No. 18-50811

In the United States Court of Appeals
For the Fifth Circuit

DEFENSE DISTRIBUTED; SECOND AMENDMENT FOUNDATION, INCORPORATED,
Plaintiffs - Appellants

CONN WILLIAMSON
Appellant

v.

UNITED STATES DEPARTMENT OF STATE; MIKE POMPEO, SECRETARY, U.S. DEPARTMENT OF STATE; DIRECTORATE OF DEFENSE TRADE CONTROLS, Department of State Bureau of Political Military Affairs,

Defendants - Appellees

Appeal from the United States District Court for the
Western District of Texas, Austin Division; No. 1:15-CV-372

Appellants' Reply Brief

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I. The State Department has made an important untrue assertion.

A revealing error begins the State Department's brief. Settlement Agreement Paragraphs 1(a), 1(b), 1(c), and 1(d) set forth the substantive legal actions that the State Department is required to accomplish for the Plaintiffs, such as the issuance of a temporary regulatory modification. ROA.1491-92. Additionally, Paragraph 1(e) requires the State Department to pay the Plaintiffs $39,581. ROA.1492.

A key starting point for several arguments is that the State Department is currently in breach of the Settlement Agreement. It is unquestionably breaching the substantive obligations of Paragraphs 1(b), 1(c), and 1(d), *see infra* Part V.B., and it is also breaching Paragraph 1(e). The State Department never paid the $39,581.

Yet the State Department's brief says the opposite. In an unequivocal statement of material fact, the State Department says that it *did* pay the $39,581. Page one of the brief asserts that "Defendants paid the agreed-upon sum":

> In 2018, plaintiffs and defendants entered into a settlement agreement resolving pending litigation. In consideration of defendants' agreement to pursue specified regulatory action and to pay nearly $40,000, plaintiffs agreed to stipulate to dismissal with prejudice.
>
> ***Defendants paid the agreed-upon sum*** and began to pursue the required actions. Plaintiffs executed the stipulated dismissal, which was filed with the district court, resulting in the case's dismissal.

Appellees' Br. at 1 (emphasis added). The State Department's payment assertion is completely false. It is false as a matter of record and false as a matter of fact.

As a matter of record, the State Department's payment assertion is false. Nothing filed in the district court supports the State Department's assertion of having paid the Plaintiffs the $39,581 they are owed under the Settlement Agreement. Neither does anything filed in this Court. Record support for the idea that the "Defendants paid the agreed-upon sum" is completely nonexistent.

As a matter of fact, the State Department's payment assertion is also false. According to a diligent inquiry conducted by the undersigned counsel, the State Department has never paid the Plaintiffs a single cent of the $39,581 that Settlement Agreement Paragraph 1(e) requires them to pay.

The State Department's deployment of false facts as the leading part of a crucial appellate argument should not be dismissed lightly (even where, as here, their counsels' good faith is not doubted). Whether the State Department decides to retract this untrue assertion at oral argument remains to be seen. If they do not, the Court could resolve the matter by appointing a special master pursuant to Federal Rule of Appellate Procedure 48. But that should not be necessary.

The State Department probably expects the Court to look the other way. They want the gaffe forgotten as an innocent abnormality. But the State Department's latest blunder is no rare outlier. It falls right in line with a disturbing trend of legal aberrations—black swan after black swan—that has turned the critical free speech case that Defense Distributed and SAF had essentially won into a manifest injustice. Yet rather than support a mutually-beneficial fix, the State Department just shrugs.

II. The State Department's opposition to relief is still illogical.

Why doesn't the State Department *support* the Plaintiffs' request to withdraw the stipulated dismissal and reopen this action so that the judgment can incorporate and/or retain jurisdiction over the Settlement Agreement? We still do not know.

That solution's substantial benefits have never been disputed. *See* Appellants' Br. at 27 & n.1 (doing so "would *strengthen* the State Department's ability to comply by making those obligations 'subject to the rules generally applicable to other judgments and decrees'"). Nor have any compelling downsides been identified.

The worst thing the State Department can say about this proposal is that it would entail a "serious concession" and involve "ongoing district court jurisdiction." Appellees' Br. at 17. These hurt legal feelings pale in comparison to the status quo.

At present, the State Department says that it desires to honor the Settlement Agreement, but is concededly breaching it ("not currently enforcing the actions required"). Appellees' Br. at 24. That seems like a very "serious concession"—if not for them, than at least for the many citizens that suffer the resulting injustice.

And at present, the State Department is subject to a *nationwide* injunction that has hijacked the President's authority to run foreign policy and interstate commerce because state politicians are frustrated at how technology liberates free individuals in a modern society. That seems like a truly intolerable "ongoing . . . jurisdiction."

In light of this comparison, the State Department's opposition to the Plaintiffs' appeal is still flummoxing. Oral argument could root out what the briefs could not.

III. The Plaintiffs seek a new judgment—not a new Settlement Agreement.

The State Department's most prominent argument attacks a straw man. Part I of their brief argues that the "Plaintiffs Are Not Entitled to Unilaterally Rewrite the Settlement Agreement." Appellees' Br. at 13-17. But that is *not* what the Plaintiffs seek to do. The first third of the State Department's argument is basically irrelevant.

The Plaintiffs' motion did *not* ask to "rewrite the settlement agreement," as the State Department's brief suggests. Appellees' Br. at 12. Instead, the Plaintiffs' motion asked the court to "vacate its judgment and reopen the case under Rules 59 and 60." ROA.1473. These are completely distinct legal operations.

A textual analysis of the judgment confirms this. The State Department's main argument would have force *if and only if* the Settlement Agreement depended on the judgment for legal force. However, the Settlement Agreement *preceded* the judgment, and the judgment says nothing but that the parties stipulated to dismissal. The judgment contains no text mentioning the Settlement Agreement, let alone any text making the Settlement Agreement depend on the judgment for anything:

> Before the Court is the parties' Stipulation of Dismissal with Prejudice. (Dkt. 112). The parties stipulate that they have resolved all causes of action and that this action should be dismissed with prejudice. (*Id.*). Federal Rule of Civil Procedure 41(a)(1)(A)(ii) allows a plaintiff to dismiss an action upon filing a stipulation of dismissal signed by all parties who have appeared. Plaintiff has done so. The Court therefore ORDERS that the case is DISMISSED WITH PREJUDICE. All costs shall be taxed to the party incurring them. This action is CLOSED.

ROA.1459.

Because of this reality, the judgment's issuance and the judgment's vacatur have the exact same impact on the Settlement Agreement: none. The Settlement Agreement meant the very same thing the day *before* the judgment was entered as it did the day *after* it was entered; and the Settlement Agreement will mean the very same thing the day *before* that judgment is vacated as it does the day *after* that vacatur. The judgment's issuance did not give rise to the Settlement Agreement, so the judgment's vacatur cannot possibly take the Settlement Agreement away. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377-80 (1994).

That is not to say that vacating the judgment will have *no* effect. It just means that the vacatur's effect is limited to what is being vacated: the judgment *alone*. Since this judgment amounts to a conclusion about what was stipulated, vacating the judgment means vacating the conclusion about what was stipulated—and that is all. *See, e.g.*, *Littman v. Bache & Co.*, 246 F.2d 490, 492 (2d Cir. 1957) (Hand, J.) ("order 'vacating' the plaintiff's 'notice of dismissal,'…reopens the case for consideration upon the merits"). After this judgment is vacated, the action might still receive a dismissal; but that will only be so *if* the district court on remand reaches that conclusion anew (either because of a new stipulation or because opposed litigation yields that result).

Thus, the straw man that is Part I of the State Department's argument should be disregarded because the Plaintiffs seek a new judgment—not a new Settlement Agreement. The only true question presented is the more mundane one of whether

the Plaintiffs had a right to withdraw their half of a stipulation. The answer to that question flows not from the Settlement Agreement, per se, but from the equitable principles vested in the district court by Federal Rules of Civil Procedure 59 and 60.

IV. The district court had total authority under both Rule 59 and Rule 60.

Knowing that a Rule 59 analysis strengthens the Plaintiffs' position substantially, the State Department tries to shoehorn the appeal into Rule 60 alone by saying that the motion did not meet Rule 59's filing deadline. Appellees' Br. at 18-20. But because the motion *did* meet the Rule 59 filing deadline, Rule 59's more accommodating test for relief must be accounted for in addition to Rule 60's backup.

A. Rule 59(e)'s filing deadline was met.

"Entry of the judgment" is the key phrase. The deadline for a Rule 59(e) motion to alter or amend a judgment depends on "the entry of the judgment":

> (e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend a judgment must be filed no later than 28 days after the *entry of the judgment*.

Fed. R. Civ. P. 59(e) (emphasis added); *see also* Fed. R. Civ. P. 54(a) (only *appealable* decisions are "judgments").

Hence, the controlling question for the deadline dispute is about what counts as the Rule 59(e) "entry of the judgment." If the Rule 59(e) "entry of the judgment" was the parties' Rule 41(a)(1) stipulation, ROA.1457, the motion did *not* meet the deadline. But if the Rule 59(e) "entry of the judgment" was the district court's subsequent order dismissing the action, taxing costs, and closing the action,

ROA.1459, the motion did meet the deadline. The State Department takes the former view (that the earlier stipulation counts). As a matter of law, that is wrong.

1. The stipulation is not a "judgment."

The State Department's deadline position is wrong because the parties' Rule 41(a)(1) stipulation of dismissal did *not* constitute a Rule 59(e) "judgment." The decisive precedent upholding this conclusion is *Harvey Specialty & Supply, Inc. v. Anson Flowline Equipment Inc.*, 434 F.3d 320 (5th Cir. 2005). *Harvey* held that "a Rule 41(a)(1) dismissal is not a 'final judgment.'" *Id.* at 324-26.

The effort to escape *Harvey* fails because the State Department quibbles only about *why* the Court rendered that holding, which plays no role in the rule of orderliness. *See* Appellees' Br. at 20. All that really matters now is *whether Harvey* rendered that holding, which it clearly did. *Harvey*, 434 F.3d at 324-26.

SmallBizPros, Inc. v. MacDonald, 618 F.3d 458 (5th Cir. 2010) (cited at Appellees' Br. at 18-19), does not contradict *Harvey*. It concerned the *substantive* issue of what courts can do to an action's merits after dismissal—not the *procedural* issue of what constitutes a "judgment" for purposes like Rule 59. These inquiries should not be conflated. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-98 (1990).

Rule 54 confirms that *Harvey*'s holding is correct. It defines a "judgment" as either a "decree" or an "order" (followed by other requirements). Fed. R. Civ. P. 54(a). But a stipulation of dismissal is neither a "decree"[1] nor an "order,"[2] mainly because judicial action plays no role in its issuance. *See Yesh Music v. Lakewood Church*, 727 F.3d 356, 360 (5th Cir. 2013) ("While judgments and orders might imply the involvement of a judicial action, a 'proceeding' does not necessarily require any such action.").

Indeed, by definition, a litigant's Rule 41(a)(1) dismissal filing occurs "without a court order." Fed. R. Civ. P. 41(a)(1)(A). So just like *Harvey*'s holding, an original analysis of the rules stops this case's Rule 41(a)(1) stipulation of dismissal from being considered the Rule 59(e) "judgment."

2. Rule 58 defines the "entry of judgment."

Apart from those "judgment" arguments, the State Department's deadline position is wrong because it contradicts Federal Rule of Civil Procedure 58. Even if it is correct to label the parties' Rule 41(a)(1)(A) stipulation a "judgment," Rule

[1] *See* DECREE, Black's Law Dictionary (West 11th ed. 2019) ("decree *n.* (14c) 1. Traditionally, a judicial decision in a court of equity, admiralty, divorce, or probate — similar to a judgment of a court of law <the judge's decree in favor of the will's beneficiary>. 2. A court's final judgment. 3. Any court order, but esp. one in a matrimonial cause <divorce decree> See JUDGMENT (2); ORDER (2); DECISION.").

[2] *See* ORDER, Black's Law Dictionary (West 11th ed. 2019) ("order n. (16c) 1. A command, direction, or instruction. See MANDATE (1). 2. A written direction or command delivered by a government official, esp. a court or judge. • The word generally embraces final decrees as well as interlocutory directions or commands. — Also termed court order; judicial order. See MANDAMUS.").

58 proves that the State Department is still wrong in its method of identifying the Rule 59(e) "*entry* of the judgment."

Rule 59 does define its keystone phrase "entry of the judgment." But Rule 58 essentially does because it defines the point at which "judgment is entered":

> **Rule 58. Entering Judgment**
>
> (a) SEPARATE DOCUMENT. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:
>
> (1) for judgment under Rule 50(b);
> (2) to amend or make additional findings under Rule 52(b);
> (3) for attorney's fees under Rule 54;
> (4) for a new trial, or to alter or amend the judgment, under Rule 59; or
> (5) for relief under Rule 60.
>
> . . .
>
> (c) TIME OF ENTRY. For purposes of these rules, judgment is entered at the following times:
>
> (1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or
>
> (2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:
>
> (A) it is set out in a separate document; or
>
> (B) 150 days have run from the entry in the civil docket.

Fed. R. Civ. P. 58(a)-(c).

In this case, Rule 58(c)**(2)(A)** supplies the "entry of judgment" definition because this judgment was required to be "set out in a separate document" and was in fact "set out in a separate document" when the district court issued its dismissal order. *See* ROA.1459. As such, the "entry of judgment" did *not* occur when the parties filed their stipulation. Rather, under this provision, the "judgment [was] entered" on the date that the court entered the dismissal order because that was when the judgment got "set out in a separate document." This makes the motion timely.

For these reasons, the district court correctly held that "it is the Court's order dismissing this case, not the parties' stipulation of dismissal, that triggers Rule 59(e)'s 28-day window for a motion to alter or amend a judgment of the Court." ROA.2177-78. "Plaintiffs' motion was therefore timely filed" under Rule 59. *Id.*

B. Rule 59 supplies the most favorable grounds for relief.

The State Department tries to avoid Rule 59 for a reason. By successfully invoking Rule 59, the Plaintiffs' motion expanded the district court's authority to its maximum extent and escaped the stricter boundaries that would have applied under Rule 60 alone. To the extent that Rule 60's principles did not already warrant relief, the motion definitely satisfied the more generous principles of Rule 59.

Circuit precedent is familiar with the key differences. Judge Rubin, joined by Judges Jones and Barksdale, captured the distinction correctly in *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 170 (5th Cir. 1990):

> A motion to reopen a case under Rule 59(e), though subject to much more stringent time limitations than a comparable motion under Rule 60(b), *is not controlled by the same exacting substantive requirements*. Unlike Rule 60(b), Rule 59(e) does not set forth any specific grounds for relief. *Nor can we discern any basis for engrafting the strict limitations of the former onto the latter*. . . . Because Rule 59(e) is *not subject to the limitations of Rule 60(b)*, the district court has considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration arising under the former rule.

Id. at 173-74 (emphasis added). So did Judges Higginbotham, Davis, and Prado in *Estate of Sturges ex rel. Anderson v. Moore*, 73 F. App'x 777 (5th Cir. 2003) (unpublished). Drawing on *Lavespere*, the *Sturges* decision addresses new evidence with the same kind of equitable balancing that should be applied to the new post-judgment developments at issue in this case:

> The district court held that the estate could show the need for Rule 59(e) reconsideration only by showing an intervening change in controlling law, new evidence not previously available, or manifest injustice. *This standard is too stringent*. In deciding a Rule 59(e) motion the district court should consider the following non-inclusive factors: "(1) the reasons for the plaintiffs' default, (2) the importance of the evidence to the plaintiffs' case, (3) whether the evidence was available to plaintiffs before they responded to the summary judgment motion, and (4) the likelihood that the defendants will suffer unfair prejudice if the case is reopened." *Ford v. Elsbury*, 32 F.3d 931, 937–38 (5th Cir.1994) (citing *Lavespere*, 910 F.2d at 174).

Id. at 778 (emphasis added) (citation omitted).

The State Department's Rule 59 analysis is meager. With Part I of its brief having been distracted by the straw man (rewriting the Settlement Agreement), and Part II.A having errantly argued about Rule 60's standard in isolation, the State Department ends up addressing Rule 59 issues in the space of just four short pages.

Appellees' Br. at 23-26. The scant Rule 59 arguments that made that cut do not warrant affirming the judgment below.

C. A flexible balancing test allows for the withdrawal of stipulated dismissals.

Whenever a party seeks to withdraw a stipulation, the same flexible balancing test applies regardless of what issue the stipulation concerns. Appellees' Br. at 20-21. "Manifest injustice" is the lodestar, which courts evaluate by looking to factors such as "(1) the effect of the stipulation on the party seeking to withdraw the stipulation, (2) the effect on the other parties to the litigation; (3) the occurrence of intervening events since the parties agreed to the stipulation; and (4) whether evidence contrary to the stipulation is substantial." *Id.* (collecting cases).

The State Department tries to limit this. It says that this test applies only to stipulations about "the rules of evidence"—not to case-dispositive stipulations like dismissals. Appellees' Br. at 26. In truth, though, the balancing test is universal.

Precedent supporting the supposed evidence-only limitation does not exist. It would have been cited if it did. But none is given because there is no backup.

Precedent instead supports the Plaintiffs' rule. In courts across the nation, the flexible balancing test discussed above governs the withdrawal of both evidentiary and non-evidentiary stipulations alike. *See generally* 73 Am. Jur. 2d Stipulations § 13 (2019). In particular, the flexible balancing test for stipulation withdrawal has been applied to case-dispositive stipulations like dismissal. *See Greenspahn v.*

Joseph E. Seagram & Sons, 186 F.2d 616, 621 (2d Cir. 1951) ("settlement stipulation"); *In re Royster Co.*, 132 B.R. 684, 685 (Bankr. S.D.N.Y. 1991) ("stipulated settlement agreement"). It also applies to important non-evidentiary matters like a stipulation of liability, *Waldorf v. Shuta*, 142 F.3d 601, 614 (3d Cir. 1998); *Equitable Life Assur. Soc. of U.S. v. MacGill*, 551 F.2d 978, 981 (5th Cir. 1977), a stipulation about jury trial versus bench trials, *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1206 (7th Cir. 1989), and a stipulation about a number of jurors, *United States v. Longwell*, 410 F. App'x 684, 689 (4th Cir. 2011).

In this way, Rule 59 and the law of withdrawing stipulations combine to produce a harmonious inquiry. At bottom, the task is to identify extraordinary circumstances with a flexible test that accounts for each party's benefits and burdens and respects the rule that each court "does have the right, and it should never fail to exercise it, to relieve counsel of stipulations to prevent manifest injustice." *Laird v. Air Carrier Engine Servs., Inc.*, 263 F.2d 948, 953 (5th Cir. 1959).

V. Extraordinary and unforeseeable circumstances warrant relief.

At oral argument, the State Department should be asked to articulate a set of extraordinary and unforeseeable circumstances that *would* warrant withdrawing a stipulated dismissal and reopening a case. Its brief tacitly admits that sufficient circumstances can exist, Appellees' Br. at 2, but never defines them.

According to the State Department, the parties here "contemplated the possibility of an Administrative Procedure Act challenge" and the "only changed circumstance is that the government's regulatory actions were . . . preliminarily enjoined by a district court." Appellees' Br. at 2. That vast oversimplification fails to acknowledge several of the situation's most important circumstances.

A. The *nationwide* injunction is especially abnormal.

The Western District of Washington's preliminary injunction against the State Department is not local in scope. It is *nationwide*. That makes it a "disturbing" event that should be "repudiate[d]" by any court that can. The federal government's own Solicitor General said so to the Supreme Court quite recently:

> The decisions below reflect a ***disturbing*** trend of issuing nationwide injunctions at the behest of individual litigants. *See generally* Bray, supra n.13. This trend allows a single district court to bring judicial review in all other fora to a halt; deprives other courts, including this one, of differing perspectives on important questions; and undercuts the congressionally authorized mechanism that is intended to permit broader relief - namely, class actions. ***The Court should repudiate that practice.*** At the very least, it should make clear that, in these circumstances, a preliminary injunction issued in response to a request for a temporary restraining order should be narrowly tailored to the plaintiffs, not a vehicle for halting public policy across the Nation.

Reply Brief for the Petitioners, *Trump v. Hawaii*, 138 S. Ct. 377 (2017), 2017 WL 4457184, at *37-38 (emphasis added).[3] In light of this, the federal government should not be allowed to downplay the nationwide aspect of this injunction.

[3] The United States has taken essentially the same position before this Court too. *See* Brief for the Appellants, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), 2015 WL 1611821 at *5.

The State Department never grapples with two key facets of the preliminary injunction's substance. It says nothing about the extraordinary decision to let states hijack the federal government's *parens patriae* interest. *See* Appellants' Br. at 13. And it says nothing about the extraordinary decision to hold that the First Amendment can be "abridged" so long as it is not "abrogated." Appellants' Br. at 14. Errors of this magnitude—all of which had to occur simultaneously to allow for the injunction's issuance—are beyond what should be expected of the courts.

B. The State Department is breaching its obligation to provide a temporary modification, license, and acknowledgement.

Critically, the State Department does *not* claim to be complying with the Settlement Agreement. The most it can say is that it "began to pursue the required actions." Appellees' Br. at 1. But of course, "begin[ning]" contract performance is not the same as accomplishing contract performance. The State Department is breaching the Settlement Agreement *and does not seem to care*.

For months now, the State Department has been breaching Settlement Agreement Paragraph 1(b). Paragraph 1(b) has applied this whole time—"while the [Paragraph 1(a)] final rule is in development"—and obligates the State Department to "publish" a "temporary modification" of the relevant regulations "to exclude the technical data that is the subject of the Action" from United States Munitions List Category I. ROA.1491-92.

Efforts to comply with the Paragraph 1(b) obligation *began* in July 2018 when the Temporary Modification was first published. *See* ROA.1477; Appellees' Br. at 7-8. But the State Department has been in breach of this obligation ever since the Western District of Washington issued its preliminary injunction, *see* ROA.2115, and the State Department acceded to it, *see* Appellees' Br. at 10 ("While that injunction "remains in effect, the parties [here] may not perform some of the obligations set forth in their settlement agreement."). This breach is clearly material.

Likewise, for months now, the State Department has been breaching Settlement Agreement Paragraph 1(c). Paragraph 1(c) requires the State Department to issue a license "advising that the Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13)." ROA.1491-92.

Compliance with the Paragraph 1(c) obligation began in July 2018 when the license was first delivered. *See* ROA.1477; Appellees' Br. at 7-8. But again, the State Department has been in breach of this obligation ever since the Western District of Washington issued the preliminary injunction, *see* ROA.2115, and the State Department acceded to it, *see* Appellees' Br. at 10. This breach is material too.

Additionally, the State Department is breaching Settlement Agreement Paragraph 1(d). Paragraph 1(d) requires the State Department to "acknowledge[] and agree[]" that (1) "the temporary modification of USML Category I permits any

United States person, to include Defense Distributed's customers and SAF's members, to access, discuss, use, reproduce, or otherwise benefit from the Defense Distributed I Files," and (2) "that the license issued to the Plaintiffs permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files." ROA.1491-92.

Compliance with Paragraph 1(d) obligation began when the Settlement Agreement was executed, as the State Department provided the requisite acknowledgement therein. *See* ROA.1477; Appellees' Br. at 7-8. But as with the prior two provisions, the State Department has been in breach of this obligation ever since the State Department acceded to corresponding part of the Western District of Washington's preliminary injunction, *see* ROA.2115 ("The federal defendants . . . shall preserve the status quo ex ante as if the modification had not occurred and the letter had not been issued . . . .").

C. The proviso about APA compliance does not help the State Department

The State Department's foreseeability argument puts much emphasis on a Settlement Agreement proviso about legality. It notices that, in Paragraph 1(a), the "settlement agreement itself expressly recognized that the government's notice of proposed rulemaking and final rule would only be possible 'to the extent authorized by law (including the Administrative Procedure Act).'" Appellees' Br. at 24. This does not help the State Department's position for two reasons.

First, the legality proviso is of little use because it exists only in Paragraph 1(a) – the provision about the final rule. No similar proviso exists in Paragraphs 1(b), 1(c), and 1(d), all of which the State Department is presently in breach of.

More importantly, even if the legality proviso existed in every Settlement Agreement paragraph, it would not help the State Department's argument for a very important reason: Everything that the Settlement Agreement obligates the State Department to do *is* authorized by law, including the Administrative Procedure Act. Nothing inherent in the obligations of Paragraphs 1(a), 1(b), 1(c), 1(d), and 1(e) violates any law. The State Department does not disagree because no serious argument to the contrary could be made. The legality proviso therefore supplies no excuse for the State Department's failure to carry out all of its Settlement Agreement's obligations.

D. The State Department has not "made every effort to continue to comply with the settlement agreement."

The State Department's brief says both that it has "made every effort to continue to comply with the settlement agreement," and that the Plaintiffs agree. Appellees' Br. at 16. That is doubly false. The Plaintiffs have never agreed to that because it is not true. The State Department is breaching the Settlement Agreement because the State Department is *not* making "every effort to continue to comply."

The State Department claims to have "defended its actions" in the Western District of Washington. Appellees' Br. at 1. It says that when the Plaintiff States sought their injunction, it "opposed that relief." Appellees' Br. at 10. Critically, though, the State Department did not "fully" oppose relief or give it "every effort." To do that would have meant taking an interlocutory appeal from the preliminary injunction to the Ninth Circuit, *see* 28 U.S.C. 1292(a)(1), which the government has done in the case of many other important nationwide injunctions. That no such appeal occurred is, in these circumstances, quite exceptional.

Furthermore, if the State Department actually wanted to make "every effort to continue to comply with the settlement agreement," it would issue *another* temporary modification, issue *another* license, and issue *another* acknowledgment. But instead of doing that, the State Department halted at the first sign of trouble. This kind of half-hearted effort does not comply with the Settlement Agreement.

Legally, the State Department has no excuse for making just *one* attempt at compliance with the Settlement Agreement. More is required because the Settlement Agreement demands the accomplishment its Paragraph 1 substantive changes *without regard to how many attempts that takes*. It does not matter *how* the State Department accomplishes the ends described in Paragraphs 1(a), 1(b), 1(c), 1(d), and 1(e), so long as they are accomplished.

This holds true notwithstanding the Western District of Washington's injunction, which acts only upon actions the State Department took in its attempt to

comply with the Settlement Agreement—not upon the Settlement Agreement itself. That case and its injunction are about *how* the State Department carried out its first attempt at Settlement Agreement compliance—not *whether* the State Department is allowed to comply in general. The injunction pauses parts of the State Department's *first attempt* to comply with the Settlement Agreement. But it does *not* stop the State Department from undertaking new efforts that avoid prior procedural errors.

Hence, the State Department remains perfectly free—and contractually obligated—to accomplish its Paragraph 1 undertakings by whatever legal means are necessary. If that means going through the motions not just once, but twice, so be it. The State Department knew full well when it made the Settlement Agreement that multiple attempts might be required in the case of an APA fault.

E. The State Department misuses several contract arguments.

The State Department thinks that it can win much of the appeal with two closely-related assertions about contract law and the Settlement Agreement: (1) the Settlement Agreement does *not* give the Plaintiffs a contractual right to the relief their motion sought, and (2) granting the motion would constitute an impermissible breach of the Settlement Agreement. Not so. Both assertions are deeply flawed.

1. Non-contractual authorities justify the Plaintiffs' motion.

The State Department errs to the extent it argues that the Plaintiffs *need* the Settlement Agreement to supply a contractual right to the relief their motion sought. *See, e.g.*, Appellees' Br. at 16 ("What plaintiffs seek is something that they could

have negotiated for, but did not."). Even if such contract rights would *suffice* to make the Plaintiffs prevail here, they are not *necessary* because other, independent authorities justify the same relief. As the Plaintiffs have argued primarily all along, their right to withdraw the stipulation and have the case reopened comes from Rules 59 and 60 and federal law's background procedural principles.

Because of this analytic flaw, the State Department cannot win the appeal just by showing that the Settlement Agreement does *not* give the Plaintiffs a contractual right to the relief their motion sought.[4] Doing so would eliminate *one* possible justification for reversal. But it would say nothing of the other justifications that can warrant the same outcome independently.

2. The State Department has no valid arguments about Settlement Agreement breach.

The State Department also errs to the extent that it argues the motion *cannot* be granted because doing so would constitute a breach of the Settlement Agreement. *See, e.g.*, Appellees' Br. at 16 ("plaintiffs may not unilaterally move for a new judgment that incorporates the settlement agreement, which would be contrary to the agreement's terms"). Initially, the State Department's own logic defeats this notion. For if "the district court lacks continuing jurisdiction to enforce the underlying settlement agreement," Appellees' Br. at 16, then the State Department is not

[4] The same flaw exists with respect to the notion that the Plaintiffs' appeal depends on a judgment with "continuing district court jurisdiction" over the Settlement Agreement. Appellees' Br. at 2. That situation might *suffice* to make the Plaintiffs prevail. But it is not a *necessary* method of supporting the motion, which a wide variety of legal authorities could warrant granting.

allowed to assert what amounts to a breach-of-contract (Settlement Agreement) claim as its reason to deny the Plaintiffs' motion.

More importantly, even if the Court were to do a full contract-law analysis of the Settlement Agreement's situation, the State Department would undoubtedly lose. A party that first materially breaches a contract cannot stop the other party from withholding future performance, *see, e.g.*, Restatement (Second) of Contracts § 237 (1981). After the Plaintiffs did their part by obtaining the requisite dismissal, the State Department committed a series of material breaches by violating and continuing to violate the Paragraph 1(b), 1(c), 1(d), and 1(e) obligations. So in this situation, the State Department is quite clearly the party that first materially breached the Settlement Agreement, and would have no meaningful right to proceed against the Plaintiffs on a breach-of-contract theory.

The State Department tries to escape this conclusion with an excuse argument: "a party does not breach its obligations under a settlement agreement by refusing to violate a court order." Appellees' Br. at 25. But this theory is rife with error.

First, this theory does not excuse the State Department's breach for a reason already explained: The court order being relied upon is the Western District of Washington's injunction, and while that decision operates on the State Department's *first attempt* at complying with the Settlement Agreement, nothing about that injunction prohibits the State Department from complying in a wave of second acts.

The Court should also reject the court-order excuse theory because the State Department failed to engage in diligent efforts to avoid the Western District of Washington's preliminary injunction. Well-established law holds that, to claim this excuse, a party in the State Department's position must engage in a good faith and diligent effort to avoid the court order. *See generally* Restatement (Second) of Contracts § 264; Restatement (First) of Contracts § 458 (1932). "Clearly, when possible, one must make a diligent effort to dissolve outstanding injunctions to avoid being found at fault." 30 Williston on Contracts § 77:61 (West 4th ed. 2019); *accord* 14 Corbin on Contracts § 76.5 (2001). Under these authorities, the State Department failed to exhibit the requisite good faith and diligence by, among other things, opting not to appeal the preliminary injunction decision to at least the Ninth Circuit.

Additionally, the Court should reject this excuse because the parties contracted for the State Department to assume the risk of the injunction they now claim as the excuse. *See* Restatement (Second) of Contracts § 264 (1981); Restatement (First) of Contracts § 458, cmts. a, d (1932); Williston, *supra* § 77:61; Corbin, *supra* § 76.5. "Circumstances surrounding the formation of a contract may indicate the possibility of potential injunctive relief and, if so recognized, its risk may be assumed by the obligor." Williston, *supra* § 77:61. That rule fits this case neatly because the Settlement Agreement makes the State Department bear the risks of adverse litigation. In this respect, the State Department is especially hurt by its continued insistence that the injunction "was not unforeseen." Appellees' Br. at 1.

If it is true that the Western District of Washington's injunction was foreseeable all along, then the Settlement Agreement must necessarily be construed to put the injunction's risk on the State Department.

VI. The Court should reverse and remand.

Finally, the State Department misunderstands the scope of relief sought in this appeal. The Plaintiffs are not seeking quite as much as the State Department thinks.

To resolve this appeal, the Court should (1) hold that the district court should have granted the Plaintiffs' motion for relief from the judgment, (2) vacate the current judgment because of that holding, and (3) *remand* for the district court to conduct further proceedings that determine what new judgment should be entered. A variety of procedural options such as those described in the Plaintiffs' motion's conclusion would then become available. *See* ROA.1486-87.

Importantly, the Court is not required to *render* a replacement judgment at this time. It could do so if the record were sufficiently clear and arguments sufficiently developed. But for the traditional reasons, the better practice is to have the issue taken up by the district court in the first instance. That way it can both receive the full panoply of legal arguments that have been previewed here and assess any lingering factual disputes. The practice of remanding instead of rendering in such circumstances is well-established and wise. *See, e.g.*, *Laguna Royalty Co. v. Marsh*, 350 F.2d 817, 825 (5th Cir. 1965).

Conclusion

The Plaintiffs' motion to vacate the existing judgment and reopen the case for further proceedings should have been granted. The district court's decision to deny that motion should be reversed and the case remanded for further proceedings.

August 30, 2019

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I hereby certify that on the 30th day of August 2019 an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system, to the following:

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No. 18-50811 Defense Distributed, et al v. U.S. Dept. of State, et al
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