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
Hon. Gray H. Miller

BRIEF FOR APPELLEES

JOSEPH H. HUNT
Assistant Attorney General

RYAN K. PATRICK
United States Attorney

SHARON SWINGLE
CASEN B. ROSS
Attorneys, Appellate Staff
Civil Division, Room 7270
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
202.514.1923

CERTIFICATE OF INTERESTED PERSONS

Anthonia Nwaorie v. USA, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiff-appellant:

Anthonia Nwaorie

Defendants-appellees:

United States of America;
U.S. Customs and Border Protection; and
Kevin K. McAleenan, Acting Commissioner, U.S. Customs and Border Protection[1]

Counsel:

For plaintiff-appellant:

Dan Alban
Anya Bidwell
Institute for Justice

[1] Mark A. Morgan is currently Acting Commissioner of the U.S. Customs and Border Protection and is thus automatically substituted as a party, per Federal Rule of Appellate Procedure 43(c).

For defendants-appellees:

Joseph H. Hunt
Ryan K. Patrick
Casen B. Ross
Sharon Swingle
Ariel N. Wiley
U.S. Department of Justice

/s/ Casen B. Ross
CASEN B. ROSS

STATEMENT REGARDING ORAL ARGUMENT

The government stands ready to present oral argument if this Court determines that it would be useful.

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INTRODUCTION

Plaintiff Anthonia Nwaorie sought to transport over $41,000 in cash out of the United States without complying with currency reporting requirements. *See* 31 U.S.C. § 5316. On that basis, U.S. Customs and Border Protection (CBP) officers seized plaintiff's cash. The government ultimately declined to seek forfeiture. Before CBP returned plaintiff's money to her, the agency asked plaintiff to sign a Hold Harmless Agreement, waiving the United States' liability in certain respects. Plaintiff declined to sign that agreement, and CBP returned her money.

Plaintiff asserts that CBP's alleged practice of demanding that individuals sign a Hold Harmless Agreement is *ultra vires* and unconstitutional, but plaintiff never signed that agreement and her property has been returned to her (and she does not claim undue delay). She thus lacks standing to sue—either on her own behalf or on behalf of a class—and her claims are moot. This Court has also called into question the continued viability of so-called *ultra vires* exception to sovereign immunity following the 1976 Amendments to the Administrative Procedure Act (APA). Even assuming the exception survives, however, plaintiff makes no effort to argue that the conduct at issue meets the demanding *ultra vires* standard.

Plaintiff has also sought interest on her seized property while it was in the government's possession. But plaintiff has not identified a statutory waiver of sovereign immunity to recover interest, and the majority of courts of appeals have rejected similar demands for interest. This Court should follow those courts' reasoning—not the reasoning of two courts of appeals that have instead re-characterized the interest award as "disgorgement," directly contrary to the Supreme Court's direction on this issue.

Finally, plaintiff's claim that CBP's inspection of her and her belongings violated her right to procedural Due Process does not survive even passing scrutiny. Plaintiff identifies nothing unlawful about the government considering an individual's past violation of the law to determine the appropriate actions to take during a border inspection, and the private interests that plaintiff cursorily invokes as the basis for her Due Process claim were not unconstitutionally infringed.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331. ROA.14 ¶ 9. On a magistrate judge's report and recommendation, ROA.668-700, the district court dismissed all of plaintiff's claims on August 8, 2019, ROA.773-74, and entered final judgment the same day, ROA.775.

Plaintiff filed a notice of appeal on October 7, 2109. ROA.776. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly dismissed plaintiff's class claims, as plaintiff lacks standing, the claims are moot, and plaintiff has not shown that any *ultra virus* exception to sovereign immunity applies or identified a valid cause of action for *ultra vires* conduct.

2. Whether the district court correctly dismissed plaintiff's claim for prejudgment interest, when plaintiff failed to identify any waiver of sovereign immunity that would entitle such recovery.

3. Whether plaintiff failed to state a viable claim for procedural Due Process.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. U.S. Customs and Border Protection's Inspection Procedures

Throughout this Nation's history, Congress has regulated the flow of goods in and out of the country. *See, e.g.*, Tariff Act of July 4, 1789, 1 Stat. 24; Act of July 31, 1789, 1 Stat. 29 (creating the customs office); *see also United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) ("Congress, since the beginning of our Government, has granted the Executive plenary authority

to conduct routine searches and seizures at the border . . . to regulate the collection of duties and to prevent the introduction of contraband into this country." (quotation marks omitted)); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 322-24 (1936) (summarizing the history of various export controls).

With the Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 411-419, 116 Stat. 2135, 2178-82, Congress created the agency currently responsible for enforcing the customs laws, U.S. Customs and Border Protection (CBP), and transferred that agency from the Department of the Treasury to the newly created Department of Homeland Security. Congress has tasked CBP with, among other things, facilitating and expediting "the flow of legitimate travelers and trade," and developing and implementing "screening and targeting capabilities" of inbound and outbound travelers to help safeguard the borders and to ensure the Nation's economic security. 6 U.S.C. § 611(c)(1)-(19).

Unless exempt by diplomatic status, everyone who enters the United States is subject to examination and search by CBP, to ensure that those individuals are eligible to enter the country and that their belongings are not being brought into the country unlawfully. 19 U.S.C. §§ 1467, 1496; 19 C.F.R.

§ 162.6; *see also* 19 U.S.C. § 1589a (providing enforcement authority for customs officers). This authority applies equally when individuals seek to leave the country. *United States v. Odutayo*, 406 F.3d 386, 388 (5th Cir. 2005). When a CBP officer initially inspects an individual (often known as "primary" inspection), the officer may determine that additional inspection is warranted and refer the individual for additional inspection (often known as "secondary" inspection). ROA.239.

To support its inspection and law enforcement efforts at the border, CBP employs the "TECS System." *See* CBP, *Privacy Impact Assessment Update for the TECS System: CBP Primary and Secondary Processing (TECS) National SAR Initiative* at 2, https://go.usa.gov/xdmnY. TECS is an "information-sharing platform": CBP officers may enter reports into TECS "based upon their observations and interactions with the public at the border," in order to document "an observation relating to an encounter with a traveler, a memorable event, or noteworthy item of information" when an officer "observe[s] behavior that may be indicative of intelligence gathering or . . . related to terrorism, criminal, or other illicit intention." *Id.*; *see also* ROA.239. TECS is not a "screening list," as the term is popularly understood when referring to watchlists used for screening, such as the "No-Fly List" or

the "Selectee List" used by the Transportation Security Administration. ROA.239; *see* 49 U.S.C. § 114(h)(3); 49 C.F.R. § 1560.105(b). TECS stores records of individuals' past interactions with CBP officers, allowing officers to consult the system when assessing how to conduct inspections for certain individuals.

2. Department of Homeland Security Redress Procedures

For individuals "who believe they have been delayed or prohibited from boarding a commercial aircraft" because they were "wrongly identified as a threat" by TSA, CBP, or any other component or office of the Department of Homeland Security, Congress has directed the Secretary of Homeland Security to "establish a timely and fair process" for those individuals to seek redress. 49 U.S.C. § 44926(a); *see also id.* § 44926(b) (providing a process for appeal); *id.* §§ 44903(j)(2)(C)(iii)(I), (j)(2)(G)(i); 44909(c)(6)(B)(i); 44926(a).

Pursuant to these authorities, TSA administers the Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP), which provides "a single point of contact for individuals who have inquiries or seek resolution regarding difficulties they experienced during their travel screening at transportation hubs—like airports—or crossing U.S. borders."

DHS, *DHS Traveler Redress Inquiry Program (DHS TRIP)* (last published Aug. 27, 2018), http://www.dhs.gov/dhs-trip; *see also* 49 C.F.R. § 1560.201. TSA has promulgated regulations governing the DHS TRIP process, 73 Fed. Reg. 64,018, 64,066 (Oct. 28, 2008); 49 C.F.R. §§ 1560.201-.207, and individuals may initiate the redress process by submitting an inquiry form to DHS TRIP. *Id.* § 1560.205(b). In coordination with federal law enforcement or intelligence agencies, if necessary, TSA will review the individual's information and "correct any erroneous information, and provide the individual with a timely written response." *Id.* § 1560.205(d).

3. Currency Reporting Requirements When Leaving the United States

a. When a person internationally transports "monetary instruments of more than $10,000 at one time" from the United States, the person must file a report with the Secretary of the Treasury. 31 U.S.C. § 5316(a)(1); *see also id.* § 5312(a)(3)(A) (defining "monetary instruments" to include "United States coins and currency"); 31 C.F.R. § 1010.340(a). That report must be filed "at the time of departure" and filed "with the Customs officer in charge at any port of . . . departure." *Id.* § 1010.306(b)(1), (3). CBP provides

individuals with a form, CBP Form 503,[2] notifying them that they must report that they are transporting more than $10,000 in currency, and the form further instructs individuals to fill out FinCEN Form 105 to make the required reporting.[3] FinCEN Form 105 asks for the person's name and address, the kind of currency transported, the value of the currency, and, if the person is acting on someone else's behalf, the name and address of that person. 31 U.S.C. § 5316(b).

Congress imposed the currency reporting requirement after concluding that such a report has "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. § 5311. The House Report to the Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114, discusses the circumstances that led to the enactment of Section 5316. That House Report explains that "[f]or years American criminal elements ha[d] been taking or sending currency out of the United States either in furtherance of a criminal activity or for deposit in a secret foreign haven." H.R. Rep. No. 91-975, 91st Cong., 2d Sess. 13 (1970). The statutory reporting requirement was intended to facilitate law enforcement investigations of

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2 *See* https://go.usa.gov/xdvwY; *see also* ROA.241.

3 *See* https://go.usa.gov/xdvw8.

those activities. *Id.* at 12-13; *see also* 31 U.S.C. § 5319 (requiring the Secretary of the Treasury to make reports made under Section 5316 available throughout the government to facilitate investigations); *United States v. Berisha*, 925 F.2d 791, 795 (5th Cir. 1991) (recognizing "the substantial national interest in regulating the exportation of domestic currency at the border").

To ensure compliance with the currency reporting requirement, Congress has provided for several enforcement mechanisms. Since 1970, Congress has made currency that is transported outside of the United States without filing a report with the Secretary of the Treasury subject to seizure and civil forfeiture. Pub. L. No. 91-508 §§ 231-232, 84 Stat. 1114, 1122-23 (1970).[4] A person who declines to file a report or files a report containing a material mission or misstatement may also be subject to a civil penalty, *id.* § 233, 84 Stat. at 1123; *see also* 31 U.S.C. § 5321(a)(2). Congress has currently provided that if a report required under section 5316 for internationally transported currency is not filed (or if filed, contains a material omission or misstatement of fact), the currency "may be seized and forfeited to the

[4] Since 1982, these currency reporting requirements have been codified at 31 U.S.C. §§ 5316-5317, *see* Pub. L. No. 97-258, §§ 5316-5317, 96 Stat 877, 998-99 (1982).

United States," consistent "with the procedures governing civil forfeitures in money laundering cases pursuant to [18 U.S.C. § 981(a)(1)(A)]." 31 U.S.C. § 5317(c)(2)(A).[5]

b. Congress substantially amended the government's procedures for pursuing civil forfeitures in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, § 2(a), 114 Stat. 202 (codified at 18 U.S.C. § 983).[6] Congress amended these civil forfeiture procedures to make them "fair to property owners and to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful government seizures." H.R. Rep. No. 106-192, 106th Cong., 1st Sess. 11 (1999).

After the government seizes an individual's property, the government must "send written notice" to the individual within "60 days . . . of the seizure" of the government's intent to administratively forfeit the property in

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[5] In 1982, Congress added a criminal enforcement mechanism, making a person who "willfully" violates the currency reporting requirement guilty of a felony, and subject to a "fine[] not more than $250,000, or imprisoned for not more than five years, or both." *See* Pub. L. No. 97-258, § 5322(a), 96 Stat at 1000; *see also* 31 U.S.C. § 5322(a).

[6] These procedures had originally been enacted in the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1366, 100 Stat 3207, 3207-35.

a "nonjudicial civil forfeiture proceeding," 18 U.S.C. § 983(a)(1)(A)(i), or the government may initiate a civil judicial forfeiture action within the same 60-day period, *id.* § 983(a)(1)(A)(ii); *see also* 28 C.F.R. § 8.9; 19 C.F.R. §§ 162.91-162.96 (CBP civil asset forfeiture regulations).

An individual who receives notice of "property seized in a nonjudicial civil forfeiture proceeding" may file a claim of ownership in that property "with the appropriate official after the seizure." 18 U.S.C. § 983(a)(2)(A). Such a claim must specify the "property being claimed," and "the claimant's interest in such property." *Id.* § 983(a)(2)(C). The claim "need not be made in any particular form," *id.* § 983(a)(2)(D), and may be made "without posting bond" to the property, *id.* § 983(a)(2)(E); *see also* 28 C.F.R. § 8.10(a)-(d).

Once a proper claim is filed, the agency that seized the property must either "return the property" to the claimant or "suspend the administrative forfeiture proceeding and promptly transmit the claim . . . to the appropriate U.S. Attorney for commencement of judicial forfeiture proceedings." 28 C.F.R. § 8.10(e). The government has 90 days to "file a complaint for forfeiture," but a district court "may extend the period for filing a complaint for good cause shown or upon agreement of the parties." 18 U.S.C.

§ 983(a)(3)(A); *cf.* 28 C.F.R. § 8.12 (noting that if a claim is not timely filed for property subject to administrative forfeiture, the property is forfeited).

If the government declines to file a complaint for civil forfeiture within 90 days, the government "shall promptly release the property pursuant to regulations promulgated by the Attorney General," and the government "may not take any further action to effect the civil forfeiture of such property." 18 U.S.C. § 983(a)(3)(B); *but see id.* § 983(a)(3)(B)(ii) (noting that the government may maintain custody of the property if it is subject to a criminal forfeiture action). Under those circumstances, the U.S. Attorney in charge of the matter must "immediately notify the appropriate seizing agency that the 90-day deadline was not met," and the agency must then "promptly notify" the claimant, and inform that person how "to contact the property custodian." 28 C.F.R. § 8.13(a)-(b). The agency must also inform the claimant that "failure to contact the property custodian . . . may result in initiation of abandonment proceedings against the property pursuant to 41 CFR part 128-48." *Id.* § 8.13(b).

To release the property, the government may require that the claimant verify her identity and may "take other steps to verify the identity of the person who" claims the property. 28 C.F.R §§ 8.10(e), 8.13(c). The

government is also not required to release the property if it "has an independent basis for continued custody, including but not limited to contraband or evidence of a violation of law." *Id.* § 8.13(a).

If the government files a complaint for civil forfeiture of the seized property, however, a person may file a claim to interest in that property. 18 U.S.C. § 983(a)(4)(A). CAFRA newly provided that if the person claiming an interest in the seized property "substantially prevails," the government is liable for post-judgment interest, 28 U.S.C. § 2465(b)(1)(B); and in cases involving currency, the government is liable for "interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument," *id.* § 2465(b)(1)(C)(i). Congress provided for interest for prevailing claims under CAFRA having recognized that "[u]nder current law, even if a property owner prevails in a forfeiture action, he may receive no interest for the time period in which he lost use of his property." H.R. Rep. No. 106-192, 106th Cong., 1st Sess. 19 (1999). Congress noted that "[t]he United States shall generally not be liable for pre-judgment interest," but for civil forfeiture cases involving currency, "the government must disgorge any funds representing interest actually paid to the United States that resulted

from the investment of the property or an imputed amount that would have been earned had it been invested." *Id.*

B. Factual Background and Prior Proceedings

1. On October 31, 2017, plaintiff Anthonia Nwaorie sought to board an international flight from the George Bush Intercontinental Airport in Houston to Nigeria, while transporting $41,377 in U.S. currency. ROA.11, 22. Plaintiff was stopped on the jetway and questioned by several Customs and Border Protection officers, who asked plaintiff how much money she was carrying. *Id.* Plaintiff responded that she was carrying only $4,000—the amount of money in her purse. ROA.22. The officers informed plaintiff that she was required to report how much currency she was internationally transporting and provided her with CBP Form 503, laying out the reporting requirements. *Id.* Plaintiff again indicated that she was transporting only $4,000. *Id.*

CBP officers then searched plaintiff's luggage and found an additional $37,377 cash. ROA.22. Because plaintiff failed to report that she was transporting more than $10,000 pursuant to 31 U.S.C. § 5316, the officers seized the $41,377. ROA.22; *see also* ROA.669-70.

When plaintiff later returned from Nigeria, she alleges that she was "targeted for additional screening by CBP when she travels internationally" that was "far more intrusive and invasive than the normal screening process." ROA.23. Plaintiff also alleges that when she travelled to Nigeria in October 2018, her checked luggage "was searched thoroughly by unknown government agents," and that "no one from CBP or anyone else in the federal government has ever informed [her] that [she] would no longer be targeted for additional screening every time [she] travel[s]." ROA.629-30.

2. On November 6, 2017, CBP sent plaintiff a notice of seizure for the $41,377, as CAFRA requires, and provided her until December 13, 2017 to request a referral to the relevant U.S. Attorney's Office for judicial forfeiture proceedings of that property. ROA.24; *see also* ROA.62-68. On December 8, 2017, plaintiff filed a request for a referral to the U.S. Attorney's Office, and filed a form stating her interest in the currency. ROA.24, 70-72.

On April 4, 2018, CBP sent a letter in response, indicating that it had received plaintiff's request for judicial forfeiture proceedings, but that the U.S. Attorney's Office had declined to bring such an action. ROA.74. In light of that declination, CBP elected to "remit the currency seizure in full." ROA.26, 74. CBP also requested that plaintiff sign a Hold Harmless

Agreement, which the agency had attached to its letter, *see* ROA.76, and CBP indicated that, "[b]y accepting th[e] remission decision," plaintiff would "waiv[e] any claim to attorney's fees, interest or any other relief not specifically provided for in this manner." ROA.74; *see also* 28 C.F.R. § 8.16. CBP also indicated that it would "initiate the procedures for remittance of the currency" after receiving plaintiff's signed agreement, and that a refund check should be mailed "within 8 to 10 weeks." ROA.74. Finally, CBP's letter noted that if plaintiff took no action "within 30 days from the date of th[e] letter," then the agency would initiate administrative forfeiture proceedings. ROA.74.

Plaintiff chose not to sign the Hold Harmless Agreement. Instead, on May 3, 2018, she filed this lawsuit. ROA.10-58. Plaintiff asserted claims on behalf of herself—including a claim for return of property (including interest) and a claim for injunctive relief to be removed from a "screening list," ROA.46-55. Plaintiff also requested that a class be certified on behalf of herself and all other people similarly situated for violations of CAFRA and 28 C.F.R. § 8.13, as well as violations of the Due Process clause of the Fifth Amendment, ROA.42-46.

The same day plaintiff filed suit, CBP initiated the return of plaintiff's property, without plaintiff having signed the Hold Harmless Agreement. ROA.236. CBP processed the refund check on May 18, 2018, and issued it to plaintiff on May 22, 2018. ROA.237.

3. The government moved to dismiss plaintiff's complaint, ROA.489-528, which the district court granted in full, ROA.668-700.

a. As to plaintiff's individual claims, the district court first noted that plaintiff obtained the full return of her property soon after she filed suit, ROA.678, and because plaintiff was not entitled to any interest while the United States had possession of the seized funds, she did not have standing to sue over this property, ROA.680-81. The district court recognized that "[i]n the absence of express congressional consent to the award of interest, . . . the United States is immune from an interest award." ROA.681 (quoting *Spawn v. Western Bank-Westheimer*, 989 F.2d 830, 832-33 (5th Cir. 1993)). Although CAFRA provided interest to a claimant who "substantially prevails," 28 U.S.C. § 2465(b)(1), CAFRA's interest provision "applies only to civil proceedings to forfeit property" that the government initiates, and not to other claims. ROA.681-82 (quoting *United States v. Huynh*, 334 F. App'x 636, 638 (5th Cir. 2009) (unpublished)).

Next, the district court dismissed plaintiff's claim that CBP's secondary border inspection was unlawful. The court concluded that CBP has "considerable discretion" in conducting border searches, and that plaintiff failed to allege facts supporting a claim that CBP's conduct was arbitrary or capricious. ROA.685; *see also* ROA.684 ("[C]ourts have granted customs agents broad discretion when deciding to conduct routine stops at the border without a warrant."). The district court also concluded that CBP had a rational basis to subject plaintiff to a more invasive search, and plaintiff alleged "no facts that would call [that decision] into question." ROA.687. Plaintiff had attempted to export more than $41,000 in currency from the United States without reporting her possession of that currency, even after being "reminded of this legal obligation and provided the appropriate form on which to make a truthful and complete declaration." ROA.686-87. The district court thus dismissed plaintiff's claim for violation of the Equal Protection clause.

b. Despite concluding that many of plaintiff's claims were moot—including the claim that the government violated CAFRA and that the return of plaintiff's property was unconstitutionally conditioned on signing the Hold Harmless Agreement, ROA.682 n.28—the district court found that plaintiff

had standing at the time her complaint was filed to seek class-based relief. ROA.689. But the court dismissed all of the class claims.

First, the district court concluded that CBP's request that plaintiff sign a Hold Harmless Agreement was not unconstitutional or *ultra vires*. The district court concluded that certain terms that would have waived plaintiff's claims for costs, interest and attorney's fees were merely "an acknowledgement that such relief cannot be obtained" and those terms were thus "not a true waiver of a right actually possessed." ROA.691-92; *see also* ROA.76. The district court also concluded that the agreement was not unlawful insofar as it included terms that would have waived plaintiff's other claims against CBP related to the detention, seizure, and release of the seized property; and the agreement was not unlawful by including terms that required plaintiff to agree to hold the United States harmless for any claim or lawsuit brought by another person involving the seized property. The court determined that these terms collectively amounted to a "tool of settlement," explaining that, when the United States seizes property and later releases that property without any forfeiture proceeding, "[t]he actual ownership of the seized property" has not been legally determined. ROA.696; *see also* ROA.693-94 (citing *Town of Newton v. Rumery*, 480 U.S. 386 (1987)).

The United States would understandably seek an assurance from the claimant that, "if the property is later found to be the property of another, the claimant will indemnify the United States," ROA.696, when the United States releases seized property to a claimant without a forfeiture proceeding.

Second, the district court concluded that plaintiff failed to allege any "undue delay" resulting from the government's release of seized property. The district court acknowledged that CAFRA requires the government to "promptly release" seized property, upon a decision to decline to bring a judicial forfeiture action. ROA.698-99; *see also* 18 U.S.C. § 983(a)(3)(B); 28 C.F.R. § 8.13. But the court found that the government did just that, and had "began to take steps to promptly release the property" as soon as CAFRA required it. ROA.700. The district court explained that the time that the government took to release the property in this case was merely a "de minimus delay" and could not "form the factual basis for a class action" that the government failed to promptly release seized property. ROA.699. The district court also found that the "additional thirty-day period" interposed by CBP, when it requested plaintiff to sign the Hold Harmless Agreement, "was not *ultra vires* or unconstitutional" and raised "no issue of undue delay." *Id.*

SUMMARY OF ARGUMENT

1. The district court correctly dismissed plaintiff's class claims that she brought on behalf of herself and other purportedly similarly situated individuals. Plaintiff lacks standing to bring these claims. And her so-called *ultra vires* claim failed to satisfy the demanding standard for any limited exception to sovereign immunity, or to make out a viable legal claim.

a. Plaintiff challenges CBP's practice of requesting that claimants to seized property sign a Hold Harmless Agreement before releasing that property to the claimant. But plaintiff never signed such an agreement, and CBP has released plaintiff's seized property. Because plaintiff did not "submit to the challenged policy," she cannot "pursu[e] an action to dispute it," *Davis v. Tarrant County*, 565 F.3d 214, 220 (5th Cir. 2009). And even assuming plaintiff had alleged a cognizable injury at the time she filed this suit, CBP has since returned all of plaintiff's property, making these claims moot, *Yarls v. Bunton*, 905 F.3d 905, 909 (5th Cir. 2018). Plaintiff has also failed to demonstrate any likely future injury, precluding the availability of any prospective declaratory or injunctive relief, *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

Additionally, because plaintiff does not have standing to sue on her own behalf, she cannot seek class-wide relief. The district court incorrectly found that plaintiff purportedly had standing at the time she filed the complaint, ROA.688-89, but the court failed to recognize that plaintiff had not suffered the injury that formed the basis for her class claims. Even were the district court correct, however, plaintiff has not identified any continuing injury for the purposes of seeking class-wide relief. Plaintiff's claims are indisputably moot and no class has been certified—her claims are thus nonjusticiable and were correctly dismissed.

Even assuming plaintiff had signed the Hold Harmless Agreement, moreover, plaintiff's claimed harms are purely speculative and do not satisfy a sufficiently definite injury for purposes of Article III standing.

b. Plaintiff's so-called *ultra vires* class claim was correctly dismissed. This Court has raised substantial doubt that an *ultra vires* action survives the 1976 Amendments to the Administrative Procedure Act. *See Geyen v. Marsh*, 775 F.2d 1303, 1307 (5th Cir. 1985). And plaintiff's so-called *ultra vires* claim conflates the waiver of sovereign immunity contemplated by a challenge to government conduct as *ultra vires* with an independent cause of action.

Even assuming that a so-called *ultra vires* claim could be valid, moreover, plaintiff does not satisfy the demanding standard for such an action. Plaintiff has not alleged that a federal official acted "without any authority whatever," or without any "colorable basis for the exercise of authority." *Danos v. Jones*, 652 F.3d 577, 583 (5th Cir. 2011) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984)). Indeed, plaintiff makes no effort to engage with this standard—rather, she raises a programmatic challenge to CBP's practice of requesting that claimants to seized property sign a Hold Harmless Agreement. Plaintiff's challenge is thus more akin to review under the Administrative Procedure Act, but plaintiff's opening brief (Br. 19-26) makes no mention of that cause of action or the applicable standard of review. Accepting plaintiff's *ultra vires* claim on these terms would improperly collapse the distinction between an *ultra vires* claim and an APA claim.

2. Plaintiff is not entitled to any accrued interest on her seized property for the period it was in CBP's possession. As the district court correctly recognized, there is no waiver of sovereign immunity that would entitle plaintiff to such an award. Had the government brought a judicial civil forfeiture action and plaintiff substantially prevailed on her claim to the

seized property, plaintiff would have been entitled to prejudgment interest on that property. 28 U.S.C. § 2465(b)(1)(C). But as plaintiff recognizes (Br. 54-55), the government declined to bring such an action.

The Supreme Court explained in *Library of Congress v. Shaw*, 478 U.S. 310, 316 (1986), that a waiver of sovereign immunity is necessary to recover interest against the government, and the Court was forceful in holding that the "no-interest rule" could not be circumvented by simply applying a different label to the interest. *Id.* at 321. This Court has consistently followed the Supreme Court's direction in *Shaw*. *See, e.g.*, *Wilkerson v. United States*, 67 F.3d 112, 120 n.15 (5th Cir. 1995). And the majority of courts of appeals have applied the Supreme Court's rule in *Shaw* to hold that a claimant may not recover interest on seized property except in a judicial civil forfeiture action brought under 28 U.S.C. § 2465. *See United States v. Craig*, 694 F.3d 509, 514 (3d Cir. 2012); *Larson v. United States*, 274 F.3d 643, 645 (1st Cir. 2001); *United States v. $30,006.25 in U.S. Currency*, 236 F.3d 610, 614 (10th Cir. 2000); *United States v. $7,990.00 in U.S. Currency*, 170 F.3d 843, 846 (8th Cir. 1999); *Ikelionwu v. United States*, 150 F.3d 233, 239 (2d Cir. 1998).

Plaintiff invites this Court to adopt the approach of the minority of courts of appeals, who have "recharacteriz[ed] an interest award as a disgorgement of profits," and held that the government has a "duty to disgorge property, earned while the seized res was in the government's hands, that was not forfeited." *$30,006.25 in U.S. Currency*, 236 F.3d at 613. But those courts have ignored the Supreme Court's rule in *Shaw* that "the no-interest rule cannot be avoided simply by devising a new name for an old institution." *Shaw*, 478 U.S. at 321; *see also Larson*, 274 F.3d at 646-47 (discussing how the circuit split originally developed and critiquing other courts' incorrect reasoning). This Court should decline plaintiff's invitation to deepen the circuit split and should instead side with the majority of courts of appeals to have addressed this issue.

3. After plaintiff failed to comply with statutory and regulatory currency reporting requirements, CBP subjected her to increased scrutiny during the inspection process. Plaintiff identifies nothing unlawful about CBP using plaintiff's own past violations of the customs laws as a basis for subjecting her to additional scrutiny.

Plaintiff cursorily invokes (Br. 57) various private interests as the basis of a procedural Due Process claim, but none substantiates a constitutional

violation. For one, plaintiff contends that CBP has interfered with her "ability to travel internationally and domestically without harassment," but plaintiff has not alleged that she has been unable to travel internationally. Minor restrictions associated with border security do not violate the right to travel. Plaintiff also contends that CBP's inspection violated her right to "hav[e] a reputation that is free from false government stigmatization and humiliation," but plaintiff failed to satisfy the "stigma-plus test" for purposes of a Due Process claim. Finally, plaintiff contends that CBP's inspection implicated her rights to be "free from discrimination based on her race and national origin," and to be "free from unreasonable searches and seizures." But plaintiff expressly abandoned (Br. 55 n.5) any equal protection claim, and in any event offers no support for her contention that the actions taken during her border inspection were based on her race or national origin. Plaintiff also fails to support her claim that CBP's inspection was unreasonable, and courts have uniformly upheld suspicionless border inspections under the Fourth Amendment.

To the extent plaintiff invokes the recent district court decision in *Elhady v. Kable*, 391 F. Supp. 3d 562 (E.D. Va. 2017), to challenge the DHS TRIP redress procedures, plaintiff never sought any relief under those

procedures. As the Sixth Circuit has held, plaintiff should be required to exhaust the DHS TRIP procedures before challenging those procedures' constitutionality. *See Shearson v. Holder*, 725 F.3d 588, 594 (6th Cir. 2013).

The district court's dismissal should be affirmed.

STANDARD OF REVIEW

The Court reviews the district court's dismissal de novo. *See Budhathoki v. Nielsen*, 898 F.3d 504, 507 (5th Cir. 2018).

ARGUMENT

I. The District Court Correctly Dismissed Plaintiff's Class Claims.

A. Plaintiff Lacks Standing Because She Has Not Suffered A Cognizable Injury And Her Claims Are Moot.

Because plaintiff never signed the Hold Harmless Agreement, she has not suffered a cognizable injury to establish standing to sue on her own behalf. Even assuming plaintiff had suffered such an injury, however, because the government has returned all of plaintiff's property to her, her claim to the return of the property is moot. And plaintiff lacks standing to seek any prospective relief. Without standing to sue on her own behalf, plaintiff thus cannot represent a class of plaintiffs based on a purported injury that she herself has not been subjected to.

1. To establish standing, plaintiff must establish "an invasion of a legally protected interest." *Center for Biological Diversity v. U.S. Envtl. Prot. Agency*, 937 F.3d 533, 537 (5th Cir. 2019) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Plaintiff has not done so here.

Plaintiff "chose not to sign" the Hold Harmless Agreement, and instead filed this lawsuit, without previously raising any disagreement with CBP over its practices. ROA.672. And CBP released plaintiff's property without any condition on its release. ROA.237, 672. On May 3, 2018, CBP initiated the refund process for returning plaintiff's property, ROA.237, 672 & nn.24-25, and completed the refund process shortly thereafter. ROA.237, 672 & n.26. Plaintiff was thus never required to waive any constitutional rights—nor did she actually waive any such rights or suffer any injury—in exchange for the return of her property.

Furthermore, the district court found that the thirty-day period during which CBP had withheld plaintiff's property and requested that she sign the Hold Harmless Agreement "raise[d] no issue of undue delay." ROA.700. In any event, plaintiff actively disavows (Br. 23-26) any challenge to the timeliness of the government's return of her property.

Because plaintiff did not sign the Hold Harmless agreement, she did not "submit to the challenged policy" and cannot "pursu[e] an action to dispute it." *Davis v. Tarrant County*, 565 F.3d 214, 220 (5th Cir. 2009); *see also Ellison v. Connor*, 153 F.3d 247, 254-55 (5th Cir. 1998) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972)).[7] Noting that plaintiff disclaims (Br. 23-26) any injury based on the delay associated with returning her property, plaintiff's decision to decline to sign the Hold Harmless Agreement produced no actionable harm—and any error stemming from that agreement is harmless. *See, e.g.*, *Miles v. M/V Mississippi Queen*, 753 F.2d 1349, 1352 & n.9 (5th Cir. 1985) ("[E]ven failure to afford a party a constitutional guarantee may be found so harmless" as to provide cause to deny relief.).[8]

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[7] Under different circumstances, the district court in *Anoushiravani v. Fishel*, No. CV 04-212, 2004 WL 1630240, at *5 (D. Or. July 19, 2004), found that the plaintiff in that case had established standing, but only for purposes of bringing a claim that he was entitled to money damages for the temporary deprivation of his property caused by the government's conduct in initially conditioning the return of that property on the plaintiff's signing of a Hold Harmless Agreement. Here, plaintiff has not sought money damages and has expressly disclaimed any claim based on the delayed return of her property. Plaintiff's claims are similar to the claim for injunctive relief for which the *Anoushiravani* court held the plaintiff there lacked standing.

[8] CBP has also adopted a longstanding position that any individual who CBP has asked to sign a Hold Harmless Agreement in connection with seized

2. Even assuming plaintiff alleged a cognizable injury at the outset of this litigation, "[t]here must be a case or controversy through all stages of a case." *Yarls v. Bunton*, 905 F.3d 905, 909 (5th Cir. 2018) (quoting *K.P. v. LeBlanc*, 729 F.3d 427, 438 (5th Cir. 2013)). As this Court regularly recognizes, a case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," regardless "how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit." *Yarls*, 905 F.3d at 909 & nn. 8-9 (quoting *Already, LLC v. Nike*, Inc., 568 U.S. 85, 91 (2013)).

To the extent plaintiff alleged a cognizable injury at the time she filed this suit based on the government's retention of her seized currency, CBP has since returned all of plaintiff's property. ROA.236-37, 672. Plaintiff thus no longer has a personal stake in her claims that CBP improperly withheld her property, and those claims are moot.[9]

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property "may request that CBP modify the terms of such agreement or void [the agreement]." ROA.539.

[9] The government's mootness argument does not bear on plaintiff's procedural Due Process claim—which the district court correctly dismissed in any event, discussed in Part III, pp. 48-56 below.

The Supreme Court's decision in *Alvarez v. Smith*, 558 U.S. 87 (2009) controls. In *Smith*, the plaintiffs challenged the Illinois state government's procedures for returning seized property. But by the time the Supreme Court heard the case, the government had returned plaintiffs' seized property, or plaintiffs conceded that property was properly confiscated—and "there was no longer any dispute about ownership or possession of the relevant property." *Id.* at 92-93. The Supreme Court thus held that the case was moot because it "is no longer embedded in any actual controversy about the plaintiffs' particular legal rights," and was instead "an abstract dispute about the law" that "falls outside the scope of the constitutional words 'Cases' and 'Controversies.'" *Id.* at 93. The district court correctly recognized here that, because CBP returned all of plaintiff's property, plaintiff's claims that CBP violated CAFRA and that CBP "unconstitutionally conditioned" the return of plaintiff's property were similarly moot. ROA.682 n.28.

Plaintiff also claims (Br. 47-55) entitlement to interest on her seized property while in the government's possession. But as explained in Part II, pp. 41-48 below, the government has not waived sovereign immunity to permit recovery of these damages, and plaintiff is not entitled to recover any interest on her seized property.

3. Plaintiff additionally lacks standing to seek prospective declaratory or injunctive relief. To obtain prospective declaratory or injunctive relief, plaintiff must demonstrate a "real or immediate threat that the plaintiff will be wronged again"—past injury alone is insufficient. *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 366 (5th Cir. 2018) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). Plaintiff has made no such showing here.

Plaintiff failed to demonstrate an imminent likelihood that she would again be subject to CBP's purportedly unlawful practice of conditioning the return of seized property on signing a Hold Harmless Agreement. Indeed, doing so would require plaintiff to show that she intends to internationally transport more than $10,000 in currency, and CBP would seize that currency because plaintiff failed to declare how much currency she was transporting in violation of currency reporting requirements. It is entirely speculative whether CBP will seize plaintiff's property ever again.

Plaintiff cannot rely on past action as evidence of "a substantial risk" that the same action will be taken "in the future"; rather, there must be evidence that the same action will be taken again. *Stringer v. Whitley*, 942 F.3d 715, 722 (5th Cir. 2019). And a "generalized grievance" of future alleged

injury to a class of individuals is also insufficient—this Court requires "[p]laintiff-specific evidence" to provide a remedy to plaintiff herself. *Id.*; *see also Perry v. Sheahan*, 222 F.3d 309, 314 (7th Cir. 2000) (holding that the plaintiff lacked standing for prospective relief because plaintiff could not "demonstrate a realistic threat" that his property would be unlawfully seized in the future, even if a "past exposure to illegal conduct . . . is accompanied by continuing, present adverse effects").

4. Plaintiff purports to represent a class of individuals who CBP required to sign a Hold Harmless Agreement in exchange for the return of their seized property, as well as individuals who did not receive their seized property because they did not sign such an agreement—an agreement that plaintiff contends conditioned the return of property on the waiver of certain constitutional rights. ROA.36, 40-41. But because plaintiff does not have standing for the claims for which she sues on behalf of a class, she cannot seek class-wide relief.

This Court has repeatedly explained that a plaintiff who "fails to establish standing . . . may not seek relief on behalf of himself or herself or any other member of the class." *James v. City of Dallas*, 254 F.3d 551, 563 (5th Cir. 2001) (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)); *see also*

In re Taxable Mun. Bond Sec. Litig., 51 F.3d 518, 522 (5th Cir. 1995) (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)).

CBP returned plaintiff's property without condition and without requiring plaintiff to sign the Hold Harmless Agreement. And plaintiff has expressly disclaimed any claim based on governmental delay in returning her property. Neither plaintiff's complaint nor her opening brief identify any other injury for purposes of seeking class-based relief.

The district court incorrectly found that plaintiff had standing for her class claims because, at the time the complaint was filed, plaintiff's "funds had not been returned." ROA.688-89. But the district court failed to recognize that plaintiff never signed the Hold Harmless Agreement—the key injury she identified for her class claims—and that CBP released plaintiff's property without requiring her to do so.

Even were the district court correct, however, plaintiff identifies no continuing injury for purposes of seeking class-based relief. This Court has explained that a plaintiff suing on behalf of a class must have standing "both at the time the complaint is filed and at the time the class is certified by the district court." *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1046 (5th Cir. 1981); *see also Fontenot v. McCraw*, 777 F.3d 741, 749 (5th Cir.

2015). The class has not been certified in this case—the district court dismissed all of plaintiff's claims before ruling on class certification. ROA.484-85, 688-89.

As noted, plaintiff did not have standing at the time the suit was initiated, but she also fails to identify any continuing injury for purposes of seeking class relief. Plaintiff's property has been returned to her, and she never signed the Hold Harmless Agreement. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 78-79 (2013). Where, as here, an individual's claims are indisputably moot and no class has been certified, the case is nonjusticiable and must be dismissed.

5. Even if, contrary to fact, plaintiff *had* signed the Hold Harmless Agreement, plaintiff could not show Article III standing. Although plaintiff identifies (Br. 29-32) a laundry list of statutory and constitutional claims purportedly waived by signing the agreement, the effect of any such waiver is purely speculative.

The list of claims in plaintiff's opening brief amount to mere conjecture. Plaintiff identifies no wrongful agency conduct and instead seeks to establish standing on the basis of hypothetical lawsuits, for which plaintiff provides no factual basis. That is plainly insufficient to establish an injury for purposes of

standing—plaintiff must have identified an "actually" or "imminently" harmed interest, not a "highly speculative and attenuated chain of possibilities partially based on the decisions of independent actors." *Glass v. Paxton*, 900 F.3d 233, 239 (5th Cir. 2018) (discussing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410-14 (2013)) (quotations omitted).

In particular, plaintiff contends (Br. 30) that signing the Hold Harmless Agreement would waive plaintiff's ability to bring claims of constitutional violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). But plaintiff makes no effort to identify the factual basis for claims that could be brought under *Bivens* following the Supreme Court's decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). The Supreme Court has "admonished [the lower courts] to exercise caution in the disfavored judicial activity of extending *Bivens* to any new set of facts." *Cantú v. Moody*, 933 F.3d 414, 421-22 (5th Cir. 2019) (quotations omitted); *see also Hernandez v. Mesa*, 140 S. Ct. 735, 743-45 (2020) (declining to extend *Bivens* to a new context).

B. The District Court Correctly Dismissed Plaintiff's So-Called *Ultra Vires* Claim.

Plaintiff claims that CBP's practice of asking property claimants to sign a Hold Harmless Agreement before returning that property is *ultra vires* and violates 18 U.S.C. § 983(a)(3) and 28 C.F.R. § 8.13. ROA.42-43. Even assuming a claim challenging government action as *ultra vires* survives the 1976 Amendments to the Administrative Procedure Act, plaintiff fails to identify such a claim here. The Supreme Court explained that a claim challenging government action as *ultra vires* is a limited exception to sovereign immunity, but it is not itself a cause of action. Plaintiff has not identified an independent cause of action here, and assuming she had, plaintiff failed to allege conduct that satisfies the demanding *ultra vires* standard for an exception to sovereign immunity.

The Supreme Court explained in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701-02 (1949), and clarified in *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963), that an action alleging that the official has acted unlawfully and seeking injunctive relief is not barred by sovereign immunity if the official was alleged to have acted outside the scope of his statutory authority or under a statute or order claimed to be unconstitutional. The legal fiction underpinning such a suit was that "a federal official acting in

violation of the Constitution or beyond his statutory powers was acting for himself only and not as an agent of government." *Geyen v. Marsh*, 775 F.2d 1303, 1307 (5th Cir. 1985).

As this Court has recognized, the continued viability of that court-created exception to sovereign immunity is highly doubtful in the wake of 1976 Amendments to the Administrative Procedure Act. In *Geyen v. Marsh*, the Court recognized that the "principal purpose" of the 1976 Amendments—which "waived sovereign immunity for suits seeking nonmonetary relief through nonstatutory judicial review of agency action"—"was to do away with the *ultra vires* doctrine and other fictions surrounding sovereign immunity." 775 F.2d at 1307 (citing Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721, 2721 (codified at 5 U.S.C. § 702 (1982)); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 116 (1984) (noting that "the *ultra vires* doctrine [is] a narrow and questionable exception" to sovereign immunity). Although this Court has subsequently assumed, without deciding, that "the *Larson* exception to sovereign immunity may still apply in certain cases after the 1976 amendments to the Administrative Procedure Act," *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011), there are good reasons to think that it does not, as the Court recognized in *Geyen*.

In any event, even assuming an exception to sovereign immunity based on *ultra vires* conduct survives, plaintiff does not satisfy the exception's demanding standard. Plaintiff must "do more than simply allege that the actions of the officer are illegal or unauthorized." *Danos*, 652 F.3d at 583 (quoting *Alabama Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1226 (5th Cir. 1976)). Rather, plaintiff must allege that a federal official acted "without any authority whatever," or without any "colorable basis for the exercise of authority." *Id.* (quoting *Pennhurst State Sch. & Hosp.*, 465 U.S. at 101 n.11)).

Plaintiff fails to identify wrongful conduct on the part of any particular government official, and instead levies a broad-based challenge to CBP's practice of requesting that claimants to seized property sign a Hold Harmless Agreement. *Cf. Danos*, 652 F.3d at 584 (rejecting various *ultra vires* challenges to specific officials' actions). Plaintiff seems to argue for review of her claim that CBP's actions were without statutory authority akin to the scope of review under the Administrative Procedure Act. While plaintiff alleged a claim under the APA, ROA.14 ¶ 10, plaintiff's opening brief (Br. 19-26) makes no mention of that cause of action or the applicable standard of review. Any such argument is thus waived in this Court. *See Warren v. Chesapeake Expl., LLC*, 759 F.3d 413, 420 (5th Cir. 2014).

Indeed, plaintiff's "*ultra vires* action," ROA.42-45, makes no mention of a cause of action, aside from alleging an "*ultra vires*" policy. But "*ultra vires*" is not a cause of action; rather, to qualify for the *ultra vires* exception to sovereign immunity, plaintiff must assert a viable cause of action. That cause of action must come from an independent source of law that explicitly applies to government action. *See, e.g.*, *Dugan*, 372 U.S. at 617 (trespass and constitutional claims); *Larson*, 337 U.S. at 684 (breach of contract claim). Plaintiff failed to do so here.

Accepting plaintiff's *ultra vires* claim on her own terms—without differentiating it from an APA claim—would collapse the distinction between these causes of action, and significantly expand the scope of *ultra vires* claims. Doing so runs directly contrary to this Court's holding in *Geyen* and "would revive the technical complexities that Congress sought to eliminate in 1976." *Geyen*, 775 F.2d at 1307; *see also, e.g.*, *Exxon Chems. Am. v. Chao*, 298 F.3d 464, 467 n.2 (5th Cir. 2002) (differentiating an APA claim from an *ultra vires* claim); *Sahara Health Care, Inc. v. Azar*, 349 F. Supp. 3d 555, 566 (S.D. Tex. 2018) (similar). This Court should refuse plaintiffs' invitation to do so, and should affirm the dismissal of her *ultra vires* claim.

II. The District Correctly Dismissed Plaintiff's Claim For Interest.

Plaintiff's complaint demanded that the government return her seized cash "with interest." ROA. 47, 48. But at no point has plaintiff identified a waiver of sovereign immunity that would entitle her to any payment of interest on the seized property. The district court correctly dismissed plaintiff's claim on that basis. ROA.678-82.

A. The district court correctly recognized that, absent an "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 (citing *Library of Cong. v. Shaw*, 478 U.S. 310, 314 (1986)). CAFRA provides that a claimant may recover interest that accrued while property was seized when the government brings a civil forfeiture action, and the claimant "substantially prevails" in recovering property in that action. 28 U.S.C. § 2465(b)(1)(C). But the government declined to bring a forfeiture action, so that provision has no bearing here. ROA.682; *see also, e.g.*, *Carvajal v. United States*, 521 F.3d 1242, 1247 (9th Cir. 2008) (explaining that the provision of CAFRA providing for interest payments, § 2465(b)(1)(C), "is triggered *only* when the government institutes civil forfeiture proceedings" and the party seeking fees "substantially prevails").

Indeed, plaintiff concedes as much (Br. 54-55), explaining that 28 U.S.C. § 2465 is inapplicable here.

The Supreme Court held in *Library of Congress v. Shaw*, 478 U.S. 310 (1986), that an express waiver of sovereign immunity is required for a litigant to claim interest against the United States: the "Court, executive agencies, and Congress itself consistently have recognized that federal statutes cannot be read to permit interest to run on a recovery against the United States unless Congress affirmatively mandates that result." *Id.* at 316; *see also id.* at 314-15 & n.2 (tracing the development of the award of interest as an element of damages); *id.* at 318 & n.6 (collecting statutes in which Congress has "expressly" waived the United States' immunity with respect to interest). The Supreme Court also eschewed a formalist approach to determining whether interest is recoverable against the United States, noting that "the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution." *Id.* at 321.

Consistent with the Supreme Court's guidance in *Shaw*, this Court has applied the no-interest rule in a variety of circumstances. *See, e.g.*, *Wilkerson v. United States*, 67 F.3d 112, 120 n.15 (5th Cir. 1995) ("In the absence of a clear and unequivocal waiver of immunity from interest awards, awarding

interest against the United States is improper."); *Perales v. Casillas*, 950 F.2d 1066, 1076 (5th Cir. 1992) (rejecting the argument to award interest "by calling the award a 'cost-of-living adjustment' rather than an interest award"); *McGehee v. Panama Canal Comm'n*, 872 F.2d 1213, 1216 (5th Cir. 1989) (rejecting the argument that a statute "impliedly waived immunity from interest," an argument which *Shaw* foreclosed); *Texas Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 778 n.2 (5th Cir. 2010) (strictly construing the waiver of sovereign immunity for certain interest payments for interest on Medicare debt under 42 U.S.C. § 1395*l*(j)). Plaintiff fails to identify any statutory waiver of sovereign immunity that would entitle her to recover interest from the government for the period it held her seized property. The district court thus correctly concluded that "[s]overeign immunity bars Plaintiff's claim for interest." ROA.682.

Courts of appeals for the First, Second, Third, Eighth, and Tenth Circuits have applied similar reasoning and concluded that a claimant is not entitled to interest on seized property, unless the claim to the seized property is brought in a civil forfeiture action under 28 U.S.C. § 2465(b)(1)(C). As directly relevant here, the Third Circuit concluded that, in a claim for return of property brought under Federal Rule of Criminal

Procedure 41(g), the rule "provides for one express remedy—the return of property" and thus does not provide for any award of interest. *United States v. Craig*, 694 F.3d 509, 513 (3d Cir. 2012); *see* ROA.14 ¶ 11 (plaintiff's complaint, noting that she brought her claim for return of property under Federal Rule of Criminal Procedure 41(g)). That court further explained that however the interest award is "labeled"—be it "as damages, loss, earned increment, just compensation, discount, offset, penalty or any other term"—that "the no-interest rule remains applicable," as "interest by any other name is still interest." *Craig*, 694 F.3d at 514.

Similarly, the First Circuit has concluded that "the recovery of any interest the money earned while in the possession of the government . . . would constitute the award of pre-judgment interest," for which "the government enjoys sovereign immunity." *Larson v. United States*, 274 F.3d 643, 645 (1st Cir. 2001). The First Circuit further explained that, prior to CAFRA and the amendments to 28 U.S.C. § 2465, Congress had "assumed . . ., prior to the new legislation, there could be no recovery of interest." *Larson*, 274 F.3d at 647 (citing H.R. Rep. No. 105-358, 105th Cong., 1st Sess. 34 (1997)); *see also United States v. $7,990.00 in U.S. Currency*, 170 F.3d 843, 845-46 (8th Cir. 1999) ("[I]t seems clear there is no statutory basis for

awarding interest on [seized property that is] returned," and a claim for "prejudgment interest" "would clearly be a windfall."); *United States v. $30,006.25 in U.S. Currency*, 236 F.3d 610, 614 (10th Cir. 2000) (rejecting an award of interest in light of the "lack of a statutory basis for the award of interest on returned property"); *Ikelionwu v. United States*, 150 F.3d 233, 239 (2d Cir. 1998) ("There is no statutory basis for awarding prejudgment interest."). Plaintiff ignores precedent of this Court and the Supreme Court by incorrectly arguing (Br. 48) that "sovereign immunity does not apply" to her claim for interest.

B. In an effort to recover prejudgment interest on her seized property, plaintiff relies (Br. 48-52) on flawed reasoning from the Sixth and Ninth Circuits, which failed to apply the Supreme Court's no-interest rule articulated in *Library of Congress v. Shaw*.

Rather than follow the Supreme Court's direction in *Shaw*, the Sixth and Ninth Circuits have "recharacteriz[ed] an interest award as a disgorgement of profits," holding that the government has a "duty to disgorge property, earned while the seized res was in the government's hands, that was not forfeited." *$30,006.25 in U.S. Currency*, 236 F.3d at 613; *see Carvajal*, 521 F.3d at 1245 ("[T]he 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.'" (quoting *United States v. $277,000 U.S. Currency*, 69 F.3d 1491, 1498 (9th Cir. 1995)); *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 504 (6th Cir. 1998) (explaining that the government "must disgorge [earned interest] along with the property itself when the time arrives for a return of the seized *res* to its owner," as the government may not always profit from the seizure of property which is ultimately returned to the owner").[10]

But by characterizing the award of interest as "disgorgement of profits," those decisions ignored the Supreme Court's clear direction that "the no-interest rule cannot be avoided simply by devising a new name for an old institution." *Shaw*, 478 U.S. at 321; *see also Craig*, 694 F.3d at 513; *Larson*, 274 F.3d at 647; *$7,990.00 in U.S. Currency*, 170 F.3d at 845. Indeed, "[c]ourts lack the power to award interest against the United States on the basis of what they think is or is not sound policy." *Craig*, 694 F.3d at 514

[10] The Eleventh Circuit has cited this approach with apparent approval, but ultimately did not resolve the case before it by applying the rule from the Sixth and Ninth Circuits. *See United States v. 1461 W. 42nd St.*, 251 F.3d 1329, 1338 (11th Cir. 2001).

(quoting *Shaw*, 478 U.S. at 321); *see also $30,006.25 in U.S. Currency*, 236 F.3d at 614 ("[F]airness or policy reasons cannot by themselves waive sovereign immunity.").[11]

This Court should thus decline plaintiff's invitation to follow the incorrect reasoning of the Sixth and Ninth Circuits. Indeed, the First Circuit in *Larson v. United States* examined how the circuit split developed, and identified how the Sixth and Ninth Circuits relied on the misapplication of an inapposite decision. In *Larson*, the First Circuit explained that, in first articulating the "disgorgement approach," the Ninth Circuit's reasoning in *$277,000 U.S. Currency* relied on a distinguishable First Circuit case, *United States v. Kingsley*, 851 F.2d 16 (1st Cir. 1988). *Larson*, 274 F.3d at 646-47; *see also $277,000 U.S. Currency*, 69 F.3d at 1497. In *Kingsley*, the government requested an order from the district court that certain seized cash from the defendant be deposited into an interest-bearing account, which the government later stipulated in a plea agreement would be applied to the defendant's outstanding tax debt. But the government failed to deposit the

[11] To be sure, plaintiff's own complaint repeatedly frames her requested relief as "interest," of the prejudgment sort. *See* ROA.47, 48; *see also* ROA. 13, 28, 29, 31, 56, 57. At no point did the complaint characterize the interest as a claim for relief to "disgorge property that was not forfeited." Br. 48.

money in an interest-bearing account. The First Circuit held that the government's breach of the agreement entitled the defendant to damages, which included damages directly caused by the breach—that is, interest that would have been earned, had the government complied with the agreement's terms. *Kingsley*, 851 F.2d at 21. *Kingsley* included no mention of the Supreme Court's decision in *Shaw*, as the award was not one for pre-judgment interest. The Ninth Circuit reasoned that *Kingsley* was "in many ways similar" to a civil forfeiture case, *$277,000 U.S. Currency*, 69 F.3d at 1497, but the Ninth Circuit failed to recognize that in *Kingsley*, the claimant entered into a contract in explicit reliance on the government's stipulation that it would place the claimant's property in an interest-bearing account—and the government's breach resulted in a damages award that would include interest. *Larson*, 274 F.3d at 646-47.

The decisions of the Sixth and Ninth Circuits thus substantially deviate from the Supreme Court's instruction in *Shaw* and would create significant tension with other decisions of this Court.

III. Plaintiff Does Not State A Claim For A Violation Of Procedural Due Process.

Like all travelers entering or leaving the United States, both plaintiff and her belongings were subject to inspection by CBP. Because plaintiff failed to comply with statutory and regulatory currency reporting requirements, CBP took additional actions during plaintiff's border inspections to ensure that plaintiff was not engaged in unlawful activities. Plaintiff herself identifies the basis for CBP's actions during her border inspection: twice, plaintiff informed CBP officers that she was transporting only $4,000 while traveling internationally, despite knowingly transporting over $41,000 in cash. *See* ROA.22, 669.

Plaintiff does not contest that she failed to comply with the applicable legal requirements. Nor does plaintiff challenge the rationality for additional scrutiny for individuals who fail to declare that they are internationally transporting currency in excess of $10,000. *See* 31 U.S.C. § 5317(b) (permitting customs officers to conduct warrantless searches at the border of

"any . . . container, and any person entering or departing from the United States"); *see also* 31 C.F.R. §§ 1010.306(b)(1), (3), 1010.340(a).[12]

Plaintiff thus identifies nothing unlawful about the government using an individual's past violations of the law as a basis for taking actions during a border inspection to ensure that the individual is not violating legal requirements. And the district court was correct in explaining that "courts have granted customs agents broad discretion when deciding to conduct routine stops at the border without a warrant." ROA.684; *see also, e.g.*, *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985); *United States v. Molina-Isidoro*, 884 F.3d 287, 291 (5th Cir. 2018) ("[O]fficials at the border may cut open the lining of suitcases without any suspicion."); *United States v. Odutayo*, 406 F.3d 386, 388 (5th Cir. 2005).

Given these facts, plaintiff failed to assert a valid procedural Due Process claim. As a basis for a procedural Due Process claim, plaintiff must

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[12] The form that plaintiff would have filled out had she properly declared the currency, FinCEN Form 105, explicitly notes that "[e]ach person who physically transports" currency "in an aggregate amount exceeding $10,000 at one time from the United States to any place outside the United States" must declare how much currency is being transported. https://go.usa.gov/xdvw8. The form nowhere suggests that an individual's declaration should be limited to how much currency is transported on the individual's actual person and instead indicates that a person must declare currency that "accompanie[s]" a person. *Id.*

first demonstrate that she has a "cognizable liberty or property interest." *Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013). That interest must be "more than an abstract need or desire and more than a unilateral expectation of it," instead "stem[ming] from an independent source." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). Plaintiff cursorily invokes (Br. 57) four private interests as the basis for her procedural Due Process claim. None survive even passing scrutiny.

First, plaintiff contends (Br. 57) that CBP has interfered with her "ability to travel internationally and domestically without harassment." But even if plaintiff alleges delays before boarding, she has not alleged that she has been denied boarding a plane—and border inspections, even if they involve delays at the border, do not implicate any due process liberty interest. The Constitution protects against only "statutes, rules, or regulations which unreasonably burden or restrict" the right to travel. *Saenz v. Roe*, 526 U.S. 489, 499 (1999); *cf. Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991) ("Minor restrictions" associated with border security do not violate the right to travel.); *see also Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999) ("[M]inor burdens impacting interstate travel . . . do not constitute a violation of that right.").

To the extent plaintiff complains of delays or inconvenience caused by border inspections, ROA.22-23, 32, 52, modest delays from inspections at the border do not implicate a protected liberty interest. *See, e.g.*, *United States v. Flores-Montano*, 541 U.S. 149, 155 n.3 (2004) ("We think it clear that delays of one to two hours at international borders are to be expected."); *Abdi v. Wray*, 942 F.3d 1019, 1032-33 (10th Cir. 2019) (forty-eight-hour delay did not deprive plaintiff of a liberty interest in travel); *Beydoun v. Sessions*, 871 F.3d 459, 468 (6th Cir. 2017) ("Plaintiffs may have been inconvenienced by the extra security hurdles they endured in order to board an airplane," but "these burdens do not amount to a constitutional violation."); *Tabbaa v. Chertoff*, 509 F.3d 89, 100-01 (2d Cir. 2007) (a border search implicating an "additional four hour" delay would not amount to "an unexpected level of intrusion into a person's privacy, that by itself would render the searches non-routine" (quotations omitted)). Plaintiff has not alleged that she has ever been unable to travel as a result of any CBP border inspection.

Next, plaintiff contends (Br. 57) that CBP's inspections violated her right to "have a reputation that is free from false government stigmatization and humiliation." But plaintiff must show actual harm to her reputation "plus an infringement of some other interest" (commonly referred to as the

"stigma-plus test"). *Does 1-7 v. Abbott*, 945 F.3d 307, 313 (5th Cir. 2019) (quoting *Blackburn v. City of Marshall*, 42 F.3d 925, 935-36 (5th Cir. 1995)). Plaintiff fails to do either. For one, plaintiff does not demonstrate any reputational harm. *See, e.g.*, *Bishop v. Wood*, 426 U.S. 341, 348 (1976) (rejecting a plaintiff's procedural Due Process claim based on reputational injury without any demonstration that plaintiff's "good name, reputation, honor, or integrity" was injured); *Blackburn*, 42 F.3d at 936 & n.10 (similar). Plaintiff did not allege that any government official publicly announced that she was included on any screening list—rather, plaintiff identifies a single off-hand remark made to her from a lone CBP officer, and she effectively assumes that she was included on a screening list. ROA.24. Indeed, plaintiff failed to allege that anyone actually told her that she was placed on a list, or that such a list existed. *Cf.* ROA.239 (CBP Assistant Port Director stating that plaintiff was not placed on a "screening list" and stating that CBP's TECS database is not a "screening list"); *see also Johnson v. Martin*, 943 F.2d 15, 17 (7th Cir. 1991) (rejecting plaintiff's procedural Due Process claim based on alleged reputational harm from inter-governmental dissemination of information that was purportedly disparaging). Indeed, this Court has previously explained that there is "the almost complete absence of any

stigma attached to being subjected to search at a known, designated airport search point." *United States v. Skipwith*, 482 F.2d 1272, 1275 (5th Cir. 1973); *see also Abdi*, 942 F.3d at 1032-34. Plaintiff alleges no other stigma from CBP's border inspections.

Additionally, plaintiff has not demonstrated infringement of any other interest for purposes of the stigma-plus test. As explained—and as the district court recognized—her border inspections have not prevented plaintiff from flying on multiple occasions and have has thus not altered plaintiff's legal right or status for purposes of stating a Due Process claim. *See, e.g.*, *Beydoun*, 871 F.3d at 469 (rejecting a procedural Due Process claim based on alleged reputational harm from enhanced screening "because Plaintiffs cannot show that their liberty interest in travel was infringed upon by being subject to relatively minor additional screening"); *Abdi*, 942 F.3d at 1031-32.

Plaintiff also contends (Br. 57) that CBP's inspections implicated her rights to be "free from discrimination based on her race and national origin," and to be "free from unreasonable searches and seizures." But plaintiff has expressly abandoned (Br. 55 n.5) her equal protection claim, and she offers no support for the argument that her experiences at the border were based

on her race or national origin. As noted, plaintiff concedes that the actions taken during her border inspections resulted from her past failure to comply with currency reporting requirements. Plaintiff similarly offers no support for her claim that CBP's inspection was unreasonable. Plaintiff seems to suggest that the inspection of her luggage was unreasonable because it resulted in damage to her personal property, ROA.23, but she does not argue that damage to her personal property amounted to a Due Process violation. And in any event, this Court has regularly upheld suspicionless routine border searches under the Fourth Amendment, *see, e.g.*, *United States v. Cardenas*, 9 F.3d 1139, 1148 & n.3 (5th Cir. 1993) (collecting authorities), as well as suspicionless airport searches ,*see, e.g.*, *United States v. Aukai*, 497 F.3d 955, 958-63 (9th Cir. 2007) (en banc); *Skipwith*, 482 F.2d at 1275-76. Those cases are equally applicable in evaluating plaintiff's asserted liberty interest here.

Next, plaintiff invokes (Br. 57-60) the recent district court decision in *Elhady v. Kable*, 391 F. Supp. 3d 562 (E.D. Va. 2019), arguing that the DHS TRIP procedures "provide no meaningful procedural safeguards." Apart from the fatal defect that plaintiff has not identified any protected liberty or property interest, plaintiff's argument also fails because she never pursued

administrative remedies provided by the DHS TRIP procedures. Plaintiff declined to seek redress under those procedures, instead electing to file this lawsuit. ROA.50 ¶ 186; *see also* ROA.54 ¶ 204 (speculating that DHS TRIP "may be [an] insufficient process," without actually pursuing that process). Plaintiff should be required to exhaust her administrative remedies before assailing the constitutionality of those remedies. *See, e.g.*, *Shearson v. Holder*, 725 F.3d 588, 594 (6th Cir. 2013) (requiring a plaintiff to exhaust procedures under DHS TRIP before challenging the constitutionality of those procedures); *see also Rathjen v. Litchfield*, 878 F.2d 836, 839-40 (5th Cir. 1989) ("[N]o denial of procedural due process occurs where a person has failed to utilize the state procedures available to him.").[13]

[13] The government respectfully disagrees with the district court's decision in *Elhady v. Kable*, and has appealed that decision to the Fourth Circuit. *See Elhady v. Kable*, No. 20-1119 (4th Cir.).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
RYAN K. PATRICK
United States Attorney

SHARON SWINGLE

s/ Casen B. Ross
CASEN B. ROSS
Attorneys, Appellate Staff
Civil Division, Room 7270
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
202.514.1923
casen.ross@usdoj.gov

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Casen B. Ross
CASEN B. ROSS

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,665 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in CenturyExpd BT 14-point font, a proportionally spaced typeface.

s/ Casen B. Ross
CASEN B. ROSS

ADDENDUM

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18 U.S.C. § 983(a)

§ 983. General rules for civil forfeiture proceedings

(a) Notice; claim; complaint.—

(1)

(A)(i) Except as provided in clauses (ii) through (v), in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure.

(ii) No notice is required if, before the 60-day period expires, the Government files a civil judicial forfeiture action against the property and provides notice of that action as required by law.

(iii) If, before the 60-day period expires, the Government does not file a civil judicial forfeiture action, but does obtain a criminal indictment containing an allegation that the property is subject to forfeiture, the Government shall either—

(I) send notice within the 60 days and continue the nonjudicial civil forfeiture proceeding under this section; or

(II) terminate the nonjudicial civil forfeiture proceeding, and take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.

(iv) In a case in which the property is seized by a State or local law enforcement agency and turned over to a Federal law enforcement agency for the purpose of forfeiture under Federal law, notice shall be sent not more than 90 days after the date of seizure by the State or local law enforcement agency.

(v) If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested party not later than 60 days after the determination by the Government of the identity of the party or the party's interest.

(B) A supervisory official in the headquarters office of the seizing agency may extend the period for sending notice under subparagraph (A) for a period not to exceed 30 days (which period may not be further extended except by a court), if the official determines that the conditions in subparagraph (D) are present.

(C) Upon motion by the Government, a court may extend the period for sending notice under subparagraph (A) for a period not to exceed 60 days, which period may be further extended by the court for 60-day periods, as necessary, if the court determines, based on a written certification of a supervisory official in the headquarters office of the seizing agency, that the conditions in subparagraph (D) are present.

(D) The period for sending notice under this paragraph may be extended only if there is reason to believe that notice may have an adverse result, including—

(i) endangering the life or physical safety of an individual;

(ii) flight from prosecution;

(iii) destruction of or tampering with evidence;

(iv) intimidation of potential witnesses; or

(v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(E) Each of the Federal seizing agencies conducting nonjudicial forfeitures under this section shall report periodically to the Committees on the Judiciary of the House of Representatives and the Senate the number of occasions when an extension of time is granted under subparagraph (B).

(F) If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the property was seized, and no extension of time is granted, the Government shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time. The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.

(2)

(A) Any person claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute may file a claim with the appropriate official after the seizure.

(B) A claim under subparagraph (A) may be filed not later than the deadline set forth in a personal notice letter (which deadline may be not earlier than 35 days after the date the letter is mailed), except that if that letter is not received, then a claim may be filed not later than 30 days after the date of final publication of notice of seizure.

(C) A claim shall—

(i) identify the specific property being claimed;

(ii) state the claimant's interest in such property; and

(iii) be made under oath, subject to penalty of perjury.

(D) A claim need not be made in any particular form. Each Federal agency conducting nonjudicial forfeitures under this section shall make claim forms generally available on request, which forms shall be written in easily understandable language.

(E) Any person may make a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

(3)

(A) Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

(B) If the Government does not—

(i) file a complaint for forfeiture or return the property, in accordance with subparagraph (A); or

(ii) before the time for filing a complaint has expired—

(I) obtain a criminal indictment containing an allegation that the property is subject to forfeiture; and

(II) take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute,

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.

(C) In lieu of, or in addition to, filing a civil forfeiture complaint, the Government may include a forfeiture allegation in a criminal indictment. If criminal forfeiture is the only forfeiture proceeding commenced by the Government, the Government's right to continued possession of the property shall be governed by the applicable criminal forfeiture statute.

(D) No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

(4)

(A) In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint.

(B) A person asserting an interest in seized property, in accordance with subparagraph (A), shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim.

28 U.S.C. § 2465

§ 2465. Return of property to claimant; liability for wrongful seizure; attorney fees, costs, and interest

(a) Upon the entry of a judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any provision of Federal law—

(1) such property shall be returned forthwith to the claimant or his agent; and

(2) if it appears that there was reasonable cause for the seizure or arrest, the court shall cause a proper certificate thereof to be entered and, in such case, neither the person who made the seizure or arrest nor the prosecutor shall be liable to suit or judgment on account of such suit or prosecution, nor shall the claimant be entitled to costs, except as provided in subsection (b).

(b)

(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for--

(A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant;

(B) post-judgment interest, as set forth in section 1961 of this title; and

(C) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale—

(i) interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and

(ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence), commencing 15 days after the property was seized by a Federal law enforcement agency, or was

turned over to a Federal law enforcement agency by a State or local law enforcement agency.

(2)

(A) The United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection.

(B) The provisions of paragraph (1) shall not apply if the claimant is convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(C) If there are multiple claims to the same property, the United States shall not be liable for costs and attorneys fees associated with any such claim if the United States—

(i) promptly recognizes such claim;

(ii) promptly returns the interest of the claimant in the property to the claimant, if the property can be divided without difficulty and there are no competing claims to that portion of the property;

(iii) does not cause the claimant to incur additional, reasonable costs or fees; and

(iv) prevails in obtaining forfeiture with respect to one or more of the other claims.

(D) If the court enters judgment in part for the claimant and in part for the Government, the court shall reduce the award of costs and attorney fees accordingly.

31 U.S.C. § 5316

§ 5316. Reports on exporting and importing monetary instruments

(a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—

(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time—

(A) from a place in the United States to or through a place outside the United States; or

(B) to a place in the United States from or through a place outside the United States; or

(2) receives monetary instruments of more than $10,000 at one time transported into the United States from or through a place outside the United States.

(b) A report under this section shall be filed at the time and place the Secretary of the Treasury prescribes. The report shall contain the following information to the extent the Secretary prescribes:

(1) the legal capacity in which the person filing the report is acting.

(2) the origin, destination, and route of the monetary instruments.

(3) when the monetary instruments are not legally and beneficially owned by the person transporting the instruments, or if the person transporting the instruments personally is not going to use them, the identity of the person that gave the instruments to the person transporting them, the identity of the person who is to receive them, or both.

(4) the amount and kind of monetary instruments transported.

(5) additional information.

(c) This section or a regulation under this section does not apply to a common carrier of passengers when a passenger possesses a monetary instrument, or to a common carrier of goods if the shipper does not declare the instrument.

(d) Cumulation of closely related events.--The Secretary of the Treasury may prescribe regulations under this section defining the term “at one time” for purposes of subsection (a). Such regulations may permit the cumulation of

closely related events in order that such events may collectively be considered to occur at one time for the purposes of subsection (a).

31 U.S.C. § 5317

§ 5317. Search and forfeiture of monetary instruments

(a) The Secretary of the Treasury may apply to a court of competent jurisdiction for a search warrant when the Secretary reasonably believes a monetary instrument is being transported and a report on the instrument under section 5316 of this title has not been filed or contains a material omission or misstatement. The Secretary shall include a statement of information in support of the warrant. On a showing of probable cause, the court may issue a search warrant for a designated person or a designated or described place or physical object. This subsection does not affect the authority of the Secretary under another law.

(b) Searches at border.—For purposes of ensuring compliance with the requirements of section 5316, a customs officer may stop and search, at the border and without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope or other container, and any person entering or departing from the United States.

(c) Forfeiture.—

(1) Criminal forfeiture.—

(A) In general.—The court in imposing sentence for any violation of section 5313, 5316, or 5324 of this title, or any conspiracy to commit such violation, shall order the defendant to forfeit all property, real or personal, involved in the offense and any property traceable thereto.

(B) Procedure.—Forfeitures under this paragraph shall be governed by the procedures established in section 413 of the Controlled Substances Act.

(2) Civil forfeiture.—

(A) In general.—Any property involved in a violation of section 5313, 5316, or 5324 of this title, or any conspiracy to commit any such violation, and any property traceable to any such violation or conspiracy, may be seized and forfeited to the United States in

accordance with the procedures governing civil forfeitures in money laundering cases pursuant to section 981(a)(1)(A) of title 18, United States Code.

* * *

28 C.F.R. § 8.9

§ 8.9 Notice of administrative forfeiture.

(a) Notice by publication.

(1) After seizing property subject to administrative forfeiture, the appropriate official of the seizing agency shall select from the following options a means of publication reasonably calculated to notify potential claimants of the seizure and intent to forfeit and sell or otherwise dispose of the property:

(i) Publication once each week for at least three successive weeks in a newspaper generally circulated in the judicial district where the property was seized; or

(ii) Posting a notice on an official internet government forfeiture site for at least 30 consecutive days.

(2) The published notice shall:

(i) Describe the seized property;

(ii) State the date, statutory basis, and place of seizure;

(iii) State the deadline for filing a claim when personal written notice has not been received, at least 30 days after the date of final publication of the notice of seizure; and

(iv) State the identity of the appropriate official of the seizing agency and address where the claim must be filed.

(b) Personal written notice.

(1) Manner of providing notice. After seizing property subject to administrative forfeiture, the seizing agency, in addition to publishing notice, shall send personal written notice of the seizure to each interested party in a manner reasonably calculated to reach such parties.

(2) Content of personal written notice. The personal written notice sent by the seizing agency shall:

(i) State the date when the personal written notice is sent;

(ii) State the deadline for filing a claim, at least 35 days after the personal written notice is sent;

(iii) State the date, statutory basis, and place of seizure;

(iv) State the identity of the appropriate official of the seizing agency and the address where the claim must be filed; and

(v) Describe the seized property.

(c) Timing of notice.

(1) Date of personal notice. Personal written notice is sent on the date when the seizing agency causes it to be placed in the mail, delivered to a commercial carrier, or otherwise sent by means reasonably calculated to reach the interested party. The personal written notice required by § 8.9(b) shall be sent as soon as practicable, and in no case more than 60 days after the date of seizure (or 90 days after the date of seizure by a state or local law enforcement agency if the property was turned over to a federal law enforcement agency for the purpose of forfeiture under federal law).

(2) Civil judicial forfeiture. If, before the time period for sending notice expires, the Government files a civil judicial forfeiture action against the seized property and provides notice of such action as required by law, personal notice of administrative forfeiture is not required under paragraph (c)(1) of this section.

(3) Criminal indictment. If, before the time period for sending notice under paragraph (c)(1) of this section expires, no civil judicial forfeiture action is filed, but a criminal indictment or information is obtained containing an allegation that the property is subject to forfeiture, the seizing agency shall either:

(i) Send timely personal written notice and continue the administrative forfeiture proceeding; or

(ii) After consulting with the U.S. Attorney, terminate the administrative forfeiture proceeding and notify the custodian to return

the property to the person having the right to immediate possession unless the U.S. Attorney takes the steps necessary to maintain custody of the property as provided in the applicable criminal forfeiture statute.

(4) Subsequent federal seizure. If property is seized by a state or local law enforcement agency, but personal written notice is not sent to the person from whom the property is seized within the time period for providing notice under paragraph (c)(1) of this section, then any administrative forfeiture proceeding against the property may commence if:

(i) The property is subsequently seized or restrained by the seizing agency pursuant to a federal seizure warrant or restraining order and the seizing agency sends notice as soon as practicable, and in no case more than 60 days after the date of the federal seizure; or

(ii) The owner of the property consents to forfeiture of the property.

(5) Tolling.

(i) In states or localities where orders are obtained from a state court authorizing the turnover of seized assets to a federal seizing agency, the period from the date an application or motion is presented to the state court for the turnover order through the date when such order is issued by the court shall not be included in the time period for providing notice under paragraph (c)(1) of this section.

(ii) If property is detained at an international border or port of entry for the purpose of examination, testing, inspection, obtaining documentation, or other investigation relating to the importation of the property into, or the exportation of the property from, the United States, such period of detention shall not be included in the period described in paragraph (c)(1) of this section. In such cases, the 60–day period shall begin to run when the period of detention ends, if a seizing agency seizes the property for the purpose of forfeiture to the United States.

* * *

28 C.F.R. § 8.10

§ 8.10 Claims.

(a) Filing. In order to contest the forfeiture of seized property in federal court, any person asserting an interest in seized property subject to an administrative forfeiture proceeding under the regulations in this part must file a claim with the appropriate official, after the commencement of the administrative forfeiture proceeding as defined in § 8.8, and not later than the deadline set forth in a personal notice letter sent pursuant to § 8.9(b). If personal written notice is sent but not received, then the intended recipient must file a claim with the appropriate official not later than 30 days after the date of the final publication of the notice of seizure.

(b) Contents of claim. A claim shall:

(1) Identify the specific property being claimed;

(2) Identify the claimant and state the claimant's interest in the property; and

(3) Be made under oath by the claimant, not counsel for the claimant, and recite that it is made under penalty of perjury, consistent with the requirements of 28 U.S.C. 1746. An acknowledgment, attestation, or certification by a notary public alone is insufficient.

(c) Availability of claim forms. The claim need not be made in any particular form. However, each seizing agency conducting forfeitures under the regulations in this part must make claim forms generally available on request. Such forms shall be written in easily understandable language. A request for a claim form does not extend the deadline for filing a claim. Any person may obtain a claim form by requesting one in writing from the appropriate official.

(d) Cost bond not required. Any person may file a claim under § 8.10(a) without posting bond, except in forfeitures under statutes listed in 18 U.S.C. 983(i).

(e) Referral of claim. Upon receipt of a claim that meets the requirements of §§ 8.10(a) and (b), the seizing agency shall return the property or shall suspend the administrative forfeiture proceeding and promptly transmit the claim, together with a description of the property and a complete statement of the facts and circumstances surrounding the seizure, to the appropriate

U.S. Attorney for commencement of judicial forfeiture proceedings. Upon making the determination that the seized property will be released, the agency shall promptly notify the person with a right to immediate possession of the property, informing that person to contact the property custodian within a specified period for release of the property, and further informing that person that failure to contact the property custodian within the specified period for release of the property will result in abandonment of the property pursuant to applicable regulations. The seizing agency shall notify the property custodian of the identity of the person to whom the property should be released. The property custodian shall have the right to require presentation of proper identification or to take other steps to verify the identity of the person who seeks the release of property, or both.

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28 C.F.R. § 8.13

§ 8.13 Return of property pursuant to 18 U.S.C. 983(a)(3)(B).

(a) If, under 18 U.S.C. 983(a)(3), the United States is required to return seized property, the U.S. Attorney in charge of the matter shall immediately notify the appropriate seizing agency that the 90–day deadline was not met. Under this subsection, the United States is not required to return property for which it has an independent basis for continued custody, including but not limited to contraband or evidence of a violation of law.

(b) Upon becoming aware that the seized property must be released, the agency shall promptly notify the person with a right to immediate possession of the property, informing that person to contact the property custodian within a specified period for release of the property, and further informing that person that failure to contact the property custodian within the specified period for release of the property may result in initiation of abandonment proceedings against the property pursuant to 41 CFR part 128–48. The seizing agency shall notify the property custodian of the identity of the person to whom the property should be released.

(c) 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.

31 C.F.R. § 1010.306

§ 1010.306 Filing of reports.

* * *

(b)(1) A report required by § 1010.340(a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise specified by the Commissioner of Customs and Border Protection.

(2) A report required by § 1010.340(b) shall be filed within 15 days after receipt of the currency or other monetary instruments.

(3) All reports required by § 1010.340 shall be filed with the Customs officer in charge at any port of entry or departure, or as otherwise specified by the Commissioner of Customs and Border Protection. Reports required by § 1010.340(a) for currency or other monetary instruments not physically accompanying a person entering or departing from the United States, may be filed by mail on or before the date of entry, departure, mailing or shipping. All reports required by § 1010.340(b) may also be filed by mail. Reports filed by mail shall be addressed to the Commissioner of Customs and Border Protection, Attention: Currency Transportation Reports, Washington, DC 20229.

* * *

(d) Reports required by § 1010.311, § 1010.313, § 1010.340, § 1010.350, § 1020.315, § 1021.311 or § 1021.313 of this chapter shall be filed on forms prescribed by the Secretary. All information called for in such forms shall be furnished.

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31 C.F.R. § 1010.340

§ 1010.340 Reports of transportation of currency or monetary instruments.

(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed, or shipped, or attempts to physically transport, mail or ship, or attempts to cause to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding $10,000 at one time from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures, or requests it to be done by a financial institution or any other person.

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