Nos. 22-1178

IN THE

Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL,

PETITIONERS,

V.

YONAS FIKRE,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE LIBERTY JUSTICE CENTER IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether the government can overcome the voluntary cessation exception to mootness by removing an individual from the No Fly List when the government remains free to return him to the list for the same reasons and using the same procedures he alleges were unlawful, and when the government has not repudiated its prior decision to place him on the list.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

To advance these goals, the Liberty Justice Center regularly litigates cases challenging government abuses, and regularly encounters government efforts to avoid constitutional review via voluntary cessation. *See, e.g., Menders v. Loudoun Cnty. Sch. Bd.*, No. 1:21-cv-669, 2023 U.S. Dist. LEXIS 195542 (E.D. Va. Oct. 31, 2023); *Etherton v. Biden*, No. 22-2085, 2023 U.S. App. LEXIS 25530 (4th Cir. Sep. 27, 2023); *Bishop of Charlston v. Adams*, No. 22-1175, 2023 U.S. App. LEXIS 17032 (4th Cir. July 6, 2023).

This case interests *amicus* because the constitutional rights of citizens deserve their day in court, and this Court should reject attempts to dodge meritorious claims via gamesmanship.

SUMMARY OF ARGUMENT

The government's claim of mootness in this case hangs entirely on a single, nonbinding paragraph from the declaration of a then-FBI official who asserted that

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amicus* funded its preparation or submission.

Fikre "will not be placed on the No Fly List in the future based on the currently available information." Pet App. 118a. This is a prediction, not a fact, and the government asks this Court to credit the prediction while refusing to explain, in even the most basic terms, the basis for Fikre's placement on the list, or the basis for his removal. He cannot rely on a promise that has not been made, and cannot adjust his behavior to avoid suspicion without knowing what behavior is suspicious. Fikre cannot even rely on then-Acting Deputy Director for Operations Courtright's word or honor, since he's now retired from the FBI.[2]

Amicus is well acquainted with this sort of gamesmanship in its own work defending constitutional rights. These are the same tactics public-sector unions have successfully used to stymie public employees' attempts to assert the rights this Court recognized in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018)—as soon as an employee challenges a union's defiance of *Janus*, the union decides the employee doesn't need to pay dues after all. *See, e.g., Grossman v. Haw. Gov't Emples. Ass'n*, 611 F. Supp. 3d 1033, 1047 (D. Haw. 2020). When a teacher challenged the Biden Administration's HeadStart vaccine mandate, all of a sudden it wasn't so important for that particular teacher to be vaccinated. *See Etherton v. Biden*, No. 22-2085, 2023 U.S. App. LEXIS 25530 (4th Cir. Sep. 27, 2023). When Virginia parents challenged their school district's attempts to police "microagressions" and "bias incidents," all of a sudden the particular bias reporting process was replaced with more obtuse policies not

[2] *See* Linkedin Profile for Retried FBI Special Agent Chris Courtright, *available at* https://www.linkedin.com/in/chris-courtright-974a60155.

directly covered in the original complaint. *See Menders v. Loudoun Cnty. Sch. Bd.,* No. 1:21-cv-669, 2023 U.S. Dist. LEXIS 195542 (E.D. Va. Oct. 31, 2023).

These Whac-A-Mole tactics are a constant challenge in defending the rights this Court recognizes as fundamental. To be clear, it should be open to the government to admit when it was wrong and resolve a citizen's injury. But if the government is going to insist that it has resolved a plaintiffs' claims beyond this Court's power to adjudicate, it must provide more than conclusory declarations averring that it doesn't currently plan on violating a plaintiffs' rights anymore. "The [governments'] main response to these criticisms is, essentially, 'trust us.'" *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2168 (2023). Where religious liberty, free expression, and due process are at stake, this Court should require more than trust. *Amcius* therefore asks that this Court affirm the Ninth Circuit.

ARGUMENT

The Government bears the burden to demonstrate mootness and must provide more than conclusory declarations.

Citizens should not be required to trust the nonbinding predictions of government officials—indeed, of the same officials they allege have violated their constitutional rights in the first place. Yet that is all the government offers here: that the Court should rely on a declaration that in no way restricts the governments' discretion and hold that's the equivalent of a binding promise. But this Court's mootness precedents require

government officials do more than announce that they, at the moment, consider it unlikely they will violate a citizen's rights in the future. It places the burden on the government to demonstrate they have resolved a Plaintiffs' claims beyond this Court's ability to provide relief.

"Just as in the First Amendment context, the due process protection against vague regulations 'does not leave regulated parties at the mercy of noblesse oblige.'" *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 255 (2012) (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)) (cleaned up). In *Fox*, the FCC had found broadcasters guilty of indecency but adopted a "policy of forbearance," declining to impose fines and expressly disclaiming any intent to rely on the indecency findings when renewing licenses or "in any other context." *Id.* This Court rejected the government's assertion of mootness because, while "the Commission claim[ed] it [would] not consider the prior indecent broadcasts 'in any context,' it [had] the statutory power to take into account 'any history of prior offenses' when setting the level of a forfeiture penalty." *Id.* Since the FCC had "the statutory authority to use its finding to increase any future penalties, the Government's assurance it [would] elect not to do so [was] insufficient to remedy the constitutional violation." *Id.*

"When a defendant ceases challenged conduct because it has been sued, its mere assurance that it will not return to its old ways is insufficient to moot the case." *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 75-76 (1983) (citing *Quern v. Mandley*, 436 U.S. 725, 733, n.7 (1978); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953)). This Court cannot credit the

government's averment that Fikre's removal was a good-faith application of the relevant policy, because at no point does the government even attempt to provide a good-faith reason for the decision. "We have only the [government's] assurance that it has made its decision voluntarily, without reference to" the litigation, and the "mere assurance that the cessation of activity has been 'voluntary' is insufficient when the cessation occurs in response" to litigation. *Id.*

Courtright's declaration makes no effort to provide a basis for the decision to add Fikre to the list, nor any basis to remove him. An American citizen was stranded abroad for years, unable to return home, and then when his status is challenged in this lawsuit the government decides it's not really worth it to keep him on the list? What sort of information is sufficient, in the government's view, to ban an American from his own country, yet so slight that when challenged they simply ask this Court to say "no harm, no foul"? Indeed, the government has not disclaimed banning him from air travel in the future, nor has it provided him any explanation of what might or might not cause them to change their mind—instead he's "expected to chisel that which must be precise from what the agency has left vague and indecisive." *SEC v. Chenery Corp.*, 332 U.S. 194, 197 (1947). And since there's no notice when he's added to the list again, he will not have a basis to challenge the government's future change of mind—at least until he shows up at an airport and once again discovers he's been grounded—and perhaps stranded abroad for years *yet again*.

The government's reservation of the right to put him back on the No Fly List at any time for any

unspecified reason at their unilateral discretion should make it impossible for them to moot this case. In *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020), the New York governor issued COVID-19 orders limiting attendance at religious services depending on whether their locality was categorized as a "'red' or 'orange' zone." 141 S. Ct. at 66. He also "regularly change[d] the classification of particular areas without prior notice." *Id.* at 68. The governor even changed the capacity limits for the religious groups' locality after they asked this Court for an emergency stay. *Id.*

This Court held that "injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange." *Id.* at 68. The Court noted: "If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained." *Id.* In concurrence, Justice Gorsuch reasoned that the fact that churches and synagogues "had been subject to unconstitutional restrictions for months" and that the Governor recently changed the restrictions for their location "only advances the case for intervention." *Id.* at 71. He pointed out that "just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant." *Id.* at 72. Declining review would "sacrifice" the rights at stake because "nothing would prevent the Governor from reinstating the challenged restrictions tomorrow" and "the Governor has fought this case at every step of the way." *Id.*

So too here—nothing prevents the government from adding Fikre back to the list tomorrow. He remains under constant threat that whatever unidentified associations or activities got him on the list in the first place—perhaps something as simple as unknowingly attending religious services at some disfavored mosque—will land him back on it. Even the suggestion that contemporary information is insufficient is, well, insufficient, because any future FBI official could change their mind about it and put him back on the list—notice that the Solicitor General's office, given ample opportunity and every incentive, nowhere disclaims the right to do that.

The "[g]overnment . . . bears the burden to establish that a once-live case has become moot." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022). "That burden is 'heavy' where, as here, '[t]he only conceivable basis for a finding of mootness in th[e] case is [the respondent's] voluntary conduct.'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 189 (2000)). "'[V]oluntary cessation does not moot a case' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* at 2607; *see also Roman Catholic Diocese*, 141 S. Ct. at 68; *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017); *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring).

Trinity Lutheran confirms that government actors confront a particularly heavy burden to demonstrate mootness in the context of voluntary cessation. There, a state offered state funds to schools and nonprofits to help them build playgrounds but excluded churches from this program. 137 S. Ct. at 2017. A church sued,

claiming the exclusion violated the Free Exercise Clause, and lost at the district court and before the court of appeals. *Id*. at 2018-19. While the church's appeal was pending before this Court, the state's governor announced "that he had directed the [state] to begin allowing religious organizations to compete for and receive [state agency] grants on the same terms as secular organizations." *Id*. at 2019 n.1. The Court held that the state had not "carried the 'heavy burden' of making 'absolutely clear' that it could not revert to its policy of excluding religious organizations." *Id*. Thus, the case was not moot. *Id*. This is precisely the sort of unilateral change in policy the court confronts here, and the court should give the same answer.

A "defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U. S. 283, 289 (1982)). And yet, as Respondent's brief makes clear, this case is not the first time the government has used gamesmanship to avoid scrutiny of their No Fly List polices. *See* Resp. Br. at 8 (citing cases). American citizens are on the No Fly List for years, and never discover it until they make the mistake of trying to, say, board a plane for the Holidays. They get no notice, nor any substantive explanation as to why they've been denied a most basic privilege and immunity of citizenship: the right to travel home to see their families.

Perhaps there are legitimate national security reasons in many cases—but the government gives no such reasons. They simply ask this court to accept the assurances of a two-page declaration from a since-retired midlevel bureaucrat who asserts, without explanation,

that the government properly and appropriately stranded him in Sweden for *four years*—banning him from his own country of citizenship—and now, after he sued them, has decided actually he's not a threat to aviation security and can fly whenever he wants…but reserve the right to change their mind. At minimum, where the government fails to explain why its behavior will not recur, that counts against their claim of mootness. *West Virginia*, 142 S. Ct. at 2607.

In *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974), this Court recognized that "[i]t is sufficient…that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." Even if the need for an injunction had passed, declaratory relief was still appropriate where there was "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." *Super Tire*, 416 U.S. at 125.

That is no less true here: the governments unexplained removal of Fikre from their secret list for secret reasons continues to affect his behavior, and the behavior of countless others who—well they don't even know? Perhaps they attended some services at a mosque federal officials had reason to be suspicious of; and perhaps they were there because they knew and were interested in some bad ideas, or perhaps it was just the most convenient place to pray among the faithful. It doesn't matter either way—the government allows no need to explain itself, no need to justify its choices, and no criteria by which Fikre could avoid tripping their wires in the future: is it studying the Quran, or attending a targeted mosque, or posting the

wrong thing on social media? If he buys a book about political theory or the history of warfare, does that mean he's a political radical or advocates warfare? Whence can this man get his reputation back—and if the governments position is he doesn't deserve it back, it is incumbent on the government to justify that. At minimum, due process should mean that those fundamental rights of Americans—including the rights to speak, associate, travel, and keep and bear arms—cannot, consistent with our Constitution and founding principles, be summarily removed from an individual by their mere placement in a top secret list, without any procedural protections or substantive adjudication.

Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). As this Court recognized applying these principles to the fight against terrorism, "*Mathews* dictates that the process due in any given instance is determined by weighing the private interest that will be affected by the official action against the Government's asserted interest, including the function involved and the burdens the Government would face in providing greater process." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (internal quotation marks omitted). These constraints require that those subject to government power be provided "notice of the reasons for the deprivation, an explanation of the evidence against him, and an opportunity to present his side of the story." *D.B. v. Cardall*, 826 F.3d 721, 743 (4th Cir. 2016) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)). At minimum, this must mean that the fundamental rights of

Americans to speak, associate, worship, and travel, cannot be abridged by secret lists compiled according to arbitrary standards—or what's worse, by standards rooted in ethnic background, political affiliation, or religious confession. Yet that is precisely what the programs at issue in this case amount to.

The Court should keep in mind that, as secretive as the government is about their reasons Fikre was on this list, they are not as secretive as they imply about his placement on that list. An individual's presence on a watchlist is disseminated to local law enforcement across the country, subjecting citizens to the risk of discriminatory treatment in any interaction they have with the police. Despite being based on only 'reasonable suspicion,' they've even been included in the criminal history considered by courts when making bail and sentencing determinations, influencing the view of judges who may not realize just how flimsy a thread this federal determination of terrorist status hangs on. Alex Kane, *Terrorist Watchlist Errors Spread to Criminal Rap Sheets*, THE INTERCEPT, Mar. 15, 2016.[3]

On June 21, 2016, Congressman and civil rights hero John Lewis led his fellow Democrats to the center of the House floor to hold a sit-in. They shut down Congress to demand, once and for all, that Congress ban Fikre—and anyone else who'd ended up on this list—from owning firearms. Zaid Jilani, *Dramatic House Sit-In on Guns Is Undercut by Focus on Secret, Racist Watchlist*, THE INTERCEPT, June 22, 2016.[4] When

[3] https://theintercept.com/2016/03/15/terrorist-watchlist-errors-spread-to-criminal-rap-sheets/.

[4] https://theintercept.com/2016/06/22/dramatic-house-sit-in-on-guns-is-undercut-by-focus-on-secret-racist-watchlist/.

someone on the No Fly List attempts to buy a gun, their purchase is delayed by an additional background check applied only to people the government has on their secret list. *Robinson v. Sessions*, 721 F. App'x 20, 22 (2d Cir. 2018), cert. denied, 138 S. Ct. 2584 (2018). The government asks you to trust them with that discretion.

Perhaps the legislation demanded by Congressman Lewis sitting on the House floor was constitutional, perhaps this Court would have found it was not. Under the government's view, they could avoid this court ever deciding the matter by simply removing anyone who took the time to sue for the right to buy a gun from the list at their convenience. *Amicus* submits the defense of such rights should get their day in court.

CONCLUSION

For the foregoing reasons, this court should affirm the decision below.

Respectfully submitted,

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