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

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

PLAINTIFF'S OBJECTIONS TO MEMORANDUM AND RECOMMENDATION

Dan Alban, Attorney-in-Charge
Virginia Bar No. 72688
Southern District No. 3194997
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Email: dalban@ij.org

Anya Bidwell
Texas Bar No. 24101516
Southern District No. 3063390
INSTITUTE FOR JUSTICE
816 Congress Avenue, Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Email: abidwell@ij.org

Attorneys for Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

Pursuant to 28 U.S.C. § 636(b)(1), Federal Rule of Civil Procedure 72(b), and General Order 2002-13, Plaintiff Anthonia Nwaorie respectfully makes the following objections to Parts A, B, D, and E of the magistrate's Memorandum and Recommendation ("M&R") entered in this matter on May 10, 2019 (ECF No. 70). The M&R's recommendations to grant Defendants' Amended Motion to Dismiss (ECF No. 58) constitute reversible error and should not be followed.

SUMMARY OF ARGUMENT

Plaintiff objects to Parts A, B, D, and E of the M&R based on the reversible errors therein.

As explained in Part I below, Part A of the M&R improperly analyzes Anthonia's individual claim for interest on her seized property (Count III). First, the M&R commits plain error by misconstruing Plaintiff's claim for interest as being brought under a statute that Plaintiff does not cite or rely on, and fails to address Plaintiff's actual argument that the interest is part of the seized *res* and must be returned with that *res*. Instead, relying on a new argument not raised by Defendants, the M&R concludes that sovereign immunity bars awards of interest on seized property, wrongly relying on case law that only applies to pre-judgment interest on damages or fee awards. In so doing, the M&R ignores three circuit court decisions and two district court opinions cited by Plaintiff in her response brief, all of which demonstrate that sovereign immunity is not a bar because federal courts regularly do award interest on seized property.

Part II addresses the serious legal errors of Part B of the M&R, which analyzes Anthonia's individual claim (Count IV) challenging her placement on a screening list that causes her to be singled out for particularly intrusive and invasive screenings. The M&R commits plain error by failing to even address Anthonia's procedural due-process challenge to being placed on a screening list without notice or an opportunity to be heard. Then, in analyzing Anthonia's equal-protection challenge to being placed on a screening list, the M&R again commits plain error by improperly analyzing this constitutional argument under the Administrative Procedure Act's arbitrary-and-

capricious standard even though Plaintiff did not bring this claim under the APA, much less under the arbitrary-and-capricious prong of the APA. The M&R compounds this error by misconstruing Plaintiff's challenge to being singled out for particularly invasive screenings as a general challenge to the border-search doctrine. The M&R further errs by refusing to take the allegations of the Complaint in the light most favorable to the Plaintiff in determining whether the Complaint raises allegations sufficient to state an equal-protection claim. Finally, the M&R errs by misconstruing Anthonia's equal-protection challenge to being placed on a screening list as a past harm, rather than an ongoing harm that affects her every time she travels internationally.

Part III addresses the numerous serious legal errors in Part D of the M&R, which analyzes Plaintiff's two class claims (Counts I and II) challenging CBP's policy of demanding that putative class members sign a Hold Harmless Agreements ("HHA") as a condition of returning their property ("CBP's HHA Policy"). First, the M&R commits plain error by assuming that every potential claim waived by the terms of the HHA is also barred by sovereign immunity, including claims for equitable relief, claims under waivers of sovereign immunity (such as Bivens, the Federal Tort Claims Act, or the Tucker Act), and even the initiation of administrative proceedings such as FOIA. Second, the M&R misconstrues Plaintiff's constitutional challenge to CBP's HHA policy as challenging every use of HHAs by CBP—including HHAs used in settlements—and wrongly concludes that the challenged HHAs are a "tool of settlement." Third, the M&R errs in attempting to justify CBP's demand that putative class members sign HHAs based on a misunderstanding of the procedures of the Civil Asset Forfeiture Reform Act ("CAFRA"). Fourth, the M&R commits plain error by conflating Plaintiff's *ultra vires* class claim (Count I) with Plaintiff's separate unconstitutional-conditions claim (Count II), and then fails to analyze Plaintiff's actual arguments that CBP's HHA Policy is *ultra vires* (the M&R's further misinterpretation of this claim is addressed

in Part IV). Fifth, instead of analyzing Plaintiff's claim that CBP's HHA Policy is *ultra vires*, the M&R instead invents a new standard: whether CBP's HHA Policy is "prudent." This too is plain error.

Part IV addresses how the M&R misconstrues Plaintiff's *ultra vires* challenge as a quibble about timeliness when Plaintiff has made clear that the challenge is to CBP imposing an additional, unauthorized condition (signing an HHA) before "promptly releasing" seized property, contrary to Section 983(a)(3)(B) of CAFRA and its implementing DOJ regulation, 28 C.F.R. § 8.13.

LEGAL STANDARD

This Court's review of the magistrate's Memorandum and Recommendation is *de novo*. "A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1).

FACTUAL OBJECTIONS

For the sake of accuracy, and to avoid conceding any errant factual finding, Plaintiff objects to the following minor factual errors in the M&R:

1. The M&R claims that: "CBP informed Plaintiff on April 4, 2018, of its decision to remit the seized currency to her in full." M&R 23. The CBP's letter does claim that, but Plaintiff objects that this was not in fact a discretionary "decision to remit" under 19 U.S.C. § 1618, but a mandatory release of property under 18 U.S.C. § 983(a)(3)(B) and 28 C.F.R. § 8.13.

2. The M&R claims that: "Plaintiff did not respond to this [April 4, 2018] letter." M&R 23. However, on May 3, 2018, Plaintiff's counsel sent a letter in response to CBP via email that reasserted Anthonia's claim to the seized currency and demanded its immediate return. This letter has not yet been introduced as evidence, but Plaintiff can provide it upon request.

LEGAL OBJECTIONS

I. Plaintiff's Individual Claim for Interest on Her Seized Property (Count III) Is Not Barred by Sovereign Immunity and Should Not Be Dismissed as Moot.

Plaintiff objects to Part A of the M&R, which wrongly holds that she does not have a legally viable claim for interest on her seized cash because such a claim "has been foreclosed by statute and subsequent case law." M&R 14. This is plain error because Plaintiff does not seek interest under 28 U.S.C. § 2465, the statute discussed in the M&R. The M&R begins with a mistaken assumption that

sovereign immunity bars Anthonia's claim for interest on the seized property absent an explicit statutory authorization allowing for the recovery of such interest. *Id.* This mistaken assumption leads the M&R to ask the wrong question: Whether 28 U.S.C. § 2465 allows for recovery of interest when the government does not initiate a forfeiture proceeding. M&R 14-15. But Anthonia never argued that she is owed interest under 28 U.S.C. § 2465. Rather, she has always insisted that sovereign immunity does not bar interest under her circumstances in the first place, since the interest she is claiming is not on damages but on the property that the government was required to return to her. *See, e.g.*, Pl.'s Resp. Opp'n Defs.' AMtD 9-10 ("Pl.'s Resp.") (ECF No. 60). Because the M&R misconstrues Anthonia's claim and because sovereign immunity does not bar interest on seized property, the M&R's recommendations in Part A should not be adopted.

A. The M&R misconstrues Plaintiff's claim for interest, which was never brought under 28 U.S.C. § 2465.

Contrary to the M&R, Anthonia never brought her claim for interest under 28 U.S.C. § 2465. *Compare* M&R 14-15 *with* Pl's Resp. 9-10; *see also* Compl. ¶ 166, Req. for Relief G (ECF No. 1). Rather, as Anthonia has explained: "When the government returns seized property, interest is also owed upon its return because the interest is part of the seized *res*." Pl.'s Resp. 9. Thus, when CAFRA required the government to return Anthonia's property, the government should have returned it in its entirety, with the interest that the property accrued. The M&R, by ignoring this argument, commits plain error, wrongly presuming instead that Anthonia's claim for interest was brought under Section 2465 of CAFRA. This mistaken assumption led the M&R to wrongly apply *United States v. Minh Huynh*, 334 F. App'x 636, 638 (5th Cir. 2009) (per curiam) and errantly conclude that *Huynh* "forecloses Plaintiff's legal arguments on interest." M&R 15. First, *Huynh* is an unpublished opinion with no precedential value and thus cannot "foreclose" a decision by this court. *See* Fifth Circuit Rule 47.5.4. ("Unpublished opinions issued on or after January 1, 1996, are not precedent.") More importantly, though, *Huynh* is inapplicable. The case deals with whether Section

2465 can be triggered in situations outside of the government instituting civil-forfeiture proceedings. According to the court in *Huynh*, it cannot. 334 F. App'x at 638. But this holding does nothing to undermine Anthonia's claim for interest because she is not bringing this claim under Section 2465. Instead, Anthonia's claim for interest arises out of the government's failure to return the entirety of her property, which, according to established caselaw, includes interest. *See* Part I.B, *infra*.

Tellingly, *Huynh* cites *Carvajal v. United States*—which Plaintiff cites in support of her claim for interest—for the proposition that the interest requirement under Section 2465 "'is triggered *only* when the government institutes civil forfeiture proceedings.'" *Id.* at 638 (quoting *Carvajal*, 521 F.3d 1242, 1247 (9th Cir. 2008)). *Carvajal* goes on to explain, however, that because of this limited application, it is critical to allow recovery of interest outside of Section 2465. Otherwise:

> [t]he government's failure to comply with 18 U.S.C. § 983(a)(3) would result in an inability to pursue forfeiture, but would yield the benefit of accrued interest on the improperly seized property, a benefit that only increases if the government refuses to comply with the law and return property . . . we would not interpret CAFRA to yield such an irrational result.

Carvajal, 521 F.3d at 1248. Thus, if Section 2465 allows interest only when the government initiates civil-forfeiture proceedings, as the M&R holds, that only strengthens Anthonia's claim for interest.

B. Contrary to the conclusion of the M&R, Plaintiff's claim for interest on her seized property is not barred by sovereign immunity.

The M&R also incorrectly concludes that sovereign immunity bars Anthonia from asserting a claim for interest on the property taken from her by the government. The M&R cites precedent for the proposition that "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." M&R 14 (quoting *Spawn v. W. Bank-Westheimer*, 989 F.2d 830, 833 (5th Cir. 1993); *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986)). But both cases address interest on "a recovery against the United States" and not interest on seized property. *See Shaw*, 478 U.S. at 312-13, 316 (dealing with an award of interest on attorney's fees granted against the United States); *Spawn*, 989 F.2d at 831-32

(regarding an award of interest on $100,000 in deposit insurance that the United States was ordered to provide). To be sure, these types of interest have historically been understood as "an element of damages separate from damages on the substantive claim." *Shaw*, 478 U.S. at 315.

But multiple federal circuit courts around the country—as well as a federal district court here in Texas, relying on their reasoning—do not extend this reasoning to interest on seized property. Instead, they agree with Plaintiff that interest on seized property is not barred by sovereign immunity. As the Sixth Circuit reasoned in *United States v. $515,060.42*, "while sovereign immunity prevents a simple claim for pre-judgment interest," in the case of interest on seized property "there is no issue of sovereign immunity" because when the government is asked "to disgorge property that was not forfeited," the award of interest is viewed "as an aspect of the seized *res* to which the Government is not entitled" rather than "the typical award of pre-judgment interest." 152 F.3d 491, 504 (6th Cir. 1998) (distinguishing *Shaw*, 478 U.S. at 311, 315). The Ninth Circuit further explained that "the payment of interest on wrongfully seized money is not a payment of damages, [and] instead is the disgorgement of a benefit 'actually and calculably received from an asset that [the government] has been holding improperly.'" *Carvajal*, 521 F.3d at 1245 (quoting *United States v. $277,000*, 69 F.3d 1491, 1498 (9th Cir. 1995)) (alterations in the original). The Eleventh Circuit, too, agrees that sovereign immunity does not bar recovery of interest on seized property. *See United States v. 1461 W. 42nd St.*, 251 F.3d 1329, 1338 (11th Cir. 2001) ("[T]he government may be liable for pre-judgment interest to the extent that it has earned interest on the seized *res*.")

These courts all follow the reasoning that the interest is part and parcel of the seized *res*. In *Carvajal*, for example—a case with a strikingly similar fact pattern involving a seizure of cash under CAFRA and a failure to return interest earned on this cash—the Ninth Circuit held that "[i]nterest earned, whether actually or constructively, is part of the *res* that must be returned to the owner." 521 F.3d at 1245. As the Sixth Circuit explained, such an outcome makes sense, since failing to return

interest on the seized money would be akin to failing to return a calf that was born after the seizure of a pregnant cow. *$515,060.42*, 152 F.3d at 505. "[I]t would hardly be fitting that the Government return the cow but not the calf." *Id.* The Northern District of Texas found the Sixth Circuit's reasoning persuasive and relied on it to order the "return [of] $1,822 to [Plaintiff], with interest" after the Drug Enforcement Agency seized the money under another forfeiture statute—21 U.S.C. § 881—and was later required to return it. *Kadonsky v. United States,* No. CA-3:96-CV-2969, 1998 WL 460293, *4 (N.D. Tex. Aug. 4, 1998) (citing *$515,060.42* rather than *Spawn* or *Shaw*). The M&R failed to recognize the key distinction between normal pre-judgment interest, which is barred by sovereign immunity, and interest on seized property, which is not barred by sovereign immunity. This Court should reject the M&R's flawed analysis and follow the persuasive authority of the Sixth, Ninth, and Eleventh Circuits—as well as the Northern District of Texas—in holding that Anthonia's claim for interest is not barred by sovereign immunity.

II. Plaintiff Brought a Viable Individual Challenge to Her Inclusion on a Screening List (Count IV).

Plaintiff also objects to Part B of the M&R, which commits plain error in its analysis of Count IV's individual claims. First, the M&R fails to analyze Anthonia's procedural due-process challenge to being placed on a screening list. Then, the M&R improperly applies the APA's arbitrary-and-capricious standard to Plaintiff's equal-protection challenge to being on a screening list. The M&R also makes several other legal errors in its analysis of Anthonia's equal-protection claim. For these reasons, Part B of the M&R should not be adopted.

A. The M&R fails to analyze Plaintiff's procedural due-process claim.

Count IV of Anthonia's complaint states that *both* her equal-protection and her due-process rights were violated when she was placed on a screening list by the government. Compl. ¶ 179. But the M&R only analyzes Anthonia's equal-protection claim, and completely ignores Anthonia's

procedural due-process claim, while still recommending that the screening-list count be dismissed in its entirety. M&R 15-21. This is plain error.

The Complaint sufficiently pleads facts to state a claim for a procedural due-process violation, namely CBP's failure to provide Anthonia with notice or an opportunity to be heard about her placement on the screening list. As the Complaint alleges in more than two dozen paragraphs, Anthonia has been targeted for particularly intrusive screenings by being placed on a screening list without any notice or opportunity to be heard, in violation of *Mathews v. Eldridge*, 424 U.S. 319 (1976). Compl. ¶¶ 181-83, 187-212. Importantly, the *Mathews* analysis implicates "fact-intensive considerations, which . . . necessarily require an evidentiary record," which is non-existent at this point in the lawsuit. *Elhady v. Piehota*, 303 F. Supp. 3d 453, 465-66 (E.D. Va. 2017) (annotation marks and alterations omitted). As such, Anthonia pleaded sufficient facts to allow her *Mathews* claim to move forward. First, she has strong private interests affected by the placement on the screening list, including (1) the ability to travel internationally without harassment, (2) having a reputation that is free from false government stigmatization and humiliation, (3) being free from discrimination based on her race and national origin, and (4) being free from unreasonable searches and seizures. Compl. ¶¶ 188-95. Second, these interests are under a high risk of erroneous deprivation because of the lack of transparency regarding the substantive standards or procedures for being included on, or removed from, the list. Compl. ¶¶ 196-204. Third, the government's interest in keeping Anthonia on the list is *de minimis*, since Anthonia does not present any national security or terrorism concerns and was placed on the list due to an alleged currency-reporting violation. Compl. ¶¶ 205-10.

The M&R plainly erred by overlooking Plaintiff's procedural due-process challenge to being placed on a screening list. As such, the M&R should not be adopted on Count III.

B. The M&R's analysis of Plaintiff's equal-protection claim over her inclusion on a screening list is flawed and must be rejected.

The M&R's analysis of Anthonia's equal-protection claim suffers from four significant deficiencies, and its recommendations with respect to this claim should be rejected. First, the M&R commits plain error by initially analyzing Anthonia's equal-protection challenge under the APA's arbitrary-and-capricious test, even though Anthonia did not bring this claim under the APA, much less under arbitrary-and-capricious review. Second, the M&R mistakenly interprets Anthonia's claim as a general challenge to the border-search doctrine, which Anthonia has never challenged and which is not at issue here. Third, the M&R wrongly fails to construe the allegations of the Complaint in the light most favorable to the Plaintiff in concluding that Anthonia did not allege sufficient facts to state a claim. Fourth and finally, the M&R misconstrues Anthonia's equal-protection challenge to being placed on a screening list as involving only a past search rather than an ongoing injury caused to her every time she travels internationally while her name is on the screening list.

1. Contrary to the M&R's analysis, Plaintiff did not bring an APA challenge under Count IV, much less an APA arbitrary-and-capricious challenge.

The M&R mistakenly begins by analyzing Count IV as an arbitrary-and-capricious challenge under the APA. M&R 17-18. But Count IV was not even brought under the APA; instead, it was brought directly under the Constitution, using a long-established exception to the doctrine of sovereign immunity first articulated in *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682 (1949). Compl. ¶ 12; *see also* Pl.'s Resp. 24 n.10.[1] *Larson* allows suits seeking to enjoin *ultra vires* or unconstitutional conduct without a specific waiver of sovereign immunity. *See Larson*, 337 U.S. at 689-90, 696 (discussing history of exception); *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963) (noting

[1] The only relevance of the APA to Count IV is that APA Section 702 provides an independent waiver of sovereign immunity as an alternative to the same waiver under *Larson*. *See* Pl.'s Resp. 18 n.7 ("the broad sovereign immunity waiver of APA Section 702 applies even to claims not brought under the APA so long as they challenge an agency action . . . and seek only equitable . . . relief") (citing *Doe v. United States*, 853 F.3d 792, 799 (5th Cir. 2017).

that "a suit for specific relief" to challenge actions that are (1) "beyond their statutory powers," or (2) "constitutionally void" are the two "recognized exceptions to the [] general rule" of sovereign immunity) (internal quotations omitted). After all, unconstitutional and *ultra vires* actions are beyond the power of the sovereign and thus are not the acts of the sovereign. *Larson*, 337 U.S. at 690.[2]

Even if Anthonia had brought her Count IV constitutional claims under the APA, the M&R's analysis would have still been flawed. The M&R mistakenly argues that an agency action *must* be affirmed unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." M&R 17 (quoting 5 U.S.C. § 706(2)(A)) (hereinafter, "arbitrary-and-capricious"). But the arbitrary-and-capricious ground is only one of six independent grounds that courts can use to "hold unlawful and set aside agency action" under the APA. *See* 5 U.S.C. § 706(2)(A)-(F). If the APA applied to Count IV, it should not be analyzed based on whether CBP's actions were arbitrary-and-capricious but whether they were "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. §§ 706(2)(B); *see, e.g.*, *Malone Mortg. Co. Am., Ltd. v. Martinez*, No. 3:02-CV-1870, 2002 WL 31114160, at *8, 20-25 (N.D. Tex. Sept. 23, 2002) (examining both whether an agency action was arbitrary-and-capricious and, separately, whether it was "contrary to constitutional right").

Because the M&R inappropriately treats Plaintiff's equal-protection challenge as an arbitrary-and-capricious challenge under the APA, its recommendations on Claim IV should not be adopted.

2. The M&R's analysis wrongly construes Plaintiff's individual challenge to being targeted for additional screening as a general challenge to the border-search doctrine.

The M&R also mistakenly assumes that Plaintiff's individual claim that she has been singled out for particularly intrusive and invasive inspections by being placed on a screening list is a challenge to the border-search doctrine. M&R 18 ("The law allows CBP considerable discretion in

[2] The M&R also misconstrues Anthonia's "directly under the Constitution" challenge as brought under the Declaratory Judgment Act ("DJA") rather than under *Larson, et al.* M&R 16 n.29. But the DJA is not used as "as a jurisdictional source of relief in this action." M&R 16 n.29. The DJA is just a vehicle for allowing declaratory judgement as a remedy in federal courts and is used here solely for such purposes. *Skelly Oil Co. v. Phillips Petrol. Co.*, 339 U.S. 667, 671 (1950).

its decisions to implement border searches.") It is not. Anthonia has never claimed that the customs agents had no right to search her as she was crossing the border. Rather, Anthonia's claim has always been that she has been placed on a list of passengers who are regularly subjected to additional, particularly intrusive and invasive screenings without being provided due process of law or a rational basis for treating her differently from similarly situated passengers. Compl. ¶¶ 181, 184, 187. In other words, Anthonia is not challenging the government's general discretion to implement border searches on the traveling public. *See* M&R 18. Rather, she is contesting the government's decision to constantly single her out from the rest of the traveling public, without providing her with an opportunity to contest such a differential treatment. For this faulty reasoning, in addition to other above-mentioned flaws, the M&R's recommendations with respect to Claim IV should be rejected.

3. Plaintiff has stated a viable equal-protection claim regarding her screening-list status.

The M&R wrongly concludes that Anthonia did not allege enough facts to have a viable equal-protection claim by failing to construe the allegations of the Complaint in the light most favorable to the Plaintiff. Instead, the M&R wrongly assumes that the seizure itself was proper and justified, despite Anthonia's allegations that she was not properly notified about the currency-reporting requirement. In reaching this conclusion, the M&R focuses its analysis on whether Anthonia pleaded enough facts to show that she is similarly situated to "those travelers who have not violated the law," M&R 19-20, as opposed to "U.S. citizens . . . who have not been charged with any federal crime, nor had any property forfeited for any alleged violations of federal law"—the point of reference identified by Anthonia in her complaint. Compl. ¶ 184. But comparing Anthonia to "those travelers who have not violated the law" ignores the fact that Anthonia contests the basis for concluding that she violated the law in this very lawsuit, contending that the seizure was unlawful because she was not adequately notified of the currency-reporting laws, as controlling Fifth Circuit precedents mandates. Compl. ¶¶ 49-57, 62, 176.

Taking the allegations in her Complaint as true, Anthonia properly pleaded that she is similarly situated to other U.S. citizens who have not been charged with any crime, nor had any property forfeited for any alleged violations of federal law. Just like the rest of this group, she was not criminally charged, let alone adjudicated guilty. Compl. ¶ 182. Moreover, Anthonia has never had an opportunity to contest the validity of the seizure, because the government declined to pursue civil forfeiture when she requested judicial review. Compl. ¶ 3, 76-86, 182; April 4, 2018 Letter (ECF No. 1-4). Additionally, the seized cash was both lawfully earned and intended for lawful purposes. Compl. ¶¶ 2, 18-21, 46, 110-11. Thus, because the Complaint makes allegations sufficient to state a claim, and because those well-pled allegations must be accepted as true at this motion-to-dismiss stage, the M&R was wrong to recommend dismissal and its recommendation should be rejected.

4. The M&R fails to recognize the inherently continuing nature of Plaintiff's claim that being on a screening list causes her ongoing injury every time she travels.

The M&R misunderstands Anthonia's equal-protection claim as involving only past searches rather than an ongoing injury caused to her by keeping her name on a screening list. M&R 20-21. Such a conclusion misconstrues Anthonia's allegations, which focus on the ongoing nature of her injury: specifically, that she remains on a screening list of passengers regularly subjected to additional screenings. Compl. ¶¶ 71-74, 180-83, 211-12. This is inherently an ongoing claim and it cannot be dismissed based on the M&R's faulty understanding that Anthonia's equal-protection claim "is based on a past search." M&R 20. The M&R's recommendation on this point should be rejected.

III. Plaintiff's Class Claims Challenging CBP's HHA Policy as Both Imposing Unconstitutional Conditions (Count II) and *Ultra Vires* (Count I) Should Not Be Dismissed for Failure to State a Claim.

Plaintiff objects to the M&R's recommendation in Part D that both class claims (Counts I and II) be dismissed. Part D initially addresses the waiver provisions of the HHAs (addressed *infra* in Part III.A); the remainder or Part D relates to the indemnity/reimbursement provisions of the HHAs (addressed *infra* in Part III.B-E). Both analyses contain serious legal errors. First, addressing

the waiver provisions of the HHAs, the M&R rejects much of Plaintiff's unconstitutional-conditions claim (Count II) based on the erroneous conclusion that HHAs do not really waive any claims because all such claims are already barred by sovereign immunity. This is plain error. Second, the M&R misconstrues Plaintiff's constitutional claim as challenging every use of HHAs by CBP, including HHAs used in settlements, and wrongly concludes that the challenged HHAs are a tool of settlement. Third, the M&R errs in trying to justify CBP's demand that putative class members sign HHAs based on a misunderstanding of CAFRA's procedures. Fourth, the M&R commits plain error by conflating Plaintiff's *ultra vires* class claim (Count I) with Plaintiff's separate unconstitutional-conditions claim (Count II), and then fails to analyze Plaintiff's actual *ultra vires* claim. Fifth, rather than analyzing Plaintiff's claim that CBP's HHA Policy is *ultra vires*, the M&R instead invents and applies a new standard: whether CBP's HHA Policy is "prudent." This too is plain error.

A. The M&R errs by rejecting much of Plaintiff's unconstitutional-conditions claim (Count II) based on the erroneous conclusion that the HHA is not a true waiver of claims, wrongly assuming all waived claims are barred by sovereign immunity.

The M&R rejects much of Plaintiff's unconstitutional-conditions claim (Count II) on the mistaken basis that no conditions are actually imposed by the HHA's waiver of claims. The M&R's holding that the primary waiver provisions of the HHA have no effect because they are duplicative of the relief barred by sovereign immunity is plain error. Specifically, the M&R considers two key HHA provisions: one that: (1) "releases and forever discharges" the United States and its officers "from any and all action[s], suits, proceedings, debts, dues, contracts, judgments, damages, claims and/or demand whatsoever in law or equity . . . in connection with the detention, seizure, and/or release" of the seized property, and another (2) stating that the signatory understands that he or she is "waiving any claims to attorney's fees, interest or any other relief." HHA (ECF No. 1-5). With respect to these provisions, the M&R erroneously concludes that the HHA "is more in the nature of

an acknowledgment that such relief cannot be obtained and is not a true waiver of a right actually possessed" because, it claims, all waived relief is already barred by sovereign immunity. M&R 24-25.

The M&R is flatly wrong on this point because it myopically focuses only on sovereign immunity against claims for "damages, attorney's fees, interests and costs incurred during an administrative forfeiture proceeding." M&R 25. But nothing about the terms of the HHA is limited to administrative forfeiture proceedings; instead, the language of these HHA provisions is extremely broad, encompassing "***any and all*** action[s], suits, proceedings, [etc.] . . . ***in connection with*** the detention, seizure, and/or release" of the seized property. HHA (ECF No. 1-5) (emphasis added).

Because of its improperly narrow focus, the M&R fails to consider the many types of actions and relief foreclosed by these HHA provisions that are *not* barred by sovereign immunity, such as claims for equitable relief for violations of constitutional rights (or *ultra vires* conduct) related to the seizure or detention of the property (such as this very lawsuit, s*ee* Pl.'s Resp. at 23-28), claims related to the seizure or detention of the property brought under waivers of sovereign immunity such as claims under *Bivens*, the Federal Tort Claims Act, or the Tucker Act, and any administrative proceeding that a claimant may initiate that is "in connection with" the seizure, detention, or release of their property, including FOIA requests or the DHS-TRIP application process.[3] It also fails to consider that attorney's fees may be available under statutes such as EAJA for bringing some types of lawsuits, and again ignores Plaintiff's argument that interest on seized currency is part of the *res* and thus must be returned as part of the *res*, sovereign immunity notwithstanding. *See supra* Part I.

In contrast to the M&R, the Complaint identifies numerous adverse legal consequences of signing HHAs beyond what is already barred by sovereign immunity (suits for monetary damages):

- Releasing and forever discharging the government and its officers from all "action[s], suits, proceedings" or "claims" connected to the seizure, detention, or release of their property, including waiving the ability to do any of the following:

[3] Oddly, the M&R even separately acknowledges that *ultra vires* claims are "an exception to sovereign immunity," M&R 25, and cites a case involving a viable *Bivens* action challenging a similar HHA policy, M&R 28-29.

- File a lawsuit for injunctive or declaratory relief to vindicate any constitutional rights that were violated during the seizure of the property, *see, e.g.*, Pl.'s Resp. 23-24, 27-28 (ECF No. 60);
- File a lawsuit for injunctive or declaratory relief challenging *ultra vires* action by government agents during the seizure or detention of the property, *see, e.g.*, Pl.'s Resp. 23-27 (ECF No. 60);
- File a lawsuit seeking monetary damages under a sovereign-immunity waiver, such as under *Bivens*, the Federal Tort Claims Act, or the Tucker Act;
- Initiate administrative proceedings with CBP or other federal agencies—including by requesting public records under FOIA or by initiating an administrative proceeding (such as DHS-TRIP) related to whether one is targeted for additional screening by CBP or other federal agencies;
- Appeal any administrative proceedings (such as a FOIA denial) related to the seizure, detention, or release of their property; and
- File a lawsuit challenging the results of administrative proceedings related to the seizure, detention or release of their property, including suing over the government's failure to comply with FOIA;

- Waiving any claim to attorney's fees or legal costs under any provision of law, such as the Equal Access to Justice Act (EAJA);
- Waiving any claim to interest on seized currency (even though interest is actually part of the *res* and must be returned*, see supra* Part I).

Compl. ¶¶ 91–101; *see also* Pl.'s Resp. 33-34 (ECF No. 60). Thus, the claims waived by the HHA are far broader than "damages, attorney's fees, interests and costs incurred during an administrative forfeiture proceeding," as the M&R contemplates. M&R 25. Because the M&R fails to consider many forms of relief foreclosed by the HHA's waiver provisions, it reaches the erroneous conclusion that there is no waiver of any meaningful right under the HHAs. This is plain error.

B. The M&R ignores the limited scope of Plaintiff's constitutional claim (Count II), misconstruing it as challenging all uses of HHAs, including in settlements.

In analyzing the indemnity/reimbursement provisions of the HHA, the M&R errs by misconstruing Plaintiff's constitutional challenge as far broader than it is: "whether an HHA is

unconstitutional in the CAFRA context." M&R 28. But Plaintiff does not bring such a broad challenge to CBP's use of HHAs in CAFRA cases. Instead, Plaintiff only challenges whether it is unconstitutional in the specific conditions presented by the putative class members. That is, Plaintiff challenges whether those claimants whose claims satisfy the requirements of Section 983(a)(3)(B) of CAFRA (the putative class), can be required to sign an HHA waiving their legal and constitutional rights—such as the right to petition the government for redress of grievances by filing a lawsuit challenging unconstitutional or *ultra vires* conduct—as a condition of returning their property. Plaintiff contends they cannot be required to do so, because they are already legally entitled to the return of their property when CBP demands they sign an HHA. Indeed, the statute commands that "the Government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense." 18 U.S.C. § 983(a)(3)(B). Thus, claimants who satisfy the requirements of Section 983(a)(3)(B) of CAFRA are already legally entitled to have their property returned and may not be required to waive additional legal and constitutional rights in order to secure the return of their property. This stands in stark contrast with negotiated settlements in CAFRA cases, where claimants who have not yet secured the legal right to the return of their property may agree to waive certain rights in exchange for the government waiving its right to retain their seized property. The M&R first confuses these two situations in which HHAs are used, and, then wrongly concludes that the HHAs challenged in this case are "squarely in the 'tool of settlement' category." M&R 29. This is flatly wrong.

1. The M&R fails to distinguish between conditions accepted as part of negotiated settlements, as in *Rumery*, and conditions imposed on the right to return of property, as in *Anoushiravani*.

The M&R's analysis of the constitutionality of the HHA's terms fails to recognize the crucial difference between a negotiated settlement resolving a bona fide dispute and a demand made by the

government after the return of seized property is legally required. The Court compares the waiver of future civil-rights litigation as part of a negotiated settlement in *Town of Newton v. Rumery*, 480 U.S. 386 (1987) to an HHA demand made as a condition of returning seized property in *Anoushiravani v. Fishel*, No. 04-CV-212, 2004 WL 1630240 (D. Ore. July 19, 2004), but wrongly concludes that this case is more like *Rumery* than *Anoushiravani*, even though this case does not involve a negotiated settlement and instead involves a demand made as a condition for returning seized property.

Unlike this case, *Rumery* involved settlement of an ongoing dispute in a "release-dismissal agreement" where the government agreed to drop criminal charges in exchange for the plaintiff waiving his right to bring future civil-rights litigation. 480 U.S. at 390-91. The Supreme Court noted that, "[i]n many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action." *Id.* at 394. The Court found that the plaintiff received valuable consideration in return for waiving any civil suit: "The benefits of the agreement to Rumery are obvious: he gained immunity from criminal prosecution in consideration of abandoning a civil suit that he may well have lost." *Id.* Accordingly, the Court held that "[b]ecause Rumery voluntarily waived his right to sue under § 1983, the public interest opposing involuntary waiver of constitutional rights is no reason to hold this agreement invalid." *Id.*

In contrast, *Anoushiravani* involved circumstances very similar to this case, where the owner of seized property contested being required to sign an HHA as a condition of returning property that CBP acknowledged it was legally required to return.[4] 2004 WL 1630240 at *1-2, *10. Addressing *Rumery* and similar negotiated-settlement cases, the *Anoushiravani* court explained, "each of these cases is easily distinguished because each depends on the parties settling a bona fide dispute; in each

[4] In *Anoushiravani*, the CBP seizure was not done under CAFRA but under the Iranian Transactions Regulations ("ITR"). CBP determined that some of the plaintiff's seized property—two musical instruments, several music CDs and cassettes, and five pairs of shoes—was exempt from forfeiture under the ITR and thus required to be returned. *Id.* at *1, *10 n.13.

case the government had a right to a person's property or the grounds to prosecute the person for a crime." *Id.* at *10. In contrast, the court explained: "The present case does not involve such a dispute; the government determined the property exempt, and the plaintiff had an unconditional right to the property." *Id.* at *13. Thus, the court concluded that, "as alleged, the [HHA] served not as a tool of settlement but as a condition on plaintiff exercising his right to the exempt property. This condition served to temporarily deprive plaintiff of his property without due process of law." *Id.* at *10. Accordingly, the plaintiff's *Bivens* claim survived the government's motion to dismiss. *Id.*

2. This case challenges only HHAs imposed after the claimant has already obtained the right to the return of the seized property.

This case is quite similar to *Anoushiravani* and bears little resemblance to the negotiated-settlement situation in *Rumery*. As in *Anoushiravani*, the challenged HHA policy does not involve negotiated settlements but a situation in which the government is already required by statute to return the property. In other words, CBP demands claimants sign the HHA as an *additional* condition of doing what CBP is already legally obligated to do under, *e.g.*, Section 983(a)(3)(B) of CAFRA. Thus, in direct contrast to *Rumery*, the government fails to offer any consideration for the return of the property, and the property claimant fails to get any additional benefit beyond what the statute already requires. *See* Compl. ¶ 102. Because of this, as the court *Anoushiravani* explained, "a hold harmless agreement is a legal quid pro quo in a § 1618 [remission or mitigation settlement] situation but an unconstitutional condition in an exemption situation," where CBP is legally entitled to return the property. *Id.* at *13. The analogous situation in the present case creates similar unconstitutional conditions, as Plaintiff has explained. Pl.'s Resp. 31-35 (ECF No. 60).

The M&R's conclusion that the challenged HHAs are a "tool of settlement" is incorrect because there is no longer any dispute to settle once the government misses the 90-day deadline to file a forfeiture complaint. At that point, CAFRA requires that CBP release the seized property.

C. The M&R erroneously concludes that the challenged HHAs are justified based on a misunderstanding of CAFRA's procedures.

The M&R wrongly concludes that imposing the HHA conditions on the putative class is permissible because "CAFRA sets forth a procedure to be followed," M&R 28, ignoring that the actual procedures set forth in CAFRA and its related DOJ regulation do not mention, much less authorize, requiring putative class members to sign HHAs as a condition of returning their property. Then, the M&R erroneously concludes that CAFRA's procedures "mak[e] the present facts distinguishable from *Anoushirvani* and plac[e] the HHA squarely in the 'tool of settlement' category." M&R 29. This reasoning relies on a faulty premise—that CAFRA's procedures provide any justification for the HHA policy—and reaches a conclusion that is simply a *non sequitur*—that the HHAs challenged here are somehow a "tool of settlement" because CAFRA requires both the government and claimant to follow a set of procedures that have nothing to do with HHAs.

The M&R errs by (1) ignoring that CAFRA commands to "promptly release" seized property Section 983(a)(3)(B) are not discretionary, and thus wrongly concluding that (2) only undisputed owners are entitled to the return of property under CAFRA, and (3) that putative class members could avail themselves of some alternative procedure if they did not wish to sign an HHA.

1. CAFRA's command to "promptly release" seized property is not discretionary.

The M&R's reasoning is particularly strained because the commands of CAFRA and its implementing DOJ regulation are considerably less discretionary than the language of the trade regulations at issue in *Anoushirvani*. Unlike CAFRA and its related DOJ regulation, which plainly command that property be "promptly released" to the claimant when the conditions of Section 983(a)(3)(B) are satisfied, the *Anoushirvani* court held that "the [trade regulations] fail to specify the precise action a[n] official must take when the official determines an item exempt. The [trade regulation] thus creates discretionary, as opposed to ministerial, authority." 2004 WL 1630240 at

*10, n.14. This stands in sharp contrast with 28 C.F.R. § 8.13, which provides detailed procedures for returning property, none of which mentions HHAs.

2. The M&R wrongly holds that only "undisputed" owners of seized property are entitled to the return of that property under Section 983(a)(3)(B) of CAFRA.

The M&R wrongly suggests that, because claimants have only filed a claim, they are not legally entitled to the return of their seized property under CAFRA. The M&R wrongly claims that "Plaintiff's constitutional argument hinges on the presumption that each class plaintiff is the undisputed owner of the seized property" and erroneously holds that "the United States cannot make such an assumption because at that stage of the process, only a claim has been filed by the class plaintiff." M&R 29.[5] But that very assumption is required by CAFRA once a claim is filed. CAFRA does not require an "undisputed owner," as the M&R suggests, but a "claimant" who has filed a verified claim for the property under penalty of perjury. As 18 U.S.C. § 983(a)(2)(C) explains: "(C) A claim shall—(i) identify the specific property being claimed; (ii) state the claimant's interest in such property; and (iii) be made under oath, subject to penalty of perjury." Once this claim is filed, the government then has 90 days to file a forfeiture complaint or obtain a criminal indictment. 18 U.S.C. § 983(a)(3). If it fails to do so, CAFRA commands "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). That is why the very DOJ regulation promulgated pursuant to 18 U.S.C. § 983(a)(3)(B) describes the claimant at this point as "the person with a right to immediate possession of the property" and directs the agency to promptly notify that person about how to obtain the release of their property. 28 C.F.R. § 8.13(b). And to ensure this is done correctly: "The

[5] The M&R fails to explain how this distinguishes these cases from the seizure in *Anoushirvani*, where the seized property could have also belonged to someone else but was still required to be returned to the person from whom it was seized.

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." 28 C.F.R. § 8.13(c).

3. There is no basis for the M&R's claim that Plaintiff could have avoided signing her HHA by proving her ownership of the property in an administrative proceeding.

The M&R further errs in its conclusion that: "If Plaintiff did not wish to sign the HHA, she could have proved her ownership of the property in the administrative forfeiture proceeding." M&R 30. This wrongly assumes that HHAs are not required for releases of property in administrative forfeiture cases—they are—and ignores the chronological order of CAFRA's procedures.

First, the M&R improperly assumes facts not in evidence at this motion-to-dismiss stage. Moreover, contrary to the M&R's assumption, HHAs *are* generally required for release of any property in administrative forfeiture proceedings (remission and mitigation petitions) before CBP. For example, for administrative CAFRA remissions, "[t]he claimant must . . . execute a Hold Harmless Agreement." U.S. Customs Services, Seized Asset Management and Enforcement Procedures Handbook, CIS HB 4400-01A, Jan. 2002, § 2.10.5 "Remission of Forfeiture" pp. 129-30, https://foiarr.cbp.gov/docs/Manuals_and_Instructions/2009/283231839_19/0910011234_seized_management_Part1.pdf.

Next, the M&R incorrectly states that a claimant can do something at the very end of the CAFRA process that is only possible at the very beginning of the process, long before they are presented with an HHA. The very first decision a property owner makes in a CAFRA proceeding is whether to proceed administratively or to file a claim and proceed with a judicial forfeiture. *See* 18 U.S.C. § 983(a)(2) (setting forth procedure for filing a claim); *see also* Election of Proceedings Form (ECF No. 1-3). By definition, all putative class members filed claims seeking a judicial forfeiture under Section 983(a)(2) of CAFRA. Once a claim is filed, all administrative, nonjudicial forfeiture proceedings are converted into judicial forfeiture proceedings, and there is no procedure in CAFRA to reverse this transition. That is because filing a claim triggers the government's 90-day deadline to

file a forfeiture complaint in court (or obtain a criminal indictment). 18 U.S.C. § 983(a)(3)(A) ("Not later than 90 days after a claim has been filed, the Government ***shall*** file a complaint for forfeiture . . .") (emphasis added). If the government fails to do so, "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). This is the end of the line. There is no further requirement that claimants "prove" their ownership of the property because they have already filed a verified claim, as explained *supra*. Nor is there a provision permitting either side to restart administrative forfeiture proceedings, and the M&R's suggestion to the contrary finds no support in CAFRA.

The M&R's conclusion that the challenged HHAs are a "tool of settlement" in these circumstances is based on a misunderstanding of CAFRA's procedures and should be rejected.

D. The M&R mistakenly conflates Plaintiff's separate class claims that CBP's HHA Policy is both *ultra vires* (Count I) and imposes unconstitutional conditions (Count II).

Although Part D of the M&R claims to address both Plaintiff's statutory *ultra vires* claim (Count I) and Plaintiff's unconstitutional-conditions claim (Count II), *see* M&R 22, it mistakenly conflates the *ultra vires* claim that CAFRA and the DOJ implementing regulation do not authorize CBP's HHA Policy with Plaintiff's separate constitutional claim that conditioning the release of property on waiving certain rights imposes an unconstitutional condition. Accordingly, the M&R improperly dismisses Plaintiff's Count II without addressing its core argument: that CBP's HHA Policy is *ultra vires* because CAFRA and the DOJ regulation do not authorize CBP to require putative class members to sign an HHA as a condition of returning their seized property. This is plain error.

Specifically, the M&R wrongly concludes that "to obtain relief under an ultra vires theory, Plaintiff must show that the imposition of an HHA is unconstitutional." M&R 26. In reaching this conclusion, the M&R relies on *Larson*, 337 U.S. at 689, a key case relied on by Plaintiff to

demonstrate the availability of common-law exceptions to sovereign immunity in two categories of cases: (1) cases where the challenged conduct was *ultra vires*, and (2) cases where the challenged conduct was unconstitutional. *See* Pl.'s Resp. at 23-28 (ECF No. 60). As *Larson* explains, one of two categories of suits for specific (equitable) relief not barred by sovereign immunity are those "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. . . . His actions are ultra vires his authority and therefore may be made the object of specific relief." 337 U.S. at 689. *Larson* notes the distinction between this *ultra vires* exception and "[a] second type of case . . . in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional." *Id.* at 690; *see also id.* at 701-02 (noting that precedent allows for "a suit for a specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void."); *accord Dugan v. Rank*, 372 U.S. 609, 621-22 (1963) (discussing these two "recognized exceptions to the [ ] general rule" of sovereign immunity); *Unimex, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 594 F.2d 1060, 1062 (5th Cir. 1979) (per curiam) (noting "the two exceptions to sovereign immunity" as *ultra vires* and constitutional challenges for specific relief.)

The M&R misreads *Larson* to wrongly conclude that these two exceptions are the same, incorrectly describing them both as constitutional exceptions. M&R 25-26 (noting the exception to sovereign immunity "where the statute that conferred power on a federal officer to take action was unconstitutional or where the manner in which the powers were exercised was constitutionally void.") But while the reason for these two exceptions is very similar—both involve the exercise of power beyond that rightly exercised by the sovereign—that does not mean that *ultra vires* arguments depend on a showing of unconstitutionality, as *Larson* makes clear. Indeed, even if Plaintiff had not brought a constitutional claim, she could and should still prevail on her *ultra vires* claim if the Court

finds that CAFRA does not authorize CBP to require putative class members to sign an HHA as a condition of returning their seized property. By conflating Count I with Count II, the M&R fails to fully consider the *ultra vires* arguments raised in Count I—*see infra* Part III.E and Part IV—and commits plain error by dismissing the claim as duplicative of Count II.

E. Rather than analyze whether the challenged policy is *ultra vires*, the M&R improperly applies a new standard: what it believes is "prudent" for CBP to do.

Instead of analyzing whether the challenged HHA policy is authorized by CAFRA and its DOJ implementing regulation, the M&R improperly invents and applies a new standard for analyzing whether a challenged policy is *ultra vires*. The M&R wrongly focuses on whether it "makes sense" or is "prudent" for the government "to seek an HHA to protect itself when it is releasing the property." M&R 29-30. Plaintiff does not question that it "makes sense" for the government to want to protect itself from liability, but that is not a relevant legal standard for analyzing an *ultra vires* challenge; instead, Plaintiff challenges CBP's authority under CAFRA and its DOJ regulation to demand that putative class members sign an HHA as a condition of returning their property.

By focusing on whether CBP's behavior was "prudent," the M&R improperly dismissed Plaintiff's *ultra vires* claim under Count I without considering CBP's legal authority to require HHAs in these circumstances. In fact, neither the DOJ regulation nor CAFRA itself mention HHAs, much less authorize agencies to require "the person with a right to immediate possession of the property," 28 C.F.R. § 8.13(b), to sign an HHA waiving their legal and constitutional rights as a condition of releasing their property. It is for this reason that the CBP's actions are *ultra vires*. Agencies cannot act without an express delegation of authority from Congress, and the absence of a prohibition cannot be construed as an authorization. *See, e.g.*, *Luminant Generation Co. v. EPA*, 675 F.3d 917, 932 (5th Cir. 2012) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.") (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). CBP has failed to offer any

source of legal authority for its use of HHAs in these circumstances because there is none. The M&R's reasoning that this overreach is permissible because "it is prudent" is reversible error.

IV. Plaintiff's *Ultra Vires* Class Claim (Count I) Does Not Challenge the Specific Timing of the Release of Property, But Instead Challenges Imposing an Additional Condition—Signing The HHA—Not Authorized by Statute or Regulation.

Plaintiff objects to Part E of the M&R. To the extent Part E addresses Plaintiff's *ultra vires* class claim, it wrongly construes it as challenging the timeliness of the release of seized property, when Plaintiff made clear in her opposition brief that her challenge is primarily to the government's failure to release the property, as required by the statute and DOJ regulation, without imposing additional conditions. Pl's Opp'n 20-21, 25-26. In other words, Plaintiff is not quibbling about the specific number of days that it takes CBP to return seized property, but instead challenges CBP's refusal to return the property until after putative class members comply with the additional, *ultra vires* condition of signing the HHA (and CBP's threat to administratively forfeit the property if the putative class member fails to do so). By interposing this additional, unauthorized step before the property is released, CBP fails to comply with CAFRA's command to "promptly release" the property, 18 U.S.C. § 983(a)(3)(B), *i.e.*, to return the property without delay, nor with the regulatory command to "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." 28 C.F.R. § 8.13(b). Part E's erroneous conclusion that when CBP "interposed a request that an HHA be signed prior to the release of property" it was not an *ultra vires* or unconstitutional act, simply relies on the reasoning in Part D, and is thus flawed for the reasons stated *supra*. Because it does not address Plaintiff's actual *ultra vires* arguments, Part E of the M&R should not be adopted.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully objects to Parts A, B, D, and E of the M&R. Defendants' Amended Motion to Dismiss should be denied as to all claims.

Dated: May 24, 2019

Respectfully submitted,

/s/ Dan Alban
Dan Alban, Attorney-in-Charge
Virginia Bar No. 72688
Southern District No. 3194997
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Email: dalban@ij.org

Anya Bidwell
Texas Bar No. 24101516
Southern District No. 3063390
INSTITUTE FOR JUSTICE
816 Congress Avenue, Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Email: abidwell@ij.org

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 24, 2019, a true and correct copy of the foregoing document was filed with the Clerk of the Court and was served upon the following counsel of record via the Court's ECF system:

Ariel Wiley
Assistant United States Attorney
1000 Louisiana Street, Suite 2300
Houston, Texas 77002
Tel.: (713) 567-9344
Email: ariel.wiley@usdoj.gov

/s/ Dan Alban

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

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

ORDER

Pending before the Court is the magistrate judge's May 10, 2019 Memorandum and Recommendation (ECF No. 70) on Defendants' Amended Motion to Dismiss (ECF No. 58). After considering Plaintiff's Objections, the briefing submitted by both parties on Defendants' Amended Motion to Dismiss, and otherwise being fully advised on the premises, the Court hereby declines to follow the magistrate judge's Memorandum and Recommendation.

IT IS HEREBY ORDERED that Defendants' Amended Motion to Dismiss is DENIED as to each of Plaintiff's individual and class claims for the reasons stated in the accompanying opinion.

SIGNED at Houston, TX this _____ day of _____, 2019.

_____
GRAY H. MILLER
UNITED STATES DISTRICT JUDGE