UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANTHONIA NWAORIE, on behalf of herself and all others similarly situated, *Plaintiff*, v. UNITED STATES OF AMERICA; U.S. CUSTOMS AND BORDER PROTECTION; KEVIN McALEENAN, Commissioner, U.S. Customs and Border Protection, sued in his official capacity, *Defendants*.	Civil Action No. 4:18–CV–01406

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This case is a nationwide class-action lawsuit challenging U.S. Customs and Border Protection's (CBP) policy or practice on returning the seized property to claimants (property owners and others with an interest in seized property) after the deadline for the government to file a forfeiture complaint has expired. Specifically, this lawsuit challenges CBP's demand that claimants sign agreements ("Hold Harmless Agreements") that waive their constitutional and other legal rights, and create new legal liabilities—in order to get back property to which they are legally entitled under the Civil Asset Forfeiture Reform Act ("CAFRA"). Plaintiff Anthonia Nwaorie ("Anthonia") brings this case on behalf of herself and all others similarly situated against the United States, CBP, and its Director (collectively "Defendants" or "the government"). Anthonia's claims are brought under the Administrative Procedures Act ("APA"), as a challenge to *ultra vires* agency action, and directly under the Constitution.

Anthonia brings two class claims and two individual claims. Her class claims challenge CBP's conditioning the return of seized property Hold Harmless Agreements, as described above, as *ultra vires* under CAFRA (Count I), and as a violation of the unconstitutional conditions doctrine (Count II). Her individual claims demand the return of her property, with interest, under Rule 41(g) (Count III), and challenge the fact that she has been designated as a passenger who will be deliberately subjected to additional, invasive and intrusive screening procedures, without notice or an opportunity to be heard (Count IV).

Defendants' conduct in this case is egregious. CBP is ignoring the clear instructions of CAFRA and the Attorney General's underlying regulations, which require them to promptly release property to claimants once the 90-day period to file a forfeiture petition has expired. Instead, CBP is extracting waivers of constitutional and other legal rights from claimants (and requiring them to assume new legal liabilities) as a condition of returning their property. It is doing this when they are at their most vulnerable, after they have been deprived of their property for months—five months in Anthonia's case—and may be desperate to get it back. As a carrot, CBP offers to release the claimants' property if they sign the Hold Harmless Agreement, even though CBP is already required to do so under CAFRA. As a stick, CBP threatens to administratively forfeit the claimants' property if they do not sign and return the Hold Harmless Agreement within a specified period, even though CAFRA expressly prohibits the government from taking any further action to forfeit the property. Most claimants likely sign these Hold Harmless Agreements rather than surrender their property. But Anthonia did not buckle under and sign this contract of adhesion; instead, she sued on behalf of herself and others affected by this lawless, unconstitutional conduct.

In their motion to dismiss, Defendants serve up a veritable smorgasbord of undercooked arguments on mootness, standing, sovereign immunity, jurisdiction, and failure to state a claim, hoping to appeal to this Court through sheer variety if not sustenance. But Defendants' arguments are all sizzle and no steak. They attempt to drive a Mack Truck through a mousehole-size exception to judicial

review under the APA. They attack equal protection and procedural due process claims that do not exist. And they base their sovereign immunity arguments on cases involving claims for monetary damages, even though none of the claims in this lawsuit seek monetary damages, a critical distinction for sovereign immunity purposes. However, two of Defendants' arguments are particularly notable for their audacity.

First, Defendants take the position that a federal agency cannot be sued in federal court for violations of both federal law and the U.S. Constitution because Congress gave the agency so much discretion under CAFRA that the agency is completely immune from suit. According to Defendants, the phrase, "the Government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense," 18 U.S.C. § 983(a)(3)(B)(ii), provides absolutely no guidance or "law to apply" for this Court to evaluate in determining whether the agency has followed its congressional mandate. If, for example, the agency does *not* promptly release seized property and instead threatens to pursue administrative forfeiture unless the owners of the property waive their constitutional rights, Defendants believe it is beyond the power of this Court to review whether that behavior is lawful or constitutional,

Second, Defendants further argue that even if sovereign immunity were waived, their actions would still be permissible. They claim that Congress could directly impose precisely the same requirements as the Hold Harmless Agreements

on property claimants as a condition of returning property to which they are legally entitled under CAFRA. In other words, even after the forfeiture deadlines have expired, Defendants believe that Congress could pass laws that unilaterally deprive property owners of the ability to bring any legal action or administrative proceeding related to the seizure or detention of their property, or to seek interest or attorney's fees, and unilaterally require them to both indemnify the government from any claims by third parties and reimburse the government for any costs of enforcing these prohibitions.

And yet, people can and do routinely sue federal administrative agencies in federal court for violations of federal law and their federal constitutional rights. They are not turned away simply because the agency identifies some potential ambiguity in a statutory provision that it claims gives it total discretion, and thus complete immunity from judicial review. At the same time, challenges under the unconstitutional conditions doctrine continue to be viable so long as the conduct they are challenging is actually unconstitutional. They are not derailed by the fact that Congress could theoretically rewrite statutes in an unconstitutional manner, because that would achieve the same unconstitutional outcome.

Defendants' motion to dismiss should be rejected.

STANDARDS OF REVIEW

When reviewing a motion to dismiss under Federal Civil Rule of Civil Procedure 12(b)(1), the court considers only whether it lacks subject matter

jurisdiction. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Smith v. Reg'l Transit Auth.*, 756 F.3d 340, 347 (5th Cir. 2014) (internal quotations and citations omitted). Under Rule 12(b)(1), "the district court is not limited to an inquiry into undisputed facts. It may hear conflicting written and oral evidence and decide for itself the factual issues which determine jurisdiction." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). Accordingly, Plaintiffs have attached the Declaration of Anthonia Nwaorie regarding developments subsequent to the filing of the Complaint for this Court's consideration on the Rule 12(b)(1) matters only.

When reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must accept as true all facts of the complaint and construe them in the light most favorable to the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 816 (5th Cir. 2012). A court does not need to determine whether a plaintiff's victory is probable. *Wilson v. Birnberg*, 667 F.3d 591, 600 (5th Cir. 2012) (citation omitted). Rather, the inquiry must focus on whether the facts pled, if true, would entitle the plaintiff to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). "Dismissal is improper if the allegations support relief on any possible theory." *Wilson*, 667 F.3d at 595 (internal quotation omitted).

ARGUMENT

In their brief, ECF No. 26 ("Defs.' Br."), Defendants present a motley assortment of threshold arguments, urging this Court to dismiss Anthonia's class-

action and individual claims for a wide variety of reasons. None of these arguments is consistent with either U.S. Supreme Court or Fifth Circuit jurisprudence, and all should be squarely rejected.

I. Anthonia's Individual Claims Are Not Moot.

Anthonia brought two claims in her individual capacity. Count III is a claim for return of property under Rule 41(g). Count IV is a due-process challenge to CBP's action of singling out Anthonia for particularly intrusive and invasive airport screenings after the October 31, 2017 seizure of her property without providing her with notice and an opportunity to be heard.

Despite the government's contentions, *see* Defs.' Br. 6–9, neither of these claims is moot. As explained below, Count III is not moot because the government has not returned the full *res*, which includes the interest on the seized property. Count IV is not moot because Anthonia is still being targeted for particularly intrusive and invasive screenings, and nothing in the government's declarations calls this fact into question. The government's declarations don't dispute this, but the government nevertheless quibbles over semantics by disputing whether Anthonia is on a "screening list" rather than part of the TECS "data repository" for "border screening."

A. Anthonia's motion for return of property (Count III) is not moot because she still has an unresolved claim for interest.

Anthonia's individual claim for return of property (Count III), including her challenge to the lack of notice when it comes to currency reporting requirements, is not moot. In addition to demanding the return of $41,377 owed to her, Anthonia

identified the ways she has been harmed by being deprived of this money for several months, *see* Compl. ¶¶ 109–12, and demanded interest on the money accrued over the period (seven months) that it was seized and held by CBP. Compl. ¶¶ 7, 166, 175, Req. for Relief (G) (p. 48). In fact, the government admits it only returned $41,377 to her and did not return any interest. *See* Decl. of Celia Grau, ECF No. 26-1, ¶¶ 3, 5; *see also* Decl. of Anthonia Nwaorie ¶ 1. Until the government returns the interest owed to Anthonia, she will continue to have standing for her individual claim for return of property under Count III.

1. Anthonia is owed interest on the money that CBP seized and held for seven months.

When property is returned by the government after being seized, interest is also owed upon its return, because the interest is part of the seized *res*. *See Carvajal v. United States*, 521 F.3d 1242, 1245 (9th Cir. 2008) (holding that interest is part of the *res* and must be returned); *United States v. 1461 W.42nd St., Hialeah, Fla.*, 251 F.3d 1329, 1338 (11th Cir. 2001) ("government may be liable for pre-judgment interest to the extent that it has earned interest on the seized *res*"); *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 505 (6th Cir. 1988) (interest "is constructively part of the *res*, and that monetary amount must also be returned as an aspect of the seized *res*"); *United States v. Farese*, No. 80 Cr. 63, 1989 WL 74963, *5 (S.D.N.Y. June 26, 1989) (ordering the return of $7,000 seized but not forfeited, plus interest, and discussing rationale for award of interest under the court's equity jurisdiction); *United States v. Becker*, No. 84 Civ. 2732, 1986 WL 5627, *5 (S.D.N.Y. May 9, 1986) (granting motion for return of $20,000

plus interest). As the Sixth Circuit reasoned in *$515,060.42* when it held that the government must pay the interest on the seized money, "[i]f the Government seized . . . a pregnant cow and, after the cow gave birth, the Government was found not to be entitled to the cow, it would hardly be fitting that the Government return the cow but not the calf." 152 F.3d at 505.

Carvajal is particularly instructive because of its close similarity to the facts of this case. In *Carvajal*, the petitioner filed a complaint seeking interest on money that had been seized by federal law enforcement; the seized money itself had already been returned to her—after she filed a motion for return of property, but before the judge could rule on the motion.[1] *Carvajal*, 521 F.3d at 1244. The Ninth Circuit held that "[i]nterest earned, whether actually or constructively, is part of the *res* that must be returned to the owner." *Id.* at 1245. Anthonia's situation is identical to the one in *Carvajal*. While the government returned the money, it failed to pay her interest, which, as the court in *Carvajal* noted, is not monetary damages, but is part of the *res*. Accordingly, the government's citation to *Bailey v. United States* for the proposition that sovereign immunity bars the award of monetary damages is unavailing in the context of interest on seized currency. *See Bailey*, 508 F.3d 736, 740 (5th Cir. 2007) (discussing how sovereign immunity bars the award of monetary damages but not classifying interest as part of damages).

[1] The situation was very similar to the one here, because the U.S. Attorney never filed a forfeiture complaint, thus missing the 90-day CAFRA deadline. *Carvajal*, 521 F.3d at 1244.

Because the government did not return the full *res* to Anthonia, which includes the interest for the seven months that it held her money, she continues to have standing with regard to her individual claim for return of property.

2. Anthonia's individual claim under Count III that she was not provided sufficient notice continues to be a live claim and controversy.

Because the interest on Anthonia's seized money has not been returned, she can continue asserting her claim for insufficient notice related to the currency reporting requirements. So long as this ongoing injury continues, her claims are not merely an abstract controversy.

As a result, the government's citation to *Alvarez v. Smith* is inapplicable. *See* Defs.' Br. 8. There, before the Supreme Court had a chance to rule on the controversy, all seized vehicles were returned and all petitioners "either forfeited any relevant cash or have accepted as final the State's return of some of it." *Alvarez v. Smith*, 558 U.S. 87, 89 (2009). As such, the Court found that the case was moot because, after all of the property was returned, it became "an abstract dispute about the law, unlikely to affect these plaintiffs any more than it affects other Illinois citizens." *Id.* at 93.

Unlike the petitioners in *Alvarez*, Anthonia never "accepted as final" CBP's return of the money seized from her. She always insisted that she was due interest on the money for the period she was not able to use it. *See* Compl. ¶¶ 7, 166, 175, Req. for Relief (G) (p. 48). As such, unlike in *Alvarez*, Anthonia's is not "an abstract dispute about the law," but a live controversy the outcome of which will certainly

affect Anthonia more than other citizens of this country. As a result, until the government returns Anthonia's entire property, including interest, her individual claim for return of property, including her due process challenge to the lack of notice, is not moot.

B. Anthonia's individual claim (Count IV) regarding being singled out for particularly invasive screenings without due process is not moot.

Anthonia's individual claim that she has been inappropriately singled out by Defendants for particularly intrusive and invasive screening since October 31, 2017 (Count IV) is not moot and continues to be a live claim. Anthonia has alleged both that she was perceptibly harmed by the agency action and that she is continuing to be injured by this agency action every time she travels. Compl. ¶¶ 71–74. In the Complaint, for lack of knowledge about the specific terminology or procedures, Anthonia describes her categorization as being put on a "screening list" of travelers who are singled out for particularly invasive screenings when they travel. Compl. ¶ 181. But her claims are not narrowly constrained by whether the government's method for tracking such travelers is described by CBP as a "list," a "database," or a "data repository"—indeed, the claim also alleges that she "is being singled out by Defendants for differential treatment since the day of the seizure" and "is specifically pulled aside for additional, intrusive screening." Compl. ¶¶ 180, 193; *see also* Compl. ¶ 211.

Rather than actually dispute this claim, Defendants play semantics by claiming that she has not been placed on a "screening list," because CBP "does not keep and/or maintain any 'screening list' of passengers at the George Bush

Intercontinental Airport." Defs.' Br. 10; Decl. of Steven Scofield, ECF No. 26-2, ¶¶ 9, 11. Instead, CBP claims, it owns and manages a "data repository" called TECS, filled with TECS Records or "Subject Records" of individuals to use for "law enforcement 'lookouts,' border screening, and reporting for CBP's primary and secondary inspection process," which is used to "document interactions with individuals at the border when there is a possible violation of a law that CBP enforces." Scofield Decl. ¶ 8. Defendants maintain that TECS is not literally a "screening list." Their argument relies solely on the conclusory statement of Steven Scofield, CBP Assistant Port Director for the Area Port of Houston Airports, that: "Based on my training and experience, I know that a TECS record is not the same as a 'screening list.'" Scofield Decl. ¶ 9. However, Mr. Scofield also admits that TECS actually *is* a type of screening list when he states: "To my knowledge, CBP does not keep and/or maintain a 'screening list' of passengers at [IAH] ***other than*** passenger information routinely stored and updated in TECS." Scofield Decl. ¶ 11 (emphasis added).

Regardless, these word games do not get Defendants past Anthonia's claim that, without providing her with notice and an opportunity to contest being singled out for particularly invasive screenings, Defendants placed her on what is functionally a "screening list," thereby violating her due-process and equal-protection rights under the Fifth Amendment. Compl. ¶¶ 184, 187. Crucially, Mr. Scofield does *not* testify that Anthonia does not have a TECS record, nor does he

deny that she is a traveler who is currently targeted for particularly invasive screenings when she travels internationally.

Anthonia clearly alleged that she is being "perceptibly harmed." *See United States v. S.C.R.A.P.*, 412 U.S. 669, 688–89 (1973) (finding hypotheticals involving long and indirect chains of causation to not satisfy this standard). Namely, Anthonia stated that when she came back from Nigeria in December 2017, CBP officers singled her out for a particularly invasive and humiliating screening[2] during which one CBP officer told Anthonia that he knew about her money being seized and that CBP would "follow her wherever she goes" and subject her to this same treatment every time she travels internationally. Compl. ¶¶ 72–74. She has also twice had her bags sliced open during this intrusive screening, rendering them unusable. Compl. ¶ 117. This is more than enough to allege that Anthonia is currently "perceptibly harmed" by being singled out for particularly invasive screenings.

The cases cited by the government, *Alvarez v. Smith* and *Fabian v. Dunn*, have no bearing on Anthonia's claim that she is currently being singled out for particularly invasive screening procedures. Both cases deal with harm that happened in the past and that is no longer ongoing. *See Alvarez v. Smith*, 558 U.S. 87, 89–90 (2009) (involving vehicles and cash seized); *Fabian v. Dunn*, No. SA–08–CV–269–XR, 2009 WL 2567866, at *5 (W.D. Tex. Aug. 14, 2009) (dealing with

[2] During this search, CBP officers ransacked Anthonia's luggage and emptied everything out of her bag, damaging and ruining her purse in the process by slitting open its bottom to search the lining. Compl. ¶ 73.

allegations of abuse while in immigration detention). Anthonia has credibly alleged that her harm is ongoing based on the December 2017 incident, the statement of a CBP officer that she would continue to be singled out for such treatment every time she travels internationally, and the fact that her bags have twice been cut open during these screenings. Compl. ¶¶ 72–74, 117. In addition, after the Complaint was filed, Anthonia was twice subjected to special screenings prior to boarding a flight to Boston, Massachusetts on June 3, 2018. Anthonia Nwaorie Decl. ¶¶ 2-4. Anthonia reasonably believes that those screenings were not random and were instead triggered by some sort of screening list or database flagging her for a special screening when she presented her ID and boarding pass to the TSA screening officer. Anthonia Nwaorie Decl. ¶¶ 4-5. This incident indicates that CBP has likely shared her TECS Record or whatever screening list or database Anthonia may appear in with other agencies within the Department of Homeland Security, further compounding her ongoing injury.

Unlike in *Alvarez* and *Fabian*, where an injunction would not help the plaintiffs because the harm was in the past, an order from this Court enjoining CBP from continuing to single Anthonia out for particularly invasive screenings would actually remedy this ongoing harm.[3] For example, Anthonia plans to return to Nigeria again in October 2018, but reasonably fears that she will once again be targeted for a particularly invasive screenings similar to what she was subjected to the last time she traveled internationally. Anthonia Nwaorie Decl. ¶ 6.

[3] To the extent Defendants' arguments under *Alvarez* and *Fabian* were intended to apply to Anthonia's class claims, they are addressed in Part II.B, *infra*.

Given that Anthonia has alleged a perceptible harm and given that this harm is ongoing, her claim for injunctive and declaratory relief on Claim IV is not moot.

II. Anthonia Still Has Standing to Bring the Class Claims (Counts I and II) as the Class Representative.

Regardless of whether her individual claims are ultimately mooted, Anthonia will continue to have standing to bring the class claims (Counts I and II) as the class representative in this action. This is because, under the "relation back" doctrine, so long as Anthonia had individual standing at the time the action was filed, she can continue to serve as a class representative on behalf of this class. In other words, even if the government returns Anthonia's interest on the seized funds, or even if this Court were to find Anthonia's individual claim for return of property has become moot, she may continue to represent the class. This is because she had standing when she filed her Complaint on May 3, 2018—none of her money had yet been returned, and the government's threat to proceed with administrative forfeiture of her money was still in effect—and because she also promptly filed a Motion for Class Certification (on that same date).

This "relation back" doctrine is explained further below, after which Defendants' arguments to the contrary are addressed.

A. Under the "relation back" doctrine, Anthonia may continue to represent the class even if her claims are mooted, because she had standing when the Complaint was filed and promptly filed a Motion for Class Certification.

Even if Anthonia's individual claim for return of property were to be mooted by the return of the interest on her seized funds, she may continue as the class

representative, and the class claims should still be reviewed. The Fifth Circuit has explained that, where, as here, "the plaintiffs have filed a timely motion for class certification and have diligently pursued it, the defendants should not be allowed to prevent consideration of that motion by tendering to the named plaintiffs their personal claims." *Zeidman v. J. Ray McDermott & Co.,* 651 F.2d 1030, 1045 (5th Cir. 1981); *see also Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 922 (5th Cir. 2008).

In *Zeidman*, hours after plaintiffs presented additional evidence to certify the class, the defendants "tendered to the named plaintiffs the full amount of their personal claims and moved in the district court for the dismissal of th[e] entire action." 651 F.2d at 1036. After they gave back what they owed to the named plaintiffs, the defendants argued that the class action "must be dismissed for mootness" because "no class had yet been certified and since by virtue of the tender no named plaintiff had any remaining claim." *Id.* at 1036. The Fifth Circuit disagreed. It concluded that "a suit brought as a class action should not be dismissed for mootness upon tender to the named plaintiffs of their personal claims, at least when, as here, there is pending before the district court a timely filed and diligently pursued motion for class certification." *Id.* at 1051. Otherwise, "in those cases in which it is financially feasible to pay off successive named plaintiffs, the defendants would have the option to preclude a viable class action from ever reaching the certification stage." *Id.* at 1050.

Anthonia's case falls squarely within *Zeidman*. Just like the plaintiffs in *Zeidman*, Anthonia timely filed and has diligently pursued her motion for certification. In *Zeidman*, the motion for certification was filed four months after the original complaint. *Id.* at 1033-34. Here, Anthonia filed her motion to certify concurrently with her complaint and, like the plaintiffs in *Zeidman*, has sought class discovery to diligently pursue class certification. Finally, just like the defendants in *Zeidman*, the Defendants here returned Anthonia's property only after Anthonia filed her complaint and her motion to certify. Celia Grau Decl. ¶ 5; Anthonia Nwaorie Decl. ¶ 1. As a result, even if Anthonia's individual claim for return of property becomes moot, this Court should allow her class claims to go forward. Otherwise, the government will do exactly what the Fifth Circuit wanted to avoid in *Zeidman*: "pick[] off" a plaintiff's claim to effectively "prevent any plaintiff in the class from procuring a decision on class certification." *Id.* at 1050.

B. The government ignores both the ongoing injury to Anthonia and other class members, and that standing is pegged to May 3, 2018.

The government's argument that there is no standing for the class claims ignores the ongoing injury to Anthonia and other class members, as well as the fact that the relevant date of inquiry for standing is May 3, 2018, the day the Complaint and Motion for Class Certification were filed. Defendants cite to *Fabian v. Dunn* and *Alvarez v. Smith* to support their claim that Anthonia's case is unreviewable because there is little risk of future injury. Both cases rely on *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), for the proposition that a plaintiff can have no standing to enjoin a government action if there is no showing of a substantial likelihood that

this very injury would be repeated against the plaintiff in the future. *Fabian v. Dunn*, No. SA–08–CV–269–XR, 2009 WL 2567866, at *5 (W.D. Tex. Aug. 14, 2009); *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). But *Lyons* is inapplicable here for two reasons. First, Anthonia is still being injured by being deprived of the interest on the funds taken from her by CBP. *See supra* Part I.A. Second, this is a class-action lawsuit that includes future class members as part of the class definition. *See* Compl. ¶ 130 ("All claimants to seized property for which CBP has pursued, or will in the future pursue . . ."). By definition, these future class members have a substantial likelihood—100%—of future injury.

The same two factors distinguish this case from both *Dunn* and *Alvarez*. In both of those cases, there was no longer an ongoing injury, and both cases involved individual claims, rather than class claims. As the Supreme Court noted in *Alvarez*, "a class might well contain members who continue to dispute ownership of seized property," but the plaintiffs in *Alvarez* had abandoned their attempt at class certification, preventing their ability to go forward. 558 U.S. at 92–93. The U.S. Supreme Court thus suggested that the *Alvarez* plaintiffs could have avoided mootness by pursuing class certification, which of course is precisely what Anthonia has done here.

III. Sovereign Immunity Does Not Bar Anthonia's Class Claims, And This Court Has Jurisdiction to Issue Declaratory and Injunctive Relief.

Despite Defendants arguments to the contrary, the government does not enjoy sovereign immunity in this case. This is because Anthonia's class-action claims do not seek monetary damages, only declaratory and injunctive relief. They

thus fit squarely within Section 702 of the APA as well as the *ultra vires* exception to sovereign immunity, and the power of courts to review claims for injunctive relief of constitutional violations "directly under the Constitution." First, both class-action claims (Counts I and II) are properly brought under the APA. Second, there are also independent, common-law grounds for the waiver of sovereign immunity: Count I is properly brought under the common law *ultra vires* exception to sovereign immunity, and Count II is properly brought "directly under the Constitution." Third, given the multiple ways in which sovereign immunity is waived, this Court plainly has federal question jurisdiction under 28 U.S.C. § 1331 and the power to issue declaratory judgments under the Declaratory Judgment Act. Accordingly, the government's motion to dismiss the class-action claims on sovereign immunity and related jurisdictional grounds should not be granted.

A. Section 702 of the APA waives sovereign immunity for both of the class-action claims (Counts I and II).

Section 702 of the APA is an explicit waiver of sovereign immunity that applies to both of Anthonia's class-action claims (Counts I and II). Section 702 was amended by Congress "to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity." *Armendariz-Mata v. U.S. Dep't of Justice*, 82 F.3d 679, 682 (5th Cir. 1996). As the Fifth Circuit explained in *Rothe Development Corporation v. U.S. Department of Defense*, "[a] waiver as to injunctive relief—but not monetary damages—can be found in § 702 of the Administrative Procedure Act, which permits parties 'suffering legal wrong because

of agency action' to file 'an action in a court of the United States seeking relief other than monetary damages." 194 F.3d 622, 624 (5th Cir. 1999) (quoting 5 U.S.C. § 702).

Both class claims challenge Defendants' policy or practice of demanding that claimants (property owners or those with a possessory interest in seized property) sign Hold Harmless Agreements waiving their rights before Defendants will return property that has been seized, despite being required to return the property under CAFRA. Count I is a statutory challenge to CBP's actions as *ultra vires*, while Count II is a constitutional challenge to CBP's actions as imposing unconstitutional conditions on claimants. Both class claims seek only injunctive and declaratory relief, and do not seek monetary relief. These are precisely the sort of claims for which Section 702 of the APA was designed to waive sovereign immunity.

Defendants' attempts to wriggle out of the APA's explicit statutory waiver of sovereign immunity are unpersuasive. First, the narrow "committed to agency discretion by law" exception to reviewability under the APA does not apply to CBP's challenged actions because the agency does not have discretion to disobey the statute's clear and detailed instructions. Second, these claims are not a programmatic challenge, but a challenge to a specific, clearly identified agency action. As such, waiver of sovereign immunity under the APA is appropriate.

1. The APA's very narrow "committed to agency discretion" exception from judicial review does not apply to CBP's challenged actions.

Anthonia challenges the CBP's affirmative action of conditioning the return of property on signing Hold Harmless Agreements despite the explicit and unambiguous statutory language that the government "***shall*** promptly release the

property" and "***may not*** take any further action to effect the civil forfeiture of such property." 18 U.S.C. § 983(a)(3)(B)(ii) (emphasis added). The government argues that the claims fall within the Section 701(a)(2) "committed to agency discretion" exception to the reviewability. Defs.' Br. 12–15. This is plainly inconsistent with U.S. Supreme Court and Fifth Circuit precedent, which hold that so long as the statutory language at issue provides a court with "law to apply," it should be reviewed under the APA. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971) (abrogated on other grounds). Agency decisions are only "completely unreviewable under the 'committed to agency discretion by law' exception [when] the statutory scheme, taken together with other relevant materials, provides ***absolutely no guidance*** as to how that discretion is to be exercised." *Texas v. United States*, 809 F.3d 134, 168 (5th Cir. 2015) (emphasis added). Because CAFRA's relevant provision provides plenty of guidance and ample "law to apply," this very rare exception to agency review does not apply here.

i. U.S. Supreme Court and Fifth Circuit authorities strongly support the inapplicability of the "committed to agency discretion" exception in this case.

The "agency discretion" exception to reviewability as provided by 5 U.S.C. § 701(a)(2) is "a very narrow exception" to judicial review. *Overton Park,* 401 U.S. at 410. It applies only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Id.* The U.S. Supreme Court has held this occurs only when, "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). In all other instances, there is "a well-

settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *Texas v. United States*, 809 F.3d at 163 (internal citations and quotations omitted). The burden is on the government to rebut this presumption of reviewability by clear and convincing evidence that Congress intended for the exception to apply. *Id.*

The controlling case law is consistent with the CBP's actions being reviewable under the APA. In *Overton Park*, the U.S. Supreme Court held that the Department of Transportation's decision to spend federal funds on a six-lane highway through a public park in Tennessee was subject to judicial review under the APA even though the statutory language was very general, prohibiting spending such funds on building roads through public parks so long as a "feasible and prudent" alternative route existed. *Id.* at 405–06. The government argued that the APA exception should apply because "the requirement that there be no other 'prudent' route requires the Secretary to engage in a wide-ranging balancing of competing interests." *Id.* at 411. But the Court disagreed and found that "[i]n this case, there is no indication that Congress sought to prohibit judicial review and there is most certainly no showing of clear and convincing evidence of a . . . legislative intent to restrict access to judicial review." *Id.* at 410 (quotations and citations omitted). The court did not find the word "prudent" to give the agency complete discretion. In the context of the statutory scheme protecting parklands, the Court found that "prudent" did not involve such factors as "considerations of

cost, directness of route, and community disruption." *Id.* at 411-12. As such, "[p]lainly, there is law to apply." *Id.* at 413 (quotation omitted).

If the statutory language in *Overton Park* constituted "law to apply" in evaluating an agency's exercise of discretion, then the statutory provision at issue here plainly constitutes "law to apply" in evaluating CBP's actions. Just like in *Overton Park*, Anthonia is dealing with an affirmative agency action that violated a clear congressional directive against it. But unlike *Overton Park*, the statutory language at issue is much clearer and more specific. Under CAFRA, "the Government ***shall promptly release the property*** pursuant to regulations promulgated by the Attorney General and ***may not take any further action to effect the civil forfeiture of such*** **property** in connection with the underlying offense." 18 U.S.C. § 983(a)(3)(B)(ii) (emphasis added). Instead of promptly releasing the property as directed, CBP refuses to release the property at all, unless and until claimants signed a Hold Harmless Agreement. Instead of not taking any further action to forfeit the property, CBP actually threatens to forfeit the property unless claimants signed and returned a Hold Harmless Agreement.

In addition, unlike in *Overton Park*, this challenge to CBP's affirmative actions does not turn on such a broad and vague term as "prudent." While the word "promptly" is used in the CAFRA mandate without a specific timeframe, this case is not about the specific number of days CBP takes to release the property, but instead about whether the CBP even attempts to "promptly release" the property, i.e.,

without delay.[4] *See, e.g.*, Promptly, Merriam-Webster.com ("without delay"), https://www.merriam-webster.com/thesaurus/promptly (last visited Aug. 23, 2018); Prompt, Merriam-Webster.com, ("performed readily or immediately," "done at once," "given without delay."), https://www.merriam-webster.com/dictionary/prompt (last visited Aug. 23, 2018). Moreover, this challenge to CBP's actions does not turn primarily on the promptness of CBP's actions. Instead this challenge focuses as much or more on the words "shall," "release," and the phrase "may not take any further action." Together, all of these terms present ample "law to apply" and are statutory language that "at least can be reviewed to determine whether the agency exceeded its statutory powers." *Texas v. United States*, 809 F.3d at 168 (quoting *Chaney*, 470 U.S. at 832).

ii. The government fails to support its claim that the CBP's actions are unreviewable because they are "committed to agency discretion."

The government does not come close to rebutting the presumption of reviewability under the APA. Instead, the government erroneously focuses on the phrase "promptly release" as though this case is primarily a dispute about the timeliness of the return of property, such as whether the property should be returned within 30 days or 90 days. Defs.' Br. 14, 18. But while the term "promptly" does play a role in determining whether CBP acted without delay, this case is

[4] To the extent that the specific timeliness of CBP's actions are at issue, the detailed timelines throughout 18 U.S.C. § 983(a) provide plenty of guidance on the meaning of the term in this context (*e.g.*, the government must send its notice of seizure no more than 60 days after the date of the seizure, the claimant must submit their claim within 30 or 35 days of the date of notice, the government must file its forfeiture complaint within 90 days after the claim has been filed, etc.).

primarily a challenge to the government's failure to obey the statutory commands that the government "shall . . . release the property" and "may not" take further actions to forfeit the property, such as by imposing additional conditions on the release of the property that are not even contemplated, let alone authorized, by the statute or its underlying regulation.

The three cases cited by the government only serve to dig this argument a deeper grave. The first case, *Heckler v. Chaney*, is a specific exception that proves the general rule. The other two cases, *American Canoe* and *Electricities of North Carolina*, involve very broad statutory language that bears no resemblance to the statutory language at issue here.

In *Heckler v. Chaney*, the U.S. Supreme Court reaffirmed its commitment to the broad principle that judicial review of administrative action is widely available. 470 U.S. at 830 (citing *Overton Park,* 401 U.S. at 410). It did draw a distinction, however, between an affirmative agency action, to which the assumption of reviewability applies, and a decision not to act, with the former being presumed reviewable and the latter, unreviewable. *Id.* at 831. Importantly, the Court noted that this distinction between action and inaction is crucial because, among other things, "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights," thus, the need to exercise judicial review is not nearly as important. *Id.* at 832 (emphasis in original). This suit challenges the CBP's affirmative action of conditioning the release of property on claimants signing a Hold Harmless Agreement despite statutory language

directing it to promptly release the property without taking any further action to forfeit the property. This is precisely the kind of "exercise [of] *coercive* power over an individual's liberty or property rights," *id.*, that warrants, indeed requires, judicial review. Thus, *Chaney* actually supports Anthonia's position, not Defendants'.

Electricities of North Carolina v. Southeastern Power Administration involved a federal law's broad command to a federal power-administration agency to distribute electric power "in such a manner as to encourage the most widespread use thereof." 774 F.2d 1262, 1264 (4th Cir. 1985) (internal quotations and citations omitted). Plaintiffs challenged the agency's decision, under this grant of authority, to exclude certain potential customers from this distribution. *Id.* at 1266. The Fourth Circuit found that the phrase "most widespread use" did not limit the agency's power, under the broad mandate, to exclude certain areas from receiving power. *Id.* at 1265–67. After all, the phrase "most widespread use" was so broad as to potentially mean any of "most geographically widespread distribution of power, distribution to the most diversified mix of ultimate consumers, or distribution to preference customers that reach the greatest number of ultimate customers." *Id.* at 1266. Given these possibilities, there was simply "no law to apply." *Id.* The broad, ambiguous mandate in *Electricities of North Carolina* is not at all similar to CAFRA's clear statutory mandate, which has specific, unambiguous directives and a clear purpose: to ensure that property is promptly returned to claimants without any further threat of forfeiture.

American Canoe Association v. United States EPA is even less availing. In this memorandum opinion from the Eastern District of Virginia, the court found that the EPA's mandate to review, "from time-to-time," states' reports on compliance with certain environmental regulations "is committed solely to agency discretion" because the phrase "from time-to-time" is so ambiguous that "there is no law for a reviewing court to apply." 30 F.Supp.2d 908, 925 (E.D. Va. 1998). What is crucial here is that the court specifically said that the one thing not reviewable under this mandate is "the ***timing*** of these reviews." *Id.* (emphasis added). In other words, the court did not hold that the EPA's review itself was not subject to judicial scrutiny. Rather, it was the *timing* that was unreviewable because the term "time-to-time" did not provide sufficient guidance for the court to evaluate compliance. Unlike the plaintiffs in *American Canoe*, this case does not seek judicial review of the timing of the release of seized property. Rather, it seeks judicial review of whether CBP's decision to condition the release of seized property on the signing of a Hold Harmless Agreement is consistent with the congressional mandate under CAFRA, as well as with the Due Process Clause. As such, *American Canoe*, just like *Chaney* and *Electricities of North Carolina*, is inapplicable.

Thus, controlling precedent makes clear that the very narrow exception from judicial review under 5 U.S.C. § 701(a)(2) does not apply. An agency's actions are subject to judicial review under the APA when there is an affirmative agency action and, when statutes are drawn in such a manner that there is at least some law to apply, thereby giving a court a meaningful standard against which to judge the

agency's exercise of discretion (even if broad). CBP's affirmative action is demanding that claimants sign a Hold Harmless Agreement as a condition of returning their seized property, even after the deadline to file a forfeiture complaint has passed, as it did with Anthonia. But CAFRA clearly states that once the 90-day deadline to file a forfeiture complaint passes, the seized property must be promptly released and the government may not take any further action to effect the civil forfeiture of such property. That is a very clear standard on which to judge the government's actions, which are thus reviewable under the APA.

2. The class claims challenge specific actions by the Defendants and are not a general programmatic challenge.

Anthonia's class action claims are properly brought under Section 702 of the APA and are not an impermissible programmatic challenge, as the government claims. *See* Defs.' Br. 15. Rather, consistent with requirements for bringing claims under Section 702, there is an easily identifiable specific agency action—CBP conditioning the release of seized property on signing Hold Harmless Agreements—and this action continues to injure Anthonia and other class members. *See Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489 (5th Cir. 2014) (discussing requirements for bringing suits under Section 702 of the APA).

i. Anthonia has identified and challenged a specific agency action.

In *Alabama-Coushatta*, the Fifth Circuit found that to count as a challenge to an agency action under Section 702, this challenge cannot be programmatic—the kind that seeks "wholesale improvement of an agency's programs by a court decree, rather than through Congress or the agency itself where such changes are normally

made." *Id.* at 490 (internal quotations and citations omitted). If the challenge is programmatic, it is not reviewable under Section 702 of the APA. *Id.*

Alabama-Coushatta involved an Indian tribe's challenge to the federal government's general practice of issuing drilling permits and oil and gas leases as well as selling timber resources from its land. *Id.* at 487. The tribe argued that "the Government breached its fiduciary duty under federal law to protect the land and natural resources subject to the aboriginal title of the Tribe." *Id.* at 486. The Fifth Circuit dismissed the case, holding that the case was unreviewable under Section 702 of the APA, since the allegations put forward by the tribe "d[id] not challenge specific 'agency action.'" *Id.* at 490 (citations omitted). The Fifth Circuit reasoned that because "the complaint contend[ed] only that all of the leases, permits, and sales administered by multiple federal agencies . . . are unlawful," it did not challenge a specific agency action. *Id.* Rather, it was simply "a blanket challenge" to "the way the government administers these programs and not to a particular and identifiable action taken by the government." *Id.* at 490–91.

Reviewing Anthonia's claims under Section 702 of the APA is wholly consistent with *Alabama-Coushatta*. Anthonia's challenge is not at all programmatic. Unlike the plaintiffs in *Alabama-Coushatta Tribe*, she is not asking for wholesale improvement of an agency's programs by a court decree. Rather, she is bringing a challenge to a specific, identifiable agency action that harms her and other class members, namely the CBP's policy or practice of demanding that claimants sign Hold Harmless Agreements as a condition of releasing property that

it is already required to release under CAFRA. Compl. ¶¶ 142-54. As such, her challenge is reviewable under Section 702 of the APA.

This conclusion is bolstered by the Fifth Circuit's decision in *Lion Health Services, Inc. v. Sebelius*, 635 F.3d 693 (5th Cir. 2011). That case involved a Medicare provider challenging a regulation establishing a cap for reimbursement inconsistent with the method provided for in the controlling statute. The government argued that the challenged regulation was not the agency action and thus the court had no authority to review it. *Id.* at 702. The Fifth Circuit disagreed and held that because the plaintiff challenged, the "facial validity of a specific regulation" and not "a general and amorphous 'program' of operations performed by the agency," this was a proper challenge to an agency action and reviewable in court. *Id.* at 702.

Both *Alabama-Coushatta Tribe* and *Lion Health Services* support the reviewability of Anthonia's class-action claim under Section 702 of the APA. Just like petitioners in *Lion Health Services*, and unlike the plaintiffs in *Alabama-Coushatta Tribe*, Anthonia is challenging a specific and identifiable agency action inconsistent with the congressional mandate. Thus, in accordance with the Fifth Circuit precedent, Anthonia's class-action claim alleging CAFRA violations satisfies the "agency action" requirement under Section 702 of the APA.

ii. The identified agency action continues to injure Anthonia and the other putative class members.

Another requirement for reviewability under Section 702 is that "the plaintiff must show that he has 'suffered legal wrong because of the challenged agency

action, or is adversely affected or aggrieved by that action within the meaning of a relevant statute.'" *Alabama-Coushatta*, 757 F.3d at 489 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990)). Defendants claim that Anthonia fails to satisfy this requirement because her individual claim is moot and because she "has not identified a class member who has suffered any viable injury resulting from Defendants' hold harmless policy." Defs.' Br. 17. But this lawsuit easily satisfies the requirement of alleging an injury both as to Anthonia and other putative class members. As discussed in Part I, *supra*, Anthonia continues to be injured by the agency action because the interest on her seized money has not been retuned. As explained in Part II, *supra*, Anthonia is also a class representative who had standing to bring her claims at the time this action was filed and who promptly pursued class certification. Despite the government's failed attempt to moot Anthonia's individual claim by returning the seized money, defendants may not simply pick off the claims of class representatives "to preclude a viable class action from ever reaching the certification stage." *Zeidman*, 651 F.2d at 1050.

B. In the alternative, Anthonia can also bring her class-action claims independent of the APA's waiver of sovereign immunity.

Anthonia brought two class-action claims in this action. Because both claims seek only non-monetary relief, reviewability by this Court is well-established under not only the APA's explicit waiver of sovereign immunity, but also separately under both the common law *ultra vires* exception to sovereign immunity and the power of federal courts to review non-monetary constitutional claims "directly under the [C]onstitution." *Porter v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979) (noting that it

makes no difference whether constitutional claims are brought directly under the Constitution or under the APA). In other words, because Anthonia's class claims do not seek monetary damages, there are multiple paths that avoid the obstacle of sovereign immunity.

1. Count I was properly brought under the *ultra vires* exception to sovereign immunity.

Anthonia's first class-action claim falls well within the *ultra vires* exception to sovereign immunity. The claim focuses on CBP's violations of 18 U.S.C. § 983(a)(3) of the Civil Asset Forfeiture Reform Act ("CAFRA") and 28 C.F.R. § 8.13 (the regulation promulgated thereunder by the Attorney General). Compl. ¶ 142. This CAFRA provision and its related regulation explicitly and unambiguously direct CBP to promptly release property without taking any further actions to forfeit the property, a direction that CBP disregarded. Because CBP acted in express violation of this congressional mandate, Anthonia's claims may proceed despite sovereign immunity.

The *ultra vires* exception to sovereign immunity based on federal officers and agencies acting outside of their authority was first articulated in *Larson v. Domestic & Foreign Commerce Corporation*, in which the U.S. Supreme Court reasoned that where a federal officer or agency acts beyond the scope of its power, the act is "ultra vires . . . and may be made . . . the object of specific relief." 337 U.S. 682, 689 (1949); *see also Leedom v. Kyne*, 358 U.S. 184, 190 (1958) (holding that a challenge could be brought to a determination by the National Labor Relations Board that was alleged to be in direct conflict with the National Labor Relations

Act, despite the Act not expressly authorizing review); *United States v. Briggs*, 514 F.2d 794, 808 n.25 (5th Cir. 1975) (interpreting *Larson* to apply to "a federal officer or agency"); *Texas v. U.S.*, 86 F. Supp. 3d 591, 643 (S.D. Tex. 2015) (judicial review is allowed "when there has been a clear departure from the agency's statutory authority.") Under *Larson* and its progeny, there is no need for a separate waiver of sovereign immunity under the APA, so long as the allegation involves an agency act in violation of a statutory mandate and so long as the requested relief is not for monetary damages.

The *ultra vires* exception to sovereign immunity requires that there be a plain violation of an unambiguous and mandatory provision of the statute and not simply a dispute over statutory interpretation. *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 293 (5th Cir. 1999). This requirement is viewed against the presumption in favor of reviewability of administrative actions, which can only be overcome by clear and convincing evidence that Congress intended to preclude the suit. *See Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986) (recognizing "strong presumption that Congress intends judicial review of administrative action").

The Fifth Circuit applied the *ultra vires* doctrine in *Manges v. Camp*, a decision recently followed by the Southern District of Texas in *Texas v. United States*, 86 F.Supp.3d at 643 (S.D. Tex. 2015) ("even unreviewable administrative actions may be subject to judicial review . . . when there has been a clear departure from the agency's statutory authority"). The plaintiff in *Manges* sued the

Comptroller of the Currency of the United States for prohibiting him from participating in any manner in the affairs of a bank because he had previously been convicted of making a false statement to the Small Business Administration. *Manges v. Camp*, 474 F.2d 97, 98 (5th Cir. 1973). The Comptroller claimed that a federal statute specifically authorized him to ban an individual from participating in the affairs of a financial institution if this individual "is charged in any information, indictment, or complaint . . . with the commission of . . . a felony involving dishonesty." *Id.* at 100 (citing 12 U.S.C. § 1818(g)(1)). The Fifth Circuit found that the Comptroller's actions were *ultra vires* and that the plaintiff's constitutional claims were reviewable. *Id.* at 101. The Court reasoned that the text of the statute and its legislative history demonstrated that it was not Congress's intent to prevent individuals who were at some point in their lives charged with a felony involving a breach of trust from participating in running financial institutions. *Id.* at 100. Rather, the statute only prohibited a person from participating in the affairs of a national bank while facing charges for a felony involving dishonesty. *Id.* at 100-01. In addition, the Court found that the Commissioner's actions required closer scrutiny since they involved potential violations of "individual rights guaranteed under the Constitution[.]" *Id.* at 100.

Anthonia's case is far stronger than *Manges*. While the statute in *Manges* on its face could be read different ways, CAFRA unambiguously commands that the Government "***shall promptly release the property*** pursuant to regulations promulgated by the Attorney General and ***may not take any further action to effect***

the civil forfeiture of such property in connection with the underlying offense." 18 U.S.C. § 983(a)(3)(B)(ii) (emphasis added). By conditioning the release of seized property on the signing of a Hold Harmless Agreement, and by threatening to initiate administrative forfeiture proceedings if the signed agreement is not returned, the CBP commits an *ultra vires* act that plainly violates the unambiguous and mandatory statutory language to "release the property" without "tak[ing] any further action to effect the civil forfeiture of such property." *Id.* Indeed, nothing in the statute or the underlying regulation authorizes the challenged agency actions of imposing an additional condition of signing a Hold Harmless Agreement before property will be returned, and threatening to re-initiate administrative forfeiture proceedings against the property if the agreement is not signed.

Moreover, the *ultra vires* exception to sovereign immunity has particular applicability where "the lawlessness of the agency's action [is] conceded by the agency itself," because it demonstrates that it is not simply a dispute over statutory interpretation. *Am. Airlines*, 176 F.3d at 293. Here, the government actually admits that the statute does not authorize these actions and implicitly concedes that they are *ultra vires*. As the government admits, the relevant "provisions [of CAFRA] fail to even indirectly address the issue of hold harmless agreements." Defs.' Br. 11. That is itself an admission that CBP's challenged conduct is *ultra vires*. It is a well-established canon of statutory construction to not read the absence of a prohibition as an implied delegation of authority, because federal agencies only derive power from specific delegations of authority by Congress. *See*, *e.g.*, *Luminant Generation*

Co. v. EPA, 675 F.3d 917, 932 (5th Cir. 2012) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.") (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). The government's concession that the statute does not even contemplate requiring the signing of Hold Harmless Agreements as a condition of returning seized property is an admission of its own lawlessness. This admission of lawless conduct by the agency further establishes the basis for *ultra vires* review by demonstrating that this is not simply a dispute over statutory interpretation, but a challenge to action that even the government implicitly concedes is not addressed, let alone authorized, by the governing law. *See Am. Airlines*, 176 F.3d at 293.

The government argues that because there is some leeway on when and how to return property, it is impossible to tell whether the statute does or does not authorize conditioning the release of property on Hold Harmless Agreements. Defs.' Br. 18. But this reasoning is inconsistent with the actual statutory language directing the property to be released without the agency taking any further actions to forfeit the property, and it runs counter to the canons of statutory construction on whether the absence of a prohibition is an authorization, as noted above. As the Fifth Circuit found, so long as the claim for an *ultra vires* statutory violation deals with plain violations of unambiguous statutory provisions—as is the case here with CAFRA—the court should review it. *See Am. Airlines*, 176 F.3d at 293.

Similarly, the government claims that, by requiring claimants to sign Hold Harmless Agreements and return them within a specified period of time, CBP is simply following 28 C.F.R. § 8.13(b), which authorizes the agency to classify the property as abandoned if a property owner fails to timely contact the property custodian. Defs.' Br. 19. This is disingenuous at best. Requiring someone to sign and return a Hold Harmless Agreement—which waives their legal and constitutional rights, and imposes new legal liabilities—is a far cry from "informing that person to contact the property custodian within a specified period for release of the property, and further informing that person that failure to contact the property custodian within the specified period for release of the property may result in initiation of abandonment proceedings against the property pursuant to 41 CFR part 128–48." 28 C.F.R. § 8.13(b). In fact, 28 C.F.R. § 8.13 does not mention anything about conditioning the release of property on claimants signing Hold Harmless Agreements, nor does it authorize threatening to begin administrative forfeiture proceedings—different from abandonment proceedings—if the agreement is not signed. The minimal requirements in 28 C.F.R. § 8.13 exist to ensure that the government is not left holding property indefinitely and that the property is returned to the correct person. These provisions certainly do not authorize extracting additional concessions and waivers of legal and constitutional rights from property owners.

Count I is reviewable under *Larson* and its progeny. CAFRA's directive to release the property without taking any further action to forfeit the property is

clear. Just because some discretion is necessarily allowed in precisely how and when seized property is returned to property owners does not mean that CBP can invent and impose entirely new conditions on the return of property and threaten to permanently forfeit the property if those conditions are not satisfied. The Complaint states that both CBP and its officers violated both the statute and its related regulation when they did not promptly release the property but instead conditioned its return on the signing of the Hold Harmless Agreement. Because the Complaint alleges CBP's actions to be *ultra vires* in violation of the plain language of the statute, and because monetary damages are not sought, Count I is not barred by sovereign immunity.

2. Count II was properly brought "directly under the Constitution."

Count II—for CBP's and its officers' constitutional violations—also falls within a common-law exception to sovereign immunity. This claim focuses on how CBP and its officers violated Anthonia's and the putative class members' Fifth Amendment rights by unconstitutionally conditioning the return of property on the waiver of constitutional rights. Compl. ¶ 157. A challenge to this kind of behavior—an agency act in violation of the Constitution— can be properly brought without regard to sovereign immunity, so long as it is for injunctive and declaratory relief and not damages. As the U.S. Supreme Court stated in *Bell v. Hood*, "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[.]" 327 U.S. 678, 684 (1946); *see also Porter v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979)

(acknowledging the right to sue "directly under the constitution" for injunctive relief against violations of constitutional rights); *Anibowei v. Sessions*, No. 3:16–CV–3495–D, 2018 WL 1477242, at *2 (N.D. Tex. Mar. 27, 2018) (discussing how "individuals have a right to sue directly under the Constitution to enjoin . . . federal officials from violating their constitutional rights") (citations and quotation marks omitted).

Defendants attempt to counter this authority by citing a series of cases that involved claims for monetary damages rather than injunctive and declaratory relief. Defs.' Br. 20 (citing *Garcia v. United States,* 666 F.2d 960 (5th Cir. 1982), *Amen Ra v. IRS,* No. 14–CV–8295, 2016 U.S. Dist. LEXIS 171469 (N.D. Tex. Mar. 24, 2006), and *DeArchibold v. United States*, No. 3:03–CV–1871–N, 2006 U.S. Dist. LEXIS 12729 (N.D. Tex. Mar. 24, 2006) for the proposition that Count II cannot be brought directly under the Constitution). This misses the point completely: the plaintiffs in *Garcia*, *Amen Ra*, and *DeArchibold* could not bring claims for damages, but they could have brought claims for declaratory and injunctive relief. The U.S. Supreme Court and the Fifth Circuit have long found that claims for injunctive and declaratory relief against agency actions can be brought directly under the Constitution. *See*, *e.g.*, *Porter*, 592 F.2d at 781 (noting that, "[w]hether Porter sues directly under the constitution to enjoin agency action, or instead asks a federal court to 'set aside' the agency actions as 'contrary to (her) constitutional right(s)' under [the APA], the role of the district court is the same"). This exception to sovereign immunity does not apply to claims for monetary damages, as the cases

cited by the government demonstrate. But again, Count II is not a claim for monetary damages; instead, it specifically requests injunctive and declaratory relief, thereby falling precisely within the authorized framework.

Accordingly, neither of Anthonia's class-action claims for injunctive and declaratory relief is barred by sovereign immunity, regardless of whether they cited the explicit waiver of sovereign immunity in Section 702 of the APA.

C. This Court has federal question jurisdiction and the power to issue declaratory judgments in this case.

Piggybacking on their argument that the class claims lack sovereign immunity, Defendants further dispute whether 28 U.S.C. § 1331 and the Declaratory Judgment Act provide an independent basis for jurisdiction.[5] Defs.' Br. 19. These add-on jurisdictional arguments fail because the class claims have multiple paths through sovereign immunity, as demonstrated *supra* in Part III.A-B. Because Defendants are wrong on that point, the remainder of their arguments completely miss the mark. First, this Court plainly has jurisdiction to review Anthonia's class-action claims under 28 U.S.C. § 1331. Second, this Court's power to

[5] Defendants cite to *Mahogany v. Louisiana State Supreme Court* as support for their argument that this Court has no jurisdiction over Anthonia's class claims. Defs.' Br. 19. But *Mahogany* is inapposite; the petitioner in that case sued the State of Louisiana and the Louisiana Supreme Court and was precluded from doing so by the Eleventh Amendment. 262 F. App'x 636, 637 n.2 (5th Cir. 2008). Unlike the claims of the petitioner in *Mahogany*, Anthonia's claims have no such bar. As discussed *supra* in Part III.A-B, the law is clear that Section 702 of the APA provides a waiver of sovereign immunity and that she can also bring her challenges to an *ultra vires* agency action as an exception to sovereign immunity and "directly under the Constitution."

issue declaratory judgments against CBP and its officers under the Declaratory Judgment Act is also clear.

1. This Court has federal question jurisdiction under 28 U.S.C. § 1331.

This Court clearly has jurisdiction to review Anthonia's class-action claims under 28 U.S.C. § 1331. As the U.S. Supreme Court stated in *Califano v. Sanders*, "when constitutional questions are in issue, the availability of judicial review is presumed." 430 U.S. 99, 109 (1977); *see also Valdez v. Astrue*, No 3:11–CV–883–K–BK, 2011 WL 5525751, at *2 (N.D. Tex. Oct. 17, 2011) (discussing how under *Califano*, availability of judicial review is presumed for constitutional questions) (recommendations adopted by *Valdez v. Astrue*, No. 3:11–CV–883–K, 2011 WL 5529806 (N.D. Tex. Nov. 10, 2011)). In addition, the Court in *Califano* held that even when no constitutional questions are raised, the fact that Congress eliminated the requirement of a specified amount in controversy means that it intended "to confer jurisdiction on federal courts to review agency action." *Califano,* 430 U.S. at 105. As such, both class claims are properly before this Court under Section 1331.

2. Anthonia is properly requesting relief under the Declaratory Judgment Act.

Anthonia has also properly requested relief for both of her class-action claims under the Declaratory Judgment Act ("DJA"). Federal Courts can issue declaratory judgments provided there is an actual dispute between adverse litigants and provided there is a substantial likelihood that a favorable decision would bring about some change. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240–41 (1937).

As discussed in Part I.A, *supra*, there is an actual dispute between Anthonia and CBP. Even though the money initially seized was returned to her, she is still owed interest for all the time that she was not able to use it. Also, as discussed in Part II, *supra*, even if Anthonia no longer has an actual dispute with CBP, or CBP returns her interest to her at a later date, her claims relate back to the date when the Complaint and Motion for Class Certification were filed (May 3, 2018).

In addition, a favorable decision by this Court declaring CBP's conduct to be unlawful and unconstitutional and enjoining CBP from continuing to engage in this conduct would obviously bring about change, providing substantial relief to the class. For example, if this Court declares that CBP's policy or practice of conditioning the release of property on signing Hold Harmless Agreements waiving constitutional rights is in violation of CAFRA and of the Constitution, then CBP will no longer be able to force claimants to sign such agreements to get back property to which they are legally entitled. In addition, members of the class who previously signed these Hold Harmless Agreements would be relieved of their legal obligations under those agreements, and those who had property withheld for failure to sign and return a Hold Harmless Agreement would be entitled to have their property returned.

Thus, Anthonia has properly invoked the jurisdiction of this Court, provided multiple grounds for the waiver of sovereign immunity, and properly invoked the Declaratory Judgment Act for the equitable remedies she seeks.

IV. The Complaint States a Viable Class Claim for Violations of Substantive Due Process Rights Under the Unconstitutional Conditions Doctrine.

The Complaint presents a viable class claim (Count II) that the government's actions violated substantive due process by imposing an unconstitutional condition. In its attempt to attack the viability of this claim, the government fails to identify this alleged failure to plead a claim under the unconstitutional conditions doctrine and evidently mistakes this for a procedural due-process or equal-protection claim. *See* Defs.' Br. 21–22.

A. Count II presents a viable and colorable substantive due process claim under the unconstitutional conditions doctrine.

Defendants claim that: "Plaintiff has not stated any cognizable constitutional violations because Defendants provide sufficient notice to satisfy claimants' due process rights." Defs.' Br. 21. Defendants mistake the nature of the constitutional claims in Count II, apparently believing them to be *procedural* Due Process claims.[6] Defs.' Br. 21–22. But Count II of the Complaint easily satisfies the burden to state a

[6] In addition, Defendants also argue that Anthonia has no colorable equal protection class claims. Defs.' Br. 21–22. But the Complaint never alleges such claims. Instead, it states that if Claimants were to sign a Hold Harmless Agreement, they would be waiving their constitutional rights, including their First Amendment right to petition the government for a redress of grievances, procedural due process rights, and equal protection rights, among others. Compl. ¶ 107. But these are not claims. These are simply examples of how requiring claimants to sign these Hold Harmless Agreements imposes an unconstitutional condition by requiring claimants to waive their constitutional rights. As such, *Garza v. Clinton*, Civ. A. No. H-10-0049, 2010 WL 5464263 (S.D. Tex. Dec. 29, 2010) (dealing with procedural due process and equal protection arguments) and *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (dealing with equal protection arguments) are simply inapplicable to Anthonia's unconstitutional conditions claim.

viable *substantive* Due Process class claim, namely for unconstitutionally conditioning the release of seized property to which claimants are legally entitled on their signing of a Hold Harmless Agreement. *See* Compl. ¶¶ 155–63.

The unconstitutional conditions doctrine provides that "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (internal quotation omitted). This doctrine is an "overarching principle . . . that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Id.* Further, when the government forces someone to surrender one constitutional right for another, as it does here, that falls into a special category of unconstitutional conditions cases in which no consideration of the government's asserted interests is required because no interest can possibly justify such a condition. *See*, *e.g.*, *Simmons v. United States*, 390 U.S. 377, 394 (1968) (noting that in "a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. . . . In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.")

To be colorable, a constitutional claim must be more than mere conclusory allegations of due process violations. *Robertson v. Bowen,* 803 F.2d 808, 810 (5th Cir. 1986). In other words, the claim must be "not wholly insubstantial, immaterial, or frivolous." *Ramirez v. Colvin*, No. EP-15–CV–127–ATB, 2016 WL 94145, at *3 (W.D. Tex. Jan. 7, 2016) (citing *Klemm v. Astrue*, 543 F.3d 1139, 1144 (9th Cir.

2008)) (quotation marks omitted).[7] The Fifth Circuit has held that a colorable constitutional claim can be found in a situation similar to Anthonia's. In *Worldwide Parking v. New Orleans City*, it found that if a plaintiff accurately alleged that it was the lowest bidder for a city contract and a statute required the contract to be awarded to the lowest bidder, then the plaintiff stated a viable constitutional claim for a violation of its due-process rights when it was not awarded the contract. 123 F. App'x 606, 608 (5th Cir. 2005).

Consistent with the Fifth Circuit's reasoning in *Worldwide Parking*, Anthonia alleged a viable and colorable constitutional claim. She showed that the plain language of the statute required CBP to promptly release the property without taking any further actions to forfeit the property. She also showed that CBP failed to do so and instead demanded that she and others similarly situated sign Hold Harmless Agreements waiving their constitutional rights in order to get back their seized property. These are more than mere conclusory allegations of unconstitutionality. Together, they state a colorable claim for a violation of Anthonia's and other putative class members' constitutional rights.

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[7] *Hearth, Inc. v. Department of Public Welfare*, cited by Defendants, is inapplicable. There, the Fifth Circuit refused to recognize a cause of action in a case in which plaintiffs were asking, without relying on any statute or common-law doctrine, to create a remedy out of whole cloth. 617 F.2d 381, 382 (5th Cir. 1980) (reasoning that "appellant does not rely on any statute or common law doctrine which might authorize such a suit"). Anthonia, however, bring her claims under both the APA and under the common-law doctrines of *ultra vires* agency action and "directly under the Constitution." As such, her case is reviewable by this Court.

B. Congress could not constitutionally impose the conditions of the Hold Harmless Agreement directly on claimants to seized property.

Defendants next argue that they have not imposed unconstitutional conditions because the conditions imposed by the Hold Harmless Agreement could constitutionally be imposed directly by Congress through limiting or eliminating waivers of sovereign immunity. Defs.' Br. 22–23. This is flatly wrong for three reasons. First, Congress' power to limit or remove sovereign immunity for claims seeking monetary damages would only affect one of the many legal consequences of the Hold Harmless Agreements. Second, Congress could not constitutionally impose the same legal consequences of the Hold Harmless Agreement on property claimants as a condition of returning property to which they are legally entitled. Third, Congress could not actually eliminate common-law waivers to sovereign immunity for non-monetary claims such as the *ultra vires* exception or lawsuits brought "directly under the Constitution."

1. The government fails to consider the many conditions imposed by the Hold Harmless Agreements that would be unaffected by limiting or eliminating waivers of sovereign immunity.

The government's argument that Congress could impose the same conditions directly by limiting or removing waivers of sovereign immunity is badly flawed because it focuses on just one consequence of signing the Hold Harmless Agreement—filing a lawsuit for monetary damages—and ignores the wide variety of "actions, suits, proceedings" or "claims" related to the seizure and detention of their property that signatories may be prevented from bringing under the agreement, as well as the new legal liabilities imposed. Compl. ¶¶ 92-103, Ex. D. The Complaint

identifies numerous legal consequences of signing the Hold Harmless Agreement that go beyond simply preventing claimants from bringing lawsuits for monetary damages, including:

- Waiving any claim to interest on seized currency (even though interest is actually part of the *res* and must be returned, *see supra* Part I.A);
- Waiving any claim to attorney's fees or legal costs;
- Releasing and forever discharging the government and its officers from all "actions, suits, proceedings" or "claims" connected to the seizure, detention, or release of their property, including waiving the ability to do any of the following:
    - File a lawsuit for injunctive or declaratory relief to vindicate any rights that were violated during the seizure of the property;
    - Initiate administrative proceedings with CBP or other federal agencies—including:
        - Initiate administrative proceedings by requesting public records under the Freedom of Information Act ("FOIA"); and
        - Initiate any administrative proceeding related to whether one is targeted for additional screening by CBP or other federal agencies;
    - Appeal any administrative proceedings related to the seizure, detention, or release of their property; and

- File a lawsuit challenging the results of administrative proceedings related to the seizure, detention or release of their property, including suing over the government's failure to comply with FOIA;

- Indemnifying the government and its officers for any claims brought by third parties related to the seizure, detention and release of their property; and
- Agreeing to reimburse the government and its officers from any expenses incurred enforcing the Hold Harmless Agreement.

Compl. ¶¶ 93–101, 103, Ex. D.

2. If Congress directly imposed the same conditions on claimants to seized property, it would be just as unconstitutional as CBP doing so through Hold Harmless Agreements.

The government's claim that Congress could directly impose all of these new legal liabilities on property claimants as a condition of returning property to which they are legally entitled, without so much as notice and a hearing—which is effectively what occurs when claimants are told they must sign the Hold Harmless Agreement to get their property back—is wholly unsupported in the government's brief and flies in the face of bedrock constitutional principles of due process and equal protection of the law. This would create the very same unconstitutional condition that plaintiffs are challenging, just via a different procedural mechanism. If Congress were to directly prevent property claimants from initiating any type of legal, administrative, or other "actions, suits, proceedings" or "claims" to vindicate

their rights, as laid out in the Hold Harmless Agreements, as a condition of returning property to which they are legally entitled, that would be a textbook unconstitutional condition. *See, e.g.*, *Dep't of Tex., Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n*, 760 F.3d 427, 438 (5th Cir. 2014) ("Congress . . . may not condition the conferral of a government benefit on the forfeiture of a constitutional right"). Each of these potential "actions, suits, proceedings" or "claims" represents a claimant's First Amendment right to petition the government for redress of grievances, as well as their right to due process and equal protection under the law.

The government cites *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, in support of this argument, but the Supreme Court's ruling in that case turned on a holding that the condition imposed by the Solomon Amendment (college campus access by military recruiters) did *not* violate the First Amendment, and thus was not unconstitutional: "Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds." 547 U.S. 47, 60 (2006). As the opinion noted, "there is no dispute in this case that [Congress' constitutional authority to raise and support armies] includes the authority to require campus access for military recruiters." *Id.* at 58.

In contrast, the doctrine of unconstitutional conditions applies in situations in which denying the government benefit "would allow the government to produce a result which (it) could not command directly." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (internal quotation omitted). The situation in *Rumsfeld* was thus wholly

different from the situation in other unconstitutional conditions cases, where the government's actions could not have been directly imposed consistent with the Constitution. *See, e.g., Koontz,* 570 U.S. at 607-08 (reasoning that if a legislature were to violate the Takings Clause by excessively burdening property in a land-use permitting context, it could not use this as a condition for receiving a benefit); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 269 (1974) (holding that a legislature could not condition receiving free medical care on a year's residence in a county, because that would violate equal protection rights and the right to interstate travel); *Perry*, 408 U.S. at 597 (collecting cases in which this principle has been applied in a variety of contexts).

For the same reason, *Rumsfeld* is also unlike this case, where numerous constitutional rights would be infringed if Congress were to directly impose the requirements of the Hold Harmless Agreement as a condition of the return of seized property. Here, Congress would be infringing directly on claimants' First Amendment rights to petition the government for redress of grievances such as by filing lawsuits (including lawsuits seeking declaratory and injunctive relief) and administrative actions or appeals, on claimants' due process rights to notice and an opportunity to be heard, and on claimants' equal protection rights to equal access to the federal courts and federal administrative agencies. In addition, Congress would be depriving claimants, without any notice or an opportunity to be heard, of their legal rights to seek interest, monetary damages, or attorney's fees for anything related to the seizure and detention of their property. And Congress would also be

imposing new legal liabilities on claimants by requiring them to indemnify the federal government against the actions of third parties who might also submit claims for the seized property. Furthermore, if Congress were directly imposing the conditions of the Hold Harmless Agreement in the same manner as CBP, it would be singling out claimants of seized property for this treatment, which would violate their rights to equal protection under the law, and it would be doing so without any due process whatsoever. The government offers no constitutional basis for Congress to impose any of these requirements—unlike in *Rumsfeld*, Congress would certainly not be acting under its broad constitutional authority to raise armies and provide for the common defense—and Plaintiffs are aware of none. Moreover, because forcing claimants to choose between the exercise of their constitutionally protected property rights—such as the right to the possession of their property—and their First and Fifth Amendment rights—including to petition the government for redress of grievances, due process, and equal protection—it would not even matter what interest the government is purportedly advancing because people cannot be forced to sacrifice one constitutional right for another. *See Simmons*, 390 U.S. at 394.

3. Congress does not have power to close common-law exceptions to sovereign immunity.

Moreover, while Congress does have the power to limit suits for *monetary damages* by narrowing or eliminating waivers of sovereign immunity such as the Federal Tort Claims Act or the Tucker Act, it certainly could not similarly limit non-monetary suits bringing *ultra vires* claims or constitutional claims "directly under

the Constitution," both of which are exceptions to sovereign immunity recognized under the common law. *See supra* Part III.B. Nor could Congress simply prevent claimants from seeking the return of the *res* or just compensation for the taking of their property under the Fifth Amendment's Takings Clause. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2425-27 (2015) ("Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.") Thus, Congress does not have the power to completely foreclose all of the "actions, suits, proceedings" or "claims" that signatories to Hold Harmless Agreements are prevented from bringing—let alone impose affirmative legal liabilities such as indemnification—and so could not directly impose the requirements of Hold Harmless Agreements on claimants as the government claims

In her Complaint, Anthonia stated a colorable constitutional claim for violation of her substantive due process rights under the unconstitutional conditions doctrine. To show at this pleading stage that CBP unconstitutionally conditioned the return of property on signing Hold Harmless Agreements, Anthonia provided detailed allegations that CBP conditioned the release of property on signing Hold Harmless Agreements, the actual substance of the Hold Harmless Agreement (and an example agreement), and allegations about the legal consequences of signing the Hold Harmless Agreement, including waiver of

constitutional and other rights and the assumption of new legal liabilities. As such, Count II is properly plead.

CONCLUSION

Defendants' various arguments on mootness, standing, sovereign immunity, jurisdiction, and failure to state a claim are unsupported by the controlling precedent of both the U.S. Supreme Court and the Fifth Circuit. Anthonia's individual claims are not moot because the government has not returned her interest on the seized money and because she continues to be targeted for invasive screenings. Anthonia has standing not only individually but also on behalf of her class under the "relation back" doctrine. Anthonia's class claims—one statutory and one constitutional—are precisely the kinds of non-monetary-damages claims for which sovereign immunity is waived under Section 702 of the APA. Alternatively, these are also the types of claims that can be brought against federal agents and agencies as an *ultra vires* challenge and "directly under the Constitution" without running afoul of sovereign immunity. Anthonia's case also meets the requirements of 28 U.S.C. § 1331 and the Declaratory Judgment Act. Finally, she has also brought viable claims by bringing detailed allegations about the nature of her statutory and constitutional claims. As a result, Defendants' Motion to Dismiss should be denied.

Dated: August 27, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of August, 2018, I electronically filed and served the foregoing Plaintiff's Response in Opposition to Defendants' Motion to Dismiss, using the CM/ECF system upon the counsel of record for the Defendants.

/s/ Dan Alban

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANTHONIA NWAORIE, on behalf of HERSELF and all others similarly situated, *Plaintiff*, v. U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES OF AMERICA; KEVIN McALEENAN, Commissioner, Customs and Border Protection, sued in his official capacity, *Defendants*.	Civil Action No.4:18-CV-1406

DECLARATION OF ANTHONIA NWAORIE
SUBMITTED UNDER RULE 12(B)(1)

I, Anthonia Nwaorie, being of majority age and competent mind, declare as follows:

1. In late May 2018, weeks after I filed this lawsuit on May 3, 2018, the government returned the $41,377 that was seized from me on October 31, 2017. However, the government has not returned any interest accrued over the seven months that it held my money.

2. On June 3, 2018, I traveled to Boston's Logan International Airport from Houston's William P. Hobby airport.

3. On that day, I passed through TSA security twice at Houston's Hobby airport because I left the security area after I learned I had missed my initial flight.

4. Both times, I was subjected to additional screening, including a full-body pat-down, immediately after the TSA screener scanned my ID and boarding pass. Based on how the TSA screener acted, by immediately calling someone over to conduct additional screening, I believe that something about my ID or boarding pass triggered this screening, and that I was flagged for additional screening rather than being randomly selected for additional screening.

5. Because of this experience—coupled with the prior incident in December 2017 when I was returning to the U.S. from Nigeria and was subjected to additional, invasive screening by CBP officers and was told by a CBP officer that this would happen to me every time I travel—I have good reason to believe that I am now being singled out for additional screenings at airports when I travel both domestically and internationally.

6. I plan to return to Nigeria again in October 2018, but I am very concerned that I will once again be targeted for particularly invasive screenings by CBP similar to what I was subjected to the last time I traveled internationally, in December 2017, when my luggage was ransacked by CBP officers and some of my bags were even cut open.

7. I, the declarant, am not currently suffering from any infirmities and am competent to testify to the facts set forth herein.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on: 08/23/18
(date)

ANTHONIA NWAORIE