CASE NO. 19-20706

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

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

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

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INTRODUCTION

Plaintiff Anthonia Nwaorie is a Houston-area nurse with no criminal record whose life savings was seized as she traveled to Nigeria to open a medical clinic; Anthonia is challenging an ongoing, programmatic abuse of power by U.S. Customs and Border Protection ("CBP") involving the return of seized property after the government's time to file a civil forfeiture complaint has expired. Specifically, CBP coerces property owners into surrendering their constitutional and other legal rights as a condition of returning their seized property. Despite the command of the Civil Asset Forfeiture Reform Act ("CAFRA") that "the Government shall promptly release the property" once the deadline to file a forfeiture complaint has expired, CBP instead demands that property owners sign a Hold Harmless Agreement ("HHA") before returning their seized property. 18 U.S.C. § 983(a)(3)(B). By signing the HHA, property owners waive a number of constitutional and statutory rights—including the right to sue the government or initiate any administrative proceedings related to the seizure—and accept new legal liabilities, in order to get their property back. This policy (the "HHA policy") exceeds CBP's statutory authority and unconstitutionally requires property owners to exchange their

constitutional rights for the "benefit" of having their property returned—a "benefit" which is already required by CAFRA.

Anthonia challenges this policy on behalf of herself and a class of similarly situated property owners harmed by the HHA policy as both (1) *ultra vires* of CBP's statutory authority and (2) imposing unconstitutional conditions on property owners. She also brings two individual claims: (3) a claim for the return of the interest on her seized property and (4) a procedural due-process claim challenging her being placed on a screening list without notice and an opportunity to be heard, which has resulted in Anthonia being singled out for particularly intrusive and invasive screenings when she travels by air.

The district court dismissed each of these claims, and Anthonia appealed, noting numerous errors made by the district court in both interpreting her claims and in applying the law to these claims. First, the district court misinterpreted Anthonia's class claim that CBP was acting *ultra vires* of its statutory authority by erroneously determining that this statutory claim could not go forward unless it also alleged a constitutional violation, and thus failed to address the merits of this claim. Second, the district court dismissed Anthonia's class claim regarding unconstitutional conditions because, *inter alia*, it wrongly concluded that signing an HHA

waives no legal or constitutional rights to bring claims against the government because all such claims are already barred by sovereign immunity. Third, the district court incorrectly held that Anthonia's individual claim for interest was barred by sovereign immunity and misconstrued it as a statutory claim that Anthonia did not bring. Fourth, the district court erroneously treated her procedural due-process claim related to the screening list as an arbitrary-and-capricious claim under the APA and thus did not address the merits of this claim. The government now argues that the district court did not err, or at least that it should be affirmed anyhow. This brief responds to those arguments.

ARGUMENT IN REPLY

The government maintains that the district court's dismissal of Anthonia's claims should be affirmed. Below, Anthonia addresses the arguments raised by the government in turn. First, Anthonia rebuts the government's claim that she has no standing because, it says, she has not suffered a cognizable injury and her class claims are moot. Anthonia was harmed by the HHA Policy when she was subjected to CBP's unlawful and unconstitutional demand to sign an HHA before her property would be released. Anthonia's claims are not moot, but even if her individual claim becomes moot, she will still retain standing as the class representative

under the relation-back doctrine, specifically under the "picking off" exception to mootness. Second, Anthonia addresses the government's contention that she did not bring a valid class claim that the challenged HHA Policy is *ultra vires* of CBP's statutory authority. Third, Anthonia notes that the government has elected not to defend the district court's reasoning about her class claim challenging the HHA Policy as imposing unconstitutional conditions, waiving any argument on the merits. Fourth, Anthonia responds to the government's argument that her claim for interest was properly dismissed, noting that it is not barred by sovereign immunity and that there is a circuit split on whether interest is part of the seized *res*. Fifth, Anthonia explains why she has brought a valid procedural due-process claim under *Mathews v. Eldridge* related to being placed on a screening list without notice or an opportunity to be heard, and explains why administrative exhaustion is not required and would be inappropriate given the inadequacy of any administrative process for addressing her constitutional concerns.

I. Anthonia Has Standing to Bring Her Class Claims.

The government asserts that Anthonia lacks class standing for two reasons. First, it argues that because she never signed the HHA, she has not suffered a cognizable injury. Second, the government argues that her claims

are moot because it returned the seized money. Resp.27-36. The district court properly rejected both arguments. ROA.688-689.

A. Anthonia suffered a cognizable injury when CBP demanded that she waive her constitutional and other legal rights in order to secure the return of her seized property.

The government argues that Anthonia never suffered any cognizable injury because, by refusing to sign the HHA, she did not "submit to the challenged policy." Resp.29. This argument fails to recognize that Anthonia was unwillingly subjected to the demands of CBP's April 4, 2018, demand letter, ROA.74, and suffered harm from those unlawful and unconstitutional demands regardless of whether she signed the HHA.

In the April 4, 2018, letter, Anthonia was informed that she had to choose between: (1) signing the HHA in order to secure the return of her seized property or (2) not signing the HHA, in which case "administrative forfeiture proceedings [would] be initiated" against her seized property. ROA.74. But signing the HHA would have required her to waive a variety of legal and constitutional rights—including the right to file suit, seek interest or attorney's fees, or initiate any administrative proceeding related to the seizure—and accept new legal liabilities, such as indemnifying the government for any claims brought by others related to the seized property. *See* ROA.76; Op. Br.5-6, 31-32. As plaintiff alleges in her class claims, this

was both unlawful because it was *ultra vires* of CBP's authority under CAFRA, and it was unconstitutional because it conditioned a "benefit" (the statutory and constitutional right to the return of the seized property) on the waiver of other constitutional rights, such as the First Amendment right to petition the government for redress of grievances by filing a lawsuit or other proceeding against the government or government officials. Being subject to *ultra vires* agency action is plainly a cognizable injury. *See, e.g.*, *Family Rehab., Inc. v. Azar*, 886 F.3d 496, 504 (5th Cir. 2018) (stating that there is jurisdiction to hear "*ultra vires* claims" against a federal agency because the claims stated in the complaint "are sufficient for irreparable injury"). So too is being deprived of one's constitutional rights by being put to the choice of either waiving those constitutional rights or receiving a "benefit." *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) ("[T]he government may not deny a benefit to a person because he exercises a constitutional right.") (citations omitted).

The government claims that because Anthonia "chose not to sign" the HHA, she was not harmed. Resp.28. That is not so. By choosing to not sign the HHA, Anthonia risked permanently losing her seized property under the terms the April 4, 2018, demand letter. At the time she did so, she was being forced to choose between the "benefit" of receiving her seized

property back and the various legal and constitutional rights she would surrender by signing the HHA. Anthonia was also being subject to a demand that exceeded CBP's statutory authority under CAFRA, which does not permit the agency to demand claimants sign HHAs as a condition of returning their seized property in these circumstances and instead commands that "the Government **shall promptly release** the property pursuant to regulations promulgated by the Attorney General, and **may not take any further action** to effect the civil forfeiture of such property . . ." 18 U.S.C. § 983(a)(3)(B) (emphasis added). The weakness of the government's argument is demonstrated by its citation only to inapposite environmental cases where generalized harm to the environment was not found to constitute a cognizable injury. Resp.28.

Anthonia's injuries were real and personal. CBP's April 4 demand letter put her on the horns of a dilemma: either lose her life savings or surrender meaningful constitutional or statutory rights. For example, had she relented to CBP's demands and signed the HHA, she would have waived her right to seek interest on her seized money. ROA.76. She also would have released and forever discharged the government from "any and all action[s], suits, proceedings . . . judgments, damages, claims, and/or demands . . . in connection with the detention, seizure, and/or release" of

her property. ROA.76. Bound by those terms, she would have been forced to challenge the HHA as unenforceable in order to bring this (or any) lawsuit or to initiate any administrative proceedings. This would have left her unable to do anything about being placed on a screening list. She could not initiate administrative proceedings such as the DHS TRIP process—the very process that the government claims is the appropriate administrative remedy for her predicament—and potentially could not even submit a FOIA request related to the seizure, detention, or release of her property.

The government further suggests that the effect of signing the HHA waiver was "purely speculative," and thus Anthonia's standing is based on "hypothetical lawsuits" that were not actual or imminent. Resp.35. This notion is debunked by this very case, where Anthonia has brought two individual claims for relief—one seeking interest on her seized property, and the other seeking relief from being subjected to intensive screenings as a result of the seizure—both of which she would have waived the right to bring had she signed the HHA.

That CBP decided to release her property after she filed this lawsuit—dropping its demand that Anthonia sign the HHA—does not demonstrate that her injuries were nonexistent or hypothetical; it merely demonstrates

that CBP failed to follow through on its *ultra vires* and unconstitutional threats once Anthonia challenged CBP's abusive behavior in court.

B. CBP's return of Anthonia's money after she filed the lawsuit does not moot her class claims.

In the district court, the government claimed that Anthonia's class claims were moot because it returned her property after she filed this lawsuit. But the district court rejected this, correctly finding that Anthonia's class claims were not moot because she "had standing at the time that the complaint was filed to seek class-based relief." ROA.689. The government again argues that Anthonia has no standing because her seized property was returned after she filed the Complaint and claims she cannot serve as class representative for the same reasons. Resp.30-35. The government's argument fails to recognize the relation-back doctrine that modifies the rules of mootness in class actions. Under the relation-back doctrine, the class representative's claims relate back to the date the complaint was filed—if she had standing then, she has standing now.

Specifically, defendants may not strategically "pick off" the named plaintiffs by mooting their individual claims in order to defeat the certification of a class. Instead, so long as named plaintiffs diligently pursue class certification, their individual claims relate back to when the complaint was filed, even if subsequently mooted. Because Anthonia had individual

standing at the time the action was filed, she can continue to serve as the class representative.

Anthonia has standing now because she had standing when she filed her Complaint on May 3, 2018—none of her money had yet been returned, and CBP was demanding that she sign the HHA or face administrative forfeiture of her life savings—and because she moved for class certification on that same date. Thus, even if Anthonia's individual claim for return of property were to be mooted by the return of the interest on her seized funds, she may continue as the class representative, and the class claims are not moot.

1. The "picking off" exception to mootness permits plaintiffs to continue as class representatives even after their individual claims have been mooted.

The government erroneously claims that Anthonia may not serve as a class representative because it says her individual claims have been mooted and the class had not been certified in this case before the claims were dismissed. Resp.33-35. This ignores the "picking off" exception to mootness. This Court has a bright line rule: a defendant's attempt to "pick off" a named plaintiff does not moot a case if she has diligently pursued class certification. And this rule is meant to address exactly what happened here—where the government returns property *after* a lawsuit is filed—to

ensure that claims do not evade review. This Circuit has explained that, where, as here, "the plaintiffs have filed a timely motion for class certification and have diligently pursued it, the defendants should not be allowed to prevent consideration of that motion by tendering to the named plaintiffs their personal claims." *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1045 (5th Cir. 1981); *see also Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 922 (5th Cir. 2008).[1]

In *Zeidman*, hours after the plaintiffs presented additional evidence to certify the class, the defendants "tendered to the named plaintiffs the full amount of their personal claims and moved in the district court for the dismissal of th[e] entire action." 651 F.2d at 1036. After they gave back what they owed to the named plaintiffs, the defendants argued that the class action "must be dismissed for mootness" because "no class had yet been certified and since by virtue of the tender no named plaintiff had any remaining claim." *Id*. at 1036. This Court disagreed. It concluded that "a suit brought as a class action should not be dismissed for mootness upon

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[1] This "picking off" exception to the mootness doctrine remains valid in this Circuit after *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013), upon which the government relies, Resp.35, as noted in *Fontenot v. McCraw*, 777 F.3d 741 (5th Cir. 2015), upon which the government also relies. Resp.34-35. *See id.* at 750-51 ("*Genesis Healthcare* does not foreclose the broader *Zeidman* approach to [the] relation back doctrine . . . What is clear from *Genesis Healthcare* and *Zeidman* is that any extant exception must be extended for plaintiffs to avoid mootness in [a] putative class action.")

tender to the named plaintiffs of their personal claims, at least when, as here, there is pending before the district court a timely filed and diligently pursued motion for class certification." *Id*. at 1051. Otherwise, "in those cases in which it is financially feasible to pay off successive named plaintiffs, the defendants would have the option to preclude a viable class action from ever reaching the certification stage." *Id*. at 1050.

2. Under the "picking off" exception to mootness, Anthonia may continue to represent the class even if her individual claim is mooted.

Anthonia's case falls squarely within the "picking off" exception to mootness described in *Zeidman*. Just like the plaintiffs in *Zeidman*, Anthonia promptly filed a motion for class certification and diligently pursued class certification. In *Zeidman*, the motion for certification was filed three months after the original complaint. *Id*. at 1033-34. Here, Anthonia filed her motion to certify concurrently with her complaint. ROA.77. And, like the plaintiffs in *Zeidman*, she has sought and conducted class discovery to diligently pursue class certification. ROA.565 n.5 ("Plaintiff is actively pursuing class discovery."); *see also* ROA.246, 249, 442, 455, 468, 785-87 (documenting Anthonia's efforts to pursue class discovery). Finally, just like the defendants in *Zeidman*, CBP here returned Anthonia's property only after Anthonia filed her complaint and her motion

to certify. ROA.237; ROA.316. As a result, even if Anthonia's individual claim for return of property becomes moot, her class claims may go forward. Otherwise, the government will do exactly what this Court wanted to prevent class defendants from doing in *Zeidman*: "pick[] off" a plaintiff's claim to effectively "prevent any plaintiff in the class from procuring a decision on class certification." *Id*. at 1050.

The government's reliance on *Alvarez v. Smith*, 558 U.S. 87 (2009), to suggest mootness is misplaced. Resp.31. The reason the Supreme Court held the claims in *Alvarez* were moot was because the plaintiffs failed to continue pursuing class certification by failing to appeal the district court's denial of class certification. 558 U.S. at 92-93 ("The District Court denied the plaintiffs' class certification motion. The plaintiffs did not appeal that denial. Hence the only disputes relevant here are those between these six plaintiffs and the State's Attorney; those disputes concerned cars and cash; and those disputes are now over."). Here, the district court dismissed Anthonia's claims without ruling on class certification and Anthonia has diligently pursued class certification from the day she filed the Complaint.

Similarly, the government's suggestion that Anthonia lacks standing to seek prospective declaratory or injunctive relief, Resp.32, is unfounded. As discussed above, the relevant date for standing under the relation-back

doctrine is the date the complaint was filed. On the date Anthonia filed the Complaint and sought class certification, she was being subjected to the HHA Policy—CBP was demanding she sign the HHA before it would return her seized property. A declaration that the HHA policy was unlawful and unconstitutional or an injunction preventing CBP from imposing the HHA policy would have remedied Anthonia's situation, permitting her to recover her seized property without signing the HHA. Anthonia thus had standing to seek prospective declaratory and injunctive relief on May 3, 2018, and still has standing to bring claims seeking such relief on behalf of the class under the relation-back doctrine.

II. Anthonia Brought a Valid Class Claim that the Challenged HHA Policy Is *Ultra Vires* of CBP's Statutory Authority.

As Anthonia explained in her opening brief, she brought a valid claim that CBP's HHA Policy is *ultra vires* of its statutory authority, Op. Br.19-26, a claim that she brought under both the APA and directly under the Constitution. ROA.14. She further explained that the district court erred by failing to address this claim about CBP's statutory authority, mistakenly believing that an *ultra vires* challenge must also allege unconstitutional conduct. Op. Br.21-23.

The government does not defend the district court's failure to address this claim on the merits. Instead, it muddies the waters by (1) suggesting

that the *Larson-Dugan ultra vires* exception to sovereign immunity is no longer valid, so Anthonia cannot bring this claim directly under the Constitution, Resp.37-38, and (2) claiming that Anthonia has not identified an independent cause of action. Resp.37, 39-40. Both arguments are flatly wrong.

First, the *Larson-Dugan* exception to sovereign immunity that permits parties to challenge *ultra vires* agency conduct directly under the Constitution remains valid and none of the cases cited by the government call this into question.[2] The cases cited by the government merely stand for the fact that the *ultra vires* exception to sovereign immunity cannot be invoked when there is ambiguity about whether a government official's actions are *ultra vires* or not because they have been delegated extensive discretion to act. For example, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 n.11 (1984), involved an official exercising discretionary authority to provide "adequate" mental health services. That is a far cry from this case, where the plain meaning of CAFRA's statutory

[2] Moreover, even if the APA's waiver of sovereign immunity were to have wholly supplanted the *Larson-Dugan ultra vires* exception, as the government claims, Anthonia also brought this claim under the APA. Even if she had not, the broad sovereign immunity waiver of 5 U.S.C. § 702 applies even to claims *not* brought under the APA, so long as they challenge an agency action (including failure to act) and seek only equitable, nonmonetary relief. *See Doe v. United States,* 853 F.3d 792, 799 (5th Cir. 2017).

provision and DOJ's implementing regulation preclude any imposition of a demand that claimants sign an HHA before their property will be released. The relevant statutory command is straightforward and clear: "the Government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense." 18 U.S.C. § 983(a)(3)(B). The implementing regulation also offers no room for discretionary authority to impose additional conditions, such as signing an HHA, that have nothing to do with correctly identifying the claimant. *See* 28 C.F.R. § 8.13.

Second, the government argues that because Anthonia did not explicitly invoke the APA as a basis for this cause of action in this specific section of her opening brief, she has somehow not identified an independent cause of action. Resp.39-40. This is absurd, particularly since the error Anthonia challenges is the district court's failure to even recognize this claim as challenging CBP's statutory authority. Nonetheless, the Complaint states that the class claims are brought under both the APA and directly under the Constitution, ROA.14, and the opening brief also noted that the class claims were brought under the APA. Op. Br.56. Because CAFRA's statutory language contains no authorization to impose the HHA

policy, Anthonia also cited a series of cases decided under the APA that stand for the proposition that an agency cannot act without an express delegation of authority from Congress. Op. Br.19-20. Finally, as the arguments raised by the government about the parameters of the *ultra vires* exception demonstrate, the claim is essentially the same whether the claim is brought under the APA and evaluated under *Chevron* analysis or via the *ultra vires* exception to sovereign immunity: the question is whether the meaning of the statutory provision is clear or ambiguous. If its meaning is unambiguous, then the plain meaning controls. If it is ambiguous, then the agency has more leeway in resolving that ambiguity (but still must be reasonable). Anthonia has already explained in detail how the unambiguous language of the statute and implementing regulation preclude the challenged HHA Policy. Op. Br.4-5, 14, 19-20, 24-25; ROA.17-18, 25-26, 33-34, 43-44. The Complaint and Opening Brief thus clearly explain the basis and validity of this claim, regardless of whether it is construed as being brought under the *Larson-Dugan ultra vires* exception to sovereign immunity or under the APA.

III. The Government Fails to Address the Merits of Anthonia's Class Claim Challenging the HHA Policy as Imposing Unconstitutional Conditions.

The government does not defend the district court's decision on the merits of Anthonia's class claim challenging the HHA Policy as imposing unconstitutional conditions; it thus waives any argument that the district court correctly dismissed this claim on the merits. Anthonia rests on the discussion presented in her opening brief. Op. Br.26-46.

IV. Anthonia's Individual Claim for Interest Is Not Barred by Sovereign Immunity.

In her opening brief, Anthonia explained that her claim for return of the interest on her seized property was not barred by sovereign immunity because she has not brought a claim for pre-judgment interest and instead simply seeks the return of the full res. Op. Br.47-55. But the government insists that in order for Anthonia to get back *all* of her money, including interest, she must identify a waiver of sovereign immunity. Resp.41. This argument misconstrues the nature of Anthonia's claim for interest.

Anthonia does not dispute that consistent with *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986), the United States is immune from an award of damages judgment against it, including interest on those damages, unless there is an explicit congressional consent to the award of interest. Op. Br.48. Anthonia does argue, however, that there is a

fundamental difference between requiring the United States to pay out of its own pocket, which undoubtedly is protected by sovereign immunity, and making it give back the benefit it unjustly received. Anthonia's claim for the return of her money with interest falls into the latter category. The government kept Anthonia's money for seven months and then declined to pursue forfeiture. CAFRA required the government to give the money back. The government must return all of it, including the interest that accumulated over that period of time. In doing so, it would not be paying out of its own pocket; it would only be returning something it had no right to keep in the first place.

The government argues that this is a distinction without a difference—"a new name for an old institution." Resp.25 (quoting *Shaw*, 478 U.S. at 321). This is not so. As the Ninth Circuit explained, "the payment of interest on wrongfully seized money is not a payment of damages." *Carvajal v. United States*, 521 F.3d 1242, 1245 (9th Cir. 2008). It is "the disgorgement of a benefit actually and calculably received from an asset that [the government] has been holding improperly." *Id*. (quotation omitted). This reasoning makes sense. Absent the government's seizure and failed forfeiture, Anthonia would have received the benefits of the seized property during the time it was held by the government, including any

interest that would have accrued. Thus, Anthonia stands to be harmed if the entirety of the property, including the interest, is not returned to her. In contrast, the government is not harmed by returning the interest that accrued while it held the property. Quite the opposite: it would be unjustly enriched if permitted to keep the interest. Worse, the government would be disincentivized from promptly returning improperly held property, since the longer it holds on to it, the greater the interest that the property accrues.

At least one court within the Fifth Circuit agrees with this analysis. *See Kadonsky v. United States*, No. CA-3:96-CV-2969-BC, 1998 WL 460293, at *4 (N.D. Tex. Aug. 4, 1998) (ordering the "return [of] $1,822 to [plaintiff], with interest" after the Drug Enforcement Agency seized the money under another forfeiture statute—21 U.S.C. § 881—and was later required to return it.). The Fifth Circuit cases the government cites are simply inapplicable, as not one concerns the disgorgement of a benefit. All deal with interest as part of a remedy against the United States. *See Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 778 n.2 (5th Cir. 2010) (plaintiff could not recover interest on a Medicare reimbursement ruling against the United States); *Wilkerson v. United States*, 67 F.3d 112, 120 (5th Cir. 1995) (plaintiff prevailed on her claim of wrongful levy and could

recover damages, as well as attorney's fees as related to that claim, but not interest); *Perales v. Casillas*, 950 F.2d 1066, 1076 (5th Cir. 1992) (plaintiff could not recover the cost-of-living adjustment for the award of attorney's fees that it won against the United States); *McGehee v. Panama Canal Comm'n*, 872 F.2d 1213, 1216 (5th Cir. 1989) (plaintiff could not recover interest on judgment against the United States).

The government is correct to point out that there is a circuit split on the issue. Resp.45. Anthonia maintains that the Fifth Circuit should join its counterparts in the Eleventh, Ninth, and Sixth Circuits, as well as the Northern District of Texas, *see* Op. Br.52-54, in holding that when the government is required to disgorge a benefit, rather than pay damages, sovereign immunity does not apply.

V. Anthonia States a Valid Individual Claim for a Violation of Her Procedural Due Process Rights.

In her opening brief, Anthonia explained that she had brought a viable procedural due-process claim under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1979), challenging her inclusion on a screening list without notice and an opportunity to be heard. Op. Br.55-60. She further explained that the district court incorrectly analyzed this claim as a challenge under the APA. *Id.* The government incorrectly claims that Anthonia has not identified any protected interest for the purposes of *Mathews* analysis and

thus does not state a claim for violation of her procedural due process rights. Resp.50-55. It also wrongly states that Anthonia should be required to exhaust the DHS TRIP process before asking the judiciary to resolve her constitutional claims. Each argument will be addressed in turn.

A. At this early stage in the litigation process, Anthonia states a proper claim for a violation of her procedural due process rights.

In her opening brief, Anthonia identified four substantial private interests affected by CBP's failure to provide Anthonia with notice or an opportunity to be heard about her placement on a screening list. Op. Br.57; *see also* ROA.50-55. The government disputes this, arguing that Anthonia has not identified any protected liberty or property interest in her complaint. Resp.51. At the same time, it avoids any discussion of the *Mathews* standard, which implicates "fact-intensive considerations" requiring "an evidentiary record." *Elhady v. Piehota*, 303 F. Supp. 3d 453, 465-66 (E.D. Va. 2017); Resp.51.

At this pre-discovery stage of litigation, Anthonia has sufficiently pled facts to state a valid claim for a procedural due-process violation under *Mathews*. First, Anthonia alleges four straight-forward, uncontroversial, and very substantial private interests: (1) the ability to travel internationally and domestically without harassment, (2) having a reputation that is free

from false government stigmatization and humiliation, (3) being free from discrimination based on her race and national origin, and (4) being free from unreasonable searches and seizures. ROA.51-52. All four of these interests have been recognized as substantial private interests by the U.S. Supreme Court. *See, e.g.*, *United States v. Place*, 462 U.S. 696, 708 (1983) (liberty interest in a traveler proceeding with his itinerary); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (liberty interest in interstate travel); *Kent v. Dulles*, 357 U.S. 116, 125-27 (1958) (liberty interest in international travel); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (liberty interest in a reputation free from false stigmatization and humiliation); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (liberty interest in exercising a fundamental right without unreasonable racial classifications); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (liberty interest in being free from unreasonable searches and seizures); *see also Hernandez v. Maxwell*, 905 F.2d 94, 96 (5th Cir. 1990). All four private interests are indeed "more than an abstract need or desire and more than a unilateral expectation of it" and could not be more different from the property interest alleged by the plaintiffs in *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005), relied on by Defendants. Resp.51.

Town of Castle Rock involved an alleged property interest in police enforcement of the restraining order against a spouse. *Town of Castle Rock*, 545 U.S. at 755. Because procedural due process "does not protect everything that might be described as a 'benefit'" and because "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion," the Supreme Court found that a benefit of police enforcement of a restraining order did not constitute a protected interest. *Id*. at 756, 766. Anthonia's private interests are fundamentally different. Only two of them—the ability to travel and the reputation interest—can even be described as benefits. And neither one can be taken away by the government at its discretion.[3]

Elhady v. Kable, which the government notes it is appealing, Resp.56 n.13, provides a case in point. There, the plaintiffs claimed that by placing them on a Terrorist Screening Database, the director of the Terrorist Center violated their procedural due-process rights, despite the availability of a DHS TRIP traveler inquiry form. 391 F. Supp. 3d 562, 567-58 (E.D. Va.

[3] The government also cites a Fifth Circuit case that denied the existence of a constitutionally protected right to have certainty as to the method of execution. *Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013). This is an even easier case to distinguish, as this interest was foreclosed by a previous Fifth Circuit precedent that rejected the existence of this right. *Id*.

2019). The court agreed and granted the plaintiffs' motion for summary judgement. In the process, the court also agreed that plaintiffs' interests in international and domestic travel, as well as reputational interests, were sufficient to trigger due process requirements. *Id*. at 580. After all, like Anthonia, plaintiffs stated that they had to refrain from traveling domestically and internationally due to their screening list status and that their reputation suffered because of the extent to which the information on the Terrorist Screening List is freely disseminated between various agencies. *Id*.; *see, e.g.*, ROA.52 (stating that the reputational interests are harmed because the information on the screening list is widely disclosed); *see also* ROA.51 (stating that due to the placement on the screening lists, Anthonia has to forgo important travel).

Anthonia also sufficiently pled the other two elements of the *Mathews* analysis: that these interests are under a high risk of erroneous deprivation because of the lack of transparency regarding the substantive standards or procedures for being included on, or removed from, the list, ROA.52-54, and that the government's interests in keeping Anthonia on the list are minimal, since Anthonia does not present any national security concerns and was placed on the list due to an alleged currency-reporting violation, which the government declined to pursue. ROA.54-55.

Given the importance of the individual interests pled by Anthonia, the very high risk of erroneous deprivation due to a black-box nature of the DHS TRIP process, and the de minimis interests of the government to keep Anthonia on the list, the outcome of the *Mathews* test here should favor Anthonia. Op. Br.56-60. At the very least, due to the fact-intensive considerations of the *Mathews* test, Anthonia should have an opportunity to develop her evidentiary record and thus be allowed to move past the motion to dismiss. *See Piehota*, 303 F. Supp. 3d at 465-66 (reasoning that *Mathews* analysis requires factual record).

B. It is neither required nor appropriate for Anthonia to pursue administrative remedies for her procedural due process claim.

Anthonia explained in her opening brief why the administrative DHS TRIP process is inadequate for providing any remedy. Op. Br.58-60. Defendants nonetheless wrongly argue that Anthonia should be required to pointlessly submit to the DHS TRIP process before she challenges its constitutionality. Resp.55-56.

To begin with, neither statutes nor regulations dealing with the individuals' inclusion on screening lists require exhaustion. *See, e.g.*, 49 U.S.C. §§ 44903(j)(2), 44926(a) (absence of any requirement that travelers follow this process to challenge their inclusion on a screening list).

Moreover, where, like here, exhaustion is not congressionally required, courts have discretion to decide whether to impose an exhaustion requirement by "balanc[ing] the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992).

The interests of the individual weigh particularly heavily in three circumstances: (1) when there is no definite timeframe for administrative action or when even with a definite timeframe, there is a threat of irreparable injury absent immediate judicial review; (2) when the unexhausted administrative remedy would be plainly inadequate; or (3) when "the claimant contends that the administrative process itself is unlawful." *Taylor v. U.S. Treasury Dept.*, 127 F.3d 470, 477 (5th Cir. 1997); *see also McCarthy*, 503 U.S. at 146.

Allegations in Anthonia's complaint fall under all three categories, making exhaustion inapplicable. First, Anthonia continues to suffer an ongoing irreparable injury by being subjected to additional, invasive screening every time she travels, ROA.32; ROA.51-52, which is exacerbated by the fact that the DHS TRIP process offers no fixed time within which the government must complete its review and thus address the harm. *See* 49

C.F.R. § 1560.205(d) (offering only a "timely" written response). Second, DHS TRIP is a plainly inadequate remedy for Anthonia's alleged due process violation, since it only exists to "correct any erroneous information," 49 C.F.R. § 1560.205(d), without even confirming or denying Anthonia's presence on the screening list, let alone addressing the constitutional issues presented in her claim. ROA.53; *see Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016) (stating that "opaque" statutory remedies are "unavailable" for exhaustion). Third, by filing her complaint, Anthonia challenges the lawfulness of DHS TRIP itself, claiming that because she has never even been provided notice that she has been placed on a screening list the redress process is constitutionally inadequate. ROA.52-54.

The government identifies a Sixth Circuit case for the proposition that the exhaustion requirement should apply here. Resp.56 (citing *Shearson v. Holder*, 725 F.3d 588, 594 (6th Cir. 2013)). But if anything, the case demonstrates why it is important for Anthonia to have access to immediate judicial review. In *Shearson*, the plaintiff complained of only one detention at the border, when she and her daughter were driving into the United States from Canada. There were no additional complaints about any other stops. 725 F.3d at 591-92. Anthonia, by contrast, is continuing to suffer irreparable harm, as every time she flies, she is subjected to additional

special screenings. ROA.23; ROA.32; ROA.55. Moreover, the plaintiff in *Shearson* was not challenging the lawfulness of DHS TRIP, something that is at the core of Anthonia's complaint here. ROA.57. Therefore, the government is incorrectly asking this Court to require Anthonia to avail herself of DHS TRIP. The exhaustion requirement should not apply in her case.

CONCLUSION

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

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Respectfully submitted,
/s/ Dan Alban

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

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

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2020, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system and that service will be accomplished by the appellate CM/ECF system.

/s/ Dan Alban
Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,278 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

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/s/ Dan Alban
Counsel for Plaintiff-Appellant