibrahim v. DHS. The  
8 trial judge ordered the government to annotate  
9 the No Fly List record that still maintained --  
10 that still existed, expunge the ones that they  
11 could. And so we think that there's plenty for  
12 the Court to do on the injunctive side.

13           On the -- the -- this -- the  
14 declaratory judgment, Yonas, the reason he  
15 brought this lawsuit was so that he could go  
16 about his everyday life, and that is what ran  
17 him into the No Fly List. A -- a -- a decision,  
18 a declaratory judgment spelling out what the  
19 government's authorities are, what Yonas's  
20 rights should be, will have a meaning to him.

21           JUSTICE ALITO: I -- I still don't  
22 understand exactly what you want. You wouldn't  
23 be satisfied simply with an injunction that says  
24 the government is enjoined from using evidence  
25 that would be in violation of the First

1 Amendment? That wouldn't satisfy you, right?

2 MR. ABBAS: I don't think so, Your  
3 Honor. I think we would have to get very  
4 specific.

5 JUSTICE ALITO: All right. So suppose  
6 one of the reasons why he was put on was that he  
7 traveled to Sudan, and suppose the passage of  
8 time convinced the government that the fact that  
9 he traveled to Sudan at some point -- I'm just  
10 speculating, this is not -- has anything to do  
11 with the real facts -- but let's suppose that  
12 that's the case.

13 The passage of time means that having  
14 traveled to Sudan in the future was no longer  
15 much -- carried much probative weight and,  
16 therefore, he didn't deserve to continue to be  
17 on the -- on the No Fly List.

18 So what do you want? Do you want,  
19 like, an advisory opinion, if you go back to  
20 Sudan, you might get back on or, if you go to  
21 any other country about which there might be  
22 some suspicion, if you go to Turkmenistan -- I'm  
23 looking at the whole list of countries that are  
24 on these various lists -- if you go to  
25 Turkmenistan, maybe that'll put you over the --

1 over the top, or if you go to Eritrea? What  
2 exactly do you -- could possibly be done?

3 MR. ABBAS: Yeah, it's -- I think it's  
4 a difficult fact-intensive question about what  
5 injunction would be appropriate, but the  
6 injunction might be like a higher level of  
7 generality. Perhaps it's the government is  
8 required to make a showing that -- of criminal  
9 conduct as part of a person's listing.

10 So I -- I think that there are  
11 possibilities --

12 JUSTICE ALITO: Well, that would be a  
13 huge change.

14 MR. ABBAS: That would be -- that  
15 would be a change. And I'm just doing that --

16 JUSTICE KAVANAUGH: That would be  
17 dramatic. Not to interrupt.

18 MR. ABBAS: Yeah. And I'm just doing  
19 that as an illustrative change of something that  
20 the government could do that would not be  
21 specific to Yonas's fact.

22 But the opposite is also true. The  
23 government could do something that's only  
24 specific to Yonas Fikre. For example, if the  
25 procedural safeguards that the Court put in

1 place -- that the government put in place were  
2 not generally applicable but were only specific  
3 to Yonas Fikre, this Court could look at those  
4 procedural safeguards and say, hey, before the  
5 government relists him, they're going to call  
6 this lawyer and they're going to call -- it's  
7 going to go to this committee and they're going  
8 to make sure that the terms of the Courtright  
9 declaration are implemented.

10 So there's a way for the government to  
11 do it specific to Yonas. There's a way for the  
12 government to do it program-wide.

13 JUSTICE ALITO: But you don't --  
14 you're not satisfied with just the Courtright  
15 declaration. That isn't going to do anything  
16 for you. I still don't -- I don't understand,  
17 like, he would be entitled to an advisory  
18 opinion about -- you're worried, and I  
19 understand it, that he might do this, that, or  
20 the other thing that he thinks is innocent and  
21 that might put him over the top and get him back  
22 on the list.

23 But you want a -- a -- you know, you  
24 want to have him -- he needs to have a number he  
25 can call up? I'm thinking of going to this



1 particular mosque. If I do that, is that going  
2 to put me on the list? I just don't understand  
3 how you think this is going to work.

4 MR. ABBAS: Yes, Your Honor. I think  
5 that the only way to determine that would be to  
6 know the -- the reasons why he was listed and --  
7 and to make sure that the government is not in a  
8 position to invoke those same unlawful reasons  
9 again.

10 JUSTICE ALITO: But what if they're --

11 JUSTICE KAVANAUGH: What --

12 JUSTICE ALITO: -- not unlawful  
13 reasons? So the reason -- one of the reasons  
14 was that he was seen socializing with Mr. X, and  
15 Mr. X has terrorist associations. So now he  
16 wants -- he wants to associate with Mr. Y or Mr.  
17 Z.

18 MR. ABBAS: It gets -- Your Honor, it  
19 gets very fact-specific. But, again, at a -- at  
20 a higher level of generality, can the government  
21 use Yonas's lawful, peaceful associations with  
22 others as a basis for his listing?

23 That could be -- the government could  
24 take a position that it's not allowed to use the  
25 lawful, peaceful associations of Yonas, and that

1 would solve Mr. -- Mr. Fikre's association with  
2 Mr. X, as well as a future association with Mr.  
3 Y in terms --

4 JUSTICE ALITO: Well, you're -- you're  
5 --

6 JUSTICE KAVANAUGH: This whole thing's  
7 based on associations, though.

8 JUSTICE ALITO: You're begging the  
9 question when you say they're lawful, peaceful  
10 associations. Let's say all they know is that  
11 he's associating with a particular person and  
12 that's a suspicious person and they don't know  
13 why he's associating with the person.

14 MR. ABBAS: Yeah. And the question  
15 would be --

16 JUSTICE ALITO: And you want -- you  
17 want -- you want them to be unable to rely on  
18 that?

19 MR. ABBAS: Your Honor, I think that  
20 gets into the merits now, and the merits would  
21 for procedural due process require a balancing,  
22 a balancing of the government's interests, a  
23 balancing of the alternatives available to the  
24 government and pursuing the interests, as well  
25 as the risk of erroneous deprivation.

1           The stronger the reason that the  
2 government has for the deprivation, the -- the  
3 lower the risk of erroneous deprivation is going  
4 to be. And so, if the government has a -- a --  
5 an overwhelming reason to put Yonas on the No  
6 Fly List like as the hypotheticals suggest,  
7 that's going to -- that's going to be enough to  
8 get the government where it wants to go with  
9 this case.

10           JUSTICE JACKSON: And from our  
11 standpoint, just in terms of how we're supposed  
12 to be looking at this, at least as I thought,  
13 aren't we isolating the merits by essentially  
14 assuming for the purpose of the determination of  
15 either standing or mootness that you're right on  
16 the merits, that the government has engaged in  
17 unlawful conduct here with respect to how they  
18 put you on -- your client on the list or  
19 whatever.

20           And the question is separately whether  
21 or not this is moot or whether or not -- so it's  
22 not -- I didn't understand that we were to be  
23 concerned about whether you're right on the  
24 merits of your argument. For the purpose of  
25 this, we say you are, and then we evaluate

1 mootness and standing in light of that?

2 MR. ABBAS: I think that's right, Your  
3 Honor. And our vernacular is the challenged  
4 conduct to -- to communicate Your Honor's point  
5 that at the voluntary cessation stage, we're --  
6 we're just trying to see if the government has  
7 done something so that the challenged conduct  
8 is -- is not likely to recur.

9 And the recurrent -- the -- the merits  
10 questions are -- are reserved for --

11 JUSTICE ALITO: Well, I do understand  
12 that. The reason why I was going into those  
13 questions was because I wanted to know what, if  
14 anything, the government could put in a  
15 declaration that would satisfy you. That's the  
16 reason why I went into it.

17 MR. ABBAS: Yes. Yes, Your Honor.

18 JUSTICE ALITO: Do you think that's  
19 wrong?

20 MR. ABBAS: Well, I -- I -- I think  
21 that there are things that the government could  
22 put in its declaration. They could put a  
23 description of the notice, the opportunity to be  
24 heard in the declaration. They could disclose  
25 the reasons and make a promise that matches

1 those reasons.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 MR. ABBAS: Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Thomas?

7 Justice Alito?

8 Justice Jackson?

9 Thank you very much.

10 Rebuttal, counsel.

11 REBUTTAL ARGUMENT OF SOPAN JOSHI

12 ON BEHALF OF THE PETITIONERS

13 MR. JOSHI: Thank you, Your Honor.

14 Just a few quick points.

15 I think the discussion right now just  
16 indicates why there is no Article III case or  
17 controversy here because it really isn't  
18 redressable. I mean, I heard my friend agree  
19 that if he brought the suit today or even a day  
20 after I presume being taken off the list, there  
21 would be no standing.

22 And if that's true, I don't think you  
23 should interpret mootness as being so  
24 disconnected from standing that we could find  
25 mootness here even though he's not on the list,

1 hasn't been on it in eight years, and is  
2 guaranteed that that decision to remove him is  
3 sort of sticky, that it won't be revisited and  
4 he won't be put back on, unless there's some new  
5 information that warrants that course of action.  
6 That's true with you or I or anyone else. And  
7 there's no reason why he has a live case just  
8 because it also happens to be true with respect  
9 to him.

10 Justice Alito, I think you -- you  
11 asked him, you know, what could the government  
12 say in a declaration that would satisfy him?  
13 And I think he had trouble answering that for a  
14 reason. There really is nothing we could say  
15 that would satisfy his test for mootness. So it  
16 would always have to go to the merits.

17 And to be clear, many of the things  
18 that he wanted in response to Justice Thomas's  
19 questions for a declaration to say were  
20 essentially repudiation. And if I leave you  
21 here with one thought today, it's that  
22 repudiation cannot be an element of the test for  
23 mootness. So, at a minimum, the Ninth Circuit's  
24 test is wrong. No one seems to be defending it,  
25 but I just want to make that clear. It sounded

1 like there was maybe some appetite for a holding  
2 that says, okay, repudiation is not required,  
3 the Ninth Circuit is wrong, but if the  
4 government is going to keep the underlying  
5 information classified, then a district judge  
6 should review it in camera ex parte to evaluate  
7 the reasonable likelihood or reasonable  
8 expectation of recurrence.

9           And I guess, as I said, I would -- I  
10 would push back on that, but the -- but the one  
11 thing I really want to emphasize is, to the  
12 extent I think my friend embraced that, he  
13 seemed to keep saying in terms of, well, you  
14 know, Mr. Fikre doesn't know what it is he did;  
15 Mr. Fikre needs to know what he can or can't do  
16 before being putting on the list. And that is  
17 absolutely not how this should work.

18           Even if you think a court should  
19 evaluate the evidence, it should be in camera,  
20 ex parte. And at the end of the day, what's  
21 going to be the result of that? Let's say a  
22 court looks at this record, looks at the reasons  
23 he was placed on the list, looks at the reasons  
24 he was taken off the list, and then makes a  
25 determination that it is or isn't reasonably

1 likely to recur. What is a court going to say?  
2 He's not going to give Respondent any  
3 information about what that classified  
4 information is.

5 And so Respondent's going to be in  
6 exactly the same position as if this Court just  
7 recognizes that, in this context, the standard  
8 for listing is so unusual, which is a U.S.  
9 citizen posing a threat of engaging in one of  
10 four enumerated terrorist activities, that just  
11 as the Court in Lyons was unwilling for Article  
12 III purposes to expect the plaintiff even to be  
13 arrested again, so too should it not reasonably  
14 expect its citizen to pose a threat of engaging  
15 in terrorist activities and then just say what I  
16 think should be obvious from common sense, which  
17 is there is no case or controversy here any  
18 longer, there is no injunctive or declaratory  
19 relief that could be issued that would solve any  
20 injury he currently or imminently will suffer,  
21 and call this case what it is, moot.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 The case is submitted.

25



1                   (Whereupon, at 1:08 p.m., the case was  
2     submitted.)  
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## Official - Subject to Final Review

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