No. 20-36052

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEOBARDO MORENO GALVEZ, *et al.*,

Plaintiffs-Appellees,

v.

UR M. JADDOU[1], *et al.*;

Defendants-Appellants.

DEFENDANTS-APPELLANTS' REPLY BRIEF

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[1] As of the date of this filing, Ur M. Jaddou is the Director of U.S. Citizenship and Immigration Services. Therefore, Defendants-Appellants request that Ur M. Jaddou, in her official capacity, replace Tracy Renaud as a Defendant-Appellant.

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I. Introduction

Plaintiffs-Appellees did not meaningfully refute USCIS's arguments. Plaintiffs-Appellees continue to rely upon stale evidence from the preliminary-injunction proceedings to support their assertion that the district court properly found that they met their burden of showing irreparable harm. As USCIS argued in its opening brief, the evidence that Plaintiffs-Appellees submitted in support of their preliminary-injunction motion did not reflect the current situation of the named Plaintiffs or class members at the time the parties cross moved for summary judgment. Moreover, even the declarations that Plaintiffs-Appellees untimely attached to their reply brief do not indicate that class members were suffering or were likely to suffer irreparable harm on account of adjudication delays. Simply put, nothing in the record indicated that Plaintiffs-Appellees had experienced or were likely to experience irreparable harm at the time Plaintiffs moved for a permanent injunction.

Plaintiffs-Appellees' argument that injunctive relief was required to ensure USCIS's compliance with the 180-day deadline (Answering Br. 26–28) fails to acknowledge the standard for permanent injunctions. Because a finding of a statutory violation does not automatically entitle the prevailing party to a permanent injunction, Plaintiffs-Appellees cannot hang their hat on previous

delays to avoid an affirmative showing of irreparable harm and that the balance of equities weigh in their favor.

Besides avoiding their burden of proof, Plaintiffs-Appellees attempt to downplay the district court's failure to consider USCIS's hardship by declaring that USCIS waived its hardship arguments before the district court. But this argument falls flat, as parties need not "vigorously" pursue their arguments to preserve them for appeal, and USCIS brought its hardship argument to the district court's attention so that the district court could have ruled on it. *United States v. Miller*, 812 F.2d 1206, 1209 (9th Cir. 1987).

Plaintiffs-Appellees also failed to meaningfully counter USCIS's argument that the district court abused its discretion in entering an overbroad injunction. USCIS should have the autonomy to determine how to ensure compliance with the 180-day mandate if USCIS must strictly apply it—the district court abused its discretion by imposing requirements on USCIS that have no statutory or regulatory basis. Accordingly, this Court should vacate the district court's permanent-injunction order and remand this case to the district court for further consideration.

II. Plaintiffs-Appellees fail to cite evidence that would support an irreparable-harm finding.

a. Plaintiffs-Appellees cite to stale evidence submitted with the preliminary-injunction motion.

First, in their factual-background section, Plaintiffs-Appellees state that they had "approximately twenty-five SIJ petitions on behalf of 18-to-20-year-olds that have been or were pending for six months or more" and that there were "serious delays in the adjudication of SIJ petitions." Answering Br. 10 (citing SER-189, SER-167). These facts, however, come from the declarations Plaintiffs-Appellees submitted in support of their motion for a preliminary injunction in March 2019, over a year before they moved for a permanent injunction. In addition, they cite to declarations submitted by the named-class members to support their assertion that "Plaintiffs' personal experiences further underscored that USCIS was violating the statutory timeframe for adjudication." *Id.* (citing Answering Br. 16–20). Again, these class-member declarations were filed in support of their motion for a preliminary injunction and were dated over a year before the parties cross-moved for summary judgment. Plaintiffs-Appellees then cite to USCIS's declaration—submitted in April 2019 during the preliminary-injunction proceedings—to assert that USCIS acknowledged that most SIJ petitions were not adjudicated within 150 days. *Id.* (citing ER-107). But this year-old declaration did not reflect the facts at the time the parties briefed their cross-summary judgment motions. The district

court recognized as much. *See* ER-7 ("Plaintiffs have not identified, and this Court is not aware of, any other outstanding class members.").

Below is a table demonstrating Plaintiffs-Appellees' factual assertions based on evidence submitted at the preliminary-injunction proceedings.

Plaintiffs' Factual Assertion	**Source of Plaintiffs' Factual Assertion**
USCIS delayed in adjudicating the named Plaintiffs' SIJ petitions (Answering Br. 16–20)	Declarations submitted by Plaintiffs-Appellees in the 2019 preliminary injunction proceedings
USCIS conceded that it "regularly delays" SIJ petitions "well beyond the 180-day period." (Answering Br. 39)	Valverde Declaration submitted in support of Motion for Reconsideration of the Preliminary Injunction Order, dated August 6, 2019
"Defendants' own data in this case further demonstrates that they have delayed adjudicating petitions long past the 180-day deadline." (Answering Br. 39)	(1) Valverde Declaration submitted in support of Motion for Reconsideration of the Preliminary Injunction Order, dated August 6, 2019 (2) Declaration from Plaintiffs-Appellees attesting to the authenticity of the evidence submitted in support of its motion for a preliminary injunction, dated March 5, 2019
"Plaintiffs' evidence likewise makes [the fact that Defendants have delayed SIJ adjudications] clear." (Answering Br. 39)	(1) Declarations of attorneys submitted in support of Plaintiffs-Appellees' motion for a preliminary injunction, dated March 5, 2019 (SER-179, 189) (2) Citation to Plaintiffs-Appellees' factual background, which, as noted above, relies entirely upon evidence submitted during the preliminary-injunction proceedings.

Because these factual assertions did not reflect the circumstances that existed at the time Plaintiffs moved for a permanent injunction, they did not show that Plaintiffs-Appellees were likely to experience irreparable harm. Opening Br. 8–10 (explaining the factual developments that occurred after the preliminary injunction); *id.* 24–27.

b. Plaintiffs-Appellees' May 2020 declarations do not demonstrate irreparable harm caused by adjudication delays.

Along with the evidence submitted during the preliminary-injunction proceedings, Plaintiffs-Appellees also point to declarations that they attached to their reply brief in support of their motion for summary judgment. Answering Br. 13–14. These declarations, however, were untimely because they were not included with their motion. *Provenz v. Miller,* 102 F.3d 1478, 1483 (9th Cir. 1996) (citation omitted)).[2]

Nonetheless, to the extent the district court relied upon these declarations, not one of them demonstrated irreparable harm caused by a violation of 8 U.S.C. § 1232(d)(2). Even assuming, *arguendo*, that Plaintiffs-Appellees are correct that the Requests for Evidence (RFEs) sought irrelevant evidence (Answering Br. 13),

[2] USCIS noted that these declarations were "untimely" in its reply brief. SER-12 ("In response, Plaintiffs, for the first time, disclose several untimely and irrelevant declarations and exhibits concerning the procedural path of certain SIJ petitions, all of which but one have nothing to do with application of the Reunification Authority Interpretation.").

nothing indicates that the issuance of the allegedly irrelevant RFEs caused the class members irreparable harm. Only one of the four declarations states that a class member was removed, but this class member was removed in 2018 after the class member's SIJ petition was denied. SER-75. And his SIJ denial had nothing to do with USCIS failing to adjudicate his petition within 180 days; USCIS denied the petition due to the former Reunification Authority Requirement, which USCIS abandoned in October 2019.[3] SER-74–75. Likewise, two of the four declarations focus on RFEs that USCIS issued in 2018 and 2019—before USCIS rescinded the Reunification Authority Requirement and several months before the parties moved for summary judgment. SER-43, SER-54–55. Overall, nothing in these declarations demonstrated that the SIJ petitioners were likely to suffer irreparable harm *because of* USCIS's delayed adjudication.

[3] USCIS reopened this petitioner's SIJ petition on May 18, 2020, ten days before Ms. Stone submitted her declaration with Plaintiffs-Appellees' reply brief. SER-77. His petition was granted on June 11, 2020—less than a month after USCIS reopened his proceedings. *Moreno Galvez v. Cuccinelli*, 2:19-cv-321, Dkt. No. 75-1 (W.D. Wash.). Further, the 180-day timeframe "applies only to the initial adjudication of the SIJ petition"—it does not apply to any motion or appeal after an SIJ denial. USCIS, Policy Manual, https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-4.

c. Plaintiffs-Appellees make unsupported inferences based upon the procedural history.

Besides their reliance on stale evidence, Plaintiffs-Appellees make some generous inferences based on the procedural history. Plaintiffs-Appellees allege that USCIS began adjudicating SIJ petitions within 180 days solely because of the injunction, concluding that absent the injunction, USCIS would systematically delay adjudication. Answering Br. 37. But that conclusion overlooks recent events that occurred outside of this litigation. In October 2019, USCIS updated its Policy Manual and issued a proposed regulation[4] affirming that USCIS will generally adjudicate SIJ petitions within 180 days, but USCIS will toll the 180-day period if the petitioner has not submitted sufficient evidence to establish eligibility. *See* Opening Br. 9. Also, USCIS rescinded the Reunification Authority Requirement in October 2019, which—as Plaintiffs-Appellees acknowledge—caused delayed adjudications beginning in 2017.[5] *See* Answering Br. at 2; *see also* ER-28–29.

[4] The issue of whether USCIS's proposed regulation violates the APA is not ripe, as the agency has not yet finalized its regulation. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 147 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977).

[5] Even Amici acknowledge that USCIS "made a real push to reduce the backlog" in 2020 nationwide—not just for Washington state petitioners. Amicus Br. at 11. The table to which Amici cite, which shows that 33,791 cases were pending in 2018 and only 8,011 were pending in 2020, also demonstrates that the vast majority of delays were due to the Reunification Authority Requirement. *Id.*

Thus, due to the developments in USCIS policy that occurred in October 2019, USCIS generally adjudicates SIJ petitions within 180 days, unless tolling is necessary to obtain additional evidence.

III. The Court should not consider the facts asserted in the amicus brief because these allegations were not before the district court.

As an initial matter, this Court should disregard any new evidence that Amici present in their brief, because this Court must view the record as it was before the district court. This Court's review of factual findings "is restricted to the 'record available to the district court when it granted or denied the injunction motion.'" *Porretti v. Dzurenda*, 11 F.4th 1037, 1047 (9th Cir. 2021) (quoting *Zepeda v. INS*, 753 F.2d 719, 724 (9th Cir. 1983)). Thus, reliance on USCIS's 2021 data (Amicus Br. 10–11), which was not before the district court when it granted the injunction, should not be considered on appeal. Likewise, Amici's "experience" representing SIJ petitioners "throughout the nation" (Amicus Br. 12, 22) was never before the district court and therefore is improperly before this Court.

Nonetheless, even if this Court were to consider the new data, Amici draw inappropriate conclusions from the USCIS data table. Amicus Br. 10–11. Because the table does not distinguish between cases that are carry-overs from previous quarters under each column, Amici inaccurately conclude that all pending cases by default are pending over 180 days. In other words, the information in the table

provides no correlation between the number of cases pending and case-processing times.

If anything, the data shows that USCIS continues to adjudicate cases expeditiously, keeping pace with the volume of cases received despite operational challenges in FY 2020 and 2021 due to COVID and staff shortages. For example:

- In Q1 of FY21, USCIS adjudicated a number of petitions equal to 89% of petitions received. Amicus Br. 10.
- In Q2 of FY21, USCIS adjudicated a number of petitions equal to 98% of petitions received. *Id.*
- In Q3 of FY21, USCIS adjudicated a number of petitions equal to 79% of petitions received. *Id.*

Ultimately, the data simply do not support, as Amici allege, that "USCIS continues to delay the 180-day statutory deadline." Amicus Br. 9. Instead, the table demonstrates that from September of 2018 to September of 2020, USCIS drastically reduced the number of pending SIJ cases from 33,791 to 8,011, before experiencing a slight uptick in pending cases over the next three quarters of 2021. The information that Amici cite from the table selectively highlight a slight increase in the number of pending cases from 8,793 to 10,599—a cumulative increase of only 1,806 cases over three quarters of a year defined by a global pandemic.

Further, longer adjudication times that occurred in 2021 should not surprise Amici: in response to the COVID-19 pandemic, USCIS granted all petitioners additional time respond to RFEs and Notices of Intent to Deny (NOIDs) beginning

in March 2020. https://www.uscis.gov/news/alerts/uscis-extends-flexibility-for-responding-to-agency-requests-3 (giving petitioners an additional 60 days to respond to RFEs and NOIDs). In addition, USCIS experienced adjudication delays across all immigration-benefit applications because of mailing delays due to the pandemic. *See* USCIS, USCIS Response to COVID-19, "Special Situations," https://www.uscis.gov/about-us/uscis-response-to-covid-19 ("As a result of COVID-19 restrictions, an increase in filings, current postal service volume and other external factors, you may experience a delay of two to four weeks in receiving your receipt notice after properly filing an application or petition with a USCIS lockbox."). Thus, any nationwide uptick in adjudication timeframes is not the result of USCIS intentionally delaying SIJ adjudications, but the result of the COVID-19 pandemic. Overall, Amici's reliance on USCIS's data table fails to demonstrate that USCIS consistently delays SIJ adjudications beyond 180 days.

IV. USCIS's previous delays in adjudication did not warrant a permanent injunction.

Plaintiffs-Appellees' argument that injunctive relief was required to ensure USCIS's compliance with the 180-day deadline (Answering Br. 26–28) does not hold water. Essentially, Plaintiffs-Appellees argue that the district court did not abuse its discretion in granting injunctive relief because USCIS violated the statutory timeframe. *Id.*

A finding of a statutory violation, however, "does not automatically entitle the prevailing party to a permanent injunction." *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 137 (D.C. Cir. 2020). In *Execution Protocol Cases*, the D.C. Circuit held that the Federal Bureau of Prisons' execution protocol (the challenged action) was "not in accordance with law" to the extent that it allowed the dispensation and administration of pentobarbital without a prescription. *Id.* There, the government did not dispute that it fails to obtain prescriptions for the pentobarbital used in executions, as required by statute, nor did it deny that it does not intend to obtain prescriptions for the upcoming executions. *Id.* at 127–28. Despite a clear statutory violation, the D.C. Circuit affirmed the district court's decision denying the petitioners' motion to enjoin their executions, because the petitioners had not shown a likelihood of suffering irreparable harm caused by the absence of a prescription. *Id.* at 137. The statutory violation, by itself, was insufficient to mandate the extraordinary relief of an injunction.

Likewise, in this case, USCIS's previous delays in adjudication, by themselves, do not necessitate injunctive relief, even though the district court found that the delays violated the 180-day statutory deadline. Thus, contrary to Plaintiffs-Appellees' assertion that injunctive relief was required to ensure compliance, the statutory violations do not mandate injunctive relief; Plaintiffs-

Appellees must still meet their burden of proving the equitable factors justifying an injunction. *Execution Protocol Cases*, 980 F.3d at 137.

To the extent that Plaintiffs-Appellees argue that *Badgley* requires injunctive relief to ensure compliance with the 180-day statutory deadline regardless of the equitable factors, their argument is at odds with *Winter*, as *Winter* held that courts must weigh the equitable factors before ordering injunctive relief, even if the agency's action is unlawful. Answering Br. 26–27 (citing *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 (9th Cir. 2002); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008); *see also Hecht Co. v. Bowles,* 321 U.S. 321, 329 (1944) (holding that "[a] grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances."). Further, *Badgley* is distinguishable from the present case because the Court's holding in *Badgley* was specific to certain violations of the Endangered Species Act (ESA). *Badgley*, 309 F.3d at 1177–78 ("Supreme Court cases reinforced the holding of *TVA* and solidified the rule that, *in the context of the ESA*, 'Congress [has] foreclosed the exercise of the usual discretion possessed by a court of equity.'") (emphasis added) (citations omitted); *Weinberger v. Romero Barcelo*, 456 U.S. 305, 314 (1982) ("The purpose and language of the statute under consideration in [*TVA*], not the bare fact of a statutory violation, compelled that conclusion."). Looking to *TVA v. Hill*, 437 U.S. 153 (1978), the Ninth Circuit

explained that the Supreme Court had already reviewed the statute at issue and held that the "clear objectives and language of Congress in passing the ESA" demonstrated that Congress had already weighed the equities and removed the court's traditional discretion. *Badgley*, 309 F.3d at 1177.

When viewed in light of other Supreme Court cases analyzing injunctive relief when the government violates a clear statutory provision, it is clear that the *TVA* and *Badgley* holdings are limited to certain violations of the ESA. After *TVA*, the Supreme Court reiterated that, absent legislative history or clear statutory language indicating otherwise, courts construe statutes "in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings" in accordance with courts' traditional practices. *Weinberger*, 56 U.S. at 320 (holding that a clear statutory violation did not necessitate injunctive relief) (quoting *Hecht*, 321 U.S. at 330) (internal quotations omitted).

Unlike the ESA, nothing from the legislative history or the text of 8 U.S.C. § 1232(d)(2) indicates that Congress intended to remove courts' equitable discretion. The Court's holding in *Badgley*, therefore, is not applicable to the present case. Further, USCIS's tolling proposal does not undermine the purpose of the SIJ statute—to protect abused, abandoned, and neglected immigrant children. USCIS tolls the statutory deadline when the petitioner must submit additional

evidence to meet her burden of proof. The alternative to issuing an RFE is issuing a denial (*see infra.* 25); thus, responding to an RFE with the requested information will, in most cases, save the petition and the petitioner's priority date. Accordingly, Plaintiffs-Appellees' reliance on *Badgley* is misplaced.

V. USCIS adequately argued hardship before the district court to preserve the issue for appeal.

Plaintiffs-Appellees' assertion that USCIS waived its hardship argument because USCIS did not adequately address the argument before the district court (Answering Br. 29) falls flat. To preserve an argument for appeal, the government need not "vigorously" pursue the argument before the district court. *United States v. Miller*, 812 F.2d 1206, 1209 (9th Cir. 1987) (holding that the government sufficiently preserved its argument for appeal because the government raised the argument at a hearing, even though it "did not vigorously pursue the argument."); *accord. Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174–75 (1988) (holding that the appellant had adequately preserved an issue on appeal even though his counsel "did not explain the evidentiary basis of his argument as thoroughly as might ideally be desired."). No bright-line rule exists to determine whether a party has properly raised an argument. *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) (citations omitted). Rather, the argument "must be raised sufficiently for the trial court to rule on it. *Id.* (citing *Inland Cities Express, Inc. v. Diamond Nat'l Corp.,* 524 F.2d 753, 755 (9th Cir.1975)).

Here, USCIS sufficiently raised its argument about hardship for the district court to rule on it. The Valverde declaration, which USCIS attached as an exhibit to its motion, explained that USCIS would suffer "operational hardship" because Washington SIJ petitioners would receive priority over petitioners from the other 49 states and USCIS would need to permanently reassign adjudicators to solely focus on Washington SIJ petitions. ER-24–25. In its Motion for Summary Judgment, USCIS stated that it would suffer administrative hardship, citing to the specific portions of the Valverde declaration regarding administrative hardship. *Moreno Galvez v. Cuccinelli*, 19-cv-321 (W.D. Wash.), Dkt. No. 66 at 23.

Citing to the specific portions of the declaration was sufficient to explain the hardship that USCIS would face. The district court should consider affidavits attached to motions for summary judgment when the party brings the declaration "to the attention of the court." *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988). Because USCIS brought their explanation of operational hardship to the district court's attention by directly citing to the Valverde declaration, the district court had an obligation to review and weigh its evidence.

Further, contrary to Plaintiffs-Appellees' argument, "it is claims that are deemed waived or forfeited, not arguments." *Weissburg v. Lancaster Sch. Dist.*, 591 F.3d 1255, 1260 n.3 (9th Cir. 2010) (citation omitted); *see also Lebron v. Nat'l*

R.R. Passenger Corp., 513 U.S. 374, 379 (1995) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.") (quoting *Yee v. Escondido,* 503 U.S. 519, 534 (1992)). In *Lebron*, the Supreme Court held that the petitioner's argument, which he did not raise until after certiorari was granted, was not waived. 513 U.S. at 379. The Court reasoned that the petitioner's argument that Amtrak is part of the Government was not a new claim, but a "new argument" to support his "consistent claim" that Amtrak violated his rights. *Id.* at 379. Here, USCIS has consistently argued that Plaintiffs-Appellees do not merit a preliminary injunction because the balance of hardships weighs in USCIS's favor (*see* SER-109–110; SER-14). Thus, USCIS did not waive the issue on appeal.

Lastly, despite Plaintiffs' reliance on the district court's erroneous assertion that Defendants "offer no evidence" that SIJ petitions require more than 180 to adjudicate and investigate (Answering Br. 32), Defendants' Valverde declaration demonstrates otherwise. Mr. Valverde explained that ordering USCIS to adjudicate all Washington state SIJ petitions within 180 days "fails to take into account the additional time that it takes to adjudicate SIJ petitions which do not contain the requisite evidentiary materials." ER-25. USCIS did not state that it was unwilling to adjudicate SIJ petitions within 180 days; instead, it explained to the district court that, in some instances, USCIS is unable to adjudicate within the timeframe

because it requires additional evidence. USCIS was not seeking a free pass to ignore the statutory deadline in all circumstances—it was only seeking the ability to toll the deadline in limited circumstances to benefit SIJ petitioners. Because the district court did not address any of the factual assertions in the Valverde declaration in agreeing with Plaintiffs about USCIS's operational capabilities, the district court abused its discretion.[6]

VI. The district court's consideration of USCIS's hardship during the preliminary-injunction proceedings did not eradicate its obligation to consider the agency's hardship during the permanent-injunction proceedings.

Moreover, Plaintiffs-Appellees' argument that the district court did not need to consider USCIS's evidence of hardship because it had already considered USCIS's hardship during the preliminary-injunction proceedings (Answering Br.

[6] Plaintiffs-Appellees also argue that "Defendants also overstate the complexity of these applications," citing to the district court's finding that "defendants offer no evidence suggesting that SIJ petitions are factually or legally complex or otherwise require more than 180 days to…adjudicate." Answering Br. 52 (citing ER-19). However, USCIS explained the complexity of SIJ adjudications in its Motion for Reconsideration of the district court's Preliminary Injunction order. *See* ER-104 ("Due to the complexity of the SIJ adjudication, it may take between six weeks to a year for an officer to be fully proficient depending on their level of experience.") – ER-105 n.4 ("[C]entral to the adjudication is review of the state court order establishing the SIJ classification…the court order itself varies by state and in each case presents unique rulings and supporting facts for consideration."). If this Court finds that the district court could review evidence from previous filings, the district court should have also considered USCIS's previous declaration about the complexity of SIJ petitions.

32) ignores the very nature and purpose of preliminary-injunction proceedings. Given the "haste that is often necessary" in preliminary-injunction proceedings, courts generally will grant a preliminary injunction based on procedures that are "less formal and evidence that is less complete" than an ultimate decision on the merits. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Because of the informality and haste, courts should not require a party to "prove his case in full at a preliminary-injunction hearing," and the findings of fact and conclusions of law made by a court granting a preliminary injunction are "not binding at trial on the merits." *Id.* (citations omitted). Thus, "it is generally inappropriate" for a district court to make a final determination on the merits at the preliminary-injunction stage. *Id.*

The district court's consideration of USCIS's hardship during the preliminary-injunction phase did not relieve the district court of its responsibility to consider the government's hardships, especially given that Plaintiffs-Appellees' position and hardship had greatly changed. To the extent the district court made a final determination on the merits of USCIS's hardship during the preliminary-injunction phase, as Plaintiffs-Appellees seem to suggest, that ruling was inappropriate. *Univ. of Texas*, 451 U.S. at 395.

VII. The district court's factual findings did not amount to irreparable harm.

The district court's factual findings of irreparable harm were not based on current evidence of class members imminently facing a threat of removal because of adjudication delays. Such evidence simply did not exist in any of the declarations that Plaintiffs-Appellees submitted in support of their motion for a permanent injunction. Absent any concrete evidence of any imminent threats of removal—or even that such threats were likely—the district court hung its hat on the possibility that petitioners *may* be detained or removed while awaiting adjudication. ER-18–19.

a. The district court's reliance on past conduct was an abuse of discretion.

Plaintiffs justify the district court's reliance on stale evidence by citing to a case in which the Ninth Circuit stated that a court may look to past and present misconduct when determining whether injunctive relief is appropriate. Answering Br. 47. While the district court may consider past conduct, that does not change the analysis: a court must have evidence of "likelihood" or "actual" irreparable harm. *See* Opening Br. 23–25 (discussing case law); *Herb Reed Enterprises, LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1251 (9th Cir. 2013) (holding that the district court's finding that trademark infringement "may continue to occur" without injunctive relief was insufficient to show a likelihood of irreparable harm). Even if a court finds that an agency's prior conduct caused harm, the court "must never

ignore significant changes in the law or circumstances underlying an injunction lest the decree be turned into an instrument of wrong." *Salazar v. Buono*, 559 U.S. 700, 714–15 (2010); *cf. Roman v. Wolf*, 977 F.3d 935, 945 (9th Cir. 2020) (vacating part of a preliminary injunction because, five months after the district court issued relief, the "circumstances ha[d] changed dramatically."). The significant changes in fact, such as USCIS's rescission of the Reunification Authority Requirement and the lack of outstanding SIJ petitions at the time of the district court's order, make reliance on USCIS's previous delays inappropriate. Plaintiffs-Appellees submitted no evidence in support of their motion for a permanent injunction that class members faced imminent removal or otherwise faced imminent harm *because of* adjudication delays. The district court, therefore, abused its discretion by relying on stale evidence and clearly erred in finding that Plaintiffs showed a likelihood of irreparable harm.

b. Delays in adjudication do not affect class members' eligibility for relief from removal.

Plaintiffs-Appellees' (Answering Br. 35)[7] and Amici's arguments that SIJ classification provides relief from removal are not technically accurate. Rather,

[7] The district court did not have these facts before it when it issued the permanent injunction. Thus, this Court need not consider Amici's and Plaintiffs-Appellees' arguments regarding ICE's prima facie determination process. Nonetheless, to the extent this Court does consider these factual developments, Plaintiffs-Appellees' and Amici's arguments regarding irreparable harm due to removal protections fail for the reasons explained in this paragraph.

eligibility for SIJ classification is a factor that ICE considers in discretionary exercises of prosecutorial discretion under existing policies. These policies, however, do not require full adjudication of an SIJ petition: the individual only needs to show that they are "prima facie" eligible for SIJ classification. Memorandum from John Trasvina, Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities, at 9 (May 27, 2021). Not surprisingly, in August 2021, ICE issued another memorandum explaining, "ICE will refrain from taking civil immigration enforcement action against known beneficiaries of victim-based immigration benefits *and those known to have a pending application for such benefits*." *See* ICE Directive 11005.3, Using a Victim-Centered Approach with Noncitizen Crime Victims, https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf (emphasis added). The victim-based-immigration benefits include SIJ petitioners. *Id.* Thus, as long as an SIJ petitioner can demonstrate that they have a pending SIJ petition, ICE may exercise favorable discretion based upon its guidance. Accordingly, a delay in adjudication would not alter a petitioner's ability to request favorable discretion.

c. The parties' stipulation to forego the administrative record did not excuse Plaintiffs-Appellees from submitting evidence of irreparable harm.

Plaintiffs-Appellees note that the parties stipulated that filing the administrative record was unnecessary. Although their point in mentioning the absence of an administrative record is unclear, the stipulation did not excuse

Plaintiffs from submitting evidence of irreparable harm in support of their request for a preliminary injunction. First, the parties' stipulation was in the context of their cross motions for summary judgment, as the parties agreed that the summary-judgment motions contained purely legal issues. SER-113. The stipulation was silent about evidence supporting or opposing Plaintiffs' motion for a permanent injunction. *Id.* Indeed, the parties did not agree that the Plaintiffs-Appellees' permanent-injunction motion contained purely legal issues, nor could they.

This Court has noted that the injunctive-relief factors are "fact dependent." *BOKF, NA v. Estes*, 923 F.3d 558, 565 (9th Cir. 2019). And district courts have generally held that the equitable factors in injunctive-relief proceedings, including the question of irreparable harm, "is not limited to the administrative record." *State v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1074 n.7 (N.D. Cal. 2018). The D.C. Circuit has held the same. *See Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 369 n.7 (D.D.C. 2017) ("[E]xtra-record evidence may be used 'in cases where relief is at issue.'") (quoting *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)). This is because "[t]he issue of injunctive relief is generally not raised in administrative proceedings below and, consequently, there will usually be no administrative record developed on these issues." *Id.* (citation omitted).

Accordingly, although the parties stipulated to foregoing the administrative record for their cross motions for summary judgment, that did not excuse Plaintiffs

from submitting evidence in support of their request for a permanent injunction. While the legal issues on cross motions for summary judgment could be resolved without an administrative record, the injunctive-relief determination was fact dependent and required evidentiary support. *BOKF*, 923 F.3d at 565. Indeed, the stipulation did not prevent the parties from filing extra-record evidence: Plaintiffs submitted extra-record declarations in support of their motion, and Defendants did the same. ER-233. Thus, the absence of an administrative record should not affect this Court's analysis regarding the parties' evidence of irreparable harm.

VIII. The scope of the injunctive relief was improper.

Plaintiffs-Appellees' assertion that the district court did not infringe on USCIS's authority to enforce the SIJ statute and prioritize administrative operations is incorrect. The district court permanently enjoined[8] USCIS to strictly abide by the 180-day deadline, without exception. As the agency tasked with adjudicating petitions and carrying out the SIJ program, USCIS best understands its operational limitations and nationwide SIJ trends, and therefore is in the best

[8] Because the district court permanently enjoined USCIS from delaying adjudication beyond 180 days—regardless of the circumstances—USCIS could face contempt proceedings if it delays adjudication of any Washington State SIJ petition, even if the delay is by only one day. The injunctive relief is especially unnecessary here, where class members may seek mandamus relief should USCIS delay their processing given the district court's declaratory judgment that delays exceeding 180 days are unlawful.

position to determine how to comply with the statutory deadline. The district court's order inappropriately eliminates USCIS's discretion.

a. Plaintiffs-Appellees misstate USCIS's tolling proposal.

Plaintiffs-Appellees state that USCIS intends to toll for timeframes "unlimited in both number and duration," thereby "effectively nullif[ying] the statutory deadline." Answering Br. 46–47 (citing ER-16). This is not the case. The duration of tolling is narrowly limited by existing regulation: when USCIS finds that the petitioner has submitted insufficient evidence for USCIS to determine SIJ eligibility, USCIS can only toll the deadline for twelve weeks for an RFE and thirty days for a NOID per 8 C.F.R. §103.2(b)(8)(iv). Although the regulation permits USCIS to reset the clock if the agency must submit a request for "initial" evidence, such a request generally occurs very early on in the process, as initial evidence is evidence "required" by regulations and other USCIS instructions, such as a completed form or a court order. *See* USCIS, Policy Manual, Vol. 1, Pt. E, Ch. 6 n.3, https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6#footnote-3. And, although Plaintiffs-Appellees presume that USCIS will abuse its use of RFEs by issuing multiple RFEs solely to delay adjudication (Answering Br. 46–47), such a presumption is inappropriate. Agencies are presumed to act in good faith; thus, it is presumed that USCIS would only issue multiple RFEs if the information requested is necessary to adjudicate the petition. *CTIA–The Wireless Ass'n v.*

FCC, 530 F.3d 984, 989 (D.C. Cir. 2008) ("[W]e have long presumed that executive agency officials will discharge their duties in good faith."). Nothing in the record overcomes this presumption of good faith; thus, Plaintiffs-Appellees' baseless assertions that USCIS will request evidence solely to delay SIJ petitions do not justify the district court's injunction.[9]

b. Plaintiffs-Appellees ignore the consequences of the permanent injunction.

The alternative to requesting initial or additional evidence is to deny the SIJ petition. *Id.* § 103.2(b)(8)(ii) ("If all required initial evidence is not submitted with the benefit request or does not demonstrate eligibility, USCIS in its discretion may deny the benefit request…or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS."); *id.* 103.2(b)(8)(iii). Importantly—and something that Plaintiffs-Appellants fail to cite—USCIS is not required to issue a RFE when a petitioner files a petition with insufficient evidence. *See id.* ("USCIS in its discretion may" deny the petition or issue an RFE). Rather, issuing an RFE based upon USCIS's regulation is an act of administrative grace that benefits the petitioner. By regulation, USCIS is only

[9] Plaintiffs-Appellees' declarations did not overcome this presumption of good faith. Even if USCIS issued RFEs that seem irrelevant to Plaintiffs-Appellees' counsel, such as a request for identification documents, USCIS may have evidence in their system indicating that the individual has used another identity. Regardless, the declarations do not show that USCIS issues RFEs solely to delay adjudication; at best, they speculate as to USCIS's intent.

required to give petitioners time to respond when USCIS uncovers "derogatory" information that will serve as the basis of denial. 8 CFR § 103.2(b)(16). But this requirement differs from insufficient evidence, which is normally resolved with a discretionary RFE. Thus, by prohibiting any tolling for USCIS to issue a discretionary RFE, USCIS may deny a petition if it discovers insufficient evidence close to the 180-day deadline.

IX. Plaintiffs-Appellees' analysis distinguishing case law misses the point of USCIS's arguments.

Plaintiffs-Appellees' attempt to distinguish *Mashpee* and *In re Barr Laboratories* (Answering Br. 43–44) falls flat. The key point of *Mashpee* is that the district court erred by "disregarding the importance of there being 'competing priorities'" for limited agency resources. *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1101 (D.C. Cir. 2003). As explained earlier, solely because a statutory timetable exists in this case does not automatically entitle Plaintiffs-Appellees to injunctive relief (*see supra.* at 10–14). Thus, although *Mashpee* involved a case in which no statutory deadline existed, this does not change the district court's obligation to consider USCIS's competing priorities for its limited resources.

Likewise, Plaintiffs-Appellees misread this Court's application of *In re Barr Laboratories, Inc.* in *Natural Resources Defense Council, Inc. v. EPA*, 966 F.2d 1292 (9th Cir. 1992). In *Natural Resources Defense Council*, this Court rejected

the EPA's request to reverse the district court's declaratory judgment, holding that Congress intended for the EPA to abide by the statutory timeline. *Id.* at 1300. The decision not to apply the *In re Barr Labratories* holding that the "agency's choice of priorities is an important factor in considering whether to grant equitable relief" was in response to the government's request for relief from the district court's declaratory judgment. *Id.* at 1299 (citing to *In re Barr Laboratories*, 930 F.2d 72, 74 (D.C. Cir. 1991) and holding that "[n]one of these factors militates against an award of declaratory relief."). This Court said nothing about *In re Barr Laboratories'* application to the district court's decision to grant or deny injunctive relief. *Id.* Thus, this Court did not reject *In re Barr Laboratories'* holding as it relates to injunctive relief.

Despite Plaintiffs-Appellees' argument distinguishing *Firebaugh* (Answering Br. 48), they once again miss the heart of USCIS's argument: USCIS should have the autonomy to determine how to ensure compliance with the 180-day mandate if USCIS must strictly apply it. Opening Br. 32–33. In other words, while agencies may grant additional procedural rights in the exercise of their discretion, reviewing courts may not "impose them if the agencies have not chosen to grant them." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 102 (2015); *see also Zixiang Li v. Kerry*, 710 F.3d 995, 1004 (9th Cir. 2013) ("We have no authority to compel agency action merely because the agency is not doing something we may

think it should do."). Because issuing RFEs rather than denials is discretionary, and no statutory or regulatory authority exists permitting tolling upon a petitioner's request, the district court abused its discretion by compelling tolling upon a petitioner's request. *Perez*, 575 U.S. at 102.

X. Plaintiffs-Appellees misjudge USCIS's operations.

Plaintiffs-Appellees are correct that the SIJ statute applies to "all" SIJ petitioners, not just Washington state petitioners. Answering Br. 54. Nonetheless, Plaintiffs-Appellees fail to acknowledge USCIS will likely encounter backlogs in the future, whether due to an unanticipated surge in SIJ petitions, a global pandemic, a government furlough, or other issues affecting operations. As the order stands, when USCIS encounters such a backlog, USCIS will be forced to place Washington-state petitioners ahead of all other petitioners nationwide. The district court's failure to consider this reality, as explained in the Valverde declaration (ER-25), was an abuse of discretion. The district court may ultimately determine that the competing priorities are outweighed by the alleged harm to Plaintiffs-Appellees, but the district court still should have considered this important factor in its analysis. Because the district court did not acknowledge that its order would place Washington-state petitioners ahead of petitioners from the other 49 states, the district court abused its discretion.

XI. Amici's suggestion that this Court should extend the injunction nationwide is inappropriate.

Amici's request that this Court create nationwide relief, or at least extend the injunction to the Ninth Circuit (Amicus Br. 25–26), is inappropriate. *City & Cty. of San Francisco v. Barr*, 965 F.3d 753, 764 (9th Cir. 2020) (vacating the district court's imposition of a nationwide injunction), *cert. dismissed sub nom. Wilkinson v. City & Cty. of San Francisco, California*, 141 S. Ct. 1292 (2021); *California v. Azar*, 911 F.3d 558, 582 (9th Cir. 2018) (holding that nationwide relief must be "necessary to give prevailing parties the relief to which they are entitled.") (citation omitted). In *Barr*, this Court held that the district court abused its discretion by issuing a nationwide injunction "without determining whether Plaintiffs needed relief of this scope to fully recover." *Id.* There, because the plaintiffs did not establish "a nexus between their claimed injuries and the nationwide operation of the Challenged Conditions," this Court limited the injunction's geographic reach. *Id.* Likewise, because a nationwide injunction, or even a Ninth Circuit injunction, is not necessary to ensure that USCIS adjudicates all Washington state petitioners' SIJ petitions within 180 days, this Court should reject Amici's far-reaching request.

XII. Conclusion

Plaintiffs-Appellees failed to justify the district court's failure to consider USCIS's evidence of hardship and reliance on stale evidence. In addition,

Plaintiffs-Appellees have not refuted USCIS's argument that the scope of relief inappropriately infringes on USCIS's discretion and will ultimately harm SIJ petitioners. Therefore, USCIS requests that this Court vacate the district court's order and remand the case for further proceedings.

Dated: October 21, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 21, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Katelyn Masetta-Alvarez
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Signature s/ Katelyn Masetta-Alvarez **Date October 21, 2021**

ADDENDUM

8 C.F.R. § 103.2(b)(10)

Effect of a request for initial or additional evidence for fingerprinting or interview rescheduling—
(i) Effect on processing. The priority date of a properly filed petition shall not be affected by a request for missing initial evidence or request for other evidence. If a benefit request is missing required initial evidence, or an applicant, petitioner, sponsor, beneficiary, or other individual who requires fingerprinting requests that the fingerprinting appointment or interview be rescheduled, any time period imposed on USCIS processing will start over from the date of receipt of the required initial evidence or request for fingerprint or interview rescheduling. If USCIS requests that the applicant or petitioner submit additional evidence or respond to other than a request for initial evidence, any time limitation imposed on USCIS for processing will be suspended as of the date of request. It will resume at the same point where it stopped when USCIS receives the requested evidence or response, or a request for a decision based on the evidence.
(ii) Effect on interim benefits. Interim benefits will not be granted based on a benefit request held in suspense for the submission of requested initial evidence, except that the applicant or beneficiary will normally be allowed to remain while a benefit request to extend or obtain status while in the United States is pending. The USCIS may choose to pursue other actions to seek removal of a person notwithstanding the pending application. Employment authorization previously accorded based on the same status and employment as that requested in the current benefit request may continue uninterrupted as provided in 8 CFR 274a.12(b)(20) during the suspense period.

8 U.S.C. § 1232(d)(2)

(2) **Expeditious adjudication**
All applications for special immigrant status under section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) shall be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed.