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Diligent Prosecution, Article II Challenges, and the Future of Environmental Citizen Suits

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DILIGENT PROSECUTION, ARTICLE II CHALLENGES, AND THE FUTURE OF ENVIRONMENTAL CITIZEN SUITS

INTRODUCTION

At the end of 2025, the U.S. Environmental Protection Agency ("EPA") issued a "Compliance First Policy" to direct its enforcement activities.[1] This Policy signifies an express shift to favoring cooperative compliance assistance for regulated entities *before* the agency will target violations through formal enforcement and judicial avenues. However, seemingly anticipating that EPA's shift to compliance over enforcement may lead to an uptick in environmental citizen suits, the Policy also emphasizes that EPA "must act swiftly to limit actions from third parties who, through citizen suit litigation, unfairly impact policy through abusive litigation tactics."[2]

Private parties have long relied on citizen suits as an alternative enforcement pathway under the major federal environmental statutes—including the Clean Air Act, Clean Water Act, Endangered Species Act, Resource Conservation and Recovery Act, and Toxic Substances Control Act. As the Supreme Court has underscored in the past, citizen suits *supplement* rather than *supplant* governmental action, and can typically proceed only when federal and state agencies do not exercise their enforcement responsibility.[3]

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[1] EPA, Memo. from Craig J. Pritzlaff, Acting Assistant Adm'r, Off. of Env't & Compliance Assurance, to OECA Off. Dirs. & Deputies, *Reinforcing a "Compliance First" Orientation for Compliance Assurance and Civil Enforcement Activities* (Dec. 5, 2025) ("Compliance First Policy"), https://www.epa.gov/system/files/documents/2025-12/reinforcing-a-compliance-first-orientation-for-compliance-assurance-and-civil-enforcement-activities.pdf (last visited Aug. 31, 2026).

[2] *Id.* at 6.

[3] *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) ("*Gwaltney*").

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The supplementary—rather than primary—role served by citizen suits is recognized by the statutory limits on when such suits may be brought. One of the notable limitations is the "diligent prosecution bar." However, consistent with EPA's recently announced policy indicating an interest in policing citizen suit litigation, the Department of Justice is acting to further limit the scope of citizen suit litigation in environmental matters. This shift is illustrated in a recent Clean Air Act citizen suit brought by the NAACP challenging compliance at xAI's Colossus 2 data center. The United States moved to intervene in the case and argued that the government was authorized to unilaterally veto and dismiss citizen suits, even where the United States has chosen *not* to pursue prosecution of any alleged violations.

This *Working Paper* discusses: (i) how the diligent prosecution bar has historically been applied, (ii) how the United States is interpreting its ability to "swiftly" limit citizen suit actions in *NAACP and NAACP Mississippi State Conference v. X.AI Corp. and MZX Tech LLC*, No. 3:26-cv-00074-DMB-JMV (N.D. Miss.) ("*NAACP*"), and (iii) the potential bases for mounting constitutional challenges to citizen suit statutes arguing that such statutes infringe on the Executive Power and violate Article II.

I. The Diligent Prosecution Bar and the Government's Primary Enforcement Role

A. The Diligent Prosecution Bar

Environmental citizen suit provisions recognize the government's primary responsibility for enforcing environmental statutes. Under the "diligent prosecution bar," citizen suits are generally barred where EPA or a State "has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance" with the requirement the citizen suit likewise alleges to have been

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violated.[4] To help effectuate the government's primary role, prospective citizen plaintiffs must generally provide advance notice of their intent to sue (often 60 days) to EPA, the relevant State, and the alleged violator.[5] This advance-notice requirement gives the government time to preempt citizen enforcement by commencing its own civil action before the citizen plaintiffs may file suit. As the Supreme Court observed in *Gwaltney*, legislative history indicates that citizen suits are proper only if the relevant agencies "fail to exercise their enforcement responsibility,"[6] and that citizen suits should not cross over from "interstitial to potentially intrusive" in a manner that impedes the government's discretion as to the manner in which it will enforce the statute.[7]

What constitutes "diligent" prosecution is a fact-specific inquiry that varies to some degree between circuits. Yet, even with these differences between the circuits, plaintiffs questioning the government's action (or lack thereof) may face a high burden because courts often presume diligence and defer to the enforcing agency.[8] For example, courts have observed that the standard "does not require government prosecution to be far-reaching or zealous. It requires only diligence. Nor must an

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[4] 42 U.S.C. § 7604(b)(1)(B). This *Working Paper* primarily cites the Clean Air Act citizen suit provision because it is at issue in *NAACP*. The Clean Air Act citizen suit provision parallels other citizen suit provisions in many respects but differs in others.

[5] 42 U.S.C. § 7604(b)(1)(A).

[6] *Gwaltney*, 484 U.S. at 60 (quoting S. Rep. No. 92-414, at 64 (1972), *reprinted in* 2 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 1482 (1973)).

[7] *Gwaltney* found that allowing citizens to pursue penalties for wholly past violations where the EPA or State had already required corrective measures (but chosen to forgo civil penalties) could significantly curtail the government's discretion to enforce the Act in the public interest and would allow such suits to cross over from "interstitial to potentially intrusive." *Id.* at 61.

[8] *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 523 F.3d 453, 459-60 (4th Cir. 2008) ("*Piney*"); *S. River Watershed All., Inc. v. DeKalb Cnty.*, Ga., 69 F.4th 809, 824–25 (11th Cir. 2023) ("The First, Second, Third, Fourth, Seventh, and Tenth Circuits all grant varying degrees of deference, ranging from a low of 'some deference' to a high of 'presumed' diligence. . . . We agree with our sister circuits that some level of deference is appropriate, but our conclusion is rooted primarily in the Supreme Court's observations about the role of citizen suits.").

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agency's prosecutorial strategy coincide with that of the citizen-plaintiff."[9] Caselaw evaluating diligence considers whether the government's enforcement action "is capable of requiring compliance with the Act and is in good faith calculated to do so."[10] The United States is therefore free to negotiate a more lenient penalty or different relief than citizen plaintiffs may have sought.[11] However, courts may find diligent prosecution lacking where the penalty sought is minor, nominal, or ineffective, or where the government commenced an action in bad faith or as a tactic solely to sidestep citizen suits.[12]

B. Rights of Intervention and Participation

Even where the diligent prosecution bar does not apply, citizen suit statutes often contain additional procedures to ensure federal participation. For example, the Clean Air Act requires citizen plaintiffs to serve a copy of their complaint on the Attorney General and EPA Administrator, and provides that the EPA "Administrator, if not a party, may intervene as a matter of right at any time in the proceeding."[13] Moreover, no consent judgment may be entered in a Clean Air Act citizen suit without

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[9] *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007); *see also Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 477 (6th Cir. 2004) ("Such second-guessing of the EPA's assessment of an appropriate remedy . . . fails to respect the statute's careful distribution of enforcement authority among the federal EPA, the States and private citizens[.]"); *Piney*, 523 F.3d at 459.

[10] *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 760 (7th Cir. 2004); *Piney*, 523 F.3d at 460.

[11] *See, e.g.*, *Piney*, 523 F.3d at 459–60; *S. River Watershed All.,* 69 F.4th at 825–26 ("Stated differently, 'when the EPA chooses to enforce the CWA through a consent decree, failure to defer to its judgment [could] undermine agency strategy. . . . For this reason, '[i]t would be unreasonable and inappropriate to find failure to diligently prosecute simply because [the defendant] prevailed in some fashion or because a compromise was reached.'") (internal citations omitted).

[12] *See, e.g., Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 890 F. Supp. 470, 490–91 (D.S.C. 1995) ("[T]he lack of substantial relief in a settlement is properly considered by the court in determining whether the state action was diligently prosecuted. . . . A lenient penalty that is far less than the maximum penalty may provide evidence of non-diligent prosecution.").

[13] 42 U.S.C. § 7604(c)(2)-(3).

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providing the United States notice and an opportunity to comment.[14]

II. The United States' Effort to Expand the Government's Role to Supplant and Veto Citizen Suits in *NAACP v. x.AI*

The current administration's evolving view on the role and constitutionality of citizen suits recently crystallized in *NAACP*, where the Department of Justice moved to intervene on behalf of the U.S. EPA—and moved to dismiss—a Clean Air Act citizen suit alleging that xAI is operating dozens of combustion turbines at a data center without required permits and in violation of applicable emissions standards.

The United States argued for dismissal largely on Article II of the Constitution by taking the position that executive prosecutorial discretion means not only that EPA (i) can decline to enforce, but (ii) the agency has the inherent power to block citizen suits that seek to proceed where EPA has decided not to prosecute.[15] The motion did not engage with the citizen suit's underlying substantive allegations of violations or claim that either the United States or Mississippi is diligently prosecuting an action. As a result, resolution of the motion did not require a factual inquiry into whether federal or state agencies are diligently prosecuting alleged violations. Rather, the United States asserted a right to unilaterally dismiss the citizen suit because the government "has determined that dismissal of this civil enforcement action accords with federal policy, national security, and the public interest."[16]

The United States' motion advanced two principal arguments for dismissal, both rooted in Article II:

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[14] 42 U.S.C. § 7604(c)(3).

[15] *See* Mem. in Supp. of the U.S.'s Mot. for Intervention and Dismissal ("U.S. Br.") at 8 (June 15, 2026), Dkt. No. 59.

[16] *Id.*

A. Argument that Federal Rule of Civil Procedure 41(a)(1) Authorizes Unilateral Dismissal as of Right

The United States maintained that it has the "absolute right" to dismiss the action under Federal Rule of Civil Procedure 41(a)(1), because xAI has not yet filed an answer or motion for summary judgment.[17] Rule 41(a)(1) provides for "voluntary dismissal" "by the plaintiff" without prejudice before the opposing party has served an answer or motion for summary judgment. The United States claimed that dismissal under this rule deprives the district court of any adjudicatory role. The United States' principal support is *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419, 437 (2023), which addressed the federal government's authority to seek dismissal of *qui tam* suits brought by relators "on behalf of and in the name of the Government" under Rule 41(a). The NAACP countered[18] by arguing that the False Claims Act—unlike the Clean Air Act—expressly provides a mechanism for the United States to take over *qui tam* cases and dismiss them over a relator's objections.[19] The NAACP sought to distinguish *qui tam* suits—which are expressly brought on behalf of and in the name of the *government*—from Clean Air Act citizen suits, where the statute expressly states that "any person may commence a civil action on his *own* behalf."[20] Procedurally, the NAACP also asserted that Federal Rule of Civil Procedure 41 allows "a plaintiff only to dismiss its own claims—*not* the claims of another plaintiff."[21]

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[17] *Id.*

[18] Pls.' Mem. in Opp'n to the U.S.'s Mot. for Intervention and Dismissal ("NAACP Opp'n") at 23 (July 20, 2026), Dkt. No. 92.

[19] *Polansky*, 599 U.S. at 435-37; 31 U.S.C. § 3730(c)(2)(A).

[20] 42 U.S.C. § 7604(a) (emphasis added).

[21] NAACP Opp'n at 2.

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B. Argument that the Clean Air Act Citizen Suit's Allowance for "Intervention as of Right" Inherently Includes the Right to Unilaterally Dismiss the Suit

The United States separately argued that the Clean Air Act's "intervention as of right" must be interpreted to include the right to dismiss, as this interpretation would "avoid grave doubts about the citizen-suit provision's constitutionality."[22] Invoking Article II's Vesting and Take Care Clauses,[23] the United States asserted that allowing citizens to seek penalties payable to the Treasury over its objection would deprive the Executive of discretion to decide a violation should not be the object of a suit *at all*.[24]

In response, the NAACP emphasized that no statutory text explicitly authorizes the government to unilaterally dismiss a citizen suit. Instead, the statute provides only the diligent prosecution bar—allowing the United States to supplant a citizen suit by commencing its own action—along with express procedural mechanisms for government participation.[25] The NAACP further countered that Congress expressly authorized government dismissal of *qui tam* suits under the False Claims Act but did not include a similar power in the Clean Air Act. These separate legislative approaches, the NAACP argued, support the conclusion that no such authority exists.[26] As to the United States' reliance on the constitutional avoidance canon, the NAACP asserted that it permits choosing "'between competing *plausible* interpretations of a statutory text' but does not 'give a court authority to rewrite a statute as it pleases.'"[27]

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[22] *See* U.S. Br. at 10.

[23] U.S. Const. art. II, § 1 cl. 1; *id.* § 3.

[24] *See* U.S. Br. at 17.

[25] NAACP Opp'n at 15-17.

[26] *Id.* at 14-15.

[27] *Id.* at 24 (quoting *Jennings v. Rodriguez,* 583 U.S. 281, 298 (2018)).

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The arguments raised by the United States, and opposed by the NAACP, raise novel questions:

- **Does the diligent prosecution bar support or detract from the United States' arguments?** One of the novel aspects of the motion to dismiss is that the United States did not claim that it (or the State) is diligently prosecuting the case, but rather that the United States must be afforded a unilateral right of dismissal because the citizen suit conflicts with Executive policy and enforcement discretion. The NAACP countered that a unilateral right of dismissal is not found in the statutory text and the statute only expressly allows the United States to block a citizen suit by commencing and diligently prosecuting its own action. In response, the United States argued that "the diligent-prosecution bar reinforces, rather than divests, the United States' inherent discretion to decide the statute should not be enforced in a particular case," because it demonstrates the United States' "preeminent enforcement discretion."[28] As a result, the United States concluded that "any suggestion that this suit should go forward *because* the federal and state governments are declining to enforce gets things backwards."[29]

- **Is a Clean Air Act citizen suit an enforcement action on behalf of the government to vindicate public rights, or an action on a citizen's own behalf seeking to vindicate his or her own concrete injury?** This is a key question underlying the arguments on the constitutionality of federal environmental citizen suit provisions, including in the Clean Air Act.[30] The United States' briefing characterized citizen suit provisions as

[28] U.S. Br. at 13-14.

[29] *Id.* at 16.

[30] The requirement for citizen suit plaintiffs to demonstrate Article III standing—and the required concrete injury—is deeply intertwined with questions regarding the constitutionality of citizen suits under Article II. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577, (1992) (in citizen suit challenging legality of the Department of Interior Endangered Species Act regulations, finding that plaintiffs lacked standing because they did not demonstrate they suffered an injury in fact, and explaining: "[i]f the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3. It would enable the courts, with the permission of Congress, 'to assume a position of authority over the governmental acts of another and co-equal department,' and to become 'virtually continuing monitors of the wisdom and

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potentially unconstitutional because they have the potential to usurp the Executive Branch's prosecutorial and enforcement responsibilities if not subject to the United States' veto. The United States described citizen plaintiffs as private attorneys general seeking relief not on their own behalf, but as "mini-EPAs" enforcing the law for the public interest as a whole. The United States argued that it is particularly troubling for citizens to have independent authority to seek civil penalties payable to the United States Treasury—a "quintessentially executive power"—over the United States' objection. Such unchecked authority, according to the Government's briefing, "raises serious concerns under Article II."[31] The United States claimed that this ability to seek penalties payable to the Treasury (rather than compensation paid to plaintiffs) "bears only the most attenuated relationship, if any, to the plaintiff's own asserted injuries."[32] In rebuttal, the NAACP characterized citizen suits as "private rights of action, created by Congress, that allow private plaintiffs to sue on their own behalf, not on behalf of the government."[33] Because citizen plaintiffs are required to demonstrate Article III standing—including injury in fact—they vindicate their own concrete injuries pursuant to a congressionally created private cause of action. The NAACP therefore contends that citizen suits do not pose Article II concerns.[34]

- **If the Clean Air Act citizen suit provision does not allow for the United States to unilaterally dismiss the case, is the citizen suit provision constitutional?** The United States' briefing, citing a number of dissenting and concurring opinions in both the Fifth Circuit and Supreme Court, highlighted a longstanding debate regarding the constitutionality of environmental citizen suit provisions. In doing so, the United States claimed that allowing a citizen suit to proceed over its objection raises serious concerns about the constitutionality of these provisions under Article II. In response, the NAACP emphasized that "[e]very court that has addressed Article II challenges to similar private rights of action has rejected them, both in the environmental context and

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soundness of Executive action.' We have always rejected that vision of our role[.]") (internal citations and quotation marks omitted).

[31] U.S. Br. at 19.

[32] *Id.* at 19, 23.

[33] NAACP Opp'n at 2.

[34] *Id.* at 25-26.

elsewhere."[35] The NAACP also pointed to a long history of the United States taking the opposite position in litigation: that citizen suits do *not* present constitutional concerns.[36]

On October 19, 2026, the United States District Court for the Northern District of Mississippi granted the United States' intervention into the *NAACP* case.[37] The Court, however, denied the United States' motion to dismiss, holding:

- Although Rule 41 "allows a plaintiff to dismiss its own action, it says nothing about dismissing *another* plaintiff's action."[38] As such, the Rule does not provide the United States an independent right to dismiss the *NAACP* action.[39]

- Although the Court agreed that "the EPA and state agencies are intended to be the primary enforcers of the Clean Air Act," that "does not mean that the federal government retains complete control over *all* Clean Air Act litigation."[40] In particular, the Court emphasized that the "Clean Air Act specifies only one situation where the federal government may preclude a citizen suit"—the diligent prosecution bar.[41]

- The structure of Clean Air Act citizen suit authority does not violate the Constitution. Although seeking monetary penalties against private parties on behalf of the United States is "a quintessentially executive power," the court distinguished that "[c]itizen suit plaintiffs bring actions on their own behalf, seeking remedies including civil penalties, to address their own injuries. Doing so is not equivalent to an administrative agency seeking penalties on behalf of the United States."[42]

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[35] *Id.* at 24-25.

[36] *Id.* at 32.

[37] *NAACP v. X.AI Corp.,* No. 3:26-CV-74-DMB-JMV, Op. and Order, at 7 (N.D. Miss. Oct. 19, 2026), Dkt. No. 135.

[38] *Id.* at 8.

[39] *Id.*

[40] *Id.* at 10.

[41] *Id.*

[42] *Id.* at 18-19.

III. Beyond *NAACP*: Article II Constitutionality and the Future of Federal Environmental Citizen Suits

The debate over citizen suits and Article II is not new, nor is it likely to be resolved by the District Court's rejection of the United States' motion to dismiss in *NAACP*. It is likely that the United States will raise this issue if an appeal proceeds to the Fifth Circuit. And we expect that the Supreme Court will ultimately be asked to resolve the constitutionality of environmental citizen suit provisions and the extent to which the government has unilateral authority to terminate citizen suit enforcement.

The Supreme Court's seminal decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167 (2000), primarily addressed Article III standing—holding that citizen plaintiffs had standing to seek civil penalties payable to the Treasury to deter future violations—but its majority, concurrence, and dissent also each signaled nuanced views on the Article II constitutionality question. This complexity, coupled with changes at the Supreme Court since *Laidlaw* was decided a quarter century ago, illustrates the uncertainty that citizen suit provisions may face as federal courts address these issues over the next several years, and before the issue is likely to be heard by the Supreme Court.

The groundwork for how future courts may approach these issues may be encapsulated by the fractured approach evident in *Laidlaw*:

- The *Laidlaw* majority, in a footnote, dismissed as "overdrawn" the dissent's concern that citizen suits carried "grave implications for democratic governance,"[43] observing that the United States had filed an amicus brief in support of citizen plaintiffs and thus did "not share the dissent's view that such suits dissipate its authority to enforce the law."[44] The Court also underscored that "the Federal Government retains the power to foreclose a citizen suit by undertaking its own action" and can

[43] *Laidlaw*, 528 U.S. at 188 n.4 (citations omitted).

[44] *Id.*

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participate in citizen suits by intervening as of right.[45]

- Justice Kennedy's concurrence reserved for "a later case" the "[d]ifficult and fundamental questions" regarding "whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, . . . are permissible in view of the responsibilities committed to the Executive by Article II."[46]

- In his dissent, Justice Scalia opined that, by permitting citizens to seek penalties payable to the Treasury, citizen suit provisions improperly grant private citizens the function of enforcing the law, rendering them "self-appointed mini-EPA[s]."[47] Moreover, Justice Scalia disagreed that the diligent prosecution bar sufficiently protects government prosecutorial discretion, because it allows the government "to avoid private enforcement only by accepting private direction as to when enforcement should be undertaken"—a "constitutionally bizarre" outcome that deprives elected officials of discretion over enforcement priorities.[48] While Justice Scalia's dissent primarily focused on Article III standing, it also briefly referenced Article II's Take Care Clause and Appointments Clause. However, like Justice Kennedy, Justice Scalia concluded that "the question of the conformity" of the citizen suit statute with Article II had not been argued, and he thus did not address it.[49]

The United States' motion to dismiss in *NAACP* drew heavily from Justice Scalia's *Laidlaw* dissent. While acknowledging that the *NAACP* court is "bound by *Laidlaw's* holding that civil penalties payable to the U.S. Treasury can redress private injuries by deterring future violations," the United States expressly "preserves the argument for future appellate proceedings that [*Laidlaw*'s] holding was incorrect for the reasons stated in Justice Scalia's dissent."[50] It also urged, in the interim, that the

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[45] *Id.*

[46] *Id.* at 197 (Kennedy, J., concurring).

[47] *Id.* at 209 (Scalia, J., dissenting).

[48] *Id.*

[49] *Id.*

[50] U.S. Br. at 19 n.4.

NAACP court "need not and should not exacerbate that error by extending *Laidlaw's* flawed reasoning on a question of Article III redressability into the distinct context of Article II."[51]

The Fifth Circuit will be given the opportunity to evaluate the *NAACP* decision on appeal, should one proceed. Yet, how the Circuit may resolve the issue remains opaque. In fact, recent examples show that the court is already wrestling with the issues it may be called on to resolve. For example, the recent 2024 Fifth Circuit *en banc* decision in *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*[52] is a highly fractured opinion that leaves no precedential ruling for the Fifth Circuit to follow in the anticipated appeal of the *NAACP* decision by the United States. While *ExxonMobil*'s various opinions primarily address citizen-suit standing, several engage with Article II separation-of-powers concerns:

- Judge Davis' concurrence (joined by seven judges total out of seventeen) found no separation-of-powers problem for three reasons: (1) the Clean Air Act's procedural limits—notice requirements, the diligent prosecution bar, and intervention as of right—ensure citizen suits supplement rather than supplant governmental action;[53] (2) the Government supported the citizen suit through amicus briefs;[54] and (3) an overly strict standing requirement would improperly block a decision on "concrete cases that Congress wants adjudicated."[55]

- Judge Jones' dissent (joined by eight judges total out of seventeen) would have held that citizen-plaintiffs lacked standing, and also questioned the government's support for citizen suits, explaining that "[t]he government's eagerness to unleash citizen CAA suits untethered to traditional Article III standing is ironic in light of their potential to usurp the Executive Branch's principal prosecutorial responsibility under

[51] *Id.*

[52] 123 F.4th 309 (5th Cir. 2024) (*en banc*), *cert. denied*, 145 S. Ct. 2845 (2025).

[53] *Id.* at 342–43 (Davis, J., concurring).

[54] *Id.* at 343.

[55] *Id.* at 343–44.

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> Article II of the Constitution."[56] The dissent took the view that "the statute authorizes citizen suits only with the consent of governing authorities" and that enforcement prioritization "falls within the discretion of the Executive Branch, not within the purview of private plaintiffs." [57]

This splintered *ExxonMobil* opinion demonstrates that Article III standing and Article II separation-of-powers issues in the citizen-suit context are far from resolved. How the Government's anticipated *NAACP* appeal to the Fifth Circuit is resolved is thus uncertain, and ultimate resolution of the constitutional questions raised in this case will likely depend on whether the Supreme Court accepts the United States' invitation to reconsider *Laidlaw*. [58]

The United States' shift in its position on citizen suits has correlated with an uptick in constitutional challenges to citizen suit authority directly from private defendants. For instance, in *Tennessee Riverkeeper, Inc. v. City of Springfield*, No. 3:26-cv-00284 (M.D. Tenn.), the defendant moved to dismiss a Clean Water Act citizen suit, largely on constitutional grounds. Among other things, the defendant claimed that the Clean Water Act's citizen suit provision unconstitutionally allows for "private, unaccountable plaintiffs" to seek public remedies by suing for civil penalties payable to the U.S. Treasury.[59] The defendant claimed that such a suit upset the balance struck by the framers when they "vested the executive power in a President and established

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[56] *Id.* at 375 n.32 (Jones, J., dissenting).

[57] *Id.* (internal quotation marks and citations omitted).

[58] *See id.* at 349 (Ho, J., concurring) ("My hope is that our inability to issue a precedential decision today will turn out to be a blessing, rather than a curse. The issues presented in—but left unresolved by—this en banc proceeding can be addressed *de novo* in a future proceeding before a three-judge panel. . . . Alternatively, the Supreme Court can grant certiorari. Indeed, only the Court can definitively resolve these issues by revisiting and reconsidering *Laidlaw* in light of Justice Scalia's persuasive dissent.").

[59] Mot. and Mem. of Law in Supp. of Def.'s Mot. to Dismiss Am. Compl. at 2, (July 20, 2026), Dkt. No. 29.

Executive Branch unity by giving the President the power to appoint, oversee, and remove subordinates."[60] The defendant further argued that citizen suits "shatter" Executive Branch unity by allowing "additional actors to exercise executive power."[61] In addition to violating the Executive Vesting, Take Care, and Appointments clauses, the defendant argued that this also violates the "private nondelegation doctrine," which "prevents private individuals from wielding government power."[62] Notably, following the defendant's motion to dismiss, the citizen-suit plaintiff in *Tennessee Riverkeeper* filed a voluntary dismissal—raising concerns that the increase in constitutional challenges may chill citizen enforcement as environmental groups seek to avoid the risk of generating adverse precedent that could significantly affect the ability to bring citizen suits in the future.[63]

With both the United States and private defendants now actively pursuing facial constitutional challenges to the scope of environmental citizen suit authority under federal law, we may see a significant shift in the legal landscape on these issues in the foreseeable future. The consequences of circuit courts, or even the Supreme Court, addressing these issues, could include the elimination of remaining uncertainty and a return to the "status quo" of the last several decades or, alternatively, could presage a seismic narrowing in the scope of private causes of action for federal environmental claims.

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[60] *Id.* at 1.

[61] *Id.*

[62] *Id.* at 2.

[63] Notice of Voluntary Dismissal (Aug. 21, 2026), Dkt. No. 35.

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