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

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OPENING BRIEF FOR PLAINTIFF–APPELLANT

Dan Alban
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
Lead Counsel for Plaintiff–Appellant

Anya Bidwell
INSTITUTE FOR JUSTICE
816 Congress Avenue, Suite 960
Austin, TX 78701
(512) 480-5936
Counsel for Plaintiff–Appellant

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

INSTITUTE FOR JUSTICE
Dan Alban
Anya Bidwell

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]

Counsel for Defendants–Appellees

UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF TEXAS
Ryan K. Patrick
Ariel N. Wiley

/s/ Dan Alban
Lead Counsel for Plaintiff–Appellant

[1] On July 7, 2019, Mark A. Morgan, 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 Morgan is automatically substituted as a party.

STATEMENT REGARDING ORAL ARGUMENT

Anthonia Nwaorie, Plaintiff-Appellant, respectfully requests twenty minutes of oral argument for each side. Oral argument would be useful as an opportunity to address four important issues necessary to deciding this case: (1) whether it exceeds the statutory authority granted to government agencies under the Civil Asset Forfeiture Reform Act ("CAFRA") to demand that property owners sign Hold Harmless Agreements ("HHAs") as a condition of returning seized property that CAFRA requires the government to "promptly release"; (2) whether a government agency imposes an unconstitutional condition when it demands that property owners sign HHAs that waive their statutory and constitutional rights and impose new legal liabilities as a condition of returning seized property that CAFRA requires the government to return; (3) whether sovereign immunity applies to claims for interest accrued on property seized by the government that the government is later required to return; and (4) whether Anthonia states a valid due-process claim related to being targeted for particularly intrusive screenings at airports without notice and an opportunity to be heard.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Anthonia Nwaorie sued U.S. Customs and Border Protection ("CBP") and its Commissioner for violating her rights, as well as the rights of other class members, under (1) 18 U.S.C. § 983(a)(3)(B), part of the Civil Asset Forfeiture Reform Act ("CAFRA"), and the Attorney General's regulation promulgated thereunder, and (2) the Fifth Amendment to the United States Constitution. ROA.42-46. Anthonia also brought an individual claim for return of property, plus interest, that CBP seized from her. ROA.46-49. Finally, Anthonia brought an individual claim for violation of her due-process and equal-protection rights under the Due Process Clause of the Fifth Amendment. ROA.49-55. Accordingly, the district court properly exercised its jurisdiction under 28 U.S.C. § 1331.

On August 8, 2019, the district court dismissed Anthonia's class-wide and individual claims under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted, and under Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction. ROA.775. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court's final judgment disposed of all claims. Anthonia filed a timely and sufficient notice of appeal on October 7, 2019. ROA.776.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

For the purposes of this case, a Hold Harmless Agreement ("HHA") is a document issued by U.S. Customs and Border Protection ("CBP") which is a waiver of statutory and constitutional rights and creates new legal liabilities for the signatory. It is not referenced in CAFRA, 18 U.S.C. § 983(a)(3)(B), or its implementing regulation.

1. Did the district court err in dismissing, under Rule 12(b)(6), Anthonia's class-wide claim that a government agency exceeds the statutory authority granted to it under CAFRA when it demands that property owners sign an HHA as a condition of returning seized property that the agency is required to return under CAFRA?

2. Did the district court err in dismissing, under Rule 12(b)(6), Anthonia's class-wide claim that a government agency imposes an unconstitutional condition when it demands that property owners sign an HHA as a condition of returning seized property that the government is required to return under CAFRA?

3. Did the district court err in holding that sovereign immunity bars claims for interest that accrues on property seized by the government, which the government is later required to return?

4. Did the district court err in failing to address Plaintiff's procedural due-process challenge to being targeted for additional, intrusive screenings at airports without notice and opportunity to be heard?

STATEMENT OF THE CASE

Statement of Facts

Appellant Anthonia Nwaorie is a U.S. citizen and a resident of Katy, Texas. ROA.15. She has worked as a registered nurse since 1983, one year after she moved to the United States from Imo State, 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.

U.S. Customs and Border Protection ("CBP") officers stopped Anthonia on the jetway as she was boarding her flight and seized the $41,377 from her for an alleged violation of currency reporting requirements. ROA.11. While Anthonia knew that travelers are supposed to report if they have more than $10,000 in currency when entering the United States, she was unaware that travelers haven an obligation to do the same when *leaving* the United States. 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 that CBP refer the case to the U.S. Attorney's Office ("USAO") for court action. ROA.11. But the USAO declined to pursue forfeiture of the money and the government failed to 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." 18 U.S.C. § 983(a)(3)(B)(ii) (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 letter, ROA.74—dated April 4, 2018—conditioning its release on her signing a Hold Harmless Agreement ("HHA") within 30 days that would waive her constitutional and statutory rights, and requires 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 imposes the following legal obligations on owners of seized property:

1. To release and forever discharge "the United States, its officers, agents, servants, and employees, their heirs, successors, or assigns," ("the United States, et al.") "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 [United States, et al.] 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 United States, its employees or agents 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).

According to CBP's demand letter, ROA.74, 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, the letter stated that the government would mail a "refund check" for the entirety of 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 by statute 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 all similarly situated

property owners sign an HHA as a condition of returning their property (the "HHA Policy"), even though they are already legally entitled to its return under CAFRA. ROA.32-33.

III. ANTHONIA'S PLACEMENT IN A SCREENING LIST OR DATABASE

After CBP seized Anthonia's money on October 31, 2017, Anthonia has been continuously targeted by the government for special, extra-intrusive screenings, both when she travels domestically and internationally. ROA.23-24, 49-50, 589-90, 629-30. This seems to be caused by Anthonia's name being placed in a special database or screening list, which subjects her to a special screening every time she provides her identification documents in airports. ROA.49-50, 589-90.

When Anthonia returned to the United States from her trip to Nigeria in December 2017, for example, CBP officers directed Anthonia to a separate lane from other passengers, ransacked her luggage and emptied everything out of her bags. ROA.23. One CBP officer slit open the bottom of her leather purse, so he could search the lining, rendering the purse unusable. ROA.23. Another CBP officer told Anthonia that he knew she had previously "had her money seized," and said that CBP would "follow her wherever she goes" and subject her to this invasive treatment every time she travels. ROA.24.

Due to this experience, Anthonia stayed away from flying unless she absolutely had to. She was again singled out for invasive screenings when she next flew, on June 3, 2018, to Boston, Massachusetts (from William P. Hobby Airport in Houston). ROA.589-90. Similar to the December 2017 incident, she was subjected to additional screening, ROA.590, and she noticed that government officers recognized her name, rather than selecting her randomly. ROA.590. Anthonia's reasonable belief that she was being singled out for special screenings was once again confirmed when she made another mission trip to Nigeria on October 23, 2018. ROA.629-30. Her luggage was again searched in a special screening process, which resulted in a spilled body wash ruining much what she had packed. ROA.629.

Other than the offhand comment from the CBP officer in December 2017 that CBP would follow her wherever she goes, Anthonia was never notified that she had been placed in a screening list/database, nor given a meaningful opportunity to contest her inclusion in the list/database. ROA.52-53. There is no way for Anthonia to challenge inclusion in a screening list/database. ROA.53-54. She can only file a traveler inquiry form with the Department of Homeland Security, to alert the government that she suspects differential treatment. *See* Department of Homeland

Security, *DHS Traveler Redress Inquiry Program* ("DHS TRIP"), https://www.dhs.gov/dhs-trip. But this form does not provide an opportunity to challenge her inclusion in a special list/database, to examine the evidence that the government used to add her, or to provide arguments or evidence challenging the basis for her inclusion. ROA.53-54; *see also Elhady v. Kable*, 391 F. Supp. 3d 562, 570-71 (E.D. Va. 2019) (describing the DHS TRIP inquiry process, in the context of one of the screening lists). All the government provides is a determination letter, with results of the redress inquiry, without disclosing any additional information. *Id*.

Procedural History

Anthonia filed this lawsuit on May 3, 2018. ROA.10-58. She brought two class claims and two individual claims. ROA.42-46. Her class claims challenged CBP's policy or practice of conditioning the return of seized property on class members signing Hold Harmless Agreements (the HHA Policy), as *ultra vires* under CAFRA (Count I), and as a violation of the unconstitutional conditions doctrine (Count II). ROA.42-55. Anthonia's individual claims demanded the return of her property, with interest, under Federal Rule of Criminal Procedure 41(g) (Count III), and also challenged her being subjected to additional, invasive, and intrusive screening

procedures, without notice or an opportunity to be heard (Count IV). ROA.46-55.

Simultaneous with the filing of the complaint, Anthonia moved to certify a class under the following definition:

> All claimants to seized property for which CBP has pursued, or will in the future pursue, civil forfeiture under 18 U.S.C. § 983, and as to which:
>
> (1) within 90 days after a claim has been filed under 18 U.S.C. § 983(a)(2), the United States government:
>
> a. declines to pursue forfeiture and thus declines to file a complaint for forfeiture under 18 U.S.C. § 983(a)(3)(A); or
>
> b. does not file a complaint for forfeiture under 18 U.S.C. § 983(a)(3)(A) for any other reason; and
>
> c. has not taken any other action under 18 U.S.C. § 983(a)(3) that would avoid its obligation to file a forfeiture complaint within 90 days after a claim has been filed, namely: obtaining an extension from the court in the district in which the complaint would be filed, obtaining a criminal indictment containing an allegation that the property is subject to forfeiture and taking the steps necessary to maintain custody of the property, or returning the property pending filing of a complaint; and
>
> (2) CBP demands that the claimant sign a Hold Harmless Agreement waiving the claimant's constitutional rights as a condition of releasing the seized property.

ROA.35-36, 79-80.

In late May 2018, CBP partially returned Anthonia's property by returning the exact amount seized ($41,377), but not the interest that had

accrued on the principal during the seven months while it was in the government's possession. ROA.672.

On July 23, 2018, the government moved to dismiss all of Anthonia's claims for lack of jurisdiction or for failure to state a claim. ROA.212. On December 18, 2018, the magistrate judge issued her original Memorandum and Recommendation ("M&R"), recommending that government's motion to dismiss be granted on Anthonia's individual claims and denying the motion with respect to Anthonia's class claims. ECF No. 39 (withdrawn). On February 28, 2019, the magistrate judge held a hearing on the objections to her M&R, filed by both sides. ROA.797-827. At the end of the hearing, the magistrate withdrew the original M&R and ordered a new round of briefing on the government's motion to dismiss. ROA.442-443. On May 10, 2019, the magistrate judge issued a second M&R, this time recommending that all of Anthonia's claims be dismissed. ROA.668-700. On August 8, 2019, the district court judge, over Anthonia's objections, adopted the magistrate's recommendations in full, dismissing Anthonia's individual claim for interest on sovereign immunity grounds, and the rest of the claims for failure to state a claim. ROA.773-774.

Anthonia noticed an appeal on October 7, 2019. ROA.776. She is now before this Court, asking it to overrule the district court's order granting the

government's motion to dismiss on all four claims. This Court should send the case back to the district court so that discovery may proceed.

SUMMARY OF THE ARGUMENT

In this case, Plaintiff Anthonia Nwaorie—a Houston-area nurse whose life savings was seized by CBP as she traveled to Nigeria to open a medical clinic—is challenging an egregious abuse of power by CBP that unlawfully extracts waivers of constitutional and statutory rights from hundreds or thousands of property owners. This HHA Policy, explained below, both exceeds its statutory authority and systematically violates the constitutional rights of property owners who are legally entitled to the return of their seized property under CAFRA, the federal civil forfeiture statute.

Under CAFRA, within 90 days after receiving a claim from the owner of seized property, the government must either file a forfeiture complaint, bring a criminal indictment, or return the property to the property owner. Specifically, 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).

Rather than obeying CAFRA's directive, CBP instead demands that Anthonia, and others in her situation, first sign a Hold Harmless Agreement (HHA) before it will return their property. If property owners fail to sign the HHA, CBP threatens to administratively forfeit their property. The HHA is a waiver of statutory and constitutional rights, including a waiver of the right to bring "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" of the seized property. ROA.76. It further waives the right to seek interest or attorney's fees, and it also creates new legal liabilities, with the signatory agreeing to indemnify the federal government for any claims brought by third parties related to the seized property.

Anthonia, on behalf of herself and others similarly situated, brings two class claims challenging the HHA Policy (1) as *ultra vires* under CAFRA and (2) as imposing unconstitutional conditions that violate due process. In addition, she brings two individual claims. The first is an individual claim seeking the return of her seized property, including the interest that accrued during the seven months it was in CBP's possession. The second is an individual procedural due-process claim, challenging CBP targeting her for special, intrusive screenings by adding her to a special screening

list/database without providing her with notice or an opportunity to challenge this decision. The district court dismissed all of these claims, finding that the class claims and the individual screening-list claim failed to state a claim, and that the individual claim for return of the interest that accrued on her seized property was barred by sovereign immunity. These holdings were in error and should be reversed.

First, Anthonia brought a facially valid *ultra vires* class claim, challenging the HHA Policy as lacking statutory authority under CAFRA. Not only does CBP's conduct directly contradict the commands of CAFRA and its implementing regulation, but neither CAFRA nor the implementing regulation even contemplate the use of an HHA. The district court wrongly dismissed this claim without ever addressing Anthonia's actual arguments that CBP's actions were *ultra vires*. First, the district court erroneously determined that her *ultra vires* claim could not go forward unless it alleged a constitutional violation, thus conflating this statutory class claim with her separate constitutional class claim. Then, the district court misconstrued Anthonia's argument as challenging the timeliness of CBP's actions rather than as challenge to CBP's authority to demand that property owners sign HHAs before retuning their property.

Second, Anthonia brought a facially valid class claim that the HHA Policy violates due process by imposing unconstitutional conditions on property owners who are forced to choose between waiving their rights by signing the HHA or getting their seized property back. The district court also wrongly held that Anthonia failed to state a claim on this cause of action. The district court first erroneously determined that no legal or constitutional claims are waived by HHAs because all such claims are barred by sovereign immunity. This holding wrongly assumes that the only claims that property owners might bring are claims for monetary damages, and ignores the fact that property owners have many potential claims that are not barred by sovereign immunity, including claims for equitable relief and other claims brought under waivers of sovereign immunity. It also ignores that HHAs require signatories to release their ability to initiate any administrative proceedings, including potentially filing FOIA requests or seeking relief under the DHS TRIP process. Next, the district court erroneously held that the challenged HHAs are a "tool of settlement," ignoring that there are no cases left for putative class members to settle, and misconstruing Anthonia's unconstitutional conditions claim as challenging every use of an HHA by CBP, including the use of HHAs in settlements. But Anthonia's challenge is limited to CBP's use of HHAs for

property owners who are already entitled to the return of their property under CAFRA, and not to the use of HHAs to settle pending seizure/forfeiture cases. Because the right to the return of their seized property has already vested, there is nothing left for these property owners to settle, and thus the terms of the HHA relate only to potential future actions the property owners might bring to exercise their statutory or constitutional rights. It is in precisely these circumstances that the unconstitutional conditions doctrine applies. Third, the district court held that the HHA Policy was justified based on CAFRA's procedures. But nothing in CAFRA authorizes or references the use of HHAs and CAFRA's procedures do not operate in the manner assumed by the district court. Finally, instead of analyzing whether CBP's conduct imposed unconstitutional conditions, the district court invented a new standard, asking whether CBP's actions were "prudent."

Third, Anthonia brought a valid individual claim for the return of her seized property including the interest accrued for the seven months it was held by CBP. While CBP ultimately decided to return the principal, it declined to return the interest that accrued. The district court found that this claim was barred by sovereign immunity as a claim for monetary damages because there is no waiver of sovereign immunity for pre-

judgment interest. The district court's holding was incorrect because Anthonia is not seeking pre-judgment interest, and, as the Sixth, Ninth, and Eleventh Circuits have held, the seized *res* includes any interest that accrues while it is seized. This is because, as the Ninth Circuit explained, "the payment of interest on wrongfully seized money is not a payment of damages, but instead is the disgorgement of a benefit actually and calculably received from an asset that [the government] has been holding improperly." *Carvajal v. United States*, 521 F.3d 1242, 1245 (9th Cir. 2008) (internal quotations omitted). Indeed, as the Sixth Circuit explained by analogy, if the government seized a pregnant cow that had since given birth to a calf, "it would hardly be fitting that the Government return the cow but not the calf." *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 505 (6th Cir. 1998). The district court also erroneously analyzed Anthonia's claim as being brought under the attorney fees provision of CAFRA, even though Anthonia brought no such claim (because the government never initiated a civil forfeiture action).

Fourth, the district court failed to analyze Anthonia's procedural due-process claim that she was targeted for additional, particularly intrusive screenings without notice and an opportunity to be heard. Instead the court erroneously treated this as an arbitrary-and-capricious claim under the

Administrative Procedure Act ("APA"), a claim which Anthonia did not bring.

Because each of these holdings is in error, the district court's opinion should be reversed and remanded, and each of Anthonia's claims should be permitted to continue.

ARGUMENT

Standard of Review

The dismissal of a claim for lack of subject matter jurisdiction based on sovereign immunity is reviewed *de novo*. *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 240 (5th Cir. 2005). This Court must take the Plaintiff's allegations as true, with the review being limited to "whether the district court's application of the law is correct." *Freeman v. United States*, 556 F.3d 326, 334 (5th Cir. 2009).

The dismissal of a claim under Rule 12(b)(6) is also reviewed *de novo*. *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 766 (5th Cir. 2019). To survive a 12(b)(6) motion to dismiss, civil complaints must set forth "sufficient factual matter" to show that the claim is facially plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Richardson v. Axion Logistics, LLC*, 780 F.3d 304, 306 (5th Cir. 2015). In addition to treating all factual allegations as true, this Court must construe the complaint in the light most

favorable to the Plaintiff, and determine whether, under any reasonable reading of the complaint, she may be entitled to relief. *Woodward v. Andrus*, 419 F.3d 348, 351 (5th Cir. 2005).

I. ANTHONIA'S CLASS CLAIM CHALLENGING THE HHA POLICY AS *ULTRA VIRES* (COUNT I) STATES A VALID CLAIM.

Anthonia's first class claim challenges the HHA Policy as *ultra vires* under CAFRA, the federal forfeiture statute. Anthonia's claim is that CBP's conduct is contrary to the plain language of the relevant provision of CAFRA, which states 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). In addition, neither the Attorney General's regulation nor CAFRA itself mention HHAs, much less authorize agencies to require "the person with a right to immediate possession of the property," 28 C.F.R. § 8.13(b), to sign an HHA waiving their legal and constitutional rights as a condition of releasing their property. Agencies cannot act without an express delegation of authority from Congress, and the absence of a prohibition cannot be construed as an authorization. As this Court has recently held en banc: "An agency is restrained by the four corners of its enabling statute and 'literally has no power to act . . . unless

and until Congress confers power upon it.'" *Collins v. Mnuchin*, 938 F.3d 553, 562 (5th Cir. 2019) (en banc) (quoting *New York v. FERC*, 535 U.S. 1, 18 (2002); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)); *see also, e.g.*, *Luminant Generation Co. v. EPA*, 675 F.3d 917, 932 (5th Cir. 2012) (quoting same).

The district court's opinion ignores the actual basis for Anthonia's *ultra vires* class claim, never even addressing whether CBP lacks statutory authority for its challenged conduct. First, the district court erred by confusing the *ultra vires* exception to sovereign immunity with the nature of an *ultra vires* challenge, holding that there must also be a constitutional violation in order to challenge the absence of statutory authority for agency action. This is plainly wrong. As a result, the district court wrongly conflates Anthonia's *ultra vires* class claim (Count I) with Anthonia's separate unconstitutional-conditions claim (Count II). Second, the district court mistakes Anthonia's *ultra vires* claims as a challenge to the timeliness of CBP's actions. But Anthonia is challenging the absence of statutory authority for CBP to demand that property owners sign HHAs before it will return seized property as required by CAFRA.

A. The District Court Erred by Holding That *Ultra Vires* Claims Must Allege Unconstitutional Conduct and Thus Mistakenly Conflated Anthonia's *Ultra Vires* Class Claim (Count I) With Her Separate Unconstitutional Conditions Class Claim (Count II).

The district court's opinion erroneously concluded that *ultra vires* claims must allege unconstitutional conduct. As a result, the district court mistakenly conflated Anthonia's *ultra vires* claim that CAFRA and its DOJ implementing regulation do not authorize the HHA Policy (Count I) with her separate constitutional claim that conditioning the release of property on waiving certain rights imposes an unconstitutional condition (Count II). *See* ROA.692-93. Accordingly, the district court wrongly dismissed Count I without addressing its core argument: that the HHA Policy is *ultra vires* under CAFRA and its implementing regulation, which do not authorize CBP to require putative class members to sign an HHA as a condition of returning their seized property. This is plain error and should be reversed.

Specifically, the district court erroneously concluded that "to obtain relief under an ultra vires theory, Plaintiff must show that the imposition of an HHA is unconstitutional." ROA.693. This statement is simply incorrect as a matter of law. *Ultra vires* claims are not constitutional claims; they are claims that the government is acting *ultra vires* (beyond) its statutory authority. *See, e.g.*, *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S.

682, 689, (1949) ("[W]here the officer's powers are limited by statute, his actions beyond those limitations . . . are ultra vires his authority . . ."); *Jean v. Gonzales*, 452 F.3d 392, 396 (5th Cir. 2006) ("[A]n ultra vires claim is 'purely one of statutory construction'") (quoting *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003)).

Based on this misunderstanding, the district court conflated Anthonia's two class claims, wrongly treating her stand-alone *ultra vires* claim under CAFRA as a subset of her separate unconstitutional conditions claim under the Due Process Clause of the Fifth Amendment. *Compare* ROA.42-44 *with* ROA.45-46. It appears that the district court confused the fact that there is an *ultra vires* exception to sovereign immunity with the necessary elements of an *ultra vires* claim. This confusion is evidenced by the district court's reliance on *Larson*, *see* ROA.692-93, a case relied on by Anthonia to demonstrate the availability of common-law exceptions to sovereign immunity in two categories of cases: (1) those where the challenged conduct was *ultra vires*, and (2) those where the challenged conduct was unconstitutional. *See* ROA.292-93, 402-05. The district court misread *Larson* to wrongly conclude that these two exceptions are the same, incorrectly describing them both as constitutional exceptions. ROA.692-93 (noting the exception to sovereign immunity "where the

statute that conferred power on a federal officer to take action was unconstitutional or where the manner in which the powers were exercised was constitutionally void"). But while the reason for these two exceptions is very similar—both involve the exercise of power beyond that rightly exercised by the sovereign—that does not mean that *ultra vires* arguments depend on unconstitutionality, as *Larson* makes clear. *See Larson*, 337 U.S. at 689-91. Indeed, even if Anthonia had not brought a constitutional claim, she should still prevail on her statutory *ultra vires* claim that CAFRA does not authorize CBP to require putative class members to sign an HHA as a condition of returning their seized property. By wrongly conflating Count I with Count II, the district court failed to fully consider the statutory *ultra vires* arguments raised in Count I and erroneously dismissed the claim as duplicative of Count II.

B. Anthonia's *Ultra Vires* Claim Does Not Challenge the Specific Timing of the Release of Property but Instead Challenges Imposing an Additional Condition—Signing the HHA—Unauthorized by Statute or Regulation.

The district court then wrongly construed Anthonia's *ultra vires* class claim as challenging only the timeliness of the release of seized property, ROA.697-700, when Anthonia made clear in both her Complaint and briefing that her challenge is primarily to the government's failure to release the property without imposing additional conditions, as required by

the statute and the Attorney General's implementing regulation, ROA.43-44, 571-72. In other words, Anthonia's claim is not a quibble about the specific number of days that it takes CBP to return seized property, but is instead a challenge to CBP's demand that property owners fulfill the additional, extra-statutory condition of signing an HHA (and CBP's threat to administratively forfeit the property if they fail to do so).

Anthonia's challenge to CBP's actions does not turn primarily on the specific timing of its actions. 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). The term "promptly" here is about more than just the number of days in which an agency acts. "Promptly" is also about whether the agency's action is delayed by other events or actions, such as the interposition of additional requirements before it will act. Anthonia's challenge is not about the specific number of days within which CBP acts, but to the government's failure to "promptly"—without delay—obey the statutory command that the government "shall . . . release the property," as well as CBP's failure to follow the command to "not take any further action" to forfeit the property.

By interposing an additional, unauthorized requirement before releasing seized property, CBP not only fails to comply with CAFRA's command to "promptly release" the property, 18 U.S.C. § 983(a)(3)(B), *i.e.*, to return the property without delay, but also fails to obey the regulatory command to "promptly notify the person with a right to immediate possession of the property, informing that person to contact the property custodian within a specified period for release of the property," 28 C.F.R. § 8.13(b). Instead of promptly releasing the property as directed, CBP refuses to release the property at all, unless and until the property owner signs an HHA. Instead of not taking any further action to forfeit the property, CBP actually *threatens to forfeit the property* unless the property owner signs and returns an HHA.

Ignoring these arguments, the district court instead assessed whether the time periods involved were "prompt" enough solely in terms of numbers of days, and concluded that "[t]he three-week period" that it took for CBP to issue Anthonia's April 4, 2018 demand letter "is a de minimus delay." ROA.699. But that is beside the point. No aspect of Anthonia's *ultra vires* claim relates to how long it took for CBP to send her the letter after the USAO declined to pursue forfeiture. Similarly irrelevant to Anthonia's claim is the district court's conclusion that the time between when CBP began

processing Anthonia's claim on May 3, 2018 (the day she filed this suit) and when the check was issued on May 22, 2018 "raises no issue of undue delay." ROA.700. Of course, those events both occurred *after* Anthonia filed her Complaint, so neither could be the basis for her *ultra vires* claim.

Because the district court failed to address Anthonia's actual *ultra vires* claim, and because Anthonia stated a valid claim that the agency acted without statutory authority, the dismissal of Anthonia's *ultra vires* claim (Count I) should be vacated and reversed.

II. ANTHONIA'S CLASS CLAIM CHALLENGING THE HHA POLICY AS IMPOSING AN UNCONSTITUTIONAL CONDITION (COUNT II) STATES A VALID CLAIM.

Anthonia second class claim challenges the HHA Policy as imposing unconstitutional conditions, which violate due process. Specifically, Anthonia challenges CBP's policy or practice of demanding that property owners waive various constitutional and statutory rights, and assume legal liabilities, before it will release property to which the property owners are legally entitled. The unconstitutional conditions doctrine applies when government threatens to "withhold [a] benefit," or to refuse some other kind of discretionary action, "because someone refuses to give up constitutional rights." *Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595, 608 (2013); *see also Perry v. Sindermann*, 408 U.S. 593, 597

(1972). Moreover, CBP is not only conditioning the "benefit" of returning seized property on property owners' waiver of their constitutional rights, it is actually forcing property owners to trade one constitutional right for another. Property owners must choose whether they wish to exercise their constitutional right to possess their property or their due-process rights and First Amendment right to petition the government for redress of grievances. When the government forces such a tradeoff between constitutional rights, it falls into a special category of unconstitutional conditions 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) ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another."); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) ("There are rights of constitutional stature whose exercise [the government] may not condition by the exaction of a price.").

The district court's analysis of Anthonia's claim that CBP's challenged conduct imposes unconstitutional conditions contains serious legal errors that warrant reversal. First, addressing the waiver provisions of the HHAs, the district court rejected much of Anthonia's unconstitutional-conditions claim (Count II) based on the erroneous conclusion that HHAs do not really

waive any legal or constitutional claims because all such claims by owners of seized property are already barred by sovereign immunity. Second, the district court wrongly concluded that the challenged HHAs are a "tool of settlement," despite the fact that there is no case left to settle when CBP demanded that Anthonia and other class members sign the HHA. Third, the district court relies on a fundamental misunderstanding of CAFRA's procedures in trying to justify CBP's demand that putative class members sign HHAs. Fourth, rather than analyzing whether CBP's challenged conduct imposes unconstitutional conditions, the district court instead improperly invented and applied a new standard: whether CBP's challenged conduct is "prudent."

A. The District Court Erred by Concluding that All Claims Waived by the HHA Are Already Barred by Sovereign Immunity.

The district court rejected much of Anthonia's unconstitutional-conditions claim (Count II) on the mistaken basis that no conditions are actually imposed by the HHA's waiver of legal and constitutional claims. The notion that the provisions of the HHA have no effect because they are duplicative of relief already barred by sovereign immunity is plain error.

The district court quickly dismisses two key HHA provisions: one that: (1) "releases and forever discharges" the United States and its officers

"from any and all action[s], suits, proceedings, debts, dues, contracts, judgments, damages, claims and/or demand whatsoever in law or equity . . . in connection with the detention, seizure, and/or release" of the seized property, and the provision (2) stating that the signatory understands that she is "waiving any claims to attorney's fees, interest or any other relief." ROA.76. With respect to these provisions, the district court erroneously concluded that the HHA "is more in the nature of an acknowledgment that such relief cannot be obtained and is not a true waiver of a right actually possessed" because, the court claimed, all of the waived relief is already barred by sovereign immunity. ROA.691-92.

The district court got this wrong because it failed to consider all potential legal remedies and myopically focuses only on sovereign immunity against claims for "damages, attorney's fees, interests and costs incurred during an administrative forfeiture proceeding." ROA.692. But nothing about the terms of the HHA is limited to administrative forfeiture proceedings; instead, the language of these HHA provisions is extremely broad, encompassing "***any and all*** action[s], suits, proceedings, [etc.] . . . ***in connection with*** the detention, seizure, and/or release" of the seized property. ROA.76. (emphasis added).

Because of its improperly narrow focus, the district court failed to consider the many types of actions and relief foreclosed by these HHA provisions that are *not* barred by sovereign immunity, such as claims for equitable relief for violations of constitutional rights (or *ultra vires* conduct) related to the seizure or detention of property. (Indeed, in this very lawsuit, all four claims seek only equitable relief and the district court only found one of the four claims (wrongly) barred by sovereign immunity.) Other claims related to the seizure or detention of the property that would not be barred in the absence of a signed HHA include claims brought under waivers of sovereign immunity such as those claims brought under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Federal Tort Claims Act, the Tucker Act, or any administrative proceeding that a claimant may initiate that is "in connection with" the seizure, detention, or release of their property, potentially including a FOIA request about the seizure or using the DHS TRIP process for travelers aggrieved by security screening procedures.[2] The district court's opinion also failed to consider that attorney fees may be available under statutes such as the Equal Access to Justice Act for prevailing under certain circumstances. With respect to

[2] Belying its own position, the district court separately acknowledged that *ultra vires* claims are "an exception to sovereign immunity," ROA.692, and cited a case involving a viable *Bivens* action challenging a similar HHA demand. ROA.695-96.

the possibility of obtaining interest, the district court simply ignores Anthonia's argument (raised in Count III) that interest on seized currency is part of the *res* and thus must be returned as part of the *res*, sovereign immunity notwithstanding. *See infra* Part III.

In contrast to the district court's opinion, Anthonia's Complaint and briefing in opposition to the government's motion to dismiss identified numerous adverse legal consequences of signing HHAs beyond what is already barred by sovereign immunity (most suits for monetary damages):

- Releasing and forever discharging the government and its officers from all "action[s], suits, proceedings" or "claims" connected to the seizure, detention, or release of their property, including waiving the ability to do any of the following:
    - File a lawsuit for injunctive or declaratory relief to vindicate any constitutional rights that were violated during the seizure of the property, *see*, *e.g.*, ROA.574-75, ROA.578-79;
    - File a lawsuit for injunctive or declaratory relief challenging *ultra vires* action by government agents during the seizure or detention of the property, *see e.g.*, ROA.574-78;
    - File a lawsuit seeking monetary damages under a sovereign-immunity waiver, such as under *Bivens*, the Federal Tort Claims Act, or the Tucker Act;
    - Initiate administrative proceedings with CBP or other federal agencies—potentially including requesting public records under FOIA or by initiating an administrative proceeding (such as DHS TRIP) related to whether one is

targeted for additional screening by CBP or other federal agencies;

- Appeal any administrative proceedings (such as a FOIA denial) related to the seizure, detention, or release of their property; and

- File a lawsuit challenging the results of administrative proceedings related to the seizure, detention or release of their property, including suing over the government's failure to comply with FOIA;

- Waive any claim to attorney's fees or legal costs under any provision of law, such as the Equal Access to Justice Act (EAJA); and

- Waive any claim to interest on seized currency (even though interest is actually part of the *res* and must be returned, *see infra* Part III).

ROA.27-29, 584-85. Thus, the claims waived by the HHA are far broader than the "damages, attorney's fees, interests and costs incurred during an administrative forfeiture proceeding," contemplated by the district court's opinion. ROA.692. Because the district court failed to consider many forms of relief foreclosed by the HHA's waiver provisions, it reached the erroneous conclusion that the HHA imposes no waiver of any meaningful right. This is plain error.

B. The District Court Wrongly Concluded That the Challenged HHAs Are a "Tool of Settlement" Even Though There Is No Case for Class Members to Settle.

In analyzing the indemnity/reimbursement provisions of the HHA, the district court erred by holding that the HHAs challenged in this lawsuit are a "tool of settlement." ROA.696. This makes no sense in the context of this class action. The putative class consists solely of property owners who have filed claims and waited 90 days for the government to file a forfeiture complaint. They are thus entitled to the "prompt[] release" of their property under Section 983(a)(3)(B) because the government did not file a forfeiture complaint (or obtain a criminal indictment) within 90 days. Thus, there is no forfeiture case pending, and no case to settle, at the time that CBP demands that property owners sign an HHA. The only benefit to the property owners from signing the HHA is the return of their property, something to which they are already legally entitled under Section 983(a)(3)(B).

This error arises because the district court misconstrues Anthonia's constitutional challenge as far broader than it is: "whether an HHA is unconstitutional in the CAFRA context." ROA.695. Again, Anthonia does not bring such a broad challenge to CBP's use of HHAs in all cases brought under CAFRA. Instead, Anthonia only challenges whether it is

unconstitutional in the specific conditions presented by the putative class members. Anthonia contends they cannot be required to sign the HHA, because property owners whose claims satisfy the requirements of Section 983(a)(3)(B) are already legally entitled to have their property returned and may not be required to waive additional legal and constitutional rights, or assume new legal liabilities, simply to secure the return of their property.

In stark contrast, negotiated settlements in CAFRA cases involve bargaining between the government and claimants with pending cases who have not yet secured the legal right to the return of their property. Because no legal rights have vested, such claimants may agree to waive certain rights—such as signing an HHA—in exchange for the government waiving its power to retain their seized property. The district court first confused these two situations in which HHAs are used, and then concluded that the HHAs challenged in this case are "squarely in the 'tool of settlement' category." ROA.696. This is plainly incorrect.

1. The district court failed to distinguish between conditions accepted as part of negotiated settlements and conditions imposed on the right to return of property.

The district court's analysis of the constitutionality of the HHA's terms failed to recognize the crucial difference between a negotiated settlement resolving a pending, bona fide dispute and a demand made by

the government after it is legally required to return the seized property. The district court compared the waiver of future civil-rights litigation as part of a negotiated settlement in *Town of Newton v. Rumery*, 480 U.S. 386 (1987), to an HHA demand made as a condition of returning seized property in *Anoushiravani v. Fishel*, No. 04-CV-212, 2004 WL 1630240 (D. Or. July 19, 2004), but wrongly concluded that this case is more like *Rumery* than *Anoushiravani*, even though this case does not involve a negotiated settlement and instead involves a demand made as a condition for returning seized property, ROA.693-96.

Unlike this case, *Rumery* involved settlement of an ongoing dispute in a "release-dismissal agreement" where the government agreed to drop pending criminal charges in exchange for the plaintiff waiving his right to bring future civil-rights litigation. 480 U.S. at 390-91. The Supreme Court noted that, "[i]n many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action." *Id.* at 394. The Court found that the plaintiff received valuable consideration in return for waiving any civil suit: "The benefits of the agreement to Rumery are obvious: he gained immunity from criminal prosecution in consideration of abandoning a civil suit that he may

well have lost." *Id.* Accordingly, the Court held that "[b]ecause Rumery voluntarily waived his right to sue under § 1983, the public interest opposing involuntary waiver of constitutional rights is no reason to hold this agreement invalid." *Id.*

In contrast, *Anoushiravani* involved circumstances very similar to this case, where the owner of seized property contested being required to sign an HHA as a condition of returning property that CBP acknowledged it was legally required to return.[3] 2004 WL 1630240, at *1-2, *10. Addressing *Rumery* and similar negotiated-settlement cases, the *Anoushiravani* court explained, "each of these cases is easily distinguished because each depends on the parties settling a bona fide dispute; in each case the government had a right to a person's property or the grounds to prosecute the person for a crime." *Id.* at *10. In contrast, the court explained: "The present case does not involve such a dispute; the government determined the property exempt, and the plaintiff had an unconditional right to the property." *Id.* at *13. Thus, the court concluded that, "as alleged, the [HHA] served not as a tool of settlement but as a condition on plaintiff exercising his right to the

[3] In *Anoushiravani*, the CBP seizure was not done under CAFRA but under the Iranian Transactions Regulations ("ITR"). CBP determined that some of the plaintiff's seized property—two musical instruments, several music CDs and cassettes, and five pairs of shoes—was exempt from forfeiture under the ITR and thus had to be returned. 2004 WL 1630240, at *1, *10 n.13.

exempt property. This condition served to temporarily deprive plaintiff of his property without due process of law." *Id.* at *10. Accordingly, the plaintiff's *Bivens* claim survived the government's motion to dismiss. *Id.*

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

Anthonia's unconstitutional conditions claim only challenges the use of HHAs in circumstances where the right to the return of the seized property has already vested in the owner. Thus, this claim is quite similar to the claim that survived the motion to dismiss in *Anoushiravani* and bears little resemblance to the negotiated-settlement situation in *Rumery*. As in *Anoushiravani*, the challenged HHA Policy does not involve negotiated settlements but a situation in which the government is already required by statute to return the property. In other words, CBP demands claimants sign the HHA as an *additional* condition of doing what CBP is already legally obligated to do under, *e.g.*, Section 983(a)(3)(B) of CAFRA. Thus, in direct contrast to *Rumery*, the government fails to offer any consideration for the return of the property, and the property claimant fails to get any additional benefit beyond what the statute already requires. *See* ROA.30.

Put another way, the district court failed to recognize the fundamental distinction between a waiver contained in a settlement

agreement that resolves a lawsuit to which the government is a party and a waiver, like the one used by CBP here, that focuses on future disputes. Whereas the former could be permissible, the latter is not, because it lacks a tight-enough nexus between "the individual right waived and the dispute that was resolved by the settlement agreement." *Lil' Man In The Boat, Inc. v. City & Cty. of S.F.*, No. 17-CV-00904-JST, 2017 WL 3129913, *9 (N.D. Cal. July 24, 2017) (citations and quotation marks omitted).

Lil' Man In The Boat illustrates this distinction well. The case involved a putative class action with plaintiffs—commercial vessel operators—suing the City and County of San Francisco for placing an unconstitutional condition on their First Amendment right to petition for redress of grievances. *Id.* at *8. The City required the plaintiffs to sign a continuous operation agreement waiving every claim for damages against the City or lose their ability to use a dock instrumental to their business. *Id.* at *2. The City, like the district court here, claimed that the waiver was not unconstitutional "because the government routinely seeks and obtains litigation waivers." *Id.* at *9. The Northern District of California disagreed, denying the motion to dismiss and noting that the only examples the government could point to "involve waivers as a prerequisite to dismissing pending litigation." *Id.* at *10. But the agreement at issue "does not

concern, much less resolve, a pending dispute; it is focused on future disputes." *Id*. at *9. Such a broad, prospective waiver is different from a routine settlement waiver "that resolves a lawsuit to which the government is a party." *Id*.

Much like *Lil' Man In The Boat*, CBP conditioned the return of Anthonia's property on signing an agreement that would waive her rights in future disputes. The agreement had nothing to do with any kind of pending litigation (at the time CBP demanded she sign the HHA) and would not have resolved any disputes to which CBP and Anthonia were currently parties. As such, the waiver was simply too broad and thus unconstitutional.

The district court's conclusion that the challenged HHAs are a "tool of settlement," ROA.696, is incorrect because there is no longer any dispute to settle once the government misses the 90-day deadline to file a forfeiture complaint. At that point, CAFRA requires that CBP release the seized property and there is nothing left for CBP to "settle." Because of this, as the court in *Anoushiravani* explained, "a hold harmless agreement is a legal quid pro quo in a § 1618 [remission or mitigation settlement] situation but an unconstitutional condition in an exemption situation," i.e., where CBP is legally required to return the property. 2004 WL 1630240, at *13. The

analogous demand to sign an HHA under the circumstances described in this case creates similar unconstitutional conditions.

C. The district court erroneously concluded that the challenged HHAs are justified based on a misunderstanding of CAFRA's procedures.

The district court wrongly concluded that imposing the HHA conditions on the putative class is permissible because "CAFRA sets forth a procedure to be followed." ROA.695. This is a misstatement of CAFRA's procedures, which require the "prompt[] release" of property in these circumstances. 18 U.S.C. § 983(a)(3)(B). Moreover, the procedures set forth in Section 983(a)(3)(B) and its implementing regulation do not mention, much less authorize, requiring putative class members to sign HHAs as a condition of returning their property.

The district court erroneously concluded that CAFRA's procedures "mak[e] the present facts distinguishable from *Anoushiravani* and plac[e] the HHA squarely in the 'tool of settlement' category." ROA.696. This reasoning relies on a faulty premise—that CAFRA's procedures provide any justification for the HHA Policy—and reaches a conclusion that is simply a *non sequitur*—that the HHAs challenged here are somehow a "tool of settlement" because CAFRA requires both the government and claimant to follow a set of procedures that have nothing to do with HHAs. ROA.696.

The district court erred by (1) ignoring that CAFRA's procedures command agencies to "promptly release" seized property under Section 983(a)(3)(B) and thus are not discretionary, (2) wrongly concluding that only undisputed owners are entitled to the return of property under CAFRA, and (3) wrongly claimed that putative class members could avail themselves of some alternative procedure if they did not wish to sign an HHA.

1. CAFRA's procedures command the agency to "promptly release" seized property and thus are not discretionary.

The district court's reasoning is particularly strained because the commands of Section 983(a)(3)(B) and its implementing regulation are considerably less discretionary than the language of the trade regulations at issue in *Anoushiravani*. CAFRA and the implementing regulation directly command that property be "promptly released" to the claimant when the conditions of Section 983(a)(3)(B) are satisfied. In contrast, the *Anoushiravani* court held that "the [trade regulations] fail to specify the precise action a[n] official must take when the official determines an item exempt. The [trade regulation] thus creates discretionary, as opposed to ministerial, authority." 2004 WL 1630240, at *10, n.14. This stands in

sharp contrast to Section 983(a)(3)(B) and the detailed procedures for returning property in 28 C.F.R. § 8.13, none of which mention HHAs.

2. The district court wrongly held that only "undisputed" owners of seized property are entitled to the return of that property under Section 983(a)(3)(B).

The district court wrongly held that, because claimants have only filed a claim, they are not legally entitled to the return of their seized property under CAFRA. The district court further wrongly claimed that "Plaintiff's constitutional argument hinges on the presumption that each class plaintiff is the undisputed owner of the seized property" and erroneously holds that "the United States cannot make such an assumption because at that stage of the process, only a claim has been filed by the class plaintiff." ROA.696.[4] Again, the district court misunderstands CAFRA's procedures.

CAFRA does not require an "undisputed owner," as the district court suggested, but merely a "claimant" who filed a verified claim for the property under penalty of perjury. As 18 U.S.C. § 983(a)(2)(C) explains: "A claim shall—(i) identify the specific property being claimed; (ii) state the claimant's interest in such property; and (iii) be made under oath, subject to penalty of perjury."

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[4] The district court failed to explain how this distinguishes these cases from the seizure in *Anoushiravani*, where the seized property could have also belonged to someone else but was still required to be returned to the person from whom it was seized.

Once a claim is filed, the government then has 90 days to file a forfeiture complaint or obtain a criminal indictment. 18 U.S.C. § 983(a)(3). If it fails to do so, CAFRA commands: "the Government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense." 18 U.S.C. § 983(a)(3)(B). That is why the very implementing regulation promulgated pursuant to 18 U.S.C. § 983(a)(3)(B) describes the claimant at this point as "the person with a right to immediate possession of the property" and directs the agency to promptly notify that person about how to obtain the release of their property. 28 C.F.R. § 8.13(b). And to ensure this is done correctly: "The property custodian shall have the right to require presentation of proper identification and to verify the identity of the person who seeks the release of property." 28 C.F.R. § 8.13(c).

3. There is no basis for the district court's claim that Anthonia could have avoided signing her HHA by proving her ownership of the property in an administrative proceeding.

The district court further erred in its conclusion that: "If Plaintiff did not wish to sign the HHA, she could have proved her ownership of the property in the administrative forfeiture proceeding." ROA.697. This again ignores the clear procedures of CAFRA, which do not permit a case to be

returned to administrative forfeiture proceedings after a claim has been filed. And it would require her to go through an additional proceeding as a penalty for refusing to waiver her rights. It also wrongly assumes—without evidence—that HHAs are not required for releases of property in administrative forfeiture cases.

First, the district court incorrectly assumes that CAFRA would permit Anthonia's case to be returned to administrative forfeiture proceedings. *See* ROA.697. But CAFRA's procedures do not allow for this. Once a claim has been filed by a claimant, a case stops being a "nonjudicial civil forfeiture proceeding" and becomes a "judicial civil forfeiture proceeding." *See* 18 U.S.C. § 983(a)-(b). There simply is no provision in the statute that permits cases to return to administrative, nonjudicial proceedings after a claim has been filed. *See id*. That is because filing a claim triggers the government's 90-day deadline to file a forfeiture complaint in court (or obtain a criminal indictment). 18 U.S.C. § 983(a)(3)(A) ("[n]ot later than 90 days after a claim has been filed, the Government ***shall*** file a complaint for forfeiture . . .") (emphasis added). If the government fails to do so, "the Government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property

in connection with the underlying offense." 18 U.S.C. § 983(a)(3)(B). It is at this stage that CBP demands that putative class members sign an HHA or "administrative forfeiture proceedings will be initiated." ROA.12, 74. This conduct is simply not permissible under the statutory text. The district court's suggestion that those who refuse to sign HHAs should be forced to go through some additional administrative forfeiture proceeding is thus not only contrary to the statute, but would also impose a further impermissible penalty of additional delay on those who exercise their rights not to sign an HHA.

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

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

D. Rather Than Analyze Whether the HHA Policy Imposes Unconstitutional Conditions, the District Court Improperly Applied a New Standard: What It Believes Is "Prudent" For CBP to Do.

Instead of analyzing whether the challenged HHA policy imposes unconstitutional conditions, the district court improperly invented and applied a new standard, focusing on whether it "makes sense" or is "prudent" for the government "to seek an HHA to protect itself when it is releasing the property." ROA.696-97. Anthonia does not question that it "makes sense" for the government to want to insulate itself from liability, but that is not a relevant legal standard for challenges to constitutional and statutory authority.

The questions raised by the class claims in this lawsuit are whether CBP has both statutory and constitutional authority to demand such an insulation from liability as a condition of returning property that it is already required to return. The district court's reasoning that CBP's overreach was permissible because "it is prudent," ROA.696, failed to apply the relevant legal standards and thus constitutes reversible error.

III. ANTHONIA'S INDIVIDUAL CLAIM FOR INTEREST ON HER SEIZED PROPERTY (COUNT III) IS NOT BARRED BY SOVEREIGN IMMUNITY.

The district court dismissed Anthonia's individual claim for interest on her seized money, incorrectly finding that the claim is barred by sovereign immunity. ROA.678-82. This dismissal should be reversed for two reasons. First, the district court was wrong not to distinguish between a claim for pre-judgment interest and a claim for the return of the *entirety* of Anthonia's seized *res*, which, according to caselaw in some federal circuits, includes interest. (There is a circuit split on this issue, described below.) While the former is foreclosed by sovereign immunity, the latter is not.

Second, the district court was wrong to assume that Anthonia brought her claim under 28 U.S.C. § 2465, which allows for recovery of interest when the government initiates a forfeiture proceeding. She did not bring such a claim. Thus, the conclusion that Section 2465 "applies only to civil proceedings to forfeit property, that is, civil forfeiture actions initiated by the Government," does nothing to undermine Anthonia's argument. ROA.681-82. Indeed, Anthonia does not need Section 2465 to provide her with a waiver of sovereign immunity. Instead, sovereign immunity simply does not apply to the return of interest on seized property. Because the district court misconstrued Anthonia's argument and failed to analyze it

under a proper framework, its order to dismiss Anthonia's individual claim for interest must be reversed.

A. Sovereign Immunity Does Not Bar Anthonia's Individual Claim for Interest on Her Seized Property.

The district court was wrong to conclude that sovereign immunity forecloses Anthonia's individual claim that she is owed interest on the money seized by CBP. Because sovereign immunity does not apply to such claims, the motion to dismiss this claim was improperly granted.

The source of the district court's error lies in the distinction between a claim for pre-judgment interest, which Anthonia does not bring, and a claim to "disgorge property that was not forfeited" and that grew in value over the period of time that it was in government's possession. *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 504 (6th Cir. 1998). This issue presents a circuit split on which this Court should now take a side. The Sixth, Ninth, and Eleventh Circuits, as well as the Northern District of Texas, have concluded that, while a claim for pre-judgment interest is foreclosed by sovereign immunity, when the government must return property it kept in its possession but failed to forfeit, the award of interest is viewed "as an aspect of the seized *res* to which the Government is not entitled as it did not succeed in its forfeiture action." *Id.; see also Carvajal v. United States*, 521 F.3d 1242, 1245 (9th Cir. 2008); *United*

States v. 1461 W. 42nd St., 251 F.3d 1329, 1338 (11th Cir. 2001) (observing that "the government may be liable for pre-judgment interest to the extent that it has earned interest on the seized *res*"); *Kadonsky v. United States*, No. CA-3:96-CV-2969, 1998 WL 460293, at *4 (N.D. Tex. Aug. 4, 1998). After all, "the payment of interest on wrongfully seized money is not a payment of damages." *Carvajal*, 521 F.3d at 1245. It is "the disgorgement of a benefit actually and calculably received from an asset that [the government] has been holding improperly." *Id*. (quotation omitted). Indeed, in this situation, "there is in fact a benefit from the use of the money, which must be allocated either to the government or the claimant." *United States v. $277,000 U.S. Currency*, 69 F.3d 1491, 1498 (9th Cir. 1995). Because the government held Anthonia's money for seven months, never filed a forfeiture complaint, and was thus required by CAFRA to return her money, the interest that accrued on her money should be allocated to Anthonia.

Like this case, *Carvajal* involved a seizure of cash under CAFRA followed by a failure to return interest earned on this cash. 521 F.3d at 1244. Federal law-enforcement officers searched Ms. Carvajal's residence without a warrant and seized $75,800 of her savings. *Id*. After the federal government failed to institute timely judicial forfeiture proceedings under

CAFRA and returned Ms. Carvajal's money, she filed a complaint against the United States asking for, among other things, the interest earned by her money while in the government's possession. *Id*. 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. In so holding, the court emphasized that allowing the government to keep the interest after it fails to initiate forfeiture proceedings would cause the perverse result of the government "yield[ing] the benefit of accrued interest on the improperly seized property, a benefit that only increases if the government refuses to comply with the law and return the property." *Id*. at 1248.

The Sixth Circuit and the Eleventh Circuit, plus the Northern District of Texas, agree. As the Sixth Circuit explained, failing to return interest on the seized money is akin to failing to return a calf that was born after the seizure of a pregnant cow. *$515,060.42*, 152 F.3d at 505. "[I]t would hardly be fitting that the Government return the cow but not the calf." *Id*. Relying on this language, the Northern District of Texas ordered the "return [of] $1,822 to [plaintiff], with interest" after the Drug Enforcement Agency seized the money under another forfeiture statute—21 U.S.C. § 881—and was later required to return it. *Kadonsky*, 1998 WL 460293, at *4.

Just like the plaintiffs in *Carvajal, $515, 060.42*, and *Kadonsky*, Anthonia is not asking for an order of pre-judgment interest as part of recovery against the United States. She is instead claiming that the interest owned to her is part of the original property that grew in value while in the government's possession, and that the government must give *all* of her property back, and not just part of it.

The district court failed to recognize this key distinction between normal pre-judgment interest, which is barred by sovereign immunity, and interest on seized property, which is not barred by sovereign immunity. It instead relied on *Spawn v. W. Bank-Westheimer*, 989 F.2d 830, 833 (5th Cir. 1993), and *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986), for the proposition that "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." ROA.681. But both cases addressed interest on "a recovery against the United States" and not interest on seized property. *See Shaw*, 478 U.S. at 312-13, 316 (dealing with an award of interest on attorney fees granted against the United States); *Spawn*, 989 F.2d at 831-32 (addressing an award of interest on $100,000 in deposit insurance that the United States was ordered to provide). That is why, when the Northern District of Texas ordered interest returned on the

money seized by the DEA, it relied on the Sixth Circuit's opinion in *$515,060.42*, which specifically dealt with the seizure of money for purposes of forfeiture, rather than on *Shaw* or *Spawn*, which involved pre-judgment interest on monetary awards. *Kadonsky*, 1998 WL 460293, at *4.

In fairness, the district court here is not the only court to rely on *Shaw* to foreclose claims for interest accrued on seized property. Federal courts of appeals for the First, Second, Third, Eighth, and Tenth Circuits have also found *Shaw* determinative. *See United States v. Craig*, 694 F.3d 509, 512 (3d Cir. 2012) (citing *Shaw* for its discussion of whether interest should be permitted to run on a recovery against the United States); *Larson v. United States*, 274 F.3d 643, 647 (1st Cir. 2001); *United States v. $30,006.25 in U.S. Currency*, 236 F.3d 610, 614 (10th Cir. 2000) (same); (same); *United States v. $7,999.00 in U.S. Currency*, 170 F.3d 843, 845 (8th Cir. 1999) (same); *Ikelionwu v. United States*, 150 F.3d 233, 239 (2d Cir. 1998) (same).

But these circuit's reliance on *Shaw* is flawed because *Shaw* is simply inapplicable as a case involving "a recovery *against* the United States." 478 U.S. at 316 (emphasis added). Unlike *Shaw*, this case does not involve a recovery of any award against the United States but is instead simply the return of seized property. And when the government returns property that

it is no longer authorized to keep, it must return *all* of it. This is, as *Carvajal* explains, "the disgorgement of a benefit actually and calculably received from an asset that [the government] has been holding." 521 F.3d at 1245. And, as *$277,000* explains, "there is in fact a benefit from the use of the money, which must be allocated either to the government or the claimant." 69 F.3d at 1498. In these circumstances, the Sixth, Ninth, and Eleventh circuits correctly balance the interests of the parties in determining that the original owner of the property should receive the benefit of the interest that accrued while their property was held by the government for a forfeiture that was never consummated. Indeed, absent the government's seizure and failed forfeiture, the property owner would have received the benefits of the seized property during the time it was held by the government, including any interest that would have accrued. Thus, the property owner stands to be harmed if she does not receive the interest that accrued while the property was seized. In contrast, the government is not harmed by returning the interest that accrued while it held the property and would be unjustly enriched if permitted to keep the interest.

Moreover, unlike with the case of a recovery against the United States, here, the government gets a bigger benefit the longer it holds on to

the property. Asking to give back this benefit, unlike asking the United States to pay out of its own pocket, is not barred by sovereign immunity.

The district court below wrongly treated Anthonia's claim for interest on seized property as the same as a claim for interest on recovery against the United States. As such, the dismissal for lack of subject matter jurisdiction on this individual claim should be reversed.

B. Anthonia's Individual Claim for Interest on Her Seized Property Was Not Brought Under Section 2465 and Is Not Precluded by That Statute.

Next, the district court wrongly presumed that Anthonia's claim for interest was brought under 28 U.S.C. § 2465—which allows for recovery of interest when the government initiates a forfeiture proceeding—and errantly concluded that *United States v. Huynh*, 334 F. App'x 636, 638 (5th Cir. 2009) "forecloses Plaintiff's legal arguments on interest," since her claim was brought after the government failed to initiate a forfeiture proceeding. ROA.682.

But Anthonia did not bring her claim under Section 2465. Instead, as explained above, Anthonia's argument is that sovereign immunity does not apply to her claim in the first place, because the interest she is claiming is not pre-judgment interest, but arises out of the government's failure to return the entirety of her property, including the interest that accrued. *See*

Part IIIA, *supra*. Thus, Section 2465 is in applicable and no waiver of sovereign immunity is necessary.

IV. ANTHONIA BROUGHT A VIABLE INDIVIDUAL PROCEDURAL DUE-PROCESS CLAIM CHALLENGING BEING TARGETED FOR ADDITIONAL, INTRUSIVE SCREENINGS (COUNT IV).

The district court clearly erred in its analysis of Anthonia's individual claim under Count IV, which states that that *both* Anthonia's equal-protection and due-process rights were violated when she was placed on a screening list. ROA.49-55. The district court only analyzed Anthonia's equal-protection claim, and ignored Anthonia's procedural due-process claim, while still recommending that the screening-list count be dismissed in its entirety.[5] ROA.682-88. For reasons that are unclear, the district court instead analyzed Anthonia's procedural due-process claim as an arbitrary-and-capricious claim under the APA, a claim which Anthonia simply did not bring. ROA.684-85. This is clear legal error that should be reversed because Anthonia actually brought a viable procedural due-process claim. ROA.49-55.

[5] Anthonia here only appeals the district court's ruling on her procedural due-process claim.

A. Count IV Did Not Bring an APA Challenge to Anthonia Being Subjected to Additional Screenings.

The district court mistakenly analyzes Count IV as an arbitrary-and-capricious challenge under the APA. ROA.684-85. But Count IV was not brought under the APA, as the Complaint makes clear. ROA.49-55. Indeed, the only two mentions of the APA in the Complaint are in reference to the jurisdictional basis for the *class* claims, and not Anthonia's individual claim. ROA.14-15.

B. The District Court Failed to Analyze Anthonia's Valid Procedural Due-Process Claim Under Count IV.

The district court simply ignored Anthonia's procedural due-process claim but recommended that the screening-list count be dismissed in its entirety. ROA.682-88.

However, the Complaint plainly alleges a due-process claim under Count IV and sufficiently pleads facts to state a valid claim for a procedural due-process violation, namely CBP's failure to provide Anthonia with notice or an opportunity to be heard about her placement on the screening list. Indeed, her Complaint spends over two dozen paragraphs analyzing CBP's conduct under the three-part balancing test for due-process violations provided by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1979). ROA.50-55. As the Complaint alleges, Anthonia has been

targeted for particularly intrusive screenings by being placed on a screening list without any notice or opportunity to be heard, in violation of due process under the *Mathews* test. ROA.49-55. First, her private interests are affected by her placement on the screening list, including (1) the ability to travel internationally and domestically without harassment, (2) having a reputation that is free from false government stigmatization and humiliation, (3) being free from discrimination based on her race and national origin, and (4) being free from unreasonable searches and seizures. ROA.51-52. Second, these interests are under a high risk of erroneous deprivation because of the lack of transparency regarding the substantive standards or procedures for being included on, or removed from, the list. ROA.52-54. Third, the government's interest in keeping Anthonia on the list is *de minimis*, since Anthonia does not present any national security or terrorism concerns and was placed on the list due to an alleged currency-reporting violation, which the government did not bother to pursue. ROA.54-55.

The validity of Anthonia's due-process claim is further buttressed by a recent decision by the Eastern District of Virginia, striking down a similar placement of travelers on a screening list without notice or an opportunity to be heard. *See Elhady*, 391 F. Supp. 3d at 568. In *Elhady*, twenty-three

United States citizens who suspected, due to repeated special screenings, that they were placed on a Terrorist Screening Database ("TSDB"), sued the director of the Terrorist Center, claiming that this placement violated the plaintiffs' procedural due-process rights, because the DHS TRIP traveler inquiry form provided them with no meaningful opportunity to challenge their placement by, for example, letting them examine the evidence used to decide on the placement or by providing them with an opportunity to present rebuttal evidence. *Id*. at 567-58. The district court agreed with the plaintiffs, holding that "DHS TRIP, as it currently applies to an inquiry or challenge concerning the inclusion in the TSDB, does not provide to a United States citizen a constitutionally adequate remedy under the Due Process Clause." *Id*. at 584.

In granting the plaintiffs' motion for summary judgment, the Court applied the *Mathews* factors and found it particularly important that "the currently existing procedural safeguards are not sufficient to address [the] risk" of "travel-related and reputational liberty interests." *Id*. at 582. After all, DHS TRIP, as applied to screening lists other than the No Fly List, "is a black-box—individuals are not told, even after filing, whether or not they are they were or remain on the TSDB watchlist [and] are also not told the factual basis for their inclusion." *Id*. This is different from the No Fly List,

where "DHS TRIP . . . must inform the individual if they are currently on the No Fly List, following which the individual may request additional information . . . and submit additional information they consider potentially relevant." *Id*. at 571 n.9. Further, unlike other screening lists/databases, the final determination about the placement on the No Fly List is subject to judicial review. *Id*.

The court also balanced individual liberty interests of domestic and international travel and the liberty interest in reputation with the very important national security interests held by the government. *Id*. at 577-80, 582-84. While conceding that "there can be no doubt that there is a profound, fundamental, and compelling Government interest in preventing terrorist attacks," *id*. at 582, the *Elhady* court nonetheless found that the risk of erroneous depravation is simply too great under the DHS TRIP process. *Id*. at 583-84.[6]

Because Anthonia is not on the No Fly List, she is similarly required to go through the regular DHS TRIP procedure, which, as the Eastern District of Virginia found, provide no meaningful procedural safeguards and violate the Due Process Clause. Anthonia's liberty interests in domestic

[6] The district court also found that plaintiffs who did not submit the DHS travel inquiry form still had claims ripe for adjudication. *Elhady*, 391 F. Supp. 3d at 576.

and international travel and in her reputation are as strong as those for plaintiffs in *Elhady*. The government interests here are weaker than in *Elhady*, since, unlike the plaintiffs in *Elhady*, Anthonia is not being suspected of terrorism-related activities and was placed on the list due to an alleged currency-reporting violation. ROA.54-55. Thus, if the outcome of the *Mathews* balancing test in *Elhady*, despite the government's profound safety interests, favored the plaintiffs, then the outcome of the *Mathews* balancing test here should favor Anthonia. As the very least, Anthonia should be allowed to proceed past the government's motion to dismiss. *See Elhady v. Piehota*, 303 F. Supp. 3d 453, 465-66 (E.D. Va. 2017) (reasoning that the *Mathews* analysis implicates "fact-intensive considerations, which . . . necessarily require an evidentiary record").

The district court plainly erred by overlooking Anthonia's procedural due-process challenge to being placed in a screening list/database.

CONCLUSION

For the foregoing reasons, Anthonia Nwaorie asks this Court to vacate the district court's judgment, reverse the grant of dismissal, and remand for further proceedings.

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Respectfully submitted,

/s/ Dan Alban
Dan Alban
Virginia Bar No. 72688
INSTITUTE FOR JUSTICE
901 North Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9320
dalban@ij.org

Anya Bidwell
Texas Bar No. 24101516
INSTITUTE FOR JUSTICE
816 Congress Ave., Suite 960
Austin, TX 78701
(512) 480-5936
abidwell@ij.org

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2019, 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 brief complies with type-volume limits of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,894 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

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/s/ Dan Alban
Counsel for Plaintiff-Appellant