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.	§	Civil Action No. 4:18-cv-1406
U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES OF AMERICA; KEVIN McALEENAN, Commissioner, U.S. Customs and Border Protection, sued in his official capacity,	§	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS

Respectfully submitted,

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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 Acting Commissioner of CBP, (collectively "Defendants"), respectfully move to dismiss all of Plaintiff Anthonia Nwaorie's ("Plaintiff") claims for lack of jurisdiction and/or 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

According to her complaint, Plaintiff alleges that on October 31, 2017, CBP Officers ("CBPO") selected Plaintiff for an outbound currency examination during an outbound operation it conducted at the George Bush Intercontinental Airport. Doc. #1 at 13. CBPO asked Plaintiff how much money she had. Plaintiff replied that she had $4,000—the amount she carried in her

purse. *Id*. CBPO then asked Plaintiff to fill out a form reporting the amount of money she had on her and she again wrote down $4,000. *Id*. CBPO then searched her carry-on luggage and purse and found $37,377. *Id.* CBPO seized the entirety of the money Plaintiff had in her purse and carry-on luggage, which was $41,377. *Id.* The money was seized and subject to forfeiture as Plaintiff failed to comply with the reporting provisions of Title 31 U.S.C. § 5316, which requires that a person file a report if they are transporting more than $10,000.00 from the United States to a place outside the United States. *See* Doc. #1, *Exh.* A.

Plaintiff also believes she has been and will be targeted for additional screening by CBP when she travels internationally because of this seizure. Doc. #1 at 14. She claims that when she returned to the United States from her trip to Nigeria in December 2017, CBPO directed Plaintiff to a separate lane from other passengers and subjected her to additional screening, during which CBPO searched her luggage. *Id.* She also claims that an officer told her that CBP would subject her to future screenings when she traveled. *Id*. at 15.

On November 6, 2017, CBP mailed Plaintiff 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 other options. *Id*. at 15. Plaintiff 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. *Id.* Plaintiff filed her CAFRA claim form and request for judicial forfeiture proceedings on December 12, 2017. *Id.* The USAO declined the matter for judicial review. *Id.*

On April 4, 2018, CBP mailed Plaintiff a letter informing her of the USAO's decision and that it had decided to remit the currency seizure in full. *Id.* at 17. The letter also informed Plaintiff

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. *Id.* at 17-18. CBP enclosed a hold harmless agreement, and the letter informed Plaintiff that "[i]f no action is taken within 30 days from the date of this letter, administrative forfeiture proceedings will be initiated." Doc. #1, *Exh.* C. The hold harmless agreement required Plaintiff to agree and forever discharge Defendants from any actions "in connection with the detention, seizure, and/or release by the [CBP] of the above listed property." Doc. #1, *Exh.* D. The agreement also required Plaintiff 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." *Id.* Plaintiff did not sign and return the hold harmless agreement. Nevertheless, on May 18, 2018, based on a check of CBP computer systems, Plaintiff received a refund check for the total amount of money seized. *See Exh.* 1.

Plaintiff claims the percentage of CBP seizures in which the USAO declines to pursue forfeiture or otherwise does not timely file a forfeiture complaint is around 0.01%. Doc. #1 at 29. Plaintiff asserts her class-action claims on account of the estimated 0.01% of claimants that may have received hold harmless agreements since January 2012. *Id.* at 28-29.

II. NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff has filed a complaint on behalf of herself and all others similarly situated in the Southern District of Texas—Houston Division on May 3, 2018. Plaintiff alleges in her complaint that CBP's practice of requesting that claimants sign hold harmless agreements in exchange for the return of seized currency violates the CAFRA, 28 C.F.R. § 8.13, and her Fifth Amendment due process rights. Plaintiff asserts both class and individual claims.

With respect to the individual claims, Plaintiff demands the immediate return of her seized property pursuant to Federal Rule of Criminal Procedure 41(g). Plaintiff also requests declaratory

and injunctive relief against Defendants under the Declaratory Judgments Act, 28 U.S.C. §§ 2201, 2202, as well as "directly under the Constitution."

Plaintiff brings her class-action claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, and the Declaratory Judgments Act, 28 U.S.C. §§ 2201, 2202, as well as "directly under the Constitution." Defendants request that all of her claims be dismissed as they are moot and barred by sovereign immunity.

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." *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 494 (5th Cir. 2005) (internal quotations and citations omitted). Because the decision relates to the 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." *Williamson v. Tucker*, 645 F. 2d 404, 413 (5th Cir. 1981). 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. *See id.* Additionally, "the party seeking to invoke jurisdiction, has the burden of proving the facts necessary to sustain jurisdiction." *Harvey Const. Co. v. Robertson-CECO Corp.*, 10 F.3d 300, 303 (5th Cir. 1994).

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. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). 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. *See 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). "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." *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)). All plaintiffs, including those represented by counsel and those *pro se*, must plead specific facts, not mere conclusory allegations. *See 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). 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. *See Collins*, 224 F.3d at 498. However, it is proper for 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. *See id*. at 498-99.

IV. ARGUMENT

This Court should dismiss Plaintiff's individual claims for lack of jurisdiction because they are moot and barred by sovereign immunity. Even if this Court had jurisdiction over her claims, Plaintiff has no claim for declaratory or injunctive relief because she cannot show a substantial likelihood of future injury. Furthermore, this Court should dismiss Plaintiff's class-action claims for lack of jurisdiction 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, Plaintiff cannot bring her constitutional claims under the Declaratory Judgments Act or "directly under the Constitution." Finally, Plaintiff cannot meet the requirements of § 702 of the APA, and she cannot assert any viable constitutional violations. Thus, 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 complaints fail for lack of subject matter jurisdiction because her claims are moot.

Because CBP properly seized and returned Plaintiff's currency and has not placed her on any "screening list," her claims are moot and barred by sovereign immunity. *See Exhs.* 1, 2. Absent a waiver, sovereign immunity shields the government and its agents from suit. *See 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)). Courts strictly construe waivers of sovereign immunity and resolve all ambiguities in favor of the sovereign. *Id.* A waiver of sovereign immunity must be unequivocally expressed in statutory text. *Id.* Plaintiffs bear the burden of showing Congress's unequivocal waiver of sovereign immunity. *Id.* at *27. The Constitution allows the courts to decide legal questions only in the context of actual "Cases" or "Controversies." *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (citing U.S. Const., Art. III, § 2). In this case, Plaintiff'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 Plaintiffs claims because there is no actual controversy between the parties—Defendants have already returned the seized currency to Plaintiff. Combined with the fact that Plaintiff never signed a hold harmless agreement, this also moots Plaintiff's complaint about waiving her constitutional rights. Furthermore, even though Plaintiff often travels

abroad, she cannot establish that Defendants will unconstitutionally target her for additional screenings. Accordingly, Plaintiff'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 complaint for lack of jurisdiction. Furthermore, because Plaintiff has failed to show past, present, or future injury, this Court should dismiss her individual claims for declaratory and injunctive relief for failure to state a claim upon which relief can be granted.

1. This Court lacks jurisdiction over Plaintiff's individual claim for the return of seized property because Defendants already returned her currency without a hold harmless signature.

Defendants have already returned Plaintiff's seized currency, so her claim is moot. Plaintiff has brought an individual claim for the return of seized property against Defendants under Federal Rule of Criminal Procedure 41(g) and this Court's general equity jurisdiction under 28 U.S.C. § 1331. Doc. # 1 at 38. However, because the NFC already sent a check to Plaintiff returning her currency, Plaintiff's claim has no standing. Additionally, while Plaintiff claims Defendants violated her due process rights by conditioning the return of her property on the waiver of other constitutional rights, Plaintiff has received her property without waiving any such rights. Plaintiff 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 Plaintiff's seized currency without requiring her to waive any rights under the hold harmless agreement, Plaintiff has no standing and this Court should dismiss her claim as moot. Furthermore, any additional claims Plaintiff 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). *See Bailey v. United States*, 508 F.3d 736, 740 (5th Cir. 2007).

2. Plaintiff's claim that Defendants violated her constitutional rights by failing to provide sufficient notice on the currency reporting requirement is moot because Defendants have returned her currency.

The return of Plaintiff's seized currency moots her claims challenging Defendants' failure to provide sufficient notice as to the currency reporting requirement[1]. An actual controversy must exist throughout the length of the case, not just when the complaint is filed. *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). 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. *Id.* at 93.

Disputes about the legality of procedures connected to the seizure of property lose standing upon return of the seized property. *See id.* In *Alvarez*, the State of Illinois seized and sought to forfeit currency and property allegedly acquired through drug trafficking. *Id*. at 89. 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. *Id.* at 90-91. At some point in the litigation process, however, the State returned the seized property. *Id*. at 92. 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. *Id.* at 93. 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. *Id.* Consequently, the Court found the plaintiffs' claims moot. *Id.* at 94.

Likewise, this Court should find Plaintiff's claim contesting Defendants' failure to provide her with sufficient notice about the reporting requirement moot since Defendants have returned

[1] CBP Officers post and carry signage at the international terminal gates explaining the currency reporting requirements to travelers. *See Exh.* 2.

Plaintiff's currency. Because Plaintiff's claim on sufficient notice is no longer embedded in any actual controversy, this Court should dismiss Plaintiff's case pursuant to *Alvarez*.

3. This Court should dismiss Plaintiff's demand for declaratory and injunctive relief because Plaintiff cannot demonstrate that CBP will subject her to future discriminatory screenings.

Plaintiff's individual claim for declaratory and injunctive relief lacks standing because Defendants have not placed her on any "screening list." *See Exh.* 2. 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. *United States v. S.C.R.A.P.*, 412 U.S. 669, 688-89 (1973). 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." *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). 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 injury complained of. *DeFunis v. Odegaard*, 416 U.S. 312, 318-319 (1974) (per curiam).

Without a reasonable showing that the injury complained of will reoccur, the capable-of-repetition doctrine does not apply to government seizure procedures. *See Alvarez,* 558 U.S. at 93-94. In *Alvarez*, the State of Illinois seized and sought to forfeit currency and property allegedly acquired through drug trafficking. *Id*. at 89. 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. *Id.* at 90-91. When determining whether the capable-of-repetition doctrine provided jurisdiction, the Supreme Court held that nothing suggested that the individual plaintiffs would likely again prove subject to the State's seizure procedures. *Id.* at 93. Moreover, since those directly affected

by the forfeiture practices could bring damages actions, the Court held that the practices did not "evade review." *Id.* at 94. 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. *Id.*

The capable-of-repetition doctrine does not apply to this case because Plaintiff cannot make a reasonable showing that she will again prove subject to seizure for failing to comply with the currency reporting requirements. Plaintiff bases her demand for declaratory and injunctive relief against Defendants on the assumption that Defendants have placed her on a discriminatory "screening list." Doc. # 1 at 40. However, Defendants have not done so. Accordingly, Plaintiff has no basis for contending that she will likely undergo future discriminatory screenings in violation of her constitutional rights. Thus, as in *Alvarez*, where the plaintiffs failed to show they would again face due process violations for lacking a speedy post-seizure hearing, in this case Plaintiff has failed to establish that she will suffer due process violations as a result of discriminatory future screenings for currency violations. Moreover, under *Alvarez*, that 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 Plaintiff's demand for declaratory and injunctive relief.

Finally, Plaintiff has no claim for injunctive relief because she has not shown—and cannot show—a substantial likelihood of future injury by Defendant. *Fabian v. Dunn*, No. SA-08-cv-269-XR, 2009 U.S. Dist. LEXIS 72348, at *5 (W.D. Tex. Aug. 14, 2009). First, Defendants have not placed Plaintiff on any screening list. *See Exh.* 2. Furthermore, Plaintiff 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. § 1589(a) includes the search of **all**

persons and baggage coming into the United States from foreign countries. *See Exh.* 2. 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. *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). 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. *Id.* Lastly, CBP does not know of any requirement—and Plaintiff does not raise one—that CBPO provide travelers with advanced notice of their intent to conduct a customs inspection and/or search of the traveler's belongings. *Id*. Even if Plaintiff was subjected to future screenings, she cannot establish that such screenings would be discriminatory and violate her rights as every passenger traveling is subject to search under the authorities previously mentioned. Further, to the extent such additional screening is done, because of her prior currency reporting violation, which she is not contesting, CBP may continue to exercise additional scrutiny at the border. Therefore, this Court should dismiss Plaintiff's claim for declaratory and injunctive relief for failure to state a claim upon which relief can be granted.

B. This Court should dismiss Plaintiff's class-action complaint for lack of jurisdiction because sovereign immunity bars Plaintiff's claims.

This Court lacks jurisdiction over Plaintiff's class-action complaint because sovereign immunity shields Defendants from liability. The provisions of CAFRA, upon which Plaintiff 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. Accordingly, CAFRA does not provide a meaningful standard against

which to judge the agency's exercise of discretion, and this Court should dismiss Plaintiff'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 Act—a declaratory judgment claim is not jurisdiction-conferring. *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 278 (5th Cir. 2010). Similarly, Plaintiff cannot obtain jurisdiction over her claim "directly under the Constitution" because she has not asserted a proper basis for jurisdiction. *See Garcia v. United States*, 666 F.2d 960, 966 (5th Cir. 1982).

1. 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 Plaintiff'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." 5 U.S.C. § 701(a)(2) (2018). 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. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). 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. *Id.* at 834-35. Otherwise, if the statutory language is susceptible to a variety of interpretations, agency decisions are discretionary and immune from suit. *See Electricities of North Carolina, Inc. v. Southeastern Power Admin.*, 774 F.2d 1262, 1266 (4th Cir. 1985).

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." 18 U.S.C. § 983(a)(3)(B)(ii)(II) (2018). The Attorney General's regulations fall under 28 C.F.R. § 8.13, which states:

> [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.

28 C.F.R. § 8.13(a) (2018). 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 C.F.R. part 128-48.

Id. at § 8.13(b). 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." *Id.* at § 8.13(c).

For example, statutory duties of timeliness that do not establish inferable deadlines are discretionary. *American Canoe Ass'n v. United States EPA*, 30 F. Supp. 2d 908, 927 n. 20 (E.D. Va. 1998). 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"). *Id.* at 911. 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. *Id.* at 912. 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. *Id.* at 923. The Virginia Eastern District Court found that the CWA's requirement to review "from time to time" left the timing of such reviews to agency discretion. *Id.* at 924. The court found it impossible to know what interval "time to time" represented. *Id.* at 925. 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. *Id.* at 923. However, these fixed deadlines for initial CPPs did not create an inferable timeframe for subsequent periodic review imagined by the statute. *Id.* at 927 n. 20. Accordingly, the court found the duty of timeliness committed solely to agency discretion and thus unreviewable under § 701(a)(2) of the APA. *Id.*

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 Plaintiff's claim under the APA. 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. Consequently, § 983(a)(3) and § 8.13 do not create nondiscretionary duties, and any 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 Plaintiffs' claim precluded under § 701(a)(2) of the APA.

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

Even if § 701(a)(2) did not bar jurisdiction, Plaintiff 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. *See Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489 (5th Cir. 2014). First, § 702 requires that the challenged practice constitute an "agency action" within the meaning of 5 U.S.C. § 551(13). *Id.* "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." *Id.* Otherwise, the plaintiff's arguments are meritless and barred by sovereign immunity. *See id.* at 491.

Where, as here, Plaintiff seeks to show she was "adversely affected or aggrieved . . . within the meaning of a relevant statute," the plaintiff must seek judicial review pursuant to a statutory or non-statutory cause of action completely separate from the general provisions of the APA. *Alabama-Coushatta Tribe of Tex.*, 757 F.3d at 489. In that situation, the rule of "finality" does not apply. *Id.* 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. *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. *United States v. S.C.R.A.P.*, 412 U.S. 669, 688-89

(1973). In other words, courts should intervene only when a specific agency action has an actual or immediately threatened effect. *Lujan*, 497 U.S. 871 at 893. 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. *Alabama-Coushatta Tribe of Tex.*, 757 F.3d at 490.

Plaintiff likely seeks judicial review "within the meaning of a relevant statute"—both CAFRA and the non-statutory constitutional claims. Accordingly, Plaintiff must show that Defendants' hold harmless policy constitutes an identifiable "agency action" within the meaning of § 551(13). In addition, Plaintiff must demonstrate that she and the alleged 0.01% of potentially affected claimants were "adversely affected or aggrieved" by Defendants' hold harmless policy 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 hold harmless policy constitutes an agency "sanction," since she will argue it functions as a "condition affecting [her] freedom." *Id.* at § 551(10)(A). Alternatively, she will argue it constitutes a "withholding of property," *id.* at § 551(10)(D), or a "withholding of relief." *Id.* at § 551(10)(B). "Relief" includes "the whole or a part of an agency . . . recognition of a . . . right. *Id.* at § 551(11)(B). Otherwise, Plaintiff will assert that the CBP's policy constitutes a "failure to act." A "failure to act" means a failure to take one of the agency actions defined in § 551. *Doe v. United States*, 853 F.3d 792, 800 (5th Cir. 2017). Agency actions, including failures to act, are limited to "discrete actions." *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 Plaintiff can establish that Defendants' hold harmless policy constitutes one of the above-mentioned terms, her claim fails because it does not meet the specificity requirement. *Alabama-Coushatta Tribe of Tex.*, 757 F.3d at 490. As established above,

Plaintiff's individual claim is moot because she has not suffered past, present, or future injury. In her class-action claim, Plaintiff 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. Doc. #1 at 26. However, Plaintiff's argument lacks merit because it constitutes an allegation of "past, ongoing, and future harms, covering actions that have yet to occur." *Alabama-Coushatta Tribe of Tex.*, 757 F.3d at 490. Plaintiff has not identified a class member who has suffered any viable injury resulting from Defendants' hold harmless policy. Instead, Plaintiff challenges the ongoing policy itself—without identifying a specific action that has adversely affected or aggrieved a claimant of property. Accordingly, this Court should find that Plaintiff fails to meet the requirements of § 702 to waive sovereign immunity.

3. Plaintiff fails to show Defendants' policy is *ultra vires* and violates CAFRA.

Plaintiff also argues that Defendants' hold harmless policy 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**.** Doc. # 1 at 34. Critically, Plaintiff 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 their constitutional and statutory rights and incur new legal liabilities." *Id.* at 24. Furthermore, Plaintiff claims that § 983 precludes Defendants' warning about potential administrative forfeiture proceedings if Plaintiff 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…" *Id.* at 24-25. Thus, Plaintiff argues that Defendants' practice violates CAFRA.

Plaintiff'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 hold harmless policy. First, neither § 8.13 nor § 983(a)(3) directly or indirectly preclude a hold harmless policy. Instead, Plaintiff 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, 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 Plaintiff. To the contrary—and as conceded by Plaintiff in her complaint—CAFRA expressly provides two conditions imposed 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 as they demand it. Furthermore, agencies such as CBP and NFC have procedures for processing refunds that may create varying times 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 hold harmless policies, CAFRA provides no manageable standard to judge the limits of Defendants' discretion. Therefore, Plaintiff's claims that Defendants' actions is *ultra vires* and violates CAFRA are unfounded and should be dismissed.

Additionally, Plaintiff'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' warning threatening administrative forfeiture proceedings 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.

4. Plaintiff cannot bring her class-action claims under the Declaratory Judgments Act because she lacks standing and cannot establish jurisdiction.

Plaintiff 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. *See In re B-727 Aircraft Serial No. 21010*, 272 F.3d 264, 270 (5th Cir. 2001). Instead, the DJA provides an additional remedy where jurisdiction already exists. *See id.* Moreover, Plaintiff's citation to the DJA coupled with 28 U.S.C. § 1331 does not establish jurisdiction. *See 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). Because Plaintiff failed to allege a valid waiver of sovereign immunity under the APA, Plaintiff has no independent basis for jurisdiction. Thus, the Court lacks jurisdiction to authorize declaratory or injunctive relief under the DJA.

Additionally, Plaintiff has no claim for injunctive relief because she has not shown—and she cannot show—a substantial likelihood of future injury by Defendant. *Fabian v. Dunn*, No. SA-08-CV-269, 2009 WL 2567866, *5 (W.D. Tex. Aug. 14, 2009). 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. *Alvarez*, 558 U.S., at 93. Plaintiff's individual claim is moot because she has suffered no cognizable injury—Defendants returned her property without requiring a hold harmless signature. Moreover, Plaintiff cannot show that any of the estimated 0.01% of claimants that may have received hold harmless signatures suffered cognizable violations. Accordingly, Plaintiff has not established past, present, or future injury. Plaintiff, therefore, cannot state a claim for injunctive or declaratory relief upon which relief can be granted.

5. Because there is no waiver of sovereign immunity, Plaintiff cannot bring her claim "directly under the Constitution."

Given Plaintiff 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. *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"). Accordingly, the plaintiff cannot base jurisdiction upon § 1331 or "directly under the Constitution" unless some other act of Congress waives sovereign immunity. *See 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 Plaintiff 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 Plaintiff from establishing a waiver of sovereign immunity under § 702. Given § 702 provides the only applicable waiver in this case, Plaintiff cannot bring her constitutional claims directly. Thus, this Court should dismiss Plaintiff's direct constitutional claims as barred by sovereign immunity.

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

Even assuming Plaintiff 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. Plaintiff has not stated any cognizable constitutional violations because Defendants provide sufficient notice to satisfy claimants' due process rights. *See Garza v. Clinton*, Civ. A. No. H-10-0049, 2010 WL 5464263 at *12 (S.D. Tex. Dec. 29, 2010). The Fifth Circuit harbors a great reluctance to permit plaintiffs to pursue due process and equal protection actions directly under the Constitution. *Hearth, Inc. v. Dep't of Pub. Welfare*, 617 F.2d 381, 382 (5th Cir. 1980). The courts allow such actions only when necessitated by a total absence of alternative courses to redress "flagrant violations" of constitutional rights. *Id.* 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. *Garza*, 2010 U.S. Dist. LEXIS 137093, at *12. 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." *Id.* (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Here, in accordance with the relevant provisions of CAFRA, Defendants' April 4, 2018 letter notified Plaintiff of the pendency of her action once USAO declined the matter for judicial review, and it specified the deadline for Plaintiff to respond before risking forfeiture. Defendants never prevented Plaintiff from presenting her objections in a timely manner—and Plaintiff cannot show that Defendants did so to class members. Consequently, Plaintiff has failed to raise viable constitutional violations to assert her claim "directly under the Constitution."

Furthermore, Plaintiff cannot assert viable equal protection claims alleging discrimination in contravention of the Fifth Amendment because she has not plead or proven that Defendants acted with discriminatory purpose on account of race, religion, or national origin. *Id*. at *14 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)). As above mentioned, Defendants 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. Because Defendants properly seized Plaintiff's property after she failed to comply with reporting requirements, she cannot establish that Defendants violated her equal protection rights.

Finally, while Plaintiff considers Defendants' hold harmless policy unconstitutional under the unconstitutional conditions doctrine, Doc. #1 at 31, Defendants' policy 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." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*., 164 L. Ed. 2d 156, 171 (2006). However, a challenged condition cannot be unconstitutional if it could be constitutionally imposed directly. *Id.* In other words, if the Constitution would not prevent Congress from directly imposing the policy in question, the policy does not place an unconstitutional condition. *See id.* at 171-72. 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. *FAA v. Cooper*, 566 U.S. 284, 290 (2012).

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' hold harmless policy functions as a direct regulation of its seizure policy. Therefore, Plaintiff's claim that Defendants' policy presents an unconstitutional condition that waives her First Amendment right to seek remedy from the government lacks merit. Since Plaintiff's individual claims are moot, and since she cannot raise viable constitutional violations, this Court should dismiss her class-action claims.

V. CONCLUSION

This Court should dismiss all of Plaintiff's individual and class-action claims for a lack of jurisdiction and failure to state a claim upon which relief can be granted. Since Defendants have already returned Plaintiff's property without a hold harmless signature and have not placed her on any "screening list," her individual claims are moot. *See Exhs.* 1, 2. Furthermore, Plaintiff's class-action claims are barred by sovereign immunity. CAFRA provides no meaningful standard to judge Defendants' exercise of discretion in sending hold harmless agreements. Moreover, Plaintiff cannot meet the requirements of § 702 or identify cognizable constitutional violations. Finally, Plaintiff cannot show that Defendants' policy presents an "unconstitutional condition." Thus, this Court should dismiss all of Plaintiff's claims with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2018, a copy of the foregoing document was served via ECF on all counsel of record.

/s/ Richard W. Bennett
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