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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 RUFINO CEDILLO-VARGAS; and
12 MARIA DEL CARMEN CEDILLO,
13 Plaintiffs,

14 v.

15 KEVIN K. MCALEENAN, Acting
16 Secretary, Department of
17 Homeland Security; KENNETH T.
18 CUCCINELLI, Acting Director, U.S.
19 Citizenship and Immigration
20 Services; ALANNA Y. OW, District
21 Director, USCIS Services, San
22 Diego, California; LETICIA
23 RODRIGUEZ, Immigration
24 Inspector; and MICHAEL R.
25 POMPEO, Secretary, Department
26 of State,

27 Defendants.
28

Case No.: 3:16-cv-02964-BTM-NLS

**ORDER GRANTING IN PART,
DENYING IN PART
DEFENDANT'S MOTION TO
DISMISS AND GRANTING
PLAINTIFF LEAVE TO AMEND**

[ECF No. 7]

In their complaint, Plaintiffs nebulously allege they have been harmed by the actions and inactions of Defendants in relation to a petition for classification as alien relative (the "Form I-130") filed by naturalized citizen Plaintiff Rufino Cedillo-

1 Vargas (“Cedillo-Vargas”) on behalf of his daughter, alien Plaintiff Maria Del
2 Carmen Cedillo (“Cedillo”), and Cedillo’s subsequent application to register
3 permanent residence or adjust status (the “Form I-485”, and together with Form I-
4 130, the “Forms”). (ECF No.1.) Plaintiffs further allege Defendants have
5 improperly classified her as an “inadmissible alien”¹ – and removed her from the
6 United States on two separate occasions – based upon the erroneous reports of
7 an immigration inspector, Defendant Leticia Rodriguez, who stated that Cedillo
8 misrepresented she was a United States citizen when she applied for admission
9 at the U.S./Mexico border in January 2003. (*Id.*) Plaintiffs allege that, based upon
10 Defendant Rodriguez’s erroneous report, Defendants have revoked – or were
11 otherwise involved in the revocation of – the prior approvals of the Forms and have
12 removed Cedillo from the United States on two separate occasions. (*Id.*) Cedillo
13 was allegedly denied assistance of counsel and an opportunity to contest the
14 erroneous report or revocations before the approvals were revoked or she was
15 removed from the United States. (*Id.*) Plaintiffs seek various declaratory
16 judgments, writs of mandamus, and relief under the Administrative Procedures Act,
17 the majority of which appear directed at challenging the erroneous report, the
18 revocation of prior-approval of the Forms, and Cedillo’s classification as
19 inadmissible. (*Id.*) Further, Plaintiff seeks an order from this Court compelling
20 Defendants to, *inter alia*, issue Cedillo a visa and “prove that Plaintiff [Cedillo]
21 made a false claim of U.S. citizenship by presenting evidence.” (*Id.* at 12-13.)

22 Defendants subsequently moved to dismiss Plaintiffs’ complaint. (ECF No.
23 7.) In their motion to dismiss, Defendants argue the Court lacks subject-matter
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26 ¹ Generally, aliens that are deemed “inadmissible” are ineligible to receive a visa
27 or otherwise be admitted to the United States. 8 U.S.C. § 1182(a). False
28 representation of United States citizenship by an alien is grounds for classification
as inadmissible. *Id.* at (a)(6)(C)(ii).

1 jurisdiction over this matter “because the case or controversy requirement of Article
2 III of the Constitution is not satisfied.” (*Id.* at 5.) This argument relies on
3 Defendants’ competing factual recitation and evidence attached in support thereof;
4 which controverts many of the factual predicates of Plaintiffs’ allegations and
5 causes of action.² In particular, Defendants assert “both of . . . Cedillo’s
6 applications for permanent residence were made through a Form I-485 which can
7 only be filed with and adjudicated by USCIS[,]” Cedillo “has only applied for
8 adjustment of status through UCSIS and has not pursued an immigrant visa
9 through the State Department[,]” and, “[a]ccording to . . . Cedillo’s alien file, the only
10 involvement of the State Department was the initial forwarding of an I-130 because
11 Ms. Cedillo may have indicated she wanted to apply for an immigrant visa from
12 abroad.” (*Id.* at 6.) Defendants also argue that Defendant Rodriguez should be
13 dismissed as an improperly named defendant because, “[t]o the extent that
14 Plaintiffs seek judicial review of State Department or USCIS action or inaction
15 relating to her I-130s, this is not relief that [Defendant] Rodriguez . . . can provide”
16 and, [t]o the extent that Plaintiffs are challenging the finding of an oral false claim
17 to U.S. Citizenship in the expedited removal order processed by Ms. Rodriguez on
18 January 14, 2003, the Court lacks jurisdiction to review that finding.” (*Id.* at 9 (citing
19 8 U.S.C. §§ 1252(e)(1) & (2).) Finally, Defendants argue that the State Department
20 and Defendant Rodriguez should be dismissed for lack of personal jurisdiction,
21 insufficiency of process, and/or insufficiency of service of process because
22 Plaintiffs have failed to properly effectuate service of process on the State
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25 ² “[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district
26 court is not restricted to the face of the pleadings, but may review any evidence,
27 such as affidavits and testimony, to resolve factual disputes concerning the
28 existence of jurisdiction.” *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.
1988) (citing *Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947); and *Biotics Research
Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir.1983)).

1 Department and Defendant Rodriguez. (*Id.* at 6-8 (citing FED. R. CIV. P. 4(i)(2));
2 see also ECF No. 4 (Order to show cause why case should not be dismissed for
3 failure to timely serve Defendants); ECF Nos. 5 & 5-1 (Plaintiffs' response to Order
4 to show cause and affidavit of service in support thereof).)

5 In their response to Defendants' motion to dismiss, Plaintiffs appear to
6 acquiesce to Defendants' factual assertion "that the State Department did not
7 adjudicate the [Forms] that are in controversy" and state that "there is no opposition
8 to [the] dismiss[al] of [the] State Department." (ECF No. 8, at 1.) Accordingly, the
9 Court dismisses, without prejudice, Defendant Michael R. Pompeo, in his official
10 capacity as Secretary of the Department of State.

11 Plaintiffs argue against the dismissal of Defendant Rodriguez, however,
12 asserting that she "has caused harm to the Plaintiffs and should not be dismissed
13 as she is an indispensable party who as an employee of the Department of
14 Homeland Security caused harm to Plaintiff." (ECF No. 8, at 2 (citing *Bivens v. Six*
15 *Unknown Agents*, 403 U.S. 388 (1971).) Yet Plaintiffs have not sought monetary
16 damages from Defendant Rodriguez, nor have they asserted a cause of action that
17 could be considered to seek such relief from Defendant Rodriguez. Indeed,
18 Plaintiffs have not even named Defendant Rodriguez in her individual capacity in
19 their complaint. See *Solida v. McKelvey*, 820 F.3d 1090, 1093–95 (9th Cir. 2016)
20 ("The only remedy available in a *Bivens* action is an award for monetary damages
21 from defendants in their individual capacities. . . . *Bivens* is both inappropriate and
22 unnecessary for claims seeking solely equitable relief against actions by the
23 federal government. By definition, *Bivens* suits are individual capacity suits and
24 thus cannot enjoin official government action. . . . There is no such animal as a
25 *Bivens* suit against a public official tortfeasor in his or her official capacity. An
26 action against an officer, operating in his or her official capacity as a United States
27 agent, operates as a claim against the United States." (internal quotations and
28 citations omitted)). Further, because Plaintiffs seek only equitable relief requiring

1 official government action, which Defendant Rodriguez is powerless to provide in
2 her individual capacity, a *Bivens* claim against Defendant Rodriguez is
3 unnecessary. See *id.* at 1095–96 (9th Cir. 2016) (“In this case, only the United
4 States—through its officers—has the power to take the action that Roca Solida
5 seeks. . . . A *Bivens* action is not necessary in suits, such as this one, which seek
6 equitable relief against the federal government, because the Administrative
7 Procedure Act waives sovereign immunity for such claims.”). Moreover, because
8 Plaintiffs have already named a superior official of the agency that employed
9 Defendant Rodriguez as a defendant, any official capacity claims against
10 Defendant Rodriguez are redundant, duplicative, or otherwise unnecessary. See
11 *id.* at 1095 (“An action against an officer, operating in his or her official capacity as
12 a United States agent, operates as a claim against the United States.”); *Sherman*
13 *v. Cty. of Maui*, 191 F. App'x 535, 537 (9th Cir. 2006) (“The district court properly
14 recognized that Sherman's claims . . . against County officials in their official
15 capacity were effectively claims against the County itself, and thus the individual
16 defendants were duplicative.” (citing *Brandon v. Holt*, 469 U.S. 464, 471–72
17 (1985))). Accordingly, the Court dismisses Defendant Rodriguez as a duplicate
18 defendant.³

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21 ³ As the Court has dismissed Defendants Pompeo and Rodriguez and none of the
22 remaining defendants contest personal jurisdiction, process, or service of process
23 on them in their present motion to dismiss, the Court need not reach their
24 arguments regarding improper service of process on Defendants Pompeo and
25 Rodriguez. (See ECF No. 9, at 4 (“Because Plaintiffs have agreed to dismiss the
26 State Department from the case, it no longer needs to be served. USCIS did not
27 contest proper service. However, service was opposed on behalf of former INS
28 Immigration Inspector [Defendant] Rodriguez in her official capacity.” (internal
citations omitted)).) See also FED. R. CIV. P. 12(h)(1). Nevertheless, Plaintiffs’
response to the Court’s Order to Show Cause reveals that Plaintiffs may not have
properly effectuated service of process in this matter upon one or more of the
original defendants. (See ECF Nos. 4, 5, & 5-1.) Accordingly, to the extent that

1 Finally, the Court observes that, because Plaintiffs' original complaint
2 focused heavily upon the conduct of the State Department, it is unclear what
3 conduct Plaintiffs are challenging, the claims they intend to pursue, and what relief
4 they seek in light of the instant dismissal of the State Department. To the extent
5 that Plaintiffs seek to attack the underlying removals or the findings associated
6 therewith, the Court's authority to review those removals and findings is highly
7 circumscribed. See 8 U.S.C. § 1252. Nevertheless, the Court disagrees with
8 Defendants' argument that all theories of recovery alleged and relief requested by
9 Plaintiffs fundamentally rely upon Plaintiffs' original factual assertions regarding
10 the State Department and that the Court lacks subject matter jurisdiction on the
11 claims against the remaining defendants. While it is true that the complaint is
12 inartfully pled and fails to articulate claims with sufficient clarity to allow the
13 remaining defendants to reasonably frame a responsive pleading thereto, the
14 Court believes that a live controversy against the remaining defendants over which
15 this Court would have jurisdiction may be buried within the factual predicates set
16 forth in the complaint.⁴ Because the Court does not believe that cognizable claims
17 are immediately apparent from the face of the complaint, however, the Court will
18 require Plaintiffs to replead pursuant to Federal Rule of Civil Procedure 12(e) so
19 as to ensure Defendants (and the Court) are afforded "fair notice of what the

21 Plaintiffs intend to add any new defendants in their forthcoming amended
22 complaint, the Court reminds Plaintiffs that they must satisfy any and all
23 requirements for proper service of process with regards to such defendants or risk
24 their dismissal. See, e.g., FED. R. CIV. P. 12(i)(2) ("To serve a United States
25 agency or corporation, or a United States officer or employee sued only in an
26 official capacity, a party must serve the United States *and also send a copy of the
summons and of the complaint by registered or certified mail to the agency,
corporation, officer, or employee.*" (emphasis added)).

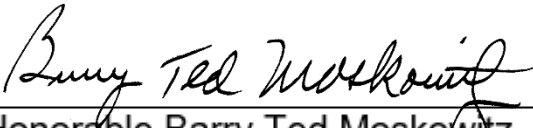
27 ⁴ Notably, in their response to Defendants' motion to dismiss, Plaintiffs requested
28 leave to amend in the event the Court granted any part of Defendant's motion.
(ECF No. 8, at 3.)

1 claim[s are] and the grounds upon which [they] rest[].” *Bell Atl. Corp. v. Twombly*,
2 550 U.S. 544, 555 (2007) (internal citations and alterations omitted); see also
3 *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1275 (11th Cir. 2006)
4 (District courts have a “supervisory obligation to *sua sponte* order repleading
5 pursuant to Federal Rule of Civil Procedure 12(e) when a shotgun complaint fails
6 to link adequately a cause of action to its factual predicates.”). In repleading,
7 Plaintiffs must make clear the specific conduct they are challenging, the claims
8 they are pursuing, and the relief they are requesting against DHS and USCIS and
9 any other defendants they may properly add in their amended complaint.

10 Therefore, in summary, the Court **GRANTS IN PART, DENIES IN PART**
11 Defendants’ motion to dismiss (ECF No. 7.) Defendants Michael R. Pompeo and
12 Leticia Rodriguez are hereby **DISMISSED WITHOUT PREJUDICE**. Plaintiffs shall
13 file an amended complaint with the Court on or before September 1, 2019 that
14 cures the deficiencies identified in this Order; Plaintiffs are warned that their failure
15 to file an amended complaint on or before September 1, 2019 may result in the
16 dismissal of this action without further notice.

17 **IT IS SO ORDERED.**

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19 Dated: July 29, 2019

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21 Honorable Barry Ted Moskowitz
22 United States District Judge
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