Gerald A. McIntyre CA Bar No. 181746
gmcintyre@justiceinaging.org
JUSTICE IN AGING
3660 Wilshire Boulevard, Suite 718
Los Angeles, CA 90010
Phone: (213) 639-0930
Fax: (213) 550-0501

Attorney for Plaintiffs
Additional Counsel Listed on Signature Page

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HUGH HELD and KELLEY RICHARDSON-WRIGHT, on behalf of themselves and all other similarly situated,

Plaintiffs,

v.

CAROLYN W. COLVIN, Acting Commissioner of Social Security, in her official capacity,

Defendant.

Case No. 2:15-cv-1732 PA (JCx)

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. BACKGROUND 3

A. Supplemental Security Income 3

B. SSA Violated Plaintiffs' Constitutional Rights 3

C. SSA Continues Discriminating Against Plaintiffs after *Windsor* 5

D. SSA's Policies Regarding Recovery of Overpayments 8

E. After the Filing of this Action, SSA Temporarily Halts Initiation of New Attempts to Recoup Overpayments 10

II. THIS CLASS ACTION IS NOT MOOT 12

A. The Commissioner's Arguments Misapprehend the Extent of the Harm Caused by SSA's Conduct and Policies 13

B. Plaintiffs' Claims are Inherently Transitory and Capable of Repetition 14

C. SSA Has Not Promulgated a Pre-Litigation Change in Policy that Prevents the Harm to the Class 16

III. EXHAUSTION DOES NOT BAR THIS ACTION 18

A. This Case Qualifies for Waiver of Exhaustion 18

1. Futility 19

2. Collaterality 22

3. Irreparability 24

B. This Action May Also Proceed Under this Court's Mandamus Jurisdiction 24

IV. CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Bowen v. City New York, 476 U.S. 467 (1986) 20, 23

Briggs v. Sullivan, 886 F.2d 1132 (9th Cir. 1989) .....passim

Califano v. Sanders, 430 U.S. 99 (1977).....22

Califano v. Yamasaki, 442 U.S. 682 (1979) 25

County of Riverside v. McLaughlin, 500 U.S. 44 (1991) 14, 15, 17

Doe v. Astrue, 2009 U.S. Dist LEXIS 72819 (N.D. Cal. Aug. 18, 2009).....21, 24

Elliott v. Weinberger, 564 F.2d 1219 (9th Cir. 1977) 25

Garcia v. Johnson, 2014 U.S. Dist. LEXIS 164454 (N.D. Cal. Nov. 21, 2014) 16

Gerstein v. Pugh, 420 U.S. 103 (1975).....14

Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 2015 U.S. LEXIS 3362 (May 18, 2015).....12

Johnson v. Shalala, 2 F.3d 918 (9th Cir. 1993).....18, 23, 24

Kennerly v. Unites States, 721 F.2d 1252 (9th Cir. 1983).....18

Kildare v. Saenz, 325 F.3d 1078 (9th Cir. 2003).....20

Leschniok v. Heckler, 713 F.2d 520 (9th Cir. 1983) 25

Mathews v. Eldridge, 424 U.S. 319 (1976) 18, 21, 22

Obergefell v. Hodges, 576 U.S. ____ (2015 slip opinion) .....passim

Pitts v. Terrible Herbst, Inc., 653 F.3d 1081 (9th Cir. 2011).....12, 13

Sosna v. Iowa, 419 U.S. 393 (1975) 12

Sze v. INS, 153 F.3d 1005 (9th Cir. 1998) 16

United States Parole Commission v. Geraghty, 445 U.S. 388 (1980) 12

United States v. Windsor, 133 S. Ct. 2675 (2013) ..... passim

Wade v. Kirkland, 118 F.3d 667 (9th Cir. 1997) 18

STATUTORY AUTHORITIES

28 U.S.C. § 1361, ... 24

42 U.S.C. § 405(g) 18

42 U.S.C. § 1381a 3

42 U.S.C. § 1382(a) 3

42 U.S.C. § 1383(b)(1)(A) 9

42 U.S.C. § 1383(b)(1)(B) 25

RULES AND REGULATIONS

20 C.F.R. § 416.110 3

20 C.F.R. § 416.1205 3

This is a proposed class action about the effects of continued discrimination by the Social Security Administration ("SSA") against Supplemental Security Income ("SSI") recipients married to a person of the same sex, long after that discrimination was held unlawful by the Supreme Court. After *United States v. Windsor*, 133 S. Ct. 2675 (2013), SSA should have recognized these marriages immediately. It failed to do so. Hugh Held and Kelley Richardson-Wright (the "Named Plaintiffs") bring this action on behalf of a class of similarly-situated individuals (collectively, "Plaintiffs") married to someone of the same sex and who have been or will be targeted by SSA for recoupment of overpayments caused by SSA's failure to recognize their marriages. SSA's issuance of overpayment notices in these circumstances and its recoupment efforts violate the Equal Protection guarantee of the Fifth Amendment, the Due Process clause, and the Social Security Act. The Complaint seeks to stop SSA's unconstitutional conduct and to require SSA to return any funds already collected. Compl., ¶¶ 90-95.

Defendant's argument seeking dismissal – particularly its foundational assumption that this case is simply about a claim for benefits – grievously misapprehends the nature of the harm SSA's unlawful conduct has caused and continues to cause. Fundamentally, SSA fails to appreciate that Plaintiffs' injuries go well beyond any monetary injury suffered by a requirement to repay an overpayment. As the Supreme Court just last month explained in *Obergefell v.*

Hodges: "Especially against a long history of disapproval of their relationships, [the] denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them." 576 U.S. at ___ (slip. op. at 22). At bottom, SSA seems not to understand that its failure to recognize Plaintiffs' marriages was wrong and that the notice of overpayment demanding that Plaintiffs prove why they were not at fault for SSA's unconstitutional conduct is ***itself*** a vestige of SSA's discrimination and itself causes real harm, exacerbating a substantial injury that should never have occurred after *Windsor*.

The Commissioner, by her motion, seeks to delay and to deny justice. She seeks this Court's blessing to continue to irreparably harm this highly vulnerable group of lawfully married couples by sending notices demanding repayment of an overpayment that was the consequence of SSA's own unlawful discrimination and for which repayment is inequitable and contrary to law. Hoping this case will go away, SSA has provided a token waiver of the monetary injury to Named Plaintiffs, while maintaining the very real threat of recoupment for other class members and leaving the continuing dignitary harm caused by SSA's conduct unchecked and uncured. Dismissal would put other, unnamed putative class members at risk of unjustified demands for repayment that serve only to further demean the class.

As the Supreme Court wrote in the closing sentences of *Obergefell*, same-sex couples simply "ask for equal dignity in the eyes of the law. The Constitution grants them that right." 576 U.S. at ___ (slip. op. at 28). Neither the mootness doctrine nor exhaustion supports SSA's litigation strategy here.

I. BACKGROUND

A. Supplemental Security Income

SSI is a federal assistance program designed to provide individuals in the greatest need income for basic necessities. 20 C.F.R. § 416.110. SSA administers the SSI program. *Id.*; 42 U.S.C. § 1381a. In order to be eligible, an individual must be age 65 or older, blind, or disabled. 42 U.S.C. § 1382(a). In addition, SSI recipients must be very poor—individuals must have less than $2,000 in resources, and married couples receiving SSI must collectively have less than $3,000 in resources. 20 C.F.R. § 416.1205. Marriage always results in a lower amount of individual monthly SSI benefits and may result in a complete loss of benefits. Def. Br. (ECF 30-1) at 8 & 11 of 31 (stating "the benefits payable to a married person are lower than those payable to a single person").

B. SSA Violated Plaintiffs' Constitutional Rights

Plaintiffs' claims have their roots in the 1996 Defense of Marriage Act ("DOMA"), which declared that marriages of same-sex couples would not have status equal to marriages of different-sex couples. Compl., ¶ 36. Section 3 of

DOMA (codified at 1 U.S.C. § 7) stated that, for the purpose of determining the meaning of any federal law, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." *Id.*

After the passage of DOMA, a growing number of states began to allow same-sex couples to marry. *Id.* ¶ 37. These included Massachusetts, where Plaintiff Kelley Richardson-Wright was married to her wife in 2007, and California, home to Plaintiff Hugh Held and his husband, a couple since 1993 who married in 2008. *Id.* ¶¶ 16-17, 37. Because of DOMA, SSA did not recognize the marriages of same-sex couples for purposes of SSI. *Id.* at ¶ 40. Instead, SSA treated applicants married to a person of the same sex as single. *Id.*

The actions of SSA and other federal agencies in denying equal status to Plaintiffs, and others, were declared illegal by the Supreme Court's decision in *United States v. Windsor*, striking down Section 3 of DOMA because it violated the Fifth Amendment of the Constitution. *Id.* ¶ 46; 133 S. Ct. 2675, 2696 (2013). The Court explained that the government had used DOMA to "impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages." 133 S. Ct. at 2693. The Court elaborated that "DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages

of others." *Id.* at 2696. Because "the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage," the Court held that DOMA violated the Fifth Amendment. *Id.* at 2694; *see also Obergefell*, 576 U.S. at ___ (slip op. at 9) ("DOMA … impermissibly disparaged those same-sex couples who wanted to affirm their commitment to one another….").

C. SSA Continues Discriminating Against Plaintiffs after *Windsor*

Nevertheless, SSA ***continued*** after *Windsor* to treat SSI recipients who were married to a person of the same sex as if they were single.[1] Compl., ¶ 50. For over a year after *Windsor*, SSA provided little guidance to the employees in its field offices, much less to SSI recipients, as to when or how it would adjust its practices to recognize marriages of these same-sex couples and cease its unlawful discrimination. *Id.* ¶ 51. It was not until the summer of 2014, nearly a year after *Windsor*, that SSA began sending notices to some SSI recipients about how SSA would be calculating their benefits as married individuals, for the first time recognizing these marriages. *Id.* ¶ 57. SSA also began seeking to recoup overpayments caused by its delay by recalculating Plaintiffs' past benefits as if

---

[1] In January 2014, six months after *Windsor*, SSA finally began to process applications of ***new*** SSI applicants married to a person of the same-sex as if they were married. Compl., ¶ 47. But SSA still continued to treat Plaintiffs, who were already receiving SSI, as if they were single. *Id.* ¶ 48.

SSA had complied with *Windsor* from the start. *Id.* ¶¶ 58-60. In effect, SSA's benefits calculation assumes a counterfactual and imaginary world where SSA had immediately complied with *Windsor*. The couples subjected to the discrimination have been left to bear the consequences of SSA's conduct. *Id.* ¶¶ 69, 82-83.

SSA admits that for the Named Plaintiffs "there was a delay between the date their marital-recognition status changed and the date on which SSA became aware of that change …." Def. Br. (ECF 30-1) at 9 of 31. In fact, even after SSA became aware of the marital status change, it failed to act for months. For example, Kelley Richardson-Wright had a routine financial redetermination in October 2014, over a year after *Windsor*. Compl., ¶ 72. Even though SSA knew of her marital status, it said nothing at the time about any changes to her SSI benefits. *Id.* ¶¶ 70-72. Similarly, shortly after *Windsor*, Hugh Held went to an SSA office and inquired as to the impact on his benefits. *Id.* ¶ 54. The SSA representative told him that it might affect his benefits, but it was unclear how. *Id.*

It was not until June 2014, ***a year*** after *Windsor*, that Mr. Held received, without explanation or warning, an SSI benefit almost two-thirds lower than his prior benefit ($308 versus $877) and then a statement telling him he had to pay back an overpayment of over $6,000. *Id.* ¶¶ 64-65. It took until September for SSA to explain that SSA had overpaid him because SSA had not recognized his marriage. *Id.* ¶ 67.

As for Ms. Richardson-Wright, in late November 2014, nearly ***a year and a half*** after *Windsor*, SSA kicked off a confusing two-week-long flurry of a half-dozen inconsistent and conflicting notices. *Id.* ¶¶ 72-78. These culminated in a December 2014 notice of overpayment stating that Ms. Richardson-Wright had been overpaid by approximately $4,100 because her "[s]pouse's wages are now taken into account" – *i.e.* because SSA finally was recognizing her marriage. *Id.* ¶ 78, Ex. F at 1. Bizarrely, SSA's notice also asked Ms. Richardson-Wright to explain why "[i]t wasn't KELLEY S RICHARDSON-WRIGHT's fault that she got too much SSI money," even though SSA is surely aware that the reason for the overpayment was SSA's failure to comply with *Windsor*. *Id.*, Ex. F at 2. Even though Ms. Richardson-Wright sought timely reconsideration from SSA, SSA began to withhold funds from her benefits. *Id.* ¶¶ 79, 81. It ceased doing so only after the Complaint in this action was filed and reimbursed the improperly withheld funds.

These events caused Ms. Richardson-Wright and her wife, Kena, to forgo basic necessities and put them at risk of eviction from their home. *Id.* ¶¶ 82-83. The SSI reduction occurred at a particularly difficult financial time for the couple. *Id.* The stress from the extreme financial strain caused by the reduction in SSI payments caused Kelley to be hospitalized. *Id.*

D. SSA's Policies Regarding Recovery of Overpayments

In order to comply with the Constitution, SSA has determined that it will treat individuals lawfully married to a person of the same sex as married as of the date of *Windsor*, even if SSA did not in fact recognize their marriage until many months later. POMS GN 00210.800 (Bychowski Decl., Ex. A). As discussed above, this means that Plaintiffs were paid more than the correct amount during the intervening months because of SSA's delay in recognizing their marriages and complying with the Constitution and *Windsor*. What the Constitution does not require and indeed should be found to prohibit is SSA's harm to Named Plaintiffs and the class by issuing notices of overpayments caused by this policy and demanding recoupment.

SSA's policy with respect to collecting overpayments is automatic and without regard for its own responsibility for Plaintiffs' overpayments. Its determination as to whether to initiate collection of an overpayment turns merely on whether more than the correct amount was paid. POMS SI 02201.005 (*Id.*, Ex. B). If so, SSA will initiate collection efforts in every case. POMS SI 02201.025 (*Id.*, Ex. C) . Indeed, SSA policy mandates that "***[a]ll individuals*** liable for repayment of an overpayment receive a notice of our determination that they are overpaid." *Id.* (emphasis added). That notice is no informal inquiry or finding. To the contrary, it is the agency's initial adjudication of the matter: "[n]otifying the

recipient of the existence of an overpayment is both an initial determination of the overpayment and notification that the overpayment must be repaid." POMS SI 02220.001 (*Id.*, Ex. D).

Prior to the filing of this lawsuit, SSA did nothing to limit or modify its default policy for collecting all overpayments to avoid further penalizing Plaintiffs' for SSA's failure to recognize Plaintiffs' marriages after *Windsor*. However, the Social Security Act requires that SSA refrain from "penalizing" a recipient who has been paid "more … than the correct amount" where (1) the overpayment was not the fault of the recipient and (2) recoupment would be against equity and good conscience. 42 U.S.C. § 1383(b)(1)(A). SSA's policy for making its determination that it is authorized to demand repayment makes ***absolutely no inquiry*** into Plaintiffs' fault or whether recovery would be against equity or good conscience, even though in the circumstances here SSA was in possession of evidence to the contrary on both counts for the entire class. *See also* Compl., ¶ 61. Once SSA belatedly and retroactively recognizes each class members' marriage, and consequently determines that an overpayment exists, SSA will automatically issue a demand for repayment even if, as in this case, it is the agency which is at fault and regardless of how unfair or harmful that demand is.

As a result, Plaintiffs here – all of whom have been overpaid due to SSA's failure to recognize their marriages after *Windsor* – will receive a demand for

recovery of the overpayment from SSA even though the circumstances and the evidence in SSA's possession show that the overpayment was SSA's fault and that collection is against equity and good conscience. SSA policy expressly puts the burden on the already discriminated against class members to appeal SSA's determination, by way of a request for reconsideration or a request for waiver, even though SSA never made any inquiry into the statutory prerequisites it must satisfy before further penalizing the class by seeking recoupment. POMS SI 02201.005; POMS SI 02260.001 (Bychowski Decl, Exs. B, E).

E. After the Filing of this Action, SSA Temporarily Halts Initiation of New Attempts to Recoup Overpayments

In a tacit admission that its conduct in seeking recoupment of these overpayments is unlawful, unfair, and causes irreparable harm, two months after the Complaint in this action was filed, SSA issued an emergency directive to its field adjudicators instructing them to put a temporary halt to its collection practices, but only for some of the class members. Specifically, on May 6, 2015, SSA issued an "Emergency Message" that adjudicators should put "on hold, effective immediately, any … SSI… post-eligibility action that would result in an overpayment for past months due to [marriage recognition for a same-sex couple]." ECF 27-2, Ex. C (Social Security Administration, *Emergency Message EM-15016*

(May 6, 2013)).[2] The emergency communication emphasized that "[r]egardless of when the change occurred or when SSA first learned of the event, do not create an overpayment on a recipient's SSI record due to recognition of a same-sex marriage." *Id.*

This directive, by its terms, expires on October 30, 2015, although the expiration date can be extended or shortened at any time. It also does not cover SSI recipients already in overpayment status as of May 6, 2015. *Id.* It does not purport to be a change in policy; it is simply a temporary hold on initiating new collections. The directive does not instruct SSA staff to cease recovery efforts of previously determined overpayments or to refund previously withheld overpayments, nor does it address whether collection of such overpayments would be against equity and good conscience, nor does it admit SSA is at fault. *Id.*

For the Named Plaintiffs, after the filing of the Complaint in this action, SSA notified each of them that it was granting waivers of overpayments, even though they had not requested one and even though SSA collected no further evidence from them and held no further proceedings. Held Decl. (ECF 26-2), ¶ 12, Ex. F; Richardson-Wright Decl. (ECF 26-3), ¶ 33, Ex. K.

---

[2] SSA's emergency message is also available at https://secure.ssa.gov/apps10/reference.nsf/links/05052015024754PM.

II. THIS CLASS ACTION IS NOT MOOT

This class action is not mooted by SSA's notifications to the Named Plaintiffs that SSA has waived their individual overpayments. As the Supreme Court explained in *United States Parole Comm'n v. Geraghty*, "the fact that a named plaintiff's substantive claims are mooted due to an occurrence other than a judgment on the merits does not mean that all the other issues in the case are mooted. One is the claim on the merits; the other is the claim that he is entitled to represent a class…." 445 U.S. 388, 403-04 (1980) (holding that class representative could continue to represent class on appeal of denial of class certification even though his personal claim had become moot); *see also Sosna v. Iowa*, 419 U.S. 393, 402 (1975) ("Although the controversy is no longer live as to appellant Sosna, it remains very much alive for the class of persons she has been certified to represent.").

Thus, in some circumstances even where an individual named plaintiff's claims have been satisfied prior to class certification, "the named plaintiff can still file a timely motion for class certification … [and] may continue to represent the class until the district court decides the class certification issue." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1092 (9th Cir. 2011); *see also Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 874-76 (9th Cir. 2014), *cert. granted*, 2015 U.S. LEXIS 3362 (May 18, 2015). Moreover, "if the district court certifies the class,

certification relates back to the filing of the complaint. Once the class has been certified, the case may continue despite full satisfaction of the named plaintiff's individual claim because an offer of judgment to the named plaintiff fails to satisfy the demands of the class." *Pitts*, 653 F.3d at 1091-92.

A. The Commissioner's Arguments Misapprehend the Extent of the Harm Caused by SSA's Conduct and Policies

The Commissioner's arguments for dismissal are premised upon an incorrect assertion that this case is simply about a claim for benefits and that waiving an overpayment makes even the Named Plaintiffs whole. But the Commissioner overlooks a distinct and significant harm in this case: the harm in requiring poor, vulnerable, and discriminated-against SSI recipients to endure receipt of a notice of overpayment, typically for thousands of dollars, and a highly dysfunctional and lengthy waiver process that would have been unnecessary but for SSA's discriminatory conduct. *See* Compl., ¶¶ 82-83.

In other words, the Commissioner's argument ignores that allowing SSA to grind the bureaucratic wheels and issue notices seeking recoupment of overpayment caused by the agency's own discrimination – with the attendant stress and uncertainty caused to this vulnerable group of people – ***itself*** results in substantial harm to these individuals. As the Supreme Court just recently explained, this type of "harm results in more than just material burdens. Same-sex

couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives." *Obergefell*, 576 U.S. at ___ (slip. op. at 17). Therefore, the waiver to Mr. Held and Ms. Richardson-Wright did not cure the harm they suffered, nor would after-the-fact waivers fully address the harm inflicted upon similarly situated class members.

B. Plaintiffs' Claims are Inherently Transitory and Capable of Repetition

This action falls comfortably within those cases allowing relief for class action claims that are transitory in nature and capable of repetition, such that a named plaintiff may pursue the claims on behalf of a class even if her individual claims are satisfied. *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11 (1975); *Pitts*, 653 F.3d at 1090-91.

The harm from SSA's demands for repayment is the definition of transitory. Indeed, the harm is perfected as soon as an already discriminated-against poor and aged or disabled SSI recipient opens that envelope from SSA. It occurs when they see in it a message that they are to blame for the SSA's discrimination and they now must repay thousands of dollars that they have no hope of obtaining. SSA's demand for payment – the vestige of years of official discrimination against these married couples – deepens those still-fresh wounds and itself causes substantial harm. The grant of a waiver does not erase the harm, of a Constitutional stature,

that SSA's conduct in unjustifiably demanding repayment has caused and will continue to cause. *See Obergefell*, 576 U.S. at ___ (slip op. at 25) ("Dignitary wounds cannot always be healed with the stroke of a pen.").

Moreover, unless the Court certifies a class, SSA's actions will continue and SSA's unconstitutional actions to collect these overpayments in the first place will evade review. As class members periodically go through their financial redeterminations with SSA, more of them will receive demands for overpayments that should not even have occurred if SSA had acted constitutionally. As even the Commissioner must concede, the membership in the proposed class "will crest in numbers." Def. Br. (ECF 30-1) at 20 of 31.[3]

The Supreme Court's decision in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), is instructive. In that case, named plaintiffs on behalf of a class challenged a county's delay in conducting their probable cause determinations after their arrest. The county argued that the case was moot and that the named plaintiffs lacked standing because those individuals already received either a

---

[3] In fact, SSA is not correctly implementing the Supreme Court's decision in *Obergefell*, compounding the problem. *Obergefell* holds that a state (and therefore SSA) must recognize a marriage performed in another state (i.e., from the date of celebration). 576 U.S. at __ (slip op. at 28) ("[T]here is no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another State…."). But on July 6, 2015, SSA updated its date of marriage recognition chart (column III) to show that states only must recognize marriages performed in other states as of June 26, 2015. POMS GN 00210.003 (Bychowski Decl., Ex. F).

probable cause determination or a release. The county also argued that the probable cause determination was "by definition, a time-limited violation" and that the alleged constitutional violation had already been completed, leaving nothing for a court to decide. *Id.* at 50. The Supreme Court rejected those arguments, explaining that "[t]he County's argument … relies on a crabbed reading of the complaint" because it ignored the harm that plaintiffs had alleged arising from the county's delay, which was "capable of being redressed through injunctive relief." *Id.* at 51. Applying, *Gerstein*, the challenge to the county's delay was an example of an "inherently transitory" claim and thus, it was immaterial that the named plaintiffs' claims had become moot prior to class certification. *Id.* at 52. The present case likewise challenges an improper procedure imposed by SSA that is likewise redressible through injunctive relief. *See also Garcia v. Johnson*, 2014 U.S. Dist. LEXIS 164454, *38-39 (N.D. Cal. Nov. 21, 2014) (class action challenging agency's delay in conducting reasonable fear determinations was not moot even though named plaintiffs had already received their determinations).

C. SSA Has Not Promulgated a Pre-Litigation Change in Policy that Prevents the Harm to the Class

SSA's reliance on *Sze v. INS*, 153 F.3d 1005 (9th Cir. 1998), is misplaced. In that case, the agency had not only provided relief to the two named plaintiffs but had ***actually changed its policy*** before the complaint was even filed. Specifically,

even prior to the filing of the complaint alleging improper delays in naturalization grants, INS had changed its procedures to eliminate the delays and ensure that future applicants were not subject to them. *Id*. at 1008-09. As a consequence, it appeared that the proposed class consisted of at most just four people. *Id.* Because the agency had "changed its procedures" prior to the filing of the complaint the court concluded that the class's claims were not inherently transitory. *Id*. at 1010. *Cf. County of Riverside*, 500 U.S. at 51 (distinguishing case "in which the constitutionally objectionable practice ceased altogether before the plaintiff filed his complaint").

No such change in SSA policy that averts the ongoing harm has occurred here, and certainly not prior to the filing of the complaint as in *Sze*. Class members have not received waivers of their overpayments and SSA's ability to pursue class members for overpayments remains unabated. Indeed, SSA has only ***temporarily*** stopped seeking to place ***new*** individuals into overpayment status, and has brazenly argued that every class member should be forced through its automatic – and improper in these circumstances – policy of demanding repayment even in the face of irrebuttable evidence that the agency is at fault and recoupment is against equity and good conscience.[4]

[4] Even if the Commissioner was correct that the waiver to the current Named Plaintiffs moots this action, dismissal is not the remedy. Rather, this Court should provisionally

III. EXHAUSTION DOES NOT BAR THIS ACTION

A. This Case Qualifies for Waiver of Exhaustion

A court may review SSA's decision under 42 U.S.C. § 405(g) if the claim for benefits has been presented to SSA (presentment) and administrative remedies have been exhausted (exhaustion). *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976). The Commissioner does not dispute presentment; thus the only issue is whether exhaustion should be required here.

Unlike presentment, exhaustion "is not jurisdictional, and thus, is waivable by … the courts." *Johnson v. Shalala*, 2 F.3d 918, 921 (9th Cir. 1993). All three factors considered by courts in determining whether to waive exhaustion support waiver here: (1) resolution of Plaintiffs' claims would not serve the purposes of exhaustion (futility); (2) Plaintiffs' claims are collateral to a substantive claim of entitlement (collaterality); and (3) Plaintiffs have made a colorable showing that

---

certify the class subject to intervention by a similarly situated class member. *See Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997) ("[I]f the district court finds that the class claims are not sufficiently transitory to qualify for this exception to the mootness doctrine, it should then consider whether putative class members with live claims should be allowed to intervene."); *Kennerly v. Unites States*, 721 F.2d 1252, 1260 (9th Cir. 1983) (remanding "for consideration of possible intervention by other members of the putative class" because "similarly situated [class] members may have relied on [named plaintiff's] asserted representation of the class"). Proposed class counsel are aware of other potential named plaintiffs.

denial of relief will cause irreparable harm (irreparability). *Briggs v. Sullivan*, 886 F.2d 1132, 1139 (9th Cir. 1989).

1. Futility

The claims in this case raise a Constitutional and statutory challenge to SSA's policies of (1) instituting overpayment collection procedures even where those collection efforts themselves are a result of (and further exacerbate) the agency's unlawful discrimination and (2) instituting collection efforts in the circumstances here without first considering the evidence in SSA's possession bearing on its own responsibility for causing the overpayment and the inequity of demanding repayment.

In other words, this case presents a broad-based challenge to the agency's collection policies and practices as applied to the proposed class, not situations of individualized error. SSA's demands for recoupment of overpayments caused exclusively by its own discriminatory conduct are unconstitutional and unlawful without regard to the individual factual circumstances of any particular case. Indeed, the reason the problems raised here even exist is because, before issuing its demand for repayment, SSA policy, as described above in Section I.D, is to consider ***only*** whether an overpayment exists; it does not also first consider (1) whether SSA itself, not Plaintiffs, is at fault for overpayments caused by the agency's own discrimination or (2) whether demanding repayment of those monies

is against equity and good conscience. As the Supreme Court explained in *Bowen v. City of New York*, the challenged policy does not "depend on the particular facts of the case before [the agency]; rather, the policy was illegal precisely because it ignored those facts." 476 U.S. 467, 485 (1986). Therefore, *Kildare v. Saenz*, 325 F.3d 1078 (9th Cir. 2003), does not apply. Unlike in *Kildare*, the agency's policies and the rigidness with which they are applied in this case are plainly spelled out in the POMS – *see* Section I.D above – and the Court need not take a "leap of faith" to conclude that the agency conduct challenged in this case stems directly from SSA's policies, not mistakes made by individual hearing officers. *Kildare*, 325 F.3d at 1083.

The Commissioner's suggestion that SSA needs to compile a detailed individualized factual record by requiring exhaustion is particularly ironic given that SSA does not bother to even assess the facts surrounding fault and good conscience before issuing the notice of overpayment that constitutes the agency's initial adjudication of whether repayment is required. If SSA did that, then the harm suffered by Plaintiffs would be entirely averted, because no person could possibly conclude that targets of discrimination are at fault for the agency's discriminatory conduct or should fairly bear the burden of its consequences. Unfortunately, SSA – elevating bureaucracy over justice – has insisted, and still insists, on blindly thrusting all overpaid recipients into the same administrative

gristmill, even if doing so further demeans and harms the targets of its past discrimination.

Tellingly, the Commissioner's motion to dismiss "has not described what sort of a detailed record might assist a court in determining the merits of … [the] straightforward statutory and constitutional challenge" presented by this case. *Briggs*, 886 F.2d at 1140. Indeed, SSA was able to grant waivers to the Named Plaintiffs here without collecting any further evidence whatsoever. Held Decl. (ECF 26-2), ¶ 12, Ex. F; Richardson-Wright Decl. (ECF 26-3), ¶ 33, Ex. K. There is thus nothing to gain from compiling a detailed factual record at the agency level regarding individual cases.

Nor is there a benefit to agency expertise in determining the Constitutional and statutory construction issues raised by these claims. *See Eldridge*, 424 U.S. at 330-332; *Briggs*, 886 F.2d at 1140 ("Administrative agencies … have no particular expertise in construing such statutes."); *Doe v. Astrue*, 2009 U.S. Dist LEXIS 72819, at *21 (N.D. Cal. Aug. 18, 2009) ("[A] more detailed factual record concerning plaintiff's individual circumstances is likely to do little to cast any additional light on either the Constitution or on Congress's intent…."). Indeed, "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions;" accordingly there is a "well-established principle that when

constitutional questions are in issue, the availability of judicial review is presumed." *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

SSA has also had plenty of opportunity to address and avoid these issues. The very *raison d'être* of this lawsuit is that SSA sat on its hands for months in implementing *Windsor* with respect to Plaintiffs, while allowing overpayments to accrue for over a year (and may still be accruing for some SSI recipients).

Lastly, requiring Plaintiffs to exhaust their remedies by going through the overpayment collection process "would ensure that the members of the class suffer the very harm they seek to prevent through this litigation." *Briggs*, 886 F.2d at 1141. Requiring Plaintiffs to endure an administrative process caused by the agency's own discriminatory and unconstitutional treatment of them – particularly when the agency has made no advance effort to consider the evidence bearing on its own culpability and the equities of demanding repayment – is the precise harm this lawsuit seeks to prevent. *See Mathews*, 476 U.S. at 484 ("We should especially be sensitive to this kind of harm where the Government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place.").

2. Collaterality

This challenge to SSA's collection policies is also collateral to a claim for benefits. It does not turn on the facts of any individual case, but rather turns on

(1) whether SSA's institution of collection procedures in these circumstances is an unlawful vestige of its unconstitutional discrimination and in violation of the Social Security Act, and (2) whether Due Process and the Social Security Act require SSA to first consider the evidence bearing on its own discriminatory conduct, its role in causing the overpayments, and the statutory elements of fault and equity, before even issuing a notice of overpayment at all.

SSA cannot dispute that, as described above in Section I.D, it is SSA policy to attempt to collect overpayments against ***every member of the class*** without regard to evidence already in the agency's possession bearing on the cause of the overpayment, the recipients lack of fault, the agency's own fault, and the equity of even making the demand for repayment. *See* POMS SI 02201.025 (Bychowski Decl., Ex. C). This case is thus a challenge to a "systemwide … policy that [is] inconsistent in critically important ways with" the Constitution and the applicable statute. *City of New* York, 476 U.S. at 485. That is precisely the type of policy challenge for which courts routinely waive exhaustion. *E.g., id*. at 483 (class members "challenged the Secretary's failure to follow the applicable regulations"); *Johnson*, 2 F.3d at 921 (plaintiffs sought "invalidation of a rule used to determine eligibility for benefits rather than the denial of benefits in a particular case").

3. Irreparability

The Commissioner does not contest irreparability. *See* Def. Br. (ECF 30-1) at p. 20-21 of 31. Indeed, SSA's recent emergency actions to temporarily halt its overpayment collection procedures against some class members is evidence enough that the agency recognizes the harm it is causing. In any event, "a colorable showing of irreparable injury is one that is not wholly insubstantial, immaterial, or frivolous." *Johnson*, 2 F.3d at 922. The economic hardship and instability inevitably caused by the threat of withholding of SSI benefits alone constitutes a colorable showing of irreparable harm, as does the "severe anxiety" caused by receipt of such notices. *Id.*; *Doe v. Astrue*, 2009 U.S. Dist. LEXIS 72819, at *19-20 (N.D. Cal. Aug. 18, 2009).

B. This Action May Also Proceed Under this Court's Mandamus Jurisdiction

Plaintiffs have also invoked the mandamus jurisdiction of this Court under 28 U.S.C. § 1361, which the Commissioners' motion does not challenge and which is an independent basis for jurisdiction. Compl., ¶ 13. Mandamus jurisdiction is appropriate here because the Commissioner's actions in attempting to recoup overpayments caused by its discrimination violates "a clear, nondiscretionary duty" owed to Plaintiffs. *Briggs*, 886 F.2d at 1142. Here, SSA has violated the statute's clear mandate that it refrain from penalizing overpaid recipients who are

without fault and where seeking repayment would contravene equity and good conscience. 42 U.S.C. § 1383(b)(1)(B); *see Leschniok v. Heckler*, 713 F.2d 520, 522 (9th Cir. 1983) (mandamus jurisdiction properly invoked where plaintiffs' sought "thoughtful consideration by the Secretary of all relevant laws which Congress enacted to administer the social security system"). SSA has violated Plaintiffs' constitutional rights, as made abundantly clear by the Supreme Court in *Windsor* and *Obergefell*, and any attempt by the agency to collect overpayments caused by that violation only furthers the harm caused by the agency's discrimination. Lastly, SSA's failure to consider the evidence bearing on the agency's own conduct before institution of collection procedures violates Due Process. *Elliott v. Weinberger*, 564 F.2d 1219, 1225-26 (9th Cir. 1977) (a suit "to compel [the agency's] compliance with due process requirements" falls within a district court's mandamus jurisdiction), *aff'd in part and rev'd in part on other grounds*, *Califano v. Yamasaki*, 442 U.S. 682 (1979).

IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny the Commissioner's motion to dismiss.

Dated: July 13, 2015.

HUGH HELD and
KELLEY RICHARDSON-WRIGHT

By their attorneys,

/s/ Stephen T. Bychowski

Gerald A. McIntyre CA Bar No. 181746
gmcintyre@justiceinaging.org
Denny Chan CA Bar No. 290016
dchan@justiceinaging.org
JUSTICE IN AGING
3660 Wilshire Boulevard, Suite 718
Los Angeles, CA 90010
Phone: (213) 639-0930
Fax: (213) 550-0501

Vickie L. Henry CA Bar No. 168731
vhenry@glad.org
GAY & LESBIAN ADVOCATES & DEFENDERS
30 Winter Street, Suite 800
Boston, MA 02108
Phone: (617) 426-1350
Fax: (617) 426-3594

Anna Rich CA Bar No. 230195
arich@justiceinaging.org
JUSTICE IN AGING
1330 Broadway, Suite 525
Oakland, CA 94612
Phone: (510) 663-1055

Claire Laporte (pro hac vice)
MA Bar No. 554979
cll@foleyhoag.com
Marco J. Quina (pro hac vice)
MA Bar No. 661660
mquina@foleyhoag.com
Catherine C. Deneke (pro hac vice)
MA Bar No. 673871
cdeneke@foleyhoag.com
Stephen T. Bychowski (pro hac vice)
MA Bar No. 682241
sbychowski@foleyhoag.com
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
Phone: (617) 832-1000
Fax: (617) 832-7000