United States Court of Appeals

FIFTH CIRCUIT
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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. Blackman, Mr. Flores, Mr. Goldstein,

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. Exception: As of July 2, 2018, Anders briefs only require 2 paper copies.

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cc:
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Mr. Eric J. Soskin
Mr. Tyce R. Walters

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

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs – Appellants:	Defense Distributed Second Amended Foundation, Inc. Conn Williamson
Counsel:	Chad Flores Beck Redden LLP Matthew A. Goldstein Farhang & Medcoff Josh Blackman Josh Blackman LLC
Defendants – Appellants:	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
Counsel:	Tyce R. Walters Stuart Justin Robinson Eric J. Soskin U.S. Department of Justice

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Statement Regarding Oral Argument

The Court should decide this appeal with oral argument. Doing so will benefit the Court's decisional process and serve the public's interest in a complete study of what has become one the nation's most high-profile free speech cases.

The Court has confronted this dispute once before already, in an interlocutory appeal from the denial of a preliminary injunction. *Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 453 (5th Cir. 2016), *reh'g en banc denied*, 865 F.3d 211 (5th Cir. 2017). The first appeal was divisive. In a 2-1 decision, Judges Davis and Graves affirmed the denial of a preliminary injunction over Judge Jones' dissent; and by a vote of 9-5, the Court denied rehearing *en banc* over the dissenting opinion of Judge Elrod, joined by Judges Jones, Smith, and Clement.

All opinions in the first appeal rightly recognized the dispute's extraordinary importance. The panel majority recognized both the "importance of the issues presented" at that time and the serious "broader implications of this dispute." *Id.* at 461. Judge Jones recognized the need "to treat the issues raised before us with the seriousness that direct abridgements of free speech demand." *Id.* at 461 (Jones, J. dissenting). And Judge Elrod's dissent recognized that the dispute warrants close attention because it is about "perhaps the most egregious deprivation of First Amendment rights possible: a content-based prior restraint." *Id.* at 212 (Elrod, J. dissenting from the denial of rehearing en banc). Although the current appeal presents different issues than the first, the need for close judicial scrutiny remains.

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Statement of Jurisdiction

The district court had original jurisdiction because the complaint, ROA.1199, established that the action arose under the Constitution and laws of the United States, *see* 28 U.S.C. § 1331, and was an action to redress the deprivation, under color of state law, of rights, privileges, and immunities secured by the Constitution and statutes providing for equal rights of citizens or of all persons within the jurisdiction of the United States, *see* 28 U.S.C. § 1343.

This Court has appellate jurisdiction because the appellants timely filed a protective notice of appeal on September 25, 2018, ROA.2173, and an amended notice of appeal on December 21, 2018, ROA.2185, from the final judgment comprised of the "Stipulation of Dismissal with Prejudice" of July 27, 2018, ROA.1457, the "Order" of July 30, 2019, ROA.1459, and the "Order" of October 10, 2018, ROA.2176. *See* Fed. R. App. P. 4(a)(1)(B); Fed. R. App. P. 4(a)(4)(B). The amended notice of appeal explains its relationship to the protective notice of appeal and shows how all appellate deadlines were met. ROA.2185-96.

Issue Presented

The issue presented is whether, under Federal Rule of Procedure 59(e), a litigant was entitled to withdraw a stipulation and alter a judgment in a manner that prejudiced no one.

Statement of the Case

In the midst of this contentious free speech case, a crucial settlement occurred. By a contract known as the "Settlement Agreement," the federal government defendants (collectively, the "State Department") and private plaintiffs resolved the case in its entirety, much to the plaintiffs' advantage. Key provisions of the Settlement Agreement essentially require the State Department to roll back its unconstitutional speech restrictions immediately. But because of unforeseeable developments in an outlying Washington district court, the State Department has been enjoined from performing the key Settlement Agreement obligations.

This is not a normal state of affairs for any litigant, and especially not for the federal government. It is extraordinary. The State Department is trapped in breach of a vital contract that every party wants fully enforced. All Americans are suffering.

Hence, the private plaintiffs returned to the district court below for relief. Originally—after the Settlement Agreement was done, but before it was ambushed by the Washington case's litigants—the parties below had stipulated to a Rule 41(a)(1) dismissal that did not incorporate the Settlement Agreement. But as soon as the Washington case's collateral attack came to light—and within the time for relief under Federal Rule of Civil Procedure 59(e)—the private plaintiffs moved to withdraw their stipulation and replace the existing judgment with one that incorporates the Settlement Agreement's key provisions. The motion was denied.

I. The underlying free speech dispute.

The Court has seen this case before, in *Defense Distributed v. United States Department of State*, 838 F.3d 451 (5th Cir. 2016) (hereinafter *DDI*). That decision aptly describes the general state of affairs before the settlement. Each extraordinary event that occurred thereafter is evidenced by an extensive set of Rule 59 filings.

A. Defense Distributed and SAF shared digital firearms information.

Plaintiff Defense Distributed is a non-profit Texas company that exists to promote the Second Amendment's individual right to keep and bear Arms. *See* ROA.1199-1200; *DDI* at 454-55. To that end, Defense Distributed authors and publishes a wide variety of digital firearms information, including information about both individual firearm components and at least one complete firearm known as he "Liberator." ROA.1200; *DDI* at 454-55.

Plaintiff Second Amendment Foundation, Inc. ("SAF") is a non-profit membership organization with members nationwide. *See* ROA.1199-1201; *DDI* at 454-55. It promotes the right to keep and bear arms by supporting education, research, publications, and legal efforts about the Constitution's right to privately own and possess firearms and the consequences of gun control. *See* ROA.1200-01; *DDI* at 454-55. Plaintiff Conn Williams engages is similar activities. *See* ROA.1200-01; *DDI* at 454-55. For efficiency's sake, references to "Plaintiffs" and "Defense Distributed and SAF" refer to all three plaintiffs.

The defendants here are the United States Department of State, the Secretary of State, the State Department's Directorate of Defense Trade Controls, the Acting Deputy Assistant Secretary of State for Defense Trade Controls in the Bureau of Political-Military Affairs, and the Acting Director of the Office of Defense Trade Controls Policy Division. *See* ROA.1201; *DDI* at 454-55. For all present intents and purposes, they may be referred to collectively as the "State Department."

B. Defense Distributed and SAF sued the State Department.

The State Department administers and enforces the Arms Export Control Act of 1976, 22 U.S.C. ch. 39 ("the AECA"), and its primary implementing regulations, the International Traffic in Arms Regulations, 22 C.F.R. Parts 120-130 ("the ITAR"). For a time, the State Department took the position that Defense Distributed was required to obtain prior United States government approval under this regulatory regime before publishing four defined categories of Defense Distributed's digital firearms information: the "Published Files," the "Ghost Gunner Files," "CAD Files," and the "Other Files." *See* ROA.1204-08. These are known collectively as the *Defense Distributed I* Files.

In response, Defense Distributed and SAF sued the State Department to challenge its use of AECA/ITAR regime vis-à-vis the *Defense Distributed I* Files. *See DDI* at 456-57. In particular, they challenged the State Department's actions as *ultra vires* conduct not authorized by the statutes and regulations at issue, and as violations of the First, Second, and Fifth Amendments of the Constitution:

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The prior restraint system challenged here cannot overcome its presumption of invalidity.
>
> Contrary to the Justice Department's warning that such actions are unconstitutional, Defendants unlawfully apply the International Traffic in Arms Regulations, 22 C.F.R. Part 120 et seq. ("ITAR") to prohibit and frustrate Plaintiffs' public speech, on the Internet and other open forums, regarding arms in common use for lawful purposes. Defendants' censorship of Plaintiffs' speech, and the ad hoc, informal and arbitrary manner in which that scheme is applied, violate the First, Second, and Fifth Amendments to the United States Constitution. Plaintiffs are entitled to declaratory and injunctive relief barring any further application of this prior restraint scheme, and to recover money damages to compensate for the harm such application has already caused.

ROA.1200; *see DDI* at 456-57.

At a preliminary stage of the litigation, the district court denied the Plaintiffs' motion for a preliminary injunction. ROA.689; *Def. Distributed v. Dep't of State*, 121 F. Supp.3d 680 (W.D. Tex. 2015). Interlocutory appellate proceedings left that preliminary decision undisturbed. A divided Fifth Circuit panel affirmed the Court's preliminary decision, *Def. Distributed v. Dep't of State*, 838 F.3d 451 (5th Cir. 2016), and five judges dissented from the Court's denial of rehearing en banc. *Def. Distributed v. Dep't of State*, 865 F.3d 211 (5th Cir. 2017). The Supreme Court denied certiorari. *Def. Distributed v. Dep't of State*, 138 S. Ct. 638 (2018).

II. The Settlement Agreement resolves the dispute in the Plaintiffs' favor.

After the interlocutory appeal concluded, the district court ordered the parties to discuss settlement. ROA.1161. They did so and decided to settle the case.

The agreement settling this dispute is a contract memorialized by the "Settlement Agreement"—a document that all sides executed on June 29, 2018. ROA.1491-98. The Settlement Agreement's most prominent provisions obligate the State Department to do four key things with regard to the *Defense Distributed I* Files:

> (a) Settlement Agreement Paragraph 1(a) requires the State Department to draft and 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 United States Munitions List ("USML") Category I to exclude the *Defense Distributed I* Files.
>
> (b) Settlement Agreement Paragraph 1(b) requires the State Department to announce, while the above-referenced final rule is in development, a temporary modification, consistent with ITAR, 22 C.F.R. § 126.2, of USML Category I to exclude the *Defense Distributed I* Files; and to publish the announcement on the Directorate of Defense Trade Controls website on or before July, 27, 2018.
>
> (c) Settlement Agreement Paragraph 1(c) requires the State Department to issue a license to the Plaintiffs on or before July 27, 2018, signed by the Deputy Assistant Secretary for Defense Trade Controls, 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).
>
> (d) Settlement Agreement Paragraph 1(d) requires the State Department to acknowledge and agree that 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 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.

See ROA.1491-92.

With the Settlement Agreement having been finalized, the parties proceeded to wind down the litigation. On July 27, 2018, they filed a Rule 41(a)(1)(A) stipulation of dismissal. ROA.1457. In this filing, the parties did not pursue the option of making the Settlement Agreement a part of the judgment; the stipulation involved only a bare-bones dismissal. ROA.1457

After the stipulation was filed, the Defendants started the process of complying with the settlement agreement in part, at least for a short period. *See* ROA.1477; ROA.1506-07. The rulemaking began, the temporary modification was issued, the license was issued, and the acknowledgement occurred. *See* ROA.1477; ROA.1506-07.

Three days after receiving the stipulation, on July 30, 2018, the district court entered a final judgment that acknowledged the stipulated dismissal, taxed costs to the party incurring them, and ordered that the "case is DISMISSED WITH PREJUDICE":

> 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. Then a series of unforeseeable events occurred.

III. Extraordinary developments hindered the Settlement Agreement.

In the evening of that same day (July 30, 2018), Washington and other states filed a lawsuit in the Western District of Washington against the State Department and Defense Distributed and SAF. ROA.1526. The complaint alleged that, by entering into the Settlement Agreement and carrying out its obligations, the State Department had "violated the Administrative Procedure Act (APA) and the Tenth Amendment of the U.S. Constitution." ROA.1533. The suit—which would ultimately include nineteen states and the District of Columbia ("the States")—sought a nationwide injunction to bar the State Department from performing its obligations under the Settlement Agreement. *See* ROA.1533.

Defense Distributed and SAF opposed the States' injunction request and defended the Settlement Agreement's obligations as perfectly lawful. *See* ROA.1579; ROA.1627; ROA.1699. Likewise, the State Department both defended the Settlement Agreement and opposed the request for a nationwide injunction. *See* ROA.1710.

The State Department pointed out the States' request was unprecedented and extraordinary. Counsel for the government explained that the States "ask the Court to suspend and enjoin enforcement of *actions already taken* by the Government pursuant to its obligations under the Settlement Agreement." ROA.1719 (emphasis added). The State Department also argued that the States lacked standing, were wrong on the merits, and had failed to demonstrate an injunction's other prerequisites such as irreparable harm. *See* ROA.1718-28.

Nevertheless, on July 31, 2018, the Western District of Washington issued a nationwide temporary restraining order. In no uncertain terms, the restraining order enjoined the State Department from fulfilling its obligations under the settlement agreement:

> For all the foregoing reasons, plaintiffs' motion for temporary restraining order is GRANTED. The federal government defendants and all their respective officers, agents, and employees are hereby enjoined from implementing or enforcing the "Temporary Modification of Category I of the United States Munitions List" and the letter to Cody R. Wilson, Defense Distributed, and Second Amendment Foundation issued by the U.S. Department of State on July 27, 2018, and shall preserve the status quo ex ante as of the modification had not occurred and the letter had not been issued.

ROA.1737. The States then moved for a preliminary injunction based on essentially the same argument as before. *See* ROA.1821; ROA.1855; ROA.2007; ROA.2029.

On August 27, 2018, the Western District of Washington issued a preliminary injunction. ROA.2091. Just like the TRO, it enjoins the State Department from "implementing or enforcing" the Settlement Agreement's two key components—the temporary modification and the licensing letter:

> For all of the foregoing reasons, plaintiffs' motion for a preliminary injunction is GRANTED. The federal defendants and all of their respective officers, agents, and employees are hereby enjoined from implementing or enforcing the "Temporary Modification of Category I of the United States Munitions List" and the letter to Cody R. Wilson, Defense Distributed, and the Second Amendment Foundation issued by the U.S. Department of State on July 27, 2018, and shall preserve the status quo ex ante as if the modification had not occurred and the letter had not been issued until further order of the Court.

ROA.2115. The decision took effect immediately.

IV. The decision below.

A. The Plaintiffs invoked their right to withdraw the stipulation and moved to reopen the case.

Defense Distributed and SAF reacted to the preliminary injunction's ambush immediately. Within hours of the injunction's issuance, they filed their motion for relief from the district court's judgment below. ROA.1472-88. The motion invoked the Plaintiffs' right to "withdraw the stipulation of dismissal" and asked the district court to "vacate its judgment and reopen the case." ROA.1473.

As authority to grant this relief, Defense Distributed and SAF's motion invoked two rules. Primarily, the motion invoked the district court's broad Rule 59 authority to "alter or amend" a judgment. ROA.1474. Additionally, realizing that the State Department might say that the Rule 59 filing deadline had passed, the motion invoked the district court's Rule 60 authority to "relieve a party . . . from a final judgment." ROA.1474 (quoting Fed. R. Civ. P. 60(b)).

The Plaintiffs' motion began by showing the judgment's complete reliance upon the stipulation—*i.e.*, that the question of whether to vacate the judgment turned on the question of whether to allow the stipulation's withdrawal. ROA.1473-75. Given that the "stipulation is the judgment's *only* basis," ROA.1473, the motion showed that, if the Plaintiffs had a right to withdraw the stipulation, the district court had no choice but to vacate the judgment:

> The stipulation's force is what makes the final judgment correct. If the stipulation deserves to be withdrawn, the resulting dismissal of the Plaintiffs' case should also be no more; and if the Plaintiffs' case is no longer dismissed, the judgment should be vacated to reopen the action. *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").

ROA.1475.

Next, the motion invoked the flexible legal standard that governs requests for withdrawal of a stipulation: stipulations can be withdrawn if doing so avoids "manifest injustice." ROA.1475-76. It cited *United States v. Texas*, 680 F.2d 356 (5th Cir. 1982), four other Fifth Circuit decisions, and *Carnegie Steel Co. v. Cambria*

Iron Co., 185 U.S. 403 (1902), for the rule that district courts have "not only the right, *but the duty* to relieve counsel from pretrial stipulations where necessary to avoid manifest injustice." ROA.1475-76 & nn.1-2 (quoting *United States v. Texas*, 680 F.2d at 370) (emphasis added)).

To establish that the Western District of Washington case's proceedings had crossed into the territory of extraordinary circumstances, the motion had a litany of arguments to make. Foremost amongst them was to show that the injunction decision "warps Article III and the Supremacy Clause by granting the states standing to sue for a takeover of the federal government." ROA.1479.

By letting the states assert what amounts to a "*parens patriae*" interest—the "quasi-sovereign interest in the health and well-being" of residents—the Seattle case's preliminary injunction violated precedent recognizing that a "State does not have standing as *parens patriae* to bring an action against the Federal Government." ROA.1479 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.1 (1982)). In other words, the motion showed that the Seattle case should have been dismissed for lack of standing well before any consideration of an injunction's merits occurred.

Additionally, the motion showed how the Western District of Washington case's treatment of the Constitutional rights at issue was unprecedented. Even though the Constitution provides that "Congress shall make no law . . . *abridging* the freedom of speech," U.S. Const. amend. I (emphasis added), the preliminary

injunction decision held that the First Amendment can be "abridged" so long as it is not "abrogated." ROA.1480. The court reached this holding despite a key premise acknowledged by all parties to the Seattle case: "*Without breaking any law*, the computer files at issue here 'can be emailed, mailed, securely transmitted, or otherwise published within the United States.'" ROA.1480 (quoting the preliminary injunction decision).

B. The State Department opposed the Plaintiffs' motion without identifying any prejudice.

The State Department opposed the Plaintiffs' motion. ROA.2134. Critically, though, the response did *not* dispute the Settlement Agreement's continued validity and did *not* dispute that the Seattle court's injunction had "affected the parties' ability to implement their settlement agreement." ROA.2134. Instead, the response opposed the motion with two very narrow arguments.

The response's first argument pertained to Rule 59, the Plaintiffs' primary basis for relief. But no substantive Rule 59 arguments occurred. The only Rule 59 argument concerned a procedural issue of timeliness. ROA.2136-37. The issue was about which event triggered Rule 59's 28-day filing deadline—the stipulation of dismissal or the order that followed it. The State Department pinned the deadline to the stipulation instead of the order and concluded that the motion was untimely. ROA.2136-37.

In reply, the Plaintiffs showed that the State Department was wrong about which event triggered Rule 59's 28-day filing deadline. ROA.2163-64. With a decisive Fifth Circuit precedent, the reply showed that the deadline starts upon entry of a "judgment" and that "a Rule 41(a)(1) dismissal is not a 'final judgment.'" ROA.2163-64. (quoting Fed. R. Civ. P. 59(e) and *Harvey Specialty & Supply, Inc. v. Anson Flowline Equip. Inc.*, 434 F.3d 320 (5th Cir. 2005)). The State Department never made substantive Rule 59 arguments; no reply was required.

The response's second argument pertained to Rule 60, the Plaintiffs' alternative basis for relief. In this respect, the response made substantive arguments about why Rule 60's "extraordinary circumstances" test was unmet. ROA.2137-43.

First, the State Department's response mistook dissatisfaction with the *district court's judgment* for dissatisfaction with *the Settlement Agreement*. ROA.2138-39. Although the State Department's response made a litany of arguments about why the "decision to settle" did not warrant Rule 60(b) relief, the response made no arguments about what should and should not be included in the judgment.

The reply pointed out this fundamental fault immediately. ROA.2162. Instead of seeking to alter the Settlement Agreement, the reply showed that the Plaintiffs sought nothing but a judgment with *increased* protection for the Settlement Agreement.

In other words, the Plaintiffs made it clear that their motion was not seeking to disrupt the Settlement Agreement in any way. Rather, the Plaintiffs sought to provide further protection for the Settlement Agreement by including its key terms as part of a new judgment:

> The State Department opposes this motion as though it attacks the Settlement Agreement. Not so. The motion does *not* ask the Court to disrupt the Settlement Agreement in any way. The motion is about withdrawal of a stipulation—not withdrawal from the Settlement Agreement.
>
> By granting the Plaintiffs' motion and reopening this case, the Court will not be acting upon the Settlement Agreement. This is because, as everyone acknowledges, the current judgment does not incorporate the Settlement Agreement in any respect. Indeed, the judgment's failure to account for the Settlement Agreement's obligations *is the problem* to be addressed upon reopening.
>
> When the stipulation occurred, no one had a reason to think that the judgment ought to account for the Settlement Agreement's obligations. But now, in light of extraordinary and unforeseeable occurrences, the benefit of a judgment that does so is apparent. The only thing standing in the way of an improved disposition is a stipulation that the Plaintiffs have timely and justifiably withdrawn. Accordingly, the judgment based upon the stipulation should be vacated.

ROA.2162.

C. The district court denied relief.

The district court denied the motion. ROA.2176. Procedurally, it sided with the Plaintiffs and held that the motion met Rule 59's filing deadline. ROA.2177-78. But on the merits, it sided with the State Department by holding that "Plaintiffs have

not demonstrated that 'manifest injustice' will result by allowing the Court's order of dismissal to stand." ROA.2182. The Plaintiffs appealed. ROA.2173, 2185.

Summary of the Argument

Real "manifest injustice" is rare. But where, as here, a combination of extraordinary and unforeseeable events produces it, courts have "not only the right *but the duty* to relieve a party from a pretrial stipulation." *Coastal States Mktg. v. Hunt*, 694 F.2d 1358, 1369 (5th Cir. 1983) (emphasis added).

Precedent makes the issuance of such relief a "duty"—not an option—for good reason. Events causing manifest injustice are erratic and do not fit traditional paradigms neatly. To address unusual problems, the law uses unusual tools because otherwise no fix exists. Since courts can correct the rare aberrations here, they must.

Perhaps it can be said that, *when viewed in isolation*, each facet of Defense Distributed and SAF's current plight is not totally exceptional. Indeed, that is what the district court thought. It divided and conquered the arguments one-by-one, in isolation. But of course, all of the legal abnormalities that threaten Defense Distributed and SAF are being inflicted simultaneously, with compounding effects.

True, federal regulations have been enjoined for APA fouls before. But not by plaintiffs that so obviously lack standing *and* not after a State Department contract promised APA compliance *and* not with an opinion that OKs First Amendment "abridgment" *and* not without any harm to the opposing party *and* not with a solution on deck that advances all interests so harmoniously. The manifest injustice that befalls Defense Distributed and SAF has never happened before and should not be allowed to continue, especially when the repair is so simple.

Argument

I. Standard of review.

The Plaintiffs moved to vacate the district court's judgment of dismissal and reopen this case by invoking Federal Rule of Civil Procedure 59(e). ROA.1472-85. That rule gives district courts a broad authority to "alter or amend" any judgment, which includes the authority to vacate. *See generally* Charles A. Wright & Arthur R. Miller et al., 11 Federal Practice & Procedure § 2810.1 (3d ed. West 2019).

"The district court has considerable discretion in deciding whether to reopen a case under Rule 59(e)." *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 353 (5th Cir. 1993). Hence, the abuse-of-discretion standard of appellate review applies. *E.g.*, *id.* But of course, such "discretion is not without limit." *Id.*

Reversible error occurs if a district court applies the wrong legal test for Rule 59 relief, such as by mistakenly requiring showings that only Rule 60 demands (e.g., "mistake, inadvertence, surprise, or excusable neglect or that the evidence is such as to show that the judgment was manifestly wrong"). *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990). Reversible error also occurs if a district court strikes the balance of relevant considerations incorrectly. *E.g.*, *Sturges ex rel. Anderson v. Moore*, 73 F. App'x 777, 779 (5th Cir. 2003). Both kinds of error occurred here.

II. The Plaintiffs' motion should have been granted because doing so would support the Settlement Agreement that all parties embrace.

The Plaintiffs' motion for Rule 59 relief proceeded in two steps. First, the motion showed that the ultimate issue of whether to reopen the case turned on the subsidiary issue of whether to let the Plaintiffs withdraw the stipulation of dismissal. ROA.1475 ("If the stipulation deserves to be withdrawn, the resulting dismissal of the Plaintiffs' case should also be no more; and if the Plaintiffs' case is no longer dismissed, the judgment should be vacated to reopen the action."). No one disputes this step of the analysis. The case's only real dispute concerns the second issue of whether the Plaintiffs were entitled to withdraw the stipulation of dismissal.

The district court denied the Plaintiffs' motion by holding that the Plaintiffs were *not* entitled to withdraw the stipulation of dismissal. ROA.2182. But that conclusion was wrong—in truth, the Plaintiffs *did* have a right to withdraw the stipulation of dismissal. As a result, the district court was obligated to grant the motion for Rule 59 relief, vacate the judgment, and reopen the case.

A. The Plaintiffs were entitled to withdraw the stipulation.

The question of when litigants are allowed to withdraw a stipulation is not novel. It is an age-old problem that courts have solved in a decidedly generous way. In accordance with precedent nationwide, the Fifth Circuit's rule is that a litigant can withdraw a stipulation whenever necessary to "avoid manifest injustice":

> The trial court has not only the right, but the duty to relieve counsel from pretrial stipulations where necessary to avoid manifest injustice . . . .

United States v. Texas, 680 F.2d 356, 370 (5th Cir. 1982) (citation omitted); *accord Rice v. Glad Hands, Inc.*, 750 F.2d 434, 438 (5th Cir. 1985); *Cent. Distributors, Inc. v. M. E. T., Inc.*, 403 F.2d 943, 946 (5th Cir. 1968).

This "manifest injustice" inquiry is a balancing test, without any dispositive consideration. Courts are to weigh context-dependent, flexible 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." *Waldorf v. Shuta*, 142 F.3d 601, 617–18 (3d Cir. 1998).

Importantly, the "manifest injustice" inquiry does *not* serve any punitive purposes. Thus, regardless of how much fault an initial stipulation might arguably entail, withdrawal is to be allowed so long as the adversary suffers no "substantial and real harm." *Equitable Life Assur. Soc. of U.S. v. MacGill*, 551 F.2d 978, 984 (5th Cir. 1977); *see Carnegie Steel Co. v. Cambria Iron Co.*, 185 U.S. 403, 444 (1902) ("[U]pon giving notice in sufficient time to prevent prejudice to the opposite party, counsel may repudiate any fact inadvertently incorporated therein.").

Here, the "manifest injustice" threshold was met because the Plaintiffs established that, *after* the stipulation occurred, unforeseeable events in the Western District of Washington's litigation "produced an injunction that jeopardizes the settlement agreement to the detriment of both Plaintiffs and [the State Department]."

ROA.1476. When the parties first effectuated the Settlement Agreement, no one had a reason to anticipate the Western District of Washington's injunctive threat. At that time, opting for the simplest and most expeditious judgment was reasonable. Only now, with the perfect storm having arrived in the form an unprecedented and erroneous injunction, is there an evident need to withdraw the Plaintiffs' stipulation. In light of these extraordinary circumstances, holding the Plaintiffs to their original stipulation would result in manifest injustice.

The key to this conclusion is a proper understanding of what exactly the Plaintiffs' motion seeks. Withdrawing the Plaintiffs' stipulation of dismissal makes perfect sense because doing so would serve all parties' interests by *supporting* the Settlement Agreement. The Plaintiffs are not fleeing from the Settlement Agreement. They continue to embrace it and wish to ensure its continued vitality.

In the district court, the Plaintiffs addressed the precise nature of their request expressly. Realizing that someone might mistakenly take them to be *undermining* the Settlement Agreement, the Plaintiffs made clear that nothing could be farther from the truth. In both the motion and reply, the Plaintiffs explained that their Rule 59 motion's sole purpose was to vacate the current judgment *so that it could be replaced by a new judgment that further supports the Settlement Agreement*.

First, the Plaintiffs spelled out the protective nature of their argument in the motion: "Neither the Plaintiffs nor the Defendants want to upend the settlement agreement. They both wish to honor it. Reopening the case will let them to do so most effectively, in ways that the current judgment does not allow for." ROA.1473.

Then, after the State Department's response mistakenly assumed that the Plaintiffs were seeking to relitigate the case's merits, *see* ROA.2138-39, the reply revisited the issue. To remove any doubt what relief was being sought, the Plaintiffs' explained that "the judgment's failure to account for the Settlement Agreement's obligations is the problem to be addressed upon reopening":

> The State Department opposes this motion as though it attacks the Settlement Agreement. Not so. The motion does not ask the Court to disrupt the Settlement Agreement in any way. *The motion is about withdrawal of a stipulation—not withdrawal from the Settlement Agreement.*
>
> By granting the Plaintiffs' motion and reopening this case, the Court will not be acting upon the Settlement Agreement. This is because, as everyone acknowledges, *the current judgment does not incorporate the Settlement Agreement in any respect*. Indeed, *the judgment's failure to account for the Settlement Agreement's obligations is the problem to be addressed upon reopening*.
>
> When the stipulation occurred, no one had a reason to think that the judgment ought to account for the Settlement Agreement's obligations. But now, in light of extraordinary and unforeseeable occurrences, the benefit of a judgment that does so is apparent.

ROA.2162 (emphasis added). In this way, the Plaintiffs' position about the motion's purpose accorded perfectly with the law governing judgments in settled actions.

When a federal lawsuit is settled, no one-size-fits-all final judgment is required. Instead, the settling parties are free to choose the kind of judgment that best fits the circumstances. *See generally* Charles A. Wright & Arthur R. Miller et al., 18A Federal Practice & Procedure § 4443 (3d ed. West 2019).

In the simplest of cases, parties can choose to have the judgment say nothing at all about the settlement agreement. "Under Rule 41(a)(1)(A)(ii), it is clear that the parties to a case may enter into a settlement agreement, sign and file a stipulation of dismissal with the district court, and the dismissal will be effective upon filing notwithstanding any other action by the district court." *SmallBizPros, Inc. v. MacDonald*, 618 F.3d 458, 460 (5th Cir. 2010). In such cases, a suit for breach of contract is the only way to enforce the settlement agreement. *See, e.g.*, *id.*

In other cases, however, parties can opt for a more protective tactic and make settlement agreement provisions part of the judgment itself. Under *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994) and *Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 427 (5th Cir. 2002), "a district court may incorporate or embody the terms of a settlement agreement in a dismissal order or expressly retain jurisdiction over a settlement agreement." *MacDonald*, 618 F.3d at 460. In such cases, the agreement's incorporated aspects are protected by a litany of powerful rules regarding court judgments, such as contempt, preclusion, shields against collateral attacks, and so forth. *See, e.g.*, *id.*

Originally, the Plaintiffs here opted for a judgment of the former variety—the simple kind that said nothing at all about the settlement agreement. In accordance with Federal Rule of Civil Procedure 41(a)(1)(A)(ii), the Plaintiffs "stipulate[d] to the dismissal with prejudice of this action" without more. ROA.1457. So that is all that the final judgment recites—that the "case is DISMISSED WITH PREJUDICE." ROA.1459. No extraordinary protective measures were taken at that time because the circumstances did not indicate the need for any.

It was not until later, *after* the Western District of Washington's developments occurred, that the need to imbue the Settlement Agreement with increased protection became evident. And so it was that the 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. *See* ROA.1473; ROA.2162.

B. The State Department has no valid reason to oppose the motion.

By all accounts, the State Department remains completely committed to honoring the Settlement Agreement. In both this action and in the Western District of Washington, the State Department has consistently taken the position that the Settlement Agreement constitutes a full-fledged and completely-valid obligation to be honored in good faith. But that is not to say that the State Department has fully complied with the Settlement Agreement. Full compliance is *not* occurring.

As the State Department's own filings must concede, the "Government has, thus far, fully complied with the settlement agreement, *except to the extent that they have complied with the court order in the* Washington *litigation.*" ROA.2139 (emphasis added). In other words, the State Department concedes that it has "ceased implementing the agreement." ROA.2143.

This is no small concession. The State Department's own filings concede that it is, at this moment, in breach of the Settlement Agreement that was used to resolve a very important constitutional challenge to an extensive regulatory regime. This alone should be enough to establish that "extraordinary circumstances" are at issue.

Critically, though, the State Department says that it remains committed to the Settlement Agreement. The ongoing breach, it says, does *not* stem from a lack of will to comply. The State Department is, according to its words, *trying* to comply.

The State Department attributes its ongoing breach of the Settlement Agreement to events beyond its control: "[The State Department] ceased implementing the agreement only when ordered to do so by the district court in Washington, in an order entered over the objections of Defendants, and Plaintiffs do not, and cannot, argue that Defendants should have disobeyed that order." ROA.2143; *see also* ROA.2143 ("Plaintiffs . . . acknowledge that 'both the Plaintiffs and Defendants remain committed to the settlement agreement's obligations.'").

Together, these circumstances raise an important question that the State Department has never answered: **If the State Department truly desires to comply with the Settlement Agreement in good faith, then why doesn't the State Department *support* the Plaintiffs' request to withdraw the stipulation and have this action's judgment incorporate and/or retain jurisdiction over the Settlement Agreement?** That course of action is an obvious and straightforward way of helping to ensure that the State Department's obligations are fulfilled.

Granting the Plaintiffs' requested relief could not possibly weaken the State's position vis-à-vis the Western District of Washington's action. To the contrary, having this action's judgment incorporate and/or retain jurisdiction over the pertinent Settlement Agreement provisions would *strengthen* the State Department's ability to comply by making those obligations "subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992).[1] If the State Department truly wants to fulfill its Settlement Agreement obligations in good faith, it ought to be supporting the Plaintiffs' request for Rule 59 relief—not opposing it.

[1] For example, if the Settlement Agreement's obligations had a judgment's imprimatur, the rules barring one district court from collaterally attacking another's judgment would provide another reason to dismiss the Western District of Washington action on jurisdictional grounds. *See Ord v. United States*, 8 F. App'x 852 (9th Cir. 2001); *Robinson v. Volkswagenwerk AG*, 56 F.3d 1268, 1274 (10th Cir. 1995); *Miller v. Meinhard-Commercial Corp*., 462 F.2d 358 (5th Cir. 1972).

A similarly-important unanswered question pertains to detriments. What disadvantage is caused by having this action's judgment incorporate and/or retain jurisdiction over the Settlement Agreement? No detriment at all has been identified.

Thus, on this record, the district court should have let the Plaintiffs withdraw the stipulation of dismissal because doing so was "necessary to avoid manifest injustice." Far from presenting any risk of "substantial and real harm," an analysis of each factor shows that letting the Plaintiffs withdraw this stipulation would benefit *all* of the parties and present no meaningful downside whatsoever. For all intents and purposes, this was a win-win.

C. The district court's analysis was incorrect.

The district court based its decision largely on a foreseeability inquiry. According to the order, the Plaintiffs did not deserve relief because "an injunction on the performance of the terms of the settlement agreement was reasonably foreseeable." ROA.2179. This was wrong for several independent reasons.

1. The Western District of Washington's injunction was *not* reasonably foreseeable.

First, the district court's foreseeability inquiry did not warrant denying the motion because it reached the wrong conclusion. Assuming for the sake of argument that the motion's fate turned on whether or not the Western District of Washington's injunction was "reasonably foreseeable," the motion should have prevailed because the Western District of Washington's injunction was *not* reasonably foreseeable.

To support its "reasonably foreseeable" conclusion, the district court said that it was "common practice" for a "court reviewing government action for compliance with the APA [to] enjoin performance of the challenged action during the pendency of litigation." ROA.2179-80 & n1. Critically, though, none of the cited cases involved the extraordinary additional element that exists here: The federal government's decision to promise—in the form of a binding contract—that it would successfully perform all of the actions at issue without delay.

That fundamental difference in the nature of the federal government's commitment changes the foreseeability calculus substantially. Even if such preliminary injunctions could be reasonably foreseeable in general—when the government actions are mere voluntary undertakings—they are necessarily not as foreseeable where, as here, the government chooses to imbue its effort with a legally-enforceable promise of success. Contracts of such import matter to reasonable expectations—especially when the United States of America's Secretary of State makes them. The district court's refusal to account for the Settlement Agreement in its foreseeability analysis was a key error.

The district court also supported its foreseeability conclusion by pointing out that "Plaintiffs expressly contemplated APA review of the settlement agreement." ROA.2180. But that is an inaccurate reading of the Settlement Agreement, which mentions the Administrative Procedure Act in a way that supports the Plaintiffs.

The Settlement Agreement mentions the Administrative Procedure Act in Section 1(a), the provision explaining the State Department's obligation to enact a final rule revising the USML. ROA.1491. According to that provision, the State Department's obligation is to pursue a final rule "to the extent authorized by law (*including the Administrative Procedure Act*)." ROA.1491 (emphasis added). In other words, the Settlement Agreement included a provision expressly requiring the State Department to comply with the APA in its execution.

Contrary to the district court's analysis, this provision does not make the Western District of Washington's injunction *more* foreseeable. If anything, the State Department's express promise to comply with the APA makes it *less* foreseeable that a court would end up preliminarily enjoining them for failing to do so. The district court's use of this provision was exactly backwards.

Another error in the district court's order concerns "information asymmetry." The district court used this idea to supposedly distinguish *Russell-Miller Mill. Co. v. Todd*, 198 F.2d 166 (5th Cir. 1952), a case the Plaintiffs had cited because it holds that relief is warranted in the case of a litigant's "honest mistake." ROA.2181. To disregard *Russell-Miller Mill. Co.*, the district court said that its "honest mistake" principle applied only in the case of an "information asymmetry"—*i.e.*, only if one party had information that the other party lacked. ROA.2181.

The district court's treatment of the "honest mistake" principle is incorrect. It is true that the "honest mistake" rule of *Russell-Miller Mill. Co.* applies to situations of "information asymmetry" in which one side of a case knows something the other side does not. But the rule is not so limited. The *Russell-Miller Mill. Co.* logic also applies where, as here, *both sides* of a case labor under the same "honest mistake."

The Plaintiffs' argument has never been about an information asymmetry. They have never argued that relief is warranted because the State Department misled or failed to inform the Plaintiffs of something at the time of the stipulation. All along, the Plaintiffs have argued that both the Plaintiffs *and the State Department* agreed to the current judgment's form without any ability to foresee the need for a different kind of disposition. This litigation entails a *two-sided* "honest mistake," making the case for the application of *Russell-Miller Mill. Co.* quite strong.

2. The district court failed to account for the issue of "substantial and real harm."

Second, the district court's foreseeability inquiry did not warrant denying the motion because it was incomplete. Assuming for the sake of argument that the Western District of Washington's injunction *was* "reasonably foreseeable," the district court was required to consider other factors.

Under precedents such as *Equitable Life Assurance Society v. MacGill*, 551 F.2d 978, 984 (5th Cir. 1977), the district court was required to *also* make an inquiry into whether or not withdrawal would cause the State Department to suffer a

"substantial and real harm." *Id.* at 984. No such inquiry occurred, and if it had, the result would have clearly favored the Plaintiffs. Withdrawing this stipulation would cause the State Department no harm whatsoever. Instead, it would benefit everyone.

3. The order commits several additional errors.

Several additional important errors infected the district court's analysis. Each error is important both on its own and as evidence of the district court's overall failure to "strike the proper balance between . . . (1) finality, and (2) the need to render just decisions on the basis of all the facts." *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 353 (5th Cir. 1993).

In search of supporting precedent, the district court relied upon cases concerning the standard for relief under Rule 60—not Rule 59. Most prominently, the district court did so by citing *National City Golf Finance v. Scott*, 899 F.3d 412 (5th Cir. 2018), and *Pettle v. Bickham*, 410 F.3d 189 (5th Cir. 2005), for the proposition that the court need not "relieve [a party] of the consequences of decisions deliberately made, although subsequent events reveal that such decisions were unwise." ROA.2181 (quoting *Scott*, 899 F.3d at 418).

Neither of these cases controls the Plaintiffs' Rule 59 motion because they did not concern Rule 59. They were both about Rule 60, which is distinctive. A post-judgment motion satisfying Rule 60 probably also satisfies Rule 59. But a motion can satisfy Rule 59 even if it does not satisfy Rule 60.

The seminal decision about this Rule 59/60 distinction is *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167 (5th Cir. 1990). It holds that "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*." *Id.* at 173-74 (emphasis added).

Under *Lavespere*, a Rule 59 motion that presents new matters to the district court "need not first show that her default was the result of mistake, inadvertence, surprise, or excusable neglect." *Id.* Nor does it have to show that the existing judgment is "manifestly wrong." *Id.* The Rule 60 doctrine centers on such showings. But *Lavespere* holds that Rule 59 does not impose such "exacting substantive requirements." *Id.* Instead, Rule 59 requires a more flexible balance of the general interest in "finality" with the interest in rendering "just decisions." *Id.* In light of this distinction, the district court's use of *Scott, Pettle*, and similar citations[2] to indirectly impose Rule 60's "exacting substantive requirements" was error.

[2] Another case that the district court relied upon was *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350 (5th Cir. 1993). Although that case involved both Rule 60 and Rule 59, the district court relied upon the wrong part. Instead of relying upon the Rule 59 part of the decision, the district court quoted from the Rule 60 analysis. *See* ROA.2179 (quoting *Edward H. Bohlin Co.*, 6 F.3d at 357).

The order's only other pertinent citations were to *Ware v. Texas Workforce Comm'n*, No. 1:07-CV-198-C, 2009 WL 10703173 (N.D. Tex. Mar. 31, 2009), and *Plummer v. Plunkett*, No. H-04-4552, 2007 WL 412192 (S.D. Tex. Jan. 31, 2007). Both of those were about Rule 60 only. No Rule 59 issues existed.

Conclusion

The district court's judgment should be reversed.

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Certificate of Service

I hereby certify that on the 9th day May, 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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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 7,502 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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