RELIEF REQUESTED BY JANUARY 13, 2020

No. 19-17480

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, et al.,
Plaintiffs/Appellees,

and

ENVIRONMENTAL DEFENSE FUND,
Plaintiff-Intervenor/Appellee,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants/Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 4:18-cv-03237 (Hon. Haywood S. Gilliam, Jr.)

APPELLANTS' REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

The judgment below enjoins EPA to perform an action that is no longer required by any law. Plaintiffs concede this fact but nevertheless contend that the district court had "equitable discretion" to deny relief from the judgment. They fail to identify a single case in which such a denial was upheld, and their cited cases all involve consent decrees, which contain elements of both contracts and judicial decrees. The judgment in this case does not embody an agreement that a court could equitably enforce. It rests *solely* on a regulatory duty that has since been abrogated. Because it is inequitable to give prospective effect to a judgment enjoining a party to take an action no longer required by any law, the district court abused its discretion in denying relief from judgment.

Plaintiffs direct much of the rest of their Opposition to diversions. They argue that EPA's failure to comply with the old regulations was unjustified, and they note that the order enforcing the old regulations was correct when issued. But both points are irrelevant to the question whether a post-judgment material change in the law warrants relief from judgment. Plaintiffs also argue that the new regulations are unwarranted. But that is an issue within the exclusive jurisdiction of the D.C. Circuit, where their challenge to those regulations is pending. Plaintiffs have not obtained (or even sought) a stay of the new regulations in that forum. Consequently, Plaintiffs may not collaterally attack and seek such a backdoor stay from the effect of the legal change here.

Finally, Plaintiffs argue that prospectively enforcing the old regulations would be better for the environment than allowing EPA to proceed under current law, which would lead to the same results but not as fast. That argument betrays a fundamental problem with the district court's refusal to grant relief from its judgment. By

prospectively enforcing a superseded law, the court usurps EPA's lawful authority to implement its policy judgments through notice-and-comment rulemaking and to act in accordance with its own lawfully enacted rules. The merits of the old regulations versus the new ones are irrelevant to the question whether a court abuses its discretion in denying relief from an injunction that is based on now superseded law. The answer is *yes*, it did. The judgment should be stayed pending this Court's plenary review.

ARGUMENT

I. EPA has a high likelihood of success on the merits.

Plaintiffs concede that "no current regulation requires promulgation [of a federal plan] to occur by January 14, 2020." Opposition at 10. The parties disagree only on whether that agreed fact requires relief from a judgment that *does* require promulgation by that date. EPA maintains that when "a change in the law authorizes what had previously been forbidden, it is an abuse of discretion for a court to refuse to modify an injunction founded on superseded law." *Toussaint v. McCarthy*, 801 F.2d 1080, 1090 (9th Cir. 1986) (quoting *American Horse Protection Ass'n v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982) (R.B. Ginsburg, J.)); *see also California Dep't of Social Services v. Leavitt*, 523 F.3d 1025, 1032 (9th Cir. 2008) (change in law that removes legal basis for continuing application of order "entitles" movant "to relief under Rule 60(b)(5)") That rule reflects the fact that a court's power is to enforce the *law*, not its vision of the good. It is inequitable to compel a party to perform an act that is not required by law, and it is accordingly an abuse of discretion to deny relief from a judgment that so compels.

Plaintiffs, on the other hand, argue that a district court may, in its discretion, deny relief from a judgment enjoining a party to comply with a legal duty that no longer

exists. They claim that Rule 60(b)(5) provides only that a court *may* relieve a party from judgment if applying it prospectively is no longer equitable, not that it *must* do so. Opposition at 7. And they argue that the Supreme Court has held that a post-judgment change in the law does not, "in and of itself, provide a basis for modifying a decree." *Id.* (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 390 (1992)).

Plaintiffs' quotations, however, elide the fact that the Court was referring to motions to modify *consent decrees*. Because a consent decree is founded on the parties' contractual consent as well as the law, its terms may go beyond what the law alone would require or what the court would have the power to award. *Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986). A change in the law therefore does not necessarily require modification of the terms of a consent decree. Instead, the court must examine whether the consent decree's terms were shaped by the superseded law or represent an agreement independent of it. *See, e.g., Rufo*, 502 U.S. at 390 (remanding for determination of whether consent decree's terms were based on superseded interpretation of constitutional requirements).

The seminal case on modification of consent decrees under Rule 60(b)(5) is *Railway Employees v. Wright*, 364 U.S. 642 (1961). There, in line with the law at the time it was entered, a consent decree prohibited union shops; a union moved to modify that decree after Congress amended the Railway Labor Act to permit union shops. The Supreme Court repeatedly noted that, if the judgment had been awarded by the court rather than negotiated by the parties, then "it would be an abuse of discretion to deny a modification of the present injunction." *Id.* at 650; *see also id.* at 648-49. The question before the Court was whether "the fact that we are dealing with a consent decree"

required a different result. *Id.* Because the Court found that the "the parties in fact attempted to conform the consent decree to the dictates of the Railway Labor Act as it then read," it held that the lower courts abused their discretion in denying relief from judgment. *Id.* at 652.

The Supreme Court's reasoning in *Railway Employees* explains the difference between cases like *Toussaint*, which state a clear rule that when "a change in the law authorizes what had previously been forbidden, it is an abuse of discretion for a court to refuse to modify an injunction founded on superseded law," 801 F.2d at 1090; and cases like *Rufo*, which state that "modification of a consent decree *may* be warranted" in such circumstances, 502 U.S. at 388 (emphasis added); *see also Leavitt*, 523 F.3d at 1032. Contrary to Plaintiffs' suggestion, *Toussaint* and *Leavitt* cannot be distinguished on the ground that they involved complex institutional reform litigation and ongoing judicial supervision. The same is true of *Rufo*. Rather, the difference is that *Rufo* involved a consent decree, whereas *Toussaint* and *Leavitt* did not.

The judgment in this case is not a consent decree; it represents solely the district court's application of law as it formerly existed. Thus, the consent decree cases are inapplicable. It is indisputable that there has been "a change in the law [that] authorizes what had previously been forbidden." *Toussaint*, 801 F.2d at 1090; *see also* Opposition at 10 (conceding that "no current regulation requires promulgation to occur by January 14, 2020"). That change "removed the legal basis for the continuing application of the Court's order," and a " 'change in law' of this type 'entitles [EPA] to relief under Rule 60(b)(5).' " *Leavitt*, 523 F.3d at 1032 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)); *accord Railway Employees*, 364 U.S. at 650 ("That it would be an abuse of discretion to

deny a modification of the present injunction if it had not resulted from a consent decree we regard as established.").

Plaintiffs argue that there need not be a "continuing violation of federal law" for a judgment to remain enforceable. Opposition at 8 (quoting *Jeff D. v. Kempthorne*, 365 F.3d 844, 852 (9th Cir. 2004)). But *Jeff D.* involved a consent decree and did not involve an intervening change in the law. So it has little in common with this case. Moreover, Plaintiffs miss the point: the problem with the judgment in this case is not that there is no ongoing violation; it is that there is no ongoing *legal duty* to do what the judgment requires.

Plaintiffs also argue that the judgment in this case simply remedies a past violation, and it does not require prospective application of a superseded legal requirement. That claim is false for the reasons explained in EPA's Motion for Stay at 14-15. The district court judgment compels EPA to promulgate a rule establishing a federal plan on January 14, 2020, altering the status quo and imposing ongoing obligations on EPA and landfill operators. Plaintiffs admit that "no current regulation requires promulgation to occur by January 14, 2020." Opposition at 10. It defies logic, therefore, to claim that the judgment—which *does* require promulgation by January 14, 2020—does not compel prospective compliance with regulations that no longer exist.

Plaintiffs argue that they "could have" brought a suit to compel agency action unreasonably delayed under 42 U.S.C. § 7604(a); that the district court "likely would have" entered a judgment in their favor in that hypothetical suit; and that EPA admitted that, if such a judgment had found a violation of a statutory duty, the new regulations would not constitute an intervening change in that law. Opposition at 11 n.4. But

Plaintiffs may not demand the benefit of a hypothetical judgment on a claim they specifically denied bringing. *See* ECF No. 48 at 17 ("this is not an 'unreasonable delay' case"). Having proceeded solely on the claim that EPA breached a nondiscretionary duty to comply with its regulations, and having successfully resisted EPA's request to stay the proceedings in light of ongoing rulemakings to amend those regulations, Plaintiffs have exactly what they sought: a judgment resting solely on regulations that they knew would soon be (and now are) superseded. That judgment cannot be salvaged on the ground that the district court *might have* ordered the same relief on statutory grounds in a judgment that it never entered on claims that Plaintiffs never brought.

Plaintiffs attempt to justify the district court's reasoning that "outside of [EPA's] reliance on the new amendment, all other circumstances indicate that enforcement of the judgment is still equitable." *See* Motion for Stay, Exhibit 1 at 5; Opposition at 11-15. That argument, however, is based on the mistaken assumption that the broader inquiry applicable to consent decrees applies here. When a judgment is based on the law alone, no "circumstances" can make equitable the prospective enforcement of that judgment after the legal duty has ceased to exist. It matters not whether the judgment was correct when issued; whether it is possible, painless, or legally permissible for EPA to comply; or even whether compliance with the judgment would benefit Plaintiffs or the public. Doubtless the railroad opposing relief from the judgment in *Railway Employees* believed it would be harmed by modification of the consent decree to permit union shops. But that did not stop the Supreme Court from holding that it was an abuse of discretion to deny that relief from judgment where the law had been amended to permit what the decree forbade.

One of the circumstances that Plaintiffs allege justifies denial of relief from judgment is that EPA's "action to change that law after judgment was not meant to remedy its violation but in effect to perpetuate the violation through further delay." Opposition at 12. But *any* change in the law that "authorizes what had previously been forbidden" will—by definition—have the effect of perpetuating conduct that would have been a violation of the superseded law. If that were a sufficient basis to deny relief, it would swallow the rule of *Toussaint* and *Railway Employees*.

Plaintiffs also observe that EPA is both the defendant and the party that changed the law, complaining that "EPA is trying to be both a player and the referee." Opposition at 14. But this is simply another attempt to fault EPA for the consequences of Plaintiffs' own litigation strategy. By Plaintiffs' choice, the relevant laws in this case are EPA's regulations. It is beyond dispute that EPA has the lawful authority to amend its own regulations through notice-and-comment rulemaking. It did so here.[1] Plaintiffs may not on the one hand insist that EPA's regulations create judicially enforceable nondiscretionary duties, but on the other hand argue that those very same regulations (once amended) somehow lack the same force and effect of law as their predecessors. The well-established rule that a change in the law that authorizes what had previously been forbidden entitles a movant to relief under Rule 60(b)(5) applies with equal force

[1] Plaintiffs' suggestion that EPA's amendments to its regulations are not actually lawful, Opposition at 14-15, are properly directed to the D.C. Circuit, where their challenges to the regulations are pending. At the hearing on its Rule 60(b)(5) motion, EPA suggested that, if the district court were concerned that the new regulations might ultimately be overturned, it could stay the judgment pending resolution of Plaintiffs' challenges instead of amending the judgment. Appendix at 132 (EPA counsel stating "we wouldn't oppose a stay to allow those reviews to occur"). Plaintiffs responded that "a stay pending the outcome of the D.C. Circuit is just not acceptable." *Id.* at 146.

whether the change in law is effected through a judicial decision, an Act of Congress, or a regulation.

Plaintiffs' argument that EPA's role in changing the law somehow disentitles it to relief from judgment is similar to an argument rejected by the Supreme Court in *Agostini*. There, the petitioners argued that subsequent changes in decisional law had so undermined the 12-year old Supreme Court precedent giving rise to the consent decree that, although it had not yet been formally overruled, it was no longer good law; the Court agreed and overruled the precedent. It then turned to the question whether the consent decree should be modified. 521 U.S. at 237. The respondents argued that the Court "should not grant Rule 60(b)(5) relief here" because "petitioners have used Rule 60(b)(5) in an unprecedented way—not as a means of *recognizing* changes in the law, but as a vehicle for *effecting* them." *Id.* at 238 (emphasis in original). The Supreme Court rejected that argument, holding that the "change in law entitles petitioners to relief under Rule 60(b)(5)" notwithstanding the petitioners' involvement in bringing that change in law about. *Id.* at 237. So too here, EPA's role in amending its own regulations does not disentitle it to relief under Rule 60(b)(5) based on that change in the law.

II. EPA will be irreparably harmed absent a stay.

Plaintiffs argue that EPA will not be harmed absent a stay because the "final judgment requires only that EPA execute its long-overdue duty" to promulgate a federal plan. Characterizing the duty as "long-overdue," however, presumes that the old regulations are still in effect. Under the new regulations, a federal plan is not due until August 30, 2021 at the earliest. It is precisely that giving of continued effect to the superseded regulations, and denying it to the current ones, that will irreparably harm

EPA in the absence of a stay. It deprives EPA of its lawful authority to implement its own regulations through notice-and-comment rulemaking and to act in accordance with its own lawfully enacted rules.

Both Plaintiffs and EPA acknowledge that this case presents significant separation-of-powers issues, but they disagree about which branch of government is in danger of encroachment here. Plaintiffs argue that "an Article II agency may [not] withdraw an Article III court's power to enforce a final judgment merely by" amending its regulations, noting that even Congress "cannot command a federal court to reopen a judgment." Opposition at 7, 14. But that is a misdirection: EPA does not claim that it may "withdraw an Article III court's power to enforce a final judgment" or "command" a court to reopen or modify a judgment. EPA moved the district court for relief from judgment precisely because EPA *lacks* that authority.

But EPA *does* have the authority to amend its own regulations—subject to statutorily prescribed judicial review, which is proceeding in due course. And when EPA's amendment of its regulations removes the legal basis on which a judgment rests, that change in the law "entitles [it] to relief under Rule 60(b)(5)." *Leavitt*, 523 F.3d at 1032. Only the courts have the power to grant that relief, but it is an abuse of discretion to refuse it. This is not, as Plaintiffs argue, an executive branch encroachment on judicial prerogatives. It is, rather, each branch of government properly working within its own sphere, as this Court's and the Supreme Court's precedents have repeatedly recognized.

Thus, in *Railway Employees*, the Supreme Court held that it was an abuse of discretion to deny relief from judgment after Congress amended the Railway Labor Act. 364 U.S. at 648. This Court similarly held in *Leavitt* that a post-judgment statute that

amended a law "to foreclose the statutory construction set forth" in the Court's earlier opinion "removed the legal basis for the continuing application of the court's Order," and thus "entitle[d] [the movant] to relief under Rule 60(b)(5)." 523 F.3d at 1029, 1032. Just as those statutory changes do not constitute an encroachment by a parallel branch on the judiciary, neither do EPA's amendments of its regulations here. But enforcement of the district court judgment, after EPA's regulatory amendments have eliminated the legal basis for it, would encroach on EPA's rightful sphere of authority by compelling it to give prospective enforcement to repealed regulations and denying it the ability to follow and apply its new regulations.

EPA will also be irreparably harmed if it is denied the opportunity to vindicate its position on appeal. Although EPA does not believe compliance with the judgment would moot its appeal, the district court believed it would. Appendix 139, 146 (Transcript of Hearing on Rule 60(b)(5) Motion). Plaintiffs' careful sidestepping of the issue, Opposition at 17; *see also* ECF No. 134 at 14, suggests that Plaintiffs intend to move to dismiss this appeal as moot if a stay is denied without acknowledging the risk of irreparable harm to EPA that denial of a stay could entail. This Court has recognized the importance of considering "this 'mootness Catch-22' when assessing whether the denial of preliminary relief will likely result in irreparable harm." *Protectmarriage.com—Yes on 8 v. Bowen*, 752 F.3d 827, 838 (9th Cir. 2014).

CONCLUSION

For the foregoing reasons, this Court should grant a stay pending appeal. EPA respectfully requests that this Court act on the pending motion by **January 13, 2020**.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: January 8, 2020.

s/ *Joan M. Pepin*
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