**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.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division,
No. 1:15-cv-372
Hon. Robert Pitman

# BRIEF FOR APPELLEES

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## CERTIFICATE OF INTERESTED PERSONS

A certificate of interested persons is not required, as defendants-appellees are government agencies and a government official sued in his official capacity. 5th Cir. R. 28.2.1.

## STATEMENT REGARDING ORAL ARGUMENT

Appellees believe that this Court may affirm the district court's decision without oral argument, based on the district court's opinion and the arguments put forward in this brief. If the Court determines that oral argument will facilitate its resolution of the case, appellees would welcome the opportunity to assist the Court.

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## INTRODUCTION

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. *See* Fed. R. Civ. P. 41(a)(1). The district court later confirmed that dismissal in an order. ROA.1459.

The same day the district court issued that order, several States filed a lawsuit in the U.S. District Court for the Western District of Washington, challenging actions taken by the State Department pursuant to its settlement with plaintiffs. Although the State Department defended its actions, the district court issued a preliminary injunction, and litigation over a permanent injunction continues.

Plaintiffs then moved to reopen this case and to vacate their stipulation of dismissal. Plaintiffs further sought to have the district court incorporate the settlement agreement into a new judgment and authorize the district court to maintain continuing jurisdiction to enforce the settlement agreement.

The district court appropriately denied that extraordinary relief. The settlement agreement expressly provided for dismissal with prejudice in the form specified by the agreement. The parties did not agree to incorporate the settlement agreement into the

stipulation, nor did they agree to be subject to continuing district court jurisdiction to enforce the settlement.

Plaintiffs have not demonstrated the sort of extraordinary and unforeseeable circumstances that might warrant reopening a closed judgment and withdrawing the stipulated dismissal. The only changed circumstance is that the government's regulatory actions were challenged under the Administrative Procedure Act and preliminarily enjoined by a district court. But that possibility was not unforeseen. The parties contemplated the possibility of an Administrative Procedure Act challenge in the settlement agreement. And before dismissing the case, plaintiffs successfully opposed an attempt by would-be intervenors to bring an Administrative Procedure Act challenge to the government's actions under the settlement agreement.

If plaintiffs wished to provide for continuing district court jurisdiction in anticipation of a challenge to the government's actions, plaintiffs could have negotiated for that as part of the settlement. But they did not do so. Plaintiffs may not now argue that the district court abused its discretion in failing to grant them settlement terms beyond those that they bargained for.

## STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, and 2202. ROA.25. Plaintiffs and defendants executed a stipulated dismissal of the case with prejudice on July 27, 2018. ROA.1457. Plaintiffs then moved to amend the judgment and for relief from judgment, which the district court

denied on October 22, 2018. ROA.2182. Plaintiffs filed an initial notice of appeal on September 25, 2018, and an amended notice of appeal on December 21, 2018. ROA.2173, 2185. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUE

Whether the district court abused its discretion in declining to permit plaintiffs to rescind a stipulation of dismissal with prejudice, vacate the dismissal, and incorporate a settlement agreement in a new judgment in contravention of the terms of that settlement agreement.

## STATEMENT OF THE CASE

### I. LEGAL FRAMEWORK

#### A. The Arms Export Control Act

The Arms Export Control Act, 22 U.S.C. § 2751 *et seq.*, authorizes the President to "control the import and the export of defense articles and defense services," *id.* § 2778(a)(1). "[T]he President is authorized * * * to promulgate regulations for the import and export of such articles and services," and to designate items as defense articles and defense services by placing them on the "United States Munitions List." *Id.* With certain exceptions not relevant here, "no defense articles or defense services * * * may be exported or imported without a license for such export or import." *Id.* § 2778(b)(2).

Under delegated authority, the Department of State has promulgated the International Traffic in Arms Regulations, 22 C.F.R. §§ 120-130, which are

administered by the Department's Directorate of Defense Trade Controls. Those regulations set out the U.S. Munitions List, which defines items as defense articles and defense services, and also set out the requirements and procedures for determining whether particular items satisfy the regulatory definitions and, if so, whether a license should be issued to permit their export. In addition to arms themselves, the U.S. Munitions List includes "[t]echnical data * * * directly related" to items on the list. 22 C.F.R. § 121.1, Category I, item (i).

### B. Stipulated Dismissals Under Federal Rule Of Civil Procedure 41

Federal Rule of Civil Procedure 41 provides that a plaintiff may dismiss a case "[w]ithout a [c]ourt [o]rder" by filing a "stipulation of dismissal signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A)(ii). Once the stipulation is filed, the case is dismissed without further action by the district court. *Meinecke v. H&R Block of Houston*, 66 F.3d 77, 82 (5th Cir. 1995) (per curiam) ("[W]hen the parties file a stipulation of voluntary dismissal pursuant to Rule 41(a)(1)(ii), 'any further actions by the court [are] superfluous.'").

The parties to a stipulation may choose to "provide for the court's enforcement of" any settlement agreement that induced the stipulated dismissal. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994). The parties can do so by having the district court "incorporate or embody the terms of a settlement agreement in a dismissal order" or asking the district court to "expressly retain jurisdiction over a

settlement agreement by clearly indicating such intent in a dismissal order." *SmallBizPros, Inc. v. MacDonald*, 618 F.3d 458, 462-63 (5th Cir. 2010) (per curiam). Because a stipulated dismissal is effective on filing, if the parties wish for the district court to retain jurisdiction to enforce a settlement agreement, then "either (i) all of the requirements for retaining jurisdiction must be met at the time of filing [the stipulated dismissal], or (ii) the filing's effectiveness must be contingent upon a future act (such as the district court issuing an order retaining jurisdiction)." *Id.* at 463. "[A]ll parties must agree to" continued district court jurisdiction after a stipulated dismissal in order for the district court to have such enforcement authority. *Id.*

## II. PRIOR PROCEEDINGS

### A. Defense Distributed's Lawsuit Against The Federal Government And The Parties' Settlement

Plaintiff Defense Distributed is a nonprofit organization that seeks to "promot[e] popular access to arms" by facilitating access to "information and knowledge related to the 3D printing of arms" and "distributing such information and knowledge on the Internet." *Defense Distributed v. U.S. Dep't of State,* 838 F.3d 451, 454 (5th Cir. 2016). In 2013, the State Department sent a letter to Defense Distributed requesting that it remove certain technical files from the internet because those files were potentially "technical data" that could not be exported without State Department approval. *See id.* at 455-56. Defense Distributed filed this suit against

defendants, seeking to enjoin enforcement against it of the International Traffic in Arms Regulations. *Id.* at 456.

The district court denied a preliminary injunction, and this Court affirmed. *Defense Distributed*, 838 F.3d at 456-61.[1] After this Court ruled in favor of defendants, the case was remanded to the district court, and the parties elected to settle. On June 29, 2018, the parties executed a settlement agreement. In that agreement, "[i]n consideration of Plaintiffs' agreement to dismiss the claims in the Action with prejudice," defendants agreed to pursue certain actions. ROA.1491. First, they agreed to "draft and to fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule" revising the Munitions List to exclude the technical data that was the subject of the litigation. ROA.1491. Second, they agreed to announce a "temporary modification" of the Munitions List "to exclude the technical data that is the subject of the Action," which would "appear on [a particular website], on or before July 27, 2018." ROA.1491-92. Third, they agreed to issue a letter to plaintiffs "advising that [certain files] are approved for public release * * *

[1] This Court also denied rehearing en banc, and the Supreme Court denied plaintiffs' petition for a writ of certiorari. *Defense Distributed v. U.S. Dep't of State,* 865 F.3d 211 (5th Cir. 2017); *Defense Distributed v. Department of State,* 138 S. Ct. 638 (2018).

because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13)." ROA.1492. Finally, defendants agreed to pay plaintiffs $39,581. ROA.1492.[2]

In return, plaintiffs agreed to "execute and provide * * * an original Stipulation for Dismissal with Prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) and 41(a)(1)(B)." ROA.1493. That stipulation, signed by all parties, would be filed with the district court "no sooner than 5 business days after the publication of the announcement" and issuance of the letter described in the settlement agreement. ROA.1493. "A copy of the Stipulation for Dismissal with Prejudice [was] attached" to the settlement agreement. ROA.1493.

As of the date the parties executed the agreement, defendants had already drafted and issued notices of proposed rulemaking consistent with their obligations under the settlement agreement: the rules would, if finalized as proposed, allow release of the technical data. *See* 83 Fed. Reg. 24,198 (May 24, 2018); 83 Fed. Reg. 24,166 (May 24, 2018).[3] On July 27, 2018, defendants complied with their second and third obligations under the settlement agreement by posting an announcement temporarily modifying the Munitions List to exclude the technical data at issue in this

[2] Defendants also confirmed their understanding that the proposed modifications of the Munitions List would allow any United States person to use the technical data at issue. ROA.1492.

[3] The proposed rules would remove non-automatic firearms (along with associated technical data) from the International Traffic in Arms Regulations and transfer jurisdiction of export restrictions over those weapons to the Commerce Department.

litigation and sending a letter to Defense Distributed approving the printing files for public release. *See* ROA.1477 (acknowledgment by plaintiffs that these actions complied with the settlement agreement).

### B. Proposed Intervenors Attempt To Challenge The Settlement Agreement Based On Alleged Violations Of The Administrative Procedure Act

Two days before the parties filed their stipulated dismissal with the district court, three gun violence prevention organizations filed an emergency motion to intervene in this action, ROA.1260-72, and for a temporary restraining order and a preliminary injunction to prevent the terms of the settlement agreement from taking effect, ROA.1320-29. The proposed intervenors alleged that the settlement agreement would violate the Administrative Procedure Act (APA) by causing the government to engage in conduct that was *ultra vires*, ROA.1296-98, ¶¶ 74-86 not in accordance with law, ROA.1298-99, ¶¶ 87-92, and arbitrary and capricious, ROA.1299-1300 ¶¶ 93-100.

The district court held a hearing on the motion to intervene, which plaintiff's counsel attended. ROA.2281-82. The court suggested that intervention in this case was a poor vehicle for the organizations to raise their APA challenges, although the court clarified that "certainly I don't think it's the only avenue for you—to have sought the relief that you are asking for." ROA.2293. Later in the hearing, government counsel reiterated that if the organizations had standing, they could potentially file a separate lawsuit raising their APA challenges. ROA.2337. After the

hearing, the district court issued an order denying the motion to intervene and the motion for injunctive relief. ROA.1449.

Soon after that order, and in accordance with the settlement agreement, the parties filed a "Stipulation Of Dismissal With Prejudice," signed by counsel for both plaintiffs and defendants. ROA.1457. The stipulation read, in full:

> Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii) and 41 (a)(1)(B), and a settlement agreement among Plaintiffs (Defense Distributed, Second Amendment Foundation, Inc., and Conn Williamson) and Defendants (the United States Department of State, the Secretary of State, the Directorate of Defense Trade Controls, the Deputy Assistant Secretary, Defense Trade Controls, and the Director, Office of Defense Trade Controls Policy), the Plaintiffs and the Defendants hereby stipulate to the dismissal with prejudice of this action.

ROA.1457. The stipulated dismissal did not attach the settlement agreement, did not ask the court to adopt the settlement agreement in an order, and did not ask the court to retain jurisdiction over the matter.

Three days later, on July 30, 2018, the district court issued an order confirming the dismissal of the case with prejudice and closing the case. ROA.1459.

### C. Different Plaintiffs Successfully Enjoin The Government's Actions Under The Settlement Agreement Based On Alleged Violations Of The Administrative Procedure Act

On that same day, July 30, 2018, a group of States and the District of Columbia filed suit in the U.S. District Court for the Western District of Washington against several federal defendants and Defense Distributed. The plaintiff States—like the proposed intervenors in this case—alleged that the actions the government took

consistent with the settlement agreement violated the APA because they were *ultra vires*, not in accordance with law, and arbitrary and capricious. Compl. ¶¶ 132-54, Dkt. No. 1, *Washington v. U.S. Dep't of State*, No. 18-cv-1115 (W.D. Wash. July 30, 2018). The plaintiff States sought an injunction prohibiting implementation of the modification to the Munitions List and suspending the State Department's agreement that Defense Distributed was entitled to post the technical data on the internet. *Id.* at 48.

Both Defense Distributed and the federal defendants opposed that relief. The district court granted a temporary restraining order, followed by a preliminary injunction against the government, enjoining federal defendants "from implementing or enforcing" the temporary modification to the Munitions List and the State Department's letter to Defense Distributed. *See Washington v. U.S. Dep't of State,* 318 F. Supp. 3d 1247, 1264 (W.D. Wash. 2018). While that injunction "remains in effect, the parties [here] may not perform some of the obligations set forth in their settlement agreement." ROA.2176-77. The plaintiff States have moved for summary judgment, and Defense Distributed and the federal defendants have filed a cross-motion for summary judgment. Dkt Nos. 170, 173, 174, *Washington v. U.S. Dep't of State*, No. 18-cv-1115 (W.D. Wash. Feb. 15 & Mar. 15, 2019). Those motions remain pending.

### D. Plaintiffs Ask The Court To Vacate Their Voluntary Dismissal

After the injunction issued in *Washington,* plaintiffs here moved to amend the judgment under Federal Rule of Civil Procedure 59(e), or, alternatively, for relief from judgment under Federal Rule of Civil Procedure 60(b). ROA.1472. Plaintiffs argued that "[w]hen the Plaintiffs and Defendants here entered the stipulation of dismissal, it was inconceivable that another federal court would allow states to mount a collateral attack on [the district court's] judgment [of dismissal]," and that "[e]xceptional circumstances" therefore warranted withdrawal of the plaintiffs' stipulation of dismissal and reopening of the case. ROA.1482. In their reply brief, plaintiffs stated that "everyone acknowledge[d] [that] the current judgment does *not* incorporate the Settlement Agreement in any respect," and that "the judgment's failure to account for the Settlement Agreement's obligations *is the problem* to be addressed upon reopening." ROA.2162. Plaintiffs asked the district court to alter the judgment or to grant them relief from judgment in order to "reflect[] the controversy's true disposition by accounting for the Settlement Agreement's obligations expressly." ROA.2167.

The district court denied plaintiff's motion. ROA.2176. The court analyzed plaintiff's motion under Rule 59(e), holding that the motion was filed within 28 days from the court's July 30, 2018 order. ROA.2178. Under Rule 59(e)'s standards, the district court held that relief was not warranted because "an injunction on the performance of the terms of the settlement agreement was reasonably foreseeable."

ROA.2179. The court emphasized that "Plaintiffs expressly contemplated APA review of the settlement agreement," ROA.2180, and it was "reasonably foreseeable that a court reviewing government action for compliance with the APA might enjoin performance of the challenged action during the pendency of litigation." ROA.2179. And plaintiff's remaining arguments did not entitle them "to the 'extraordinary remedy' of reconsideration of a judgment." ROA.2182 (quoting *Templet v. HydroChem Inc.,* 367 F.3d 473, 479 (5th Cir. 2004)).

## SUMMARY OF ARGUMENT

**I.** When the parties negotiated the settlement agreement, there were two ways to dismiss the case under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The parties could ask the district court to exercise continuing jurisdiction over the settlement agreement to enforce its terms, or they could stipulate to an unconditional dismissal. The parties chose the latter option, signed the settlement agreement, and executed the stipulated dismissal with prejudice. Plaintiffs later asked the district court to re-write the settlement agreement and the dismissal in order to provide for continuing enforcement jurisdiction. The district court properly declined to do so. This Court and the Supreme Court have made clear that district courts may only exercise continuing jurisdiction over settlement agreements if *both* parties consent to that jurisdiction at the time of dismissal. Neither party so consented here, and plaintiffs may not unilaterally rewrite the settlement agreement to provide otherwise.

**II.** Plaintiffs filed their motion to amend the judgment and for relief from judgment 31 days after the parties filed their stipulated dismissal. That was too late for the motion to be considered under the 28-day time limit in Federal Rule of Civil Procedure 59(e), so the motion should be analyzed under Rule 60(b). Because plaintiffs fail to satisfy any of the grounds for relief specified in Rule 60(b), the district court did not abuse its discretion in denying relief. And even if the motion were analyzed under Rule 59(e), plaintiffs have not shown how any "manifest errors of law" or "newly discovered evidence," that might warrant extraordinary relief. *Templet v. HydroChem Inc.,* 367 F.3d 473, 479 (5th Cir. 2004).

## STANDARD OF REVIEW

The Court reviews the denial of a Rule 59(e) motion to alter or amend the judgment and the denial of a Rule 60(b) motion for relief from judgment for abuse of discretion. *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 353 (5th Cir. 1993). "Under this standard, the [district] court's decision need only be reasonable." *Id.*

## ARGUMENT

### I. PLAINTIFFS ARE NOT ENTITLED TO UNILATERALLY REWRITE THE SETTLEMENT AGREEMENT

Federal Rule of Civil Procedure 41(a)(1) provides two methods for a plaintiff's dismissal of a complaint. First, the plaintiff may dismiss the action when all parties stipulate to dismissal. Fed. R. Civ. P. 41(a)(1)(A)(ii). Second, the plaintiff may unilaterally dismiss the action before the defendant files an answer or a motion for

summary judgment. Fed. R. Civ. P. 41(a)(1)(A)(i). "No other unilateral action by the plaintiff is permitted." 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2363 (3d ed. 2019). While the parties are "free to negotiate the conditions on which they agree to" a stipulated dismissal, *id.* § 2366, the parties "are bound by the terms and conditions of th[at] stipulation," *id.* § 2363.

As a general rule, federal courts lack jurisdiction to enforce the terms of a settlement agreement that results in a case's dismissal. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377-78 (1994). "If the parties *wish* to provide for the court's enforcement of" the settlement agreement, "they can seek to do so" under Rule 41(a)(1)(A)(ii) by having the district court "embody the settlement contract in [a] dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract)." *Id.* at 381-82. The district court may only do so, however, "if the parties agree." *Id.* at 382. If the parties do not request a court order that could form the basis for continued jurisdiction, the stipulated dismissal "take[s] effect when *filed* and do[es] not require an order of the court." *Meinecke v. H&R Block of Houston*, 66 F.3d 77, 82 (5th Cir. 1995) (per curiam).

Here, the settlement agreement provided that plaintiffs would file a stipulated dismissal of the action "with Prejudice" "pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) and 41(a)(1)(B)." ROA.1493. In return, defendants agreed to several matters, including "[p]ayment in the amount of $39,581.00" to plaintiffs, ROA.1492, the publication of a notice of proposed rulemaking and final rule, the announcement of a

temporary modification "of USML Category I to exclude the technical data that is the subject of the Action," the acknowledgement that plaintiff's members and customers may access, use, and reproduce "the technical data that is the subject of the Action," ROA.1492, and the issuance of a letter to Plaintiffs that certain files "satisfy the criteria of 22 C.F.R. § 125.4(b)(13)," ROA.1491-92.

Nothing in the settlement agreement provided for continued district court jurisdiction to enforce the agreement. The agreement made clear that it "constitute[d] the entire agreement of Plaintiffs and Defendants," which reflected "the desire of the Parties to reach a full and final conclusion of the Action, and to resolve the Action without the time and expense of further litigation." ROA.1495. The parties agreed that the settlement "cannot be modified or amended except by an instrument in writing, agreed to and signed by the Parties." ROA.1495. Consistent with the agreement, the parties filed a stipulation of dismissal with prejudice, ROA.1457, which did not ask the district court to "embody the settlement contract in [a] dismissal order" or to "retain jurisdiction over the settlement contract)." *Kokkonen*, 511 U.S. at 381-82.

Plaintiffs now seek to vacate the stipulated dismissal for the "sole purpose" of entering "a new judgment that further supports the Settlement Agreement." Opening Br. 22 (emphasis omitted). Specifically, plaintiffs are disappointed that "the current judgment does not incorporate the Settlement Agreement in any respect," and they wish to solve that "problem," *id.* at 23, by "withdraw[ing] their stipulation and

replac[ing] the existing judgment with one that incorporates the Settlement Agreement's key provisions," *id.* at 3. *See also id.* at 25 ("Plaintiffs sought to withdraw the stipulation for one and only one purpose: to have the current bare-bones dismissal replaced with a judgment that 'incorporates,' 'embodies,' and/or 'retains jurisdiction' over the Settlement Agreement.").

What plaintiffs seek is something that they could have negotiated for, but did not. The agreement provides for a Rule 41(a)(1)(A)(ii) stipulation of dismissal with prejudice, without any contemplation of continuing district court jurisdiction or enforcement. *See SmallBizPros, Inc. v. MacDonald*, 618 F.3d 458, 463-64 (5th Cir. 2010) (stipulated dismissal with "no contingent or conditional language" is effective upon filing, and the district court lacks continuing jurisdiction to enforce the underlying settlement agreement).

The district court did not abuse its discretion in recognizing that plaintiffs may not unilaterally move for a new judgment that incorporates the settlement agreement, which would be contrary to the agreement's terms. Plaintiffs do not dispute that this settlement agreement was "negotiated at arm's length," ROA.2179, or that defendants have made every effort to continue to comply with the settlement agreement. Far

from "supporting the Settlement Agreement," Opening Br. 22 (emphasis omitted), plaintiffs' requested relief would contravene its express terms.[4]

At bottom, plaintiffs asked the district court to give them more than they received under the settlement agreement. But the courts have consistently held that whether a settlement agreement should be incorporated into a court order is a decision for the parties to make together. *See Kokkonen,* 511 U.S. at 381 ("If the parties *wish* to provide for the court's enforcement of a dismissal-producing settlement agreement, they can seek to do so"); *SmallBizPros, Inc.,* 618 F.3d at 462-63 (noting that "all parties must agree to such jurisdiction"); *see also Gardiner v. A.H. Robins Co., Inc.*, 747 F.2d 1180, 1190 (8th Cir. 1984) (reversing district court's *sua sponte* incorporation of a settlement agreement into a court order, because doing so "effectively deprived the parties of their unconditional right to a Rule 41(a)(1)(ii) dismissal by stipulation"). Having agreed to dismissal without incorporation of the agreement, plaintiffs are not now entitled to unilaterally amend the terms of the settlement.

[4] Plaintiffs suggest that defendants should be motivated, out of a desire to see the Western District of Washington action dismissed on jurisdiction grounds, to gain "a judgment's imprimatur" and thus bar "one district court from collaterally attacking another's judgment." Opening Br. 27 n.1. Even assuming that an altered judgment here would estop the plaintiff States from obtaining an injunction, it is a serious concession for the federal government to enter into a consent decree and bind itself to ongoing district court jurisdiction—a concession that, again, the parties did not agree upon.

## II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' MOTION TO WITHDRAW THEIR STIPULATED DISMISSAL

The district court acted well within its discretion by denying plaintiffs' motion to vacate their dismissal, whether analyzed under Federal Rule of Civil Procedure 59(e) or 60(b). Below, we explain why plaintiffs' motion should be analyzed under Rule 60(b), and why the district court was correct to deny the motion under either standard.

### A. Because Plaintiffs' Motion Was Untimely Under Rule 59(e), It Should Be Analyzed Under Rule 60(b)

Plaintiffs filed their motion to vacate the judgment on August 27, 2019. ROA.1472. That was 31 days after the parties filed their stipulation of dismissal, ROA.1457, and thus outside the 28-day limit in which motions to alter or amend the judgment under Rule 59(e) may be filed. *See* Fed. R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.").

"A stipulated dismissal is 'effective automatically' upon filing and requires no further action on behalf of a district court in order to constitute a final judgment." *In re Brewer*, 863 F.3d 861, 868 (D.C. Cir. 2017); *see State Nat'l Ins. Co. v. County of Camden*, 824 F.3d 399, 406, 408 (3d Cir. 2016) (stipulated dismissal "was a final judgment" that "is effective automatically"); *National City Golf Fin. v. Scott*, 899 F.3d 412, 417 (5th Cir. 2018) (stipulated dismissal is a "final judgment, order, or proceeding"). Once the

parties filed the stipulated dismissal on July 27, 2018, it was "effective upon filing notwithstanding any other action by the district court," and the deadline for a Rule 59(e) motion began to run. *SmallBizPros, Inc.*, 618 F.3d at 462. That conclusion accords with the Third Circuit's opinion in *State National Insurance Co.*, which held that the deadline for appeal began to run when the parties filed their stipulated dismissal. 824 F.3d at 404, 410 (explaining that the notice of appeal was untimely, notwithstanding court orders issued after the stipulated dismissal).

Because plaintiffs filed their motion 31 days after the stipulated dismissal, it was out of time under Rule 59(e). In district court, plaintiffs contended that their motion was timely because it was filed within 28 days of the district court's order confirming dismissal of the case. But that subsequent order did not change the legal effect of the stipulation. "A plaintiff's dismissal of his claims with prejudice is the 'legally operative act of dismissal pursuant to [Federal] Rule 41(a)(1)([(A)])(i),' such that a 'district court's subsequent order to the same effect [is] superfluous.'" *Derr v. Swarek*, 766 F.3d 430, 440-41 (5th Cir. 2014) (quoting *Warfield v. AlliedSignal TBS Holdings, Inc.*, 267 F.3d 538, 541 (6th Cir. 2001)).

In their statement of the case, plaintiffs suggest that their motion was timely under Rule 59(e), citing this Court's statement in *Harvey Specialty & Supply, Inc. v. Anson Flowline Equipment Inc.*, 434 F.3d 320 (5th Cir. 2005), that "a Rule 41(a)(1) dismissal is not a 'final judgment.'" Opening Br. 15. The Court in *Harvey Specialty*, however, was

not considering whether a stipulated dismissal is a judgment from which certain deadlines may run. Rather, the Court was faced with a case under the Anti-Injunction Act, which generally prohibits federal courts from enjoining state court proceedings, but contains an exception for issues already litigated that result in a final judgment. *Harvey Specialty*, 434 F.3d at 323. In *Harvey Specialty*, the plaintiff had previously brought litigation raising the same issue, but then voluntarily dismissed its claims without prejudice under Rule 41(a)(1). *Id.* at 323-24. The Court held that the re-litigation exception did not apply because a stipulated dismissal without prejudice "put[s] the plaintiff in a legal position as if he had never brought the first suit," and the plaintiff "is free to return to the dismissing court or other courts at a later date with the same claim." *Id.* at 324. That analysis does not change the fact that plaintiffs' stipulated dismissal was effective on filing, *SmallBizPros, Inc.*, 618 F.3d at 462, and the time for filing a Rule 59(e) motion began to run from that filing.

Because plaintiffs' motion was untimely under Rule 59(e), it is best analyzed under Rule 60(b).

### B. The District Court Reasonably Denied Relief From Judgment Under Rule 60(b)

A party moving for relief from judgment under Rule 60(b) must satisfy one of the six grounds identified in the rule for such relief:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

In their opening brief, plaintiffs present no substantive arguments that they are entitled to relief under Rule 60. Thus, plaintiffs have forfeited any argument that the district court erred in denying relief under Rule 60(b). *United States v. Bowen*, 818 F.3d 179, 192 n.8 (5th Cir. 2016) (per curiam) ("We have made clear that any issue not raised in an appellant's opening brief is forfeited."). In any event, plaintiffs do not qualify for relief under Rule 60(b).

Rule 60(b)(1) provides that relief may be appropriate when the judgment results from a mistake, inadvertence, surprise, or excusable neglect. Plaintiffs concede that they were aware that they could choose to dismiss the case without continuing district court jurisdiction, or they could choose to bargain for an agreement with defendants for "a more protective tactic and make settlement agreement provisions part of the judgment itself." Opening Br. 24. Plaintiffs "opted for a judgment of the former variety." *Id.* at 25. Rule 60(b)(1) is "not intended to relieve [a party] of the consequences of decisions deliberately made, although subsequent events reveal that

such decisions were unwise." *National City Golf*, 899 F.3d at 418. *See also Eskridge v. Cook County*, 577 F.3d 806, 810 (7th Cir. 2009) (affirming denial of Rule(b) motion to vacate voluntary dismissal because plaintiffs "having explicitly asked for a voluntary dismissal * * * could not claim that this dismissal resulted from 'mistake' or 'inadvertence'"). And notably, in the district court plaintiffs did not argue that they were entitled to relief under Rule 60(b)(1).

Subsections (2) through (5) are also all inapplicable—plaintiffs' motion did not rely on new evidence, allege fraud, or assert that the judgment was void or had been satisfied. Nor was the district court required to grant relief under subsection (6). While Rule 60(b)(6) confers broad power on a district court, that rule "is not for the purpose of relieving a party from free, calculated, and deliberate choices he has made." *Edward H. Bohlin Co. v. The Banning Co.*, 6 F.3d 350, 357 (5th Cir. 1993). Rather, it is reserved for those circumstances where relief is necessary because "the initial judgment [has been shown] to have been manifestly unjust." *Id.* With that standard in mind, the "federal courts have consistently applied this principle in refusing to grant a party who voluntarily requests dismissal of a claim to obtain relief from that judgment under Rule 60(b)." *In re Pettle*, 410 F.3d 189, 192 (5th Cir. 2005). *See also id.* ("[N]either strategic miscalculation nor counsel's misinterpretation of the law warrants relief from judgment.") (quoting *McCurry v. Adventist Health Sys./Sunbelt*, 298 F.3d 586, 592 (6th Cir. 2002)). The district court did not abuse its discretion in conforming to this practice and denying plaintiffs' requested relief.

### C. The District Court Reasonably Declined To Alter Or Amend The Judgment Under Rule 59(e)

Even if plaintiffs' motion were analyzed under Rule 59(e), plaintiffs have failed to demonstrate that they are entitled to reopen this case and replace the unconditional stipulated dismissal with a dismissal that provides for continued district court enforcement. The district court did not abuse its discretion in declining to grant that extraordinary relief.

A district court "has considerable discretion in deciding whether to reopen a case under Rule 59(e)," *Edward H. Bohlin Co.*, 6 F.3d at 355, and this Court has observed that Rule 59(e) "favor[s] the denial of motions to alter or amend a judgment," *Southern Constructors Grp., Inc. v. Dynalectric Co.,* 2 F.3d 606, 611 (5th Cir. 1993). Indeed, "[r]econsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly" to "serve[] the narrow purpose of allowing a party to correct manifest errors of law or to present newly discovered evidence." *Templet v. HydroChem Inc.,* 367 F.3d 473, 479 (5th Cir. 2004).

Plaintiffs' claim that they are entitled to reopen this case relies exclusively on what they characterize as "unforeseeable events" and "extraordinary circumstances" in the Western District of Washington. Opening Br. 21-22; *see* ROA.1482. Plaintiffs incorrectly assert that "[w]hen the Plaintiffs and Defendants here entered the stipulation of dismissal, it was inconceivable that another federal court would allow states to mount a collateral attack on [the district court's] judgment [of dismissal]."

ROA.1482. But the event in question—a preliminary injunction of governmental action based on alleged violations of the APA—does not mandate that the district court was required to reopen the case and assert continuing enforcement jurisdiction, in contravention of the settlement agreement.

Plaintiffs entered into that settlement agreement, negotiated at arm's length, with the understanding that the agreement required defendants to undertake actions potentially subject to challenge under the APA. 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)." ROA.1491. *See also* 5 U.S.C. §§ 702-706 (providing for judicial review under the APA). And before plaintiffs filed their stipulated dismissal, they were keenly aware that the government's actions under the settlement agreement might be challenged under the APA, because third parties had attempted to intervene in the case and block the settlement agreement on precisely those grounds. *See supra* pp. 8-10.

In the district court, plaintiffs were careful to note that defendants have not breached the settlement agreement. *See, e.g.*, ROA.1482 ("This is not a run-of-the-mill case where one side has reneged on a settlement agreement."). Plaintiffs correctly note that defendants are not currently enforcing the actions required by the settlement agreement insofar as those actions remain preliminarily enjoined by the district court for the Western District of Washington, but now characterize that inability to enforce

those actions as a "breach." Opening Br. 26. But a party does not breach its obligations under a settlement agreement by refusing to violate a court order. *See Borup v. Western Operating Corp.*, 130 F.2d 381, 385 (2d Cir. 1942) ("[A] promisor is excused, except in unusual circumstances, if performance becomes unlawful by a change in the law made after the contract was executed."). This Court has explained elsewhere that "a court order may excuse a party's performance under a contractual obligation," and further explained that this excuse will not apply if a party can fulfill its contractual obligations notwithstanding a court injunction. *Heritage Bank v. Redcom Labs., Inc.*, 250 F.3d 319, 328 (5th Cir. 2001). But here, there is no question that the only reason the defendants cannot fulfill their terms of the settlement agreement is because of the current injunction in the *Washington* case. And defendants—like plaintiffs—continue to oppose the efforts of the plaintiff States in *Washington* to obtain a permanent injunction.

In support of their argument that they are entitled to rescind their stipulated dismissal, plaintiffs rely exclusively on cases dealing with evidentiary stipulations. *See* Opening Br. 21 (citing *United States v. Texas,* 680 F.2d 356, 370 (5th Cir. 1982) (holding that party was entitled to relief from pretrial evidentiary stipulation because "the stipulations * * * d[id] not provide factual support for the court's finding"); *Rice v. Glad Hands, Inc.,* 750 F.2d 434, 437-38 (5th Cir. 1985) (vacating evidentiary stipulation because the stipulation was made orally and it was unclear as to what the terms of the stipulation were); *Central Distribs., Inc. v. M.E.T., Inc.,* 403 F.2d 943 (5th Cir. 1968)

(permitting amendment of pretrial stipulation to allow introduction of records)). These decisions concerning the rules of evidence do not address whether and how a district court may use its discretion in declining to vacate the stipulated dismissal of a case.

Similarly, plaintiffs argue that they were entitled to an inquiry into whether reopening the judgment would cause the government "substantial and real harm." Opening Br. 32 (quoting *Equitable Life Assurance Soc'y of U.S. v. MacGill,* 551 F.2d 978, 984 (5th Cir. 1977)). Again, the quoted language comes from a case involving an evidentiary stipulation rather than a stipulation of dismissal. And even under the Court's reasoning in *Equitable Life*, an inquiry into "suitable protective terms or conditions * * * to prevent substantial and real harm to the adversary" is necessary only where the moving party has established "manifest injustice." 551 F.2d at 984. Plaintiffs, having failed to demonstrate such manifest injustice, are wrong to suggest that the district court was "required to *also* make an inquiry" into possible harm to the government. Opening Br. 31.

Plaintiffs also contend that the district court erred by citing to cases that discuss Rule 60(b) motions instead of Rule 59(e) motions. Opening Br. 32-33. The district court, however, explained that plaintiffs were not entitled to the "'extraordinary remedy' of reconsideration of a judgment," ROA.2182, quoting this Court's decision in *Templet*, which discussed at some length the appropriate analysis of a Rule 59(e) motion, *see* 367 F.3d at 477-80. And in any event, the district court's analysis of

plaintiffs' motion under Rule 60(b) was correct, as explained above, because plaintiffs were out of time to file a Rule 59(e) motion.

Even assuming that the district court erred in analyzing plaintiffs' motion under Rule 60(b), that was an error that plaintiffs invited. Plaintiffs captioned their motion as arising both under Rule 59 and Rule 60. ROA.1472. Plaintiffs asserted that "[i]n substance, the standard for relief under Rule 60(b) is essentially the same as the standard for relief under Rule 59," ROA.1485, and that relief was warranted under Rule 59 and Rule 60 "[f]or the same reasons," ROA.1486. *See also* ROA.1485 (plaintiffs arguing that the inquires under both rules "dovetail harmoniously as one in the same"). Having argued that the district court should treat the Rules interchangeably for purposes of their motion, plaintiffs may not now argue that the district court erred by taking them up on their offer. *See Sierra Club v. Yeutter*, 926 F.2d 429, 437-38 (5th Cir. 1991) (refusing to consider claim that district court erred by applying a de novo standard of review, when appellant argued for a de novo standard in district court).

## CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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August 2019

## CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

*/s/Daniel Aguilar*
Daniel Aguilar

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,531 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

*/s/ Daniel Aguilar*
Daniel Aguilar

# ADDENDUM

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**Fed. R. Civ. Pro. 41. Dismissal of Actions**

**(a) Voluntary Dismissal.**

**(1)** ***By the Plaintiff.***

(A) *Without a Court Order*. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect*. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

**(2)** ***By Court Order; Effect***. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

**Fed. R. Civ. Pro. 59. New Trial; Altering or Amending 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. Pro. 60. Relief From a Judgment or Order**

* * * *

**(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

# *United States Court of Appeals*

**FIFTH CIRCUIT**
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August 09, 2019

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No. 18-50811 Defense Distributed, et al v. U.S. Dept. of State, et al
USDC No. 1:15-CV-372

Dear Mr. Aguilar,

You must submit the 7 paper copies of your brief required by 5th Cir. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1. Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3.

Sincerely,

LYLE W. CAYCE, Clerk

Roeshawn Johnson

By: _____
Roeshawn A. Johnson, Deputy Clerk
504-310-7998

cc: Mr. Joshua Michael Blackman
Mr. Chad Flores
Mr. Matthew Goldstein
Mr. Stuart Justin Robinson
Mr. Eric J. Soskin
Ms. Sharon Swingle