No. 20-768

In the Supreme Court of the United States

GERARDO SERRANO, PETITIONER

v.

UNITED STATES CUSTOMS AND BORDER PROTECTION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

When the government seizes a vehicle for civil forfeiture under federal customs laws, whether the Due Process Clause requires that, before a final forfeiture hearing is held, an earlier post-seizure hearing before a judicial officer be held to test the legality of the detention of the vehicle.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 975 F.3d 488. The order of the district court (Pet. App. 29-82) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2020. The petition for a writ of certiorari was filed on December 1, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Federal statutes impose limitations on the export of goods, technology, and services from the United States and, in certain contexts, authorize the seizure and forfeiture of property used in connection with export violations. Congress, for instance, has authorized federal officials to "seize and detain" any "arms or

munitions of war or other articles" and "any vessel, vehicle, or aircraft containing the same" "[w]henever an attempt is made to * * * take [such articles] out of the United States." 22 U.S.C. 401(a). Property so seized "shall be forfeited." *Ibid.*

In addition, the Arms Export Control Act, 22 U.S.C. 2751 *et seq.*, authorizes the President to "control the import and the export of defense articles and defense services." 22 U.S.C. 2778(a)(1). In general, no designated "defense articles or defense services"—including certain ammunition, firearm parts, accessories, or attachments —"may be exported or imported without a license." 22 U.S.C. 2778(b)(2); see 22 C.F.R. 121.1(a) (2015) (version applicable to petitioner's conduct). "Merchandise exported * * * or attempted to be exported or sent from the United States contrary to law * * * and property used to facilitate the exporting or sending of such merchandise * * * shall be seized and forfeited to the United States." 19 U.S.C. 1595a(d).

A customs officer may seize property if there is "reasonable cause to believe that any law or regulation enforced by [U.S. Customs and Border Protection (CBP)] or Immigration and Customs Enforcement has been violated, by reason of which the property has become subject to seizure or forfeiture." 19 C.F.R. 162.21(a).

b. The Tariff Act of 1930, 19 U.S.C. 1202 *et seq.*, establishes procedures that generally govern "seizures of any property effected by customs officers under any law enforced or administered by the Customs Service." 19 U.S.C. 1600; see 19 U.S.C. 1602-1619 (procedures); 22 U.S.C. 401(b). And Congress has expressly excluded forfeitures under the Tariff Act or Section 401 from the civil-forfeiture procedures prescribed by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 18 U.S.C. 983,

see 18 U.S.C. 983(i)(2)(A) and (E), in light of the special considerations surrounding "seizures at the border" and the judgment that applying CAFRA "to Customs Service border operations would compromise the Service's ability to carry out its mission." H.R. Rep. No. 358, 105th Cong., 1st Sess. Pt. 1, at 36 (1997).

Under the Tariff Act, when the value of seized property does not exceed $500,000 or other conditions are satisfied, the government may institute summary forfeiture proceedings. 19 U.S.C. 1607(a), 1608-1609; see 19 C.F.R. 162.47. The government must provide public notice of its intent to forfeit and dispose of the property. 19 U.S.C. 1607(a). It must also provide written notice to any party who appears to have an interest in the property. *Ibid.* The written notice must, *inter alia*, identify the provisions of law allegedly violated, describe the specific acts or omissions forming the basis of the violations, and provide information about the circumstances of the seizure. 19 C.F.R. 162.31(b). If no party files a claim within 20 days, the property is summarily forfeited. 19 U.S.C. 1609(a) and (b).

A party who timely files a claim and elects a judicial forfeiture proceeding must normally post a bond to cover "the costs and expenses of the proceedings," 19 U.S.C. 1608, but that requirement is waived if the claimant demonstrates "financial inability," 19 C.F.R. 162.47(e). Upon the filing of a claim and any required bond invoking judicial forfeiture, CBP must "report promptly such seizure * * * to the United States attorney for the district * * * in which such seizure was made." 19 U.S.C. 1603(b); see 19 U.S.C. 1608. The Attorney General must then "immediately" investigate the matter and, if he finds it "probable" that "forfeiture has been incurred by reason of [a] violation," must

"forthwith" and "without delay" initiate forfeiture proceedings in federal court unless he "decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they" be pursued. 19 U.S.C. 1604.

A claimant may also seek the return of his property through alternatives to judicial forfeiture. First, the claimant may file an administrative "petition for the remission or mitigation of * * * forfeiture." 19 U.S.C. 1618. CBP may grant such a petition if it finds "mitigating circumstances" or that there was no "willful negligence" or intent to defraud or to violate the law. *Ibid.* Second, the claimant may submit an offer of compromise for the return of the property. 19 U.S.C. 1617. And third, the claimant may offer to substitute a payment of the value of the property during the pendency of the forfeiture proceedings. 19 U.S.C. 1614; see 19 C.F.R. 162.44, 162.49(b).

The notice that CBP provides to each interested person must describe the right to petition the agency for remission or mitigation of forfeiture and must state that, unless the person "provides an express agreement to defer judicial or administrative forfeiture proceedings until completion of the administrative process, the case will be referred promptly to the U.S. attorney or the Department of Justice * * * for institution of judicial proceedings, or summary forfeiture proceedings will be begun." 19 C.F.R. 162.31(a). If a claimant does not file a petition for remission, CBP either will complete administrative forfeiture proceedings or will refer the matter to the U.S. Attorney to initiate judicial forfeiture. 19 C.F.R. 162.32(a).

2. On September 21, 2015, petitioner attempted to travel from the United States to Mexico through the

Eagle Pass, Texas Port of Entry. Pet. App. 3. CBP agents stopped petitioner, detained him, and searched his pickup. *Ibid.* The agents discovered five .380-caliber bullets and a .380-caliber magazine. *Ibid.* The agents seized the bullets, magazine, and truck pursuant to 19 U.S.C. 1595a(d) and 22 U.S.C. 401, and released petitioner. Pet. App. 4 & n.4, 131-132.

Ten days later, CBP sent petitioner a notice of seizure (Pet. App. 131-139) stating that the government intended to forfeit the seized property because it had probable cause to believe that he had attempted to export munitions unlawfully from the United States. *Id.* at 132. The notice explained petitioner's options and that he "must [timely] choose one of [them]." *Ibid.*

The notice explained that petitioner could elect a "Court Action" by filing a claim and posting a bond or seeking a waiver of that bond. Pet. App. 135-136 (emphasis omitted). Once a bond was posted or waived, the notice stated, "the case will be referred promptly to the appropriate U.S. Attorney for the institution of judicial proceedings in Federal court." *Ibid.* The notice also explained petitioner's other options: filing an administrative petition for remission of the property under 19 U.S.C. 1618, see Pet. App. 132-133; offering an amount in compromise under 19 U.S.C. 1617, see Pet. App. 134-135; or, in conjunction with the other procedural options, seeking the property's "immediate[] release[]" by providing a substitute payment or letter of credit, *id.* at 137. The notice also informed petitioner that he could abandon the property or take no action, which could lead to the property's forfeiture. *Id.* at 135-137.

On October 22, 2015, petitioner demanded the immediate return of his truck or a hearing in court. Pet. App. 6. Petitioner does not contend that he sought a waiver

of the bond requirement; instead, he proffered the necessary security to cover the cost of judicial proceedings. *Id.* at 5 n.5, 6. In the ensuing months, a CBP paralegal, Juan Espinoza, informed petitioner that CBP had been delayed in referring the matter to the U.S. Attorney's Office. *Id.* at 6, 32. Petitioner no longer challenges that delay in referring the case for the initiation of judicial forfeiture proceedings. *Id.* at 13 n.10.

3. a. On September 6, 2017, petitioner filed this action in district court. Pet. App. 7. Petitioner asserted two sets of claims on his own behalf. First, petitioner asserted a claim against the government seeking the return of his truck and its contents under Rule 41(g) of the Federal Rules of Criminal Procedure, which provides that a "person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return" and contemplates that the court may order such return with "reasonable conditions to protect access to the property and its use in later proceedings," Fed. R. Crim. P. 41(g). See Pet. App. 7. Petitioner alleged that his property should be returned because its seizure and ongoing detention "without a post-seizure hearing" violated the Fourth and Fifth Amendments, and because the statutory bond requirement for electing judicial proceedings violated due process. Compl. ¶¶ 133, 135; see Pet. App. 7. Second, petitioner asserted damages claims against Espinoza and unnamed individuals under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for alleged violations of his Fourth and Fifth Amendment rights. Pet. App. 7.

Petitioner additionally asserted a claim against the government for injunctive and declaratory relief on behalf of a putative plaintiff class. Pet. App. 7. That class-

wide claim alleged that CBP's "seiz[ure of] vehicles for civil forfeiture" without "provid[ing] a prompt post-seizure hearing" in which the owner could "challenge the legality of the seizure and the continued retention of the property pending the forfeiture proceeding" violates the Due Process Clause. Compl. ¶¶ 154-155. Petitioner also filed a "mo[tion] to certify a class consisting of 'all U.S. Citizens whose vehicles are or will be seized by CBP for civil forfeiture and held without a post-seizure hearing.'" Pet. App. 7.

On October 19, 2017, CBP returned petitioner's truck. Pet. App. 8. It returned petitioner's security payment by February 26, 2018, and returned the seized bullets and magazine by May 29, 2018. *Ibid.*

b. On July 23, 2018, the magistrate judge entered a report and recommendation, Pet. App. 83-130, which was adopted by the district court on September 28, 2018, in an order that granted the government's and Espinoza's motions to dismiss, *id.* at 29-82.

First, the district court observed that, in light of the return of his property, petitioner "acknowledge[d]" that his Rule 41(g) motion for alleged Fourth and Fifth Amendment violations by the government "[wa]s moot." Pet. App. 34. The court then addressed whether, given that petitioner's own claim against the government was moot, the due-process claim that he sought to assert on behalf of a putative class was also moot. *Id.* at 38-43. The court found inapplicable the exception to mootness for putative-class contexts "[w]here the transitory nature of the [challenged] conduct" would necessarily preclude class certification, *id.* at 39, 42-43, because that exception has "invariably focused on the fleeting nature of the challenged conduct" itself, "not on the defendant's litigating strategy," *id.* at 39-40 (quoting *Genesis*

Healthcare Corp. v. *Symczyk*, 569 U.S. 66, 76-77 (2013)). The court also determined that *Zeidman* v. *J. Ray McDermott & Co.*, 651 F.2d 1030 (5th Cir. Unit A July 1981)—which "extended" the "inherently transitory doctrine" to contexts where the defendant employs a litigation strategy of "'pick[ing] off' claims [of named plaintiffs] to prevent * * * class certification"—may no longer be good law but it "remains binding precedent until it is expressly overruled." Pet. App. 40, 43 (citation omitted). The court held that petitioner's putative-class claim was not moot "under *Zeidman*." *Id.* at 43.

Rather than resolving the procedural question of class certification, the district court analyzed the putative class's due-process claim, rejected that claim on the merits, Pet. App. 44-59, and then denied class certification because petitioner had "failed to state a claim on behalf of the class members," *id.* at 59-60.

The district court separately dismissed petitioner's *Bivens* claims against Espinoza. Pet. App. 60-81.

4. The court of appeals affirmed. Pet. App. 1-28. As relevant here, the court observed that petitioner "conceded that the return of his property mooted" his own claim against the government, which was based, *inter alia*, on lack of a prompt post-seizure judicial hearing. *Id.* at 9. Based on its 1981 decision in *Zeidman*, however, the court rejected the government's argument that the putative class's due-process claim against the government was also moot. *Id.* at 2 n.1. The court instead resolved the merits of that claim in the government's favor, *id.* at 11-24, and, having affirmed the dismissal of that claim, "affirm[ed] the denial of [petitioner's] motion for class certification as moot," *id.* at 25.

The court of appeals analyzed the putative class's procedural-due-process claim under the three-factor

balancing test in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Pet. App. 12-24. The court prefaced its analysis by stating that, "[i]mportantly," petitioner neither "challenge[d] the validity of the initial seizure" here nor "allege[d] that the [CBP's] administrative delays in referring his case to the United States Attorney [for the initiation of judicial forfeiture proceedings] in this instance violate[d] due process." *Id.* at 13 n.10. On that understanding, the court determined that, in this particular context under the customs laws, due process did not require an intermediate judicial hearing to test the government's detention of property pending the resolution of judicial forfeiture proceedings. *Id.* at 12-24.

The court of appeals recognized that, for purposes of the first *Eldridge* factor, an individual has "an important interest in the possession of his or her motor vehicle." Pet. App. 13. But the court determined that the remaining *Eldridge* factors weighed against requiring an additional post-seizure hearing. *Id.* at 14-24.

With respect to the second *Eldridge* factor, the court determined that the risk of an erroneous deprivation "is minimal" in light of existing procedures. Pet. App. 14-19. The court explained that, when a person claiming seized property properly elects a judicial forfeiture proceeding, customs officials must "promptly" refer the case to a United States Attorney and the Attorney General must then "immediately" investigate and commence proceedings in federal court. *Id.* at 16 (quoting 19 U.S.C. 1603(b), 1604). The court observed that petitioner "concedes that the forfeiture proceeding itself would provide the post-seizure hearing required by due process if it were held promptly," and it stated that while petitioner himself did not challenge the delay in referring his case, claimants generally may challenge

such delays as unreasonable under *Barker* v. *Wingo*, 407 U.S. 514 (1972). See Pet. App. 13 n.10, 17. The court also stated that a claimant may move under Rule 41(g) for the return of property, which a "court can properly construe" as "a civil complaint" that can provide an opportunity for "a prompt merits determination [that] minimizes any need for an interim hearing." *Id.* at 17-19. The court further determined that the option of filing a "petition for remission offer[ed] an expedited administrative procedure" that also limited the risk of a prolonged erroneous deprivation. *Id.* at 15-16.

With respect to the third *Eldridge* factor, the court of appeals concluded that "the context of the underlying seizure" here was important, given the government's "significant" interest in preventing the export of contraband at the border. Pet. App. 20. The court explained that petitioner's property was "subject to forfeiture" based on probable cause to believe that petitioner was violating customs laws and that petitioner did not "dispute that the seizure [here] was pursuant to [that] statutory grant of authority." *Id.* at 20 & n.16. Given that context, the court explained that the government's retention of seized property "protects its interest [there]in" and that requiring "prompt post-seizure hearings in every vehicle seizure" would create a "significant administrative burden." *Id.* at 20. The court held that petitioner failed to state "a procedural due process violation" on behalf of the putative class. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 29-32) that the court of appeals erred in rejecting his putative-class-action claim for injunctive relief because the Due Process Clause demands a prompt post-seizure hearing before a judicial officer whenever CBP has seized a vehicle under federal

customs laws authorizing civil forfeiture. Petitioner further contends (Pet. 17-28, 32-35) that the court of appeals' decision conflicts with decisions of other courts of appeals. This Court, however, lacks Article III jurisdiction to decide the due-process question that petitioner presents because no live claim against the government is before the Court. In any event, petitioner's due-process contentions in this federal-customs-law context are without merit, and the court of appeals' decision rejecting those contentions does not conflict with any decision of any other court of appeals or state court of last resort. No further review is warranted.

1. Petitioner asks (Pet. i, 35-37 & n.25) this Court to review the merits of a due-process claim against the government that he seeks to assert on behalf of a putative plaintiff class. This Court, however, cannot address the merits of that claim because petitioner's own claim against the government is moot, and no certified class exists to present the class-wide claim.

a. A putative class action becomes moot once "a case or controversy no longer exists between the named plaintiff[] and the [defendant]" unless an independent basis exists for ongoing Article III jurisdiction. *Board of Sch. Comm'rs* v. *Jacobs*, 420 U.S. 128, 129 (1975) (per curiam). Petitioner has correctly "conceded" that the case or controversy between him and the government terminated by May 2018 upon the government's return of his property. Pet. App. 8-9 (noting petitioner's concession). This Court has identified three theories on which a named plaintiff whose claim has become moot may continue to litigate the procedural question of class certification on behalf of a putative class. But because none of those grounds applies here, petitioner's case against the government is moot.

First, the mootness exception reflected in *Sosna* v. *Iowa*, 419 U.S. 393 (1975), and *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980), is inapplicable. *Sosna* held that unnamed members of a class "acquire[] a legal status separate from the interest asserted by [the named plaintiff]" "[w]hen the District Court certifie[s]" a class action. 419 U.S. at 399. If the named plaintiff's claim remains live "at the time the class action is certified," a controversy between the "defendant and a member of the [certified] class" will continue to exist even if "the claim of the named plaintiff has [later] become moot." *Id.* at 402. "*Geraghty* narrowly extended [that] principle to *denials* of class certification motions." *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 74 (2013). *Geraghty* "held that where an action would have acquired the independent legal status described in *Sosna* but for the district court's erroneous denial of class certification, a corrected ruling on appeal 'relates back' to the time of the erroneous denial of the certification motion." *Id.* at 74-75 (quoting *Geraghty*, 445 U.S. at 407 n.11). *Geraghty* thus "explicitly limited its holding to cases in which the named plaintiff's claim remains live at the time the district court denies class certification." *Id.* at 75. This Court in *Alvarez* v. *Smith*, 558 U.S. 87 (2009), later invoked *Geraghty* in holding that, after the district court denied class certification, the merits of a due-process challenge to a State's forfeiture procedure became moot once the government returned the named plaintiffs' seized property. *Id.* at 92-93.

Petitioner cannot benefit from *Sosna* or *Geraghty* because his claim against the government became moot when the government returned his property, Pet. App. 8-9—*before* the district court's order denying class

certification, *id.* at 29, 59-60. Petitioner argues that the fact that he "*filed a motion* for class certification before his vehicle was returned" saves this case from mootness and distinguishes it from *Smith*. Pet. 35 & n.25 (emphasis added). But petitioner misses the point. A putative class obtains an independent legal status sufficient to preserve an Article III case or controversy only when a court *resolves* a class-certification motion. Where, as here, "the named plaintiff has no personal stake in the outcome *at the time class certification is denied*, relation back of [the] appellate reversal of that denial still would not prevent mootness of the action." *Geraghty*, 445 U.S. at 407 n.11 (emphasis added).

Second, petitioner cannot benefit from *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980). Petitioner contends (Pet. 36) that *Roper* acknowledged an "exception to mootness" when the "government seeks to 'pick off' class representatives before a class can be certified." But this Court has explained that the passage he invokes was "dicta" and that *Roper*'s "holding turned on a specific factual finding that the plaintiffs possessed a continuing personal economic stake in the litigation." *Genesis Healthcare*, 569 U.S. at 78. *Roper* found that named plaintiffs whose own damages claims were resolved had an economic interest sufficient to allow them to appeal the denial of class certification because, if the class were certified and recovered damages, they could seek compensation for attorney's fees and costs they incurred on behalf of the class. 445 U.S. at 332, 334 n.6, 336, 338 n.9. Petitioner identifies no analogous Article III interest that might save this case from mootness.[1]

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[1] *Roper* may lack "continuing validity in light of" this Court's later recognition that an "'interest in attorney's fees is * * * insufficient

Third, *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), and *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), provide no basis for Article III jurisdiction. Petitioner contends (Pet. 37) that this case falls within the "inherently transitory" exception to mootness that those cases reflect. But *Gerstein* recognized an exception to mootness in a *certified*-class-action context, see 420 U.S. at 107, for the "narrow class of cases" in which the challenged conduct "is *by nature* temporary" such that "it is most unlikely that *any* given individual could have his * * * claim decided on appeal" before the conduct ends. *Id.* at 110 n.11 (emphases added). *McLaughlin* extended that principle to allow a trial court to certify a class "after the named plaintiffs' claims had become moot" if the court has insufficient "'time to rule on a motion for class certification before the proposed representative's individual interest expires.'" 500 U.S. at 52 (citation omitted). But as the facts of this case reflect, the government's seizure and retention of property for forfeiture is not inherently transitory; claimants are not precluded from bringing due-process challenges or seeking class certification during that period.

Petitioner concedes (Pet. 37 n.27) that the action he challenges is not inherently too brief. He instead contends (*ibid.*) that his claim for a prompt hearing "is transitory * * * because the government can unilaterally moot the claim." But the possibility that a defendant may provide the relief a plaintiff seeks exists in many cases. The "doctrine has invariably focused on the fleeting *nature of the challenged conduct* giving rise to the claim, not on the defendant's litigation strategy."

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to create an Article III case or controversy where none exists on the merits.'" *Genesis Healthcare*, 569 U.S. at 78 n.5 (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 480 (1990)).

Genesis Healthcare, 569 U.S. at 76-77 (emphasis added). This Court has thus rejected the view that a defendant's ability "to 'pick off' named plaintiffs" is sufficient to satisfy *Gerstein*'s "'inherently transitory'" exception to mootness. *Id.* at 76 (citation omitted).[2]

The Fifth Circuit and the district court in this case did not determine otherwise and thus did not apply *Gerstein*'s "inherently transitory" exception. Pet. App. 2 n.1, 38-43. They instead concluded that they were obligated to follow a broader extension of that exception that the Fifth Circuit created in 1981. *Ibid.* Petitioner does not, and could not plausibly, seek refuge in that quarter.[3]

b. In any event, even if any of the three mootness exceptions for putative class actions were applicable, none would permit what petitioner seeks: an adjudication of the *merits* of a claim pressed by a named plaintiff whose individual claim is moot on behalf of a putative

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[2] Although petitioner's *Bivens* claim against Espinoza is not moot, petitioner does not seek this Court's review to challenge the dismissal of that claim on qualified-immunity grounds. Pet. 35; Pet. App. 27. In any event, the existence of a live damages claim against Espinoza would not preserve a case or controversy between petitioner and *the government* on a class-wide claim seeking only injunctive and declaratory relief. Cf. Compl. ¶¶ 152-160 (putative-class claim).

[3] In *Zeidman* v. *J. Ray McDermott & Co.*, 651 F.2d 1030 (5th Cir. Unit A July 1981), the court concluded that a defendant's "tender to the named plaintiffs of their personal claims" should not moot a putative class action where "there is pending before the district court a timely filed and diligently pursued motion for class certification." *Id.* at 1051. But as noted above, this Court has since rejected such an extension of *Gerstein*'s "'inherently transitory' rationale." *Genesis Healthcare*, 569 U.S. at 76-77. Although it has not decided whether "*Zeidman* has been overruled," even the Fifth Circuit has acknowledged that its validity "may be in doubt." *Fontenot* v. *McCraw*, 777 F.3d 741, 750 (2015).

class that has not been certified. *Geraghty* makes clear that "[a] named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified." 445 U.S. at 404. *Roper* emphasizes that its Article III rationale allows a court "to entertain [an] appeal *only* to review the asserted procedural error [in denying class certification], not for the purpose of passing on the merits of the substantive controversy." 445 U.S. at 336 (emphasis added). And *McLaughlin*'s application of *Gerstein*'s exception for inherently transitory conduct simply reflects "that by *obtaining* class certification, plaintiffs preserve[] the merits of the controversy" for future litigation. *McLaughlin*, 500 U.S. at 51 (emphasis added).

Petitioner might have invoked such mootness doctrines to seek review of the denial of class certification on the ground that the certification decision does not turn on the merits, that the court of appeals and district court erred in conflating the distinct certification and merits inquiries (Pet. App. 25, 59-60), and that a remand would be warranted for the district court to re-exercise its discretion under Rule 23 of the Federal Rules of Civil Procedure and decide whether to certify a class without that error.[4] Cf. *Amgen Inc.* v. *Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013) ("Rule 23 grants courts no license to engage in free-ranging

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[4] Petitioner asserts (Pet. 36 n.25) in passing that class certification would be "appropriate" under Rule 23(b)(2), but he presents no class-certification question for this Court's review. Pet. i; see *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) ("[T]he fact that [petitioner] discussed this issue in the text of [his] petition for certiorari does not bring it before" this Court, because "Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.") (citation omitted; some brackets in original).

merits inquiries at the certification stage."). But petitioner instead seeks this Court's review of the *merits* of a due-process claim on behalf of a non-certified class. Pet. i. No Article III jurisdiction exists to resolve the merits of that claim because petitioner's own claim is moot and a plaintiff class that might assert its own claim has not been certified. Simply put, no entity is before this Court with a live claim for relief against the government that might allow the Court to adjudicate the merits of that claim. See *Geraghty*, 445 U.S. at 408 ("It would be inappropriate for this Court to reach the merits of this controversy" based on a mootness ruling that "extends only to the appeal of the class certification denial.").[5]

2. In any event, the court of appeals correctly determined that, in the context of this case, existing Tariff Act procedures for the forfeiture of property seized at the border satisfy due process.

a. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). As a result, "some form of hearing is required before an individual is finally deprived of a property interest." *Ibid.* Precisely

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[5] "The only way a class-action defendant * * * can assure itself" that "the entire plaintiff class [will be] bound by res judicata just as [the defendant will be] bound" is "to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 805 (1985). But if a named plaintiff whose claim was moot could obtain a merits ruling on a claim for a non-certified putative class, the defendant would risk a decision on the merits that would bind it without any risk that the plaintiff or potential class members would be bound by an adverse decision.

what process is required, however, is context specific. *Id.* at 334. *Eldridge* accordingly concluded that determining the "specific dictates" of procedural due process "generally" requires a consideration of three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

In this forfeiture context, *Eldridge*'s three-part balancing largely collapses into a single question: Is the timing of the hearing to resolve the forfeiture claim adequately supported by valid government interests? That is because no one disputes "the fairness and reliability of the existing [forfeiture] procedures," *Eldridge*, 424 U.S. at 343. Petitioner contends only that the forfeiture hearing is insufficiently prompt. Pet. 28 (citing Pet. App. 17). In addition, the private interest at stake concerns only the *length* of the deprivation, not the nature of the seizure. Petitioner, for instance, does not "challenge the validity of the initial seizure" of his property, Pet. App. 13 n.10; see Pet. 32, nor does he dispute that the government could properly hold the property pending sufficiently prompt proceedings. When a due-process challenge concerns only the *timing* of forfeiture proceedings, this Court's cases have focused principally on the strength of the governmental interests at stake in the context of the procedures that are available. *Eldridge* is thus consistent with the Court's context-specific decisions addressing whether these interests justify the timing of proceedings to forfeit personal property.

b. Since *Eldridge*, this Court has twice rejected due-process challenges to the Tariff Act's civil-forfeiture procedures. Both of those decisions illustrate that petitioner's current challenge also lacks merit.

In *United States* v. *$8,850*, 461 U.S. 555 (1983), this Court addressed a due-process challenge to a delay in instituting a civil-forfeiture proceeding under Tariff Act procedures, which required a customs officer to refer a forfeiture case to a United States Attorney (before Congress required that referral to be made "promptly") and required the United States Attorney "immediately" to investigate and to file "forthwith" and "without delay" a forfeiture action if forfeiture was warranted. *Id.* at 557-558 & n.3 (quoting 19 U.S.C. 1603-1604 (Supp. V 1981)); see *id.* at 566 n.16. Like petitioner, the claimant in *$8,850* did not dispute that the eventual "judicial [forfeiture] hearing" would be sufficient, *id.* at 562; she instead argued that the 18-month delay before those proceedings unconstitutionally deprived her of property without due process of law. *Id.* at 556, 564. The Court recognized that "there is no obvious bright line dictating when a postseizure hearing must occur," *id.* at 562, and concluded that the "balancing inquiry" articulated in *Barker* v. *Wingo*, 407 U.S. 514 (1972)—for assessing whether delay violates the right to a speedy trial—adequately accounted for relevant due-process concerns by "balancing the interests of the claimant and the Government" in light of the "length of delay," "the reason [there]for," the individual's "assertion of his right," and any resulting "prejudice." *$8,850*, 461 U.S. at 564-565.

The Court in *$8,850* then conducted a balancing like the one contemplated by *Eldridge*. The Court explained that the private interest was significant because the claimant had been "deprived of [a] substantial sum of

money for a year and a half," imposing a "significant burden." *$8,850*, 461 U.S at 565. The Court also found other considerations important: the government "must be allowed some time to decide whether to institute forfeiture proceedings"; that serves all parties because "the Government may return the money without formal proceedings"; and some delay to allow the government to consider a "petition for remission" can "favor both the claimant and the Government" because the government's entitlement to property is often "clear" and allowing a federal official to "exercise his discretion and allow remission or mitigation" can avoid more "formal and expensive judicial forfeiture proceedings." *Id.* at 565-566. The Court further recognized that other processes allowed the claimant to "trigger rapid filing of a forfeiture action," either by "fil[ing] an equitable action" or by filing a motion under Federal Rule of Criminal Procedure 41(e) (the predecessor to Rule 41(g)) if she "believes the initial seizure was improper." *$8,850*, 461 U.S. at 569. Balancing those factors, the Court determined that the delay under the circumstances of that case did not deprive the claimant of property without due process of law. *Id.* at 569-570.

The Court again addressed a due-process challenge to the Tariff Act forfeiture process in *United States* v. *Von Neumann*, 474 U.S. 242 (1986), in the context of the seizure of an automobile at the border. After the parties relied on both *$8,850* and *Eldridge* in their briefing, see, *e.g.*, U.S. Br. at 27-28, 30, 39, *Von Neumann*, *supra* (No. 84-1144); Resp. Br. at 5, 10-11, *Von Neumann*, *supra*, the Court determined that *$8,850* held that "due process requires a postseizure determination within a reasonable time of the seizure" and that "[i]mplicit in this Court's discussion of timeliness in *$8,850* was the

view that *the forfeiture proceeding, without more, provides the postseizure hearing required by due process* to protect [a claimant's] property interest in the [seized item]." 474 U.S. at 247, 249 (emphasis added). Although the vehicle's owner emphasized "the importance of automobiles to citizens" in arguing that a petition for remission must be resolved expeditiously, the Court rejected that contention, reiterating that the claimant's "right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to the car and the money [that the claimant later substituted for the car]." *Id.* at 250-251.

c. The same factors considered under the three-part *Eldridge* framework lead to the same conclusion here. First, as the court of appeals explained, individuals have a substantial interest in possessing their vehicles, Pet. App. 13, though that interest in this context is a possessory one only for the period between the seizure and final forfeiture hearing. That interest is also protected by the Tariff Act option to request release of the property in exchange for substitute security. 19 U.S.C. 1614.

Second, in light of existing processes in the Tariff Act context, the "'risk of erroneous deprivation of [that time-limited] interest'" is minimal in light of "the remedial procedures available" such that the probable value of additional process is not substantial. Pet. App. 14 (citation omitted). Congress has already required that customs officials "promptly" refer cases to the Department of Justice, 19 U.S.C. 1603(b), which must "immediately" investigate and commence appropriate proceedings "forthwith" and "without delay" in federal court. 19 U.S.C. 1604. That process can "result in return of the property and any bond without further delay." Pet. App. 16-17; see *United States* v. *One 1971 BMW 4-Door*

Sedan, 652 F.2d 817, 820 (9th Cir. 1981) ("[T]he duty of the United States Attorney to investigate and make a determination, independent of the seizing agency, as to whether forfeiture [is] warranted serve[s] to safeguard against an erroneous seizure."). And in atypical cases where unreasonable delay makes normal legal remedies inadequate, the court of appeals properly recognized that a claimant may bring an equitable action akin to a Rule 41(g) motion in criminal proceedings to compel judicial review of the forfeiture. Pet. App. 18.

The claimant may also file a petition for remission, which enables the agency to obtain relevant testimony. 19 U.S.C. 1618. That process not only allows the government to exercise discretion to forgo forfeiture in whole or in part, but also facilitates early identification of material errors. See Pet. App. 15.

Those processes are constitutionally sufficient in this border context, where most seizures for customs violations made by trained customs officials are relatively straightforward. There is no dispute in this case, for instance, that petitioner's vehicle was being used to transport bullets and a magazine out of this country. Pet. App. 20 n.16. And petitioner himself does not dispute that the seizure of his property was legally authorized. *Id.* at 13 n.10, 20 n.16.

Third, the government's interest in this border context is substantial. "One of the ways in which the Executive protects this country is by attempting to control the movement of people and goods across the border, and that is a daunting task." *Hernandez* v. *Mesa*, 140 S. Ct. 735, 746 (2020). And given the role of organized criminal enterprises in unlawful smuggling and the volume of cross-border traffic, the government's interest in a streamlined process for the seizure and forfeiture

of items for violations of laws enforced at the border is substantial. Adding an additional judicial "post-seizure hearing[] in *every* vehicle seizure" on top of the multiple existing procedures specified by Congress would impose a "significant administrative burden," requiring the further diversion of CBP personnel charged with protecting the border. Pet. App. 20 (emphasis added). Congress specifically tailored the Tariff Act's existing procedures for the border context, see pp. 2-3, *supra*, and its judgment regarding appropriate procedures in light of the interests at stake is entitled to substantial weight. See Pet. App. 14.[6]

d. Notably, petitioner has failed to challenge the validity of the initial seizure of his truck, and he has conceded that the forfeiture hearing contemplated by the Tariff Act would be sufficient if it were held promptly. Pet. App. 17, 20 n.16. Further, petitioner is not alleging that CBP's lengthy "administrative delay in referring his case to the United States Attorney in this instance violate[d] due process." *Id.* at 13 n.10; see *id.* at 6. Instead, petitioner more broadly challenges (Pet. 29-31) the Tariff Act's forfeiture process as constitutionally insufficient. But as explained above, that process already requires that, upon receiving a claim (and any required bond) invoking judicial-forfeiture proceedings, CBP shall "promptly" refer the case to the Department of

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[6] Petitioner incorrectly asserts (Pet. 10) that CBP has a financial incentive under 31 U.S.C. 9705 to forfeit property. Section 9705 governs the Department of the Treasury Forfeiture Fund, which Congress has made "available to the Secretary [of the Treasury]" for certain purposes. 31 U.S.C. 9705(a). The Secretary has delegated that authority to the Director of the Treasury Executive Office for Asset Forfeiture. U.S. Dep't of the Treasury, *Treasury Directive 15-04* (Oct. 10, 2017), https://go.usa.gov/xsVbE. CBP has no control over those funds.

Justice, 19 U.S.C. 1603(b); see 19 U.S.C. 1608, which must "immediately" investigate the matter and then "forthwith" and "without delay" initiate forfeiture proceedings in federal court if forfeiture is warranted, 19 U.S.C. 1604. Nothing in that statutorily prescribed forfeiture process, which incorporates options to trigger judicial proceedings upon unreasonable delay, violates due process. And if that process is unreasonably delayed in any particular case, the claimant may challenge that delay as a violation of due process. See *$8,850*, 461 U.S. at 569. Petitioner's decision not to bring such a delay-based challenge in this case does not render Congress's chosen process for Tariff Act forfeitures unconstitutional.

3. Petitioner contends (Pet. 17-31) that the decision of the court of appeals conflicts with decisions from other courts of appeals and state high courts. No relevant conflict exists that might merit this Court's review.

The question that petitioner asks this Court to resolve in this forfeiture case involving Tariff Act procedures is whether "due process require[s] a prompt post-seizure hearing to test the legality of the seizure and continued detention of the vehicle pending the final forfeiture trial" when "the government seizes a vehicle for civil forfeiture." Pet. i. The resolution of that question under the appropriate balancing test is necessarily context-specific. But petitioner identifies no lower-court decision that addresses a similar case involving the Tariff Act procedures at issue here, much less one that conflicts with the judgment of the court of appeals. Indeed, the decisions on which petitioner relies specifically distinguished the Tariff Act from the contexts they addressed, underscoring the absence of any relevant division of authority.

Petitioner's assertion of a conflict primarily relies (Pet. 3, 18-20) on *Krimstock* v. *Kelly*, 306 F.3d 40 (2d Cir. 2002) (Sotomayor, J.), cert. denied, 539 U.S. 969 (2003), and *Smith* v. *City of Chicago*, 524 F.3d 834 (7th Cir. 2008), vacated *sub nom. Alvarez* v. *Smith*, 558 U.S. 87 (2009). Petitioner thus contends (Pet. 3, 17) that this Court previously granted certiorari to review the Seventh Circuit's decision in *Smith* to resolve "the [same] question" that petitioner now presents before *Smith* became moot while on review. Petitioner is incorrect.

This Court in *Smith* granted certiorari only on the following *methodological* question:

> In determining whether the Due Process Clause requires a State or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial" test employed in *United States v. $8,850*, 461 U.S. 555 (1983) and *Barker v. Wingo*, 407 U.S. 514 (1972) or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

Pet. at i, *Alvarez* v. *Smith*, *supra* (No. 08-351); see *Alvarez* v. *Smith*, 555 U.S. 1169 (2009) (granting certiorari "limited to Question 1 presented by the petition"). Both of the courts of appeals in *Smith* and *Krimstock* applied the *Eldridge* test rather than the *Barker* test. See *Smith*, 524 F.3d at 836-837; *Krimstock*, 306 F.3d at 68. And the petition in *Smith* sought this Court's review based on an alleged methodological conflict between *Smith* and *Krimstock* and other courts applying the *Barker* test. Pet. at 34-36, *Smith*, *supra*. Any such conflict cannot aid petitioner, however, because the court of appeals here, like both *Smith* and *Krimstock*, applied

Eldridge's balancing test to resolve petitioner's due-process contentions. Pet. App. 12-21.[7]

Moreover, *Smith* and *Krimstock* illustrate that the distinct due-process question that petitioner presents depends on context and cannot properly be resolved with a one-size-fits-all judgment for all federal and state forfeiture procedures arising in different contexts and implicating different governmental interests. The *Eldridge* test itself requires a balancing of the interests at stake and the existing procedures alleged to be inadequate. As a result, *Smith* emphasized that the procedures relevant to the forfeiture of seized property "under U.S. customs laws" involved "significant differences" from the state-law procedures it analyzed. *Smith*, 524 F.3d at 837 ("[I]mportantly, the customs laws allowed procedures for [a claimant] to obtain a speedy release of his automobile prior to the actual forfeiture hearing."). *Krimstock* similarly observed that, unlike the state procedures it found deficient, forfeiture procedures under "U.S. customs laws" allow a claimant to seek judicial relief more promptly and provide for "release[] [of] the claimant's vehicle after he [posts] a bond pursuant to 19 U.S.C. § 1614." *Krimstock*, 306 F.3d at 52 n.12. Both decisions thus demonstrate that the invalidation on due-process grounds of a state forfeiture process arising in a particular context does not mean that the distinct Tariff Act processes applicable to customs seizures at the border also violate due process.

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[7] The government explained in *Smith* that the "choice between [the frameworks in *Eldridge* and *$8,850*] is in large measure immaterial" because their analyses are fully consistent with each other in the context of challenges to the timing of forfeiture proceedings. U.S. Amicus Br. at 7-8, *Smith*, *supra* (No. 08-351).

Petitioner incorrectly asserts (Pet. 19) that *Lee* v. *Thornton*, 538 F.2d 27 (2d Cir. 1976), conflicts with the decision below in purportedly holding that an immediate post-seizure probable-cause hearing is required when vehicles are seized under federal customs laws. In fact, applying the *Eldridge* test, *Lee* "h[e]ld that when vehicles are seized for forfeiture or as security, action on *petitions for mitigation or remission* should be required within 24 hours." *Id.* at 33 (emphasis added). That timing decision about administrative petitions (not judicial hearings) gave rise to the Ninth Circuit's decision in *Von Neumann* v. *United States*, 729 F.2d 657, 660 n.6, 661-662 (9th Cir. 1984), which this Court *reversed* by holding that constitutional due process does not "entitle[] [a claimant] to a speedy answer to his [administrative] remission petition" and that the claimant's "right to a forfeiture proceeding meeting the *Barker* test satisfies any due process right with respect to [a] car" seized at the border. *Von Neumann*, 474 U.S. at 250-251. *Lee* also stated that "some kind of hearing on probable cause for the detention before [*a customs*] *officer* * * * should be provided within 72 hours if the petition is not granted in full." 538 F.2d at 33 (emphasis added). But even if that statement about additional agency process had survived this Court's subsequent decisions in *$8,850* and *Von Neumann*, it would not suggest that due process requires the type of intermediate *judicial* hearing that petitioner requests.

The state-court decisions on which petitioner relies (Pet. 20-21) are even further afield. In *Olson* v. *One 1999 Lexus*, 924 N.W.2d 594 (Minn. 2019), the court determined that the State of Minnesota did *not* violate a driver's procedural due-process rights by waiting 18 months to provide a post-seizure forfeiture hearing

after seizing the car incident to the driver's arrest for driving while impaired. *Id.* at 608-612; see *id.* at 599-600. The court's additional holding that a prompt judicial hearing was necessary to consider a state-law innocent-owner defense advanced by the driver's mother, see *id.* at 612-613, is irrelevant in this customs context where no such third-party defense is implicated. Similarly, in *State* v. *Hochhausler*, 668 N.E.2d 457 (Ohio 1996), the court determined that an Ohio statute authorizing vehicle seizure without a *pre*-seizure hearing was unconstitutional "as applied to the owner of a vehicle that has been seized and immobilized because the vehicle was being operated by a third person when that person was arrested on a drunk-driving charge." *Id.* at 469. And the court in *County of Nassau* v. *Canavan*, 802 N.E.2d 616 (N.Y. 2003), which also involved a state statute authorizing the seizure of vehicles operated by drunk drivers, also concluded that a post-seizure probable-cause hearing was necessary, emphasizing that where state law (unlike the Tariff Act) gave no option of "post[ing] a bond" to recover the vehicle, an innocent owner would have no way to assert her continued interest before the final forfeiture hearing that, under the state forfeiture statute, could take "years" to resolve. *Id.* at 623-625. None of those decisions balancing the interests implicated in particular state-forfeiture contexts conflicts with the court of appeals' due-process decision in this Tariff Act case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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