



1           IN THE SUPREME COURT OF THE UNITED STATES  
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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

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15           The above-entitled matter came on for oral  
16   argument before the Supreme Court of the United  
17   States 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.

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



1 But that is the threshold determination, only  
2 people who satisfy that, and so we know exactly  
3 what those criteria 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 -- No Fly  
8 List. You now give him this declaration that  
9 says on the -- we're not going to put you on the  
10 No Fly List for anything that's happened in the  
11 past. Tomorrow he holds another fundraiser for  
12 the same mosque. Can you put him back on the  
13 list 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 -- No Fly List  
6 determinations are not made with respect to any  
7 particular event, conduct, anything. They are  
8 always based 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 -- I'm sorry. Finish your sentence. I -- I do  
20 find this a very perplexing case because you --  
21 you 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 -- 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 -- your claim that you're going  
13 to be -- you may be put back on is entirely  
14 speculative. So, anyway, that's why I find it  
15 perplexing.

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

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

23 I guess what I would say is I would  
24 fall back on the fact that the standard is poses  
25 a threat of engaging in one of four enumerated

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

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

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

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

25 JUSTICE KAGAN: I mean, Mr. Joshi,

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

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

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

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

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

1                   MR. JOSHI: Yeah. I -- so, if you  
2                   want a yes-or-no answer, my answer is yes  
3                   because --

4                   JUSTICE KAGAN: Yes what?

5                   MR. JOSHI: Yes --

6                   JUSTICE KAVANAUGH: He can go back on?

7                   JUSTICE KAGAN: Yes, you can put him  
8                   back on --

9                   MR. JOSHI: Correct.

10                  JUSTICE KAGAN: -- for the same kinds  
11                  of activities?

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

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

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



1 and -- and that he stopped associating with  
2 those people or organizations and you took him  
3 off the list.

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

9 At that point, I think how can you  
10 have satisfied our standard?

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

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

22 So even if he -- his claim and no  
23 court has decided, I agree it's the merits, that  
24 our placement of him at time one, whenever that  
25 was, was unlawful for whatever reason,

1 procedural or substantive, the question for  
2 mootness purposes is could -- could he be  
3 expected to be placed back on the list at a  
4 future time.

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

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

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

25 Even if you would take that allegation

1 as true for analyzing his past choke hold  
2 complaint, you wouldn't expect him to be held in  
3 a choke hold in the future. Just as a matter of  
4 law, you say we are not going to base Article  
5 III on an expectation that the plaintiff is  
6 going to do something illegal or do something to  
7 get arrested, and if he does, then he'll have a  
8 live case at that point.

9 I think the same analysis would work  
10 --

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

19 So it's --

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

1 other cases saying it's never on the basis of  
2 First Amendment protected activity.

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

11 JUSTICE JACKSON: But, Mr. Joshi --

12 JUSTICE KAVANAUGH: Are you just  
13 saying that's --

14 CHIEF JUSTICE ROBERTS: But suppose --

15 JUSTICE KAVANAUGH: -- are you saying  
16 that's unlikely?

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

23 JUSTICE KAVANAUGH: Right. I mean, he  
24 was in a prison in UAE for months, right? I  
25 mean, he's not the average -- you know, that's

1 not a usual circumstance of a U.S. person, I  
2 guess.

3 MR. JOSHI: And for Article III  
4 purposes, I think this Court has always been  
5 reluctant to rely on past instances in order to  
6 --

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

11 MR. JOSHI: It was a standing case.

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

24 Here, he's brought a claim. The  
25 government, I -- I didn't take you to be saying

1 that there's something wrong with his claim in  
2 its inception, but the government is now arguing  
3 that the claim is no longer live because of  
4 mootness because they have removed him from the  
5 list.

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

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

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

24 And -- and I take the point that we  
25 have the absolutely clear, the reasonable. But,

1 I mean, if I told you you have a hundred percent  
2 chance of having a 50 percent shot at victory,  
3 that's still 50 percent.

4 JUSTICE JACKSON: Right. But what  
5 makes this --

6 MR. JOSHI: Right.

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

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

17 MR. JOSHI: Yes.

18 JUSTICE JACKSON: Okay.

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

20 JUSTICE JACKSON: Okay.

21 MR. JOSHI: The -- the reasonableness  
22 is that he poses a threat of engaging in one of  
23 four enumerated acts of terrorism.

24 JUSTICE JACKSON: But you previously  
25 assessed in her hypothetical that he did that

1 when he gave money to a mosque or raised -- had  
2 a fundraiser to a mosque, right?

3 MR. JOSHI: And that's why I pushed  
4 back on the premise when she asked me that  
5 question, because it's never about doing any one  
6 thing. It's always a totality of circumstances,  
7 not even necessarily things that the individual  
8 him- or herself says or does.

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

19 I -- I don't think it really helps in  
20 the end that it's a multi-factored inquiry. At  
21 some point, you're making a judgment about  
22 conduct that puts you on the list. And the  
23 problem here is that you're -- you basically  
24 just admitted, conceded, that the same conduct,  
25 if he participated in it again, could put him



1 back on the list. So, once that's true, I don't  
2 really see where the mootness argument is.

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

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

16 MR. JOSHI: So --

17 JUSTICE KAVANAUGH: -- the fifth piece  
18 of it again.

19 MR. JOSHI: Yeah. So --

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

24 JUSTICE KAGAN: Irresponsible.

25 JUSTICE KAVANAUGH: -- that would be

1 totally irresponsible, right?

2 MR. JOSHI: Right. So, I mean, I -- I  
3 think, again, it's -- he says -- his argument is  
4 that he doesn't know what put him on the list.  
5 But, if that's -- if that's the claim, then I --  
6 I think, you know, you -- you would -- I think  
7 the voluntary cessation exception really would  
8 swallow the rule.

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

16 JUSTICE KAVANAUGH: Right.

17 MR. JOSHI: And so it would always  
18 have to get to the merits.

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

22 MR. JOSHI: Yeah.

23 JUSTICE KAVANAUGH: -- the standard  
24 that you and Justice Alito were discussing is  
25 very challenging --

1 MR. JOSHI: It is, but --

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

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

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

13 JUSTICE KAVANAUGH: But he's on the  
14 list before. Oh, keep going. That's --

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

16 JUSTICE KAVANAUGH: I -- yeah.

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

1                   So I would guess at that point --

2                   JUSTICE KAVANAUGH:   So which way do we  
3                   go then?

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

9                   JUSTICE KAVANAUGH:  That's not really  
10                  the standard.  The standard is whether it's  
11                  reasonably likely to recur.

12                  MR. JOSHI:  Right.  And --

13                  JUSTICE KAVANAUGH:  And that depends  
14                  on your assessment of the person's activity, and  
15                  that's a complete wild card.

16                  MR. JOSHI:  I --

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

20                  MR. JOSHI:  I --

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

25                  MR. JOSHI:  I -- I take the point, but

1 this Court, for Article III purposes, has  
2 frequently said that past instances of  
3 misconduct by the plaintiff do not allow us to  
4 infer that he'll engage in that misconduct  
5 again.

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

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

23 And he was taken off not as a matter  
24 of grace. This isn't like the union fee return  
25 in Knox. It's not, you know -- this is -- it's

1 not like the governor allowing the churches to  
2 get the playground funds in -- in the Trinity  
3 case --

4 JUSTICE JACKSON: So it's not the  
5 special individualized treatment. I was going  
6 to ask you about that --

7 MR. JOSHI: No. No.

8 JUSTICE JACKSON: -- because --

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

19 JUSTICE BARRETT: Mr. --

20 JUSTICE KAVANAUGH: Would your  
21 argument be different if it were just a year  
22 after?

23 MR. JOSHI: Not necessarily. I think  
24 the -- the eight years underscores the fact that  
25 these sorts of determinations are sticky, and I

1 think the declaration makes it sort of sticky,  
2 and I think it makes it sticky enough,  
3 especially in this context where the standard is  
4 reasonable expectation --

5 JUSTICE GORSUCH: Well, counsel --

6 MR. JOSHI: -- to say let's not  
7 reasonably expect someone to pose a threat of  
8 engaging in --

9 JUSTICE GORSUCH: Counsel, why -- I'm  
10 sorry.

11 JUSTICE BARRETT: No, no.

12 JUSTICE GORSUCH: No, please go ahead.

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

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

25 JUSTICE BARRETT: What about the point

1 -- I think their point was also that he was  
2 mid-level. I mean, this wasn't a declaration  
3 from someone who had more authority.

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

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Justice Thomas?

14 Justice Alito?

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



1 imminent threat?

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

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

25 JUSTICE ALITO: Well, is the upshot of

1 what you've said that Article III can't be  
2 satisfied in this case unless the -- the basis  
3 for putting him on in the first place and taking  
4 him off later is disclosed at least to the  
5 judge? And so that's what this is all about.  
6 I'll ask your -- your -- your -- your friend  
7 whether that's his understanding.

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

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

19 Now a court could look at all the  
20 classified evidence and then determine whether  
21 it's likely to recur -- reasonably expect to  
22 recur or not, or can just hold as a matter of  
23 law the government is fulfilling its national  
24 security responsibilities in good faith, it's  
25 evaluating people against the standard

1 correctly, and even if the allegation is that it  
2 didn't do that at time one, we -- we cannot  
3 reasonably expect the government to fall down  
4 and act in bad faith at time two.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Sotomayor?

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

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

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

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

1 JUSTICE SOTOMAYOR: No, because you --

2 MR. JOSHI: -- based on the currently  
3 available information.

4 JUSTICE SOTOMAYOR: -- we can go -- we  
5 go -- go back to the fundraising. But, anyway.

6 MR. JOSHI: Well, but --

7 JUSTICE SOTOMAYOR: Okay. Thank you,  
8 counsel.

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

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

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

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

22 JUSTICE KAGAN: Is the government able  
23 to say anything about how this relisting occurs  
24 or -- or, more particularly, about how often it  
25 occurs? In other words, are -- are -- are --

1 are you capable of telling us anything about  
2 when you're taken off a list, how often is  
3 somebody put back on a list?

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

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

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

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

1 think he's not going back on the list.

2 MR. JOSHI: Yeah. So, obviously,  
3 we've done that in the cases we've taken to --  
4 to judgment, but that's been on the merits. So  
5 I gather your question is, well, what if it's  
6 just for the limited purpose --

7 JUSTICE KAGAN: Yeah --

8 MR. JOSHI: -- first of mootness.

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

15 You go to the judge and you say,  
16 judge, here's why he was on the list, here's why  
17 he's not on the list anymore, here's why we  
18 don't think he's going back on the list.

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

24 I think, as this Court recognized in  
25 Abu Zubaydah and other cases, even the

1 disclosure ex parte and in camera of highly  
2 sensitive information, classified information,  
3 itself works a harm on the government and the  
4 public and national security interests, so you  
5 want to limit the circumstances in which you do  
6 it to where it's really necessary and where the  
7 inquiry is not an actual evaluation by the court  
8 as to substantively whether we -- whether he was  
9 appropriately put on the list, not in -- you  
10 know, for protected conduct, et cetera, which is  
11 the -- a merits question, when the question is  
12 simply we all agree he's not on the list now,  
13 hasn't been on the list, is assured he's not  
14 going to be put back on the list based on what  
15 we know about him, so now we're just  
16 speculating, well, is it possible he'll be put  
17 back on the list in the future --

18 JUSTICE KAGAN: Well, that suggests --

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

20 JUSTICE KAGAN: -- that we're not  
21 committed to our voluntary cessation rule, which  
22 I think we've given every indication we are  
23 extremely committed to.

24 MR. JOSHI: No, you are. But -- but  
25 the inquiry, of course, is going to be like, is

1 it reasonably expected to occur in the future?  
2 And precisely because it's based on a totality  
3 of circumstances that's ever changing, that even  
4 the passage of time itself can cause information  
5 that once seemed suspicious not to appear so  
6 anymore, the lack of corroboration can change  
7 how you view things.

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

15           JUSTICE KAGAN: Thank you, Mr. Joshi.

16           MR. JOSHI: -- that that's just  
17 unlikely to happen.

18           CHIEF JUSTICE ROBERTS: Justice  
19 Gorsuch?

20           JUSTICE GORSUCH: I -- I wanted to  
21 follow up actually on Justice Kagan's question.  
22 That -- that's where I was headed earlier too.

23           We have an American citizen here who  
24 was for years sometime, I don't remember exactly  
25 how long, forced to live abroad and fearful



1 about coming home because he didn't know what he  
2 was being accused of.

3 Now the government may very well have  
4 had good reasons. I -- I don't for a second  
5 mean to suggest otherwise. But an American  
6 citizen normally has a right to what's been  
7 called every man's evidence against him. That's  
8 due process. That's a pillar of our democracy.

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

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

1 at stake?

2 MR. JOSHI: So a couple responses,  
3 Justice Gorsuch.

4 First, I -- I do need to push back on  
5 the narrative that he was somehow stranded  
6 overseas or forced to live overseas. Even  
7 someone on the No Fly List can get --

8 JUSTICE GORSUCH: That's -- that's  
9 what he alleges.

10 MR. JOSHI: I -- I -- I understand.  
11 But --

12 JUSTICE GORSUCH: And we have to take  
13 that as true at this stage.

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

21 I presume the reason he didn't seek  
22 one for the years -- for the four years he was  
23 in Sweden is because he had a pending Swedish  
24 asylum application. I don't know how Swedish  
25 law works, but I would imagine if he voluntarily

1 returned that that might affect it.

2 So I just want to resist the -- the  
3 premise that he was stranded overseas. He could  
4 have come back with the one-time waiver, which  
5 he, when he requested it, was able to come back.

6 The second piece of your question is  
7 I -- I -- I think the judge in this case, the  
8 district court in this case, sensibly realized  
9 that he's not on the list and he's been assured  
10 he won't be put back on the list based on  
11 the currently available --

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

19 It's his right to travel, his right to  
20 every man's evidence. And is it when those two  
21 things at stake, is it too much to ask the  
22 federal government to share with the district  
23 court in a SCIF enough information to be able to  
24 assess the mootness question? Perhaps even  
25 share it with cleared counsel as it does in so

1 many other circumstances under other statutory  
2 regimes. Why is that too much to ask the  
3 executive branch?

4 MR. JOSHI: So that is exactly what we  
5 do when these cases get to the merits. If he  
6 had remained on the No Fly List, that's what  
7 would have happened. That's what happens in the  
8 other cases. There's no question, Justice  
9 Gorsuch.

10 My only point is, in the mootness  
11 context, there has been no district court that  
12 has attempted to invoke those kinds of  
13 procedures. We haven't faced that. And the  
14 reason I think is that mootness, the Article III  
15 inquiry, is different from the merits inquiry.

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

24 JUSTICE GORSUCH: So -- so, if -- if I  
25 can summarize, I think your argument is it's not

1 necessary here, even though it often is in the  
2 merits?

3 MR. JOSHI: That's correct.

4 JUSTICE GORSUCH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Kavanaugh?

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

16 MR. JOSHI: Well, if you accept  
17 Respondent's submission in this case or the  
18 Ninth Circuit's, it's not just going to be a few  
19 more cases; it's going to be literally anyone  
20 who's ever on the No Fly List, the claims could  
21 never moot out unless we --

22 JUSTICE KAVANAUGH: Right.

23 MR. JOSHI: -- revealed the  
24 information, then, you know, there is a point of  
25 minimization. Even, you know, when we have to

1 reveal the information --

2 JUSTICE KAVANAUGH: I agree.

3 MR. JOSHI: -- we do it, but we don't  
4 want to -- that doesn't mean we do it all the  
5 time.

6 JUSTICE KAVANAUGH: I -- I'm very  
7 sympathetic to that, so I -- I accept that.

8 Okay. On the -- on -- I'm sympathetic  
9 to your mootness argument, although I might not  
10 have sounded like it, but the reason I'm having  
11 trouble is to squeeze this kind of situation  
12 into the test we use I find very -- very  
13 difficult.

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

1                   When it's this kind of, well,  
2                   connecting the dots situation, it's much harder,  
3                   I think, to squeeze it into reasonably expected  
4                   to recur because we just have no idea.

5                   MR. JOSHI: Yeah. So two -- two  
6                   responses to that.

7                   One, I -- I -- I think you hit the  
8                   nail on the head with the dynamic nature of  
9                   these things. It's not like, you know, the  
10                  churches either are or aren't entitled --

11                  JUSTICE KAVANAUGH: Yes.

12                  MR. JOSHI: -- to a grant under the  
13                  First Amendment. The union fees either are or  
14                  aren't, you know, chargeable under the First  
15                  Amendment.

16                  Here, it's -- it's not static like  
17                  that. It's not like, if you're an individual,  
18                  you either always belong on or always belong off  
19                  the No Fly List. It's at the moment, do you  
20                  pose a threat of engaging in terrorism. And an  
21                  individual might pose that threat before 2016,  
22                  not pose it since 2016, and, you know, in -- in  
23                  2050 might pose it again. Who knows? But you  
24                  can never know that, right? And I think that  
25                  you're right, that is a distinction here.

1                   And so then the second part of my  
2 answer is I think we need to remember that  
3 voluntary cessation is a judge-made exception to  
4 Article III. We're still -- we're always  
5 implementing Article III. And I think,  
6 therefore, it's critical not to stray or become  
7 untethered from the purposes of the voluntary  
8 cessation doctrine and why this Court developed  
9 it. It was to prevent gamesmanship and docket  
10 manipulation to avoid judicial review,  
11 post-certiorari maneuvers, other sorts of  
12 things.

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

24                   And, here, he's not on the list. He  
25 hasn't been on the list in eight years. There



1 just simply isn't a live case or controversy  
2 about his -- placement on the No Fly List any  
3 longer. And in the unlikely event he's put back  
4 on the No Fly List in the future, he can bring a  
5 challenge at that time.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Barrett?

9 JUSTICE BARRETT: Mr. Joshi, could you  
10 address the claim made by Respondent and some of  
11 the amici that the government, in fact, is  
12 strategically mooted these cases by dismissing  
13 them?

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

24 Of course, that's the -- that's how  
25 many U.S. persons are removed from the No Fly

1 List, just based on the administrative redress  
2 process, which is what we think is happening.  
3 So ACLU documents that, well, some of these  
4 plaintiffs are removed before any briefs are  
5 filed, and then some are removed after the  
6 briefs are filed but before a district court  
7 decision. And then some are removed after the  
8 decision. Some are removed on appeal.

9 And I look at all that and I think,  
10 well, that makes sense because they're removed  
11 as an outcome of the administrative redress  
12 process and where the agency takes a fresh look  
13 at the file and says we now no longer believe  
14 they pose a risk of engaging in the terrorist  
15 activities.

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

24 So I think, if you look at the  
25 universe of cases, what is apparent is that in

1 all of the cases cited by Respondent and I think  
2 in ACLU's appendix, redress proceedings were in  
3 parallel to the litigation, and I think it's  
4 natural to expect that sometimes those  
5 individuals will be removed as a result of the  
6 redress process.

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

16 CHIEF JUSTICE ROBERTS: Justice  
17 Jackson?

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

21 MR. JOSHI: No.

22 JUSTICE JACKSON: Are -- are we doing  
23 some sort of a carveout for national security?

24 MR. JOSHI: No, quite the opposite. I  
25 -- I -- we rely extensively, I didn't think it

1 was possible to rely more heavily, on a case  
2 than we do on -- than on Already. That was a  
3 case involving private parties. We think  
4 exactly the same rule applies.

5 We do think the national security  
6 context does matter for an evaluation of the  
7 facts on the ground. I think it's Respondent  
8 who would have a heightened rule for government  
9 officials.

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

20 MR. JOSHI: Right. The standard is  
21 the same. It's the reasonable expectation of  
22 recurrence. So we are not asking for a  
23 different legal test in the national security  
24 context.

25 My point is that where the thing that

1 has to recur is that an individual poses a  
2 threat of engaging in one of four enumerated  
3 acts of terrorism, that a court should hold is  
4 just -- not likely to recur --

5 JUSTICE JACKSON: But doesn't -- but  
6 aren't you skipping over the government's  
7 assessment of whether or not that's happening  
8 and the basis upon which the government is  
9 making that assessment?

10 So this is what I mean, right? The  
11 government doesn't -- you keep saying it's a  
12 totality of circumstances analysis. And I  
13 appreciate that. But, according to the  
14 declaration and everything we understand, the  
15 government is making that assessment on the  
16 basis of certain criteria.

17 Am I right about that?

18 MR. JOSHI: I've told you the  
19 criteria.

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

24 MR. JOSHI: It's on 118a.

25 JUSTICE JACKSON: 118. Thank you. In

1 the declaration, that he was placed on the not  
2 -- the No Fly List in accordance with applicable  
3 policies and procedures.

4 So there is some policy that the  
5 government looks at in each case when it's  
6 assessing on the -- totality of the  
7 circumstances whether or not a person qualifies,  
8 right?

9 MR. JOSHI: So the -- the policy as  
10 referred to there is the standard I just gave  
11 you.

12 JUSTICE JACKSON: It's at that level  
13 of generality? A person can't make an argument  
14 that the government, in applying that standard,  
15 has used certain criteria that I'm challenging  
16 with respect to my application?

17 MR. JOSHI: No, I've -- I've given you  
18 the criteria for placement on the No Fly List.  
19 You also have to satisfy placement on the  
20 broader Watchlist, which is reasonable suspicion  
21 that you are -- they call it a KST, a Known or  
22 Suspected Terrorist. But --

23 JUSTICE JACKSON: All right. So, if a  
24 person wants to argue in their claim that  
25 they're bringing in their lawsuit is that the

1 government was mistaken about its assessment  
2 that my conduct qualified under the standard  
3 that you have articulated, and then the  
4 government said -- does not say we've changed  
5 the way we looked at what you did before, we've  
6 changed the criteria that we used to assess it  
7 or anything, the government just says, okay,  
8 you're now off the list and we think the case is  
9 moot as a result, why -- why does the court have  
10 some sort of reassurance that that -- that the  
11 government wouldn't look at the -- the situation  
12 down the line and make the same assessment?

13 MR. JOSHI: Because, in this case, if  
14 -- if -- if it's as you just said, if I heard  
15 you right, then -- then I agree, that would pose  
16 a much tougher case.

17 But, here, we have two additional  
18 things. One, the Court -- Courtright  
19 declaration that we were just reading makes  
20 clear that he was removed from the list not just  
21 as a matter of grace or because, you know, we  
22 wanted to moot out the litigation, but he was  
23 removed from the list because he substantively  
24 didn't satisfy the criteria anymore. And that,  
25 under the presumption of good faith and national

1 security, is entitled to respect as, you know,  
2 and -- and absent some strong showing of bad  
3 faith.

4 And then, second, the Courtright  
5 declaration says: And we're not going to  
6 reconsider this decision because you won't be  
7 put back on the No Fly List based on the  
8 currently available information.

9 So it adds a stickiness to that  
10 determination. So it's not a matter of grace,  
11 and it's sticky and so isn't lightly going to be  
12 revoked in the future.

13 JUSTICE JACKSON: All right. Let me  
14 ask you about the standing question real quick.  
15 Does the government dispute that Mr. Fikre had  
16 standing at the time that he filed his suit in  
17 2013?

18 MR. JOSHI: No.

19 JUSTICE JACKSON: All right. So he  
20 did. And don't we ordinarily assess standing at  
21 the time the person brings the lawsuit? If you  
22 have standing to bring -- to file the lawsuit,  
23 then, to the extent your circumstances change,  
24 we now move into the realm of evaluating it  
25 under mootness, right?



1                   MR. JOSHI: That -- that's correct,  
2 but I'll point out that Already, which was a  
3 case about mootness, did mention that, you know,  
4 in these circumstances where the -- the claim is  
5 no longer really live, that cases like Lyons and  
6 Article III apply with equal force, that a  
7 litigant cannot just rely on speculative  
8 injuries to keep the case alive.

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

21                   JUSTICE JACKSON: But isn't -- isn't  
22 -- I mean, Justice Scalia suggested that the  
23 voluntary cessation exception really is about  
24 whether or not the case is moot to begin with.  
25 It's not as though we're accepting that it's

1 moot under a circumstance in which the  
2 government takes him off the No Fly List and  
3 then we're looking at is there an exception to  
4 mootness in this situation.

5           Instead, we're saying has the  
6 government actually mooted the case when it  
7 takes him off the -- the No Fly List, right?

8           MR. JOSHI: Well, I'm not sure about  
9 that. I mean, Justice Scalia dissented in  
10 Friends of the Earth.

11           JUSTICE JACKSON: Yes, he did.

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

22           So, really, his -- the -- the -- to  
23 keep his No Fly List claims alive really does  
24 depend on this delta between mootness and  
25 standing, even though both implement Article

1     III. And the only way to get there is through  
2     voluntary cessation. And, there, I think you  
3     shouldn't interpret it to be so unmoored from  
4     its purposes that --

5                     JUSTICE JACKSON: Thank you.

6                     CHIEF JUSTICE ROBERTS: Thank you,  
7     counsel.

8                     Mr. Abbas?

9                     ORAL ARGUMENT OF GADEIR ABBAS  
10                    ON BEHALF OF THE RESPONDENT

11                    MR. ABBAS: Mr. Chief Justice, and may  
12     it please the Court:

13                    The government agrees that when a  
14     defendant voluntarily ceases conduct challenged  
15     in litigation, it has a heavy burden to make  
16     absolutely clear that the conduct could not  
17     reasonably be expected to recur. But the  
18     Courtright declaration just promises Mr. Fikre  
19     that he won't be put back on the No Fly List  
20     based on currently available information.

21                    That's in -- inadequate for three  
22     reasons. First, if our client was previously  
23     listed for attending the wrong mosque and  
24     attends that same mosque this year, the  
25     declaration would allow the government to relist

1 him. It gets worse.

2           Even if he doesn't attend again, but  
3 the government gets new suspicion-inducing  
4 information not about Yonas but about the mosque  
5 itself, the -- the declaration likewise allows  
6 the government to relist. Any new fact not  
7 currently known to the government would allow  
8 Yonas to be relisted, consistent with the  
9 declaration.

10           And if he is relisted in either of  
11 those ways, that's recurrence of the challenged  
12 conduct. He is disadvantaged in the same  
13 fundamental way his complaint was meant to  
14 redress.

15           Imagine if Nike had promised Already  
16 not to bring any trademark claim based on  
17 currently available information but could sue  
18 for infringement based on new information.  
19 Under those facts, the Court couldn't have  
20 concluded that Already could move on with its  
21 business free from suit.

22           Second, the Courtright declaration  
23 does nothing to guarantee Fikre notice or a  
24 hearing if he is relisted and, therefore, does  
25 not address his procedural -- due process claim

1 at all.

2 The government's response is that he  
3 has no current plans to relist him, but the  
4 government insists on retaining the right to do  
5 so. And that's its prerogative, but if it does  
6 relist him, there is a hundred percent certainty  
7 that his procedural claim will recur.

8 Third, because the government hasn't  
9 disclosed either to Yonas or a court why he is  
10 listed -- why he was listed, a court can't  
11 possibly say anything clearly at all about  
12 whether recurrence is reasonably likely or not,  
13 and Mr. Fikre cannot move on with his life in  
14 the way the lawsuit was meant to allow.

15 He doesn't know why he was listed. He  
16 doesn't know what might cause him to be  
17 relisted. He doesn't know if the next time he  
18 worships at a mosque or travels abroad he might  
19 be relisted, massively disrupting his life once  
20 again.

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

25 I welcome the Court's questions.

1 JUSTICE THOMAS: How would the  
2 government's declaration have to be amend --  
3 amended in order to satisfy your notion of  
4 mootness?

5 MR. ABBAS: Yes, Your Honor. For the  
6 substantive due process claim, if the government  
7 submitted a declaration either to us or to the  
8 Court itself disclosing the reasons and made a  
9 promise that matched up with those reasons not  
10 to repeat them or invoke them or similar ones to  
11 them, we think that that could moot the  
12 substantive due process claim.

13 For the procedural due process claim,  
14 if the government described, okay, we didn't  
15 have notice, now there's notice, you didn't have  
16 a meaningful opportunity to rebut the evidence  
17 against you, now here's a meaningful opportunity  
18 to rebut the evidence against you, in doing  
19 that, they would be able to moot the procedural  
20 due process claim.

21 JUSTICE THOMAS: So you actually your  
22 -- you want repudiation then?

23 MR. ABBAS: No, Your Honor, we don't  
24 believe that repudiation is required. We don't  
25 think that the Ninth Circuit required

1 repudiation. But what we do -- and we -- but  
2 what we do -- is we agree with the government  
3 that repudiation is one kind of evidence that --  
4 that shows that the likelihood of recurrence is  
5 lower.

6 And, here, the evidence is not  
7 neutral. The government didn't take no position  
8 on its past conduct. They doubled down. And so  
9 that counts against the government in meeting  
10 its burden.

11 CHIEF JUSTICE ROBERTS: It -- it  
12 surely would be irresponsible for the government  
13 to say we're not going to put him on the No Fly  
14 List no matter what?

15 MR. ABBAS: Yes, Your Honor.

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

22 Now maybe we'll decide that that's not  
23 enough, but you can't really expect them to say  
24 more than that. He's not on the list, as for --  
25 as far as we know, any other reason he -- he's

1 not -- we're not on going to put him on the list  
2 for the same reasons.

3 MR. ABBAS: Well, for example, Your  
4 Honor, they could moot the procedural due  
5 process claim without disclosing any reasons at  
6 all about why Mr. Fikre was put on the list  
7 because that just deals with the procedures  
8 itself.

9 On the -- on the substance -- on the  
10 reasons, you're right, Your Honor, that it's --  
11 it's -- it's up to the government to decide  
12 whether to disclose or not to disclose. And if  
13 the government chooses not to disclose, that  
14 doesn't mean that they've lost the case.  
15 Instead, it just means that they have to defend  
16 it on the merits.

17 CHIEF JUSTICE ROBERTS: Well -- well,  
18 I appreciate that -- you're right, but that's  
19 not what I was saying. I want to know, am I  
20 right about the idea that there's no way they  
21 could issue -- say anything about what the  
22 future would hold in terms of the national  
23 security interests?

24 They can't say you've got a, you know,  
25 free pass, whatever you want to do, we're not



1 going to put you on the No Fly List?

2 MR. ABBAS: Of course not, Your Honor.  
3 And I think the government has made it easy by  
4 saying nothing at all about what it'll do in the  
5 future, but it could have made a limited  
6 promise. It could have said we disclosed -- we  
7 put him on the list for a mistake, and now we've  
8 addressed that mistake, and we think that this  
9 explanation shows that that mistake is unlikely  
10 to recur, or they said we -- we -- we disclose  
11 the reasons, we identified that they're illegal  
12 in X, Y, and Z manner, that's against our  
13 policy.

14 So they --

15 CHIEF JUSTICE ROBERTS: Well, but  
16 you're -- that's where I wonder if you're going  
17 back to the situation where you're insisting on  
18 a statement to the effect that they were wrong.  
19 It was -- in fact, you said it was a mistake or  
20 -- or whatever.

21 And mootness has never required that  
22 type of determination or that type of assertion.  
23 It's just solely -- it's forward-looking and  
24 that's the only -- you're not entitled to, to  
25 establish mootness, a determination that what

1 they did in the past was wrong.

2 MR. ABBAS: Yes, Your Honor, we agree  
3 with that, that repudiation is not required.  
4 And -- but repudiation is forward-looking, even  
5 though it deals with the past for one. If -- if  
6 -- if a party acknowledges that what they did  
7 was illegal, was wrong, or perhaps was not what  
8 they would want to do or how they want their  
9 program to work, that -- that's an example of a  
10 government moving away from its prior decision.

11 And the -- the -- the humble fact, the  
12 humble point, jurisprudential point of  
13 repudiation is that a party that steps away from  
14 what it's done in the past is less likely to  
15 repeat that behavior in the future. And that's  
16 --

17 CHIEF JUSTICE ROBERTS: Well, but in  
18 Already, we said no matter how vigorous the  
19 dispute remains between the parties, that's not  
20 the question.

21 MR. ABBAS: Yeah -- yes. And in  
22 Already, the -- the Nike had made a promise to  
23 Already that covered every shoe that it's  
24 currently making, every shoe that it had made in  
25 the past, and any future imitation of those

1 shoes.

2 That would be like, instead of the --  
3 the Courtright declaration saying currently  
4 available information, it would have said we --  
5 we disclose here are the reasons we put you on  
6 the list, we promise not to use those same  
7 reasons again in the future and enumerated them.  
8 That's not what the government did here.

9 And because the government didn't take  
10 -- didn't do -- didn't take one step towards  
11 Your Honor's position, it -- it -- it -- it  
12 simplifies this Court's analysis. There's --  
13 there's simply no repudiation. There's an  
14 embrace of their past conduct.

15 JUSTICE KAVANAUGH: Does that mean  
16 that if you're on the No Fly List, your case is  
17 never moot if the government is unwilling to say  
18 more than it said here?

19 MR. ABBAS: No, Your Honor. If -- if  
20 we were bringing this case today, I think that  
21 we wouldn't be able to make out standing. And  
22 so -- this is -- this case deals with a unique  
23 -- situation which, in my colleague's telling,  
24 is -- is -- is rare, where a person files a  
25 lawsuit and, at the time they file the lawsuit,

1 everybody agrees they're on the No Fly List and  
2 there's standing.

3           During the course of litigation, the  
4 government removes that person from the No Fly  
5 List. That doesn't make the case moot. That  
6 triggers the application of this Court's  
7 voluntary cessation doctrine to determine  
8 whether it is moot or isn't moot.

9           The application of the voluntary  
10 cessation doctrine is demanding. It assigns the  
11 government -- it assigns the party moving for  
12 mootness the burden, and it uses this language  
13 over and over and over again, absolutely clear.  
14 And I think, Your Honor, that the failure to  
15 disclose the reasons for the listing  
16 short-circuits this Court's analysis of whether  
17 or not they've met their burden. The --

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

21           MR. ABBAS: I -- I think, Your Honor,  
22 we fit within the situation described in Laidlaw  
23 where sometimes, when you're making a projection  
24 of what's going to happen in the future, you --  
25 the -- the -- the showing that you have to make

1 to demonstrate standing is going to be higher  
2 than the showing that you have to make to defeat  
3 mootness.

4 Here, in this case, we're -- we think  
5 that the -- where the burden is assigned is  
6 important and -- and what the case turns on.

7 JUSTICE JACKSON: Isn't the answer  
8 also that there's just like no basic  
9 redressability from the standing standpoint at  
10 this point in time? So, in other words, he's  
11 off the list now. If he showed up in court  
12 tomorrow not on the list, initiating a lawsuit  
13 and asking to be taken off the No Fly List as  
14 one of his, you know -- or even perhaps a  
15 declaration that when he was previously on the  
16 No Fly List, that was a problem, I would think  
17 there would be a legitimate argument on the  
18 government's part that he had no standing to  
19 proceed.

20 But what saves you in this case is  
21 that he actually initiated this when he did have  
22 standing. And the government concedes that.  
23 And so now the whole exercise becomes under what  
24 circumstance can the government stop the case  
25 that was already in motion at the time that it

1 was legitimately -- you know, stop a case that  
2 was legitimately started pursuant to Article  
3 III. It's on the government then to show that  
4 this is now moot as a result of something that  
5 they did.

6 MR. ABBAS: Yes, Your Honor, it is on  
7 the government. And -- and -- and, here, what's  
8 -- what underscores Your Honor's point is that  
9 Yonas Fikre doesn't -- he was living his  
10 law-abiding everyday life when the government  
11 put him on the No Fly List. He still doesn't  
12 know why he was put on the No Fly List.

13 And so I think that is -- because the  
14 No Fly List operates under that cloak of  
15 secrecy, that that creates a problem for them  
16 meeting their burden.

17 JUSTICE ALITO: Can I --

18 JUSTICE SOTOMAYOR: Would you answer  
19 --

20 JUSTICE ALITO: -- come back to the  
21 question of what might be said in a declaration  
22 that would be sufficient to show that it was  
23 sufficiently unlikely that he would be put back  
24 on the list? Short of repudiation or a change  
25 of circumstances, am I correct that your answer

1 is that there must be a disclosure of the  
2 reasons why he was on in the first place?

3 MR. ABBAS: For the substantive due  
4 process claim, yes, Your Honor, we think that a  
5 disclosure of some kind is the only way for  
6 establishing a baseline that the court can then  
7 compare a promise to.

8 JUSTICE ALITO: And suppose that's  
9 disclosed and you see, well, there was this  
10 combination of factors and the government  
11 inferred from that that the standard was met.  
12 Why would -- what kind of guarantee would that  
13 provide in the future that he would not be put  
14 back on if just one additional relevant factor  
15 were added? What would that achieve?

16 MR. ABBAS: Yeah, it -- it would  
17 depend, Your Honor, on the reasons that were  
18 disclosed. And I know, Your Honor, that's a  
19 frustrating answer to have to provide, but it --  
20 but it -- it turns on the reasons because,  
21 depending on what those reasons are, the court  
22 could reach a conclusion that recurrence is very  
23 likely because this is the normal and typical  
24 operation of the program, perhaps the program  
25 allows for the consideration of unlawful

1 reasons, or it was aberrational, there was some  
2 kind of exceptional circumstance that gave rise  
3 to his listing.

4 And the effectiveness of the  
5 declaration would be -- would depend on the --  
6 the reasons disclosed.

7 JUSTICE ALITO: Well, what if there  
8 are no unlawful reasons? Is that central to  
9 your argument, that there was an unlawful reason  
10 that he was put on for a reason that violates  
11 his free exercise right?

12 MR. ABBAS: At the voluntary cessation  
13 stage, Your Honor, it's just the challenged  
14 conduct. The court can defer its adjudication  
15 of the lawfulness of the procedures, the  
16 lawfulness of the reasons to the merits. Right  
17 now, yes, we challenged the -- the reasons why  
18 they listed him and we challenged the procedures  
19 why they listed him.

20 JUSTICE ALITO: But you -- you -- you  
21 challenged the lawfulness of -- of individual  
22 reasons or you challenged the conclusion that  
23 the evidence that was available to the  
24 government was insufficient -- was sufficient to  
25 satisfy the -- the -- the -- the standard?



1 Which or both?

2 MR. ABBAS: It -- it could be both,  
3 Your Honor. The -- both in the sense that the  
4 government used the bare fact, for example, of  
5 his lawful, peaceful associations in his  
6 religious community as a basis for his listing,  
7 or it could be that the standard was inadequate  
8 -- was so low that it allowed anything to sail  
9 right through to the list.

10 JUSTICE KAGAN: If -- if --

11 JUSTICE SOTOMAYOR: Can -- can --

12 JUSTICE KAGAN: If -- if we thought  
13 that the reasonable way to deal with this really  
14 quite difficult situation is for the government  
15 to do what it does on the merits part of the  
16 cases and go in and tell the judge in -- in  
17 camera why the person was listed and why the  
18 person was taken off and what it has to say  
19 about why the person won't be taken off, do you  
20 know anything about how that process works? And  
21 is -- is counsel part of that process typically  
22 when it's a substantive issue? And do you want  
23 to say anything about whether counsel has to be  
24 part of that process?

25 MR. ABBAS: Sure, Your Honor. A few

1 thoughts.

2           The -- the government, generally  
3 speaking, does provide some kind of explanation  
4 as to the reasons for a person's watchlisting  
5 publicly even. And so this is an exceptional  
6 case where they provided no information at all.

7           In -- in other watchlist cases, the  
8 government, for example, in *Latif v. Holder*,  
9 provided an extensive series of ex parte in  
10 camera declarations to supplement some of the  
11 public descriptions, and I believe there was a  
12 mixture of access that was provided to counsel  
13 in -- in that case.

14           But some of the information that gets  
15 disclosed ends up being designated as sensitive  
16 security information. We -- we've gotten  
17 cleared on that -- on that basis.

18           But, you know -- so there are all  
19 those options, but the government had all those  
20 options before they got to this Court. And so,  
21 before 2018, they decided -- in the first  
22 application of voluntary cessation doctrine to  
23 this case, they didn't provide any declaration.  
24 After the first application, they provided this  
25 declaration.

1                   And so we think that the -- the -- the  
2 government had the opportunity to muster what  
3 evidence it wanted on -- on the mootness  
4 question, and -- and it's provided this to the  
5 Court.

6                   JUSTICE GORSUCH: Have -- have you --  
7 have you suggested any of these alternatives or  
8 offered to reach an accommodation with the  
9 government in this case in this fashion?

10                  MR. ABBAS: I believe there's a --  
11 there is a protective order in place currently  
12 at the -- or there was --

13                  JUSTICE GORSUCH: Beyond a standard  
14 protective order, have -- have you -- have you  
15 made any attempts to settle this case with the  
16 government?

17                  MR. ABBAS: Yes, Your Honor, we have.  
18 We've -- we've done -- I think, before the Ninth  
19 Circuit's decision, there was a mediation, and  
20 the mediation was in part about what is the  
21 government willing to say, and it turns out that  
22 the government is not willing to say a word more  
23 than what's in the Courtright declaration.

24                  JUSTICE GORSUCH: Okay. Worth a try.

25                         (Laughter.)

1 JUSTICE SOTOMAYOR: Can we go back to  
2 Justice Alito's earlier question of your -- of  
3 the opposing side? What's the remedy you're  
4 seeking and how do you have standing for that  
5 remedy?

6 MR. ABBAS: Yes.

7 JUSTICE SOTOMAYOR: Let's clarify.  
8 Are you seeking an injunction? Are you seeking  
9 just a declaration? And why would the  
10 declaration not violate the law that the other  
11 side claims it would?

12 MR. ABBAS: Yes, Your Honor. We're --  
13 we're seeking an injunction and a declaratory  
14 judgment.

15 The -- the injunction is the same  
16 injunction that we saw at the beginning of the  
17 case to prevent the government from using the  
18 unlawful reasons that it did to list him and  
19 from using the same unlawful procedures that it  
20 did previously.

21 And the reason that injunction is  
22 still viable and live is because the voluntary  
23 cessation doctrine isn't -- isn't exactly an  
24 exception to mootness. It's when mootness  
25 exists. And so, here, the -- Mr. Fikre has an

1 interest in the government not returning to its  
2 old ways, and so it maintains the interest in  
3 the injunction.

4 But there's even more concrete things.  
5 The government, by standing by its prior  
6 decision, indicates an interest in continuing to  
7 use his past No Fly List status in the future.  
8 Among many of the things that the government is  
9 likely to consider about Yonas Fikre when it  
10 runs into him in the future is the fact that the  
11 government for a period of five years put him on  
12 the No Fly List. And so the Court, this Court  
13 or another, lower courts, can order the  
14 government to not use his past No Fly List  
15 status for any particular purpose.

16 Annotate the records, that's something  
17 that the government has been ordered to do by a  
18 court in -- after the only No Fly List trial in  
19 this nation's history in Ibrahim v. DHS. The  
20 trial judge ordered the government to annotate  
21 the No Fly List record that still maintained --  
22 that still existed, expunge the ones that they  
23 could. And so we think that there's plenty for  
24 the Court to do on the injunctive side.

25 On the -- the -- this -- the

1 declaratory judgment, Yonas, the -- the reason  
2 he brought this lawsuit was so that he could go  
3 about his everyday life, and that is what ran  
4 him into the No Fly List. A -- a -- a -- a  
5 decision, a declaratory judgment spelling out  
6 what the government's authorities are, what  
7 Yonas's rights should be, will have a -- a --  
8 meaning to him.

9 JUSTICE ALITO: I -- I still don't  
10 understand exactly what you want. You wouldn't  
11 be satisfied simply with an injunction that says  
12 the government is enjoined from using evidence  
13 that would be in violation of the First  
14 Amendment? That wouldn't satisfy you, right?

15 MR. ABBAS: I don't think so, Your  
16 Honor. I think we would have to get very  
17 specific.

18 JUSTICE ALITO: All right. So suppose  
19 one of the reasons why he was put on was that he  
20 traveled to Sudan, and suppose the passage of  
21 time convinced the government that the fact that  
22 he traveled to Sudan at some point -- I'm just  
23 speculating, this is not -- has anything to do  
24 with the real facts -- but let's suppose that  
25 that's the case.

1           The passage of time means that having  
2 traveled to Sudan in the future was no longer  
3 much -- carried much probative weight and,  
4 therefore, he didn't deserve to continue to be  
5 on the -- on the No Fly List.

6           So what do you want? Do you want,  
7 like, an advisory opinion, if you go back to  
8 Sudan, you might get back on or, if you go to  
9 any other country about which there might be  
10 some suspicion, if you go to Turkmenistan -- I'm  
11 looking at the whole list of countries that are  
12 on these various lists -- if you go to  
13 Turkmenistan, maybe that'll put you over the --  
14 over the top, or if you go to Eritrea? What  
15 exactly do you -- could possibly be done?

16           MR. ABBAS: Yeah, it's -- I think it's  
17 a difficult fact-intensive question about what  
18 injunction would be appropriate, but the  
19 injunction might be like a higher level of  
20 generality. Perhaps it's the government is  
21 required to make a showing that -- of criminal  
22 conduct as part of a person's listing.

23           So I -- I think that there are  
24 possibilities --

25           JUSTICE ALITO: Well, that would be a

1 huge change.

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

4 JUSTICE KAVANAUGH: That would be  
5 dramatic. Not to interrupt.

6 MR. ABBAS: Yeah. And I'm just doing  
7 that as an illustrative change of something that  
8 the government could do that would not be  
9 specific to Yonas's fact.

10 But the opposite is also true. The  
11 government could do something that's only  
12 specific to Yonas Fikre. For example, if the  
13 procedural safeguards that the Court put in  
14 place -- that the government put in place were  
15 not generally applicable but were only specific  
16 to Yonas Fikre, this Court could look at those  
17 procedural safeguards and say, hey, before the  
18 government relists him, they're going to call  
19 this lawyer and they're going to call -- it's  
20 going to go to this committee and they're going  
21 to make sure that the terms of the Courtright  
22 declaration are implemented.

23 So there's a way for the government to  
24 do it specific to Yonas. There's a way for the  
25 government to do it program-wide.



1 JUSTICE ALITO: But you don't --  
2 you're not satisfied with just the Courtright  
3 declaration. That isn't going to do anything  
4 for you. I still don't -- I don't understand,  
5 like, he would be entitled to an advisory  
6 opinion about -- you're worried, and I  
7 understand it, that he might do this, that, or  
8 the other thing that he thinks is innocent and  
9 that might put him over the top and get him back  
10 on the list.

11 But you want a -- a -- you know, you  
12 want to have him -- he needs to have a number he  
13 can call up? I'm thinking of going to this  
14 particular mosque. If I do that, is that going  
15 to put me on the list? I just don't understand  
16 how you think this is going to work.

17 MR. ABBAS: Yes, Your Honor. I think  
18 that the only way to determine that would be to  
19 know the -- the reasons why he was listed and --  
20 and to make sure that the government is not in a  
21 position to invoke those same unlawful reasons  
22 again.

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

24 JUSTICE KAVANAUGH: What --

25 JUSTICE ALITO: -- not unlawful

1 reasons? So the reason -- one of the reasons  
2 was that he was seen socializing with Mr. X, and  
3 Mr. X has terrorist associations. So now he  
4 wants -- he wants to associate with Mr. Y or Mr.  
5 Z.

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

11 That could be -- the -- the government  
12 could take a position that it's not allowed to  
13 use the lawful, peaceful associations of Yonas,  
14 and that would solve Mr. -- Mr. Fikre's  
15 association with Mr. X, as well as a future  
16 association with Mr. Y in terms --

17 JUSTICE ALITO: Well, you're -- you're  
18 --

19 JUSTICE KAVANAUGH: This whole thing's  
20 based on associations, though.

21 JUSTICE ALITO: You're begging the  
22 question when you say they're lawful, peaceful  
23 associations. Let's say all they know is that  
24 he's associating with a particular person and  
25 that's a suspicious person and they don't know

1 why he's associating with the person.

2 MR. ABBAS: Yeah. And the question  
3 would be --

4 JUSTICE ALITO: And you want -- you  
5 want -- you want them to be unable to rely on  
6 that?

7 MR. ABBAS: Your Honor, I think that  
8 gets into the merits now, and the -- the merits  
9 would for procedural due process require a  
10 balancing, a balancing of the government's  
11 interests, a balancing of the alternatives  
12 available to the government and pursuing the  
13 interests, as well as the risk of erroneous  
14 deprivation.

15 The stronger the reason that the  
16 government has for the deprivation, the -- the  
17 lower the risk of erroneous deprivation is going  
18 to be. And so, if the government has a -- a --  
19 an overwhelming reason to put Yonas on the No  
20 Fly List like as the hypotheticals suggest,  
21 that's going to -- that's going to be enough to  
22 get the government where it wants to go with  
23 this list.

24 JUSTICE JACKSON: And from our  
25 standpoint, just in terms of how we're supposed

1 to be looking at this, at least as I thought,  
2 aren't we isolating the merits by essentially  
3 assuming for the purpose of the determination of  
4 either standing or mootness that you're right on  
5 the merits, that the government has engaged in  
6 unlawful conduct here with respect to how they  
7 put you on -- your client on the list or  
8 whatever.

9 And the question is separately whether  
10 or not this is moot or whether or not -- so it's  
11 not -- I didn't understand that we were to be  
12 concerned about whether you're right on the  
13 merits of your argument. For the purpose of  
14 this, we say you are, and then we evaluate  
15 mootness and standing in light of that?

16 MR. ABBAS: I think that's right, Your  
17 Honor. And our vernacular is the challenged  
18 conduct to -- to communicate Your Honor's point  
19 that at the voluntary cessation stage, we're --  
20 we're just trying to see if the government has  
21 done something so that the challenged conduct  
22 is -- is not likely to recur.

23 And the recurrent -- the -- the merits  
24 questions are -- are reserved for --

25 JUSTICE ALITO: Well, I do understand

1 that. The reason why I was going into those  
2 questions was because I wanted to know what, if  
3 anything, the government could put in a  
4 declaration that would satisfy you. That's the  
5 reason why I went into it.

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

7 JUSTICE ALITO: Do you think that's  
8 wrong?

9 MR. ABBAS: Well, I -- I -- I think  
10 that there are things that the government could  
11 put in its declaration. They could put a  
12 description of the notice, the opportunity to be  
13 heard in the declaration. They could disclose  
14 the reasons and make a promise that matches  
15 those reasons.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 MR. ABBAS: Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Thomas?

21 Justice Alito?

22 Justice Jackson?

23 Thank you very much.

24 Rebuttal, counsel.

25

1 REBUTTAL ARGUMENT OF SOPAN JOSHI  
2 ON BEHALF OF THE PETITIONERS

3 MR. JOSHI: Thank you, Your Honor.  
4 Just a few quick points.

5 I think the discussion right now just  
6 indicates why there is no Article III case or  
7 controversy here because it really isn't  
8 redressable. I mean, I heard my friend agree  
9 that if he brought the suit today or even a day  
10 after I presume being taken off the list, there  
11 would be no standing.

12 And if that's true, I -- I don't think  
13 you should interpret mootness as being so  
14 disconnected from standing that we could find  
15 mootness here even though he's not on the list,  
16 hasn't been on it in eight years, and is  
17 guaranteed that that decision to remove him is  
18 sort of sticky, that it won't be revisited and  
19 he won't be put back on, unless there's some new  
20 information that warrants that course of action.  
21 That's true with you or I or anyone else. And  
22 there's no reason why he has a live case just  
23 because it also happens to be true with respect  
24 to him.

25 Justice Alito, I think you -- you

1 asked him, you know, what could the government  
2 say in a declaration that would satisfy him?  
3 And I -- I think he had trouble answering that  
4 for a reason. There really is nothing we could  
5 say that would satisfy his test for mootness.  
6 So it would always have to go to the merits.

7           And to be clear, many of the things  
8 that he wanted in response to Justice Thomas's  
9 questions for a declaration to say were  
10 essentially repudiation. And if I leave you  
11 here with one thought today, it's that  
12 repudiation cannot be an element of the test for  
13 mootness. So, at a minimum, the Ninth Circuit's  
14 test is wrong. No one seems to be defending it,  
15 but I just want to make that clear. It sounded  
16 like there was maybe some appetite for a holding  
17 that says, okay, repudiation is not required,  
18 the Ninth Circuit is wrong, but if the  
19 government is going to keep the underlying  
20 information classified, then a district judge  
21 should review it in camera ex parte to evaluate  
22 the reasonable likelihood or reasonable  
23 expectation of recurrence.

24           And I guess, as I said, I would -- I  
25 would push back on that, but the -- but the one

1 thing I really want to emphasize is, to the  
2 extent I think my friend embraced that, he  
3 seemed to keep saying in terms of, well, you  
4 know, Mr. Fikre doesn't know what it is he did;  
5 Mr. Fikre needs to know what he can or can't do  
6 before being putting on the list. And that is  
7 absolutely not how this should work.

8           Even if you think a court should  
9 evaluate the evidence, it should be in camera,  
10 ex parte. And at the end of the day, what's  
11 going to be the result of that? Let's say a  
12 court looks at this record, looks at the reasons  
13 he was placed on the list, looks at the reasons  
14 he was taken off the list, and then makes a  
15 determination that it is or isn't reasonably  
16 likely to recur. What is a court going to say?  
17 He's not going to give Respondent any  
18 information about what that classified  
19 information is.

20           And so Respondent's going to be in  
21 exactly the same position as if this Court just  
22 recognizes that, in this context, the standard  
23 for listing is so unusual, which is a U.S.  
24 citizen posing a threat of engaging in one of  
25 four enumerated terrorist activities, that just



1 as the Court in Lyons was unwilling for Article  
2 III purposes to expect the plaintiff even to be  
3 arrested again, so too should it not reasonably  
4 expect its citizen to pose a threat of engaging  
5 in terrorist activities and then just say what I  
6 think should be obvious from common sense, which  
7 is there is no case or controversy here any  
8 longer, there is no injunctive or declaratory  
9 relief that could be issued that would solve any  
10 injury he currently or imminently will suffer,  
11 and call this case what it is, moot.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 The case is submitted.

15 (Whereupon, at 1:08 p.m., the case was  
16 submitted.)

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## Official

<b>1</b>	<b>actual</b> <sup>[1]</sup> 38:7 <b>actually</b> <sup>[10]</sup> 4:14 5:17 26:6 34:23 39:21 48:16 57:6,12 61:21 68:21 <b>additional</b> <sup>[4]</sup> 11:18 31:21 54:17 70:14 <b>address</b> <sup>[2]</sup> 12:17 31:17 <b>addressed</b> <sup>[1]</sup> 64:8 <b>adds</b> <sup>[1]</sup> 55:9 <b>adjudication</b> <sup>[1]</sup> 71:14 <b>administrative</b> <sup>[2]</sup> 49:1,11 <b>admitted</b> <sup>[1]</sup> 23:24 <b>advisory</b> <sup>[2]</sup> 4:12 78:7 <b>affect</b> <sup>[2]</sup> 42:1 45:16 <b>affects</b> <sup>[1]</sup> 35:19 <b>Africa</b> <sup>[1]</sup> 27:23 <b>agency</b> <sup>[1]</sup> 49:12 <b>agree</b> <sup>[9]</sup> 11:1 12:21 16:23 32:2 38:12 45:2 62:2 65:2 85:8 <b>agrees</b> <sup>[2]</sup> 58:13 67:1 <b>ahead</b> <sup>[1]</sup> 30:12 <b>AL</b> <sup>[1]</sup> 1:4 <b>al-Qaeda</b> <sup>[1]</sup> 27:23 <b>ALITO</b> <sup>[19]</sup> 10:18 11:4,9,23 25:24 31:14 36:18 69:17 70:8 71:7 77:9,18 80:1,23 81:17,21 82:4 84:7,21 <b>Alito's</b> <sup>[1]</sup> 75:2 <b>alive</b> 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