No. 22-1178

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
PETITIONERS

v.

YONAS FIKRE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Respondent filed this suit in 2013 to challenge his placement on the No Fly List. In 2016, while the litigation was pending, respondent was removed from that list and, in 2019, the government provided a declaration stating that respondent "will not be placed on the No Fly List in the future based on the currently available information."

The question presented is whether respondent's No Fly List claims are moot.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellees below) are the Federal Bureau of Investigation (FBI); Merrick B. Garland, Attorney General; Antony J. Blinken, Secretary of State; Christopher A. Wray, Director, FBI; Michael Glasheen, Director, Terrorist Screening Center; Paul M. Nakasone, Director, National Security Agency; Avril D. Haines, Director of National Intelligence; Alejandro N. Mayorkas, Secretary of Homeland Security; and David P. Pekoske, Administrator, Transportation Security Administration.*

Respondent (plaintiff-appellant below) is Yonas Fikre.

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* All individual defendants were sued in their official capacities, and the petitioners above have been automatically substituted for their respective predecessors. See Sup. Ct. R. 35.3; Fed. R. App. P. 43(c)(2); Fed. R. Civ. P. 25(d).

Defendants also previously included David Noordeloos; Jason Dundas; John and Jane Does II-XX; the United States of America; the Department of State; and the National Security Agency. Respondent's claims against them have been dismissed.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 35 F.4th 762. A prior opinion of the court of appeals (Pet. App. 31a-44a) is reported at 904 F.3d 1033. Another prior opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 738 Fed. Appx. 545. The opinion and order of the district court (Pet. App. 45a-73a) is not published in the Federal Supplement but is available at 2020 WL 4677516. A prior opinion and order of the district court (Pet. App. 74a-114a) is not published in the Federal Supplement but is available at 2016 WL 5539591.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2022. A petition for rehearing was denied on January 4, 2023 (Pet. App. 115a-116a). On March 16,

2023, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including June 2, 2023, and the petition was filed on that date. The petition for a writ of certiorari was granted on September 29, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

U.S. Const. Art. III, § 2, Cl. 1.

STATEMENT

1. a. The Terrorist Screening Center (TSC), a federal multi-agency center administered by the FBI, maintains a terrorism watchlist. One component of that watchlist is the No Fly List, which contains the names of individuals who are prohibited from flying into, out of, within, or over the United States. See 49 U.S.C. 114, 44901, 44903; 49 C.F.R. 1560.105; Department of Homeland Security, *Traveler Redress Inquiry Program, Step 1: Should I Use DHS TRIP?*, dhs.gov/step-1-should-i-use-dhs-trip. Certain individuals on the terrorism watchlist who are not also on the No Fly List may be required to undergo enhanced security screening before being permitted to board a flight. See *ibid.* The Transportation Security Administration (TSA), an agency within the Department of Homeland Security (DHS), checks airline passenger manifests against the No Fly List and other components of the terrorism watchlist, and notifies airlines to take appropriate ac-

tion with respect to passengers on those lists. See 49 C.F.R. 1560.105(b)(1) and (2).

Because of "the dynamic intelligence environment," the TSC "regularly reviews" the watchlist to ensure that it is "thorough, accurate, and current." TSC, *Overview of the U.S. Government's Watchlisting Process and Procedures* 2, 6 (Jan. 2018), reproduced at Doc. 196-16, *Elhady* v. *Kable*, No. 16-cv-375 (E.D. Va. Apr. 27, 2018). In addition, the TSC conducts "a review following each screening encounter when there is a potential match to an identity in the [watchlist]." *Id.* at 6. The TSC also conducts a "biannual review for all U.S. person records in the [watchlist]," in particular for "all U.S. persons on the * * * No Fly List." *Ibid.* And the government "continuously evaluates its standards for inclusion in the [watchlist] and its subset lists." *Id.* at 4.

Individuals who are denied boarding on a flight may seek redress through DHS's Traveler Redress Inquiry Program (TRIP). See 49 C.F.R. 1560.205. Before 2015, individuals who requested redress using DHS TRIP were not told whether they were on the No Fly List and were not given any reasons or evidence supporting their possible inclusion on that list. See *Kashem* v. *Barr*, 941 F.3d 358, 366 (9th Cir. 2019) (describing the procedures). In 2015, DHS revised DHS TRIP to provide that United States citizens and lawful permanent residents seeking redress after having been denied boarding on a flight now be told whether they are on the No Fly List and any unclassified reasons for their status. See *ibid.*

b. According to the operative complaint, respondent is a United States citizen residing in Portland, Oregon. Pet. App. 129a, 137a-138a (¶¶ 17, 51-52). Respondent alleges that in April 2010, while he was in Sudan on busi-

ness, FBI officials questioned him about his ties to a mosque in the Portland area, told him he had been placed on the No Fly List and so could not return to the United States, and then offered to remove his name from the No Fly List if he became a government informant. *Id.* at 138a-141a (¶¶ 52-65). Respondent alleges that he refused. *Id.* at 141a (¶ 62).

Respondent alleges that he moved to the United Arab Emirates (UAE) in September 2010, Pet. App. 142a (¶ 68), and that in June 2011 he was abducted by UAE secret police, who imprisoned, interrogated, and tortured him for more than three months, *id.* at 142a-145a, 147a (¶¶ 69-79, 88). Respondent alleges that one of his interrogators told him that the FBI had requested the detention and interrogation. *Id.* at 147a (¶ 88). Respondent alleges that he was eventually released in September 2011 but, unable to board a flight to the United States because of his placement on the No Fly List, he flew instead to Sweden, where he had a relative. Pet. App. 148a (¶¶ 89-90). Respondent alleges that Sweden denied him asylum in early 2015 and flew him back to Portland, Oregon, by private jet in February 2015. *Id.* at 152a (¶¶ 103, 105).

c. In May 2013, when he was still in Sweden, respondent filed this suit in the United States District Court for the District of Oregon. As relevant here, the operative complaint alleges that placing and retaining respondent on the No Fly List violated substantive and procedural due process, and seeks declaratory, injunctive, and other relief. See Pet. App. 164a-169a (¶¶ 154-185). In November 2013, the government moved to dismiss respondent's No Fly List claims for failure to exhaust administrative remedies, or alternatively on ripeness grounds, because respondent had not sought re-

dress through DHS TRIP. See D. Ct. Doc. 22, at 13-19 (Nov. 4, 2013).

Shortly after the government filed its motion to dismiss, respondent filed a redress request through DHS TRIP. Pet. App. 151a (¶ 100); see D. Ct. Doc. 27, at 5 (Dec. 9, 2013). In January 2014, under the policies then in place, DHS informed respondent that "no changes or corrections are warranted at this time." Pet. App. 123a. DHS explained that respondent could seek an administrative appeal or, if he did not do so within 30 days, its decision would become final and thus reviewable in the court of appeals under 49 U.S.C. 46110. Pet. App. 123a. Respondent did not pursue an administrative appeal or file a petition for review in the court of appeals. See *id.* at 151a (¶ 100).

In February 2015, after the change in DHS TRIP procedures, DHS informed respondent that it had reevaluated his previous inquiry and confirmed that respondent was on the No Fly List "because he had been identified as an individual who 'may be a threat to civil aviation or national security.'" Pet. App. 119a (quoting 49 U.S.C. 114(h)(3)(A)); see *id.* at 152a (¶ 104). Respondent requested an administrative appeal. In March 2015, TSA determined that he would remain on the No Fly List. *Id.* at 119a-121a; see *id.* at 152a (¶ 104). TSA informed respondent that its determination was a final order reviewable in the court of appeals under 49 U.S.C. 46110. Pet. App. 121a. Respondent did not file a petition for review.

In May 2016, the government informed respondent that he had been removed from the No Fly List. See D. Ct. Doc. 98, at 1 (May 9, 2016). Respondent successfully flew from Portland to San Diego later that month. D. Ct. Doc. 100, at 3 (May 16, 2016). Respondent does

not allege that he has been placed back on the No Fly List since then. He alleges, however, that his having previously been on that list causes him continuing reputational harm. See Br. in Opp. 20-21; cf. Pet. App. 151a-152a (¶¶ 101-102).

After respondent was removed from the No Fly List, the parties to this litigation jointly stipulated that "there is no longer a live controversy with respect to [respondent's] request for an injunction requiring the Government to remove him from the No Fly List." D. Ct. Doc. 102, at 2 (May 27, 2016). Respondent maintained, however, that his removal from the No Fly List did not moot his request for "a declaratory judgment to the effect that his initial placement and continued retention of his name on the list were illegal and unconstitutional." D. Ct. Doc. 100, at 3.

2. In light of respondent's removal from the No Fly List, the district court dismissed respondent's No Fly List claims as moot. Pet. App. 74a-114a. The court explained that a declaration that respondent's original placement on the No Fly List was unlawful "would not have any effect on [respondent's] substantive legal rights because [respondent] is no longer on the No-Fly List." *Id.* at 91a (citation omitted); see *id.* at 93a-94a.

The district court recognized that "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot" unless "'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" Pet. App. 88a-89a (citations omitted). But the court concluded that the challenged conduct was unlikely to recur here: "the notion that [the] government would remove an individual from the No-Fly List whom it believes is '"a threat to civil aviation or national security,"' for the

'mere purpose of concluding this litigation is, to say the least, far-fetched.'" *Id.* at 93a (citation omitted). The court, however, "emphasize[d] the courthouse doors will be open to [respondent] in the future if [the government] again place[s] him on the No-Fly List." *Id.* at 96a.

3. The court of appeals reversed. Pet. App. 31a-44a.

The court of appeals recognized that under this Court's precedents, a defendant that voluntarily ceases the challenged conduct during litigation can establish mootness if "it is 'absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" Pet. App. 41a (quoting *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013)). But the court held that the government had not satisfied that standard here because it had not "acquiesce[d] to the righteousness of [respondent's] contentions" that his initial placement on the No Fly List was unlawful, and therefore "ha[d] not assured [respondent] that he will not be banned from flying for the same reasons that prompted the government to add him to the list in the first place." *Id.* at 42a.

The court of appeals further reasoned that because the government had not "acknowledg[ed]" that respondent "did not belong on the list" in the first place, respondent remained stigmatized by his placement on the No Fly List and "vindication in this action would have actual and palpable consequences for" him. Pet. App. 43a. The court also noted that removing respondent from the No Fly List was "individualized" and "untethered to any explanation or change in policy." *Id.* at 41a; see *id.* at 41a-42a. The court concluded that "[b]ecause there are neither procedural hurdles to reinstating [respondent] on the No Fly List based solely on facts already known, nor any renouncement by the gov-

ernment of its prerogative and authority to do so," respondent's No Fly List claims were not moot. *Id.* at 44a.

The court of appeals suggested, however, that the government might establish mootness if it were to submit a declaration stating that "if [respondent] is ever put back on the No Fly List, that determination would 'necessarily be predicated on a new and different factual record.'" Pet. App. 43a (citing *Mokdad* v. *Sessions*, 876 F.3d 167, 169 (6th Cir. 2017)) (ellipsis omitted).

4. a. On remand, the government filed a declaration from Christopher R. Courtright, the Acting Deputy Director for Operations of the Terrorist Screening Center. See Pet. App. 117a-118a. As relevant here, the declaration states:

> [Respondent] was placed on the No Fly List in accordance with applicable policies and procedures. [Respondent] was removed from the No Fly List upon the determination that he no longer satisfied the criteria for placement on the No Fly List. He will not be placed on the No Fly List in the future based on the currently available information.

Id. at 118a.

That assertion echoed the language in a declaration from the then-Deputy Director for Operations of the Terrorist Screening Center in the *Mokdad* case that the court of appeals here had cited: "Mr. Mokdad is not currently on the No Fly List, and he will not be placed on the No Fly List in the future based on the currently available information." D. Ct. Doc. 58, at 2, *Mokdad* v. *Lynch*, No. 13-cv-12038 (E.D. Mich. Aug. 16, 2016). Relying in part on that declaration, the Sixth Circuit in *Mokdad* had affirmed dismissal of the No Fly List claims there as moot. See 876 F.3d at 171.

b. In light of the Courtright declaration, the district court in this case again dismissed respondent's No Fly List claims as moot. Pet. App. 45a-73a. Meanwhile, respondent had amended his complaint to add allegations that he remains on the broader terrorism watchlist and as a result has been subjected to enhanced security screenings when he flies, which have caused him reputational and other harm. See, *e.g.*, *id.* at 155a-156a, 159a, 161a-162a (¶¶ 116-118, 134, 143-144). The court dismissed those claims for failure to state a claim for relief. See *id.* at 60a-73a.

5. The court of appeals again reversed. Pet. App. 1a-30a. As relevant here, the court stated that the Courtright declaration "does not provide the assurances specified by [the court's earlier decision] as adequate to overcome the voluntary cessation exception to mootness." *Id.* at 13a.

The court of appeals reasoned that the declaration neither "repudiate[d] the decision to add [respondent] to the No Fly List" nor "acquiesced to the righteousness of [respondent's] contentions" that his initial placement on the No Fly List was unlawful. Pet. App. 16a-17a (brackets and citation omitted). Accordingly, the court held, the Courtright declaration does not "assure[] [respondent] that he will not be banned from flying for the same reasons that prompted the government to add him to the list in the first place." *Id.* at 17a (citation omitted).

The court of appeals also faulted the Courtright declaration for neither providing an "explanation for [respondent's] inclusion on or removal from the No Fly List" nor "identif[ying] any change to the policies, procedures, and criteria under which [respondent] was placed on the No Fly List in the first place." Pet. App.

16a. And the court found the declaration deficient because it did not indicate that any "procedural safeguards have been implemented" that would limit the government's "'ability to revise [respondent's] status on the receipt of new information.'" *Id.* at 17a (citation omitted).

Having reversed the dismissal of respondent's No Fly List claims, the court of appeals also reversed the dismissal of some of respondent's claims related to his alleged continued placement on the terrorism watchlist, leaving it to the district court on remand to determine whether those claims were viable on the merits. Pet. App. 27a-28a. Those claims are not the subject of the mootness holding under review in this Court.

SUMMARY OF THE ARGUMENT

Respondent's claims challenging his placement on the No Fly List are moot because he was removed from that list more than seven years ago and his being placed back on the list cannot reasonably be expected to recur.

A. 1. This Court has made clear that a case is moot, and a federal court thus lacks the power to resolve a dispute, when the issues are no longer live and the dispute is no longer embedded in any actual controversy about the plaintiff's legal rights. Although a defendant cannot automatically moot a case by voluntarily ceasing the challenged conduct, a case will be moot in that circumstance if it is absolutely clear that the conduct cannot reasonably be expected to recur.

2. Respondent's No Fly List claims are moot. Because he is no longer on that list, his challenge to the procedures used to add him to or remove him from that list, and the alleged deprivation of liberty he suffered while on that list, are no longer embedded in any live controversy. Moreover, the government has submitted

a declaration stating that respondent "will not be placed on the No Fly List in the future based on the currently available information." Pet. App. 118a. That makes it absolutely clear that his being returned to the No Fly List on the same basis that he was initially placed on it cannot reasonably be expected to recur. A contrary conclusion would improperly presuppose that the government removed respondent from the No Fly List and risked the national security (for seven years and counting) simply to moot this case.

B. The court of appeals reasoned that this case was not moot because the government had not acquiesced to the righteousness of respondent's contentions and repudiated its past conduct. That reasoning confuses mootness with the merits. Mootness does not depend on whether the parties continue to dispute the lawfulness of the defendant's past conduct. Instead, mootness and voluntary cessation are forward-looking: they ask whether the challenged conduct can reasonably be expected to recur in the future, regardless of whether the defendant agrees it acted wrongfully in the past.

C. Respondent's alleged lingering reputational harm stemming from his former No Fly List placement does not preclude a finding of mootness because such harm is neither legally cognizable nor redressable. This Court has held that reputational harm, standing alone, cannot keep an otherwise moot claim alive. Such harm also is not redressable through a declaratory judgment that respondent's past placement on the No Fly List was unlawful because courts may not issue declaratory judgments solely to announce that a defendant's *past* conduct was wrongful when there is no cognizable live dispute over that past conduct.

D. The court of appeals' remaining arguments lack merit. Contrary to the court's reasoning, the government need not provide an explanation for its past conduct or identify a change to its policies and procedures in order to establish mootness. This Court has never imposed such requirements. And the government's declaration makes clear that respondent will not be returned to the No Fly List on the same basis that he was placed on it, since the "currently available information" necessarily includes all of the information that was available in 2010, when respondent alleges that he was placed on that list, and in 2016, when he was removed from it.

E. The national-security context here makes it especially important to adhere to traditional mootness principles and reject the court of appeals' holding. Individuals might be placed on or removed from the No Fly List based on highly sensitive information. Allowing moot No Fly List claims to proceed to discovery would needlessly enmesh the parties and courts in disputes about the use of such information and divert scarce agency resources that otherwise could be devoted to protecting the national security.

ARGUMENT

RESPONDENT'S NO FLY LIST CLAIMS ARE MOOT

The court of appeals erred in holding that respondent's claims challenging his placement on the No Fly List are not moot, even though respondent was removed from that list more than seven years ago and the government has submitted a declaration stating that he "will not be placed on the No Fly List in the future based on the currently available information." Pet. App. 118a. The court's principal rationale—that the claims are not moot because the government has not

"acquiesced to the righteousness of [respondent's] contentions," *id.* at 16a (brackets and citation omitted)—incorrectly confuses mootness with the merits. If allowed to stand, the ruling below would needlessly precipitate further litigation about legal claims that have no ongoing real-world relevance and invite the lower courts to issue advisory opinions in contravention of Article III—an especially troublesome result in this national-security context. This Court should reverse the judgment below.

A. Respondent's No Fly List Claims Are Moot Because He Cannot Reasonably Be Expected To Be Returned To That List

1. When A Defendant Voluntarily Ceases The Challenged Conduct, The Plaintiff's Prospective Claims Are Moot If That Conduct Cannot Reasonably Be Expected To Recur

Article III of the United States Constitution limits the federal "judicial Power" to the adjudication of "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. One "essential and unchanging part of the case-or-controversy requirement" is Article III standing, which requires a plaintiff to demonstrate an actual or imminent injury that is personal, concrete, and particularized, that is fairly traceable to the defendant's conduct, and that likely will be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Such an "actual controversy" between the parties "must be extant" not only "at the time the complaint is filed," but also through "all stages" of the litigation. *Alvarez* v. *Smith*, 558 U.S. 87, 92 (2009) (citation omitted). The dispute between the parties must at all times remain "definite and concrete, touching the legal rela-

tions of parties having adverse legal interests." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citation omitted).

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'" *Ibid.* (citation omitted); see *Alvarez*, 558 U.S. at 93 (finding mootness where the parties "continue to dispute the lawfulness of the State's hearing procedures" because "that dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights"). And mootness "deprives [a court] of [its] power to act; there is nothing for [the court] to remedy, even if [it] were disposed to do so," because courts "are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." *Spencer* v. *Kemna*, 523 U.S. 1, 18 (1998).

This Court also has held, however, that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); see *Already*, 568 U.S. at 91 ("[A] defendant cannot automatically moot a case simply by ending its unlawful conduct once sued."). In a situation involving such voluntary cessation, the case is moot only if the defendant demonstrates that "it

is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already*, 568 U.S. at 91 (citation omitted).

For example, in *Mesquite*, the Court held that a challenge to a city ordinance was not moot, even though the city had repealed the "objectionable language" in the ordinance, because the city could "reenact[] precisely the same provision" and had "announced just such an intention." 455 U.S. at 289 & n.11. In contrast, in *Already*, the Court found moot a shoe manufacturer's claim alleging invalidity of a competitor's trademark after the competitor (Nike) issued an "unconditional and irrevocable" covenant promising not to make any trademark-related claim or demand against the manufacturer's current and previous designs, including any colorable imitations thereof. 568 U.S. at 93. Even though the manufacturer (Already) "ha[d] plans to introduce new shoe lines," it had not asserted any "concrete plans to engage in conduct not covered by the covenant," and so the Court found that "the challenged conduct"—namely, Nike's assertion of an allegedly invalid trademark against Already—"cannot reasonably be expected to recur." *Id.* at 95.

2. *Placement Of Respondent On The No Fly List Cannot Reasonably Be Expected To Recur*

a. Under the principles set forth above, respondent's No Fly List claims are moot. The operative complaint alleges that the government employed defective procedures in adding respondent to the No Fly List, provided inadequate procedures for seeking removal from that list, and infringed a constitutionally protected liberty interest in flying while respondent was on that list. See Pet. App. 164a-169a (¶¶ 154-185). But respondent is no longer on the No Fly List, and has not been for

more than seven years. His claims about the procedures used to add him to and take him off the No Fly List, and the alleged deprivations of liberty he experienced while on that list, are thus "no longer 'live'" with respect to his request for injunctive and declaratory relief. *Already*, 568 U.S. at 91 (citation omitted). And although the complaint mentions damages in passing, see Pet. App. 125a, 129a (¶¶ 3, 13), respondent identifies no cause of action or waiver of sovereign immunity that would afford such retrospective relief. Cf. *New York State Rifle & Pistol Association, Inc.* v. *City of New York*, 140 S. Ct. 1525, 1526-1527 (2020) (per curiam); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 69 (1997). Any dispute about the lawfulness of respondent's presence on the No Fly List before 2016 therefore "is no longer embedded in any actual controversy about [respondent's] particular legal rights." *Already*, 568 U.S. at 91 (citation omitted).

Nor does the "voluntary cessation" principle rescue respondent's No Fly List claims from mootness. Respondent was removed from the No Fly List more than seven years ago, and he does not allege that he has been on that list since. That alone is strong evidence that his being placed back on the list "could not reasonably be expected to recur." *Already*, 568 U.S. at 91 (citation omitted). Indeed, although the defendant bears the burden of showing that the challenged conduct cannot reasonably be expected to recur, see *ibid.*, this Court has explained that mere "speculation" that the challenged conduct will recur is insufficient to "shield the case from a mootness determination," *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 283 (2001). Yet speculation is all that respondent offers here.

Were there any lingering doubt about whether the challenged conduct could reasonably be expected to recur, the government has conclusively dispelled it by executing a declaration making clear that respondent "will not be placed on the No Fly List in the future based on the currently available information." Pet. App. 118a. The "currently available information" necessarily includes all of the information available in 2010, when respondent alleges that he was placed on the No Fly List, and in 2016, when he was removed from that list. And that includes not just classified or sensitive information, but *all* information, including any allegedly improper reasons that respondent thinks the government might have had for initially placing him on the No Fly List. Because respondent will not be placed back on the No Fly List based on that information, it is "absolutely clear" that his being placed back on the No Fly List on the same basis that he was initially placed on it—whatever that basis was—"could not reasonably be expected to recur." *Already*, 568 U.S. at 91 (citation omitted). Rather, the Courtright declaration makes clear that if respondent were ever to be placed back on the No Fly List, that placement would have to be based at least in part on *new* information—and thus by definition would not constitute a "recur[rence]" of the challenged conduct. *Ibid.* (citation omitted).

b. To conclude otherwise, as respondent and the court of appeals do, would be to improperly presuppose that the government was willing to take respondent off the No Fly List and risk harm to the national security (for seven years and counting) simply to moot this case. Or, to the extent respondent claims that the government *never* actually considered him a threat to national security (and instead placed him on the No Fly List for

improper reasons), any argument against mootness would necessarily presuppose that the government will place him back on the No Fly List on the thinnest of pretexts once the litigation has concluded. Such reasoning would be flatly inconsistent with the presumption of regularity that attaches to governmental actions. See *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."); cf. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (applying the presumption to prosecutorial decisions); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971) (applying the presumption to administrative actions).

Especially in this national-security context, absent some strong showing of bad faith (which respondent has not attempted to make), the court of appeals should have presumed that the government removed respondent from the No Fly List for genuine reasons and in good faith, and that it will not place respondent back on the list absent new information that justifies that course of action. See *DeFunis* v. *Odegaard*, 416 U.S. 312, 317 (1974) (per curiam) (explaining that when evaluating mootness, "it has been the settled practice of the Court * * * fully to accept [such] representations" from governmental parties); cf. *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 33-35 (2010); *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24-25 (2008).

Indeed, in addressing the mootness of claims challenging governmental action, this Court generally presumes that—absent admissions like the one in *Mesquite*, *supra*, of an intent to resume the challenged

conduct—the government acts in good faith when ceasing that conduct. For example, in *New York State Rifle & Pistol Association*, the Court found claims for prospective relief challenging a city firearms rule to be moot after the State amended its firearms licensing statute and the city correspondingly amended the rule. 140 S. Ct. at 1526. Although three Justices would have held that the case was not moot, they relied principally on the ground that the amendments did not in fact provide the plaintiffs with *all* the prospective relief they sought. See *id.* at 1533-1540 (Alito, J., dissenting). None suggested that the State and city could reasonably be expected to repeal the amendments. Cf. *ibid.*

The same presumption is applicable to federal Executive Branch actions that terminate the challenged conduct, as this Court has recognized in a series of recent cases. See, *e.g.*, *Arizona* v. *Mayorkas*, 143 S. Ct. 1312, 1312 (2023) (motion to intervene in case challenging public-health orders moot after President terminated national emergency, resulting in expiration of the orders); *Yellen* v. *United States House of Representatives*, 142 S. Ct. 332, 332 (2021) (challenge to certain expenditures moot after Executive Branch ceased the expenditures); *Mayorkas* v. *Innovation Law Lab*, 141 S. Ct. 2842, 2842 (2021) (challenge to certain immigration practices moot after Executive Branch terminated the practices); *Trump* v. *International Refugee Assistance*, 138 S. Ct. 353, 353 (2017) (challenge to executive order moot after expiration of order). There is no sound reason to treat No Fly List claims any differently, especially in light of the Courtright declaration's assurance to petitioner that he "will not be placed on the No Fly List in the future based on the currently available information." Pet. App. 118a.

In its 2018 decision in this case, the court of appeals stated that it "presume[s] the government acts in good faith and do[es] not impute to it a strategic motive to moot [respondent's] suit." Pet. App. 42a. But at the same time, the court also suggested that the government could establish mootness on remand by "execut[ing] a declaration to th[e] effect" that "if [respondent] is ever put back on the No Fly List, that determination would 'necessarily be predicated on a new and different factual record.'" *Id.* at 43a (ellipsis omitted). The government on remand executed precisely such a declaration, stating that respondent "will not be placed on the No Fly List in the future based on the currently available information." *Id.* at 118a. That logically and necessarily means that if respondent is ever returned to the No Fly List, it would be based on new information (which by definition is not "currently available"). Yet in its most recent opinion, the court of appeals implausibly read the Courtright declaration as reflecting a "careful choice of words" designed to permit the government to "remain[] practically and legally 'free to return to its old ways.'" *Id.* at 19a (brackets and citation omitted). That uncharitable reading is at odds with the presumption of regularity and this Court's general acceptance of similar governmental representations. See *DeFunis*, 416 U.S. at 317.

B. The Court Of Appeals' Insistence That The Government Acquiesce To The Righteousness Of Respondent's Contentions Or Repudiate Its Past Actions Confuses Mootness With The Merits

Notwithstanding this Court's precedents and the straightforward analysis set forth above, the court of appeals erroneously held that respondent's No Fly List claims were not moot. Although the court accurately

recited this Court's holding that a case involving voluntary cessation is moot when it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," Pet. App. 14a (citation omitted), the court of appeals badly erred in interpreting and applying that standard. The court's main rationale was that the government was required to "acquiesce[] to the righteousness of [respondent's] contentions" and "repudiate[] the decision to add [respondent] to the No Fly List" in order to establish mootness under that standard. *Id.* at 16a-17a (citations omitted). Respondent likewise has maintained that mootness under the "voluntary cessation doctrine" requires a defendant to provide "*past*, present, and future assurances." Br. in Opp. 19 (emphasis added); see *id.* at 3, 4, 13, 20. Under respondent's and the court of appeals' view of the law, therefore, the government must "repudiat[e] the *past* decision to * * * place [respondent] on the No Fly List" to establish mootness. *Id.* at 4. That reasoning is erroneous because it confuses mootness with an admission of liability on the merits.

At its core, the mootness inquiry asks whether "the issues presented are no longer 'live' " because of intervening post-complaint developments. *Already*, 568 U.S. at 91 (citation omitted). The answer to that question does not depend on which party was right about *the merits* of those no-longer-live issues. Indeed, this Court could not have been clearer in *Already* that "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.' " *Ibid.* (citation omitted); see *Alvarez*, 558 U.S. at 93 (finding mootness notwithstanding

that the parties "continue[d] to dispute the lawfulness of the State's hearing procedures"). Respondent's and the court of appeals' insistence in this case that the government "acquiesce[] to the righteousness of [respondent's] contentions," Pet. App. 16a (citation omitted), by "repudiating the *past* decision to * * * place [respondent] on the No Fly List," Br. in Opp. 4; see Pet. App. 17a, cannot be reconciled with *Already*'s recognition that mootness is to be evaluated without regard to any lingering dispute over the merits of the plaintiff's claims. Neither respondent nor the court of appeals has identified any precedent from this Court that supports their contrary view.

What is true of mootness in general is true of voluntary cessation in particular. *Already* itself involved voluntary cessation; yet the Court did not suggest that a "vehement[]" disagreement about "the lawfulness of the conduct that precipitated the lawsuit" could preclude mootness if the defendant has voluntarily ceased the challenged conduct. 568 U.S. at 91. That a continuing disagreement over the merits does not preclude mootness makes sense because the voluntary-cessation inquiry is forward-looking, not backward-looking: it asks about the likelihood of the challenged conduct's recurrence in the future, not whether the defendant agrees it acted wrongfully in the past. Nike's covenant in *Already*, for example, did not repudiate or explain the reasons for any prior conduct, but instead simply promised not to engage in similar conduct in the future. See *Already*, 568 U.S. at 93 (quoting the covenant). That covenant mooted the case because it meant that a trademark dispute between the parties "could not reasonably be expected to recur" *in the future*—regardless of

whether Nike agreed that its *past* trademark infringement suit was unjustified. *Id.* at 91 (citation omitted).

Respondent suggests that a requirement that the government repudiate his initial placement on the No Fly List does not necessarily "require an 'admission of liability'" because he "brings constitutional claims," and the government might be able to repudiate its past decision "with assurances short of an admission of constitutional liability." Br. in Opp. 22-23 (citation omitted). That is a non sequitur. Even if the government could craft a declaration that carefully walked a line between repudiating its past decision and avoiding an admission of liability, requiring that needle-threading exercise still would incorrectly focus on the propriety of past conduct instead of the likelihood that the conduct will recur in the future. The trademark claim and counterclaim in *Already* no doubt included multiple elements (priority of use, registration, likelihood of confusion, etc.), but Nike was not required to acquiesce to the righteousness of Already's contentions as to *any* of those elements in order for the dispute to be moot, even if doing so with respect to a subset of elements would have fallen short of a complete admission of liability. The Court instead focused solely on whether the trademark dispute could reasonably be expected to recur in the future.

To be sure, a repudiation of the challenged conduct might have some evidentiary value to a court's evaluation of the likelihood that a defendant will "return to his old ways," *Already*, 568 U.S. at 92 (citation omitted). Accordingly, a defendant would be entitled to rely on such a repudiation, if one exists, to help demonstrate that the challenged conduct cannot reasonably be expected to recur. But there is no sound basis in law or

logic to make repudiation of the past conduct or "acquiesce[nce] to the righteousness of [the plaintiff's] contentions" a rigid requirement to establish mootness, as the court of appeals did here. Pet. App. 16a (citation omitted).

C. Respondent Cannot Avoid Mootness By Alleging A Lingering Reputational Injury From His Past Placement On The No Fly List

Respondent has contended that a focus on the past is "logical" because "he has experienced continued enhanced scrutiny [before air travel], causing reputational injury," and that "[w]ithout vindication" of his reputational interests, he "remains injured by his past No Fly List placement." Br. in Opp. 20-21; cf. Pet. App. 43a. That contention lacks merit.

As a threshold matter, respondent's contention conflates his separate claims regarding his alleged placement on the broader terrorism watchlist, which can result in enhanced security screenings when traveling, see pp. 2-3, *supra*, and his No Fly List claims, which are the subject of the court of appeals' mootness holding. And the only allegation in the operative complaint referring to a reputational or stigmatic injury resulting from respondent's No Fly List placement appears to refer to injuries allegedly suffered *before* his No Fly List status had been publicly disclosed to anyone (including respondent himself), see Pet. App. 151a (¶ 101), thus undermining any claim of a cognizable injury to reputation, see *Bishop* v. *Wood*, 426 U.S. 341, 348 (1976) (where a "communication was not made public, it cannot properly form the basis for a claim that [the plaintiff's] interest in his 'good name, reputation, honor, or integrity' was thereby impaired") (footnote omitted); see also *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2209-

2210 (2021) (similar, for purposes of Article III standing).

Even setting all of that aside, respondent cannot avoid mootness by alleging lingering reputational harm stemming from his former placement on the No Fly List when any claim challenging that former placement is itself moot. Such alleged reputational harm, standing alone, is not a cognizable or redressable injury that can rescue his otherwise moot claim.

1. This Court has explained that an "'interest in vindicating reputation'" is not "'constitutionally sufficient' to avoid mootness" of a claim where that interest is the only lingering consequence of the challenged conduct. *Spencer* v. *Kemna*, 523 U.S. 1, 16 n.8 (1998) (brackets, citation, and ellipses omitted); see *St. Pierre* v. *United States*, 319 U.S. 41, 43 (1943) (per curiam) (explaining that "the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review"). *Spencer* held that a state prisoner's challenge to his parole revocation hearing was moot upon his subsequent release from prison because the prisoner had not identified, and the Court would not presume the existence of, any "continuing 'collateral consequences' of the parole revocation." 523 U.S. at 8; see *id.* at 14-16. In finding the claim moot, the Court expressly rejected the dissent's proposition that because the parole revocation was based on a judicial finding that the defendant had committed a rape, it "renders the 'interest in vindicating reputation constitutionally sufficient' to avoid mootness." *Id.* at 16 n.8 (brackets, citation, and ellipses omitted). The Court explained that it had never previously recognized lingering reputational interests as sufficient to avoid mootness in similar circumstances, and that any such recog-

nition would be both boundless and inconsistent with prior precedent. *Ibid.* (citing *Benton* v. *Maryland*, 395 U.S. 784, 790-791 (1969), *Carafas* v. *LaVallee*, 391 U.S. 234, 237-238 (1968), and *Fiswick* v. *United States*, 329 U.S. 211, 220-222 (1946)).

Spencer's holding follows from the established proposition that an "interest in reputation," standing alone, "is neither 'liberty' nor 'property' " within the meaning of the Due Process Clause in the first place. *Paul* v. *Davis*, 424 U.S. 693, 712 (1976); see *id.* at 702 n.3 (same analysis applicable to Fifth and Fourteenth Amendments). In *Paul*, city police distributed to local merchants a flyer that identified the plaintiff as an "active shoplifter[]" even though he had never been convicted of shoplifting. 424 U.S. at 695 (capitalization omitted); see *id.* at 695-696. The plaintiff contended that the flyer "deprived him of some 'liberty' protected by the Fourteenth Amendment" because it "would inhibit him from entering business establishments" and "would seriously impair his future employment opportunities." *Id.* at 697. This Court rejected that contention, explaining that "reputation alone" is not "sufficient to invoke the procedural protection of the Due Process Clause" because "the infliction by state officials of a 'stigma' to one's reputation" is not a cognizable harm under that clause. *Id.* at 701; see *id.* at 712 ("[P]etitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause."); see also *Siegert* v. *Gilley*, 500 U.S. 226, 233-234 (1991).

Although *Paul*'s holding addressed the merits of a due-process claim, and not mootness (or standing), this Court in *Spencer* recognized that—consistent with

Paul—a lingering reputational injury, standing alone, is insufficient to keep alive an otherwise moot claim. 523 U.S. at 16 & n.8. In setting forth the contrary proposition, the dissent in *Spencer* expressly argued that the merits holding in *Paul* was "distinct from whether an interest in one's reputation is sufficient to defeat a claim of mootness," *id.* at 24 n.4 (Stevens, J., dissenting), and observed that "an interest in one's reputation is sufficient to confer standing" with respect to certain *other* types of legal claims, *id.* at 25 (citing *Meese* v. *Keene*, 481 U.S. 465 (1987)).

But the Court in *Spencer* rejected those arguments, holding instead that an alleged lingering reputational harm was not sufficient to avoid mootness of the parole-revocation challenge in that case. See 523 U.S. at 16 n.8. Like this case, *Spencer* involved a due-process claim—but its holding that reputational or stigmatic harm cannot itself rescue an otherwise moot claim logically applies to other types of constitutional and statutory claims as well. See, *e.g.*, *St. Pierre*, 319 U.S. at 42 (constitutional self-incrimination claim); *Pulphus* v. *Ayers*, 909 F.3d 1148, 1154 (D.C. Cir. 2018) (First Amendment claim); *R.M. Investment Co.* v. *U.S. Forest Service*, 511 F.3d 1103, 1108 (10th Cir. 2007) (Administrative Procedure Act claim), cert. denied, 553 U.S. 1054 (2008).

Respondent's attempt to rely on an alleged reputational injury to avoid mootness of his No Fly List claims is incompatible with the Court's holding in *Spencer*. Respondent's due-process claims assert interests in the procedures used to add him to or remove him from the No Fly List and in a substantive right to travel. See Pet. App. 27a, 164a-169a. But any injury to those interests has long since been cured, given respondent's removal from the No Fly List in 2016. And when the "only

legally cognizable injury * * * is now gone and * * * cannot reasonably be expected to recur," *Already*, 568 U.S. at 100, the *non*-cognizable reputational harm itself cannot keep the claims alive. Just as reputational harm, standing alone, was insufficient to rescue the parole-revocation claim in *Spencer* from mootness, it likewise is insufficient, standing alone, to rescue respondent's No Fly List claims from mootness. See *Long* v. *Pekoske*, 38 F.4th 417, 426-427 (4th Cir. 2022) (rejecting reputational or stigmatic injury as a basis to avoid mootness of materially identical No Fly List claims).

Respondent's reliance (Br. in Opp. 6, 20) on *County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979), is misplaced. There, the Court stated that a case becomes moot under principles of voluntary cessation if, among other requirements, "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* at 631. The Court in *Davis* held that a class-wide challenge to allegedly discriminatory hiring practices was moot in part because there was no evidence that, for example, "any minority job applicant was excluded from employment" or "any prospective minority job applicant was deterred from applying for employment" because of those practices. *Id.* at 633.

Davis does not help respondent here because the "effects" to be "eradicated" must be *legally cognizable* effects. 440 U.S. at 631. A candidate who was not hired as a result of the discriminatory practices in *Davis* would have had an ongoing legally cognizable injury—the lack of a job—that could be redressed in part by an injunction requiring the county to reconsider his application anew. By contrast, respondent here alleges only a reputational injury from his former placement on the No Fly List, an asserted injury that is not legally cog-

nizable. And any legally cognizable injuries that respondent did allege have been completely eradicated by his removal from that list.

2. Even setting aside the lack of cognizable injury, respondent's claims for lingering reputational injury are not redressable. Having agreed that his request for injunctive relief with respect to his No Fly List claims is moot, respondent continues to seek only a declaratory judgment that his past placement on the No Fly List was unlawful. See Pet. App. 11a, 169a-170a. But a declaratory judgment is an available form of relief only when "a case of actual controversy" *already* exists. 28 U.S.C. 2201(a); see *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237, 242 (1952). Accordingly, although a litigant may seek a declaratory judgment "whether or not further relief is or could be sought," 28 U.S.C. 2201(a), he cannot bootstrap a request for a declaratory judgment to *create* an Article III case or controversy in the first place. See *California* v. *Texas*, 141 S. Ct. 2104, 2115-2116 (2021). It logically follows that a litigant likewise cannot bootstrap a request for a declaratory judgment to *maintain* a case or controversy that otherwise has become moot. Such bootstrapping would violate fundamental Article III limits on the judicial power. See *Wycoff*, 344 U.S. at 242 (explaining that the Declaratory Judgment Act "was adjudged constitutional only by interpreting it to confine the declaratory remedy within conventional 'case or controversy' limits") (citing *Ashwander* v. *TVA*, 297 U.S. 288, 325 (1936)).

Furthermore, a court may not issue a declaratory judgment solely to pronounce that a defendant's *past* conduct was wrongful when there is no cognizable live dispute over that past conduct. Declaratory relief is by

its nature prospective; its purpose is to "'declare the rights and other legal relations' of a party" going forward. *Wycoff*, 344 U.S. at 241 (quoting 28 U.S.C. 2201). For that reason, this Court has indicated that federal courts generally should not "issue a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law." *Green* v. *Mansour*, 474 U.S. 64, 67 (1985).

Green involved a claim that a state social-services agency violated federal law in calculating benefits. 474 U.S. at 65. During the litigation, Congress amended the relevant statute and the agency's calculations were brought into conformance with federal law. *Ibid.* The plaintiffs nevertheless sought "a declaration that [the agency's] prior conduct violated federal law." *Ibid.* This Court rejected that request because there was "no claimed continuing violation of federal law" or "threat of state officials violating the repealed law in the future," and because the Eleventh Amendment would bar any judicial relief to the plaintiffs even if a "dispute about the lawfulness of [the agency's] past actions" were resolved in their favor. *Id.* at 73.

Here, as in *Green*, there is no claimed continuing violation of respondent's due-process rights with respect to the No Fly List and no reasonable prospect that the government will place him back on that list based on the currently available information. And here, as in *Green*, the Constitution—albeit Article III instead of the Eleventh Amendment—would preclude federal courts from resolving a dispute over the government's past conduct, given the absence of a viable claim for retrospective relief. As in *Green*, therefore, "a declaratory judgment that [the government] violated federal law in the past would have to stand on its own feet as an appropriate

exercise of federal jurisdiction"—which "it cannot do." 474 U.S. at 74.

D. The Court Of Appeals' Remaining Rationales Lack Merit

In addition to its improper focus on the past, the court of appeals maintained that the Courtright declaration suffers from various deficiencies that preclude a finding of mootness here. Those arguments are inconsistent with this Court's precedents and lack merit.

1. The court of appeals faulted the Courtright declaration for not providing an "explanation for [respondent's] inclusion on or removal from the No Fly List" or "identif[ying] any change to the policies, procedures, and criteria under which [respondent] was placed on the No Fly List in the first place." Pet. App. 16a. According to the court, those omissions meant that respondent's "removal from the No Fly List was 'more likely an exercise of discretion than a decision arising from a broad change in agency policy or procedure.'" *Ibid.* (citation omitted). But as this Court's decision in *Already* makes clear, a defendant's challenged conduct can reasonably be expected not to recur for individualized reasons even in the absence of a broad change in policy. Nike's covenant not to sue Already for trademark infringement neither expressed a change in policy nor identified any reasons for its prior conduct, yet the Court nevertheless found the claims moot in that case. See *Already*, 568 U.S. at 93.

The court of appeals' reasoning likewise is incompatible with this Court's decision in *Alvarez*. That case involved a due-process challenge to the State's failure to provide a prompt forfeiture hearing after seizing personal property without a warrant. See 558 U.S. at 89-90. During the pendency of litigation, it became appar-

ent that "there was no longer any dispute about ownership or possession of the relevant property," including because the State had itself returned the seized property to some of the plaintiffs. *Id.* at 92. Notwithstanding the State's role in bringing about those intervening events, this Court held that the case was moot even though the parties "continue[d] to dispute the lawfulness of the State's hearing procedures." *Id.* at 93. Although the Court did not address the voluntary-cessation doctrine in particular, it noted that the dispute over the procedures—which the State had not changed—was unlikely to recur with respect to those plaintiffs because "nothing suggests that the individual plaintiffs will likely again prove subject to the State's seizure procedures." *Ibid.* Instead, any lingering dispute "is an abstract dispute about the law, unlikely to affect these plaintiffs any more than it affects other Illinois citizens." *Ibid.* The same is true here of respondent's dispute about the policies or procedures used to add someone to or remove someone from the No Fly List: it is just an abstract dispute about procedures that is unlikely to affect respondent in particular, especially given the assurances he has received in the Courtright declaration.

That declaration identifies respondent by name and avers that he, specifically, "will not be placed on the No Fly List in the future based on the currently available information." Pet. App. 118a. The challenged conduct thus cannot reasonably be expected to recur *with respect to respondent* regardless of whether the government removed him from the No Fly List because of a change in "policies, procedures, and criteria" or instead because "something about [respondent]" himself (or the information known about him) had changed. *Id.* at 16a.

That the government continues to maintain that respondent originally "was placed on the No Fly List in accordance with applicable policies and procedures" at that time, *id.* at 118a, thus does not preclude a finding that respondent's removal (and continued absence) from that list for the past seven years—combined with the declaration making clear that he will not be returned to that list "based on the currently available information," *ibid.*—renders his No Fly List claims moot.

2. The court of appeals also faulted the Courtright declaration for not indicating that any "procedural safeguards have been implemented" that would limit the government's "'ability to revise [respondent's] status on the receipt of new information.'" Pet. App. 17a (citation omitted). Again, that confuses mootness with the merits of respondent's procedural due process claim and is inconsistent with *Already* and *Alvarez*. And to the extent the court was concerned that respondent might "be placed on the List if 'a new factual record' showed that he was engaging in the same or similar conduct once again," *id.* at 19a, that possibility is speculative and thus "could not *reasonably* be expected to recur," *Already*, 568 U.S. at 91 (emphasis added; citation omitted); see *Alvarez*, 558 U.S. at 93. It therefore is insufficient to keep respondent's claims live. Cf. *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 410-412 (2013) (finding it speculative whether the government would intercept the plaintiffs' communications); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105-106 (1983) (finding it speculative whether the police would subject the plaintiff to another chokehold for resisting arrest); cf. also *United States* v. *Sanchez-Gomez*, 138 S. Ct. 1532, 1541 (2018). Besides, for obvious reasons, the government cannot responsibly promise that respondent (or

anybody else) will never be placed on the No Fly List in the future regardless of his actions or new information learned about him; nor should it have to do so in order to establish mootness.

3. Finally, the court of appeals stated that the Courtright declaration does not "'assure[] [respondent] that he will not be banned from flying for the same reasons that prompted the government to add him to the list in the first place.'" Pet. App. 17a (citation omitted). That is incorrect; as explained above, all information about respondent that was available when he was first added to the list obviously is "currently available" as well. *Id.* at 118a. Therefore, as a logical matter, the declaration assures respondent that, if he is ever placed on the No Fly List in the future, such placement would necessarily rely on *new* information—not just the information available when he was added to the list "in the first place," *id.* at 17a (citation omitted).

E. Adhering To Traditional Mootness Principles Is Especially Important In This National Security Context

This Court has explained that "no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Amnesty International*, 568 U.S. at 408 (brackets and citation omitted). Because of that fundamental limitation, "courts have 'no business' deciding legal disputes or expounding on law in the absence of such a case or controversy." *Already*, 568 U.S. at 90 (citation omitted); see *Spencer*, 523 U.S. at 18 ("We are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong.").

Yet the decision below would invite the lower courts to stray beyond those judicial boundaries to pronounce

that respondent's initial placement on the No Fly List was right (or wrong) even though such a pronouncement would have no effect on respondent's status going forward. If affirmed, the decision below would allow all United States individuals who were once but are no longer on the No Fly List to secure advisory opinions regarding the lawfulness of their former placements on that list, even if, like respondent, the individuals were to receive assurances that they will not be returned to the No Fly List based on the currently available information.

Such advisory opinions, in addition to contravening fundamental Article III limits on the Judiciary, would be particularly problematic in this national-security context. Governmental agencies generally do not disclose the full reasons why an individual was placed on or removed from a terrorism watchlist; those reasons may frequently include highly sensitive state, military, and law-enforcement secrets. Allowing moot No Fly List claims to proceed, however, would needlessly generate disputes about the use of such information and potentially lead to orders requiring the government to reveal those secrets in litigation—itself a form of harm to the government and the public. Cf. *FBI* v. *Fazaga*, 595 U.S. 344, 358 (2022); *United States* v. *Zubaydah*, 595 U.S. 185, 204-205 (2022). For that reason, the Fourth Circuit has correctly emphasized the importance of "allow[ing] the government more leeway" "in this unique national-security context where the relevant decision-making is highly sensitive and confidential." *Long*, 38 F.4th at 426 (citing *Humanitarian Law Project*, 561 U.S. at 33-35).

Those kinds of disputes and orders also could distract agencies from carrying out their national-security

and counterterrorism duties—including to review *other* individuals' redress requests with respect to the No Fly List. Agencies would have to divert scarce resources from those tasks to assemble classified records for possible judicial review that describe the government's prior actions with respect to an individual who, by hypothesis, no longer poses a national-security threat sufficient to warrant inclusion on the No Fly List. The court of appeals' decision here thus imposes potentially large costs on society for little meaningful benefit.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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