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.

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 BRIEF

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INTRODUCTION

The sole question before this Court is whether the district court abused its discretion in denying EPA's Rule 60(b)(5) motion for relief from an injunction compelling prospective compliance with a legal duty that no longer exists. Both the Supreme Court and this Court have held that a movant is *entitled* to relief from an injunction compelling performance of a superseded legal duty. In *every case* in which a lower court has denied Rule 60(b)(5) relief from a judicial decree founded on superseded law, that denial has been reversed or vacated on appeal. The reason for this unbroken record is plain: injunctions enforce *legal duties*. It is inequitable to compel performance of an action not required by any law, and it is an abuse of discretion to deny relief from a judgment that so compels. The district court's denial of Rule 60(b)(5) relief here should be reversed as well.

SUMMARY OF ARGUMENT

1. Plaintiffs contend that the Supreme Court's decision in *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367 (1992), and this Court's decision in *Bellevue Manor Associates v. United States*, 165 F.3d 1249 (9th Cir. 1999) (*Bellevue Manor II*), establish that courts have discretion to deny relief from an injunction even when the law has changed to permit what the injunction forbids. But Plaintiffs misinterpret *Rufo* and *Bellevue Manor II*, taking isolated words from those decisions out of context and distorting the actual holdings. Neither of

those cases, nor any other of which we are aware, holds that a court may deny relief from a judicial decree compelling performance of a superseded legal duty.

2. It has long been settled that when the law underlying an injunctive decree has been modified by the competent authority, the injunction may not be enforced. In recognition of that precept, a unanimous line of precedents from the Supreme Court, this Court, and other courts of appeals has consistently held 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. Plaintiffs' argument that this rule conflicts with the constitutional separation of powers has been rejected by both the Supreme Court and this Court. Plaintiffs' attempts to discredit or distinguish the precedents establishing that relief must be granted from an injunction enforcing superseded law lack merit.

3. Plaintiffs argue that equitable factors, such as the balance of harms and the public interest, justify the district court's refusal to grant relief from the injunction here. But such factors are not relevant in a Rule 60(b)(5) motion for relief from an injunction enforcing superseded law, and they can never overcome the lack of a continuing legal duty.

The district court's order denying relief from judgment should be reversed.

ARGUMENT

I. Neither *Rufo* nor *Bellevue Manor II* holds that a court's discretion extends to prospectively enforcing superseded law.

Plaintiffs claim that *Rufo* established a "flexible" standard under which a change in the law "may" warrant relief from judgment, and they note that *Bellevue Manor II* held that *Rufo* applies to "all" motions under Rule 60(b)(5). Thus, Plaintiffs argue, courts may deny relief even if a change in law renders lawful what an injunction prohibits as unlawful. Answering Brief at 19-23.

Plaintiffs misread both cases. As shown below, *Rufo* overturned prior, pre-Rule 60(b) precedent that had set an extremely high bar for the modification of consent decrees. *Rufo*'s statement that a change in the law "may" warrant modification of a consent decree rested on its explanation that consent decrees create contractual duties that "may" remain equitably enforceable even after a change in law. *Bellevue Manor II*'s holding that *Rufo* applies to "all" Rule 60(b)(5) motions meant that *Rufo*'s abrogation of the previous standard for modifying consent decrees extended beyond the context of institutional reform litigation, not that statements in *Rufo* that were specific to consent decrees apply equally to purely judicial decrees lacking any consent (i.e., contractual) component. Neither case provides any support for Plaintiffs' argument that a court has discretion to deny relief from an injunction, not founded on the consent of the parties, after the law has changed to permit what the injunction forbids.

A. *Rufo* held that Rule 60(b)(5) loosened the Court's prior stringent standard for modifying a consent decree.

Before the adoption of Rule 60(b)(5), the Supreme Court had held that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." *United States v. Swift & Co*. 286 U.S. 106, 119 (1932). In *Rufo*, a county sheriff sought relief under Rule 60(b)(5) from a consent decree, citing post-judgment changes in both fact and law. Applying *Swift*, the district court denied relief, and the court of appeals affirmed. The Supreme Court granted certiorari to decide whether *Swift*'s stringent standard applied to motions to modify consent decrees brought under Rule 60(b)(5). *Rufo*, 502 U.S. at 372.

The answer was *no*: "a district court should exercise flexibility in considering requests for modification of an institutional reform consent decree" under Rule 60(b)(5). *Id.* at 383. The party "seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Id.* It may "meet its initial burden by showing either a significant change in either factual conditions or in law." *Id.* at 384.

Applying that standard to the case before it, *Rufo* held that "modification of a consent decree may be warranted when the statutory or decisional law has

changed to make legal what the decree was designed to prevent." *Id.* at 388. But modification of a consent decree in such circumstances is not automatic because consent decrees "embod[y] an agreement of the parties and thus in some respects [are] contractual in nature." *Id.* at 378. The parties to a consent decree may "settle the dispute . . . by undertaking to do more than the Constitution itself requires" and "more than what a court would have ordered absent the settlement." *Id.* at 389. When the parties have voluntarily agreed to do more than the law requires, a change in the law may or may not render continued enforcement of a consent decree inequitable; a fact-specific inquiry into how the superseded law shaped the consent decree is required. *Id.* at 390; *accord Railway Employees v. Wright*, 364 U.S. 642, 652 (1961). Accordingly, the Supreme Court in *Rufo* vacated the denial of Rule 60(b)(5) relief and remanded for fact-finding regarding whether the consent decree's terms reflected a voluntary agreement to exceed legal minima or instead reflected an attempt to conform to a superseded interpretation of the Constitution's requirements. *Id.* at 390.

B. *Bellevue Manor II* held that *Rufo*'s abrogation of the *Swift* standard is not limited to institutional reform litigation.

Because the Supreme Court described its own holding in *Rufo* as requiring "flexibility in considering requests for modification *of an institutional reform consent decree*," 502 U.S. at 383 (emphasis added), there was some confusion in

the aftermath of *Rufo* about whether its abrogation of *Swift* was limited to institutional reform litigation. In *Bellevue Manor II*, this Court joined other courts of appeals in "confirming the applicability of the flexible *Rufo* standard beyond the institutional reform context." 165 F.3d at 1255 n.5.

Bellevue Manor involved a contract dispute between the Department of Housing and Urban Development (HUD) and a group of landlords. The district court entered declaratory and injunctive relief in favor of the landlords, but subsequent changes in statutory and decisional law eliminated the legal duty that the injunction enforced. The district court granted HUD's Rule 60(b)(5) motion based on the change in the law alone. *Bellevue Manor Associates v. United States,* 1997 WL 582818 at *1 (9th Cir. 1997) (*Bellevue Manor I*). This Court reversed and remanded for findings on the other factors required under this Court's decision in *Transgo, Inc. v. Alac Transmission Parts Corp.*, 911 F.2d 363 (9th Cir. 1990)—a pre-*Rufo* decision that incorporated the stringent *Swift* standard. 1997 WL 582818 at *1.

Transgo embodied the rule that Plaintiffs wish to apply here: "a litigant seeking to modify an injunction would have to show (1) a substantial change in circumstances or law since the order was entered; (2) extreme and unexpected hardship in compliance with the injunction's terms; and (3) a good reason why the court should modify the permanent injunction." *Bellevue Manor I*, 1997 WL

582818 at *1 (alterations omitted) (quoting *Transgo*, 911 F.2d at 365). *Bellevue Manor I* acknowledged that *Transgo* might have been abrogated by *Rufo*, but this Court had not yet decided whether *Rufo* applied outside the institutional reform context. Reasoning that findings on the second and third *Transgo* factors "might obviate the need to decide whether *Rufo* affects *Transgo* in this case," the Court vacated and remanded. *Id.* at *2.

On remand, the district court found that HUD satisfied *Transgo* and granted relief. This Court reviewed and affirmed the *Transgo* finding "out of respect for the district court's efforts undertaken at this court's direction," but *Bellevue Manor II*'s principal holding was that "*Transgo* no longer provides a permissible test for Rule 60(b)(5) motions brought on the ground that changed circumstances have rendered it inequitable to leave the challenged order in place. . . . Accordingly we hold that the *Rufo* standard applies to all Rule 60(b)(5) petitions brought on equitable grounds." *Bellevue Manor II*, 165 F.3d at 1254, 1257. Having already reviewed and affirmed the district court's decision under *Transgo*, it "require[d] only a moment"—and a single sentence—for this Court to apply *Rufo*: "For the same reasons that we have found that HUD met the tougher *Transgo* test—the change in law, HUD's loss of funds to support other Section 8 programs and the unfair preferential treatment of these landlords—HUD easily satisfies the *Rufo* standard." *Id.* at 1257.

C. Plaintiffs' argument distorts the holdings of *Rufo* and *Bellevue Manor II*.

As the foregoing explication of *Rufo* and *Bellevue Manor II* makes clear, Plaintiffs' argument based on snippets from those cases is unsound. *Rufo*'s statement that modification "may" be warranted when the law has changed to allow what the judgment prohibits was *explicitly* about *consent decrees,* which unlike judicial decrees embody *contractual* duties that "may" remain equitable to enforce even after a change in the law. 502 U.S. at 388-90. And *Bellevue Manor II*'s holding that *Rufo* applies to "all" Rule 60(b)(5) motions meant only that *Rufo*'s abrogation of *Swift* and *Transgo* extended "beyond the institutional reform context," not that Rule 60(b)(5) requires all judgments to be treated as if they were consent decrees. 165 F.3d at 1255 n.5.[1]

Plaintiffs argue that this Court's application of the *Rufo* standard in *Bellevue Manor II* considered "not only the change in law" but "also, among other things, the prejudice to both the movant and vulnerable members of society from the district court's injunction." Answering Brief at 21. They infer that *Bellevue*

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[1] The same is true of the out-of-Circuit cases cited by Plaintiffs in support of their claim that *Rufo* applies to all Rule 60(b)(5) motions. *See* Answering Brief at 25-26 (citing *Building & Construction Trades Council v. NLRB*, 64 F.3d 880, 887–88 (3d Cir. 1995); *United States v. Western Electric Co.*, 46 F.3d 1198, 1203 (D.C. Cir. 1995); *In re Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993)). Like *Bellevue Manor*, those cases simply hold that *Rufo*'s abrogation of *Swift* was not limited to cases involving institutional reform litigation or structural injunctions.

Manor II definitively holds that a change in the law making legal what the judgment enjoins is *not* sufficient grounds for modification without consideration as well of the balance of harms and the public interest. *Id.* at 26. They go so far as to argue that this Court lacked the authority to hold, as it did in *California Department of Social Services v. Leavitt*, 523 F.3d 1025 (9th Cir. 2008), that "a change in law of this type entitles petitioners to relief under Rule 60(b)(5)." *Id.* at 1032 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). Plaintiffs contend that if *Leavitt* means what it says, then it would "impliedly overrule *Bellevue Manor,*" and so *Leavitt* must be "reconciled" into meaning nothing at all. Answering Brief at 30. But *Leavitt* did not "overrule" *Bellevue Manor*; it followed Supreme Court precedent on an issue that *Bellevue Manor* did not reach.[2]

Plaintiffs read too much into *Bellevue Manor II*'s single sentence applying *Rufo.* The Court stated that, "*For the same reasons that we have found that HUD met the tougher Transgo test*,"—which the Court then listed—"HUD easily satisfies the *Rufo* standard." 165 F.3d at 1257. To interpret the Court's recitation of the satisfied *Transgo* factors as a holding that *Rufo* requires satisfaction of those same

[2] Plaintiffs also argue that *Leavitt* is distinguishable because it affirmed the grant, rather than reversing the denial, of Rule 60(b)(5) relief. Answering Brief at 31. The same, however, is true of *Bellevue Manor.*

factors would negate the decision's central holding that "*Rufo*'s mandate prevents us from continued reliance on *Transgo*." *Id.* A more logical reading is that *Bellevue Manor* means just what it says: having satisfied the more demanding *Transgo* standard, HUD easily satisfied *Rufo*. It says nothing one way or the other about whether the change in the law, alone, would have been sufficient.

Plaintiffs assert that EPA attempts to "dismiss" *Rufo* and *Bellevue Manor II* on appeal despite having acknowledged their validity below. Answering Brief at 16-17, 26-27. The charge is false: EPA has never disputed the vitality of those cases.[3] But neither *Rufo* nor *Bellevue Manor II* addresses the question presented by this case: whether, when a change in the law makes legal what an injunction prohibits, it is an abuse of discretion to deny Rule 60(b)(5) relief from that injunction. That question is answered by the cases discussed below, which uniformly hold that such a denial is an abuse of discretion.

[3] Equally baseless is Plaintiffs' suggestion that EPA's position on appeal is "new." In the district court, Plaintiffs claimed that EPA's "principal argument" was "that the Court is required to vacate the requirement to promulgate a federal plan in light of the change in EPA's regulations." S.E.R. 25 (internal quotation marks omitted) (opposition to Rule 60(b)(5) motion).

II. This Court's and the Supreme Court's cases establish that it is an abuse of discretion to deny relief from an injunction compelling compliance with superseded law.

A. When the law underlying a judgment has been modified by the competent authority, injunctive relief "cannot be enforced."

It is beyond reasonable dispute that, although a parallel branch of government may not alter the judgment of an Article III court, it may alter the law on which such a judgment rests. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1855); *Miller v. French*, 530 U.S. 327, 344-45 (2000). And when the law underlying a judgment "has been modified by the competent authority, so that the" enjoined conduct "is no longer . . . unlawful," then "it is quite plain the decree of the court cannot be enforced." *Wheeling Bridge*, 59 U.S. (18 How.) at 431-32; *see also* EPA's Opening Brief at 29-31.

Plaintiffs dispute that well-established rule. From the correct premise that an "agency cannot retroactively command a court to modify a final judgment," Plaintiffs leap to the erroneous conclusion that "Rule 60(b)(5) cannot reasonably be read to permit agencies to accomplish indirectly by regulation and motion what the Constitution bars them from accomplishing directly." Answering Brief at 24. A court, Plaintiffs argue, "must be afforded the discretion to decide" whether the old law or the new shall apply prospectively, or else "erosion of the constitutional separation of powers" would result. *Id.* at 24-25.

That separation-of-powers argument was rejected in *Wheeling Bridge*, as explained in EPA's Opening Brief at 29-30. It was also rejected by this Court in even more closely analogous circumstances in *Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996). In that case, the district court granted a Rule 60(b)(5) motion to dissolve an injunction after Congress amended the statute that the injunction enforced. The plaintiffs moved this Court for a stay pending appeal, arguing that the post-judgment statute "violates the separation of powers" by "impermissibly overturn[ing] a final judgment of an Article III court." *Id.* at 556.

This Court rejected that argument, holding that "this case falls squarely within *Wheeling Bridge*." *Id.* at 557. This Court explained that the congressional enactment has "present and future, not retroactive, effect." *Id.* The new statute did not, and could not, affect the district court's grant of declaratory relief, which was retrospective. But injunctive relief is "prospective" and, the underlying legal duty having been "modified by the competent authority," the "decree of the court cannot be enforced." *Id*. (quoting *Wheeling Bridge*); *cf. Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) ("relief by injunction operates *in futuro*"). This Court concluded that even though the post-judgment enactment rendered the injunction unenforceable, "in *Wheeling Bridge*, as here, there was no violation of separation of powers." 89 F.3d at 557.

The same analysis applies here. The district court's award of *declaratory* relief, holding that EPA had violated its then-existing regulations, is unaltered by EPA's post-judgment amendment of those regulations; EPA has not asked for any modification of that retrospective relief. But the district court's award of *injunctive* relief, compelling EPA to immediately promulgate a federal plan, depends upon the existence of a legal duty to do so. That legal duty "has been modified by the competent authority," such that the current lack of a federal plan is "no longer . . . unlawful." It is therefore "quite plain the decree of the court cannot be enforced." *Wheeling Bridge*, 59 U.S. (18 How.) at 432.

Plaintiffs counter that there need not be a "continuing violation of federal law" for a judgment to remain enforceable. Answering Brief at 25 (citing *Jeff D. v. Kempthorne*, 365 F.3d 844, 852 (9th Cir. 2004), and *Frew v. Hawkins*, 540 U.S. 431, 438 (2004)). But neither of those cases involved a post-judgment change in the law authorizing what the judgments (both of which were consent decrees) prohibited, and so they are of little relevance here. Moreover, Plaintiffs' argument misses the point: the problem with the district court's denial of relief is not that there is no ongoing *violation*; it is that there is no ongoing *legal duty* to do what the injunction compels.

B. The Supreme Court and the courts of appeals have consistently held that it is an abuse of discretion to deny Rule 60(b)(5) relief in these circumstances.

Because an injunction may not be enforced when the underlying legal duty has been modified by the competent authority, appellate courts have *without exception* held that a district court abuses its discretion in denying Rule 60(b)(5) relief in such situations. *See, e.g., Agostini*, 521 U.S. at 237; *Railway Employees*, 364 U.S. at 650-52; *American Horse Protection Ass'n Inc. v. Watt*, 694 F.2d 1310, 1316 (D.C. Cir. 1982); *McGrath v. Potash*, 199 F.2d 166, 167-68 (D.C. Cir. 1952). This Court has also acknowledged that "[w]hen 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); *accord Leavitt*, 523 F.3d at 1032. We are aware of no case, and Plaintiffs have cited none, in which a denial of relief from an injunction compelling compliance with a superseded legal duty has been upheld.

The Supreme Court held in *Railway Employees v. Wright*, 364 U.S. 642 (1961), that it is an abuse of discretion to deny relief from an injunction when the law has changed to permit the enjoined conduct. That case concerned a consent decree that, in line with the law at the time it was entered, prohibited union shops. After Congress amended the Railway Labor Act to permit union

shops, the defendant union moved under Rule 60(b)(5) to modify the decree. The district court and court of appeals denied relief because the union had agreed to the terms of the consent decree; continued compliance remained legally permissible; and nonunion members might be harmed if the decree were amended. 364 U.S. at 646.

Reviewing that denial, the Supreme Court repeatedly noted that if the judgment had *not* been a consent decree, then "there could be little doubt but that, faced with the 1951 amendment to the Railway Labor Act, it would have been improvident for the court" to deny relief. *Id.* at 648. After surveying the relevant caselaw, most notably *Wheeling Bridge*, the Court summed up the state of the law and the question before it: "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. Is this result affected by the fact that we are dealing with a consent decree?" *Id.* at 650.[4] Because the record showed that "the parties in fact attempted to conform the consent decree to the dictates of the Railway Labor Act as it then read," the Court held that the "established" rule

[4] Because this summation of the caselaw was integral to the Court's reasoning, it is not dicta. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("[I]t is not only the result but also those portions of the opinion necessary to that result by which we are bound."). "Even if it could be considered a dictum," moreover, this Court gives "great weight to dicta of the Supreme Court." *Coeur d'Alene Tribe v. Hammond*, 384 F.3d 674, 683 (9th Cir. 2004).

applicable to judicial decrees likewise applied to the consent decree at hand, and it reversed the denial of Rule 60(b)(5) relief. *Id*. at 652.

Plaintiffs contend that *Railway Employees* "did not announce a per se rule." Answering Brief at 29-30. The Court did, in preface, state that a change in the facts or law "may call for the modification" of an injunction, *id.* at 647; but it went on to hold that—for *no other reason* than the change in law—the lower courts abused their discretion by denying relief under Rule 60(b)(5). The Court unambiguously stated that "we regard as established" 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." *Id.* at 650. That statement *does* in fact announce a per se rule that relief should be granted from a judicial decree compelling prospective compliance with superseded law.

In *Agostini v. Felton*, 521 U.S. at 238, the Supreme Court likewise reversed the denial of Rule 60(b)(5) relief solely because the underlying law had changed. The petitioners had moved for relief from an injunction on the ground that subsequent Supreme Court decisions had so eroded the Establishment Clause precedent underlying the injunction that, while not formally overruled, such precedent was no longer good law. The Supreme Court agreed and expressly overruled the precedent, and it then held that the change in the law—alone—"entitled" the petitioners to Rule 60(b)(5) relief from the injunction.

Plaintiffs deny that the relief in *Agostini* was predicated on the change in law alone. They argue that the Court "carefully examined whether, 'under these circumstances,' prospective application of the judgment would be 'inequitable.'" Answering Brief at 29 (quoting *Agostini*, 521 U.S. at 240). That is not accurate: the Court never entertained the idea that prospective enforcement of the injunction could be equitable despite the change in the law. In the portion of the opinion quoted by Plaintiffs, the Court was responding to the dissent's view that the Court should refrain from *making* the change in the underlying law, and instead "wait for a 'better vehicle'" to address the "continued vitality" of the Establishment Clause precedent underlying the original injunction. 521 U.S. at 240. In *that* discussion, the Court noted the fiscal hardship to the petitioner that would result were Court to "bide our time waiting for another case to arise." *Id.* But neither that hardship nor any other equitable consideration (other than the lack of a continuing legal duty) factored into the Court's decision to grant Rule 60(b)(5) relief. The Supreme Court's reversal of the lower courts' denial of relief was based solely on the well-established legal truth that "this change in law entitles petitioners to relief under Rule 60(b)(5)." *Id.* at 238.

The D.C. Circuit has recognized the same rule. *American Horse Protection Association v. Watt*, 694 F.2d at 1316, reversed a denial of Rule 60(b)(5) relief, holding 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 the superseded law." That holding, in turn, relied on that court's earlier decision in *McGrath v. Potash*, 199 F.2d 166 (D.C. Cir. 1952), which was cited with approval by the Supreme Court in *Railway Employees*. In *McGrath*, the D.C. Circuit reversed the denial of Rule 60(b)(5) relief because the "statutory basis for the injunction having been removed by Congress, the injunction should be vacated." *Id.* at 167-68.

Plaintiffs argue that *American Horse* did not actually apply the rule that it stated, and that even if it had, it "would not do so now." Answering Brief at 32 n.11 (citing *United States v. Western Electric Co.*, 46 F.3d 1198 (D.C. Cir. 1995)). Plaintiffs are twice wrong. *American Horse* considered "the congressional purposes and the tenor" of the new statute not (as Plaintiffs suggest) to judge whether it was better policy than the old, but because there was a genuine dispute about whether the post-judgment statute displaced the one that the judgment enforced. 694 F.2d at 1316-19. Having found that it did, the court held that the actions compelled by the "1976 injunction [were], in light of [the] 1978 legislation, not required," and reversed the denial of Rule 60(b)(5) relief. *Id*. at 1319. Plaintiffs' suggestion that *Western Electric* overturned *American Horse* is unfounded. Like *Bellevue Manor*, *Western Electric* held that *Rufo*'s abrogation of *Swift* was not limited to institutional reform litigation. 46 F.3d at 1203.

This Court has twice acknowledged that an injunction must be modified if a change in law authorizes what the injunction prohibits. *Leavitt* affirmed the grant of Rule 60(b)(5) relief from an injunction based on an intervening change in the law. Following *Agostini*, this Court held that a "change of law of this type entitles petitioners to relief under Rule 60(b)(5)." 523 F.3d at 1032 (internal quotation marks omitted). Plaintiffs' claim that this Court lacked the authority to so hold is erroneous for the reasons explained at page 9 above. And in *Toussaint v. McCarthy*, this Court modified an injunction based on a change in law, quoting with approval *American Horse's* holding that "[w]hen 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.

Plaintiffs attempt to distinguish *Toussaint* because it involved direct review of an injunction, not a Rule 60(b)(5) motion for relief from a judgment that had already become final. But *Toussaint* did not rely on *American Horse* because it was ignorant of that fact; it did so because the situation was analogous. The district court had entered an injunction enforcing superseded decisional law, believing itself bound by law of the case. *Id.* Thus, *Toussaint* confronted the question presented here: whether an injunction compelling future compliance with superseded law must be modified when the law no longer requires what the

injunction compels. *Toussaint*'s reliance on *American Horse*, and its modification of the injunction, is persuasive authority here.

C. Plaintiffs' other attempts to distinguish those cases are meritless.

Plaintiffs argue that all of the cases on which EPA relies are inapplicable. They suggest that EPA has "acknowledged" as much, Answering Brief at 44, citing EPA's statement in its motion below for stay pending appeal that, "in this case of first impression, this Court carves a new exception to the general rule that subsequent changes in law are grounds for modification of a court's order under Rule 60(b)(5)." S.E.R. 48. But, as the context makes clear, EPA's statement that this is a "case of first impression" referred to the district court's unprecedented creation of a third-party actor exception, not to the well-established rule that the court refused to follow. *See infra* pp. 27-28 and Opening Brief at 17-24 (discussing that court's erroneous "third-party actor" rationale).

Plaintiffs proffer three distinctions that allegedly distinguish the precedents. First, they contend, this case "simply does not implicate the sort of continuing supervision by the issuing court" as the "structural injunctions" in *Agostini* and *Toussaint*. Answering Brief at 45. But *Bellevue Manor II* rejected the supposed distinction between institutional reform decrees and other injunctions, 165 F.3d at 1255-56, and Plaintiffs cite no case applying that distinction. The fact that the *court* need not trouble itself with supervision is irrelevant to the

question whether it is equitable to compel *EPA* to perform an act for which no legal duty presently exists.[5] The distinction also fails on the facts; the injunction here—compelling EPA to promulgate a regulation establishing a regulatory program—is no less "structural" or "public" than the injunctions in *Agostini*, *Wheeling Bridge,* and *Railway Employees*.

Second, Plaintiffs claim that the precedents are distinguishable because they involved changes to substantive rather than procedural law. Plaintiffs offer no explanation why courts would have the discretion to require prospective compliance with superseded legal duties as long as those duties can be described as "procedural," nor do they identify any case so holding. Their supposed distinction is incompatible with *McGrath v. Potash*, 199 F.2d at 167-68, in which the legal duties enforced by the injunction and modified by superseding law were both procedural in nature. In cases like *McGrath* and this one, where a procedural legal duty is the subject of the lawsuit, a change to that procedural legal duty *is* a change in the "underlying substantive law." It is irrelevant that EPA did not amend the substantive requirements of the landfill emissions guidelines; the injunction compels compliance with a regulatory deadline

[5] EPA agrees with Plaintiffs that, under the new regulations, EPA still has a legal duty to promulgate a federal plan. Answering Brief at 45 n.14. But EPA is not in violation of that duty, the deadline for which is in the future. Legal duties that have not been violated are not actionable.

flowing from the old implementing regulations, and those regulations *have* been materially amended.

Finally, Plaintiffs argue that in the precedents, the changes in law "conflicted" with the injunctions, whereas the regulatory amendment here allegedly does not. This, too, is both factually and legally wrong. In *Agostini* and *Railway Employees*, as here, the changes in law did not *compel* the actions forbidden by the injunction; the changes merely *authorized* them. Indeed, the lower courts in *Railway Employees* denied relief in part on that basis, reasoning that continued adherence to the consent decree was "not unlawful either before or after the 1951 amendments" to the Railway Labor Act. 364 U.S. at 645. Yet in both cases, the Supreme Court held that that the change in the law entitled the movants to relief from an injunction compelling compliance with superseded law. The same is true here.

III. None of the factual circumstances cited by Plaintiffs overcome the lack of a continuing legal duty.

Plaintiffs allege that the district court "denied EPA's Rule 60(b)(5) motion on half a dozen grounds" and suggest that the equitable factors on which the district court relied can somehow compensate for the fact that the law no longer requires the immediate promulgation of a regulation establishing a federal plan. Answering Brief at 34. Plaintiffs are categorically wrong: no "circumstances" can render equitable the prospective enforcement of that judgment after the legal

duty has ceased to exist. It does not matter whether the judgment was correct when issued; whether it is possible, painless, or legally permissible for EPA to comply; or even if compliance with the judgment would benefit the Plaintiffs or the public. In none of the cases discussed above did the Court weigh the absence of a legal duty against other equitable factors; the lack of a legal duty, alone, renders denial of Rule 60(b)(5) relief an abuse of discretion.

Plaintiffs nevertheless argue that the district court was justified in refusing to modify the injunction because the new regulations do not "remedy" but rather "perpetuate the violation." Answering Brief at 35. But the change in law here neither remedied nor perpetuated the violation of the former regulations; it *ended* the violation by eliminating the legal duty. Moreover, *any* change in the law that "authorizes what had previously been forbidden" will, by definition, have the effect of perpetuating conduct that would have violated the superseded law. *Toussaint*, 801 F.2d at 1090. If that basis were sufficient to deny relief, the exception would swallow the rule of *Toussaint*, *Railway Employees*, and *Agostini*.

Next, Plaintiffs note that the change in law did not "render the requirements imposed by the injunction impermissible." Answering Brief at 35. But as explained above (p. 22), *Railway Employees* held that the lower courts abused their discretion in denying Rule 60(b)(5) relief because the conduct compelled by the injunction, though no longer legally required, was "not

unlawful." 364 U.S. at 645. "That it would be an abuse of discretion to deny a modification" to an injunction in such circumstances, the Supreme Court held, "we regard as established." *Id.* at 650.

Plaintiffs next argue that they would be harmed if EPA were not compelled to continue complying with the superseded regulations, whereas EPA and other states would *not* be harmed by being so compelled. Answering Brief at 36-38. No argument about the balance of harms, however, can justify compelling a party to perform an action *for which no legal duty exists*. We are aware of no case in which the balance of harms was even *considered* in the absence of a legal duty, let alone held sufficient to justify denial of relief from a judgment compelling prospective compliance with superseded law.

Plaintiffs' penultimate claim is that the amended implementing regulations are an improper attempt to "sidestep" the district court's judgment. Answering Brief at 38-43. This is both factually false and legally wrong. As a legal matter, even if the regulatory changes *were* targeted at the judgment, that would not justify the district court's denial of relief. A change in the law is not "rendered suspect because it is targeted at a single controversy. The legislation in *Wheeling Bridge* was similarly targeted, as was . . . the Northwest Timber Compromise," a statute that amended the statutes forming the "basis of two named pending cases." *Mount Graham Coalition*, 89 F.3d at 557; *see also Robertson*

v. Seattle Audubon Society, 503 U.S. 429 (1992) (upholding Northwest Timber Compromise).

As a factual matter, the regulations were *not* amended to overturn the judgment. The rulemakings were initiated more than six months *before* the judgment in this case, for the sound purpose of aligning EPA's regulatory timelines with those set forth in 110 of the Clean Air Act, 42 U.S.C. § 7410, and applying those aligned timelines to an ongoing regulatory process. *See* Opening Brief at 4-6. Although Plaintiffs dispute the legitimacy of the new regulations, exclusive jurisdiction over that question rests in D.C. Circuit, where Plaintiffs' challenges are pending.[6] They have not sought a stay, and so the new regulations are the law notwithstanding Plaintiffs' disapproval.

Plaintiffs and the district court were fully aware throughout this litigation that rulemakings were underway to amend the regulations, and that they would alter the regulatory deadlines that were the sole legal basis for Plaintiffs' suit. At Plaintiffs' urging, the court raced to issue judgment under the old regulations

[6] Plaintiffs state that EPA's 2019 amendment to the landfill emission guidelines (which they tendentiously refer to as the "delay rule") "does nothing more than reset the deadlines." Answering Brief at 11. That is false: the rule does alter the deadline for promulgation of a federal plan, but it also adopts many other new provisions of the new implementing regulations, including changes to requirements for public hearings, extensions, and completeness determinations and criteria. Addendum to Opening Brief at 7a.

before EPA could complete the rulemaking processes, even denying extensions as "not feasible" due to "the pending rulemaking." 2 E.R. 117. The new regulations, which are the product of full notice-and-comment rulemaking processes initiated long before the district court issued judgment, bear no resemblance to a post-judgment "emergency" rule purporting to "suspend" the effect of a court order. Thus, Plaintiffs' comparison to *International Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 921 (D.C. Cir. 1984) (*ILGWU*), is inapposite. *See NAACP v. Donovan*, 737 F.2d 67, 72 (D.C. Cir. 1984) (distinguishing *ILGWU* from lawful post-judgment amendment of regulations).

Plaintiffs argue that the district court's speculation that EPA might "perpetually evade judicial review" through future amendment of its regulations was "reasonable." Answering Brief at 40. But as explained in EPA's Opening Brief at 24-26, the court's speculation about hypothetical future regulatory changes cannot justify its refusal to give effect to an *actual* regulatory change that eliminated the legal duty that the injunction enforces.[7]

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[7] EPA has been diligent in carrying out its duties under the new regulations. *See, e.g.*, 85 Fed. Reg. 9388 (Feb. 19, 2020) (finalizing approval of the Pinal County, Arizona state plan); 85 Fed. Reg. 9673 (Feb. 20, 2020) (finalizing approval of Delaware's state plan); 85 Fed. Reg. 14,474 (Mar. 12, 2020) (fulfilling new legal duty to make a completeness determination as to which states submitted plans by the new deadline of August 29, 2019, and which states failed to make such submissions); 85 Fed. Reg. 14,621 (Mar. 13, 2020) (proposing to approve Oregon's state plan).

Plaintiffs also attempt to defend the district court's novel "third-party actor" exception—while simultaneously denying that the court created any such exception. Answering Brief at 40-41; *but see* Order, 1 E.R. 4-5 (declining to follow precedents because "this case [is] unlike those where subsequent changes in law were enacted by third parties, as opposed to by the very party subject to the Court's order"). As explained more fully in the Opening Brief at 17-24, no case supports the district court's holding that an agency's amendment of its own regulations is an exception to the general rule that a change in law precludes prospective enforcement of the superseded law. EPA is indisputably the "competent authority" to create and modify the Clean Air Act's regulations; where, as here, the agency has acted to modify the law that the injunction enforces, "it is quite plain the decree of the court cannot be enforced." *Wheeling Bridge*, 59 U.S. (18 How.) at 431-32; *see also NAACP v. Donovan*, 737 F.2d at 72 (holding that agency, having been found in violation of its regulations, was free to amend those regulations, and that district court erred in enjoining agency from proceeding under the amended regulations).

Plaintiffs argue that *Chemical Producers v. Helliker*, 463 F.3d 871 (9th Cir. 2006), supports the third-party actor exception. Answering Brief at 41. But that case is about vacatur of a declaratory judgment due to mootness, not relief from an injunction under Rule 60(b)(5). The difference is significant. A motion for

vacatur due to mootness falls under Rule 60(b)(6), and it requires consideration of the factors set forth in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), including whether the party seeking vacatur caused the mootness by voluntary action. *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 117, 118 n.2, 121 (4th Cir. 2000). But "the vacatur of injunctive orders under Rule 60(b)(5) is governed by the altogether different standards set forth by the Supreme Court in *Agostini.*" *Id.* at 122. *Valero* explains that "in contrast to the inquiry for vacatur of a declaratory judgment due to mootness under Rule 60(b)(6), considerations of relative fault and public interest are irrelevant to the inquiry for modification or vacatur of an injunction under Rule 60(b)(5) on the grounds of a significant change in fact or law." *Id.* For the reasons explained in *Valero*, *Helliker* does not support the district court's creation of a third-party exception to the general rule.

Finally, Plaintiffs argue that the public interest would be best served by requiring EPA to continue to comply with its superseded law, which Plaintiffs believe is environmentally preferable to current law. But, as with the balance of harms, "considerations of . . . public interest are irrelevant" to the question of whether an injunction must be modified when the legal duty it enforces ceases to exist. *Id.* The court may not equitably compel EPA to prospectively comply with superseded law even if the court believes the old law is better policy.

As Plaintiffs acknowledge, both the old regulations and the new will ultimately lead to the same result: the installation of air-pollution-control technology in approximately 93 municipal solid-waste landfills nationwide. Answering Brief at 45 n.14; Addendum 12a. The only difference is how fast. Plaintiffs would prefer that it happen sooner than required under current law, and the district court apparently agreed. But courts are empowered to compel compliance only with the law, not with their notion of good policy. In the absence of a legal duty, the district court abused its discretion in denying relief from the injunction.

CONCLUSION

For the foregoing reasons, the district court's order denying relief from judgment should be reversed.

Respectfully submitted,

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