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Waiver of Federal Sovereign Immunity and the Clean Air Act: Clearing Up a Split Among the Circuit Courts

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Editors' Summary: When state or local government entities sue the federal government under the CAA, they can find themselves barred by the doctrine of federal sovereign immunity, which prevents suit against the U.S. government. They must find an applicable statutory provision that waives sovereign immunity and is applicable to their case to survive a motion to dismiss. This author analyzes whether sovereign immunity is waived under the CAA as to punitive civil penalties in enforcement actions brought by states and local governments. While the CAA's citizen suit provision is held to waive sovereign immunity in the Sixth Circuit, the Eleventh Circuit determined that the same waiver language is provided only for coercive penalties. In suggesting a resolution of this circuit split, the author highlights the differences of each circuit's methodology, and argues for the framework utilized by the Sixth Circuit to provide for waiver of punitive civil penalties.

I. Introduction

A major obstacle in the path of any claimant seeking to obtain a damage award against the United States or its agencies is the doctrine of sovereign immunity. Proving a waiver of sovereign immunity has become an increasingly difficult task in recent years, following a number of U.S. Supreme Court decisions.[1] The obstacles that must be overcome to sufficiently demonstrate a waiver of sovereign immunity are examined in Part II of this Article by analyzing the Court's case law and noting the issues the Court has raised regarding sovereign immunity waiver. Part III reduces the issues to a framework to be utilized in analyzing a sovereign immunity waiver problem.

Part IV of this Article then looks at waiver of federal sovereign immunity in the context of the pollution control statutes, paying particular attention to the Clean Air Act (CAA)[2] and utilizing Clean Water Act (CWA)[3] case law to provide illumination. The CAA's federal facilities provision[4] waives sovereign immunity for awards of injunctive relief against the United States, and for coercive penalties imposed for a violation of an injunction or other order.[5] However, the question of whether the CAA waives sovereign immunity with regard to *punitive* civil penalties is in dispute.[6] While the CAA provides for the award of punitive civil penalties in certain circumstances, sovereign immunity precludes subject matter jurisdiction to assess such penalties against the United States unless the U.S. Congress has waived sovereign immunity as to such penalties.[7] The question of whether the CAA does in fact waive sovereign immunity with regard to punitive civil penalties, has caused a conflict between the circuits.[8]

The CAA's federal facilities provision[9] and its citizen suit provision[10] have been used to argue that the CAA waives federal sovereign immunity with regard to punitive civil penalties. The federal facilities provision claim as to waiver has not succeeded. In fact, the Supreme Court has rendered a

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1. *See* Lane v. Pena, 518 U.S. 187, 192 (1996) (summarizing recent Court cases pertaining to waiver of sovereign immunity).
2. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.
3. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
4. 42 U.S.C. §7418.
5. *See* Department of Energy v. Ohio, 503 U.S. 607, 620, 22 ELR 20804 (1992) (federal government conceded that injunctive relief and coercive penalties were available under the CWA, relying on a provision almost identical to the CAA's).
6. *See* United States v. Tennessee Air Pollution Control Bd., 185 F.3d 529, 29 ELR 21403 (6th Cir. 1999), *reh'g & reh'g en banc denied* (Nov. 5, 1999) and City of Jacksonville v. Department of Navy, 348 F.3d 1307 (11th Cir. 2003), *reh'g & reh'g en banc denied*, 91 Fed. Appx. 658 (11th Cir. 2004). The two cases reach conflicting results in resolving the issue of whether sovereign immunity is waived by the CAA with regard to punitive civil penalties.
7. 42 U.S.C. §7413(b).
8. *Tennessee Air*, 185 F.3d at 529 and *Jacksonville*, 348 F.3d at 1307.
9. 42 U.S.C. §7418(a).
10. *Id.* §7604(e).

judgment holding that the CWA federal facilities provision, which is nearly identical to the CAA provision, does not waive sovereign immunity with regard to punitive civil penalties.[11] Thus, arguments premised on the language of the CAA federal facilities provision are non-starters. And the search for a waiver must turn elsewhere.

The argument that the citizen suit provision waives federal immunity when the complaining party is a state or local government has received mixed reviews. In 1999, the U.S. Court of Appeals for the Sixth Circuit was the first to rule on the provision in *United States v. Tennessee Air Pollution Control Board (Tennessee Air)*,[12] holding that the CAA's citizen suit provision clearly waived sovereign immunity as to punitive civil penalties.[13] Soon contradicting the Sixth Circuit was the U.S. Court of Appeals for the Eleventh Circuit decision in *City of Jacksonville v. Department of Navy (Jacksonville)*,[14] holding that the same waiver did not reach to punitive civil penalties, only coercive penalties.

Through careful examination of the two circuit court rulings, this Article seeks to resolve the circuit split. The reasoning of the Sixth Circuit addresses and surmounts the sovereign immunity obstacles, and this author deems that court to have correctly found a waiver in the CAA's citizen suit provision. Conversely, there are numerous flaws in the Eleventh Circuit's reasoning, from false statements of the language found in the statutes, to misconstruing the Court's reasoning, to intellectual dishonesty in defining language. This Article reaches this conclusion by analyzing both opinions through the sovereign immunity analysis framework set forth in Part III. The result provides argument and guidance as to how the Supreme Court should rule when it is called upon to resolve this split.

II. Sovereign Immunity

A. Historical Look at the Doctrine of Sovereign Immunity

Federal sovereign immunity is among the most important obstacle a claimant must clear in order to succeed in a suit against the United States or a federal agency. In order to survive a motion to dismiss, a claimant must find a specific statute that waives sovereign immunity and that fits the claimant's suit precisely within the boundaries of the waiver. Thus, the doctrine of sovereign immunity can frequently act as a barrier to obtaining relief from the federal government since, where a suit seeks to force the United States to pay monetary damages or impose injunctive relief, the doctrine functions as a jurisdictional bar.[15] The origin of sovereign immunity in the United States is generally attributed to the English common-law principle, and fallacy, that "the king can do no wrong."[16]

Sovereign immunity was not always a doctrine held in high regard by the Supreme Court. In applying the Federal Tort Claims Act (FTCA),[17] Justice Felix Frankfurter opined that the Court should not act "as a self-constituted guardian of the [U.S.] Treasury [and] import immunity back into a statute designed to limit it."[18] The Court had previously noted that the doctrine of sovereign immunity was held in disfavor and that waivers of sovereign immunity must be liberally construed.[19] In avowing his distaste for the doctrine, Justice Frankfurter stated that sovereign immunity "undoubtedly runs counter to modern democratic notions of the moral responsibility of the State."[20] Even today, not all members of the Court stand strongly behind the doctrine of sovereign immunity. As a dissenting voice, Justice John Paul Stevens stated: "[T]he doctrine of sovereign immunity is nothing but a judge-made rule that is sometimes favored and sometimes disfavored."[21]

Yet, since the early 1980s, the Court has consistently held that sovereign immunity exists as a federal protection, even if the doctrine is not derived from the U.S. Constitution. In *United States v. Mitchell*,[22] the Court stated: "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."[23]

Because the doctrine exists outside of the Constitution, Congress can waive sovereign immunity, including immunity from monetary damages, and has done so on numerous occasions.[24] A waiver can be a complete waiver, subjecting the United States to any and all possible penalties, or it can be more limited in nature. For instance, in some cases, Congress has only waived sovereign immunity as to injunctive relief,[25] and in other instances Congress has completely waived sovereign immunity, making the federal government liable for punitive civil penalties.[26]

Additionally, the Court has also defined how to express such a waiver. Since abandoning its rule in favor of liberal construction, the Court has imposed strict construction of

11. *Ohio*, 503 U.S. at 619-20.
12. *Tennessee Air*, 185 F.3d at 529.
13. *Id.* at 531.
14. *Jacksonville*, 348 F.3d at 1309.
15. Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature.").
16. 3 William Blackstone, Commentaries on the Laws of England 256-57 (1884); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 Va. L. Rev. 1, 33 (2003); *see* Louis L. Jaffee, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 2 (1963) (discussing English law under which the king could not be sued in his own courts).
17. *See* 28 U.S.C. §§1346 et seq. (1946), which did away with discretionary immunity (based on sovereignty) for the United States in civil tort actions in federal court.
18. Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955).
19. Federal Hous. Admin. v. Burr, 309 U.S. 242, 245 (1940).
20. Great N. Life Ins. Co. v. Read, 322 U.S. 47, 59 (1944).
21. United States v. Nordic Village, Inc., 503 U.S. 30, 42 (1992) (Stevens, J., dissenting).
22. 463 U.S. 206 (1983).
23. *Id.* at 212.
24. *See* Department of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999) (citing the FTCA and the Tucker Act as examples); *see also* the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011 (RCRA provision amended to waive sovereign immunity after Court held RCRA did not waive sovereign immunity in 1992).
25. The Court has held that Congress enacted such a limited waiver of the CWA in *Department of Energy v. Ohio*, 503 U.S. 607, 22 ELR 20804 (1992).
26. After the *Ohio* ruling, Congress amended RCRA to effect such a comprehensive waiver of sovereign immunity. *See* 42 U.S.C. §6961:

> The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are *punitive or coercive* in nature or are imposed for isolated, intermittent, or continuing violations.

Id. (emphasis added).

waivers of sovereign immunity.[27] The new rule taken from this line of cases is that a waiver of sovereign immunity must be "unequivocally expressed" and that the scope of the waiver must be narrowly construed.

B. Recent Development of the Doctrine of Federal Sovereign Immunity

In the early 1990s, the Court heard a number of cases involving federal sovereign immunity. There, the Court has set out the current state of the sovereign immunity doctrine. In three cases, the Court made significant holdings regarding the doctrine: (1) the statutory purpose is irrelevant in determining whether a sovereign immunity has been waived[28]; (2) the Court cannot look to legislative history to determine if sovereign immunity was intended to be waived[29]; and (3) where there is ambiguity in a statutory provision, the Court will not find a waiver of sovereign immunity.[30] These cases further the concept that strict narrow constructions are applied to sovereign immunity waivers, with a preference for finding no waiver, with one limited exception described below.

1. The Statutory Purpose as Irrelevant

The Equal Access to Justice Act (EAJA) provides that a prevailing party in certain adversarial proceedings may recover attorneys fees from the government.[31] At issue in *Ardestani v. U.S. Immigration & Naturalization Services*[32] was whether that Act waived sovereign immunity so that the United States was liable for attorneys fees in immigration proceedings in cases where the government's position was "not substantially justified."[33] The Court held that the EAJA only clearly applied to proceedings governed by §554 of the Administrative Procedure Act (APA),[34] and that the Court has unequivocally held that immigration proceedings are not governed by APA §554.[35] Therefore, sovereign immunity was not waived.

But doesn't the statutory purpose of the EAJA clearly indicate that it would be appropriate to waive sovereign immunity in this case? The dissent in *Ardestani* delineated how the statutory purpose of the EAJA would be furthered by determining that waiver was applicable for the purposes of attorneys fees in immigration proceedings.[36] The majority rejected such consideration of the statutory purpose in determining whether sovereign immunity had actually been waived the EAJA.[37] Instead, the majority narrowly focused on the plain language of the statute, and coupled that with the principle that waivers of sovereign immunity must be strictly construed.[38] Thus, *Ardestani* signifies that in looking for a waiver of sovereign immunity, the Court will only consider the plain statutory language and will not explore whether a waiver of sovereign immunity might further the purpose of the statute.

2. The Legislative History as Irrelevant

In *United States v. Nordic Village, Inc.*,[39] the Court sought to explain why some waivers of sovereign immunity are construed liberally and others are narrowly construed in favor of the sovereign.[40] The Court expounded on just what materials can be used to establish whether statutory text provides the necessary unequivocal expression that sovereign immunity is waived.[41]

The Court expressed that there are two types of sovereign immunity waivers, those made in sweeping language, or broad waivers, and those made in unequivocal language, or unequivocal waivers. Broad waivers of sovereign immunity are those such as the waiver found in the FTCA.[42] Other examples of such sweeping language are the statutes that include "sue and be sued" grants of authority.[43] These provisions grant a federal government entity the authority to sue, similar to private entities, and the liability to be sued as any private entity may be sued. The Court reasoned that these broad waivers are the only waivers that are to receive liberal construction in favor of finding a waiver of sovereign immunity, and that the Court will narrowly construe exceptions to such waivers.[44]

The proposition that "sue and be sued" clauses are construed to liberally waive sovereign immunity was affirmed in *Federal Deposit Insurance Corp. v. Meyer*.[45] In *Meyer*, a suit was brought against the Federal Savings and Loan Insurance Corp. (FSLIC),[46] for a violation of due process rights, when a senior officer of a failing thrift institution was

27. *See, e.g.*, United States v. King, 395 U.S. 1, 4 (1969) ("[J]urisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that such a waiver cannot be implied but must be unequivocally expressed."); United States v. Mitchell, 445 U.S. 535, 538 (1980) ("In the absence of clear congressional consent, then, 'there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States.'").
28. Ardestani v. U.S. Immigration & Naturalization Servs., 502 U.S. 129 (1991).
29. United States v. Nordic Village, Inc., 503 U.S. 30 (1992).
30. *Ohio*, 503 U.S. at 607.
31. *Ardestani*, 502 U.S. at 131.
32. 502 U.S. 129 (1991).
33. *Id*. at 129.
34. 5 U.S.C. §551, *available in* ELR Stat. Admin. Proc.; *Ardestani*, 502 U.S. at 135.
35. *Ardestani*, 502 U.S. at 134-35.
36. *Id.* at 142 (Blackmun, J., filed a dissenting opinion, in which Stevens, J., joined).
37. *Id.* at 138.
38. *Id.*
39. 503 U.S. 30 (1992).
40. *Id*. at 34.
41. *Id.* at 35-36.
42. 28 U.S.C. §2674. Relevantly, the Act provides:

> *The United States shall be liable*, respecting the provisions of this title relating to tort claims, *in the same manner and to the same extent as a private individual under like circumstances*, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

Id. (emphasis added).

43. Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994).
44. *Nordic Village*, 503 U.S. at 34.
45. 510 U.S. 471 (1994).
46. *Id*. at 473.

discharged by the FSLIC without notice and a hearing.[47] The petitioner argued that the FSLIC's sovereign immunity prevented jurisdiction over the suit. However, the enabling legislation creating the FSLIC granted the agency the authority to "sue and be sued, complain, and defend, in any court of competent jurisdiction."[48] The Court held that the "sue and be sued" provision was a broad waiver of sovereign immunity to be liberally construed, and created the presumption that immunity has been waived.[49] To overcome the presumption, the government must make a clear showing that Congress did not intend to waive sovereign immunity via the "sue and be sued" clause.[50] The principle of liberal construction of "sue and be sued" clauses was also reaffirmed in 2004, when the Court stated that, when Congress enacts a sovereign immunity waiver through a "sue and be sued" clause, "the waiver should be given a liberal—that is to say, expansive—construction."[51]

Applying these principles, the *Nordic Village* Court examined the specific waiver alleged to exist in that case. The Court stated that if waivers are not made by broad, sweeping language, they must be unequivocally expressed[52] and narrowly construed in favor of the sovereign, rather than liberally construed in favor of waiver.[53] In *Nordic Village*, the Court found that the provision at issue (found in §106(c) of the U.S. Bankruptcy Code) must be unequivocally expressed to effect waiver, and narrowly construed in favor of the federal government.[54]

Next, the Court determined that the waiver found in §106(c) was not unequivocally expressed. The language of §106(c) was sufficiently ambiguous to present at least two possible interpretations where immunity was not present[55] and, thus, the waiver of sovereign immunity was not clear enough to allow an award of monetary relief against the United States.[56] The Court then went further to explain that in searching for unequivocal expressions of waiver, the Court could only look to statutory text, clearly stating that legislative history could not be used to bolster the text and find the requisite unequivocal expression.[57] The *Nordic Village* holding is consistent with *Ardestani*, in that waivers of sovereign immunity must be crystallized in the statutory text, and that the Court will not examine either the statutory purpose or legislative history.

47. *Id.* at 471.

48. *Id.* at 475.

49. *Id.* at 475, 480-81.

50. *Id.* at 481. Additionally, in *Meyer* the Court went even further in clarifying how sovereign immunity questions must generally be analyzed. First, the Court must examine whether there is a waiver of sovereign immunity. Second, the Court must determine "whether the source of substantive law upon which the claimant relies provides an avenue for relief." That is, has the government actually violated the law that the claimant alleges the government to have violated? If there is an affirmative answer to each of the two inquiries the relief sought by the claimant will be awarded against the United States or the federal entity.

51. U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736, 741 (2004).

52. *Nordic Village*, 503 U.S. at 33-34 (citing Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990)).

53. *Id.* at 34.

54. *Id.* at 35.

55. *Id.* at 34-35.

56. *Id.* at 37.

57. *Id.*

3. An Ambiguous Statute Precludes Waiver

The Court also has held that a statute with any measure of ambiguity does not signify a waiver of sovereign immunity. In *U.S. Department of Energy v. Ohio*,[58] the U.S. Department of Energy (DOE) admitted that it violated the CWA and the Resource Conservation and Recovery Act (RCRA) in operating a uranium processing plant, but argued that it maintained sovereign immunity from the punitive civil penalties the state sought to impose pursuant to the CWA and RCRA.[59] The state made various arguments as to why the CWA and RCRA waive sovereign immunity, but the Court found ambiguity in the relevant statutory provisions, and thus held that the requisite unequivocal waiver of sovereign immunity was not present.

First, the state argued that the citizen suit provisions of the CWA and RCRA waived sovereign immunity.[60] The citizen suit provisions of each statute assert that a "person" can be subjected to a citizen suit and that a person includes the United States.[61] Thus, by making the United States subject to citizen suits, the state reasoned that the United States was also made liable for the punitive civil penalties that could be imposed through a citizen suit.[62] However, the Court found otherwise. The Court noted that while the United States was specifically included within the definition of a person for purposes of being subject to a citizen suit, the United States was omitted from the definition of a person in the civil penalties provisions of the statutes. As a result of this ambiguity in the statutes, the Court held that the United States is a person for purposes of being subject to a citizen suit, but not a person subject to civil penalties.

The state's next argument contended that the federal facilities provision of the CWA waived sovereign immunity as to punitive civil penalties.[63] The federal facilities provision generally provides that federal government operations are subject to the CWA requirements as well as state and local government requirements in the same manner as any nongovernmental entity. In particular, the CWA's federal facilities provision states that

> [e]ach department, agency, or instrumentality of the . . . Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and *process and sanctions* respecting the control and abatement of water pollution in the same manner . . . as any nongovernmental entity . . . . The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, whatsoever), (B) to the exercise of any Federal, State or local administrative authority, and (C) to any *process and sanction*, whether enforced in Federal, State, or local courts or in any other manner . . . . [T]he United States shall be liable for only those *civil penalties arising under Federal law* or imposed by a State or local court to enforce an order or the process of such court.[64]

58. 503 U.S. 607, 22 ELR 20804 (1992).

59. *Id*. at 612.

60. *Id.* at 615-16.

61. *Id.* at 618.

62. *Id.*

63. *Id.* at 620.

64. 33 U.S.C. §1323(a) (emphasis added).

The state's first argument with regard to the CWA's federal facilities provision relied on the statute's use of the word "sanction," arguing that the word sanction must be understood to include punitive civil penalties and allow the state to collect punitive civil penalties from the federal government.[65] The Court disagreed and held that the term did not unequivocally express a waiver of sovereign immunity regarding punitive civil penalties.[66] First, the Court stated that the term sanction itself, without further clarification, is broad enough to include both punitive civil penalties and coercive penalties.[67] In an effort to then clarify the term and determine if it should be more narrowly construed, so as not to encompass both punitive and coercive fines, the Court first resorted to dictionary definitions and common usage of the term,[68] and found that much evidence points toward defining a sanction in only a coercive sense.[69] One dictionary simply defined a sanction as a coercive measure.[70] Additionally, the Court cited a preponderance of cases that used the term sanction in a coercive sense.[71]

However, the Court ultimately rested its construction of the term sanction on the context in which the term was used in the CWA's federal facilities provision. The Court found it important that the term sanction was coupled with the word "process" in the relevant passage. The term sanction appears twice in the federal facilities provision and both times it appears as part of the phrase "process and sanctions."[72] The Court found that "process and sanctions" generally refers to judicial process, as distinct from substantive statutory requirements.[73] Further, the term process generally refers to "forward-looking orders enjoining future violations, and that such orders are only given teeth by allowing for sanctions for violation of the order in the future."[74] As a result of the contextual analysis, the Court found it to be credible that Congress only intended for the term sanction to allow for coercive fines and not allow for punitive civil penalties.[75] Therefore, the Court found no unequivocal expression waiving sovereign immunity based on the term sanction, as the term was used in the CWA's federal facilities provision.[76]

The state based its second argument on the fact that the federal facilities provisions waived sovereign immunity for punitive civil penalties by stating: "[T]he United States shall be liable only for those civil penalties *arising under Federal law* . . . ."[77] The state argued that punitive civil penalties imposed by a state statute approved by the U.S. Environmental Protection Agency (EPA) and supplanting the CWA arose under federal law.[78] The majority, however, disagreed. The Court held that the sanctions sought by the state did not "arise under" federal law.[79] The Court relied on precedent interpreting the phrase "arising under federal law" (in the context of federal question jurisdiction) to reason that "'arising under' federal law excludes cases in which the plaintiff relies on state law, even when the State's exercise of power in the particular circumstances is expressly permitted by federal law."[80] Unfortunately for the state, the statute it sought to enforce was a state statute; thus, even though the state statute is permitted by federal law and approved by a federal agency, the Court held it did not arise under federal law. Even though reading the statute in such a manner causes the "civil penalties arising under federal law" language to be rendered superfluous (in opposition to the canon of statutory interpretation that a statute should not be read so as to render statutory language superfluous), the Court was untroubled.[81] Instead the Court speculated that "[p]erhaps [Congress] used [the language] just in case some later amendment might waive the Government's immunity from punitive sanctions. Perhaps a drafter mistakenly thought that liability for such sanctions has somehow been waived already. Perhaps someone was careless."[82]

The dissent, however, determined that the plain language of the CWA's federal facilities provision provided an unequivocal waiver of sovereign immunity as to punitive civil penalties and that the majority's reading of the statute renders the phrase civil penalties arising under federal law meaningless.[83] Characterizing the majority as inappropriately asserting that Congress sought to be incoherent, the dissent found that the plain language clearly contemplates a waiver of sovereign immunity.[84] Then, citing the majority opinion from *Nordic Village*, authored by Justice Antonin Scalia, the dissent stated: "[O]nce Congress has waived sovereign immunity over certain subject matter, the Court should be careful not to assume the authority to narrow the waiver that Congress intended."[85]

The *Ohio* decision illustrates just how far the Court will go in an effort *not* to find a waiver of sovereign immunity. The Court will look to dictionary definitions, common usage of terms, and the contextual setting of language in construing a statute in its effort to find no unequivocal waiver of sovereign immunity in a statute. This contrasts with the simple efforts the Court refuses to make to find a waiver. Most obviously, as described above, the Court refuses to examine legislative history and statutory purpose, which generally are well-settled tools of statutory interpretation.

In the end, the *Ohio* Court again reiterates that waivers of sovereign immunity will only be found where the statutory text makes the waiver exceedingly clear. Based on the *Ardestani* and *Nordic Village* opinions, the statutory purpose and legislative history cannot be used to discern whether the necessary unequivocal expression of waiver of sovereign immunity exists; only the statutory text may be examined. Based on the *Ohio* decision, the unequivocal waiver

65. *Ohio*, 503 U.S. at 620-21.
66. *Id*. at 621-23.
67. *Id.* at 621.
68. *Id.*
69. *Id.*
70. *Id*.
71. *Id*.
72. *Id*. at 622.
73. *Id.* at 623.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* (emphasis added).
78. *Id.* at 624-25.
79. *Id.* at 625.
80. *Id.* (citing Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 116 (1936); International Bridge Co. v. New York, 254 U.S. 126 (1987)).
81. *Id*. at 627.
82. *Id.* at 626-27.
83. *Id.* at 635-36 (White, J., filed an opinion concurring in part and dissenting in part, in which Blackmun and Stevens, JJ., joined).
84. *Id.*
85. *Id*. at 636 (citing *Nordic Village*, 503 U.S. at 45) (internal quotations omitted).

must be found in statutory text that is not susceptible to any other interpretation, and the Court will look to outside statutory interpretation tools to make a finding that the language is susceptible to another interpretation. Where there is any possible ambiguity in the statutory text, the necessary unequivocal waiver will not be found.

III. Synthesizing the Doctrine of Sovereign Immunity Into a Comprehensive Framework

The following section summarizes what the above cases mean, and then presents a framework within which sovereign immunity problems before the Court in the future should be analyzed. As a broad context for examining sovereign immunity problems, the Court in *Meyer* set out a two-step approach for any such problem: (1) determine whether sovereign immunity has been waived in the case before the Court; and (2) if so, determine whether there has been a violation of the substantive law that the claimant alleges to have been violated by the United States or a federal agency.[86] If the answer to both is affirmative, then the Court will provide relief to the claimant.

More specifically, the Court has provided some guidance to be used in determining whether the first step of the *Meyer* test is satisfied—has sovereign immunity been waived? First, there are two categories of waivers: (1) the broad or sweeping language waivers (hereinafter broad waivers)[87]; and (2) the narrower but still unequivocal expressions of waiver (hereinafter unequivocal waivers).[88] The waiver category at issue will have a considerable impact as to how the language of the waiver, or alleged waiver, is analyzed.

Recognized broad waivers are few. Broad waivers are exemplified by sue and be sued provisions which are often found in an agency's enabling legislation. The FTCA also provides an example of language that the Court has found to be sufficiently broad to fall into the category of broad waivers of sovereign immunity. The significance of the Court finding that a statute provides a broad waiver is that the Court will then liberally construe the scope of that waiver. The Court has stated that broad waivers create the presumption that immunity has been waived.[89] To defeat the presumption, a clear showing that Congress did not intend to waive sovereign immunity must be made by the federal government.[90] Placing the burden on the government is very different from how the Court has treated cases where a broad waiver was not found.

Where such broad language is not found, the waiver must be unequivocally expressed for the Court to find that there has been a waiver of sovereign immunity. The Court has recently summarized how it will search for unequivocal waivers in *Lane v. Pena*.[91] There are four prongs to determine whether there is an unequivocal waiver. First and foremost, the Court has held that unequivocal waivers must be unequivocally expressed in the statutory text.[92] Second, the scope of an unequivocal waiver will be strictly construed in favor of the United States[93]; this is in direct opposition to the broad waivers, which are liberally construed in favor of finding a waiver of sovereign immunity. The meaning of this second prong is threefold: (1) ambiguities in statutory language will be construed in favor of the sovereign[94]; (2) limitations, conditions, and exceptions found in a waiver will be strictly observed[95]; and (3) the waiver must not be enlarged beyond what the language requires.[96] The third prong is that where monetary relief is at issue, "the waiver of sovereign immunity must extend unambiguously to such monetary claims."[97] Fourth, legislative history and statutory purpose are not used in determining whether sovereign immunity has been waived, reinforcing the rule that the waiver must unequivocally appear in the statutory text.[98]

IV. The Pollution Control Laws and Waiver of Sovereign Immunity

A. Comparing Statutory Provisions of the CWA and the CAA

With the Court's principles of sovereign immunity in mind, to what extent have the pollution control laws waived sovereign immunity? The two statutes that are examined here are the CWA, on which the Court has directly spoken, and the CAA, which the Court has yet to address in terms of waiver of sovereign immunity.

1. Waiver Under the Federal Facilities Provisions of the CWA and the CAA

The Court, in *Ohio*, closely examined the federal facilities provision of the CWA,[99] which provides:

> Each department, agency, or instrumentality of the . . . Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and *process and sanctions* respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity . . . . The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any *process and sanction*, whether enforced in Federal, State, or local courts or in any other manner. . . . This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law . . . . [T]he United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.[100]

86. *Meyer*, 510 U.S. at 484; *see also* U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736 (2004).
87. *Meyer*, 510 U.S. at 480-81; *see also Nordic Village*, 503 U.S. at 34.
88. *Ohio*, 503 U.S. at 609; *see also* Ardestani v. U.S. Immigration & Naturalization Servs., 502 U.S. 129, 138 (1991).
89. *Meyer*, 510 at 480-81.
90. *Id*. at 481.
91. 518 U.S. 187, 192 (1996).
92. *Id.* at 192 (citing *Nordic Village*, 503 U.S. at 33-34).
93. *Id.* (citing United States v. Williams, 514 U.S. 527, 531 (1995)).
94. United States v. Williams, 514 U.S. 527, 531 (1995).
95. Lehman v. Nakshian, 453 U.S. 156, 161 (1981).
96. Library of Congress v. Shaw, 478 U.S. 310, 318 (1986) (citing Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-86, 13 ELR 20664 (1983)).
97. *Lane*, 518 U.S. at 192 (citing *Nordic Village*, 503 U.S. at 34).
98. *Id*. (citing *Nordic Village*, 503 U.S. at 37).
99. *Ohio*, 503 U.S. at 620-21.
100. 33 U.S.C. §1323(a) (emphasis added).

First, the Court mentioned the undisputed waivers of sovereign immunity found in this provision. That is, the CWA waives federal sovereign immunity as to injunctive relief and coercive penalties as a means to enforce orders already in place.[101] DOE conceded this in its briefing to the Court.[102] However, the Court held that a waiver of sovereign immunity could not be found in the CWA's federal facilities provision in regard to punitive civil penalties.

Ohio made two arguments, both rejected by the Court, as to why the federal facilities provision waived sovereign immunity for punitive civil penalties, which are thoroughly discussed above in Part II.B.3. of this Article. After a searching and painstaking examination of the CWA's federal facilities provision, the Court held that sovereign immunity was not waived as to punitive civil penalties.

The CAA also contains a federal facilities provision, and it is strikingly similar to the CWA's provision. The CAA federal facilities provision provides in relevant part:

> Each department, agency, and instrumentality of the . . . Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), *(B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program*, (C) to the exercise of any Federal, State, or local administrative authority, and (D) to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. *No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable*.[103]

Due to the considerable similarity between the CWA's federal facilities provision and the CAA's federal facilities provision (the only phrases/sentences that differ are italicized in the above passage) there is no reason to believe that a waiver of sovereign immunity regarding punitive civil penalties can be found in the CAA provision. Unless the Court unexpectedly shifts course and finds Justice Byron White's dissent in *Ohio* decidedly more persuasive than it did in 1992, the reasoning of the Court regarding the CWA provision will undoubtedly control a challenge to sovereign immunity based on the CAA's federal facilities provision. Thus, different language from a different provision is a requisite to persuade the Court to hold that sovereign immunity as to punitive civil penalties has been waived by the CWA.

2. Waiver Under the Citizen Suit Provisions of the CAA

The citizen suit provision of the CAA may provide the language that is necessary to convince the Court that the CAA does indeed waive sovereign immunity as to punitive civil penalties, at least in cases where a state or local government seeks such penalties. One appeals court has already held as much; however, another circuit has held precisely to the contrary.

The CAA's citizen suit provision provides in relevant part:

> Nothing in this section or in *any other law of the United States* shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—
>
> **(1)** bringing any enforcement action or *obtaining any judicial remedy or sanction* in any State or local court, or
>
> **(2)** bringing any administrative enforcement action or *obtaining any administrative remedy or sanction* in any State or local administrative agency, department or instrumentality,
>
> against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.[104]

Based on the phrases "any other law of the United States" and any "remedy or sanction" found in the CAA's citizen suit provision, the Sixth Circuit, in *Tennessee Air*, held that sovereign immunity has indeed been waived by the CAA with regard to punitive civil penalties when the suit against the United States is brought by a qualified plaintiff (a state, local, or interstate authority).[105] Language similar to the phrases cited from the CAA does not exist in the CWA.[106] However, the Eleventh Circuit, in *Jacksonville*, explicitly disagreed with the Sixth Circuit, holding that the CAA's citizen suit provision does not waive sovereign immunity with regard to punitive civil penalties.[107]

a. *Tennessee Air* Waives Sovereign Immunity

In *Tennessee Air*, the state air pollution control board (Board) imposed a punitive civil penalty of $2,500 against the U.S. Army for violations of the Tennessee Air Quality Act at an ammunition plant in Tennessee.[108] On appeal of a declaratory judgment by the district court, the Sixth Circuit held that the CAA did waive sovereign immunity as to the penalties sought by the Board.[109]

The Sixth Circuit's analysis can be roughly fit into the sovereign immunity analysis framework. The first step in the *Meyer* test is to determine whether there is a waiver of sovereign immunity, either broadly or unequivocally stated. In *Tennessee Air*, the court did not mention the broad waiver as a part of its analysis. Instead the court's analysis immediately concluded that the CAA expressed an unequivocal waiver, stating that the CAA's "text *unequivocally* and unambiguously effects a waiver of sovereign immunity" as to

101. *Ohio*, 503 U.S. at 619.

102. *Id.* at 620.

103. 42 U.S.C. §7418 (emphasis added).

104. 42 U.S.C. §7604(e) (emphasis added).

105. *Tennessee Air*, 185 F.3d at 529.

106. *See* 33 U.S.C. §1365(e).

107. *Jacksonville*, 348 F.3d at 1307.

108. *Tennessee Air*, 185 F.3d at 531.

109. *Id.*

the punitive civil penalty assessed against the United States by the Board."[110]

Failing to analyze the possibility of a broad waiver, however, is a misstep in the *Tennessee Air* opinion. To date, the difference between a broad waiver and an unequivocal waiver is not well defined. Other than sue and be sued provisions and the waiver found in the FTCA, there are no explicitly recognized examples of broad waivers. Yet the disparity of treatment between broad waivers (being given liberal constructions in favor of finding a waiver of sovereign immunity) and unequivocal waivers (being given exceedingly narrowing constructions in favor of the sovereign), cries out for careful consideration. Thus, any analysis of a sovereign immunity problem should begin with an explicit determination of what type of waiver is potentially present in the statute. Without such a determination, it will be unclear whether the waiver should be liberally construed in favor of waiving immunity or narrowly construed in favor of the sovereign.

While the *Tennessee Air* court did not explicitly state that there was no broad waiver present, the court did indicate that it was looking for an unequivocal waiver. Thus, having placed the CAA waiver in the unequivocal waiver category, the next step is to determine whether the CAA waiver meets the unequivocal waiver standard derived from recent Court decisions. Again, there are four prongs to this analysis. First, the waiver must be unequivocally expressed in the statutory text. In *Tennessee Air*, the court found that the CAA satisfied this prong. The court focused on the CAA's citizen suit provision language providing:

> Nothing in this section or *any other law* of the United States shall be construed to prohibit . . . any State . . . from bringing any administrative enforcement action or *obtaining any administrative remedy or sanction* in any State or local administrative agency . . . against the United States . . . under State or local law respecting control and abatement of air pollution.[111]

In particular, the any other law phrase was significant because the court reasoned "'any other law' obviously includes the law of sovereign immunity."[112] Thus, nothing in the law of sovereign immunity can be construed to prohibit a state from gaining any remedy or sanction against the United States. The court stated: "[T]his is a clear waiver of sovereign immunity."[113] Therefore, if the court had applied the sovereign immunity analysis framework presented here, the court would have reached the appropriate and sensible conclusion that the CAA satisfies the first prong, by unequivocally expressing a waiver.

The second prong of the unequivocal waiver analysis is that a waiver of sovereign immunity is to be construed strictly in favor of the sovereign. The meaning of this prong is threefold: (1) ambiguities in statutory language will be construed in favor of the sovereign[114]; (2) limitations, conditions, and exceptions found in a waiver will be strictly observed[115]; and (3) the waiver must not be enlarged beyond what the language requires.[116] The *Tennessee Air* court did not specifically address this prong. However, based on some of the language in the opinion, it appears the court would have found there to be no possible construction, based on the statutory language, other than waiver of sovereign immunity regarding punitive civil penalties assessed by states. Explicitly, the court stated that the citizen suit provision provides that "nor 'any other law' shall restrict states from obtaining any judicial or administrative remedy or sanction. If words have meaning, this says that no law shall restrict the State of Tennessee from obtaining any administrative remedy or sanction against a federal air polluter."[117] Importantly, the court found no ambiguity or limitation in this language and that the language required finding a waiver. Thus, there is no possible limiting construction based on the statutory language that could limit the scope of the waiver in favor of the United States; the language is simply too clear and too broad in its mandate. The second prong is satisfied.

The third prong of the unequivocal waiver analysis addresses situations where monetary relief is sought. Specifically, where monetary relief is at issue, the waiver must extend unambiguously to such monetary claims. Again, the *Tennessee Air* court did not make specific mention of this point, but the court undoubtedly found it to be satisfied. The court cited to the fact that the statute allows for any administrative remedy or sanction.[118] The term sanction is not coupled with the term process, as was the case with the federal facilities provision in the *Ohio* case, leading the Court to determine that immunity from punitive civil penalties was not intended to be waived by the CWA.[119] Absent such a coupling in the CAA citizen suit provision, the *Tennessee Air* court found that there was no ambiguity as to whether punitive civil penalties, a type of monetary relief sought by the Board, were allowable. The court stated: "The words 'any administrative remedy or sanction,' as used by §7604(e)(2), clearly encompass the civil penalty imposed by the Board in the case at bar. The Board's enforcement authority is not limited to prospective, coercive action . . . ."[120] Therefore, the third prong is satisfied.

The fourth prong is that legislative history or statutory purpose cannot be used to find a waiver of sovereign immunity. The *Tennessee Air* court, correctly, did not make any mention or use of legislative history or statutory purpose in reaching its conclusion.[121] Instead the court relied on straightforward statutory text, satisfying the fourth prong. Therefore, all four prongs of the unequivocal waiver analysis are satisfied and the court correctly held that the CAA citizen suit provision contained an unequivocal waiver of sovereign immunity regarding punitive civil penalties assessed by states and local governments.

The final step of the sovereign immunity analysis is the second step of the *Meyer* test, which has less to do with sovereign immunity and more to do with alleging an appropriate violation of the law. That is, if there is a waiver of sovereign immunity, does the source of substantive law upon which claimant relies provide an avenue for relief? Where sovereign immunity as to punitive civil penalties is held to be waived, there appears to be no question that the CAA pro-

110. *Id.* (emphasis added).

111. *Id.* at 532 (citing 42 U.S.C. 7604(e)) (emphasis added).

112. *Id.*

113. *Id*.

114. United States v. Williams, 514 U.S. 527, 531 (1995).

115. Lehman v. Nakshian, 453 U.S. 156, 161 (1981).

116. Library of Congress v. Shaw, 478 U.S. 310, 318 (1986).

117. *Tennessee Air*, 185 F.3d at 533.

118. *Id.*

119. *Ohio*, 503 U.S. at 623-24.

120. *Tennessee Air*, 185 F.3d at 532.

121. *See id.*

vides an avenue for a state to receive substantive relief in the form of punitive civil penalties. Particularly, the citizen suit provision provides that a state may enforce any of its "[s]tate or local law respecting control and abatement of air pollution" against the United States.[122] Thus, the Board had the right to enforce its substantive air pollution law against the United States.

Therefore, all steps of the sovereign immunity analysis framework were either expressly recognized as satisfied by the Sixth Circuit in *Tennessee Air*, or if not expressly analyzed, it is readily apparent from the language of the opinion that the Sixth Circuit would reason that each step was satisfied. Thus, the Sixth Circuit appropriately held that sovereign immunity with regard to punitive civil penalties has been waived by the citizen suit provision of the CAA and the court appropriately allowed the state to collect such penalties from the United States.

b. *Jacksonville* Does Not Find a Waiver of Sovereign Immunity

In *Jacksonville*, the Eleventh Circuit reached a result contrary to that of the Sixth Circuit, holding that the same CAA citizen suit provision did not waive sovereign immunity as to punitive civil penalties.[123] The Eleventh Circuit held that there was no unequivocal waiver,[124] reversing a district court decision that had agreed with the Sixth Circuit's *Tennessee Air* reasoning and found an unequivocal waiver of sovereign immunity.[125]

In the district court, the city alleged that the U.S. Department of Navy (Navy) had violated state and local air pollution regulations 250 times between 1996 and 2001.[126] The city had brought suit in state court and sought punitive civil penalties of $10,000 for each past violation, for a total of $2.5 million.[127] The Navy removed the case to federal district court and filed a motion on the pleadings arguing a lack of subject matter jurisdiction because, it argued, the CAA does not waive federal sovereign immunity regarding punitive civil penalties.[128] In denying the Navy's motion, the district court held that sovereign immunity was waived by the language of the CAA. The district court essentially adopted the *Tennessee Air* reasoning of the Sixth Circuit.[129] The Eleventh Circuit reversed, finding fault in the Sixth Circuit's reasoning and the district court's use of it.

Applying the sovereign immunity analysis framework to the *Jacksonville* decision, it appears that the Eleventh Circuit failed to determine whether the potential waiver at issue was a broad waiver or an unequivocal waiver.[130] Instead, the court launched into an analysis of whether an unequivocal waiver existed, without mention of the broad waiver category.[131]

The *Jacksonville* court did, however, evaluate many of the four unequivocal waiver prongs in its analysis of the CAA citizen suit provision. Departing from its sister circuit, the Eleventh Circuit did not find that the waiver was sufficiently expressed in the statutory text of the CAA's citizen suit provision.[132] Focusing on the language that allowed the city to obtain any administrative remedy or sanction, the court was not convinced this language included punitive civil penalties.[133] In particular, the Eleventh Circuit stated: "We respectfully disagree with the Sixth Circuit's broad interpretation of this phrase, as we must adhere to the Supreme Court's rationale that the phrase 'remedy or sanction,' by itself, 'carries no necessary implication that a reference to punitive fines is intended.'"[134]

However, the Eleventh Circuit's characterization of the Court's language in *Ohio* is simply incorrect. The *Ohio* Court did in fact make the statement quoted by the Eleventh Circuit, however, that quote was in reference only to the term sanction not to the phrase remedy or sanction as the Eleventh Circuit asserts.[135] Additionally, the *Ohio* Court, after making the statement quoted in *Jacksonville*, sought to further clarify the meaning of the term sanction. The *Ohio* Court found that dictionary definitions clearly pointed in the direction of a sanction being a coercive measure, not a punitive measure. Also, the *Ohio* Court looked for examples of usage of the term sanction and found that "examples of usage in the coercive sense abound."[136] Finally, the *Ohio* Court examined the context in which the term sanction was used in the CWA, and found the context of the term to be dispositive as to the true scope and meaning of the term sanction in the CWA. However, at no point did the *Ohio* Court engage in an inquiry into the phrase remedy or sanction or the term remedy[137]; thus, the Eleventh Circuit's statement implying as much is categorically untrue.[138]

If the Eleventh Circuit is going to purport to rest its decision on a fragment of a sentence found in the Court's *Ohio* decision, then it should also endeavor to follow the systematic reasoning of *Ohio*. Because the Eleventh Circuit failed to do as much, an inquiry tracking the reasoning of *Ohio* is appropriate here. First, the dictionary definition of remedy must be examined. The dictionary defines remedy as "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief."[139] Certainly, preventing or redressing a wrong is one purpose of a punitive civil penalty, and a punitive civil penalty is a type of legal relief. Perhaps more importantly, the definition of remedy is significant for what it does not say. The definition in no way indicates that a remedy is only coercive.

Next, the usage of the term remedy must be examined. Such an exercise shows that usage of the term remedy in the punitive or civil penalty sense abound.[140] This is a strong in-

122. 42 U.S.C. §7604(e).

123. *Jacksonville*, 348 F.3d at 1320.

124. *Id.* at 1309.

125. City of Jacksonville v. Department of Navy, 187 F. Supp. 2d 1352, 1358 (M.D. Fla. 2002).

126. *Jacksonville*, 348 F.3d at 1309-10.

127. *Id.* at 1310.

128. *Id.*

129. *Id.*

130. *Id*. at 1314.

131. *See id.*

132. *Id.* at 1319-20.

133. *Id*.

134. *Id.* at 1319-20 (citing *Ohio*, 503 U.S. at 621).

135. *Ohio*, 503 U.S. at 621.

136. *Id*.

137. In fact, the CWA's federal facilities provision contains no mention of the term remedy. *See* 42 U.S.C. §7418.

138. *Ohio*, 503 U.S at 621.

139. Black's Law Dictionary 1320 (8th ed. 2004).

140. Tull v. United States, 481 U.S. 412, 423, 17 ELR 20667 (1987) ("[T]he *remedy of civil penalties* is similar to the remedy of punitive

dication that Congress, with its use of the term, intended to include punitive civil penalties as a type of relief available against the United States.

Finally, the primary reason that the *Ohio* Court held that the term sanction did not express an unequivocal waiver was the context in which the term sanction is used in the CWA.[141] Specifically, each time the term sanction is used in the CWA's federal facilities provision, it is within the phrase "process and sanction[s]."[142] Using the term process along with the term sanction led the Court to reason that Congress was distinguishing substantive requirements from judicial process—meaning that Congress was talking about judicial process with its use of the phrase "process and sanctions."[143] Sanctions in terms of judicial process generally refer to coercive penalties, not punitive civil penalties. Specifically, the Court stated: "'Process' normally refers to the procedure and mechanics of adjudication and the enforcement of decrees or orders that the adjudicatory process finally provides."[144] Finally, the Court found that violations of process are enforced through forward-looking orders enjoining future violations, which are "given teeth by equity's traditional coercive sanctions for contempt: fines and bodily commitment imposed pending compliance or agreement to comply."[145] Therefore, the Court used the linguistic context in which the term sanction was used to narrow its meaning to include only coercive fines and not punitive civil penalties.[146]

The difference in the language between the two statutes means that the Court's contextual analysis of the term sanction in the CWA is not controlling over a contextual analysis of the term sanction in the CAA. However, the method of the Court's contextual analysis is instructive as to what a court should similarly do in evaluating the term sanction in the CAA's federal facilities provision.

While the Eleventh Circuit's analysis begins in much the same way as the Court's in *Ohio*, the Eleventh Circuit failed to provide a complete analysis by not engaging in a contextual analysis similar to the *Ohio* analysis. The *Jacksonville* court appropriately cited the *Ohio* case for the proposition that the term "'sanction' is spacious enough to cover not only . . . punitive fines, but coercive ones as well."[147] Yet, the *Jacksonville* court fails to recognize that this was only the starting point for the Court's construction of the term. The Court then went on, by using dictionary definitions, common usage, and contextual analysis, to narrow the meaning of the term sanction to reach the conclusion that the term sanction, as used in the CWA, refers only to coercive fines. The Eleventh Circuit simply begins with the proposition that sanction is a spacious term, and then goes on to state that remedy, as used in the CAA's citizen suit provision in conjunction with the term sanction, is also spacious enough to cover not only punitive fines, but coercive ones as well. This statement is as true as it is insignificant, because the *Jacksonville* court fails to go to the next requisite step of analysis: finding a way to narrow the meaning of the terms to include only coercive fines.[148] Bluntly, the Eleventh Circuit appears to have failed to take this step in its analysis because it would not have yielded the same result as the *Ohio* case; the phrase remedy or sanction simply cannot be forthrightly narrowed to mean only coercive penalties.

In the case of the phrase remedy or sanction from the CAA's citizen suit provision, definitions, usage, and context cannot be used narrow the meaning of the phrase to only coercive fines. Thus, if the phrase remedy or sanction has meaning at all, it must mean that both punitive and coercive fines are included in its ambit. This is, undoubtedly, statutory text that expresses an unequivocal waiver of sovereign immunity with regard to punitive civil penalties, satisfying the first prong of the unequivocal waiver analysis; the phrase simply can have no other meaning.

The unequivocal waiver of the statutory text of the CAA's citizen suit provision is further bolstered by the beginning phrase of the second sentence of the provision which states, "Nothing in this section or in *any other law* of the United States shall be construed [to] prohibit, exclude, or restrict . . . any state or local government from obtaining any 'remedy or sanction.'"[149] The Eleventh Circuit failed to note the importance of the phrase any other law.[150] As noted by the Sixth Circuit in *Tennessee Air*:

> "[A]ny other law" obviously includes the law of sovereign immunity, so this sentence tells us that nothing in the law of sovereign immunity shall be construed to prohibit any state from obtaining any administrative remedy or sanction against the United States. As we read it, this is a clear waiver of sovereign immunity.[151]

The Eleventh Circuit ignored this important phrase as it pertains to sovereign immunity.

As stated, the second prong of the unequivocal waiver analysis is that the scope of the waiver will be strictly construed in favor of the sovereign.[152] The *Jacksonville* court took this prong as license to freely interpret the language narrowly to exclude a waiver of punitive civil penalties.

damages, another legal remedy that is not a fixed fine."); Cook County, Ill. v. United States ex rel. Chandler, 538 U.S. 119, 130 (2003) ("Congress's adoption of a *'punitive' remedy* entailed the elimination of municipal liability in 1986."); Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 7 (2000) ("Where deficiencies are less serious, the Secretary may impose lesser *remedies*, such as *civil penalties*, transfer of residents, denial of some or all payment, state monitoring, and the like."); Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 168, 30 ELR 20246 (2000) ("Citing *Steel Co. v. Citizens for Better Environment* . . . the court reasoned that the only *remedy* currently available to FOE, *civil penalties* payable to the Government, would not redress any injury FOE had suffered."); Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977) (In reference to OSHA the Court stated: "Two new *remedies* were provided permitting the Federal Government, proceeding before an administrative agency, (1) to obtain abatement orders requiring employers to correct unsafe working conditions and (2) to impose *civil penalties* on any employer maintaining any unsafe working condition."). Emphasis was added to each quote by using italics.

141. *Ohio*, 503 U.S. at 622.

142. *Id*.

143. *Id.* at 623.

144. *Id.*

145. *Id*.

146. *Id.*

147. *Jacksonville*, 348 F.3d at 1318 n.8.

148. *Id.*

149. 42 U.S.C. §7604(e) (emphasis added).

150. *See Jacksonville*, 348 F.3d at 1307.

151. *Tennessee Air*, 185 F.3d at 532.

152. *See* United States v. Williams, 514 U.S. 527, 531 (1995); Lehman v. Nakshian, 453 U.S. 156, 161 (1981); and Library of Congress v. Shaw, 478 U.S. 310, 318 (1986) (citing Ruckelshaus v. Sierra Club, 463 U.S. 680, 685-86, 13 ELR 20664 (1983)).

However, the court failed to make a finding that the language was ambiguous, or that there were statutory limitations placed on the waiver, or that finding a waiver of sovereign immunity as to punitive civil penalties would go beyond what the language requires. Court precedent establishes these conditions as prerequisites to imposing a narrowing construction on a waiver, and none of these prerequisites are found in the CAA's citizen suit provision. Therefore, the *Jacksonville* court exceeded its authority and inappropriately narrowed the waiver found in the CAA's citizen suit provision to include only coercive penalties.

The *Jacksonville* court did offer one justification for its narrowing interpretation, that the citizen suit provision must be interpreted "in light of the remainder of the statute which it is a part."[153] Under this concept, the *Jacksonville* court looked to the CAA's federal facilities provision, which is referenced in the citizen suit provision. Since the scope of the federal facilities provision's waiver of sovereign immunity is limited to coercive penalties (relying on the Court's *Ohio* analysis), the *Jacksonville* court reasoned that the scope of the citizen suit provision should also be so limited.[154] However, upon closer examination, this reason for limiting the scope of the CAA's citizen suit provision is nonsensical. First, it is a settled rule that statutes are to be construed in a manner that gives every provision, and indeed every word, effect.[155] This settled rule would be frustrated by simply giving the CAA's citizen suit provision precisely the same meaning as the federal facilities provision. Such an interpretation would make the inclusion of language superfluous, a strongly disfavored outcome.

Additionally, limiting the scope of one waiver simply based on the scope of a waiver found elsewhere in a statute is illogical, especially when there is no regard given to the differing language of the two provisions. There are important policy reasons why a waiver of a more limited scope will be found in the federal facilities provision and a waiver of greater scope will be found in the citizen suit provision that preserves the rights of states and local governments to bring suit against the United States. Granting a full waiver in the federal facilities provision would give any citizen group (including private citizens and nongovernment organizations) the right to obtain punitive civil penalties in suits against the United States. This would potentially open up the federal government to significant monetary liability and could be thought to endanger the federal treasury. However, waiving sovereign immunity with regard to punitive civil penalties in the case of suits brought by states and local governments makes more sense. A government-to-government relationship helps to ensure a better working relationship between the parties and makes it more likely that punitive civil penalties will only be sought in truly egregious cases. Further, under concepts of cooperative federalism found in the CAA, it is state and local governments who have primary implementation responsibility for the CAA.[156] Thus, restraining a state or local government's authority to obtain a full range of relief under the auspices of sovereign immunity seems undesirable.

153. *Jacksonville*, 348 F.3d at 1319 (citing *Tennessee Air*, 185 F.3d at 534).

154. *Id.*

155. United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992).

156. *See* Michigan v. EPA, 268 F.3d 1075, 1084, 32 ELR 20248 (D.C. Cir. 2001); *see also* 42 U.S.C. §7410.

The third prong of the unequivocal waiver test requires that, for monetary damages to be sustained against the United States, the sovereign immunity waiver must extend unambiguously to such monetary claims.[157] The *Jacksonville* court mentioned this prong stating: "[W]here a waiver would authorize payments from the federal treasury, as the City claims the waiver in the CAA does, it 'must extend unambiguously to such monetary claims.'"[158] While having made mention of this prong, the *Jacksonville* court did not include an analysis of this prong. The court had already held that the statute did not unequivocally express a waiver as to punitive civil penalties in its text and that the scope of the waiver had to be narrowed to exclude a waiver as to punitive civil penalties, making such an analysis unnecessary because the court had deemed that it had resolved the case on other grounds.

However, because the *Jacksonville* court incorrectly held that the first two prongs of the unequivocal waiver test resolved the case, the third prong is reached here. The Court's opinion in *West v. Gibson*[159] assists the resolution of this issue. In *West*, the Court shed some light on the principle that the waiver must extend unambiguously to monetary claims.[160] The Court held that sovereign immunity as to compensatory damages, under §717(b) of Title VII of the Civil Rights Act of 1964, was waived even though there was no express statement allowing for compensatory damages in an administrative proceeding.[161] The provision only provided for "appropriate remedies."[162] Thus, if the phrase appropriate remedies is enough to unambiguously waive sovereign immunity as monetary claims, then surely the phrase any remedy or sanction is also enough to waive sovereign immunity as to monetary claims. The third prong is satisfied by the CAA's citizen suit provision.

The fourth, and final, prong of the unequivocal waiver analysis requires that legislative history and statutory purpose not be used to reach a determination of whether sovereign immunity has been waived. The *Jacksonville* court, appropriately, did not use such factors in reaching its incorrect determination that sovereign immunity is not waived. While the legislative history and statutory purpose may be helpful,[163] the legislative history and statutory purpose are not necessary to reach the appropriate conclusion: the CAA's citizen suit provision waives sovereign immunity with regard to punitive civil penalties when they are sought by a state or local government.

157. Lane v. Pena, 518 U.S. 187, 192 (1996) (citing *Nordic Village*, 503 U.S. at 34).

158. *Jacksonville*, 348 F.3d at 1314.

159. 527 U.S. 212 (1999).

160. *Id.*

161. *Id.* at 225 (Justice Kennedy dissenting).

162. *Id.*

163. Stephan J. Schlegelmilch, *The Clean Air Act, Sovereign Immunity, and Sleight of Hand in the Sixth Circuit:* United States v. Tennessee Air Pollution Control Board, 50 Case W. Res. L. Rev. 933, 951-52 (2000). Congressional intent to waiver sovereign immunity

> can be seen in a number of ways in the [CAA]. First, the stated purpose of [the] Act, and the overarching structure of the Act, suggest that such a result was intended. Second, the circumstances under which the 1977 Amendments to that act, as well as the recorded history of the drafters, suggest that the waiver was intended to be interpreted broadly. And finally, other related passages of the [CAA] suggest that federal liability was to be the rule, not the exception.

The Eleventh Circuit in *Jacksonville* reached the wrong result. Analyzing that court's opinion in detail reveals a number of missteps made by the court. Further, applying the comprehensive sovereign immunity analysis framework, the CAA's citizen suit provision clearly satisfies the requirements of an unequivocal waiver of sovereign immunity. Thus, if, or more likely when, this issue reaches the Supreme Court, the Court should hold that the CAA's citizen suit provision waives sovereign immunity with regard to punitive civil penalties when they are sought by a state or local government.

V. Conclusion

The issue of waiver of sovereign immunity is an important one and one that has been before the Supreme Court frequently in the last two decades. At this point, the Court's decisions can be set into a framework to be used to analyze future waiver of sovereign immunity questions. Applying this sovereign immunity analysis framework to the CAA reveals that the split between the Eleventh Circuit and the Sixth Circuit should be resolved in favor of finding a waiver. The CAA's citizen suit provision unequivocally waives federal sovereign immunity as to punitive civil penalties in enforcement actions brought by states and local governments. The Eleventh Circuit's *Jacksonville* decision reached the opposite conclusion due to the court's inappropriate reliance on a small fragment from the Court's *Ohio* opinion regarding waiver of sovereign immunity under the CWA. Careful examination of the entirety of the *Ohio* decision demonstrates that the opinion does not resolve the issue of waiver of sovereign immunity as to the CAA due to differing language between the CAA and the CWA—CWA language that the Court expressly relied upon does not exist in the CAA. However, the *Ohio* opinion does provide examples of tools a court should use in resolving the issue of waiver by the CAA. Application of these tools compels a result contrary to *Ohio*'s holding precisely because of the CAA's differing language. Therefore, when the Court is called upon to settle this circuit split, the Court should hold that the CAA does waive sovereign immunity as to punitive civil penalties in enforcement actions brought by a state or local government.