# Heart of Mootness: *FBI v. Fikre*

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Imagine you join a socially active church near your home in Portland, Oregon, that strongly opposes illegal wildlife trade and sometimes stages protests outside the embassies of responsible countries. On a trip to investigate elephant poaching in South Africa, you receive an invitation to attend a security briefing at the American Embassy. You arrive at the appointed time, only to be escorted to a small office where two grim-faced men in dark suits are waiting for you. They cut right to the chase: "We're Special Agents Kurtz and Marlow, and we're working on an investigation involving members of your church. We've put you on the No Fly List, which means you're effectively stranded abroad until we remove you—which we will do if you agree to become an FBI informant and spy on your fellow congregants in connection with our investigation. So, what do you say?"

You refuse and spend the next five years in the proverbial wilderness, separated from your family as you try to find a way back home. During this odyssey, you're kidnapped and tortured for several months by another country's secret police (who claim to be acting at the behest of the U.S. government), and your spouse divorces you due to the rigors of the separation and the stigma of your watchlist status. You eventually make it back to America and file suit against the FBI, which then takes you off the No Fly List without explanation and moves to dismiss your case as moot. You fight them up and down the federal court system for nearly a decade on that point until the Supreme Court unanimously slaps down the government's mootness argument, clearing the way for you to finally learn the truth behind the FBI's decision to ruin your life.

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As difficult as it may be to imagine an American citizen being subjected to such a horrific ordeal—especially by an agency whose official motto is "Fidelity, Bravery, and Integrity"[1]—those are the essential facts of *Federal Bureau of Investigation v. Fikre*,[2] one of several cases this Term in which government officials employed various stratagems designed to forestall judicial review of their alleged misconduct. Overall, the results were mixed.[3]

As the brevity and unanimity of the decision suggest, *Fikre* was neither a close call nor a difficult case to get right. Nor did it break any fresh doctrinal ground or resolve any meaningful split of legal authority among lower courts. So why bother writing (or reading) about it, especially in a Term with so many blockbuster cases? The short answer is because the government tried to pull a fast one on the Supreme Court and got smacked down—gently, but firmly. And despite being unsuccessful in this case, the government's attempt to derail a potentially meritorious case through procedural legerdemain warrants close scrutiny. Because when we catch government officials trying to steal a base—as they've succeeded in doing on this issue in some lower courts and as they tried mightily to do here—we should call attention to it. "If you see something, say something."[4]

Perhaps the most interesting thing about the short and seemingly unremarkable opinion in *Fikre* is how it evokes the so-called "Iceberg Theory" (or "Theory of Omission") often associated

[1] FBI, *History*, https://www.fbi.gov/history/seal-motto#.

[2] 601 U.S. 234 (2024). Yonas Fikre's government-authored ordeal began in Sudan, not South Africa, and he was there to sell consumer electronics, not to investigate elephant poaching. Also, he attended a mosque in Portland, not a church. The facts of Fikre's case are otherwise materially identical to the hypothetical. *See id.* at 237–38.

[3] *See, e.g.*, Trump v. United States, 144 S. Ct. 2313 (2024) (establishing broad immunity from criminal prosecution for acts of former Presidents taken while in office); Moody v. NetChoice, 144 S. Ct. 2383 (2024) (remanding challenges to Florida and Texas laws restricting content moderation by social media platforms); Murthy v. Missouri, 144 S. Ct. 1972 (2024) (holding that plaintiffs lacked standing to sue federal officials regarding "jaw-boning" of social media companies); Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz, 601 U.S. 42 (2024) (denying federal agency's assertion of sovereign immunity as defense to Fair Credit Reporting Act suit); Food & Drug Admin. v. All. for Hippocratic Med., 602 U.S. 367 (2024) (holding that plaintiff-physicians lacked standing to challenge FDA rules regarding approval and availability of abortion-inducing drug mifepristone).

[4] Dep't of Homeland Sec., *If you see something, say something*, https://www.dhs.gov/see-something-say-something.

with Ernest Hemingway's writing, in which some of the most important characters or actions exist outside the formal narrative and are never explicitly mentioned by the author. In *Fikre*, this unnamed-but-nevertheless-omnipresent character goes by the name of "strategic mooting," an increasingly common (and pernicious) practice that enables rights-violating government officials to shield their unlawful acts from judicial scrutiny and deny their victims the relief to which they are justly entitled.[5] And while the Justices never mention "strategic mooting" by name in their decision, make no mistake—it's the other villain in *FBI v. Fikre*.

I'll begin by describing in more detail what the FBI tried to do here, both in the field and in court, and then explain how an incoherence in the Supreme Court's mootness doctrine has been exploited by government officials to shield their own misconduct from judicial review. I conclude with some thoughts about how judges can more effectively rebuff this unseemly practice and discourage the time- and resource-wasting litigation tactics so vividly on display in this and other cases described below.

The FBI is a domestic law-enforcement organization. So one question that jumps off the page in *Fikre* is why U.S.-based FBI agents traveled all the way to Sudan to meet with a U.S.-domiciled American citizen regarding a U.S.-based investigation when they could just as well have met with him back in Oregon, where he resides and where the mosque in question is located.[6] Presumably, the discovery process will shed further light on that question. But the most plausible explanation right now is that the agents wanted to confront Yonas Fikre in a setting of particular vulnerability for him and exceptional leverage for them in order to maximize the likelihood that he would agree to spy on his fellow congregants back in Portland. Informing a U.S. citizen who has left the protections and comforts of American soil that he will be marooned abroad indefinitely if he refuses to cooperate represents an extraordinary exercise of government power. And the question presented by Fikre's complaint—as in most constitutional litigation—is whether the exercise of that power was legal.

[5] For further discussion of "strategic mooting," see Joseph C. Davis & Nicholas R. Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary Cessation Doctrine*, 129 Yale L.J. Forum 325–42 (Nov. 26, 2019), https://www.yalelawjournal.org/pdf/DavisandReaves_ThePointIsntMoot_3f4xopmf.pdf.

[6] *See Fikre*, 601 U.S. at 237–38.

Unsurprisingly, the FBI fought tenaciously to avoid making the disclosures necessary for a reviewing court to assess the lawfulness of the FBI's decision to place Fikre on the No Fly List. As Justice Neil Gorsuch noted somewhat dryly near the beginning of his opinion, "it appears no statute or publicly promulgated regulation describes the standards the government employs when adding individuals to, or removing them from, the list."[7] In other words, the process is a black box.

Also unclear is what doctrinal framework should govern challenges to the government's decision to place someone on the No Fly List. Which factors may the government lawfully consider in making that determination and which factors, if any, are impermissible? May the government include in its decisionmaking calculus traditionally forbidden characteristics such as race, ethnicity, national origin, religion, or gender?[8] And whatever the set of permissible characteristics may be, what quantum of proof, if any, must the government possess in order to legally place someone on the No Fly List? Will a mere scintilla suffice, or must there be reasonable suspicion, probable cause, or something akin to clear and convincing evidence? And does the quantum of proof depend to some extent on the gravity of the suspicion, such that A-list bomb makers or "chemical super-freaks"[9] require a lesser showing than rabble-rousing college students? But these and other questions remain largely unanswered, leaving countless people to wonder why they were put on the No Fly List and what it might take to get themselves removed.

To be clear, there can be perfectly good reasons why an agency like the FBI might be reluctant to explain publicly (or even to a judge alone, *in camera*) why it decided to put a given person on the No Fly List. Among other things, the disclosure of that information could compromise confidential sources and methods of intelligence collection, tip off genuinely bad actors that they're under surveillance, cause those bad actors to upgrade the security of their communications, or prompt them to flee to another country from which extradition or rendition may be impossible.

But there can also be wholly illegitimate reasons for putting people on the No Fly List, including a bare desire, unsupported by any

[7] *Id.* at 237.

[8] *See id.* at 239.

[9] *The Rock* (Don Simpson/Jerry Bruckheimer Films 1996).

concrete suspicion of wrongdoing, to pressure them into cooperating with the government in some way. Thus, in Fikre's case, it may well be that the FBI had some law-enforcement or national security interest in the mosque he attended. The FBI may have decided that it would be useful to have an informant inside that mosque, targeting Fikre simply because he happened to be the first congregant to put himself in a vulnerable position by traveling overseas. If so, not only would that be a clear abuse of power, but it would also suggest that the various governmental defendants and their counsel were less than candid when they assured the courts that Fikre "'was placed on the No Fly List in accordance with applicable policies and procedures.'"[10]

Notably, Fikre's complaint cites the notorious case of a woman named Rahinah Ibrahim, a Malaysian graduate student who studied architecture in California and inexplicably found herself on the No Fly List when trying to fly from Kuala Lumpur to San Francisco.[11] After nearly a decade of litigation, during which the government fought tooth and nail not to disclose its reason for placing Ibrahim on the No Fly List, it emerged during the bench trial that one of the FBI agents involved in her case had simply checked the wrong box on the relevant form.[12] Thus, there appears to be at least some basis for Fikre's allegation that the FBI's reasons for putting him on the No Fly List were improper. And its reasons for taking him off the list also deserve skepticism. The FBI's effort to keep those reasons secret may have had more to do with saving face than with national security.

Those concerns are further supported by the ACLU's amicus brief, which presents as comprehensive an accounting as possible of the government's handling of No Fly List litigation.[13] The picture that

[10] *See, e.g.*, Petition for Writ of Certiorari at 8, *Fikre*, 601 U.S. 234 (No. 22-1178) (quoting declaration of Acting Deputy Director for Operations of the Terrorist Screening Center Christopher R. Courtright).

[11] *See* Ibrahim v. Dep't of Homeland Sec., 62 F. Supp. 3d 909, 916 (N.D. Cal. 2014).

[12] *See id.*; *see also* Seventh Amended Complaint, Fikre v. Christopher Wray, et al., No. 3:13-cv-00899-MO (D. Or. Dec. 18, 2019), ECF No. 145 at 13 ¶ 46.

[13] *See* Brief for the American Civil Liberties Union and the ACLU Foundation of Oregon as Amici Curiae in Support of Respondent at 14, *Fikre*, 601 U.S. 234 (No. 22-1178) (noting that of "40 U.S. persons who engaged in litigation over their placement on the No Fly List, 28—i.e., 70%—received confirmation that *they were removed from the List during litigation*") (emphasis added).

emerges, according to the ACLU, is "a pattern in which the government strategically and methodically averts judicial review by taking individual plaintiffs off the No Fly List, declaring the plaintiffs' cases effectively over, and leaving unanswered serious questions about if and how the program will be applied to those plaintiffs in the future."[14] In short, the government persistently seeks to "avoid judicial review" in No Fly List cases "through jurisdictional manipulation"[15]—that is, strategic case mooting.[16]

The opportunity for strategic mooting arises from an approach-avoidance conflict in the Supreme Court's overall jurisprudence for determining which cases are properly before the federal courts. The Court has consistently acknowledged its "virtually unflagging obligation to hear and resolve questions properly before it."[17] Yet the Court has nevertheless churned out a steady profusion of avoidance doctrines that are only tenuously grounded—if grounded at all—in any plausible construction of governing law, including Article III's "case or controversy" provision.[18] These judicially confected litigation off-ramps include (1) prudential standing and ripeness rules,[19] (2) comity-promoting abstention doctrines,[20] (3) heightened pleading requirements,[21] and (4) invented-from-whole-cloth defenses, such as qualified immunity[22]

[14] *Id*. at 4.

[15] *Id*. at 16.

[16] *Id*. at 21; *c.f. generally* Davis & Reaves, *Abuse of the Voluntary Cessation Doctrine*, *supra* note 5.

[17] *Fikre*, 601 U.S. at 240 (internal quotation marks omitted).

[18] *See* U.S. Const. art. III, § 2.

[19] *See* S. Todd Brown, *The Story of Prudential Standing*, 42 Hastings Const. L.Q. 95, 96 (2014) ("Technically speaking, prudential standing is not really 'standing' at all; it is merely a judicially crafted set of exceptions to the obligation to hear and decide matters that are within the court's jurisdiction.").

[20] *See generally* John Harland Giammatteo, *The New Comity Abstention*, 111 Calif. L. Rev. 1705 (2023).

[21] *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

[22] *See* Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, Cato Inst. Pol'y Analysis No. 901 (Sept. 14, 2020), https://www.cato.org/sites/cato.org/files/2020-09/PA%20901_1.pdf.

and absolute prosecutorial immunity.[23] Thus, the Justices assure themselves (and the public) that the doors to federal courthouses are open to people with colorable claims while simultaneously festooning those doors with a slew of case-killing locks, buzzers, and barricades.

These barricades include mootness doctrine, which seeks to prevent courts from issuing impermissible advisory opinions regarding essentially hypothetical questions and also to avoid the pointless expenditure of judicial resources on once-viable legal disputes where there is no longer anything at stake for the parties.[24] As Justice Gorsuch explained in *Fikre*, "Sometimes, events in the world overtake those in the courtroom, and a complaining party manages to secure outside of litigation all the relief he might have won in it."[25] Such cases must be dismissed as moot, the Justices said, because "[t]he limited authority vested in federal courts to decide cases and controversies means that they may no more pronounce on past actions that do not have any 'continuing effect' in the real world than they may shirk decision on those that do."[26]

But the line between a still-viable case where there is enough at stake to merit judicial review and an ostensibly moot case can be vanishingly thin. This was illustrated several years ago in a case called *Uzuegbunam v. Preczewski*, which involved a challenge to the application of a Georgia college's speech code that restricted religious expression on campus.[27] After initially seeking to defend the restriction, the college officials "quickly abandoned that strategy and instead decided to get rid of the challenged policies."[28] This rendered Chike Uzuegbunam's request for injunctive relief superfluous, and the defendants moved to dismiss the case on the grounds that

[23] *See* Imbler v. Pachtman, 424 U.S. 409 (1976); *see also* William Bock, *The Idiosyncrasies of Imbler: Absolute Immunity for Prosecutors Makes Absolutely No Sense*, B.U. Sch. of L. Dome (Jan. 26, 2024), https://sites.bu.edu/dome/2024/01/26/the-idiosyncrasies-of-imbler-absolute-immunity-for-prosecutors-makes-absolutely-no-sense/.

[24] For the first Supreme Court decision addressing the mootness doctrine and setting forth its initial impetus, see Mills v. Green, 159 U.S. 651, 653–54 (1895).

[25] *Fikre*, 601 U.S. at 240.

[26] *Id.* at 241.

[27] 592 U.S. 279 (2021).

[28] *Id.* at 284.

his claim for nominal damages "was insufficient by itself to establish standing."[29] The district and circuit courts agreed and dismissed the case.[30]

The Supreme Court reversed in an 8–1 decision, from which only Chief Justice John Roberts dissented.[31] The majority acknowledged that "if in the course of litigation a court finds that it can no longer provide a plaintiff with effectual relief, the case generally is moot."[32] In determining whether a claim for purely nominal damages (like a single dollar) satisfies that standard, the Court "look[s] to forms of relief awarded at common law."[33] And the award of nominal damages was plainly such a remedy. As the majority explained, historically "[t]he award of nominal damages was one way for plaintiffs to 'obtain a form of declaratory relief in a legal system with no general declaratory judgment act.'"[34] Thus, "by permitting plaintiffs to pursue nominal damages whenever they suffered a personal legal injury, the common law avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights."[35]

But that "oddity" asserts itself with breathtaking force in cases like Fikre's. Sometimes a plaintiff like Fikre alleges truly abominable and manifestly injurious conduct but is unable to assert a claim for so much as one dollar in nominal damages because the defendant is wholly immune from suits for money damages. This can occur

[29] *Id*. The line between standing and mootness is often indistinct, and the Justices used the terms essentially interchangeably in the majority, concurring, and dissenting opinions. *See id.* at 282 ("[S]tanding generally assesses whether [a concrete legal] interest exists *at the outset* [of the litigation], while . . . mootness considers whether it exists *throughout the proceedings*. . . . And if in the course of litigation a court finds that it can no longer provide a plaintiff with any effectual relief, the case generally is moot.") (emphasis added); *id.* at 293 (Kavanaugh, J., concurring) (nominal damages both "satisfy the redressability requirement" and "keep an otherwise moot case alive"); *id*. at 295–96 (discussing mootness in terms of Article III's redressability requirement).

[30] Uzuegbunam v. Preczewski, 781 Fed. Appx. 824 (11th Cir. 2019); Uzuegbunaivi v. Preczewski, 378 F. Supp. 3d 1195 (N.D. Ga. 2018).

[31] *See generally Uzuegbunam*, 592 U.S. at 279.

[32] *Id*. at 282.

[33] *Id*. at 296 (Roberts, C.J., dissenting).

[34] *Id*. at 285 (majority opinion) (quoting D. Laycock & R. Hasen, Modern American Remedies 636 (5th ed. 2019)).

[35] *Id*. at 289.

despite the defendant's having engaged in misconduct for which the common law would certainly have provided compensation. And which class of litigant ends up being the most frequent beneficiary of this mootness-by-mere-happenstance manifestation of judicial formalism? Why, governmental defendants, of course.

Again, courts have been prolific in the creation of legal doctrines that exempt rights-violating government actors from liability in cases where a nongovernmental defendant would pay through the nose. The result is a largely incoherent patchwork of liability and immunity. Some government entities are liable for some misconduct some of the time, whereas other government entities are completely immune from liability across the board, and still other government entities have whatever liability that they have chosen, in their largesse, to create for particular plaintiffs and claims. It has reached the point where any correspondence between a governmental defendant's exposure to financial liability today and what that same defendant's exposure would have been at common law is largely coincidental. Moreover, it seems doubtful that the existence of an Article III "case or controversy" should, in the colorful words of the Chief Justice, "depend on whether the defendant decides to fork over a buck."[36] And yet it does.[37]

Or does it? In fact, mootness doctrine features a number of exceptions that breathe life into cases where there is no money at stake—not even "a buck."[38] This is perhaps not surprising, given the essentially arbitrary distinction between victims who are owed one dollar for the government's misconduct and identically situated victims who are owed zero dollars due to the nonavailability of a nominal-damages claim. But how can a case *not* be moot if it is impossible for the judiciary to do anything more than opine that a particular defendant's past conduct was or was not unlawful? As Professor Matthew Hall explains, it is because "[t]he law of mootness lacks a coherent theoretical foundation."[39] As a result, "courts routinely hear moot cases where strong prudential reasons exist

[36] *Id*. at 304 (Roberts, C.J., dissenting).

[37] *Id*. at 291 (majority opinion) ("[N]o federal court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury.").

[38] *See* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 Geo. Wash. L. Rev. 562 (2009).

[39] *Id*.

to do so—a practice that cannot be reconciled with the belief that mootness is a mandatory jurisdictional bar."[40]

Among these prudential exceptions to mootness is the doctrine of "voluntary cessation," which provides that courts may retain jurisdiction over cases where no damages are available for past injury and where the defendant has obviated the need for a forward-looking injunction by ceasing the alleged misconduct.[41] Although it is possible to successfully moot a case through voluntary cessation, the defendant "bears the formidable burden of showing that it is *absolutely clear* the alleged wrongful behavior *could not reasonably be expected* to recur."[42] As the incongruous pairing of the categorical term "absolutely clear" with the more pliable "not reasonably expected" suggests, this is an inherently imprecise standard that puts the party who bears the burden of persuasion at a distinct disadvantage. To be sure, it is certainly possible to imagine situations where a given act could not plausibly happen again, such as if the government has razed a prison that was alleged to be unfit for human habitation. But the vast majority of civil rights claims involve policies or practices that can be commenced, suspended, and recommenced at the drop of a hat.

Moreover, as any experienced litigator knows very well, sometimes the burden of persuasion is everything. Hotly contested issues are often a sufficiently close call that a conscientious adjudicator could go either way. In those situations, there is a strong temptation for judges to simply throw up their hands and find that the party who bore the burden of persuasion fell short of carrying it—especially when the burden itself is couched in such capacious terms that it is not entirely clear what showing would be necessary to satisfy it.

Government lawyers are acutely aware that this puts them at a disadvantage. They have thus initiated a quiet campaign to shift the burden of persuasion from themselves to would-be plaintiffs in voluntary-cessation cases. In case after case, they have asserted that governmental defendants are in effect more trustworthy than "'self-interested private parties'"[43] and are therefore entitled to a

[40] *Id*. at 563.

[41] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000).

[42] *Id.* at 190 (emphases added).

[43] Davis & Reaves, *Abuse of the Voluntary Cessation Doctrine*, *supra* note 5, at 326 (quoting Sossamon v. Lone Star State of Tex., 560 F.3d 316, 325 (5th Cir. 2009)).

"'presumption of good faith.'"[44] And that campaign has been remarkably successful in the lower courts. According to Becket Fund litigators Joe Davis and Nick Reaves, as of 2019, six circuits placed a lighter burden on the government than on private litigants to show that a case was moot.[45]

In some cases, including *Fikre*, this burden-lightening/shifting strategy manifested as an explicit request for special treatment under the guise of the so-called "presumption of regularity." According to this presumption, courts will assume—"in the absence of clear evidence to the contrary"—that government actors "have properly discharged their official duties."[46] Notably, the term "presumption of regularity" appears nine times in the government's Supreme Court briefing in *Fikre* (and twice more in its oral argument to the Court), but zero times in the Supreme Court's decision and in the opinions of the courts below.[47] In short, the government was selling it hard, but the courts weren't buying. And it's no mystery why not. As explained and documented in various *Fikre* amicus briefs, the assertion that governmental defendants are more trustworthy than private litigants when disclaiming bad faith in the voluntary-cessation context emphatically fails to withstand scrutiny.

Starting with the theoretical case, the Becket Fund's amicus brief explains that the government-favoring presumption of regularity "gets things exactly backwards" because governmental defendants are "both *readier* and *abler* than private defendants to use voluntary cessation to strategically moot claims."[48] The brief then lists three distinct reasons why the government's burden in voluntary-cessation cases should, if anything, be more stringent than for private parties: (1) governmental defendants have strong incentives to strategically moot a case when faced with the "potentially enormous downstream consequences of an adverse result";[49]

[44] *Id*. at 333 (quoting Marcavage v. Nat'l Park Serv., 666 F.3d 856, 861 (3d Cir. 2012)).

[45] *Id*. at 333 & n.50 (citing cases).

[46] United States v. Chemical Found., 272 U.S. 1, 14–15 (1926).

[47] *See* Petition for a Writ of Certiorari at 17, *Fikre*, 601 U.S. 234 (No. 22-1178); Brief for the Petitioners at 18, 20, *Fikre*, 601 U.S. 234 (No. 22-1178); Reply Brief for the Petitioners at 6-7, *Fikre*, 601 U.S. 234 (No. 22-1178).

[48] Brief of the Becket Fund for Religious Liberty as Amicus Curiae in Support of Neither Party at 3, *Fikre*, 601 U.S. 234 (No. 22-1178).

[49] *Id*. at 9.

(2) "far more than the average private defendant, governmental defendants are repeat litigants," which gives them both the opportunity and the incentive to be selective about when to take cases the full distance and when to throw in the towel early;[50] and (3) as previously noted, "governmental defendants enjoy statutory and constitutional immunities that often insulate them from damages claims—making it much easier to strategically moot cases."[51]

Multiple amici in *Fikre* make the empirical case against lessening (or transferring) the government's burden in voluntary-cessation cases. These include the Cato Institute's Pat Eddington, whose amicus brief argues that "the presumption that government officials generally act reasonably and with good faith is not supported by experience"—to the contrary, there have been "numerous examples" of public officials "acting unreasonably and with improper motives in litigation."[52] These examples include (1) New York City's repealing a conversion-therapy law to avoid a First Amendment challenge (and one official's acknowledgment that this was done to avoid creating adverse precedent against similar statutes); (2) the Florida prison system's vigorously contesting pro se challenges to its no-kosher-meals policy but then granting an exception to the policy to a prisoner who was represented by counsel (and thus more likely to effectively challenge the policy); and (3) a similar ploy by the U.S. Bureau of Prisons in litigation over its refusal to provide deaf prisoners with sign language interpreters for religious services.[53]

Perhaps the most notorious example of strategic mooting in recent memory occurred when the Supreme Court granted certiorari in a case challenging New York City's "premises" licensing policy for handguns, which severely restricted the ability of law-abiding citizens to move lawfully owned firearms from one location to another.[54] After defending that policy vigorously—and successfully—in the

[50] *Id*. at 10.

[51] *Id*. at 12.

[52] Brief of Patrick G. Eddington as Amicus Curiae in Support of Respondent at 25, *Fikre*, 601 U.S. 234 (No. 22-1178).

[53] *Id*. at 25–26.

[54] *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45, 51–52 (2d Cir. 2018).

lower courts,[55] the City promptly repealed the law following the Supreme Court's cert grant in a blatant (and successful) effort to moot the case and prevent the Court from assessing the constitutionality of the challenged law.[56] As Justice Samuel Alito noted with some asperity in dissent, "Although the City had previously insisted that its ordinance served important public safety purposes, our grant of review apparently led to an epiphany of sorts, and the City quickly changed" its policy.[57]

Finally, the ACLU's amicus brief makes a strong empirical case that there is good reason to suspect that the federal government has made a similarly calculated effort to manipulate No Fly List litigation, and that its indignant denials[58] of strategic mooting are neither persuasive nor credible.[59] After meticulously documenting all of the No Fly List cases it was able to identify and what happened in each of them, the ACLU concluded that a pattern emerges. The sequence

> goes like this: When a plaintiff sues to challenge placement on the List, the government removes the plaintiff from the List and seeks to moot the case before a court has a chance to definitively weigh in on the merits of the plaintiff's challenge. And the government is often successful, even though it provides the thinnest of explanations to the reviewing court—explanations that . . . would not satisfy mootness-by-voluntary-cessation requirements in any other type of case, even one involving the government.[60]

[55] *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 86 F. Supp. 3d 249 (S.D.N.Y. 2015) (rejecting challenges based on the Second Amendment, fundamental right to travel, First Amendment, and dormant Commerce Clause), *aff'd*, 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019).

[56] *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 590 U.S. 336, 338 (2020).

[57] *Id*. at 341 (Alito, J., dissenting).

[58] *See, e.g.*, Brief for the Petitioners, *Fikre*, 601 U.S. 234 (No. 22-1178) at 20 (complaining that the lower court's "uncharitable reading" of key FBI declaration "is at odds with the presumption of regularity and this Court's general acceptance of similar governmental representations").

[59] *See* Brief for the American Civil Liberties Union and the ACLU Foundation of Oregon as Amici Curiae in Support of Respondent at 13–16, *Fikre*, 601 U.S. 234 (No. 22-1178).

[60] *Id.* at 19.

Summarizing the government's litigation strategy, the ACLU echoed other amici in arguing that "unlike any other defendant, the government has managed to moot claims even where it plainly does not meet the 'heavy burden' that voluntary cessation doctrine demands," and it has done so by "invoking the presumption of regularity and the trump card of national security to justify a voluntary cessation standard that does not remotely resemble the standard that this Court has applied to all defendants alike."[61] In other words, the government tried to run a game on the Supreme Court in *Fikre*—the same one it has run successfully on at least half a dozen circuit courts[62]—and got smacked down: gently but unmistakably.

The current mootness doctrine lacks coherence, invites litigation gamesmanship, and employs a variety of half-baked kludges to lessen the violence that the doctrine does to the judiciary's "virtually unflagging obligation" to exercise the full measure of jurisdiction conferred upon it by the Constitution.[63] Nonetheless, the Supreme Court has allocated the burden of persuasion in voluntary-cessation cases with consistency and clarity.[64] It is thus both surprising and unsettling to see how much success the government has had in leading lower-court judges down the primrose path of lightening the government's burden—or even sloughing it off onto hapless plaintiffs like Yonas Fikre.[65] Those judges would do well not just to heed the Justices' unanimous rejection of the government's attempt to rejigger the voluntary-cessation rubric in *Fikre*, but also to better acquaint themselves with the real-world track record of public officials pursuing blatant—and often deeply cynical—efforts at strategic mooting across a wide variety of cases. And they should recognize that if there is a difference between

[61] *Id*. at 21. *Cf.* Brief of the Institute for Justice as Amicus Curiae in Support of Respondent at 10–11, *Fikre*, 601 U.S. 234 (No. 22-1178); Brief of Patrick G. Eddington as Amicus Curiae in Support of Respondent at 4, *Fikre*, 601 U.S. 234 (No. 22-1178).

[62] *See* Davis & Reaves, *Abuse of the Voluntary Cessation Doctrine*, *supra* note 5, at 333 & n.50.

[63] *Fikre*, 601 U.S. at 240 (internal quotation marks omitted).

[64] *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 719 (2022); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 457 & n.1 (2017); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719–20 (2007).

[65] *See* Davis & Reaves, *Abuse of the Voluntary Cessation Doctrine*, *supra* note 5, at 333 & n.50.

governmental litigants and private litigants regarding a propensity for strategic mooting, it cuts exactly opposite from the way the government avers in seeking the benefits of a largely mythical "presumption of regularity" regarding its litigation strategies.

**Conclusion**

Governmental defendants have become extraordinarily adept at derailing potentially meritorious lawsuits that seek to shed light on their actions, elicit (honest) explanations for their decisions, and ensure accountability for their misconduct. Today, only a handful of public officials and their counsel know for sure whether the FBI had a good reason for what it did to Yonas Fikre. It subjected him to a Kafkaesque five-year odyssey, blew up his marriage by putting him on the No Fly List, and then inexplicably removed him after he filed suit—just as it has done with dozens of other No Fly List litigants. Perhaps the FBI was acting in good faith throughout Fikre's ordeal; perhaps it was not. The FBI repeatedly assured the courts, through counsel, that its decision to remove Fikre from the No Fly List in the midst of litigation was merely a coincidence and not a cynical attempt to frustrate judicial review. Perhaps those assurances were honest, perhaps they were not. Either way, the Justices should be commended for sending a clear and unanimous message that when government actors seek to moot judicial review of their plausibly unlawful policies by suspending those policies after the commencement of litigation, the judiciary will not presume the purity of their motives where no such presumption is remotely warranted.