ADMINISTRATIVE LAW — INJUNCTIONS AGAINST ADMINISTRATIVE AGENCIES — NINTH CIRCUIT ADOPTS PER SE RULE FOR MODIFICATION OF INJUNCTIONS BASED ON SUPERSEDED LAW. — *California v. EPA*, 978 F.3d 708 (9th Cir. 2020).

"Revision and control of Article III judgments" by the other branches of government is "radically inconsistent with the independence of that judicial power which is vested in the courts."[1] However, the traditional powers of courts permitted their modification of judgments for reasons of equity,[2] including when another branch changed the law underlying a prospectively operating judgment.[3] Today, administrative agencies both create law and are subject to injunctions for its violation. What happens, then, when the enjoined party also has the power to change the law it has violated? Recently, in *California v. EPA*,[4] the Ninth Circuit announced a per se rule that, in such circumstances, a court must dissolve the injunction.[5] Though this outcome may have reflected the most natural reading of precedent, the novel application of this per se rule to enjoined agencies misaligns with the motivations underlying recent jurisprudence on Rule 60(b)(5) of the Federal Rules of Civil Procedure, limits opportunities for judicial review of agency action, and further curtails the ability of agencies to make credible commitments.

The Clean Air Act[6] empowers the Environmental Protection Agency (EPA) to promulgate emissions standards for existing, in addition to new, sources of air pollution.[7] EPA regulations pursuant to the Act prescribe a series of deadlines for both states and EPA to meet upon EPA's issuing new emissions standards.[8] States have nine months to submit implementation plans to bring themselves into compliance with the standards, which EPA then has four months to either approve or reject.[9] Should EPA reject a state's plan or the state fail to submit one, EPA has "six months from the state-submission deadline"[10] to promulgate a federal

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[1] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 226 (1995) (internal quotation marks omitted) (quoting Hayburn's Case, 2 U.S. (2 Dall.) 409, 411 (1792) (opinion of Wilson & Blair, JJ., & Peters, D.J.)).

[2] *Id.* at 233–34.

[3] *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 430–32 (1856).

[4] 978 F.3d 708 (9th Cir. 2020).

[5] *Id.* at 711.

[6] 42 U.S.C. §§ 7401–7671q.

[7] *Id.* § 7411(c)–(d).

[8] *California*, 978 F.3d at 711.

[9] *Id.*; 40 C.F.R. §§ 60.23(a)(1), 60.27(b) (2019).

[10] *California*, 978 F.3d at 711.

plan that would govern in that state instead.[11] In August 2016, EPA promulgated new emissions standards for municipal solid waste landfills,[12] thereby triggering this series of deadlines. However, EPA missed all of them, failing to approve any state plan or promulgate a federal plan in 2017.[13]

Several states, including California (States), sued EPA under the citizen suit provision of the Clean Air Act[14] in the United States District Court for the Northern District of California, seeking an injunction compelling EPA to review existing state plans and promulgate a federal plan.[15] On motions for summary judgment, the court granted in part for the States.[16] After rejecting EPA's argument that the States lacked standing,[17] the court examined the "sole remaining issue" of "what timetable to impose on EPA for it to complete its long-overdue nondiscretionary duties."[18] While the court's injunction adopted EPA's proposed timetable for the review of most state plans, it imposed upon EPA the "presumptively reasonable" six-month timetable for promulgating a federal plan.[19] Therefore, EPA had to set forth a federal plan by November 2019, six months after the order was entered.[20]

While this litigation was ongoing, EPA commenced a rulemaking process to change the underlying deadlines.[21] The amended regulation took effect in August 2019 and changed the deadline for states to submit a plan to that August while giving EPA an additional two years after the new deadline to promulgate a federal plan.[22] These changes pushed

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[11] 40 C.F.R. § 60.27(d) (2019).

[12] *See* 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).

[13] *California*, 978 F.3d at 712.

[14] 42 U.S.C. § 7604(a)(2); Appellees' Brief at 7–8, *California*, 978 F.3d 708 (9th Cir. 2020) (No. 19-17480).

[15] California v. EPA, 385 F. Supp. 3d 903, 911 (N.D. Cal. 2019).

[16] *Id.* at 916.

[17] *Id.* at 911. The court found that the States were entitled to "special solicitude" as sovereigns under *Massachusetts v. EPA*, 549 U.S. 497 (2007), and rejected EPA's argument that the States had failed to plead causation and redressability. *California*, 385 F. Supp. 3d at 910–11 (quoting *Massachusetts*, 549 U.S. at 520).

[18] *California*, 385 F. Supp. 3d at 911.

[19] *Id.* at 914–15.

[20] *Id.* at 916.

[21] *California*, 978 F.3d at 712; *see* Adopting Requirements in Emission Guidelines for Municipal Solid Waste Landfills, 84 Fed. Reg. 44,547, 44,549 (Aug. 26, 2019) (to be codified at 40 C.F.R. pt. 60). EPA's new regulation specifically exempted its 2016 landfill emissions standards from the generally applicable regulatory deadlines codified in 40 C.F.R. §§ 60.23 and 60.27, but did not alter those two underlying regulations, which are still applicable to other emission standards promulgated under the Clean Air Act. *See* Adopting Requirements in Emission Guidelines for Municipal Solid Waste Landfills, 84 Fed. Reg. at 44,556.

[22] California v. EPA, No. 18-cv-03237, 2019 WL 5722571, at *2 (N.D. Cal. Nov. 5, 2019); *see* 40 C.F.R. § 60.30f (2016).

EPA's deadline for promulgating a federal plan to August 2021.[23] EPA now had two deadlines: one imposed by the district court injunction and one imposed by its amended regulations.

Within two weeks of the amendment, EPA filed a motion under Rule 60(b)(5) of the Federal Rules of Civil Procedure in the Northern District of California for the court to vacate its order for EPA to promulgate a federal plan by November 2019.[24] Rule 60(b)(5) provides that a "court may relieve a party . . . from a final judgment, order, or proceeding" if "applying [the judgment] prospectively is no longer equitable."[25] EPA argued that, because the challenged injunction was based on superseded law, its prospective enforcement was no longer equitable, and that it would be an abuse of discretion for the court to refuse to modify it.[26]

The district court denied the motion.[27] It placed heavy emphasis on the fact that EPA, rather than a third party, had itself changed the underlying law, thereby "sidestep[ping] the Court's order."[28] Allowing EPA to effectively release itself from an injunction threatened to permit agencies to "perpetually evade judicial review through amendment, even after a violation has been found."[29] Continued enforcement of the injunction was equitable because of "EPA's significant progress and the limited work remaining on the federal plan."[30] Finally, the court held that requiring EPA to "issu[e] a final federal plan also pose[d] no obstacle to the EPA's New Rule," because it would not preclude states from submitting their plans on EPA's new timetable.[31]

The Ninth Circuit reversed. Writing for a unanimous panel, Judge Bumatay[32] ruled that a district court abuses its discretion by refusing to modify an injunction "when a change in law dissolve[s] the legal basis for its order."[33] An "unbroken line of Supreme Court cases,"[34] as well

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[23] *California*, 978 F.3d at 712.

[24] *California*, 2019 WL 5722571, at *2.

[25] FED. R. CIV. P. 60(b).

[26] *California*, 2019 WL 5722571, at *3.

[27] *Id.* at *4.

[28] *Id.* at *3; *see id.* at *2–3 (observing that the EPA only issued this new regulation to "reset its non-discretionary deadline," *id.* at *2).

[29] *Id.* at *3.

[30] *Id.* at *3–4.

[31] *Id.* at *4.

[32] Judge Bumatay was joined by Judge Siler of the Sixth Circuit, sitting by designation, and by Judge Lee.

[33] *California*, 978 F.3d at 713.

[34] *Id.* at 713–14; *see* Agostini v. Felton, 521 U.S. 203, 237–40 (1997) (modifying an injunction due to a shift in Establishment Clause jurisprudence without analyzing other equitable factors); Sys. Fed'n No. 91, Ry. Emps.' Dep't v. Wright, 364 U.S. 642, 644, 648 (1961) (stating that had the consent decree at issue been an injunction, "it would have been improvident for the court to continue [its] effect" after Congress amended the relevant law, *id.* at 648); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431–32 (1856) (modifying an injunction against rebuilding a bridge after Congress legalized the bridge).

as Ninth Circuit precedent,[35] indicated that a "change in the law alone warrant[s] dissolution of [an] injunction."[36] Rejecting the States' argument that Rule 60(b)(5) called for a "broad, fact-intensive inquiry" into the equity of modification,[37] Judge Bumatay distinguished the authorities cited by the States by pointing to one case's unique procedural posture[38] and drawing a distinction between how courts treat injunctions and consent decrees under Rule 60(b)(5). Because consent decrees are like contracts and can place obligations on the parties beyond what the law requires, it is appropriate to look beyond a change in law when evaluating a Rule 60(b)(5) motion for relief.[39] This is not true, however, of injunctions.[40] And the court's per se rule for injunctions comported with traditional understandings of equity.[41] Even if an injunction seemed to do no harm to the enjoined party, as the district court implicitly found was the case,[42] being enjoined at all is "necessarily" a harm "by its nature."[43] As a result, a "positive basis" for an injunction is always required.[44]

Judge Bumatay then addressed the parties' separation of powers arguments. While true that Congress — and executive agencies — cannot reverse a final order from an Article III court, Judge Bumatay pointed out that this principle applies only to final judgments, not to prospectively operating injunctive relief.[45] Meanwhile, the fact that EPA had itself brought about the change in law was irrelevant.[46] It was only "a natural consequence of a lawsuit based solely on EPA's own regulations."[47] Judge Bumatay concluded that the "greater threat to the separation of powers" was posed not by agencies defying courts, but by courts effectively making their own rules to control parties' future conduct.[48]

California v. EPA renders the most natural, though not the inexorable, reading of Supreme Court precedent on the modification of injunctions. Though no court has explicitly embraced the per se rule, courts

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[35] *California*, 978 F.3d at 715; *see* Cal. Dep't of Soc. Servs. v. Leavitt, 523 F.3d 1025, 1027, 1029–32 (9th Cir. 2008) (modifying an injunction based on an interpretation of a federal program after Congress amended the underlying statute).

[36] *California*, 978 F.3d at 716.

[37] *Id.* at 715–16.

[38] *Id.* at 716 (citing Bellevue Manor Assocs. v. United States, 165 F.3d 1249, 1254 (9th Cir. 1999)).

[39] *See id.* at 716.

[40] *See id.*

[41] *See id.* at 717.

[42] *See* California v. EPA, No. 18-cv-03237, 2019 WL 5722571, at *3 (N.D. Cal. Nov. 5, 2019).

[43] *California*, 978 F.3d at 717.

[44] *Id.* (internal quotation marks omitted).

[45] *Id.* at 717–18 (citing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 226–27 (1995)).

[46] *Id.* at 718.

[47] *Id.*

[48] *Id.*

have rarely — if ever — refused to modify an injunction based entirely on superseded law.[49] However, in formalistically applying precedent to the novel circumstance of an enjoined agency changing the legal basis of an injunction against it, the Ninth Circuit's adoption of the per se rule misaligns with the shift against rigidity in recent Rule 60(b)(5) jurisprudence and threatens both the opportunities for judicial review of agency action and the ability of agencies to make credible commitments.

Though the outcome aligns with those in other courts, which appear to have universally granted modification of injunctions based on superseded law,[50] the Ninth Circuit completely discounted the novel circumstances before it. The States urged that all Rule 60(b)(5) motions, including injunctions, should be analyzed under the same flexible standard applied to consent decrees outlined in *Rufo v. Inmates of Suffolk County Jail*.[51] Such a standard allows a court to "take all the circumstances into account in determining whether to modify" a judgment[52] and would, the States argued, permit denial of modification in the extreme case of an enjoined party itself changing the underlying law.[53] Isolated language from various circuit court opinions supports the States' argument for *Rufo*'s application,[54] and no court had previously adopted a per se rule explicitly.[55] Faced with these competing considerations, the Ninth Circuit could have leaned into the novelty of the circumstances confronting it — there is seemingly no prior case that

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[49] *See id.* at 713–15.

[50] *E.g.*, Agostini v. Felton, 521 U.S. 203, 237 (1997); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 430 (1856); Cal. Dep't of Soc. Servs. v. Leavitt, 523 F.3d 1025, 1032 (9th Cir. 2008).

[51] 502 U.S. 367 (1992); *see* Appellees' Brief, *supra* note 14, at 26–34.

[52] Bellevue Manor Assocs. v. United States, 165 F.3d 1249, 1256 (9th Cir. 1999) (describing the *Rufo* approach).

[53] Appellees' Brief, *supra* note 14, at 34–44.

[54] *See, e.g.*, *In re* Hendrix, 986 F.2d 195, 198 (7th Cir. 1993) ("[T]he 'flexible standard' . . . is no less suitable to other types of equitable case . . . . So now a court can modify an injunction that it has entered whenever the principles of equity require it do so." (quoting *Rufo*, 502 U.S. at 393)); Jackson v. Los Lunas Cmty. Program, 880 F.3d 1176, 1198 (10th Cir. 2018) ("[W]e glean that the [Supreme] Court considers a consent decree and an injunctive order equivalent for purposes of evaluating a Rule 60(b)(5) motion for modification.").

[55] Perhaps the closest the Supreme Court has come to doing so was in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, where it stated that since "[the law] has been modified by the competent authority . . . it is quite plain the decree of the court cannot be enforced." *Id.* at 432. However, more recent Court opinions are dominated by discretionary language. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 261 (1995) (Stevens, J., dissenting) ("Congress surely *could* add to Rule 60(b) certain instances in which courts *must* grant relief from final judgments if they make particular findings . . . ." (first emphasis added)); Sys. Fed'n No. 91, Ry. Emps.' Dep't v. Wright, 364 U.S. 642, 647 (1961) ("[S]ound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact . . . have changed . . . .").

had involved an enjoined party itself dissolving the underlying legal duty[56] — to apply the *Rufo* standard.

By instead adopting a per se rule, the opinion sits uncomfortably with the animating principles behind Rule 60(b)(5) and the Supreme Court's decades-long shift to greater willingness to modify judgments. Once governed by an inflexible "grievous wrong" standard that strongly disfavored modification,[57] motions for modification are now treated more generously.[58] As the Ninth Circuit recognized, this increased flexibility is a "virtue, not a vice" that permits courts to ensure their equitable powers do not work injustice.[59] Courts have also embraced flexibility so that they can better police the relationship between different governmental structures.[60] By formalistically applying a per se rule to the novel situation confronting it, in which the procedural history was especially susceptible to the fact-intensive *Rufo* analysis, *California v. EPA* actually runs counter to these animating concerns. Instead of flexibility, the court came full circle to promote rigidity in *favor* of modification, and, rather than policing broad structural arrangements, it surrendered the field to governmental actors behaving in bad faith.[61] The outcome seems particularly incongruous when put up against the plain language of Rule 60(b)(5), which states that a court "may" modify injunctions when enforcing them "prospectively is no longer equitable."[62]

In addition, applying a per se rule to changes in regulations instigated by an enjoined agency may create troubling ripple effects within administrative law. First, the per se rule alters the balance between agencies and the judiciary. On its face, the per se rule limits judicial discretion by mandating a particular judicial outcome upon a

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[56] EPA, in its brief, analogized to *NAACP v. Donovan*, 737 F.2d 67 (D.C. Cir. 1984), a case where an agency engaged in rulemaking to alter a regulation the court found defective. *Id.* at 70; Appellants' Opening Brief at 20–21, *California*, 978 F.3d 708 (9th Cir. 2020) (No. 19-17480). However, the question in *Donovan* was whether the district court could preliminarily enjoin the implementation of the new regulation itself, not whether the court had to modify an existing injunction. *See Donovan*, 737 F.2d at 68.

[57] United States v. Swift & Co., 286 U.S. 106, 119 (1932).

[58] Bellevue Manor Assocs. v. United States, 165 F.3d 1249, 1255 (9th Cir. 1999) (discussing *Rufo*'s abrogation of the *Swift* standard and application to the context of institutional reform litigation).

[59] *California*, 978 F.3d at 713; *see Rufo*, 502 U.S. at 380.

[60] *See* Horne v. Flores, 557 U.S. 433, 448 (2009) (considering an institutional reform injunction and citing, inter alia, the federalism concerns presented by federal dictates on state and local budget priorities); Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 VAND. L. REV. 167, 204–05 (2017). The Court pointed out that "precisely because federalism concerns are heightened, a flexible approach to Rule 60(b)(5) relief is critical." *Horne*, 557 U.S. at 452. It seems this same logic should apply to the separation of powers between agencies and the judiciary.

[61] The opinion also sanitized EPA's actions. *See California*, 978 F.3d at 712 ("EPA then confronted dueling deadlines . . . . To resolve this dilemma, EPA filed a motion . . . requesting relief . . . ."). But EPA specifically targeted the district court's injunction. *See supra* note 21.

[62] FED. R. CIV. P. 60(b). It is important to note, however, that Rule 60(b) is "simply the recitation of pre-existing judicial power" of equity. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 234–35 (1995).

discretionary exercise of agency power. The operation of the per se rule may also disincentivize plaintiffs from litigating agency violations of regulations, thereby limiting occasions for judicial review in the first place. While certain remedies such as money damages would be immune from an agency's retroactive meddling,[63] injunctive relief is not.[64] Plaintiffs who obtained injunctive relief based on superseded regulations could challenge the new regulations themselves, as indeed the state plaintiffs in *California v. EPA* have done at the time of this writing.[65] However, such challenges may have to take place in a different forum from the original litigation,[66] a forum that may not have jurisdiction to address the original claims should it even overturn the challenged rule.[67] Plaintiffs will then find themselves back in district court relitigating the same legal issues to obtain the same injunctive relief.[68] And there is nothing in the opinion that would preclude agencies from repeatedly engaging in this cycle, district courts now having no discretion to examine these factual circumstances.[69] Therefore, regulatory beneficiaries aware that a determined agency has the power to completely dissolve their injunctive relief face a powerful disincentive to challenging the original violation.[70] The per se rule may thereby prevent some agency

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[63] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431 (1856) ("[I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of [C]ongress.").

[64] And in the context of challenges to agency action, claims for money damages cannot always overcome sovereign immunity. *See* 5 U.S.C. § 702 ("An action . . . seeking relief *other than* money damages and stating a claim [against an agency] . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . ." (emphasis added)).

[65] Petitioners' Final Brief at 1–2, 13–15, Env't Def. Fund v. EPA, Nos. 19-1222, 19-1227 (D.C. Cir. Dec. 11, 2020).

[66] This forum is often the D.C. Circuit. *See, e.g.*, 33 U.S.C. § 2717(a) (requiring review of regulations promulgated under the Oil Pollution Act to take place in the D.C. Circuit).

[67] The Clean Air Act functions this way. *See* 42 U.S.C. § 7604(a)(2) (giving district courts jurisdiction over citizen suits against EPA for failing to perform nondiscretionary duties); 42 U.S.C. § 7607(b)(1) (giving the D.C. Circuit exclusive jurisdiction over challenges to nationally applicable regulations promulgated by EPA).

[68] *See* Oral Argument at 24:55, *California*, 978 F.3d 708 (9th Cir. 2020) (No. 19-17480), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000017778 [https://perma.cc/VAJ4-LZR8].

[69] *See* California v. EPA, No. 18-cv-03237, 2019 WL 5722571, at *3 (N.D. Cal. Nov. 5, 2019) (The district court noted it had "no guarantee that this precise situation w[ould] not occur again in two years' time."). This prospect also implicates concerns analogous to those in mootness doctrine, where a court will not dismiss an action as moot "if the government remains practically and legally free to return to [its] old ways." Fikre v. FBI, 904 F.3d 1033, 1039 (9th Cir. 2018) (internal quotation marks omitted) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)); *see also* Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen, 815 F.2d 1435, 1451–52 (11th Cir. 1987).

[70] *Cf.* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 578 (1997) ("The motive of a person who brings suit is ordinarily not . . . to deter socially undesirable behavior in the future. Rather it is usually to obtain compensation for harm or other relief."); Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIA. L. REV. 111, 113 (1991) ("[B]ecause litigation is costly, the probability

violations of regulations from even coming before the courts, a serious risk where "[j]udicial review of administrative action protects the very essence of constitutional democracy and the rule of law."[71]

Second, the per se rule further exacerbates a problem that scholars have long identified within administrative law — that of weak commitment mechanisms.[72] There are occasions where an agency may wish to induce reliance in order to accomplish its regulatory mission.[73] However, due to the broad deference given to agencies to interpret statutory commands[74] and to reverse policy course,[75] such commitments are hard to make credibly.[76] *California v. EPA*'s per se rule, which gives agencies a reliable route to escape prospectively operating injunctions, reduces the credibility of agency hand-tying through regulations even further, as an agency can now escape a legal obligation even *after* a violation has been found and relief granted in response.

Though the continued enforcement of an injunction absent a positive legal basis may indeed be unjustifiable in most circumstances,[77] the flexible *Rufo* standard may have permitted the court to make a rare exception given the facts presented — an exception not directly prohibited by the relevant precedent. The decision to instead apply a per se rule to all motions to modify injunctions resulted here in a misalignment between two areas of law. This misalignment is apparent in the tension between the application of a per se rule and some of the underlying motivations in recent Rule 60(b)(5) precedent in *Rufo* and related cases. It is also apparent from its potential effects on agencies moving forward. Somewhat perversely, the per se rule threatens to expand the ability of agencies to act mischievously due to decreased accountability, while limiting their ability to accomplish valid regulatory aims. Such is the result of permitting agencies to "sidestep" the judicial power.[78]

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of winning a lawsuit becomes an important consideration in the decision to bring suit."). Plaintiffs bringing suit against agencies already face significant barriers, such as standing doctrine and strong judicial deference. *See* Andrew C. Lillie, *Barriers to Successful Environmental and Natural Resources Litigation: Tenth Circuit Approaches to Standing and Agency Discretion*, 78 DENV. U. L. REV. 193, 193 (2000).

[71] David S. Tatel, Remarks, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENV'T L. REV. 1, 2 (2010).

[72] *See, e.g.*, Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1022–24 (2007); Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 111–17 (2018).

[73] Masur, *supra* note 72, at 1022–23. For example, a regulated industry may decline to make up-front investments to obtain long-term benefits provided by a certain regulatory regime if the future operation of that regime is uncertain. *See id.*

[74] *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

[75] *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009).

[76] Masur, *supra* note 72, at 1041–43.

[77] *See California*, 978 F.3d at 717.

[78] California v. EPA, No. 18-cv-03237, 2019 WL 5722571, at *3 (N.D. Cal. Nov. 5, 2019).