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PERSPECTIVE

Come fly with us – if it's not moot

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Every day, millions of people tolerate long security lines and intrusive pat downs for the right to enjoy a cramped trip across the friendly skies. For travelers on the No Fly List, however, no amount of screening will save them from missing their flights. Official figures are hard to find, but as of 2011, approximately 16,000 individuals were on the list, including about 500 Americans. *See “Terrorist Screening Center, Ten Years After: The FBI Since 9/11,”* Federal Bureau of Investigation. Although listed individuals can file administrative challenges to their inclusion, some have sued in federal court to pursue other relief besides removal, including procedural safeguards against future unwarranted inclusion on the list. This term, the Supreme Court will revisit its mootness jurisprudence when it considers the scope of the government’s ability to moot such suits by removing litigants from the list during litigation.

The facts before the Court in *Federal Bureau of Investigation v. Fikre*, No. 22-1178, lay bare the severe, lifelong consequences that listed persons can experience. Yonas Fikre is an American citizen who claims his inclusion on the list ruined his reputation, precipitated his divorce, and contributed to his arrest and torture by Emirati secret police. *See Fikre v. Fed. Bureau of Investigation*, 904 F.3d



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1033, 1035-36, 1040 (9th Cir. 2018) [*Fikre I*]. After two administrative attempts to seek removal from the list failed, he sued the government for violations of his due process rights. *See id.* at 1036. The case made its way to the 9th Circuit twice on the question of whether Fikre’s claims are moot. In its latest decision, the trial court dismissed the suit as moot after the government removed him from the list and filed a declaration promising he would not be added back based on “currently available information.” *See Fikre v. Fed. Bureau of Investigation*, 35 F.4th 762, 764 (9th Cir. 2022) [*Fikre II*]. The 9th Circuit disagreed, finding that

the voluntary cessation exception to mootness applied. *See id.* at 770.

The Constitution prevents courts from adjudicating cases that are moot because the issues presented are no longer live. *See id.* (citations omitted). The voluntary cessation doctrine, an exception to this principle, provides that a party’s agreement to cease allegedly illegal behavior does not moot a case unless “subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *United States v. Concentrated Phosphate Exp. Ass’n*, 393 U.S. 199, 203 (1968). For decades, the Supreme Court has applied this standard

stringently. *See, e.g., id.; City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1982). Indeed, as recently as 2012, the Court chastised “maneuvers” designed to artificially moot cases, and vowed to view such efforts with a “critical eye.” *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 307-08 (2012).

This precedent strengthens Fikre’s position before the Supreme Court, particularly given that the government’s decision to remove him from the list mid-litigation remains unexplained. *See Fikre II*, 35 F.4th at 771. As the 9th Circuit noted, there is no indication that Fikre’s removal was the result

of an official policy change. *Id.* In addition, before relenting, the government considered his status twice, under separate procedures, but chose to keep him on the list. See *Fikre I*, 904 F.3d at 1036. The government’s change of heart during litigation lends credibility to Fikre’s fear that he may end up back on the list in the future, especially since the government refuses to explain why he was added in the first place. This lack of transparency is what makes the government’s carefully worded promise hard to enforce. In other words, Fikre wants reassurances that he will not end up back on the list not just based on his *current* situation, but also for the same reasons he was added in the *past*. The government’s declaration offers no such guarantee.

To justify its refusal to explain its decision-making process, the government resorts to the presumption of regularity that is generally afforded to governmental actions, and argues that the 9th Circuit “improperly presuppose[d] that the government was willing to take respondent off the No Fly List and risk harm to national security (for

seven years and counting) simply to moot this case, or that the government will immediately place respondent back on the No Fly List on the thinnest of pretexts as soon as litigation has concluded.” Petition at 17, *Fed. Bureau of Investigation v. Fikre*, No. 22-1178 (June 2, 2023). The Ninth Circuit is not alone in its concerns, however.

Commentators argue the government is abusing the presumption to avoid creating unfavorable precedent governing the rights of gun owners, prisoners, advertisers, and employers, among others. See Joseph C. Davis & Nicholas R. Reaves, “The Point Isn’t Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine,” 129 *Yale L.J. Forum* 325, 326-32 (2019) (analyzing the interaction between the presumption of regularity and the voluntary cessation doctrine). They contend government actors have strong incentives to strategically moot cases, particularly where contentious matters of public concern are at issue. *Id.* at 328 (“[T]he kinds of cases in which governments and officials are typically defendants—often involving

the Constitution and often of great interest to the public—are exactly the cases in which, deliberate, selective mooting does the most harm.”). On the other hand, *Fikre* involves questions of national security, an area in which the judiciary has been loath to second guess executive decisions. See *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111-12 (1948) (explaining that courts generally have “neither aptitude, facilities nor

responsibility” to review national security determinations).

Given the competing interests between the doctrines of voluntary cessation and presumption of regularity, the Court may land somewhere in between in *Fikre*: The government can moot Fikre’s case, without further explanation, if it guarantees he will not be listed again for any *past or current* behavior that has already come to its attention.

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