No. 19-17480

IN THE 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
The Honorable Haywood S. Gilliam, Jr., District Judge

APPELLEES' BRIEF

SUSANNAH L. WEAVER
MATTHEW LITTLETON
Donahue, Goldberg, Weaver & Littleton
1008 Pennsylvania Avenue SE
Washington, DC 20003
(202) 569-3818
susannah@donahuegoldberg.com

PETER ZALZAL
RACHEL FULLMER
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302
Attorneys for Environmental Defense Fund

XAVIER BECERRA
Attorney General of California
ROBERT BYRNE
Senior Assistant Attorney General
GARY TAVETIAN
DAVID A. ZONANA
Supervising Deputy Attorneys General
JULIA K. FORGIE
ELIZABETH B. RUMSEY
Deputy Attorneys General
1515 Clay Street, 20th Floor
Oakland, CA 94612
(510) 879-0860
liz.rumsey@doj.ca.gov
Attorneys for the State of California, by and through Attorney General Xavier Becerra and the California Air Resources Board

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

PRELIMINARY STATEMENT

Since May 2017, the United States Environmental Protection Agency (EPA) has employed various tactics to delay implementing existing standards that will significantly reduce emissions of potent greenhouse gases and other dangerous air pollutants from municipal solid waste landfills. In May 2019, the district court declared EPA's delay unlawful, recognizing the harms it had caused Plaintiffs. The court entered a final judgment compelling the agency to implement its landfill standards immediately, including an order to issue a federal implementation plan as soon as the court deemed feasible.

Rather than appeal that judgment or commence a rulemaking to modify or repeal its underlying standards, and although the agency had all but completed the required federal plan, EPA attempted to "sidestep[]" the judgment by rushing out a narrow regulatory change that does nothing more than perpetuate the delay, including by retroactively extending the long-expired federal-plan deadline by several years. E.R. 5. EPA then filed a perfunctory motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(5), under which a court "may," in its discretion, grant a party relief if "applying [a final judgment] prospectively is no longer equitable."

Taking "all the circumstances into account," as this Court requires in all cases where a party seeks relief from a final judgment pursuant to Rule 60(b)(5),

Bellevue Manor Ass'ns v. United States, 165 F.3d 1249, 1256 (9th Cir. 1999), the district court concluded that EPA had not borne its burden to demonstrate inequity. Nor could it: EPA has never disputed that the emissions reductions prescribed in its extant regulations are in the public interest; and the agency cannot demonstrate any harm in promptly implementing them. EPA points *only* to its new regulatory deadline, a thinly veiled attempt to circumvent a court order. The district court correctly found that these circumstances—where "EPA undisputedly violated the Old Rule, received an unfavorable judgment, and then issued a New Rule only to reset its non-discretionary deadline (rather than to remedy its violation)"—do not render the judgment inequitable. E.R. 4.

Although EPA urged the district court to apply the correct *Bellevue Manor* test, Supplemental Excerpts of Record (S.E.R.) 5, 8, and the district court properly based its ruling on that standard, E.R. 3, EPA now ignores that case entirely. Instead, EPA stakes its appeal on the proposition that the *only* circumstance the district court was permitted to consider was the agency's unilateral post-judgment change in the regulatory deadline. EPA's argument is precluded by controlling Supreme Court and Ninth Circuit law. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 390 (1992) (holding that a change in the law upon which a judgment is founded does not invariably, "in and of itself, provide a basis for modifying" a final judgment); *Bellevue Manor*, 165 F.3d 1249.

This Court should affirm because the district court applied the correct legal standard and did not otherwise abuse its discretion by declining to vacate its prior injunction.

STATEMENT OF JURISDICTION

Plaintiffs California, Illinois, Maryland, New Mexico, Oregon, Pennsylvania, Vermont, and the California Air Resources Board, and Plaintiff-Intervenor Environmental Defense Fund (collectively, Plaintiffs) agree with EPA's statement of jurisdiction. Appellant's Opening Brief (EPA Br.) 2.

STATEMENT OF THE ISSUES

The district court concluded that EPA's post-judgment change in law did not, in and of itself, provide an adequate basis to vacate a prior injunction and denied the agency's request for prospective relief from final judgment after considering the totality of the circumstances. The issues presented are:

1. Did the district court apply the correct legal standard under Rule 60(b)(5)?

2. Did the district court otherwise abuse its discretion by declining to modify its judgment, *i.e.*, was the court's fact-bound determination that EPA failed to carry its burden to show inequity in retaining the court's injunction illogical, implausible, or without support in inferences that may be drawn from facts in the record?

STATEMENT OF THE CASE

EPA appeals from the denial of a motion for relief from judgment under Rule 60(b)(5). E.R. 32–33. Because "an appeal from denial of Rule 60(b) relief does not

bring up the underlying judgment for review," *Browder v. Dir., Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978), it is undisputed that the district court properly entered an injunction compelling EPA to implement its own regulations as soon as feasible, *see* EPA Br. 8 n.2. Nevertheless, an overview of the legal and procedural history of this case will inform this Court's consideration of the issues on appeal.

I. STATUTORY AND REGULATORY BACKGROUND

This case arises from EPA's refusal to implement its 2016 regulations limiting greenhouse gas emissions and other air pollution from existing municipal solid waste landfills.

A. The Clean Air Act requires swift regulation of air pollution.

Congress enacted the Clean Air Act (or Act) "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). Section 111 of the Act, *id.* § 7411, "require[s] EPA and the States to take swift and aggressive action" to control air pollution from stationary sources. EPA, *State Plans for the Control of Certain Pollutants from Existing Facilities*, 40 Fed. Reg. 53,340, 53,342–43 (Nov. 17, 1975) (codified at 40 C.F.R. § 60.27(d) (1975)). In that vein, Section 111 mandates that EPA directly regulate new sources and issue standards for existing sources. 42 U.S.C. § 7411(b), (d).

The Act uses a cooperative-federalism model to regulate existing sources. After EPA develops or amends standards for a class of sources, states may submit, and EPA must review and approve or disapprove, plans to implement those standards for sources within their borders. *Id*. For states that choose not to submit a plan (or whose plan EPA disapproves), Section 111 directs EPA to promulgate a federal plan. *Id.* § 7411(d)(2). In 1975, EPA issued timing regulations mandating that the agency issue a federal plan at any time *within* six months of states' deadline to submit plans. 40 Fed. Reg. at 53,341; 42 U.S.C. §§ 7411(d)(2). Federal plans typically "prescribe emission standards of the same stringency as the corresponding" standards that EPA has prescribed. 40 C.F.R. § 60.27(e)(1).

B. In 2016, EPA strengthened its standards for landfill pollution, but since 2017, the agency has refused to implement them.

In 2016, EPA strengthened its standards for existing municipal solid waste landfills, which are the nation's third largest anthropogenic source of methane emissions. *Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills*, 81 Fed. Reg. 59,276, 59,281 (Aug. 29, 2016) ("Emission Guidelines"). Methane is a far more potent greenhouse gas than carbon dioxide, *see id*., and immediate and substantial reductions in methane emissions are essential to mitigating climate change. While EPA now tries to minimize the benefits of these stronger standards, EPA Br. 6, when promulgating them, it found that they would

"significantly reduce emissions" of methane and other pollutants, including harmful volatile organic compounds and hazardous air pollutants. *Id*. at 59,279–80 (standards would reduce excess annual emissions of 1,810 metric tons of ozone-forming volatile organic compounds and 285,000 metric tons of methane).

EPA instructed states to submit plans to implement the Emission Guidelines within nine months, *i.e.*, by May 30, 2017. 81 Fed. Reg. at 59,313 (codified at 40 C.F.R. § 60.30f(b) (2016)). "[I]n accordance with section 111(d) of the Clean Air Act" and EPA's longstanding timing regulations, *id.*, the agency then had to promulgate a federal plan within six months of that date—i.e., by November 30, 2017—for states without plans approved by EPA, *see id.* at 59,304. If EPA had complied with its obligations, by November 2017 every state would have had a new plan to reduce landfill emissions and sources would be well on their way to achieving the necessary reductions.

Instead, in May 2017, EPA embarked on a campaign to evade its implementation duties. Weeks before state plans were due, EPA notified industry groups that it intended to stay the Emission Guidelines "in their entirety" for 90 days. *See Stay of Standards of Performance for Municipal Solid Waste Landfills and Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills*, 82 Fed. Reg. 24,878, 24,879 (May 31, 2017). EPA then issued a 90-day

stay on the day after state plans were due. *Id.* The stay expired in August 2017. *See* 42 U.S.C. § 7607(d)(7)(B).

EPA then considered proposing a rule to impose a longer stay.[1] Instead, EPA decided simply to refuse to implement the Emission Guidelines. EPA broadcast this intent to violate the law through a statement to a trade publication weeks before its deadline to issue a federal plan. The agency declared that "any states that fail to submit plans … 'are not subject to sanctions'" and that EPA "d[id] not plan to prioritize the review of these state plans … nor are we working to issue a Federal Plan for states that fail to submit a state plan."[2] The November 2017 deadline to promulgate a federal plan passed without any indication that EPA would implement the Emission Guidelines.

II. PROCEDURAL HISTORY

A. Plaintiffs successfully challenged EPA's failure to implement the new standards.

Section 304(a)(2) of the Clean Air Act, 42 U.S.C. § 7604(a)(2), entitles "any person," including a state, to sue EPA when it fails "to perform any act or duty

[1] *See* S.E.R. 20 & n.5 (citing draft proposed rule, https://reginfo.gov/public/do/eAgendaViewRule?pubId=201704&RIN=2060-AT64).

[2] *See* S.E.R. 21 & n.6 (citing Cody Boteler, *EPA Offers Public Clarification on Timeline for NSPS, EG Landfill Rules Months After Stay Expires*, Waste Dive, Oct. 31, 2017, https://www.wastedive.com/news/epa-offers- public-clarification-on-timeline-for-nsps-eg-landfill-rules-mon/508484).

under this [Act] which is not discretionary." In May 2018, six months after EPA violated its deadline to issue a federal plan implementing the Emission Guidelines, Plaintiffs filed a citizen suit and sought an injunction compelling EPA to promulgate a federal plan.

The complaint presented a clear-cut and indefensible violation of a date-certain regulatory deadline, but EPA continued to stall. EPA moved the district court to dismiss Plaintiffs' complaint for want of statutory subject-matter jurisdiction, E.R. 112, despite having just told the U.S. Court of Appeals for the District of Columbia Circuit that "any remedy for EPA's failure to" promulgate a federal plan fell under Section 304(a)(2).[3] The district court denied that motion, but the briefing and disposition bought EPA seven more months of delay in implementing the Emission Guidelines.

Meanwhile, two days before the district court's scheduled hearing on EPA's motion to dismiss, and after what the White House Office of Management and Budget itself described as a "very rushed" three-day review process,[4] then-Acting

[3] *See* S.E.R. 20 (citing Resp. Initial Br. at 37, *Nat. Res. Def. Council v. Pruitt*, D.C. Cir. No. 17-1157 (D.C. Cir. Jan. 22, 2018), ECF 1714147).

[4] S.E.R. 21 (quoting White House Office of Management and Budget, E-mail from Chad Whiteman, "Interagency Discussion and EPA Responses Pertaining to Landfills Subpart Ba NPRM" [2060-AU33] at 2 (Oct. 16, 2018), *Supporting & Related Material Issued by EPA to EPA Docket No. EPA-HQ-OAR-2018-0696-0003,* https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0696-0003).

EPA Administrator Andrew Wheeler signed a proposed rule to further delay implementation of the Emission Guidelines. *Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills*, 83 Fed. Reg. 54,527 (Oct. 30, 2018). The proposal did not contain any substantive changes; it simply proposed to delay—until the end of August 2021 at the earliest—EPA's own deadline for promulgating a federal implementation plan, a deadline that had passed eleven months earlier. *Id.* at 54,532.

EPA then moved to stay this litigation on the basis of its proposed deadline extension. The district court denied that motion, E.R. 82, and two subsequent motions to stay that were based on a five-week lapse in federal appropriations, E.R. 117–18 (Dkt. Nos. 84 & 89). The district court ruled that the equities disfavored a stay given the "'fair possibility' of harm" to Plaintiffs and the absence of any clear hardship to EPA from prompt implementation of the Emission Guidelines. E.R. 81.

Unable to contest liability at the summary-judgment stage, EPA tried another gambit: contesting Plaintiffs' standing to sue. The district court found the agency's argument precluded by "clear[ly] applicabl[e]" law. E.R. 14–15. With only the remedy left to resolve, EPA sought twelve months—twice the amount of time mandated by the Emission Guidelines—over and above its by-then two-year delay to promulgate a federal plan. E.R. 20. The district court carefully considered

EPA's submissions and rejected both the assertion that it would take an entire year from judgment to finalize a federal plan and EPA's claim of resource constraints (a problem that the court determined was of the agency's own making). The district court found that the agency feasibly could complete its overdue federal plan in just six more months, and the court entered judgment accordingly on May 6, 2019. E.R. 7.

EPA did not appeal from the district court's final judgment, including the court's determination that the agency could feasibly complete a federal plan in six months. Nor did EPA move to amend the judgment under Federal Rule of Civil Procedure 59(e). Instead, at long last, the agency began to implement the 2016 Emission Guidelines. First, EPA approved implementation plans from the five states that had submitted them prior to judgment. Second, EPA proposed a federal plan to govern the remaining states. *Federal Plan Requirements for Municipal Solid Waste Landfills That Commenced Construction On or Before July 17, 2014, and Have Not Been Modified or Reconstructed Since July 17, 2014*, 84 Fed. Reg. 43,745 (Aug. 22, 2019). In that plan, EPA proposed a straightforward application of the standards that the agency already had "specifically and explicitly set forth" in the Emission Guidelines three years earlier. *Id.* at 43,756 (acknowledging that issuing a federal plan will not require "the exercise of any policy discretion").

B. EPA promulgated a targeted rule to delay implementation of the landfill standards beyond the deadline in the district court's final judgment.

In its Rule 60(b)(5) briefing to the district court and this Court, EPA has never claimed that it is infeasible for the agency to promptly publish the final federal plan. But only four days after EPA published that proposed plan, it finalized a narrow rule (the Delay Rule) that does nothing more than reset the deadlines EPA had flouted for so long. *Adopting Requirements in Emission Guidelines for Municipal Solid Waste Landfills*, 84 Fed. Reg. 44,547 (Aug. 26, 2019). Specifically, EPA moved the already-past deadline for state-plan submission from May 30, 2017, to August 29, 2019, three days after the Delay Rule's publication. The Delay Rule further granted EPA until August 2021 or later to promulgate a federal plan, nearly four years after the prior regulatory deadline and nearly two years after the deadline in the district court's final judgment. 84 Fed. Reg. at 44,547, 44,549.

Although the agency had not appealed the district court's conclusion that a six-month timeline was feasible, and although the federal plan was all but complete, EPA explained in the Delay Rule that the reason for the significant extension of the federal-plan deadline was that "the rulemaking requirements [for issuing a federal plan in Clean Air Act] section 307(d)" "involve[] a number of *potentially* time-consuming steps," for a federal plan that "*may be* … complex and

time-intensive." 84 Fed. Reg. at 44,551 (emphasis added). The preamble to the Delay Rule ignored that EPA had already fulfilled most of those steps in proposing a federal plan based on a routine (not "complex") application of EPA's Emission Guidelines.[5]

C. EPA sought discretionary relief from the final judgment, which the district court denied.

After finalizing the Delay Rule, EPA moved the district court to grant it relief under Rule 60(b)(5) from the portion of the final judgment requiring the agency to finalize a federal plan by November 6, 2019. *See* S.E.R. 1. EPA first argued that, in the wake of the Delay Rule, the district court "lack[ed] jurisdiction to enforce" its prior injunction compelling EPA to finalize a federal plan. S.E.R. 6. In the alternative, EPA acknowledged that "the Ninth Circuit has directed courts to 'take all the circumstances into account in determining whether to modify or vacate a prior injunction,'" S.E.R. 5 (citing *Bellevue Manor*, 165 F.3d at 1256), but still contended that the Delay Rule alone warranted modification of the judgment irrespective of any other circumstances. S.E.R. 6–7.

[5] The U.S. Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review the Delay Rule, 42 U.S.C. § 7607(b)(1), and Plaintiffs have petitioned that court to vacate the rule on several grounds, *Envtl. Def. Fund v. EPA*, D.C. Cir. No. 19-1222 (filed Oct. 23, 2019); *California v. EPA*, D.C. Cir. No. 19-1227 (filed Oct. 25, 2019). Briefing on the merits of those petitions is scheduled to conclude on August 31, 2020. *See* Order, No. 19-1222, ECF 1827597 (D.C. Cir. Feb. 7, 2020).

After full briefing and a hearing on EPA's motion, the district court held that the Delay Rule did not deprive the court of jurisdiction to enforce its own judgment and that, under the undisputed totality-of-the-circumstances standard, EPA had not met its burden to show entitlement to relief from judgment. "[I]n its discretion, the Court f[ound] that the situation presented here, where EPA undisputedly violated the [deadline to implement a federal plan], received an unfavorable judgment, and then issued the [Delay Rule] only to reset its non-discretionary deadline (rather than to remedy its violation), does not render the judgment inequitable." E.R. 4.

The district court recognized that the harm to Plaintiffs and the general public from EPA's ongoing delay in implementing the 2016 Emission Guidelines had "not dissipate[d], and in fact continue[d]," following the Delay Rule. E.R. 4 n.4. On the other hand, any harm to EPA from completing a federal implementation plan would be minimal given the agency's "significant progress" since final judgment "and the limited work remaining." E.R. 6. Moreover, the judgment was not inconsistent with and "posed no obstacle to" the Delay Rule, which did not erase EPA's obligation to promulgate a federal plan after the deadline for states to submit their own plans had passed. *Id.* The district court also distinguished the Delay Rule from other changes in law that had prompted other courts to modify their judgments: this change was effected by the losing party in

order to "sidestep[ ]" a final judgment and deny Plaintiffs the remedy to which they were entitled. E.R. 4–5.

To allow either party to file a notice of appeal, the district court stayed its injunction—and thus the deadline for EPA to complete a federal plan—for two months, until January 7, 2020. E.R. 6. The district court later extended that deadline to January 14, 2020. E.R. 124. A motions panel of this Court subsequently entered a stay pending appeal, "express[ing] no view regarding the merits of the appeal." E.R. 24–25.

STANDARD OF REVIEW

Because "the trial court is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)," *Std. Oil Co. v. United States*, 429 U.S. 17, 19 (1976) (internal quotation marks omitted), this Court reviews a district court's denial of such a motion using the "deferential abuse of discretion standard," *Wood v. Ryan*, 759 F.3d 1117, 1119 (9th Cir. 2014). In *United States v. Hinkson*, the en banc Court set forth "an objective two-part test" to determine whether a district court abused its discretion. 585 F.3d 1247, 1251 (9th Cir. 2009). First, this Court reviews *de novo* "whether the district court identified the correct legal standard for decision of the issue before it." *Id.* Second, this Court "determine[s] whether the district court's findings of fact, and its application of those findings of fact to the correct legal standard, were illogical, implausible, or without support in

inferences that may be drawn from facts in the record." *Id.* "It is not enough to show that a grant of the motion might have been permissible or warranted; rather the decision to deny the motion must have been sufficiently unwarranted as to amount to an abuse of discretion." *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982).

SUMMARY OF ARGUMENT

1. The district court employed the correct legal standard in deciding EPA's motion for equitable relief under Rule 60(b)(5). That standard is whether, "tak[ing] all the circumstances into account," prospective enforcement of a final judgment is inequitable. *Bellevue Manor*, 165 F.3d at 1256. Binding precedent forecloses EPA's argument that a bare change in the law upon which a judgment is founded always mandates modification of the judgment, irrespective of any other circumstances.

a. In *Bellevue Manor*, this Court squarely addressed the standard for decision of a Rule 60(b)(5) motion brought on equitable grounds in which the movant seeks vacatur of a prior injunction due to a post-judgment change in law. The Court ruled that the standard governing such a motion—and, indeed, any Rule 60(b)(5) motion brought on equitable grounds—is described in the Supreme Court's opinion in *Rufo*. That opinion sets forth a "flexible standard" under which a change in pertinent law is sometimes, but not always, a sufficient reason to modify a judgment. 502 U.S. at 380. *Rufo* and *Bellevue Manor* explicitly preserve

the discretion of a district court to reopen a final judgment "only to the extent that equity requires," *id.* at 391, after taking account of all the circumstances. That discretion is embodied in the text of Rule 60(b)(5), which provides that a court "*may* relieve a party from a final judgment" if "applying it prospectively is no longer *equitable*." Fed. R. Civ. P. 60(b)(5) (emphases added).

Preserving the equitable discretion of a federal court to modify its judgment is vital to maintaining the constitutional separation of powers. That principle requires that judgments of Article III courts not be subject to mandatory revision by actions of Article II agencies. The court may decide, *in its discretion*, that administrative action renders prospective enforcement of the judgment inequitable. But no change in law effected by the political branches can erase the court's traditional equitable role to decide whether to grant relief under Rule 60(b) and modify a final judgment.

b. EPA's arguments to the contrary are unsupported. Despite having asked the district court to decide its motion under the standard prescribed in *Bellevue Manor*—which is controlling precedent in this circuit—the agency now entirely ignores that case and its unambiguous holding in favor of excerpts from other opinions taken out of context. EPA recognizes that Rule 60(b)(5) generally affords district courts broad discretion to deny relief from judgment on equitable grounds, but the agency argues, Br. 16, that courts *must* grant such relief to the extent that

"the law no longer [independently] requires what the judgment commands." *Bellevue Manor* rejects this approach.

Apart from being inconsistent with *Bellevue Manor*, the text of Rule 60(b)(5), and separation-of-powers principles, EPA's new position is devoid of support in case law. To be sure, courts often deem it "appropriate to grant a Rule 60(b)(5) motion when the party seeking relief … can show 'a significant change … in law.'" *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (quoting *Rufo*, 502 U.S. at 384). But each Rule 60(b)(5) ruling "is intimately tied to the context in which it arose." *Id.* at 238. EPA cites no holding of this Court or any other court announcing the agency's preferred per se rule of decision. EPA's attempt to avail itself of its regulatory authority to unilaterally excuse itself from a deadline set forth in a final judgment did not deprive the district court of its discretion to determine whether relief was warranted.

2. a. The district court did not abuse its discretion in denying EPA's motion. EPA had "undisputedly violated the [law]." E.R. 4. And rather than appeal the district court's remedial order or "remedy its violation," the agency tried to "sidestep[] the Court's order" by changing the deadline for performing its own obligations, which raises serious concerns "that . . . [the] agency can perpetually evade judicial review through [regulatory] amendment, even after a violation has been found." *Id*. at 5.

The district court correctly reasoned that the judgment is not inconsistent with, and does not undermine any purpose of, the Delay Rule other than EPA's illegitimate interest in not enforcing the law. The court properly recognized, and EPA does not contest, that any harm to the agency from complying with the judgment is de minimis and outweighed by the harm to Plaintiffs from EPA's failure to remedy its continued delay in implementing its 2016 Emission Guidelines. The court further explained why this change in law, effected by the losing party in an effort to subvert a judicial decree, differs from the legal changes that often prompt courts to modify their judgments under Rule 60(b)(5).

b. Indeed, the circumstances of this case are strikingly different from those upon which EPA relies. Whereas here the final judgment remedied a single, long-past violation, and the change in law was a non-substantive regulatory amendment targeted at evading the judicial remedy for that violation, EPA's cases regard ongoing structural injunctions and substantive changes in statutory and decisional law.

The district court's specific findings and its overall conclusion that EPA had not demonstrated entitlement to equitable relief were well-founded and far from "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *Hinkson*, 585 F.3d at 1251. This Court therefore should affirm the denial of the agency's Rule 60(b)(5) motion.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE CORRECT LEGAL STANDARD.

The legal standard governing district courts' review of Rule 60(b)(5) motions brought on equitable grounds is settled in this circuit. In *Bellevue Manor*, this Court exhaustively considered this very issue and held that the Supreme Court's decision in "*Rufo* sets forth a general, flexible standard for *all* petitions brought under the equity provision of Rule 60(b)(5)." 165 F.3d at 1255 (emphasis added). That standard "allows courts to fulfill their traditional equity role: to take all the circumstances into account in determining whether to modify or vacate a prior injunction or consent decree." *Id.* at 1256. And "a flexible standard obviates any need to pigeonhole cases" into different categories that call for district courts to employ different Rule 60(b)(5) standards. *Id.* This binding precedent precludes EPA's attempt to carve out a special category of cases in which a change in law removes a district court's traditional discretion to modify—or decline to modify—its final judgment.

A. Under *Rufo* and *Bellevue Manor*, district courts must consider the totality of the circumstances before resolving any Rule 60(b)(5) motion.

The district court applied the correct legal standard under this Court's decision in *Bellevue Manor*, which held unambiguously that, under the Supreme Court's decision in *Rufo*, district courts must consider all the circumstances before deciding whether to modify a judgment on equitable grounds under Rule 60(b)(5).

Like this case, *Bellevue Manor* addressed a request to modify an *injunction* based on a *change in law*. Following changes in the relevant statutory and decisional law, the Department of Housing and Urban Development (HUD) had sought relief from an injunction that limited how it could calculate federal housing subsidies. 165 F.3d at 1251–52. The question presented was whether HUD must meet the stringent criteria set out in *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 911 F.2d 363 (9th Cir. 1990)[6] to obtain relief, or whether, rather, "*Rufo* and its pronouncement of a more flexible standard" had displaced *Transgo* "as to *all* Rule 60(b)(5) petitions brought on equitable grounds." *Id.* at 1254. The *Bellevue Manor* Court decided that *Rufo* "support[ed] the implied abrogation of *Transgo*" and the replacement of its three-factor test with "a more flexible standard" grounded in traditional equitable principles. *Id.* at 1256. And it squarely held that "*Rufo* sets forth a general, flexible standard for *all* petitions brought under the equity provision of Rule 60(b)(5)."[7] *Id.* at 1255 (emphasis added). In doing so, this Court

[6] The *Transgo* court had prescribed "a three-part test that a party must meet to gain relief under the 'equity' provision of Rule 60(b)(5): (1) a substantial change in circumstances or law since the order was entered; (2) extreme and unexpected hardship in compliance with the order; and (3) a good reason why the court should modify the order." *Id.*

[7] The "equity provision" of Rule 60(b)(5) is distinct from other provisions that authorize relief where a judgment "has been satisfied, released, or discharged," or was "based on an earlier judgment that has been reversed or vacated." Fed. R. Civ. P. 60(b)(5). EPA sought relief from final judgment only under the equity provision.

noted that the Supreme Court's decision in *Agostini*, 521 U.S. 203, "likewise applied *Rufo*'s new flexible standard in providing relief from a permanent injunction based on later-discredited Establishment Clause jurisprudence." *Id.* at 1256.

The *Bellevue Manor* Court then applied that flexible standard, considering not only "the change in law," *id.* at 1257, but also, among other things, the prejudice to both the movant and vulnerable members of society from the district court's injunction—which mandated that public funds be redirected to others—before holding that the district court had not abused its discretion by vacating the injunction. *Id.* at 1256–57; *see also S.E.C. v. Coldicutt*, 258 F.3d 939, 945 (9th Cir. 2001) (confirming that *Bellevue Manor* "considered hardship to the defendant to be part of the *Rufo* analysis"). And the Court concluded that "HUD's loss of funds to support other Section 8 programs and the unfair preferential treatment of these landlords" demonstrated that the agency had carried its burden to establish entitlement to relief—*i.e.*, that prospective application of the injunction would be inequitable. *Id*. at 1257.[8]

[8] Because the movant in *Bellevue Manor* was entitled to relief from final judgment even under the more stringent *Transgo* test, *Bellevue Manor*, 165 F.3d at 1254, the Court might have avoided deciding whether that test had survived *Rufo*. But the Court chose to resolve that issue, which was "properly presented, fully argued, and elaborately considered" in the opinion. *R.R. Cos. v. Schutte*, 103 U.S. 118, 143 (1880). The Court determined that *Rufo* had abrogated *Transgo* and went

Rufo and *Bellevue Manor* illustrate that a change in law *can* support a modification of a judgment founded on that law, but "it does not follow that a modification will be warranted in all circumstances." *Rufo*, 502 U.S. at 383. Instead, the "district court should exercise flexibility in considering requests for modification," *id.* at 383, and only grant such requests after considering all the circumstances because "equity demands a flexible response to the unique conditions of each case," *Bellevue Manor*, 165 F.3d at 1256.[9]

Bellevue Manor's flexible standard comports with the plain language of Rule 60(b)(5), which provides that a court "*may* relieve a party from a final judgment" if "applying it prospectively is no longer *equitable*." Fed. R. Civ. P. 60(b)(5)

---

on to "apply *Rufo*'s general equitable approach" to the case at bar before holding that the district court acted within its discretion to grant relief under Rule 60(b)(5). *Bellevue Manor*, 165 F.3d at 1257. In short, *Bellevue Manor*'s determination that the *Rufo* test applied to all Rule 60(b)(5) motions brought on equitable grounds was a holding that is binding on future panels of this Court. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

[9] *United States v. Asarco Inc.*, 430 F.3d 972 (9th Cir. 2005), is not to the contrary. That case considered whether *Bellevue Manor*'s totality-of-the-circumstances test governs the threshold question whether a party seeking post-judgment relief from a consent decree had "anticipated a contested change in factual circumstances" when it entered into the decree. 430 F.3d at 981. The Court held, consistent with contract-law principles used to interpret consent decrees, that a district court must examine "the plain terms of the consent decree"—not the totality of the circumstances—to discern "the parties' expectation that a particular change in factual circumstances might occur during the lifetime of the decree." *Id.* at 982. The parties' expectation as to factual changes, along with other factors, will then inform the ultimate question under Rule 60(b)(5) whether to modify the decree. *Id.* at 979. The Court reaffirmed that the answer to *that* ultimate question depends on the totality of the circumstances. *Id.*

(emphases added). That language epitomizes discretion, and it does not distinguish among different types of changed circumstances. In *all* cases, the court has discretion whether to modify its judgment. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233–34 (1995) ("Rule 60(b), which authorizes discretionary judicial revision of judgments …, does not impose any legislative mandate to reopen upon the courts, but merely reflects and confirms the courts' own inherent and discretionary power … to set aside a judgment whose enforcement would work inequity.").

B. A district court has discretion to deny a Rule 60(b)(5) motion even when the law no longer requires what the judgment commands.

EPA asserts that where there is a change in the law such that the law no longer independently requires what the judgment commands, the court must grant relief without considering any other factors. EPA Br. 16. EPA misreads the precedent. Neither *Bellevue Manor* nor any other case that EPA cites adopted or condoned a legal standard that withdraws a court's discretion to deny a Rule 60(b)(5) motion premised on a change in law. The problem this Court identified with the defunct *Transgo* test was its rigidity, which conflicted with "the sound policy behind courts' traditional equitable power to modify prospective relief." *Bellevue Manor*, 165 F.3d at 1257. But the *Bellevue Manor* Court did not jump out of the frying pan and into the fire by announcing an even *more* rigid standard

diametrically opposed to *Transgo*. *Cf. Phelps v. Alameida*, 569 F.3d 1120, 1132–33 (9th Cir. 2009) (finding that the Supreme Court had abrogated the "*per se* rule" of *Tomlin v. McDaniel*, 865 F.2d 209, 210 (9th Cir. 1989), "that Rule 60(b)(6) motions cannot be predicated on intervening changes in the law," and holding "that the proper course … is to evaluate the circumstances surrounding the specific motion" using "a case-by-case approach").

A per se rule requiring a district court to grant relief from judgment following a change in law by one of the political branches would pose an additional, even more serious, problem: erosion of the constitutional separation of powers. "[T]he firm and unvarying practice of Constitutional Courts [is] to render no judgments … subject to later review or alteration by administrative action" by Article II agencies. *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113–14 (1948). An agency cannot retroactively command a court to modify a final judgment. *See Taylor v. United States*, 181 F.3d 1017, 1024 (9th Cir. 1999) (en banc).[10] And 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—namely, the removal of the district court's equitable discretion.

[10] When EPA issued the Delay Rule, the agency acknowledged that it needed to "comply with the deadline for a federal plan in the [c]ourt's order" unless the agency obtained "appropriate relief" from the district court. 84 Fed. Reg. at 44,550.

To be sure, agencies may "change the law and, in light of [those] changes …, a *court* may decide in its discretion to reopen and set aside," or "refuse to enforce," a final judgment. *Taylor*, 181 F.3d at 1024; *see id.* at 1025 (explaining that the "important thing about [*Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855) (*Wheeling Bridge*)] is that it was the *Court* that made this decision, exercising *its* discretion" to "apply[] newly enacted standards"). But no unilateral action of an agency can withdraw the court's discretion to retain its judgment, even if there is no longer a "continuing violation of federal law." *Jeff D. v. Kempthorne*, 365 F.3d 844, 852 (9th Cir. 2004); *see also Rufo*, 502 U.S. at 388 (recognizing that Rule 60(b)(5) relief is discretionary where "the statutory or decisional law has changed to make legal what the decree was designed to prevent"). A final judgment, no less than a regulation, "furthers the objectives of federal law," *Frew v. Hawkins*, 540 U.S. 431, 438 (2004), and there is a "strong federal interest" in its enforcement, *Jeff D.*, 365 F.3d at 853, as well as in finality. A district court faced with two presumptively valid rules of federal law—an Article III judgment and a federal regulation—must be afforded the discretion to decide when the former should yield to the latter.

Notably, this Court is far from alone in applying *Rufo*'s flexible standard to all Rule 60(b)(5) motions brought on equitable grounds. *See Bellevue Manor*, 165 F.3d at 1255 (observing that this Court was "join[ing] a significant number of other

Courts of Appeals" on this issue); *Bldg. & Constr. Trades Council v. Nat'l Labor Relations Bd.*, 64 F.3d 880, 887–88 (3d Cir. 1995); *United States v. Western Elec. Co.*, 46 F.3d 1198, 1203 (D.C. Cir. 1995); *In re Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993). In any event, under *Bellevue Manor*, the law of this circuit is clear: a district court must consider all the circumstances before resolving a Rule 60(b)(5) motion, and the court is not compelled to grant relief in every case in which a law has been changed to no longer independently require what the court's final judgment commands.

C. EPA's efforts to avoid application of *Rufo* and *Bellevue Manor* are unavailing.

Until now, the United States adhered to the (correct) view that *Rufo*'s flexible standard governs all Rule 60(b)(5) motions brought on equitable grounds, including motions seeking relief from injunctions due to post-judgment changes in law. *E.g.*, Br. for the U.S. as Amicus Curiae at 16, *Horne v. Flores*, S. Ct. No. 08-289 (Mar. 25, 2009), 2009 WL 796293 (quoting *Rufo* for the proposition that "courts should utilize 'a flexible approach'"). Indeed, EPA told the district court in this case that the correct standard for its decision was "set forth in *Rufo*," and that under the "'flexible' Rule 60(b)(5) standard, [this Court] has directed courts to 'take all the circumstances into account in determining whether to modify or vacate a prior injunction or consent decree.'" S.E.R. 5 (quoting *Bellevue Manor*, 165 F.3d at 1256). After the district court denied EPA's motion, the agency

requested a stay pending appeal and again pressed the totality-of-the-circumstances standard. S.E.R. 36, 48.

On appeal, however, EPA dismisses *Rufo* and does not even mention *Bellevue Manor*, which the agency cited throughout its Rule 60(b)(5) motion, S.E.R. 4, 5, 8, and which the district court relied upon in its decision, E.R. 3. EPA now contends that the "wide discretion" afforded to courts deciding Rule 60(b)(5) motions becomes no discretion at all if the law upon which a final judgment is founded "no longer requires what the judgment commands." EPA Br. 14, 16. EPA thus argues that the district court applied the incorrect legal standard, without even addressing the controlling authority invoked by the court.

The agency tries, Br. 14, to confine the *Rufo* standard to cases involving only changes in fact, but *Rufo* itself involved a change in law. *See* 502 U.S. at 376. So did *Bellevue Manor*. *See* 165 F.3d at 1257. EPA also tries, Br. 14–15, to restrict application of *Rufo* to cases with consent decrees rather than injunctions, but the Supreme Court and this Court both have applied *Rufo* when modifying injunctions. *See Horne v. Flores*, 557 U.S. 433, 447–50 (2009); *Coldicutt*, 258 F.3d at 942 (applying *Rufo* and concluding that relief from a court's injunction was not warranted); *Bellevue Manor*, 165 F.3d at 1257. EPA's newly discovered authorities do not narrow or conflict with *Rufo* or *Bellevue Manor*, and none of them supports the agency's assertion that Rule 60(b)(5) relief is automatic when the law ceases to

independently require what the judgment commands. And, as discussed, *infra* Argument, Part II.B., where the courts in those cases granted relief, they did so under circumstances that are entirely distinct from those presented here.

EPA begins, Br. 14, with *Agostini*, a Supreme Court case that *Bellevue Manor* placed firmly in the *Rufo* tradition of flexible, case-by-case review of Rule 60(b)(5) motions. 165 F.3d at 1256; *see supra*, at pp. 20–21. The agency argues, Br. 15–16, that *Agostini* announced a "sound rule" of general application that district courts must grant prospective relief from judgment based on changes in the law. Apart from the fact that this Court has already construed *Agostini* otherwise, EPA's characterization of the case is incorrect.

Agostini addressed whether parties were entitled to relief from an injunction because judicial interpretation of the constitutional law underpinning the injunction had changed. The district court's injunction prohibited state officials from providing enrichment services on the premises of parochial schools, forcing them to provide these services offsite at tremendous expense. In examining whether relief was warranted, the Court concluded that the pertinent law had changed, 521 U.S. at 218–36, but the opinion did not end there. The Court moved on "to decide whether this change in law entitle[d] petitioners to relief under Rule 60(b)(5)" or whether it did not. *Id.* at 237.

That decision would have been ministerial if the Supreme Court had followed the per se rule urged by EPA here, particularly given that the legal issue in *Agostini* was constitutional, which meant that that any remedial injunction be "narrowly tailored to enforce constitutional requirements only." *See Toussaint v. McCarthy*, 801 F.2d 1080, 1089 (9th Cir. 1986). Instead, in a separate section of its opinion, the Court carefully examined whether, "under these circumstances," prospective application of the judgment would be "inequitable." *Agostini*, 521 U.S. at 240; *see also id.* at 209 (finding that the movants were entitled to relief "on the facts presented here"). *Agostini* made abundantly clear that it was not relying on a principle that changes in law automatically mandate relief from judgment: "Most importantly, our decision today is intimately tied to the context in which it arose." *Id.* at 238; *see also id.* at 256 (Ginsburg, J., dissenting) ("The Court makes clear, fortunately, that any future efforts to expand today's ruling will not be favored."). Thus, far from supporting the rigid rule EPA seeks to apply, *Agostini* plainly applied the flexible *Rufo* standard.

The same is true of *Railway Employees v. Wright*, a pre-*Rufo* case where the Supreme Court held that "sound judicial discretion *may* call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." 364 U.S. 647 (1961) (emphasis added). A court exercising such discretion must

consider whether, under all the circumstances, "a change in law or facts has made inequitable what was once equitable." *Id.* at 652; *accord* Fed. R. Civ. P. 60(b)(5). To be sure, the Supreme Court observed that "discretion is never without limits," *Railway Employees*, 364 U.S. at 648, especially "when a change in law brings [the] terms [of a judgment] in conflict with statutory objectives," *id.* at 651. But the Court did not announce a per se rule in that situation, much less in cases where (as here) the law upon which the judgment is founded has changed without creating such a conflict. *See Rufo*, 502 U.S. at 380 ("*Railway Employees* emphasized the need for flexibility."); *id.* at 388 ("[M]odification … *may be* warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent." (emphasis added)).

The agency's reliance, Br. 16–17, on *California Department of Social Services v. Leavitt*, 523 F.3d 1025 (9th Cir. 2008), is likewise misplaced. EPA places great weight on one sentence in that decision: "A 'change in law' of this type 'entitles petitioners to relief under Rule 60(b)(5).'" *Id.* at 1032 (citing *Agostini*, 521 U.S. at 237). That lone sentence did not, and could not, impliedly overrule *Bellevue Manor* and announce a per se rule of decision for Rule 60(b)(5) motions predicated on changes in the law. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2013) (en banc) ("[A] three-judge panel may not overrule a prior decision of the [C]ourt."). This Court has an "obligation … to reconcile" *Leavitt* with *Bellevue*

Manor if possible, *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065 (9th Cir. 2004), and it can do so with ease.

First, as previously discussed, *Agostini* did not announce a general standard for deciding any type of Rule 60(b)(5) motion. Indeed, the sentence in *Agostini* that is cited in *Leavitt* asked "whether" relief from judgment was warranted in light of the particular change in constitutional law at issue in *Agostini*. 521 U.S. at 237. This Court's opinion in *Leavitt* did not transform the Supreme Court's particularized question into a generally applicable answer. Second, this Court's opinion addressed only whether "the district court abused its discretion by *granting*" relief under Rule 60(b)(5), and it decided only that the appellants had not shown such abuse. *Leavitt*, 523 F.3d at 1032 (emphasis added). The change in law may have given that district court the discretion to grant relief from judgment, but that does not mean the court was obliged to grant that relief or would have abused its discretion by not doing so in light of other considerations.

EPA likewise repeatedly invokes *Toussaint* to support the proposition that "[w]hen a judgment is founded on the law alone, and the law changes to permit what had previously been forbidden, then 'it is an abuse of discretion for a court to refuse to modify an injunction founded on the superseded law.'" EPA Br. 15 (quoting *Toussaint*, 801 F.2d at 1090). That passage is ambiguous at best. This Court began by reciting the flexible proposition that "[a] change in the law *may*

constitute a changing circumstance requiring the modification of an injunction." *Toussaint*, 801 F.2d at 1090 (emphasis added). Two sentences later, however, the Court quoted *American Horse Protection Association v. Watt*, 694 F.2d 1310 (D.C. Cir. 1982) (R.B. Ginsburg, J.) (*AHPA*), for what EPA characterizes as a rigid rule 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*, 801 F.2d at 1090.[11] The Court then switched back and examined factors beyond changes in law—including that the injunction was a "structural one" through which the district court had "assumed too much control over the day to day affairs of" defendants—before deciding to vacate a portion of the district court's injunction for abuse of discretion. *Id.* at 1085, 1114. Read in context—including that, like *Agostini*, *Toussaint* addressed a matter of constitutional law—*Toussaint* does not support EPA's stance that a district court must, irrespective of any other circumstances, grant Rule 60(b)(5) relief if the law does not separately require what the judgment commands.

Toussaint thus does not stand for the proposition ascribed to it by EPA. But even if it did, it would not control here. The defendants in *Toussaint* had not

[11] Even assuming that the D.C. Circuit applied that proposition in *AHPA*, *but see AHPA*, 694 F.2d at 1318–19 (granting relief from an injunction only after considering in detail "the congressional purposes and the tenor of" a new law and the "inconsisten[cy]" it created with the injunction), that court would not do so now in the wake of *Rufo*, *see Western Elec.*, 46 F.3d at 1202–04.

moved for relief under Rule 60; they took "a direct appeal of a district court's order of injunctive relief." 801 F.2d at 1091 n.7. Statements in *Toussaint* about the standard for deciding Rule 60(b)(5) motions are dicta, not "holdings," EPA Br. 23, because direct appeals from final judgments are not subject to that standard. *See Cal. Med. Ass'n v. Shalala*, 207 F.3d 575, 577 & n.2 (9th Cir. 2000) (observing that a discussion of "the applicability of Rule 60(b)(5) in an opinion involving a direct appeal" was "probably dicta"). Indeed, this Court cited *Toussaint* only in passing when it held just a few years later that even "a substantial change in … law" is *not* sufficient to warrant relief from a district court's injunction. *Transgo*, 911 F.2d at 365. *Toussaint* predates not only *Transgo*, but *Rufo* and this Court's holding in *Bellevue Manor* that *Rufo* changed the governing standard under Rule 60(b)(5). These cases have swept away any residual effects of the relevant passage in *Toussaint*.

Finally, EPA cites *NAACP v. Donovan*, 737 F.2d 67 (D.C. Cir. 1984), to argue that a district court must grant relief from any "judgment premised on a superseded regulatory duty." EPA Br. 21. The agency's invocation of *Donovan* is unavailing. It does not bind this Court, and, in any event, the D.C. Circuit has since embraced *Rufo*'s flexible standard for "all types of injunctive relief" sought under Rule 60(b)(5). *Western Elec.*, 46 F.3d at 1203. If that were not enough, *Donovan*, like *Toussaint*, did not even confront a Rule 60(b) motion—it was a direct appeal

from "an interlocutory order issued by the district court enjoining [the defendant] from implementing [a] regulation" promulgated after final judgment. 737 F.2d at 68. This outdated, out-of-circuit, and out-of-context decision cannot override this Court's unmistakable holding in *Bellevue Manor* that a district court must "take all the circumstances into account in determining whether to modify or vacate a prior injunction" on any basis under Rule 60(b)(5). 165 F.3d at 1256.

The standard of decision on which EPA stakes its appeal is wrong. The district court applied the correct standard by considering all the circumstances before determining that the agency had not carried its burden under Rule 60(b)(5).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING RELIEF

The district court's application of the correct legal standard to deny EPA discretionary relief was entirely proper and certainly was not "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *Hinkson*, 585 F.3d at 1251.

A. The district court's discretionary decision properly took account of all of the relevant circumstances.

The district court denied EPA's Rule 60(b)(5) motion on half a dozen grounds, only one of which EPA even attempts, albeit unsuccessfully, to dispute. Indeed, beyond the bare regulatory deadline change, EPA has not presented a

single piece of evidence or argument to carry its burden to show why "applying [the judgment] prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5).

1. The relief sought by EPA would have perpetuated its violation by enabling further delay.

In denying EPA's motion, the district court reasoned that "EPA undisputedly violated the [law]" (which EPA does not contest), and that the agency's action to change its regulatory deadlines after judgment was not meant to "remedy its violation," but to perpetuate the violation through further delay. E.R. 4. After more than a year of supervising this case, the district court understood that EPA's history of delay and evasion long preceded EPA's efforts to retroactively amend its regulatory deadlines.

2. The Delay Rule did not render the requirements imposed by the injunction impermissible.

The district court found that its judgment does not compel EPA to do anything that the Delay Rule renders impermissible because the Delay Rule does not prohibit EPA from promulgating a federal plan sooner and imposes no new or heightened obligations on anyone. E.R. 6; *see also Rufo*, 502 U.S. at 388 (distinguishing between situations where "one or more of the obligations placed upon the parties has become impermissible under federal law" and situations where "the statutory or decisional law has changed to make legal what the decree was designed to prevent"). EPA does not challenge this finding either. It plainly can

comply with both the final judgment and the Delay Rule by finalizing the federal plan as ordered by the district court, because the Delay Rule allows EPA to finalize a federal plan at any time *before* August 2021.

3. The injunction does not harm other states.

EPA also does not contest the district court's finding that states that did not submit implementation plans would suffer no harm. Nor could it: a federal plan "does not prevent states from submitting, and EPA from approving, new state plans." E.R. 6.[12] Moreover, as even the delayed state plan submission deadline has passed, *supra* p. 11, neither these states nor regulated entities therein have any legitimate interest in not being subject to the substantive regulations.

4. The injunction does not harm EPA.

The district court also found no significant injury to EPA, which already was prepared to comply with the court's judgment by timely issuing a federal plan—an action that does not require "the exercise of any policy discretion." 84 Fed. Reg. at 43,755; *see* E.R. 5–6. Even now, EPA does not claim it will be at all difficult

[12] In earlier phases of this case, EPA attempted to make an argument that its bare regulatory change somehow promoted cooperative federalism. S.E.R. 49, 51–52. That argument was wrong: The interval between the state-plan submission deadline and the date of issuance of a federal plan is not a grace period in which some landfills have a legally protected interest in being free of regulation under the Emission Guidelines. S.E.R. 73. At any rate, EPA has abandoned it on appeal. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) ("[I]ssues which are not specifically and distinctly argued and raised in a party's opening brief are waived.").

(much less infeasible) to issue the federal plan promptly. Instead, it argues, Br. 26, that the court erred by *considering* the agency's ability to finalize a plan. But the ease with which a losing party can continue to comply with a judgment is obviously relevant to Rule 60(b)(5)'s equitable inquiry. *See Coldicutt*, 258 F.3d at 945 ("[H]ardship to the defendant [is] part of the *Rufo* analysis.").

5. The relief requested by EPA would harm Plaintiffs by nullifying the remedy to which they were entitled.

The district court found that the relief EPA seeks would prolong *actual, demonstrated* harm to Plaintiffs' residents and members, and the public generally. *See* E.R. 4 n.4, 9, 15, 30. This finding, which EPA entirely ignores, is supported by ample evidence.

The relief EPA seeks will lead to excess annual emissions of 1,810 metric tons of ozone-forming volatile organic compounds into the air Americans breath and 285,000 metric tons of the powerful greenhouse gas methane. These are the very harms EPA acknowledged and sought to reduce by promulgating the Emission Guidelines in the first place. 81 Fed. Reg. at 59,280. The record also includes compelling evidence of the health harms caused by EPA's ongoing delay in implementing those legal protections. S.E.R. 80–124 (for example, Dr. Elena Craft explained at page 12 of her declaration (S.E.R. 124) that "further delay in the full implementation . . . will result in more asthma attacks, hospitalizations, increased cancer risks, emergency room visits, and premature deaths in those

[areas close to covered landfills].”). These are the very dangers from which the Clean Air Act directs EPA to protect human health and welfare. 42 U.S.C. §§ 7401(b); 7411.

Indeed, even now, EPA does not dispute that its Emission Guidelines, and the pollution reductions they promise, are in the public interest. EPA only disputes *when* the agency should have to implement them. E.R. 4–6; *see also* 84 Fed. Reg. at 44,554. The district court correctly observed that EPA is attempting “to erase the commitment it made before and extend the deadline to comply by a period of several years, even while acknowledging that the harms that are the target of the rule are significant.” E.R. 36 (3:18–23).

6. EPA improperly seeks to sidestep the remedy imposed upon EPA for its violation.

The district court explained that one of the “unique conditions” of this case supporting denial of the Rule 60(b)(5) motion, *Bellevue Manor*, 165 F.3d at 1256, is that “EPA’s voluntary action here makes this case 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.” E.R. 4–5. EPA’s post-judgment change of law “sidesteps the Court’s order” and “presents a serious concern that . . . [the] agency can perpetually evade judicial review through amendment, even after a violation

has been found." *Id*. at 5; *see supra* at 13–14. Although EPA disputes this ground, its arguments are unpersuasive.[13]

Indeed, given the factual history of this case, the district court's concern was amply justified. *Contra* EPA Br. 24. The Delay Rule does "sidestep" the district court's order. If EPA believed the district court's remedial order was in error—that the steps needed to complete a federal plan were too "complex" or "time-consuming," 84 Fed. Reg. at 44,551, to be done in six months as the Delay Rule asserts—it could have appealed that order to this Court. It did not. Instead, EPA decided to attempt to nullify that order through a unilateral post-judgment change in law. Moreover, contrary to EPA's assertion that the district court's "judgment and subsequent orders were premised *solely* on" EPA's legal violation, Br. 16, the district court engaged in detailed fact-finding in setting a feasible remedy, which the agency now attempts to circumvent. E.R. 16–21. EPA's Delay Rule here is similar to the emergency regulation issued by the Department of Labor following a

[13] EPA is wrong to argue that the district court was obligated to grant relief under Rule 60(b) because it had held previously that the Act permits citizens to sue EPA for failing to comply with a duty imposed by a regulation prescribed under the Act. EPA Br. 18. The statutory-interpretation question whether such a duty is an "act or duty under this [Act]," 42 U.S.C. § 7604(a)(2), is entirely distinct from the question whether a new, post-judgment regulation warrants equitable relief under Rule 60(b)(5). There is no dispute here that EPA's new Delay Rule supplies enforceable law governing future state plan submissions, or that violations of that law by EPA could give rise to future citizen suits. EPA Br. 18. But that does not mean the Delay Rule can trump the *final judgment* of an Article III court.

judgment, which the D.C. Circuit dismissed as nothing more than "an attempt to circumvent a lawful order of th[at] court." *International Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 923 (D.C. Cir. 1984).

EPA asserts that it is "far-fetched," EPA Br. 24, to be concerned that, when the Delay Rule's deadline for promulgation of a federal plan approaches, EPA would engage in yet another effort to move the goal posts. But as explained *supra*, Statement of the Case, Parts I.B and II, the Delay Rule was merely the latest step in EPA's years-long campaign to avoid implementation of the Emission Guidelines. Certainly it was not illogical or implausible for the district court, which had witnessed EPA's serial attempts at delay over a period of 18 months as well as EPA's attempt to retroactively change regulatory deadlines the agency had set three years earlier, to find that rewarding EPA's conduct here would encourage similar abuses of judicial and administrative processes by dilatory federal agencies. To the contrary, the agency's history of extraordinary efforts to frustrate implementation of these specific public-health protections gave rise to a reasonable concern that those efforts would continue. This is the very sort of equitable concern that should (and did) inform the district court's discretionary decision.

Accordingly, in considering this concern about the agency undermining the court's authority, the district court did not create a "third-party-actor exception." *Contra* EPA Br. 17. Rather, it conducted a nuanced analysis that took into account

one of many relevant circumstances, as it should have, in determining whether EPA had met its burden of showing that continuing to apply the injunction would be inequitable. EPA asserts that *Agostini* "rejected" any notion that it matters who changed the law, EPA Br. 18–19, but the Supreme Court did no such thing. As EPA recognizes, it was the *Court*, not the party seeking relief, that changed the law in *Agostini*. Here, EPA did not merely lobby for a change in law; it unilaterally changed the law, and the agency's history of extraordinary efforts to frustrate implementation of these specific public-health protections gave rise to a reasonable concern that those efforts would continue. This is the very sort of equitable concern that should (and did) inform the district court's discretionary decision.

Chemical Producers v. Helliker, 463 F.3d 871 (9th Cir. 2006), supports this conclusion. *Contra* EPA Br. 22. That case addressed the question when a case becomes moot due to a change in law—a question that, like Rule 60(b)(5), calls for an equitable inquiry. And in that context, while this circuit follows a "near categorical rule of mootness [in] cases of statutory amendment," it adopts a more flexible, fact-specific approach to "continuing federal adjudicatory power" in cases of "administrative agency repeal or amendment." *Helliker*, 463 F.3d at 878. Like Rule 60(b), that flexible approach to mootness allows courts to take account of the relative ease of changing regulations and the unfortunate reality that agency defendants may act to evade judicial review of their unlawful behavior. *See, e.g.*,

Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen, 815 F.2d 1435, 1451–52 (11th Cir. 1987) (holding that an agency did not moot a suit challenging its regulations merely by issuing an amendment to the regulations in an effort to avoid an adverse judgment).

Finally, in an attempt to make its actions seem more reasonable in hindsight, EPA leans heavily, Br. 24–25, on its separate action to change the deadlines for developing Section 111(d) guidelines going forward. This post-hoc rationalization rings hollow. The fact that EPA decided, *thirty-three years* after Congress extended the statutory timetable for EPA's more complex planning obligations under Section 110 of the Act, 42 U.S.C. § 7410, to discretionarily align its regulatory deadlines for simpler planning obligations under Section 111, does not explain why it rushed a separate rulemaking to apply this new alignment retroactively *only in the case of the Emission Guidelines for municipal solid waste landfills*. As the district court well understood, EPA had been avoiding implementation of the Emission Guidelines for more than a year before the agency even *proposed* to align its Section 110 and 111 deadlines. *See supra* at pp. 6–9. Moreover, the rationale that EPA actually put forward for the Delay Rule's two-year period to promulgate a federal plan—that such a plan "involves a number of potentially time-consuming steps" and "may be . . . complex," 84 Fed. Reg. at 44,551—is squarely contradicted by the judicial record showing that EPA was

poised to issue it, something the Delay Rule completely ignores. *See supra* at pp. 11–12. EPA's reliance on its new view of decades-old congressional intent to support the agency's position in this case is misplaced and cannot support a conclusion that the district court abused its discretion.

7. The denial of EPA's motion is supported by the public interest and the inequities that would be created by vacating the injunction.

While there is no inequity in enforcing the district court's order, there is clear inequity in vacating it. In 2016, EPA promised Americans that it would reduce dangerous pollution from municipal solid waste landfills and do so swiftly. States, including Plaintiffs here, and their residents relied upon that promise, sought to enforce it, and secured a final judgment that would finally deliver those promised benefits. But now, without claiming that the pollution is harmless, or that reducing it is not in the public interest, or that the agency will face any difficulty in implementing its regulation to reduce that pollution, EPA tries to eliminate virtually all of those benefits.

To make matters worse, the relief sought by EPA would create inequities among residents of the several states. The residents of five states—those who submitted plans—get undisputed benefits from the Emission Guidelines, while the residents of the rest of the nation do not. Rule 60(b)(5) embodies the venerable rule that the same law applies to everyone—past law to past actions and future law to

future actions. *Cf. Railway Employees*, 364 U.S. at 648 (continuing to enforce consent decree would grant the beneficiaries a "protection" at the expense of a "privilege denied and deniable to no other" entity). EPA's attempt to use Rule 60(b)(5) here would do the precise opposite, applying a new law midway through remedying a long-past violation and perpetuating a patchwork of compliance with the four-year-old Emission Guidelines. *Cf. Committee for a Better Arvin v. EPA*, 786 F.3d 1169, 1173 (9th Cir. 2015) ("States and the federal government must work together to improve air quality for individuals *nationwide*." (emphasis added)).

In short, the circumstances overwhelmingly support the district court's denial of EPA's motion.

B. The circumstances of this case are substantially different from those of the cases on which EPA relies.

The circumstances just discussed make this case markedly different from all of EPA's cited authorities. Indeed, as EPA itself acknowledged below, this is "a case of first impression." S.E.R. 48.

The district court's injunction here remedied a single, long-past legal violation by requiring one discrete task. The procedural change in law on which EPA premises its request for relief is similarly targeted solely at that single

violation.[14] This case simply does not implicate the sort of "continuing supervision by the issuing court" that is the "source of the power to modify." *Railway Employees*, 364 U.S. at 647; *see Taylor*, 181 F.3d at 1025–26 (distinguishing cases because they "involve[ed] comprehensive consent decrees [subject to] ongoing court supervision and enforcement," including one that "generated a judicially administered structure comprising over ninety related court orders and extending to more than thirty discrete areas of prison administration").

First, the injunctions at issue in the cases EPA cites involved supervision of ongoing violations and applied to many potential violations. For example, the structural injunction at issue in *Agostini* forbade the use of public funds to provide services to certain students and, without modification, would have applied to new requests for funding. 521 U.S. at 212–14. In *Leavitt*, the injunction, without modification, would have applied old eligibility standards for foster care benefits to brand new claims "going forward." 523 F.3d at 1032. In *Toussaint*, this Court concluded that the district court's "structural injunction, which involves the

[14] EPA explains that, even after it finalizes a federal plan, the agency and regulated landfills must take further steps to reduce dangerous pollution. EPA Br. 31. That may be true, but the district court would have no role in supervising those subsequent actions. Rather, industry and EPA would perform them pursuant to EPA's own federal plan. Moreover, contrary to EPA's contention, EPA Br. 31, that "*none* of those duties or obligations is presently required under current law," *all* of these duties and obligations are required—the only question is whether EPA and industry take concededly in-the-public-interest steps now or in two years' time.

ongoing application of changing law to changing circumstances," assumed too much control over the day-to-day affairs of defendant prisons. 801 F.2d at 1084, 1089–90. *Wheeling Bridge* similarly regarded "a continuing decree" that "require[d] not only the removal of [a] bridge, but enjoin[ed] the defendants against any reconstruction or continuance." 59 U.S. at 431. The injunction at issue here does not purport to apply to any *new* emission guidelines—unlike the district court in *Donovan*, 737 F.2d at 72, the court did not enjoin EPA from applying new timing regulations going forward. It simply remedied one long-past violation with a discrete remedy that does not entail any ongoing judicial supervision once EPA finalizes its federal plan.

Second, the cases EPA cites all involved "chang[ing] the underlying *substantive* law." *Gilmore v. California*, 220 F.3d 987, 1002 (9th Cir. 2000) (emphasis added) (describing the change in law in *Wheeling Bridge*). *Agostini* regarded a new judicial interpretation of the Establishment Clause that permitted using public funds to provide remedial education in parochial schools. 521 U.S. at 208–09. A statutory change that permitted union shops was at issue in *Railway Employees*. 364 U.S. at 645–46. *Leavitt* addressed a statutory change to the eligibility standards for foster care benefits, 523 F.3d at 1032, and *Toussaint* concerned a change in decisional law regarding prisoners' constitutional liberty interest in remaining in the general population, 801 F.2d at 1089. Here, EPA did

not change the substance of the Emission Guidelines. It did not conclude that they are no longer in the public interest or that they do not address significant endangerment that the Clean Air Act requires EPA to reduce. All the agency has changed is its own regulatory deadline for implementing those substantive Emission Guidelines.

Third, in the cases EPA cites, the changes in law directly conflicted with the injunction or decree. For example, in *Agostini*, the new law permitting public funds to be used for remedial education in parochial schools directly conflicted with the court's injunction forbidding such use. 521 U.S. at 212–14. In *Leavitt*, the eligibility standard required by the injunction was "foreclose[d]" by the new requirement in the statute. 523 F.3d at 1029–30. Indeed, the *Leavitt* court specifically noted that it was faced with a change in law "of th[e] type," 523 F.3d at 1032, that makes compliance with final judgment "impermissible under federal law," *Rufo*, 502 U.S. at 388. So, too, with respect to the Supreme Court's 1855 decision in *Wheeling Bridge*, in which Congress declared the bridge whose construction had been enjoined to be a "lawful structure[]" and established it as a mail route for the U.S. Postal Service. 59 U.S. at 429. Continued enforcement of the injunction would have conflicted with the new statute, not least by barring the mail route Congress had established. By contrast, as explained *supra* p. 11, the change in law here—which requires promulgation of a federal plan *by* August 2021—does not

conflict with compliance with the injunction, which merely requires the already-developed plan to be promulgated sooner.

Those and other distinctions between the circumstances presented in EPA's authorities and this case matter. They bear directly upon whether retaining the district court's final judgment is "equitable." Fed. R. Civ. P. 60(b)(5). The circumstances surrounding changes in law are no more binary than those surrounding changes in facts; they are complex and nuanced. Ultimately, these nuances demonstrate the wisdom of this Court's decision in *Bellevue Manor* that the flexible *Rufo* standard "applies to *all* Rule 60(b)(5) petitions brought on equitable grounds," and that it is within the discretion of district courts to take "*all* the circumstances into account." *Bellevue Manor*, 165 F.3d 1249, 1256–57 (9th Cir. 1999) (emphasis added).

CONCLUSION

This Court should affirm the district court's denial of EPA's Rule 60(b) motion.

Dated: March 16, 2020

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
ROBERT BYRNE
SALLY MAGNANI
Senior Assistant Attorneys General
GARY TAVETIAN
DAVID A. ZONANA
Supervising Deputy Attorneys General
JULIA K. FORGIE
Deputy Attorneys General

*/s/ Elizabeth B. Rumsey**
ELIZABETH B. RUMSEY
Deputy Attorney General
1515 Clay Street, 20th Floor
Oakland, CA 94612
(510) 879-0860
liz.rumsey@doj.ca.gov

Attorneys for the State of California, by and through Attorney General Xavier Becerra and the California Air Resources Board

*I attest that all other parties on whose behalf the filing is submitted concur in the filing's content.

SUSANNAH L. WEAVER
MATTHEW LITTLETON
Donahue, Goldberg, Weaver & Littleton
1008 Pennsylvania Avenue SE
Washington, DC 20003
(202) 569-3818
susannah@donahuegoldberg.com
matt@donahuegoldberg.com

PETER ZALZAL
RACHEL FULLMER
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302
Telephone: (303) 447-7214
pzalzal@edf.org
rfullmer@edf.org

Attorneys for Environmental Defense Fund

For the STATE OF ILLINOIS
KWAME RAOUL
Attorney General of Illinois
DANIEL I. ROTTENBERG*
Assistant Attorney General
Environmental Bureau
Illinois Attorney General's Office
69 W. Washington St., 18th Floor
Chicago, Illinois 60602
(312) 814-3816
DRottenberg@atg.state.il.us

For the STATE OF NEW MEXICO
HECTOR BALDERAS
Attorney General of New Mexico
BILL GRANTHAM
Assistant Attorney General
201 Third Street NW, Suite 300
Albuquerque, New Mexico 87102
(505) 717-3520
wgrantham@nmag.gov

For the STATE OF MARYLAND
BRIAN E. FROSH
Attorney General of Maryland
LEAH J. TULIN
Assistant Attorney General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6962
ltulin@oag.state.md.us

For the STATE OF OREGON
ELLEN F. ROSENBLUM
Attorney General of Oregon
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street, N.E.
Salem, Oregon 97301-4096
(503) 947-4342
paul.garrahan@doj.state.or.us

For the COMMONWEALTH OF PENNSYLVANIA
JOSH SHAPIRO
Attorney General of Pennsylvania
MICHAEL J. FISCHER
Chief Deputy Attorney General
ROBERT A. REILEY
Assistant Director, Pennsylvania Department of Environmental Protection
Pennsylvania Office of Attorney General
Strawberry Square
Harrisburg, PA 17120
(215) 560-2171
mfischer@attorneygeneral.gov

For the STATE OF VERMONT
THOMAS J. DONOVAN, JR.
Attorney General of Vermont
NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Vermont Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3171
nick.persampieri@vermont.gov

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-17480

I am the attorney or self-represented party.

This brief contains 10,743 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: s/ Elizabeth B. Rumsey **Date:** March 16, 2020