

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MOHAMMAD NASSIRI, *et al.*
Plaintiff,

Plaintiffs,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Social Security Administration; SSA
AGENT NICK; SSA-AGENT 2;
MARY HAGAR; DUKE DUC TRAN;
and STATE and/or LOCAL AGENTS
CDI DOES 21-40,

Defendants.

CASE NO. 15cv0583-WQH-NLS

ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss as Moot All Claims Against Acting Commissioner Nancy A. Berryhill (ECF No. 104) filed by Defendant Nancy A. Berryhill, Acting Commissioner of Social Security, Social Security Administration (“SSA”) (“Defendant Berryhill”).

I. Background

On March 14, 2015, Plaintiffs initiated this action by filing a Class Action Complaint. (ECF No. 1). On May 12, 2015, Plaintiffs filed the First Amended Class Action Complaint (“FAC”). (ECF No. 15). On December 27, 2015, Plaintiffs filed the Second Amended Class Action Complaint (“SAC”). (ECF No. 63). On August 18, 2016, the Court issued an order granting in part and denying in part Defendant

1 Commissioner of Social Security Carolyn W. Colvin’s¹ motion to dismiss the SAC.
2 (ECF No. 79). The Court denied the motion to dismiss as to the sixth [Equal
3 Protection], eleventh [First Amendment], and thirteenth [Fourth and Fourteenth
4 Amendment] causes of action filed by Plaintiffs Anh Van Thai, Diep Thi Nguyen,
5 Huynh, Trai Chau, and Hoi Cuu Quan Nhan VHCH, and granted the motion to dismiss
6 as to all other claims. *Id.* at 18. The Court stated, “To the extent that Plaintiffs seek
7 damages against the United States, Commissioner Colvin sued in her official capacity,
8 and the SSA for constitutional torts allegedly committed by federal agents, the
9 Complaint fails to demonstrate that the United States has waived its sovereign immunity
10 with respect to any of Plaintiffs’ claims for monetary relief.” *Id.* at 17.

11 On September 2, 2016, Defendants Colvin and the United States filed a motion
12 to dismiss claims against them as moot. (ECF No. 82). On October 21, 2016, Plaintiffs
13 filed a motion for leave to amend the complaint and for leave to file a Third Amended
14 Complaint (“TAC”). (ECF No. 92).

15 On December 21, 2016, the Court issued an order granting in part the motion for
16 leave to amend the complaint. (ECF No. 100). The Court ordered that “Plaintiffs may
17 file a Third Amended Complaint, naming only the remaining Defendants Carolyn
18 Colvin, Nicholas Pilcher, Sundeep Patel, William Villasenor, Dulce Sanchez, Duke
19 Tran and Mary Hagar – and only including the sixth [Equal Protection], eleventh [First
20 Amendment], and thirteenth [Fourth and Fourteenth Amendment] causes of action
21 alleged in Plaintiffs’ Proposed Third Amended Complaint.” *Id.* at 6-7. On January 10,
22 2017, Plaintiffs filed the TAC. (ECF No. 101).

23 In the TAC, Plaintiffs allege “they have been the subject of a campaign of
24 intimidation by agents and employees of the Social Security Administration” after filing
25

26
27 ¹ In the Motion to Dismiss, Defendant Berryhill asserts that “Nancy A. Berryhill
28 is now the Acting Commissioner of Social Security. Pursuant to Rule 25(d) of the
Federal Rules of Civil Procedure, Nancy A. Berryhill is automatically substituted in for
Carolyn W. Colvin as her successor as Acting Commissioner of Social Security.” (ECF
No. 104 at 2 n.1).

1 an earlier action in this district.² *Id.* at ¶ 1. Plaintiffs allege that “Defendant SSA has
2 acted in a bad faith and in a discriminatory manner against plaintiffs, as plaintiffs who
3 had filed affidavits against SSA” in the *Phan* action “were singled out for illegal
4 searches and seizures and explicit threats of (i) criminal prosecution for filing fraudulent
5 applications; and (ii) losing benefits whereas other applicants not filing affidavits or not
6 suing SSA were not searched and seized, interrogated, or threatened with losing
7 benefits.” *Id.* at ¶ 71. “This case is brought as a class action to obtain a declaratory
8 judgment that SSA and other unknown state and/or local agents have been violating the
9 plaintiffs’ federal and state constitutional rights.” *Id.* at ¶ 2. On January 13, 2017, the
10 Court issued an order denying the motion to dismiss filed by Defendants Colvin and the
11 United States as moot. (ECF No. 103).

12 On January 24, 2017, Defendant Berryhill filed the Motion to Dismiss as Moot
13 All Claims Against Acting Commissioner Nancy A. Berryhill. (ECF No. 104). On
14 February 14, 2017, Plaintiffs filed a response in opposition.³ (ECF No. 105). On
15 February 17, 2017, Defendant Berryhill filed a reply. (ECF No. 108).

16 **II. Contentions of the Parties**

17 Defendant Berryhill contends that the only remaining claims against her should
18 be dismissed as moot. Defendant Berryhill asserts that the SSA has closed its
19 investigation of Plaintiffs’ counsel Alexandra Manbeck. Defendant Berryhill contends
20 that there is no ongoing conduct by SSA for the Court to enjoin.

21 Plaintiffs contend that this action is not moot as to Defendant Berryhill because
22 Plaintiffs continue to suffer physical and emotional damages arising from searches and

24 ² See *Phan et al v. Colvin*, Case No. 13-cv-02036-WQH-NLS (S.D. Cal. filed
25 Aug. 30, 2013) (“the *Phan* action”).

26 ³ Plaintiffs’ response in opposition (ECF No. 105) was due on February 13, 2017,
27 or fourteen days prior to the February 27, 2017 hearing date on Defendant Berryhill’s
28 Motion to Dismiss (ECF No. 104). See CivLR 7.1(e)(2). On March 1, 2017, Plaintiffs
filed the Ex Parte Motion for One-Day Extension to file the opposition on February 14,
2017 because of a recent personal injury to Plaintiffs’ counsel. (ECF No. 113). The
Court grants the Ex Parte Motion (ECF No. 113) and considers Plaintiffs’ response in
opposition (ECF No. 105).

1 interviews conducted by individual Defendants employed by the SSA in 2014 and 2015.
2 Plaintiffs contend that Defendant Berryhill and the SSA continue to retaliate against
3 Plaintiff Anh Thai by withholding Social Security benefits from her. Plaintiffs contend
4 that Defendant Berryhill “can still be sued for injunctive relief with respect to plaintiff
5 Anh Thai, and the *Bivens* claims of SSA’s employees are of a compensatory and
6 punitive character and are properly joined with plaintiffs’ civil rights claims against
7 SSA.” (ECF No. 105 at 11). Plaintiffs contend that this Court should deny the Motion
8 to Dismiss because this Court has previously rejected Defendants’ identical motion to
9 dismiss on mootness grounds.

10 **III. Analysis**⁴

11 “The basic question in determining mootness is whether there is a present
12 controversy as to which effective relief can be granted.” *Feldman v. Bomar*, 518 F.3d
13 637, 642 (9th Cir. 2008) (quoting *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244
14 (9th Cir. 1988)). “A federal court lacks jurisdiction unless there is a ‘case or
15 controversy’ under Article III of the Constitution.” *McCullough v. Graber*, 726 F.3d
16 1057, 1059 (9th Cir. 2013). “Article III requires that a live controversy persist
17 throughout all stages of the litigation.” *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d
18 1125, 1128-29 (9th Cir. 2005) (en banc). “However, ‘[t]he burden of demonstrating
19 mootness is a heavy one.’” *Feldman*, 518 F.3d at 642 (quoting *Gordon*, 893 F.2d at
20 1244). “In general a case becomes moot when the issues presented are no longer live
21 or the parties lack a legally cognizable interest in the outcome.” *Pub. Utils. Com’n of*
22 *State of Cal. v. F.E.R.C.*, 100 F.3d 1451, 1458 (9th Cir. 1996) (quoting *Murphy v.*
23 *Hunt*, 455 U.S. 478, 481 (1982)) (citations and quotation marks omitted).

24 On August 29, 2016, the Court ordered that the Plaintiffs’ SAC “fail[ed] to
25

26 ⁴ The Court has not already denied Defendant Berryhill’s Motion to Dismiss.
27 The earlier motion to dismiss (ECF No. 82) was denied on January 13, 2017 because
28 it related to claims asserted in the SAC. The SAC was superceded by the filing of the
TAC on January 10, 2017, at which point the SAC was no longer the operative pleading
in this action. The Court did not address the merits of the earlier motion to dismiss in
its January 13, 2017 dismissal order.

1 demonstrate that the United States has waived its sovereign immunity with respect to
2 any of Plaintiffs’ claims for monetary relief.” (ECF No. 79 at 17). On December 21,
3 2016, the Court granted Plaintiffs leave to file the TAC asserting three claims against
4 Defendant Colvin (who has been subsequently substituted by Defendant Berryhill): the
5 Equal Protection claim for illegal retaliation, the First Amendment claim, and the
6 Fourth and Fourteenth Amendment claim for search and seizure violations. (ECF No.
7 100 at 6-7). While Plaintiffs’ “Prayer for Relief” section of the TAC includes a claim
8 for “compensatory and punitive damages against the defendants, jointly and severally”
9 (ECF No. 101 at 36), Plaintiffs’ claims for monetary relief against Defendant Berryhill
10 remains dismissed. *See* ECF No. 79 at 17. Plaintiffs’ only claims for relief against
11 Defendant Berryhill in the TAC are limited to claims for injunctive relief.⁵

12 Accordingly, the Court must determine “whether there is a present controversy
13 as to which effective relief can be granted” as to Plaintiffs’ claims for injunctive relief
14 against Defendant Berryhill. *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 715
15 (9th Cir. 2011) (citation and quotation marks omitted). Each of the remaining claims
16 against Defendant Berryhill concern injunctive relief relating to SSA’s allegedly illegal
17 searches and interrogations of Plaintiffs in 2014 and 2015. *See* ECF No. 101 at ¶ 87
18 (Equal Protection claim arises from “selectively searching and intimidating plaintiffs
19 at home or in public place while not conducting similar searches of claimants who did
20 not file complaints against SSA or were not represented by plaintiffs’ attorney); *id.* at
21 ¶ 89 (First Amendment claim arises from Defendants’ “illegal searches, which began
22 in January 2014 and continue unabated in 2015, were intentionally designed to
23 intimidate the plaintiffs and prevent them from seeking legal representation and thus
24 infringe the plaintiffs’ First Amendment associational privacy and free speech rights”);
25 *id.* at ¶ 93 (Fourth and Fourteenth Amendment claim arises from “defendant
26

27 ⁵ In their response in opposition, Plaintiffs contend that “[i]n the TAC, as in the
28 FAC and SAC, . . . [t]he plaintiffs *seek injunctive relief against the government*, and
compensatory and punitive damages against the individual defendants pursuant to
Biven[s.]” (ECF No. 105 at 7) (emphasis added).

1 SSA . . . violat[ing] Plaintiffs’ right to be free of unreasonable searches, detention and
2 seizures under the Fourth and Fourteenth Amendments to the United States
3 Constitution. No search warrant was ever issued, and the searches and seizures were
4 conducted without probable cause.”).

5 In a declaration attached to the Motion to Dismiss, Jesus M. Ortis, formerly a
6 Senior Attorney in the SSA Office of the General Counsel during the time period at
7 issue in this case, Ortis states, “Following dismissal of the sanction proceedings against
8 Ms. Manbeck on June 24, 2015, SSA officially closed its investigation of Ms. Manbeck
9 based upon the conduct alleged by the SSA Office of General Counsel in the Agency’s
10 July 10, 2013 Notice of Intent to Sanction.” (Ortis Decl. at ¶ 4; ECF No. 104-2 at 2).

11 In a declaration by Stephen P. Conte, Regional Chief Counsel of the New York Region
12 of the SSA’s Office of the General, Conte states that the New York Region office
13 “presently has no open investigation of Ms. Manbeck for any such action and does not,
14 based on information presently known to it, intend to re-open any prior investigation
15 of Ms. Manbeck or to initiate a new investigation of her.” (Conte Decl. at ¶ 5; ECF No.
16 104-3 at 2).⁶ Conte states,

17 [a] poll of the other regions of the Agency’s Office of the General Counsel
18 indicates that no other office of the Agency’s Office of the General
19 Counsel presently has an open investigation of Ms. Manbeck. Nor, based
20 on information presently known to them, do these other offices intend to
re-open any prior investigation of Ms. Manbeck, or to initiate any new
investigation of her.

21 (Conte Decl. at ¶ 6; ECF No. 104-3 at 2).

22 Plaintiffs do not assert that SSA has continued to interrogate, search, or otherwise
23

24 ⁶ On March 20, 2015, Plaintiffs’ counsel Manbeck filed an action in the United
25 States District Court for the Southern District of New York challenging the SSA’s
26 initiation of a sanction proceeding against her. *See Manbeck v. Colvin*, Case No.
27 7:15-cv-02132-VB (S.D.N.Y. filed Mar. 20, 2015). On January 4, 2016, the district
28 judge found that the SSA dropped the sanction proceeding against Plaintiffs’ counsel
Manbeck, and concluded that there was no reasonable expectation that the SSA will
initiate another sanction proceeding against Plaintiffs’ counsel Manbeck for engaging
in the same conduct that gave rise to the action. *Manbeck v. Colvin*, Case No.
7:15-cv-02132-VB (ECF No. 57 at 5, 9). The district judge dismissed the action as
moot. *Id.* at 13.

1 contact Plaintiffs since June 2015, when Ortis states that the investigation of Manbeck
2 was closed. Rather, Plaintiffs contend that Defendant Berryhill “continues to retaliate
3 against at least one of the lead plaintiffs, Anh Thai, by withholding benefits against
4 her.” (ECF No. 105 at 4). In support of this contention, Plaintiffs attach a declaration
5 by Anh Thai stating that she applied for benefits in June 2013 and has still not received
6 a decision concerning potential Social Security benefits. (Thai Decl. at ¶ 2; ECF No.
7 105-1 at 1). Thai states, “On March 18, 2016 I appeared before SSA Judge Mark
8 Greenberg and testified about an hour about my severe mental and physical
9 problems . . . [i]n the summer of 2016 Judge Greenberg sent me to an SSA doctor for
10 evaluation and obtained a report that stated that I was severely impaired and that I was
11 disabled.” (Thai Decl. at ¶ 3; ECF No. 105-1 at 1). Thai states that “[s]ince last
12 summer I have not heard from SSA and still am awaiting benefits. I believe that SSA
13 has been withholding benefits from me in spite of favorable medical reports issued by
14 SSA doctors in retaliation for my participation in this action as well as in prior actions.”
15 (Thai Decl. at ¶ 3; ECF No. 105-1 at 1-2).

16 42 U.S.C. § 405 provides the sole method whereby Plaintiffs can appeal an
17 adverse decision concerning Plaintiff Thai’s Social Security benefits. In a section titled
18 “Judicial review[,]” the statute states,

19 Any individual, after any final decision of the Commissioner of Social
20 Security made after a hearing to which he was a party, irrespective of the
21 amount in controversy, may obtain a review of such decision by a civil
22 action commenced within sixty days after the mailing to him of notice of
such decision or within such further time as the Commissioner of Social
Security may allow. Such action shall be brought in the district court of
the United States for the judicial district in which the plaintiff resides[.]

23 42 U.S.C. § 405(g). Section 405(g) is the exclusive means for judicial review of
24 decisions of the Commissioner of Social Security. *See Winberge v. Salfi*, 422 U.S. 749,
25 757 (1975) (stating that 42 U.S.C. § 405 “prevent[s] review of decisions of the
26 Secretary save as provided in the Act, which provision is made in [§] 405(g)");
27 *Klemm v. Astrue*, 543 F.3d 1139, 1144 (9th Cir. 2008) (“The Social Security Act grants
28 to district courts jurisdiction to review only ‘final decisions’ of the Commissioner.”)

1 (citing 42 U.S.C. § 405(g)). The Court does not have jurisdiction to address Plaintiff
2 Thai’s pending application for Social Security benefits.

3 Further, Plaintiffs’ claims for equitable relief against Defendant Berryhill are
4 separate from Plaintiffs’ *Bivens* claims against other individual Defendants. The Court
5 of Appeals has stated that “*Bivens* is both inappropriate and unnecessary for claims
6 seeking solely equitable relief against actions by the federal government. By definition,
7 *Bivens* suits are individual capacity suits and thus cannot enjoin official government
8 action.” *Solida v. McKelvey*, 820 F.3d 1090, 1094 (9th Cir. 2016). Plaintiffs’ claims
9 against Defendant Berryhill in the TAC only seek equitable relief, and are only brought
10 against Defendant Berryhill in her official capacity. *See Ibrahim v. Dep’t of Homeland*
11 *Sec.*, 538 F.3d 1250, 1257 (9th Cir. 2008) (stating that “no *Bivens*-like cause of action
12 is available against federal agencies or federal agents sued in their official capacities.”).

13 The Court concludes that, despite the heavy “burden of demonstrating
14 mootness[,]” Defendant Berryhill has demonstrated that there is no longer “a present
15 controversy as to which effective relief can be granted” as to the claims remaining
16 against her. *Feldman*, 518 F.3d at 642 (citation omitted). “There are, however, four
17 major exceptions to the mootness doctrine, for (1) collateral legal consequences; (2)
18 wrongs capable of repetition yet evading review; (3) voluntary cessation; and (4) class
19 actions where the named party ceases to represent the class.” *In re Burrell*, 415 F.3d
20 994, 998 (9th Cir. 2005).

21 While Plaintiffs do not contend that any of the exceptions to the mootness
22 doctrine apply to this action, the Court determines that “[t]he one plausible candidate
23 exception in [this] case” is the “capable of repetition yet evading review” exception.
24 *Id.* “[T]he capable-of-repetition doctrine applies only in exceptional
25 situations, . . . where the following two circumstances [are] simultaneously present: (1)
26 the challenged action [is] in its duration too short to be fully litigated prior to cessation
27 or expiration, and (2) there [is] a reasonable expectation that the same complaining
28 party [will] be subject to the same action again[.]” *Spencer v. Kemna*, 523 U.S. 1, 17

1 (1998) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 109) (1983); *Lewis v. Cont'l*
2 *Bank Corp.*, 494 U.S. 472, 481 (1990) (citations and quotation marks omitted)).

3 “Under the ‘capable of repetition’ prong of the exception to the mootness
4 doctrine, the [P]laintiffs have the burden of showing that there is a reasonable
5 expectation that they will once again be subjected to the challenged activity.” *Lee v.*
6 *Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985). “The exception to mootness for
7 those actions that are capable of repetition, yet evading review, usually is applied to
8 situations involving governmental action where it is feared that the challenged action
9 will be repeated.” *Id.*

10 There are no facts in the record to demonstrate a reasonable expectation that SSA
11 will engage in the same action alleged in the TAC such that Plaintiffs will “be subject
12 to the same action again[.]” *Spencer*, 523 U.S. at 17 (citation omitted); *see Bernhard v.*
13 *Cty. of Los Angeles*, 279 F.3d 862, 871-72 (9th Cir. 2002) (concluding exception did
14 not apply because the Court of Appeals “f[ou]nd no indication in [the plaintiff’s]
15 complaint that she will be subjected to the same situation again”); *see also Fed. Election*
16 *Com’n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463-64 (2007) (finding “that
17 there exists a reasonable expectation that the same controversy involving the same party
18 will recur” when the defendant “credibly claimed that it planned on” engaging in the
19 challenged action in the future); *Bernhardt*, 279 F.3d at 871 (“Where the activities
20 sought to be enjoined already have occurred, and the . . . courts cannot undo what has
21 already been done, the action is moot, and must be dismissed.”).

22 The Court GRANTS Defendant Berryhill’s Motion to Dismiss as Moot All
23 Claims (ECF No. 104).

24 ///

25 ///

26 ///

27 ///

28 ///


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. Conclusion

IT IS HEREBY ORDERED that Plaintiffs' Ex Parte Motion for One-Day Extension (ECF No. 113) is GRANTED.

IT IS FURTHER ORDERED that Defendant Berryhill's Motion to Dismiss as Moot All Claims (ECF No. 104) is GRANTED.

DATED: July 19, 2017


WILLIAM Q. HAYES
United States District Judge