United States Court of Appeals

FIFTH CIRCUIT
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No. 18-50977 Gerardo Serrano v. U.S. Customs and Border, et al
USDC No. 2:17-CV-48

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No. 18-50977

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GERARDO SERRANO, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

CUSTOMS AND BORDER PATROL, U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES OF AMERICA; JOHN DOE 1-X; JUAN ESPINOZA; KEVIN MCALEENAN,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Texas, Del Rio Division,
No. 2:17-cv-48
Alia Moses, U.S. District Judge

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CERTIFICATE OF INTERESTED PERSONS

Gerardo Serrano v. U.S. Customs and Border Protection, et al., No. 18-50977

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

/s/Carleen Mary Zubrzycki
Carleen Mary Zubrzycki

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Gerardo Serrano

Defendants-appellees:

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United States of America
Kevin McAleenan, Acting Commissioner, U.S. Customs and Border Protection
Juan Espinoza, U.S. Customs and Border Protection Paralegal Specialist
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STATEMENT REGARDING ORAL ARGUMENT

The government stands ready to present oral argument if this Court determines that it would be useful.

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INTRODUCTION

When plaintiff attempted to cross through a U.S. port of entry into Mexico while transporting firearm ammunition and a magazine in his vehicle, U.S. Customs and Border Protection (CBP) lawfully seized plaintiff's vehicle and the munitions. CBP ultimately declined to prosecute plaintiff and returned plaintiff's belongings to him approximately twenty-three months later. Plaintiff asserts that the procedures established by Congress for forfeiture proceedings in this context are unconstititutional, and seeks to bring a class action on behalf of all persons whose vehicles have been or will be seized at the border, urging that due process requires the creation of a new post-seizure hearing before civil forfeiture proceedings are commenced, as well as the elimination of the statutory bond requirement. He also asks this Court to create a novel cause of action by extending *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) to this new context. The district court properly concluded that the existing procedures comport with the requirements of due process and that there is no *Bivens* cause of action here.

STATEMENT OF JURISDICTION

Plaintiff Gerardo Serrano invoked the district court's jurisdiction under 28 U.S.C. § 1331. *See* ROA.10. The district court entered final judgment on September 28, 2018, and plaintiff filed a timely notice of appeal on November 21, 2018. ROA.512. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The questions presented are as follows:

1. Whether this case is moot because all of plaintiff's property has been returned to him and no class has been certified.
2. Whether existing procedures governing vehicle seizures at the border comport with the Constitution's requirements.
3. Whether special factors counsel hesitation against extending *Bivens* to create a damages remedy against individual federal defendants for alleged constitutional torts in this new context.

STATEMENT OF THE CASE

A. Legal Background

Throughout our Nation's history, Congress and the President have controlled and regulated the export of weapons and other munitions, and the trade of goods and services with designated foreign nations and foreign nationals in order to protect national security and to further national foreign policy interests. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322-24 (1936) (summarizing the extensive use throughout the Nation's history of embargoes and export controls). Currently, several federal statutes impose limitations and licensing requirements on the export or transfer of goods, technology, and services from the United States. One of these statutes, the Arms Export Control Act, 22 U.S.C. § 2751 *et seq.*, authorizes the government, to "control the import and the export of defense articles and defense

services." 22 U.S.C. § 2778(a)(1). In general, "no defense articles or defense services . . . may be exported or imported without a license." 22 U.S.C. § 2778(b)(2). The Arms Export Control Act is implemented via the International Traffic in Arms Regulations (ITAR), which include a "Munitions List" that identifies covered "defense articles or defense services," set forth at 22 C.F.R. § 121.1(a). Covered articles include ammunition, as well as certain firearm parts, accessories, or attachments. *See, e.g.*, *id.* Category I (Note), Category III.

To enforce these and other customs laws, this Court and others have recognized that the Constitution and federal laws permit officials to conduct routine searches at the border without a warrant or individualized suspicion. This "border search exception" permits suspicionless searches for both incoming and outgoing persons and property. *See United States v. Odutayo*, 406 F.3d 386, 392 (5th Cir. 2005) ("[T]oday we join our sister circuits in holding that the border search exception applies for all outgoing searches at the border").

Congress has enacted a number of statutes that require or authorize government officials to seize unlawfully exported goods and related items. For instance, 19 U.S.C. § 1595a(d) provides that "[m]erchandise exported or sent from the United States or attempted to be exported . . . contrary to law . . . and property used to facilitate [that unlawful exportation] . . . shall be seized and forfeited to the United States." Another statute, 22 U.S.C. § 401, also authorizes government officials to

"seize and detain such arms or munitions of war or other articles and may seize and detain any vessel, vehicle, or aircraft containing the same . . . ."

The statutory procedures governing customs forfeitures are codified at 19 U.S.C. §§ 1602-1619. *See* 19 U.S.C. § 1600 ("The procedures set forth in sections 1602 through 1619 of this title shall apply to seizures of any property effected by customs officers under any law enforced or administered by the Customs Services unless such law specifies different procedures.").[1] Congress, recognizing the special interests implicated in border seizures, has expressly exempted forfeitures arising under the customs laws from the provisions of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), which sets forth timeframes and procedural guidelines applicable to other types of forfeitures. *See* 18 U.S.C. § 983(i) (exempting forfeitures under Title 19, among other provisions). For customs forfeitures, if the value of the seized property exceeds $500,000, the case is automatically referred to the U.S. Attorney's Office for judicial forfeiture proceedings. 19 U.S.C. § 1610. If the value is below $500,000 or certain other conditions are met, the government may institute summary

[1] As a result of the Homeland Security Act of 2002, Pub. L. No. 107-296 §§ 403, 411, 116 Stat. 2135, 2192, 2310 (2002), codified at 6 U.S.C. §§ 203, 211, and a subsequent Presidential Reorganization Plan pursuant to that Act (H.R. Doc. No. 108-32 (2003)), the U.S. Customs Service (formerly part of the Treasury Department) was renamed the Bureau of Customs and Border Protection (now U.S. Customs and Border Protection) within the newly-created Department of Homeland Security. As part of that reorganization, the Immigration and Naturalization Service (formerly part of the Department of Justice) was abolished, and the immigration inspection and border patrol functions previously fulfilled by the INS were transferred to CBP.

forfeiture proceedings after providing public notice and notifying any known parties with interest in the property of the intended forfeiture. *See id.* § 1607(a). If no party files a claim within twenty days, the property is summarily forfeited. *Id.* § 1609.

If, however, an interested party files a claim and posts a bond equal to ten percent of the value of the property or $5,000, "whichever is lower," CBP will initiate civil forfeiture proceedings by transferring the claim and bond to the U.S. Attorney for the district in which the seizure took place. 19 U.S.C. § 1608. If the result of the forfeiture proceeding is favorable to the claimant, generally the bond is returned. *See Arango v. U.S. Dep't of the Treasury*, 115 F.3d 922, 925 (11th Cir. 1997). A bond is not always required, however. If a claimant demonstrates "financial inability to post the bond," that requirement is waived. 19 C.F.R. § 162.47(e).[2] Upon referral to the U.S. Attorney's Office, the matter must be immediately investigated and appropriate proceedings must be instituted "forthwith . . . , without delay, for the . . . forfeiture," unless "upon inquiry and examination, the Attorney General decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted." 19 U.S.C. § 1604. Thus, referral may result in return of the property and any bond without further delay. And, as explained below, in many cases, a seaizure never reaches the point of judicial

[2] This regulation was adopted in response to a decision of the Ninth Circuit holding that absent such an exception, the bond requirement would be unconstitutional as applied to indigent persons. *See* 45 Fed.Reg. 84,993, 84,993 (Dec. 24, 1980) (discussing *Wiren v. Eide*, 542 F.2d 757 (9th Cir. 1976)).

forfeiture proceedings. Additionally, forfeiture proceedings generally may not be commenced after five years from the discovery of the offense. *Id.* § 1621.

Congress has provided several alternatives to judicial forfeiture proceedings. Persons with an interest in seized property may file "a petition for the remission or mitigation [of the forfeiture]," which CBP may grant if the forfeiture was incurred without "willful negligence" or intent to defraud, or if mitigating circumstances exist. 19 U.S.C. § 1618. There is no bond requirement for submission of such an administrative petition. A claimant may also submit an offer of compromise for the return of the property. *Id.* § 1617. In any event, a claimant may offer to submit the value of the property to have the property returned during the pendency of the administrative or judicial forfeiture proceedings. *Id.* § 1614.

CBP's implementing regulations provide that "property may be seized . . . by any Customs officer who has reasonable cause to believe that any law or regulation enforced by [CBP] or Immigration and Customs Enforcement has been violated, by reason of which the property has become subject to seizure or forfeiture." 19 C.F.R. § 162.21. Regulations specifically set forth the procedures for forfeitures. *See* 19 C.F.R. § 162.31-162.32 ("Subpart D. Procedure when Fine, Penalty, or Forfeiture Incurred."); 19 C.F.R. § 162.41-162.52 ("Subpart E. Treatment of Seized Merchandise"). Under those regulations, after a seizure is effected, CBP sends written notice "to each party that the facts of record indicate has an interest in the claim or seized property." *Id.* § 162.31. The notice informs the party of the right to file an

administrative petition for remission consistent with 19 U.S.C. § 1618, and must state that unless the interested party objects, "the case will be referred promptly to the U.S. attorney or the Department of Justice . . . for institution of judicial proceedings, or summary forfeiture proceedings will be begun." *Id.* § 162.31(a); *see also* 19 C.F.R. § 162.45 (describing in detail contents of notice). The notice identifies, among other things, the provisions of law alleged to have been violated, a description of the specific acts or omissions alleged, and additional details about the subject merchandise. 19 C.F.R. § 162.31(b). If a claimant does not file a petition for remission, CBP either completes administrative forfeiture proceedings or refers the matter to the U.S. Attorney to initiate judicial forfeiture. *Id.* § 162.32(a).

B. Factual Background

Plaintiff alleges that on September 21, 2015, he attempted to travel into Mexico through the Eagle Pass, Texas Port of Entry. ROA.13. Two CBP officers stopped Plaintiff and searched his vehicle before he crossed through the Port of Entry. ROA.14-15. Their search revealed five .380 caliber bullets and a .380 caliber magazine. ROA.15. Pursuant to 19 U.S.C. § 1595a(d), which mandates the seizure of unlawfully exported merchandise and property used to facilitate such exportation, and 22 U.S.C. § 401, which authorizes the government to seize arms or munitions of war or other articles and also to seize "any vessel, vehicle, or aircraft containing the same or which has been or is being used in" unlawful exportation, the agents seized plaintiff's bullets, magazine, and truck. Plaintiff was released.

According to the complaint, a few days later, on October 1, 2015, CBP sent plaintiff notice that the government intended to forfeit the seized property because there was probable cause to believe that plaintiff had attempted to illegally export regulated munitions from the United States. ROA.17-18. The seizure notice assigned plaintiff a case number and explained the available options to him. If he wished to contest the seizure in court, plaintiff could post a bond equal to ten percent of the value of the seized property and "request to have th[e] matter referred to the U.S. Attorney," after which, "the case [would] be referred promptly to the appropriate U.S. Attorney for institution of judicial proceedings." ROA.18. Alternatively (or in addition), plaintiff could file an administrative petition to seek remission of the seized property under 19 U.S.C. § 1618, which authorizes the Commissioner of CBP to return seized property upon a finding that the petitioner was not "willfully negligent" and did not intend "to defraud the revenue or to violate the law," or upon concluding that other mitigating factors were present. *Id.* The notice further informed plaintiff that he could alternatively offer an amount in compromise under 19 U.S.C. § 1617, or abandon the property. ROA.268-72.

Plaintiff alleges that on October 22, 2015, he requested the matter be referred to the U.S. Attorney's Office and submitted a $3,804.99 bond, equal to ten percent of the value of the seized property, to a CBP paralegal, Juan Espinoza. In the ensuing months, Mr. Espinoza informed plaintiff that his file was complete but that CBP's attorneys were delayed in processing his case to complete the referral to the U.S.

Attorneys' Office. ROA.19. Plaintiff chose not to file a petition for remission with CBP. On or about October 19, 2017, following CBP attorneys' review of plaintiff's case, CBP returned plaintiff's property to him, ROA.248, and returned his posted bond shortly thereafter. *See* Dkt. Nos. 62-63.

C. Prior Proceedings

1. On September 6, 2017, shortly before CBP completed its review and returned the property, plaintiff brought this suit, naming several defendants—the United States, CBP, and the Acting Commissioner of CBP in his official capacity. Plaintiff's complaint included claims for injunctive relief on his own behalf and on behalf of a proposed class consisting of "[a]ll U.S. citizens whose vehicles are or will be seized by CBP for civil forfeiture and held without a post-seizure hearing," asserting that CBP engages in a "policy or practice of seizing vehicles for civil forfeiture without providing a prompt post-seizure hearing." ROA.23 ¶ 115, ROA.24 ¶ 122. No class was ever certified. The complaint also included two *Bivens* claims seeking damages against Juan Espinoza (a paralegal at CBP) in his individual capacity, and putatively naming ten "John Doe" *Bivens* defendants identified only as "unknown CBP employees with responsibility for maintaining custody over seized assets," also in their individual capacities. ROA.20 ¶ 93. The first *Bivens* claim asserted that the "seizure of [p]laintiff's property for over twenty three months, without judicial process, violates the Fourth Amendment's prohibition on unreasonable seizures." ROA.28 ¶ 138. The second asserts that the retention of plaintiff's property "without

a post-seizure hearing" violates the Due Process Clause of the Fifth Amendment. ROA.29 ¶ 145.

2. The United States and the sole individual-capacity defendant, Juan Espinoza, moved to dismiss. The magistrate judge's report and recommendation recommendes the dismissal all of plaintiff's claims. ROA.405-440.

The magistrate judge concluded that plaintiff's injunctive claim on his own behalf was moot, ROA.410, and rejected the class claim on the merits. The magistrate judge concluded that under both the logic of the Supreme Court's decision in *United States v. Von Neumann*, 474 U.S. 242 (1986), and under a traditional application of the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), there is no basis for requiring any additional post-deprivation hearing . The magistrate judge likewise rejected plaintiff's argument that requiring the posting of a bond to institute forfeiture procedures violates due process. ROA.425-456. The magistrate judge also recommended dismissal of plaintiff's *Bivens* claims under the framework described by the Supreme Court in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017), because plaintiff's claims arise in a new context and special factors counsel against extending the *Bivens* remedy to these cricumstances. ROA.430.

3. The district judge overruled plaintiff's objections, adopted all of the magistrate judge's "overall recommendations," and dismissed the case. ROA.471-510.

With respect to the class claim, the district court applied the three-factor framework from *Mathews v. Eldridge* and held that the processes for civil forfeiture

comport with due process. The district court explained that the first factor, the private interest implicated, cut in favor of plaintiff because the private interest in vehicles is substantial, but that the remaining factors—the risk of erroneous deprivation and the government's interest—weigh in favor of the government. The district court explained, for instance, that the risk of erroneous deprivation is minimal because CBP agents are well-trained in identifying customs violation, and noted that in this case there is no dispute regarding CBP's assessment that the plaintiff's vehicle contained the magazine and bullets. ROA.491. The district court further explained that the government's interest in curbing illegal exports—in this case, regulated munitions—is substantial, and that the proposed hearings would be substantially redundant of existing available procedures, including the judicial forfeiture proceeding itself. ROA.492-93. On balance, the district court thus concluded that due process does not require the additional post-seizure hearing that plaintiff seeks. Because plaintiff had not objected to the magistrate judge's ruling that the bond requirement comports with due process, the court adopted the magistrate judge's report on that issue . ROA.493 n.8.

The district court also held that there is no *Bivens* remedy here, and accordingly dismissed the *Bivens* claims. First, the district court concluded that both of plaintiff's claims arise in a "new context" that is significantly different from any of the three *Bivens* claims the Supreme Court has approved in the past. ROA.496. With respect to the Fourth Amendment claim, the court stressed that it was meaningfully different

from *Bivens* and its progeny, and that the cases on which plaintiff relied were either "nonbinding circuit opinions decided shortly after *Bivens*" or "involved the unlawful seizure of property, or the continued seizure of property once the initial justification for the seizure expired and, in any event, did not arise in the asset forfeiture context." ROA.500, 503. With respect to the Fifth Amendment due process claim, the district court agreed with the magistrate judge's conclusionon that the plaintiff's claim went well beyond the limited claims recognized in earlier Supreme Court decisions. ROA.502-503.

Having concluded that both *Bivens* claims arise in a new context, the district court further concluded that special factors counsel against expanding the *Bivens* remedy here. ROA.506. In particular, the court explained that the remedial scheme for civil forfeiture under the customs laws is analogous to the statutory schemes that the Supreme Court found preclusive of a judicially-created *Bivens* remedy in *Bush v. Lucas*, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412 (1988). ROA.503-06. The district court further explained that recognizing a new *Bivens* remedy here would "have significant consequences for the federal government and its employees," "weaken the strong governmental interest in halting criminal organizations' exportation of fruits of criminal enterprises," "impair the Executive Branch's power to control the borders and promote our relationship with Mexico by stemming the flow of arms into Mexico," and interfere with law enforcement's ability to "preserve evidence throughout its investigation and establish *in rem* jurisdiction during

subsequent forfeiture proceedings." ROA.509. Accordingly, the district court dismissed the *Bivens* claims.

SUMMARY OF ARGUMENT

Plaintiff's claims for injunctive relief are moot and, in any event, lack merit. When all named plaintiffs' individual claims are moot and no class has been certified, no justiciable controversy remains. *Fontenot v. McCraw*, 777 F.3d 741, 750 (5th Cir. 2015). Here, all of plaintiff's property has been returned to him and his individual claims are accordingly moot, and no class has been certified. While the district court concluded that plaintiff's class claim falls within an exception to mootness discussed in *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1050, 1051 (5th Cir. Unit A 1981), that case dealt with claims for monetary relief, not injunctive relief. The Supreme Court's recent decision in *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013) calls *Zeidman*'s continued viability into question and at minimum counsels against extending it to this case.

Regardless, plaintiff's claims for injunctive relief were properly dismissed on the merits. The district court correctly concluded that the longstanding processes for civil forfeiture under the customs laws, which are set forth in a carefully reticulated statutory scheme, comport with the requirements of due process. The statutes provide that claimants who post a bond and request judicial review are entitled to have their case promptly referred to the U.S. Attorney's Office for the institution of judicial forfeiture proceedings. The Supreme Court has noted that this judicial

procedure, "without more, provides the postseizure hearing required by due process" to protect a claimant's "property interest in [a seized] car." *United States v. Von Neumann*, 474 U.S. 242, 249 (1986). Claimants also have a number of administrative and other less formal avenues for promptly resolving disputes about civil forfeiture proceedings.

Plaintiff asserts that the Constitution requires an additional post-deprivation hearing prior to any judicial proceedings. Such an additional hearing would have little benefit as it would be largely duplicative of existing processes, and the risk of erroneous deprivation in this context is minimal. Plaintiff's additional step would impose a significant burden both on the government's ability to promptly resolve the substantial volume of customs forfeiture proceedings and on the government's broader interest in enforcing customs laws with significant international implications. Accordingly, under the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the procedures established by Congress adequately protect claimants' interests in seized vehicles. The statutory bond requirement and the regulations providing for waiver of that requirement also comport with the requirements of due process.

The district court correctly dismissed plaintiff's claims seeking personal damages against an individual-capacity defendant under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court declined to extend *Bivens* to the new context presented here. Special factors counsel hesitation when contemplating a judicially-created damages remedy against CBP agents,

paralegals, and other employees conducting civil-forfeiture proceedings after a lawful border seizure under the customs laws. Congress has set forth in great detail various mechanisms for disputing a seizure under the customs laws. The existence of such an alternative remedial structure "alone may limit the power of the Judiciary to infer a *Bivens* cause of action," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017), as it "amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (citing *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). More generally, Congress's interest in both civil forfeiture procedures and in the customs laws has been "frequent and intense," further counseling against judicial intervention. *Abbasi*, 137 S. Ct. 1843. And implying a personal damages remedy against the myriad CBP employees who have some role in civil forfeiture proceedings would have a significant impact on the fundamental Executive Branch interests in the enforcement of customs laws, including those designed to prevent trafficking of arms. In this context, Congress is "better position[ed]" than the Judiciary "to consider if the public interest would be served by imposing a new substantive legal liability" on federal employees. *Id.* at 1857 (quotation marks omitted).

STANDARD OF REVIEW

This Court exercises de novo review of the district court's decision dismissing the complaint for failure to state a claim. *Inclusive Communities Project, Inc. v. Lincoln*

Prop. Co., 920 F.3d 890, 899 (5th Cir. 2019). The Court may affirm the dismissal on any basis supported by the record. *Id.*

ARGUMENT

I. Plaintiff's Claims For Injunctive Relief Are Moot And Lack Merit

A. Plaintiff's Claims For Injunctive Relief Are Moot

Plaintiff's injunctive claim on his own behalf is undisputedly moot because the government has returned all of the seized property, as well as the full amount of plaintiff's bond. Plaintiff does not, and cannot, seek any relief concerning those claims. Moreover, because the district court never certified any class of plaintiffs in this case, the putative class claims for injunctive relief must likewise be dismissed for lack of jurisdiction.

This Court has described the "general rule" that a putative class action becomes moot when the claims of all named plaintiffs have been satisfied and no class has been certified. *Fontenot v. McCraw*, 777 F.3d 741, 748 (5th Cir. 2015); *see also Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1050, 1045 (5th Cir. Unit A July 1981). "In such a case there is no plaintiff (either named or unnamed) who can assert a justiciable claim against any defendant and consequently there is no longer a 'case or controversy' within the meaning of Article III of the Constitution." *Zeidman*, 651 F.2d at 1041 (collecting cases). The Supreme Court recently confirmed that a putative collective action is not justiciable when the individual plaintiff's claims become moot. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013). The plaintiff there brought a

putative collective action under the Fair Labor Standards Act, and conceded that her individual claim had been mooted by the defendant's offer of judgment in the full amount that she sought before any other plaintiffs joined the case.[3] The Supreme Court, employing what it described as "[a] straightforward application of well-settled mootness principles," *id.* at 73, held that the case was moot. In response to the plaintiff's argument that applying mootness principles would permit defendants to "pick off" named plaintiffs, the Court concluded that none of the various exceptions to the general mootness rule applied. In particular, the Court stressed that the "inherently transitory" exception did not apply, explaining that this doctrine focuses on the "nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy." *Id.* at 76-77.

This Court has recognized that *Genesis* has significant implications for mootness jurisprudence in the class-action context.[4] Prior to *Genesis*, this Court had recognized an exception to mootness in circumstances where a defendant could by tender "pick off" individual named plaintiffs' claims by offering to pay the requested damages.

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[3] In *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), the Supreme Court held that an unaccepted offer of judgment would not render such a claim moot. The Supreme Court's analysis in *Campbell-Ewald* did not disturb the *Genesis* court's analysis of the effect that mootness of a named plaintiff's claims would have on unnamed class or collective action plaintiffs.

[4] *Fontenot* explained that, although *Genesis* specifically ruled on how the mootness doctrine applies under the Fair Labor Standards Act, "the Court's discussion [is] no less authoritative in regard to class action mootness cases." *Fontenot*, 777 F.3d at 750.

Zeidman, 651 F.2d at 1050, 1051. *Fontenot v. McCraw* explained that *Genesis* undermines "*Zeidman*'s analogy between the 'inherently transitory' exception to mootness and the strategic 'picking off' of named plaintiffs' claims." 777 F.3d at 750. This Court explained that *Genesis* instead makes clear that the relation back doctrine for class actions depends on whether the "'substance of the claim" is inherently transitory and not on the "'defendant's litigation strategy.'" *Id.* at 750 (citing *Genesis*, 133 S.Ct. at 1531). For that reason, *Zeidman*'s reliance on the inherently transitory exception is no longer good law. The *Fontenot* court ultimately declined to "finally decide" whether *Zeidman* had been overruled, but declined to extend the doctrine further as the plaintiffs in that case requested. *Id.*

This Court should similarly decline to extend *Zeidman* to the injunctive claims at issue in this case. Despite the Court's analysis in *Fontenot*, the district court here relied on *Zeidman* to hold that plaintiff's uncertified class claims were not mooted by the return of his property. That holding was incorrect for two reasons. First, *Zeidman*'s reasoning is contrary to *Genesis*, as this Court recognized in *Fontenot*. 777 F.3d at 741. Whether a case falls within the "inherently transitory" exception turns on the nature of the claim, not the defendant's actions or litigation strategy. In any event, this case is meaningfully different from *Zeidman*. The claims at issue in *Zeidman* were limited to claims for money damages, not equitable or injunctive relief. *See Zeidman*, 651 F.2d at 1050 (noting that cases from other circuits involving claims for injunctive relief against the government "do not raise precisely the same issue as that faced in

[*Zeidman*]," although the same concerns underlie both contexts). While this Court has assumed that *Zeidman* extends to claims for injunctive relief, *see Fontenot*, 777 F.3d at 750, and several other courts of appeals have concluded that a "picking off" exception to mootness applies to injunctive claims, *see Richardson v. Bledsoe*, 829 F.3d 273, 286 (3d Cir. 2016); *Wilson v. Gordon*, 822 F.3d 934, 949-50 (6th Cir. 2016); *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1142-43 (9th Cir. 2016), this Court has never held as much. Allowing this case to proceed would thus require a new extension of *Zeidman*.

At minimum, the Supreme Court's intervening decision in *Genesis* and this Court's reasoning in *Fontenot* counsel against any such expansion. While the *Genesis* court's holding only squarely addressed claims for money damages and distinguished claims for equitable relief in some respects, the crux of its logic—that the "inherently transitory" mootness exception depends on the nature of a claim, not defendant's litigation strategy—applies with equal force in both settings. *See Genesis*, 569 U.S. at 77. Nor would declining to extend *Zeidman* necessarily preclude class actions from being litigated: a plaintiff who wishes to pursue a class action even where a defendant has offered relief could, in at least some circumstances, decline to accept the offered relief. Along these lines, after *Genesis*, the Supreme Court held that an unaccepted offer of judgment to satisfy an individual's claims cannot moot a class action. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 670 (2016). Indeed, under *Campbell-Ewald*, the *Zeidman* panel reached the correct result but for the wrong reason: in *Zeidman*, as in *Campbell-Ewald*, the plaintiff had refused to accept defendant's offer of judgment on

her individual claim, and the action therefore should not have been dismissed as moot for that independent reason. *See Zeidman*, 651 F.2d at 1036. But where, as here, the individual's claims are indisputably moot and no class has been certified, the case is nonjusticiable and must be dismissed.

B. The District Court Correctly Held That The Challenged Procedures Satisfy The Requirements Of Due Process

Even if the claims were not moot, they would fail on the merits. Plaintiff's injunctive claims contend that two aspects of the government's procedures for forfeiture under the customs laws violate the Due Process clause of the Fifth Amendment to the U.S. Constitution. First, he asserts that due process requires a prompt post-seizure hearing. Second, he asserts that the requirement that claimants post a ten percent bond prior to instituting judicial proceedings violates due process principles. As the magistrate judge and district court judge agreed, those arguments are inconsistent with governing law.[5]

[5] As the district court noted, plaintiff has repeatedly and "strenuously" emphasized that he is not challenging the duration of or delay in the forfeiture proceedings themselves, but rather the absence of a separate post-deprivation hearing. ROA.489.

1. Due Process Does Not Require An Additional Post Seizure Hearing Prior To Forfeiture Proceedings Under The Customs Laws

The Supreme Court explained in *Mathews v. Eldridge*, 424 U.S. 319 (1976), that a three-factor framework governs the question of what process is due when an administrative agency terminates a property rightset forth. The three factors are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 355.

A few years after *Mathews* was decided, the Supreme Court addressed the requirements of due process after a car is seized under the customs laws. *See United States v. Von Neumann*, 474 U.S. 242 (1986). In *Von Neumann*, the plaintiff's new Jaguar Panther car was seized at the Canadian border pursuant to 19 U.S.C. § 1497, which provides that imported articles that were not declared upon entry into the United States are subject to forfeiture or a penalty equal to the value of the article. 474 U.S. at 243-44. The plaintiff posted a bond equal to the value of his vehicle, and customs officials released his vehicle to him. The statutory scheme was in relevant respects identical to the one at issue here: as the Court explained, after property has been seized, "a claimant to it has essentially two options. He may pursue an administrative remedy under 19 U.S.C.A. 1618 . . . or he may challenge the seizure in a

judicial forfeiture action initiated by the Government." *Id.* The plaintiff chose the second option and filed a petition for remission of the posted funds, which was granted in part after a 36-day delay.

The Supreme Court held that the administrative delay did not violate plaintiff's right to due process, explaining that the *judicial forfeiture proceeding* itself, "without more, provides the postseizure hearing required by due process" to protect the claimant's "property interest in the car." *Von Neumann*, 474 U.S. at 249 (discussing *United States v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983)). The Court held that the question of the timeliness of the supplemental remission was thus entirely beside the point, because that administrative proceeding was not constitutionally required. *Id.* at 250 ("[R]emission proceedings are not *necessary* to a forfeiture determination, and therefore are not constitutionally required. Thus there is no constitutional basis for a claim that respondent's interest in the car, or in the money put up to secure the bond, entitles him to a speedy answer to his remission petition."). *Von Neuman* thus forecloses plaintiff's argument that due process requires "a prompt post-seizure hearing when it seizes vehicles" (Br. 10) at the border pursuant to the customs laws, in addition and prior to the contemplated judicial forfeiture proceeding. The Court's reasoning turned on its conclusion that judicial forfeiture proceedings themselves are the only process required prior to a civil forfeiture of a vehicle under the customs law. The logic of *Von Neumann* thus forecloses plaintiff's injunctive claims, which do not take

issue with any delay in forfeiture proceedings but rather assert that due process requires additional procedures beyond the forfeiture proceeding itself.

The same result follows under a straightforward application of the *Mathews v. Eldridge* factors. First, an individual's interest in a vehicle may be significant, but any legitimate interest is diminished to the extent the vehicle is being used to unlawfully transport munitions or other regulated materials across the border illegally. Moreover, unlike in other forfeiture schemes that courts have found problematic, the customs laws generally permit claimants to request release of a vehicle by paying the value of the seized property. *Cf. Krimstock v. Kelly*, 306 F.3d 40, 55-56 (2d Cir. 2002) (contrasting New York statute with those of States that permit vehicle owners to post a bond for the return of their vehicle pending a forfeiture action); *see* 19 U.S.C. § 1614. The relevant interest is thus in the vehicle or an amount of money equal to its value.

Even accepting that a claimant's interest in a vehicle or its monetary equivalent is significant, however, the second and third *Mathews* factors make clear that existing procedures are sufficient. With respect to the second factor, under the current regime established by Congress, the "risk of erroneous deprivation" during a border seizure is low, and the duplicative hearing that plaintiff proposes has very limited "probable value, if any." *Mathews*, 424 U.S. at 335. Unlike most law enforcement seizures, customs officers may conduct routine searches of persons and effects at the border without any suspicion in order to enforce the customs laws. *Cf. United States v. Flores-Montano*, 541 U.S. 149, 154-55 (noting that "the expectation of privacy is less at the

border than it is in the interior" and "the Government's authority to conduct suspicionless inspections at the border include[s] the authority to remove, disassemble, and reassemble a vehicle's fuel tank"). Most customs violations—including whether an automobile is being used to unlawfully transport weapons or other regulated or prohibited items—are straightforward, and customs officials are trained to ascertain when seizure forfeiture is warranted. There is thus seldom likely to be a mistake as to whether a vehicle was being used to transport munitions across the border unlawfully. Indeed, there is no dispute in this case that the seizure was legally authorized on that basis. *Cf. City of Los Angeles v. David*, 538 U.S. 715, 718 (2003) (holding that delay in processing claims involving parking violations did not violate due process because "the straightforward nature of the issue—whether the car was illegally parked—indicates that initial towing errors, while they may occur, are unlikely").

Moreover, there are a number of procedures in place to protect those with an interest in seized property. Claimants are promptly notified of the seizure, its factual and legal basis, and their options under the relevant law. *See* 19 C.F.R. §§ 162.31, 162.45. If they submit a timely request and the requisite bond, the matter will be referred to a U.S. Attorneys' Office for the institution of judicial forfeiture proceedings. *See supra* pp. 3-7. In addition to the protections offered by the judicial procedure itself, any risk of error is further minimized by the fact that the U.S. Attorney's Office must independently evaluate the facts and law prior to instituting

forfeiture proceedings, as the Ninth Circuit explained in rejecting a similar challenge. *United States v. One 1971 BMW*, 652 F.2d 817, 820-21 (9th Cir. 1981) (explaining that pursuant to 19 U.S.C. § 1604, once a matter is referred to the U.S. Attorney's Office, that Office conducts its own evaluaton of the facts and law, and will only intitute forfeiture proceedings if it concludes that such proceedings can "probably be sustained" or are required by the "ends of public justice."). Moreover, a claimant may file an administrative petition for remission to alert CBP to a possible mistake or other mitigating circumstances. 19 U.S.C. § 1618.

Contrary to plaintiff's suggestion, moreover, Congress has also enacted a detailed scheme to ensure against any risk of abuse related to forfeiture funds, and CBP does not have a direct interest in the outcome of forfeiture proceedings. Forfeiture proceeds are placed in the Treasury Forfeiture Fund under control of the Secretary of the Treasury, who has delegated that authority to the Director of the Executive Office for Asset Forfeiture (an office within the Department of the Treasury). *See* Treasury Directive 15-04, Delegations Relating to the Treasury Forfeiture Fund (October 2017), available at https://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/td15-04.aspx. CBP has no control over the funds. Rather, the Director manages the funds to cover the cost of asset forfeiture and provide support to various law enforcement agencies in accordance with the statutory limitations set forth in 31 U.S.C. § 9705, which sets forth mandatory priority expenses and other permissible expenses for which funds may be used. To the

extent that money from the Fund may in limited circumstances be used by CBP, the authorized amounts do not bear any direct relation to the amounts deposited into the Fund by virtue of CBP forfeitures. Additionally, Congress receives monthly reports on the financial status of the Fund and frequently rescinds funds from it when account balances are high.[6]

Finally, with respect to the third *Mathews v. Eldridge* factor, the government's interests here—including the additional fiscal and administrative burdens that additional hearings would entail—are substantial. The government's interest in preventing the unlawful exportation of munitions is significant, as is the government's interest in preventing the exportation of drugs and other contraband. Given the role of organized criminal enterprises in smuggling illegal items across the border, the government's interest here goes well beyond that at issue in statutory schemes involving, for instance, seizures or forfeitures pursuant to statutes involving motor vehicle offenses. *Cf. Krimstock*, *supra* p. 23. Congress's decision to mandate the forfeiture of vehicles intentionally used for unlawful exportation evidences the strong policy interests at issue. In many cases, seized vehicles have been modified to better enable illegal activities. And the government also has a strong interest in preventing

[6] *See, e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. 113-235, Div. E (rescinding $769 million in unobligated balances from TFF); Consolidated Appropriations Act, 2017, Pub. L. 115-31, Div. E, Tit. 1 (rescinding $988 million and permanently cancelling $314 million); and Consolidated Appropriations Act, 2019, Pub. L. 116-6, Div. A, Title V, Sec. 540 (rescinding $200 million in unobligated balances from the TFF).

instruments of customs violations—including vehicles—that can "easily be disposed of or sold" from returning to the market or to the organizations using them. Moreover, the addition of a new procedure—on top of the remission procedures and judicial review regime established by Congress—would likely entail significant fiscal and practical burdens on CBP's already overburdened employees and systems. In short, adding additional proceedings would serve as a "costly and substantially redundant administrative burden" on top of the remission procedures, options for compromise, and formal judicial forfeiture processes that Congress has already provided in this context. *One 1971 BMW*, 652 F.2d at 821. The likely effect of such duplicative proceedings would be to increase congestion and delay the ultimate judicial resolution of forfeiture claims further.

Rather than discussing, or even citing, the cases involving judicial forfeiture proceedings under the customs laws, plaintiff relies on a line of earlier cases addressing statutory schemes that allowed private parties to obtain writs of replevin against their private adversaries with essentially no judicial process. *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 601, 606-10 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Those cases implicate an entirely different set of interests and are fully consistent with both the district court's weighing of the *Mathews v. Eldridge* factors and with the Court's later statements in *Von Neumann*. The court of appeals decisions from other circuits on which plaintiff relies are similarly inapposite. Both *Stypmann v. City & County of San Francisco*, 557 F.2d

1338, 1344 (9th Cir. 1977) and *Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994) involved challenges to delays in obtaining a final hearing—a challenge that plaintiff expressly disclaims in this case—and involved seizures pursuant to motor vehicle regulations. *See supra* n.5. And in *Draper v. Coombs*, the Ninth Circuit found unconstitutional a statute that permitted the impoundment of a vehicle for traffic violations without any hearing whatsoever. 792 F.2d 915 (9th Cir. 1996). None of those cases presented issues akin to those presented here, where plaintiff seeks an additional set of hearings that would largely duplicate existing procedures and could come at a cost to fundamental governmental interests in rigorously enforcing customs laws, especially those designed to prohibit the transportation of drugs and weapons across the border.

2. The Bond Requirement In The Border Forfeiture Context Comports With Due Process

The statutory bond requirement is also constitutional, as the district court correctly held. Congress has provided that property seized under the customs laws that is valued at $500,000 or less is subject to summary forfeiture proceedings, unless claimants affirmatively elect to challenge the forfeiture in court. 19 U.S.C. §§ 1607-1609. Claimants who wish to challenge the forfeiture must post a "bond . . . in the penal sum of $5,000 or 10% of the value of the claimed property, whichever is lower, but not less than $250." 19 U.S.C. § 1608. The bond requirement helps to prevent the government from being deterred from pursuing meritorious condemnations out

of concern that the expense of the proceeding would exceed the value of the seized property. The bond thus serves "to cover the costs and expenses of the proceedings." *Arango v. U.S. Dep't of the Treasury*, 115 F.3d 922, 925 (11th Cir. 1997). It also serves to deter claimants with frivolous challenges from "demanding costly judicial proceedings without hesitation." *Id.* (quotation marks omitted). "If the outcome of the judicial proceeding is in the claimant's favor, the bond is returned." *Id.*

To ensure that the bond requirement does not deny indigent claimants an opportunity to contest the forfeiture in court, CBP provides by regulation that "upon satisfactory proof of financial inability to post the bond, [CBP] shall waive the bond requirement for any person who claims an interest in the seized property." 19 C.F.R. § 162.47(e). Plaintiff has not requested such a waiver, nor does he contend that he was or is unable to afford the bond payment.

Nothing about this statutory requirement violates due process principles, and neither of the two cases on which plaintiff relies advances his cause. Both *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), and *Bell v. Burson*, 402 U.S. 535 (1971), involve bond requirements designed to protect the interests of private litigants that created risks of abuse in litigation. In *North Georgia Finishing*, the Court addressed a statutory scheme that enabled a plaintiff to obtain a garnishment order, depriving the defendant of use of a bank account for the duration of litigation, simply by having an attorney without personal knowledge of the facts file a conclusory

affidavit with a court clerk, and the defendant could challenge the garnishment only upon posting a bond equal to double the amount the plaintiff claimed. *North Ga. Finishing*, 419 U.S. at 607-08. In *Bell v. Burson*, the Supreme Court addressed a statutory scheme under which uninsured motorists who were involved in car accidents had their drivers licenses suspended for the duration of any private litigation arising out of the car accident, unless the motorist posted a bond equal to the entire amount of damages claimed by the other party. Here, by contrast, the bond requirement is triggered only after federal law enforcement officials, entitled to a presumption of regularity, have concluded that there is probable cause to believe that the seized property was used in violation of federal law, such that the government is entitled to judicial forfeiture. The amount of the bond is limited to $5,000 or ten percent of the value of the asset, whichever is lower. And the requirement serves an important public interest in ensuring that forfeiture laws are enforced and in reducing frivolous litigation. Any plausible due process concern with this scheme is satisfied by the regulations ensuring that the bond requirement will not create an insurmountable barrier for claimants who cannot afford it.

II. The District Court Properly Dismissed Plaintiff's *Bivens* Claims

Plaintiff's *Bivens* claims seek damages against a CBP paralegal in his individual capacity (as well as unnamed defendants) who, after a lawful seizure was effected at the border, he asserts was "responsible" for holding his property for 23 months in advance of forfeiture proceedings without providing a hearing that is not required by

any statute or regulation. The district court correctly declined to extend the *Bivens* cause of action to this new context, which bears no resemblance to the limited contexts in which the Supreme Court has recognized that implied remedy. Moreover, plaintiff has not alleged any violation of clearly established law, and any claim should be dismissed on the basis of qualified immunity.

A. The District Court Correctly Declined To Extend *Bivens* To The New Context Presented Here

1. The Supreme Court Reaffirmed in *Abbasi* That Extending *Bivens* Is Disfavored

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). The Court in *Bivens* held, despite the absence of a statutory cause of action, that federal narcotics agents acting under color of federal law could be sued for money damages for conducting a warrantless search and arrest in a person's home, in violation of the Fourth Amendment. *Bivens*, 403 U.S. at 389. This holding was issued at a time when, "as a routine matter," the Court "would imply causes of action not explicit in [a statute's] text" on the assumption that courts could properly "provide such remedies as [were] necessary to make effective" the statute's purpose. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). In that era, the Court's approach to the creation of such actions under the Constitution was correspondingly lax.

The Supreme Court has long since repudiated, on separation-of-powers grounds, the "ancien regime" from which *Bivens* arose. *Abbasi*, 137 S. Ct. at 1855 (quoting *Alexandar v. Sandoval*, 532 U.S. 275, 287 (2001)). The Court has stressed that whether a damages remedy should be created requires consideration of "a number of economic and governmental concerns." *Id.* at 1856. For instance, creating extra-statutory causes of action for damages against federal officers in their individual capacities creates "substantial costs" for the government, including defending federal employees, and also imposes on the government the significant "time and administrative costs attendant upon intrusions resulting from the discovery and trial process." *Id.* at 1856. Because of considerations like these, Congress is "better position[ed]" than the judiciary "to consider if the public interest would be served by imposing a new substantive legal liability." *Id.* at 1857 (quotation marks omitted). "It is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims in the complex sphere of litigation, with all of its burdens on some and benefits to others." *Id.* at 1858. The question of whether to create such claims should thus "be committed to those who write the laws rather than those who interpret them." *Id.* at 1857 (quotation marks omitted).

Because of considerations like these, expanding *Bivens* has been "disfavored" for over thirty years. *Abbasi*, 137 S. Ct. at 1857. Since *Bivens* itself, the Supreme Court has recognized a damages action under the Constitution only twice to redress

constitutional claims: first, in an equal protection claim against a Congressman for sex discrimination in congressional-staff employment, *Davis v. Passman*, 442 U.S. 228 (1979), and second, in an Eighth Amendment claim against federal prison officials for their failure to provide vital medical care to treat a federal inmate's asthma, resulting in the inmate's death, *Carlson v. Green*, 446 U.S. 14 (1980). The Supreme Court has "consistently refused to extend *Bivens* liability" to any new contexts or categories of defendants beyond these. *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *see also Abbasi*, 137 S. Ct. at 1857 (collecting cases). Indeed, "in light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today." *Abbasi*, 137 S. Ct. at 1856.

To protect the separation of powers from further encroachment, *Abbasi* set forth stringent criteria limiting when a court may recognize a *Bivens* remedy. At the threshold, courts must determine if the asserted cause of action arises in a new context—that is, if it differs "in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court." *Abbasi*, 137 S. Ct. at 1859; *see also id.* at 1860 (listing "some examples [that] might prove instructive" in identifying a new context). The Court left no doubt that even small differences constitute a new context, noting that "even a modest extension is still an extension." *Id.* at 1864. Consequently, "the new-context inquiry is easily satisfied." *Id.* at 1865.

If the asserted cause of action arises in a new context, courts must then consider whether "special factors" counsel against extending *Bivens* in the absence of "affirmative action by Congress." *Abbasi*, 137 S. Ct. at 1857. *Abbasi* clarified that this "inquiry must concentrate on whether the Judicary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1857-58. A court "must" not recognize an implied *Bivens* remedy if "there are sound reasons to think that Congress *might* doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong." *Id.* at 1858 (emphasis added). Relatedly, "if there is an alternative remedial structure present in a certain case," the existence of that altermative process "alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Id.*

2. Plaintiff's *Bivens* Claims Arise In A New Context

Plaintiff's *Bivens* claims are premised on the theory that unnamed CBP officers and a paralegal failed to provide a hearing, above and beyond those required by the customs statutes and regulations, after plaintiff's ammunition, magazine, and vehicle were lawfully seized at the border. Plaintiff does not dispute that the seizure was pursuant to a statutory grant of authority under the customs laws. The claims here bear no resemblance to the three cases in which the Supreme Court has previously recognized the availability of a *Bivens* remedy, and thus arise in a new context.

Plaintiff contends that his Fourth Amendment claim does not arise in a new context because it involves "the unreasonably prolonged seizure of his truck" and thus "arises in the search-and-seizure context." Br. 39. But that argument frames the new-context inquiry at too high a level of generality, and is directly contrary to the Supreme Court's instructions in *Abbasi*. As the district court correctly recognized, even assuming that plaintiff's Fourth Amendment claim does not collapse entirely into his Fifth Amendment claim, *Abbasi* "forecloses Plaintiff's conclusory argument that his Fourth Amendment claim arises in the same context as *Bivens* simply because he alleged a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures." ROA.498-99. Even before *Abbasi*, this Court recognized that courts could not conduct "amendment-by-amendment ratification of *Bivens* actions," but must instead "examine each new context." *De La Paz v. Coy*, 786 F.3d 367, 372 (5th Cir. 2015); *see also, e.g.*, *Tun-Cos v. Perrotte*, 922 F.3d 514, 518, 523-25 (4th Cir. 2019) (Fourth Amendment claims challenging immigration-related "stops, detentions, and home invasions" presented "new context" notwithstanding *Bivens*); *Vanderklok v. United States*, 868 F.3d 189, 199 (3d Cir. 2017) ("The [Supreme] Court has explained that its recognition of a cause of action under a constitutional amendment does not mean that such an action can vindicate every violation of the rights afforded by that particular amendment. . . . The recognition of a cause of action is context-specific.") (citations omitted). The two cases plaintiff cites, *Groh v. Ramirez*, 540 U.S. 551, 563-64 (2002) and *Anderson v. Creighton*, 483 U.S. 635 (1987), only underscore how far afield

his claim is from the classic *Bivens* context: both—like *Bivens* itself—involve investigative law enforcement searches of homes conducted without a lawful warrant. The Supreme Court has never recognized a *Bivens* cause of action involving a lawful seizure at the border pursuant to legislative authority, let alone in a context where the plaintiff's challenge is not to the decision to seize the property, but to the timing or adequacy of the procedures for contesting it after the fact.

Plaintiff's Fifth Amendment cause of action likewise arises in a new context. Plaintiff does not assert that his claim bears any resemblance to *Passman*, *supra* p. 33, which involved employment discrimination and is the only case in which the Supreme Court has recognized a *Bivens* claim under the Fifth Amendment. Instead, he relies at length on a 1974 Fourth Circuit case, which the Supreme Court cited in a descriptive footnote in *Passman*. 422 U.S. at 244 n.22 (citing *States Marine Lines, Inc. v. Shulz*, 498 F.2d 1146 (4th Cir. 1974), in support of statement that "five Courts of Appeals have implied causes of action directly under the Fifth Amendment."). But in *Abbasi*, the Supreme Court made entirely clear that its *own* "three cases—*Bivens, Davis,* and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy." *Id.* at 1855. As the district court correctly found, *Abbasi* thus "forecloses the Plaintiff's reliance on decades-old circuit decisions," regardless of whether the Court happened to cite to such opinions in passing. ROA.498-499; *see Abbasi*, 137 S. Ct. at 1859 ("The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is different in a meaningful way from

previous *Bivens* cases decided by *this Court*, then the context is new.") (emphasis added).

3. Special Factors Counsel Hesitation

The district court also correctly held that special factors counsel against recognizing a new *Bivens* remedy against CBP paralegals, agents, attorneys, or others who in some sense have responsibility for property following border seizures under the customs laws and the United States' treaty obligations.

The Supreme Court's restrictive approach to the expansion of the *Bivens* remedy is grounded in separation-of-power concerns, as "it is a significant step under separation-of-powers principles for a court to determine that it has the authority . . . to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Abbasi*, 137 S. Ct. at 1856. When a party seeks to assert a *Bivens* remedy, "[t]he question is 'who should decide' whether to provide for a damages remedy, Congress or the Courts?" *Id.* at 1857 (citing *Bush v. Lucas*, 462 U.S. 367, 380 (1983)).

A *Bivens* remedy would be especially inappropriate here because at their core, plaintiff's allegations are not about individual official misconduct; rather, they are about the adequacy of the legislative and regulatory systems the government more broadly has in place for the period between a border seizure and the institution of civil forfeiture proceedings. *See, e.g.*, Br. 45 ("None of these options redresses [plaintiff's] Fourth and Fifth Amendment Claims, since none provides a right to a

prompt, post-seizure hearing or a remedy where such a hearing is denied"). Yet plaintiff disclaims any effort to bring this suit against higher-level policy-makers. *See, e.g.*, Br. 43 (characterizing case as one about "rank-and-file officers"). In other words, plaintiff's *Bivens* suit appears to be largely premised on the idea that a paralegal and other unnamed "rank-and-file" officers should be held personally liable for failing to create an entirely new set of processes in advance of the institution of civil forfeiture proceedings. But "a *Bivens* action is not 'a proper vehicle for altering an entity's policy.'" *Abbasi*, 137 S. Ct. at 1860 (quoting *Malesko*, 534 U.S. at 74). There is no reason to think that Congress would intend "rank-and-file" employees to be personally liable for following the law, or that they should be required to defend against the systemic concern that plaintiff seeks to pursue here. And to whatever extent plaintiff asserts that the duration of the seizure, rather than the absence of a post-seizure hearing, was the problem, there is no reason to think that Congress would intend low-level employees be personally liable for delays that may be attributable to multiple layers of processing in a bureaucratic system. Individual liability for processing delays would be especially unwarranted in this context, given that Congress—perhaps recognizing the enormous volume of forfeiture proceedings for which CBP is responsible—has expressly declined to extend CAFRA's clear processing deadlines for civil forfeitures to the customs context. *See* 18 U.S.C. § 983.

As the district court recognized, moreover, Congress has by statute established detailed rules governing both forfeitures at the border and civil forfeiture more

generally. The existence of an alternative remedial structure "alone may limit the power of the Judiciary to infer a new *Bivens* cause of action," *Abbasi*, 137 S. Ct. at 1858, as it "amounts to a convincing reason for the Judicial branch to refrain from providing a new and freestanding remedy in damages," *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (citing *Bush*, 462 U.S. at 378). Courts must defer to indications that Congress's silence on the availability of damages remedy has not been "inadvertent." *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). Creating a *Bivens* remedy is thus unwarranted "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations." *Id.*; *see also, e.g.*, *De La Paz*, 786 F.3d at 377-78 (citation omitted) (declining to extend *Bivens* remedy to immigration context based on INA's comprehensive regulation of immigration issues); *Gaspard v. United States*, 713 F.2d 1097, 1103 (5th Cir. 1983) (similar with respect to the Veterans Benefits Act).

As the district court explained, "Congressional interest in the customs laws has been frequent and intense," as is Congress's "interest specifically in asset forfeitures." ROA.508; *see also Abbasi*, 137 S. Ct. 1843 (declining to extend *Bivens* remedy where "Congressional interest" in the area "has been 'frequent and intense.'" (quoting *Schweiker*, 487 U.S. at 425)). Congress has enacted a comprehensive and detailed scheme governing the seizure and forfeiture of property at the border. *See, e.g.*, 19 U.S.C. §§ 1602-1618. Those statutes, for instance, mandate that agents report seizures to particular officials, *id.* § 1602; dictate the custody and storage of seized goods, *id.*

§ 1605; provide for the appraisal of seized goods; and dictate under what conditions the sale of seized goods might be lawful. *Id.* §§ 1609-1612. They also establish multiple procedures for interested persons to challenge or otherwise respond to a seizure or forfeiture. Section 1617 authorizes interested persons to submit an offer of compromise after a seizure. Section 1618 provides for administrative petitions to seek remission. Congress also provided for summary forfeiture and sale in some circumstances. 19 U.S.C. § 1609. Otherwise, prior to any final forfeiture, Congress requires officials to forward cases to the U.S. Attorneys' Offices for the institution of judicial forfeiture proceedings. *Id.* § 1610.

In a separate statute, CAFRA, Congress established various procedures to govern civil forfeitures more generally, and expressly exempted forfeitures arising under the customs laws from those procedures, including the various specific processing deadlines that Act establishes. *See* 18 U.S.C. § 983. That Congress has spoken on the issue of forfeiture in general and under the customs laws in particular in this level of detail, and declined to provide a damages remedy, is sufficient to conclude that the Judiciary should not act on its own to provide a new, freestanding remedy beyond what Congress has deemed sufficient. *See Wilkie*, 551 U.S. at 550; *see also* ROA.506-509.

Nor is it relevant whether Congress has provided a remedy for the specific claims that plaintiff brings here, challenging the absence of a separate, post-seizure, pre-civil-forfeiture-proceedings, hearing. An alternative remedial scheme generally

precludes the extension of *Bivens* claims even if that scheme is incomplete or would not afford particular relief in the case at hand. *See Schweiker*, 487 U.S. at 425 (declining to extend *Bivens* remedy even though such remedy would "obviously offer the prospect of relief for injuries that must now go unredressed"); *United States v. Stanley*, 483 U.S. 669, 683 (1987) (declining to extend *Bivens* remedy to injuries incident to military service because "it is irrelevant to a 'special factors' analysis whether the laws currently on the books afford Stanley . . . an 'adequate' federal remedy for his injuries"). The question is whether the overall scheme indicates that Congress did not inadvertently fail to create a personal damages cause of action against customs officers. *Schweiker*, 487 U.S. at 425; *see also, e.g.*, *Tun-Cos*, 922 F.3d at 526–27 (noting that INA does not include money damages remedy and often does not provide redress for constitutional violations, but concluding that "this misses the point, for the relevant question 'is not what remedy the court should provide for a wrong that would otherwise go unredressed' but instead 'whether an elaborate remedial system ... should be augmented by the creation of a new judicial remedy.'").

Here, as the district court correctly explained, the absence of a damages remedy here is likely "more than mere oversight." ROA.508; *see also Abbasi*, 137 S. Ct. at 1849. "Put another way, and just like in [*Abbasi*], the silence of Congress here is relevant, and it is telling." ROA.508. And "Congress is in a better position than the courts to decide whether the creation of a new substantive legal liability here would serve the public interest." ROA. 509.

Plaintiff asserts that the district court misread *Abbasi* by quoting its discussion of the standard for implied causes of action under statutes (Br. 49-50), but it is plaintiff who misreads the district court's decision. The district court quoted *Abbasi*'s statement that "[i]f the statute does not display an intent to create a private remedy, then a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." ROA.505 (quoting *Abbasi*, 137 S. Ct. at 1856). In the very next sentence, the court explained that "*[l]ikewise*, the 'absence of statutory relief *for a constitutional violation* . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation.'" ROA.505-06 (quoting *Schweiker*, 487 U.S. at 421-22).

Other factors also counsel hesitation here. As the district court explained, extending *Bivens* to border seizures would have "significant consequences on the federal government and its employees." ROA. 509. It would cause employees to second-guess decisions about seizures under the customs laws out of fear for personal liability, potentially affecting the strong governmental interest in halting criminal organizations' exportation of the fruits of criminal exercise. *Id.*; *see also De La Paz*, 786 F.3d at 379 ("Faced with a threat to his checkbook from suits based on evolving and uncertain law, the officer may too readily shirk his duty."); *cf. Vanderklok*, 868 F.3d at 209 ("[T]he role of the TSA in securing public safety is so significant that we ought not create a damages remedy in this context"). To the extent that the *Bivens* claims are

premised on an asserted failure by employees to create entirely new post-deprivation, pre-judicial-forfeiture-proceeding hearings, in addition to the existing statutory and regulatory remedies, holding line-level paralegals, agents, or other similarly placed employees personally liable would put them in the untenable position of circumventing existing procedures, returning lawfully seized property, or risking personal liability. *See* ROA.436 (noting that this suit seeks to hold liable "CBP agents of all types (including paralegals, attorneys, and agents maintaining custody over the seized property, just to name a few)"). There is no reason to think that Congress would intend a personal damages remedy for such a claim, nor does the Constitution require it. In short, the district court was entirely correct when it explained that regardless of whether Congress's system is the best one, "Congress is the body charged with making the inevitable compromises required in the design of a massive and complex asset forfeiture scheme under the customs laws." ROA.510; *see Abbasi*, 137 S. Ct. at 1857 (quoting *Bush*, 462 U.S. at 380) ("The question is 'who should decide' whether to provide for a damages remedy, Congress or the courts? . . . The answer most often will be Congress.").

Finally, plaintiff's suggestion that the district court's conclusion that there is no *Bivens* claim in these circumstances "cast[s] doubt" on the constitutionality of the Westfall Act (Pl. Br. 34) is entirely inapt and without merit. The Westfall Act has not been invoked or challenged in this case, and it has nothing to do with plaintiff's claims. Moreover, following the Supreme Court's narrow approach to the extension

of *Bivens* remedies is not the equivalent of limiting *Bivens* to circumstances with "identical" facts (*id.*), and in any event, the Supreme Court has repeatedly stressed that the absence of other avenues for vindicating a particular right is not a reason to extend the judicially-created *Bivens* remedy to new contexts. *See*, *e.g.*, *Schweiker*, 487 U.S. at 421-22 ("The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against officers responsible for the violation."); *Stanley*, 483 U.S. at 683 (declining to extend *Bivens* remedy to injuries incident to military service because "it is irrelevant to the 'special factors' analysis whether the laws currently on the books afford Stanley . . . an 'adequate' federal remedy for his injuries").

B. Plaintiff's *Bivens* Claims Must Be Dismissed In Any Event

Even if a *Bivens* remedy could be available in these circumstances, there is no merit to plaintiff's underlying theories of a constitutional violation. Both of plaintiff's *Bivens* claims are ultimately premised on the absence of a post-deprivation procedure that Congress did not elect to provide. *See* ROA.28-29. As discussed above, the Constitution does not require the post-seizure, pre-forfeiture hearing that plaintiff seeks. *See* supra pp. 21-28. To the contrary, the Supreme Court has made clear that the judicial civil forfeiture proceeding itself, "without more, provides the post-seizure hearing required by due process" to protect a property interest in a car seized under the customs laws. *Von Neumann*, 474 U.S. at 248. And neither this Court nor any

other court of which we are aware has adopted plaintiff's theory that a 23-month delay between a lawful customs seizure and judicial forfeiture proceedings violates the Fourth Amendment. In fact, the Supreme Court has held that an 18-month delay between a border seizure and the institution of judicial forfeiture proceedings was consistent with due process. *United States v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983).

At a minimum, plaintiff has failed to plausibly allege that any individual federal defendant has violated clearly established law sufficient to overcome qualified immunity. In order for an official to lose the protections of qualified immunity, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). The Supreme Court has stressed that qualified immunity thus "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Abbasi*, 137 S. Ct. at 1866 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "[I]f a reasonable officer might not have known for certain that the conduct was unlawful—then the officer is immune from liability." *Id.* Even assuming that the Constitution required CBP's employees to follow different or faster procedures, there is no existing precedent clearly establishing as much, and the individual defendant would be entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,634 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Carleen M. Zubrzycki
Carleen M. Zubrzycki

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Carleen M. Zubrzycki
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ADDENDUM

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19 U.S.C. § 1600

§ 1600. Application of the customs laws to other seizures by customs officers

The procedures set forth in sections 1602 through 1619 of this title shall apply to seizures of any property effected by customs officers under any law enforced or administered by the Customs Service unless such law specifies different procedures.

19 U.S.C. § 1602

§ 1602. Seizure; report to customs officer

It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred, and to turn over and deliver to such customs officer any vessel, vehicle, aircraft, merchandise, or baggage seized by him, and to report immediately to such customs officer every violation of the customs laws.

19 U.S.C. § 1607

§ 1607. Seizure; value $500,000 or less, prohibited articles, transporting conveyances

(a) Notice of seizure

If--

(1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed $500,000;

(2) such seized merchandise is merchandise the importation of which is prohibited;

(3) such seized vessel, vehicle, or aircraft was used to import, export, transport, or store any controlled substance or listed chemical; or

(4) such seized merchandise is any monetary instrument within the meaning of section 5312(a)(3) of Title 31;

the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.

(b) "Controlled substance" and "listed chemical" defined

As used in this section, the terms "controlled substance" and "listed chemical" have the meaning given such terms in section 802 of Title 21.

(c) Report to Congress

The Commissioner of U.S. Customs and Border Protection shall submit to the Congress, by no later than February 1 of each fiscal year, a report on the total dollar value of uncontested seizures of monetary instruments having a value of over $100,000 which, or the proceeds of which, have not been deposited into the Customs Forfeiture Fund under section 1613b of this title within 120 days of seizure, as of the end of the previous fiscal year.

19 U.S.C. § 1608

§ 1608. Seizure; claims; judicial condemnation

Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

19 U.S.C. § 1609

§ 1608. Seizure; summary forfeiture and sale

(a) In general

If no such claim is filed or bond given within the twenty days hereinbefore specified, the appropriate customs officer shall declare the vessel, vehicle, aircraft, merchandise, or baggage forfeited, and shall sell the same at public auction in the same manner as merchandise abandoned to the United States is sold or otherwise dispose of the same according to law, and shall deposit the proceeds of sale, after deducting the expenses described in section 1613 of this title, into the Customs Forfeiture Fund.

(b) Effect

A declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States. Title shall be deemed to vest in the United States free and clear of any liens or encumbrances (except for first preferred ship mortgages pursuant to section 961 of Title 46, Appendix, or any corresponding revision, consolidation, and enactment of such subsection in Title 46) from the date of the act for which the forfeiture was incurred. Officials of the various States, insular possessions, territories, and commonwealths of the United States shall, upon application of the appropriate customs officer accompanied by a certified copy of the declaration of forfeiture, remove any recorded liens or encumbrances which apply to such property and issue or reissue the necessary certificates of title, registration certificates, or similar documents to the United States or to any transferee of the United States.

19 U.S.C. § 1610

§ 1610. Seizure; judicial forfeiture proceedings

If any vessel, vehicle, aircraft, merchandise, or baggage is not subject to section 1607 of this title, the appropriate customs officer shall transmit a report of the case, with the names of available witnesses, to the United States attorney for the district in which the seizure was made for the institution of the proper proceedings for the condemnation of such property.

19 U.S.C. § 1614

§ 1614. Release of Seized Property

If any person claiming an interest in any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of this chapter offers to pay the value of such vessel, vehicle, aircraft, merchandise, or baggage, as determined under section 1606 of this title, and it appears that such person has in fact a substantial interest therein, the appropriate customs officer may, subject to the approval of the Secretary of the Treasury if under the customs laws, or the Commandant of the Coast Guard or the Commissioner of U.S. Customs and Border Protection, as the case may be, if under the navigation laws, accept such offer and release the vessel, vehicle, aircraft, merchandise, or baggage seized upon the payment of such value thereof, which shall be distributed in the order provided in section 1613 of this title.

19 U.S.C. § 1617

§ 1617. Compromise of Government claims by Secretary of the Treasury

Upon a report by a customs officer, United States attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is authorized to compromise such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury.

19 U.S.C. § 1618

§ 1618. Remission or mitigation of penalties

Whenever any person interested in any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws, and with the Commandant of the Coast Guard or the Commissioner of U.S. Customs and Border Protection, as the case may be, if under the navigation laws, before the sale of such vessel, vehicle, aircraft, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, the Commandant of the Coast Guard, or the Commissioner of U.S. Customs and Border Protection, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission to any customs officer to take testimony upon such petition: Provided, That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition.

19 C.F.R. § 162.47

§ 162.47. Claim for property subject to summary forfeiture

(a) Filing of claim. Any person desiring to claim under the provisions of section 608, Tariff Act of 1930, as amended (19 U.S.C. 1608), seized property not exceeding $500,000 in value (however there is no limit in value of merchandise, the importation of which is prohibited, or in the value of vessels, vehicles or aircraft used to import, export, transport, or store any controlled substance, or in the amount of any monetary instruments within the meaning of 31 U.S.C. 5312(a)(3), that may be seized and forfeited) and subject to summary forfeiture, shall file a claim to such property with the Fines, Penalties, and Forfeitures Officer within 20 days from the date of the first publication of the notice prescribed in § 162.45.

(b) Bond for costs. Except as provided in paragraph (e) of this section, the bond in the penal sum of $5,000 or 10% of the value of the claimed property, whichever is lower, but not less than $250, required by section 608, Tariff Act of 1930, as amended, to be filed with a claim for seized property shall be on Customs Form 301, containing the bond conditions set forth in § 113.72 of this chapter.

(c) Claimant not entitled to possession. The filing of a claim and the giving of a bond, if required, pursuant to section 608, Tariff Act of 1930, shall not be construed to entitle the claimant to possession of the property. Such action only stops the summary forfeiture proceeding.

(d) Report to the U.S. attorney. When the claim and bond, if required, are filed within the 20–day period, the Fines, Penalties, and Forfeitures Officer shall report the case to the U.S. attorney for the institution of condemnation proceedings.

(e) Waiver of bond. Upon satisfactory proof of financial inability to post the bond, the Fines, Penalties, and Forfeitures Officer shall waive the bond requirement for any person who claims an interest in the seized property.

General Information

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