No. 22-1178

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
PETITIONERS

v.

YONAS FIKRE

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

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
SOPAN JOSHI
Assistant to the Solicitor General
SHARON SWINGLE
JOSHUA WALDMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Individuals are sometimes removed from the No Fly List during ongoing litigation about their placement on that list. The Fourth and Sixth Circuits have held that an individual's removal from the No Fly List moots a case when the government represents that the individual will not be placed back on the list based on currently available information. In conflict with those decisions, the Ninth Circuit held in this case that respondent's claims were not moot even though he was removed from the No Fly List in 2016 and the government provided a sworn declaration stating that he "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 claims challenging his placement on the No Fly List 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; Sanjay Virmani, Acting 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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* Sanjay Virmani has been automatically substituted for Charles H. Kable, IV, under Rule 35.3 of the Rules of this Court.

Defendants previously included Eric H. Holder, Jr., Attorney General; Loretta E. Lynch, Attorney General; Jefferson B. Sessions, III, Attorney General; William P. Barr, Attorney General, John F. Kerry, Secretary of State; Michael R. Pompeo, Secretary of State; Robert S. Mueller, III, Director, FBI; James B. Comey, Director, FBI; Timothy J. Healy, Director, Terrorist Screening Center; Christopher M. Piehota, Director, Terrorist Screening Center; Michael S. Rogers, Director, National Security Agency; Joseph Maguire, Acting Director of National Intelligence; James R. Clapper, Director of National Intelligence; Daniel Coats, Director of National Intelligence; Kevin K. McAleenan, Acting Secretary of Homeland Security; and Chad F. Wolf, Acting Secretary of Homeland Security, all in their official capacities. They were replaced by the petitioners listed above. See 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.

RELATED PROCEEDINGS

United States District Court (D. Or.):

Fikre v. *Federal Bureau of Investigation*, No. 13-cv-899 (Aug. 12, 2020)

United States Court of Appeals (9th Cir.):

Fikre v. *Federal Bureau of Investigation*, No. 16-36072 (Sept. 20, 2018)

Fikre v. *Federal Bureau of Investigation*, No. 20-35904 (May 27, 2022)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and regulations:

Miscellaneous:

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 35 F.4th 762. A prior opinion of the court of appeals (App., *infra*, 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 (App., *infra*, 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 (App., *infra*, 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 (App., *infra*, 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. The jurisdiction of this Court is invoked under 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, a division within the FBI's National Security Branch, maintains a terrorism watchlist. Two components of that watchlist are the No Fly List, which contains the names of individuals who are prohibited from flying within, to, from, and over the United States, and the Selectee List, which contains the names of individuals who must undergo enhanced security screening before being permitted to board a flight. See 49 U.S.C. 114, 44901, 44903; 49 C.F.R. 1560.105. The Transportation Security Administration (TSA), an agency within the Department of Homeland Security (DHS), checks airline passenger manifests against those two lists and alerts airlines to

take appropriate action with respect to passengers on either list. See 49 C.F.R. 1560.105(b)(1) and (2).

Individuals can appeal travel-related issues 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, the government revised DHS TRIP to include additional procedural safeguards. See *ibid.* United States citizens and lawful permanent residents seeking redress now are told whether they are on the No Fly List and, to the extent possible consistent with national-security and law-enforcement interests, the reasons for their status. See *ibid.*

b. According to the operative complaint, respondent is a United States citizen residing in Portland, Oregon. App., *infra*, 129a, 137a-138a (¶¶ 17, 51-52). Respondent alleges that in April 2010, while he was in Sudan on business, 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, App., *infra*, 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 (¶¶ 69-79). Respondent alleges that one of his in-

terrogators told him that the FBI had requested the detention and interrogation. *Id.* at 147a (¶ 88). (The district court dismissed respondent's claims related to his interrogation, see 23 F. Supp. 3d 1268, 1281, and respondent did not challenge that dismissal on appeal.)

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. App., *infra*, 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 November 2013, while he was still in Sweden, respondent filed a redress request through DHS TRIP. App., *infra*, 151a (¶ 100). In January 2014, under the policies then in place, DHS informed respondent that "no changes or corrections are warranted at this time." *Id.* at 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. App., *infra*, 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.'" App., *infra*, 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. App., *infra*, 121a. Respondent did not file a petition for review.

In light of the "dynamic intelligence environment" and "regular reviews of the data," the terrorism watchlist "is continuously reviewed and updated." Terrorist Screening Center, *Overview of the U.S. Government's Watchlisting Process and Procedures as of January 2018*, at 2; cf. *Long* v. *Barr*, 451 F. Supp. 3d 507, 516 (E.D. Va. 2020), vacated and remanded, 38 F.4th 417 (4th Cir. 2022). In May 2016, respondent was informed 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 he remains on the Selectee List and as a result has been subjected to enhanced security screenings and suffered other harms. See, *e.g.*, App., *infra*, 155a-156a, 159a, 161a-162a (¶¶ 116-118, 134, 143-144).

2. Meanwhile, in May 2013, also while in Sweden (and before seeking redress through DHS TRIP), 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 and the Selectee List violated substantive and procedural due process, and seeks declaratory, injunctive, and other relief. See App., *infra*, 164a-169a (¶¶ 154-185).

After respondent was removed from the No Fly List, the parties 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 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" was not moot. D. Ct. Doc. 100, at 3.

After additional briefing, the district court dismissed respondent's No Fly List claims as moot. App., *infra*, 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 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." *Id.* at 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. App., *infra*, 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 wrong-

ful behavior could not reasonably be expected to recur.'" App., *infra*, 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." App., *infra*, 42a. The court 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. *Id.* at 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 government 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.'" App., *infra*, 43a (citing *Mokdad* v. *Sessions*, 876 F.3d 167, 169 (6th Cir. 2017)) (ellipsis omitted).

4. On remand, the government filed a declaration from Christopher R. Courtright, the Acting Deputy Di-

rector for Operations of the Terrorist Screening Center. See App., *infra*, 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) (*Mokdad* Decl.). 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.

In light of the Courtright declaration, the district court here again dismissed respondent's No Fly List claims as moot. See App., *infra*,45a-73a.

5. The court of appeals again reversed. App., *infra*, 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 found 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. App., *infra*, 16a-17a (brackets and citations 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." App., *infra*, 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).*

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* The district court also had dismissed respondent's Selectee List claims on the merits, explaining that respondent's having previously undergone enhanced security screening procedures before being permitted to board an aircraft did not allege harm to a cognizable liberty interest. See App., *infra*, 65a-73a; cf. *Paul* v. *Davis*, 424 U.S. 693, 701 (1976) (rejecting "the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause"). Having reversed the dismissal of respondent's No Fly List claims, the court of appeals also reversed dismissal of some of respondent's Selectee List claims, leaving it to the district court on remand to determine whether those claims were viable on the merits. See App., *infra*, 27a-28a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that respondent's claims challenging his placement on the No Fly List are not moot even though he was removed from that list seven years ago and the government has submitted a sworn declaration stating that he "will not be placed on the No Fly List in the future based on the currently available information." App., *infra*, 118a. The court's holding directly conflicts with decisions of the Fourth and Sixth Circuits that have found similar No Fly List claims moot upon the execution of declarations materially identical to the one in this case. And 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 an admission of liability on 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. This Court should grant the petition and reverse the judgment below.

A. The Court Of Appeals Incorrectly Held That Respondent's No Fly List Claims Are Not Moot

1. 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 relations 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). 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 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 "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, the competitor's assertion of an allegedly invalid trademark against the manufacturer—"cannot reasonably be expected to recur." *Id.* at 95.

2. Under those principles, 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 App., *infra*, 164a-169a (¶¶ 154-185). But respondent is no longer on the No Fly List. His claims about the procedures

used to add him to (or take him off) the No Fly List, or the alleged deprivations of liberty he suffered 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 (citations omitted). And although the complaint mentions damages in passing, see App., *infra*, 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* 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 between 2010 and 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 seven years ago and has not been on that list since. Moreover, the government has executed a sworn declaration making clear that respondent "will not be placed on the No Fly List in the future based on the currently available information." App., *infra*, 118a. The "currently available information" necessarily includes all of the information available in 2010, when respondent was initially placed on the No Fly List. It is thus "absolutely clear" that respondent's being placed back on the No Fly List for the same reasons that he was placed on it in 2010 "could not reasonably be expected to recur." *Already*, 568 U.S. at 91 (citation omitted). Rather, the Courtright declaration makes clear that if respondent is ever placed back on the No Fly List, it would have to be

based on *new* information—and thus by definition would not constitute a "recur[rence]" of the "allegedly wrongful behavior." *Ibid.* (citation omitted).

3. The court of appeals' contrary reasoning lacks merit. The court found respondent's No Fly List claims not to be moot, notwithstanding the Courtright declaration, principally on the ground that the declaration "neither 'repudiates the decision to add [respondent] to the No Fly List' nor 'assures [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.'" App., *infra*, 17a (brackets and citation omitted). As a threshold matter, the latter assertion is factually incorrect; as explained above, all information about respondent that was available in 2010 obviously is "currently available" as well, *id.* at 118a, and thus the declaration as a logical matter assures respondent that, if he is ever placed on the No Fly List in the future, it would necessarily be based on new information—not just the information available in 2010 when he was added to the list "in the first place," *id.* at 17a (citation omitted).

Even more fundamentally, the court of appeals' reasoning confuses mootness with an admission of liability on the merits. The court cited no precedent from this Court supporting its view that the government had to "repudiate[] the decision to add [respondent] to the No Fly List" or "acquiesce[] to the righteousness of [respondent's] contentions" in order to establish mootness under the voluntary-cessation doctrine. App., *infra*, 16a-17a (citations omitted). Indeed, this Court has said precisely the opposite, recognizing that a case can be moot after a defendant ceases its challenged conduct "[n]o matter how vehemently the parties continue to

dispute the lawfulness of the conduct that precipitated the lawsuit." *Already*, 568 U.S. at 91.

That 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. The competitor's covenant in *Already*, for example, did not repudiate or explain the reasons for any prior conduct, but instead simply promised to avoid similar conduct in the future. See *Already*, 568 U.S. at 93 (quoting the covenant). To be sure, a repudiation of the challenged conduct might be relevant to a court's evaluation of the likelihood that a defendant will "return to his old ways," *id.* at 92 (citation omitted). 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 requirement of mootness, as the court of appeals did here. App., *infra*, 16a (citation omitted).

For the same reason, the court of appeals erred in faulting 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." App., *infra*, 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. See 568 U.S. at 93

(covenant expressing no change in policy or identifying any reasons for the prior conduct).

Here, the Courtright 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." App., *infra*, 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 because "something about [respondent]" himself (or the information known about him) had changed. *Id.* at 16a. That the government continues to maintain that respondent "was placed on the No Fly List [in 2010] in accordance with applicable policies and procedures" at that time, *id.* at 118a, is thus irrelevant to whether respondent's removal 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.

Finally, the court of appeals 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.'" App., *infra*, 17a (citation omitted). Again, that confuses the merits of respondent's procedural due process claim with mootness. 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 speculative possibility "could not *reasonably* be expected to recur," *Already*, 568 U.S. at 91 (emphasis added; citation omitted), and

thus is insufficient to keep respondent's claims live, cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983). 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; nor should it have to do so in order to establish mootness.

More fundamentally, the court of appeals' reasoning is in serious tension with the presumption of regularity generally afforded to governmental actions, cf. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996), because it improperly presupposes 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. Especially in this national-security context, absent some strong showing of bad faith (which respondent has not attempted to make), the court 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 *Mes-*

quite, *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.*, *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 reason to treat No Fly List claims any differently, especially given the Courtright declaration's assurances that respondent "will not be placed on the No Fly List in the future based on the currently available information." App., *infra*, 118a.

B. The Decision Below Warrants Further Review

1. a. The court of appeals' decision conflicts with the Fourth Circuit's decision in *Long* v. *Pekoske*, 38 F.4th

417 (2022), and the Sixth Circuit's decision in *Mokdad* v. *Sessions*, 876 F.3d 167 (2017). *Long* itself acknowledged the conflict. See 38 F.4th at 424-425. There, as here, the plaintiff had "asserted a bevy of constitutional and procedural claims related to his inclusion in * * * the No Fly List." *Id.* at 419. And there, as here, "the government ha[d] removed [the plaintiff] from the No Fly List and avowed that it [would not] reinstate him based on currently available information." *Id.* at 420. But contrary to the decision below, the court in *Long* found the plaintiff's No Fly List claims there moot. *Id.* at 423-426.

Although the Fourth Circuit in *Long* agreed that the Ninth Circuit in this case had identified the correct "general framework" for evaluating voluntary cessation and mootness, it concluded that the Ninth Circuit "demand[ed] too much." 38 F.4th at 424. "[U]nlike the Ninth Circuit" here, the Fourth Circuit recognized that the materially identical declaration in *Long* assured the plaintiff that "the government will only return [him] to the No Fly List on a new factual record" because "[t]he 'currently available information' the government has promised it won't rely on (exclusively, at least) to return [the plaintiff] to the list includes whatever information prompted it to add him in the first place." *Id.* at 425. The court explained that any "future decision to place [the plaintiff] back on the No Fly List" would therefore be based at least "in part" on "new grounds," and therefore "a mootness finding here is appropriate." *Ibid.* (emphasis omitted).

Long expressly rejected the Ninth Circuit's requirement that the declaration provide an "explanation" for the plaintiff's initial placement on the No Fly List or announce a "change in policy." 38 F.4th at 425 (citation

omitted). "Even without a specific explanation on why it removed Long from the No Fly List," the court in *Long* explained, "we (unlike the Ninth Circuit) infer that the government has 'acquiesced to the righteousness of Long's contentions,' at least to some degree," because "we assume [the government] removed Long from the list because, as he contends, he doesn't belong on it." *Ibid.* (brackets and citation omitted). "To say otherwise would be to suggest the government risked national security simply to moot a lawsuit. This we decline to do." *Ibid.*; see *id.* at 426 (explaining that, at a minimum, it is "appropriate" to "allow the government more leeway" "in this unique national-security context").

The decision below likewise conflicts with the Sixth Circuit's decision in *Mokdad*, *supra*. The plaintiff in *Mokdad* had challenged his alleged placement on the No Fly List but, during litigation, was informed that he was not on the list and was furnished with a declaration stating that he "will not be placed on the No Fly List in the future based on the currently available information." *Mokdad* Decl. at 2; see *Mokdad*, 876 F.3d at 169. As in *Long*, but unlike in this case, the Sixth Circuit held that the No Fly List claims were moot and did not fall within the voluntary-cessation exception to mootness. *Mokdad*, 876 F.3d at 171. To be sure, the *Mokdad* court rested its holding on the ground that the government's submission of a declaration was not entirely of its own free will because the government had "initially argued that such a declaration was unnecessary" and had submitted the declaration only after the district court suggested it. *Ibid.* But the same would be true here: the government initially argued that respondent's No Fly List claims were moot even without

the Courtright declaration, and submitted that declaration on remand only after the court of appeals disagreed with the government while suggesting that the government could "execute[] a declaration" like the one in *Mokdad* to establish mootness, App., *infra*, 43a (citing *Mokdad*, 876 F.3d at 169).

b. In opposing rehearing below, respondent claimed (C.A. Resp. to Pet. for Reh'g 10-11) that "*Long* presents at most a trivial circuit split" because "the two Declarations [in the respective cases] differ in crucial ways," and the fact that "two courts would interpret two different declarations differently does not create a circuit split." But the relevant language in the two declarations is nearly identical. The declaration in this case states that respondent "will not be placed on the No Fly List in the future based on the currently available information." App., *infra*, 118a. The declaration in *Long* states that the plaintiff "will not be placed *back* on the No Fly List in the future based on the currently available information." C.A. Supp. App. at 15, *Long*, *supra* (No. 20-1406) (May 12, 2021) (emphasis added). The only difference is the inclusion of a single additional word ("back") in the latter that cannot reasonably explain the divergent outcomes.

The other supposedly "crucial" differences identified by respondent (C.A. Resp. to Pet. for Reh'g 11) are in fact immaterial. The Courtright declaration explains that 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," App., *infra*, 118a, whereas the *Long* declaration explains that the plaintiff was "removed from the No Fly List based on an assessment of the currently available information," C.A. Supp. App. at 15, *Long*, *supra* (No. 20-1406). Sim-

ilarly, the Courtright declaration explains that respondent was initially "placed on the No Fly List in accordance with applicable policies and procedures," App., *infra*, 118a, whereas the *Long* declaration incorporates by reference a letter to the plaintiff stating that the agency had previously "uph[e]ld [his] placement on the No Fly List based on the totality of available information." C.A. Supp. App. at 17, *Long*, *supra* (No. 20-1406). It is difficult to see how those statements are materially different, especially in light of the forward-looking inquiry required under the voluntary-cessation doctrine.

More to the point, the Fourth Circuit in *Long* did not rely on any of those differences (or even cite them) in disagreeing with the Ninth Circuit in this case. See 38 F.4th at 424-426. And nowhere does the *Long* declaration or letter repudiate the prior decision to place the plaintiff on the No Fly List, acquiesce to the righteousness of the plaintiff's contention that placing him on that list was unlawful, explain the reasons for his initial placement on that list, or announce a change in policy or criteria for inclusion on that list. Under the court of appeals' analysis in this case, therefore, *Long* would have come out the other way. It beggars belief to think that had the government submitted a declaration in this case that was exactly (and not just materially) identical to the one in *Long*, the court of appeals here would have determined that respondent's No Fly List claims are moot. Respondent himself has stated (C.A. Resp. to Pet. for Reh'g 11) that "*Long* was wrongly decided" on his view of the law, underscoring the conflict between the Fourth and Ninth Circuits' respective analyses.

Nor can the decision below be characterized as a factbound application of settled law for which this Court's review is unwarranted. Although the court of

appeals accurately reproduced this Court's statement that a case is moot under the voluntary-cessation doctrine when it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," App., *infra*, 14a (citation omitted), the court of appeals interpreted that principle to require a defendant to repudiate its prior actions or announce a change in policy in order to defeat a reasonable expectation of recurrence. Under the precedential decision below, therefore, it is difficult to see how No Fly List claims could be mooted in the Ninth Circuit absent a declaration averring one or both of those things.

But this Court has never adopted such categorical requirements, which would be inconsistent with the finding of mootness in *Already* (where neither was present). And the Fourth Circuit has squarely rejected those legal requirements in the specific context of No Fly List claims. See *Long*, 38 F.4th at 424-426. The bottom line is that individuals on the No Fly List who file suit but are later removed from that list—with an accompanying promise that they will not be returned to the list based on the currently available information—may continue to litigate their claims in the Ninth Circuit, but not in the Fourth or Sixth Circuits.

2. The question presented is important. 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." *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 408 (2013) (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 in 2010 was right (or wrong) even though such a pronouncement would have no effect on respondent's legal rights or status going forward. (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. See *Spencer*, 523 U.S. at 16 n.8; *Paul* v. *Davis*, 424 U.S. 693, 701 (1976); *Long*, 38 F.4th at 426-427 (rejecting reputational or stigmatic injury as a basis to avoid mootness).) The decision below would allow every United States individual on the No Fly List to secure an advisory opinion even after being removed from the list (with an accompanying promise not to be returned to it based on the currently available information) as long as the individual files suit in the Ninth Circuit.

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 and military 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*, 142 S. Ct. 1051,

1056 (2022); *United States* v. *Zubaydah*, 142 S. Ct. 959, 967 (2022); cf. also *Long*, 38 F.4th at 426 ("allow[ing] the government more leeway" "in this unique national-security context"). Such disputes and orders also could require agencies to divert scarce resources—ones that otherwise could be used to carry out national-security and counterterrorism duties—to assemble classified records for 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, underscoring the need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
SOPAN JOSHI
Assistant to the Solicitor General
SHARON SWINGLE
JOSHUA WALDMAN
Attorneys

JUNE 2023

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-35904
D.C. No. 3:13-cv-00899-MO

YONAS FIKRE, PLAINTIFF-APPELLANT

v.

FEDERAL BUREAU OF INVESTIGATION; MERRICK B. GARLAND, ATTORNEY GENERAL; ANTONY BLINKEN; CHRISTOPHER A. WRAY; CHARLES H. KABLE IV, DIRECTOR OF THE TERRORIST SCREENING CENTER; PAUL NAKASONE, DIRECTOR OF THE NATIONAL SECURITY AGENCY; AVRIL D. HAINES, DIRECTOR OF NATIONAL INTELLIGENCE; ALEJANDRO MAYORKAS, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; DAVID PEKOSKE, ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION, DEFENDANTS-APPELLEES

Argued and Submitted: Nov. 15, 2021
Pasadena, California
Filed: May 27, 2022

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

OPINION

Before: MARSHA S. BERZON and JOHNNIE B. RAWLINSON, Circuit Judges, and JOHN ANTOON II,* District Judge.

Opinion by Judge BERZON

BERZON, Circuit Judge:

For a second time, Plaintiff-Appellant Yonas Fikre appeals the district court's dismissal of his lawsuit alleging that the Federal Bureau of Investigation violated his substantive and procedural due process rights by placing and maintaining him in the Terrorist Screening Database and on its constituent No Fly List. After the government removed Fikre from the No Fly List and submitted a declaration stating that Fikre would "not be placed on the No Fly List in the future" based on "currently available information," the district court dismissed as moot Fikre's claims pertaining to his inclusion on the No Fly List. The district court then dismissed Fikre's claims pertaining to his inclusion in the broader Terrorist Screening Database on the ground that he failed to state a cognizable stigma-plus procedural due process claim.

Because the government has failed to follow the instructions given by this Court the last time Fikre's case was before us, *see Fikre v. FBI* (*Fikre I*), 904 F.3d 1033 (9th Cir. 2018), we hold that the district court erred by dismissing as moot Fikre's No Fly List claims. We also hold that 49 U.S.C. § 46110(a) does not divest the district court of jurisdiction over Fikre's No Fly List claims. We remand to the district court to consider, in the first instance, whether Fikre's complaint states a vi-

* The Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

able substantive or procedural due process claim with respect to his inclusion on the government's watchlists when his Database and No Fly List allegations are considered together.

I. Background

A. The Terrorist Screening Database

In 2003, President George W. Bush executed Homeland Security Presidential Directive 6, which instructed the Attorney General to "establish an organization to consolidate the Government's approach to terrorism screening." Homeland Security Presidential Directive-6 —Directive on Integration and Use of Screening Information to Protect Against Terrorism, 39 Weekly Comp. Pres. Doc. 1234 (Sept. 16, 2003). Pursuant to that directive, the Attorney General created the Terrorist Screening Center ("the Screening Center"), a multi-agency entity administered by the FBI that consolidates the United States government's terrorist watchlists into a single database—the Terrorist Screening Database ("TSDB" or "Database"). "The TSDB is maintained by the" Screening Center, which places an individual in the Database "when there is 'reasonable suspicion' that he or she is a known or suspected terrorist." *Kashem v. Barr*, 941 F.3d 358, 365 (9th Cir. 2019). After a United States government agency or a foreign partner with whom the United States shares terrorist screening information nominates an individual for inclusion in the Database, the Screening Center reviews the nomination and determines whether to add the individual to the Database. Fikre alleges that the final authority to accept, reject, or modify a nomination to the Database rests with the Screening Center alone and that the Screening

Center does not notify individuals about their nomination or inclusion in the Database.

Once individuals have been placed in the Database, the Screening Center sorts them into constituent lists, used by a different government agency—the Transportation Security Administration ("TSA")—for screening purposes. The No Fly List, the most restrictive of these lists, is reserved for individuals in the Database whom the Screening Center has determined pose a threat of committing an act of international or domestic terrorism, including acts of terrorism using aircraft or against U.S. government facilities. *Kashem*, 941 F.3d at 365-66. "Federal departments and agencies submit nominations for inclusion on the No Fly List, and [the Screening Center] decides which individuals to include." *Id.* at 365. After the Screening Center decides to place someone on the No Fly List, TSA prohibits those individuals from boarding commercial aircraft that fly over United States airspace. *Id.*; *see* 49 C.F.R. § 1560.105(b)(1).

Individuals included in the Database who are not on the No Fly List are generally permitted to board commercial aircraft but are subject to enhanced security screenings at airports and border crossings. In addition to the standard metal detector, advanced imaging technology, or pat-down screening applied to all air passengers, enhanced screening for individuals included in the Database can include individual searches, physical inspection of the inside of their luggage, examination of their electronics to ensure that any devices can be turned on, and screening of their property for traces of explosives. Fikre also alleges that, when individuals in the Database are at border crossings, the government

searches and copies the contents of their electronic devices, and that the government assigns them "handling codes." The handling codes, Fikre alleges, provide instructions for law enforcement officers about how to treat someone listed in the Database during an encounter, and can require "their arrest or other adverse treatment" during such encounters. He also alleges that the government bars individuals in the Database from access to employment with federal agencies and certain industries, and that the government disseminates the Databases' lists to government agencies around the country and to foreign governments. The government does not disclose the criteria for inclusion in the Database.

To permit individuals to challenge their inclusion on the No Fly List and the Database, the TSA administers the Department of Homeland Security's Traveler Redress Inquiry Program ("DHS TRIP"). *See* 49 U.S.C. §§ 44903(j)(2)(C)(iii)(I), (j)(2)(G)(i); *id.* §§ 44926(a), (b)(1); 49 C.F.R. §§ 1560.201-207. Under the DHS TRIP process, individuals included on the No Fly List may ask why they were placed on the No Fly List. If they do so, they will be provided with a letter identifying the specific reason(s) for their listing, as well as an unclassified summary of information supporting that listing. The TSA Administrator then has the authority, in light of these materials and a report submitted by the Screening Center's Redress Office, to remove an individual from or maintain an individual on the No Fly List. Fikre also alleges that, independently of the DHS TRIP process, "[the Screening Center] periodically reviews its TSDB listings and No Fly List annotations" and "occasionally imposes or removes No Fly List annotations."

With respect to individuals in the Database who are not also on the No Fly List, the procedures are different. Following a traveler inquiry regarding inclusion in the Database, the Screening Center Redress Office may decide whether to remove the individual from the Database, but the government neither confirms nor denies a person's inclusion in or deletion from the Database. Nor does the government provide individuals in the Database with the underlying reasons or intelligence justifying the individual's inclusion in the Database.

B. Factual and Procedural History

Yonas Fikre is a naturalized U.S. citizen of Eritrean descent.[1] At some point in late 2009 or early 2010, Fikre moved to Sudan and began a business venture that involved selling consumer electronic products in East Africa. During an April 2010 visit to the U.S. embassy in Sudan, Fikre was approached by two FBI agents. The agents interrogated him concerning his association with a mosque in Portland, Oregon, where he used to live. In the course of that interrogation, the FBI agents informed Fikre that he had been placed on the No Fly List but suggested that they would remove him from the list if he agreed to become an FBI informant. Fikre refused.

Several months later, Fikre traveled on business to the United Arab Emirates. There, UAE police arrested, imprisoned, and tortured him. In the course of his detention, UAE police interrogated him concerning

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[1] Because we are reviewing the district court's grant of a motion to dismiss, "we recite the facts as alleged in [Fikre's] complaint, and assume them to be true." *Brooks v. Clark County*, 828 F.3d 910, 914 n.1 (9th Cir. 2016).

his association with the Portland mosque. During one interrogation, a UAE officer told Fikre that the FBI had requested his detention and interrogation.

Fikre was eventually released from detention in the UAE. Unable to fly home to the United States because of his No Fly List status, he traveled to Sweden, where he applied for asylum. Fikre eventually began the process of seeking to modify his No Fly List status through the DHS TRIP procedures.[2] On February 14, 2015, the Swedish government returned Fikre to Portland by private jet.

In 2013, before leaving Sweden and before filing his DHS TRIP inquiry, Fikre filed this lawsuit, alleging that the United States government had violated his substantive and procedural due process rights under the Fifth Amendment by including him on the No Fly List and providing inadequate means for him to challenge that designation. As the litigation was proceeding, in January 2014 and again in March 2015, the TSA informed Fikre that no change to his No Fly List status was warranted. A little over a year later, however, while the government's motion to dismiss Fikre's complaint was pending, the government filed a notice in the district court stating, without explanation, that the Screening Center had notified the government that

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[2] While Fikre was in Sweden, the United States in 2012 indicted him and two other individuals for conspiracy to structure monetary transfers. Fikre alleges this indictment was instigated because he had publicized his inclusion on the No Fly List and his subsequent detention in the UAE. Fikre also alleges that the government brought that prosecution in part based on surveillance of his telephone calls, text messages, and emails that had been conducted sometime in 2010 without a warrant or probable cause.

Fikre "has been removed from the No Fly List." Based on that notice, the district court dismissed Fikre's due process claim as moot.

Fikre appealed the district court's mootness holding to this Court, and we reversed. In *Fikre I*, we held that an exception to mootness—the "voluntary cessation" exception—applied to Fikre's No Fly List claim because "the government remain[ed] practically and legally 'free to return to [its] old ways' despite abandoning them in the ongoing litigation." 904 F.3d at 1039 (second alteration in original) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). In particular, we emphasized that the government had neither "assured Fikre 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" nor "verified the implementation of procedural safeguards conditioning its ability to revise Fikre's status on the receipt of new information." *Id.* at 1040. "Absent an acknowledgment by the government that its investigation revealed Fikre did not belong on the list, and that he will not be returned to the list based on the currently available evidence," we determined, "vindication in this action would have actual and palpable consequences for Fikre." *Id.*

On remand, the government again moved to dismiss Fikre's complaint, then in its sixth amended version.[3] FBI Supervisory Special Agent Christopher Courtright filed a declaration (the "Courtright Declaration") in support of the government's motion to dismiss. In addi-

[3] In this version of the complaint, Fikre alleged that the government violated his substantive and procedural due process rights by placing and maintaining him both on the No Fly List and in the Database generally.

tion to providing an overview of the Database, the Courtright Declaration states that Fikre "was placed on the No Fly List in accordance with applicable policies and procedures"; that on May 6, 2016, "[the Screening Center] advised counsel for the Defendants" that Fikre "had been removed from the No Fly [L]ist"; that Fikre "was removed from the No Fly List upon determination that he no longer satisfied the criteria for placement on the No Fly List"; and that Fikre "will not be placed on the No Fly List in the future based on the currently available information."

In its motion to dismiss, the government argued that the Courtright Declaration's statement that Fikre would not be placed back on the No Fly List "based on the currently available information" "satisfies one of the [*Fikre I*] panel's concerns because it unequivocally demonstrates that there *are* 'procedural hurdles to reinstating [Plaintiff] on the No Fly List based solely on the facts already known.'" "To the extent that the Ninth Circuit panel determined that the Government must also 'renounce[]' its prerogative to place [Fikre] on the No Fly List in the first place," however, the government "respectfully disagree[d]." (first alteration in original). The government instead maintained that, because "watchlisting decisions are based on current assessments of the risks posed by particular individuals" and "evaluations change as the available information changes," it was "inappropriate" for this Court to require "an acknowledgement by the government that its investigation revealed [Fikre] did not belong on the list." Echoing the Courtright Declaration, the government reiterated that "the fact that a person was removed from the watchlist or one of its subsets does not

mean that the original placement was in error or unlawful."

On November 14, 2019, the district court heard oral argument on the government's motion to dismiss. Ruling from the bench, the district court held that Fikre's due process claims pertaining to his inclusion on the No Fly List were moot in light of the Courtright Declaration, which the district court described as a "barrier . . . to putting him back on the list."[4] But the district court granted Fikre leave to amend his complaint to allege additional facts regarding ongoing reputational injuries he has suffered by virtue of his alleged inclusion in the Database, which the district court indicated could serve as an independent basis for a due process claim.

On December 18, 2019, Fikre filed his Seventh Amended Complaint. The Seventh Amended Complaint added allegations that Fikre's reputation was harmed when, due to his status as an individual listed in the Database, he was subjected to enhanced screening on two flights in 2016—one from Seattle to Mecca to complete a religious pilgrimage, the other to San Diego for a family trip. Specifically, Fikre alleges that, due to his inclusion in the Database, he was subjected to enhanced screening at several points during these trips.

For example, when he checked in for his flight from Seattle to Mecca, the ticketing agent had to call federal agents for "individualized permission to print Fikre's

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[4] The district court framed this issue as one of "standing" but later clarified, in the written order dismissing Fikre's Seventh Amended Complaint (the operative one in this appeal), that the government "had met their burden under the voluntary cessation doctrine as laid out by the Ninth Circuit's decision in this case."

boarding pass" and stamped his boarding pass with an "SSSS" notation, which Fikre alleges "indicates a person's TSDB status." As Fikre was going through airport security in Seattle, the TSA, "in accordance with his TSDB status," subjected Fikre "to invasive and disparate screening," which was witnessed by his co-travelers. And at the gate in Seattle, agents asked him to step aside and again searched him, patted him down, and swabbed his belongings in front of his co-travelers. Fikre alleges that similar inspections took place when he boarded a connecting flight in Chicago; when he boarded his flight leaving Saudi Arabia to return to the United States; and when he flew to San Diego with his family on a separate 2016 trip. The Seventh Amended Complaint seeks declaratory and injunctive relief, including a declaration that the government violated his due process rights by placing him on the No Fly List and an injunction requiring that the government remove him from the Database and "repudiate in its entirety the decision to add Fikre to the TSDB with a No Fly List annotation and maintain him there for approximately five years."

Once more, the government moved to dismiss Fikre's complaint. The district court granted the motion. The district court first reiterated that it had already dismissed as moot Fikre's due process claims "insofar as they were based on a theory of present or future injury to a travel-related liberty interest" due to his inclusion on the No Fly List. Turning to Fikre's Database-related claims, the district court dismissed the claim that the government had violated his Fifth Amendment substantive due process rights by placing him in the Database.

With regard to his procedural due process claim, Fikre argued that he had pleaded a cognizable "stigma-plus" liberty interest stemming from his alleged inclusion in the Database.[5] Specifically, Fikre argued that the government harmed his reputation by subjecting him to enhanced screenings during his 2016 flights to Mecca and San Diego and that, in connection with those reputational harms, Fikre's watchlist status led to his detention and torture in the UAE, his prohibition from flying over United States airspace while he was on the No Fly List, his 2012 indictment, the unconstitutional surveillance of his phone and email communications in 2010, interference with his religious exercise, and several other burdens.

The district court agreed that the government had publicly stigmatized him "by subjecting him to intensive, repeated, non-random security screenings in front of members of his community and family during his 2016 Mecca and San Diego trips," and that Fikre therefore suffered a reputational injury sufficient to support a "stigma-plus" procedural due process claim. The court concluded, however, that Fikre failed to state a "plus" factor—the alteration or deprivation of a more tangible right or status—caused by or in connection with that 2016 reputational harm, as required by the governing case law. *See Hart*, 450 F.3d at 1069-70. In particu-

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[5] As explained in more depth in Part II.C of this opinion, a "stigma-plus" claim allows a plaintiff to recover for reputational harm inflicted by the government where the plaintiff can show that he was "stigmatized in connection with the denial of a 'more tangible' interest." *Hart v. Parks*, 450 F.3d 1059, 1069 (9th Cir. 2006) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)). Fikre's appeal —to the extent that it challenges his inclusion in the Database— focuses exclusively on this type of procedural due process claim.

lar, the district court noted that, although he was subjected to enhanced screening during his 2016 trips, Fikre was not "prevented or significantly impeded from traveling during those two trips" and that, aside from enhanced screening, Fikre "has not alleged that he has personally suffered any" of the other consequences of inclusion in the Database, "such as the denial of credentials or employment" with federal agencies or certain industries. As for Fikre's other asserted "plus" factors, the district court concluded that "the surrounding circumstances of each violation ha[d] absolutely nothing to do with the events of Mr. Fikre's 2016 reputational injury"; they involved "different actors," "occurred years apart," and "happened for a host of possible different reasons." The district court therefore dismissed Fikre's procedural due process claim relating to his inclusion in the Database.

Fikre now appeals both the district court's dismissal on mootness grounds of his No Fly List-related claims and the district court's dismissal of his stigma-plus procedural due process claim related to his inclusion in the Database.

II. Discussion

A. Mootness

We first address whether the district court erred by once again dismissing as moot Fikre's due process claims relating to his inclusion on the No Fly List. We conclude it did.

The Courtright Declaration submitted by the government on remand does not provide the assurances specified by *Fikre I* as adequate to overcome the voluntary cessation exception to mootness. And because *Fikre I*

governs, the district court should not have dismissed the No Fly List due process claims as moot.

"Article III of the Constitution," as we explained in *Fikre I*, "grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.'" *Fikre I*, 904 F.3d at 1037 (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013)). When the issues presented by a case "are no longer 'live'" or when "the parties lack a legally cognizable interest in the outcome," a case becomes moot and therefore no longer constitutes a "Case" or "Controversy" under Article III. *Id.* (quoting *Already*, 568 U.S. at 91). The "voluntary cessation of allegedly illegal conduct," however, does not moot a case unless the party asserting mootness satisfies the "heavy burden" of making it "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 1037, 1039 (first quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); then quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000); and then quoting *Already*, 568 U.S. at 91).

Under the law of the case doctrine, ordinarily, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1042 (9th Cir. 2018) (quoting *Musacchio v. United States*, 577 U.S. 237, 244-45 (2016)).[6]

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[6] There are exceptions to the law of the case doctrine: when "the first decision was clearly erroneous," "an intervening change in the law has occurred," the evidence at the later stage of the case "is substantially different," "other changed circumstances exist," or "a manifest injustice would otherwise result." *Askins*, 899 F.3d at 1042 (quoting *United States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998)). None of these exceptions applies here.

Accordingly, absent the applicability of exceptions, "one panel of an appellate court will not reconsider matters resolved in a prior appeal to another panel in the same case." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995). This Court specified in *Fikre I* what the government was required to do to show that it is "absolutely clear the allegedly wrongful behavior"—Fikre's inclusion on the No Fly List—"could not reasonably be expected to recur." Accordingly, we assess whether the Courtright Declaration satisfies the criteria identified in *Fikre I* and thereby overcomes the voluntary cessation exception. *Fikre I*, 904 F.3d at 1039 (quoting *Already*, 568 U.S. at 91). Under this analysis, the Courtright Declaration does not do the job.

First, like the government's 2016 notice, the Courtright Declaration treats Fikre's removal from the No Fly List essentially as "an individualized determination untethered to any explanation or change in policy, much less an abiding change in policy." *Id.* at 1039-40. That notice stated, without more, that the government's lawyers were "advised by the Terrorist Screening Center that [Fikre] has been removed from the No Fly List." *Id.* at 1040 (alteration in original). *Fikre I* noted that the government had recently determined, at the conclusion of the DHS TRIP process, that Fikre still posed "a threat to civil aviation or national security." *Id.* Although the government then removed Fikre from the No Fly List "two months after briefing was completed on the government's motion to dismiss Fikre's lawsuit," the lack of "explanation or any announced change in policy" suggested "that Fikre'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." *Id.*

The Courtright Declaration, similarly, provides no explanation for Fikre's inclusion on or removal from the No Fly List and, far from announcing a change in policy regarding inclusion on the No Fly List, indicates that there has been none. So it continues to appear that Fikre'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." *Id.* The only explanation the Declaration provides is the statement that Fikre "was removed from the No Fly List upon determination that he no longer satisfied the criteria" for inclusion on the list. But that sentence neither explains what those criteria are nor identifies any change to the policies, procedures, and criteria under which Fikre was placed on the No Fly List in the first place. The clear implication from the Courtright Declaration, then, is that the government has not changed its policies but that *something else* has changed to warrant Fikre's change in status, apparently something about Fikre.

Second, *Fikre I* recognized that "the government's unambiguous renunciation of its past actions can compensate for the ease with which it may relapse into them." *Id.* at 1039. Because the government there had "not repudiated the decision to add Fikre to the No Fly List and maintain him there for approximately five years," *id.* at 1040, there was no basis to conclude in *Fikre I* that "the current permission Fikre has to travel by air" was "'entrenched' or 'permanent,'" *id.* (quoting *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015)), or that the government had "acquiesce[d] to the righteousness of Fikre's contentions," *id.* "Absent an acknowledgment by the government that its investigation revealed Fikre did not belong on the list, and that

he will not be returned to the list based on the currently available evidence," Fikre remained stigmatized "as a known or suspected terrorist." *Id.*

The Courtright Declaration does not satisfy the heavy burden of making it absolutely clear that the government would not in the future return Fikre to the No Fly List for the same reason it placed him there originally. Like the government's 2016 notice, it neither "repudiate[s] the decision to add Fikre to the No Fly List" nor "assure[s] Fikre 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.* In fact, it does the opposite: instead of renouncing the government's original decision, the Courtright Declaration doubles down on it, maintaining that Fikre "was placed on the No Fly List in accordance with applicable policies and procedures." Indeed, in its motion to dismiss Fikre's Sixth Amended Complaint and its brief on appeal, the government expressly disavowed any intent to repudiate its decision to place Fikre on the No Fly List originally, maintaining that "there is no such invariable requirement for demonstrating mootness."

Third, *Fikre I* emphasized that another reason the government could not evade the voluntary cessation exception to mootness was because it had not "verified the implementation of procedural safeguards conditioning its ability to revise Fikre's status on the receipt of new information." *Id.* at 1040. Likewise, the Courtright Declaration provides no sign that any such procedural safeguards have been implemented. To the contrary, that Declaration refers to "applicable policies and procedures" as if static from the time Fikre was placed on the No Fly List until now.

The government nevertheless maintains that, by providing that Fikre "will not be placed on the No Fly List in the future based on the currently available information," the Courtright Declaration "condition[s] its ability to revise Fikre's status on the receipt of new information." That statement, however, does not ensure that Fikre "will not be banned from flying for the same reasons that prompted the government to add him to the list in the first place." *Fikre I*, 904 F.3d at 1040. Instead, the Declaration indicates only that Fikre "*no longer* satisfie[s]" the government's criteria, based on information available now regarding Fikre's *current* circumstances. (emphasis added). Should Fikre's circumstances change back to what they were when he was first placed on the No Fly List, he could be placed on the list again "for the same reasons that prompted the government to add him to the list in the first place." *Id.*

We disagree with the government's contention that the phrase "currently available information" "necessarily subsumes the information known" when Fikre was first placed on the No Fly List and that any decision to add him to the List again "would necessarily be based on a new factual record." The government insists elsewhere in its brief that it need not "declare that plaintiff should not have been placed on the No Fly List even in the past, based on the information available to the government at that time" because No Fly List decisions "are highly fact-dependent assessments" based "on the information available to the government *at that time*." (emphasis added). Likewise, in its motion to dismiss Fikre's Sixth Amended Complaint, the government maintained that "watchlisting decisions are based on current assessments of the risks posed by particular individuals" and that the Courtright Declaration ad-

dressed only "the Government's *current* assessment of Plaintiff," not its assessment at "the point at which Plaintiff was originally nominated." In light of these additional statements, the government's careful choice of words in the sentence first quoted in this paragraph appears to connote only that Fikre will not be placed on the No Fly List now based on what he did in the past, not that he would not be placed on the List if "a new factual record" showed that he was engaging in the same or similar conduct once again.

In sum, the government has assured Fikre only that he does not *currently* meet the criteria for inclusion on the No Fly List. It has not "repudiated the decision" to place Fikre on the list, nor has it identified any criteria for inclusion on the list that may have changed. Thus, there is no reason to believe that the government would not place Fikre on the list "for the same reasons that prompted the government to add him to the list in the first place." *Fikre I*, 904 F.3d at 1040. As before, "the government remains practically and legally 'free to return to [its] old ways'" the moment Fikre again meets whatever criteria he satisfied initially. *Id.* at 1039 (alteration in original) (quoting *W.T. Grant*, 345 U.S. at 632).

Aside from relying on the Courtright Declaration, the government also asserts that because Fikre's "removal from the No Fly List is now five years old," "[w]hat may have appeared in the prior appeal to have been a 'tentative[]' discretionary decision is now more clearly an 'entrenched' agency action." The government also contends this case is now moot because we stated that "there is no bright-line rule for application of the voluntary cessation doctrine."

These arguments do not fly. It is true, of course, that there is no bright-line rule for applying the voluntary cessation doctrine, *Fikre I*, 904 F.3d at 1039, and that the passage of time may support the conclusion that the government has abandoned its allegedly illegal conduct for good, *see, e.g.*, *Bell v. City of Boise*, 709 F.3d 890, 900 (9th Cir. 2013). But for the reasons just explained, the government's decision to remove Fikre from the No Fly List remains "an individualized determination untethered to any explanation or change in policy, much less an abiding change in policy," notwithstanding the passage of time since Fikre's change of status. *Fikre I*, 904 F.3d at 1039-40. And even though there is no bright-line rule for the application of the voluntary cessation doctrine as a general matter, this Court did draw some applicable lines for *this case* in *Fikre I*. Again, absent exceptions not at issue here, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). Applying *Fikre I*'s analysis, Fikre's No Fly List claims are not moot.

B. Subject Matter Jurisdiction

The government contends that, even if Fikre's No Fly List due process claims are not moot, we must affirm the district court's dismissal of those claims on the ground that 49 U.S.C. § 46110 divests the district court of subject matter jurisdiction over those claims. Not so.

Section 46110, as relevant here, concerns judicial review of orders issued by the TSA Administrator. Specifically, § 46110 states that "a person disclosing a substantial interest in an order issued by" the TSA Admin-

istrator "under this part . . . may apply for review of the order by filing a petition for review" in an appropriate court of appeals. 49 U.S.C. § 46110(a). "The petition must be filed not later than 60 days after the order is issued," *id.*, and the court of appeals "has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order," *id.* § 46110(c). So, if Fikre's lawsuit challenges an order by the TSA Administrator, as the government contends, then the district court would lack jurisdiction over his claims. But if his lawsuit challenges the conduct of another agency, such as the Screening Center, then § 46110 is inapplicable.

To support its argument that Fikre's claims are barred by § 46110, the government relies on *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019). *Kashem* concerned a lawsuit filed by a group of individuals on the No Fly List challenging both the sufficiency of the procedures for disputing their inclusion on the No Fly List and, substantively, their "continued inclusion on the No Fly List." *Id.* at 364, 367. After they were prevented in 2010 from boarding commercial flights, the plaintiffs filed grievances through the DHS TRIP process and a lawsuit alleging that their apparent inclusion on the No Fly List violated their substantive due process rights. *See Latif v. Holder*, 686 F.3d 1122, 1126 (9th Cir. 2012).[7] As a result of the *Latif* litigation, the government in 2015 revised the DHS TRIP procedures. *Kashem*, 941 F.3d at 367. Those revised procedures

[7] The *Kashem* and *Latif* appeals involved the same group of plaintiffs and the same underlying lawsuit. The plaintiffs in *Kashem* were the four plaintiffs from *Latif* still on the No Fly List after the government reevaluated their statuses in light of *Latif*. *Kashem*, 941 F.3d at 367 & n.2.

made the TSA Administrator alone—not the Terrorist Screening Center—responsible for issuing a final order maintaining a traveler on the No Fly List at the conclusion of the DHS TRIP process. *Id.* at 391.

Evaluating the *Kashem* plaintiffs' challenge to their continued No Fly List status under those revised procedures, the TSA Administrator "issued final orders maintaining each plaintiff on the list." *Id.* at 367-68. The *Kashem* plaintiffs—the subset of the plaintiffs from *Latif* who were still on the No Fly List—then returned to the district court to challenge their continued inclusion on the No Fly List. *Id.* at 367-68. The district court dismissed their substantive due process claims for lack of subject matter jurisdiction, citing § 46110. *Id.* at 369.

This Court's opinion in *Kashem* affirmed the dismissal. *Id.* at 390-91. We explained that, "[b]efore the 2015 revisions to the DHS TRIP procedures," § 46110 did not bar district court review of a No Fly List order, because "[the Screening Center]—not TSA—actually review[ed] the classified intelligence information about travelers and decide[d] whether to remove them from the list." *Id.* at 390 (quoting *Latif*, 686 F.3d at 1128). Under the revised DHS TRIP procedures, however, "the TSA Administrator is solely responsible for issuing a final order maintaining a traveler on the No Fly List" at the conclusion of the DHS TRIP process. *Id.* at 391. The Screening Center submits only a recommendation and supporting materials to the TSA Administrator, to aid in that decision. *Id.* So, for an individual challenging a No Fly List decision made at the conclusion of the DHS TRIP process, *Kashem* explained, "[i]t is no longer the case" that "any remedy must involve [the Screening

Center]." *Id.* *Kashem* thus held that § 46110 governed the plaintiffs' suit challenging the TSA Administrator's final order maintaining them on the No Fly List. *Id.*

The government argues that "*Kashem* is squarely on point." It is not. Unlike the plaintiffs in *Kashem*, Fikre is not challenging the *TSA Administrator's* decision refusing to remove him from the No Fly List under the DHS TRIP process. He is challenging the *Screening Center's* decision to place him on the No Fly List in the first place.[8]

As Fikre explains in his briefing before this Court, his challenge concerns "the entire watchlisting system that *led to his listing*, including both the *initial decision*

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[8] Before the 2015 changes to the DHS TRIP process, *Latif* held that § 46110 did not divest the district court of jurisdiction to hear a substantive due process challenge to inclusion on the No Fly List. 686 F.3d at 1127. In so holding, *Latif* observed in a footnote that, "[w]ith regard to the applicability of § 46110, there is no meaningful difference between the 'initial placement' of a name on the List and 'continued placement' or 'removal'" because (at that time) "[the Screening Center] decide[d] both whether travelers are placed on the List and whether they stay on it," even in the course of the DHS TRIP process. *Id.* at 1127 n.6; *see id.* at 1125-26. After the 2015 revisions to the DHS TRIP process, however, there *is* a "meaningful difference" between an individual's "initial placement" on the No Fly List, carried out by the Screening Center, and an individual's "continued placement" or "removal" pursuant to DHS TRIP, carried out by the TSA Administrator. *Id.* at 1127 n.6. In its brief in *Kashem*, the government made exactly that distinction, arguing that the plaintiffs there were "not challenging their inclusion on the No Fly List in the first instance" but rather "their continued inclusion on the No Fly List following review under the revised DHS TRIP procedures." Answering Brief for Appellees at 68, *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019) (No. 17-35634).

and process used to place him on the No Fly List." (emphasis added). That characterization of Fikre's action is borne out by his Seventh Amended Complaint. With respect to his procedural due process claim, Fikre alleges that the government "*placed* Plaintiff's name in the Terrorist Screening Database and on its No Fly List subcomponent" and asserts that he "has experienced economic, reputational, physical, and liberty harms due to Defendants' *placement* of his name" on those lists. With respect to his substantive due process claim, Fikre alleges, among other things, that the government "*placed* Plaintiff on the TSDB and No Fly List despite lacking any reasonable suspicion that Plaintiff is a known, suspected, or potential terrorist" and that the government relies on "race, ethnicity, national origin, religious affiliation, and First Amendment protected activities as factors supporting *placement* on the TSDB and No Fly List." (emphasis added). By contrast, Fikre's complaint mentions the DHS TRIP process very little, spending just two paragraphs on Fikre's engagement with that redress process.[9]

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[9] Fikre's complaint notes that the TSA reaffirmed in early 2015 that his name would remain on the No Fly List. But the complaint does not purport to challenge that decision. And although Fikre's complaint mentions the government's "actions in placing *and keeping*" him on the No Fly List, (emphasis added), our understanding is that those references, in the context of Fikre's full complaint, concern the Screening Center's own authority, independent of the DHS TRIP process, to remove individuals from the No Fly List. That independent authority is both alleged in the complaint and confirmed by the government's watchlisting overview document, which states that "[the Screening Center] regularly reviews data in the TSDB" and that, "[i]f it is determined during the quality assurance reviews that a change should be made to a record in the TSDB," the Screening Center "takes steps to clarify the record," including

In sum, unlike the plaintiffs in *Kashem*, Fikre does not challenge the TSA Administrator's decision made at the end of the DHS TRIP process or seek a court order requiring the TSA Administrator to remove him from the No Fly List. Rather, his claims concern the Screening Center's role in assigning him to the No Fly List in the first place. As in *Ibrahim v. Department of Homeland Security*, 538 F.3d 1250 (9th Cir. 2008), "putting [Fikre's] name on the No-Fly List was an 'order' of an agency *not* named in section 46110," and so "the district court retains jurisdiction to review that agency's order," *id.* at 1255; *see also Mokdad v. Lynch*, 804 F.3d 807, 811-12 (6th Cir. 2015) (distinguishing between a plaintiff's challenge to "the adequacy of the redress process," which "amount[s] to a challenge to a TSA order," and "a direct challenge to his placement by [the Screening Center] on the No Fly List").[10]

"[a]dditions, modifications, and removals." In any event, to the degree Fikre's complaint can, contrary to our own interpretation, be read to challenge the TSA's decision not to remove him from the No Fly List as part of DHS TRIP review, the district court, and this Court, would lack jurisdiction over that aspect of Fikre's case.

[10] The government also contends that *Kashem* erred by distinguishing, for purposes of § 46110, procedural due process claims challenging the sufficiency of DHS TRIP's procedures and substantive challenges to the decision in a final TSA order. 941 F.3d at 391 n.16. As a three-judge panel, we would be bound by this distinction in *Kashem*, were it relevant. *Scalia v. Emp. Sols. Staffing Grp., LLC*, 951 F.3d 1097, 1103 (9th Cir. 2020). But it is not. Here, both Fikre's procedural due process and substantive due process claims challenge the Screening Center's decision to place him on the No Fly List, not an order of the TSA Administrator.

C. Stigma-Plus Procedural Due Process Claim

Fikre also appeals the district court's dismissal of his complaint for failure to state a cognizable stigma-plus procedural due process claim. We remand Fikre's stigma-plus procedural due process claim to the district court to consider in the first instance whether Fikre states a viable procedural due process claim when his placement on the No Fly List is also considered.

To state a procedural due process claim, a plaintiff must allege "(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of process." *Wright v. Riveland*, 219 F.3d 905, 913 (9th Cir. 2000) (alteration in original) (quoting *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993)). Although "[d]amage to reputation alone is not actionable," *Hart v. Parks*, 450 F.3d 1059, 1069 (9th Cir. 2006) (quoting *Paul v. Davis*, 424 U.S. 693, 711-12 (1976)), such reputational harm caused by the government can constitute the deprivation of a cognizable liberty interest if a plaintiff "was stigmatized in connection with the denial of a 'more tangible' interest," *id.* at 1069-70 (quoting *Paul*, 424 U.S. 701-02). Under this "stigma-plus" test, a plaintiff who has suffered reputational harm at the hands of the government may assert a cognizable liberty interest for procedural due process purposes if the plaintiff "suffers stigma from governmental action plus alteration or extinguishment of 'a right or status previously recognized by state law.'" *Humphries v. County of Los Angeles*, 554 F.3d 1170, 1185 (9th Cir. 2009) (quoting *Paul*, 424 U.S. at 711), *rev'd in part on other grounds*, 562 U.S. 29 (2010)).

Here, the district court permitted Fikre to amend his complaint a seventh time with respect to the theory that he suffered a "stigma-plus" reputational injury by virtue of his alleged inclusion in the Database. And the district court acknowledged that, "if an individual were to suffer a stigma as a result of their placement on the No Fly List and then were denied the ability to travel due to the No Fly List," that allegation might state a viable stigma-plus claim. But the district court held the No Fly List-related claims moot and so viewed the "only stigmatic injury for which Mr. Fikre ha[d] established standing" as "the 2016 reputational injury he allegedly suffered as a result of the Mecca and San Diego trips," stemming from his inclusion in the Database. With the No Fly List claims out of the case, the district court concluded that any restriction on Fikre's ability to travel was "far too attenuated in both time and circumstance to be deemed as having occurred 'in connection with' his 2016 reputational injury," and so dismissed the stigma-plus claims.

But we have concluded that the district court erred by dismissing as moot Fikre's claims pertaining to his placement on the No Fly List. *See supra* Part II.A. Considering Fikre's placement on the No Fly List and his alleged presence in the broader Database together, both the reputational injuries and the "plus" factors at issue in Fikre's case may be more numerous and more substantial than the district court believed.

Generally, "a federal appellate court does not consider an issue not passed upon below," although we have discretion to do so "where the issue presented is a purely legal one and the record below has been fully developed." *Davis v. Nordstrom, Inc.*, 755 F.3d 1089,

1094 (9th Cir. 2014) (quoting *Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986)). Because both the district court's decision and the parties' briefs on appeal focused their stigma-plus analysis on the stigma and plus factors related to Fikre's 2016 reputational injuries stemming from his status as an individual listed in the Database—not on those factors as they related to the ramifications of his previous No Fly List status—we choose not to exercise that discretion in this case. We therefore vacate the district court's dismissal of Fikre's stigma-plus claim and remand for the district court to consider whether Fikre has a viable procedural due process claim when his No Fly List-related injuries are also considered.

III. Scope of Remand

We briefly clarify what claims will be before the district court on remand.

Fikre's Seventh Amended Complaint asserted two causes of action—a Fifth Amendment procedural due process claim and a Fifth Amendment substantive due process claim. Each of those causes of action pertains both to his past placement on the No Fly List and to his alleged current inclusion in the Database.

Fikre raised two issues in his opening brief on appeal. First, Fikre challenged the district court's dismissal as moot of his No Fly List-related claims. Second, Fikre challenged the district court's dismissal for failure to state a claim of his stigma-plus procedural due process claim, relating to his alleged inclusion in the Database. Because Fikre did not challenge the district court's dismissal of his substantive due process claim stemming from his inclusion in the Database, any challenge to that

decision has been waived. *See, e.g.*, *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1061 (9th Cir. 2020).

But by appealing the district court's mootness ruling in its entirety, Fikre necessarily preserved both his substantive and non-stigma-related procedural due process challenges to his placement on the No Fly List. The district court ruled on neither challenge on the merits, given its mootness determination. By challenging that determination, Fikre was requesting reinstatement of his operative complaint as to both due process challenges to his placement on the No Fly List; by reversing as to mootness, we confirm that the merits of both challenges as alleged in the operative complaint were properly before the district court and so are to be decided.

The government nonetheless suggested at oral argument that Fikre entirely relinquished any substantive due process claim on appeal. To support that contention, the government pointed to Fikre's statement in his reply brief, in response to the government's jurisdictional arguments, that his appeal "does not concern Fikre's substantive due process claims" because the district court dismissed them as moot, and that, "[a]s relevant to this appeal, Fikre challenges the No Fly List (and the broader TSDB) on procedural due process grounds." That statement did not waive Fikre's substantive due process claim as it pertains to his placement on the No Fly List. Rather, as Fikre's reply brief recognized, the merits of Fikre's No Fly List-specific claims, whether substantive or procedural, are not before this Court because the district court dismissed them as moot and never ruled on them substantively. Therefore, "[a]s relevant to this appeal" on the merits,

only the district court's dismissal of Fikre's separate stigma-plus procedural due process claim was implicated.

As explained, we now hold that the district court erred by dismissing Fikre's No Fly List claims as moot and that § 46110 does not divest the district court of jurisdiction over those claims. Both Fikre's substantive due process and non-stigma-related procedural due process claims pertaining to his placement by the Screening Center on the No Fly List, as well as his stigma-plus procedural due process claims pertaining both to his placement on the No Fly List and his alleged placement in the Database, will be before the district court on remand. Any substantive due process claim pertaining to his placement in the Database will not.

IV. Conclusion

We reverse the district court's dismissal on mootness grounds of Fikre's substantive due process and non-stigma-related procedural due process No Fly List claims. We also vacate the district court's dismissal of Fikre's stigma-plus procedural due process claim and remand to the district court to consider, in the first instance, whether Fikre has stated a viable stigma-plus procedural due process claim considering both his past placement on the No Fly List and his alleged inclusion in the Database.

REVERSED, VACATED, and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-36072
D.C. No. 3:13-cv-00899-BR

YONAS FIKRE, PLAINTIFF-APPELLANT

v.

FEDERAL BUREAU OF INVESTIGATION; JEFFERSON SESSIONS, ATTORNEY GENERAL; MIKE POMPEO, SECRETARY OF STATE; CHRISTOPHER A. WRAY, DIRECTOR OF THE FBI (SUED IN HIS OFFICIAL CAPACITY); CHARLES H. KABLE, IV, DIRECTOR OF FBI TERRORISM SCREENING CENTER (SUED IN HIS OFFICIAL CAPACITY); DANIEL COATS, DIRECTOR OF NATIONAL INTELLIGENCE (SUED IN HIS OFFICIAL CAPACITY); PAUL NAKASONE, DIRECTOR OF THE NATIONAL SECURITY AGENCY (SUED IN HIS OFFICIAL CAPACITY); DAVID NOORDELOOS, AN FBI AGENT (SUED IN HIS OFFICIAL AND INDIVIDUAL CAPACITY); JASON DUNDAS, AN FBI AGENT (SUED IN HIS OFFICIAL AND INDIVIDUAL CAPACITY); NATIONAL SECURITY AGENCY; UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES

Argued and Submitted: May 9, 2018
Portland, Oregon
Filed: Sept. 20, 2018

Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding

OPINION

Before: JOHNNIE B. RAWLINSON, MILAN D. SITH, JR.,[*] and MORGAN CHRISTEN, Circuit Judges.

Opinion by Judge CHRISTEN

CHRISTEN, Circuit Judge:

Yonas Fikre sued the United States government, alleging that the Federal Bureau of Investigations violated his substantive and procedural due process rights by placing and maintaining him on the No Fly List. While the suit was pending, the Defendants removed Fikre from the list and the district court dismissed Fikre's due process claims as moot. Fikre appeals. We have jurisdiction, 28 U.S.C. § 1291, and we reverse.

BACKGROUND[1]

Fikre is an American citizen who, until 2009, lived in Portland, Oregon and worked for a cellular telephone company. In late 2009, Fikre traveled to Sudan to establish a consumer electronics business in East Africa. In April 2010, while still in Sudan, Fikre was approached by two FBI agents who questioned him about his association with the as-Saber Mosque in Portland and his

[*] Following Judge Garbis's retirement, Judge Smith was drawn by lot to replace him. Ninth Circuit General Order 3.2.h. Judge Smith has read the briefs, reviewed the record, and listened to oral argument.

[1] At this stage of the proceedings, "[w]e accept as true all well-pleaded allegations of material fact, and construe them in the light most favorable to the non-moving party." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

commercial finances. The agents told Fikre that he had been placed on the No Fly List, which identifies individuals who are prohibited from flying into, out of, or over the United States and Canadian airspace by commercial airlines. The FBI agents offered to remove Fikre from the list if he became a government informant. Fikre refused.

Fikre's business took him to the United Arab Emirates (UAE) in September 2010. As recounted by Fikre, Emirati secret police seized him from the place where he was staying in June 2011 and transported him to an unknown location where he was imprisoned and tortured for 106 days. During this time, Fikre was interrogated about his connection to the as-Saber Mosque and the nature of his financial dealings. One of the interrogators told Fikre that the FBI had requested his detention. Fikre was released in September 2011, but he was unable to board a plane bound for the United States because he remained on the No Fly List. Fikre sought refuge in Sweden. While there, he consulted an attorney and held a press conference denouncing his capture and confinement in the UAE.

The Department of Homeland Security (DHS)'s Traveler Redress Inquiry Program (TRIP) allows individuals the opportunity to have the Transportation Security Administration review and, if appropriate, correct their files if it determines that a person has been erroneously placed on a watchlist. As initially implemented in 2007, the government responded to TRIP inquiries without confirming a traveler's inclusion on the No Fly List. Fikre attempted in November 2013 to rectify his situation through TRIP, but the DHS neither confirmed nor denied his placement on the No Fly List

in response to this first inquiry; it stated only that "no changes or corrections [we]re warranted at th[at] time."

In 2015, the DHS modified TRIP to comply with the judgment in *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014). The revised TRIP protocol includes additional procedural safeguards that were unavailable at the time Fikre filed his action. Requesters are now apprised of their presence or absence on the No Fly List and the unclassified reasons for their status. Applying the revised procedures, in February 2015 the DHS informed Fikre that he was and would remain on the No Fly List because he had been "identified as an individual who may be a threat to civil aviation or national security." No other reasons were provided for the decision to maintain Fikre on the No Fly List. Fikre was ultimately denied asylum in Sweden, and the Swedish government returned him to the United States in 2015. Fikre avers that these events damaged his reputation by stigmatizing him as a suspected terrorist and so strained his marriage that his wife divorced him while he was stranded outside of the country.

Fikre brought the instant suit against the government raising a variety of common law, statutory, and constitutional claims.[2] As relevant here, Fikre alleged that the FBI violated his right to substantive due process by depriving him of his liberty interest in his repu-

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[2] Fikre's complaint listed sixteen causes of action, but only his substantive due process, procedural due process, and Fourth Amendment claims are implicated in this appeal. We affirm the dismissal of Fikre's Fourth Amendment claims in a concurrently filed memorandum disposition.

tation and international travel,[3] and by conditioning his removal from the No Fly List upon his agreement to become a government informant. Fikre's complaint also maintained that the FBI denied him procedural due process by placing and keeping him on the No Fly List without adequate notice and an opportunity to be heard. Fikre prayed for injunctive and declaratory relief for both due process claims and asked, among other things, for a declaration by the government that he should not have been added to the No Fly List.

The Defendants moved to dismiss the operative complaint and, shortly thereafter, notified Fikre that he had been removed from the No Fly List. In a joint status report filed at the district court's direction, Fikre agreed that, to the extent he sought an injunction requiring the Defendants to remove him from the list, that claim was moot. Fikre contended, however, that he remained entitled to other injunctive and declaratory relief.

The district court subsequently dismissed Fikre's remaining procedural and substantive due process claims in a detailed decision. The court reasoned that the government's removal of Fikre from the No Fly List was "a sufficiently definite action" to render his claims moot. In reaching this conclusion, the district court observed that the Defendants had publicly stated that Fikre was no longer on the No Fly List, that more than six months had elapsed since this change in status, and that the record did not indicate a lack of good faith on the government's part. The district court also "emphasize[d]"

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[3] The Supreme Court has recognized the right to international travel as a protected right under substantive due process. *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

that "the courthouse doors will be open to [Fikre]" were he to be reinstated to the No Fly List in the future.

STANDARD OF REVIEW

We review "questions of Article III justiciability, including mootness" de novo. *Bell v. City of Boise*, 709 F.3d 890, 896 (9th Cir. 2013) (citing *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1176 (9th Cir. 2011)).

DISCUSSION

The government argues that Fikre's procedural and substantive due process claims are moot because he has been removed from the No Fly List. In the government's view, insofar as Fikre sought to be removed from the No Fly List, that outcome has now been achieved and his former status does not impinge on his existing legal rights. The government argues that there is no longer a live controversy and no effectual relief the court could grant.

Fikre begs to differ. According to him, the voluntary cessation doctrine should apply to preclude a finding of mootness, especially because the government has not explained why it added him to the No Fly List in the first place and why, years later, it spontaneously took him off of it. Fikre urges that nothing prevents the government from putting him back on the list and that his claims are therefore not moot.

"Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). "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 out-

come.'" *Id.* at 91 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). It is well-established, however, that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case" unless "it can be said with assurance that 'there is no reasonable expectation . . . ' that the alleged violation will recur" and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (alteration in original) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)); *see Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017). A party asserting mootness has "the 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (alteration in original) (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Where that party is the government we presume that it acts in good faith, *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010), though the government must still demonstrate that the change in its behavior is "entrenched" or "permanent." *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) (quoting *Bell*, 709 F.3d at 900); *see Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014).

Our precedents illuminate the contours of such an inquiry. First, the form the governmental action takes is critical and, sometimes, dispositive. "A statutory change . . . is usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." *Native Vill.*

of Noatak v. Blatchford, 38 F.3d 1505, 1510 (9th Cir. 1994); *see Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 877-78 (9th Cir. 2006). The rigors of the legislative process "bespeak . . . finality and not . . . for-the-moment, opportunistic tentativeness." *Libertarian Party of Ark. v. Martin*, 876 F.3d 948, 951 (8th Cir. 2017). On the other hand, "an executive action that is not governed by any clear or codified procedures cannot moot a claim." *McCormack*, 788 F.3d at 1025; *see Trinity Lutheran Church*, 137 S. Ct. at 2019 n.1 (holding that although the state had "beg[u]n allowing religious organizations to compete for and receive [government] grants on the same terms as secular organizations," it did not meet the requisite "'heavy burden' of making 'absolutely clear' that it could not revert to its policy of excluding religious organizations" (quoting *Friends of the Earth, Inc.*, 528 U.S. at 189)). For cases that lie between these extremes, we ask whether the government's new position "could be easily abandoned or altered in the future." *Rosebrock*, 745 F.3d at 972 (quoting *Bell*, 709 F.3d at 901).

We have also examined the avowed rationale for governmental action when assessing the merits of a claim of voluntary cessation. For instance, *Olagues v. Russoniello*, 770 F.2d 791 (9th Cir. 1985), held that abandonment of a federal investigation into illegal voter registration by noncitizens did not moot the plaintiffs' suit. *Id.* at 794. Important to our conclusion was the fact that "the United States Attorney did not voluntarily cease the challenged activity because he felt that the investigation was improper." *Id.* at 795. "Rather, [he] terminated the investigation solely because it failed to produce evidence supporting any further investigative activities" and "ha[d] at all times continued to argue vig-

orously that his actions were lawful." *Id.*; *see also Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1274 (9th Cir. 1998) (the discontinuance of syphilis tests on employees "merely for reasons of 'cost-effectiveness'" did not moot the case because the laboratory did not "offer[] any reason why they might not return in the future to their original views on the utility of mandatory testing" and therefore did not rule out that testing might be employed again); *Porter v. Bowen*, 496 F.3d 1009, 1016-17 (9th Cir. 2007) (letter from California Secretary of State to the California legislature tolerating the operation of vote-swapping websites pending clarification of state election code did not moot lawsuit because "the Secretary has maintained throughout the nearly seven years of litigation . . . that [her predecessor] had the authority under state law to threaten [plaintiffs] with prosecution"); *Forest Guardians v. Johanns*, 450 F.3d 455, 460, 462 (9th Cir. 2006) (Forest Service's practice of not monitoring utilization levels of grazed allotment likely to persist despite interim monitoring because the agency "argued throughout th[e] litigation that it is not required to meet [those monitoring requirements]").

In contrast, *White v. Lee*, 227 F.3d 1214, 1242-44 (9th Cir. 2000) held that a change in administrative policy that embraced plaintiffs' free speech arguments rendered their claims moot. The plaintiffs in *White* opposed the conversion of a motel into a multi-family housing unit for the homeless, *id.* at 1220, by "wr[iting] to the Berkeley City Council, sp[eaking] out before the Zoning Adjustment Board and at other public meetings, and publish[ing] a newsletter with articles critical of the project." *Id.* at 1221. They aired their grievances to the press, asked the business community to espouse their

cause, and challenged the integrity of the Zoning Adjustment Board's decision-making processes. *Id.* After the Department of Housing and Urban Development (HUD) investigated the plaintiffs for engaging in a discriminatory housing practice under the Fair Housing Act (FHA), the plaintiffs sued the agency for injunctive and declaratory relief. *Id.* at 1222-25. The investigation prompted HUD to promulgate guidelines prohibiting the investigation of petitioning or lobbying activities that did not threaten physical harm. *Id.* at 1242-43. We held that plaintiff's claim was moot in light of HUD's new guidelines. *Id.* at 1243-44. HUD's change of heart did not fall within the voluntary cessation exception to mootness because it "represent[ed] a permanent change in the way HUD conduct[ed] FHA investigations," was "broad in scope and unequivocal in tone," and, significantly, "fully supportive of First Amendment Rights." *Id.*

Our case law teaches that a voluntary change in official stance or behavior moots an action only when it is "absolutely clear" to the court, considering the "procedural safeguards" insulating the new state of affairs from arbitrary reversal and the government's rationale for its changed practice(s), that the activity complained of will not reoccur. *McCormack*, 788 F.3d at 1025; *Rosebrock*, 745 F.3d at 974. No bright-line rule separates cases comprehended by the voluntary cessation doctrine from those that are not, but the government's unambiguous renunciation of its past actions can compensate for the ease with which it may relapse into them. In *White*, for instance, we deemed a memorandum issued by an assistant secretary for the Office of Fair Housing and Equal Opportunity sufficient to moot a case, even though there had been no intervening statu-

tory or regulatory change, because the memorandum "addresse[d] all of the objectionable measures that HUD officials took against the plaintiffs . . . and even confesse[d] that th[e] case was the catalyst for the agency's adoption of the new policy." 227 F.3d at 1243. Though there is no bright-line rule for application of the voluntary cessation doctrine, this much is apparent: a claim is not moot if the government remains practically and legally "free to return to [its] old ways" despite abandoning them in the ongoing litigation. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

Returning to Fikre's appeal, the government insists that it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *Already*, 568 U.S. at 91 (quoting *Friends of the Earth, Inc.*, 528 U.S. at 190), because it filed a notice in district court announcing Fikre's removal from the No Fly List. We disagree. Even accepting the government's argument that its notice constitutes a "formal agency action, publicly made, and unequivocally expressed," the mere announcement that Fikre was removed from the list falls short of meeting the government's burden.[4]

To begin, the FBI's decision to restore Fikre's flying privileges is an individualized determination untethered to any explanation or change in policy, much less an abiding change in policy. *Cf. Am. Cargo Transp.*, 625 F.3d at 1180. The DHS re-evaluated Fikre's presence

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[4] We note that the focus should not be on the absence of evidence that the government intends to reinstate Fikre to the list, as that would improperly shift the evidentiary burden to Fikre to prove the alleged violation will not reoccur. *See Nat. Res. Def. Council v. County of Los Angeles*, 840 F.3d 1098, 1104 (9th Cir. 2016). The government bears the burden of proving mootness. *Id.*

on the No Fly List in 2013 and 2015 pursuant to its TRIP procedure and determined that no adjustments to his status were necessary. Indeed, the DHS affirmed as late as March 2015—*after* it had amended TRIP to conform to the decision in *Latif*—that Fikre posed "a threat to civil aviation or national security" and it refused to remove him from the No Fly List. Yet it did just that fourteen months later, without explanation or any announced change in policy. Fikre was taken off the list two months after briefing was completed on the government's motion to dismiss Fikre's lawsuit. *See* Reply to Motion to Dismiss, *Fikre v. FBI*, No. 3:13-cv-00899-BR (D. Or. Oct. 24, 2016), Dkt. # 96. This record suggests that Fikre'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.

Moreover, the government has not assured Fikre 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, nor has it verified the implementation of procedural safeguards conditioning its ability to revise Fikre's status on the receipt of new information. As far as we can tell, the current permission Fikre has to travel by air is "discretionary," and not "entrenched" or "permanent." *McCormack*, 788 F.3d at 1025. We presume the government acts in good faith and do not impute to it a strategic motive to moot Fikre's suit, *see Am. Cargo Transp.*, 625 F.3d at 1180, but with no explanation of the reasons for dropping Fikre from the No Fly List, we may not infer the government's acquiescence to the righteousness of Fikre's contentions. On this record, the government has not repudiated the decision to add Fikre to the No Fly List and maintain him there for approximately five years.

Finally, in response to the government's assertion that no relief is available for Fikre's claims, we note that Fikre's removal from the No Fly List does not "completely and irrevocably eradicate[] the effects of the alleged violation[s]." *Davis*, 440 U.S. at 631. The notice filed by the government averred only that "counsel recently was advised by the Terrorist Screening Center that [Fikre] has been removed from the No Fly List." Absent an acknowledgment by the government that its investigation revealed Fikre did not belong on the list, and that he will not be returned to the list based on the currently available evidence, Fikre remains, in his own words, "stigmatiz[ed] . . . as a known or suspected terrorist and as an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so." Because acquaintances, business associates, and perhaps even family members are likely to persist in shunning or avoiding him despite his renewed ability to travel, it is plain that vindication in this action would have actual and palpable consequences for Fikre.

The government suggests in its appellate brief that if Fikre is ever put back on the No Fly List, that determination would "necessarily be . . . predicated on a new and different factual record," but the government has not executed a declaration to that effect. *Cf. Mokdad v. Sessions*, 876 F.3d 167, 169 (6th Cir. 2017). Nor has the government explained why such a declaration would not constitute additional relief that may be afforded to Fikre. When examining whether a claim has become moot, "[t]he question is not whether the precise relief sought at the time [the case] was filed is still available. The question is whether there can be any effective relief." *McCormack*, 788 F.3d at 1024 (second

alteration in original) (quoting *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1157 (9th Cir. 2006)).

Because there are neither procedural hurdles to reinstating Fikre on the No Fly List based solely on facts already known, nor any renouncement by the government of its prerogative and authority to do so, the voluntary cessation doctrine applies. Fikre's due process claims are not moot.

CONCLUSION

We reverse the district court's dismissal of Fikre's due process claims and remand for further proceedings.

REVERSED and REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 3:13-cv-00899-MO

YONAS FIKRE, PLAINTIFF

v.

CHRISTOPHER WRAY, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION (SUED IN HIS OFFICIAL CAPACITY), ET AL., DEFENDANTS

Filed: Aug. 12, 2020

OPINION AND ORDER

MOSMAN, J.,

This case comes before me on Defendants' Motion to Dismiss [ECF 146] Plaintiff Yonas Fikre's Seventh Amended Complaint [ECF 145]. Defendants move to dismiss Mr. Fikre's latest complaint for lack of subject matter jurisdiction (due to lack of standing) and for failure to state a claim. While I find that Mr. Fikre has standing, I hold that his complaint fails to state a claim. Therefore, for the reasons explained below, I GRANT Defendants' motion and I DISMISS this case with prejudice.

BACKGROUND

Mr. Fikre began this action when he filed his original complaint in this court on May 30, 2013. [ECF 1].

Then, as now, Mr. Fikre's grievance centers around alleged injuries sustained as a result of the Government's decision to list him in the Terrorism Screening Database ("TSDB") and to place him on the No Fly List. The TSDB is the federal government's integrated list of known and suspected terrorists. Watchlisting Overview [ECF 130-1] at 1-2. The No Fly List is a subset of the TSDB that bars those listed on it from boarding flights on U.S. carriers or any flight that enters U.S. airspace. *Id.* at 2. Persons listed in the TSDB but not included on the No Fly List are generally permitted to travel by air, but may be subject to additional security screening. *Id.*

Over the last seven years and in as many amended complaints, much has transpired in this case. The factual circumstances have changed, claims have fallen away, and theories have been rejected. The case has made its way from the District Court to the Ninth Circuit and back again. Here, now, Mr. Fikre has been given leave to file a Seventh Amended Complaint to advance one final remaining theory: that he has suffered a reputational injury in violation of his Fifth Amendment right to due process. As will be described in more detail below, Mr. Fikre's Seventh Amended Complaint contains new allegations which purport to accomplish this goal.[1] But the complaint (and Mr. Fikre's argument in response to Defendants' present motion) also attempts to repackage old allegations—which formed the basis of claims and theories that have already been

[1] While much of the previous litigation in this case has centered around Mr. Fikre's status on the No Fly List, these new allegations post-date Mr. Fikre's removal from the No Fly List and focus on his inclusion in the TSDB more generally, which allegedly continues.

rejected by this court—into the remaining reputational injury theory. For the cold reader, it can be hard to distinguish ground that has already been decisively covered from the new, limited issues that are the principal concern here. With that challenge in mind, I provide an abbreviated procedural history of this case, beginning with the circumstances of Mr. Fikre's successful appeal to the Ninth Circuit and the procedural and factual developments that have occurred since.[2]

I. Procedural History

On November 29, 2015, Mr. Fikre filed his Fifth Amended Complaint [ECF 87] and Defendants moved to dismiss [ECF 90]. In that complaint, Mr. Fikre asserted sixteen different claims for relief, on constitutional, statutory, and common law grounds. Fifth Am. Compl. [87] at 23-40. Among those many claims, Mr. Fikre alleged that the Government's decision to place and retain him on the No Fly List violated his Fifth Amendment rights to substantive due process (claim one) and procedural due process (claim three) by infringing his liberty interest in international travel. *Id.* at 23-24. Additionally, as part of his procedural due process claim only, Mr. Fikre alleged that his placement on the No Fly List also infringed his protected liberty interest "in his reputation and in freedom from government-assigned stigmas." *Id.* at 25.

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[2] For a comprehensive procedural history of the events that predate the filing of the Fifth Amended Complaint and the Ninth Circuit's decision, see Judge Anna J. Brown's Opinion and Order ("O&O") [ECF 128] at 2-12. Judge Brown was the judge on this case until July 15, 2019. Notice [ECF 134].

On May 9, 2016, before the District Court had ruled on Defendants' motion to dismiss, Defendants filed a notice with the court representing that Mr. Fikre had been removed from the No Fly List. Notice [ECF 98] at 1. As a result, the court granted Defendants' motion and dismissed Mr. Fikre's due process claims as moot. Op. and Order ("O&O") [ECF 105] at 19-27.[3] Mr. Fikre appealed the dismissal of his due process claims. *See* O&O [128] at 11.[4]

On September 20, 2018, the Ninth Circuit issued an opinion in which it reversed the District Court's holding that Mr. Fikre's substantive and procedural due process claims were moot. *Fikre v. FBI*, 904 F.3d 1033, 1041 (9th Cir. 2018). Citing the voluntary cessation doctrine, the Ninth Circuit held that the Government's disclosure that Mr. Fikre was no longer on the No Fly List was insufficient, on its own, to ensure that the Govern-

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[3] Judge Brown also dismissed with prejudice claim four (freedom of association claim alleging that Defendants attempted to coerce Mr. Fikre into becoming a government informant by offering to remove him from the No Fly List), claim twelve (Fourth Amendment claim alleging the Government impermissibly searched and seized Mr. Fikre's private communications), claim thirteen (alleged violations of FISA), claim fourteen (alleged violations of the Stored Communications Act), claim fifteen (alleged violations of the Wiretap Act), and claim sixteen (alleged violations of Federal Rule of Criminal Procedure 41(g)). O&O [105] at 27-29, 35, 42, 45-46. Claim two and claims five through eleven related exclusively to a subset of defendants who were sued in their individual capacities. *Id.* at 4 n.1. After Mr. Fikre filed a notice of non-objection to the dismissal of these defendants [ECF 106] the court dismissed them without prejudice. Order [ECF 107].

[4] Mr. Fikre also appealed the dismissal of his Fourth Amendment claim (claim twelve), but the Ninth Circuit affirmed the dismissal of that claim. *Fikre v. FBI*, 904 F.3d 1033, 1036 n.2 (9th Cir. 2018).

ment's allegedly illegal conduct in placing and retaining Mr. Fikre on the No Fly List would not recur. *Id.* at 1037-41.

Relevant for our purposes here, at the conclusion of its analysis the Ninth Circuit stated the following:

> Finally, in response to the government's assertion that no relief is available for Fikre's claims, we note that Fikre's removal from the No Fly List does not "completely and irrevocably eradicate[ ] the effects of the alleged violation[s]". . . . **Absent an acknowledgment by the government that its investigation revealed Fikre did not belong on the list, *and* that he will not be returned to the list based on the currently available evidence**, Fikre remains, in his own words, "stigmatiz[ed] . . . as a known or suspected terrorist and as an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so." Because acquaintances, business associates, and perhaps even family members are likely to persist in shunning or avoiding him despite his renewed ability to travel, it is plain that vindication in this action would have actual and palpable consequences for Fikre.

Id. at 1040 (emphasis added) (citations omitted).

The Ninth Circuit remanded the case for further proceedings, *id.* at 1041, and Mr. Fikre moved the District Court for leave to file a sixth amended complaint, [ECF 125]. The court granted Mr. Fikre's motion to amend only in part. O&O [128] at 30. It permitted Mr. Fikre to amend his complaint to remove previously resolved claims and to plead additional *factual* allegations related

to his due process claims. *Id.* But it did not permit amendment to add any new claims, including a proposed claim under the Religious Freedom Restoration Act ("RFRA") (which closely resembled Mr. Fikre's previously dismissed freedom of association claims). *Id.*

On May 19, 2019, Mr. Fikre filed his Sixth Amended Complaint, in which he reasserted and updated his procedural and substantive due process claims. [ECF 129] at 32-35.[5] Defendants again moved to dismiss. [ECF 130]. In apparent reaction to the Ninth Circuit's decision, Defendants attached a declaration to their motion which stated, in part, that "[Mr. Fikre] 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." Defs.' Mot. Ex. B [ECF 130-2] ("Courtright Decl.") ¶ 5. Among other arguments, Defendants claimed in their motion that this declaration—specifically, the assurance

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[5] Mr. Fikre's due process claims, as they appeared in the Sixth Amended Complaint, had evolved in some questionable ways given the District Court's limitation that only new *factual* allegations could be added. First, in contrast to his Fifth Amended Complaint, Mr. Fikre alleged that his Fifth Amendment rights were violated not just through his inclusion on the No Fly List, but also through his more general inclusion as a listee in the TSDB. Sixth Am. Compl. [126] at 32-36. Second, he appeared to allege the deprivation of a variety of additional liberty interests, beyond the previously alleged deprivations of his travel-related and reputational interests. *See id.* ¶¶ 117, 121, 139-40. It was unclear if those allegations were part of the reputational-injury claim, or if they were an attempt to advance new theories or to repackage previously dismissed claims into the due process claims. Because, as discussed below, I dismissed the Sixth Amended Complaint on jurisdictional grounds, I did not reach the question of the propriety of these additional allegations.

that Mr. Fikre would not be re-added to the No Fly List based on "currently available information"—sufficed to moot Mr. Fikre's due process claims. Defs.' Mot. [130] at 12-13. After Defendants filed their motion, the case was reassigned to me. Notice [134].

On November 11, 2019, I heard oral argument on Defendants' motion and ruled from the bench. Min. of Proceedings [ECF 141]. In light of Defendants' declaration that Mr. Fikre would not be returned to the No Fly List based on any "currently available information," I held that Mr. Fikre's due process claims—insofar as they were based on a theory of present or future injury to a travel-related liberty interest—did not present a live case or controversy and I dismissed them, with prejudice, on justiciability grounds. Tr. [ECF 143] at 40-41.[6] But while I agreed that Defendants' declaration dispensed with Mr. Fikre's travel-related theory of injury, I did not agree that it would be sufficient to remedy a reputational injury. *Id.* at 41-42. The problem, however, was that Plaintiff's Sixth Amended Complaint did not sufficiently allege a cognizable reputational injury. *Id.* Nevertheless, despite Mr. Fikre's multiple previous opportunities to amend his complaint, I granted him leave to file a seventh amended complaint on the "sole remaining theory" that he has suffered a reputational

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[6] At oral argument I framed that decision using standing terminology, but key to my holding was that Defendants had met their burden under the voluntary cessation doctrine as laid out by the Ninth Circuit's decision in this case. *See* Tr. [143] at 40-41 ("I take into account that [Mr. Fikre] has been taken off the [No Fly] List and that a serious barrier has been put in place to putting him back on the list—that is, the declaration that he won't be put back on the list based on anything currently known.").

injury in violation of his Fifth Amendment rights. *Id.* at 42-44.

II. The Seventh Amended Complaint

Mr. Fikre filed his Seventh Amended Complaint on December 18, 2019. [ECF 145]. The updated complaint adds approximately forty new paragraphs of allegations but is otherwise identical to the Sixth Amended Complaint. *See* Seventh Am. Compl. [145] ¶¶ 101, 114-153; Tr. [ECF 163] at 3-5.

The new allegations focus on two separate trips taken by Mr. Fikre: (1) a 2016 trip to Mecca to complete the Hajj in which Mr. Fikre traveled with fellow members of the Seattle-area Muslim community, and (2) a 2016 family trip to San Diego. Seventh Am. Compl. [145] ¶¶ 114, 141. Mr. Fikre alleges that during the course of traveling through U.S. airports as part of these two trips, the Government stigmatized him (and thus injured his reputation) by subjecting him to repeated, non-random, intensive security screening in front of his co-travelers, which led those co-travelers to believe that the Government suspected Mr. Fikre of being a terrorist. *See generally id.* ¶¶ 114-153. Mr. Fikre alleges he has suffered a variety of harms as a result of his injured reputation. *See, e.g.*, *id.* ¶¶ 138-40.

More specifically, Mr. Fikre alleges a chain of causation that breaks down into four parts. First, Mr. Fikre alleges that while he was no longer on the No Fly List at the time of the two 2016 trips, he remained a listee on the TSDB subject to non-random, intensive screenings at airports. *Id.* ¶¶ 35, 113, 116-17. Second, Mr. Fikre alleges that on both trips, because of his TSDB status, he was subjected to repeated, intensive security screen-

ings in front of his community members (the Mecca trip) and his family members (the San Diego trip). *Id.* ¶¶ 117-18, 128-29, 143-44. Third, because the Muslim community is familiar with the consequences of being listed on the TSDB, including being subjected to intensive screenings at airports, the Muslim community members who witnessed Mr. Fikre's treatment at airport security "deduced his TSDB status from how Defendants treated him," or, more generally, "could tell that the federal government believed Fikre was dangerous." *Id.* ¶¶ 119, 124. Fourth, because certain community members and family believed that the federal government suspected Mr. Fikre of being a terrorist, they shunned him in various ways and the stigma spread throughout Mr. Fikre's local and religious community. *Id.* ¶¶ 120-21, 127, 132-33, 138-40.

Mr. Fikre seeks a variety of declaratory and injunctive relief, including sixteen specific injunctions. *Id.* at 46-49. He asserts that his reputational injury can only be cured if Defendants "repudiate in its entirety the decision to add Fikre to the TSDB with a No Fly List annotation and maintain him there for approximately five years." *Id.* at 49.

DISCUSSION

Defendants move to dismiss the Seventh Amended Complaint on two main grounds: (1) that Mr. Fikre lacks standing, and (2) that he fails to state either a substantive due process or a procedural due process claim. Defs.' Mot [146] at 3, 15, 19. I take each argument in turn.

I. Standing

Standing is a remedy-specific inquiry. *See Lyons v. City of Los Angeles*, 461 U.S. 95, 105, 109 (1983) (holding that the plaintiff had standing to pursue damages for his past injury but lacked standing to pursue injunctive relief to prevent future harm). The general rule of standing is that a plaintiff must allege (1) a concrete, particularized and personal injury that is (2) fairly traceable to defendant's allegedly unlawful conduct, and (3) is redressable by the requested relief. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Where the plaintiff alleges a threatened or future injury that has not yet occurred, the potential injury must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("[W]e have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that [a]llegations of *possible* future injury are not sufficient.") (internal quotations omitted). Relatedly, "[p]ast exposure to harmful or illegal conduct does not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects." *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010) (citation omitted).

Finally, when a defendant brings a standing challenge against an amended complaint that was filed subsequent to the original commencement of the action, the proper focus in determining jurisdiction is the factual lay of the land at the time the complaint under consideration was filed, rather than the facts as they existed at the time the original complaint was filed. *Northstar Financial Advisors, Inc. v. Schwab Investments*, 779 F.3d 1036, 1044 (9th Cir. 2015).

Here, Defendants spend the bulk of their briefing arguing that Mr. Fikre has not shown that there is a "certainly impending" risk of a future injury to his reputation sufficient to confer standing for any prospective relief. *See* Mot. [146] at 4-7. Fair enough: many of the specific injunctions that Mr. Fikre requests are forward looking. *See, e.g.*, Seventh Am. Compl. [145] at 48 (requesting an injunction that would require Defendants to provide written notice if they were to re-add Mr. Fikre to the No Fly List). And to the extent Mr. Fikre seeks prospective relief, I agree with Defendants that Mr. Fikre has not alleged a certainly impending risk of a future reputational injury. But the allegations in the complaint concerning the reputational injury that purportedly resulted from the 2016 Mecca and San Diego trips do not describe a future, yet-to-be-realized harm, they describe a harm that has already occurred and is ongoing. The standing inquiry for such a present, ongoing harm is the standard three-prong analysis of injury, causation, and redressability.

A. Injury-in-fact

Injury to one's reputation can be a cognizable injury-in-fact to confer standing to bring suit. *See Meese v. Keene*, 481 U.S. 465, 474-76, 479 n.14 (1987) ("The risk of this reputational harm . . . is sufficient to establish appellee's standing. . . . "); *Robins v. Spokeo*, 867 F.3d 1108, 1112 (9th Cir. 2017) ("[H]arm to one's reputation . . . may be sufficient for Article III standing.").

Here, Mr. Fikre has alleged that the Government stigmatized him and that his reputation within his community—and even within his own family—has suffered. He has alleged specific facts that show that his

injured reputation has manifested in real consequences. For example, he alleges that members of his local congregation have opposed him leading prayer or calling the adhan and refuse to share their names with him. Seventh Am. Compl. [145] ¶¶ 136, 138. That community members have stopped or reduced their patronage of his restaurant. *Id.* ¶ 139. That friends and even family members have ended their relationships with him. *Id.* ¶¶ 140, 146-47. And he has alleged that his reputation continues to suffer and that his community and family persist in shunning him. *Id.* ¶ 151.

Therefore, I hold that Mr. Fikre has sufficiently alleged a reputational injury that constitutes a concrete, particularized injury-in-fact.

B. Causation

The question here is whether there is a "fairly traceable" causal connection between Mr. Fikre's injured reputation and Defendants' alleged unlawful conduct: listing Mr. Fikre in the TSDB without due process. *See Lujan*, 504 U.S. at 560. "[T]he causal connection put forward for standing purposes cannot be too speculative, or rely on conjecture about the behavior of other parties, but need not be so airtight at this stage of litigation as to demonstrate that the plaintiffs would succeed on the merits." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2005) (citation omitted); *see also Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) ("A causation chain does not fail simply because it has several "links," provided those links are 'not hypothetical or tenuous' and remain 'plausib[le].'") (citation omitted).

As described above in the background section, Mr. Fikre alleges a four-part causal chain between Defendants' conduct and his injured reputation. I hold that Mr. Fikre's allegations at each part are plausible and thus there is a "fairly traceable" causal connection between the alleged injury and Defendants' alleged conduct that is sufficient for standing purposes.

There is no real dispute that the allegations regarding the first, second, and fourth steps in the causal chain are plausible. First and second, it is plausible that despite being removed from the No Fly List, Mr. Fikre remained a listee of the TSDB subject to intensive screening when traveling through airports, and that he was so screened when he traveled in 2016. Fourth, it is plausible that someone's community and family might shun him if it were revealed that the government suspected that person of being a terrorist.

Defendants focus on the third step, where Mr. Fikre alleges that members of his community and family discerned that the Government suspected him of being a terrorist after observing the intensive security screening that Mr. Fikre received at the airport. Defendants argue that Mr. Fikre "cannot establish that the Government's placement of him on the No Fly List has caused the alleged harms to his reputation, because the Government does not disclose watchlist status publicly" and because "the disclosure of his former No Fly List status and subsequent removal was made publicly available through this lawsuit which [Mr. Fikre] brought." Mot. [146] at 8 (citation omitted).

Taking Defendants' second argument first, Mr. Fikre's reputational allegations concern his alleged TSDB listee status, not his No Fly List status, so the argument is

inapposite—there has been no public disclosure one way or the other in this lawsuit with respect to Mr. Fikre's possible TSDB status. As to their first argument, that the Government does not publicly disclose watchlist status, Defendants make this argument more fully when addressing the merits of Mr. Fikre's stigma-plus claim (which I discuss at length below). In short, they argue that the Government can only be causally connected to a reputational injury when the Government stigma results from an "official disclosure" of information. *See id.* at 8, 21. But Defendants cite no authority that, for standing purposes, a reputational injury is only fairly traceable to an official government disclosure of information. Nor would such a requirement make sense. The Government can surely stigmatize someone through its conduct, official or not. For example, it could stigmatize someone as a possible criminal through a false arrest conducted in public view.

Rather, the inquiry here is whether the allegations regarding this third step are plausible. I think they are. It is common knowledge for Americans who travel that airport security is tight and that anyone might be randomly subject to additional, more invasive screening upon passing through security. But while it might be unremarkable to see a member of your traveling party pulled aside for extra screening while passing through security, eyebrows would surely raise if that same person were repeatedly subjected to intense scrutiny, including at the gate (where people are not routinely rescreened) and at subsequent airports throughout the course of the journey. *See* Seventh Am. Compl. [145] ¶¶ 118, 122-23. I also find it plausible that those of Muslim faith living in America might be especially sensitive and aware of security procedures when traveling,

given the pervasive and harmful stereotypes in our society that broadly associate Muslims with terrorism.[7] Therefore, I find it plausible that Mr. Fikre's co-travelers, after viewing how he was treated, could come to the conclusion that the Government believed Mr. Fikre was potentially a terrorist, or at least a dangerous person.[8]

C. Redressability

Having sufficiently plead an injury that is fairly traceable to Defendants' conduct, the only question remaining is whether that injury is redressable by the requested relief. Among other relief, Mr. Fikre seeks an injunction which would require that "Defendants repudiate in its entirety the decision to add Fikre to the TSDB with a No Fly List annotation and maintain him there for approximately five years." Seventh Am. Compl. [145] at 49. This injunction—and this one only—would redress Mr. Fikre's injured reputation and was explicitly contemplated by the Ninth Circuit in its recent decision in this case. *See Fikre v. FBI*, 904 F.3d 1033, 1040 (9th Cir. 2018) (stating that any reputational injury to Mr. Fikre would not be redressed "absent an acknowledgement by the government that . . . Fikre did not belong on the [watch]list").

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[7] *See* Michael T. Luongo, *Traveling While Muslim Complicates Air Travel*, N.Y. Times (Nov. 7, 2016), https://www.nytimes.com/2016/11/08/business/traveling-while-muslimcomplicates-air-travel.html.

[8] It does not matter whether his co-travelers believed specifically that Mr. Fikre was a listee on the TSDB; it is enough that his reputation suffered because his co-travelers believed the Government suspected him of being a dangerous person or possible terrorist. Mr. Fikre's alleged TSDB status is only relevant here because it purportedly set this causal chain in motion.

In sum, Mr. Fikre has alleged injury, causation, and redressability sufficient to confer standing for an ongoing reputational injury for which he may seek an injunction that would require the Government to repudiate its purported decision to list him in the TSDB.

II. Whether the Seventh Amended Complaint States a Claim

A. Legal Standard

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A pleading that offers only "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

B. Substantive Due Process Claim

In his response to Defendants' motion, Mr. Fikre seeks to "incorporate [his] prior substantive due process arguments made in response to Defendants' prior motion to dismiss" rather than provide any new briefing on why the particular substantive due process claim alleged in his Seventh Amended Complaint should survive Defendants' current motion. Resp. [152] at 25. That won't cut it. If I had found the arguments made in Mr. Fikre's last round of briefing compelling, I would not have granted Defendants' previous motion to dismiss. I thus decline to take up his request to revisit the arguments made in his last round of briefing.

Regardless, I am persuaded by Defendants' argument that Plaintiff states no substantive due process claim in his Seventh Amended Complaint because he alleges no facts that show "conscience shocking" behavior by Defendants that resulted in the deprivation of a reputational liberty interest. *See* Mot. [146] at 15-18; *see also Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006) ("[I]n order to establish a constitutional violation based on substantive due process, [a plaintiff] must show both a deprivation of her liberty and conscience shocking behavior by the government."). I therefore DISMISS Plaintiff's substantive due process claim with prejudice.

C. Procedural Due Process Claim

"To state a procedural due process claim, [a plaintiff] must allege '(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of process.'" *Wright v. Riveland*, 219 F.3d 905, 913 (9th Cir. 2000) (citation omitted).

An injured reputation, by itself, is not a liberty deprivation that can sustain a procedural due process claim. *Hart v. Parks*, 450 F.3d 1059, 1069 (9th Cir. 2006) (citing *Paul v. Davis*, 424 U.S. 693, 711-12 (1976)). If, however, a plaintiff is "stigmatized in connection with the denial of a 'more tangible' interest" then the plaintiff may advance what has become known as a "stigma-plus" claim. *Id.* (citing *Paul*, 424 U.S. at 701-02); *see also Ulrich v. City and County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002).

According to the Ninth Circuit, there are two independent ways that a plaintiff can make out a stigma-plus

claim. The first route requires the plaintiff to "show that the injury to his reputation was inflicted *in connection with* the deprivation of a federally protected right." *Hart*, 450 F.3d at 1070. The second route requires the plaintiff to "show that the injury to reputation *caused* the denial of a federally protected right." *Id.*; *see also Herb Hallman Chevrolet, Inc. v. Nash-Holmes*, 169 F.3d 636, 645 (9th Cir. 1999).[9] In either case, a legal right is sufficiently deprived or altered for the purposes of a stigma-plus claim when the plaintiff shows she "legally [cannot] do something that she could otherwise do." *Miller v. California*, 355 F.3d 1172, 1179 (9th Cir. 2004) (discussing *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)). The plaintiff must also contest the accuracy of the stigmatizing label. *Ulrich*, 308 F.3d at 982.

Here, Defendants argue that Mr. Fikre fails to state a stigma-plus claim for two reasons. First, they argue the Seventh Amended Complaint "does not allege facts that show public stigmatization by the Government." Mot. [146] at 21-22. Second, that it also "fails to allege a 'plus' factor. . . . " *Id.* I take each argument in turn.

1. Public Stigmatization

Defendants argue that to state a stigma-plus claim, the government must officially disclose stigmatizing information. *See id.* at 20-21. More specifically, the government must publicly disclose a spoken or written statement that is defamatory. *See* Tr. [163] at 13-15.

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[9] The denial or alteration of a right or status previously recognized by *state* law (as opposed to just federal law) also suffices. *See Humphries v. County of Los Angeles*, 554 F.3d 1170, 1185 (9th Cir. 2009) (citing *Paul*, 424 U.S. at 711).

In other words, the government's unspoken conduct does not count, even if that conduct clearly imposes a stigma and injures one's reputation. *See id.*

I disagree. True, in most of (if not all) the Ninth Circuit cases that address stigma-plus claims, the underlying factual scenario was a typical defamation incident—the plaintiff had alleged that the government stigmatized him through some defamatory written or spoken statement that was released to the public. *See, e.g.*, *Hart*, 450 F.3d at 1069 (alleging defamatory statements made by police during a press conference); *Herb*, 169 F.3d at 645 (accusing prosecutors of defamatory comments). And in those cases, the Ninth Circuit has sometimes articulated the stigma-plus test with reference to the publication of stigmatizing "statements" rather than using more general language that would unambiguously encompass stigmatizing government conduct. *See, e.g.*, *Ulrich*, 308 F.3d at 982 ("Under [the stigma-plus] test, a plaintiff must show the public disclosure of a stigmatizing statement by the government. . . . ").

But I think the latter is an inadvertent consequence of the former, rather than a clear decision by the Court of Appeals to limit stigma-plus claims solely to spoken or written statements. Indeed, neither party has cited a Ninth Circuit case that has explicitly considered the question of whether stigmatizing government conduct can form the basis of a stigma-plus claim. *See* Tr. [163] at 14. And the United States Supreme Court has acknowledged that the government can injure a person's reputation through its actions as well as its speech. For example, it has warned of the stigma that can accompany the mere fact of an arrest. *Michelson v.*

United States, 335 U.S. 469, 482 (1948) ("Arrest without more may nevertheless impair or cloud one's reputation."); *see also Paul*, 424 U.S. at 733 n.17 (Brennan, J., concurring in part).

It is unclear what principle would support drawing a line between government statements and conduct in the stigma-plus context. It does not matter whether your neighbors think you are a drug dealer because the police said so in a press release or because they saw dozens of agents swarming your lawn wearing jackets emblazoned with the letters "DEA." The Court has made it clear that the harm underlying such claims is the "badge of infamy" that the government stamps on an individual. *See Paul*, 424 U.S. at 705-08. It should not matter by what method the government assigns that badge.

Because I hold that stigmatizing conduct can form the basis of a stigma-plus claim, the only question here is whether Defendants engaged in such conduct. The analysis of that question plays out the same as the analysis of causation in the standing section, described above. In short, I think Mr. Fikre has plausibly alleged that Defendants have stigmatized him as a suspected terrorist (or, at least, a dangerous person) by subjecting him to intensive, repeated, non-random security screenings in front of members of his community and family during his 2016 Mecca and San Diego trips.[10]

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[10] In his briefing, Mr. Fikre appears to argue that he was publicly stigmatized in other ways separate from the 2016 Mecca and San Diego trips. For example, he argues that the Government stigmatized him when it "broadcast to the UAE that Fikre was a suspected terrorist," which allegedly led to his torture in the UAE. Resp. [152] at 19. He also argues his "No Fly List status became public" because he "could not hide, from his family or from his friends, the

2. The "Plus" Factor

Mr. Fikre argues that his "watchlist status" has led to the denial or alteration of five legal rights or statuses. Response [152] at 21. Specifically, that:

1. His "watchlist status led to his 106 day detainment and torture at the hands of UAE."
2. His "No Fly List status prohibited him from flying on an airplane to, from, or over the United States."
3. His "watchlist status appeared to have contributed to his indictment in the United States."
4. His "watchlist status led to his communications being intercepted in violation of his Fourth Amendment rights."
5. His "watchlist status led the Government to try and interfere with his sincere religious beliefs protected under RFRA by demanding he act as an informant as a way to get off the No Fly List."

Id.

Additionally, Mr. Fikre points to paragraph thirty-five of the Seventh Amended Complaint for other "legal disabilities" that generally accompany someone who is a listee of the TSDB and argues that these, too, constitute plus factors. *Id.* at 22-23; Tr. [163] at 23. These "disabilities" include "lengthy and onerous secondary screen-

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reasons for his inability to board a plane back to the United States." *Id.* at 20. But these allegations are not new, and this court has already rejected them as the basis for a reputational injury claim. *See generally* Tr. [143]; *see also* Tr. [163] at 3-6 (discussing the reputational injury theory of the Seventh Amended Complaint).

ing at airports; . . . the mandatory search and copying of . . . electronic devices at borders;" and loss of "access to employment or credentials across federal agencies and public and private infrastructure industries." Seventh Am. Compl. [145] ¶ 35.

The question is whether any of these alleged facts constitutes a plus factor. As described above, to state a "plus" factor Mr. Fikre must either show that (1) injury to his reputation was inflicted *in connection with* the deprivation of a protected right or (2) that injury to his reputation *caused* the denial of a protected right. *Hart*, 450 F.3d at 1070.

Resolution of this question is aided by the fact that counsel for Mr. Fikre has explicitly disavowed any reliance on the second route—that the 2016 reputational injuries *caused* a deprivation of rights. Tr. [163] at 34-35. Just so, given that all five of the alleged rights violations identified in Mr. Fikre's briefing occurred well before the 2016 trips. *Id.* at 22. Thus, the only issue left to decipher is whether Mr. Fikre has successfully traveled the first route by alleging that a protected right was deprived "in connection with" the reputational injury he suffered as a result of the 2016 trips.

The most straightforward example of an "in connection with" stigma-plus claim is when the police or prosecutors make defamatory comments about a plaintiff following an arrest or an indictment that was made without probable cause. *See, e.g.*, *Herb*, 169 F.3d at 645 (recognizing a stigma-plus claim where "prosecutors made defamatory comments in connection with indictments and arrests for which there was no probable cause"); *see also Hart*, 450 F.3d at 1070. In such cases, the injury to reputation and the separate deprivation of

a protected right are both caused by the same set of actors, they occur in close temporal proximity, and arise out of the same set of circumstances.

A somewhat more complex example is found in *Humphries v. County of Los Angeles*, 554 F.3d 1170 (9th Cir. 2009), *rev'd on other grounds,* 562 U.S. 29 (2010). In that case, the plaintiffs advanced a stigma-plus claim on the basis of their inclusion in California's Child Abuse Central Index ("CACI"). *Id.* at 1185-92. The CACI is a statutorily created database that contains a list of individuals suspected of child abuse, which is made available to a "broad range of third parties." *Id.* at 1176-77. Other California statutes require various state and licensing agencies to consult the CACI such that "the CACI listing plays an integral role in obtaining many rights under California law, including employment, licenses, volunteer opportunities, and even child custody." *Id.* at 1178. The plaintiffs argued that being listed on the CACI stigmatized them as child abusers and that the variety of statutory consequences of being listed on the CACI constituted a plus factor, thus creating a stigma-plus liberty interest that could not be deprived without due process of law. *Id.* at 1185.

The court quickly agreed that being listed as a suspected child abuser was stigmatizing before turning to the question of whether the plaintiffs had stated a plus factor. *Id.* at 1186. It then held that "where a state statute creates both a stigma and a tangible burden on an individual's ability to obtain a right or status recognized by state law, an individual's liberty interest has been violated." *Id.* at 1188. And it also stated that a "tangible burden" can be created when "the law creates a framework under which agencies reflexively check the

stigmatizing listing—whether by internal regulation or custom—prior to conferring a legal right or benefit." *Id.* The court concluded that the CACI statute was of this nature. *Id.*

But it was not enough for the plaintiffs to point to the CACI statute's general nature for them to prevail. Rather, in concluding that the plaintiffs had demonstrated a plus factor, the *Humphries* court emphasized that the plaintiffs had proved that their status on CACI had led to an actual alteration of their rights via the designed operation of the statutory framework. *Id.* ("We have mentioned, and the district court found, that the Humphries were directly affected in their eligibility to work or volunteer at a local community center. The Humphries also introduced evidence indicating that Wendy was affected in her ability to renew her teaching credentials."). Finally, the court emphasized that its "decision is limited to those 'stigma-plus' situations where both the defamatory statement and the tangible burden on a legal right are statutorily created." *Id.* at 1189.

Here, Mr. Fikre has failed to plead that his 2016 reputational injury occurred in connection with the denial or alteration of a right. In explaining my reasoning, I will first discuss the five rights violations described by Mr. Fikre in his briefing. I will then address the allegations in paragraph thirty-five of the Seventh Amended Complaint.

To begin, I want to point out that four of the five rights violations (excluding the "indictment" theory) that are described in Mr. Fikre's briefing are familiar to this court. That is because each of them was at some point the foundation of a distinct, independent claim advanced by Mr. Fikre—totally separate from any stigma-

plus due process claim. And each of those distinct claims was rejected by this court.[11] Thus I think it dubious, at best, to find them reincarnated as "plus" factors in Mr. Fikre's procedural due process claim. For example, it is hard to see how allegations that were too speculative to support a discrete claim of a rights violation could nevertheless be sufficient to state a plus factor. In any event, even if these theories could be rejected as plus factors on procedural grounds, they also fail on the merits.

The purported connection between all five rights violations and Mr. Fikre's 2016 reputational injury is that all roads lead back to his alleged status as a listee in the TSDB. As a result, Mr. Fikre argues that, under *Humphries*, these violations constitute "tangible burdens" on a legal right that were suffered in connection with a reputational injury. *See* Resp. [152] at 22; Tr. [163] at 24-25. But four of the five theories suffer from the same general flaw which precludes them from constituting a plus factor under the logic of *Humphries*. Neither be-

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[11] The torture theory involving the UAE was discussed extensively at the oral argument on Defendants' motion to dismiss the Sixth Amended Complaint, and I held that that theory was too speculative to serve as a basis for standing. *See* Tr. [143] at 7-9, 15, 24-27, 40-42; *see also* O&O [128] at 2-4 (describing other iterations of Mr. Fikre's torture theory). As discussed at length in the procedural history section of this opinion, Mr. Fikre's claims involving the No Fly List and his travel interest have also been dismissed with prejudice. Likewise, his claim that his communications were intercepted in violation of his Fourth Amendment rights was dismissed with prejudice. O&O [105] at 29-35. Finally, his claim that he was coerced to become an informant in violation of RFRA was disallowed as outside the scope of the court's leave to amend (it also closely resembled an earlier claim that had been dismissed with prejudice). O&O [128] at 22-30.

ing tortured, being indicted, having your communications intercepted in violation of the Fourth Amendment, nor being coerced to act as an informant in violation of your religious beliefs is a "tangible burden" on a legal right that is "statutorily created," i.e., that the burden is created by the statutory scheme. *Humphries*, 554 F.3d at 1189. Setting aside the fact that the TSDB is authorized and governed by a presidential directive rather than a statute, Watchlisting Overview [130-1] at 1, the TSDB process creates no scheme—either formally or informally—which purposefully subjects a TSDB listee to any of these legal violations. Thus, any analogy to *Humphries* with respect to those four theories is inapposite.

That leaves Mr. Fikre's argument that he states a plus factor by alleging that his "No Fly List status prevented him from traveling to, from, or over the United States." Resp. [152] at 21. In general, there might be a closer analogy to *Humphries* if an individual were to suffer a stigma as a result of their placement on the No Fly List and then were denied the ability to travel due to the No Fly List, given that denying the ability to travel is an intended consequence of the No Fly List scheme. But that is not what happened here. The only stigmatic injury for which Mr. Fikre has established standing is the 2016 reputational injury he allegedly suffered as a result of the Mecca and San Diego trips. At the time of that injury, Mr. Fikre was not on the No Fly List. Nor was he prevented or significantly impeded from traveling during those two trips. To be sure, Mr. Fikre alleges in his complaint that he was prevented from traveling to the United States as a result of his earlier placement on the No Fly List. *See, e.g.*, Seventh Am. Compl. [145] ¶¶ 89-105. But those alleged

events occurred years before Mr. Fikre's 2016 Mecca and San Diego trips and are far too attenuated in both time and circumstance to be deemed as having occurred "in connection with" his 2016 reputational injury.

That is a problem that plagues all five of the "plus" theories Mr. Fikre lists in his briefing. Other than the alleged connection of these alleged rights violations to Mr. Fikre's TSDB status, the surrounding circumstances of each violation has absolutely nothing to do with the events of Mr. Fikre's 2016 reputational injury. They involve different actors, they occurred years apart (with the alleged right violations all occurring at a time when Mr. Fikre had suffered no cognizable reputational injury) and happened for a host of possible different reasons. Mr. Fikre's most fundamental and insuperable problem is this: an alleged connection to Mr. Fikre's purported TSDB status cannot link what are otherwise completely discrete events to Mr. Fikre's later reputational injury in a way that is sufficient to state a stigma-plus claim.[12]

Finally, the allegations in paragraph thirty-five of Mr. Fikre's complaint do not establish a plus factor. With the exception of more significant security screening, Mr. Fikre has not alleged that he has personally suf-

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[12] Separately, while I do not wish to retread arguments against theories that have already been rejected by this court (such as the speculative aspects of Mr. Fikre's torture theories), I want to point out that Mr. Fikre's third "plus" theory, that his "watchlist" status contributed to his indictment in the United States, fails for the additional reason that he has not alleged that he was the subject of anything but a duly-issued indictment. *Cf. Herb*, 169 F.3d at 645 (recognizing an indictment issued without probable cause as a "plus" factor).

fered any of these consequences, such as the denial of credentials or employment. As described above, the *Humphries* court held that it was insufficient for a plaintiff to merely point to general possible consequences of a stigmatizing statutory scheme without alleging that he has personally suffered any of those consequences. *Humphries*, 554 F.3d at 1186; *see also Abdi v. Wray*, 942 F.3d 1019, 1033 (10th Cir. 2019) (holding that the plaintiff's stigma-plus argument regarding TSDB-related consequences failed because the plaintiff "did not specifically allege that he has actually been prevented from participating in any of the [described] activities"). And while Mr. Fikre alleges he was subjected to intensive, non-random security screening during his 2016 Mecca and San Diego trips, the level of extra screening he received does not implicate a travel-related interest which suffices to constitute a "plus" factor. *See Latif v. Holder*, 969 F.Supp.2d 1293, 1302-05 (D. Or. 2013) (holding that the plaintiffs had established a "plus" factor based on a travel interest because they were "legally banned from traveling by air"); *Gilmore v. Gonzales*, 435 F.3d 1125, 1137 (9th Cir. 2006) ("burdens on a single mode of transportation do not implicate the right to interstate travel.") (citing *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999)).

In sum, Mr. Fikre had two available routes to demonstrate a "plus" factor. He could either show that his 2016 reputational injury *caused* the deprivation of a right, or he could show that the reputational injury occurred *in connection with* a deprivation of a right. But Mr. Fikre has disavowed that his 2016 reputational injury caused the deprivation of a right, and he fails to identify an alleged deprivation of a right that occurred "in connection with" his 2016 reputational injury.

Therefore, because Mr. Fikre has not alleged a viable "plus" factor, he fails to state a stigma-plus procedural due process claim. Because Mr. Fikre has already received multiple opportunities to amend his complaint and this particular claim, and because I believe further amendment would be futile, I dismiss his procedural due process claim with prejudice.

CONCLUSION

For the foregoing reasons, I GRANT Defendants' Motion to Dismiss [146] and DISMISS Plaintiff's Seventh Amended Complaint [145] in its entirety, with prejudice.

IT IS SO ORDERED.

DATED this 12th day of Aug., 2020.

/s/ MICHAEL W. MOSMAN
MICHAEL W. MOSMAN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 3:13-cv-00899-MO

YONAS FIKRE, PLAINTIFF

v.

FEDERAL BUREAU OF INVESTIGATION; LORETTA E. LYNCH, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES; DEPARTMENT OF STATE; JOHN KERRY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; UNITED STATES OF AMERICA; JAMES B. COMEY, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION; CHRISTOPHER M. PIEHOTA, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE FBI TERRORIST SCREENING CENTER; JAMES CLAPPER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF NATIONAL INTELLIGENCE; MICHAEL S. ROGERS, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE NATIONAL SECURITY AGENCY; NATIONAL SECURITY AGENCY; DAVID NOORDELOOS, AN EMPLOYEE OF THE FEDERAL BUREAU OF INVESTIGATION, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; JOHN DOE I, ALSO KNOWN AS JASON DUNDAS, AN EMPLOYEE OF THE FEDERAL BUREAU OF INVESTIGATION, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; AND JOHN/JANE DOES II-XX, AGENTS OF THE UNITED STATES, DEFENDANTS

Filed: Sept. 28, 2016

OPINION AND ORDER

BROWN, Judge.

This matter comes before the Court on the Motion (#90) to Dismiss Plaintiff's Fifth Amended Complaint filed by Defendants Federal Bureau of Investigation (FBI), Loretta E. Lynch, Department of State, John Kerry, James B. Comey, Christopher M. Piehota, Michael S. Rogers, National Security Agency (NSA), United States of America, and James Clapper (collectively referred to as Official Capacity Defendants) and Official Capacity Defendants' Unopposed Motion (#91) Motion for Partial Stay of Due Process Claims.

For the reasons that follow, the Court **GRANTS** Official Capacity Defendants' Motion (#90) to Dismiss and **DISMISSES with prejudice** Plaintiff's Fifth Amended Complaint as to Plaintiff's claims against Official Capacity Defendants. The Court also **DENIES as moot** Official Capacity Defendants' Unopposed Motion (#91) to Stay Plaintiff's Due Process Claims.

PROCEDURAL BACKGROUND

Plaintiff filed his Fifth Amended Complaint (#87) (FAC) on November 29, 2015.

On January 21, 2016, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) Official Capacity Defendants moved to dismiss the claims that Plaintiff Yonas Fikre brings against them in his FAC as described below and also moved in the alternative to stay Plaintiff's due-process claims.[1]

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[1] David Noordeloos and the John and Jane Doe Defendants, who Plaintiff sued in their individual capacities (collectively Individual Capacity Defendants), have not yet been served and, therefore, are not currently parties to this litigation. Thus, Claims Two, Five, Six,

On February 11, 2016, Plaintiff filed a Response (#95) in Opposition to Official Capacity Defendants' Motion to Dismiss. On March 3, 2016, Official Capacity Defendants filed a Reply (#96) in Support of Motion to Dismiss.

On May 9, 2016, Official Capacity Defendants filed a Notice (#98) Regarding Plaintiff's Status in which they represented "Plaintiff has been removed from the No Fly List." That same day by Order (#99) the Court directed the parties[2] to confer and to file no later than May 16, 2016, a single, joint status report in which the parties set out their positions regarding the effect of Plaintiff's removal from the No-Fly List on Official Capacity Defendants' pending Motion (#90) to Dismiss Plaintiff's Fifth Amended Complaint and Official Capacity Defendants' Unopposed Motion (#91) to Stay Due Process Claims and, in particular, to specify the portions of the pending Motions that are rendered moot and the portions that are unaffected by the Notice.

In a Joint Status Report (#100) filed May 16, 2016, the parties agreed Claims One and Three should be dismissed to the extent that those claims seek injunctive relief related to the removal of Plaintiff's name from the No-Fly List. Plaintiff, however, contends he remains entitled to other injunctive and declaratory relief on Claims One and Three.

Seven, Eight, Nine, Ten, and Eleven, are not at issue in this Motion because those claims relate exclusively to Individual Capacity Defendants.

[2] For purposes of this Motion only, the Court's references to the "parties" include only Plaintiff and Official Capacity Defendants.

On May 20, 2016, the Court issued Order (#101) in which it concluded oral argument was unnecessary to resolve the pending Motions. In light of the intervening developments since the filing of Defendants' Motions, however, the Court directed the parties to file a stipulation confirming their agreement as to the extent to which Defendants' Notice (#98) moots or otherwise resolves any of Plaintiff's pending claims. In addition, the Court provided the parties an opportunity to file simultaneous, supplemental memoranda regarding the effect that Plaintiff's removal from the No-Fly List has on Official Capacity Defendants' Motions and to provide any additional argument. The parties filed their respective supplemental memoranda (#103, #104) on June 23, 2016, and the Court took this matter under advisement without argument on that date.

BACKGROUND

For purposes of these Motions, the Court deems as true the following background facts from Plaintiff's FAC, Official Capacity Defendants' Notice (#98) Regarding Plaintiff's Status, and the parties' Joint Status Report (#100):

I. The No-Fly List

The FBI is responsible for development and maintenance of the No-Fly List, which identifies individuals who are "prohibited from flying into, out of, or over the United States" or into, out of, or over Canadian airspace by commercial airlines.

II. Interrogation of Plaintiff and Placement on the No-Fly List

Plaintiff is a 33-year-old naturalized American citizen of Eritrean descent who was a resident of Portland, Oregon, beginning in 2006. In late 2009 Plaintiff decided to use his experience working for a cellular telephone company in the United States to pursue the business of distributing and selling consumer electronic products in East Africa, and, accordingly, Plaintiff traveled to Sudan where some of his extended family lives. In Sudan Plaintiff informed the United States Embassy in Khartoum of his presence in the country and his intention to pursue business opportunities there. Based on encouragement from Embassy personnel, Plaintiff began the process of obtaining a Sudanese business license.

On April 21, 2010, Plaintiff received a telephone call from the Embassy requesting Plaintiff to contact Defendant Noordeloos. When Plaintiff returned the call, Noordeloos represented himself as an Embassy official working for the State Department. Noordeloos invited Plaintiff to a luncheon at the Embassy the following day to discuss safety during a period of political turmoil in Sudan.

The next morning Plaintiff arrived at the Embassy and was met by Noordeloos and Defendant John Doe I, who introduced himself as Jason Dundas. Noordeloos and Dundas escorted Plaintiff to a small meeting room, shut the door, positioned themselves between Plaintiff and the door, and informed Plaintiff that they worked for the FBI Field Office in Portland, Oregon.

When he was told Noordeloos and Dundas were FBI agents from Portland, Plaintiff requested to be repre-

sented by his legal counsel during any interrogation. Noordeloos, however, informed Plaintiff that he could not return to the United States to confer with his Oregon-based legal counsel because Plaintiff had been placed on the No-Fly List.

The ensuing interrogation lasted several hours until the end of the business day. Throughout the course of the interrogation Noordeloos and Dundas questioned Plaintiff about the As-Saber Mosque in Portland where Plaintiff had attended prayer services. In addition, Noordeloos and Dundas questioned Plaintiff about the source of financial support for his business endeavors and told him that sanctions made his business activities in Sudan illegal. Finally, Noordeloos asked Plaintiff to be an informant for the FBI in exchange for "substantial compensation" and removal from the No-Fly List. Plaintiff responded he did not wish to become an informant. At the end of the business day Noordeloos suggested they resume the discussion the following day. Plaintiff agreed.

The following morning Plaintiff called Noordeloos on the telephone and informed him that he did not wish to meet further with Dundas and Noordeloos. Noordeloos became agitated when Plaintiff again stated he did not want to be an informant. Noordeloos concluded the conversation by telling Plaintiff: "Whenever you want to go home you come to the embassy." On May 4, 2010, a little more than a week after their final conversation, Noordeloos emailed Plaintiff as follows:

> Yonas,
>
> Thanks for meeting with us last week in Sudan. While we hope to get your side of issues we keep hearing about, the choice is yours to make. The time to help yourself is now.
>
> Be safe in Sudan,
>
> Dave Noordeloos

FAC ¶ 38. Plaintiff remained in Khartoum for approximately two months during which time he noticed he was being followed by persons he assumed to be associated with the Sudanese secret police. He learned from acquaintances that similar individuals had been inquiring about him and his activities. Plaintiff left Sudan on approximately June 15, 2010.

On approximately September 15, 2010, Plaintiff traveled to the United Arab Emirates (UAE) to pursue similar business interests. Plaintiff obtained a residency permit in the UAE in order to conduct business, and he invested substantial financial resources provided by his family for that purpose.

On the evening of June 1, 2011, Plaintiff was forcibly taken from his home by persons who he later learned were Emirati secret police. The police seized some of Plaintiff's personal property, blindfolded him, and placed him in a heavily air-conditioned car. Plaintiff's captors drove him for approximately two hours to a building where he was housed in a heavily air-conditioned, windowless cell with only a bed.

The next morning Plaintiff was led to a room in which he would undergo the first of repeated interrogations during 106 days of imprisonment. During these inter-

rogations Plaintiff was blindfolded while he was questioned in English for extended periods of time. Periodically Plaintiff was able to peek beneath his blindfold and to view the shoes and lower torsos of his interrogators, some of whom wore Western clothes.

The substance of the interrogations focused on the activities, fundraising, and leadership of the As-Saber Mosque. In addition, the interrogators questioned Plaintiff about "circumstances and events that [P]laintiff had disclosed" to Noordeloos and Dundas in Khartoum, and the interrogators urged Plaintiff "numerous times" to cooperate with the FBI by becoming an informant.

Plaintiff was subjected to multiple threats and beatings throughout the course of his confinement. In response to his resistance to answering questions, Plaintiff was struck on the head. Plaintiff also was repeatedly beaten on his back, legs, and the soles of his feet with batons and plastic pipes. When Plaintiff returned to his cell at the end of the first day of interrogation, his bed had been removed and he had to sleep on the floor of his cold cell. When Plaintiff asked his interrogators on several occasions whether his confinement and interrogation were at the request of the FBI, the interrogators severely beat him.

On June 14, 2011, Plaintiff took a "lie-detector test" during which he was questioned about whether his "financial arrangements involved soliciting funds for al-Qaeda," but he was not asked about the as-Saber Mosque. That evening the bed was returned to his cell.

On June 20, 2011, Plaintiff's family learned from Plaintiff's neighbors in the UAE that he was missing.

Plaintiff's counsel notified the United States Consulate in Abu Dhabi that Plaintiff had disappeared after being placed in an SUV of the type commonly used by the Emirati secret police.

The interrogations and beatings continued until July 28, 2011, when Plaintiff met with a United States Department of State employee named Marwa. Before the meeting Plaintiff's captors instructed him not to disclose his mistreatment. During the interview guards told Marwa that Plaintiff was being held without charge as part of an ongoing investigation. Despite Plaintiff losing approximately 30 pounds since his kidnapping, Marwa found Plaintiff was in good health. Plaintiff "attempted by facial contortions and winks to indicate that he was under duress," but Marwa either did not notice or disregarded the signals.

The interrogations and beatings resumed after Marwa's visit. Following the meeting interrogators repeatedly told Plaintiff that he would be released "soon" or "tomorrow," but he was not released. Plaintiff considered refusing food in an attempt at suicide, but he was told he would be force-fed.

Near the end of his detention Plaintiff again asked an interrogator whether the FBI had requested his detention and interrogation. This time the interrogator confirmed the FBI had made such a request and that American and Emirati authorities work closely on a number of such matters.

On September 14, 2011, Plaintiff was told he would be released that day. Interrogators took money from Plaintiff's wallet to purchase an airline ticket back to the United States, but they were told Plaintiff would not be

allowed to return to the United States by air because he was on the No-Fly List. Thus, Plaintiff chose to fly to Sweden where, in the belief that he might still be in danger of abuse in countries that condone torture, Plaintiff submitted an application for asylum.

Based on his experience with State Department officials in Khartoum and the UAE, Plaintiff does not believe he can rely on the State Department to protect or to assist him while overseas.

On April 18, 2012, Plaintiff and his Swedish attorney held a press conference to detail his experiences in Sudan and the UAE and to announce that he would seek asylum in Sweden. Less than two weeks later Plaintiff and two other individuals were indicted in the United States District Court for the Southern District of California for "conspiracy to structure monetary transfers" from his family to him between April 14, 2010, and April 19, 2010. The charges against Plaintiff were ultimately dismissed.

In the fall of 2013 Defendants' counsel suggested Plaintiff should visit the U.S. Embassy in Stockholm to make the necessary arrangements to return to the United States. Because the government would not assure Plaintiff (1) that his safety from "extra-judicial actions" was guaranteed and (2) that he would be permitted to leave the United States after he returned, Plaintiff declined to return to the United States.

In November 2013 Plaintiff filed a DHS TRIP inquiry. On January 23, 2014, DHS informed Plaintiff that changes to his status were not warranted at that time. DHS, however, did not verify Plaintiff's status on the No-Fly List.

Plaintiff's wife sought and received a divorce from Plaintiff because of the separation resulting from Plaintiff's inability to return to the United States and because of the stigma attached to Plaintiff's placement on the No-Fly List.

In early 2015 Plaintiff's asylum application in Sweden was denied. On February 12, 2015, after the parties stipulated DHS would reconsider Plaintiff's DHS TRIP application under the new procedures in light of the Court's June 24, 2014, Opinion and Order in *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014), DHS informed Plaintiff that he remained on the No-Fly List because he had been "identified as an individual who may be a threat to civil aviation or national security." DHS did not provide any additional factual reasons for Plaintiff's designation.

On February 14, 2015, the Swedish government transported Plaintiff to Portland, Oregon, by private jet.

As noted, on May 9, 2016, Official Capacity Defendants filed a Notice (#98) Regarding Plaintiff's Status in which Official Capacity Defendants indicated Plaintiff had been removed from the No-Fly List.

III. Defendants' Surveillance of Plaintiff

In 2010 while Plaintiff was in the United States, he and his brother, Dawit Woldehawariat, worked together to set up a business venture abroad. Plaintiff and Woldehawariat discussed this venture by telephone, email, and text messages.

As a result of discovery and filings in the Southern District of California criminal case against Plaintiff that was ultimately dismissed, Plaintiff discovered Defendants intercepted the contents of the communications be-

tween Plaintiff and Woldehawariat. Plaintiff alleges Defendants did so without a warrant or probable cause and that the electronic surveillance took place under Foreign Intelligence Surveillance Act (FISA) authority. These intercepted communications formed the basis for the meeting in the Khartoum Embassy and have been transmitted to several United States government agencies and foreign governments.

STANDARDS

I. Federal Rule of Civil Procedure 12(b)(1)

When deciding a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), the court may consider affidavits and other evidence supporting or attacking the plaintiff's jurisdictional allegations. *Autery v. U.S.*, 424 F.3d 944, 956 (9th Cir. 2005). The court may permit discovery to determine whether it has jurisdiction. *Data Disc, Inc. v. Sys. Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). *See also Mujica v. AirScan, Inc.*, 771 F.3d 580, 617 (9th Cir. 2014). The court has broad discretion in granting discovery and may narrowly define the limits of such discovery. *Data Disc, Inc.*, 557 F.2d at 1285. *See also Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). When the court "receives only written submissions, the plaintiff need only make a *prima facie* showing of jurisdiction." *Rio Props., Inc. v. Rio Int'l Interlink,* 284 F.3d 1007, 1019 (9th Cir. 2002). Plaintiff has the burden to establish that the court has subject-matter jurisdiction. *Ass'n of American Med. Coll. v. United States*, 217 F.3d 770 (9th Cir. 2000).

II. Federal Rule of Civil Procedure 12(b)(6)

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the plaintiff's complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 545 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 546). When a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557).

The pleading standard under Federal Rule of Civil Procedure 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). *See also* Fed. R. Civ. P. 8(a)(2). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Twombly*, 550 U.S. at 555. A complaint also does not suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557.

DISCUSSION

As noted, Official Capacity Defendants move to dismiss each of the claims brought against them in Plaintiff's FAC.[3]

I. Plaintiff's Due Process Claims: Substantive Due Process (Claim One) and Procedural Due Process (Claim Three)

In Claim One Plaintiff brings a substantive due-process claim against Official Capacity Defendants in which Plaintiff asserts his placement on the No-Fly List violated his fundamental right to international travel. In Claim Three Plaintiff brings a procedural due-process claim against Official Capacity Defendants in which Plaintiff asserts they provided him with inadequate procedural opportunities to have his name removed from the No-Fly List through the DHS TRIP process. Plaintiff seeks declaratory and injunctive relief on Claims One and Three.

Official Capacity Defendants move to dismiss Claims One and Three on the basis that those claims are moot as a result of Plaintiff's removal from the No-Fly List.

A. Mootness Standard

The limitation of the judicial branch in Article III of the United States Constitution to adjudicate "cases" and "controversies" requires "those who invoke the power of a federal court to demonstrate standing—a 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Already, LLC v. Nike Inc.*, 133 S. Ct. 721, 726

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[3] In his FAC, Plaintiff only brings Claims One, Three, Four, and Twelve through Sixteen against Official Capacity Defendants.

(2013) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). "[A]n 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation." *Already, LLC*, 133 S. Ct. at 726 (quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009)). Moreover, a "'plaintiff must demonstrate standing separately for each form of relief sought.'" *Mayfield v. United States*, 599 F.3d 964, 969 (9th Cir. 2010) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 185 (2000)).

"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*, 133 S. Ct. at 726 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)). "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.'" *Already*, 133 S. Ct. at 727 (quoting *Alvarez*, 558 U.S. at 93). "'A case becomes moot whenever it loses its character as a present, live controversy. . . . The question is not whether the precise relief sought at the time [the case] was filed is still available. The question is whether there can be any effective relief.'" *McCormack v. Herzog*, 788 F.3d 1017, 1024 (9th Cir. 2015) (quoting *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 559 (9th Cir. 2009) (ellipses and bracketed text in original)).

"The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the chal-

lenged conduct as soon as the case is dismissed." *Knox v. Serv. Emp. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012). *See also Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013). "[V]oluntary cessation can yield mootness if a 'stringent' standard is met: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014)(quoting *Laidlaw Envtl. Servs.*, 528 U.S. at 189). *See also McCormack*, 788 F.3d at 1024.

B. Analysis

When the government changes a policy, the court must presume the government entity is acting in good faith. *Rosebrock*, 745 F.3d at 971. Nonetheless, "when the Government asserts mootness based on such a change it still must bear the heavy burden of showing that the challenged conduct cannot reasonably be expected to start up again." *Id.* *See also Bell*, 709 F.3d at 898-99. "A presumption of good faith, however, cannot overcome a court's wariness of applying mootness under 'protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.'" *McCormack*, 788 F.3d at 1025 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 n.5 (1953)).

"[W]hile a statutory change 'is usually enough to render a case moot,' an executive action that is not governed by any clear or codified procedures cannot moot a claim." *Id.* (quoting *Bell*, 709 F.3d at 898-900). When determining whether an executive action "not reflected in statutory changes or even in changes in ordinances or regulations" is sufficiently definitive to render a case

moot, the court considers the following factors: (1) whether "the policy change is evidenced by language that is 'broad in scope and unequivocal in tone,'" (2) whether "the policy change fully 'addresses all of the objectionable measures that [the Government] officials took against the plaintiffs in th[e] case,'" (3) whether the case in question was the "'catalyst for the agency's adoption of the new policy,'" (4) whether "the policy has been in place for a long time when we consider mootness," and (5) whether the government has engaged in conduct similar to that challenged by the plaintiff since the implementation of the new policy. *Rosebrock*, 745 F.3d at 972 (quoting *White v. Lee*, 227 F.3d 1214, 1243-44 (9th Cir. 2000) (bracketed text in original)). "On the other hand, [the court is] less inclined to find mootness where the 'new policy . . . could be easily abandoned or altered in the future.'" *Rosebrock*, 745 F.3d at 972 (quoting *Bell*, 709 F.3d at 901).

This Court addressed a similar situation in *Tarhuni v. Lynch*, 129 F. Supp. 3d 1052 (D. Or. 2015). In *Tarhuni* the plaintiff, who was also on the No-Fly List, brought substantive and procedural due-process claims regarding his placement on the No-Fly List similar to those raised here. During the course of the *Tarhuni* litigation and after the government had been required to reconsider Tarhuni's DHS TRIP inquiry pursuant to new procedures that had been promulgated following this Court's previous decision in *Latif*, the defendants notified Tarhuni that he had been removed from the List. Tarhuni, however, maintained his claims for prospective relief remained viable notwithstanding his removal from the No-Fly List because he did not know the specific reasons why he had been placed on the No-Fly List and there was the possibility that the defendants

would place him back on the No-Fly List after termination of the litigation. *Tarhuni*, 129 F. Supp. 3d at 1060.

The Court, nevertheless, concluded Tarhuni's claims were moot. The Court reasoned the defendants' conduct was "not a voluntary act in any real sense" because it came at the conclusion of a DHS TRIP reconsideration process that was put into motion by the Court's decision in *Latif*. *Id.* at 1061. The Court noted the only relief that Tarhuni sought was "a declaration that Plaintiff's placement on the No-Fly List violated his substantive due-process rights," and, therefore, the Court ultimately found "[s]uch a declaration would not have any effect on Plaintiff's substantive legal rights because Plaintiff is no longer on the No-Fly List." *Id.*

Even if the voluntary-cessation doctrine applied, the Court also concluded in *Tarhuni* that "Defendants have carried their 'heavy burden' to demonstrate Plaintiff's placement on the No-Fly List based on current information will not recur." *Id.* at 1062 (quoting *Rosebrock*, 745 F.3d at 971). Although the Court noted the "*Rosebrock* factors do not fit neatly within the context of an individualized determination," the Court, nonetheless, concluded the "principles expressed in *Rosebrock* support a finding that this case is now moot" because the defendants' statements regarding Tarhuni's presence on the No-Fly List were "unequivocal" and the defendants had acted "in a manner consistent with a genuine change in Defendants' assessment of Plaintiff's inclusion on the List" for the more than six months since Tarhuni had been taken off the list. *Tarhuni*, 129 F. Supp. 3d at 1062. The Court pointed out that, unlike in *McCormack*, there was "not any evidence in this record from which the Court can conclude Defendants'

'abandonment seems timed to anticipate suit, and there is probability of resumption,'" and, in fact, "the notion that the government would remove from the No-Fly List an individual whom Defendants believe is, in fact, 'an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so' for the mere purpose of concluding this litigation is, to say the least, far-fetched." *Id.* (quoting *McCormack*, 788 F.3d at 1025.

There are, however, some differences between this case and *Tarhuni*. In *Tarhuni* the plaintiff's removal from the No-Fly List was a direct result of a process that was initiated because of the Court's Order in *Latif*. Here the connection between the Court's coercive Order in *Latif* and Plaintiff's removal from the No-Fly List is more attenuated. Although Official Capacity Defendants reassessed Plaintiff's DHS TRIP inquiry through the revised procedures, that process concluded in March 2015 with a determination that Plaintiff should remain on the No-Fly List. It was not until almost a year later that Official Capacity Defendants, apparently acting on their own initiative, removed Plaintiff from the List. Accordingly, the Court concludes this case is somewhat different than *Tarhuni*, and the voluntary-cessation doctrine applies to this case.

As it did in *Tarhuni*, however, the Court notes the *Rosebrock* analysis "do[es] not fit neatly within the context of an individualized determination." *Tarhuni*, 129 F. Supp. 3d at 1062. Many of the factors the Ninth Circuit set out in *Rosebrock* are based on the assumption that the government action that potentially moots the lawsuit has general applicability and, therefore, is capable of codification in statutes and regulations.

In this case, however, the government action is inherently individualized and is not a matter of legislative or executive discretion. If an individual does not meet the substantive criteria to be placed or maintained on the No-Fly List, the government cannot place or keep that individual on the List. As in *Tarhuni*, the circumstances in this case, therefore, are somewhat different from those the Ninth Circuit addressed in *Rosebrock*.

Nonetheless, the Court concludes Official Capacity Defendants' removal of Plaintiff from the No-Fly List is a sufficiently definite action to render this case moot. As in *Tarhuni*, the government affirmatively informed Plaintiff that he had been removed from the No-Fly List, and the government filed a Notice confirming that action in the public record of this case. Also, like *Tarhuni*, more than six months have elapsed since Official Capacity Defendants took that action, and there is not any evidence in the record to suggest Plaintiff's removal from the No-Fly List is not "a genuine change in Defendants' assessment of Plaintiff's inclusion on the List." *Tarhuni*, 129 F. Supp. 3d at 1062. Finally, as in *Tarhuni*, the notion that 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."[4] *See Tarhuni*, 129 F. Supp. 3d at 1062. The Court, therefore, concludes Official Capacity

[4] This is especially true in light of the fact that many of the legal issues raised in Plaintiff's Claims One and Three remain at issue in *Latif v. Lynch*, No. 3:10-cv-00750-BR, as well as several other cases around the country. To the extent that the government may be concerned about the potential legal and policy implications of those issues, mooting this case would do little to allay those concerns.

Defendants have carried their "heavy burden" to demonstrate their placement of Plaintiff on the No-Fly List based on current information will not recur. *See Rosebrock*, 745 F.3d at 971.

Finally, the prospective relief that Plaintiff seeks in this case would no longer redress any nonconjectural injury, and, therefore, there is "no longer a 'Case' or 'Controversy' for purposes of Article III." *See Already, LLC*, 133 S. Ct. at 726 (quoting *Murphy*, 455 U.S. at 481). The relevant injunctive relief that Plaintiff seeks in his substantive due-process claim (Claim One) would be an order requiring Official Capacity Defendants to remove Plaintiff's name from the No-Fly List, which has already occurred.[5]

Plaintiff, nonetheless, asserts his procedural due-process claim (Claim Three) remains cognizable, and, therefore, Plaintiff still seeks an order requiring Official Capacity Defendants to take the following actions:

> f. Official Capacity defendants not condition the removal of plaintiff's name from the No-Fly List upon plaintiff's agreeing to become an informant or *agent provocateur* on behalf of Official Capacity defendants;
>
> g. Official Capacity defendants not deny plaintiff written notice whenever his named is added to the No-Fly List;

---

[5] Plaintiff now concedes a requested injunction directing Official Capacity Defendants to remove Plaintiff from the No-Fly List is now moot. *See* Jt. Status Rept. (#100), May 16, 2016.

h. Official Capacity defendants not deny plaintiff written notice whenever his name is removed from the No-Fly List; [and]

i. Official Capacity defendants [provide] plaintiff with the specific reasons why his name was added to the No-Fly List;

FAC at 44.

The Court concludes the relief Plaintiff seeks in paragraphs (f), (g), and (h) is not cognizable because the circumstance that could necessitate such relief in the future (*i.e.*, Official Capacity Defendants again placing Plaintiff on the No-Fly List) is speculative. Such "relief," if imposed, would not redress any actual or imminent injury. *See Mayfield*, 599 F.3d at 971 ("Once a plaintiff has been wronged, he is entitled to injunctive relief only if he can show that he faces a 'real or immediate threat . . . that he will again be wronged in a similar way.'") (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)).

Similarly, the relief sought in paragraph (i) of Plaintiff's FAC would not redress any actual or imminent injury because it would only be effective if Official Capacity Defendants placed Plaintiff on the No-Fly List again for the same or similar reasons. That, however, is precisely the sort of "speculation or 'subjective apprehension' about future harm" that does not support standing. *See Mayfield*, 599 F.3d at 971 (quoting *Laidlaw Envtl. Servs.*, 528 U.S. at 184). Thus, because Plaintiff's removal from the No-Fly List deprives Plaintiff of standing to seek prospective relief as to his No-Fly List claims against Official Capacity Defendants, the Court finds Plaintiff's Claims One and Three are moot.

Accordingly, the Court dismisses with prejudice Plaintiff's Claims One and Three as moot. As in *Tarhuni*, however, the Court emphasizes the courthouse doors will be open to Plaintiff in the future if Official Capacity Defendants again place him on the No-Fly List.

II. Claim Four—Right to Freedom of Association

In Claim Four Plaintiff asserts all Defendants violated his right to freedom of association as guaranteed by the First Amendment when they placed him on the No-Fly List in order to coerce him into becoming an *agent provocateur* pursuant to a policy, custom, or practice of doing so.

By Opinion and Order (#81) issued November 11, 2015, the Court dismissed with prejudice an identical claim in Plaintiff's Corrected Fourth Amended Complaint. *See Fikre v. Fed. Bur. Of Investigation*, 142 F. Supp. 3d 1152, 1166 (D. Or. 2015). Accordingly, the Court also dismisses with prejudice Plaintiff's Claim Four in his FAC.

III. Plaintiff's Surveillance Claims - Claims Twelve Through Sixteen

In Claims Twelve through Sixteen, Plaintiff brings claims against Official Capacity Defendants for their alleged search and seizure of Plaintiff's telephone communications, emails, and text messages.

In his FAC Plaintiff alleges the searches and seizures of his communications were "not authorized by a warrant satisfying the Fourth Amendment [and] were not supported by probable cause," but instead "were done under purported FISA authority." FAC ¶¶ 138, 144. Plaintiff alleges the surveillance of his telephone calls,

text messages, and emails under the authority of FISA is ongoing. FAC ¶ 140.

Plaintiff's surveillance allegations stem from a disclosure by the government in a criminal case in the United States District Court for the Southern District of California that indicated the government intended to introduce into evidence or otherwise to use in that case "information obtained or derived from electronic surveillance and physical searches conducted pursuant to (FISA)" against Plaintiff's co-defendants in that case (Dawit Woldehawariat, who is, as noted, Plaintiff's brother, and Abrehaile Haile).

In the Southern District of California case, Plaintiff, Woldehawariat, and Haile were charged with structuring or attempting to structure monetary transactions to avoid federal financial-reporting regulations in violation of 31 U.S.C. § 5324(a)(3) and conspiracy to do so under 18 U.S.C. § 371. In addition, Woldehawariat was charged with two counts of failure to file a tax return in violation of 26 U.S.C. § 7203. After Woldehawariat pled guilty to one count of failure to file a tax return, the government dismissed the other three counts against him pursuant to a plea agreement. The court also dismissed the charges against Plaintiff and Haile on the government's motion.

Official Capacity Defendants move to dismiss Plaintiff's Claims Twelve through Sixteen on the basis that Plaintiff fails to state a claim.

A. Claim Twelve - Fourth Amendment

In Claim Twelve Plaintiff brings his claim under the Fourth Amendment contending Defendants intercepted, searched, and seized his telephone calls, emails,

and text messages without a "warrant satisfying the Fourth Amendment," probable cause, or reasonable suspicion. FAC ¶ 138.

Plaintiff seeks a declaration that "the provisions of the Patriot Act and FISA which permit the federal government secretly to collect, disseminate, and retain information from a person and which allow one to perform electronic surveillance and wiretaps of a person without first demonstrating to a court the existence of probable cause that the person has committed a crime are unconstitutional." FAC ¶ 141.

In addition, Plaintiff seeks an injunction "requiring [D]efendants to return or destroy any of [P]laintiff's unconstitutionally seized telephone calls, emails, or text messages, or information derived therefrom, that [D]efendants continue to retain, and prohibiting any use or disclosure of those communications and information." FACC ¶ 140.

Official Capacity Defendants move to dismiss Plaintiff's Claim Twelve for failure to state a claim. Official Capacity Defendants assert the only conclusion that can be drawn from Plaintiff's FAC is that the surveillance took place pursuant to FISA and that the surveillance, therefore, did not violate the Fourth Amendment. Official Capacity Defendants specifically rely on *United States v. Abu-Jihaad*, 630 F.3d 102 (2d Cir. 2010), for the proposition that FISA is consistent with the Fourth Amendment and, therefore, Plaintiff's Claim Twelve must be dismissed with prejudice because the surveillance was authorized by FISA.

Plaintiff, on the other hand, contends:

> Regardless of whether the surveillance was done with or without FISA authorization, it does not change the outcome where plaintiff has alleged that the interception, search, and seizure of plaintiff's telephone calls, emails, and text messages were not authorized by a warrant satisfying the Fourth Amendment, were not supported by probable cause or reasonable suspicion, and did not contain particulars regarding the persons, premises and things to be searched.

Pl.'s Resp. (#95) at 15. In any event, Plaintiff contends this Court should follow a previous case in this District in which the court concluded surveillance conducted pursuant to FISA violated the Fourth Amendment. *See Mayfield v. United States*, 504 F. Supp. 2d 1023, 1036-42 (D. Or. 2007), *vacated on justiciability grounds by Mayfield*, 599 F.3d 964.

With the exception of the *Mayfield* decision in this District that was later vacated on justiciability grounds by the Ninth Circuit, Official Capacity Defendants are correct that there is broad consensus that surveillance conducted pursuant to FISA does not violate the Fourth Amendment. *See Abu-Jihaad*, 630 F.3d at 120 (collecting cases). *See also United States v. Duka*, 671 F.3d 329, 341 (3d Cir. 2011). Moreover, after multiple opportunities to re-plead, Plaintiff's FAC remains devoid of nonconclusory allegations from which this Court could find the alleged surveillance was not authorized by FISA. Instead Plaintiff sets out a series of conclusory reasons in his FAC as to why he believes any FISA authorization may have been legally deficient:

> 146. Plaintiff and his brother are not foreign powers or agents of foreign powers, and there has

> never been any probable cause to believe so. The information obtained from defendants' electronic surveillance of their communications is not foreign intelligence information. Obtaining foreign intelligence was not the primary purpose and was not a significant purpose of defendants' electronic surveillance of plaintiff's communications. The information defendants obtained from their electronic surveillance of plaintiff's communications could have been obtained by normal investigative techniques, *e.g.*, normal criminal wiretap warrants conforming to the Fourth Amendment's warrant requirement.
>
> 147. The electronic surveillance was not authorized or conducted pursuant to the strict FISA procedural requirements, certifications, and privacy protections for U.S. persons, and/or the minimization procedures that apply only to foreign intelligence and not open-ended domestic intelligence activities.

FAC ¶¶ 146-47. Such allegations, however, are precisely the kind of "labels and conclusions" or "a formulaic recitation of the elements of a cause of action [that] will not do." *See Twombly*, 550 U.S. at 555. The only plausible, factual conclusion that can be drawn from Plaintiff's FAC, therefore, is that Official Capacity Defendants conducted surveillance that captured Plaintiff's communications pursuant to FISA. Because Plaintiff has not established such surveillance violates the Fourth Amendment as a matter of law, the Court dismisses Plaintiff's Claim Twelve.

The Court notes Federal Rule of Civil Procedure 15(a) provides a party may amend a pleading after a response has been filed only by leave of court unless the opposing party consents to the amendment. Rule

15(a), however, also provides leave to amend "shall be freely given when justice so requires." This policy is to be applied with "extreme liberality." *Moss v. United States Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009).

The Supreme Court has recognized several factors that a district court should consider when determining whether justice requires the court to grant leave to amend. Those factors include

> undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment.

Foman v. Davis, 371 U.S. 178, 182 (1962). *See also Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). The factor that carries the greatest weight is whether the amendment will prejudice the opposing party. *Eminence Capital*, 316 F.3d at 1052. "Absent prejudice or a strong showing of any of the remaining *Foman* factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." *Id.* "Delay alone is insufficient to justify denial of leave to amend; the party opposing amendment must also show that the amendment sought is futile, in bad faith or will cause undue prejudice to the opposing party." *Jones v. Bates*, 127 F.3d 839, 847 n.8 (9th Cir.1997) (citing *United States v. Webb,* 655 F.2d 977, 980 (9th Cir. 1981)). *See also Quantum Tech. Partners II, L.P. v. Altman Browning and Co.*, No. 08-CV-376-BR, 2009 WL 1795574, at *19 (D. Or. June 23, 2009)(same). The party who opposes amendment bears the burden to show prejudice. *Eminence Capital*, 316 F.3d at 1052 (citing *DCD*

Programs, Ltd. v. Leighton, 833 F.2d 183, 187 (9th Cir. 1987)).

In the Court's Opinion and Order (#81) in which it dismissed in part Plaintiff's Fourth Amended Complaint (Corrected), the Court noted the multiple opportunities that Plaintiff had been given to produce a viable complaint. In particular, the Court observed:

> In the Court's view, the unusually protracted Rule 12 litigation arises from the moving target that Plaintiff created in his pleadings and that has already significantly delayed this action and potentially prejudiced the Official Capacity Defendants in light of their interest in a reasonably speedy resolution of this matter on the merits. The Court concludes there is now an urgent need to move this matter beyond Rule 12 litigation and toward resolution on the merits.

Fikre, 142 F. Supp. 3d at 1170-71. Nonetheless, the Court provided Plaintiff with "one final opportunity to amend" his Complaint. *Id.* at 1711.

At this point (which is more than three years after Plaintiff filed this litigation) if the Court provided Plaintiff with another opportunity to amend his Complaint, Official Capacity Defendants, who have been required to participate in multiple rounds of Rule 12 litigation, would be unduly prejudiced. In addition, the repeated opportunities that Plaintiff has had to amend his various Complaints and Plaintiff's apparent inability to plead additional and more specific facts indicates any further opportunities to amend would be futile.

On this record, therefore, the Court dismisses Plaintiff's Claim Twelve with prejudice pursuant to Rule 12(b)(6).

B. Claim Thirteen—FISA

In Claim Thirteen Plaintiff seeks to state a claim for damages against the Official Capacity Defendants' for alleged FISA violations pursuant to 18 U.S.C. § 2712(a). Official Capacity Defendants move to dismiss Claim Sixteen on the basis that Plaintiff fails to state a claim under FISA.

Plaintiff's sole remaining claim for damages under FISA arises from the allegation that Official Capacity Defendants willfully failed to employ and to follow sufficient minimization procedures on the disclosure of information seized pursuant to FISA in violation of 50 U.S.C. § 1806(a).[6] Section 1806(a) provides:

> Information acquired from an electronic surveillance conducted pursuant to this subchapter concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by this subchapter. No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character. No information acquired from an electronic surveillance pursuant to this subchapter may be used or disclosed by Federal officers or employees except for lawful purposes.

---

[6] Plaintiff's FAC purports to include claims for damages arising from alleged violations of 50 U.S.C. §§ 1801(i) and 1804(a). This Court, however, previously dismissed those claims with prejudice on the basis that Plaintiff failed to identify a valid waiver of sovereign immunity. *See Fikre*, 142 F. Supp. 3d at 1168-69.

Pursuant to 18 U.S.C. § 2712(a) Plaintiff may only obtain damages for a violation of § 1806(a) if he proves such a violation was willful. *See Fikre*, 142 F. Supp. 3d at 1169-70.

Official Capacity Defendants assert Plaintiff's Claim Thirteen must be dismissed because (1) Plaintiff does not provide a plausible, nonconclusory allegation that any surveillance information relating to Plaintiff was actually disclosed; (2) Plaintiff's FAC does not contain any nonconclusory allegations as to what the minimization procedures were and which of those procedures were violated, and (3) Plaintiff fails to allege nonconclusory facts from which the Court could find Plaintiff has pled a claim for willful violation sufficient to waive sovereign immunity under § 2712(a).

Plaintiff, on the other hand, contends his allegation that "the information upon which defendants caused Plaintiff to meet with Defendant FBI agents Noordeloos and John Doe I (Jason Dundas) in Khartoum and upon which defendants caused the UAE to imprison and torture plaintiff was derived from illegal surveillance and searches" is sufficient to establish at this stage of the proceedings that there was a disclosure of the FISA derived information that is actionable under § 1806(a). Moreover, Plaintiff contends he could not more specifically allege a failure to follow or to employ minimization procedures because those procedures are secret.

Standing alone, the Court is not troubled by Plaintiff's failure to include specific allegations about the minimization procedures associated with the FISA-derived email, text messages, and telephone conversations between Plaintiff and his brother. The Court notes Rule 12 does not require a plaintiff to plead what he can-

not possibly know. Nonetheless, the remainder of Plaintiff's allegations are insufficient to cross "'the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Plaintiff's nonconclusory factual allegations regarding the connection between the FISA-derived materials and his interrogation and torture in the UAE are as follows:

> 77. In 2010, while he was inside the United States, plaintiff and his brother Dawit Woldehawariat —both US citizens—worked together to set up a lawful business venture abroad. In furtherance of this objective, plaintiff and his brother discussed the parameters of the business venture they envisioned and the financial resources necessary to execute their plan. These discussions occurred by telephone, email, and text message.
>
> 78. Unbeknownst at the time to either plaintiff or his brother, defendants were intercepting and/or acquiring the content of plaintiff's telephone calls, his text messages, and his emails. Plaintiff now knows this because the United States has confirmed, through Department of Justice filings submitted in a since-dismissed prosecution against plaintiff in the United States District Court for the Southern District of California, that it intercepted the contents of plaintiff's telephone calls, emails, and text messages. *See* U.S. District Court for the Southern District of California, Docket No. 3:12-cr-06189-JAH, Doc. # 10.

FAC ¶¶ 77-78. In his FAC Plaintiff alleges the general content of the FISA-derived communications was discussed when Noordeloos and Dundas interrogated him.

> 35. Because defendants John Doe I (Jason Dundas) and Noordeloos were blocking the door, plaintiff, who had never before been detained or arrested, felt he could not leave. During the following interrogation, defendants Noordeloos and John Doe I (Jason Dundas) questioned plaintiff extensively about the events, activities, and leadership at the as-Saber Mosque in Portland, which plaintiff had attended for prayer services. Defendant Noordeloos also questioned plaintiff about the source of his financial support for this business endeavors in Sudan, and told plaintiff that, because of the Sudan sanctions imposed by the Office of Foreign Assets Control, it was illegal for plaintiff to engage in business transactions in Sudan—a statement that is inconsistent with the advice and recommendation earlier given by the representative of the embassy as set forth in ¶ 29, *supra*.

FAC ¶ 35. After Plaintiff moved from Sudan to the UAE and was imprisoned by Emirati agents, Plaintiff alleged he was interrogated regarding the following subjects:

> 44. The primary focus of the blindfolded interrogations was events at Portland's as-Saber Mosque, addressing in particular who plaintiff knew at the mosque who had a "jihadi mentality," what topics the mosque's leader, Sheikh Mohamed Kariye, speaks about both in public and in private, and how fundraising at the mosque occurs and who engages in fundraising there. The interrogators also questioned plaintiff about circumstances and events that plaintiff had disclosed to defendants Noordeloos and John Doe I (Jason Dundas) during his interrogation at the embassy in Khartoum. Numerous times during the

> blindfolded interrogations plaintiff's interrogators urged him to cooperate with them and with the FBI by becoming an informant.
>
> * * *
>
> 47. On several occasions plaintiff told his interrogators that the questions he was being asked and the suggestions of cooperation with the FBI were the same questions and suggestion he had heard from defendants Noordeloos and John Doe I (Jason Dundas); he thus inquired whether his confinement and mistreatment was at the request of the FBI. On each such occasion the interrogators responded by beating plaintiff severely.
>
> * * *
>
> 50. On or about June 14, 2011, plaintiff was informed that he had to take a lie detector test. During the test, for the only time during his confinement, plaintiff was questioned without a blindfold in place. The questioning during the test focused not upon events at Portland's as-Saber Mosque but, rather, upon whether plaintiff's financial arrangements involved soliciting funds for al-Qaeda. Following the lie detector test plaintiff's bed and bedding were returned to his cell.

FAC ¶¶ 44, 47, 50. From these facts Plaintiff concludes:

> 80. On information and belief, the information upon which defendants caused plaintiff to meet with defendant FBI agents Noordeloos and John Doe I (Jason Dundas) in Khartoum and upon which defendants caused the UAE to imprison and torture plain-

> tiff was derived from illegal surveillance and searches.
>
> 81. On information and belief, information derived from the electronic surveillance of plaintiff was willfully, knowingly, and/or recklessly disseminated for the unlawful purpose of interrogating plaintiff without counsel and coercing plaintiff to become an informant and then to cause his torture by proxy in the UAE.
>
> 82. On information and belief, the information derived from the electronic surveillance of plaintiff was disseminated to several agencies and foreign governments including but not limited to the Central Intelligence Agency, the National Security Council, the Department of Defense, the Department of Homeland Security, the Department of Justice/Federal Bureau of Investigation, the US Attorney's Office for the District of Oregon, the Department of the Treasury and the National Security Agency, and the United Arab Emirates.

FAC ¶¶ 80-82.

Plaintiff's conclusion that the FISA-derived communications provided the basis for his interrogation in Khartoum and torture and interrogation in the UAE, therefore, is based on the rough commonality of the general subject matter brought up in all three events. In particular, the Court notes the subject matter of his alleged communications with his brother was very specific; *i.e.*, "plaintiff and his brother discussed the parameters of the business venture they envisioned and the financial resources necessary to execute their plan." FAC ¶ 77. Plaintiff's interrogation in Khartoum, on

the other hand, concerned activities at the as-Saber Mosque and "the source of his financial support for his business endeavors in Sudan." FAC ¶ 44. His interrogation in the UAE concerned activities at the as-Saber Mosque, "circumstances and events that plaintiff had disclosed to defendants Noordeloos and John Doe I (Jason Dundas) during his interrogation at the embassy in Khartoum," and "whether plaintiff's financial arrangements involved soliciting funds for al-Qaeda." FAC ¶¶ 44, 50.

The relationship between these three events (the FISA surveillance, the Khartoum interrogation, and the UAE interrogation) as alleged by Plaintiff is tenuous. Foe example, Plaintiff does not allege he was ever questioned either in Khartoum or in the UAE about the communications with his brother, which allegedly was the subject of the FISA surveillance. Although the Court appreciates allegations concerning a disclosure of FISA-derived information will often have to be circumstantial, a plaintiff remains required to "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. In this case the relationship between the allegedly FISA-derived material and the alleged interrogations is too attenuated to permit the Court to reasonably infer that Official Capacity Defendants disclosed the FISA-derived information in a manner that would support a claim for damages under § 1806(a) and § 2712(a).

On this record and for the same reasons as with Claim Twelve, the Court dismisses with prejudice Plaintiff's Claim Thirteen for failure to state a claim.

C. Claim Fourteen - Stored Communications Act

In Claim Fourteen Plaintiff brings claims for violation of the Stored Communications Act (SCA), 18 U.S.C. § 2703, and states a cause of action for damages under § 2712. Plaintiff's contention is that Official Capacity Defendants unlawfully compelled the production of stored communications from service providers in violation of the procedures set out in § 2703.

Official Capacity Defendants move to dismiss Plaintiff's Claim Fourteen on the basis that 18 U.S.C. § 2511(2)(a)(ii) provides a safe-harbor provision for government agents who conduct surveillance pursuant to FISA authorization. Section 2511(2)(a)(ii) provides:

> Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—
>
> (A) a court order directing such assistance or a court order pursuant to section 704 of the Foreign Intelligence Surveillance Act of 1978 signed by the authorizing judge, or
>
> (B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory

> requirements have been met, and that the specified assistance is required,

Plaintiff concedes § 2511(2)(a)(ii) would provide a safe harbor for Official Capacity Defendants if the surveillance was, in fact, authorized by FISA, but Plaintiff contends the surveillance in this case was not properly authorized by FISA. As noted, however, Plaintiff fails to sufficiently allege the FISA surveillance was not properly authorized.

Accordingly, the Court dismisses with prejudice Plaintiff's Claim Fourteen pursuant to § 2511(2)(a)(ii).

D. Claim Fifteen - Wiretap Act

In Claim Fifteen Plaintiff brings a cause of action for damages pursuant to § 2712 in which Plaintiff alleges Official Capacity Defendants violated the Wiretap Act, 18 U.S.C. § 2511. Official Capacity Defendants move to dismiss Plaintiff's Claim Fifteen for failure to state a claim on primarily the same basis as Claim Fourteen: Official Capacity Defendants contend § 2511(2)(e) precludes liability under the Wiretap Act when the surveillance is conducted pursuant to FISA.

Section § 2511(2)(e) provides:

> Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

As the Court noted in its November 4, 2015, Opinion and Order (#81), "[a]lthough the Official Capacity Defend-

ants are correct that § 2511(2)(e) permits surveillance that is conducted pursuant to FISA, Official Capacity Defendants' contention that § 2511(2)(e) immunizes Defendants' conduct is, once again, premature on this record because Plaintiff has not alleged Defendants conducted the surveillance in this case pursuant to FISA." *Fikre*, 142 F. Supp. 3d at 1173. Official Capacity Defendants' contention is no longer premature. As noted, in his FAC Plaintiff alleges the surveillance was conducted under FISA authority.

Accordingly, the Court dismisses with prejudice Plaintiff's Claim Fifteen.

E. Claim Sixteen - Federal Rule of Criminal Procedure 41(g)

In Claim Sixteen Plaintiff raises a stand-alone claim under Federal Rule of Criminal Procedure 41(g) in which Plaintiff seeks the return of allegedly illegally searched and seized property. Accordingly, Plaintiff seeks an order directing Official Capacity Defendants to return or to destroy the records of telephone calls, emails, text messages, and derivative information that Plaintiff alleges Official Capacity Defendants seized unconstitutionally.

In its November 4, 2015, Opinion and Order (#81), however, the Court found Plaintiff's claim under Rule 41(g) was not cognizable as a stand-alone claim because "Rule 41(g) provides a remedy in civil cases in which Plaintiff establishes a Fourth Amendment violation" and the relief sought in Plaintiff's Rule 41(g) claim was "functionally identical to the injunction that he seeks in Claim Fifteen to remedy Defendants' alleged Fourth Amendment violation." *Fikre*, 142 F. Supp. 3d at 1173.

The Court, therefore, dismissed Plaintiff's Rule 41(g) claim "without prejudice to Plaintiff seeking relief authorized by Rule 41(g) in the event that Plaintiff prevails on Claim Fifteen." *Id.*

As noted, the Court dismisses Plaintiff's Fourth Amendment claim (Claim Twelve) on the basis that Plaintiff has failed to state a claim in light of his allegation that the surveillance was conducted pursuant to FISA. Accordingly, because Plaintiff's Claim Sixteen operates only as a potential remedy for Plaintiff's Claim Twelve under the Fourth Amendment, the Court also dismisses Plaintiff's Claim Sixteen with prejudice.

IV. Official Capacity Defendants' Unopposed Motion (#91) to Stay Plaintiff's Due Process Claims

In their Unopposed Motion (#91) to Stay Plaintiff's Due Process Claims, Official Capacity Defendants request the Court stay adjudication of Plaintiff's procedural and substantive due-process claims until the Court addresses similar claims in *Latif v. Lynch*, No. 3:10-cv-00750-BR.

In light of this Court's conclusion that Plaintiff's Claims One and Three are now moot as a result of Plaintiff's removal from the No-Fly List, the Court finds Official Capacity Defendants' Motion to Stay Plaintiff's Due Process Claims is also moot.

The Court, therefore, **DENIES as moot** Official Capacity Defendants' Motion (#91) to Stay Plaintiff's Due Process Claims.

CONCLUSION

For the reasons that follow, the Court **GRANTS** Official Capacity Defendants' Motion (#90) to Dismiss and **DISMISSES with prejudice** Plaintiff's Fifth Amended Complaint as to Plaintiff's claims against Official Capacity Defendants. The Court also **DENIES as moot** Official Capacity Defendants' Unopposed Motion (#91) to Stay Plaintiff's Due Process Claims.

After more than three years of litigation the record still reflects none of Individual Capacity Defendants identified in Plaintiff's FAC have been served. Accordingly, pursuant to Federal Rule of Civil Procedure 4(m), the Court directs Plaintiff to show cause in writing **no later than October 14, 2016**, why this action should not be dismissed as to Individual Capacity Defendants.

IT IS SO ORDERED.

DATED this 28th day of Sept., 2016.

/s/ ANNA J. BROWN
ANNA J. BROWN
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-35904
D.C. No. 3:13-cv-00899-MO
District of Oregon, Portland

YONAS FIKRE, PLAINTIFF-APPELLANT

v.

FEDERAL BUREAU OF INVESTIGATION; MERRICK B. GARLAND, ATTORNEY GENERAL; ANTONY J. BLINKEN; CHRISTOPHER A. WRAY; CHARLES H. KABLE IV, DIRECTOR OF THE TERRORIST SCREENING CENTER; PAUL NAKASONE, DIRECTOR OF THE NATIONAL SECURITY AGENCY; AVRIL D. HAINES, DIRECTOR OF NATIONAL INTELLIGENCE; ALEJANDRO N. MAYORKAS, SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; DAVID PEKOSKE, ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION,
DEFENDANTS-APPELLEES

Filed: Jan. 4, 2023

ORDER

Before: BERZON and RAWLINSON, Circuit Judges, and ANTOON,* District Judge.

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* The Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

Judge Rawlinson has voted to deny the petition for rehearing en banc. Judge Berzon and Judge Antoon recommend denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

Case No. 3:13-cv-00899-BR

YONAS FIKRE, PLAINTIFF

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
DEFENDANTS

DECLARATION OF CHRISTOPHER R. COURTRIGHT

I, Christopher R. Courtright, hereby declare as follows, pursuant to 28 U.S.C. § 1746:

1. I am a Supervisory Special Agent with the Federal Bureau of Investigation (FBI) and the Associate Deputy Director for Operation of the Terrorist Screening Center (TSC). I became Associate Deputy Director for Operations at TSC in December 2015. I have been Acting Deputy Director for Operations of the TSC since June 10, 2019. I have been with the FBI since 2001 and have served in a variety of criminal investigative, counterterrorism, and management positions.

2. The matters stated herein are based on my personal knowledge and review and consideration of information available to me in my official capacity including information furnished by TSC personnel, FBI Special Agents, and other Government agency employees or

contract employees acting in the course of their official duties.

3. The current policies and procedures regarding inclusion on the No Fly List are described in the Watchlisting Overview document released by the U.S. Government in January 2018.

4. On May 6, 2016, TSC advised counsel for Defendant that Plaintiff had been removed from the No Fly List. Counsel for Defendants notified counsel for Plaintiff of this change on Friday, May 6, 2016.

5. Plaintiff was placed on the No Fly List in accordance with applicable policies and procedures. Plaintiff 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 Li tin the future based on the currently available information.

Executed this 19th day of June 2019.

/s/ CHRISTOPHER R. COURTRIGHT
CHRISTOPHER R. COURTRIGHT
Deputy Director for Operations, Acting
Terrorist Screening Center

APPENDIX G

Office of the Administrator
U.S. Department of Homeland Security
601 South 12th Street
Arlington, VA 20598-6001

Transportation
Security
Administration

DECISION AND ORDER

On February 19, 2015, Yonas Fikre, through his counsel, submitted a response to the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) providing reasons why he believed his placement on the No Fly List was in error and requesting his removal from that List. For the reasons set forth below, I determine that Mr. Fikre should remain on the No Fly List.

On November 19, 2013, Mr. Fikre submitted an inquiry to DHS TRIP describing his travel difficulties. On January 23, 2014, DHS TRIP informed Mr. Fikre it had conducted a review of his records and determined that no changes were warranted at that time. On February 12, 2015, DHS TRIP informed Mr. Fikre that it was reevaluating his redress inquiry. DHS TRIP informed Mr. Fikre that he 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." 49 U.S.C. § 114(h)(3)(A). In particular, it had been determined that he was an individual who represents a threat of engaging in or conducting a violent act of terrorism and who was operationally capable of doing so.

In addition, DHS TRIP encouraged him to respond with relevant information if he believed the determination was in error or if he felt the information provided to

him was inaccurate. DHS TRIP did not provide additional information supporting his placement on the No Fly List because additional disclosure of certain information would risk harm to national security and jeopardize law enforcement activities. On February 19, 2015, Mr. Fikre, through his counsel, responded that he believed he received insufficient notice to allow him to respond meaningfully to DHS TRIP's determination. Mr. Fikre did not submit any evidence in support of his response.

Upon review of all of the information Mr. Fikre has submitted to DHS TRIP, as well as other information available to me related to Mr. Fikre's placement on the No Fly List, I find that Mr. Fikre may be a threat to civil aviation or national security; in particular, I find that he is an individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so. I therefore conclude that Mr. Fikre is properly placed on the No Fly List and no change in status is warranted.

Consistent with the protection of national security and law enforcement activities, I can provide the following explanation of my decision:

- I have considered Mr. Fikre's contention that he "categorically denies that he represents a threat of engaging in or conducting a violent act of terrorism or that he is operationally capable of doing so." I conclude, however, that the information available supports Mr. Fikre's placement on the No Fly List.

This conclusion does not constitute the entire basis of my decision, but I am unable to provide additional infor-

mation. Without specifying all possible grounds for withholding information in this case, information has been withheld for the following particular reasons:

- additional disclosure would risk harm to national security; and
- additional disclosure would jeopardize law enforcement activities.

No Fly List determinations, including this one, are not based solely on the exercise of Constitutionally protected activities, such as the exercise of protected First Amendment activity.

This determination constitutes a final order and is reviewable in a United States Court of Appeals pursuant to 49 U.S.C. § 46110 or as otherwise appropriate by law. A petition for review must be filed within 60 days of issuance of this order.

[3/9/15] /s/ MELVIN J. CARRAWAY
MELVIN J. CARRAWAY
Acting Administrator
Transportation Security Administration

APPENDIX H

U.S. Department of
Homeland Security
Traveler Redress inquiry
Program (TRIP)
601 South 12th Street, TSA-901
Arlington, VA 20598-6901

Homeland Security

Jan. 23, 2014

Mr. Yonas Fikre
Co Advokat Hans Bredberg
Norlandsgaten 12, Third Floor
Stockholm
Sweden

Redress Control Number: 2184463

Dear Mr. Yonas Fikre:

Thank you for submitting your Traveler Inquiry Form and identity documentation to the Department of Homeland Security (DHS) Traveler Redress Inquiry Program (TRIP). DHS's mission is to lead the unified national effort to secure the country, including U.S. border and transportation security. We take requests for redress seriously, and we understand the inconveniences that additional inspections may cause. DHS strives to process travelers in the most efficient and professional

manner possible without compromising our mission to safeguard the United States, its people, and its visitors.

In response to your request, we have conducted a review of any applicable records in consultation with other Federal agencies, as appropriate. It has been determined that no changes or corrections are warranted at this time.

If you feel that this decision is in error, you may file a request for administrative appeal with the Transportation Security Administration (TSA) by following the instructions in the enclosure, "How to Request an Appeal of an Initial Agency Decision." The information you submit should be as complete as possible and include accurate dates; complete addresses, names, and telephone numbers where appropriate.

This determination will become final 30 calendar days after you receive this letter unless you file a timely administrative appeal. Final determinations are reviewable by the United States Court of Appeals pursuant to 49 U.S.C. § 46110.

If you have any further questions, please contact DHS TRIP via e-mail at TRIP@dhs.gov, or write to the address found in the letterhead.

Sincerely,

/s/ DEBORAH O. MOORE

DEBORAH O. MOORE
Director
DHS Traveler Redress Inquiry Program
cc w/encl: Atty. Thomas Howard Nelson