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

REPLY BRIEF FOR THE PETITIONERS

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Respondent has all but confessed error. The Ninth Circuit held that respondent's No Fly List claims were not moot—even though he was removed from that list nearly eight years ago and the government has assured him that he will not be returned to that list based on the currently available information—because the government had not "acquiesced to the righteousness of [respondent's] contentions" and "repudiated the decision to add [respondent] to the No Fly List" in the first place. Pet. App. 16a (brackets and citation omitted). In opposing certiorari, respondent agreed that such "*past*, present, *and* future assurances" are "[r]equir[ed]" to "establish mootness" under principles of voluntary cessation. Br. in Opp. 19 (emphases added). The government has explained (Gov't Br. 12-24, 31-34) why that position fundamentally confuses mootness with the merits and is incompatible with this Court's precedents.

Respondent has now abandoned his former position. While he previously maintained that mootness under principles of voluntary cessation requires "past * * * and future assurances," Br. in Opp. 19, he has now swapped the "and" for an "or," asserting that a defendant can establish mootness by providing past *or* future assurances—that is, by "repudiat[ing] the challenged conduct" "or" by "point[ing] to barriers that prevent the recurrence of the challenged conduct." Resp. Br. 15. Respondent also suggests (but does not elaborate on) a sliding-scale approach in which a "combination" of those past and future assurances, in unspecified lesser degrees that "compensate" for each other, also can establish mootness. *Id.* at 15, 20.

Respondent's newly minted test is no better than his old one. To the extent the new test still focuses on repudiation of past conduct, even as part of a sliding-scale approach, it lacks merit for the same reasons the Ninth Circuit's test lacks merit: mootness is about the future, not the past, and a case is moot if it no longer presents a live controversy "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013).

Once the improper focus on the past is discarded, respondent's new test boils down to a requirement that the government "point to barriers that prevent recurrence of the challenged conduct." Resp. Br. 15. Taken literally, that formulation would impose rigid and often out-of-place prerequisites that find no roots in the practical aspects of the mootness inquiry. But perhaps respondent intends simply to provide an alternative formulation of the traditional test that asks whether the challenged conduct could "reasonably be expected to re-

cur," *Already*, 568 U.S. at 91 (citation omitted). If so, that is the test the government has urged in this case, and which respondent and the Ninth Circuit erroneously interpreted to require "acquiesce[nce] to the righteousness of [respondent's] contentions" on the merits. Pet. App. 16a (citation omitted). As the government has explained (Gov't Br. 15-20), the Courtright declaration assuring respondent that he "will not be placed on the No Fly List in the future based on the currently available information," Pet. App. 118a, combined with respondent's absence from the No Fly List for the past nearly eight years, makes it absolutely clear that his being returned to that list cannot reasonably be expected to recur. Respondent's No Fly List claims are therefore moot, and this Court should reverse the contrary judgment below.

A. Placement Of Respondent Back On The No Fly List Cannot Reasonably Be Expected To Recur

1. Respondent's due-process claims challenging his placement on the No Fly List no longer present a live case or controversy because he is no longer on that list. Gov't Br. 13-20. And although a "defendant's voluntary cessation of a challenged practice does not" necessarily moot a claim, *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), the claim is moot if "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *Already*, 568 U.S. at 91 (citation omitted).

Here, it is absolutely clear that respondent's placement on the No Fly List cannot *reasonably* be expected to recur because he has been off that list for nearly eight years and the Courtright declaration avers that respondent "will not be placed on the No Fly List in the future based on the currently available information."

Pet. App. 118a. Because the currently available information necessarily includes all information available when respondent was initially placed on the list, the declaration assures respondent that any hypothetical future placement on the No Fly List would have to be based at least in part on new information, and thus would not constitute a "recurrence" of the challenged conduct.

2. Respondent acknowledges (Resp. Br. 36) that the Courtright declaration "suffice[s] to show the government will not restore [respondent] to the No Fly List for the specific things he did" that "prompted his initial placement." That should be the end of this case. And respondent's various other objections (*id.* at 30-37) to the declaration lack merit.

a. Respondent contends that the Courtright declaration is "not a binding legal document," Resp. Br. 30, and "easily reversible," *id.* at 32, and contrasts it with the covenant in *Already*, which he says "was a 'judicially enforceable' promise," "was 'unconditional and irrevocable,'" and "had the effect of 'prohibiting Nike from making any claim or demand' on the plaintiff." *Ibid.* (brackets and citation omitted). Respondent also suggests that the Courtright declaration lacks legal force because it purportedly "was not executed by a senior official with policymaking authority," *id.* at 30; see *id.* at 32 ("mid-level official"), and "the record contains no evidence that officials with authority to relist [respondent] would even be aware of it," *id.* at 33. Those arguments are incorrect.

The Courtright declaration, filed in federal court, is just as binding and irreversible as the covenant in *Already*. If the government were to place respondent back on the No Fly List based solely on the information

available at the time the declaration was executed, the government would surely lose any subsequent litigation, and probably expose itself to an award of fees and costs. Cf. 28 U.S.C. 2412. Citing *Heckler* v. *Community Health Services*, 467 U.S. 51 (1984), respondent incorrectly suggests (Resp. Br. 33) that the Courtright declaration might not be binding because the government might not be subject to judicial estoppel. *Community Health Services* addressed (but left open) the availability of estoppel against the government based on misrepresentations by its contractual intermediary as to the meaning of a regulation; the concern was that if the government were "unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law [would be] undermined." 467 U.S. at 60.

This case, by contrast, involves a declaration by a government officer filed in federal court representing that the government will not take certain actions against respondent in particular. That declaration is legally binding in the same sense that the covenant in *Already* was legally binding: just as Already could invoke the covenant as a defense if Nike were to file a suit against Already in the future, respondent could invoke the Courtright declaration in administrative or judicial proceedings if he were placed back on the No Fly List in the future. In both cases, the factfinders would determine whether the challenged actions were prohibited by the relevant promises and resolve the disputes accordingly. Indeed, respondent elsewhere acknowledges (Resp. Br. 48-49) that a governmental declaration would be sufficiently binding to moot his case if it repudiated the past conduct, thus underscoring the makeweight nature of his references to estoppel.

Respondent also acknowledges that "abandonment of a government policy" by "legislative or executive action" will "moot[] a case" under principles of voluntary cessation, "even though future legislatures and executive bodies are free to reenact the repealed policy." Resp. Br. 33. In respondent's view, those determinations "carry indicia of permanence" because the government "will be held accountable to the public if it reverses course." *Id.* at 34. But what moots the disputes in those cases is not that politicians might pay a price at the polls, but that recurrence of the challenged conduct cannot reasonably be expected to recur. As *Already* illustrates, that can be true for purely individualized reasons irrespective of any change in policies or procedures. See Gov't Br. 31-33. Respondent's insistence that a defendant make "an enduring change in policy or procedure" (Resp. Br. 21) or a "major policy change" (*id.* at 34) thus misses the mark.

Respondent is wrong to question (Resp. Br. 32) the declaration's force by asserting that Courtright was a "mid-level official" when he executed it. Courtright was the "Acting Deputy Director for Operations of the [Terrorist Screening Center (TSC)]," Pet. App. 117a, which means that the only higher-ranking TSC official was the Director himself. And respondent points to nothing to suggest that Courtright could not speak for and bind the government. Respondent's suggestion (Resp. Br. 33) that future government officials might not be aware of the Courtright declaration is both incorrect and irrelevant. It is incorrect because the declaration is part of TSC's nominations control file and thus would be reviewed if respondent were ever nominated to be placed back on the No Fly List. And it is irrelevant because the Court found the covenant in *Already* sufficient to

establish mootness without inquiring whether a future in-house counsel at Nike might be unaware of (or disregard) the covenant and attempt to sue Already. What matters is that the promise binds the promisor entity, and thus can be invoked by the promisee in court should the promise be breached.

b. Respondent further contends that the Courtright declaration does "not by its own terms protect [respondent] from recurrence of the challenged conduct" for two reasons. Resp. Br. 35; see *id.* at 35-37. Neither has merit.

First, respondent faults the declaration because it "reaffirms the propriety of the procedures used to place [respondent] on the list in the first place." Resp. Br. 35. But that once again confuses mootness with the merits of respondent's procedural due-process claim. See Gov't Br. 31-34. Whether or not the procedures in place when respondent was initially added to the No Fly List complied with due process, he is no longer on that list and cannot reasonably be expected to be placed back on that list in the future. Accordingly, the constitutionality of those procedures is not embedded in any concrete case or controversy with respect to respondent's legal rights. Indeed, those procedures already have changed since respondent was initially placed on the list, see *id.* at 3 (noting the change in procedures in 2015), underscoring the lack of a live and concrete controversy here.

Respondent's reliance (Resp. Br. 30, 35) on *Vitek* v. *Jones*, 445 U.S. 480 (1980); *Parents Involved in Community Schools* v. *Seattle School District Number 1*, 551 U.S. 701 (2007); and *Knox* v. *Service Employees International Union, Local 1000*, 567 U.S. 298 (2012), is misplaced. *Vitek* held that a constitutional challenge to the procedures by which state prisoners were trans-

ferred to mental institutions was not moot after the plaintiff was released on parole because the State had "represented that" the plaintiff "would again be transferred" in light of his "'history of mental illness'" if the lower court's injunction were lifted. 445 U.S. at 486 (citation omitted); see *ibid.* (observing that the plaintiff had already violated parole and been reincarcerated). In *Parents Involved*, a challenge to race-based school assignments was not moot because the school district had "nowhere suggest[ed] that if th[e] litigation [were] resolved in its favor it w[ould] not resume using race to assign students." 551 U.S. at 719. And in *Knox*, the Court held that a union's "postcertiorari maneuver[]" of refunding the challenged fees did not moot the case because "it [wa]s not clear why the union would necessarily refrain from collecting similar fees in the future." 567 U.S. at 307.

This case involves none of those circumstances. The government has not made (or failed to make) any representation or suggestion like the ones in *Vitek* or *Parents Involved*. Nor has it engaged in any post-certiorari maneuvers to insulate the decision below from this Court's review, as the respondent union had done in *Knox*. To the contrary, the government removed respondent from the No Fly List nearly eight years ago, while the case was still pending in the district court, and has unequivocally declared that respondent "will not be placed on the No Fly List in the future based on the currently available information" regardless of the outcome of this litigation. Pet. App. 118a. Accordingly, as in *Alvarez* v. *Smith*, 558 U.S. 87 (2009), respondent's No Fly List claims are moot even if the parties "continue[] to dispute the lawfulness of the [challenged] procedures." *Id.* at 93.

Second, respondent asserts (Resp. Br. 35) that the Courtright declaration would not "preclude [the government] from returning [respondent] to the No Fly List for the same reasons he claims are unlawful." Respondent reasons (*id.* at 36) that the declaration's assurance that he will not be returned to the No Fly List absent "'new information'" is different from an assurance that he will not be returned absent "'new reasons,'" and so he might be placed back on the list if he "were to do those same or similar things again," such as "join[ing] the wrong mosque."

As a threshold matter, the government strongly denies respondent's assertion that he was placed on the No Fly List solely because he "join[ed] the wrong mosque" or engaged in other constitutionally protected activity. Resp. Br. 36; see *id.* at 3 (speculating that respondent "may have been placed on the list" because he "attended the wrong lectures, purchased the wrong books, or browsed the wrong websites"). The government has made clear that respondent was placed on the list because he "represent[ed] a threat of engaging in or conducting a violent act of terrorism" and "was operationally capable of doing so." Pet. App. 119a. In any event, respondent's assertions do not establish that this case still presents a live controversy.

For one thing, in the nearly eight years since being taken off the No Fly List, respondent presumably has joined religious organizations, attended lectures, purchased books, or browsed websites. Yet he has not been placed back on the list. Indeed, respondent presumably also engaged in those behaviors in 2015 (when he was still on the list), yet he was nevertheless removed from the list in 2016. Respondent's speculation about the behavior he might engage in that might cause him to be

returned to the No Fly List is just that—speculation—and does not establish that his being on the list can *reasonably* be expected to recur, much less recur on the same basis that prompted his initial placement.

Moreover, respondent's proposed distinction (Resp. Br. 36) between "new information" and "new reasons" is a false dichotomy. In the highly dynamic intelligence environment, new information can cause old information to be reassessed in ways favorable or unfavorable to the subject. For example, the reliability and credibility of certain pieces of information may wane or wax over time. Or a piece of information that once seemed suspicious may appear less (or more) so as time passes, depending on the lack (or presence) of additional corroborating information and other circumstances. In particular, and as relevant to respondent's arguments here, the resumption of particular conduct is meaningfully different from having engaged in it only once. Consider an individual who attends a terrorist training camp, then leaves and renounces terrorism, but then later returns to the camp to resume her training. Surely resuming and reembracing the prior conduct carries different significance than the initial conduct. And in that case, the fact of resumption necessarily would constitute a new *reason* for viewing the individual with suspicion, not simply a recurrence of the same old reason.

Furthermore, whether an individual is placed on the No Fly List depends on an individualized, factbound prediction of future conduct based on the currently available information. As the government has elsewhere explained, an individual is placed on the No Fly List only when there exists "enough information to establish a reasonable suspicion that the individual is a

known or suspected terrorist," TSC, *Overview of the U.S. Government's Watchlisting Process and Procedures* 3 (Jan. 2018), reproduced at D. Ct. Doc. 196-16, *Elhady* v. *Kable*, No. 16-cv-375 (E.D. Va. Apr. 27, 2018), *and* that the individual poses a "threat" of "committing" or "engaging in" certain conduct involving "an act of international terrorism," "an act of domestic terrorism," or "a violent act of terrorism" where the individual is "operationally capable of" engaging in that act, Declaration of Samuel P. Robinson, Associate Deputy Director for Operations, TSC, ¶ 11, at 5 (Robinson Decl.), D. Ct. Doc. 203-1, *Jardaneh* v. *Garland*, No. 18-cv-2415 (D. Md. Aug. 29, 2022).

Because a No Fly List decision is dynamic, fact-intensive, and predictive, each decision to add—or not to add—an individual to the list necessarily is not a recurrence of any previous decision if it is based on new information that was unavailable at the time of the previous decision. And because respondent has been specifically assured that he will not be placed back on the No Fly List based on the currently available information, as a logical matter any previous decision to place him on the list cannot reasonably be expected to "recur."

3. Indeed, the prospect that respondent would be returned to the No Fly List on the same basis on which he was initially placed on the list is entirely speculative, especially given that he has not been returned to the list in the nearly eight years since he was removed from it. See Gov't Br. 16. Respondent contends that whether that prospect is speculative "misstates the test" and that even undertaking that inquiry somehow "shift[s]" or "invert[s] the voluntary cessation burden" to respondent. Resp. Br. 23, 38, 40. That is incorrect.

The point is that when it is speculative whether an event will recur, a court cannot determine that it could *reasonably* be expected to recur. Indeed, this Court has "never held that the [voluntary-cessation] doctrine—by imposing th[e] burden on the defendant—allows the plaintiff to rely on theories of Article III injury that would fail to establish standing in the first place." *Already*, 568 U.S. at 96. And as this Court has repeatedly held, speculation is insufficient to establish an Article III injury for both mootness and standing purposes. See, *e.g.*, *City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 285 (2001) (holding that "a live controversy is not maintained by speculation that" the plaintiff would reenter a business it had exited and thus be subject to an allegedly unconstitutional licensing regime); *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983) (holding that the plaintiff lacked standing because of "the speculative nature of his claim that he will again experience injury as the result of [the challenged] practice," even though he had experienced that injury in the past). Relying on such speculation would be especially problematic in the national-security context. See *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 410-414 (2013).

Respondent contends (Resp. Br. 41) that his being returned to the No Fly List is not speculative because "[t]he government found him to be appropriately listed" in the past. But that is the same argument this Court rejected in *Lyons*. 461 U.S. at 108; see *Already*, 568 U.S. at 98 (citing *Lyons* to reject a similar argument in the mootness context). Indeed, in *Lyons* the Court found it significant that "five months" had elapsed without recurrence of the challenged conduct, 461 U.S. at 108; here it has been nearly eight years. Respondent

suggests (Resp. Br. 42) that the lengthy passage of time is "not especially relevant" because the litigation is still ongoing. But litigation will always be ongoing when a question of mootness arises. And disregarding the passage of time would be particularly inappropriate in the national-security context, for it would improperly imply that the government is willing to remove an individual from the No Fly List who otherwise should remain on it—and thereby risk the national security—simply to moot a case.

Respondent suggests (Resp. Br. 41) that past conduct is uniquely relevant in the No Fly List context because the plaintiff in *Ibrahim* v. *DHS*, 912 F.3d 1147 (9th Cir.) (en banc), cert. denied, 140 S. Ct. 424 (2019), was supposedly "listed again." That suggestion rests on an incorrect premise; the plaintiff there was mistakenly placed on the No Fly List because of "human error," was "removed from the no-fly list" "on or around January 2, 2005," and has not been returned to the No Fly List since. *Ibrahim* v. *DHS*, 62 F. Supp. 3d 909, 921 (N.D. Cal. 2014); see D. Ct. Doc. No. 737-8, at 2, *Ibrahim*, *supra* (No. 06-cv-545) (N.D. Cal. Apr. 15, 2014) (informing Ibrahim that "your identity has not been included on the No Fly List since January 2, 2005); cf. *Ibrahim*, 912 F.3d at 1164.[1]

Similarly, respondent's allegation that the government "regularly" "engage[s] in strategic mooting of

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[1] The plaintiff in *Ibrahim* was later removed from the broader terrorism watchlist in September 2006, added back in March 2007, removed again in May 2007, and then returned in October 2009. 62 F. Supp. 3d at 922-923. The district court there did not find that any of those actions was erroneous or in bad faith. Cf. *id.* at 927-931. Instead, they simply reflected the dynamic nature of such national-security and intelligence determinations.

claims" lacks merit and is inconsistent with the presumption of regularity. Resp. Br. 7, 44 n.10; see *id.* at 8. "The TSC never removes an individual from the [terrorism watchlist]," much less the No Fly List, "as a matter of litigation strategy or convenience." Robinson Decl. ¶ 15, at 7. Moreover, the cases respondent cites (Resp. Br. 8) do not support his allegation of "strategic mooting." In those cases, the plaintiffs filed suit before completing the administrative redress process, which continued in parallel with the litigation.[2] Any mid-suit removal from the No Fly List is thus more accurately characterized as a favorable outcome of that administrative process and not a bad-faith litigation tactic.

Indeed, TSA and TSC have informed this Office that in recent years, roughly 50% of DHS TRIP redress requests filed by U.S. persons have resulted in removal or downgrading from the No Fly List. Cf. *Tarhuni* v. *Lynch*, 129 F. Supp. 3d 1052, 1057 (D. Or. 2015) (plaintiff was "removed from the No-Fly List" based in part on his own "'submissions to DHS TRIP'" in response to the unclassified summary) (citation omitted), reversed on other grounds, 692 Fed. Appx. 477 (9th Cir. 2017).

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[2] See, *e.g.*, *Long* v. *Barr*, 451 F. Supp. 3d 507, 515 (E.D. Va. 2020); *Mokdad* v. *Sessions*, 876 F.3d 167, 169 (6th Cir. 2017); *Elhady* v. *Piehota*, 303 F. Supp. 3d 453, 458 n.2 (E.D. Va. 2017); *Kovac* v. *Wray*, 363 F. Supp. 3d 721, 736-737 (N.D. Tex. 2019); *Tanvir* v. *Lynch*, 128 F. Supp. 3d 756, 765 (S.D.N.Y. 2015), reversed on other grounds, 894 F.3d 449 (2d Cir. 2018), affirmed, 592 U.S. 43 (2020); *Tarhuni* v. *Lynch*, 129 F. Supp. 3d 1052, 1057 (D. Or. 2015), reversed on other grounds, 692 Fed. Appx. 477 (9th Cir. 2017); *Latif* v. *Holder*, 686 F.3d 1122, 1126 (9th Cir. 2012); D. Ct. Doc. 73, at 13-14, 21, *Jardaneh*, *supra* (D. Md. No. 18-cv-2415) (July 20, 2020); D. Ct. Doc. 4, at 3, *Chebli* v. *Kable*, No. 21-cv-937 (D.D.C. May 12, 2021); *Maniar* v. *Wolf*, No. 18-cv-1362, 2020 WL 1821113, at *2 (D.D.C. Apr. 10, 2020).

And of course there are many cases in which the plaintiffs have not been removed from the No Fly List during litigation.[3] "[I]n all cases, when TSC removes an individual from the [terrorism watchlist], it is because TSC personnel determined, based upon a review of the available information, that the individual no longer satisfies the criteria" for inclusion. Robinson Decl. ¶ 15, at 7.

B. The Court Should Reject Respondent's New Test For Mootness Because It Continues To Improperly Focus On The Past

The court of appeals found respondent's No Fly List claims still live on the ground that the government had not "acquiesced to the righteousness of [respondent's] contentions" and "repudiated the decision to add [respondent] to the No Fly List" in the first place. Pet. App. 16a (brackets and citation omitted). Respondent defended that view in opposing certiorari. See Br. in Opp. 4, 15, 19-23.

But respondent has now abandoned his (and the court of appeals') previous view that "past, present, *and* future assurances" are "[r]equir[ed]" to "establish mootness [under] the voluntary cessation doctrine." Br. in Opp. 19 (emphasis added); see *id.* at 20 (asserting that mootness "necessarily requires the government" to "renounce or explain its past decision," in addition to other requirements). Instead, respondent now asserts that *either* past *or* future assurances are required to establish mootness under principles of voluntary cessation, or perhaps some "combination" of the two. Resp.

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[3] See, *e.g.*, *Kashem* v. *Barr*, 941 F.3d 358 (9th Cir. 2019); *Busic* v. *TSA*, 62 F.4th 547 (D.C. Cir. 2023) (per curiam); *Moharam* v. *TSA*, No. 22-1184 (D.C. Cir. Aug. 5, 2022); *Khalid* v. *TSA*, No. 23-1150 (D.C. Cir. June 6, 2023).

Br. 15. Specifically, respondent proposes a new test under which, as he summarizes it, a defendant can "point to barriers that prevent recurrence of the challenged conduct," "repudiate the challenged conduct," or demonstrate some unspecified lesser "combination" of the two—say, by erecting a modest (instead of "strong") barrier while "distancing itself from" (instead of repudiating) the challenged conduct. *Id.* at 15-16. This Court should reject respondent's newly minted test, including its sliding-scale component, as hopelessly vague and inconsistent with fundamental principles of mootness.

Respondent's emphasis on repudiation of the challenged conduct continues to confuse mootness with the merits. See Gov't Br. 20-24. The mootness inquiry is forward-looking, not backward-looking. What matters is whether the challenged conduct can reasonably be expected to recur in the future, "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit" in the past. *Already*, 568 U.S. at 91; see *id.* at 93-94 (finding mootness even though Nike had not repudiated any of its past conduct). To the extent respondent's new test could require a defendant to repudiate its past conduct, it is incompatible with this Court's precedents and suffers from the same fundamental flaw as respondent's (and the Ninth Circuit's) previous test.

The same is true to the extent respondent's sliding-scale test could call for some sort of "distancing" from the past conduct even if it falls short of complete repudiation, Resp. Br. 15; even then, respondent's test would improperly focus on the past. A defendant's repudiation of its past conduct might be relevant *evidence* a fact-finder could consider in evaluating the likelihood that

the challenged conduct will recur. Gov't Br. 23-24. But the focus is at all times on the future; repudiation—or some diluted version of repudiation—cannot itself be part of the test for mootness.

Once repudiation is set aside, respondent's new test boils down to a requirement that a defendant "point to barriers that prevent recurrence of the challenged conduct." Resp. Br. 15. Respondent invokes various adjectives to describe the requisite barrier—"significant barrier," *ibid.*; "legally enforceable barrier," *id.* at 17; "strong barrier," *id.* at 20; "formal barrier," *id.* at 25—but he most often refers to it as an "effective barrier" or a "clearly effective barrier." *E.g.*, *id.* at 20-21. Respondent purports to derive that formulation from this Court's decision in *Trinity Lutheran Church* v. *Comer*, 582 U.S. 449 (2017), and the citations in his brief suggest that the Court held that the dispute in that case was not moot because "[t]here was 'no clearly effective barrier that would prevent the State from reinstating its policy in the future,'" Resp. Br. 22 (quoting *Trinity Lutheran*, 582 U.S. at 457 n.1) (brackets omitted); see *id.* at 20-21, 24, 32.

But in fact the "clearly effective barrier" language appears not in the Court's own analysis, but in a letter from one of the litigants in that case to the Clerk of the Court. See *Trinity Lutheran*, 582 U.S. at 457 n.1. The Court, for its part, reiterated the traditional test: "voluntary cessation of a challenged practice does not moot a case unless 'subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Ibid.* (brackets and citation omitted). If respondent intends to fashion a new test out of the language in that litigant's letter, the Court should reject that invitation. And if respondent

intends that language to be equivalent to the traditional formulation, the Courtright declaration satisfies it. That declaration is as clearly effective a barrier to respondent's future placement on the No Fly List as anyone can reasonably expect.

C. The Court Should Adhere To Traditional Mootness Principles In This National-Security Context

1. Adhering to traditional mootness principles is especially important in this national-security context because allowing moot claims to proceed to discovery would needlessly generate disputes about sensitive state, military, and law-enforcement information, potentially even requiring disclosure of such information (itself a harm to the government and the national security). Gov't Br. 17-20, 34-36. Respondent does not dispute the point; instead, he wrongly asserts that the "government implies without saying that the voluntary cessation standard in national-security cases should be different." Resp. Br. 45; see *id.* at 45-48.

To the contrary, the government has consistently maintained that the legal standard for mootness under principles of voluntary cessation—namely, whether the challenged conduct could reasonably be expected to recur—is the same for private and governmental defendants, including in national-security cases. Indeed, the government has relied extensively on the articulation and application of that standard in *Already*, *supra*, which was a case involving two private parties with no national-security implications whatsoever. Just as the covenant not to sue in *Already* was sufficient to satisfy the standard, even though it did not explain or repudiate the prior conduct, so too is the Courtright declaration sufficient here.

It is respondent, not the government, who would impose different—and more demanding—standards for governmental defendants, including in national-security cases. For example, respondent proposes a unique public-accountability requirement that private defendants would not need to satisfy. See Resp. Br. 33-35 & n.9. Relatedly, he contends that "[o]ne way a government defendant can" establish mootness "is by making an enduring change in policy or procedure," *id.* at 21, which obviously was not required of the private defendant in *Already*, *supra*. Respondent also contends that the national-security context "should recommend even greater caution" before finding a case moot. Resp. Br. 48. And he raises (though ultimately does not embrace) an argument that unlike private declarations, governmental declarations can never be sufficiently binding to moot a case. Compare *id.* at 33, with *id.* at 48-49. This Court should reject all of those proposed heightened standards for the government to establish mootness under principles of voluntary cessation.

To be clear, although the legal standard is the same for governmental and private defendants, the governmental status of a defendant might make a difference to a court's evaluation of the facts. A factfinder might be entitled, for example, to disbelieve or find not credible a private defendant's promise not to engage in the challenged conduct in the future, or to question the motives behind cessation of the challenged conduct. But the presumption of regularity precludes courts from doing the same with respect to governmental defendants absent a strong showing of bad faith. See *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). And in national-security cases, courts should be all the

more hesitant to question governmental motives. See Gov't Br. 17-20, 34-36.

Here, for example, respondent's intimations (Resp. Br. 49; see *id.* at 32-35) that the government will turn "an about-face" and place respondent back on the No Fly List as soon as the litigation has ended necessarily relies on one of two premises: (1) the government believes that respondent belongs on the No Fly List but has been willing to remove him from the list (and keep him off it) for nearly eight years simply to moot this case, or (2) the government believes that respondent does not meet the standards for inclusion on the No Fly List but will place him there anyway as soon as this case is over. Either premise is inconsistent with the presumption of regularity because it improperly suggests that the government is willing to risk the national security or abuse its national-security authority simply to get a leg up in litigation.

2. Respondent suggests (Resp. Br. 48-50) several other things he thinks the government should do to establish mootness under principles of voluntary cessation, but none is required by this Court's precedents. He reiterates the suggestion (*id.* at 49) of "clearly repudiating [the] initial decision to place [respondent] on the No Fly List," which simply repeats the Ninth Circuit's error of confusing mootness with the merits. He suggests (*id.* at 50) "formally chang[ing] [the] No Fly List procedures * * * to remedy the constitutional violations" that respondent has alleged, which also effectively requires the government to concede the merits of the case. The same is true of respondent's suggestion (*id.* at 49) that the government "commit[] that before [respondent] can be relisted, the government must use different procedures for him than the procedures he al-

leges to be unconstitutional." And both of those alternatives would be problematic in the national-security context if they required the government to disclose confidential aspects of the previous or new procedures.

Finally, respondent's suggestion (Resp. Br. 49) that the government promise not to place him on the No Fly List in the future for "materially the same reasons or based on the same type of conduct that supported his initial listing" is unworkable and inconsistent with this Court's precedents. The relevant inquiry focuses on recurrence of the challenged conduct, not different conduct of "the same type" or that is "materially the same." The covenant in *Already* covered only a single trademark (the Air Force 1 mark), not other Nike marks of the same "type" or that were "materially" similar to the Air Force 1. See 568 U.S. at 93. Moreover, the uncertainty and vagueness of "the same type" and "materially the same" would leave litigants and courts guessing when a particular promise is sufficient to moot a case—precisely the opposite of the clarity this Court ordinarily prefers for jurisdictional rules.

Respondent's proposal would be particularly unworkable in this context. Consider again the individual who attends a terrorist training camp, leaves and renounces terrorism, but then later returns. If she was initially placed on the No Fly List for her attendance but then removed when she left the camp, would it, on respondent's view, be for "materially the same reasons" or "based on the same type of conduct," Resp. Br. 49, to place her back on the list upon her return? If not, then the Courtright declaration in this case already provides respondent all the assurances he seeks. If so, then respondent essentially seeks a kind of immunity from being placed on the No Fly List in the future, which the

government cannot responsibly provide—to him or to anyone else.

Respectfully submitted.

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DECEMBER 2023