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

OPPOSITION TO MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

As it has for two and a half years, the Environmental Protection Agency ("EPA" or "the agency") seeks to delay implementing its own regulations that reduce air pollution from municipal solid waste landfills. This time, EPA seeks a stay pending appeal of the district court's discretionary, fact-bound decision not to vacate a final judgment remedying EPA's failure to meet its 2017 deadline to implement the landfill standards. That unappealed judgment, however, simply requires the agency to promptly finalize a federal plan (for states that declined to submit their own plans) to implement standards that EPA itself explained would significantly reduce emissions of potent greenhouse gases and harmful smog-forming and hazardous air pollutants. That requirement harms no one (least of all EPA), and it undisputedly benefits public health and welfare. The district court properly exercised equitable discretion to deny EPA relief from judgment under Federal Rule of Civil Procedure 60(b), a decision that this Court will review only for abuse of discretion. There is no basis for this Court to give the agency the further delay it seeks under the guise of a stay pending appeal.

BACKGROUND

EPA issued standards for landfill pollution under Section 111 of the Clean Air Act, 42 U.S.C. § 7411(b) (the "Act"). Congress enacted Section 111 in 1970 because it "was dissatisfied with air pollution control efforts at all levels of government and was convinced that relatively drastic measures were necessary to protect public health and welfare." 40 Fed. Reg. 53,340, 53,342–43 (Nov. 17, 1975); *id.* at 53,343 (demanding "swift and aggressive action"). EPA regulates new stationary sources of pollution (e.g., landfills) directly, and it sets standards for existing sources that states may implement

via EPA-approved plans. 42 U.S.C. § 7411(b), (d). For states that do not timely submit plans, EPA must issue a federal plan. *Id.* § 7411(d)(2).

In 2016, EPA strengthened its standards for existing landfills, the nation's third largest anthropogenic source of methane emissions. 81 Fed. Reg. 59,276, 59,281 (Aug. 29, 2016) ("Emission Guidelines"). As EPA noted, methane is a more potent greenhouse gas than carbon dioxide, *id.* at 59,282–83, and immediate reductions in methane emissions are critical to mitigating climate change. EPA found that these new standards—which remain in effect—would "significantly reduce emissions" of methane and other landfill gases, including harmful volatile organic compounds and hazardous air pollutants. *Id.* at of 59,279. To that end, the Emission Guidelines required that: (a) states submit plans to implement the new standards by May 30, 2017; (b) EPA review and either approve or disapprove timely submitted plans by September 30, 2017; and (c) EPA promulgate a federal plan by November 30, 2017, for any states without approved plans. *Id.* at 59,286, 59,304. Had EPA complied with its regulatory duties, by the end of 2017 every state in the nation would have had an approved state or federal plan to reduce dangerous landfill emissions.

Instead, at industry's behest, *see* Ex. A to Decl. of B. Levitan, attached, EPA began a campaign to avoid implementing the Emission Guidelines. On May 5, 2017, *before* state plans were due, EPA announced plans to stay the new standards for 90 days. *See* 82 Fed. Reg. 24,878 (May 31, 2017). After issuing that stay, *id.*, EPA sent the Office of Management and Budget ("OMB") a proposed rule extending the stay beyond 90 days. *See* Pls.' Opp. to R. 60(b) Mot. 3 & n.5, Dkt. 114 ("60(b) Opp.") (citing http://reginfo.gov/public/do/eAgendaViewRule?pbId=201704&RIN=2060AT64). But EPA

never proposed that rule. Rather, EPA announced that states need not be concerned about submitting plans; that EPA would not "prioritize the review of" plans it received; and that EPA was "[not] working to issue a Federal Plan" for states that failed to submit a satisfactory plan consistent with the Emission Guidelines. *Id.* at 4 & n.6.[1]

Because their States, residents, and members were harmed by EPA's unlawful actions, Plaintiffs filed a citizen suit to enforce EPA's legal duties under the Act. Their complaint presented clear-cut violations of date-certain deadlines. EPA had just told the U.S. Court of Appeals for the District of Columbia Circuit (in a challenge to the 90-day stay) that the Act gave the district court jurisdiction to remedy such violations, Resp. Br. 37, *NRDC v. Pruitt*, No. 17-1157 (D.C. Cir. Jan. 22, 2018), No. 1714147; EPA nonetheless filed an unsuccessful motion to dismiss the complaint for lack of jurisdiction, Dkt. 28, which slowed the case by seven months.

Meanwhile, two days before the district court heard argument on EPA's motion to dismiss, Acting Administrator Andrew Wheeler rushed out a proposed rule to extend the deadlines at issue to give states until August 29, 2019 to submit their plans and EPA until at least August 2021 to issue a federal plan. 83 Fed. Reg. 54,527, 54,531 (Oct. 30, 2018); *see also* 60(b) Opp. at 4 & n.7.[2] Based on that proposed rule, EPA filed a motion

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[1] 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-nspseg-landfill-rules-mon/508484).

[2] Citing OMB, Internal Email 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*, Regulations.gov, https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0696-0003) (noting OMB's "very rushed" three-day review of EPA's proposed rule).

to stay, which the court denied on December 21, 2018. Dkt. 82.

EPA ultimately filed a summary judgment motion that did not contest liability. Dkt. 92. Instead, EPA challenged the standing of eight sovereign states—an argument the district court determined was precluded by "clear[ly] applicab[le]" law, Dkt. 96 at 7–8. In the alternative, EPA requested a remedy that would double (to 12 months) the time afforded by the Emission Guidelines to finalize a federal plan, on top of the existing two-year delay. *Id.* at 13. The court concluded that six months, until November 6, 2019, was a "feasible" timeline for EPA to promulgate its overdue federal plan, *id.* at 9, 14, and entered judgment to that effect on May 6, 2019. Dkt. 97.

EPA did not appeal that judgment to this Court. Instead, at long last, EPA began implementing the Emission Guidelines. It reviewed and approved the state plans submitted by five states prior to the district court's judgment. EPA also published a proposed federal plan to govern the remaining states. 84 Fed. Reg. 43,745 (Aug. 22, 2019). That proposed plan is a straightforward application of the standards EPA "specifically and explicitly set forth" in the Emission Guidelines three years prior. *Id.* at 43,756. EPA also made it clear that a federal plan does not prevent states from submitting, or EPA from approving, any state plans submitted in the future. *Id.* at 43,749.

Only four days after publishing the proposed federal plan, however, EPA finalized its proposal to reset the implementation deadlines. 84 Fed. Reg. 44,547 (Aug. 26, 2019) (the "Delay Rule"). The Delay Rule applies *solely* to implementation of the landfill guidelines. It does not alter the standards; but it grants EPA until August 2021 or later to issue a federal plan. *Id.* at 44,547, 44,549. The "rationale" for the Delay Rule's two-year federal plan development period was that it "involves a number of *potentially* time-

consuming steps" and "*may* be … complex." *Id.* at 44,551 (emphases added).

EPA then moved the district court under Rule 60(b) for relief from the portion of the judgment that required EPA to finalize the federal plan by November 6, 2019. Dkt. 109. Applying the undisputed standard articulated in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), for a Rule 60(b) motion premised on a change in law, the court determined that EPA had not carried its burden to show entitlement to relief. Order Denying Defs.' R. 60(b) Mot. to Alter J. at 4, Dkt. 124 ("60(b) Order"). "[I]n its discretion," the court "f[ound] that the situation presented here, where EPA undisputedly violated the [original deadline], 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." *Id.* The court then denied EPA's motion to stay enforcement of the final judgment pending EPA's appeal of the Rule 60(b) ruling, concluding that, for reasons discussed below, EPA had not met the standard for extraordinary relief. Order Denying Mot. to Stay, Dkt. 139 ("Stay Order").

PREREQUISITES FOR A STAY PENDING APPEAL

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotations and citations omitted). A stay applicant must make a "strong showing" that it is likely to succeed on the merits, demonstrate irreparable injury absent a stay, and establish that both the balance of the hardships and the public interest favor a stay. *Id.* at 426. A movant asserting "serious questions" on the merits must show that the "balance of hardships tip sharply" in its favor. *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011).

ARGUMENT

I. EPA WILL NOT SUCCEED ON THE MERITS BECAUSE THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING RULE 60(b)(5) RELIEF.

This Court reviews a denial of a Rule 60(b) motion under the "deferential abuse of discretion" standard. *Wood v. Ryan*, 759 F.3d 1117, 1119 (9th Cir. 2014). The Court first considers *de novo* whether the district court applied the correct legal standard. *See United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc). If it did, this Court will reverse the ruling of the district court only if it is "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Id.* This Court cannot reverse "absent a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors." *Valdivia v. Schwarzenegger*, 599 F.3d 984, 988 (9th Cir. 2010). There was no abuse of discretion here; far from being illogical, implausible, or without support in the record, the district court's discretionary decision was entirely correct.

A. The district court applied the correct legal standard when it considered the totality of the circumstances before denying EPA relief.

In an attempt to convert a multi-factor equitable judgment into a one-factor legal test subject to *de novo* review, EPA argues that its post-judgment change in the regulatory deadline deprived the district court of discretion to deny relief under Rule 60(b)(5). Appellants' Mot. for Stay Pending Appeal ("Mot.") at 8–10, ECF 12-1. Put otherwise, according to EPA, the *only* circumstance to consider here is that the agency—a party on the short end of a final judgment—opted, in lieu of an appeal, to try to negate the judgment by moving back its own regulatory deadline. As both this Court and the Supreme Court have recognized, EPA is wrong.

The rigid rule proposed by EPA is inimical to the flexible analysis mandated by the Federal Rules. As the Supreme Court has recognized, "Rule 60(b) . . . authorizes *discretionary* judicial revision of judgments." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233 (1995) (emphasis added). And Rule 60(b)(5) expressly states that a district court "*may* relieve a party from a final judgment" if "applying it prospectively is no longer equitable." (Emphasis added.) Because "equity demands a flexible response to the unique conditions of each case," in applying Rule 60(b)(5), a district court must take "all the circumstances into account" before granting prospective relief from judgment. *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249, 1256 (9th Cir. 1999).

In keeping with this approach, the Supreme Court has held that a post-judgment change in law—even statutory law—does not, "in and of itself, provide a basis for modifying a decree . . . ." *Rufo*, 502 U.S. at 390; *see also id.* at 383 (following a change in law, "district court[s] should exercise flexibility in considering" requests for relief; "it does not follow that a modification will be warranted in all circumstances"). Relief from a judgment is *never* automatic based on a change in law. *See Taylor v. United States*, 181 F.3d 1017, 1024 (9th Cir. 1999) (en banc) (finding that while "a court may decide in its discretion to reopen and set aside a consent decree under [Rule] 60(b)," even Congress cannot command a federal court to reopen a judgment). As with any Rule 60(b) motion, the district court must consider all the circumstances before deciding whether a particular change in law warrants revision of a particular final judgment.

Nor need there be "a continuing violation of federal law" for a final judgment to be enforceable. *Jeff D. v. Kempthorne*, 365 F.3d 844, 852 (9th Cir. 2004); *see also Rufo*, 502 U.S. at 388 (Rule 60(b) relief is discretionary where "the statutory or decisional law has

changed to make legal what the decree was designed to prevent"). To the contrary, this Court has recognized there is a "strong federal interest in ensuring that the judgments of federal courts are meaningful and enforceable," whether or not there is an "ongoing violation." *Jeff D.*, 365 F.3d at 852–53; *see also Frew v. Hawkins*, 540 U.S. 431, 440 (2004).

Indeed, the suggestion that a federal agency may prohibit a district court from enforcing a final judgment against it simply by changing its regulations post judgment is incompatible with the constitutional separation of powers. *See Taylor*, 181 F.3d at 1026. It is therefore well-settled that when there are two presumptively valid rules of law—a final judgment and final regulation—Rule 60(b) places the burden on the party seeking relief to show that it is *inequitable* to enforce the judgment and affords the district court *discretion* to decide whether that burden is carried. *See Rufo*, 502 U.S. at 383, 393.

EPA fails to reconcile its assertion that the judgment must be vacated as a matter of law because of a new regulation it issued with separation-of-powers principles, the flexible nature of Rule 60(b)(5), or the decisions from this Court and the Supreme Court expressly recognizing that a change in the law does not automatically require a revision of a final judgment. Instead, EPA relies on two Ninth Circuit cases that the agency did not cite in its Rule 60(b) motion: *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), and *California Department of Social Services v. Leavitt*, 523 F.3d 1025 (9th Cir. 2008). Neither case can support the tremendous weight that EPA puts upon them. Indeed, both presented strikingly different circumstances and, thus, are readily distinguishable.

In *Toussaint*, after holding that inmates have a due-process right to remain in the general prison population, the district court entered a "structural" injunction. 801 F.2d at 1085, 1090. That injunction "govern[ed] conditions of confinement and segregation"

at two prisons, which required "the ongoing application of changing law to changing circumstances" and was directed at "events to come," as opposed to "rights fully accrued." *Id.* (quotations and citations omitted). Following judgment, the Supreme Court held in a different case that inmates *do not* have a liberty interest in remaining in the general population, and, based on this change in the law, the prisons sought relief under Rule 60(b). *Id.* at 1091–92. In ruling that the law-of-the-case doctrine did not preclude equitable relief, this Court cited a D.C. Circuit case for the proposition that it is an abuse of discretion not to change an injunction that is founded on superseded law. *Id.* at 1090. Similarly, *Leavitt* involved ongoing judicial supervision of eligibility for foster-care benefits. After passage of a statute amending eligibility standards, this Court "[could] not say that the district court abused its discretion by" using the congressionally mandated new eligibility standard "for all cases *going forward*." 523 F.3d at 1032 (emphasis added).

Toussaint and *Leavitt* are clearly distinguishable. Here, there was no structural injunction entailing ongoing supervision of *future* legal violations. The district court did not require EPA to apply regulations that no longer exist to forthcoming emission guidelines or enjoin EPA from changing future deadlines that govern landfill standards. It simply remedied a single, past violation: EPA's failure to meet valid, enforceable deadlines. Thus, in sharp contrast to *Toussaint* and *Leavitt*, the judgment in this case does not require prospective application of a legal requirement that no longer exists. *Toussaint* is also distinguishable because it addressed a different issue (law-of-the-case) and a different superseding event (Supreme Court precedent). Nor did either case purport to set out a general method for applying Rule 60(b)—which is no doubt why subsequent decisions from this Court have held that there is no automatic relief based on a change in

the law without mentioning *Toussaint* or *Leavitt*.

EPA's reliance on *NAACP, Jefferson County Branch v. Donovan*, 737 F.2d 67 (D.C. Cir. 1984), is also misplaced. *See* 60(b) Order at 5. As in *Toussaint* and *Leavitt*, the injunction in *NAACP* applied prospectively, in that instance to the agency's future minimum-wage calculations. *NAACP* was not even a Rule 60(b) case, and the distinction matters. *Contra* Mot. at 12. It addressed whether the district court had applied the correct legal test in *enjoining* the defendant agency from enforcing a new regulation. The district court here has not enjoined the Delay Rule (and EPA's deadlines for state plan submission and review continue to govern for plans submitted following judgment).

Here, the final judgment from which EPA seeks relief does not require prospective application of regulations that no longer exist. *Contra* Mot. at 1. Indeed, it would be impossible to hold EPA to its former deadline, which lapsed in 2017. It is true that, while extant law requires the agency to promulgate a federal plan, no current regulation requires promulgation to occur by January 14, 2020. *See* 60(b) Order at 5 (the new regulations "delay EPA's obligations, rather than changing them"). But a final "federal court order that springs from a federal dispute and furthers the objectives of federal law," *Frew*, 540 U.S. at 438, does so require, and that order "may be enforced." *Id.* at 440.[3]

Finally, 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

[3] EPA notes that, even after it finalizes a federal plan, the agency and regulated landfills must take further steps to reduce pollution, Mot. at 14, but the district court will not supervise any of those steps.

Act. *See* Mot. at 10. 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).[4] 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. *See* Mot. at 10. But that does not mean the Delay Rule can trump the *final judgment* of an Article III court. That decision—whether a final judgment or a final rule prevails—lies squarely within the discretion of the district court.

B. The district court properly considered all the relevant circumstances and did not commit an error of judgment.

To decide whether EPA met its burden to show that continued enforcement of a final judgment would be inequitable, the district court had to "take all the circumstances into account," *Bellevue Manor*, 165 F.3d at 1256; the court could not blind itself to the facts as EPA urged it (and now this Court) to do. Under the particular factual and legal

[4] EPA never disputed it had a judicially enforceable duty to implement the Emission Guidelines; at issue was whether the date-certain deadlines in EPA's regulations gave rise to a "duty under [the Act] which is not discretionary." 42 U.S.C. § 7604(a). Even if no such duty existed, Plaintiffs could have sued under the Act's general prohibition on "agency action unreasonably delayed," the district court likely would have deemed EPA's multi-year delay unreasonable and entered a judgment imposing a deadline. *See, e.g.*, *In re A Cmty. Voice*, 878 F.3d 779, 787–88 (9th Cir. 2017). EPA admitted below that a new regulatory deadline could not override that judicial deadline. *See* Dkt. 129 at 9 n.3. Yet EPA reasons here that the district court's deadline must yield to the Delay Rule because timely implementation of the Emission Guidelines is so important that the agency had self-imposed a date-certain deadline from the start. That reasoning is backwards. If an administrative agency cannot use its regulatory powers to overturn a judicial deadline prompted by unreasonable delay, it should not be able to use them to overturn a judicial deadline prompted by noncompliance with a date-certain deadline.

circumstances here, the district court's discretionary decision was not "illogical," "implausible," or "without support," *Hinkson*, 585 F.3d at 1251. To the contrary, it was well supported, and EPA is highly unlikely to succeed in overturning that decision on appeal.

First, the district court reasoned that "EPA undisputedly violated the [law]," and that the agency's action to change that law after judgment was not meant to "remedy its violation," but in effect to perpetuate the violation through further delay. 60(b) Order at 4. After more than a year of supervising this case, the district court understood that EPA's history of delay and evasion long preceded the Delay Rule.

Second, the district court found that EPA's delay continues to harm Plaintiffs. *See infra* at 18. EPA does not dispute that its Emission Guidelines, and the pollution reductions they promise, are in the public interest, Mot. at 18; EPA only disputes *when* they should be implemented. 60(b) Order at 4–6; *see also* 84 Fed. Reg. at 44,554 (emphasizing that the Delay Rule "does not change the stringency of the emission reduction requirements promulgated in the [Emission Guidelines]"). 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." Dkt. 122 ("Tr.") at 3:18–23.

Third, the district court found no harm to the states that did not submit implementation plans. "Issuing a final federal plan poses no obstacle to EPA's [Delay] Rule" because a federal plan "does not prevent states from submitting, and EPA from approving, new state plans." 60(b) Order at 6. Moreover, only one state (Virginia) submitted a plan after final judgment but before the Delay Rule's submission deadline. Tr. 9:23–24. Because EPA is poised to approve Virginia's plan, *see* 84 Fed. Reg. 57,838 (Oct.

29, 2019), the judgment should not affect any state that submitted an implementation plan by the Delay Rule deadline.

Fourth, the district court found no injury to EPA because it observed that EPA is prepared to comply with the court's judgment by timely issuing a federal plan, which EPA has conceded "is not a significant regulatory action." 60(b) Order at 5–6 (citing 84 Fed. Reg. at 43,755); *see also id.* at 6 (noting the "limited work remaining"). In response, EPA has not claimed it will be difficult (much less impossible) to meet the district court's deadline. Instead, it argues that the court erred by considering the agency's ability to finalize a plan by the court-imposed deadline. Mot. at 12. But the ease with which a losing party can comply with a final judgment is obviously relevant to Rule 60(b)(5)'s equitable inquiry.

Fifth, the district court considered that its judgment does not compel EPA to do anything that the Delay Rule renders impermissible (because the Rule imposes no new or heightened obligations on *anyone*). 60(b) Order at 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 can comply with *both* the final judgment and the Delay Rule by finalizing the federal plan on January 14, 2020.

Sixth, the district court explained that one of the "unique conditions," *Bellevue Manor*, 165 F.3d at 1256, of this case that weighs against granting relief from judgment is that the losing party itself effected the post-judgment change in law. "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." 60(b) Order at 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. Given the factual history of this case, this concern is amply justified. *Contra* Mot. at 13.

This circumstance, where EPA is trying to be both a player and the referee, heightens the risk of impingement on the constitutional separation of powers. EPA's view—that an Article II agency may withdraw an Article III court's power to enforce a final judgment merely by altering applicable deadlines—would open the door to serial abuses of judicial and administrative processes by dilatory federal agencies. The district court correctly noted that EPA's efforts to avoid implementing the Emission Guidelines preceded its proposal to change the regulatory timetable. The Delay Rule, which applies *exclusively* to these Emission Guidelines, is merely the latest step in EPA's years-long campaign to avoid implementing these health-protective regulations.

That EPA independently 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 align its regulatory deadlines for planning under Section 111 does not explain why the agency took a further step aimed solely at these Emission Guidelines, to apply the alignment *retroactively*. Moreover, were it not for EPA's years of illegal delay starting in 2017, a 2019 change in regulatory deadlines for implementing Section 111 standards could not have affected implementation of the Emission Guidelines because they already would have been implemented. EPA's reliance on decades-old congressional intent to support its position in this case is therefore misplaced.

Lastly, the rationale 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," Delay Rule, 84 Fed. Reg. at 44,551 (emphases added)—is squarely contradicted by the judicial record. The Delay Rule does not even mention that EPA already has taken almost all of the necessary steps to issue a federal plan that is based on a straightforward application of the Emission Guidelines. *See supra* at 4. This fact lends further support to the district court's conclusion.

II. EPA WILL NOT BE IRREPARABLY HARMED ABSENT A STAY.

EPA will not suffer irreparable harm absent a stay. The final judgment requires only that EPA execute its long-overdue duty to implement regulations the agency itself deems necessary to address air pollution that endangers public health and welfare. EPA does not allege any concrete harm from implementation of its regulations, presumably because only "limited work remain[s]" in finalizing its federal plan. 60(b) Order at 6. Instead, EPA tries to manufacture irreparable injury on the theory that enforcing the district court's judgment following promulgation of the Delay Rule would offend abstract principles like the constitutional separation of powers and cooperative federalism. These assertions have no basis.

A. Enforcement of the district court's final judgment will not offend separation of powers, much less cause EPA irreparable harm.

EPA tries to turn the district court's separation-of-powers concern in its favor, arguing there is "inherent harm" in "preventing it from enforcing [deadline] regulations that Congress found it in the public interest to direct that agency to develop and enforce." Mot. at 15–16. As an initial matter, as explained *supra* at 14, the circumstances here cast significant doubt on EPA's suggestion that the Delay Rule stems from the

agency's separate regulation governing future Section 111(d) deadlines. Moreover, EPA's argument disregards the *other* landfill regulations at issue here: the Emission Guidelines, promulgated by the agency pursuant to Congress's statutory mandate "to take swift and aggressive action" to reduce harmful pollution. 40 Fed. Reg. at 53,342–43. The district court's judgment does not "prevent[] the EPA from enforcing any substantive regulation." Stay Order at 3 n.3. Indeed, it takes some cheek for EPA to complain that it is being "prevented" from implementing its Delay Rule, when the genesis of this litigation is the agency's steadfast and unlawful *refusal to implement* substantive regulations to control emissions that are the driving concern of the enabling statute.

EPA's false claim that retaining the district court's final judgment "essentially nullifies EPA's valid regulatory actions," Mot. at 16, exposes the agency's own assault on the separation of powers. EPA's Delay Rule seeks to essentially nullify the district court's final judgment. Neither separation-of-powers principles nor Rule 60(b) dictates whether the court's final judgment or the agency's post-judgment regulation should govern. In any event, EPA does not cite any authority for the proposition that a generalized affront to the separation of powers constitutes "irreparable" harm warranting a stay.

B. Enforcement of the district court's judgment will promote, rather than harm, cooperative federalism.

Although no state came to EPA's defense in this case, EPA also invokes, purportedly on states' behalf, "the principle of cooperative federalism that is central to the Act." Mot. at 16. But EPA does not explain how it may establish irreparable injury by arrogating to itself injuries suffered by other parties. Mot. at 16–17.

In any event, states will not be injured absent a stay. Under both the Emission Guidelines and the Delay Rule, the deadline for state plan submissions has passed.[5] States that chose not to submit required plans will now benefit from the forthcoming federal plan. Contrary to EPA's suggestion, Mot. at 16–17, the time after the state plan submission deadline is not a grace period for late state plans—it is time for EPA to promulgate a federal plan, which it has all but finished here. States that failed to meet the Delay Rule's plan submission deadline, and landfills within those states, have no legally protected interest in being free from a federal plan. It does not promote cooperative federalism to require states with approved plans to protect their citizens from dangerous pollution while EPA needlessly withholds from other states the assistance (i.e., the federal plan) that Congress guaranteed.

C. A stay pending appeal would grant EPA the relief it seeks on appeal rather than preserve the status quo ante.

EPA briefly argues that it might be irreparably harmed if its appeal is deemed moot after it promulgates a federal plan. Mot. at 17. But the delay EPA seeks now is essentially the same as the relief it seeks on appeal. Consequently, if this Court grants a stay pending appeal, EPA will receive much or all of the delay that it sought in its Rule 60(b) motion (and has sought through multiple delay tactics for nearly three years). The district court properly concluded in its equitable discretion that such relief was not warranted. The status quo here—which this Court should preserve—is the district court's

[5] As noted above, EPA has already approved or proposed to approve the plans of every state that submitted one prior to the deadline set by the Delay Rule. *Supra* at 12–13.

final judgment, which EPA *did not appeal*, and which requires EPA to implement its Emission Guidelines by promulgating a federal plan by January 14, 2020.

III. THE PUBLIC INTEREST AND BALANCE OF EQUITIES TIP DECISIVELY AGAINST A STAY.

In contrast to EPA's inability to demonstrate harm to the agency, the relief EPA seeks would prolong *actual*, *demonstrated* harm to the States and to the public. The district court found abundant evidence that further delay in implementing the Emission Guidelines will harm Plaintiffs' residents and members, and the public generally. *See* Dkt. 96 at 2, 8 (summary judgment order detailing harms); 60(b) Order at 4 n.4 (noting that "Plaintiffs established harm stemming from the EPA's failure to promulgate a federal plan"); Stay Order at 3 (noting that Plaintiffs "continue to be harmed by the delay in implementing the Emission Guidelines"). These actual injuries—including 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—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. In declarations submitted to the district court, Plaintiffs have clearly demonstrated how these excess emissions harm them as well as the public at large. *See* Decls. of Dr. Rupa Basu, Dkt. 87-14; Philip Mote, Dkt. 87-15; Glenn Patterson, Dkt. 87-16; George S. Aburn, Jr., Dkt. 87-17; Trisha Sheehan, Dkt. 87-19; Denise Fort, Dkt. 87-20; and Elena Craft, Dkt. 93-1 ("[F]urther 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].").

EPA now attempts post-hoc to distance the agency from its own findings, contending that the number of impacted landfills (93) is "small." Mot. at 18. But EPA itself has said the emissions reductions at stake are "significant," 81 Fed. Reg. at 59,279, and that the regulations were needed to "improve air quality and reduce the potential for public health and welfare effects associated with exposure to landfill gas emissions." *id.* at 59,276. EPA has not changed this conclusion. Likewise, the fact that *other* regulations of *other* landfill sources and *other* pollutants exist, Mot. at 18, does not alter EPA's finding that the Emission Guidelines were needed. The agency cannot dispute its own evidence and conclusions without any new facts or analysis.[6]

Rather than explain how delaying the federal plan and associated emission reductions is in the public interest, EPA asserts that the public's interest necessarily merges with EPA's. Mot. at 19. But the authorities on which EPA relies do not support that sweeping proposition, which is particularly inapt here. The Supreme Court has previously "merge[d]" its consideration of the third and fourth stay factors "when the Government is the opposing party." *Nken*, 556 U.S. at 435 (2009). Here, however, EPA is the moving party. And though a court's consideration of irreparable harm to federal interests "*may*, in practical terms, merge with consideration of the public interest," *Sierra Club v. Trump*, 929 F.3d 670, 705 (9th Cir. 2019) (emphasis added), "[p]ublic interest is a concept to be considered broadly," *id.*, and parochial interests of the government *qua* government are not a stand-in for all "the interests of the public at large," *Trump v. Int'l*

[6] Indeed, since the agency promulgated the Emission Guidelines, it co-wrote a major report urging immediate action to reduce emissions of greenhouse gases, to avoid the most severe consequences of climate change. Ex. 4 to Dkt. 85, USGCRP, *Fourth National Climate Assessment, Volume II* (Nov. 23, 2018).

Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (citation omitted); *Sierra Club*, 929 F.3d at 705 (considering "the respective impacts" of a stay on not only the government itself but also "the general public"). There is no good reason to equate the public interest with EPA's parochial interest in delay, particularly given that numerous governmental parties *oppose* a stay. *Cf. Fed. Trade Comm'n v. Qualcomm Inc.*, 935 F.3d 752, 756 (9th Cir. 2019) (separately considering the public interest and hardship to the government where "the government itself is divided about the propriety of the judgment and its impact on the public interest").

The "strong public interest in the timeliness and finality of judgments," *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009) (quotations and alterations omitted), also weighs strongly in favor of denying a stay. Here, in a final judgment, the district court remedied EPA's multi-year unlawful refusal to implement its own regulation that protects the public health and welfare. EPA has *never* articulated a practical reason for its delay campaign, instead relying entirely on muscular, abstract assertions of executive authority. Its motion for a stay pending appeal, founded on an incorrect view that an Article II agency can deprive an Article III court of its equitable discretion to determine whether relief from a final judgment is warranted, is merely the latest step of this campaign. Far from "tip[ping] sharply in EPA's favor, *Leiva-Perez*, 640 F.3d at 970, the hardship factors weigh decisively against rewarding EPA with further delay.

CONCLUSION

This Court should deny EPA's motion for a stay pending appeal.

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*As certified below, all other parties on whose behalf the filing is submitted concur in the filing's content.

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CERTIFICATE OF COMPLIANCE

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ATTESTATION OF CONCURRENCE

1. This document complies with the 20-page limit of Circuit Rule 27-1(1)(d).

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond font.

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

Dated: January 2, 2020

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