WRINKLING CITIZEN SUITS: *CALIFORNIA V. EPA* (9TH CIR. 2020) AND CLEAN AIR ACT UNDERENFORCEMENT

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Introduction

President Ronald Reagan's first Environmental Protection Agency ("EPA") Administrator, Anne Gorsuch Burford, was reportedly asked by the President's staff if she was willing "to bring EPA to its knees."[1] Burford's time as Administrator was subsequently characterized by undercutting environmental regulations and enforcement.[2] The Reagan Administration's underenforcement of environmental laws led to a proliferation of citizen suits under the Clean Air Act[3] ("CAA") and other statutes, aiming to hold the federal government accountable for its environmental duties.[4] President Donald Trump's first EPA Administrator, Scott Pruitt, applied a similar playbook: he attempted an

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1. Richard Lazarus, The Making of Environmental Law 101 (2004) (quoting Anne Burford, Are You Tough Enough? 84 (1986)).
2. *Id.*
3. Clean Air Act Amendments of 1970, Pub. L. 91–604, 84 Stat. 1706.
4. *See* Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 Temp. Env't L. & Tech. J. 55, 56 (1989); Madeline June Kass, *Presidentially Appointed Environmental Agency Saboteurs*, 87 UMKC L. Rev. 697, 723 (2019); *see also infra* note 18.

unprecedented series of regulatory rollbacks that involved undermining more than thirty environmental rules in just four months.[5] Again, citizen suits helped to prevent EPA from shirking its statutory responsibilities.[6]

Citizen suits are a key feature of the CAA designed to protect against exactly the kind of agency abdication practiced by the Reagan and Trump Administrations.[7] Yet courts have steadily weakened citizen suits' power. In *California v. EPA*,[8] the Ninth Circuit struck another blow. Led by California, a group of states sued EPA in 2018 using the CAA's citizen suit provision;[9] they challenged EPA's failure to enforce by the regulatory deadline an Obama-era rule imposing new landfill emissions guidelines.[10] The district court ordered a compliance deadline, but EPA amended its regulations to give itself more time and asked the district court to modify its injunction under Federal Rules of Civil Procedure Rule 60(b).[11] The district court declined.[12] In a case of first impression, the Ninth Circuit reversed, holding that a district court has no equitable discretion to modify an injunction when the underlying legal basis for a decision has changed, even when that change results from a party's own actions. In short, if an agency alters its own rules to circumvent a court order, the court is powerless to modify that order.

Although the Ninth Circuit's decision in *California v. EPA* answers a narrow question about equitable discretion under Rule 60(b), it forms another barrier to the effective use of the CAA's citizen suit provision. Part I of this Comment provides a brief history of this provision, focusing on its use in en-

5. Kass, *supra* note 4, at 708 (citations omitted).

6. *See generally* Bonnie Heiple et al., *Environmental Litigation Alert: Citizen Suits Challenge Rollbacks, Replacements and Project Approvals*, JDSUPRA (Apr. 1, 2019), https://perma.cc/MG45-B3PE (noting that *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), and other high-profile cases were initially filed as citizen suits); Sara Mogharabi et al., *Environmental Citizen Suits in the Trump Era*, AM. BAR ASS'N NAT. RES. & ENV'T, Fall 2017 (predicting this trend in the early months of the Trump Administration).

7. *See infra* note 18.

8. 978 F.3d 708 (9th Cir. 2020).

9. 42 U.S.C. § 7604.

10. *See generally* Complaint, California v. EPA, 385 F. Supp. 3d 903 (N.D. Cal. 2019) (No. 18-cv-03237) (challenging Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,276 (Aug. 29, 2016) (to be codified at 40 C.F.R. pt. 60)). The eight states are California, Illinois, Maryland, New Mexico, Oregon, Pennsylvania, Rhode Island, and Vermont. California v. EPA, 385 F. Supp. 3d at 906 n.1.

11. California v. EPA, 978 F.3d at 712. Rule 60(b) provides a narrow set of reasons under which a losing party may seek the court's permission to alter an otherwise final judgment or order. EPA argued for relief under Rule 60(b)(5), which states that "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." FED. R. CIV. P. 60(b)(5).

12. California v. EPA, 978 F.3d at 712.

forcing deadlines and by environmental justice[13] plaintiffs to ensure enforcement in those communities. Part II summarizes the procedural posture, reasoning, and holding in *California v. EPA*. Part III illustrates how the decision allows for end-runs around the CAA's citizen suit provision and makes the achievement of environmental justice more challenging, both in this case and in future ones. Part IV argues that the decision further chips away at the CAA's citizen suit provision by invoking separation of powers to permit presidential underenforcement of the CAA.

I. The Clean Air Act's Citizen Suit Provision

The CAA set out ambitious goals "to protect and enhance the quality of the Nation's air resources" and "promote the public health and welfare and the productive capacity of its population."[14] Section 111,[15] which EPA relied on to promulgate the landfill emissions standards at issue in *California v. EPA*, "require[s] EPA and the States to take swift and aggressive action" to control air pollution from stationary sources.[16] Ideally, EPA identifies environmental problems and uses its statutory authority to solve them. But as the Reagan and Trump Administrations demonstrated, this may not always be the case. EPA might temporarily ignore a problem due to resource constraints or political concerns, or, in the case of *California v. EPA*, the agency may *intentionally* fail to act.[17] Congress anticipated these possibilities. A Senate report on the CAA

13. For the purposes of this Comment, I use EPA's definition of environmental justice: "Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." *Environmental Justice*, EPA, https://perma.cc/HF5U-FEXS. Under Executive Order 12,898, federal agencies are required to identify and address the disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations. Exec. Order No. 12,898 § 1–101, 3 C.F.R. § 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321; *see also Summary of Executive Order 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, EPA, https://perma.cc/9R57-PB37. EPA's EJSCREEN tool considers six demographic indicators of potential susceptibility to environmental pollution: low-income, minority, less than high-school education, linguistic isolation, individuals under age five, and individuals over age sixty-four. *Overview of Demographic Indicators in EJSCREEN*, EPA, https://perma.cc/4NN8-73D4.

14. 42 U.S.C. § 7401(b)(1).

15. *Id.* § 7411. This section establishes a mechanism for controlling air pollution from different categories of stationary sources, and various subsections apply to new, existing, and modified sources. *See id.*

16. State Plans for the Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. 53,340, 53,342–43 (Nov. 17, 1975); *see also* Petitioners' Proof Brief at 8, Env't Def. Fund v. EPA, No. 19-1222 (D.C. Cir. Aug. 12, 2020).

17. *See infra* note 59; Lazarus, *supra* note 1, at 191 (listing reasons why the government may fail to take aggressive action to enforce environmental laws). *See generally* William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 Duke L.J. 1509 (2018)

Amendments of 1970 described federal efforts to enforce the CAA as "restrained," and anticipated that the proposed citizen suit provision could "motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings."[18]

The CAA's "citizen suit" provision, section 304(a), was codified in 1970[19] and became a model for other environmental statutes.[20] The provision permits individuals, interest groups, businesses, and government entities to sue for enforcement of the CAA.[21] There are two major types of citizen suits: citizen enforcement suits and agency-forcing actions. The former may be brought against individual polluters in citizen enforcement actions.[22] The latter permit suits against the EPA Administrator for her failure "to perform any act or duty . . . which is not discretionary"—in other words, failure to undertake her delegated lawmaking responsibility.[23] Generally, federal courts have extremely limited jurisdiction to compel agency action.[24] The citizen suit provision, therefore, offers a unique opportunity for the public to influence EPA to vigorously implement and enforce environmental laws.[25] Each action inches the federal government and the country closer to Congress's ambitious clean air goals.

Despite Congress's intent and the provision's potential, section 304(a) has been hollowed out by a series of judicial and congressional decisions. Though the balance of this Comment focuses on the agency-forcing side of the provision, there has been an equally great, if not greater, winnowing of citizen enforcement actions. Like *California v. EPA*, diligent prosecution rules allow

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(describing the Trump administration's common use of abnegation—self-denial of regulatory authority—throughout 2017 and 2018, particularly in the environmental context).

18. Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 845 (1985) (quoting S. REP. NO. 1196, 91st Cong., 2d Sess. 36–37 (1970)). Congress may have been wary of industry capture of regulatory agencies as well. Cass Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 192–93 (1992).

19. Clean Air Act Amendments of 1970, Pub. L. 91–604, § 12(a), 84 Stat. 1706.

20. *See, e.g.*, Federal Water Pollution Control Act, Pub. L. No. 92–500, § 2, 86 Stat. 888 (1972) (codified as amended at 42 U.S.C. § 505); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94–580, § 2, 90 Stat. 2825 (codified as amended at 42 U.S.C. § 7002).

21. 42 U.S.C. § 7604(a); *see also id.* § 7602(e); Chester Rothstein, Comment, *Jurisdictional Badminton with the Clean Air Act's "Citizen Suit" Provision: The Birdie Is Dying in the Trees*, 53 ALB. L. REV. 671, 672–73 (1989).

22. 42 U.S.C. § 7604(a)(1).

23. *Id.* § 7604(a)(2).

24. *See* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 951 (2008); Norton v. S. Utah Wilderness All., 542 U.S. 55, 62–63 (2004) (limiting judicial review under the Administrative Procedure Act for an agency's failure to act).

25. *See* James R. May et al., *Environmental Citizen Suits at Thirtysomething: A Celebration and Summit*, 33 ENV'T L. REP. 10721, 10721 (2003). *But see* Sunstein, *supra* note 18, at 222 ("[T]he citizen suit is probably best understood as a band-aid superimposed on a system that can meet with only mixed success.").

agency action to undercut citizen suits when agency *inaction* is the original cause of suit.[26]

In both agency-forcing and citizen enforcement suits, standing has been a consistent challenge for environmental plaintiffs. *Lujan v. Defenders of Wildlife*[27] required plaintiffs to demonstrate a clear connection between their interests and the particular injury in the case to satisfy the requirements for Article III standing; mere ideological or law enforcement interests are insufficient.[28] Courts have since relaxed the requirements slightly, but the hurdle remains largely intact.[29] During the district court litigation in *California v. EPA*, EPA argued that the plaintiffs lacked standing due to an insufficient showing that climate-related harms were caused by EPA's failure to address landfill pollution.[30] The district court rejected that argument and the Ninth Circuit did not review it, but the example demonstrates how standing may be a lurking challenge in citizen suits.

Courts have also narrowly interpreted what can be considered a cognizable nondiscretionary duty under the agency-forcing provision. In 1974, the Court of Appeals for the D.C. Circuit noted in *Natural Resources Defense Council v. Train*[31] that Congress "did not fling the courts' doors wide open" in passing the

26. The CAA precludes civil citizen enforcement actions where EPA or a state is "diligently prosecuting" the same alleged violation. 42 U.S.C. § 7604(b)(1)(B). Some courts have interpreted this expansively, weighing against citizen enforcement actions. *See, e.g.*, Grp. Against Smog & Pollution, Inc. v. Shenango Inc., 810 F.3d 116, 132 (3d Cir. 2016) (permitting the diligent prosecution bar to apply provided an action is in litigation or has been terminated); Citizens for Clean Power v. Indian River Power, LLC, 636 F. Supp. 2d 351, 357 (D. Del. 2009) (applying the diligent prosecution bar despite citizens demanding a more stringent standard than the government did in litigation). In the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251–1388, context, permits have also been used as a shield from citizen suits. *See, e.g.*, Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353, 354 (2d Cir. 1994) (holding the CWA's citizen suit provision cannot be used to halt discharge of pollutants not listed in a valid CWA permit). Similar arguments might apply to CAA permits. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 1195 (8th ed. 2018) (noting that citizen suits could be used to challenge CAA permit violations).

27. 504 U.S. 555 (1992).

28. *See* Sunstein, *supra* note 18, at 226; Harold Feld, *Saving the Citizen Suit: The Effect of* Lujan v. Defenders of Wildlife *and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM. J. ENV'T L. 141, 141 (1994). To meet Article III's "case or controversy" requirement, *Lujan* requires litigants to demonstrate injury-in-fact identify a causal connection between the injury and the defendant's actions, and show that the injury is likely redressable by a favorable decision. *See Lujan*, 504 U.S. at 560–61.

29. *See* Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 183–84 (2000) (permitting litigants to demonstrate injury-in-fact through recreational, aesthetic, and economic interests); *see also* May et al., *supra* note 25, at 10723 ("*Laidlaw* is important because it seems to have halted the trend of the campaign of Justice Antonin Scalia to essentially destroy citizen suits in this country.").

30. *See Court Orders EPA to Fulfill Its "Long-Overdue" Duty to Reduce Landfill Pollution*, ENV'T DEF. FUND BLOG (May 6, 2019), https://perma.cc/266T-TQ5U.

31. 510 F.2d 692 (D.C. Cir. 1974).

citizen suit provision.[32] Instead, only "clear-cut violations" of "default[ ]" duties could be challenged under section 304(a)(2).[33] Several years later, the D.C. Circuit took a more significant step in *Sierra Club v. Thomas*[34] and limited the definition of nondiscretionary duties to those where it is "categorically mandat[ed] that *all* specified action be taken by a date-certain deadline."[35] Both the requirements of clear-cut statutory violations and date-certain deadlines persist today,[36] despite Congress abrogating other aspects of that decision.[37] These limitations have made it difficult to sue sucessfully.[38]

Agency-forcing citizen suits under the CAA have essentially been relegated to "deadline suits," in which citizens sue EPA for failing to issue a rule on time.[39] Even with such limited applicability, the citizen suit provision is still important in avoiding the dangerous consequences of regulatory delay. For example, the San Joaquin Valley in California has some of the worst air quality in the country—mostly due to ozone[40]—and, relatedly, high rates of childhood asthma.[41] It is also a priority environmental justice community for EPA.[42] Rela-

32. *Id.* at 700.

33. *Id.*

34. 828 F.2d 783 (D.C. Cir. 1987).

35. *Id.* at 791 (internal quotation marks omitted).

36. *See, e.g.*, Sierra Club v. Wheeler, 956 F.3d 612, 616 (D.C. Cir. 2020) ("A duty is nondiscretionary under the CAA if it is 'clear-cut' and requires the Administrator to act by a 'date-certain deadline.'" (quoting *Thomas*, 828 F.2d at 791)). Mandatory duties must also be found in statute, rather than by implication from any scientific evidence. *See, e.g.*, Zook v. EPA, 611 F. App'x 725, 726 (D.C. Cir. 2015) ("[S]cientific evidence alone—even if EPA is aware of that evidence—cannot give rise to a mandatory duty to regulate.").

37. *See* Humane Soc'y of the United States v. McCarthy, 209 F. Supp. 3d 280, 285 (D.D.C. 2016) (citing Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544, 553 n.6 (D.C. Cir. 2015)) (discussing Congress's changes to *Thomas*'s other, jurisdictional holding).

38. *See, e.g.*, *Wheeler*, 956 F.3d at 614, 616 (holding that EPA lacked a nondiscretionary duty to impose, for two categories of solid waste incinerator, a federal plan on noncompliant states by any particular deadline); Zen-Noh Grain Corp. v. Jackson, 943 F. Supp. 2d 657, 662–63 (E.D. La. 2013) (adopting a "bright-line rule" for whether a statute is nondiscretionary and holding that no "readily ascertainable deadline" existed in the statute at issue).

39. U.S. GOV'T ACCOUNT. OFF., GAO-15-34, IMPACT OF DEADLINE SUITS ON EPA'S RULEMAKING IS LIMITED 2 (2014) [hereinafter GAO REPORT], https://perma.cc/SM3Y-YCWG.

40. As of this writing, all of the counties in the San Joaquin Valley are in extreme ozone nonattainment (the most severe rating) for both 2008 and 2015 ozone standards: Fresno County, Kern County, King County, Madera County, Merced County, San Joaquin County, Stanislaus County, and Tulare County. *Current Nonattainment Counties for All Criteria Pollutants*, EPA (Dec. 31, 2020), https://perma.cc/K2VK-LKRG; *see also* Tess Thorman, Sarah Bohn & Vicki Hsieh, *2020 Census: Counting the San Joaquin Valley*, PUB. POL'Y INST. OF CAL. (Aug. 30, 2018), https://perma.cc/2NGW-49KY (listing the counties considered to be part of the San Joaquin Valley). All of these counties are also in nonattainment for particulate matter. *Current Nonattainment Counties for All Criteria Pollutants*, EPA (Dec. 31, 2020), https://perma.cc/4NWR-DKE2.

41. *See San Joaquin Valley*, EPA, https://perma.cc/9DRG-N83G.

tive to the rest of the state, the region has the highest rates of poverty, a high proportion of young people, and diverse racial demographics.[43] In 2004, EPA failed to take action on the San Joaquin Valley Air Pollution Control District's Extreme Ozone Attainment Demonstration Plan, despite a statutory requirement to do so.[44] The aptly named Association of Irritated Residents ("AIR") filed a citizen suit, and the court—taking into consideration equitable factors—imposed a deadline on EPA to review and approve the plan.[45] Much of the San Joaquin Valley remains in ozone nonattainment,[46] but the citizen suit provision gave these environmental justice plaintiffs a tool to prevent EPA from turning a blind eye to the harmful pollution problems in their community.

II. *California v. EPA*

A. Regulation of Landfill Emissions

One woman's trash *can* be another woman's treasure[47]—or it can lead to her local air pollution and climate change. When trash is sent to a landfill, the organic material decomposes under anaerobic conditions, producing landfill gas ("LFG"): a mixture of methane, carbon dioxide ("CO_2"), and nonmethane organic compounds.[48] Such gas can become treasure by capturing it and converting it into electricity, heat, or renewable natural gas.[49] But without some form of gas collection and control system, LFG becomes a powerful source of local air pollution in the form of hazardous air pollutants and volatile organic

42. *See* U.S. EPA Region 9, Fiscal Year 2015 Action Plan to Address Environmental Justice (EJ) 1–2 (2015), https://perma.cc/GA3Z-KBYU (noting that as part of the Region's EJ work it would "focus on communities in the Southern San Joaquin Valley," among others). Region 9 covers the Pacific Southwest, including Arizona, California, Hawaii, Nevada, the Pacific Islands, and 148 Tribal Nations. *EPA Region 9 (Pacific Southwest)*, EPA, https://perma.cc/AC4V-DFVW.

43. *See* San Joaquin Valley Air Pollution Control District, Environmental Justice Strategy 5 (2015), https://perma.cc/8Y7Y-4UV4.

44. *See* Joy Herr-Cardillo, *Indirect Source Review: Is It a Strategy that Could Help Phoenix Finally Clear Its Air*, 43 Ariz. State L.J. 735, 745 (2011).

45. Ass'n of Irritated Residents v. EPA, No. 18-cv-01604, 2018 U.S. Dist. LEXIS 123921, at *6–9 (N.D. Cal. July 24, 2018).

46. *See supra* note 40.

47. *See* John Francis Campbell, Popular Tales of the West Highlands, at iii (Singing Tree Press 1969) (1860) ("[O]ne man's rubbish may be another's treasure.").

48. *Basic Information About Landfill Gas*, EPA, https://perma.cc/8FSM-QS32. Nonmethane organic compounds include organic hazardous air pollutants, compounds associated with stratospheric ozone depletion, and volatile organic compounds. 1 EPA, AP 42 Chapter 2: Solid Waste Disposal § 2.4, at 2–3 (5th ed. Supp. 1998), https://perma.cc/5TM9-WWJQ.

49. EPA, *supra* note 48.

compounds, as well as a contributor to climate change.[50] In the United States, municipal solid waste landfills are the third-largest source of anthropogenic methane,[51] a greenhouse gas ("GHG") that is twenty-eight to thirty-six times more potent than CO_2.[52]

The Obama administration recognized the environmental, public health, and economic value of managing landfill emissions. President Barack Obama's *Climate Action Plan—Strategy to Cut Methane Emission*s targeted LFG as a major source of methane emissions and directed EPA to take action.[53] In 2016, EPA promulgated two new rules to address landfill emissions under section 111 of the CAA: one rule covering existing landfills[54] ("Emissions Guidelines") and the other covering new landfills[55]. The Emissions Guidelines updated 1996 guidelines to account for technological advances and operating practices and to reduce a major source of GHGs.[56]

Implementing the Emissions Guidelines requires cooperation from the states. In accordance with 1975 EPA regulations, the agency had until September 2017 to review state plans and until November 2017 to finalize federal plans for noncomplying states.[57] EPA missed both deadlines. The agency never claimed it was *unable* to take the required actions by the deadline; it appears that EPA was simply *unwilling*.[58]

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50. *See* Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg. 59, 279–80 (Aug, 29, 2016) (to be codified at 40 C.F.R. pt. 60).

51. EPA, *supra* note 48.

52. EPA, *Understanding Global Warming Potentials*, https://perma.cc/Y2B5-5CUK. EPA uses a hundred-year global warming potential ("GWP") and relies on the values from the Intergovernmental Panel on Climate Change's Fifth Assessment Report. *Id.* Since methane is a relatively short-lived pollutant, the twenty-year GWP for methane is much higher than the hundred-year measure. *Id.*

53. The White House, Climate Action Plan—Strategy to Cut Methane Emissions 2 (2014), https://perma.cc/8NU7-3CCK.

54. Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg. at 59,276 (noting applicability of the Emission Guidelines to "landfills that accepted waste after November 8, 1987, and that commenced construction, reconstruction, or modification on or before July 17, 2014").

55. Standards of Performance for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,332 (Aug. 29, 2016) (to be codified at 40 C.F.R. pt. 60).

56. Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg. at 59,276 (Aug. 29, 2016) (to be codified at 40 C.F.R. pt. 60).

57. Under section 111(d), states develop plans establishing standards of performance for the covered sources in their state, and then they submit those plans to EPA for review and approval. *See* 42 U.S.C. § 7411(d)(1); 40 C.F.R. § 60.27 (2019). EPA can mandate a federal plan if the state fails to submit a satisfactory plan, and it can enforce the provisions of a state plan if the state fails to enforce them. 42 U.S.C. § 7411(d)(2); *see also* Complaint at 3, California v. EPA, 385 F. Supp. 3d 903 (N.D. Cal. 2019) (No. 18-cv-03237).

58. *See* Brief for Appellees at 6, California v. EPA, 978 F.3d 708 (9th Cir. 2020) (No. 18-cv-03237) ("EPA embarked on a campaign to evade its implementation duties.").

B. The Citizen Suit in District Court

California, seven other states, and the Environmental Defense Fund successfully invoked the CAA's agency-forcing citizen suit provision to compel EPA to implement and enforce the Emissions Guidelines.[59] The district court required EPA to approve or disapprove of existing state plans by September 6, 2019, and promulgate a federal plan by November 6, 2019.[60] As the case was pending, EPA initiated a notice-and-comment rulemaking that would move the deadline back more than two years.[61] The rule was finalized shortly after the court set the above deadline.[62] EPA then faced competing deadlines: the one set by the court and the later one EPA self-imposed by regulation.

EPA moved to amend the court order under Federal Rules of Civil Procedure Rule 60(b)(5), arguing that its new rule warranted vacatur of the court's initial order with respect to the deadline for federal plans.[63] Rule 60(b)(5) permits a judge to modify or dissolve an injunction if its application is "no longer equitable."[64] Per Ninth Circuit precedent, a court may consider "all the circumstances" in making this decision.[65] The district court found no inequities. EPA "undisputedly violated the [previous timing regulation], received an unfavorable judgment, and then issued the New Rule only to reset its non-discretionary deadline (rather than to remedy its violation)."[66] Thus, the district court denied the motion, and EPA appealed.

59. *See* California v. EPA, 385 F. Supp. 3d at 916; *see also supra* note 10.

60. California v. EPA, 385 F. Supp. 3d at 916.

61. Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills, 83 Fed. Reg. 54,527 (proposed Oct. 30, 2018) (to be codified at 40 C.F.R. pt. 60). According to commenters, this proposed rule was published two days before a major hearing in the district court case. Env't Def. Fund, Nat. Res. Def. Council, and Clean Air Task Force, Comments on Proposed Rule on Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills at 2 (Oct. 30, 2018), https://perma.cc/BR6M-XRFG.

62. Adopting Requirements in Emission Guidelines for Municipal Solid Waste Landfills, 84 Fed. Reg. 44,547 (Aug. 26, 2019) (to be codified at 40 C.F.R. pt. 60). This rule is currently the subject of litigation. *See* Env't Def. Fund v. EPA, No. 19-1222 (D.C. Cir. filed Oct. 23, 2019).

63. California v. EPA, No. 18-cv-03237, 2019 U.S. Dist. LEXIS 192206, at *3 (N.D. Cal. Nov. 5, 2019)

64. *See supra* note 11. For an excellent history of equitable discretion, including Rule 60, see Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 Nev. L.J. 1397 (2015).

65. Bellevue Manor Assocs. v. United States, 165 F.3d 1249, 1256 (9th Cir. 1999).

66. California v. EPA, 2019 U.S. Dist. LEXIS 192206, at *7.

C. Ninth Circuit's Rule 60(b) Holding

Writing for the Ninth Circuit panel, Judge Bumatay reversed, holding that the district court abused its discretion in refusing to modify an order after the order's legal basis had "evaporated."[67] Although Rule 60(b)(5) is intended to give the district court significant discretion, the Ninth Circuit determined that such discretion is "not unbridled."[68] The court established a per se rule that eliminates the district court's equitable discretion to modify an injunction when the underlying legal basis for a decision has changed, regardless of the motivations for that change.[69]

The court derived its reasoning from two categories of cases that held modification was required: (1) those in which Congress had ordered a change in law;[70] and (2) those in which judicial interpretation of the law underpinning the injunction had changed[71]. No previous cases considered a change caused by the party subject to the injunction, and none completely deprived the court of its discretion.[72]

The court then turned to address a separation of powers concerns raised in the parties' briefing that a political branch of government might be seen as impermissibly overruling an Article III court.[73] The court reasoned that injunctive orders are prospective and therefore pose no threat to separation of powers.[74] Further, EPA's choice to alter its regulations to avoid the order was no obstacle:

> EPA's dual role as rulemaker and defendant here is a natural consequence of a lawsuit based solely on EPA's own regulations. EPA is undisputedly the "competent authority" to modify the law at issue. As such, we see no reason why a coequal branch should be prejudiced when moving for Rule 60(b)(5) relief simply because it has the authority to amend its regulations.[75]

The court contrasted these concerns with what it perceived as the more serious separation of powers issue: allowing the district court to determine whether the

67. California v. EPA, 978 F.3d 708, 711 (9th Cir. 2020).

68. *Id.* at 713.

69. *See id.*

70. *See id.* at 714 (citing Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1855); Sys. Fed'n No. 91 v. Wright, 364 U.S. 642 (1961)); *id.* at 715 (citing Cal. Dep't of Soc. Servs. v. Leavitt, 523 F.3d 1025 (9th Cir. 2008)).

71. *See id.* at 714 (citing Agostini v. Felton, 521 U.S. 203 (1997)).

72. *See id.* at 716 (noting that the court had previously "dodged the question of whether the change in the law alone warranted dissolution of the injunction").

73. *Id.* at 717.

74. *See id.* at 717–18.

75. *Id.* at 718 (citations omitted).

deadlines in EPA's new regulation or the court order governed would permit too much judicial intrusion into the executive branch's domain.[76]

III. The Consequence of Limiting Equitable Discretion

California v. EPA's per se rule—which uniformly requires court orders to give way to underlying changes in law—now renders it easier for EPA to evade pressure from citizen suits. First, the decision created additional delay in this case, which was costly from environmental and public health perspectives and had distinct implications for environmental justice communities. Second, *California v. EPA* further undermines the CAA's citizen suit provision as a tool for preventing costly delay in other cases.

A. The Real-World and Environmental Justice Impacts of Delay

The Government Accountability Office has argued that deadline suits "affect the *timing and order* in which rules are issued but not *which* rules are issued."[77] However, the timing of rules is not a minor factor to be overlooked. The purpose of section 111(d) in particular is to "[c]ontrol . . . emissions from existing sources *before* they harm people and the environment,"[78] and "time is simply of the utmost essence."[79] Delay may have important, tangible consequences for plaintiffs and the planet, and *California v. EPA* exacerbates such delay.

California v. EPA deferred the implementation of much-needed action to curb LFG emissions from municipal solid waste landfills. Now, such action will likely happen at least three years later than initially planned.[80] The original Emissions Guidelines would have saved roughly the equivalent annual emissions of 1.8 million cars and generated net benefits of $452 million annually.[81] Three years of saving more than the emissions of all the cars in New England[82] or $1.36 billion[83] are now permanently foregone. Given the long-term effects of

76. *See id.*

77. GAO Report, *supra* note 39, at 2 (emphasis added).

78. Am. Lung Ass'n v. EPA, 985 F.3d 914, 993 (D.C. Cir. 2021) (emphasis added).

79. *Id.* at 994 (citation omitted).

80. EPA's original deadline for imposing a federal plan was in 2017. *See supra* note 57 and accompanying text.

81. Complaint at 12–13, California v. EPA, 385 F. Supp. 3d 903 (N.D. Cal. 2019) (No. 18-cv-03237).

82. Fed. Highway Admin., Highway Statistics Series (2019), https://perma.cc/LS9K-8GT6 (calculated by summing all of the automobiles for Maine, Vermont, New Hampshire, Massachusetts, Connecticut and Rhode Island).

83. This calculation does not account for discount rates.

GHGs, the stability of the climate system depends on emissions being reduced *today*, not at some time in the future.[84]

Delay does not impact every community equally. It is well documented that environmental justice communities tend to be disproportionately affected by environmental harms,[85] as well as a general lack of environmental enforcement.[86] Slowing mitigation prolongs negative health and economic consequences and may, in some instances, effectively trap residents—particularly environmental justice populations—in unhealthy conditions if they are unable or unwilling to leave.[87] Landfills do not have significant environmental justice implications nationwide,[88] but they do in some states. In California, the population in areas surrounding landfills is sixty-seven percent racial minority

84. *See, e.g.*, 2 U.S. GLOB. CHANGE RSCH. PROGRAM, IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT 26 (David R. Reidmiller et al. eds., 2018) ("Future risks from climate change depend primarily on decisions made today.").

85. *See* Paul Mohai et al., *Environmental Justice*, ANN. REV. ENV'T & RES. 405, 425 (2009) ("Hundreds of studies have now documented unequal exposures by race, ethnicity, and economic class . . . [and] [c]limate change has been shown to create unequal impacts on communities of color, indigenous peoples, the poor, and on developing countries."); *see, e.g.*, Lara P. Clark et al., *National Patterns in Environmental Injustice and Inequality: Outdoor NO_2 Air Pollution in the United States*, 9 PLOS ONE e94431, at 1 (2014) (finding that, on average, communities of color in the United States are exposed to 38 percent more nitrogen dioxide than white communities); Kristie S. Gutierrez & Catherine E. LePrevost, *Climate Justice in Rural Southeastern United States: A Review of Climate Change Impacts and Effects on Human Health*, 13 INT'L J. ENV'T RSCH. & PUB. HEALTH 189, 189 (2016) ("Vulnerable communities, such as communities of color, indigenous people, the geographically isolated, and those who are socioeconomically disadvantaged and already experiencing poor environmental quality, are least able to respond and adapt to climate change.").

86. *See generally* Robert R. Kuehn, *Remedying the Unequal Enforcement of Environmental Laws*, 9 J. CIV. RTS. & ECON. DEV. 625 (1994) (documenting underenforcement in low-income communities and communities of color).

87. *See, e.g.*, Tristan Baurick et al., *Welcome to "Cancer Alley," Where Toxic Air Is About to Get Worse*, PROPUBLICA (Oct. 30, 2019), https://perma.cc/4QBN-HBGY (noting that in Louisiana's "Cancer Alley," many Black residents have been "rooted [t]here for centuries" despite the proliferation of major polluters); Erin Savage, *Realities on the Ground in the West Virginia Water Crisis*, APPALACHIAN VOICES FRONT PORCH BLOG (Jan. 29, 2014), https://perma.cc/4UKV-DDWH (documenting that in the context of a chemical spill affecting local water quality, residents who could not afford to move "suffer[ed] the highest consequences").

88. *See* EPA, EJ SCREENING REPORT FOR MUNICIPAL SOLID WASTE LANDFILLS NEW SOURCE PERFORMANCE STANDARDS (NSPS) AND EMISSION GUIDELINES AND COMPLIANCE TIMES FOR MUNICIPAL SOLID WASTE LANDFILLS 141–44 (2016) (finding that near landfills, the average proportion of minority, low income, linguistically isolated, age zero to four, and age sixty-five-plus populations is not significantly different than the national average, though the proportion of those without a high school diploma is significantly greater than the national average).

groups, compared to sixty percent in the rest of the state.[89] Delayed implementation of the Emissions Guidelines, therefore, has unique environmental justice implications for California.

When crafting regulations and deciding how quickly to implement them, EPA is necessarily attentive to a national audience; although EPA may consider the impacts on particular communities, aggregate impacts are more likely to guide decision-making.[90] Regulation and agency priority-setting often represent the views of a national audience and consider the overall balance of costs and benefits. One might argue then that *California v. EPA*'s rule is better because regulations produced as part of a nationally representative and democratically accountable process are preferable to an unelected judge's order. However, the CAA's citizen suit provision is designed to address a predictable shortcoming in the democratic process that may lead to adverse effects in certain communities. The provision intentionally permits litigants to bypass the regulatory process and "proceed directly to court to enforce statutory standards."[91] Environmental justice communities often lack the political or financial resources necessary to successfully advocate for themselves on the national stage when it comes to developing regulation or legislation in the first place.[92] The citizen suit provision empowers these communities to demand action if they are overlooked or disproportionately affected by an agency's failure to take nondiscretionary actions.

California v. EPA is exactly the kind of problem the provision is designed to address: The impact of EPA's revised timing on California's environmental justice communities was obscured by the nationwide constituency represented in EPA's revised timing regulations, and the citizen suit provision gave California a tool to ensure EPA could not further delay action on LFG in that state. The CAA's citizen suit provision intentionally tips the playing field toward

89. *Id.* at 13.

90. *Cf.* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T L. REV. 325, 352–53 (2014) (describing the White House Office of Information and Regulatory Affairs' role in ensuring EPA's rules could, when permitted by statute, be justified by their nationwide cost-benefit analysis).

91. *Cf.* Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, 25 COLO. NAT. RES. ENERGY & ENV'T L. REV. 61, 63 (2014) (describing citizen suit provisions under the CWA).

92. *See generally* Richard J. Lazarus, *Pursuing "Environment Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993) (explaining a variety of structural barriers that have led to communities of color being disproportionately affected by environmental harms); Amy Patronella & Saharra Griffith, *Communities of Color Bear the Brunt of Trump's Anti-Environmental Agenda*, CTR. FOR AM. PROGRESS (Feb. 27, 2020), https://perma.cc/9X39-BRPW (illustrating the disproportionate impacts on low-income communities and communities of color caused by the Trump administration's environmental rollbacks).

communities that are often disadvantaged by the usual regulatory process.[93] *California v. EPA* undoes this advantage, causing additional, costly delay in this case and virtually guaranteeing delay in future cases.

B. End-Runs Around the Clean Air Act's Citizen Suit Provision

The CAA's citizen suit provision, though already limited by standing requirements and judicial interpretation of nondiscretionary duties, is a tool for preventing costly delay. But if EPA can simply pass a regulation to give itself more time, the citizen suit provision's already limited number of use cases approaches zero. As described in Part I, agency-forcing actions under the citizen suit provision are largely focused on bringing about delayed action. And these suits have successfully done so. For example, EPA's Air and Radiation division received 309 court-imposed deadlines for its regulations between October 1988 and October 2003.[94] From May 31, 2008, to June 1, 2013, nine of the thirty-two major rules EPA promulgated under the CAA resulted from settlements in deadline suits.[95] *California v. EPA* undermines this success and the intent behind the provision.

EPA may be able to purposefully avoid a court-imposed deadline again. In the repeal of the Clean Power Plan and finalization of the Affordable Clean Energy ("ACE") Rule, EPA changed the generally applicable timing regulations for section 111(d) implementation.[96] The rules at issue in *California v. EPA* are landfill-specific: EPA cross-referenced the generally applicable change from the ACE Rule such that it applied clearly to landfills.[97] Although the D.C. Circuit vacated the changes to the timing regulations promulgated as part of the ACE Rule,[98] EPA can alter its timing regulations again. A court might order EPA to make a federal plan or approve a state plan for any category of

93. The intent of the citizen suit provision was to play this democratic empowerment role, and Congress expected it to result in "higher air quality and better air pollution control programs." *See* S. COMM. ON PUB. WORKS, 93D CONG., A LEGISLATIVE HISTORY OF THE CLEAR AIR AMENDMENTS OF 1970, at 138 (1974). *But see* Lazarus, *supra* note 92, at 820 (arguing that the voices of racial minority groups have not been well represented in public interest organizations filing citizen suits).

94. Gersen & O'Connell, *supra* note 24, at 940.

95. U.S. GOV'T ACCOUNT. OFF., GAO-15-803T, INFORMATION ON CASES AGAINST EPA AND FWS AND ON DEADLINE SUITS ON EPA RULEMAKING 2 (2015), https://perma.cc/MHX9-M9L9.

96. *See* Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,564–71 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

97. *See* Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills, 83 Fed. Reg. 54,527 (proposed Oct. 30, 2018) (to be codified at 40 C.F.R. pt. 60).

98. *See* Am. Lung Ass'n v. EPA, 985 F.3d 914, 995 (D.C. Cir. 2021).

sources regulated under section 111(d). EPA could then adjust its general or source-specific timing regulations and bypass the court order[99]—with, of course, appropriate justification.[100]

Public Citizen Health Research Group v. Chao[101] presents an analogous example in which an agency, such as EPA, might be permitted to shirk a court order under *California v. EPA*'s per se rule. In that case, the Occupational Safety and Health Administration ("OSHA") established a toxic exposure standard for hexavalent chromium but promised to complete a new rulemaking after an interest group petitioned for a more stringent standard.[102] OSHA continually missed self-imposed deadlines, and the Third Circuit compelled the agency to act after nine years of delay.[103] Applying the *California v. EPA* rule, OSHA could have simply moved its self-enforced deadline again via regulation, without concern that the agency would be held accountable to a previous court-imposed deadline through a citizen suit.

California v. EPA may also discourage would-be litigants from bringing citizen suits in the first place. Citizen suits are focused on preventing regulatory delay, and very often, this limits the remedy to injunctive relief.[104] There is little incentive to devote financial resources to bringing an agency-forcing citizen suit if the agency can simply subvert the court's already limited remedy.

Some might argue that the scope of the decision is more limited. For example, it does not apply to agency-forcing citizen suits that involve consent

99. When describing the need for the change to the landfill Emissions Guidelines, EPA noted that:

> [T]he promulgation of the proposed new implementing regulations [in the ACE Rule] would not be sufficient to change the timing requirements for the . . . [Municipal Solid Waste Landfills Emissions Guidelines], even though it is an ongoing CAA section 111(d) action. This is because the . . . [Municipal Solid Waste Landfills Emissions Guidelines] includes a cross-reference to the old implementing regulations, as well as a specific deadline for the submission of state plans that was based on the timing requirements in the old implementing regulations. The EPA is proposing to amend the cross-references and deadline in the MSW Landfills EG to align with the proposed timing requirements in [the ACE Rule].

Repeal of the Clean Power Plan, 83 Fed. Reg. at 54,529 (Oct. 20, 2018) (to be codified at 40 C.F.R. pt. 60).

100. The D.C. Circuit struck down the timing regulations in the ACE Rule because of EPA's failure to consider or explain the environmental and public health effects of the delay that would be caused by the change. *See Am. Lung Ass'n*, 985 F.3d at 995.

101. 314 F.3d 143 (3d Cir. 2002).

102. *Id.* at 145.

103. *See id.* at 145–46.

104. *See* Gersen & O'Connell, *supra* note 24, at 927 ("When agencies act slowly, or refuse to act at all, courts are rarely in a position to dictate specific outcomes. Essentially the only remedy available is to order some agency action within a specified time period—that is, to impose a deadline."); Kerry D. Florio, Note, *Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?*, 27 B.C. ENV'T AFFS. L. REV. 707, 713 (1999).

decrees or settlements,[105] which make up a significant number of citizen suits.[106] To be sure, all of the lawsuits leading to the promulgation of new EPA rules, discussed above, resulted from settlements rather than court orders.[107] But regardless of the limited explicit applicability of the decision to settlements and consent decrees, *California v. EPA* may affect them too. Previously, EPA was likely to perceive a settlement as preferable to a court order because the agency and plaintiff could mutually agree on remedial action, rather than the court imposing a remedy. Neither a settlement nor a court order was more legally binding. *California v. EPA* may change this calculus by making court orders less immutable and therefore more appealing to EPA. Further, this might decrease citizen suit plaintiffs' bargaining power or the likelihood that EPA would engage in settlement negotiations at all.

IV. Separation of Powers

"[T]his case is not just about trash, landfills, or emissions guidelines; it's also about the separation of powers."[108] The separation of powers has been used repeatedly to question the constitutionality of citizen suit provisions.[109] Federal courts have unanimously rejected this view, despite adopting some limitations on citizen suits.[110] In *California v. EPA*, the Ninth Circuit embraced the idea that separation of powers can restrict the reach of citizen suits, at least for a particular set of applications, and contributed to erosion of constitutional confidence in citizen suits.

Justice Scalia suggested in *Lujan* that environmental citizen suit provisions violate the separation of powers, because they allow Congress and the courts to intrude on the President's Take Care Clause[111] powers.[112] Were citizen plain-

105. California v. EPA, 978 F.3d 708, 719 n.7 (9th Cir. 2020).

106. *See* Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 Seattle U. L. Rev., 891, 891 (2013) ("When faced with lawsuits for failing to perform non-discretionary duties, agencies tend to settle because their liability is clear.").

107. GAO Report, *supra* note 77, at 15.

108. California v. EPA, 978 F.3d at 711.

109. *See, e.g.*, Micheal E. Solimine, *Congress, Separation of Powers, and Standing*, 59 Case W. Rsrv. L. Rev. 1023, 1025 (2009). For deft defenses of the constitutionality of the CAA's citizen suit provision, see Sunstein, *supra* note 18, at 213; Robin Kundis Craig, *Will Separation of Powers Challenges 'Take Care' of Environmental Citizen Suits? Article III, Injury-in-Fact, Private 'Enforcers,' and Lessons from Qui Tam Litigation*, 72 U. Colo. L. Rev. 94, 128–32 (2001); Cass R. Sunstein, *Article II Revisionism*, 92 Mich. L. Rev. 131, 133–38 (1993); Jeffrey G. Miller & Brooke S. Dorner, *The Constitutionality of Citizen Suit Provisions in Federal Environmental Statutes*, 27 J. Env't L. & Litig. 401, 457–58 (2012).

110. William Droze & Viktoriia De Las Casas, *Amicus Briefing Suggests Citizen Suits Are Unconstitutional*, Troutman Pepper Blog (Aug. 17, 2020), https://perma.cc/3AGV-DF8R.

111. U.S. Const. art. II, § 3.

112. *See* Craig, *supra* note 109, at 95–96; Linda Greenhouse, Opinion, *The Supreme Court vs. the President*, N.Y. Times (Feb. 4, 2016), https://perma.cc/ZS49-LXW9 (explaining the Take

tiffs able to sue to advance a *public* interest, rather than a particularized *private* one, "it would enable the courts, with the permission of Congress, 'to assume a position of authority over the governmental acts of another and co-equal department,'. . . and to become 'virtually continuing monitors of the wisdom and soundness of Executive action.'"[113] Requiring plaintiffs to meet Article III standing pacified these concerns.[114] Recently, two professors in an amicus brief asked a federal district court to reconsider the constitutionality of the CAA's citizen suit provision.[115] Like Justice Scalia, they fault citizen suits for "empower[ing] factions[ ] who can wield executive power,"[116] and more explicitly, they note that the President should be given wide latitude to "underenforce oppressive laws" under the Take Care Clause.[117]

California v. EPA echoed many of these same arguments and concluded this particular application of the CAA's citizen suit provision went too far. The Ninth Circuit was concerned about courts intruding on the President's powers. "[A]llowing [the] court[ ] to pick and choose" the governing law and the applicable deadline was "a greater threat to the separation of powers" than the fact that EPA's own actions circumvented the court's order.[118] The judge might "behave with all the violence of an oppressor"[119] if she could exercise her equitable discretion to contradict the agency. This functionally eliminates the category of CAA citizen suits that involve an agency's self-imposed deadlines. It also endorses the notion that the President has a constitutional prerogative to underenforce the CAA. *California v. EPA*'s per se rule requires a court to step aside if an agency weakens a timing or substantive requirement through rulemaking. By contrast, if an agency moves a deadline up or takes more rigorous action, such action does not create a conflict applicable under the per se rule.

Separation of powers is designed to prevent any one branch from accruing too much power.[120] Joining *Lujan* and its progeny, *California v. EPA* removes

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Care Clause argument in *Lujan* and describing the opinion as "one of Justice Scalia's most important opinions in 30 years").

113. Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (quoting Massachusetts v. Mellon, 262 U.S. 447, 489 (1923); then quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).

114. *See id.* at 577–78; Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 129 (1998) (Stevens, J., concurring) ("It is hard to see, however, how [the statute's] citizen-suit provision impinges on the power of the Executive. As an initial matter, this is not a case in which respondent merely possesses the 'undifferentiated public interest' in seeing [the statute] enforced."); Solimine, *supra* note 109, at 1025; Miller & Dorner, *supra* note 109, at 440.

115. Brief for Richard Epstein and Jeremy Rabkin as Amici Curiae Supporting Plaintiff, United States v. DTE Energy, No. 10-13101 (E.D. Mich. July 30, 2020).

116. *Id.* at 9.

117. *Id.* at 8 (citations omitted).

118. California v. EPA, 978 F.3d 708, 718 (9th Cir. 2020).

119. *Id.* (quoting MONTESQUIEU, THE SPIRIT OF LAWS (1748)).

120. *See* THE FEDERALIST NO. 47 (James Madison); *see also* Miller & Dorner, *supra* note 109, at 408.

the courts, Congress, and private parties from checking the President's powers—particularly the power to underenforce environmental laws. Congress employed the CAA's citizen suit provision to prevent the kind of statutory underenforcement practiced by the Reagan and Trump administrations. Further centralizing power in the executive branch weakens the CAA's citizen suit provision's already limited checks on presidential underreach.

Conclusion

California v. EPA arose from a relatively rare instance of the CAA's citizen suit provision being invoked successfully. States and environmental advocates used the provision to ensure EPA would regulate harmful emissions from landfills in a reasonable time, but the Ninth Circuit permitted EPA to set its own deadline different from the one imposed by the district court. The decision not only imposed a significant and rigid limitation on equitable discretion, but it also relegated CAA citizen suits to an even narrower set of useful applications. *California v. EPA* facilitates end-runs around the CAA's citizen suit provision—with particularly troubling implications for environmental justice communities—and adds to a growing body of literature that uses the separation of powers to limit environmental citizen suits' ability to challenge presidential underenforcement.