

No. 22-1178

IN THE
Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
Petitioners,

v.

YONAS FIKRE,
Respondent.

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

**BRIEF OF ASIAN AMERICANS ADVANCING JUSTICE
AND OTHER ASIAN-AMERICAN CIVIL RIGHTS
ORGANIZATIONS AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICI CURIAE¹

Asian Americans Advancing Justice | AAJC (“Advancing Justice-AAJC”) is a nonprofit, nonpartisan organization that seeks to create an equitable society for all. Advancing Justice-AAJC works to further civil and human rights and empower Asian American communities through organization, education, advocacy, and litigation. Advancing Justice-AAJC is a leading expert on issues of importance to the Asian American community, including national security policies and enforcement measures, immigrant rights, and anti-racial profiling.

An additional 23 *amici* organizations are listed in the appendix as signatories to this brief. These organizations advocate for civil and human rights, including the rights of Asian-American, Arab, and Muslim citizens and residents of the United States and their communities. Advancing Justice-AAJC and the additional *amici* organizations share an interest in ensuring that the Government does not use national security concerns to trample the rights of American communities, and that those citizens that do challenge the Government’s national security

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to this brief’s preparation or submission.

actions receive all the relief to which they are entitled, without their cases being mooted prematurely.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Terrorist Watchlist System—including the No-Fly List—is opaque by design, overinclusive, and inaccurate. The List itself is secret, and the basic criterion for inclusion is that individuals are placed on the No-Fly List because they are suspected terrorists. But the secret “evidence” the Government relies on to include people on the List is often uncorroborated or innocuous. People are not generally told when or why they are placed on the No-Fly List, and they are not told if (or why) they are removed. The Government’s broad and unfettered discretion to operate the No-Fly List makes it ripe for error and abuse.

In practice, the Government uses the Watchlist system to target Muslim and South Asian communities. Leaked documents have revealed that more than 98% of names on the List are of Muslim origin. And individuals who are on the receiving end of No-Fly-List-related interrogation report that they are frequently subject to questions concerning their religious practices—indeed, the FBI has trained its interrogators to ask just those questions.

The Islamophobia animating the composition of the No-Fly List, and the lack of transparency and accountability in its operation, have led to disastrous

consequences for the Muslim and South Asian communities—and for Mr. Fikre in particular. As an initial matter, the pervasive and enduring impact of placement on the No-Fly List, notwithstanding subsequent removal, is well-documented, including by Mr. Fikre here. What is more, the Government has used the threat of placement on the No-Fly List as a cudgel to force members of the Muslim and South Asian communities to serve as informants on their own people. Consequently, distrust and ostracism of anyone even suspected of being on the No-Fly List is commonplace and has worked to sever community ties, causing harm that is exceptionally difficult to repair.

Against this backdrop, the Government's effort to moot this case should fail. The proffered Courtright Declaration says, in effect, that Mr. Fikre does not currently meet the criteria for inclusion on the No-Fly List. Missing from the Declaration is any explanation of the rationale for Mr. Fikre's placement on, and removal from, the List—and any assurance that the Government cannot simply return him to the List in the future for the same reason it placed him there originally. Mr. Fikre is thus left with a choice between curtailing core constitutional rights—the free exercise of his religion and the right to travel—or risking wrongful placement on the List yet again. As such, the Declaration does not “irrevocably eradicate[] the effects of the alleged violation;” Mr. Fikre's case is not moot; and the Ninth Circuit's decision should be

affirmed. See *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

ARGUMENT

I. THE TERRORIST WATCHLIST SYSTEM—INCLUDING THE NO-FLY LIST—IS OPAQUE, OVERINCLUSIVE, AND INACCURATE

A. The Watchlist System’s Lack of Transparency and Accountability Sets the Stage for Error and Abuse

Mr. Fikre sought recourse in court after the Government placed and maintained him in the Terrorist Screening Database (popularly known as the “Watchlist”) and on its constituent No-Fly List—products of the federal government’s two-decade-plus effort to “assemble[] a vast, multi-agency, counterterrorism bureaucracy that tracks hundreds of thousands of individuals.” *Ibrahim v. DHS*, 669 F.3d 983, 988–89 (9th Cir. 2012). The Watchlist is the main repository of the data tracking those individuals. *Id.* at 989. The No-Fly List, which purports to “contain[] the identity information of known or suspected terrorists” who are prohibited from boarding “an aircraft when flying within, to, from and over the United States,”² is drawn from the Watchlist and is its

² See Transp. Sec. Admin., *DHS Traveler Redress Inquiry Program* (last visited Dec. 19, 2023), <https://tinyurl.com/579s9y5y>.

most restrictive subset. See *Ibrahim*, 669 F.3d at 989. Both lists are secret, as is another list, known as the “Selectee List,” which contains the names of those “subject to enhanced security screening before boarding an airplane.” *Ibid.* The Transportation Security Administration (“TSA”) administers the No-Fly List, and it claims to use the List “to screen commercial air travelers at home and abroad to prevent known or suspected terrorists from flying into, out of, or within the United States, or at least to identify suspected terrorists who can be allowed to board a flight but will remain under surveillance.”³

The National Counterterrorism Center and the FBI nominate known and suspected terrorists to the Watchlist, *Ibrahim*, 669 F.3d at 989, though other agencies, and even other countries, can nominate as well, see *Elhady v. Kable*, 391 F. Supp. 3d 562, 568 (E.D. Va. 2019), *rev’d on other grounds*, 993 F.3d 208 (4th Cir. 2021).⁴ All that is needed to nominate

³ Jerome H. Kahan, *Quis custodiet ipsos custodiet?: Who Watches the Watchlisters?*, HARV. NAT’L SEC. J. ONLINE (Feb. 1, 2017) (citation omitted), <https://tinyurl.com/2v22fsk6>; Transp. Sec. Admin., *Security Screening* (last visited Dec. 1, 2023), <https://tinyurl.com/2an68da8>.

⁴ Another lesser-known source of information eventually included in the Watchlist is the Department of Homeland Security’s Tactical Terrorism Response Teams (TTRTs). These teams’ “goals” are to “make watchlist nominations,” meaning they have “free rein to target folks that have never presented a security threat or red flag for the government” and then “put them on a terrorist watchlist.” Melissa del Bosque, *Secretive CBP Counterterrorism Teams Interrogated 180,000 U.S. Citizens Over*

someone for the Watchlist is “articulable intelligence or information” raising a “reasonable suspicion” of involvement in terroristic activities. *Elhady v. Kable*, 993 F.3d 208, 214 (4th Cir. 2021). That “reasonable suspicion” standard is infinitely malleable. “[C]oncrete facts are not necessary” for reasonable suspicion, and “inferences” and “uncorroborated” information are to be considered.⁵ Moreover:

The TSC [the FBI’s Terrorist Screening Center] defines a “reasonably suspected terrorist” as “an individual who is reasonably suspected to be, or [has] been, engaged in conduct constituting, in preparation for, in aid of, or related to terrorism and terrorist activities based on articulable and reasonable suspicion.” On its face, this standard is baffling and circular: it essentially defines a suspected terrorist as a suspected terrorist. The standard is certainly not sufficient to ensure that a person is truly a threat.

American Civil Liberties Union, *U.S. Government Watchlisting: Unfair Process and Devastating Consequences* (March 2014).

Two-Year Period, The Intercept (Sept. 4, 2021, 7:00 AM), <https://tinyurl.com/34hcecbv>.

⁵ Nat’l Counterterrorism Ctr., *Watchlisting Guidance*, at 34 (2013), <https://tinyurl.com/yc8mtnwu>.

Though meeting that standard qualifies an individual for “nomination,” in practice, nomination is tantamount to placement on the Watchlist. “TSC receives around 113,000 nominations annually and around 99% are accepted.” *Elhady*, 993 F.3d at 214. Working from the Watchlist, the TSC then determines who to include on the No-Fly List. See *Latif v. Holder*, 686 F.3d 1122, 1125 (9th Cir. 2012). Those flaws in the Watchlist are passed on to its subsets. “[T]he No Fly List’s flaws are inherited from the lists it uses. They, in turn, remain largely unregulated, unappealable, and obscured from public attention.” Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, 61 BUFF. L. REV. 461, 462 (2013).

The Government has consistently refused to provide any information about “[h]ow the various nominating agencies interpret the standard(s) for nomination, how widely those interpretations vary across the intelligence community, . . . whether any agency has issued guidance elaborating on the standard(s),” and, critically, “[h]ow the TSC interprets the term ‘terrorism’” despite admitting “that ‘agencies utilizing watch list records recognize various definitions of the term.’” ACLU, *supra* at 5.⁶ Instead, the available information is a product of legal

⁶ See also Rachel Levinson-Waldman & José Gutiérrez, *Overdue Scrutiny for Watchlisting and Risk Prediction*, at 2, Brennan Center for Justice (Oct. 9, 2023), <https://tinyurl.com/44wj2br3> (“[T]he category of ‘suspected terrorist’ is nebulous and susceptible to broad interpretation based on subjective judgments.”).

challenges to placement on the No-Fly List. In a 2012 case, the Ninth Circuit stated that a nomination for inclusion on the No-Fly List “must (1) contain sufficient identifying data so that a person being screened can be matched to or disassociated from the record, and (2) satisfy minimum substantive derogatory criteria. Generally, nominations must be based on reasonable suspicion derived from the totality of available information that the individual is a known or suspected terrorist.” *Latif*, 686 F.3d at 1125 n.2. But the Government did not provide the “derogatory criteria” in that case. *Ibid.*

Another set of criteria for No-Fly List inclusion emerged in 2018. In further litigation surrounding the No-Fly List, the Government provided as an exhibit an unclassified “Overview of the U.S. Government’s Watchlisting Process and Procedures.”⁷ That Overview stated that to be included on the No-Fly List an individual must pose either:

- (1) a threat of committing an act of international terrorism (as defined in 18 U.S.C. § 2331(1)) or domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to an aircraft (including a threat of piracy, or a threat to airline, passenger, or civil aviation security);

⁷ See Exhibit 7, *Elady v. Kable*, Case No. 1:16-cv-00375-AJT-JFA (E.D. Va. Apr. 27, 2018), ECF No. 196-16, <https://tinyurl.com/36enzucw>.

(2) a threat of committing an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to the homeland;

(3) a threat of committing an act of international terrorism (as defined in 18 U.S.C. § 2331(1)) against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installations (as defined by 10 U.S.C. 2801(c)(4)), U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government; or,

(4) a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so.

Id. at 4. Again, the circular nature of that criteria is readily apparent: someone who is placed on the No-Fly List (that is, suspected of terrorism) is someone who is suspected of terrorism. And again, the vague and malleable nature of that standard vests the Government with virtually unchecked discretion.

That broad and unfettered discretion allows bureaucratic inertia to shape the composition of the No-Fly List, making it overinclusive. “To the extent that terrorist watch lists play a role in national

security, we would expect the agencies that manage them to create strict procedures to ensure their efficacy.” Bernstein, *supra* at 466. “In actuality, however, agencies have not fulfilled these expectations.” *Id.* at 472. Agents are incentivized to “appear active and efficacious” by putting more names on the list because “[m]ore entries can make the agency look more active in its pursuit of the public good, even when they produce no actual public benefits down the line.” *Id.* at 472. Further, “[o]verlisting also has institutional benefits. . . . [A] large watch list makes national security threats seem prevalent, which makes the agency’s activities particularly necessary, which encourages attention and resources to flow to the agency and the watch list.” *Id.* at 473.

Individuals generally are not informed about their placement on the No-Fly List. Instead, they find out that they are on it only when they show up to the airport and are prevented from boarding.⁸ Unsurprisingly, this combination of broad discretion, lack of public accountability, and lack of notice has led to frequent errors. After a 2006 internal review of the No-Fly List, for example, 5,000 names were

⁸ *E.g.*, Dep’t of Homeland Sec., *Step 1: Should I Use DHS TRIP?, More About Screening and Watchlists* (last visited Dec. 7, 2023), <https://tinyurl.com/56jfb68f> (stating that “the U.S. government’s general policy is to neither confirm nor deny a person’s watchlist status, except in very limited circumstances . . . [where] eligible individuals may be notified of their placement on the No Fly List”).

immediately removed, and 22,000 were downgraded from the No-Fly List to the Watchlist. See *Ibrahim*, 669 F.3d at 990. In one well-known example, a flight from London to Washington with Rock and Roll Hall of Famer and folk singer Yusuf Islam (formerly known as Cat Stevens) on it was diverted to Maine because he was mistakenly allowed to board despite being on the No-Fly List—and he was on the No-Fly List even though the famed musician is in no sense a terrorist.⁹ In another case, an FBI agent filled out a form in “exactly the opposite way from the instructions on the form” and nominated Dr. Rahinah Ibrahim, a Muslim graduate student at Stanford University, to the No-Fly List. See *Ibrahim v. DHS*, 62 F. Supp. 3d 909, 916 (N.D. Cal. 2014). That agent did not realize his mistake until he was deposed in Dr. Ibrahim’s lawsuit, more than eight years after he first nominated her. *Ibid.* Errors pervade the Watchlist too. As one example, *Weekly Standard* journalist Stephen Hayes was placed on the Watchlist after he and his wife took a one-way flight to Turkey for a cruise.¹⁰

These errors have significant consequences, not only for the communities they impact, see *infra* § II,

⁹ See Gregory Krieg: *No-fly list nightmares: The program’s most embarrassing mistakes*, CNN (Dec. 7, 2015, 3:26 PM), <https://tinyurl.com/45tkvt8c>.

¹⁰ See Dylan Byers, *Stephen Hayes on DHS Terrorist Watchlist*, Politico (Sept. 23, 2014, 4:44 PM), <https://tinyurl.com/mwrzabtv>.

but for the efficacy of the Watchlist apparatus and its alleged national security justification too:

The always-worth-it view also ascribes astronomical costs to any false negative, and essentially zero costs to false positives. But false positives are not costless. For one thing, they decrease watch list efficacy because large numbers of irrelevant entries make it more difficult for users to distinguish signal from noise. Agents have a harder time identifying relevant, useful information that appropriately motivates action.

Bernstein, *supra*, at 478.

Given the lack of transparency inherent in the No-Fly List process and the fact that even those who do not meet the criteria at all can be placed on the List through, functionally, a clerical error, individuals cannot structure their actions to avoid inclusion on the List. With the secrecy surrounding the process, and the potential for errors and abuse, the Government owes individuals who challenge their No-Fly List status a clear explanation when it seeks to moot a case. As discussed below, see *infra* § III, that is not what Mr. Fikre got here.

B. The No-Fly List's Inherent Flaws Are Compounded By The Opaque

Process For Challenging Placement On The List

Challenging one's placement on the No-Fly List is, similarly, a murky process. Such challenges generally come through the Department of Homeland Security's Traveler Redress Inquiry Program ("DHS TRIP"). Dep't of Homeland Sec., *DHS/ALL/PIA-002(b) Privacy Impact Assessment for the DHS Traveler Redress Inquiry Program (TRIP)* 1 (2018).¹¹ Under DHS TRIP, airline passengers identified as a threat by the prescreening system can appeal the determination. See 49 U.S.C. §§ 44903(j)(2)(C)(iii)(I), (j)(2)(G)(i).

Before 2015, DHS TRIP's responses to individuals seeking redress did not confirm or deny their placement on the No-Fly List or disclose any reasons or evidence supporting their possible inclusion. Pet. 3; see also *Kashem v. Barr*, 941 F.3d 358, 366 (9th Cir. 2019). That particular policy was challenged successfully on due process grounds, and DHS TRIP now provides a written response that confirms an individual's status on No-Fly List. See *Mohamed v. Holder*, No. 1:11-cv-50 (AJT/MSN), 2015 U.S. Dist. LEXIS 92997, at *42-43 (E.D. Va. July 16, 2015). If an individual learns from this response that they are on the No-Fly List, they may elect to receive more information through what is called a stage-two

¹¹ Individuals placed on the No-Fly List may also, as Mr. Fikre did, challenge their designation in federal court.

letter.¹² If requested, this stage-two letter “will identify the specific criteria or criterion under which the individual has been placed on the” List, “includ[ing] an unclassified summary of information supporting the individual’s No-Fly List status.” *Id.* at ¶ 38; see also Pet. App. 5a. However, the contents and level of detail included in the unclassified summary are up to the Government’s discretion, and it is neither full nor uniform by law or policy. Grigg Decl., *supra* n.12, at ¶ 38.

After reviewing all the documentation, information requested from the individual, and a report from the TSC’s Redress Office, the TSA will “correct any erroneous information” and “provide the individual with a timely written response” regarding its determination. 49 C.F.R. §§ 1560.205(d); Pet. App. 5a. Individuals who remain on the List may request an administrative appeal with the TSA within 30 days of their DHS TRIP determination. Pet. App. 123a. Final determinations are reviewable by the United States Court of Appeals pursuant to 49 U.S.C. § 46110. *Id.*

Though these processes may sound adequate, in practice they are anything but. With regard to Dr. Ibrahim, for example, it took years before she was removed from the No-Fly List, despite the fact that

¹² See Decl. of G. Clayton Grigg, [Deputy Director for Operations of the Terrorist Screening Center,] *Latif v. Holder*, No. 3:10-cv-00750-BR (D. Or. May 28, 2015), ECF No. 253 [hereinafter Grigg Decl.].

her placement was purely the result of an error. *Ibrahim*, 62 F. Supp. 3d at 916. And Mr. Fikre's experience, too, reveals just what a byzantine process removal is. Mr. Fikre was detained by United Arab Emirates (UAE) authorities when he was in that country in 2011. The authorities tortured and interrogated him about his activities at his mosque in Portland, allegedly upon orders from the FBI. Mr. Fikre discovered that he was on the No-Fly List only when his jailer attempted to take him to the airport so that he could leave the UAE but could not obtain a boarding pass for Mr. Fikre. Pet. App. 147a-148a. When Mr. Fikre challenged his inclusion on the No-Fly List, he received a letter from DHS TRIP in 2014 that simply stated that "no changes or corrections are warranted at this time." Pet. App. 123a (Letter from Deborah O. Moore to Yonas Fikre (Jan. 23, 2014)). It was not clear what would have been subject to any "changes or corrections," as DHS refused to confirm or deny his placement on the No-Fly List. Pet. App. 33a-34a. After the 2015 court-ordered policy change, DHS told 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." Pet. App. 34a. When the Government notified Mr. Fikre that he had been removed from the No-Fly List in 2016, it did so outside of the DHS TRIP process by informing the court directly. D. Ct. Doc. 98 at 1 (May 9, 2016). The notice did not express the reason for removal. *Id.*; see also Pet. App. 35a, 84a.

As a result, Mr. Fikre does not know what, if anything, he did to be placed on the No-Fly List, and he does not know what, if anything, he did to be removed—or the circumstances under which the Government could revise his status and place him back on the No-Fly List again. As such, the Courtright Declaration fails to moot his case. See *infra* § III; *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

II. THE NO-FLY LIST TARGETS MUSLIM AND SOUTH ASIAN COMMUNITIES

The burden of navigating the opaque, overinclusive, and inaccurate No-Fly List does not fall equally on American communities. Indeed, for decades, Muslim and South Asian people have suffered the discriminatory impact of the List's structural flaws.

A. The No-Fly List Is Tainted By Islamophobia

After the terrorist attacks of September 11, 2001, “there were enough voices of hate, deliberate misinformation, and genuine misunderstandings to create a powerful message: Muslims are not to be trusted.”¹³ This prevailing social norm was reinforced

¹³ Farah Pandith, *The U.S., Muslims, and a Turbulent Post-9/11 World*, Council on Foreign Relations (Sept. 1, 2021, 3:36 PM), <https://tinyurl.com/37c9tc29>; see also Louise Cankar, *No Longer Invisible: Arab and Muslim Exclusion After September 11*,

by the American media, see Saher Selod, *Forever Suspect 75-76* (Rutgers Univ. Press 2018) (describing the creation of a narrative that depicted “Muslims as terrorist, backward, misogynistic and anti-democratic”), and ultimately enshrined in government policy. “Federal and state policies in the years since September 11 reinforced ideas of Islam as foreign, threatening, and oppositional to American identity.” Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333, 1396 (2019). It was in the midst of that climate of Islamophobia that the Government radically expanded its use of the No-Fly List.

It is no surprise then (and has long been known in the Muslim and South Asian communities, the press, and civil society organizations) that the Watchlist and No-Fly List disproportionately target Muslims, including U.S. citizens.¹⁴ This was confirmed in 2023, when the 2019 No-Fly and Selectee Lists were leaked.¹⁵ An analysis of those Lists showed that “98 percent of the names are in reference to Muslims.” Representative Katie Porter, Letter to the President

Middle East Report (Fall 2002), <https://tinyurl.com/5f77a3z3> (reporting 645 “bias incidents and hate crimes” against Arabs and South Asians in the week after September 11, 2001).

¹⁴ See, e.g., Brandon Tensley, *Innocent Until Proven Muslim: How Islamophobia lingers in post-9/11 era*, CNN (Sept. 9, 2021, 3:23 AM) <https://tinyurl.com/y6cctuum>.

¹⁵ Peter Wade, *Hactivist Discovered U.S. No Fly List on Unsecured Airline Server*, Rolling Stone (Jan. 22, 2023), <https://tinyurl.com/2a4e7tpv>.

of the United States (June 27, 2023). In the same vein, leaked documents revealed that Dearborn, Michigan—which in 2014 had a population of 96,000 that was approximately 40% Arab—had more residents on the Watchlist than cities like Houston and Chicago, which had populations an order of magnitude greater, but smaller Muslim communities.¹⁶

That statistical evidence of targeting is borne out by the experiences of people who find themselves on one of those Lists. CBP officers have reportedly asked “What type of Muslim are you?” to individuals on the Watchlists, including specifically asking, “Are you Sunni or Shi’a?” Compl. ¶ 1, *Kariye v. Mayorkas*, No. 2:22-cv-01916 (C.D. Cal Mar. 24, 2022). Similarly, when Adis Kovac was placed on the No-Fly List, two FBI agents interrogated him twice about his Islamic beliefs, including his views and opinions on “Sharia law.” Compl. ¶¶ 132, 138, *Kovac v. Wray*, No. 18-cv-110 (N.D. Tex. Jan. 17, 2018).

Individuals placed on the No-Fly List have spoken out for decades about the discriminatory and coercive treatment they face, including in at least one case that ended up before this Court. See *Tanzin v. Tanvir*, 592 U.S. 43 (2020). There, FBI agents asked plaintiff Muhammad Tanvir whether he could share

¹⁶ See Jeremy Scahill & Ryan Devereaux, *Watch Commander*, *The Intercept* (Aug. 5, 2014, 12:14 PM), <https://tinyurl.com/yhsu65af>.

information as broad as “anything about the American Muslim community” and expressed a general interest “in people from the ‘Desi’ (South Asian) communities.” Compl. ¶¶ 53, 68, *Tanvir v. Lynch*, No. 13–cv–6951 (S.D.N.Y. Oct. 1, 2013).

Indeed, the FBI has trained its interrogators to ask just these kinds of questions focused on religious stereotypes and protected First Amendment expression. See Michael German, *Stigmatizing Boston’s Muslim Community is No Way to Build Trust*, Brennan Center for Justice (Oct. 9, 2014) (describing how “[t]he FBI’s theory of terrorist radicalization claims that the commonplace activities of many American Muslims, including wearing traditional religious attire, frequent attendance at mosques, participating in a pro-Muslim social group or political cause, or even growing facial hair, are ‘indicators’ in a four-step process toward becoming a terrorist”). Internal FBI documents made public in 2016 “expos[ed] the hidden loopholes that allowed agents to violate the bureau’s own rules against racial and religious profiling and domestic spying as they pursued the domestic war on terror.”¹⁷

Given the FBI’s role in composing the Watchlist and No-Fly Lists, it is no surprise that the Lists reflect

¹⁷ Janet Reitman, *I Helped Destroy People*, THE NEW YORK TIMES MAGAZINE (Sept. 9, 2021), <https://tinyurl.com/yn24zpvvr>; see also Harsha Panduranga & Faiza Patel, *Stronger Rules Against Bias: A Proposal for a New DHS Nondiscrimination Policy*, Brennan Center for Justice (Sept. 9, 2022), <https://tinyurl.com/n2xcnzch>.

the same anti-Muslim bias. And the No-Fly List, in turn, reinforces these racial and religious stereotypes:

[R]esearch suggests that the categories of people that populate database predictions can affect broadly held conceptions of society. By creating categories of people and making them seem prevalent, or rare, watch lists can affect how both government actors and the public at large understand the composition of society. . . . It can lead agents and members of the public to more readily assume that someone is a terrorist because watch lists have already assured them that many people are terrorists. . . . [S]uch effects are most likely in the very areas of high uncertainty that watch lists address.

Bernstein, *supra*, at 497-498. As one former FBI agent has explained, “[w]e’ve built this entire apparatus and convinced the world that there is a terrorist in every mosque, and that every newly arrived Muslim immigrant is secretly anti-American, and because we have promoted that false notion, we have to validate it.” Reitman, *supra* n.17.¹⁸ In this context, as

¹⁸ This anti-Muslim animus is not confined solely to the Watchlist and the No-Fly List. In 2003, President Bush directed the creation of the National Security Entry-Exit Registration System (“NSEERS”), which “targeted men who entered the U.S. on nonimmigrant visas from primarily Arab, Muslim-majority,

discussed below, see *infra* § III, the Courtright Declaration should not moot Mr. Fikre’s case.

B. The Government Has Used The Threat Of Placement On The No-Fly List To Force Members Of The Muslim And South Asian Communities To Spy On Their Own

Muslims and South Asians are not only overrepresented in the Watchlist apparatus, but the Government also routinely uses the fact of placement on the List as a coercive tool against these communities. Indeed, “[f]ederal authorities are using the watchlists to target Muslims in the hopes they will spy on their own communities on behalf of the US government.”¹⁹ The pressure to become an informant is well-known in the community and has been highlighted in several rounds of litigation. In one case, an FBI special agent sought to pressure a U.S. Citizen

African, and South Asian countries.” Asian Americans Advancing Justice-AAJC, Written Statement, Hearing Before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties (March 1, 2022) (“AAJC Written Testimony”). Yet despite its ostensible justification as a “national security” program, NSEERS resulted in zero terrorism convictions. *Ibid.*; see also Nadeem Muaddi, *The Bush-era Muslim registry failed. Yet the US could be trying it again*, CNN (Dec. 22, 2016, 11:30 AM), <https://tinyurl.com/5n89pckz>.

¹⁹ Danny McDonald, *The FBI is Trying to Recruit Muslims as Snitches by Putting Them on No-Fly Lists*, VICE News (April 23, 2014, 8:30 AM) <https://tinyurl.com/3d9netps>.

“into becoming an informant in Libya, presumably by committing espionage in that country.” See Compl. ¶ 81, *Kadura v. Lynch*, No. 14-cv-13128 (E.D. Mich. Aug. 14, 2014). The agent pushed further, indicating that “if Mr. Kadura wanted to remove his name from the No-Fly list, it would be nearly impossible for him to do so unless he agreed to work as an informant in Libya.” *Id.* ¶ 82.

In another example, Iranian-American student Kevin Iraniha was stopped from boarding a flight home to San Diego from Costa Rica.²⁰ Iraniha felt pressured to talk to FBI agents about his No-Fly List status because “[i]t just seemed like if I don’t talk [to them] . . . they might become suspicious of me . . . and I don’t need to hide anything from anybody.” During those discussions, the agent asked Iraniha questions “primarily to do with Islam, his being Muslim and his views on and travels to Muslim countries, including specific questions about the full names of people he visited or stayed with.” *Ibid.* Iraniha was eventually told that, because he was a U.S. citizen, he had “the right to go into America, you just can’t fly into America, so if you want you can take a boat or you can go by land -- drive into America.” *Ibid.* Only after speaking to a lawyer did Iraniha realize that he had been “targeted to become an informant.” *Ibid.*

²⁰ Shirin Sadeghi, *U.S. Citizen Put on No-Fly List to Pressure Him Into Becoming FBI Informant*, Huffington Post (Aug. 7, 2012), <https://tinyurl.com/2yt7fesu>.

The same thing happened to Mr. Fikre. He was locked in a room with federal agents in Sudan and told that the FBI wished him to become an informant. Pet. App. 140a. In exchange, Mr. Fikre would be removed from the No-Fly List and be paid compensation. *Ibid.* That offer was repeated several times after Mr. Fikre declined it, always with the threat that Mr. Fikre would remain on the No-Fly List unless he acquiesced. *Ibid.*

Perverse incentives embedded into the system fuel this tactic of recruitment. “FBI special agents are promoted and rewarded based on the negative information they provide on the communities they are monitoring. Information that exonerates people from suspicion is not similarly rewarded. Suspicious activity is created that otherwise would not have existed. Preconceived biases against Muslim communities are confirmed in this manner.” Sana Sekkarie, *The FBI Has a Racism Problem and It Hurts Our National Security*, GEO. SEC. STUD. REV. (August 19, 2020). The FBI reinforces its own beliefs about Muslims by adding them to the Watchlist ecosystem, using that as leverage to coerce people in these communities into becoming informants, and subsequently using any information from informants or surveillance to add even more Muslim and South Asian people into the system.

Given how difficult it is for someone to seek removal from the No-Fly List or even to gain basic information about their inclusion, the threat of being

added or the promise of removal are powerful coercive tactics that have been abused. Communities are rightfully fearful of the consequences, and often modify their behavior as a result. See *infra* § II.C. Without recourse through the judicial system, this vicious cycle will continue unchecked, with lasting consequences for individuals and vulnerable communities.²¹

**C. The Muslim And South Asian
Communities Suffer The
Discriminatory Impact Of The
Watchlist System**

The climate of suspicion and distrust fostered by the Watchlist system has had disastrous consequences for Muslim communities. Individuals placed on the No-Fly List frequently become outcasts even within their communities. And placement on the

²¹ This legacy of animus continues to this day. Continued Islamophobic justifications for alleged national security programs during the Trump administration further embedded fear and prejudice against Muslims and South Asians in American society. See, e.g., Vanessa Williamson & Isabella Gelfand, *Trump and Racism: What do the Data Say*, Brookings Institution (Aug. 14, 2019), <https://tinyurl.com/y5eya6ws> (noting a “clear correlation” between 2016 campaign events and incidents of prejudiced violence and that counties that held a Trump campaign rally in 2016 “saw hate crime rates more than double compared to similar counties that did not host a rally”); Tensley, *supra* n.14.

No-Fly List can serve as *carte blanche* for outside actors to hurt community members as well.

The discriminatory impact of the Watchlist system is reflected in the accounts of community members. In *Elhady v. Piehota*, for example, the court recounted the experiences of several individuals who suffered consequences because of their inclusion in the Watchlist. 303 F. Supp. 3d 453, 459-60 (E.D. Va. 2017). Some of these plaintiffs were on the No-Fly List at the start of the litigation, but received letters from the Government that they had been removed following the filing of the amended complaint. See *id.* at 458 n.2. The court held that the plaintiffs plausibly alleged that the dissemination of their status was “so widespread that it [was] tantamount to public disclosure[.]” See *id.* at 465. And, according to the plaintiffs, even removal from the No-Fly List did not stop the harm. Plaintiffs were denied the ability to make wire transfers, had their bank accounts closed without explanation, were denied the ability to test drive a vehicle at a car dealership, denied the ability to apply for employment at an airline, denied exercise of their constitutional right to bear arms, and one plaintiff had a gun drawn on him on two occasions at traffic stops. See *id.* at 459-460.

One of the most egregious examples of harm is the case of Dr. Ibrahim, who was mistakenly placed on the No-Fly List because an FBI agent filled out the

inclusion form in the wrong way.²² The court found that “suspicious adverse effects continued to haunt Dr. Ibrahim in 2005 and 2006, even though the government claims to have learned of and corrected the mistake” by then. *Id.* at 929. For instance, after she was removed from the No-Fly List, her visa was revoked and her daughter—a U.S. citizen—“was not allowed to fly to the United States even to attend th[e] trial.” *Id.* Despite being a case of accidental inclusion, “federal authorities fought [Dr. Ibrahim] all the way.”²³

Another Michigan man, Ahmad Chebli, voiced the lasting psychological consequences that he suffered from his mistaken inclusion on the No-Fly List, explaining, “I’m relieved to be off the No-Fly List but still reeling from the government’s abusive use of the list against me and its violations of my constitutional rights.”²⁴ Mr. Chebli’s experience of being pressured by the FBI to inform on his own community is a familiar one, see *supra* § II.B, and only compounded

²² *Ibrahim*, 62 F. Supp. 3d at 916.

²³ David Kravets, *FBI Checks Wrong Box, Places Student on No-Fly List*, WIRED (Feb. 6, 2014, 4:48 PM), <https://tinyurl.com/5a4v8n3x>.

²⁴ American Civil Liberties Union, *Michigan Father Wrongly Placed On No Fly List Is Removed After ACLU Files Lawsuit On His Behalf*, (May 12, 2021, 2:00 PM), <https://tinyurl.com/37vvys4t>.

his inability to travel for work or even his Muslim religious pilgrimage.²⁵

In another instance, the United States placed Ashraf Maniar, an American living in Texas as of 2021, on the No-Fly List because of his association with a friend of his former wife.²⁶ By 2020, after years of litigation, see *Maniar v. Wolf*, No. 1:18-cv-1362, 2020 WL 1821113 (D.D.C. Apr. 10, 2020), Maniar received a letter from the Department of Homeland Security clearing him from the List. *Ibid.* Shortly thereafter, Maniar arrived in Pakistan for the first time, hoping to visit family. *Ibid.* At customs, the Pakistani Inter-Services Intelligence agency detained and questioned him. *Ibid.* Though he offered the DHS letter clearing him, Pakistani authorities were unmoved. They placed a hood over his head and took him to a gated compound for four more days of prolonged interrogations, during which he had no contact with his family. *Ibid.* On the fourth day, his interrogator revealed that they had no problem with Maniar, but that the U.S. had shared information flagging him as a possible terrorist. *Ibid.* The interrogator advised him to leave the country. Immediately upon landing in Atlanta, agents from

²⁵ Ahmad Chebli, *I Refused to Become an FBI Informant, And The Government Put Me On The No Fly List*, ACLU (May 12, 2021), <https://tinyurl.com/mr494pkm>.

²⁶ Murtaza Hussain & Pedro Aparicio, *One Man's No-Fly List Nightmare*, The Intercept (May 30, 2021, 7:00 AM), <https://tinyurl.com/26wvfz34>.

Homeland Security appeared at his terminal and took him in for questioning. *Ibid.*

And Mr. Fikre, too, has suffered numerous collateral consequences from his placement on the No-Fly List. As one example, “[b]ecause of the fear created by [Mr.] Fikre’s placement on the No-Fly List, [his] wife sought and received a divorce from [him].” Pet. App. 152a. As another, Mr. Fikre undertook a trip to Mecca for his *hajj* pilgrimage—one of the pillars of the Muslim faith, which every faithful Muslim who is physically and economically capable is required to make at least once in a lifetime—in the company of several other Muslims in 2015. *Id.* at 155a. Even though Mr. Fikre had been removed from the No-Fly List at that point, he was singled out for special security screening and his fellow Muslims—familiar as they were with the functioning of the No-Fly List, see *supra* § II.A—noticed this enhanced screening, deduced that Mr. Fikre had been on the No-Fly List, and shunned him for the remainder of the trip. *Id.* at 155a-158a. When Mr. Fikre arrived in Saudi Arabia, he was again singled out for special security measures, this time being detained by Saudi officials for “four or five hours.” *Id.* at 158a.

Moreover, when Mr. Fikre has attempted to take a leadership role in worship at his mosque, “fellow congregants have opposed him leading prayer or calling the adhan [(an Islamic recitation that signals to congregants the start of prayer)]” because of his placement on the No-Fly List. *Id.* at 160a. Other

congregants believe that Mr. Fikre was removed from the No-Fly List only because he was an informant, and have limited their interactions with him. *Ibid.* Members of his religious community avoided a restaurant he owned, and at least one friend cut off contact with him entirely, for the same reason. *Ibid.* Mr. Fikre's placement on the No-Fly List has damaged his relationship with his brother and his cousins too. *Id.* at 162a.

Mr. Fikre's experiences reflect the climate of suspicion and distrust fostered by the Watchlist system. "In the context of the War on Terror, Muslim Americans are cognizant they are being watched and monitored." Selod, *supra*, at 100. Therefore, "they fear[] being classified as a terrorist by someone misinterpreting their beliefs on religion and politics. They [are] less likely to participate in political and religious discussions at work and in public spaces because they fear[] it could cast them as anti-American or suspicious." *Id.* In this way, the No-Fly List, and the Government's use of the List for racial and religious targeting, work to sever community ties for Muslims and South Asians, causing harm that is exceptionally difficult to repair.

III. IN THIS CONTEXT, THE COURTRIGHT DECLARATION SHOULD NOT MOOT THIS CASE.

It should not be controversial that the No-Fly List's lack of transparency in the name of national

security sets the stage for error and abuse. As demonstrated above, through countless examples and decades of experiences, Muslim and South Asian communities have suffered the discriminatory impact of such error and abuse in disproportionate numbers, with devastating consequences.

The harm caused by the No-Fly List stems from the fact that it is a bloated, bureaucratic dataset with circular inclusion criteria. Yet the Government asks this Court to credit its reliance on just that flawed criteria to deprive Mr. Fikre of judicial recourse.

The Government maintains, through the Declaration of Special Agent Courtright, that Mr. Fikre “was removed from the No-Fly List upon the determination that he no longer satisfied the criteria for placement” and “will not be placed on the No-Fly List in the future based on the currently available information.” Pet. App. 118a. The opacity and vagueness of that Declaration mirrors that of the No-Fly List itself. The Declaration does not state what “criteria for placement” Mr. Fikre supposedly satisfied initially, or what has changed based on “the currently available information.” *Ibid.* As such, it leaves entirely unclear the rationale for Mr. Fikre’s placement on, and removal from, the List—and, thus, whether the Government could return him to the List for the same reason it placed him there originally. Just like hundreds of other Americans, Mr. Fikre is simply left to guess why he was placed on the No-Fly List and why he was removed.

This puts Mr. Fikre in an untenable position. It leaves him to speculate about the conduct he needs to avoid in the future so that he is not placed back on the No-Fly List. Perhaps it was Mr. Fikre's exercise of his constitutionally protected right to travel that drew the Government's attention, as Mr. Fikre did travel to Sudan shortly before his apparent placement on the No-Fly List. Pet. App. 138a. Or perhaps it was the practice of his religion; as discussed extensively *supra* § II, the Government has targeted the Muslim community through the No-Fly List, and Mr. Fikre is a faithful Muslim. It should be intolerable that, to preserve the status quo in the context of this information vacuum, Mr. Fikre would curtail his constitutionally-protected right to travel, see *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (“[T]he ‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.” (citation omitted))—or his right to practice his religion, see *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) (“[The Free Exercise Clause] does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts.” (citation and internal quotation marks omitted)).

In short, the Courtright Declaration leaves Mr. Fikre in limbo, and consequently, does not “completely and irrevocably eradicate[] the effects of the alleged violation.” *Davis*, 440 U.S. at 631-32. The Ninth Circuit's decision below, by contrast, holds the

promise of providing Mr. Fikre with meaningful information to guide his conduct. The court held that the Government needed to do one of two things to moot Mr. Fikre's case. First, the Government could show that Mr. Fikre did not initially belong on the List by making "a change in administrative policy that embraced . . . [Mr. Fikre's] arguments." Pet. App. 39a. Second, it could expressly "repudiate[] the decision to add [Mr.] Fikre to the No-Fly List." *Id.* at 42a. Those requirements are appropriately calibrated to the opacity of the No-Fly List process and the history of targeting Muslim communities like Mr. Fikre's.

Doubtless, the Government has a national security interest in protecting the nation's skies from terroristic threats. But the abuse of the Watchlist system to target Muslim and South Asian communities, and the opacity of both placement and removal in the context of widespread error, undermine that interest. In such an environment, the unadorned statements proffered in the Courtright Declaration do not in any sense bind the Government, and they do not provide any guidance to Mr. Fikre as to whether he can exercise core constitutional rights without subjecting himself to the abuses he suffered from placement on the No-Fly List.

As this Court has repeatedly made clear, under "[l]ongstanding principles of mootness" a court may conclude that voluntary cessation of the challenged activity has rendered a case moot only where "there is no reasonable expectation" that the harms endured

will recur, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66-67 (1987) (citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)), and where “interim relief or events have completely or irrevocably eradicated the effects of the alleged violation.” *Davis*, 440 U.S. at 631. The Courtright Declaration does not begin to meet that standard. “If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.” *Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021).

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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December 20, 2023

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APPENDIX

TABLE OF APPENDICES

APPENDIX – LIST OF ADDITIONAL
AMICI CURIAE..... 1a

**APPENDIX – LIST OF ADDITIONAL *AMICI
CURIAE***

1. Arab Community Center for Economic and Social Services (ACCESS)
2. Arizona Asian American Native Hawaiian and Pacific Islander for Equity Coalition
3. Asian American Federation
4. Asian American Federation of Florida – South Region
5. Asian American Legal Defense and Education Fund
6. AAPI Equity Alliance
7. Asian American Youth Rising (AAPI Youth Rising)
8. Asian Americans United
9. Asian Caribbean Exchange
10. Asian Counseling and Referral Service
11. Asian Law Alliance
12. Asian Pacific Islander Domestic Violence Resource Project
13. Chinese for Affirmative Action

14. Engage Action
15. Florida Asian Services
16. Japanese American Citizens League
17. Missouri Asian American Youth Federation
18. Muslim Advocates
19. National Tongan American Society
20. Organization of Chinese Americans (OCA) – Asian Pacific American Advocates
21. Organization of Chinese Americans (OCA) South Florida Chapter
22. Services, Immigrant Rights, and Education Network (SIREN)
23. Stop AAPI Hate