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

ANTHONIA NWAORIE, on behalf of herself and all others similarly situated,	§	
	§	
Plaintiff,	§	
	§	
	§	**Civil Action No. 4:18-CV-01406**
	§	
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.	§	

DEFENDANTS' AMENDED MOTION TO DISMISS

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Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants United States of America, U.S. Customs and Border Protection ("CBP"), and Kevin McAleenan, in his official capacity as Commissioner of CBP, (collectively "Defendants"), respectfully move to dismiss all of Plaintiff Anthonia Nwaorie's ("Plaintiff") claims for lack of jurisdiction and for failure to state any claims upon which relief can be granted. For the reasons stated below, Defendants respectfully request that the Court grant this Motion, and dismiss Plaintiff's claims with prejudice.

I.
FACTUAL BACKGROUND

Plaintiff Anthonia Nwaorie alleges that on October 31, 2017, CBP officers selected her for currency examination at the George Bush Intercontinental Airport as she sought to leave the United States to travel to Nigeria.[1]

CBP officers asked Nwaorie whether she was carrying more than $10,000.00 and she replied that she had $4,000.00—the amount she carried in her purse.[2] When CBP officers searched Nwaorie's carry-on luggage and purse, they found a total of $41,377.[3] Nwaorie's money is subject to forfeiture because she failed to comply with the reporting provisions of Title 31 U.S.C. § 5316, which require a person to file a report if they are transporting more than $10,000.00 from the United States to Nigeria.[4] The money was seized by CBP officers.[5]

On November 6, 2017, CBP mailed Nwaorie a Notice of Seizure under the Civil Asset Forfeiture Reform Act ("CAFRA"), giving her until December 13, 2017, to respond if she wanted to request a referral to the U.S. Attorney's Office ("USAO") for judicial forfeiture proceedings, among

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[1] Docket Entry (DE) 1 at 13.
[2] *Id.*
[3] *Id.*
[4] Exhibit B; DE 1 Ex. A.
[5] DE 1 at 13.

other options.[6] Nwaorie elected for a judicial forfeiture proceeding under CAFRA, requesting that CBP "send the case to the U.S. Attorney for court action," and filed a CAFRA claim form stating her interest in the seized cash.[7] Nwaorie filed her CAFRA claim form and request for judicial forfeiture proceedings on December 12, 2017. [8] The USAO declined the matter for judicial review. [9]

On April 4, 2018, CBP mailed Nwaorie a letter informing her of the USAO's decision and that it had decided to return to Nwaorie all of the money that had been seized.[10] The letter also informed Nwaorie that by accepting the remission decision, she waived any claim to attorney's fees, interest, or any other relief not specifically provided for in this matter.[11] CBP enclosed a hold harmless agreement, and the letter informed Nwaorie that "[i]f no action is taken within 30 days from the date of this letter, administrative forfeiture proceedings will be initiated."[12] The hold harmless agreement required Nwaorie to agree to forever discharge Defendants from any actions "in connection with the detention, seizure, and/or release by the [CBP] of the above listed property."[13] The agreement also required Nwaorie to "hold and save [Defendants] from any claims by any others . . . in connection with the detention, seizure, and/or release by the [CBP] of the above listed property."[14] Nwaorie did not sign and return the hold harmless agreement. Nevertheless, on or about May 18, 2018, Nwaorie received a refund check for the total amount of money seized.[15]

Nwaorie claims that in 0.01% of CBP seizure cases, the USAO declines to pursue forfeiture or does not timely file a forfeiture complaint.[16] Nwaorie supports her purported class-action claims by

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[6] *Id.* at 15.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 17.
[11] *Id.* at 17-18.
[12] DE 1 Ex. C.
[13] DE 1 Ex. D.
[14] *Id.*
[15] DE 26-1; Exhibit A.
[16] DE 1 at 29.

relying on her speculation that an estimated 0.01% of claimants may have received hold harmless agreements since January 2012.[17]

II.
NATURE AND STAGE OF THE PROCEEDINGS

On May 3, 2018, Nwaorie filed a complaint on behalf of herself and all others similarly situated in the Southern District of Texas, Houston Division. The same day, Nwaorie filed a motion to certify the purported class. Nwaorie alleges in her complaint that CBP has a practice of requiring that claimants sign hold harmless agreements in order to receive seized property governed by §983(a)(3)(B), and such practice violates the CAFRA, 28 C.F.R. § 8.13, and her Fifth Amendment due process rights. Nwaorie asserts both class and individual claims.

With respect to the individual claims, Nwaorie demands the immediate return of her seized property pursuant to Federal Rule of Criminal Procedure 41(g)—though her property was returned on May 22, 2018. Nwaorie also requests declaratory and injunctive relief against Defendants under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, as well as "directly under the Constitution."

Nwaorie brings her purported class claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, as well as "directly under the Constitution."

III.
STANDARD OF REVIEW

A. Fed. R. Civ. P. 12(b)(1)

Dismissal under Fed. R. Civ. P. 12(b)(1) is appropriate where the Court 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."[18] Because the decision relates to the

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[17] *Id.* at 28-29.

[18] *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 494 (5th Cir. 2005) (internal quotations and citations omitted).

court's "very power to hear the case," 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."[19] The Court may dismiss for lack of jurisdiction based on the complaint alone, the complaint supplemented by the undisputed facts in the record, or the complaint, undisputed facts, in addition to the court's resolution of disputed facts.[20] Additionally, "the party seeking to invoke jurisdiction, has the burden of proving the facts necessary to sustain jurisdiction."[21]

B. Fed. R. Civ. P. 12(b)(6)

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is appropriate where a defendant attacks the complaint because it fails to state a legally cognizable claim.[22] A complaint should not be dismissed for failure to state a claim unless it appears that Plaintiff cannot prove any set of facts in support of her claim which would entitle her to relief.[23] "In order to avoid dismissal for failure to state a claim, however, a plaintiff must plead specific facts, not mere conclusory allegations. We will thus not accept as true conclusory allegations or unwarranted deductions of law."[24] In considering a motion to dismiss under Rule 12(b)(6), a district court must limit itself to the contents of the pleadings, including attachments thereto.[25] However, it is proper for

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[19] *Williamson v. Tucker*, 645 F. 2d 404, 413 (5th Cir. 1981).
[20] *Id.*
[21] *Harvey Const. Co. v. Robertson-CECO Corp.*, 10 F.3d 300, 303 (5th Cir. 1994).
[22] *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).
[23] *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000); *Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992).
[24] *Collins*, 224 F.3d at 498 (quoting *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994) (internal citations, quotation marks and ellipses omitted)); *Jackson v. United States*, No. 95-30387, 68 F.3d 471, 1995 WL 581898, at *1 (5th Cir. Sept. 22, 1995) (affirming district court's dismissal of *pro se* complaint); *Baney v. Mukasey*, No. 3:06-CV-2064-L, 2008 WL 706917, at *5 (N.D. Tex. Mar. 14, 2008).
[25] *Collins*, 224 F.3d at 498.

the court to consider documents attached to the motion to dismiss where those documents are referred to in the complaint and are central to the plaintiff's claim.[26]

IV.
ARGUMENT AND AUTHORITIES

This Court should dismiss Nwaorie's individual and class action claims because she failed to exhaust her administrative remedies.

Even if Nwaorie had exhausted, the court lacks jurisdiction over her class action claims because the discretion afforded Defendants under CAFRA protects them from liability pursuant to 5 U.S.C. § 701(a)(2). Since sovereign immunity is not waived under the APA, Nwaorie cannot bring her constitutional claims under the Declaratory Judgments Act or "directly under the Constitution." Finally, Nwaorie cannot meet the requirements of § 702 of the APA, and she cannot assert any viable constitutional violations.

Additionally, the Court should dismiss Nwaorie's individual claims for lack of jurisdiction because Nwaorie lacks standing, her claims are moot, and barred by sovereign immunity. Even if this Court has jurisdiction over her claims, Nwaorie has no claim for declaratory or injunctive relief because she cannot show a substantial likelihood of future injury.

As such, this Court should dismiss her claims for lack of jurisdiction and for failure to state a claim upon which relief can be granted.

A. Plaintiff's Individual and Class Action Claims Are Unexhausted and Must be Dismissed.

Nwaorie's individual and class action claims must be dismissed because she wholly failed to exhaust her administrative remedies.

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[26] *Id* at 498-99.

"The doctrine of exhaustion of administrative remedies is one among related doctrines—including abstention, finality, and ripeness—that govern the timing of federal-court decision making."[27] "The jurisprudential exhaustion doctrine is a 'long settled rule of judicial administration [which mandates] that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'"[28] The doctrine serves:

> (1) to avoid premature interruption of the administrative process; (2) to let the agency develop the necessary factual background upon which decisions should be based; (3) to permit the agency to exercise its discretion or apply its expertise; (4) to improve the efficiency of the administrative process; (5) to conserve scarce judicial resources, since the complaining party may be successful in vindicating rights in the administrative process and the courts may never have to intervene; (6) to give the agency a chance to discover and correct its own errors; and (7) to avoid the possibility that "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures."[29]

"While courts have discretion in applying the jurisprudential exhaustion requirement, the exercise of that discretion is circumscribed in that a court *should only* excuse a claimant's failure to exhaust administrative remedies in *extraordinary circumstances*."[30] "Traditional circumstances in which courts have excused a claimant's failure to exhaust administrative remedies include situations in which (1) the unexhausted administrative remedy would be plainly inadequate, (2) the claimant has made a constitutional challenge that would remain standing after exhaustion of the administrative remedy, (3) the adequacy of the administrative remedy is essentially coextensive with the merits of the claim (e.g., the claimant contends that the administrative process itself is unlawful), and (4) exhaustion of

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[27] *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *superseded by statute on other grounds*.
[28] *Taylor v. U.S. Treasury Dep't*, 127 F.3d 470, 476 (5th Cir. 1997) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938)).
[29] *Id.* at 476–77 (quoting *Patsy v. Florida Int'l Univ.*, 634 F.2d 900, 903 (5th Cir. Jan. 1981) (en banc), *reversed and remanded on other grounds*, *Patsy v. Bd. Of Regents*, 457 U.S. 496 (1982).
[30] *Id.* at 477 (emphasis added).

administrative remedies would be futile because the administrative agency will clearly reject the claim."[31]

In her individual claims, Nwaorie seeks two forms of relief: 1) for the return of her property under Count III, and 2) to be taken off of a screening list under Count IV.[32] Nwaorie failed to exhaust either claim. In an instance where an individual has property seized and makes a claim pursuant to CAFRA, seeking initiation of a civil judicial forfeiture proceeding, if the USAO formally declines to file a complaint before the statutorily prescribed deadline under 18 U.S.C. § 983, the government is required to return the property to the claimant, absent another lawful basis for retaining the property. If the property is not returned, the individual may contact CBP to request that CBP take administrative action to return the property.[33] Nwaorie never submitted such a request for administrative return of the property prior to seeking judicial recourse in this action. As such, she failed to exhaust her administrative remedies and cannot bring suit in Federal Court.

Under Count IV, Nwaorie claims that she should not be subjected to additional screening and should be taken off of CBP's alleged screening list. An individual who would like their screening concerns to be reviewed may go through the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP).[34] DHS TRIP serves an important function by providing the traveling public with a single point of contact for a wide variety of complaints and inquiries regarding travel difficulties such as delayed or denied entry into the United States at a port of entry.[35] It is undisputed

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[31] *Id.*
[32] DE 1 at 33.
[33] Ex. C
[34] 49 U.S.C. § 44926(a); https://www.dhs.gov/dhs-trip (DHS TRIP Site); https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhs002b-trip-april2018.pdf (DHS TRIP Privacy Impact Assessment dated April 23, 2018).
[35] Step 1: Should I Use DHS TRIP?, available at https://www.dhs.gov/step-1-should-i-use-dhs-trip (last checked March 20, 2019)

that Nwaorie has yet to file a request under the DHS TRIP process.[36] Nwaorie's claim, therefore, remains unexhausted and must be dismissed.[37]

Nwaorie has also brought two class action claims to 1) void signed hold harmless agreements under Count I, and 2) and to cease hold harmless agreements under Count II.[38] An individual who would like to challenge the hold harmless agreements can request that CBP change or void a hold harmless agreement.[39] Nwaorie is an inadequate purported class representative because, as will be later argued, Nwaorie lacks standing to bring these class action claims for prospective equitable relief. However, even if Nwaorie did have standing, she wholly failed to exhaust her administrative remedies because she never addressed with CBP her concerns about signing the hold harmless agreement prior to filing the subject judicial complaint. Nwaorie's class action claims, therefore, remain unexhausted and must be dismissed.

Finally, when it comes to a class action, it is generally agreed that at least one of the purported representatives of a class must have exhausted their administrative remedies.[40] Without exhaustion, the agency is denied the opportunity to exercise administrative reform and review at the Federal Court is premature.[41] Nwaorie is the only purported representative of the class, and she failed to exhaust her administrative remedies. There is no representative of the purported class who has exhausted their administrative remedies, as such, the class action claims must be dismissed.

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[36] DE 1 at 41.
[37] *See, Shearson v Holder*, 725 F.3d 588, 594 (6th Cir. 2013) (requiring Plaintiff to exhaust her administrative remedies through the DHS TRIP program).
[38] DE 1 at 33.
[39] Ex. C
[40] *Olivares v. Martin*, 555 F.2d 1192, 1197 (5th Cir. 1977) *citing Phillips v. Klassen*, 163 U.S. App. D.C. 360, 502 F.2d 362, 369, *cert. denied*, 419 U.S. 996, 95 S. Ct. 309, 42 L. Ed. 2d 269 (1974); *cf. Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498-99 (5th Cir. 1968) (exhaustion of remedies requirement satisfied for class action if named plaintiff representing class exhausted remedies). *See also Swain v. Hoffman*, 547 F.2d 921, 924 (5th Cir. 1977).
[41] *Olivares* at 1197; *see also Franks v. Bowman Transportation Co.*, 495 F.2d 398, 420 (5th Cir. 1974).

B. Plaintiff's Class Action Claims – Counts I and II.

i. Plaintiff failed to demonstrate waiver of sovereign immunity and lacks standing to bring her class action claims.

Nwaorie has no claim for declaratory or injunctive relief because the DJA, 28 U.S.C. §§ 2201, 2202, does not provide an independent basis for exercising jurisdiction.[42] Instead, the DJA provides an additional remedy where jurisdiction already exists.[43] Nwaorie's citation to the DJA coupled with 28 U.S.C. § 1331 does not establish jurisdiction.[44] Because Nwaorie failed to allege a valid waiver of sovereign immunity under the APA, Nwaorie has no independent basis for jurisdiction. Thus, the Court lacks jurisdiction to authorize declaratory or injunctive relief under the DJA.

Additionally, Nwaorie has no claim for injunctive relief because she has not shown—and she cannot show—a substantial likelihood of future injury caused by Defendant.[45] A dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the context of "cases" and "controversies" within the scope of the Constitution.[46] The Supreme Court has previously explained, "[t]he equitable remedy [of prospective relief] is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged *again*—a 'likelihood of substantial and immediate irreparable injury.'"[47]

Nwaorie's individual claim is moot because she has suffered no cognizable injury—Defendants returned her property without requiring a hold harmless signature. Moreover, Nwaorie

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[42] *In re B-727 Aircraft Serial No. 21010*, 272 F.3d 264, 270 (5th Cir. 2001).
[43] *Id.*
[44] *Mahogany v. La. State Supreme Court*, 262 F. App'x 636, 637 n.2 (5th Cir. 2008) (noting that while 28 U.S.C. §§ 1331 and 2201 provide federal question jurisdiction and declaratory relief, they do not establish an independent private right of action).
[45] *Fabian v. Dunn*, No. SA-08-CV-269, 2009 WL 2567866, *5 (W.D. Tex. Aug. 14, 2009) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983).
[46] *Alvarez v. Smith*, 558 U.S. 87, 93 (2009).
[47] *Lyons*, 461 U.S. at 111 (emphasis added).

cannot show that any of the purported class that may have received hold harmless signatures suffered cognizable injury.

Whether CBP ever seizes property from Nwaorie in the future is purely speculative, as is whether such property would fall within the purview of § 983(a)(3)(B).[48] There is no non-frivolous argument to the contrary.[49]

Consequently, Nwaorie lacks standing to seek prospective equitable relief regarding Defendants' alleged policy. Fifth Circuit precedent requires that Nwaorie's purported class claims be dismissed insofar as they seek either to enjoin Defendants' future use of this alleged policy or to have the policy declared unconstitutional or unlawful, without reaching the class certification issues with respect to such relief.[50]

ii. Sovereign immunity bars Plaintiff's class-action claims.

This Court lacks jurisdiction over Nwaorie's class-action complaint because sovereign immunity shields Defendants from liability.

The provisions of CAFRA, upon which Nwaorie rests her claim, provide vague instruction, and expressly afford agencies discretion in conditioning the release of seized property. Moreover, such provisions fail to even indirectly address the issue of hold harmless agreements.

CAFRA does not provide a meaningful standard against which to judge the agency's exercise of discretion, and this Court should dismiss Nwaorie's class-action complaint pursuant to 5 U.S.C. §701(a)(2). Furthermore, this Court does not have jurisdiction pursuant to the Declaratory Judgment

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[48] at 106 n.7 (explaining that in order "to have a case or controversy with the City that could sustain Count V, Lyons would have to credibly allege that he faced a realistic threat from the future application of the City's policy," and, therefore, Lyons would have to demonstrate that he, himself, will not only again be stopped by the police but will be choked without any provocation or legal excuse")

[49] *See* Fed. R. Civ. P. 11.

[50] *James v. City of Dallas, Tex.*, 254 F.3d 551, 563 (5th Cir. 2001) (explaining that "at least one named Plaintiff must have standing to seek injunctive relief on each of the claims against" the defendants and that standing is examined claim by claim with respect to each form of relief).

Act—a declaratory judgment claim is not jurisdiction-conferring.[51] Similarly, Nwaorie cannot obtain jurisdiction over her claim "directly under the Constitution" because she has not asserted a proper basis for jurisdiction.[52]

a. Defendants have immunity under the APA because CAFRA provides no meaningful standard upon which to judge Defendants' exercise of discretion.

This Court lacks jurisdiction over Nwaorie's class-action complaint under the APA because the discretion afforded CBP in how it returns seized property shields it from liability. While the APA generally provides a waiver against sovereign immunity, the APA is inapplicable to the extent that "agency action is committed to agency discretion by law."[53] An agency's action is "committed to discretion" where the statute provides the court no meaningful standard against which to judge the agency's compliance.[54] In other words, if the statute indicates an intent to circumscribe agency enforcement discretion—and it has provided meaningful standards for defining the limits of that discretion—courts may demand agencies to follow that law.[55] Otherwise, if the statutory language is susceptible to a variety of interpretations, agency decisions are discretionary and immune from suit.[56]

In relevant part, CAFRA states that: if the Government does not—before the time for filing a complaint has expired—take the steps necessary to preserve its right to maintain custody of the property, "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."[57] The Attorney General's regulations fall under 28 C.F.R. § 8.13, which states:

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[51] *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 278 (5th Cir. 2010).
[52] *Garcia v. United States*, 666 F.2d 960, 966 (5th Cir. 1982).
[53] 5 U.S.C. § 701(a)(2) (2018).
[54] *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).
[55] *Id.* at 834-35.
[56] *Electricities of North Carolina, Inc. v. Southeastern Power Admin.*, 774 F.2d 1262, 1266 (4th Cir. 1985).
[57] 18 U.S.C. § 983(a)(3)(B)(ii)(II) (2018).

> [i]f, under 18 U.S.C. § 983(a)(3), the United States is required to return seized property, the U.S. Attorney in charge of the matter shall immediately notify the appropriate seizing agency that the 90-day deadline was not met. Under this subsection, the United States is not required to return property for which it has an independent basis for continued custody, including but not limited to contraband or evidence of a violation of law.[58]

The provision goes on to instruct:

> [u]pon becoming aware that the seized property must be released, the agency shall promptly notify the person with a right to immediate possession of the property, 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.[59]

Section 8.13(c) further states that the "property custodian shall have the right to require presentation of proper identification and to verify the identity of the person who seeks the release of property."[60]

For example, statutory duties of timeliness that do not establish inferable deadlines are discretionary.[61] In *American Canoe*, two nonprofits dedicated to preserving waterways brought suit against the United States Environmental Protection Agency ("EPA") asserting that the EPA failed to perform its duties pursuant to the Clean Water Act ("CWA").[62] The nonprofits alleged that the EPA injured their aesthetic and recreational interests by failing to identify and properly restore the State's most heavily polluted waters as mandated by the CWA.[63] In one count, the nonprofits' complaint challenged the EPA's failure to review the State's continuing planning process ("CPP") from "time to time" pursuant to § 1313(e) of the CWA.[64] The Eastern District of Virginia Court found that the

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[58] 28 C.F.R. § 8.13(a) (2018).
[59] *Id.* at § 8.13(b).
[60] *Id.* at § 8.13(c).
[61] *American Canoe Ass'n v. United States EPA*, 30 F. Supp. 2d 908, 927 n. 20 (E.D. Va. 1998).
[62] *Id.* at 911.
[63] *Id.* at 912.
[64] *Id.* at 923.

CWA's requirement to review "from time to time" left the timing of such reviews to agency discretion.[65] The court found it impossible to know what interval "time to time" represented.[66] The CWA set out a duty to review a state's initial CPP within 30 days of submission, and it required states to submit those initial CPPs within 120 days after October 18.[67] However, these fixed deadlines for initial CPPs did not create an inferable timeframe for subsequent periodic review imagined by the statute.[68] Accordingly, the court found the duty of timeliness committed solely to agency discretion and thus unreviewable under § 701(a)(2) of the APA.[69]

Since § 983(a)(3) and § 8.13 provide no meaningful standard to define the limits of Defendants' exercise of discretion regarding its hold harmless policy, this Court should dismiss Nwaorie's claim under the APA. While there are no cases that specifically interpret this term under CAFRA, the Court can look to *American Canoe* for reference. Similar to *American Canoe*, where "time to time" did not provide a standard to judge the EPA's discretion in when it reviews CPPs, here "promptly release" does not provide a standard to judge Defendants' discretion in sending hold harmless agreements before returning property. In *American Canoe*, the initial deadlines of submission did not create an inferable deadline for subsequent periodic review. Likewise, here the U.S. Attorney's initial 90-day deadline to seek judicial review does not create an inferable standard for subsequent release policies. Since "promptly release" is vague, undefined by CAFRA, and susceptible to a variety of interpretations, CAFRA provides no meaningful standard against which to judge Defendants' compliance.[70] Consequently, § 983(a)(3) and § 8.13 do not create nondiscretionary duties, and any

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[65] *Id.* at 924.
[66] *Id.* at 925.
[67] *Id.* at 923.
[68] *Id.* at 927 n. 20.
[69] *Id.*
[70] Indeed, a leading authority on CAFRA described this phrase as "a study in vagueness." Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. Legis. 97, 145 (2001); *see In re Funds on Deposit*, 919 F. Supp. 2d 169, 172 (D. Mass. 2012) (describing Cassella's article as "best set[ing] forth" the "history and purpose of CAFRA").

delay created by Defendants' hold harmless policy remains within their discretion pursuant to § 701(a)(2). Thus, as in *American Canoe*, this Court should find Nwaorie's claim precluded under § 701(a)(2) of the APA.

b. Plaintiff fails to meet the requirements under 5 U.S.C. §704 (a)(2).

Even if § 701(a)(2) did not bar jurisdiction, Nwaorie cannot establish jurisdiction because Defendants' hold harmless policy does not meet the requirements of § 702. To have sovereign immunity waived under § 702, the plaintiff must demonstrate whether the challenged agency action meets the requirements of § 702.[71]

First, § 702 requires that the challenged practice constitute an "agency action" within the meaning of 5 U.S.C. § 551(13).[72] "Agency action" includes "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13) (2018). Second, the plaintiff must show that she 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."[73] Otherwise, the plaintiff's arguments are meritless and barred by sovereign immunity.[74]

Where, as here, Nwaorie seeks to show she was "adversely affected or aggrieved . . . within the meaning of a relevant statute," Nwaorie must seek judicial review pursuant to a statutory or non-statutory cause of action completely separate from the general provisions of the APA.[75] In that situation, the rule of "finality" does not apply.[76] For an adverse effect to be "within the meaning of the relevant statute," it must fall within the "zone of interests" that the statute specifically seeks to protect.[77]

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[71] *Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489 (5th Cir. 2014).
[72] *Id.*
[73] *Id.*
[74] *Id.* at 491.
[75] *Alabama-Coushatta Tribe of Tex.*, 757 F.3d at 489.
[76] *Id.*
[77] *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 883 (1990).

Furthermore, the plaintiff must allege that she has been, or in fact will be, harmed by the challenged agency action; it does not suffice that she can imagine circumstances in which she could be affected.[78] In other words, courts should intervene only when a specific agency action has an actual or immediately threatened effect.[79] Allegations of "past, ongoing, and future harms, seeking 'wholesale improvement' and cover actions that have yet to occur" do not challenge specific "agency action" as required under § 702.[80]

Nwaorie likely seeks judicial review "within the meaning of a relevant statute"—both CAFRA and the non-statutory constitutional claims. Accordingly, Nwaorie must show that Defendants' practice of requesting hold harmless agreements constitute an identifiable "agency action" within the meaning of § 551(13). Nwaorie must show that she and the purported class were "adversely affected or aggrieved" by Defendants' practice of requesting hold harmless agreements within the meaning of CAFRA and the Due Process Clause of the Fifth Amendment.

To identify an agency action under § 551(13), Plaintiff will likely claim that the practice of requesting hold harmless agreements constitutes an agency "sanction," since she will argue it functions as a "condition affecting [her] freedom."[81] Alternatively, she will argue it constitutes a "withholding of property,"[82] or a "withholding of relief."[83] "Relief" includes "the whole or a part of an agency . . . recognition of a . . . right.[84] Otherwise, Nwaorie will assert that the CBP's practice constitutes a "failure to act." A "failure to act" means a failure to take one of the agency actions defined in § 551.[85] Agency actions, including failures to act, are limited to "discrete actions."[86]

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[78] *United States v. S.C.R.A.P.*, 412 U.S. 669, 688-89 (1973).
[79] *Lujan*, 497 U.S. 871 at 893.
[80] *Alabama-Coushatta Tribe of Tex.*, 757 F.3d at 490.
[81] *Id.* at § 551(10)(A).
[82] *Id.* at § 551(10)(D).
[83] *Id.* at § 551(10)(B).
[84] *Id.* at § 551(11)(B).
[85] *Doe v. United States*, 853 F.3d 792, 800 (5th Cir. 2017).
[86] *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61, 124 S. Ct. 2373, 2379, 159 L. Ed. 2d 137 (2004).

Regardless of whether Nwaorie can establish that Defendants' practice of requesting hold harmless agreements constitutes one of the above-mentioned terms, her claim fails because it does not meet the specificity requirement.[87] As established below, Nwaorie's individual claim is moot because she has not suffered past, present, or future injury. In her class-action claim, Nwaorie asserts that—upon "information and belief"—Defendants have "subjected, or will subject, hundreds or even thousands of claimants to [their] unlawful and unconstitutional policy or practice.[88]

However, Nwaorie's argument lacks merit because it constitutes an allegation of "past, ongoing, and future harms, covering actions that have yet to occur."[89] Plaintiff has not identified a class member who has suffered any viable injury resulting from Defendants' practice of requesting hold harmless agreements. Instead, Nwaorie challenges the ongoing practice itself—without identifying a specific action that has adversely affected or aggrieved a claimant of property. Accordingly, this Court should find that Nwaorie fails to meet the requirements of § 702 to waive sovereign immunity.

c. Plaintiff fails to show Defendant's policy is *Ultra Vires* and violates CAFRA.

Nwaorie also argues that Defendants' practice of requesting hold harmless agreements is *ultra vires* and violates Title 18 U.S.C. § 983(a)(3) and 28 C.F.R. § 8.13(b), since her interpretation of those provisions suggests CAFRA indirectly precludes hold harmless agreements.[90] Nwaorie interprets CAFRA as mandating the "automatic" and "prompt" release of her property. Her complaint alleges that "CBP fails to promptly release the property as required by CAFRA and instead conditions the release of the property on claimant[s] signing a Hold Harmless Agreement that requires them to waive

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[87] *Alabama-Coushatta Tribe of Tex.*, 757 F.3d at 490.
[88] DE 1 at 26.
[89] *Alabama-Coushatta Tribe of Tex.*, 757 F.3d at 490.
[90] DE 1 at 34.

their constitutional and statutory rights and incur new legal liabilities."[91] Furthermore, Nwaorie's claims that § 983 precludes Defendants' warning about potential administrative forfeiture proceedings if Nwaorie failed to "take action" within 30 days, since § 983 states that the Government may "not take any further action to effect the civil forfeiture of such property…"[92] Thus, Nwaorie argues that Defendants' practice violates CAFRA.

Nwaorie's claims are unconvincing because § 983(a)(3) and § 8.13 provide no meaningful standard to define the limits of Defendants' exercise of discretion regarding its practice of requesting hold harmless agreements. First, neither § 8.13 nor § 983(a)(3) directly or indirectly preclude the practice of requesting hold harmless agreements. Instead, Nwaorie points to the "promptly release" language under § 983(a)(3) to argue that Defendants' policy violates CAFRA. However, since "promptly release" is vague and nowhere defined under the statute or in case law, the Court has no manageable standard for evaluating whether Defendants' hold harmless policy violates that instruction. Moreover, this Court will not find the word "automatic" anywhere in the CAFRA provisions raised by Nwaorie. To the contrary—and as conceded by Nwaorie in her complaint—CAFRA expressly imposes two conditions on claimants of seized property: (1) Section 8.13(b) conditions release on the claimant's contacting the property custodian within a specified period for release, and (2) Section 8.13(c) conditions release on the claimant providing identification to the custodian. 28 C.F.R. § 8.13(b)-(c).

Given this discretion afforded Defendants to condition the release of property, CAFRA does not "automatically" require the prompt return of property. If a claimant does not satisfy these conditions—according to the agency's discretion—the claimant may risk forfeiture. Accordingly, "promptly release" does not indicate claimants have an unrestricted right to seized property as soon

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[91] *Id.* at 24.
[92] *Id.* at 24-25.

as they demand it. Furthermore, agencies such as CBP have procedures for processing refunds that may create varying amounts of delay. As a practical matter, therefore, "promptly release" must carry broad meaning to accommodate agencies' various procedures. CAFRA thus leaves agencies broad leeway in when and how they return property and, without addressing whether hold harmless agreements may be requested by such agencies, CAFRA provides no manageable standard to judge the limits of Defendants' discretion. Therefore, Nwaorie's claims that Defendants' actions is *ultra vires* and violates CAFRA are unfounded and should be dismissed.

Additionally, Nwaorie's argument about Defendants violating § 983 by threatening civil forfeiture proceedings lacks merit. Section 8.13(b) instructs agencies to inform claimants to contact them within a specified period and informs claimants that failure to do so "may result in initiation of abandonment proceedings." Thus, Defendants' notifying claimants that administrative forfeiture proceedings may be initiated if claimants do not "take action" within thirty days of receiving notice of the decision not to pursue judicial review complies with § 8.13(b), and, as such does not violate CAFRA.

d. Plaintiff cannot bring her claim "directly under the Constitution" because there is no waiver of sovereign immunity.

Given Nwaorie has not established that Defendants have waived sovereign immunity, she cannot otherwise assert her class-action claims "directly under the Constitution." Neither 28 U.S.C. § 1331, nor the Constitution waive the federal government's sovereign immunity.[93] Accordingly, the plaintiff cannot base jurisdiction upon § 1331 or "directly under the Constitution" unless some other act of Congress waives sovereign immunity.[94]

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[93] *Garcia*, 666 F.2d, at 966. *See also Amen Ra v. IRS*, No. 14-cv-8295, 2016 U.S. Dist. LEXIS 171469, at *7 (N.D. Tex. Mar. 24, 2006). ("[T]here is no waiver of sovereign immunity for claims against federal agencies arising directly under the Constitution").

[94] *DeArchibold v. United States*, No. 3:03-CV-1871-N, 2006 U.S. Dist. LEXIS 12729, at *6 (N.D. Tex. Mar. 23, 2006).

Since Nwaorie cannot have sovereign immunity waived under § 702 of the APA, she has no basis for bringing her claims "directly under the Constitution." As established above, the "committed to discretion" exception under § 701(a)(2) prevents Nwaorie from establishing a waiver of sovereign immunity under § 702. Given § 702 provides the only applicable waiver in this case, Nwaorie cannot bring her constitutional claims directly. Thus, this Court should dismiss Nwaorie's direct constitutional claims as barred by sovereign immunity.

iii. Plaintiff's class-action constitutional claims fail because Plaintiff has not asserted viable constitutional violations.

Even assuming Nwaorie could rely on § 702 to waive sovereign immunity, she cannot assert her claims "directly under the Constitution" because she has not asserted cognizable constitutional violations. Nwaorie has not stated any cognizable constitutional violations because Defendants provide sufficient notice to satisfy claimants' due process rights.[95] The Fifth Circuit harbors a great reluctance to permit plaintiffs to pursue due process and equal protection actions directly under the Constitution.[96] The courts allow such actions only when necessitated by a total absence of alternative courses to redress "flagrant violations" of constitutional rights.[97] The Due Process Clause of the Fifth Amendment does not demand that the government provide the same kind of procedural protections for every deprivation of a property or liberty interest.[98] Due process requires that the government provide "notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[99]

Here, in accordance with the relevant provisions of CAFRA, Defendants' April 4, 2018 letter notified Nwaorie that the USAO had declined the matter for judicial review, and it specified the

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[95] *Garza v. Clinton*, Civ. A. No. H-10-0049, 2010 WL 5464263 at *12 (S.D. Tex. Dec. 29, 2010).
[96] *Hearth, Inc. v. Dep't of Pub. Welfare*, 617 F.2d 381, 382 (5th Cir. 1980).
[97] *Id.*
[98] *Garza*, 2010 U.S. Dist. LEXIS 137093, at *12.
[99] *Id.* (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

deadline for Nwaorie to respond before she would be legally considered to have abandoned her interest in the property, at which point the government would be entitled to take further administrative action. Defendants never prevented Nwaorie from presenting her objections in a timely manner—and Nwaorie cannot show that Defendants did so to purported class members. Consequently, Nwaorie has failed to raise viable constitutional violations to assert her claim "directly under the Constitution."

Finally, while Nwaorie considers Defendants' practice of requesting hold harmless agreements unconstitutional under the unconstitutional conditions doctrine,[100] Defendants' practice does not create an unconstitutional condition. Under the unconstitutional conditions doctrine, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit."[101] However, a challenged condition cannot be unconstitutional if it could be constitutionally imposed directly.[102] In other words, if the Constitution would not prevent Congress from directly imposing the practice in question, the practice does not place an unconstitutional condition.[103] Under the doctrine of sovereign immunity, a plaintiff may bring suit against the government or its agents only where Congress has unequivocally expressed a waiver in statutory text.[104]

Since Congress has the authority to establish waivers of sovereign immunity, it follows that it may directly regulate whether claimants of seized property may initiate actions against government agencies such as CBP. Because Congress may exercise that authority without violating the Constitution, Defendants' practice of requesting hold harmless agreements functions as a direct regulation of its seizure policy. Therefore, Nwaorie's claim that Defendants' practice presents an

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[100] DE 1 at 31.
[101] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 164 L. Ed. 2d 156, 171 (2006).
[102] *Id.*
[103] *Id.* at 171-72.
[104] *FAA v. Cooper*, 566 U.S. 284, 290 (2012).

unconstitutional condition that waives her First Amendment right to seek remedy from the government lacks merit. Since Nwaorie's individual claims are moot, and since she cannot raise viable constitutional violations, this Court should dismiss her class-action claims.

C. Plaintiff's Individual Claims – Count III and IV.

i. Plaintiff failed to state an equal protection claim.

Nwaorie claims that her equal protection rights have been violated because she has been subjected to additional screening ever since October 2017 when she failed to report approximately $37,000.00 to CBP.[105] Assuming *arguendo*, Nwaorie fails to state a viable equal protection claim, and this claim must be dismissed.

"The equal protection clause essentially requires that all persons similarly situated be treated alike."[106] As the Fifth Circuit explained, "[i]f a legitimate reason for classifying the [persons] differently exists, and that legitimate reason is rationally related to the classification, the two sets of [persons] are not similarly situated and no equal protection violation has occurred."[107]

CBP is responsible for enforcing hundreds of laws and regulations, including those addressing currency, financial transactions, and customs.[108] CBP utilizes these broad authorities in fulfilling its mission responsibilities relating to border security.[109]

As the Supreme Court has observed, "Congress, since the beginning of our Government, 'has granted the Executive plenary authority to conduct routine searches and seizures at the border,

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[105] DE 1 at 184 ("Defendants are violating [Plaintiff]'s right to equal protection of the law by treating her differently from, and worse than, similarly situated international travelers who are U.S. citizens and who have not been charged with any federal crime, nor had any property forfeited for any alleged violations of federal law.")
[106] *Mahone v. Addicks Util. Dist. of Harris Cty.*, 836 F.2d 921, 932 (5th Cir. 1988).
[107] *Id.* at 933 n.11 (5th Cir. 1988); *Duarte v. City of Lewisville, Texas*, 858 F.3d 348, 354 (5th Cir. 2017) ("If neither a suspect class nor a fundamental right is implicated, the classification need only bear a rational relation to a legitimate governmental purpose.").
[108] *See generally* Summary of Laws and Regulations Enforced by CBP (last modified March 8, 2014), https://www.cbp.gov/trade/rulings/summary-laws-enforced/us-code (last visited March 14, 2019).
[109] 6 U.S.C. § 211.

without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."[110] CBP officers have ample federal statutory authority to conduct warrantless, suspicion less searches at the border or its functional equivalent.[111] Under the "border search doctrine," the Supreme Court has held "a governmental officer at the international border may conduct routine stops and searches without a warrant or probable cause because the United States as a sovereign state has the right to control what persons or property crosses its international borders."[112] Furthermore, the Supreme Court has found that travelers do not have "some sort of Fourth Amendment right not to be subject to delay at the international border," and in doing so stated, "We think it clear that delays of one to two hours at international borders are to be expected."[113]

The Fifth Circuit has held that "the 'border search exception' to the Fourth Amendment . . . applies with equal force to outgoing searches."[114] Moreover, Fifth Circuit precedent is absolutely clear "the requirement that outer garments such as coat or jacket, hat or shoes be removed, that pockets, wallet or purse be emptied, are part of the routine examination of a person's effects which require no

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[110] *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004).

[111] *See, e.g.*, 31 U.S.C. § 5317(b) (expressly providing that, "for purposes of ensuring compliance with the requirements of section 5316[, dealing with reports on importing and exporting monetary instruments], a customs officer may stop and search, *at the border and without a search warrant*, *any* vehicle, vessel, aircraft, or other conveyance, any envelope or other *container*, and *any person entering or departing from the United States*.") (emphasis added); 19 U.S.C. § 1496 (providing that a CBP officer "may cause an *examination* to be made of the *baggage of any person arriving in the United States in order to ascertain what articles are contained therein* and whether subject to duty, free of duty, or prohibited notwithstanding a declaration and entry therefor has been made") (emphasis added).

[112] *United States v. Cardenas*, 9 F.3d 1139, 1147 (5th Cir. 1993); *see also United States v. Chaplinski*, 579 F.2d 373, 374 (5th Cir. 1978) ("At the border, customs agents need not have a reasonable or articulable suspicion that criminal activity is involved to stop one who has traveled from a foreign point, examine his or her visa, and search luggage and personal effects for contraband.")

[113] *Flores-Montano*, 541 U.S. at 155 n.3.

[114] *United States v. Odutayo*, 406 F.3d 386, 388 (5th Cir. 2005).

justification other than the person's decision to cross our national boundary."[115] The Fifth Circuit has "held that officials at the border may cut open the lining of suitcases without any suspicion[.]"[116]

It is undisputed that, on October 31, 2017, Nwaorie failed to disclose to CBP the $37,377.00 that she was carrying. It is further undisputed that Nwaorie's property was appropriately seized by CBP. Nwaorie claims that she is not being treated the same as other international travelers who are U.S. citizens and who have not been charged with any federal crime, nor had any property forfeited for any alleged violations of federal law."[117] Nwaorie's allegations, however, show she is not similarly situated with these other travelers *because of* her incident in October 2017.

Assuming Nwaorie's allegations are true, CBP has a rational legitimate basis to exercise their lawful boarder search, to vindicate the recognized "substantial national interest" in preventing the unreported importation and exportation of United States currency.[118] There is no allegation that Nwaorie is being treated differently than others who previously had their property seized by CBP in similar circumstances. As such, Nwaorie has failed to state an equal protection claim, and her claim must be dismissed.

ii. Plaintiff failed to state a due process claim.

Nwaorie failed to state a viable procedural or substantive due process claim. As such, her due process claims under Claim IV must be dismissed.

The Fifth Amendment's due process clause "contains both a substantive and a procedural component."[119] "The substantive component 'prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty[.]'"[120] With

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[115] *United States v. Sandler*, 644 F.2d 1163, 1169 (5th Cir. 1981).
[116] *United States v. Molina-Isidoro*, 884 F.3d 287, 291 (5th Cir. 2018).
[117] DE 1 at 41.
[118] *United States v. Berisha*, 925 F.2d 791, 795 (5th Cir. 1991).
[119] *Hernandez v. United States*, 757 F.3d 249, 267 (5th Cir. 2014).
[120] *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)).

respect to the latter aspect of the substantive component, the Supreme Court has required "a careful description of the asserted fundamental liberty interest," and a demonstration that the interest is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed."[121]

To the extent that Nwaorie is bringing a substantive due process claim, her claim fails because there is no fundamental liberty interest in international travel and she has not made an allegation that "shocks the conscience."[122] Her substantive due process claim fails as a matter of law.

For a procedural due process claim, it is undisputed that Nwaorie is aware of the administrative procedure, DHS-TRIP, and has failed to use it. As such, her procedural due process claim fails as a matter of law.[123]

iii. Plaintiff's individual complaints fail for lack of subject matter jurisdiction because her claims are moot.

Nwaorie's individual complaints fail for a lack of subject matter jurisdiction because CBP properly seized and returned her currency.[124] Therefore, her claims are moot and barred by sovereign immunity.

Absent a waiver, sovereign immunity shields the government and its agents from suit.[125] Courts strictly construe waivers of sovereign immunity and resolve all ambiguities in favor of the sovereign.[126]

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[121] *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).
[122] *Id.*; *Haig v. Agee*, 453 U.S. 280, 307 (1981) (rejecting respondent's contention "that the revocation of his passport impermissibly burdens his freedom to travel").
[123] *Rathjen v. Litchfield*, 878 F.2d 836, 839–40 (5th Cir. 1989) ("This circumstance causes the case to fall within our recent jurisprudence holding that no denial of procedural due process occurs where a person has failed to utilize the state procedures available to him."); *see also Myrick v. City of Dallas*, 810 F.2d 1382, 1388 (5th Cir. 1987) (Furthermore, Myrick cannot dispute the adequacy of post-deprivation remedies . . . . [S]he cannot skip an available state remedy and then argue that the deprivation by the state was the inadequacy or lack of the skipped remedy.")
[124] Ex. A and B.
[125] *Tsolmon v. United States*, No. H-13-3434, 2015 U.S. Dist. LEXIS 114988, at *26 (S.D. Tex. Aug. 28, 2015) (citing *F.D.I.C. v. Meyer*, 510 U.S. 471, 474 (1994)).
[126] *Id.*

A waiver of sovereign immunity must be unequivocally expressed in statutory text.[127] Plaintiff bears the burden of showing Congress's unequivocal waiver of sovereign immunity.[128] The Constitution allows the courts to decide legal questions only in the context of actual "Cases" or "Controversies."[129]

In this case, Nwaorie's claims assert the following jurisdiction: "Plaintiff brings her individual claim for the immediate return of her seized property under Federal Rule of Criminal Procedure 41(g). Plaintiff brings her individual claim for declaratory and injunctive relief . . . under the Declaratory Judgments Act, 28 U.S.C. §§ 2201, 2202, as well as 'directly under the Constitution.'"

This Court lacks jurisdiction over Nwaorie's claims because there is no actual controversy between the parties—Defendants have already returned the seized currency. Combined with the fact that Nwaorie never signed a hold harmless agreement, this also moots Nwaorie's complaint about waiving her constitutional rights. Furthermore, Nwaorie cannot establish that Defendants will unconstitutionally target her for additional screenings. Accordingly, Nwaorie's claims related to seizure without sufficient notice, failure to promptly return the seized currency under CAFRA, waiving constitutional rights under a hold harmless agreement, and inclusion on a "screening list" are moot. Therefore, this Court should dismiss Plaintiff's individual claims for lack of jurisdiction.

Finally, Nwaorie fails to show past, present, or future injury. As such, this Court should dismiss her individual claims for declaratory and injunctive relief for failure to state a claim upon which relief can be granted.

a. Plaintiff's individual claim for the return of seized property is moot.

Defendants have already returned Nwaorie's seized currency, so her individual claim to have her property returned is moot. Nwaorie's individual claim for the return of her seized property is

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[127] *Id.*
[128] *Id* at 27.
[129] *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (citing U.S. Const., Art. III, § 2).

under Federal Rule of Criminal Procedure 41(g) and this Court's general equity jurisdiction under 28 U.S.C. § 1331.[130] However, Nwaorie has already had her currency returned. Therefore, her claim is moot.

Additionally, while Nwaorie claims Defendants violated her due process rights by conditioning the return of her property on the waiver of other constitutional rights, Nwaorie has received her property without waiving any such rights. Nwaorie presumably read, acknowledged, and understood the hold harmless agreement attached to the April 4, 2018 letter, but she did not sign or return the agreement. Since Defendants have returned Nwaorie's seized currency without requiring her to waive any rights under the hold harmless agreement, as described above, Nwaorie has no standing to support prospective equitable relief with respect to any hold harmless agreements (and Defendants' alleged practice relating thereto) and, further, this Court should dismiss her claim as moot with respect to the return of property.

Finally, any additional claims Nwaorie may bring subsequent to the Defendants' release of her property must be denied because sovereign immunity bars the award of monetary damages under Rule 41(g).[131]

b. Plaintiff's claim to provide sufficient notice on the currency reporting is moot.

The return of Nwaorie's seized currency moots her claims challenging Defendants' failure to provide sufficient notice as to the currency reporting requirement.[132]

An actual controversy must exist throughout the length of the case, not just when the complaint is filed.[133] A dispute solely about the meaning of a law, abstracted from any concrete actual

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[130] DE 1 at 38.
[131] *Bailey v. United States*, 508 F.3d 736, 740 (5th Cir. 2007).
[132] CBP Officers post and carry signage at the international terminal gates explaining the currency reporting requirements to travelers. *See Exhibit* B.
[133] *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)).

or threatened harm, falls outside the context of "cases" and "controversies" within the scope of the Constitution.[134]

Disputes about the legality of procedures connected to the seizure of property lose standing upon return of the seized property.[135] In *Alvarez*, the State of Illinois seized and sought to forfeit currency and property allegedly acquired through drug trafficking.[136] The plaintiffs brought a civil rights action against the City of Chicago, the Chicago Police Department, and the Cook County State's Attorney, challenging the State's failure to provide a speedy post-seizure hearing as violating the Due Process Clause.[137] At some point in the litigation process, however, the State returned the seized property.[138] Accordingly, the Supreme Court determined that the parties' dispute about the lawfulness of the State's failure to conduct a speedy post-seizure hearing was no longer embedded in any actual controversy about the Plaintiff's legal rights.[139] The State had returned the property to the plaintiffs, and the Court found the parties' dispute about the law "abstract" and unlikely to affect the plaintiffs any more than other citizens.[140] Consequently, the Court found the plaintiffs' claims moot.[141]

Likewise, this Court should find Nwaorie's claim contesting Defendants' failure to provide her with sufficient notice about the reporting requirement moot because Nwaorie received notice when the CBP officers gave Nwaorie a form requiring her to report the amount of money she was carrying, and Defendants have returned Nwaorie's currency. Because Plaintiff's claim on sufficient notice is no longer embedded in any actual controversy, this Court should dismiss Nwaorie's case pursuant to *Alvarez*.

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[134] *Id.* at 93.
[135] *Id.*
[136] *Id.* at 89.
[137] *Id.* at 90-91.
[138] *Id.* at 92.
[139] *Id.* at 93.
[140] *Id.*
[141] *Id.* at 94.

iv. Plaintiff cannot seek declaratory or injunctive relief because she cannot demonstrate the CBP will subject her to future discriminatory screenings.

Nwaorie's individual claim for declaratory and injunctive relief lacks standing because Defendants do not maintain any "screening list" that would require further scrutiny during border inspections based on a single, years-old instance of failure to adhere to currency reporting requirement, as alleged in Plaintiff's Complaint.[142]

That a plaintiff can imagine circumstances in which she could be affected by an agency action does not suffice to establish standing; she must show that she has been or in fact will be perceptibly harmed.[143] While courts may entertain challenges against practices that no longer directly affect the challenging party, those practices must be "capable of repetition while evading review."[144] Furthermore, the "capable-of-repetition" doctrine applies only in exceptional situations—generally only where the named plaintiff can make a reasonable showing that she will again face the complained of injury.[145]

Without a reasonable showing that the injury complained of will reoccur, the capable-of-repetition doctrine does not apply to government seizure procedures.[146] In *Alvarez*, the State of Illinois seized and sought to forfeit currency and property allegedly acquired through drug trafficking.[147] The plaintiffs brought a civil rights action challenging the State's failure to provide a speedy post-seizure hearing as violating the Due Process Clause.[148] When determining whether the capable-of-repetition doctrine provided jurisdiction, the Supreme Court held that nothing suggested that the individual

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[142] Ex. B.
[143] *United States v. S.C.R.A.P.*, 412 U.S. 669, 688-89 (1973).
[144] *Alvarez*, 558 U.S. at 93 (finding that plaintiffs failed to show they would again suffer due process violations for lacking access to a speedy post-seizure hearing).
[145] *DeFunis v. Odegaard*, 416 U.S. 312, 318-319 (1974) (per curiam).
[146] *Alvarez*, 558 U.S. at 93-94.
[147] *Id.* at 89.
[148] *Id.* at 90-91.

plaintiffs would likely again prove subject to the State's seizure procedures.[149] Moreover, since those directly affected by the forfeiture practices could bring damages actions, the Court held that the practices did not "evade review."[150] Consequently, the Court held that the case did not fit into the category of cases "capable of repetition while evading review," and it found the case moot.[151]

The capable-of-repetition doctrine does not apply to this case because Nwaorie cannot make a reasonable showing that she will again prove subject to having her property seized for failing to comply with the currency reporting requirements. Nwaorie bases her demand for declaratory and injunctive relief against Defendants on the assumption that Defendants have placed her on a discriminatory "screening list."[152] However, Defendants do not maintain a "screening list" that would require further scrutiny during border inspections based on a single, years-old instance of failure to adhere to currency reporting requirements. Accordingly, Nwaorie has no basis for contending that she will likely undergo future discriminatory screenings in violation of her constitutional rights.

Thus, as in *Alvarez*, Nwaorie has failed to establish that she will suffer due process violations as a result of discriminatory future screenings for currency violations. Moreover, under *Alvarez*, those affected by property forfeited could bring damages actions should ensure Defendants' practices do not "evade review." Thus, this Court should find that this case does not fall under the category of cases that are "capable of repetition while evading review," and it should dismiss Nwaorie's demand for declaratory and injunctive relief.

Finally, Nwaorie has no claim for injunctive relief because she has not shown—and cannot show—a substantial likelihood of future injury by Defendants.[153] First, Defendants do not have a

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[149] *Id.* at 93.
[150] *Id.* at 94.
[151] *Id.*
[152] DE 1 at 40.
[153] *Fabian v. Dunn*, No. SA-08-cv-269-XR, 2009 U.S. Dist. LEXIS 72348, at *5 (W.D. Tex. Aug. 14, 2009).

"screening list" that would require further scrutiny during border inspections based on a single, years-old instance of failure to adhere to currency reporting requirements.[154] Second, Nwaorie cannot show future injury with respect to unconstitutional discriminatory screenings as Defendants' authority to enforce the customs and immigration laws under 19 U.S.C. § 1582 includes the search of **all** persons and baggage coming into the United States from foreign countries.[155]

Under the border search doctrine, CBPO may conduct routine searches—without seriously invading a traveler's privacy—of a traveler exiting or entering the Nation's borders without probable cause, a warrant, or any suspicion to justify the search.[156] Defendants also have authority under 31 U.S.C. § 5317(b) to stop and search, at the border and without a warrant, any person entering or departing the United States for purposes of ensuring compliance with the requirements of 31 U.S.C. § 5316—reports on exporting and importing monetary instruments.[157]

Lastly, CBP does not know of any requirement—and Nwaorie does not raise one—that CBPO provide each traveler with advanced notice of their intent to conduct a customs inspection and/or search of the traveler's belongings.[158] The law provides CBP with the authority to conduct inspections of any person and merchandise crossing the border.[159] Even if Nwaorie was subjected to future screenings, she cannot establish that such screenings would be discriminatory and violate her rights as every person traveling into or out of the United States is subject to search under the authorities previously mentioned. Further, to the extent such additional screening is done because of

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[154] Ex. B.
[155] Ex. B.
[156] *Id.* at 5 (citing *United States v. Roberts*, 274 F.3d 1007, 1011 (5th Cir. 2001); *United States v. Berisha*, 925 F.2d 791, 795 (5th Cir. 1991).
[157] *Id.*
[158] *Id.*
[159] *See e.g.,* 19 U.S.C. §§ 482 (search of vehicles and persons), 1461 (inspection of merchandise and baggage), 1496 (examination and baggage), 1499 (search of persons and baggage).

her prior currency reporting violation—an offense which she is not contesting—CBP has clear authority to continue to exercise additional scrutiny at the border.

Therefore, this Court should dismiss Nwaorie's claim for declaratory and injunctive relief for failure to state a claim upon which relief can be granted.

V.
CONCLUSION

This Court should dismiss all of Nwaorie's individual and class-action claims for a lack of jurisdiction and failure to state a claim upon which relief can be granted. Nwaorie wholly failed to exhaust her administrative remedies, as such her individual and class action claims must be dismissed. Defendants have also already returned Nwaorie's property without a hold harmless signature and have not placed her on any "screening list," her individual claims are moot. Furthermore, Plaintiff's class-action claims are barred by sovereign immunity. CAFRA provides no meaningful standard to judge Defendants' exercise of discretion in requesting hold harmless agreements, and Nwaorie cannot meet the requirements of § 702 or identify cognizable constitutional violations. Finally, Nwaorie cannot show that Defendants' policy presents an "unconstitutional condition." Thus, this Court should dismiss all of Plaintiff Anthonia Nwaorie's claims with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 22, 2019, the foregoing pleading was mailed to all parties and counsel registered with the Court CM/ECF system.

/s/*Ariel N. Wiley*
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