

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 - - - - -
10
11
12 Washington, D.C.
13 Monday, January 8, 2024
14
15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States
17 at 11:47 a.m.
18
19 APPEARANCES:
20 SOPAN JOSHI, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf
22 of the Petitioners.
23 GADEIR ABBAS, ESQUIRE, Washington, D.C.; on behalf of
24 the Respondent.
25

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P R O C E E D I N G S

(11:47 a.m.)

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

Mr. Joshi.

ORAL ARGUMENT OF SOPAN JOSHI
ON BEHALF OF THE PETITIONERS

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

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

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

1 gave rise to the lawsuit.

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

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

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

25 The government has litigated many No

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

6 I welcome the Court's questions.

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

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

14 MR. JOSHI: So two responses.

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

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

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

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

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

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

25 JUSTICE THOMAS: Yeah, I understand

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

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

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

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

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

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

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

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

25 JUSTICE SOTOMAYOR: All of the -- all

1 of the facts are the same.

2 MR. JOSHI: We -- we --

3 JUSTICE SOTOMAYOR: Just answer the
4 question.

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

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

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

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

18 MR. JOSHI: Huh?

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

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

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

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

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

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

1 agree with that?

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

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

8 MR. JOSHI: Well --

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

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

16 It's -- 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 because

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 JUSTICE KAGAN: Yes what?

3 MR. JOSHI: Yes --

4 JUSTICE KAVANAUGH: He can go back on?

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

7 MR. JOSHI: Correct.

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

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

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

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

1 and you took him off the list.

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

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

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

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

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

1 back on the list at a future time.

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

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

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

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

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

6 I think the same analysis would work
7 --

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

16 So it's --

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

25 So it is going to be based on a

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

8 JUSTICE JACKSON: But, Mr. Joshi --

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

11 CHIEF JUSTICE ROBERTS: But suppose --

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

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

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

25 MR. JOSHI: And for Article III

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

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

8 MR. JOSHI: It was a standing case.

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

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

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

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

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

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

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

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

3 MR. JOSHI: Right.

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

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

14 MR. JOSHI: Yes.

15 JUSTICE JACKSON: Okay.

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

17 JUSTICE JACKSON: Okay.

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

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

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

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

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

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

25 MR. JOSHI: And I think that if you

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

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

13 MR. JOSHI: So --

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

16 MR. JOSHI: Yeah. So --

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

21 JUSTICE KAGAN: Irresponsible.

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

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

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

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

13 JUSTICE KAVANAUGH: Right.

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

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

19 MR. JOSHI: Yeah.

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

23 MR. JOSHI: It is, but --

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

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

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

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

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

13 JUSTICE KAVANAUGH: I -- yeah.

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

23 So I would guess at that point --

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

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

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

9 MR. JOSHI: Right. And --

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

13 MR. JOSHI: I --

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

17 MR. JOSHI: I --

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

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

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

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

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

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

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

4 MR. JOSHI: No. No.

5 JUSTICE JACKSON: -- because --

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

16 JUSTICE BARRETT: Mr. --

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

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

1 reasonable expectation --

2 JUSTICE GORSUCH: Well, counsel --

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

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

8 JUSTICE BARRETT: No, no.

9 JUSTICE GORSUCH: No, please go ahead.

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

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

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

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

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas?

11 Justice Alito?

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

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

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

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

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

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

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

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

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

1 and act in bad faith at time two.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor?

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

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

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

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

24 JUSTICE SOTOMAYOR: No, because you --

25 MR. JOSHI: -- based on the currently

1 available information.

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

4 MR. JOSHI: Well, but --

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

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

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

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

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

1 somebody put back on a list?

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

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

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

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

25 MR. JOSHI: Yeah. So, obviously,

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

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

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

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

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

1 want to limit the circumstances in which you do
2 it to where it's really necessary.

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

14 JUSTICE KAGAN: Well, that suggests --

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

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

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

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

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

11 JUSTICE KAGAN: Thank you, Mr. Joshi.

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

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 MR. JOSHI: So that is exactly what we
25 do when these cases get to the merits. If he

1 had remained on the No Fly List, that's what
2 would have happened. That's what happens in the
3 other cases. There's no question, Justice
4 Gorsuch.

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

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

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

23 MR. JOSHI: That's correct.

24 JUSTICE GORSUCH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

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

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

17 JUSTICE KAVANAUGH: Right.

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

22 JUSTICE KAVANAUGH: I agree.

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

1 JUSTICE KAVANAUGH: I -- I'm very
2 sympathetic to that, so I -- I accept that.
3 Okay.

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

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

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

1 MR. JOSHI: Yeah. So two -- two
2 responses to that. One, I -- I think you hit
3 the nail on the head with the dynamic nature of
4 these things. It's not like, you know, the
5 church is either are or aren't entitled --

6 JUSTICE KAVANAUGH: Yes.

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

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

21 And so then the second part of my
22 answer is I think we need to remember that
23 voluntary cessation is a judge-made exception to
24 Article III. We're still -- we're always
25 implementing Article III. And I think,

1 therefore, it's critical not to stray or become
2 untethered from the purposes of the voluntary
3 cessation doctrine and why this Court developed
4 it. It was to prevent gamesmanship and docket
5 manipulation to avoid judicial review,
6 post-certiorari maneuvers, other sorts of
7 things.

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

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

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

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

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

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

1 briefs are filed but before a district court
2 decision. And then some are removed after the
3 decision. Some are removed on appeal.

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

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

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

1 redress process.

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

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

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

16 MR. JOSHI: No.

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

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

25 We do think the national security

1 context does matter for an evaluation of the
2 facts on the ground. I think it's Respondent
3 who would have a heightened rule for government
4 officials.

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

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

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

25 JUSTICE JACKSON: But doesn't -- but

1 aren't you skipping over the government's
2 assessment of whether or not that's happening
3 and the basis upon which the government is
4 making that assessment?

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

13 MR. JOSHI: I have told you the
14 criteria.

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

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

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

24 So there is some policy that the
25 government looks at in each case when it's

1 assessing, on the totality of the circumstances,
2 whether or not a person qualifies, right?

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

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

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

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

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

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

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

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

1 currently available information.

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

6 JUSTICE JACKSON: All right. Let me
7 ask you about the standing question real quick.
8 Does the government dispute that Mr. Fikre had
9 standing at the time that he filed his suit in
10 2013?

11 MR. JOSHI: No.

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

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

1 injuries to keep the case alive.

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

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

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

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

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

3 JUSTICE JACKSON: Yes, he did.

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

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

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Abbas?

24 ORAL ARGUMENT OF GADEIR ABBAS

25 ON BEHALF OF THE RESPONDENT

1 MR. ABBAS: Mr. Chief Justice and may
2 it please the Court:

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

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

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

25 And if he is relisted in either of

1 those ways, that's recurrence of the challenged
2 conduct. He is disadvantaged in the same
3 fundamental way his complaint was meant to
4 redress.

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

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

17 The government's response is that he
18 has no current plans to relist him, but the
19 government insists on retaining the right to do
20 so. And that's its prerogative but if it does
21 relist him, there is 100 percent certainty that
22 his procedural claim will recur.

23 Third, because the government hasn't
24 disclosed either to Yonas or a court why he is
25 listed -- why he was listed, a court can't

1 possibly say anything clearly at all about
2 whether recurrence is reasonably likely or not.
3 And Mr. Fikre cannot move on with his life in
4 the way the lawsuit was meant to allow.

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

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

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

20 MR. ABBAS: Yes, Your Honor. For the
21 substantive due process claim, if the government
22 submitted a declaration, either to us or to the
23 Court itself, disclosing the reasons and made a
24 promise that matched up with those reasons not
25 to repeat them or invoke them or similar ones to

1 them, we think that that could moot the
2 substantive due process claim.

3 For the procedural due process claim,
4 if the government describes, okay, we didn't
5 have notice, now there's notice. You didn't
6 have a meaningful opportunity to rebut the
7 evidence against you? Now here's a meaningful
8 opportunity to rebut the evidence against you.

9 In doing that, they would be able to
10 moot the procedural due process claim.

11 JUSTICE THOMAS: So you actually --
12 you want repudiation then?

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

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

25 CHIEF JUSTICE ROBERTS: It -- it

1 surely would be irresponsible for the government
2 to say we're not going to put him on the No Fly
3 List no matter what?

4 MR. ABBAS: Yes, Your Honor.

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

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

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

23 On the -- on the -- on the reasons,
24 you're right, Your Honor, that it's -- it's --
25 it's up to the government to decide whether to

1 disclose or not to disclose. And if the
2 government chooses not the disclose, that
3 doesn't mean that they've lost the case.
4 Instead it just means they have to defend it on
5 the merits.

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

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

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

1 Z manner, that's against our policy.

2 So --

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

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

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

24 And the -- the -- the humble fact, the
25 humble point jurisprudential point of

1 repudiation is that a party that steps away from
2 what it's done in the past is less likely to
3 repeat that behavior in the future. And that's
4 --

5 CHIEF JUSTICE ROBERTS: But in Already
6 we said no matter how vigorous the dispute
7 remains between the parties, that's not the
8 question.

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

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

21 And because the government didn't take
22 -- didn't do -- didn't take one step towards
23 Your Honor's position, it -- it -- it -- it
24 simplifies this Court's analysis. There's --
25 there's simply no repudiation. There's an

1 embrace of their past conduct.

2 JUSTICE KAVANAUGH: Does that mean
3 that if you're not No Fly List your case is
4 never moot, if the government is unwilling to
5 say more than it said here?

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

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

21 The application of the voluntary
22 cessation doctrine is demanding. It assigns the
23 government -- it assigns the party moving for
24 mootness the burden, and it uses this language
25 over and over and over again, absolutely clear.

1 And I think, Your Honor, that the failure to
2 disclose the reasons for the listing
3 short-circuits this Court's analysis of whether
4 or not they've met their burden. The --

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

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

16 Here, in this case, we're -- we think
17 that the -- where the burden is assigned is
18 important and -- and what the case turns on.

19 JUSTICE JACKSON: Isn't the answer
20 also that there's just like no basic
21 redressability from the standing standpoint at
22 this point in time? So, in other words, he's
23 off the list now. If he showed up in court
24 tomorrow not on the list, initiating a lawsuit
25 and asking to be taken off the No Fly List as

1 one of his, you know -- or even perhaps a
2 declaration that when he was previously on the
3 No Fly List, that was a problem, I would think
4 there would be a legitimate argument on the
5 government's part that he had no standing to
6 proceed.

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

18 MR. ABBAS: Yes, Your Honor, it is on
19 the government. And -- and -- and, here, what
20 -- what underscores Your Honor's point is that
21 Yonas Fikre doesn't -- he was living his
22 law-abiding everyday life when the government
23 put him on the No Fly List. He still doesn't
24 know why he was put on the No Fly List.

25 And so I think that is -- because the

1 No Fly List operates under that cloak of
2 secrecy, that that creates a problem for them
3 meeting their burden.

4 JUSTICE ALITO: Can I --

5 JUSTICE SOTOMAYOR: Would you answer
6 --

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

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

20 JUSTICE ALITO: And suppose that's
21 disclosed and you see, well, there was this
22 combination of factors and the government
23 inferred from that that the standard was met.
24 Why would -- what kind of guarantee would that
25 provide in the future that he would not be put

1 back on if just one additional relevant factor
2 were added? What would that achieve?

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

15 And the effectiveness of the
16 declaration would be -- would depend on the --
17 the reasons disclosed.

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

23 MR. ABBAS: At the voluntary cessation
24 stage, Your Honor, it's just the challenged
25 conduct. The court can defer its adjudication

1 of the lawfulness of the procedures, the
2 lawfulness of the reasons to the merits. Right
3 now, yes, we challenged the reasons why they
4 listed him and we challenged the procedures why
5 they listed him.

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

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

21 JUSTICE KAGAN: If -- if --

22 JUSTICE SOTOMAYOR: Can -- go ahead.

23 JUSTICE KAGAN: If -- if we thought
24 that the reasonable way to deal with this really
25 quite difficult situation is for the government

1 to do what it does on the merits part of the
2 cases and go in and tell the judge in -- in
3 camera why the person was listed and why the
4 person was taken off and what it has to say
5 about why the person won't be taken off, do you
6 know anything about how that process works? And
7 is -- is counsel part of that process typically
8 when it's a substantive issue? And do you want
9 to say anything about whether counsel has to be
10 part of that process?

11 MR. ABBAS: Sure, Your Honor. A few
12 thoughts.

13 The government, generally speaking,
14 does provide some kind of explanation as to the
15 reasons for a person's watch-listing publicly
16 even. And so this is an exceptional case where
17 they provided no information at all.

18 In -- in other watch list cases, the
19 government, for example, in *Latif v. Holder*,
20 provided an extensive series of ex parte in
21 camera declarations to supplement some of the
22 public descriptions, and I believe there was a
23 mixture of access that was provided to counsel
24 in -- in that case.

25 But some of the information that gets

1 disclosed ends up being designated as sensitive
2 security information. We've gotten cleared on
3 that -- on that basis.

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

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

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

20 MR. ABBAS: I believe there's a --
21 there is a protective order in place currently
22 at the -- or there was --

23 JUSTICE GORSUCH: Beyond a standard
24 protective order, have you -- have you made any
25 attempts to settle this case with the

1 government?

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

9 JUSTICE GORSUCH: Worth a try.

10 (Laughter.)

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

16 MR. ABBAS: Yes.

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

22 MR. ABBAS: Yes, Your Honor. We're --
23 we're seeking an injunction and a declaratory
24 judgment.

25 The -- the injunction is the same

1 injunction that we saw at the beginning of the
2 case to prevent the government from using the
3 unlawful reasons that it did to list him and
4 from using the same unlawful procedures that it
5 did previously.

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

14 But there's even more concrete things
15 that the government, by standing by its prior
16 decision, indicates an interest in continuing to
17 use his past No Fly List status in the future.
18 Among many of the things that the government is
19 likely to consider about Yonas Fikre when it
20 runs into him in the future is the fact that the
21 government for a period of five years put him on
22 the No Fly List. And so the Court, this Court
23 or other lower courts can order the government
24 to not use his past No Fly List status for any
25 particular purpose.

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

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

18 JUSTICE ALITO: I -- I still don't
19 understand exactly what you want. You wouldn't
20 be satisfied simply with an injunction that says
21 the government is enjoined from using evidence
22 that would be in violation of the First
23 Amendment? That wouldn't satisfy you, right?

24 MR. ABBAS: I don't think so, Your
25 Honor. I think we would have to get very

1 specific.

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

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

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

25 MR. ABBAS: Yeah, it's -- I think it's

1 a difficult fact-intensive question about what
2 injunction would be appropriate, but the
3 injunction might be like a higher level of
4 generality. Perhaps it's the government is
5 required to make a showing that -- of criminal
6 conduct as part of a person's listing.

7 So I -- I think that there are
8 possibilities --

9 JUSTICE ALITO: Well, that would be a
10 huge change.

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

13 JUSTICE KAVANAUGH: That would be
14 dramatic. Not to interrupt.

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

19 But the opposite is also true. The
20 government could do something that's only
21 specific to Yonas Fikre. For example, if the
22 procedural safeguards that the Court put in
23 place -- that the government put in place were
24 not generally applicable but were only specific
25 to Yonas Fikre, this Court could look at those

1 procedural safeguards and say, hey, before the
2 government relists him, they're going to call
3 this lawyer and they're going to call -- it's
4 going to go to this committee and they're going
5 to make sure that the terms of the Courtright
6 declaration are implemented.

7 So there's a way for the government to
8 do it specific to Yonas. There's a way for the
9 government to do it program-wide.

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

20 But you want a -- a -- you know, you
21 want to have him -- he needs to have a number he
22 can call up? I'm thinking of going to this
23 particular mosque. If I do that, is that going
24 to put me on the list? I just don't understand
25 how you think this is going to work.

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

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

8 JUSTICE KAVANAUGH: What --

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

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

20 That could be -- the government could
21 take a position that it's not allowed to use the
22 lawful, peaceful associations of Yonas, and that
23 would solve Mr. -- Mr. Fikre's association with
24 Mr. X, as well as a future association with Mr.
25 Y in terms --

1 JUSTICE ALITO: Well, you're -- you're
2 --

3 JUSTICE KAVANAUGH: This whole thing's
4 based on associations, though.

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

11 MR. ABBAS: Yeah. And the question
12 would be --

13 JUSTICE ALITO: You want -- you
14 want -- you want them to be unable to rely on
15 that?

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

23 The stronger the reason that the
24 government has for the deprivation, the -- the
25 lower the risk of erroneous deprivation is going

1 to be. And so, if the government has a -- a --
2 an overwhelming reason to put Yonas on the No
3 Fly List like as the hypotheticals suggest,
4 that's going to -- that's going to be enough to
5 get the government where it wants to go with
6 this case.

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

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

24 MR. ABBAS: I think that's right, Your
25 Honor. And our vernacular is the challenged

1 conduct to -- to communicate Your Honor's point
2 that at the voluntary cessation stage, we're --
3 we're just trying to see if the government has
4 done something so that the challenged conduct
5 is -- is not likely to recur.

6 And the recurrent -- the -- the merits
7 questions are -- are reserved for --

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

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

15 JUSTICE ALITO: Do you think that's
16 wrong?

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

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 MR. ABBAS: Thank you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Justice

3 Thomas?

4 Justice Alito?

5 Justice Jackson?

6 Thank you very much.

7 Rebuttal, counsel.

8 REBUTTAL ARGUMENT OF SOPAN JOSHI

9 ON BEHALF OF THE PETITIONERS

10 MR. JOSHI: Thank you, Your Honor.

11 Just a few quick points.

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

19 And if that's true, I don't think you
20 should interpret mootness as being so
21 disconnected from standing that we could find
22 mootness here even though he's not on the list,
23 hasn't been on it in eight years, and is
24 guaranteed that that decision to remove him is
25 sort of sticky, that it won't be revisited and

1 he won't be put back on, unless there's some new
2 information that warrants that course of action.
3 That's true with you or I or anyone else. And
4 there's no reason why he has a live case just
5 because it also happens to be true with respect
6 to him.

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

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

1 government is going to keep the underlying
2 information classified, then a district judge
3 should review it in camera ex parte to evaluate
4 the reasonable likelihood or reasonable
5 expectation of recurrence.

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

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

1 information is.

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 The case is submitted.

23 (Whereupon, at 1:08 p.m., the case was
24 submitted.)

25

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