CASE NO. 19-20706

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; U.S. CUSTOMS & BORDER PROTECTION; KEVIN K. MCALEENAN,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division, No. 4:18-CV-01406, Honorable Gray H. Miller, Presiding

APPELLANT'S PETITION FOR PANEL REHEARING

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CERTIFICATE OF INTERESTED PERSONS

(1) Case Number 19-20706: *Anthonia Nwaorie v. USA, et al.*

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiff–Appellant

Anthonia Nwaorie

Counsel for Plaintiff–Appellant

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Dan Alban
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Defendants–Appellees

United States of America;
U.S. Customs and Border Protection; and
Kevin K. McAleenan, Commissioner, U.S. Customs and Border Protection, sued in his official capacity. [1]

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/s/ Dan Alban
Lead Counsel for Plaintiff–Appellant

[1] On or about November 12, 2022, Troy A. Miller, was appointed to serve as Acting Commissioner of the U.S. Customs and Border Protection. Under Federal Rule of Appellate Procedure 43(c), Acting Commissioner Miller is automatically substituted as a party.

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STATEMENT OF THE ISSUES MERITING PANEL REHEARING

Pursuant to Fed. R. App. P. 40(a)(2), Plaintiff-Appellant Anthonia Nwaorie hereby identifies the following facts or points of law she believes were misapprehended or overlooked in the panel opinion related to her standing to seek various types of equitable relief as a class representative:

(1) The opinion erroneously creates and then relies on an incorrect "fact" unsupported by the record—namely that Customs and Border Protection (CBP) began returning Anthonia's money *before* she filed this lawsuit. The opinion then finds this newly invented "fact" dispositive in determining that she did not have standing to seek an injunction prohibiting Defendants from continuing to hold the seized property of class members. *Nwaorie v. United States*, No. 19-20706, 2023 WL 3034261, at *5 (5th Cir. Apr. 21, 2023). Instead, the record reflects that, at most, CBP began returning her money "[o]n or about" the same day she filed this lawsuit. ROA.236. And even if CBP had "initiated" internal "refund" procedures on that day, that would not deprive Anthonia of standing because CBP still had not actually returned her property.

(2) The opinion errs in holding Anthonia had no standing to challenge the CBP policy because she did not sign the Hold Harmless Agreement

(HHA). That holding is based on a mischaracterization of the policy Anthonia is challenging. *Nwaorie*, 2023 WL 3034261, at *5. Contra the opinion, Anthonia is *not* contesting the terms of the HHA, a standardized form used in many settlements. Instead, she is contesting CBP's policy of issuing an ultimatum to class members—those who are entitled to the "prompt[] release" of their property due to the government's failure to timely file a forfeiture complaint—to sign the HHA within 30 days or face administrative forfeiture of their property, as described in CBP's April 4, 2018 demand letter. ROA.74. Thus, it was not necessary for Anthonia to sign the HHA to be subject to CBP's ultimatum, nor was this a policy to which she could "submit"—she was involuntarily subjected to CBP's ultimatum after her property was seized without her consent. As a consequence of not signing the HHA, she unlawfully faced administrative forfeiture of her seized money. If the panel opinion were correct, CBP could unlawfully make *any demand* as a condition of returning seized property and face no consequences so long as the property owner does not acquiesce. But that holding conflicts directly with Supreme Court precedent on unconstitutional conditions. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) (finding unconstitutional

conditions doctrine applies "regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right.")

(3) The opinion further errs in holding that Anthonia was not suffering injury from the challenged policy when she filed the complaint and thus had no standing to seek an injunction against Defendants continuing to require class members to sign HHAs as a condition of returning seized property. *Nwaorie*, 2023 WL 3034261, at *5. The Complaint repeatedly alleges that, at the time she filed suit, Anthonia was currently suffering from "ongoing" injuries because CBP had not returned her savings and was still requiring her to sign an HHA to get her money back. *See* ROA.30-31. Accordingly, when Anthonia filed the complaint, she had standing to seek to "[e]njoin the Defendants from *continuing* to condition the return of seized property to class members on signing Hold Harmless Agreements." ROA.56 (emphasis added).

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Anthonia filed this lawsuit on May 3, 2018. ROA.10-58. She brought two class claims and two individual claims. ROA.42-46. This petition solely addresses her class claims, which challenged CBP's policy or practice of conditioning the return of seized property on class members signing HHAs, as *ultra vires* under the Civil Asset Forfeiture Reform Act (CAFRA) (Count I), and as a violation of the unconstitutional conditions doctrine (Count II). ROA.42-55. On August 8, 2019, the district court dismissed Anthonia's class claims for failure to state a claim. ROA.773-74. Anthonia noticed an appeal on October 7, 2019. ROA.776. After briefing, oral argument was held on September 2, 2020. A decision issued on April 21, 2023, dismissing Anthonia's class claims for lack of standing. *Nwaorie*, 2023 WL 3034261, at *5.

STATEMENT OF THE FACTS

Plaintiff-Appellant Anthonia Nwaorie is a U.S. citizen and resident of Texas. ROA.15. She has worked as a registered nurse since 1983, one year after she moved to Texas from Nigeria. ROA.15.

I. Anthonia's 2017 Flight to Nigeria.

On October 31, 2017, Anthonia was at Houston's George Bush Intercontinental Airport, boarding an international flight to travel to Nigeria

on a mission trip. ROA.11. She was traveling with $41,377 in U.S. currency, all of which was lawfully earned and intended for lawful purposes. ROA.11. Anthonia planned on spending more than $30,000 of that money to start a medical clinic for women and children in Nigeria. ROA.11. She had saved that money over the years from her income as a nurse. ROA.11. The remainder was money from family in the United States to deliver to family in Nigeria to pay for medical expenses, retirement expenses, and home repair. ROA.11.

CBP officers stopped Anthonia on the jetway to her flight and seized the $41,377 for an alleged violation of currency reporting requirements. ROA.11. While Anthonia knew travelers are supposed to report if they have more than $10,000 when *entering* the United States, she was unaware that travelers have an obligation to do the same when *leaving* the country. ROA.11.

II. Anthonia's CAFRA Claim and CBP's Demand That She Sign an HHA.

CBP sent Anthonia a CAFRA seizure notice in November 2017. ROA.11. On December 12, 2017, Anthonia timely submitted her claim, requesting CBP refer the case to the U.S. Attorney's Office (USAO) for court action. ROA.11. But the USAO declined to pursue forfeiture and did not timely file a forfeiture complaint within the 90-day period required under CAFRA. *See* 18 U.S.C. § 983(a)(3)(A). As a result, CBP was obligated to "promptly release" the

property to Anthonia. *See* 18 U.S.C. § 983(a)(3)(B)(ii) ("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." (emphasis added)); *see also* 28 C.F.R. § 8.13 (setting forth the implementing regulation promulgated by the Attorney General).

But instead of "promptly releas[ing]" Anthonia's money as required by CAFRA, CBP sent her a demand letter, ROA.74—dated April 4, 2018—conditioning its release on her signing a HHA within 30 days that would waive her constitutional and statutory rights, and would require her to accept new legal liabilities, such as indemnifying the government for any claims brought by other parties relating to the seized property. ROA.11.

Specifically, the HHA would impose the following legal obligations on owners of seized property:

1. To release and forever discharge Defendants "from any and all actions, suits, proceedings, debts, dues, contracts, judgments, damages, claims, and or demands whatsoever in law or equity . . . in connection with the detention, seizure, and/or release by the Customs and Border Protection of the above listed property";

2. To "hold and save the [Defendants] harmless from **any claims by any others**, including costs and expenses for or on account of any and all lawsuit or claims of any character whatsoever in connection with the detention, seizure, and/or release by the Customs and Border Protection of the above listed property";
3. To "reimburse the [Defendants] from any necessary expenses, attorney's fees, or costs expenses incurred in the enforcement of any part of this agreement within thirty (30) days after receiving written notice"; and
4. To "waiv[e] any claim to attorney's fees, interest, or any other relief not specifically provided for in this decision."

ROA.27-28, 76 (emphasis added).

CBP's demand letter stated that if Anthonia did not sign the HHA within 30 days, "administrative forfeiture proceedings will be initiated." ROA.12, 74. But if she did sign the HHA, CBP's demand letter stated that the government would mail a "refund check" for the money within eight to ten weeks. ROA.12, 74. Because CBP was obligated by CAFRA to "promptly release" the property and was not authorized to impose any additional conditions on the return of her property, Anthonia refused to sign the HHA

and instead filed this lawsuit on behalf of herself and others similarly situated. ROA.16.

Anthonia alleges that CBP's conduct is not unique to her and is part of CBP's ongoing policy or practice of demanding that hundreds or thousands of similarly situated property owners sign an HHA as a condition of returning their property, even though they are already legally entitled to its return under CAFRA. ROA.32-33, 35.

III. Anthonia Files Her Complaint and Then CBP Returns Her Money.

Anthonia filed this lawsuit on May 3, 2018. ROA.10-58. Simultaneously, Anthonia moved to certify a class. ROA.77-91. In late May 2018, CBP returned the seized $41,377. ROA.672. The government claims CBP began processing a "refund" to Anthonia "[o]n or about May 3, 2018," the same day the complaint was filed. ROA.236. The record does not reflect whether CBP began processing this "refund" before or after it became aware of the complaint due to a courtesy copy provided to CBP on that day by Anthonia's counsel. However, CBP's April 4, 2018 demand letter provided a 30-day deadline for Anthonia to return the completed HHA that would have expired on May 4, 2018. ROA.74. Thus, when CBP began processing her "refund," Anthonia had not returned the HHA and the deadline to do so had

not yet expired, but she had filed her complaint and sought class certification.

ARGUMENT AND AUTHORITIES

I. The opinion erred by inventing and relying on a new, incorrect "fact" that is not supported by the record, which the opinion found dispositive on Anthonia's standing to enjoin CBP's continued detention of seized property.

The opinion improperly rejected Anthonia's standing to seek an injunction prohibiting CBP's continued detention of property because a class member has not signed an HHA. The opinion found it dispositive as to Anthonia's standing that, "[b]y the time Nwaorie filed her complaint, CBP had initiated her refund process and ultimately returned her property just 19 days later. *Nwaorie*, 2023 WL 3034261, at *5. The opinion explains: "Because CBP was **in fact in the process of returning her property** at the time Nwaorie filed her complaint, Nwaorie only alleges a past injury that is insufficient to establish standing to pursue the equitable relief she seeks on behalf of her proposed class." *Id.* (emphasis added).

These statements invent, and then rely on a new, incorrect "fact" that is not supported by the record, namely the contention that CBP began returning Anthonia's property *before* she filed her complaint. At most, the record shows that CBP began returning her property "[o]n or about May 3, 2018," the same day Anthonia's complaint was filed. ROA.236. But there is

nothing in the record—and the government has never contended—that this "refund" process was initiated *before* the government received a copy of Anthonia's complaint. Nor is there any reason to think that, in the absence of the complaint, CBP would have begun initiating Anthonia's "refund" without a signed HHA and before her 30-day deadline had expired. *See* ROA.74. Instead, it is far more likely that CBP began processing Anthonia's refund *after* receiving a courtesy copy of the complaint, in an attempt to moot her case. And on a motion to dismiss, "[t]he complaint must be liberally construed, with all reasonable inferences drawn in the light most favorable to the plaintiff." *Woodard v. Andrus*, 419 F.3d 348, 351 (5th Cir. 2005). Accordingly, a "dismissal will be upheld only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (internal quotations omitted). That standard is not satisfied here, where the record does not support the timeline relied on by the opinion, and where Plaintiff has had no opportunity to develop a factual record about this timeline.[2]

[2] Because this is an appeal of a dismissal, Plaintiff has never had an opportunity to depose the CBP official whose declaration states that "[o]n or about May 3, 2018," CBP began processing a "refund" to Anthonia, nor otherwise take discovery regarding the timing of the events described in that declaration, which does not address when she learned of the complaint.

Simply put, this Court should not invent or infer new facts that are not in the record, particularly when it finds those facts dispositive on standing. Because the Court found the timing of the return of her property was dispositive on the issue of Anthonia's standing, and the timeline it relied on is unsupported by the record, it should now find that Anthonia does have standing to challenge CBP's detention of her property based on the actual record and not the Court's suppositions about the timing of events.

Moreover, even if it were true that CBP had "initiated" the return of her property prior to the filing of the complaint, Anthonia would still have standing to challenge the continued detention of her property up until the time it was actually returned. Merely "initiating" a "process of returning [] property" is not the same as actually returning someone's property and does not end an injury-in-fact nor moot a claim for return of property. Indeed, before mootness can occur, "the challenged practice must have *actually ceased*." *Sullivan v. Benningfield*, 920 F.3d 401, 411 (6th Cir. 2019).[3] Thus,

[3] The opinion also incorrectly notes, in dicta, that Anthonia's claims are "likely moot" because of "CBP's apparent voluntary cessation of its policy of conditioning the return of property on claimants' signing HHAs." *Nwaorie*, 2023 WL 3034261, at *6 n.3. But a defendant seeking to moot a claim through voluntary cessation must show both that (1) it is "'absolutely clear' that it could not revert to" the challenged policy, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 n.1 (2017), and (2) "interim relief or events have completely or irrevocably eradicated the effects of the alleged violation." *Zukerman v. USPS*, 961 F.3d 431, 442 (D.C. Cir. 2020) (quotation

even if there had been no class complaint or motion for class certification, Anthonia's challenges to the CBP policy would not have been mooted until her seized property was actually returned in late May. And if CBP had been enjoined from continuing to detain class members' seized property on May 3, 2018, that would have provided immediate relief to Anthonia, whose money was still being detained under the challenged policy.

II. The opinion erred by mischaracterizing the nature of the challenged policy, and thus failed to recognize that Anthonia did not have to "submit" to the challenged policy to be subjected to the policy.

The opinion incorrectly found that Anthonia lacks standing to seek a declaration that HHAs signed by class members are void and unenforceable or a declaration that it is unlawful to require class members to sign HHAs because she "never entered into an HHA." *Nwaorie*, 2023 WL 3034261, at *5. Relatedly, the opinion noted that "a plaintiff generally must submit to the challenged policy before pursuing an action to dispute it." *Id.* And the opinion also noted that: "Not only did Nwaorie never submit to the HHA

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marks omitted) (rejecting as insufficient a Rule 28(j) letter filed by U.S. Postal Service expressing its intent to terminate a challenged program). There is nothing in the record to make either showing. Instead, Defendants failed to produce anything supporting their claims about ending this policy when requested to do so in Fall 2021, despite claiming on the eve of oral argument that a corrective "department-wide directive" would be developed by August 31, 2021. *See* Docket No. 52.

policy she seeks to challenge, but she has offered no argument that it would have been futile for her to submit to the challenged policy before pursuing this lawsuit." *Id.* These statements mischaracterize the challenged policy as challenging the terms of the HHA, rather than a challenge to CBP's ultimatum requiring class members to sign an HHA or lose their property.

First, Anthonia is not challenging the terms of the HHA itself. She is instead challenging CBP's ultimatum requiring class members to either (1) sign the HHA within 30 days, or (2) face "administrative forfeiture" of their property. ROA.74. Because she still faced this unlawful demand on the day she filed the complaint, she had standing to seek a declaration that it was unlawful and unconstitutional for CBP to issue this demand to class members. Such a declaration would have provided her immediate relief. And even though she did not sign an HHA, she also had standing to seek a declaration that HHAs executed by class members were void and unenforceable because that too would have provided her with immediate relief—she could have then signed an HHA and received her property under the terms of CBP's demand letter without actually being bound by the HHA. Thus, if the court declared on May 3, 2018 that HHAs signed by class members were void and unenforceable, or declared CBP's policy of requiring

class members to sign HHAs was unlawful, that would have provided immediate relief to Anthonia.

Second, contra the opinion, Anthonia did not have to sign an HHA to be subject to CBP's unlawful ultimatum because the challenged policy is not one to which a person can choose to "submit." Instead, CBP unilaterally subjected Anthonia to the challenged CBP policy. CBP had already seized her property without her consent and then unlawfully withheld it unless she signed an HHA. It is irrelevant which option she chose, because "regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz*, 570 U.S. at 606. Here, the "benefit" coercively withheld from Anthonia was the return of her seized property, as required by § 983(a)(3)(B)(ii). And CBP's policy required Anthonia to surrender other constitutional rights—including her right to petition, due-process rights, and property rights in claims against CBP—in order to have her statutory and constitutional right to possess her property restored. ROA.27-29. That is the very definition of an unconstitutional condition.

Third, the HHA's restrictions made it futile to sign the HHA before pursuing this lawsuit. The HHA releases the government from any liability over anything related to the seizure or detention of the property, and requires the property owner to pay the government's attorneys fees and costs to enforce the HHA. ROA.27-29, 76. Signing the HHA and then pursuing this lawsuit would have exposed Anthonia to tremendous financial risk. It cannot be the case that a civil rights plaintiff must sign an agreement pledging to pay the government's attorney's fees in order to have standing to contest the policy requiring her to sign that agreement as a condition of receiving her returned property.

III. The opinion erred by failing to recognize that Anthonia's injuries were ongoing at the time she filed the complaint, and thus she had standing to enjoin CBP from requiring signed HHAs as a condition of returning seized property.

Ignoring her repeated allegations in the complaint that she was suffering ongoing injury from the continued detention of her property, the opinion further erred by holding that Anthonia had only suffered past injury and did not have standing to seek prospective equitable relief. *Nwaorie*, 2023 WL 3034261, at *5. Specifically, the opinion found she did not have standing to seek to "[e]njoin the Defendants from **continuing to condition** the return of seized property to class members on signing" HHAs. ROA.56 (Request for Relief, Part D) (emphasis added).

This holding improperly ignores the repeated, plausible allegations in the complaint that, at the time she filed suit, Anthonia was suffering "ongoing injury" from CBP's "continued retention" of her savings under the challenged policy. *See, e.g.*, ROA.30-31. In short, because she had not signed the HHA, as CBP demanded, she was injured by her money continuing to be withheld. Thus, the opinion not only fails to construe the complaint with all reasonable inferences in the light most favorable to the plaintiff, *see Woodard*, 419 F.3d at 351, it fails to literally construe multiple paragraphs in the complaint alleging the ongoing injury. By mischaracterizing these allegations as only regarding past harms because "CBP had already imposed such an ultimatum on her," *Nwaorie*, 2023 WL 3034261, at *5, the opinion fails to consider the ongoing injuries from the ultimatum presented in CBP's demand letter—such as her inability to use her money to open a medical clinic. It also failed to consider that the ultimatum itself was ongoing—Anthonia had 30 days to respond and that deadline had not yet expired when she filed her class complaint. *See* ROA.74.

This holding also fails to recognize how the declaration Anthonia sought would have provided immediate relief to her. Because her money was still being detained by CBP under the challenged policy, Anthonia sought an injunction preventing Defendants from "continuing to condition" the return

of seized property on class members signing HHAs. In other words, she was not seeking relief from a "past injury" but relief from a current, ongoing injury that she was suffering due to CBP's continued application of the challenged policy to her under the conditions of CBP's demand letter. Had that injunction been granted on May 3, 2018, CBP would have been compelled to "promptly release" Anthonia's property as required by § 983(a)(3)(B)(ii).

The holding also conflicts with Supreme Court precedent recognizing that continued detention (of people) at the moment a class complaint is filed constitutes an ongoing injury for which injunctive relief is proper. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) (people arrested without warrants had standing to challenge policy delaying probable cause hearings even though they were subsequently released after the complaint was filed.) The Court explained: "Plainly, plaintiffs' injury was at that moment capable of being redressed through injunctive relief." *Id*. The Court noted that such a situation "is easily distinguished from *Lyons*, in which the constitutionally objectionable practice ceased altogether before the plaintiff filed his complaint." *Id*. And the Court brushed aside the idea that plaintiff only alleged a past injury, noting that "the argument the constitutional violation had already been 'completed' relies on a crabbed reading of the

complaint." *Id.* This opinion does the same disservice to the well-pleaded allegations of Anthonia's complaint and should be reconsidered.

CONCLUSION

In denying Anthonia standing to seek equitable relief for her class claims, the opinion (1) invents and then relies on a new, incorrect "fact," which it finds dispositive as to her standing, (2) mischaracterizes the nature of the challenged policy, and (3) fails to recognize that Anthonia was suffering ongoing injury at the time she filed the complaint, despite her repeated allegations in the complaint and despite the uncontested fact that her property had not been returned on the day she filed her complaint. Respectfully, the panel should reconsider its opinion in light of these serious material errors and rehear this case, which was previously argued nearly three years ago on September 2, 2020.

Dated: June 5, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2023, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system and that service will be accomplished by the appellate CM/ECF system.

/s/ Dan Alban
Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

1. This petition complies with type-volume limits of Federal Rule of Appellate Procedure 35(b)(2) because it contains 3,883 words, as determined by the word-count function of Microsoft Word for Microsoft 365, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

2. This petition complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Georgia font.

/s/ Dan Alban
Counsel for Plaintiff-Appellant