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

ANTHONIA NWAORIE, on behalf of herself and all others similarly situated,

Plaintiff,

v.

UNITED STATES OF AMERICA;

U.S. CUSTOMS AND BORDER PROTECTION;

KEVIN McALEENAN, Commissioner, U.S. Customs and Border Protection, sued in his official capacity,

Defendants.

Civil Action No. 4:18–CV–01406

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

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INTRODUCTION

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

Anthonia brings two class claims and two individual claims. Her class claims challenge CBP's demand that this class of property owners sign HHAs to get their property back as *ultra vires* under CAFRA (Count I) and as an unconstitutional conditions (Count II). Her individual claims demand the return of her property, with interest, under Rule 41(g) (Count III) and challenge her designation as a traveler who is deliberately targeted for additional, invasive and intrusive screening procedures without notice or an opportunity to be heard (Count IV).

Defendants' conduct in this case is egregious. CBP is ignoring the clear commands of CAFRA and the underlying regulations, which require the government to promptly release property to claimants once the 90-day period to file a forfeiture petition has expired. Instead, CBP is extracting waivers of constitutional and other legal rights from property owners (and requiring them to assume new legal liabilities) as a condition of returning their property. CBP is doing this when property owners are at their most vulnerable, after they have been deprived of their property for months—five months in Anthonia's case—and may be desperate to get it back. As a carrot, CBP offers to release the person's property if they sign the HHA, even though CBP is already required to release the property under CAFRA. As a stick, CBP threatens to administratively forfeit the person's property if they do not sign and return the HHA within a specified period, even though CAFRA expressly prohibits the government from taking any further action to forfeit the property.

In their motion to dismiss, Defendants' serve up a veritable smorgasbord of arguments on

exhaustion, mootness, standing, sovereign immunity, jurisdiction, and failure to state a claim, hoping to appeal to this Court through sheer variety. But Defendants' arguments are all sizzle and no steak. They attempt to invent a new "administrative remedy" out of whole cloth—based on extrinsic evidence—claiming that people must call or email CBP before they can sue. They try to drive a Mack Truck through a mousehole-size exception to judicial review under the APA. They base their sovereign immunity arguments on cases involving claims for monetary damages, even though none of the claims in this lawsuit seek monetary damages—a critical distinction under this doctrine. The government even argues that CBP can impose unconstitutional conditions using HHAs because, they claim, Congress could unilaterally impose the very same unconstitutional conditions on people.

Despite Defendants' creative arguments to the contrary, people can and do routinely sue federal administrative agencies in federal court for violations of federal law and their federal constitutional rights. They are not turned away simply because they did not email the agency before they sued, or because the agency claims that some ambiguity in a statutory provision gives it total discretion and thus, complete immunity from judicial review. At the same time, challenges under the doctrine of unconstitutional conditions continue to be viable so long as the conduct they are challenging is actually unconstitutional. They are not derailed by the fact that Congress could theoretically pass unconstitutional laws, because that would achieve the same unconstitutional outcome. Accordingly, Defendants' amended motion to dismiss should be rejected.

STANDARDS OF REVIEW

When reviewing a motion to dismiss under Federal Civil Rule of Civil Procedure 12(b)(1), the court considers only whether it lacks subject matter jurisdiction. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Smith v. Reg'l Transit Auth.*, 756 F.3d 340, 347 (5th Cir. 2014) (internal quotation and citation omitted). Under Rule 12(b)(1), "the district court is not limited to an inquiry into undisputed facts. It may hear conflicting written and oral evidence and decide for itself the factual issues which determine jurisdiction." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). Accordingly, Plaintiff has attached the Declaration of Anthonia Nwaorie regarding developments

subsequent to the filing of the Complaint for this Court's consideration only on Rule 12(b)(1) issues.

When reviewing a motion to dismiss under Rule 12(b)(6), a court must accept as true all facts in the complaint and construe them in the light most favorable to the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court does not need to determine whether a plaintiff's victory is probable. *Wilson v. Birnberg*, 667 F.3d 591, 600 (5th Cir. 2012) (citation omitted). Rather, the inquiry must focus on whether the facts pled, if true, would entitle the plaintiff to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). "Dismissal is improper if the allegations support relief on any possible theory." *Wilson*, 667 F.3d at 595 (internal quotation omitted). "In ruling on Rule 12(b)(6) motions, district courts generally may rely only on the complaint and its proper attachments." *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006).

SUMMARY OF ARGUMENT

In their Amended Motion to Dismiss ("AMtD"), ECF No. 58, Defendants present a motley assortment of arguments to urge this Court to dismiss Anthonia's class-action and individual claims. None of these arguments is consistent with U.S. Supreme Court or Fifth Circuit case law, and all should be squarely rejected. In Part I below, Plaintiff demonstrates there is no requirement of administrative exhaustion for any of Anthonia's claims and that it would be inappropriate for this Court to impose one. In Part II, Plaintiff shows why her claims are not moot: because CBP has not returned her interest on the seized money and because she continues to be targeted for invasive screenings. In Part III, Plaintiff explains why Anthonia has standing on behalf of the class under the "relation back" doctrine—she continues to have standing to bring her claims because she had standing at the time the suit was filed. In Part IV, Plaintiff shows why her claims are precisely the kinds of non-monetary claims for which Section 702 of the APA waives sovereign immunity. Alternatively, her claims also fall within two common-law exceptions to sovereign immunity for equitable challenges to *ultra vires* or unconstitutional conduct. In Part V, Plaintiff rebuts Defendants' attacks on the viability of Count IV and Count II, demonstrating that the Complaint pleads facts sufficient to support her constitutional challenge to being targeted for screening (Count IV) and her challenge to CBP's HHA policy as imposing unconstitutional conditions (Count II).

ARGUMENT

I. Exhaustion of Administrative Remedies Does Not Bar Any of Anthonia's Claims.

Defendants assert that each of Anthonia's claims fails because she failed to exhaust her administrative remedies. AMtD 5-8. As a threshold matter, Defendants rely on extrinsic evidence with respect to three of Anthonia's four claims, citing a newly submitted declaration, ECF No. 58-3, which either (1) must be ignored, or (2) the AMtD must be converted into a motion for summary judgment.[1] If the motion is converted into one for summary judgment, it should be summarily denied for failure to satisfy the minimum requirements for such a motion.[2] But even if this Court were to consider this improper extrinsic evidence, Defendants' arguments are fatally flawed.

A. Exhaustion of administrative remedies does not apply to the class claims.

With respect to the class claims, which are brought under the APA, Defendants argument does not establish failure to exhaust administrative remedies under the APA. First, Defendants fail to identify any "prescribed administrative remedy" that Plaintiff could have exhausted. *Taylor v. U.S. Treasury Dep't.*, 127 F.3d 470, 476 (5th Cir. 1997). Instead, Defendants only cite to extrinsic evidence in a declaration that just says people "may request" that CBP modify or waive their HHA. AMtD 8.

Second, Defendants' failure to identify any statutory or regulatory exhaustion requirement is fatal to their argument. The exhaustion provision of the APA states that only administrative remedies "expressly required by statute" or "require[d] by [agency] rule" prevent an agency action from becoming final. 5 U.S.C. § 704. The U.S. Supreme Court has held that this provision, "limit[s] the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates." *Darby v. Cisneros*, 509 U.S. 137, 146 (1993). Defendants cite no such statute or

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[1] *See* Fed. R. Civ. P. 12(d). Defendants' administrative exhaustion argument can only be made under Rule 12(b)(6), and not Rule 12(b)1), because it is not jurisdictional. Exhaustion of administrative remedies is not a jurisdictional prerequisite unless required by statute, *see Taylor v. U.S. Treasury Dep't.*, 127 F.3d 470, 475-76 (5th Cir. 1997), and Defendants have not identified any statute requiring exhaustion of administrative remedies in these circumstances.

[2] Defendants fail to assert, much less show, that there is no genuine dispute as to any material fact, Fed. R. Civ. P. 56(a), and fail to provide any support for such an assertion as required by Fed. R. Civ. P. 56(c)(1). Discovery is ongoing in this case and Plaintiff has not yet had an opportunity to depose the declarant upon which Defendants' rely. Ms. Gleason was not disclosed in Defendants' initial disclosures and Plaintiff only became aware of her on March 22, 2019 when the AMtD and declaration were filed. If the Court wishes, Plaintiff's counsel will provide a declaration to this effect.

rule and Plaintiff is aware of none. In *Darby*, the Court rejected any attempt by courts "to impose additional exhaustion requirements beyond those provided by Congress or the agency" reasoning that if courts could do so, "the last sentence of [5 U.S.C. § 704] would make no sense." *Id.* at 146-47.

Third, and contrary to Defendants' position that Plaintiff did not exhaust her administrative remedies because "she never addressed with CBP her concerns about signing the [HHA] prior to filing" this lawsuit, AMtD 8, agency action is "final" under the APA "whether or not there has been presented or determined an application . . . for any form of reconsideration, or . . . an appeal to superior agency authority." 5 U.S.C. § 704. In *Darby*, the Court rejected such requirements, noting that "it would be inconsistent with the plain language of [5 U.S.C. § 704] for courts to require litigants to exhaust optional appeals as well." 509 U.S. at 147.

Thus, under the APA, "the district court may not impose an exhaustion requirement where exhaustion is not expressly required by statute or agency rule." *AAA Bonding Agency Inc. v. DHS*, 447 F. App'x 603, 612 (5th Cir. 2011); *accord United States v. Menendez*, 48 F.3d 1401, 1410–11 (5th Cir. 1995). Imposing new exhaustion requirements here, as Defendants suggest, would conflict directly with well-established precedent of the U.S. Supreme Court and the Fifth Circuit.

B. Exhaustion is neither required nor appropriate for Anthonia's individual claims.

Defendants also argue that Anthonia was required to exhaust administrative remedies for her individual claims, but again overlook the fact that there is no "prescribed administrative remedy" for these claims, *Taylor*, 127 F.3d at 476 (internal quotation omitted), and that both claims fall within the "[t]raditional circumstances" in which courts have not required exhaustion. *Id.* at 477.

1. Exhaustion is not required or appropriate for Count III (return of property).

With respect to Count III, Anthonia's claim for return of her seized property (with interest), Defendants again fail to identify any administrative remedy that Anthonia failed to exhaust beyond extrinsic evidence in a declaration, AMtD 7 (citing ECF No. 58-3), which is not properly considered under Rule 12(b)(6), and fails to present undisputed material facts under Rule 56. *See supra* notes 1-2.

Even if this extrinsic evidence were considered, the "administrative remedy" Defendants propose is not an actual process. CBP simply says anyone can contact them about returning their

property. ECF No. 58-3 at ¶ 3. This suggestion ignores the fact that Anthonia had just received a letter from CBP stating unequivocally that she had to sign the HHA within 30 days or her property would be administratively forfeited. Compl. ¶¶ 85-90. Moreover, the mere fact that people can contact CBP is simply not a "prescribed administrative remedy," *Taylor*, 127 F.3d at 476, particularly given the clear procedures in CAFRA for seeking the return of seized property. *See* 18 U.S.C. § 983(a). In fact, Anthonia fully followed the steps outlined in CAFRA to secure the return of her property, having filed a claim with CBP and waited for the agency to file a forfeiture complaint. Compl. ¶¶ 75-84. It was CBP's insertion of an additional requirement in this administrative process without authorization by CAFRA or the underlying regulations—demanding Anthonia sign a HHA as a condition of returning her property—that led to this claim being filed. Compl. ¶¶ 85-90, 167-75.

In addition, Anthonia's return-of-property claim falls within several of the "[t]raditional circumstances" outlined in *Taylor* where courts do not require exhaustion. 127 F.3d at 477. First, "the exhausted remedy would be plainly inadequate." *Id.*. at 477. Plaintiff alleges that CBP's systematic policy or practice is to demand that putative class members like Anthonia sign HHAs as a condition of returning their property, Compl. ¶¶ 1, 8, so the suggestion that a call or email would be an adequate remedy for this systematic conduct strains credulity. Second, Anthonia is challenging CBP's additional requirement for return of her seized property as *ultra vires* and unconstitutional, so "the adequacy of the administrative remedy is essentially coextensive with the merits of the claim (e.g., the claimant contends that the administrative process itself is unlawful)." *Taylor*, 127 F.3d at 477. Third, "exhaustion of administrative remedies would be futile because the administrative agency will clearly reject the claim." *Id.* Anthonia had just received a letter from CBP plainly stating its HHA demand, consistent with CBP's systematic policy or practice of making such demands, so it beggars belief that CBP would have simply changed this policy if only Anthonia had called or emailed the agency. Requiring exhaustion of CBP's supposed "administrative remedy" here would elevate form over substance, requiring futile actions before seeking a judicial remedy for constitutional violations.

2. Exhaustion is not required or appropriate for Count IV (screening list).

Regarding Anthonia's claim challenging her inclusion on a screening list, Defendants point

to the DHS TRIP process—the very process that Anthonia alleges is constitutionally inadequate—as the administrative remedy that she has failed to exhaust. AMtD 7. But following this process is not mandatory under any statute or regulation. *See, e.g.*, 49 U.S.C. §§ 44903(j)(2), 44926(a) (absence of any requirement that travelers follow this process to challenge their inclusion on a screening list). In situations where, like here, exhaustion is not congressionally mandated, it is a court's discretion, based on the circumstances, whether to impose an exhaustion requirement. In so determining, a court "must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992). Requiring exhaustion is not appropriate where "irreparable injury will result absent immediate judicial review." *Dawson Farms, LLC v. Farm Serv. Agency*, 504 F.3d 592, 606 (5th Cir. 2007) (citation omitted). Other "[t]raditional circumstances" in which courts do not require exhaustion include when "the unexhausted administrative remedy would be plainly inadequate" or "the claimant contends that the administrative process itself is unlawful." *Taylor*, 127 F.3d at 477.

First, the indefinite timeframe for the DHS TRIP process coupled with Anthonia's ongoing irreparable injury from being targeted for intrusive screening creates "circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion." *McCarthy*, 503 U.S. at 146. The DHS TRIP process offers no fixed time within which the review must be completed. *See* 49 C.F.R. § 1560.205(d) (offering only a "timely" written response). As a result, without judicial review, there is simply no telling when Anthonia may obtain relief from the ongoing irreparable injury of being subjected to additional, invasive screening every time she travels. Compl. ¶¶ 113-17, 188-95. When "prejudice may result" from an "indefinite timeframe for administrative action," exhaustion of remedies is inappropriate. *McCarthy*, 503 U.S. at 147 (cataloguing examples). Because Anthonia continues to suffer ongoing irreparable injury due to CBP's ongoing conduct, she should receive immediate judicial review. *See Dawson Farms*, 504 F.3d at 606.

Second, Anthonia should not be required to complete the DHS TRIP process before asserting her constitutional claims in this Court because DHS TRIP is a plainly inadequate remedy. DHS TRIP exists only to "correct any erroneous information," 49 C.F.R. § 1560.205(d), and cannot

resolve constitutional or other legal challenges. *See* Compl. ¶¶ 196-204. DHS TRIP would not even confirm or deny Anthonia's presence on the screening list. Compl. ¶ 201; a*ccord Elhady v. Piehota*, 303 F. Supp. 3d 453, 459 (E.D. Va. 2017) ("While the redress process can result in the correction of erroneous information, the concluding letter neither confirms nor denies whether the individual is on the Watch List or the Selectee List."). The DHS TRIP outcome would thus neither inform Anthonia of the reasons for her inclusion on the screening list nor address the constitutional issues presented in this claim. Compl. ¶¶ 198-204. When a statutory remedy is "so opaque" as this, the Supreme Court has held it is "unavailable" for exhaustion. *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016).

Finally, requiring exhaustion of administrative remedies is inappropriate where, as here, the plaintiff is challenging the lawfulness of the administrative process itself. *Taylor*, 127 F.3d at 477. Anthonia alleges that the redress process is constitutionally inadequate because, among other things, she has never even been provided notice that she has been placed on a screening list. Compl. ¶ 196-204. Requiring Anthonia to complete this constitutionally inadequate redress process would be pointless given her challenge to the constitutionality of that very process.

II. Anthonia's Individual Claims Are Not Moot and She Has Standing to Bring Them.

Anthonia brought two claims in her individual capacity. Count III is a claim for return of property under Rule 41(g).[3] Count IV is a challenge to CBP's ongoing conduct of singling out Anthonia for particularly intrusive airport screenings after the October 31, 2017, incident without providing her with notice and an opportunity to be heard regarding her inclusion on a screening list.

Defendants wrongly contend both claims are moot, AMtD 24-27, and that Anthonia lacks standing to bring Count IV because she cannot demonstrate likelihood of future injury. AMtD 28-30. As explained below, Count III is not moot because the government has not returned the property in full, which includes the interest on the seized property. Count IV is not moot and Anthonia has standing on Count IV for the same reason: She is still being targeted for particularly

[3] Like other circuits, the Fifth Circuit construes Rule 41(g) motions as initiating a civil action in equity, particularly where the government has seized property, but not initiated judicial forfeiture. *See Bailey v. United States*, 508 F.3d 736, 738 (5th Cir. 2007); *Peña v. United States*, 122 F.3d 3, 4-5 (5th Cir. 1997); *Richey v. Smith*, 515 F.2d 1239, 1243-45 (5th Cir. 1975) (applying same rule, then titled Rule 41(e)). For more detailed briefing, *see* Plaintiff's Objections, ECF No. 47 at 3-11.

intrusive screenings. Nothing in the government's declarations disputes that. Instead, Defendants' quibble over the semantics of whether she is on a "screening list" or instead in a "data repository" for "border screening." Decl. of Steven Scofield ¶¶ 8-9, ECF No. 58-2.

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

Anthonia's individual claim for return of property (Count III), including her challenge to the lack of notice for the currency reporting requirements, is not moot. In addition to demanding the return of $41,377 owed to her, Anthonia identified the ways she has been harmed by being deprived of this money for several months, *see* Compl. ¶¶ 109–12, and demanded interest on the money accrued over the period (seven months) that it was seized and held by CBP. Compl. ¶¶ 7, 166, 175, Req. for Relief (G) (p. 48). In fact, the government admits it only returned $41,377 to her and did not return any interest. *See* Decl. of Celia Grau, ECF No. 58-1, ¶¶ 3, 5; *see also* Decl. of Anthonia Nwaorie ¶ 1, ECF No. 60-1. Until the government returns the interest owed to Anthonia, she will continue to have standing for her individual claim for return of property under Count III.

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

When the government returns seized property, interest is also owed upon its return because the interest is part of the seized *res*. *See Carvajal v. United States*, 521 F.3d 1242, 1245 (9th Cir. 2008) (interest is part of the *res* and must be returned); *United States v. 1461 W. 42nd St.,* 251 F.3d 1329, 1338 (11th Cir. 2001) ("government may be liable for pre-judgment interest to the extent that it has earned interest on the seized *res*"); *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 505 (6th Cir. 1998) (interest "is constructively part of the *res*, and that monetary amount must also be returned as an aspect of the seized *res*"); *United States v. Farese*, No. 80 Cr. 63, 1989 WL 74963, *5 (S.D.N.Y. June 26, 1989) (ordering return of seized $7,000 seized, plus interest, and discussing rationale for award of interest under the court's equity jurisdiction); *United States v. Becker*, No. 84 Civ. 2732, 1986 WL 5627, *5 (S.D.N.Y. May 9, 1986) (granting motion for return of $20,000 plus interest). As the Sixth Circuit reasoned in *$515,060.42*, "[i]f the Government seized . . . a pregnant

cow and, after the cow gave birth, the Government was found not to be entitled to the cow, it would hardly be fitting that the Government return the cow but not the calf." 152 F.3d at 505.

Carvajal is particularly instructive because of its close similarity to this case. In *Carvajal*, the petitioner filed a complaint seeking interest on money seized by federal law enforcement; the seized money itself had already been returned to her—after she filed a motion for return of property, but before the judge could rule on the motion.[4] *Carvajal*, 521 F.3d at 1244. The Ninth Circuit held that "[i]nterest earned, whether actually or constructively, is part of the *res* that must be returned to the owner." *Id.* at 1245. Anthonia's situation is virtually identical to *Carvajal*. While CBP returned her money, it failed to pay her interest, which, as the court in *Carvajal* noted, is not monetary damages, but is part of the *res*. Accordingly, the government's citation to *Bailey v. United States* for the proposition that sovereign immunity bars the award of monetary damages is unavailing because *Bailey* does not address interest on seized currency. 508 F.3d at 740.

Because CBP did not return the full *res* to Anthonia by withholding the seven months of interest, she continues to have standing with regard to her individual claim for return of property.

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

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

As a result, the government's citation to *Alvarez v. Smith* is inapposite. AMtD 26. There, before the Supreme Court had a chance to rule on the controversy, all seized vehicles were returned and all petitioners "either forfeited any relevant cash or have accepted as final the State's return of some of it." *Alvarez v. Smith*, 558 U.S. 87, 89 (2009). As such, the Court found that the case was moot because once all the property was returned, it became "an abstract dispute about the law, unlikely to affect these plaintiffs any more than it affects other [people]." *Id.* at 93.

[4] The situation in *Carvajal* was also very similar to this case because the U.S. Attorney never filed a forfeiture complaint, thus missing the 90-day CAFRA filing deadline. 521 F.3d at 1244.

Unlike the petitioners in *Alvarez*, Anthonia never "accepted as final" CBP's return of the money seized from her. She always insisted that she was due interest on the money for the period she was not able to use it. *See* Compl. ¶¶ 7, 166, 175, Req. for Relief (G) (p. 48). As such, unlike in *Alvarez*, Anthonia's is not "an abstract dispute about the law," but a live controversy, the outcome of which will certainly affect Anthonia more than other people. If she prevails on this claim, she will receive seven months of interest. If she loses, she will not. As a result, until the government returns Anthonia's entire property, including interest, her individual claim for return of property, including her due process challenge to the lack of notice, is not moot.

B. Anthonia's individual screening-list claim (Count IV) is not moot and her very presence on a screening list creates substantial likelihood of future injury.

Defendants loosely mix an unsupported assertion that Count IV is moot, AMtD 25, with a standing argument that she cannot show likelihood of future injury. AMtD 28-30. Anthonia's individual claim (Count IV) that Defendants have placed her on a list of travelers targeted for intrusive and invasive screening since October 31, 2017 is not moot and she has standing because being on a screening list means she is targeted for screening whenever she travels. She has alleged both that she was perceptibly harmed by CBP's actions and that she will continue to be injured by this agency action every time she travels because she is still on a screening list. Compl. ¶¶ 71–74, 114-117, 180-83, 197, 211-12. The Complaint refers to this as a "screening list," Compl. ¶ 181, but also alleges that she "is being singled out by Defendants for differential treatment since the day of the seizure" and "is specifically pulled aside for additional, intrusive screening." Compl. ¶¶ 180, 193.

Defendants play semantics by claiming CBP has no "screening list." AMtD 28-30. Instead, a CBP official admits the agency uses TECs, a "data repository" filled with records of individuals for "law enforcement 'lookouts,' border screening, and reporting for CBP's primary and secondary inspection process." Scofield Decl. ¶ 8. Mr. Scofield then simply begs the question: "Based on my training and experience, I know that a TECS record is not the same as a 'screening list.'" Scofield Decl. ¶ 9. In fact, Mr. Scofield later admits that TECS actually *is* a type of screening list: "CBP does not keep and/or maintain a 'screening list' of passengers at [IAH] ***other than*** passenger information

routinely stored and updated in TECS." Scofield Decl. ¶ 11 (emphasis added).

Regardless, these word games do not defeat Anthonia's claim that, without providing her with notice and an opportunity to contest being singled out for particularly invasive screenings, Defendants placed her on what is functionally a "screening list," thereby violating her due-process and equal-protection rights under the Fifth Amendment. Compl. ¶¶ 184, 187. Crucially, Mr. Scofield does *not* testify that Anthonia has no TECS record, nor does he deny that Anthonia continues to be targeted for screenings. *Compare* Scofield Decl. ¶¶ 4–11 *with* Compl. ¶¶ 71–74.

Anthonia clearly alleged that she is being "perceptibly harmed." *See United States v. S.C.R.A.P.*, 412 U.S. 669, 688-89 (1973) (finding hypotheticals involving long and indirect chains of causation to not satisfy this standard). Namely, Anthonia stated that when she came back from Nigeria in December 2017, CBP officers singled her out for a particularly invasive and humiliating screening during which one CBP officer told Anthonia that he knew about her money being seized and that CBP would "follow her wherever she goes" and subject her to this same treatment every time she travels internationally. Compl. ¶¶ 71–74. She has also twice had her bags sliced open during this intrusive screening, rendering them unusable. Compl. ¶ 117. This is sufficient to allege that Anthonia is currently "perceptibly harmed" by being singled out for particularly invasive screenings.

The cases cited by the government, *Alvarez* and *Fabian v. Dunn*, have no bearing on Anthonia's claim that she is suffering ongoing harm by being singled out for particularly invasive screening procedures. Both cases deal with harm that happened in the past and that was no longer ongoing at the time of the suit. *See Alvarez*, 558 U.S. at 92 (involving seized vehicles and cash that had already been returned or defaulted on); *Fabian v. Dunn*, No. SA-08-CV-269-XR, 2009 WL 2567866, at *5 (W.D. Tex. Aug. 14, 2009) (dealing with allegations of past abuse while in immigration detention). Anthonia has credibly alleged that her harm is ongoing based on the December 2017 incident, the statement of a CBP officer that she would continue to be singled out for such treatment every time she travels internationally, and the fact that her bags have twice been cut open during these screenings. Compl. ¶¶ 72–74, 117. In addition, after the Complaint was filed, Anthonia was twice subjected to special screenings prior to boarding a flight to Boston on June 3,

2018. Nwaorie Decl. ¶¶ 2-4. Anthonia reasonably believes that those screenings were not random and were instead triggered by some sort of screening list or database. Nwaorie Decl. ¶¶ 4-5. This incident indicates CBP has likely shared her TECS Record, or another screening list or database she appears in with other agencies, compounding her ongoing injury.

Unlike in *Alvarez* and *Fabian*, where an injunction would not help the plaintiffs because the harm was in the past, an order from this Court enjoining CBP from continuing to target Anthonia out for invasive screenings would actually remedy this ongoing harm. Given that Anthonia has alleged a perceptible, ongoing harm, her claim for equitable relief on Count IV is not moot.

III. Anthonia Has Standing to Bring the Class Claims.

Defendants wrongly contend that Anthonia does not have standing to bring the class claims because, they say, her individual claims have been mooted and she cannot show likelihood of future injury. AMtD 9-10. But Anthonia will continue to have standing to bring the class claims (Counts I and II) as the class representative in this action regardless of the eventual disposition of her individual claims. This is because under the "relation back" doctrine, so long as Anthonia had individual standing at the time the action was filed, she can continue to serve as a class representative on behalf of this class. In other words, even if the government returns Anthonia's interest on the seized funds, or even if this Court were to find Anthonia's individual claim for return of property has become moot, she may continue to represent the class. This is because she had standing when she filed her Complaint on May 3, 2018—none of her money had yet been returned, and the government's threat to proceed with administrative forfeiture of her money was still in effect—and because she also promptly filed a Motion for Class Certification (on that same day).

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

A. Under the "relation back" doctrine, Anthonia may continue to represent the class even if her individual claims are mooted, because she had individual standing when the action was filed and promptly pursued class certification.

Even if Anthonia's individual claim for return of property were to be mooted by the return

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

In *Zeidman*, the defendants paid off the named plaintiffs and then argued that the class action "must be dismissed for mootness" because "no class had yet been certified and since by virtue of the tender no named plaintiff had any remaining claim." 651 F.2d at 1036. But the Fifth Circuit held that "a class action should not be dismissed for mootness upon tender to the named plaintiffs of their personal claims" when "a timely filed and diligently pursued motion for class certification" is pending. *Id.* at 1051. Otherwise, "defendants would have the option to preclude a viable class action from ever reaching the certification stage" by paying off the named plaintiffs. *Id.* at 1050.

Anthonia's case falls squarely within *Zeidman*. Just like the plaintiffs in *Zeidman*, Anthonia timely filed and has diligently pursued her motion for certification. In *Zeidman*, the motion for certification was filed four months after the original complaint. *Id.* at 1033-34. Here, Anthonia filed her motion to certify concurrently with her complaint and, like the plaintiffs in *Zeidman*, has diligently pursued class discovery to obtain class certification.[5] Finally, just like the defendants in *Zeidman*, the Defendants here returned Anthonia's property only after Anthonia filed her complaint and her motion to certify. Grau Decl. ¶ 5; Nwaorie Decl. ¶ 1. As a result, even if Anthonia's individual claim for return of property becomes moot, this Court should allow her class claims to go forward. Otherwise, the government will do exactly what the Fifth Circuit wanted to avoid in *Zeidman*: "pick[] off" a plaintiff's claim to effectively "prevent any plaintiff in the class from procuring a decision on class certification." 651 F.2d at 1050.

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[5] Per the Court's Order, ECF No. 54, Plaintiff's Motion for Class Certification was withdrawn while she pursues class discovery. The Court has ordered (and Defendants have stipulated) that when Plaintiff refiles her Motion for Class Certification, it will relate back to the date of the original filing: May 3, 2018. Plaintiff is actively pursuing class discovery.

B. Because Anthonia had standing at the time the Complaint was filed, she continues to have standing to assert the class claims.

Defendants claim that Anthonia does not have standing to bring her class claims because there she cannot show substantial likelihood of future injury. AMtD 9-10. Defendants rely on cases such as *City of Los Angeles v. Lyons,* where the Supreme Court held that a man previously injured by a police officer's chokehold did not have standing to sue to enjoin the use of such police chokeholds in the future because was not a substantial likelihood that he would suffer the same injury again and thus his injury could not be redressed by forward-looking injunctive relief. 461 U.S. 95, 111 (1983).

Anthonia does not have a *Lyons* standing problem because standing for claims seeking forward-looking injunctive relief (such as Anthonia's class claims) is determined based on the circumstances at the time the complaint is filed. As the U.S. Supreme Court explained in *County of Riverside v. McLaughlin*, the standing doctrine requires that "**at the time the [] complaint [is] filed**" a plaintiff must "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." 500 U.S. 44, 51 (1991), (emphasis added) (internal quotation omitted); *accord U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (standing requires personal interest "at the commencement of litigation"); *see also* 13B Charles Alan Wright et al., Federal Practice and Procedure § 3531.12 (3d ed., Nov. 2018) (discussing the standard "rule" that "standing must be measured by circumstances at the time the complaint is filed.").

Unlike Adolph Lyons—whose injury had already occurred and was complete by the time he filed his complaint—Anthonia has alleged an ongoing personal injury that could be redressed by the requested injunctive relief. At the time she filed her Complaint, all of her seized money was still in CBP's possession. And the relief Anthonia requested—class-wide relief enjoining CBP's policy or practice of unlawfully conditioning the release of seized property on claimants signing HHAs—would have redressed Anthonia's injury by causing her money to be returned.

This reasoning is consistent with U.S. Supreme Court precedent as well as decisions by lower appellate courts. In *McLaughlin*, plaintiffs—who were incarcerated at the time the complaint was filed—sought injunctive and declaratory relief on behalf of themselves and others who were or

would be similarly incarcerated, requesting that defendants provide "in-custody arrestees, arrested without warrants, prompt probable cause, bail and arraignment hearings." 500 U.S. at 48. After the plaintiffs were released or otherwise received probable cause determinations, defendants invoked *Lyons* to argue that the plaintiffs lacked standing because it was too late for them to receive hearings (since they were no longer in custody or had eventually received a probable cause hearing) and they could not show the likelihood of being subjected to similar treatment in the future. *Id.* at 51. The Supreme Court, however, found *Lyons* inapplicable and held that the plaintiff did have standing. *Id.* As the Court explained, "[t]his case is easily distinguished from *Lyons*, in which the constitutionally objectionable practice ceased altogether before the plaintiff filed his complaint." *Id.* Thus, *Lyons* did not apply and the *McLaughlin* plaintiffs had standing. *Id.*[6]

The same reasoning applies here. Like the *McLaughlin* plaintiffs, at the time she filed her Complaint, Anthonia was suffering an ongoing injury. (She also still suffers an ongoing injury, *see supra* Part II.A) And just like the *McLaughlin* plaintiffs, her requested injunctive relief would redress that ongoing injury by fixing the policy that created and maintained the ongoing injury. That is, if Defendants ceased conditioning the return of Anthonia's property on signing a HHA, her property would have simply been returned. Finally, like *McLaughlin* plaintiffs, Anthonia sought class certification prior to her individual claim being mooted. *See* ECF No. 2. In such circumstances, the Supreme Court recognized: "That the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction." *McLaughlin*, 500 U.S. at 52 (referencing the same "relation back" doctrine discussed in *Zeidman*).

Fifth Circuit case law also draws this distinction between claims alleging ongoing injury and claims regarding past injury. *James v. City of Dallas,* 254 F.3d 551 (5th Cir. 2001), which Defendants rely on, actually supports Plaintiff's position. In *James*, the Fifth Circuit found standing for claims that included an allegation of ongoing injury at the commencement of litigation and that asked for

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[6] *See also Fox v. District of Columbia*, 851 F. Supp. 2d 20, 29 (D.C. Cir. 2012) (distinguishing *Lyons* and finding standing where plaintiff challenged policy or practice on behalf of other class members); *Deshawn v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998) (distinguishing *Lyons* and finding standing where class alleged to be "likely to suffer future interrogations").

the type of injunctive relief that could have redressed this injury. But when the injury alleged was the demolition of the homes themselves, which occurred two years before the lawsuit was filed, and the relief requested was enjoining the city from demolishing future homes, the court found there was no standing because enjoining future demolitions would not redress the injury of past demolitions. *Id.* at 564-65. In contrast, the court concluded there was standing for claims alleging ongoing deleterious effects suffered by homeowners in relation to the demolition of their homes (such as being in debt for the cost of the demolition) and seeking injunctive relief that would redress these effects (such as enjoining the city from collecting on that debt). *Id.* at 564 n.10.

Anthonia's situation is very different from the claims in *James* where standing was denied, and is instead comparable to the claims where the court found standing. Her injury at the commencement of litigation was that CBP would not release her seized money without her signing a HHA waiving her constitutional and other legal rights and accepting new legal liabilities. The injury was ongoing and could have been redressed by the relief Anthonia requested, namely declaring unconstitutional CBP's policy or practice of refusing to return property without a signed HHA, enjoining CBP from following that practice, and ordering the release of all property held under such circumstances (including Anthonia's money). Anthonia's class-action claims thus do not have a *Lyons* standing problem and instead fall squarely within *McLaughlin*.

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

Despite Defendants arguments to the contrary, AMtD 9-19, the government does not enjoy sovereign immunity in this case. This is because Anthonia's claims do not seek monetary damages, only declaratory and injunctive relief. They thus fit squarely within Section 702 of the APA as well as two common law exceptions to sovereign immunity. First, Section 702 of the APA waives sovereign immunity for all of Anthonia's claims. Second, all of Anthonia's claims fall within the independent, common-law exceptions to sovereign immunity for challenges to *ultra vires* and unconstitutional action. Third, given the multiple ways in which sovereign immunity is waived, this Court plainly has federal question jurisdiction under 28 U.S.C. § 1331 and the power to issue declaratory judgments

under the Declaratory Judgment Act ("DJA"). Accordingly, there is no merit to Defendants' arguments on sovereign immunity and jurisdiction.

A. APA Section 702 waives sovereign immunity for all of Anthonia's claims.

Section 702 of the APA is an explicit waiver of sovereign immunity that applies to all of Anthonia's claims, including her individual claims.[7] Section 702 was amended by Congress "to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity." *Armendariz-Mata v. DOJ*, 82 F.3d 679, 682 (5th Cir. 1996). As the Fifth Circuit explained in *Rothe Development Corp. v. DoD*: "A waiver as to injunctive relief—but not monetary damages—can be found in § 702 of the [APA], which permits parties 'suffering legal wrong because of agency action' to file 'an action in a court of the United States seeking relief other than monetary damages.'" 194 F.3d 622, 624 (5th Cir. 1999) (quoting 5 U.S.C. § 702).

Both of Anthonia's class claims challenge agency action and seek only injunctive and declaratory relief, not monetary relief. These are precisely the sort of claims for which Section 702 was designed to waive sovereign immunity. Defendants' attempts to wriggle out of the APA's explicit statutory waiver of sovereign immunity, AMtD 11-16, are unpersuasive. First, the narrow "committed to agency discretion by law" exception to reviewability under the APA does not apply here because the agency does not have discretion to disobey CAFRA's clear, detailed instructions. Second, these claims are a challenge to a specific, identified agency action, and are not a broad, programmatic challenge. As such, waiver of sovereign immunity under the APA is appropriate.

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

Anthonia challenges CBP's affirmative action of conditioning the return of property on signing HHAs despite the explicit and unambiguous statutory language that the government "***shall*** promptly release the property" and "***may not*** take any further action to effect the civil forfeiture of

[7] Although Defendants do not argue that sovereign immunity bars Anthonia's individual claims, Plaintiff would like to assure this Court that 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 (including failure to act) and seek only equitable, nonmonetary relief. *See Doe v. United States*, 853 F.3d 792, 799 (5th Cir. 2017).

such property." 18 U.S.C. § 983(a)(3)(B)(ii) (emphasis added). The government argues that the claims fall within the Section 701(a)(2) "committed to agency discretion" exception to the reviewability. AMtD 11-14. This is plainly inconsistent with U.S. Supreme Court and Fifth Circuit precedent, which hold that if the statutory language at issue provides a court with "law to apply," the agency's conduct should be reviewed under the APA. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971) (abrogated on other grounds). Agency decisions are only "completely unreviewable under the 'committed to agency discretion by law' exception [when] the statutory scheme . . . provides ***absolutely no guidance*** as to how that discretion is to be exercised." *Texas v. United States*, 809 F.3d 134, 168 (5th Cir. 2015) (citations omitted) (emphasis added). Because CAFRA's relevant provision provides plenty of guidance and ample "law to apply," this very rare exception to agency review does not apply here.

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

The "agency discretion" exception to reviewability in 5 U.S.C. § 701(a)(2) is "a very narrow exception" to judicial review. *Overton Park,* 401 U.S. at 410. It applies only "in those rare instances where 'statutes are drawn in such broad terms that . . . there is no law to apply'." *Id.* (citation omitted.) The Supreme Court has held this occurs only when, "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). In all other instances, there is "a well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *Texas v. United States*, 809 F.3d at 163 (internal citations and quotations omitted). This presumption can only be rebutted by clear and convincing evidence that Congress intended for the exception to apply. *Id.*

Indeed, just this term, the U.S. Supreme Court explained why exemption from judicial review under Section 701(a)(2) is so rare: "To give effect to § 706(2)(A) and to honor the presumption of review, we have read the exception in § 701(a)(2) quite narrowly." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370, (2018). The Court further explained that: "The few cases in which we have applied the § 701(a)(2) exception involved agency decisions that courts have

traditionally regarded as unreviewable, such as the allocation of funds from a lump-sum appropriation . . . or a decision not to reconsider a final action." *Id.* (internal citations omitted).

The statutory language here is very clear. Under CAFRA, "the Government ***shall promptly release the property*** pursuant to regulations promulgated by the Attorney General and ***may not take any further action to effect the civil forfeiture of such*** **property** in connection with the underlying offense." 18 U.S.C. § 983(a)(3)(B)(ii) (emphasis added). Together, these terms present ample "law to apply" and are statutory language that "at least can be reviewed to determine whether the agency exceeded its statutory powers." *Texas v. United States*, 809 F.3d at 165, 168 (citations omitted). Instead of promptly releasing the property as directed, CBP refuses to release the property at all, unless claimants sign a HHA. Instead of not taking any further action to forfeit the property, CBP actually threatens to forfeit the property unless claimants sign and return a HHA.

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

Defendants do not come close to rebutting the presumption of reviewability under the APA. Instead, Defendants erroneously focus on the phrase "promptly release" as though this case is primarily a dispute about the timeliness of the return of property, such as whether the property should be returned within 30 days or 90 days. AMtD 13, 17. Although Defendants claim the meaning of "promptly" is too ambiguous for this Court to interpret, the ordinary meaning of "promptly" is hardly a mystery.[8] And, while the term "promptly" does indicate that CBP should act without delay,[9] this case primarily challenges CBP's failure to obey the statutory commands that it "shall . . . release the property" and "may not take any further action" to forfeit the property by demanding that claimants sign HHAs before releasing the property. 18 U.S.C. § 983(a)(3)(B)(ii)

The three cases cited by Defendants, AMtD 11-13, only serve to dig this argument a deeper

[8] *See, e.g.*, *Promptly*, Merriam-Webster.com ("without delay"), https://www.merriam-webster.com/thesaurus/promptly (last visited Apr. 9, 2019); *Prompt*, Merriam-Webster.com, ("performed readily or immediately," "done at once," "given without delay."), https://www.merriam-webster.com/dictionary/prompt (last visited Apr. 9, 2019).

[9] To the extent that the specific timeliness of CBP's actions are at issue, the detailed timelines throughout 18 U.S.C. § 983(a) provide plenty of guidance on the meaning of the term in this context. (Government must send notice of seizure no more than 60 days after the seizure, the claimant must submit their claim within 35 days of the date of notice, etc.).

grave. *Heckler v. Chaney*, 470 U.S. 821 (1985), illustrates a specific exception that proves the general rule. The Court there distinguished between an affirmative agency action, to which the assumption of reviewability applies, and a decision not to act, which is unreviewable. *Id.* at 831. This distinction is crucial because "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights." *Id.* at 832. Thus, the need to exercise judicial review is not nearly as important. This suit, in contrast, challenges CBP's *affirmative* action of demanding that claimants sign a HHA to get their property back despite a statute directing it to promptly release the property without taking any further action to forfeit the property. This is just the kind of "exercise [of] *coercive* power over . . . property rights," *id.*, that warrants, indeed requires, judicial review.

The other two cases involve very broad statutory language that bears no resemblance to the relevant language in CAFRA. In *Electricities of North Carolina v. Southeastern Power Administration*, the Fourth Circuit found the phrase "most widespread use" of electricity power to be subject to agency discretion, because it could mean any of "most geographically widespread distribution of power, distribution to the most diversified mix of ultimate consumers, or distribution to preference customers that reach the greatest number of ultimate customers," giving the courts "no law to apply." 774 F.2d 1262, 1264, 1266 (4th Cir. 1985). In *American Canoe Association v. EPA*, the Eastern District of Virginia held that the phrase "from time to time" was too ambiguous to allow courts to evaluate whether the EPA timely reviews states' compliance reports. 30 F. Supp. 2d 908, 925 (E.D. Va. 1998). The very broad, ambiguous language at issue in these cases is not at all like CAFRA's clear statutory mandate, which has specific, unambiguous directives and a clear purpose: to ensure that property is returned to claimants swiftly and without any further threat of forfeiture.

Thus, controlling precedent makes clear that the very narrow exception from judicial review under 5 U.S.C. § 701(a)(2) does not apply. The statutory commands provide a clear standard by which to judge CBP's actions, which are thus reviewable under the APA.

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

Anthonia's class action claims are properly brought under Section 702 of the APA and are

not an impermissible programmatic challenge, as the government claims. AMtD 14-16. Rather, consistent with Section 702's requirements, there is an easily identifiable specific agency action—CBP conditioning the release of seized property on signing HHAs—and this action continues to injure Anthonia and other class members. *See Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 489 (5th Cir. 2014) (discussing requirements for bringing suits under Section 702).

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

In *Alabama-Coushatta*, the Fifth Circuit held that APA Section 702 does not permit "programmatic" challenges to agency action—the kind that seek "wholesale improvement of an agency's programs by court decree." *Id.* at 490 (internal quotations and citations omitted). *Alabama-Coushatta* involved an Indian tribe's challenge to the federal government's general practices for issuing drilling permits and oil and gas leases, as well as selling timber resources on tribal land. *Id.* at 486-87. The Fifth Circuit dismissed the case as unreviewable under Section 702, because the Tribe "d[id] not challenge specific 'agency action'" and instead "contend[ed] only that all of the leases, permits, and sales administered by multiple federal agencies . . . are unlawful." *Id.* at 490 (citations omitted). Thus, it was an impermissible "blanket challenge" to "the way the Government administers these programs and not to a particular and identifiable action taken by the Government." *Id.* at 490–91.

Reviewing Anthonia's claims under Section 702 is wholly consistent with *Alabama-Coushatta*. Unlike the plaintiffs in *Alabama-Coushatta*, Anthonia is not asking for wholesale improvement of an agency's programs. Rather, she is bringing a challenge to a specific, identifiable agency action that harms her and other putative class members, namely CBP's policy or practice of demanding that claimants sign HHAs as a condition of releasing property that it is already required to release under CAFRA. Compl. ¶¶ 142-54. As such, her challenge is reviewable under Section 702.

This conclusion is bolstered by the Fifth Circuit's decision in *Lion Health Services, Inc. v. Sebelius*, 635 F.3d 693 (5th Cir. 2011). That case involved a Medicare provider challenging a regulation establishing a cap for reimbursement inconsistent with the method provided for in the

controlling statute. The Fifth Circuit held that because the plaintiff challenged the "facial validity of a specific regulation" and not "a general and amorphous 'program' of operations performed by the agency," this was a proper challenge to an agency action and reviewable in court. *Id.* at 702.

Both *Alabama-Coushatta* and *Lion Health Services* support the reviewability of Anthonia's class-action claims under Section 702 of the APA. Just like petitioners in *Lion Health Services*, and unlike the plaintiffs in *Alabama-Coushatta*, Anthonia is challenging a specific and identifiable agency action that is inconsistent with the agency's legal authority. Thus, in accordance with Fifth Circuit precedent, Anthonia's class-action claims satisfy the "agency action" requirement under Section 702.

b. The identified agency action continues to injure Anthonia and the putative class.

Another requirement for reviewability under Section 702 is that "the plaintiff must show that he has 'suffered legal wrong because of the challenged agency action, or is adversely affected or aggrieved by that action within the meaning of a relevant statute.'" *Alabama-Coushatta*, 757 F.3d at 489 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990)). Defendants claim that Anthonia fails to satisfy this requirement because her individual claim is moot and because she "has not identified a class member who has suffered any viable injury resulting from Defendants' practice." AMtD 16. But this lawsuit easily satisfies the requirement of alleging an injury both as to Anthonia and other putative class members. As explained in Part III, *supra*, Anthonia is a class representative who had standing to bring her claims at the time this action was filed and who is diligently pursuing class certification. Further, as discussed in Part II.A, *supra*, Anthonia continues to be injured by the agency action because the interest on her seized money has not been retuned. Despite the government's failed attempt to moot Anthonia's individual claim by returning the seized money, defendants may not simply pick off the claims of class representatives "to preclude a viable class action from ever reaching the certification stage." *Zeidman*, 651 F.2d at 1050.

B. Independent of the APA, all of Anthonia's claims fall within two common-law exceptions to sovereign immunity for claims seeking only equitable relief.

Because all of Anthonia's claims seek only equitable, non-monetary relief, they are not only subject to the APA's explicit waiver of sovereign immunity, but also separately fall within two

common-law exceptions to sovereign immunity—the power of federal courts to review claims for equitable relief challenging: (1) *ultra vires* conduct and (2) unconstitutional actions.[10]

In contrast to claims for monetary damages, the U.S. Supreme Court has long recognized that there is an "exception to the doctrine of sovereign immunity" for claims seeking to enjoin unconstitutional or *ultra vires* conduct. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90, 696 (1949) (discussing history of exception); *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963) (noting 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); *see also* Erwin Chemerinsky, Federal Jurisdiction § 9.2.2, at 676 (7th ed. 2016) (noting that it is "[a]n extremely important and well-established exception to the principle of sovereign immunity" that "unconstitutional government actions can be halted by seeking an injunction against the individual officer responsible for executing the government's policy"). The Fifth Circuit, too, has repeatedly acknowledged "the *Larson-Dugan* exception to sovereign immunity." *Petterway v. Veterans Admin. Hosp.*, 495 F.2d 1223, 1225 (5th Cir. 1974).[11]

Both the Supreme Court and the Fifth Circuit have explained the basis for these exceptions: unconstitutional and *ultra vires* actions are beyond the power of the sovereign and thus are not the acts of the sovereign, so cannot be entitled to the immunity of the sovereign. *See*, *e.g.*, *Larson*, 337 U.S. at 690 ("[T]he [challenged] conduct . . . is beyond the officer's powers and is, therefore, not the conduct of the sovereign . . . because of its constitutional invalidity."); *Ala. Rural Fire Ins. Co. v. Naylor*, 530 F.2d at 1226 (5th Cir. 1976) (summarizing this tradition in federal case law).

[10] Defendants do not argue that sovereign immunity bars Anthonia's individual claims, but Plaintiff would like to assure this Court that the individual claims are also covered by these common-law exceptions to sovereign immunity for the same reasons as the class claims, because they are also challenges to *ultra vires* and unconstitutional agency conduct that seek only equitable, nonmonetary relief. For more detailed briefing, *see* Plaintiff's Objections, ECF No. 47 at 12-16.

[11] *See also Linn v. Chivatero*, 714 F.2d 1278, 1283 n.5 (5th Cir. 1983) ("There is no sovereign immunity when . . . a government agent acts in an unconstitutional manner."); *Unimex, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 594 F.2d 1060, 1061-62 (5th Cir. 1979) (per curiam) (an action for specific relief against unconstitutional action is "one of the two exceptions to sovereign immunity"); *accord Pollack v. Hogan*, 703 F.3d 117, 120 (D.C. Cir. 2012) (it "is well-established that sovereign immunity does not bar suits for specific relief against government officials where the challenged actions of the officials are alleged to be unconstitutional *or* beyond statutory authority") (citation omitted).

1. Count I falls within the *ultra vires* exception to sovereign immunity.

Count I falls well within the *ultra vires* exception to sovereign immunity. The claim focuses on CBP's violations of 18 U.S.C. § 983(a)(3) of CAFRA and 28 C.F.R. § 8.13 (the regulation promulgated thereunder by the Attorney General). Compl. ¶ 142. Both the statute and regulation explicitly and unambiguously direct CBP to promptly release property without taking any further actions to forfeit it, a direction that CBP disregarded. Because CBP acted in express violation of this congressional mandate, this claim may proceed under the *ultra vires* exception to sovereign immunity.

The *ultra vires* exception to sovereign immunity requires a plain violation of an unambiguous and mandatory provision of a statute and not simply a dispute over statutory interpretation. *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 293 (5th Cir. 1999); *see also Texas v. United States*, 86 F. Supp. 3d 591, 643 (S.D. Tex. 2015) (judicial review is allowed "when there has been a clear departure from the agency's statutory authority"). In applying this rule, there is a strong presumption in favor of reviewability, which can only be overcome by clear and convincing evidence that Congress intended to preclude the suit. *See Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986) (recognizing "strong presumption that Congress intends judicial review of administrative action").

CAFRA's commands are unambiguous, as is CBP's failure to follow them. CAFRA commands that the government "***shall promptly release the property*** pursuant to regulations promulgated by the Attorney General, and ***may not take any further action to effect the civil forfeiture of such property*** in connection with the underlying offense." 18 U.S.C. § 983(a)(3)(B)(ii) (emphasis added). By (1) conditioning the release of seized property on the signing of a HHA, and (2) threatening to initiate administrative forfeiture if the signed HHA is not returned, CBP commits two *ultra vires* acts that plainly violate the unambiguous and mandatory statutory language to "release the property" without "tak[ing] any further action to effect the civil forfeiture of such property." *Id.* Indeed, nothing in the statute or underlying regulation authorizes the challenged agency actions of (1) imposing an additional condition of signing a HHA before property will be returned, or (2) threatening to re-initiate administrative forfeiture against the property if the HHA is not signed.

Moreover, the *ultra vires* exception to sovereign immunity has particular applicability where

"the lawlessness of the agency's action [is] conceded by the agency itself" because it demonstrates that it is not simply a dispute over statutory interpretation. *Am. Airlines*, 176 F.3d at 293. Here, the government admits that the relevant "provisions [of CAFRA] fail to even indirectly address the issue of [HHAs]." AMtD 10. Because agencies may not act without an express delegation of authority from Congress,[12] that is a concession that CBP's challenged conduct is *ultra vires*. Therefore, this claim is not a dispute over statutory interpretation, but a challenge to action that even Defendants admit is not addressed, let alone authorized, by the governing law. *See Am. Airlines*, 176 F.3d at 293.

Defendants argue that because there is no direct prohibition on CBP conditioning the release of property on claimants signing HHAs, it is impossible to tell whether the statute does or does not authorize this practice. AMtD 17. But this reasoning is inconsistent with the actual statutory language, discussed above, and runs counter to the principle that the absence of a prohibition is not an authorization. *See supra* and note 12. As the Fifth Circuit found, so long as an *ultra vires* claim alleges plain violations of unambiguous statutory provisions—as is the case here with CBP running roughshod over CAFRA—the court should review it. *See Am. Airlines*, 176 F.3d at 293.

Similarly, the government claims that, by requiring claimants to sign HHAs and return them within a specified period of time, CBP is simply following 28 C.F.R. § 8.13(b), which authorizes the agency to classify the property as abandoned if a property owner fails to timely contact the property custodian. AMtD 18. This is disingenuous at best. Requiring someone to sign and return a HHA—which waives their legal and constitutional rights, and imposes new legal liabilities—is a far cry from "informing that person to contact the property custodian within a specified period for release of the property, and further informing that person that failure to contact the property custodian within the specified period for release of the property may result in initiation of abandonment proceedings against the property." 28 C.F.R. § 8.13(b). In fact, 28 C.F.R. § 8.13 does not mention anything about conditioning the release of property on claimants signing HHAs, nor does it authorize threatening to

[12] It is a well-established canon of statutory construction to not read the absence of a prohibition as an implied delegation of authority, because federal agencies only derive power from specific delegations of authority by Congress. *See*, *e.g.*, *Luminant Generation Co. v. EPA*, 675 F.3d 917, 932 (5th Cir. 2012) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.") (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

begin administrative forfeiture proceedings—different from abandonment proceedings—if the HHA is not signed. The minimal requirements in 28 C.F.R. § 8.13 exist to ensure that an agency is not left holding property indefinitely and that the property is returned to the correct person. These provisions certainly do not authorize extracting additional legal concessions from claimants.

Because Count I plausibly alleges that CBP's actions are in violation of the plain language of the statute, and does not seek monetary damages, it falls within the common-law *ultra vires* exception.

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

Count II also falls within a common-law exception to sovereign immunity. This claim focuses on how CBP and its officers violated Anthonia's and other putative class members' Fifth Amendment rights by unconstitutionally conditioning the return of property on the waiver of constitutional rights. Compl. ¶ 157. A challenge to this kind of behavior—an agency act in violation of the Constitution— can be properly brought without regard to sovereign immunity, so long as it is for injunctive and declaratory relief and not monetary damages. As the U.S. Supreme Court stated in *Bell v. Hood*, "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[.]" 327 U.S. 678, 684 (1946); *see also Porter v. Califano*, 592 F.2d 770, 781 (5th Cir. 1979) (acknowledging the right to sue "directly under the constitution" for injunctive relief against violations of constitutional rights); *Anibowei v. Sessions*, No. 3:16-CV-3495-D, 2018 WL 1477242, at *2 (N.D. Tex. Mar. 27, 2018) (discussing how individuals "have a right to sue directly under the [C]onstitution to enjoin . . . federal officials from violating [their] constitutional rights") (citations and quotation marks omitted).

Defendants attempt to counter this authority by citing a trio of cases that involved claims for monetary damages rather than injunctive and declaratory relief. AMtD 18 n.93, 94. This misses the point completely: The plaintiffs in those cases could not bring claims for monetary damages, but they could have brought claims for declaratory and injunctive relief. The U.S. Supreme Court and the Fifth Circuit have long found that claims for injunctive and declaratory relief against agency actions can be brought directly under the Constitution. *See*, *e.g.*, *Porter*, 592 F.2d at 781 (noting that, "[w]hether Porter sues directly under the [C]onstitution to enjoin agency action, or instead asks a

federal court to 'set aside' the agency actions as 'contrary to (her) constitutional right(s)' under [the APA], the role of the district court is the same"). This exception to sovereign immunity does not apply to claims for monetary damages, as the cases cited by the government demonstrate. But again, Count II is not a claim for monetary damages; instead, it specifically requests injunctive and declaratory relief, thereby falling precisely within the authorized framework.

Accordingly, neither of Anthonia's class-action claims for equitable relief are barred by sovereign immunity because both fall within these long-recognized common-law exceptions.

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

Piggybacking on their argument that the class claims are barred by sovereign immunity, Defendants further dispute whether 28 U.S.C. § 1331 and the DJA provide an independent basis for jurisdiction.[13] AMtD 9. These add-on jurisdictional arguments fail because the class claims have multiple paths through sovereign immunity, as demonstrated *supra* in Part IV.A-B. Because Defendants are wrong on that point, the remainder of their arguments should be disregarded. First, this Court plainly has jurisdiction to review Anthonia's class-action claims under 28 U.S.C. § 1331. Second, this Court has clear power to issue declaratory judgments under the DJA.

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

This Court has jurisdiction to review Anthonia's class-action claims under 28 U.S.C. § 1331. As the U.S. Supreme Court stated in *Califano v. Sanders*, "when constitutional questions are in issue, the availability of judicial review is presumed." 430 U.S. 99, 109 (1977); *see also Valdez v. Astrue*, No 3:11-CV-883-K-BK, 2011 WL 5525751, at *2 (N.D. Tex. Oct. 17, 2011) (discussing how under *Califano*, availability of judicial review is presumed for constitutional questions) (recommendations adopted by *Valdez v. Astrue*, No. 3:11-CV-883-K, 2011 WL 5529806 (N.D. Tex. Nov. 10, 2011)). In addition, the Court in *Califano* held that even when no constitutional questions are raised, the fact

[13] Defendants cite to *Mahogany v. Louisiana State Supreme Court* as support for their argument that this Court has no jurisdiction over Anthonia's class claims. AMtD 9. But *Mahogany* is inapposite; the petitioner in that case sued the State of Louisiana and the Louisiana Supreme Court and was precluded from doing so by the Eleventh Amendment. 262 F. App'x 636, 637 n.2 (5th Cir. 2008). Unlike the claims of the petitioner in *Mahogany*, Anthonia's claims have no such bar.

that Congress eliminated the requirement of a specified amount in controversy means that it intended "to confer jurisdiction on federal courts to review agency action." *Califano,* 430 U.S. at 105. As such, both class claims are properly before this Court under Section 1331.

2. Anthonia properly requested relief under the Declaratory Judgment Act.

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

As discussed in Part III, *supra*, Anthonia's claims relate back to the date when the Complaint and Motion for Class Certification were filed—May 3, 2018—when CBP still had Anthonia's money and was demanding that she sign a HHA to get it back. That is an actual dispute. Also, as discussed in Part II.A, *supra*, Anthonia is still owed interest for the seized cash, which is an ongoing dispute.

A favorable decision by this Court declaring CBP's conduct to be unlawful and unconstitutional, and enjoining CBP from continuing to engage in this conduct would obviously bring about change, providing substantial relief to the class. CBP would no longer be able to force claimants to sign HHAs to get back property to which they are legally entitled. Further, members of the class who previously signed these HHAs would be relieved of their legal obligations under those agreements, and those who had property withheld for failure to sign and return a HHA would be entitled to have their property returned.

Thus, Anthonia has properly invoked the jurisdiction of this Court, provided multiple grounds for waiver of sovereign immunity, and properly invoked the DJA for equitable remedies.

V. The Complaint Pleads Facts Sufficient to Present Viable Constitutional Claims Under Count IV (Screening List) and Count II (Unconstitutional Conditions).

Defendants dispute whether Count IV and Count II adequately state a claim. AMtD 19-24. Defendants are mistaken. The Complaint alleges facts sufficient to support Anthonia's individual claim (Count IV) that her constitutional rights were violated by targeting her—without notice and an opportunity to be heard—for additional intrusive screening during international travel, irrationally

subjecting her to differential treatment from similarly situated international travelers. The Complaint also presents a viable class claim (Count II) that the government's actions violated the substantive due process rights of Anthonia and other putative class members by imposing an unconstitutional condition. In its attack on the viability of this claim, the government fails to identify any alleged failure to plead a claim under the unconstitutional conditions doctrine and evidently mistakes this for a procedural due-process claim. AMtD 19-20. The government also proposes a bizarre hypothetical about Congress directly imposing the conditions of HHAs on property claimants, which only serves to illustrate the unconstitutionality of CBP's challenged conduct. AMtD 20-21.

A. Count IV presents viable constitutional claims.

Defendants wrongly allege that Anthonia has failed to adequately state due process and equal protection claims under Count IV. AMtD 21-24.

1. Count IV properly pleads the elements of a procedural due process claim.

The Complaint sufficiently pleads facts to state a claim under Count IV for a procedural due process violation under *Mathews v. Eldridge*, 424 U.S. 319 (1976). Anthonia has been targeted for particularly intrusive screenings by being placed on a screening list without any notice or opportunity to be heard. Compl. ¶¶ 181-87. Applying the *Mathews* due-process analysis, Anthonia should be granted relief because of her strong private interests that are affected, Compl. ¶ 188, the high risk of erroneous deprivation of these interests, Compl. ¶ 196, and the very low government interest in continuing to keep her on that list. Compl. ¶ 205. These are, of course, "fact-intensive consideration[s]," which "necessarily require an evidentiary record . . ." *Elhady*, 303 F. Supp. 3d at 465 (internal quotations omitted).

Defendants' argument that Anthonia fails to present a due process claim because she failed to use DHS TRIP is addressed *supra* in Part I.B.2 on exhaustion of administrative remedies.

2. Count IV properly pleads the elements of an equal protection claim.

Count IV alleges that, unlike similarly situated international travelers—U.S. citizens who have not been charged with any crime, nor had any property forfeited for any alleged violations of federal law—Anthonia is being singled out for particularly intrusive screenings. Compl. ¶¶ 180-84.

The Equal Protection Clause "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Harris v. Hahn*, 827 F.3d 359, 365 (5th Cir. 2016). Anthonia is not being targeted for additional screenings because she is different in any relevant respect from other international travelers, but because she was the victim of CBP's unlawful failure to provide adequate notice of her currency reporting obligations before the seizure. Compl. ¶ 176

Defendants wrongly argue that to properly plead an equal protection claim, Anthonia must allege that she is "being treated differently than others who previously had their property seized by CBP in similar circumstances." AMtD 23. But this ignores the fact that Anthonia contests the basis for that seizure in this very lawsuit, contending that the seizure was unlawful because she was not adequately notified of the currency reporting requirements, as controlling Fifth Circuit precedent requires. Compl. ¶¶ 49-57, 62, 176. It cannot be the case that being victimized by unconstitutional government conduct—as Anthonia alleges she was—is dispositive for equal-protection analysis, because it would permit the government to irrationally single out individuals for differential treatment based on improper criteria, namely the government's prior unlawful conduct.

Defendants have no rational basis for targeting Anthonia for additional screenings. She has not been charged with any crime, let alone adjudicated guilty. Compl. ¶ 182. 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. *Id.* All her seized cash was both lawfully earned and intended for lawful purposes. Compl. ¶¶ 2, 18-21, 46, 110-11. This Court could, of course, rule on these matters on summary judgment or at trial, but it must accept the Complaint's allegations as true at this motion-to-dismiss stage. For all of these reasons, CBP's unlawful seizure cannot by itself justify subjecting Anthonia to differential treatment, and Count IV is properly plead.

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

Defendants claim Anthonia "has not stated any cognizable constitutional violations because Defendants provide sufficient notice to satisfy claimants' due process rights." AMtD 19. Defendants mistake the nature of the constitutional claim in Count II, apparently believing it to be a *procedural*

due process claim. AMtD 19-20. But Count II easily satisfies the burden to state a viable *substantive* due process claim, namely for unconstitutionally conditioning the release of seized property to which claimants are legally entitled on them signing a HHA. *See* Compl. ¶¶ 155–63.

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

To be colorable, a constitutional claim must be more than mere conclusory allegations of due process violations. *Robertson v. Bowen,* 803 F.2d 808, 810 (5th Cir. 1986). In other words, the claim must be "not wholly insubstantial, immaterial, or frivolous." *Ramirez v. Colvin*, No. EP-15-CV-127-ATB, 2016 WL 94145, at *3 (W.D. Tex. Jan. 7, 2016) (internal citations omitted).[14] The Fifth Circuit has held that a colorable constitutional claim can be found in a situation analogous to Anthonia's. In *Worldwide Parking, Inc. v. New Orleans*, it held that if a plaintiff accurately alleged it was the lowest bidder for a city contract and a statute required the contract to be awarded to the lowest bidder, then the plaintiff stated a viable constitutional claim for a violation of its due-process rights when it was not awarded the contract. 123 F. App'x 606, 608 (5th Cir. 2005).

Consistent with the Fifth Circuit's reasoning in *Worldwide Parking*, Anthonia alleged a viable

[14] *Hearth, Inc. v. Department of Public Welfare*, cited by Defendants, is inapplicable. There, the Fifth Circuit refused to recognize a cause of action in a case because "appellant does not rely on any statute or common law doctrine which might authorize such a suit." 617 F.2d 381, 382 (5th Cir. 1980) Anthonia, however, brings her claims under both the APA Section 702 waiver of sovereign immunity and under the common-law exceptions to sovereign immunity.

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

C. Congress could not unilaterally impose the terms of HHAs on claimants and Defendants' proposal to the contrary illustrates the unconstitutional conditions challenged in Count IV.

Defendants next propose that they have not imposed unconstitutional conditions because the conditions imposed by the HHA could constitutionally be imposed directly by Congress through limiting or eliminating waivers of sovereign immunity. AMtD 20-21. This audacious claim is flatly wrong for three reasons. First, Congress' power to limit or remove sovereign immunity for claims seeking monetary damages would affect just one of the many legal consequences of the HHAs. Second, Congress could not actually eliminate common-law exceptions to sovereign immunity because they are court-created doctrines to ensure judicial review of *ultra vires* and unconstitutional conduct. Third, if Congress were to enact legislation unilaterally imposing the legal consequences of HHAs on claimants as a condition of returning property, it would be a flagrant violation of claimants' constitutional rights—the same rights violated by CBP's challenged policy or practice.

1. The government fails to consider the many conditions imposed by the HHAs that are unaffected by sovereign immunity.

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

for monetary damages, including a prohibition on bringing lawsuits seeking equitable relief for constitutional violations or initiating any administrative proceedings related to the seizure (including potentially even requesting records under FOIA), indemnifying the government from any claims brought by third parties related to the seizure, and agreeing to reimburse the government and its officers for any expenses incurred enforcing a HHA. Compl. ¶¶ 93–101, 103, Ex. D.

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

Moreover, while Congress does have the power to limit suits for *monetary damages* by narrowing or eliminating waivers of sovereign immunity such as the Federal Tort Claims Act or the Tucker Act, it certainly could not limit common law exceptions to sovereign immunity for non-monetary suits bringing *ultra vires* claims or constitutional claims "directly under the Constitution." *See supra* Part IV.B. Nor could Congress simply prevent claimants from seeking the return of the *res* or just compensation for the taking of their property under the Fifth Amendment's Takings Clause. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2425-27 (2015) (noting that the duty to compensate for takings applies equally to personal property). Thus, Congress does not have the power to completely foreclose all of the "actions, suits, proceedings" or "claims" that signatories to HHAs are prevented from bringing—let alone impose affirmative legal liabilities such as indemnification—and so could not directly impose the requirements of HHAs on claimants as the government claims.

3. If Congress directly imposed the same conditions on claimants, it would be just as unconstitutional as CBP doing so through HHAs.

Without citation to any authority, Defendants claim that because Congress has "authority to establish waivers of sovereign immunity," then Congress could "directly" impose all of the legal consequences of a HHA on claimants, AMtD 20, apparently without even a notice or a hearing. This *ipse dixit* flies in the face of bedrock principles of due process and equal protection. It would create the very same unconstitutional condition that Plaintiff is challenging, just via a different procedural mechanism. If Congress were to directly prevent claimants from initiating any type of legal, administrative, or other "actions, suits, proceedings" or "claims" to vindicate their rights, as

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

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

In contrast, the doctrine of unconstitutional conditions applies in situations in which denying the government benefit "would allow the government to produce a result which (it) could not command directly." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (internal quotation omitted) (collecting cases in which this principle has been applied in a variety of contexts). For the same reason, *Rumsfeld* is also unlike this case, because a variety of constitutional rights—including the right to petition, due-process rights, equal-protection rights, and property rights—would be infringed if Congress were to directly impose the requirements of the HHA as a condition of returning seized property. *See* Compl. ¶¶ 92-101. The government offers no constitutional basis for Congress to impose any of these requirements—unlike in *Rumsfeld*, Congress would certainly not be acting under its broad authority to raise and support armies—and Plaintiff is aware of none.

CONCLUSION

Defendants' arguments on exhaustion, mootness, standing, sovereign immunity, jurisdiction, and failure to state a claim are without merit. As a result, their Motion to Dismiss should be denied.

Dated: April 12, 2019

Respectfully submitted,

/s/ Dan Alban

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CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of April 2019, I electronically filed and served the foregoing Plaintiff's Response in Opposition to Defendants' Amended Motion to Dismiss, using the CM/ECF system upon the counsel of record for the Defendants.

/s/ Dan Alban