[ORAL ARGUMENT NOT YET SCHEDULED]

No. 23-5025

In The United States Court of Appeals
For The District of Columbia Circuit

AFGHAN AND IRAQI ALLIES UNDER SERIOUS THREAT BECAUSE OF THEIR FAITHFUL SERVICE TO THE UNITED STATES,
On Their Own and On Behalf of Others Similarly Situated,

Plaintiffs-Appellees,

v.

ANTONY J. BLINKEN,
in his official capacity as Secretary of the United States Department of State, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Columbia
No. 1:18-cv-1388 (Hon. Tanya S. Chutkan)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiffs-Appellees certify as follows:

A. Parties and Amici: All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Certificate as to Parties, Rulings, and Related Cases included in the Brief for Defendants-Appellants.

B. Rulings Under Review: References to the rulings at issue appear in the Certificate as to Parties, Rulings, and Related Cases included in the Brief for Defendants-Appellants.

C. Related Cases: The history of this case before the Court appears in the Certificate as to Parties, Rulings, and Related Cases included in the Brief for Defendants-Appellants. Counsel for Plaintiffs-Appellees are not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

Dated: June 23, 2023

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GLOSSARY OF ABBREVIATIONS

AAPA	Afghan Allies Protection Act of 2009, Pub. L. No. 111-8, 123 Stat. 807 (2009)
APA	Administrative Procedure Act, 5 U.S.C. § 706
Br.	Opening brief for Defendants-Appellants, Doc No. 2000704, May 24, 2023
ESSAA	Emergency Security Supplemental Appropriations Act, 2021, Pub. L. No. 117-31, § 401(a)(3), 135 Stat 309
JA	Joint Appendix Doc No. 2000705, May 24, 2023
RCIA	Refugee Crisis in Iraq Act of 2007, Pub. L. No. 110-181, 122 Stat. 395 (2008)
SIV	Special Immigrant Visa

INTRODUCTION

Defendants' appeal is the latest step in their history of intransigence towards Congress's directive to promptly adjudicate Special Immigrant Visa ("SIV") applications so as to provide a meaningful path to safety for Afghan and Iraqi nationals who face deadly risks of retaliation because of their service to the United States. Over the past two decades of U.S. military involvement in Afghanistan and Iraq, thousands of ordinary citizens in those countries risked their lives to provide critical assistance to the U.S. and allied troops and civilian missions. Starting in 2006, Congress created the SIV program in recognition of the moral debt that the United States owes to those Afghan and Iraqi allies for their contributions, their loyalty, and the ongoing dangers that they and their families face as a result. In 2013, to rebuke Defendants for their unacceptably slow pace of adjudications, Congress amended the SIV laws to direct that all processing steps in Defendants' control "should be completed not later than 9 months."

Defendants, however, failed to heed the 2013 congressional directive, and the magnitude of delays experienced by SIV applicants continued to grow into multiple years. As a result, in 2018, Plaintiffs—a class of Afghan and Iraqi SIV applicants whose applications were pending beyond the nine months directed by Congress—filed this unreasonable delay case to force Defendants to promptly adjudicate their applications. In 2019, the district court conducted a full merits

analysis under the *TRAC* factors, which this Circuit uses to determine whether there is unreasonable delay under the Administrative Procedure Act, 5 U.S.C. § 706(1). *See Telecomms. Rsch. & Action Ctr. v. F.C.C.*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). Based on this analysis, the district court ruled on summary judgment that Defendants' delays were unlawful, and that injunctive relief was appropriate.

As contemplated by the summary judgment order, in 2020, the district court entered a permanent injunction ("Injunction" or "2020 Injunction"). The Injunction takes the form of a common and practical remedy in unreasonable delay cases: it requires Defendants to follow a schedule that Defendants themselves developed for adjudicating the delayed applications and to periodically report on their progress. The Injunction applies to those applications that were, as of 2020, pending in government control for more than nine months in contravention of the congressional directive. The Injunction's objective was, and remains, to prioritize and secure final adjudication for that defined group of SIV applicants. Defendants would discharge their obligations under it when they complete the required adjudications.

Between 2020 and 2021, Defendants made little progress in adjudicating the applications covered by the Injunction and failed to meet the Injunction's schedule for adjudication during each reporting period. In the summer of 2021, as the United

States' deadline for withdrawing its troops from Afghanistan neared, Congress passed a bill with overwhelming bipartisan support reiterating the nine-month timetable and the importance of fulfilling the promise to bring SIV applicants and their families to safety. Yet, owing to Defendants' record of delays, the U.S. government left thousands of the Injunction's beneficiaries under Taliban control when it completed its withdrawal from Afghanistan at the end of the summer. These Afghan applicants joined the ranks of the Iraqi Injunction beneficiaries who were also left behind by the U.S. departure from Iraq years ago.

In 2022, Defendants filed their motion for relief from the 2020 Injunction—the motion underlying this appeal—even though they had never complied with the Injunction and had not completed adjudicating the delayed SIV applications covered by it. Defendants instead sought to persuade the court that alleged "intervening events" and "ongoing, shifting on-the-ground realities" that emerged over the time they delayed adjudicating the applications justified relief from their obligations to the Injunctions' beneficiaries. Br. 55-56; *see also* JA 993-94 ("Order") (describing Defendants' alleged "intervening factual developments"). Defendants moved for termination or modification of the Injunction either under Rule 60(b), which permits relief from final judgments or orders, or in the alternative, Rule 54(b), which permits reconsideration of certain other orders.

In the order on appeal before this Court, the district court denied Defendants' motion to the extent it sought termination of the Injunction and held that its conclusion would be the same whether Rule 60(b) or Rule 54(b) applied. *See* JA 993-99. In so doing, the court recognized that many of the "changes" identified by Defendants were "not changes at all," and simply reiterated arguments resolved previously. JA 996-97. For example, the court had already balanced the nine-month statutory directive against Defendants' operational needs and had accounted for certain external events, such as the COVID-19 pandemic and embassy closures in issuing the Injunction. JA 996-97. Moreover, in reconsidering the *TRAC* analysis in light of "intervening factual developments," the court held that the "key facts" remained the same: Congress had reaffirmed the nine months timetable for adjudications in the SIV laws; Defendants had yet to adjudicate the SIV applications that were already unreasonably delayed in 2020; and Plaintiffs continued to be harmed by the delay, living at risk of retaliation for their support of the United States. JA 993, 996-98. Indeed, the court recognized that the Injunction's beneficiaries are now living at increased risk in deteriorating conditions in Iraq and Afghanistan; and in Afghanistan, many of the beneficiaries are hiding from the Taliban forces that are seeking revenge against those they consider to be traitors. JA 998.

The Court should affirm the district court's refusal to terminate the 2020 Injunction on one of three independent grounds.[1] First, the Court need not reach Defendants' Rule 54(b) arguments, including the *TRAC* analysis, if it decides that Rule 60(b) applies to Defendants' motion and affirms on the ground that Defendants have not shown that the Injunction is detrimental to the public interest under Rule 60(b)(5), or that extraordinary circumstances exist under Rule 60(b)(6). Second, even if the Court decides that Rule 54(b) applies, the Court can alternatively affirm if it decides that, as a threshold matter, none of Defendants' "changes" justify reconsideration of prior orders because they cannot render reasonable continued delays that were previously unreasonable. Finally, even if the Court applies Rule 54(b) and reaches the district court's reconsideration of the *TRAC* analysis, it should still affirm. The court did not abuse its discretion when it concluded that none of the "changes" raised by Defendants warrant terminating the Injunction and refused to consider anew Defendants' argument—repeated and

[1] In the same order on appeal, the district court ordered that the Injunction be modified to cover SIV applicants who joined the class between May 2020 and November 2022. *See* JA 998. Defendants' appeal, however, is limited to the district court's refusal to terminate the existing injunction. Defendants' statement of issues on appeal refers only to "the injunction," Br. 4, and the only existing injunction is the 2020 Injunction because, as explained further in Plaintiffs' counter-statement of the case, *see infra* pp. 7-18, the modified injunction has not been entered yet.

rejected throughout this litigation—that the judiciary has no role in enforcing Congress's nine-month timetable.

In the closing pages of their brief, Defendants reveal the true reason that they are seeking to terminate the Injunction: that no matter their delays, they deem it "impracticable" to comply with *any* injunction in the form of a "judicially imposed adjudication plan" that "would require the Agencies to meet timing benchmarks and reporting obligations beyond reporting already provided to Congress." Br. 56. But that position finds no basis in the law. Congress directed Defendants to adjudicate SIVs in nine months; the APA authorizes the courts to hold agencies accountable for unreasonable delays; courts in this Circuit routinely order injunctions like this one to remedy delays; and the district court concluded that the Injunction was a proper remedy in a prior decision that should not be the focus of this appeal. The proper role of the judiciary is to hold the Executive accountable to Congress. The Court should reject Defendants' bid for impunity.

COUNTER-STATEMENT OF ISSUES

Did the district court act within its discretion in refusing to terminate the 2020 Injunction, which requires Defendants to promptly adjudicate, and report on the progress of, a defined group of Special Immigrant Visa ("SIV") applications that were previously identified as unreasonably delayed?

PERTINENT STATUTES AND POLICIES

All applicable statutes and policies are contained in the Addendum to the Brief for Defendants-Appellants.

COUNTER-STATEMENT OF THE CASE

I. Congress Created the SIV Program and Directed Defendants to Adjudicate SIVs in Nine Months to Address Delays.

During the decades-long U.S. military presence in Afghanistan and Iraq, tens of thousands of Afghan and Iraqi nationals aided the United States and allied coalitions in their military and governmental operations, risking their lives to provide essential local and linguistic expertise. *See* Decl. of Steven Miska, Col. (Ret.) U.S. Army, in Supp. of Pls.' Mot. Prelim. Inj. ¶¶ 24-30, ECF No. 34-2. For their allegiance to the United States, an untold number of allies and their families have been kidnapped, tortured, and killed by the Taliban, ISIS, and other insurgents who view them as traitors. *See id.* ¶¶ 9, 26-27.[2]

In recognition of their service and the life-threatening dangers that they face, Congress created the SIV program to provide a speedy path to safety for Afghan and Iraqi nationals who experience ongoing and serious threats because of their service to U.S. efforts in their countries. *See* Refugee Crisis in Iraq Act of 2007,

[2] *See, e.g.*, Decl. of Allison C. Wilson in Supp. of Pls.' Mot. Prelim. Inj. Ex. 6, ECF No. 34-18 (reporting on how the Taliban told villagers they would burn the children of anyone who aids Americans and proceeded to pour gasoline over the head of an 11-year-boy and set his body on fire).

Pub. L. No. 110-181, 122 Stat. 395 (2008) ("RCIA") (codified as a note to 8 U.S.C. § 1157); Afghan Allies Protection Act of 2009, Pub. L. No. 111-8, 123 Stat. 807 (2009) ("AAPA") (codified as a note to 8 U.S.C. § 1101). The laws creating the SIV program set forth a straightforward adjudication process not unlike other immigrant visa processes: they require that an applicant demonstrate eligibility, including by having employment with a U.S. government-affiliated entity verified, and clear a "risk assessment" and "a background check and appropriate screening." RCIA §§ 1244(a)-(b); AAPA §§ 602(b)(1)-(2). All processing and adjudication steps, other than an in-person interview and issuance of the visa, take place electronically. *See* JA 867-69 (Decl. of A ¶¶ 14-32) (describing the process from the applicant's perspective); JA 857-58 (Decl. of W ¶¶ 7-18, 30) (same).

Since the program's inception, however, Defendants implemented the SIV program with indifference to Congressional intent, creating a labyrinthine fourteen-step process not required by the SIV laws. *See* Br. 6 (describing the process that Defendants created). Representative Earl Blumenauer, one of the original sponsors of the SIV legislation, complained that the State Department was "drag[ging] its feet on these visas for Afghans who risked their lives" after only "a trickle" of the visas that were authorized had been approved four years into the program's existence. 159 Cong. Rec. 17031 (2013). He lamented that "[t]here is no

excuse to fail to make the SIV program work," and that "[i]t is our duty now to save those who risked so much to help us when we needed them." *Id.*

To compel Defendants to accelerate the pace of SIV adjudications, Congress amended the laws in 2013 to provide that all government-controlled steps in the SIV process "should be completed *not later than 9 months*" from submission of an application. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1218-19, 127 Stat. 910, 914 (2013) (as codified in RCIA and AAPA) (emphasis added); RCIA § 1242(c)(1) (2013) (same); AAPA § 602(b)(4)(A) (2013) (same). Congress emphasized the importance of speedy adjudication by requiring that Defendants publish quarterly public reports that include "the reasons for the failure to process any applications that have been pending for longer than 9 months." RCIA § 1248(f)(2); AAPA § 602(b)(11); *see also* RCIA § 1248(f) (requiring the submission of a report to Congress within 120 days describing, *inter alia*, "the implementation of improvements" to SIV applications); AAPA § 602(b)(11)(B) (same).

II. Plaintiffs Filed This Case and Secured the Injunction Because Defendants Defied the Congressional Directive and Continued to Delay SIV Adjudication.

Despite Congress's 2013 directive, SIV applicants continued to experience persistent delays far exceeding nine months. As a result, Plaintiffs filed this class action complaint in 2018 on behalf of SIV applicants whose applications had been

pending in government control for more than the statutory timetable. Am. Compl., ECF No. 23. As relevant to this appeal, Counts 1 and 2 of the five-count Amended Complaint sought (1) a declaration that Defendants have unreasonably delayed the processing and adjudication of the class members' SIV applications under the APA, 5 U.S.C. § 706, and (2) an injunction compelling Defendants to take the unreasonably delayed action—*i.e.*, final adjudication of delayed SIV applications. *Id.* ¶¶ 68-77. In January 2019, the court denied Defendants' motion to dismiss, in which they had argued that, *inter alia*, the pace of SIV adjudications is discretionary. *See* Order Den. Mot. to Dismiss, ECF No. 48. The parties then embarked on expedited discovery in support of Plaintiffs' motion for a preliminary injunction. *See* Order Granting Disc., ECF No. 49.

In September 2019, the district court converted the preliminary injunction motion and entered summary judgment in Plaintiffs' favor, concluding that Defendants unreasonably delayed adjudicating Plaintiffs' SIV applications. *See* JA 1-20 (Summ. J. Order). In so doing, the district court conducted a full merits analysis pursuant to the *TRAC* factors that this Circuit uses to assess unreasonable delay in APA cases. *See id.* (citing *TRAC*, 750 F.2d 70, 79-80). The court relied on Plaintiffs' undisputed analysis of adjudicatory delays, which Plaintiffs calculated based on data obtained in discovery. *See* JA 4-5. The court also accepted Plaintiffs' undisputed account of problems with "Defendants' method of tracking and

reporting SIV application processing times" that "result[] in an undercount" of delays in Defendants' public reports on the program. JA 5-7. Finally, the court credited Plaintiffs' declarations, which Defendants did not challenge, that the delays "(1) place Plaintiffs' lives in danger, (2) cause Plaintiffs to live with the stress and anxiety of trying to protect themselves and their families from danger, (3) prevent Plaintiffs from adequately planning for the future, and (4) harm national interests, because delays undermine other countries' trust in this country's commitments." JA 14. The court concluded that "the probability of actual harm and the related stress are compounded each day an applicant waits for adjudication" and "the level of uncertainty increases . . . the longer [applicants] wait for processing because the passage of time makes it more difficult to obtain the requisite verifications and information to pass background checks." JA 15.

The court also rejected a bevy of legal arguments Defendants made in support of their position that they should be given "an unbounded, open-ended timeframe in which to adjudicate SIV applications." JA 11-13. The court, for example, rejected Defendants' excuses that the complexity of the program and national security concerns inherent in it justify the delays, ruling that "Congress was patently aware of the national security implications" and other complexities when it enacted the statutory timetable. JA 11-12. The court further ruled that Defendants' decision to prioritize certain applications for adjudication, Br. 9, does

not excuse them from Congress's directive that *all* SIV applications, regardless of prioritization, be adjudicated within nine months. *See* JA 16-17; *see also* JA 55-56 (Order on Class Certification).[3]

In light of its unreasonable delay ruling, the district court held that Plaintiffs were entitled to injunctive relief. The court ordered "[t]he remedy of requiring an agency to create a plan [for adjudication] and submit periodic progress reports," which the court explained is a "common" remedy for unreasonable delay and would not "unduly intrud[e] into Defendants' province." JA 18 (Summ. J. Order). The court opted not to order "the immediate adjudication of the applications as a remedy for Defendants' delay." *Id*.

In June 2020, the district court entered the permanent injunction contemplated by the summary judgment order. *See* JA 62-76 (Inj. Order). The Injunction approves Defendants' proposed schedule for adjudication at each "government-controlled step" of the adjudication process and proposed format for

[3] Although Congress directed Defendants to "develop[] and implement[] a system to prioritize the processing of" Afghan SIV applicants as a funding restriction in an appropriation bill for fiscal year 2019, it did not require the particular prioritization plan that Defendants adopted and the requirement is no longer in place, as it expired at the end of the fiscal year. Consolidated Appropriations Act, Pub. L. 116-6, § 7076, 133 Stat. 391 (2019); *Bldg. & Const. Trades Dep't, AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir. 1992) ("While appropriation acts are 'Acts of Congress' which can substantively change existing law, there is a very strong presumption that they do not, and that when they do, the change is only intended for one fiscal year.") (internal citation omitted).

periodic reporting. *See* JA 65-75. The Injunction also defines a methodology for identifying its beneficiaries: those SIV applicants "whose applications have been awaiting government action for longer than 9 months, as of May 21, 2020, the date of the submission of [the] plan." JA 64. The Injunction's objective is to require Defendants to promptly complete the adjudication of the defined group of beneficiaries' applications.

The Injunction also accounts for contingencies that may affect visa processing. Relevant here, for example, the Injunction recognizes that as of June 2020, the visa unit at the U.S. Embassy Kabul was closed due to the COVID-19 pandemic and consular services in Iraq were "severely limited." JA 68. The Injunction accounts for such ongoing contingencies that might affect processing by allowing Defendants to explain any "reasonable circumstances for the delay" at the interview stage in their progress reports. JA 68-70.

Defendants filed a motion for reconsideration of the summary judgment order, which the district court denied. *See* JA 22-28 (Order Den. Recons.). Defendants appealed the entry of the Injunction, but later voluntarily dismissed the appeal. *Afghan & Iraqi Allies v. Blinken*, 2021 WL 4765441 (D.C. Cir. 2020).

III. Defendants Continued to Delay Adjudications Despite the Injunction, Leaving the Injunction's Beneficiaries in Increased Danger.

Despite the entry of the Injunction, Defendants continued to delay SIV adjudications and failed to meet the Injunction's schedule for adjudication during

each reporting period—even as the United States prepared to withdraw from Afghanistan and the Taliban made advances in the country. *See* JA 268-72 (Greene Decl. ¶¶ 4, 10, 11, 20). In the summer of 2021, recognizing the increased urgency of protecting Afghan SIV applicants, Congress passed an emergency bill with overwhelming bipartisan support that expanded eligibility for SIVs and underscored that the nine-month timetable set in 2013 encompasses *all* government-controlled stages of the SIV process. *See* Emergency Security Supplemental Appropriations Act, 2021 ("ESSAA 2021"), Pub. L. No. 117-31, § 401(a)(3), 135 Stat 309, 316. The bill set to rest Defendants' position, taken throughout this litigation, that the nine-month timetable applied only to the later stages of the SIV application process. *See, e.g.*, JA 24-26 (Order Den. Recons., (rejecting the position)). As the President signed the bill into law, the bill's co-sponsor, Senator Jeanne Shaheen, emphasized, "We must send a strong message to our current and future allies: If you stand by our side on the battlefield, we will have your back." 167 Cong. Rec. S.5214 (daily ed. July 30, 2021).

Although Defendants made some efforts to speed up SIV processing in the few months before the August 2021 target deadline for U.S. withdrawal from Afghanistan, *see* Br. 12-13, those efforts were too little, too late. Because Defendants had long delayed adjudicating SIVs, the U.S. government left behind many of their Afghan allies under Taliban rule when it completed its withdrawal.

In October 2021, when the parties agreed to a time-limited stay of the Injunction to allow for settlement discussions,[4] Defendants stipulated that thousands of applications belonging to the Injunction's beneficiaries remained unadjudicated. *See* Joint Stipulation, ECF No. 144, at 2.

For those Injunction beneficiaries who remain in Afghanistan, the harm of Defendants' delays has been magnified under Taliban rule. After taking over Afghanistan, the Taliban have launched door-to-door campaigns to systematically locate and kill those who aided the United States. *See, e.g.*, JA 702-05 (Greene Decl. Ex. 13 (reporting on findings from a U.N. report)); *see also* JA 859 (Decl. of W ¶¶ 24-26 (describing deteriorating conditions in Afghanistan, including that "the Taliban are going door-to-door searching for people who have worked with the Americans")). Injunction beneficiaries remain in hiding as they await adjudication of their visas. *See id*.

Meanwhile, the security situation in Iraq has also deteriorated for those SIV applicants who remain there, despite the U.S. military withdrawal from Iraq in 2011. The SIV program for Iraqis closed to new applicants in 2014, JA 537 (Greene Decl. Ex. 10), meaning that all Iraqi SIV applicants still awaiting adjudication are Injunction beneficiaries who have been waiting for their SIVs for

[4] After the settlement talks failed and Defendants suggested that they would file a motion for relief, the district court continued to stay the Injunction. Plaintiffs opposed the extended stay, but it remains in place to this day. *See* JA 991 (Order).

nearly a decade. One such Iraqi applicant has been waiting nine years for his SIV and, in those years, he has been the target of multiple assassination attempts, a close associate of his was murdered owing to his work for the United States, and he and his family continue live in fear while his application languishes in agency delays. *See* JA 866-72 (Decl. of A ¶¶ 7-13, 33-39).

IV. Defendants Seek to Terminate the Injunction Without Completing Adjudication of Delayed SIV Applications.

When the parties' settlement discussions failed in 2022, Defendants filed the motion at the root of this appeal: a motion to terminate, or in the alternative, modify the Injunction. *See* JA 77-78 (Defs. Mot. for Relief). Defendants did not claim that they had completed adjudicating the SIV applications covered by the Injunction. Instead, they argued that certain "changed circumstances" that arose during their continued delay in adjudication—including "global events," "embassy operations," COVID-19, and "improvements to the SIV program"—justified terminating or modifying an injunction as to which the objective had not been satisfied. *See* JA 96-130.

In the November 30, 2022 order that is on appeal before this Court, the district court denied Defendants' motion for relief to the extent it sought termination of the Injunction. *See* JA 989-1001 (Order). The court considered each of the "factual developments" that Defendants raised under the *TRAC* analysis and held that they "ultimately do not alter the court's determination that the

government's delay in adjudicating Plaintiffs' applications is unreasonable." JA 994. The court also refused to reconsider many of the legal arguments that Defendants had made previously on summary judgment. *See, e.g.*, JA 996-97, 999.

In the same November 30 order, the court ruled that modifications to the Injunction may be warranted, and in that respect, it ordered additional proceedings to consider any modifications. *See* JA 999-1001. Given that Defendants had not proposed any specific modifications to date, the court did not approve any modifications in that order, except to move out the cut-off date for application of the Injunction to account for class members who joined the class after May 21, 2020. JA 1000. The court instead ordered Defendants to propose modifications tailored to their claimed "changed circumstances" and permitted Plaintiffs to take discovery so that they could object as needed. *Id.* The court referred the case to a magistrate judge to oversee the development of a modified injunction. *Id.*

During the discovery period that followed the district court order, Plaintiffs uncovered additional support for challenging the evidence that Defendants submitted in support of their motion for relief. Specifically, Defendants submitted several declarations from government officials in support of their motion. In opposing the motion, Plaintiffs had challenged those declarations because they lacked foundation, included statistical information without citation or explanation, relied on hyperbolic and self-serving characterization, and were inconsistent with

each other. *See* JA 38-41 (Pls.' Opp'n to Mot. for Relief). Discovery confirmed Plaintiffs' concerns, and so at the conclusion of discovery, Plaintiffs filed a motion to strike several of Defendants' declarations. Mot. to Strike, ECF No. 216. In particular, Plaintiffs moved to strike the whole declaration of Maren Brooks and portions of the declarations of Neal Vermillion and Evelyn Martin because the declarants lacked personal knowledge and the declarations contained inadmissible hearsay. *See id.* at 6-7, 9-13, 15-20, 22-23. Defendants rely on the same declarations in this appeal. *cf.* Br. 31, 34, 41, 44, 46-48, 50 (citing Brooks declaration, JA 134-55); Br. 31 (citing Martin declaration, JA 203-06); Br. 47 (citing Vermillion declaration, JA 197-201).[5]

Plaintiffs' motion to strike and the parties' submissions on potential modifications to the Injunction remain pending before the district court. The appeal before this Court pertains only to the district court's refusal to terminate the 2020 Injunction.

[5] Defendants also cite to the declaration of Peggy Petrovich on appeal, despite the parties' agreement that Plaintiffs would forego deposing her as long as Defendants did not rely on the declaration in future proceedings without first producing her or a substitute 30(b)(6) witness for deposition. *See* Joint Status Rep., at 3, ECF No. 205. The Court should strike references to that declaration from Defendants' appeal brief. *See* Br. 31, 43 (citing Petrovich Declaration, JA 176-183).

SUMMARY OF THE ARGUMENT

The Court should affirm the district court's denial of Defendants' motion to terminate the 2020 Injunction under one of three independent grounds presented by Plaintiffs. The district court did not abuse its discretion in refusing to terminate the Injunction based on alleged "changed circumstances," Br. 2, whether the Court reviews the appeal by reference to: (I) the limited grounds for relief from a final judgment or order in Rule 60(b); (II) the threshold question of whether justice requires reconsideration under Rule 54(b); or (III) the district court's substantive reconsideration of the *TRAC* factors under Rule 54(b).

I. The Court should affirm because Defendants are not entitled to relief under Rule 60(b). Rule 60(b) governs relief from "final judgment[s]" and "final…order[s]," and applies to Defendants' attempt to terminate the permanent Injunction that the court entered after a full hearing on the merits. Fed. R. Civ. P. 60(b). Rule 60(b) specifies limited grounds for relief and Defendants cite only Rule 60(b)(5) and (b)(6) as grounds for termination. But Defendants cannot show that "applying [the Injunction] prospectively is no longer equitable," so as to permit relief under Rule 60(b)(5), because there is no dispute that Defendants have yet to adjudicate all of the SIV applications covered by the Injunction. Nor do any extraordinary circumstances exist to meet the standard for relief under Rule 60(b)(6).

II. In the alternative, if the Court decides that Rule 54(b) applies, the Court should affirm the district court because, as a threshold matter, justice does not require reconsidering the 2020 Injunction or the unreasonable delay ruling. Despite Defendants' claim that "changed circumstances" render the Injunction "impracticable," Br. 56, Congress continues to affirm the nine-month timetable and the Injunction's beneficiaries continue to await processing of their delayed applications—which are now three years *more* delayed than when the Injunction was entered. The drastic step of terminating the Injunction at this point would signify that Defendants are free to disregard their statutory obligations. That is not the law.

III. Even if the Court were to apply Rule 54(b) and review the district court's substantive reconsideration of the *TRAC* factors based on Defendants' "changed circumstances," the Court should affirm the district court. The district court did not abuse its discretion when it concluded that Defendants' alleged factual developments did not change the outcome of the *TRAC* analysis or warrant terminating the Injunction, and when it refused to revisit legal arguments that it rejected previously.

ARGUMENT

The Court should affirm the district court's refusal to terminate the Injunction based on any of the three independent grounds that Plaintiffs presented

before the district court and present here. *See Wilburn v. Robinson*, 480 F.3d 1140, 1148-49 (D.C. Cir. 2007) ("We have discretion to *uphold* a grant of summary judgment. . . on any ground that finds support in the record, particularly one raised before the district court" (emphasis in original)). On appeal from a denial from a motion to terminate or reconsider an injunction, the Court reviews the district court's decision for abuse of discretion, *accord* Br. 20-21, which means that the Court should affirm so long as the district court stayed within its range of discretion. *See Morrissey v. Mayorkas*, 17 F.4th 1150, 1156 (D.C. Cir. 2021), *cert. denied,* 143 S. Ct. 624 (2023) ("We may not substitute our judgment for that of the trial court . . . ." (internal quotation marks omitted)). Although Defendants focus their brief on challenging the district court's analysis of their "changed circumstances" under the *TRAC* factors, this Court may affirm on the first two grounds—Rule 60(b) or the threshold question of reconsideration under Rule 54(b)—without reviewing that analysis.

I. The Court Should Affirm the District Court Under Rule 60(b).

The district court concluded that it would reach the same result whether it applied Rule 60(b) or Rule 54(b) to Defendants' motion to terminate the Injunction, *see* JA 993-94, but this Court should affirm under Rule 60(b) because the Injunction is a final judgment or order. Rule 60(b) specifies grounds under which Defendants may move for relief, and Defendants pursue only Rule 60(b)(5)

and (b)(6) grounds as alternatives to their Rule 54 argument. *See* Br. 12 n.2, 50-56. Defendants fall far short of the requirements of Rule 60(b)(5) and (b)(6), as explained further in the sections below.

A. Rule 60(b) Applies to Motions to Terminate Injunctive Relief.

Rule 60(b) governs relief from a "final judgment, order, or proceeding," and therefore applies to Defendants' attempt to terminate what they admit is a "permanent injunction," Br. 4, which finally resolved Plaintiffs' unreasonable delay claims. *See* JA 20 (converting Plaintiffs' request for a preliminary injunction into summary judgment). Although Rule 60(b) does not define the terms "final judgment" or "final order," a permanent injunction fits comfortably within their scope: it is "final" because it is "an ultimate disposition of an individual claim" and a "judgment" because it is "a decision upon a cognizable claim of relief." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980) (citation omitted) (defining "final judgment" in the Rule 54(b) context). The Supreme Court and this Court routinely apply Rule 60(b) to motions for relief from permanent injunctions and other enforceable judicial decrees. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (applying Rule 60(b) to a motion for relief from a permanent injunction); *Am. Council of the Blind v. Mnuchin*, 878 F.3d 360, 366 (D.C. Cir. 2017) (same).

Although no court appears to have squarely resolved the question whether Rule 60(b) or Rule 54(b) applies to a motion to terminate a permanent injunction

entered prior to the disposition of all claims, the intent of the rules favors application of Rule 60(b). Rule 54(b) grants district courts the authority to direct the entry of final judgment as to fewer than all claims in a lawsuit if "there is no just reason for delay;" "[o]therwise," all other rulings "may be revised at any time." Fed. R. Civ. P. 54(b). This rule "serves primarily the important function of denoting unmistakably that a final order has been entered so that the losing party may either file a timely appeal or pay the judgment." *Redding & Co. v. Russwine Constr. Corp.*, 417 F.2d 721, 727 (D.C. Cir. 1969). Rule 54(b) does not apply to permanent injunctions however—even those issued before the conclusion of the case—because injunctions are unmistakably executed and appealable without a Rule 54(b) judgment. *See Mow v. Republic of China*, 201 F.2d 195, 197 (D.C. Cir. 1952) (holding that Rule 54(b) certification is not a condition to appeal a preliminary injunction);[6] *see also Gray Line Motor Tours, Inc. v. City of New Orleans*, 498 F.2d 293, 295 n.1 (5th Cir. 1974) ("Injunctive orders . . . are considered to be outside the scope of Rule 54(b).").

Policy rationales also support applying Rule 60(b) rather than Rule 54(b) to a motion to terminate a permanent injunction entered after a final and appealable

[6] In *Mow*, the Court construed the order converting the preliminary injunction to a permanent injunction as subject to revision under Rule 54(b), but only because, in that case, the remand from the appeal had reopened the adjudication of the claim. *See* 201 F.2d at 200-01.

decision on the merits. As the Supreme Court has warned, even when the court exercises its inherent powers to review prior orders, "[f]irmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided." *Sys. Fed'n No. 91, Ry. Emps.' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961); *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 732 F.2d 253, 256 (2d Cir. 1984) ("A final or permanent injunction is granted only after a hearing on the merits . . . and may not be changed in the interest of the defendants if the purposes of the litigation as incorporated in the decree have not been fully achieved."). Rule 60(b) honors the "sanctity of final judgments" in setting forth limited grounds for relief. *Smalls v. United States*, 471 F.3d 186, 191 (D.C. Cir. 2006) (internal quotation marks omitted) (holding that review of a denial of Rule 60(b) relief should account for finality considerations). The Court should thus review the district court's decision under Rule 60(b).

B. Defendants' Rule 60(b)(5) Argument Fails.

Under Rule 60(b)(5), Defendants bear the burden of showing that "a significant change" in circumstances renders the continuation of the Injunction "detrimental to the public interest." *Horne v. Flores*, 557 U.S. 433, 447 (2009) (internal quotation marks omitted); *see* Br. 50 (recognizing the same). On appeal,

Defendants press two arguments: (1) the Injunction is no longer in the "public interest" because of "the confluence of global events" and Defendants' "improved adjudication pace" in processing SIVs, *see* Br. 53-54, and (2) because "continued application of the injunction creates a risk of interference with the government's processes." Br. 53.

With respect to the first argument, Defendants complain that the district court failed to address their evidence of "global events" and "improved adjudication pace," both of which, according to Defendants, render the Injunction detrimental to the public interest. Br. 53-54. But the district court explicitly addressed Defendants' evidence and ruled that it does not warrant terminating the Injunction because "the fact remains that Plaintiffs' applications are still pending beyond the statutory deadline and the government has not provided any concrete timetable for adjudicating them." JA 996.

The obstacle to the relief that Defendants seek is therefore their inability to show that "a durable remedy has been implemented" such that public interest warrants termination. *Horne*, 557 U.S. at 447 (remanding to decide whether defendants have achieved a durable remedy such that "continued enforcement of the order is not only unnecessary, but improper"). In the cases on which Defendants rely, the defendants produced evidence that they were complying with the respective injunctions. *See id.* (remanding where defendants provided evidence

of compliance with the injunction); *Petties ex rel. Martin v. District of Columbia*, 662 F.3d 564, 570-71 (D.C. Cir. 2011) (same where defendants presented "systemic evidence" of yearlong compliance and plaintiffs conceded that "few if any" class members were at risk of harm). Here, by contrast, Defendants have not achieved the "durable remedy" that is necessary to terminate an injunction: they have not adjudicated the SIV applications identified by the Injunction. *See supra* pp. 1-6. Nor did they comply with the Injunction during the year and a half that it was in effect. *See id.* pp. 14-16. They also did not produce reliable evidence of improvements in processing times, instead relying on their own public reports of processing times that the court had previously ruled undercounted delays. *See infra* pp. 9-13. The district court was therefore squarely within its discretion to conclude that purported "improvements in processing times" did not justify terminating the Injunction. JA 996; *see LaShawn A. ex rel. Moore v.* Gray, 412 F.App'x 315 (D.C. Cir. 2011) (affirming denial of motion to terminate because of lack of durable compliance).

With respect to the second argument regarding the "risk of interference with the government's processes," Br. 53, Defendants fail to provide any citation to the record in support. To the extent Defendants are advancing a purely legal argument, the cases on which Defendants rely are distinguishable because they involve "institutional reform injunctions" that did not define an end date; implicated

federalism concerns; and raised the specter of state and local officials being bound to the policy preferences of their predecessors. *See Horne*, 557 U.S. at 448-49 (considering termination of an injunction that had been in place for eight years, which "dictat[ed] state or local budget priorities"); *see also Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 374 (1992) (considering modification of a consent decree entered 14 years prior in "institutional reform litigation" regarding local jail conditions). None of these concerns apply to the Injunction here, which is designed to relieve Defendants of their obligations when they finish adjudicating the finite number of SIV applications it covers. The court did not abuse its discretion in rejecting Defendants' argument regarding interference with their functions, which is no different from Defendants' previous attempts—since the case began—to avoid all accountability. *See* JA 1 (Summ. J. Order); JA 997 (Order) (again rejecting argument that SIV adjudications should be left to the "political branches").

Finally, under either of their arguments, Defendants ignore a critical element of relief under Rule 60(b)(5): their proposed relief with respect to the Injunction must be "suitably tailored to the changed circumstance[s]." *Rufo*, 502 U.S. at 393 (vacating and remanding for further inquiry under the standard). Improvements in processing times, new global events, and some interference with Defendants' processes are to be expected when injunctive relief issues to compel adjudication.

Defendants have not attempted to explain how the drastic remedy of terminating the Injunction could be suitably tailored to the changed circumstances that they present.

C. Defendants' Rule 60(b)(6) Argument Fails.

Defendants fare no better under Rule 60(b)(6). Rule 60(b)(6) applies only in "extraordinary" situations, and this Court has warned that it "should be only sparingly used." *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1140 (D.C. Cir. 1988) (internal quotation marks omitted). Moreover, Rule 60(b)(6) requires "a more compelling showing of inequity or hardship" than Rule 60(b)(5), which is far from present here. *Id*.

Defendants complain that the district court failed to address their Rule 60(b)(6) arguments, Br. 55, but they do not explain what "extraordinary circumstances" they presented that the court did not address. *Twelve John Does*, 841 F.2d at 1141. At best they refer to "intervening events" and "ongoing, shifting on-the-ground realities." Br. 55-56. But the district court assessed the "intervening factual developments" presented by Defendants against the statutory timetable and concluded that they do not justify terminating the Injunction because the "government's delay in adjudicating Plaintiffs' applications is unreasonable." JA 993-94.

The district court also rejected the Defendants' remaining Rule 60(b)(6) arguments because they were the same arguments that the district court had rejected in its summary judgment decision. *See, e.g.*, JA 996 (finding that Congress's nine-month timeline has not changed); JA 997 (holding that the court has already rejected the argument that SIV adjudications should be left to the political branches). The court acted within its discretion in doing so, because Rule 60(b) is not a tool to relitigate the merits of a summary judgment decision. *See Derrington-Bey v. D.C. Dep't of Corr.*, 39 F.3d 1224, 1226 (D.C. Cir. 1994) (holding that the scope of review from a Rule 60(b) denial cannot reach the merits of the prior order).

What is "extraordinary" here is not Defendants' predicament with complying with this Injunction, but their position that, regardless of the extent of delays facing SIV applicants, they should not be bound by "[a]ny judicially imposed adjudication plan" that "would require the Agencies to meet timing benchmarks and reporting obligations beyond reporting already provided to Congress." Br. 56. This position is inconsistent with the SIV laws, the APA, case law from this Circuit, and the district court's summary judgment decision. The district court was well within its discretion in rejecting such a position as a basis for termination under Rule 60(b)(6).

II. The Court Should Affirm Because Justice Does Not Require Reconsideration as a Threshold Matter under Rule 54(b).

If the Court determines that Rule 54(b) applies to Defendants' motion to terminate the Injunction, the Court should affirm the district court's denial of the motion on the threshold basis that justice does not require reconsideration of the court's prior orders. *See Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011) (holding that Rule 54(b) allows reconsideration "as justice requires"). Although the district court undertook the exercise of reconsideration in addressing Defendants' motion for relief, it ultimately concluded the Injunction should not be terminated. *See* JA 993-94. On an appeal from the court's conclusion, this Court can affirm on the alternative basis that reconsideration was not required in the first place because none of the "changed circumstances," Br. 2, warrant revisiting the Injunction or the underlying summary judgment order.

Defendants' arguments on appeal obscure the purpose of the Injunction, which is to obtain final adjudication for a defined group of SIV applicants whose applications were unreasonably delayed three years ago. As explained in the paragraphs below, none of the "changed circumstances"—even if Defendants' assertions are taken at face value—could render the delays faced by the Injunction's beneficiaries reasonable or justify the drastic relief of terminating the Injunction before its purpose has been satisfied.

- "Improved processing times" and "improvements to the program's administration": "Improved processing times," Br. 24, and "improvements to the program's administration," Br. 36, do not warrant reconsidering the summary judgment ruling. It is logically impossible that any improvements would render reasonable the delays that the Injunction's beneficiaries continue to face, given that the delays have only mounted since they were deemed to be unreasonable three years ago. As to the continued existence of the Injunction, "improved processing times" and other improvements, if true, would facilitate Defendants' compliance with the Injunction, but do not counsel terminating it before its purpose has been achieved. The very fact that the applications covered by the Injunction are still pending, however, demonstrates that purported improvements in processing have had little to no effect on the Injunction's beneficiaries.
- "Influx of SIV applications": Similarly, the "influx of SIV applications," Br. 31, since August 2021 does not warrant revisiting the summary judgment opinion or the Injunction. Defendants rely on *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F. 3d 1094 (D.C. Cir. 2003), but that case is inapposite. There, the Court expressed concern that remedying the delay in adjudication of the plaintiff's application would result in line-jumping because of the influx in similar applications that *predated* its filing. *See Id.* at

1101. Here, the facts are inverse: the alleged "influx" *postdated* the Injunction—and long postdated the filing of applications covered by the Injunction. Defendants make no effort to explain how this influx of more recently filed applications justifies terminating the Injunction that applies to long-delayed SIV applications. If anything, the influx increases the need for the Injunction to ensure that longer-pending SIV applications are adjudicated despite Defendants' decision to forego first-in, first-out processing and prioritize certain applications. *See* Br. 9 (describing the prioritization scheme).

- U.S. embassy closures: U.S. embassy closures in Afghanistan and Iraq, whether due to the U.S. military withdrawal or the security situation in Iraq or COVID-19, do not warrant revisiting the Injunction or the unreasonable delay analysis. The bulk of SIV processing, including submission of application materials and adjudication, occurs electronically and can continue regardless of embassy closures. *See supra* pp. 7-8. Although SIV applicants in Afghanistan must now travel to another location to complete SIV processing, traveling for interviews has been a common part of SIV processing well before the U.S. withdrawal from Afghanistan.[7] Such travel

[7] *See* Wilson Decl., Ex. 3, ECF No. 34-15, at 15 (State Department webpage notifying Iraqi applicants that they must travel outside of Iraq); *id.* Ex. 7, ECF No.

does not affect the unreasonable delay analysis or the Injunction, because an applicant's travel time is not a delay that accrues to the government for purposes of the *TRAC* analysis and is not a "government-controlled step" of the Injunction. Moreover, the Injunction gives Defendants the flexibility to explain "reasonable circumstances for the delay" at the interview step in the progress reports as needed. JA 68 (Inj. Order). Defendants offered such explanations in their reports when the U.S. Embassies in Afghanistan and Iraq were closed or operating at significantly reduced capacity at the time the Injunction went into effect. *See, e.g.*, Oct. 13, 2020 Progress Report, ECF No. 120-1, at 5 (noting that Embassy Baghdad has been closed since December 2019); Jan. 11, 2021 Progress Report, ECF No. 133, at 3-5, 9-10 (describing suspension of visa services due to the COVID-19 pandemic).

- Burden of Injunction reporting: The burden of Injunction reporting also does not warrant revisiting the Injunction or the underlying summary judgment ruling because it is not a new factual development. *See Agostini*, 521 U.S. at 216 (ruling that anticipated costs of compliance with an injunctive order are not changed circumstances). In issuing the Injunction, the district court

34-19, at 2 (article noting that in the first years of the Afghan program, all applicants were required to travel to Pakistan for interviews); *see also* Defs.' Resp. Opp'n Pls.' Prelim. Inj. Suppl., ECF No. 70, at 11-12 (arguing in opposition to summary judgment that suspensions of embassy operations are "not infrequent").

already concluded that "the administrative burdens associated with tracking and reporting requirements are worth ensuring the government's compliance with its legal obligations." JA 997-98. Defendants' complaints about these burdens are nothing more than an attempt to re-litigate anew the wisdom of the Injunction.

While Defendants argue that these "changed circumstances" warrant revisiting the court's unreasonable delay analysis and its Injunction, the same changes have not deterred Congress from reaffirming its directive that SIV applications should be adjudicated in nine months. *See* ESSAA 2021; *see supra* p. 14.[8] As the district court concluded: "Congress issued [the nine month] instruction in 2013, understanding that the [SIV] process would often be challenging and complex . . . and has declined to disturb it even after the complications of recent years." JA 996.

Because justice does not require reconsidering the Injunction or its underlying summary judgment order based on "changed circumstances" alleged by Defendants, this Court can and should affirm the district court decision without reviewing the district court's substantive Rule 54(b) analysis. Defendants'

[8] Defendants assert without citation that the nine-month timetable "contemplates a steady stream of applications." Br. 33. But this cannot be correct given that Congress reaffirmed the statutory timetable in the month before the conclusion of the U.S. withdrawal from Afghanistan, even as it expanded eligibility and invited additional applications. *See* ESSAA 2021.

argument for reconsideration is at its core an effort to avoid all judicial oversight, but the judiciary's proper role is to hold Defendants accountable to their legal obligations. *See Slack Techs., LLC v. Pirani*, 143 S. Ct. 1433, 1442 (2023) ("Congress remains free to revise the . . . laws at any time . . . to address . . . any development. Our only function lies in discerning and applying the law as we find it."); *In re Aiken Cnty.*, 725 F.3d 255, 257 (D.C. Cir. 2013) (issuing mandamus against an Executive agency for flouting the law and holding that the judiciary's "modest task is to ensure, in justiciable cases, that agencies comply with the law as it has been set by Congress.") (Kavanaugh, J.). Defendants have defied Congress and the Injunction at every turn; the Court should not allow Defendants to use the passage of time that has resulted from their delay as an excuse to relieve them of their obligations. *See In re Ctr. for Biological Diversity*, 53 F.4th 665, 670-71 (D.C. Cir. 2022) (issuing mandamus where "[t]he executive stands alone in opposition to both the judiciary and the legislature").

III. In the Alternative, the Court Should Affirm the District Court's *TRAC* Analysis under Rule 54(b).

Finally, if the Court determines that the district court appropriately revisited the unreasonable delay analysis under *TRAC* pursuant to Rule 54(b), the Court should affirm the decision below because the court did not abuse its discretion in upholding the Injunction based on its assessment of Defendants' alleged "factual developments." *See* JA 994-99. The proper standard of review for this Court is

abuse of discretion. *Capitol Sprinkler Inspection, Inc.*, 630 F.3d at 225. Defendants' attempt to graft de novo review onto the district court's *TRAC* analysis, *see* Br. 20, misses the mark: While Defendants are correct that a district court abuses its discretion if it commits a legal error, *id.*, Defendants do not raise any pure legal error on appeal. Rather, Defendants challenge how the district court resolved the "complicated and nuanced task requiring consideration of the particular facts and circumstances before the court." *Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1100 (describing the *TRAC* analysis). Because Defendants seek review of a legal inquiry rooted in factual determinations, the Court "should apply an abuse-of-discretion standard in reviewing *all* aspects of a district court's . . . determination." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 n.2, 564 (2014); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (adopting a "unitary abuse-of-discretion" standard for legal inquiries "rooted in factual determinations").

The sections below address each of the *TRAC* factors in turn, as well as the propriety of the injunctive relief.

A. Factors 1 and 2: "Rule of Reason" and Statutory Timetable Continue to Favor Plaintiffs.

The first two *TRAC* factors ask whether Defendants' delay in adjudication is "governed by a 'rule of reason,'" and whether the content of the rule may be found in a "timetable or other indication . . . in the enabling statute." *TRAC*, 750 F.2d at

80. In refusing to terminate the Injunction, the court reviewed Defendants' "intervening factual developments" and found that they do not change key facts. JA 993-94; *see supra* pp. 16-17. The court also refused to revisit legal arguments that it had already decided about the import of the statutory nine-month timetable. The court did not abuse its discretion with respect to either element of its analysis on factors 1 and 2.

"Intervening Factual Developments" Do Not Outweigh Key Facts

Defendants challenge the weight that the court gave to their factual assertions, but disagreement with how the district court weighs the facts is not a basis for reversal on an abuse of discretion review. *See Morrissey*, 17 F.4th at 1156-57. The court carefully considered each of Defendants' intervening facts, and, as explained above, *see supra* pp. 16-17, correctly concluded that they do not outweigh the facts most central to the analysis.

If anything, the district court gave more credence to Defendants' claimed "improved processing time" and improvements to SIV processing than they deserve. Defendants contend that there has been a "significant reduction in average processing times" since the district court's 2019 decision, Br. 25, but this claim and the presentation of data from their own public reports are misleading. The district court based its 2019 decision on Plaintiffs' calculation of delays using raw government data. JA 4-7 (Summ. J. Order); *see supra* pp. 10-11. At the same time,

the court credited Plaintiffs' analysis of "potential problems with Defendants' method of tracking and reporting SIV application processing times," which have led Defendants to understate delays in their public reporting. JA 5. Among other errors, Defendants' public reporting omits pending cases—which potentially include the longest delayed cases—from their calculations of average processing times. JA 6-7.

Defendants nevertheless assert improvement in processing times based on the same self-serving public reports that the court previously discredited. *See* Br. 25-27. Defendants go so far as to improperly seek judicial notice of new numbers that they published in their January 2023 report and introduce a graph using those numbers. *See* Br. 26, n.5. But judicial notice under Federal Rules of Evidence 201 is only appropriate if it is "not subject to reasonable disputes," and Defendants know well that the parties have been disputing the reliability of these numbers since the beginning of the litigation. *See* JA 4-6 (Summ. J. Order). The Court should thus strike Defendants' reliance on their January 2023 report, Br. 26, as well as the graph that they created based on those numbers, Br. 27.

Fundamentally, average processing time could not have improved for the Injunction's beneficiaries because they have now been waiting three additional years for adjudication. Nor could processing time have improved for all remaining Iraqi applicants who have been waiting for adjudication since 2014 at the latest,

when the program closed to new applicants. *See supra* p. 16. Aside from being meaningless given their flawed methodology, Defendants' presentation of average processing times is patently irrelevant to the Injunction's beneficiaries.

Refusal to Revisit Legal Arguments About the Nine-Month Timetable

Defendants also cannot show that the court abused its discretion when it refused to revisit legal arguments about the significance of the nine-month timetable. The Supreme Court has recognized that courts "should be loathe to" revisit a prior ruling "in the absence of extraordinary circumstances." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); *see also Hall & Assocs. v. E.P.A.*, 210 F. Supp. 3d 13, 18 (D.D.C. 2016) ("[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again."). Defendants' previously rejected arguments are three-fold: (1) that the district court incorrectly treated the timetable as near-mandatory, (2) that the timetable should be given less weight because SIV processing is complex, and (3) that the timetable should be disregarded in light of foreign policy and national security interests.

First, Defendants complain that the court gave the nine-month reference in the SIV laws "near-mandatory status" even though it is not mandatory. Br. 2. But the text and the context of the laws confirm that it is mandatory. Congress instructed that adjudication of SIV applications "should be completed not later than

9 months" from application. National Defense Authorization Act §§ 1218-19. Defendants argue that Congress's use of the word "should" instead of "shall" means that this timetable is not mandatory, but the case law that they rely on merely establishes that courts evaluate words in their context. *Compare Jolly v. Listerman*, 672 F.2d 935, 945 (D.C. Cir. 1982) (finding that the word "should" may not be binding when used in a document described as a "guideline") *with Doe v. Hampton*, 566 F.2d 265, 281-82 (D.C. Cir. 1977) (holding that the use of the word "should" instead of "shall" is not automatically determinative of whether the provision is directory rather than mandatory, especially where accompanied by "strong expressions of congressional . . . policy"). The district court previously held—in agreement with another court in this Circuit—that Congress has been clear in instructing the prompt adjudication of SIVs in nine months. *See* JA 996 (Order); *Nine Iraqi Allies v. Kerry*, 168 F. Supp. 3d 268, 293 (D.D.C. 2016) ("The RCIA and AAPA . . . instruct[] that Defendants shall process SIV applications within nine months").[9]

In any event, whether Congress's directive to adjudicate SIVs in nine months is mandatory is not pertinent to this appeal of the district court's

[9] Ironically, Defendants cite *Nine Iraqi Allies* in their favor for the proposition that the SIV process involves complex concerns of security and diplomacy. *See* Br. 38, 44. There, the court relied on the nine-month timetable in ruling that a group of SIV applicants stated a claim against Defendants for unreasonable delay in the adjudication of their applications. *See Nine Iraqi Allies*, 168 F. Supp. 3d at 293.

unreasonable delay analysis because the court merely used the nine months as a "rule of reason" against which to assess unreasonable delay. In granting relief to Plaintiffs, the district court did not require Defendants to adjudicate all SIV applications within nine months, or even to adjudicate the already unreasonably delayed applications immediately. *See* JA 9-13 (Summ. J. Order). The court instead required Defendants to follow a schedule for adjudicating applications that had already awaited adjudication for more than nine months. *See* JA 18.

None of the cases Defendants rely on cast doubt on the district court's use of the statutory timetable for measuring delays under factors 1 and 2 of the *TRAC* analysis. Indeed, the cases that Defendants cite to argue that the district court "excessively rel[ied]" on the nine-month timetable, Br. 22-24, do not involve a statutory timetable at all. *See, e.g.*, *Mashpee Wampanoag Tribal Council, Inc.*, 336 F.3d at 1100; *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987); *In re Am. Fed'n of Gov't Emps.*, 837 F.2d 503, 506-07 (D.C. Cir. 1988).[10] And although Defendants cite *In re Am. Rivers & Idaho Rivers United* for the proposition that there is no "per se rule as to how long is too long to wait for agency action," Br. 27-28, the Court granted mandamus relief in that case despite the lack of a statutory

[10] Defendants misleadingly state that this Court in *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 477-78 (D.C. Cir. 1998), declined to order agency action notwithstanding delays "in achieving the rule's statutory objective," but there was no relevant statutory timetable for the action in that case.

timetable, holding that "a reasonable time for agency action is typically counted in weeks or months, not years." 372 F.3d 413, 419 (D.C. Cir. 2004).

Second, Defendants re-raise the previously rejected argument that the nine-month timetable should be given diminished weight because SIV processing is complex. *See* Br. 23-24; JA 12 (Summ. J. Order) (rejecting the same argument). As an initial matter, Defendants exaggerate the complexity of SIV processing. *See, e.g.*, Br. 1, 6. Congress created an immigrant visa process that mimics other immigration programs: applicants submit application materials, including those relating to verification of employment; appear for an interview; and pass background checks coordinated among various agencies. *Compare supra*, pp. 7-8, *with* 8 U.S.C. § 1182(a)(5)(A) (requiring labor certification from the Secretary of Labor for certain immigrants) *and id.* § 1202(e) (generally requiring appearance before a consular officer) *and id.* § 1105(a) (authorizing interagency exchange of information for enforcement of immigration laws). Any complexities beyond what Congress required, such as the fourteen-step process, were Defendants' own design choice. When Defendants finally decided to take some steps to improve the efficiency of the program years after the entry of the Injunction, they were able to streamline and collapse several of the processing steps of their own accord. *See* Br. 33.

In any event, this Court has recently held that considerations such as "complexity" and "numerous competing obligations" do not hold sway where "Congress has spoken" by imposing a timetable. *In re Ctr. for Biological Diversity*, 53 F.4th at 671 (granting mandamus where the agency was in violation of a statutory timetable, despite defendants' argument about complexity of the process and competing obligations). As the district court ruled previously, "Congress explicitly referenced that complexity in the 9-month provision" and nevertheless instructed that "all steps" of the process "incidental to the issuance of such visas, including required screenings and background checks," be completed within nine months. *See* JA 12 (Summ. J. Order); *see also* AAPA § 602(b)(4)(A), RCIA § 1242(c)(1). Congress reiterated the nine-month timetable as recently as 2021. *See* ESSAA 2021; *see supra* p. 14. Even under the cases Defendants cite for this purpose, which did not in any event involve a statutory timetable, the excuse of complexity has become less persuasive as the delay increases. *See Cutler*, 818 F.2d at 898 (holding that justifications such as complexity "become less persuasive as delay progresses"); *Cobell v. Norton*, 240 F.3d 1081, 1097 (D.C. Cir. 2001) ("[N]either a lack of sufficient funds nor administrative complexity, in and of themselves, justify extensive delay . . . ").

Third and finally, Defendants again argue that the nine-month timetable should be given diminished weight because visa processing implicates foreign

affairs and national security concerns. *See* Br. 28-31. But, as the district court held when granting summary judgment to Plaintiffs in the first place, "the construction of the statute makes clear that Congress was patently aware of the national security implications when it set a 9-month time limit." JA 11 (Summ. J. Order). Defendants' argument—that they should not be liable for any delays in the program because the program implicates national security and foreign affairs matters on which the agencies have expertise—does not find any basis in the law. *See In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 838 (D.C. Cir. 2012) (recognizing national security and foreign policy concerns but nevertheless ordering the Secretary of State to take action within a set amount of time).

B. Factors 3 and 5: Human Health and Welfare and Interests at Stake Favor Plaintiffs More than Before.

Under *TRAC* factors 3 and 5, courts assess "human health and welfare" and the "nature and extent of the interests prejudiced by delay." *TRAC*, 750 F.2d at 80. With respect to these factors, the district court concluded that they "weigh more heavily for Plaintiffs than they did in [2019]" given that "[m]any Plaintiffs have now waited years more . . . , while the conditions for them and their families have become increasingly desperate and dangerous." JA 998. Defendants claim to "recognize the dangerous conditions many SIV applicants face," Br. 39, but raise a patchwork of issues—"national security and diplomatic concerns," Defendants' various emergency response efforts, and the burden of Injunction compliance—

that they contend demonstrate that *TRAC* factors 3 and 5 favor them because they are "best positioned to manage the SIV program in the best interests of both SIV applicants and the public interest." Br. 37, 39, 36-44.

First, Defendants complain that the district court did not adequately consider recent developments that purportedly show that Defendants are best placed to administer the SIV program because it involves "national security and diplomatic concerns." Br. 37. But contrary to Defendants' assertion, the district court *did* consider Defendants' argument. *See* JA 997 (summarizing Defendants' argument that "because adjudicating SIV applications implicates foreign affairs and national security, it is better left to the political branches."). The court did not abuse its discretion in concluding that it had already rejected such arguments, and that such arguments in any event stray far from the focus of these factors on "Plaintiffs' health, welfare, and other interests jeopardized by the government's delay." *Id.* In effect, Defendants argue that they should not be subject to court oversight—but that view is undermined by the very existence of the APA, which provides a mechanism for parties to sue agencies in the event of unreasonable delay. *See* 5 U.S.C. § 706 (providing a cause of action for an agency's unreasonable delay). Defendants may be experts in "[i]mmigration, foreign affairs, and national security judgments," Br. 38, but this Court has not hesitated to hold agencies accountable

when needed to enforce the law. *See In re People's Mojahedin Org. of Iran*, 680 F.3d at 838; *In re Aiken Cnty.*, 725 F.3d at 257.[11]

Second, Defendants argue that their emergency responses to various events—such as the COVID-19 pandemic, terrorist attacks in Iraq, and evacuations of U.S. citizens from various countries—demonstrate that they are best positioned to administer the SIV program for the health and safety of the general public. Br. 41-43. Defendants complain that the district court did not give this argument enough weight, *id.*, but they are wrong. The district court rejected Defendants' identical argument—that SIV adjudication delays are reasonable because their general job duties require them to respond to various "global events"—under *TRAC* factor 4. *See* JA 999 (discussing JA 120-21 (Defs.' Mot. for Relief)); *infra* pp. 25-26. The court also noted that many of these "changes," such as the COVID-

[11] Defendants' suggestion that courts should be reluctant to enforce the law "where the Executive is in an ongoing dialogue about the program with Congress," Br. 39, finds no support in the law. The case that Defendants cite for this proposition notes that Congress's oversight function was aided by an annual reporting requirement, but the court addressed this reporting requirement in the context of its assessment of legislative intent—not to suggest that congressional oversight as a general matter should discourage judicial involvement. *See Council of & for the Blind of Del. Cnty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1526-27 (D.C. Cir. 1983) (discussing Congress's intent in creating an alternative remedy that precludes APA actions). Here, Congress required reporting on Defendants' compliance with the nine-month timetable, *see supra* p. 9, which provides additional evidence that Congress intended to enforce speedy adjudication.

19 pandemic and instability in Iraq, are "not changes at all" because that was the background against which the court entered the Injunction. JA 996-97.

Finally, Defendants are wrong that the district court "ignored" their evidence on "the administrative costs of tracking and reporting requirements" under the Injunction. *See* Br. 43. Rather, the court considered Defendants' evidence on the costliness of Injunction compliance and held that Defendants failed to show how any time spent complying with the Injunction prejudiced class members, as is relevant for *TRAC* factors 3 and 5. *See* JA 997-98.

On appeal, Defendants continue to assert without citation or explanation that tracking individual class members through adjudication steps and reporting on progress take resources away from adjudication. *See* Br. 44. But Defendants must track applications for Congressional reporting and for adjudication in any event, Br. 8, 43, and Defendants' own declarants were internally inconsistent and vague on the extent of the burden attributable to Injunction compliance. For example, one declarant stated that recent technological improvements within the agencies have "resulted in reporting efficiencies . . . as the analytics are automatically compiled and can be updated in a real-time environment." JA 194 (Nolan Decl. ¶ 9). Another declarant reported hours spent by "State Department staff" on "litigation-related efforts," JA 154 (Brooks Decl. ¶ 73), without specifying who the staff were or what the efforts were. By contrast, Plaintiffs submitted evidence showing the

Injunction's benefits, including that tracking and reporting have resulted in identifying class members whose applications would have been overlooked and thus indefinitely delayed if not for the Injunction. *See* JA 273-74 (Greene Decl. ¶¶ 22-26). Defendants cannot complain about the burden of complying with an Injunction that is remedying the harms it is intended to remedy. *See Agostini*, 521 U.S. at 216 (holding that anticipated costs of compliance with an injunctive order are not changed circumstances).

C. Factor 4: Competing Priorities Analysis Remains Unchanged.

Citing considerations such as the U.S. military withdrawal from Afghanistan, commitment to Ukrainian refugees, and visa backlog caused by the COVID-19 pandemic, Defendants complain that the district court "disregarded the Agencies' many competing priorities since 2019" under factor 4 of *TRAC*. Br. 45. But the district court *did* consider Defendants' assertions of their "general 'commitment to provide assistance to address global events,'" and did not abuse its discretion in concluding that these priorities fall within the general category of "humanitarian and foreign relations concerns" that Defendants face by the nature of their work. JA 999 (quoting JA 120 (Defs.' Mot. for Relief)); *see also* Br. 48 ("By virtue of their missions, the State Department and USCIS on a day-to-day basis must address humanitarian and foreign affairs crises around the globe."). Defendants' general job responsibilities are not competing priorities that justify

delays, as Congress was aware of the agencies' mandates when it imposed the nine-month timetable. *See In re Ctr. for Biological Diversity*, 53 F.4th at 671-72 (rejecting similar argument where a congressional timetable exists); *In re People's Mojahedin Org. of Iran*, 680 F.3d at 837 (same, noting that Congress "undoubtedly knew the enormous demands placed upon the Secretary [of State]"). In fact, Congress reiterated the nine-month timetable even as Defendants faced concerns such as the Afghanistan withdrawal and COVID-19. *See* ESSAA 2021.

The cases that Defendants cite are inapposite, as Congress has specified that Defendants should be prioritizing SIV adjudications among their job responsibilities. Defendants mistakenly cite *Action on Smoking & Health (ASH) v. Dep't of Lab.*, 100 F.3d 991 (D.C. Cir. 1996), for the proposition that the Court should hesitate to reset agency priorities even "where agencies fail to meet a statutory deadline for action." Br. 46. But that case involved the failure to meet an *agency's internal policy deadline* in the context of a statute that had been interpreted to give the agency the discretion to set its own priorities. *See Action on Smoking & Health*, 100 F.3d at 994. And in *In re Barr Laboratories, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) and *Mashpee*, 336 F.3d at 1100-02, the only other cases from this Court involving unreasonable delay that Defendants cite for this purpose, the Court declined to reset agency priorities for single plaintiffs that would result in line-jumping. That concern is not in play here given that this is a class action. The

Court should not disturb the district court's conclusion that factor 4 continues to be neutral or weighs in favor of Plaintiffs.

D. Factor 6: Bad Faith Analysis Remains Unchanged.

The district court did not abuse its discretion when it refused to revisit its earlier decision to forego consideration of whether the Defendant Agencies are acting in bad faith. *See* JA 999. Although Defendants argue on appeal that the sixth *TRAC* factor should favor them because they have been acting in good faith, *see* Br. 49-50, the factor states that agencies need not act in bad faith for the court to find unreasonable delay. *See TRAC*, 750 F.2d at 80. By the same token, good faith does not necessarily protect against an unreasonable delay finding. The circuit cases cited by Defendants, *see* Br. 49-50, are not to the contrary, and consider good faith only in the context of deciding whether the defendants have made progress in resolving the challenged delays. *See, e.g.*, *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189, 192-93 (D.C. Cir. 2016) (remanding for the district court to determine whether mandamus should issue, and noting that it may be appropriate unless it finds "significant progress toward a solution" is being made); *In re Am. Fed'n of Gov't Emps.*, 837 F.2d 503, 507 (D.C. Cir. 1988) (holding that the petitioners' request for an inflexible six-month deadline into the future would not be appropriate given defendant's responsiveness in remedying delays).

In any event Defendants' assertions of "good faith" do not warrant terminating the Injunction because, as discussed above, Defendants have not adjudicated the applications covered by the Injunction. *See supra* pp. 1-6. And although Defendants cite to their efforts coordinating an operation to assist Afghans when the United States withdrew from Afghanistan, Br. 50, they have not demonstrated, or even asserted, that the effort related to their obligation to promptly adjudicate the SIV applications of the Injunction's beneficiaries. Nor does that operation change the fact that Defendants had failed to timely adjudicate applications prior to the U.S. withdrawal from Afghanistan in accordance with their statutory and court-ordered obligations, resulting in thousands of the Injunction's beneficiaries being left behind in danger. *See* Joint Stipulation, ECF No. 144, at 2. If anything, Defendants' history of recalcitrance in the face of Congress's nine-month directive, their lassitude in complying with the schedule for adjudication in the Injunction, and their failure to address the unlawful backlog of SIV applications prior to withdrawing from Afghanistan all point towards bad faith in Defendants' administration of the SIV program.

E. The Injunction Remains Warranted.

Finally, having ruled that the *TRAC* factors still warranted a finding of unreasonable delay, the district court did not abuse its discretion in upholding the Injunction as a remedy. An injunction of this type is a common remedy for

unreasonable agency delay. *See Cobell*, 240 F.3d at 1098 (upholding a similar schedule and progress report remedy); *see, e.g.*, *TRAC*, 750 F.2d at 81 (ordering agency to inform court of its schedule for resolution within 30 days and requiring progress reports every 60 days thereafter); *In re United Mine Workers*, 190 F.3d 545, 556 (D.C. Cir. 1999) (ordering the agency to advise the court on the final agency disposition and status of the matter); *Pub. Citizen Health Rsch. Grp. v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987) (ordering agency to comply with the schedule for resolution that it submitted in response to plaintiffs' motion and to submit progress reports). Whether the district court decides to modify the Injunction or not in the ongoing proceedings, the Injunction in some form remains necessary to hold Defendants accountable to its beneficiaries, who were promised a speedy path to safety for their service to the United States and who continue to wait for adjudication years after the court concluded that their applications were unreasonably delayed.

CONCLUSION

For the reasons explained above, this Court should affirm the decision below and remand with instructions that the Injunction, whether in modified form or otherwise, should take effect again as promptly as possible. If, however, the Court does not affirm, it should remand for further proceedings to allow for full

consideration of Plaintiffs' challenges to Defendants' evidence in support of their motion to terminate the Injunction.

Respectfully submitted,

Dated: June 23, 2023
New York, New York

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CERTIFICATE OF COMPLIANCE

I certify the following:

This motion complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B)(i). It contains 12,319 words, excluding the accompanying documents authorized by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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