

HOW CLEARLY DOES CONGRESS NEED TO WAIVE SOVEREIGN IMMUNITY? ENVIRONMENTAL IMPLICATIONS OF THE CLEAR STATEMENT RULE

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The English fiction that “the king can do no wrong” is clearly wrong, yet according to long-standing Supreme Court precedent, courts must narrowly construe waivers of sovereign immunity in favor of the sovereign. This can shield the government from liability if the statutory text is not crystal-clear, even where congressional intent of waiver is clearly discernable from statutory purpose and legislative history. As a result, many courts strictly construe waivers of sovereign immunity—be it for federal, state, or tribal governments—to the detriment of the environment.

The Ninth Circuit, for example, recently held that the Clean Water Act could not be enforced against a tribally co-operated hydroelectric facility, even though the statute waived sovereign immunity of any “person” and elsewhere defined “person” to include Indian tribes. But not all courts are so strict. Currently, the Circuit Courts of Appeals are split on the issue of whether the Clean Air Act waives federal sovereign immunity for punitive fines. Some judges have found waiver in the clear legislative history and statutory purpose, whereas others have ignored this evidence of congressional intent and have instead demanded a crystal-clear statement.

This Chapter considers how eight of the sitting Supreme Court justices would rule if the issue came before them. I investigate how each justice might vote based on their individual jurisprudences, arguing that the Court will most likely split along its ideological lines. I predict that Justices Thomas, Alito, Gorsuch, Kavanaugh, Barrett and Chief Justice Roberts are most likely to adhere to stricter textualism and find no waiver, and that Justices Sotomayor and Kagan would be more willing to look at legislative history to discern congressional intent and find waiver. It is by no means a

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foregone conclusion, however, as there are some noteworthy nuances in each of their jurisprudences. Unfortunately, although strict construction of waivers of sovereign immunity in environmental statutes makes little sense in a world threatened by climate change and environmental devastation, with the modern conservative court, it looks as if it is here to stay.

I.	INTRODUCTION	586
II.	BACKGROUND ON THE WAIVER OF SOVEREIGN IMMUNITY	589
	A. <i>The Origins of Sovereign Immunity and the Development of Modern Clear Statement Jurisprudence</i>	589
	B. <i>United States Department of Energy v. Ohio</i>	591
	C. <i>Circuit Split Regarding the Clean Air Act</i>	595
III.	THE MODERN SUPREME COURT	598
	A. <i>Justice Thomas</i>	598
	B. <i>Chief Justice Roberts</i>	601
	C. <i>Justice Alito</i>	604
	D. <i>Justice Sotomayor</i>	607
	E. <i>Justice Kagan</i>	609
	F. <i>Justice Gorsuch</i>	611
	G. <i>Justice Kavanaugh</i>	615
	H. <i>Justice Barrett</i>	617
IV.	CONCLUSION	619

I. INTRODUCTION

In *Deschutes River Alliance v. Portland General Electric (DRA)*,¹ the Ninth Circuit held that Congress did not abrogate tribal sovereign immunity in a Clean Water Act (CWA)² citizen-suit enforcement action for injunctive relief.³ Since the tribe was a necessary party as a co-operator of the hydroelectric facility whose CWA § 401 certification⁴ was being challenged, the Ninth Circuit reversed the district court's ruling that the CWA abrogated tribal sovereign immunity and dismissed the case for failure to join the tribe as a necessary party.⁵ The Ninth Circuit—splitting from the Eighth and Tenth Circuits⁶—applied a strict

¹ 1 F.4th 1153, 1156 (9th Cir. 2021).

² Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388 (2018).

³ *DRA*, 1 F.4th at 1153, 1163.

⁴ See 33 U.S.C. § 1341(a)(5) (providing that discharges into water of the United States require a water quality certification).

⁵ *DRA*, 1 F.4th at 1163.

⁶ See *Blue Legs v. U.S. Bureau of Indian Affs.*, 867 F.2d 1094, 1097 (8th Cir. 1989) (finding that the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k (2018), abrogated tribal sovereign immunity); see also *Osage Tribal Council ex rel.*

clear statement rule: to abrogate tribal sovereign immunity, Congress must do so clearly and unequivocally.⁷ The Ninth Circuit found no abrogation in the CWA, despite language in the statute that waives sovereign immunity against “any person” and later defines “person” to include “municipalities” and “municipalities” to include “an Indian tribe.”⁸

The Ninth Circuit reasoned that Congress did not abrogate tribal sovereign immunity in the CWA because Congress did not explicitly include tribes, unlike how it included states and the federal government, in the citizen-suit waiver provision.⁹ This holding contradicted the Eighth Circuit’s interpretation of the parallel provisions in the Resource Conservation and Recovery Act (RCRA)¹⁰ as abrogating tribal sovereign immunity.¹¹ The Eighth Circuit had reasoned that RCRA abrogates tribal sovereign immunity because, like the CWA, it abrogates the sovereign immunity of any “person” and defines “person” to include tribes.¹² The Eighth Circuit also relied on legislative history to support its finding that Congress meant for RCRA to apply to tribes,¹³ whereas the Ninth Circuit bolstered its reading with legislative history from the CWA¹⁴ to conclude that Congress included tribes within the definition of “municipalities” only to make tribes eligible for federal grants—not to subject them to unconsented suits.¹⁵ The Ninth Circuit also split from the Tenth Circuit, differentiating the Safe Drinking Water Act (SDWA)¹⁶ from the CWA.¹⁷ The Ninth Circuit noted that the citizen-suit provision of the SDWA, unlike the citizen-suit provision of the CWA, does not explicitly waive the sovereign immunity of the federal or state governments, and therefore Congress’s inclusion of tribes within the

Osage Tribe of Indians v. U.S. Dep’t of Lab., 187 F.3d 1174, 1182 (10th Cir. 1999) (finding that the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f–300j-27 (2018), abrogated tribal sovereign immunity).

⁷ *DRA*, 1 F.4th at 1159.

⁸ *Id.* at 1160–61; 33 U.S.C. §§ 1365(a), 1362(4)–(5).

⁹ *DRA*, 1 F.4th at 1160; 33 U.S.C. § 1365(a) (“[A]ny citizen may commence a civil action on his own behalf . . . against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution).”).

¹⁰ 42 U.S.C. §§ 6901–6992k (2018).

¹¹ *Blue Legs*, 867 F.2d at 1094; 42 U.S.C. §§ 6972(a)(1)(A), 6903(13), (15) (2018).

¹² *Blue Legs*, 867 F.2d at 1097; 42 U.S.C. §§ 6972(a)(1)(A), 6903(13), (15).

¹³ H.R. REP. NO. 94-1491, at 37 (1976) (listing avoiding harm to tribal children on reservations among the aims of RCRA).

¹⁴ S. REP. NO. 92-414, at 76 (1971) (“The definition of municipalities is clarified to make clear that public bodies eligible for grants under this Act includes associations formed under State law for the purpose of dealing with water problems . . . as well as operating agencies established and approved under section 209.”).

¹⁵ *DRA*, 1 F.4th 1153, 1162 (9th Cir. 2021). Judge Bea in partial dissent would have applied an even stricter clear statement standard and found no abrogation in the CWA without looking to legislative history. *Id.* at 1164 (Bea, J., dissenting in part and concurring in judgment).

¹⁶ 42 U.S.C. §§ 300f–300j-27 (2018).

¹⁷ *DRA*, 1 F.4th at 1162.

definition of “municipalities” in the SDWA is a clearer abrogation of tribal sovereign immunity than in the CWA.¹⁸

The Ninth Circuit’s strict application of the clear statement rule for abrogation of tribal sovereign immunity implies that environmental regulations against any tribally operated or co-operated facility might be practically impossible to enforce, by a citizen suit or even by the Environmental Protection Agency.¹⁹ This ruling followed a trend in Supreme Court sovereign immunity jurisprudence: to apply a strict clear statement standard despite seemingly obvious congressional intent.²⁰ In the context of the Clean Air Act (CAA),²¹ however, the circuit courts are split on the issue of whether Congress waived federal sovereign immunity for the purposes of punitive fines.²² Some circuits have followed the reasoning of *United States Department of Energy v. Ohio (Dep’t of Energy v. Ohio)*²³—where the Supreme Court interpreted the CWA and RCRA as not waiving federal sovereign immunity for punitive fines despite seemingly clear congressional intent—and have applied the strict clear statement rule.²⁴ Other circuits have found material differences between the relevant provisions of the CWA and the CAA, and have relied on legislative history to conclude that Congress did waive federal sovereign immunity for punitive fines in the CAA.²⁵

This Chapter explores the question of how clearly Congress needs to indicate waiver of sovereign immunity and predicts how the modern Supreme Court would rule if the issue of waiving federal sovereign immunity for punitive fines in the CAA came before it. Part II describes the history of Supreme Court jurisprudence on waiver of sovereign immunity, the *Dep’t of Energy v. Ohio* case, and the split in the circuits regarding the CAA. Part III surveys the sovereign immunity and clear statement jurisprudence of the modern Supreme Court justices²⁶ and

¹⁸ *Id.*; 42 U.S.C. §§ 300j–9(i)(2)(A), 300f(12), (10) (2018) (providing that “[a]ny employee who believes that he has been discharged or otherwise discriminated against by any person” may file a complaint with the Secretary of Labor and defining “person” to include “municipality” and “municipality” to include “an Indian tribe”).

¹⁹ It might be possible to get around tribal sovereign immunity with the *Ex parte Young* exception, where state officials can sometimes be sued for injunctive relief even when a state is protected by sovereign immunity. *Ex parte Young*, 209 U.S. 123, 154, 159–60 (1908). For examples of how the *Ex parte Young* exception has been used to get around tribal sovereign immunity, see *Vann v. U.S. Dep’t of Interior*, 701 F.3d 927, 930 (D.C. Cir. 2012); *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1181 (9th Cir. 2012); *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001).

²⁰ See *infra* notes 33–41 and accompanying text.

²¹ 42 U.S.C. §§ 7401–7671q (2018).

²² See *infra*, notes 61–85 and accompanying text.

²³ 503 U.S. 607 (1992).

²⁴ See *infra*, note 67 and accompanying text.

²⁵ See *infra*, note 68 and accompanying text.

²⁶ As of the writing of this Chapter, Justice Breyer had announced his retirement and his successor had yet to be confirmed by the Senate. This Chapter therefore analyzes only the eight sitting justices.

attempts to determine how likely the current justices would find that the CAA waives federal sovereign immunity for punitive fines. Part IV concludes that the modern conservative court would most likely apply the strict clear statement rule, ignore legislative history, and find no waiver of sovereign immunity for punitive fines in the CAA. By extension, the Ninth Circuit was therefore correct in also applying the strict clear statement rule in *DRA* and holding that the CWA did not abrogate tribal sovereign immunity for injunctive relief, albeit with regrettable implications for the enforcement of environmental regulations.

II. BACKGROUND ON THE WAIVER OF SOVEREIGN IMMUNITY

This Part explores how the Court's clear statement construction of the waiver of sovereign immunity evolved over time, ultimately leading to *Dep't of Energy v. Ohio*. It then analyzes the Court's reasoning in that case. Lastly, this Part describes the split in the circuits regarding the CAA. While some argue that strict construction of waiver of sovereign immunity protects the government's ability to function, including its treasury,²⁷ such values should not outweigh the value of environmental protection. The Supreme Court, however, as currently constituted, is not likely to agree, and will most likely construe the CAA as preserving federal sovereign immunity for punitive fines.

A. The Origins of Sovereign Immunity and the Development of Modern Clear Statement Jurisprudence

The doctrine of sovereign immunity comes from before the founding of the United States, from the English fiction that “the king can do no wrong.”²⁸ State sovereign immunity appeared in the Constitution in the Eleventh Amendment²⁹ in 1794, and Chief Justice Marshall interpreted

²⁷ See *infra* note 33 and accompanying text.

²⁸ 1 WILLIAM BLACKSTONE, *Commentaries* *246 (Philadelphia: J.B. Lippincott Co. ed 1893) (“The king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong: he can never mean to do an improper thing: in him is no folly or weakness.”) (emphasis in original).

²⁹ U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”) (restricting the ability of individuals to sue states in federal court). The Supreme Court has held, however, that Congress can abrogate state sovereign immunity with its authority under § 5 of the Fourteenth Amendment, U.S. CONST. amend XIV, § 5, and that the Bankruptcy Clause, U.S. CONST. art. I, § 8, abrogates state sovereign immunity in bankruptcy cases. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976):

[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment . . . Congress may, in determining what is ‘appropriate legislation’ for the purpose of enforcing the provisions of the Fourteenth

the Supremacy Clause³⁰ as implicitly granting federal sovereign immunity against state taxation in 1819.³¹ The Supreme Court explicitly embraced the concept of federal sovereign immunity as early as 1821,³² and over time has offered the rationale that sovereign immunity protects the public welfare by maintaining the function of government, including the public treasury.³³ It nevertheless remains unclear as to why interference with government operations should necessarily outweigh the rights of citizens or protection of the environment.

The notion that Congress can waive sovereign immunity dates back to 1834,³⁴ and the Supreme Court began developing its strict construction of waiver of sovereign immunity in the ensuing decades. The Court first required waivers to be unequivocally expressed in 1868,³⁵ and soon after expanded the doctrine to require waivers to be construed narrowly.³⁶ The Court continued developing its strict

Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

(citation omitted); *see also* Cent. Va. Cmty. Coll. v. Katz (*Katz*), 546 U.S. 356, 359 (2006) (finding that the Bankruptcy Clause abrogates state sovereign immunity).

³⁰ U.S. CONST. art. VI, cl. 2.

³¹ *McCulloch v. Maryland*, 17 U.S. 316, 429–31 (1819).

³² *Cohens v. Virginia*, 19 U.S. 264, 411–12 (1821) (“The universally received opinion is, that no suit can be commenced or prosecuted against the United States.”).

³³ *See, e.g., The Siren*, 74 U.S. 152, 154 (1868) (stating that the public welfare would be harmed “if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government.”); *United States v. Lee*, 106 U.S. 196, 206 (1882):

[I]t would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury.

See also *United States v. Shaw*, 309 U.S. 495, 501 (1940) (“The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants.”).

³⁴ *See* *United States v. Clarke*, 33 U.S. 436, 444 (1834) (“As the United States are not suable at common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it.”).

³⁵ *See* *The Davis*, 77 U.S. 15, 19 (1869) (“[N]o suit can be sustained in which the United States is made an original defendant . . . without some act of Congress expressly authorizing it to be done.”).

³⁶ *See, e.g., Schillinger v. United States*, 155 U.S. 163, 166 (1894) (“Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be in their possession of a larger jurisdiction over the liabilities of the Government.”); *Price v. United States & Osage Indians*, 174 U.S. 373, 375–76 (1899):

We cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume The Government is not

construction jurisprudence into the early 1990s, when, in *Ardestani v. Immigration and Naturalization Services*,³⁷ the Court determined that statutory purpose was irrelevant.³⁸ *Lane v. Peña*³⁹ synthesized the modern rule, which restricts the waiver's scope from including money damages unless explicit and ignores legislative history:

A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in [the] statutory text Moreover a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims . . . [and a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text⁴⁰

The Supreme Court, without ever articulating a satisfactory rationale for its strict adherence to the clear statement doctrine for waiver of sovereign immunity, has nonetheless consistently applied it.⁴¹

B. United States Department of Energy v. Ohio

Against this backdrop, the State of Ohio sued the U.S. Department of Energy for violating the CWA and RCRA at a federal uranium processing plant.⁴² The government conceded the violations as well as that the CWA and RCRA waived sovereign immunity as to injunctive relief and coercive penalties but argued that neither statute waived immunity for punitive fines arising from past violations.⁴³ The Supreme Court agreed.⁴⁴

liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it.

³⁷ 502 U.S. 129 (1991).

³⁸ *Id.* at 138 (acknowledging that the purposes of the statute would be served by the interpretation advanced by the plaintiff yet constrained by “the plain language of the statute, coupled with the strict construction of waivers of sovereign immunity”); *see also* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 781–82 (1995) (discussing *Ardestani* in more detail).

³⁹ 518 U.S. 187 (1996).

⁴⁰ *Id.* at 192 (internal quotations and citations omitted).

⁴¹ *See, e.g.*, Nagle, *supra* note 37, at 774, 777, 780, 796–97 (discussing the Court's application of a strict clear statement rule for waiver of sovereign immunity).

⁴² *Dep't of Energy v. Ohio*, 503 U.S. 607, 612 (1992).

⁴³ *Id.* at 613–14. Coercive penalties are prospective fines to enforce injunctions. *Id.* at 613. Punitive fines are important for the enforcement of environmental regulations because without them a facility might reason that it has a decent chance of getting away with pollution. *See Tull v. United States*, 481 U.S. 412, 422–23 (1987) (Courts “can require retribution for wrongful conduct based on the seriousness of the violations, the number of prior violations, and the lack of good-faith efforts to comply with the relevant requirements It may also seek to deter future violations by basing the penalty on its economic impact.” (internal citations omitted)); *Friends of the Earth v. Laidlaw Env't Servs.*, 528 U.S. 167, 185–186 (2000):

Justice Souter, writing for the Court, first analyzed the citizen-suit provision of the CWA, which provides in relevant part that:

any citizen may commence a civil action . . . against any person (including [] the United States) . . . who is alleged to be in violation of [] an effluent standard or limitation under this chapter The district courts shall have jurisdiction . . . to apply any appropriate civil penalties under [the civil penalties provision] of this article.⁴⁵

The Court held that although the civil penalties provision authorizes punitive fines, the statute does not extend the waiver of sovereign immunity to punitive fines.⁴⁶ This was because the citizen-suit provision expressly references the civil penalties provision, which does not explicitly include the United States in the definition of “person.”⁴⁷ The Court reasoned that because the citizen-suit provision incorporates the general statutory definition of “person,” it thus does not waive the sovereign immunity of the federal government beyond injunctive relief

It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. To the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.

See also 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, 937 (2000):

Injunctions, and the coercive penalties fashioned to compel future compliance, do no more than force polluters to comply with federal regulation in the future—something they should have been doing from the start Therefore, a polluter faced with costly pollution abatement may quite reasonably calculate that because there is little chance of getting caught, and no real sanction for non-compliance, the logical choice is to avoid compliance as long as possible Punitive fines imposed for this past pollution, however, make such a gambit significantly more risky to the polluter and create an incentive to comply from the beginning.

(internal citations omitted).

⁴⁴ *Dep't of Energy v. Ohio*, 503 U.S. at 611.

⁴⁵ CWA, 33 U.S.C. § 1365(a) (2018). The citizen-suit provision of RCRA is substantially the same:

[A]ny person may commence a civil action . . . against any person (including [] the United States) . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter The district court shall have jurisdiction . . . to apply any appropriate civil penalties under [the civil penalties provisions] of this title.

RCRA, 42 U.S.C. § 6972(a) (1994); *Dep't of Energy v. Ohio*, 503 U.S. at 615–16.

⁴⁶ *Dep't of Energy v. Ohio*, 503 U.S. at 617, 619.

⁴⁷ 33 U.S.C. § 1319(d) (“Any person who violates [sections] of this title . . . shall be subject to a civil penalty not to exceed \$25,000 per day for each violation.”).

and coercive fines.⁴⁸ The Court held the same for RCRA's substantially similar citizen-suit provision.⁴⁹

The Court next analyzed the CWA's federal-facilities provision, which provides that "the Federal Government . . . shall be subject to . . . all Federal, State, interstate, and local . . . process and sanctions respecting the control and abatement of water pollution."⁵⁰ The Court reasoned that the term "sanction" carries no necessary implication of the punitive as against the coercive[.]⁵¹ and that in the context of the term "sanction" being paired with the word "process," it was at least possible that Congress meant for "sanction" to refer only to forward-looking judicial processes.⁵² Because of this seeming ambiguity, the Court concluded that Congress had not unequivocally waived sovereign immunity as to punitive sanctions.⁵³

The CWA's federal-facilities provision further provides that "the 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."⁵⁴ Despite this seemingly clear waiver of sovereign immunity, the Court determined that although the state statute Ohio sought to enforce was permitted by federal law and approved by a federal agency, it still did not arise "under federal law."⁵⁵ The Court acknowledged that the language of "civil penalties arising under federal law" is therefore superfluous, but resolved the tension by construing the statute narrowly in favor of the sovereign.⁵⁶ The Court lastly found that RCRA's federal-facilities provision—which does not contain the phrase "civil penalties arising under federal law"—does not waive sovereign immunity, and interpreted the phrase "all requirements" and the explicit inclusion of injunctive relief as exclusive of punitive measures.⁵⁷

⁴⁸ *Dep't of Energy v. Ohio*, 503 U.S. at 619. ("Thus, in the instances before us here, the inclusion of the United States as a 'person' must go to the clauses subjecting the United States to suit, but no further.").

⁴⁹ *Id.* at 616, 619.

⁵⁰ *Id.* at 622–23; CWA, 33 U.S.C. § 1323(a).

⁵¹ *Dep't of Energy v. Ohio*, 503 U.S. at 622.

⁵² *Id.* at 623.

⁵³ *Id.* at 621–23.

⁵⁴ 33 U.S.C. § 1323(a).

⁵⁵ *Dep't of Energy v. Ohio*, 503 U.S. at 625–26.

⁵⁶ *Id.* at 627 ("The rule of narrow construction therefore takes the waiver no further than the coercive variety."); *see also id.* at 626–27 ("Perhaps [Congress] used [the phrase 'civil penalties arising under Federal law'] 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 had somehow been waived already. Perhaps someone was careless.").

⁵⁷ *See RCRA*, 42 U.S.C. § 6961 (1982):

Each department, agency and instrumentality of the executive, legislative and judicial branches of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirements for permits or reporting or any provisions

Justice White, joined by Justices Stevens and Blackmun, dissented. He found the waiver in the CWA to be unequivocal and the congressional intent of waiver in the federal-facilities and citizen-suit provisions to be “obvious,” “clear,” and “unambiguous.”⁵⁸ He concurred as to the finding of no waiver in the federal-facilities provision of RCRA because it did not reference civil penalties.⁵⁹ Congress soon after amended RCRA to be (arguably) unequivocal:

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.⁶⁰

This clear waiver, with its explicit mention of punitive fines, might be the best model Congress has for successfully waiving sovereign immunity for punitive fines, considering the Court’s strict clear statement rule and refusal to acknowledge legislative history or statutory purpose.

or injunctive relief and such sanctions as may be imposed by a court to enforce such relief).

See also *Dep’t of Energy v. Ohio*, 503 U.S. at 628 (discussing the drafters’ decision to be silent on the punitive sanctions matter).

⁵⁸ *Dep’t of Energy v. Ohio*, 503 U.S. at 631, 633, 636 (White, J., dissenting).

⁵⁹ *Id.* at 636. (White, J., dissenting) (“The section makes no reference to civil penalties and, instead, waives immunity for ‘any such injunctive relief.’”).

⁶⁰ 42 U.S.C. § 6961(a) (1994) (emphasis added). It is worth noting that the Court had, before *Dep’t of Energy v. Ohio*, ruled that the CWA did not waive sovereign immunity in *U.S. Env’t Prot. Agency v. California ex rel. State Water Res. Control Bd. et al. (ex rel. State Water Res. Control Bd.)*, 426 U.S. 200, 227 (1976), and Congress subsequently amended the Act. In *Dep’t of Energy v. Ohio*, on its way up to the Supreme Court, the Sixth Circuit looked to the legislative history of the amendments to find a clear waiver of sovereign immunity as to punitive sanctions. See *Ohio v. U.S. Dep’t of Energy*, 904 F.2d 1058, 1061 (6th Cir. 1990):

Following [*ex rel. State Water Res. Control Bd.*], Congress amended the Clean Water Act, stating that federal facilities were subject to ‘all’ requirements, including ‘process and sanctions.’ *The amendment clearly subjects federal agencies to civil penalties.* The fact that the amendment was provoked by a Supreme Court decision protecting sovereign immunity underscores Congress’s determination to waive sovereign immunity for civil penalties.

(emphasis added). Congress stated as much explicitly in the legislative history: “Though [it] was the intent of the Congress [to waive immunity] in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court . . . has misconstrued the original intent.” S. REP. NO. 95-370, at 67 (1977). The Court in *Dep’t of Energy v. Ohio* neither mentioned the lower court’s reasoning nor acknowledged the legislative history.

C. Circuit Split Regarding the Clean Air Act

In the context of the CAA, some lower courts have followed *Dep't of Energy v. Ohio's* strict clear statement rule and found no waiver of sovereign immunity as to punitive fines, while others have found material differences between the relevant provisions of the CAA and CWA and relied on reasonable readings of legislative history to ascertain congressional intent.⁶¹

Congress amended the CAA's federal-facilities provision in 1977, following the Supreme Court's ruling in *Hancock v. Train*,⁶² where the Court found the CAA did not clearly establish the federal government as subject to state permitting requirements.⁶³ The amended provision reads:

[T]he 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 The preceding sentence shall apply . . . 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 . . . under any law or rule of law.⁶⁴

In drafting the amendment, Congress referred to the ruling in *Hancock* and stated that “the language of [then] existing law should have been sufficient to insure Federal compliance Unfortunately, . . . the U.S. Supreme Court construed [the federal-facilities provision] narrowly.”⁶⁵ Congress further stated that it intended its amendment “to overturn the *Hancock* case, and to express with sufficient clarity, the committee's desire to subject Federal facilities to all Federal, State, and local requirements—procedural, substantive, or otherwise—process and sanctions.”⁶⁶ This clear legislative history and congressional intent, however, in light of the Supreme Court's strict sovereign immunity jurisprudence, may amount to nothing.

Although the Eleventh Circuit has twice followed *Dep't of Energy v. Ohio* and found no waiver of sovereign immunity for punitive fines in the CAA,⁶⁷ the Sixth and Fourth Circuits have not applied the clear

⁶¹ See *infra* notes 67–68 and accompanying text.

⁶² 426 U.S. 167 (1976).

⁶³ *Id.* at 198 (“[W]ith respect to subjecting federal installations to state permit requirements, the Clean Air Act does not satisfy the traditional requirement that such intention be evinced with satisfactory clarity. Should this nevertheless be the desire of Congress, it need only amend the Act to make its intention manifest.” (internal citation omitted)).

⁶⁴ CAA, 42 U.S.C. § 7418(a) (2018).

⁶⁵ H.R. REP. NO. 95-294, at 199 (1977).

⁶⁶ *Id.*

⁶⁷ See *Jacksonville v. Dep't of Navy (Jacksonville v. Navy)*, 348 F.3d 1307, 1309 (11th Cir. 2003); *Sierra Club v. Tennessee Valley Auth.*, 430 F.3d 1337, 1340 (11th Cir. 2005)

statement rule so strictly.⁶⁸ The majority and dissenting opinions in the recent case of *State of North Carolina v. United States*⁶⁹ from the Fourth Circuit illustrate well the different lines of reasoning.

North Carolina assessed a civil penalty against a coal-powered Marine Corps facility that failed an air quality compliance test and violated its state permit and, on appeal, the government argued it was protected by sovereign immunity.⁷⁰ The Fourth Circuit pointed to the absence in the CAA's federal-facilities provision of the critical language of the CWA's federal-facilities provision: namely, that the CWA limits federal liability to "civil penalties . . . imposed by a State or local court to enforce an order or the process of such court."⁷¹ The Fourth Circuit, following the Sixth Circuit's reasoning from *United States v. Tennessee Air Pollution Control Board*,⁷² found the citizen-suit provision dispositive of unequivocal waiver.⁷³ The provision provides in relevant part:

Nothing in this section . . . shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from [] bringing any enforcement action or obtaining *any judicial remedy or sanction* in any State or local court . . . against the United States For provisions requiring compliance by the United States . . . see [the federal-facilities provision] of this title.⁷⁴

The Court read "any" to mean "all" and "remedy or sanction" to include civil penalties.⁷⁵ Beyond the plain language of the statute, the Court also looked to the legislative history, citing the congressional intent "to resolve any question about the sanctions to which noncomplying Federal agencies . . . may be subject," thus making clear that "Federal facilities . . . may be subject to injunctive relief[,] . . . civil or criminal penalties, and to delayed compliance penalties."⁷⁶ The Court also relied on the CAA's statutory purpose, noting the efficacy of punitive penalties.⁷⁷ Thus, instead of adhering to an overly strict clear

(both finding the difference between the CWA and CAA federal-facilities provisions immaterial and following *Dep't of Energy v. Ohio* as binding precedent).

⁶⁸ *United States v. Tennessee Air Pollution Control Bd. (Tennessee Air)*, 185 F.3d 529, 531 (6th Cir. 1999); *North Carolina v. United States (N.C. v. U.S.)*, 7 F.4th 160, 162 (4th Cir. 2021).

⁶⁹ *N.C. v. U.S.*, 7 F.4th at 166–171, 171–179.

⁷⁰ *Id.* at 162.

⁷¹ *Id.* at 167 (internal citation omitted); CWA, 33 U.S.C. § 1323(a) (2018).

⁷² *Tennessee Air*, 185 F.3d at 534.

⁷³ *N.C. v. U.S.*, 7 F.4th at 167.

⁷⁴ CAA, 42 U.S.C. § 7604(e) (2018) (emphasis added).

⁷⁵ *N.C. v. U.S.*, 7 F.4th at 168.

⁷⁶ *Id.* (citing H.R. REP. No. 95-294, at 200 (1977)).

⁷⁷ *Id.* at 170–71:

[Section] 7604(e) was part of a suite of provisions enacted to provide more effective . . . enforcement tools for States . . . to bring [federal and private facilities] into compliance and to assure that they remain in compliance [T]o the extent State

statement waiver of sovereign immunity jurisprudence, the Fourth Circuit struck a more reasonable tone and instead followed what it and the Sixth Circuit found to be discernible congressional intent.

The dissent took a different approach and followed the Eleventh Circuit's reasoning from *City of Jacksonville v. Department of Navy*,⁷⁸ finding the CAA's federal-facilities and citizen-suit provisions to be materially similar to the CWA's, and thus their interpretation bound by the precedent the Supreme Court set in *Dep't of Energy v. Ohio*.⁷⁹ The dissent reasoned that the pairing of *sanction and process* in the context of enforcing *process* in the CAA's federal-facilities provision provides the same ambiguity as the *Dep't of Energy v. Ohio* court found in the CWA.⁸⁰ The dissent read *Dep't of Energy v. Ohio's* discussion of the missing proviso, that is, "the 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,"⁸¹ as simply clarifying and not dispositive.⁸²

Regarding the CAA's citizen-suit provision, the dissent again relied on *Dep't of Energy v. Ohio* to conclude that "any . . . sanction" does not necessarily include punitive sanctions.⁸³ The dissent was unpersuaded by the majority's plain reading of the word "any" to encompass punitive sanctions, and interpreted the provision's reference to the federal-facilities provision as limiting "any judicial remedy or sanction" to "process and sanctions," which the dissent found ambiguous and thus as not encompassing punitive fines.⁸⁴ While acknowledging that the legislative history indicated a congressional intent to expand state enforcement capabilities, the dissent nonetheless adhered to strict clear statement jurisprudence and construed the statute narrowly in favor of

and local enforcement efforts had been ineffective in bringing about compliance, it was precisely because states had been unable to adequately enforce existing civil penalty provisions. . . . Section 7604(e)'s broader purpose and context thus confirm that its text means what it says: Congress sought to remove all barriers preventing states from obtaining any judicial remedy or sanction against federal facilities, including penalties that Congress believed were necessary to deter noncompliance.

(internal quotations and citations omitted).

⁷⁸ *Jacksonville v. Navy*, 348 F.3d 1307, 1309 (11th Cir. 2003).

⁷⁹ *N.C. v. U.S.*, 7 F. 4th. at 171 (Agee, J., concurring in part and dissenting in part).

⁸⁰ *Id.* at 174 (Agee, J., concurring in part and dissenting in part).

⁸¹ CWA, 33 U.S.C. § 1323(a) (2018).

⁸² *N.C. v. U.S.*, 7 F.4th at 174–75 (Agee, J., concurring in part and dissenting in part) (quoting *Jacksonville v. Navy*, 348 F.3d at 1317, for the proposition that "the absence of [the CWA's proviso] in § 7418(a) of the CAA does not make any kind of affirmative statement . . . [T]he only affirmative and unequivocal language indicating the scope of the government's immunity is within the language . . . discussing 'process and sanctions.'").

⁸³ *Id.* at 177 (Agee, J., concurring in part and dissenting in part) (quoting *Dep't of Energy v. Ohio*, 503 U.S. 607, 621 (1992)).

⁸⁴ *Id.* at 177–178 (Agee, J., concurring in part and dissenting in part).

the sovereign, turning a blind eye to the CAA's legislative history and purpose.⁸⁵

III. THE MODERN SUPREME COURT

This latter Part analyzes the modern Supreme Court to predict how the individual justices would rule if the issue of waiver of sovereign immunity for punitive fines in the CAA came before it. It examines each justice's jurisprudence on waiver of sovereign immunity across the different contexts of federal, state, and tribal governments; how strictly they have adhered to the clear statement rule; and their attitude toward reliance on legislative history or statutory purpose to discern congressional intent. This Part concludes that if the issue of waiver of sovereign immunity for punitive fines in the CAA came before the Supreme Court, at least five justices would follow *Dep't of Energy v. Ohio* and the cases from the Eleventh Circuit, apply the strict clear statement rule, and ignore legislative history and statutory purpose. There are, however, some interesting and noteworthy nuances.⁸⁶

A. Justice Thomas

Justice Thomas consistently upholds findings of no waiver of sovereign immunity.⁸⁷ He is most likely to find waiver in statutes with clear statutory language, like the Federal Tort Claims Act (FTCA).⁸⁸ In three dissents from denials of certiorari, he found the waiver of federal sovereign immunity in the FTCA to be "sweeping" and would have overturned precedent which denied servicemen from bringing claims against the government for injuries sustained while in service, interpreting the statute along strict textualist lines.⁸⁹ He also authored uncontroversial majority opinions for unanimous courts in *Federal*

⁸⁵ *Id.* at 179 (Agee, J., concurring in part and dissenting in part) ("Although § 7604(e)'s legislative history reveals Congress' broad purpose of expanding the available enforcement tools for States, that history cannot be the basis for construing the enacted statutory language more broadly than the text and context of the statute permits.").

⁸⁶ Naturally, this Chapter surveyed more cases for justices who have been on the court longer, so their predictions are based on more solid data. In general, the newer the justice, the less reliable the prediction. For example, this Chapter surveyed fifty cases for Justice Thomas and only six for Justice Barrett.

⁸⁷ See app. I.a–c (finding no waiver or abrogation of sovereign immunity in 16 out of 27, or 59%, of cases surveyed).

⁸⁸ 28 U.S.C. §§ 2671–2680 (2018); see app. I.a (finding waiver of federal sovereign immunity in 7 out of 15, or 47%, of cases surveyed, 6 of which were FTCA cases).

⁸⁹ See *Lanus v. United States*, 570 U.S. 932, 932 (2013) ("The FTCA is a sweeping waiver of sovereign immunity."); *Daniel v. United States*, 139 S. Ct. 1713, 1713–14 (2019) ("Had Congress itself determined that servicemembers cannot recover for the negligence of the country they serve, the dismissal of their suits would . . . be just. But it did not." (internal quotations and citations omitted)); *Doe v. United States*, 141 S. Ct. 1498, 1498 (2021) ("[T]he law does not 'preclud[e] . . . suits brought by servicemen'—at least not because of their military status." (internal citations omitted)).

*Deposit Insurance Co. v. Meyer (FDIC)*⁹⁰ and *Millbrook v. United States*,⁹¹ in which he again found a broad waiver of federal sovereign immunity in the FTCA.⁹² In *Dolan v. United States Postal Service*,⁹³ however, he argued in a lone dissent along textualist lines that the FTCA's exception to waiver for negligent transmission of mail is clear, and that even if any statutory ambiguity does exist, it should be resolved in the government's favor.⁹⁴ He also voted among the four dissenters in *United States v. Wong (Wong)*,⁹⁵ finding that an FTCA claim filed after the deadline could not be equitably tolled, again interpreting the statute along strict textualist lines.⁹⁶

Considering Justice Thomas's overall voting record and authored opinions in the context of federal sovereign immunity, he would not likely find waiver in the CAA for punitive fines. Justice Thomas votes consistently with textualist principles, finding waiver only in the clearest of instances and resolving any perceived ambiguities in favor of the federal government without looking at legislative history or statutory purpose.⁹⁷ In the CAA, the legislative history and statutory purpose reveal Congress's intent to waive sovereign immunity,⁹⁸ but Justice Thomas's interpretations of the FTCA are all based in the statute's plain text.⁹⁹ Considering that he has consistently voted against waivers of federal sovereign immunity—including in *Dep't of Energy v. Ohio*¹⁰⁰—and that the waiver in the CAA is not as clear as the waiver in the FTCA,¹⁰¹ he would likely construe the supposed ambiguity in the CAA in the government's favor.

⁹⁰ 510 U.S. 471, 473 (1994).

⁹¹ 569 U.S. 50, 51–2 (2013).

⁹² *FDIC*, 510 U.S. at 475 (“By permitting [the agency] to sue and be sued, Congress effected a broad waiver of [the agency’s] immunity from suit.” (internal quotations omitted)); *Millbrook*, 569 U.S. at 52 (finding FTCA’s waiver of federal sovereign immunity for law enforcement extends beyond investigative activities).

⁹³ 546 U.S. 481 (2006).

⁹⁴ FTCA, 28 U.S.C. § 2680(b) (2018) (not waiving sovereign immunity for “[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.”); *Dolan*, 546 U.S. at 493 (Thomas, J., dissenting) (“[The] claim arises out of the Postal Service’s ‘negligent transmission’ of mail and is thus covered by the terms of the postal exception. Even if the exception is ambiguous, this Court’s cases require that ambiguities as to the scope of the Government’s waiver of immunity be resolved in its favor.”).

⁹⁵ 575 U.S. 402 (2015).

⁹⁶ *Id.* at 421 (Alito, J., dissenting) (“The statutory text, its historical roots, and more than a century of precedents show that this absolute bar is not subject to equitable tolling. I would enforce the statute as Congress intended.”).

⁹⁷ See *supra* notes 87–96.

⁹⁸ See *supra* notes 76–77 and accompanying text.

⁹⁹ See *supra* notes 87–96.

¹⁰⁰ *Dep't of Energy v. Ohio*, 503 U.S. 607, 609 (1992) (voting with the majority).

¹⁰¹ See FTCA, 28 U.S.C. § 1346(b)(1) (2018) (waiving the federal government’s sovereign immunity for civil suits seeking money damages:

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United

Justice Thomas's votes in the context of state sovereign immunity bolster this prediction, although his reasoning finds firmer ground in the Eleventh Amendment and colonial notions of state sovereignty.¹⁰² Of the cases this Chapter surveyed, he only found waiver of state sovereign immunity in a single instance, voting with a unanimous court in an uncontroversial opinion which found that a state waives its sovereign immunity when it removes to federal court.¹⁰³ In every other instance, he has voted against waiver or abrogation of state sovereign immunity¹⁰⁴ and has authored some notable opinions expressing his views. In the seminal case of *Central Virginia Community College v. Katz*,¹⁰⁵ he argued in dissent along with three of his conservative colleagues against Congress having Bankruptcy Clause power to abrogate state sovereign immunity.¹⁰⁶ In a similar vein, in *Coleman v. Maryland Court of Appeals*¹⁰⁷ (another five-four case), he argued in concurrence that Congress had not abrogated state sovereign immunity under § 5 of the Fourteenth Amendment in the Family Medical Leave Act¹⁰⁸ for patterns of gender discrimination.¹⁰⁹ And in yet another close case, *Franchise Tax Board of California v. Hyatt*,¹¹⁰ he argued for the majority along with his four conservative colleagues that a state could never be sued without its consent, even in another state court.¹¹¹ While his views on state sovereign immunity find ground in the Eleventh Amendment, which is not the case for federal sovereign immunity, they nonetheless speak to a firm view of a sovereign's right against being sued without its consent.¹¹²

States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

¹⁰² See app. I.b (finding no waiver or abrogation of state sovereign immunity in 8 out of 9, or 89%, of cases surveyed); see also *Franchise Tax Bd. of Cal. v. Hyatt (Hyatt)*, 139 S. Ct. 1485, 1493, 1496 (2019) ("In proposing the [Eleventh] Amendment, Congress acted not to change but to restore the original constitutional design. The sovereign immunity of the States, . . . neither derives from, nor is limited by, the terms of the Eleventh Amendment." (internal quotations and citations omitted)).

¹⁰³ *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 616 (2002).

¹⁰⁴ See *supra* note 102.

¹⁰⁵ 546 U.S. 356, 359 (2006). This ruling carved out an exception to the rule from *Seminole Tribe of Florida v. Florida (Seminole Tribe)*, 517 U.S. 44, 47 (1996), in which the Court held that Congress lacked power under Article I to abrogate state sovereign immunity. See *supra* note 29.

¹⁰⁶ *Katz*, 546 U.S. at 379 (Thomas, J., dissenting).

¹⁰⁷ 566 U.S. 30, 33 (2012).

¹⁰⁸ 29 U.S.C. § 2612(a) (2018).

¹⁰⁹ *Coleman*, 566 U.S. at 44 (Thomas, J., concurring).

¹¹⁰ *Hyatt*, 139 S. Ct. 1485, 1490 (2019).

¹¹¹ *Id.*

¹¹² Justice Thomas has been less favorable to tribal sovereign immunity, finding abrogation of tribal sovereign immunity in 3 out of 3, or 100%, of cases surveyed. See app. I.c. He expressed his views directly every time: in the majority opinion in *South Dakota v. Bourland (Bourland)*, 508 U.S. 679, 687 (1993), and in the dissenting opinion in *Michigan v. Bay Mills Indian Community (Bay Mills)*, 572 U.S. 782, 814 (2014) (finding tribal sovereign immunity comes from Congress and is not inherent), and *Upper Skagit Indian*

As a nail in the coffin, Justice Thomas would not likely find waiver in the CAA because he strongly disfavors use of legislative history or statutory purpose to discern congressional intent.¹¹³ He has relied on legislative history in only a small number of cases, and has more tellingly written a number of concurrences where he specifically wrote to share his disdain for reliance on legislative history.¹¹⁴ His dissent in *Commissioner of Internal Revenue Service v. Lundy (Lundy)*¹¹⁵ reveals the nature of his limited flexibility: he relied on legislative history but only because he found the text so ambiguous and congressional intent “difficult to discern.”¹¹⁶ Justice Thomas generally disfavors legislative history, as exemplified by his opinion in *Barnhart v. Sigmon Coal Co.*,¹¹⁷ where he noted that statutory text generally reflects legislative compromise and criticized his dissenting colleagues for relying on a sentence inserted into the record after the bill’s passage.¹¹⁸ Overall, Justice Thomas rarely engages in extra-textual analysis, and is therefore unlikely to be swayed by the convincing legislative history of the CAA showing Congress intended to waive federal sovereign immunity.

B. Chief Justice Roberts

The Chief Justice is the most likely of the conservative justices to find waiver in the CAA. His voting record shows that he is overall more

Tribe v. Lundgren (Lundgren), 138 S. Ct. 1649, 1656 (2018) (finding the immovable property exception should extend to tribes). See *infra* notes 174–177 and accompanying text.

¹¹³ See app. I.d (voting along strict constructionist lines in 19 out of 23, or 82%, of cases surveyed).

¹¹⁴ See, e.g., *Samantar v. Yousuf*, 560 U.S. 305, 326 (2010) (Thomas, J., concurring) (“I join the Court’s opinion except for those parts relying on the legislative history In my view, the Court’s textual analysis is sufficient to resolve this case.”); *Dig. Realty Tr. v. Somers*, 138 S. Ct. 767, 783–84 (2018) (Thomas, J., concurring):

The Court goes on, however, to discuss the supposed ‘purpose’ of the statute, which it primarily derives from a single Senate Report. Even assuming a majority of Congress read the Senate Report, agreed with it, and voted for [the statute] with the same intent, ‘we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.’ . . . And ‘it would be a strange canon of statutory construction that would require Congress to state in committee reports . . . that which is obvious on the face of a statute.’ For these reasons, I am unable to join the portions of the Court’s opinion that venture beyond the statutory text.

(internal citations omitted).

¹¹⁵ 516 U.S. 235, 253 (1996).

¹¹⁶ *Id.* at 255; see also, Judge H. Brent McKnight, *The Emerging Contours of Justice Thomas’s Textualism*, 12 REGENT U. L. REV. 365, 377 (2000) (“[Justice Thomas’s] *Lundy* opinion demonstrates that where the text is ambiguous and it is likely Congress had no relevant intent, rules of construction are powerless, making resort to legislative history necessary.”).

¹¹⁷ 534 U.S. 438, 461 (2002).

¹¹⁸ *Id.* at 457, n.15.

likely to find waiver or abrogation of sovereign immunity than his conservative colleagues, especially in the context of federal sovereign immunity.¹¹⁹ Although he has authored no opinions in any federal sovereign immunity cases, his vote in *Dolan* revealed an ideological split from Justice Thomas. In *Dolan*, Chief Justice Roberts voted with the majority to find the waiver of immunity extended to negligent transmission of mail, relying on statutory purpose to discern congressional intent.¹²⁰ Although the Chief Justice has often found waiver of federal sovereign immunity, he has also mostly voted along strict constructionist lines,¹²¹ so it is still less likely he would find waiver for punitive fines in the CAA. Additionally, the fact that he has voted with the majority in a high percentage of cases also indicates that he is less likely to vote along with his liberal colleagues in dissent.¹²²

In state sovereign immunity cases, he has been less likely to find waiver or abrogation.¹²³ But he has not been rigid, either, and his majority opinion in *PennEast Pipeline Co., LLC v. New Jersey (PennEast)*¹²⁴ reveals some of his jurisprudence. In *PennEast*, he split from three of his conservative colleagues to argue that states implicitly consented to condemnation suits by private parties with delegated eminent domain power when the states ratified the Constitution.¹²⁵ In that case, Congress had given eminent domain power to a private energy company through the Natural Gas Act (NGA),¹²⁶ and the company then sought to exercise eminent domain over the State of New Jersey by building a pipeline.¹²⁷ The Court held that because the states consented to federal eminent domain at ratification and the federal government can delegate eminent domain power, private parties with delegated eminent domain power can bring condemnation suits against

¹¹⁹ See app. II (finding waiver or abrogation of sovereign immunity in 7 out of 14, or 50%, finding waiver of federal sovereign immunity in 4 out of 6, or 67%, and voting along strict constructionist lines in 7 out of 14, or 50%, of cases surveyed).

¹²⁰ *Dolan*, 546 U.S. 481, 486 (2006) (Kennedy, J.) (“A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.”).

¹²¹ See app. II (finding waiver or abrogation of sovereign immunity in 7 out of 14, or 50%, finding waiver of federal sovereign immunity in 4 out of 6, or 67%, and voting along strict constructionist lines in 7 out of 14, or 50%, of cases surveyed).

¹²² See *infra* note 141 and accompanying text.

¹²³ See app. II.b. (finding waiver or abrogation in 4 out of 6, or 67%, of state sovereign immunity cases surveyed).

¹²⁴ 141 S Ct. 2244, 2251 (2021).

¹²⁵ *Id.* at 2259 (“[T]he States consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegates. The plan of the Convention reflects the fundamental postulates implicit in the constitutional design.” (internal quotations and citations omitted)).

¹²⁶ 15 U.S.C. §§ 717–717(z) (2018). (“[C]ertificate shall be issued to any qualified applicants . . . authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application.”); *id.* at § 717(f)(e).

¹²⁷ *PennEast* 141 S. Ct. at 2251–53.

states.¹²⁸ While taking a less-strict stance on sovereign immunity than some of his conservative colleagues,¹²⁹ this opinion might just show that the Chief Justice values the federal government's supreme power over state sovereign immunity, and it does not necessarily translate to a likelihood of him finding waiver of federal sovereign immunity in the CAA.

Chief Justice Roberts also authored a concurrence—joined by three of his liberal colleagues—in *Whole Woman's Health v. Jackson*,¹³⁰ where he found that the *Ex parte Young* doctrine¹³¹ should allow challenges to Texas's "heartbeat" ban (which was unconstitutional at the time it was passed), which does not allow abortions after six-weeks, when heartbeats can first be detected.¹³² More than anything, the end of his opinion revealed his jurisprudence:

[I]t is . . . a basic principle that the Constitution is the fundamental and paramount law of the nation, and '[i]t is emphatically the province and duty of the judicial department to say what the law is.' Indeed, '[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.' The nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake.¹³³

Chief Justice Roberts apparently values that people view the Court as a respectable institution over a state's sovereign immunity and use of creative laws to get around the Court's constitutional rulings. His willingness to extend *Ex parte Young* to uphold the Court's image, while expressing a less-strict view of sovereign immunity than some of his conservative colleagues, however, does not significantly indicate that he would find waiver of federal sovereign immunity in the CAA for punitive fines.

Regarding statutory construction, Chief Justice Roberts is again less strict than some of his conservative colleagues.¹³⁴ In his majority opinion in *King v. Burwell*,¹³⁵ he split from three of his conservative colleagues and relied on the broader structure, design, and purpose of

¹²⁸ *Id.* at 2251.

¹²⁹ *Cf. infra* notes 218, 230.

¹³⁰ 142 S. Ct. 522, 544 (2021).

¹³¹ *See supra* note 19 and accompanying text.

¹³² *Whole Woman's Health*, 142 S. Ct. at 526 (Opinion of Roberts, C.J); 87th Leg., Reg. Sess. (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE §§ 171.201–171.212). This Chapter was written before the decision of *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240 (2022), which overturned *Roe v. Wade*, 410 U.S. 113, 116 (1973) and the constitutionality of abortions.

¹³³ *Whole Woman's Health*, 142 S. Ct. at 545 (internal citations omitted).

¹³⁴ *See app. II.d* (adhering to strict construction rules and refusing to look at legislative history or statutory purpose to discern congressional intent in 7 out of 14, or 50%, of cases surveyed).

¹³⁵ 576 U.S. 473, 478 (2015).

the Affordable Care Act,¹³⁶ as opposed to a strict textualist reading, to discern congressional intent.¹³⁷ He also voted along with the liberal majority in *Samantar v. Yousuf*, not joining the concurrences of three of his conservative colleagues who all wrote separately to distinctly not join the parts of the opinion which relied on legislative history.¹³⁸ Similarly, he has also voted along with his liberal colleagues in several other majority opinions which relied in part on legislative history in other instances of statutory ambiguity.¹³⁹ The Chief Justice's willingness to vote with his liberal colleagues in reliance on legislative history or statutory purpose is valuable information for predicting his vote in the context of the CAA because the congressional intent of the CAA can be distinguished from the CWA by its clear legislative history.¹⁴⁰

One last striking observation that comes through an analysis of the Chief Justice is that he appears to like a unified court. Chief Justice Roberts overwhelmingly voted with the majority in cases this Chapter surveyed and seldom authored opinions to directly express his personal views.¹⁴¹ Unlike some of his conservative colleagues, he seems to strive for a unified court and appears to feel less strongly about sharing his own opinion.¹⁴² Therefore, considering the current conservative makeup of the court, he would be even less likely to vote with a liberal minority and find waiver of sovereign immunity in the CAA for punitive fines.

C. Justice Alito

Justice Alito is easier to predict than Chief Justice Roberts because his jurisprudence is so consistent, and he often refuses to rely on

¹³⁶ Affordable Care Act, Pub. L. 111–48 (2018).

¹³⁷ *King*, 576 U.S. at 492–93:

Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of [the provision]. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law. Here, the statutory scheme compels us to reject petitioners' interpretation because it would . . . likely create the very [scenario] that Congress designed the Act to avoid. We cannot interpret federal statutes to negate their own stated purposes.

(internal quotations and citations omitted).

¹³⁸ *Samantar*, 560 U.S. 305, 306, 323, 326–327 (2010) (Alito, Thomas, Scalia, JJ., concurring).

¹³⁹ See e.g., *Carr v. United States*, 560 U.S. 438, 440, 457 (2010) (voting with liberal majority relying in part on legislative history); *Yates v. United States*, 574 U.S. 528, 531, 542 (2015) (joining majority relying in part on legislative history); *Dig. Realty Tr.*, 138 S. Ct. 767, 773–74, 777–78, 780–81 (2018); *Lamar, Archer, & Cofrin, LLP v. Appling (Lamar)*, 138 S. Ct. 1752, 1762 n.3 (2018) (relying in part on legislative history).

¹⁴⁰ See *supra* notes 63–66 and accompanying text.

¹⁴¹ See app. II (voting with the majority in 26 out of 30, or 87%, of cases surveyed, and writing only 4 opinions).

¹⁴² *Id.*

legislative history or look beyond a statute's plain text.¹⁴³ Therefore, despite the CAA's revealing legislative history, he would not likely find a waiver of federal sovereign immunity for punitive fines in the CAA.

In the context of federal sovereign immunity, like Justice Thomas, Justice Alito tends to find waiver only in cases of very clear statutory language.¹⁴⁴ He expressed this jurisprudence in *Wong*, where sticking to a strict textual analysis, he argued in dissent along with three of his conservative colleagues that FTCA claims could not be equitably tolled.¹⁴⁵ But his majority opinion in *Federal Aviation Administration v. Cooper (FAA v. Cooper)*,¹⁴⁶ in which he argued that the Privacy Act¹⁴⁷ did not waive federal sovereign immunity for mental or emotional distress, revealed some of the contours of his strict constructionist views of waiver of sovereign immunity jurisprudence:

Although [the sovereign immunity] canon of interpretation requires an unmistakable statutory expression of congressional intent to waive the Government's immunity, Congress need not state its intent in any particular way. We have never required that Congress use magic words. To the contrary, we have observed that the sovereign immunity canon is a tool for interpreting the law and that it does not displac[e] the other traditional tools of statutory construction. What we thus require is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools.¹⁴⁸

Despite this language seeming to depart from a heightened clear statement standard, the Court—with a majority of five conservative justices—nevertheless held that the Privacy Act's waiver of “actual damages” did not extend to mental or emotional distress.¹⁴⁹ In *Richlin Security Service Co. v. Chertoff (Richlin)*,¹⁵⁰ Justice Alito similarly referred to the sovereign immunity canon as “just” a canon of construction, and held that the Equal Access to Justice Act¹⁵¹ clearly allowed recovery for paralegal fees.¹⁵² While Justice Alito may not require “magic words,” he still favors resolving perceived ambiguity in

¹⁴³ See app. III.d (voting along strict constructionist lines in 12 out of 16, or 75% of cases surveyed).

¹⁴⁴ See *supra* notes 87–101 and accompanying text.

¹⁴⁵ *Wong*, 575 U.S. 402, 421 (2015) (Alito, J., dissenting).

¹⁴⁶ 566 U.S. 284, 287 (2012).

¹⁴⁷ Privacy Act of 1974, 5 U.S.C. § 552a(g)(4)(A) (2018).

¹⁴⁸ *FAA v. Cooper*, 566 U.S. at 291 (internal quotations and citations omitted).

¹⁴⁹ See 5 U.S.C. § 522a(g)(4) (stating for any “intentional or willful” refusal or failure to comply with the Act, the United States shall be liable for “actual damages sustained by the individual as a result of the refusal or failure”); *FAA v. Cooper*, 566 U.S. at 287.

¹⁵⁰ 553 U.S. 571, 573 (2008).

¹⁵¹ 5 U.S.C. § 504 (2018).

¹⁵² *Richlin*, 553 U.S. at 589–590 (“The sovereign immunity canon is just that—a canon of construction . . . There is no need for us to resort to the sovereign immunity canon because there is no ambiguity left for us to construe.”).

favor of the sovereign, which does not indicate he would likely find a waiver in the CAA for punitive damages.

In state sovereign immunity cases, he has consistently found no abrogation or waiver.¹⁵³ His only vote against state sovereignty was in *PennEast*, allowing Congress to give private companies eminent domain power over states.¹⁵⁴ His precise personal views on state sovereign immunity are not entirely clear, however, because he has not authored any opinions in any state sovereign immunity cases. Based on his voting record alone, it appears that he favors state sovereignty in all but the rarest of circumstances.¹⁵⁵

Regarding statutory interpretation, Justice Alito has consistently voted along strict statutory construction lines.¹⁵⁶ Thus, he is unlikely to look to legislative history or statutory purpose to discern congressional intent, and unlikely to find waiver in the CAA for punitive fines. He is not dogmatic, however, and has discerned congressional intent from beyond the text in a few notable instances.¹⁵⁷ In *Zuni Public School District No. 89 v. Department of Education*,¹⁵⁸ he voted with the majority—over the dissent of three of his conservative colleagues—in an opinion which gleaned congressional intent from the statute’s background and purpose.¹⁵⁹ And in a five-justice majority opinion in *Adoptive Couple v. Baby Girl*,¹⁶⁰ while primarily relying on the statutory text, Justice Alito nevertheless cited to legislative history to underscore his reading of congressional intent.¹⁶¹ More telling, however, are his concurrences where he specifically refused to join reliance on legislative history.¹⁶² Based on Justice Alito’s overall consistent preference for clear statements in the context of federal sovereign immunity and his general

¹⁵³ See app. III.b (finding no waiver or abrogation of state sovereign immunity in 4 out of 5, or 80%, of cases surveyed).

¹⁵⁴ *PennEast*, 141 S. Ct. 2244, 2252 (2021).

¹⁵⁵ Like Justice Thomas, Justice Alito is more likely to find abrogation of tribal sovereign immunity, voting with the dissents in *Bay Mills*, 572 U.S. 782, 814 (2014) and *Lundgren*, 138 S. Ct. 1649, 1656 (2018). See app. III.c (finding no abrogation of tribal sovereign immunity in 2 out of 2, or 100%, of cases surveyed).

¹⁵⁶ See app. III.d (voting along strict constructionist lines in 12 out of 16, or 75%, of cases surveyed).

¹⁵⁷ *Id.*; see *infra* note 158–161 and accompanying text.

¹⁵⁸ 550 U.S. 81, 83 (2007).

¹⁵⁹ *Id.* at 90–93:

[B]ecause of the technical nature of the language in question, we shall first examine the provision’s background and basic purposes [T]he history and purpose of the [provision] indicate that the Secretary’s [interpretation] is a reasonable method that carries out Congress’ likely intent in enacting the statutory provision before us.

¹⁶⁰ 570 U.S. 637, 639 (2013).

¹⁶¹ *Id.* at 649–52.

¹⁶² See e.g., *Samantar*, 560 U.S. 305, 326 (2010) (Alito, J., concurring) (“I think that the citations to legislative history are of little if any value here.”); *Lamar*, 138 S. Ct. 1752, 1756, 1763 (2018) (joining the opinion except for the part relying on legislative history); see also *Yates*, 574 U.S. 528, 549–552 (2015) (Alito, J., concurring) (concurring with judgment but interpreting statute on narrower, more textualist grounds).

refusal to discern congressional intent from legislative history or statutory purpose, he is not likely to find that the CAA waives sovereign immunity for punitive fines.

D. Justice Sotomayor

Justice Sotomayor is likely to find that the CAA does waive federal sovereign immunity for punitive fines. Although her jurisprudence on sovereign immunity seems to change depending on the context—be it federal, state, or tribal—she has found waiver or abrogation more often than not.¹⁶³ She is least likely to find waiver in the context of federal sovereign immunity.¹⁶⁴ In *FAA v. Cooper*, for example, she argued in dissent along with two of her liberal colleagues that the federal government waived sovereign immunity for damages for mental and emotional distress in the Privacy Act, based on the statute’s “text, structure, drafting history, and purpose.”¹⁶⁵

In the single federal sovereign immunity case this Chapter surveyed where Justice Sotomayor found for the government, as the lone dissenter in *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak (Patchak)*,¹⁶⁶ she found no waiver in the Administrative Procedure Act (APA)¹⁶⁷ for claims brought under the Quiet Title Act (QTA),¹⁶⁸ where the landowner had no personal interest in the land.¹⁶⁹ In that case, the eight other justices held that the federal government waived its sovereign immunity for a suit brought by a private landowner who owned property adjacent to tribal property—held in trust by the federal government—where the tribe planned to build a casino.¹⁷⁰ Justice Sotomayor found that the QTA “expressly forbid[]” use of the APA to “divest the Federal Government of title to and possession of land held in trust for Indian tribes.”¹⁷¹ This preservation of federal sovereign immunity may be more the result of her stronger beliefs around tribal sovereignty, however, and less about sovereign immunity in general.

In a telling concurrence in *Michigan v. Bay Mills Indian Community (Bay Mills)*,¹⁷² where the Court held that a state could not

¹⁶³ See app. IV.a–c (finding waiver or abrogation of sovereign immunity in 7 out of 11, or 64%, of cases surveyed). Justice Sotomayor apparently feels more strongly about protecting tribal sovereign immunity, so not counting the two tribal cases, her record is 7 out of 9, or 78%.

¹⁶⁴ *Id.* at IV.a (finding waiver in 3 out of 4, or 75%, of federal sovereign immunity cases surveyed).

¹⁶⁵ *FAA v. Cooper*, 566 U.S. 284, 305 (2012) (Sotomayor, J., dissenting).

¹⁶⁶ 567 U.S. 209, 228–29. (2012).

¹⁶⁷ 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

¹⁶⁸ 28 U.S.C. § 2409(a)(a) (2018).

¹⁶⁹ *Patchak*, 567 U.S. at 217.

¹⁷⁰ *Id.* at 212–215.

¹⁷¹ *Id.* at 228, 236 (Sotomayor, J., dissenting).

¹⁷² *Bay Mills*, 572 U.S. 782, 804 (2014).

sue a tribe for operating a casino off-reservation, Justice Sotomayor wrote separately to express her strong support for tribal sovereign immunity as a courtesy of comity.¹⁷³ She also voted with the majority in *Upper Skagit Indian Tribe v. Lundgren*,¹⁷⁴ finding that the common-law immovable property exception for sovereign immunity should not apply to tribal sovereign immunity.¹⁷⁵ In that case, property owners sought to quiet title to property acquired by adverse possession that the previous owner had sold to a tribe.¹⁷⁶ The Court held that even though the tribe purchased the land like a private individual, it had not necessarily waived its sovereign immunity, and the Court remanded the case for the lower court to decide the issue of sovereign immunity.¹⁷⁷ Justice Sotomayor's concurrence in *Bay Mills* reveals her supportive views of tribal sovereign immunity, but this might not affect the likelihood of her finding waiver of federal sovereign immunity in the CAA for punitive damages.¹⁷⁸

In contrast to her views on tribal sovereign immunity, Justice Sotomayor more easily finds abrogation of state sovereign immunity.¹⁷⁹ In the single exception of cases this Chapter surveyed, *Allen v. Cooper*,¹⁸⁰ she voted with a unanimous court to not extend the *Katz* Bankruptcy Clause exception to the Intellectual Property Clause.¹⁸¹ She notably did not join two of her liberal colleagues in concurrence, who voted based on *stare decisis* and wrote separately to express their belief that the court “went astray” in *Seminole Tribe of Florida v. Florida*¹⁸² and its progeny.¹⁸³ Thus, while she may not be the most outspoken member of the court in regard to Congress's power to abrogate state sovereign immunity, her fairly consistent views lend at least some

¹⁷³ *Id.* at 806 (Sotomayor, J., concurring) (explaining the history of tribal sovereign immunity and the economic hardship of tribes as a result of federal policies) (“Principles of comity strongly counsel in favor of continued recognition of tribal sovereign immunity Comity—that is, a proper respect for [a sovereign’s] functions—fosters respectful, harmonious relations between governments.” (internal quotations and citations omitted)).

¹⁷⁴ 138 S. Ct. 1649, 1651 (2018).

¹⁷⁵ *Id.* at 1653 (Gorsuch, J.) (explaining the immovable property exception) (“At common law . . . sovereigns enjoyed no immunity from actions involving immovable property located in the territory of another sovereign A prince, by acquiring private property in a foreign country, . . . may be considered as so far laying down the prince, and assuming the character of a private individual.” (internal quotations and citations omitted)).

¹⁷⁶ *Id.* at 1652–1654.

¹⁷⁷ *Id.* at 1654.

¹⁷⁸ Unlike the CWA, RCRA, or the SDWA, the CAA does not include tribes within the definition of “person” or “municipality.” CAA, 42 U.S.C. § 7602 (e)–(f) (2018).

¹⁷⁹ See app. IV.b (finding abrogation of state sovereign immunity in 4 out of 5, or 80%, of cases surveyed).

¹⁸⁰ 140 S. Ct. 994, 998 (2020).

¹⁸¹ *Id.*; U.S. CONST. art I, § 8, cl. 8; U.S. CONST. art I, § 8, cl. 4; *Katz*, 546 U.S. 356, 359 (2006); see also *supra* note 105 and accompanying text (discussing how *Katz* carved out an exception to *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996)).

¹⁸² 517 U.S. 44 (1996).

¹⁸³ *Allen*, 140 S. Ct. at 1009 (Breyer, J. concurring).

support to the conclusion that she would find waiver of federal sovereign immunity in the CAA for punitive fines.

Her highly consistent votes on clear statement rules and statutory construction strengthen this prediction.¹⁸⁴ One exception is her majority opinion in *Lockhart v. United States*,¹⁸⁵ where she found a child pornography law clear and did not apply the rule of lenity to the criminal defendant.¹⁸⁶ The rule of lenity, however, is a unique clear statement rule, and only applies with the most grievous ambiguity.¹⁸⁷ The exception is thus not too notable, except for the fact that her opinion did not rely on legislative history, unlike her dissenting liberal colleagues.¹⁸⁸ More telling however, is her concurrence in *Digital Realty Trust v. Somers*,¹⁸⁹ where she wrote separately to express her favorable views on reliance on legislative history to discern congressional intent.¹⁹⁰

Overall, Justice Sotomayor's voting record and views expressed in authored opinions indicate that she would likely find waiver of federal sovereign immunity for punitive damages in the CAA. Her generally favorable attitude towards reliance on legislative history bolsters this prediction, and her strong belief in tribal sovereign immunity would not bear too heavily on the issue.

E. Justice Kagan

Justice Kagan is slightly less predictable than Justice Sotomayor, but she is still likely to find waiver of federal sovereign immunity in the CAA for punitive fines.¹⁹¹ Of the federal sovereign immunity cases this

¹⁸⁴ See app. IV.d (relying on legislative history or statutory purpose beyond the statutory text in 8 out of 10, or 80%, of cases surveyed).

¹⁸⁵ 136 S. Ct. 958 (2016).

¹⁸⁶ *Id.* at 968.

¹⁸⁷ See *Moskal v. United States*, 498 U.S. 103, 108 (1990) (“[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute’s intended scope even *after* resort to ‘the language and structure, legislative history, and motivating policies’ of the statute.” (internal citations omitted) (emphasis in original)).

¹⁸⁸ See *Lockhart*, 136 S. Ct. at 973 (Kagan, J. dissenting) (“Legislative history confirms what the natural construction of language shows.”).

¹⁸⁹ *Dig. Realty Tr.*, 138 S. Ct. 767, 782 (2018).

¹⁹⁰ *Id.* at 782 (Sotomayor, J., concurring):

I write separately only to note my disagreement with the suggestion in my colleague’s concurrence that a Senate Report is not an appropriate source for this Court to consider when interpreting a statute. Legislative history is of course not the law, but that does not mean it cannot aid us in our understanding of a law. Just as courts are capable of assessing the reliability and utility of evidence generally, they are capable of assessing the reliability and utility of legislative-history materials.

See also, *Carr*, 560 U.S. 438, 457 (2009) (discussing reliance on legislative history in relation to criminal penalties); *Lamar*, 138 S. Ct. 1752, 1762 (2018).

¹⁹¹ See app. V.a–c (finding waiver or abrogation of sovereign immunity in 6 out of 10, or 60%, of sovereign immunity cases surveyed). Like Justice Sotomayor, she voted in favor of

Chapter surveyed, she always found waiver.¹⁹² She expressed her views in two majority opinions: *Patchak* and *Wong*, finding that the government waived its immunity in both instances.¹⁹³ Like Justice Sotomayor, Justice Kagan's views on sovereign immunity differ when it comes to tribal sovereign immunity, but given her voting record and written opinions on federal sovereign immunity, it is still likely that she would find waiver in the CAA for punitive fines.¹⁹⁴

Her views on state sovereign immunity, while seemingly less strong, do not change this prediction.¹⁹⁵ In *Allen*, she wrote the majority opinion declining to extend the *Katz* Bankruptcy Clause exception to the Intellectual Property Clause.¹⁹⁶ She also voted in dissent along with some of her conservative colleagues in *PennEast*, disagreeing that states implicitly consented at ratification to condemnation suits by private parties with delegated eminent domain power.¹⁹⁷ Her state sovereign immunity jurisprudence will not likely bear too heavily on the issue of waiver in the CAA for punitive fines, however, because it finds constitutional ground in the Eleventh Amendment, which is not the case for federal sovereign immunity.

Justice Kagan's favorable views towards reliance on legislative history bolster the prediction that she will find waiver in the CAA. In cases where the court debated whether legislative history should be outcome-determinative, she often voted in favor of reliance on legislative history, statutory purpose, and going beyond statutory text to discern congressional intent.¹⁹⁸ In the single, uncontroversial exception, *Azar v. Allina Health Services*,¹⁹⁹ she voted along with an eight-justice majority to require the Health and Human Services Department to undertake notice and comment procedures for issuing a substantive policy statement, over a lone dissent by Justice Breyer that would have relied on legislative history to find otherwise.²⁰⁰ The statutory language of the Health Insurance For the Aged Act (Medicare Act)²⁰¹ (establishing that policy statements which substantively change or establish a legal

tribal sovereign immunity in two of these cases, so not counting the tribal cases, her record in 6 out of 8, or 75%.

¹⁹² See app. V.a (finding waiver in 3 out of 3, or 100%, of federal sovereign immunity cases surveyed).

¹⁹³ See *Patchak*, 567 U.S. 209, 212 (2012) (finding waiver of federal sovereign immunity in APA for purposes of the Quiet Title Act); *Wong*, 575 U.S. 402, 420 (2015) (finding FTCA claims could be equitably tolled).

¹⁹⁴ See app. V.c (finding tribes protected by sovereign immunity in 2 out of 2, or 100%, of cases surveyed).

¹⁹⁵ See app. V.b (finding abrogation or waiver in 3 out of 5, or 60%, of state sovereign immunity cases surveyed).

¹⁹⁶ *Allen*, 140 S. Ct. 994, 998–1003 (2020); see also *supra* notes 105, 181 and accompanying text.

¹⁹⁷ *PennEast*, 141 S. Ct. 2244, 2265 (2021) (Barrett, J., dissenting).

¹⁹⁸ See app. V.d (relying on legislative history in 7 out of 8, or 88%, of cases surveyed).

¹⁹⁹ 139 S. Ct. 1804, 1808 (2019).

²⁰⁰ *Id.* at 1817 (Breyer, J., dissenting).

²⁰¹ 42 U.S.C. §§ 1395–1395(I)(I)(I) (2018).

standard require notice and comment procedures)²⁰² is far clearer than the waiver language at issue in the CAA, so her vote in that instance of statutory clarity does not indicate that Justice Kagan would find waiver of sovereign immunity in the CAA for punitive fines. Although she once expressed that the late Justice Scalia changed her approach to statutory interpretation to be more textualist (saying in an interview: “We’re all textualists now”),²⁰³ her overall voting record and views expressed in authored opinions indicate that she prefers to discern congressional intent from sources beyond only the text itself.²⁰⁴ Therefore, considering the persuasive legislative history of the CAA and her consistent finding of waiver of federal sovereign immunity, she is likely to find waiver of federal sovereign immunity for punitive fines in the CAA.

F. Justice Gorsuch

Out of all the more recent appointees—who have fewer cases upon which to base predictions—Justice Gorsuch is the most predictable.²⁰⁵ In every single sovereign immunity case this Chapter surveyed, across the different contexts of state, federal, and tribal sovereign immunity, he voted for the sovereign and found no waiver or abrogation.²⁰⁶ He is also a highly consistent strict constructionist, and relies on legislative history in only rare exceptions.²⁰⁷ Therefore, he is unlikely to find waiver of sovereign immunity for punitive fines in the CAA.

During his time serving on the Tenth Circuit Court of Appeals, then-Judge Gorsuch consistently found no waiver of federal sovereign immunity, although his opinions and votes do not appear to reveal very

²⁰² *Id.* at § 1395hh(a)(2):

No rule, requirement, or other statement of policy . . . that establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits . . . shall take effect unless it is promulgated by the Secretary.

²⁰³ Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://perma.cc/6RS7-KZFB> (“[Committee reports are] not what Congress passed, right? If they want to pass a committee report, they can go pass a committee report. They can incorporate a committee report into the legislation if they want to. You know, they didn’t do that.”).

²⁰⁴ *See supra* note 198 and accompanying text; *see also, e.g., Lockhart*, 136 S. Ct. 958, 965–75 (2016) (Kagan, J., dissenting) (“[The] normal construction finds support in uncommonly clear-cut legislative history Legislative history confirms what the natural construction of language shows [A]gainst the most natural construction of [the provision’s] language, plus unusually limpid legislative history, the majority relies on a structural argument.”).

²⁰⁵ *See app.* VI.a–c (finding no waiver or abrogation in 11 out of 11, or 100%, of sovereign immunity cases surveyed).

²⁰⁶ *See id.* (showing that even when he was in the dissent, Justice Gorsuch voted for upholding sovereign immunity).

²⁰⁷ *See infra* notes 226–235 and accompanying text.

much about his jurisprudence. In *Bork v. Carroll*,²⁰⁸ he wrote an opinion which denied relief to a servicemember bringing claims against his superior officers.²⁰⁹ There, the plaintiff attempted to bring a non-FTCA claim using the FTCA precedent, and then-Judge Gorsuch dismissed the complaint, finding that sovereign immunity protected the government officials because there was no statutory waiver to interpret.²¹⁰ The case does not reveal much besides that Justice Gorsuch was unwilling to entertain the possibility of expanding the doctrine to provide any judicial relief for the plaintiff.²¹¹ Justice Gorsuch also voted to find no waiver of federal sovereign immunity in *Shagoury v. United States*,²¹² denying relief to a pro se plaintiff who was suing the Drug Enforcement Administration for “trying to kill and injure him.”²¹³ Like the plaintiff in *Bork*, the plaintiff in *Shagoury* did not raise any strong arguments showing the requisite affirmative waiver of sovereign immunity, and then-Judge Gorsuch voted to dismiss the complaint.²¹⁴ Justice Gorsuch’s vote here, again, does not reveal much about his jurisprudence on waiver of federal sovereign immunity except for his adherence to Supreme Court precedent.

Justice Gorsuch is also consistent with finding for the sovereign in the context of tribal sovereign immunity, finding no waiver or abrogation of tribal sovereignty in every case this Chapter surveyed.²¹⁵ While serving on the Tenth Circuit, he voted in an opinion arguing that tribal sovereign immunity barred a civil rights claim,²¹⁶ and wrote an opinion arguing that a tribe did not waive its sovereign immunity by entering into a mutual assistance agreement with the state.²¹⁷ On the Supreme Court, Justice Gorsuch also notably wrote the majority opinion in *Lundgren*, where he declined to extend the immovable property exception to tribal sovereign immunity—over the dissent of two of his conservative colleagues—writing that “[d]etermining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes” and that “immunity doctrines lifted from

²⁰⁸ 449 F. App’x. 719, 720 (10th Cir. 2011).

²⁰⁹ *Id.* at 721–22.

²¹⁰ *Id.* at 721.

²¹¹ *Id.* (“Whether there might be some *other* way someone in [the plaintiff’s] shoes could invoke the jurisdiction of the federal courts—say, by relying on the APA’s waiver of sovereign immunity, or on an exception to federal sovereign immunity—we do not need to (and do not) say.” (internal citations omitted) (emphasis in original)).

²¹² 569 F. App’x 549, 551 (10th Cir. 2014).

²¹³ *Id.*

²¹⁴ *Id.* at 549, 553 (“[The plaintiff] offers no reason to suppose that the federal government has waived the sovereign immunity that would otherwise attach to this agency.” (internal citation omitted)).

²¹⁵ *See app. VI.c* (finding no waiver or abrogation of tribal sovereign immunity in 3 out of 3, or 100%, of tribal sovereign immunity cases surveyed).

²¹⁶ *Sanders v. Anotubby*, 631 F. App’x 618, 619 (10th Cir. 2015).

²¹⁷ *Ute Indian Tribe of the Uintah and Ouray Rsrvs. v. Utah*, 790 F.3d 1000, 1003, 1009 (10th Cir. 2015).

other contexts do not always neatly apply to Indian tribes.”²¹⁸ Thus, it would appear that Justice Gorsuch has a heightened respect for tribal sovereignty and is less willing to disregard it than some of his conservative colleagues. Justice Gorsuch’s consistent finding in favor of the sovereign indicates he is unlikely to find waiver for punitive fines in the CAA.

On the Supreme Court, Justice Gorsuch has had more opportunity to vote on state sovereign immunity cases, finding no waiver or abrogation in every case surveyed.²¹⁹ He authored opinions directly expressing his views in two cases which divided the conservative justices: writing for the majority in *Whole Woman’s Health* to find that the state judge and court clerk were immune and that the *Ex parte Young* exception did not apply;²²⁰ and writing a dissent in *PennEast* to argue that Congress cannot give eminent domain power over a state to a private company.²²¹ He also authored two opinions on state sovereign immunity during his time on the Tenth Circuit, in *Sellers v. Cline*²²² and *Johnson v. Oklahoma Department of Transportation*,²²³ finding that state sovereign immunity protected state officials from suit in both instances. These opinions, along with his votes on the Supreme Court of finding no congressional abrogation of state sovereign immunity in *Hyatt* and *Allen*,²²⁴ as well as his consistent votes in favor of the sovereign in the contexts of federal and tribal sovereign immunity,²²⁵ all point to Justice Gorsuch’s strong views in support of sovereign immunity and reinforce the prediction that he would not find waiver of federal sovereign immunity in the CAA for punitive fines.

Justice Gorsuch’s views on statutory interpretation leave some, but not much, room for doubt. While serving on the Tenth Circuit, he wrote a revealing majority opinion in *Lexington Insurance Co. v. Precision Drilling Co.*,²²⁶ expressing his ideology that the best evidence of

²¹⁸ *Lundgren*, 138 S. Ct. 1649, 1654 (2018); see also *supra* notes 112, 155, 166–178, 194 and accompanying text (discussing other Justices’ inconsistency regarding tribal sovereign immunity). Although not a sovereign immunity case, it also bears mentioning that Justice Gorsuch wrote the majority opinion and garnered the votes of his liberal colleagues in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020), holding that Congress had not disestablished a tribal reservation, honoring tribal treaties—“[W]e hold the government to its word”—and significantly expanding tribal jurisdiction.

²¹⁹ See app. VI.b (finding no abrogation or waiver in 6 out of 6, or 100% of state sovereign immunity cases surveyed).

²²⁰ *Whole Woman’s Health*, 142 S. Ct. 522, 529, 532 (2021).

²²¹ *PennEast*, 141 S. Ct. 2244, 2263 (2021) (Gorsuch, J., dissenting).

²²² 651 F. App’x. 804, 805 (10th Cir. 2016) (finding that state sovereign immunity precluded claim by inmate against state prison officials).

²²³ 645 F. App’x 765, 767 (10th Cir. 2016) (finding state officials entitled to sovereign immunity against civil rights claim).

²²⁴ See app. VI.b (voting with the majority in *Hyatt*, 139 S. Ct. 1485, 1490 (2019) and *Allen*, 140 S. Ct. 995, 998 (2020)).

²²⁵ See *supra* notes 205–218 and accompanying text.

²²⁶ 830 F.3d 1219, 1220 (10th Cir. 2016).

legislative intent is in the text.²²⁷ He also wrote a concurrence in *United States v. Hinckley*,²²⁸ however, where he relied in part on clear legislative history to resolve ambiguous statutory language. Where a plain reading would have led to “absurd results,”²²⁹ he suggested that there is room in his statutory construction jurisprudence to look beyond the text to discern congressional intent when text is sufficiently ambiguous and legislative history extraordinarily clear.²³⁰ Overall, he has voted consistently along strict constructionist lines.²³¹

He wrote two majority opinions for the Supreme Court taking the position against reliance on legislative history.²³² In *Azar*, he devoted an entire page to engage with the argument for legislative history and indicated his limited willingness to rely on it in some instances: “[E]ven those of us who believe that clear legislative history can illuminate ambiguous text won’t allow ambiguous legislative history to muddy clear statutory language.”²³³ He also interestingly wrote a majority opinion—which garnered the votes of his liberal colleagues—in *Bostock v. Clayton County*,²³⁴ where although mostly analyzing the text itself, he also engaged in some extra-textual analysis to discern the congressional intent regarding sexual orientation discrimination under Title VII.²³⁵

²²⁷ *Id.* at 1221.

²²⁸ 550 F.3d 926, 940 (10th Cir. 2008).

²²⁹ *Id.* at 945 (Gorsuch, J., concurring) (“[A]mbiguity is suggested by the absurd results that [defendant’s] reading produces.”).

²³⁰ *Id.* at 947, 927 (Gorsuch, J., concurring) (“Though the Supreme Court has recognized that legislative history is often murky, ambiguous, and contradictory, the Court itself has repeatedly told us to employ such history when seeking to resolve an ambiguous text [H]appily, the legislative history in this case is neither murky, ambiguous, nor contradictory.” (internal quotations and citations omitted)).

²³¹ *See* app. VI.d (voting along strict constructionist lines in 5 out of 7, or 71%, of cases surveyed).

²³² *See Azar*, 139 S. Ct. 1804, 1808 (2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018). (“[L]egislative history is not the law. It is the business of Congress to sum up its own debates in its legislation, and once it enacts a statute we do not inquire what the legislature meant; we ask only what the statute means.” (internal quotations and citations omitted)).

²³³ *Azar*, 139 S. Ct. at 1814 (internal citations omitted); *see also supra* notes 199–202 and accompanying text (discussing how Justice Kagan joined Justice Gorsuch’s opinion because statutory language was sufficiently clear).

²³⁴ 140 S. Ct. 1731 (2020).

²³⁵ Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e–2(a)(1) (2018); *Bostock*, 140 S. Ct. at 1750:

[W]hile legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose: Because the law’s ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context. And we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally. To ferret out such shifts in linguistic usage or subtle distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law’s drafters as some (not always conclusive) evidence.

Overall, given Justice Gorsuch's consistent votes in favor of sovereign immunity and against reliance on legislative history, he is likely to find no waiver of federal sovereign immunity in the CAA for punitive fines.

G. Justice Kavanaugh

From his limited votes on sovereign immunity cases alone, Justice Kavanaugh is not entirely predictable, but he has generally voted in favor of the sovereign.²³⁶ In the context of federal sovereign immunity, he has consistently found no waiver.²³⁷ In *We the People Foundation Inc. v. United States (We the People)*,²³⁸ while serving as a circuit judge on the D.C. Circuit Court of Appeals, then-Judge Kavanaugh wrote for the Court that the Tax Anti-Injunction Act²³⁹ precluded the plaintiff's claim for an injunction of tax collection as an exception to the APA's waiver of federal sovereign immunity for injunctive relief.²⁴⁰ He held for the federal government again in two other cases, both in the context of the FTCA, finding exceptions to the FTCA's waiver for discretionary functions and injuries suffered in foreign countries.²⁴¹ His interpretation of the FTCA stayed within textualist parameters, and his votes in favor of sovereign immunity from the D.C. Circuit do not reveal much about his jurisprudence besides faithful adherence to Supreme Court precedent.²⁴²

On the Supreme Court, Justice Kavanaugh only found waiver of state sovereign immunity in *PennEast*, where he voted with the majority to find that states implicitly waived their sovereign immunity at ratification for condemnation suits by private parties with delegated eminent domain authority.²⁴³ *PennEast* divided the conservatives on the court, so his vote of finding waiver only reveals that he is more aligned with Chief Justice Roberts and Justice Alito than with Justices Thomas, Gorsuch, and Barrett, and it is not a very strong indication that his sovereign immunity jurisprudence is particularly liberal.

Justice Kavanaugh's time serving on the D.C. Circuit reveals some of his statutory construction jurisprudence. In *Al-Bihani v. Obama*,²⁴⁴

²³⁶ See app. VII.a–c (voting in favor of the sovereign in 6 out of 8, or 75%, of cases surveyed).

²³⁷ *Id.*

²³⁸ 485 F.3d 140, 141 (D.C. Cir. 2007).

²³⁹ 26 U.S.C. § 7421(a) (2018).

²⁴⁰ *We the People*, 485 F.3d at 142–143.

²⁴¹ *Shuler v. United States*, 531 F.3d 930, 931, 936 (D.C. Cir. 2008) (finding no waiver in FTCA for discretionary functions); *Harbury v. Hayden*, 522 F.3d 413, 423 (D.C. Cir. 2008) (finding no waiver in FTCA for injuries suffered in foreign countries).

²⁴² See *supra* notes 88–96 and accompanying text (describing Justice Thomas' interpretation of the FTCA).

²⁴³ *PennEast*, 141 S. Ct. 2244, 2251 (2021). Justice Kavanaugh has also held that the *Ex Parte Young* doctrine could apply to tribes to get around tribal sovereign immunity in *Vann*, 701 F.3d 927, 929 (D.C. Cir. 2012).

²⁴⁴ 619 F.3d 1 (D.C. Cir. 2010).

the Court denied a rehearing en banc for a Guantanamo Bay detainee's writ of habeas corpus.²⁴⁵ Then-Judge Kavanaugh wrote a separate and lengthy concurrence to express a stricter constructionist view than his colleagues, explaining why judges should not use international law to clarify ambiguity²⁴⁶ in situations where Congress has delegated war authority to the Executive.²⁴⁷ In *Allina Health Services v. Price*²⁴⁸ (which went up to the Supreme Court later as *Azar v. Allina Health Services* and produced some debate about the use of legislative history),²⁴⁹ he wrote a majority opinion—splitting from the Tenth, Eighth, Sixth, and First circuits²⁵⁰—that stuck to a strict textual analysis and did not rely on legislative history to find that the Medicare Act did not incorporate the APA's interpretive-rule exception to notice and comment rulemaking.²⁵¹ The Supreme Court, also not relying on legislative history, later affirmed his opinion.²⁵² One notable exception to his strict textual construction jurisprudence is *Loving v. Internal Revenue Service*,²⁵³ where he relied in part on legislative history and statutory framework to interpret a provision of the tax code and rejected the canon against surplusage for making unrealistic assumptions about congressional drafting.²⁵⁴ He revealed his statutory construction jurisprudence further in a law review article, where he expressed his view that judges should find less ambiguity in order to be impartial, neutral, and objective—instead of using perceived ambiguity to

²⁴⁵ *Id.*; see *Al-Bihani v. Obama*, 590 F.3d 866, 868–89 (D.C. Cir. 2010) (panel denying writ of habeas corpus).

²⁴⁶ See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.”); see also Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1215, 1232–33 (2008) (characterizing the canon as: “[A]mbiguous congressional statutes should be construed in harmony with international law” and proposing that courts disentangle the canon from a plain statement requirement).

²⁴⁷ *Al-Bihani*, 619 F.3d at 35–36 (Kavanaugh, J., concurring) (“[N]either judicial respect for international law nor available evidence regarding actual congressional intent . . . justifies use of the *Charming Betsy* canon to conform federal statutes to non-self-executing treaties or customary international law.”).

²⁴⁸ 863 F.3d 937, 938 (D.C. Cir. 2017), *aff'd sub nom.* *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019).

²⁴⁹ *Azar*, 139 S. Ct. 1804, 1808 (2019); see *supra* notes 198–201, 231 and accompanying text.

²⁵⁰ *Via Christi Reg'l Med. Ctr., Inc. v. Leavitt*, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007); *Baptist Health v. Thompson*, 458 F.3d 768, 776 n.9 (8th Cir. 2006); *Omni Manor Nursing Home v. Thompson*, 151 F. App'x 427, 431 (6th Cir. 2005); *Warder v. Shalala*, 149 F.3d 73, 79 n.4 (1st Cir. 1998).

²⁵¹ *Allina Health Servs.* 863 F.3d at 944.

²⁵² *Azar*, 139 S. Ct. at 1808; see *supra* notes 199–202, 233 and accompanying text.

²⁵³ 742 F.3d 1013, 1014, (D.C. Cir. 2017).

²⁵⁴ See *id.* at 1019–20 (examining the history and framework of the statute). See also *id.* at 1019 (“[L]awmakers . . . sometimes employ overlap or redundancy so as to remove any doubt and make doubly sure. Interpreting [the provision] to have some modest overlap is . . . reasonable.” (internal citations omitted)).

interpret statutes to achieve their own policy aims.²⁵⁵ To the argument that judges should examine legislative history more closely to better understand congressional intent, Justice Kavanaugh countered, “[I]f Congress could—but chooses not to—include certain committee reports (or important parts thereof) in the statute, on what legal basis can a court treat the unvoted-on legislative history as ‘authoritative’?”²⁵⁶

Given Justice Kavanaugh’s overall votes in favor of sovereigns and expressed views on strict statutory construction, he would not likely find waiver of federal sovereign immunity in the CAA for punitive fines. He might, however, be the next most likely conservative, after the Chief Justice, to go the other way. But, like the Chief Justice, he has also voted overwhelmingly with the majority,²⁵⁷ so he is less likely to vote with his liberal colleagues in dissent.

H. Justice Barrett

Justice Barrett, the newest member of the Court as of this writing, is harder to predict due to the paucity of information available about her jurisprudence. This Chapter surveyed only six of her votes, and in only one did she write and express her opinion directly.²⁵⁸ Notwithstanding the limited information, she is not likely to find waiver of federal sovereign immunity for punitive fines in the CAA.

In every case this Chapter surveyed, Justice Barrett voted in favor of the sovereign, finding no waiver or abrogation of sovereign immunity.²⁵⁹ In the context of federal sovereign immunity, she voted on two cases during her time serving as a circuit judge on the Seventh Circuit Court of Appeals, voting in favor of the federal government as protected by sovereign immunity in both instances.²⁶⁰ In *Burns v. United States*, then-Judge Barrett voted to dismiss a claim brought by a

²⁵⁵ See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016):

A number of canons of statutory interpretation depend on an initial evaluation of whether the statutory text is clear or ambiguous. But because it is so difficult to make those clarity versus ambiguity determinations in a coherent, evenhanded way, courts should reduce the number of canons of construction that depend on an initial finding of ambiguity. Instead, courts should seek the *best reading* of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons. Once they have discerned the best reading of the text in that way, they can depart from that baseline if required to do so by any relevant substantive canons.

(emphasis in original).

²⁵⁶ *Id.* at 2124.

²⁵⁷ See app. VII (voting with the majority in 11 out of 12, or 92%, of cases surveyed).

²⁵⁸ See app. VIII (at time of this writing, the only sovereign immunity opinion Justice Barrett had authored was her dissent in *PennEast*, 141 S. Ct. 2244, 2265 (2021)).

²⁵⁹ See app. VIII.

²⁶⁰ See *Burns v. United States*, 762 F. App’x. 338, 339 (7th Cir. 2019) (mem.); *Neely-Bey Tarik-El v. Conley (Conley)*, 912 F.3d 989, 992 (7th Cir. 2019).

pro se criminal plaintiff who sued their convicting prosecutor and jurors, finding that sovereign immunity protected the prosecutors.²⁶¹ Similarly, in *Neely-Bey Tarik-El v. Conley*, then-Judge Barrett found that sovereign immunity protected federal government officials from money damages in a claim brought by another pro se criminal plaintiff against prison officials for infringing upon his religious rights.²⁶² Like the circuit court cases for Justices Gorsuch and Kavanaugh, these cases were neither well-argued nor remotely close, and her votes in favor of the sovereign do not reveal much about her jurisprudence besides her faithful adherence to Supreme Court precedent.

In the one sovereign immunity opinion she has authored for the Supreme Court, a dissent in *PennEast*, she argued strongly—against some of her conservative colleagues—that the states did not implicitly waive their sovereign immunity at ratification for condemnation suits by private parties with delegated eminent domain power.²⁶³ This opinion, compounded with her votes from the Seventh Circuit, gives some indication that she would not find waiver of federal sovereign immunity in the CAA for punitive fines.

Otherwise, the best evidence of how she would vote comes from a law review article she wrote about statutory construction.²⁶⁴ In the article, she expressed her view that faithful textualism is sometimes at odds with what she called “aggressive” substantive canons, including sovereign immunity.²⁶⁵ She describes these canons as:

permitting a court to forgo a statute’s most natural interpretation in favor of a less plausible one more protective of a particular value. For example, a court will strain the text of a statute to avoid deciding a serious constitutional question, and absent a clear statement, it will not interpret an otherwise unqualified statute to subject either the federal government or the states to suit.²⁶⁶

She posited that true textualists, as agents of Congress who do not protect social values as a part of statutory interpretation, should not engage with substantive canons that interpret statutes beyond plain language unless “constitutionally inspired.”²⁶⁷ She described the development of the sovereign immunity clear statement rule as “a conscious application of a time-honored rule of sovereign exemption,” but also as “the starkest example of early courts both describing and applying a maxim justifying an interpretation other than the most

²⁶¹ *Burns*, 762 F. App’x. at 339.

²⁶² *Conley*, 912 F.3d at 993.

²⁶³ *PennEast*, 141 S. Ct. 2244, 2265 (2021) (Barrett, J., dissenting).

²⁶⁴ See generally Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010) (discussing the history and application of various canons of construction).

²⁶⁵ *Id.* at 110.

²⁶⁶ *Id.* at 109–10.

²⁶⁷ *Id.* at 111.

natural reading of the statute.”²⁶⁸ She found that the “federal sovereign immunity rule can be justified as protecting the sovereignty that the federal government possesses by virtue of the constitutional structure.”²⁶⁹ Therefore, she appears to believe that sovereign immunity is “constitutionally inspired” and would interpret the CAA to protect what she perceives to be a constitutional value.

IV. CONCLUSION

Given the current conservative makeup of the Court, it seems unlikely that five justices would follow the Fourth and Sixth Circuits on the question of whether the CAA waives sovereign immunity for punitive damages. It is more likely that at least five, if not six, justices would apply a strong clear statement standard to protect the government from any money damages and vote to find no waiver, unwilling to examine legislative history, no matter how clarifying or helpful in discerning congressional intent.

This Supreme Court jurisprudence is influencing lower courts with serious implications for the environment. The Ninth Circuit, in the *DRA* case from this Chapter’s introduction—which held that a tribally co-operated hydroelectric facility could not have its CWA § 401 certificate challenged due to tribal sovereign immunity—is treading down a questionable path.²⁷⁰ I believe that environmental protection should outweigh the doctrine of sovereign immunity, especially for injunctive relief, which does not threaten the treasury. I would be remiss, however, to not mention that tribal sovereign immunity occupies a unique space due to our country’s legacy of land theft and genocide.²⁷¹ Given that history, respecting the sovereignty of tribal nations seems like an utterly minimal gesture of respect. Although I believe that policies protecting the environment are to everyone’s benefit, and thus that the CWA and CAA should be enforced to the fullest extent possible, I also do not presume unequivocally that the federal government always knows what is best. Tribal nations successfully protected the environment for millennia before European settlers arrived on this continent²⁷² and, by no fault of their own, Indigenous people now live in a capitalist society

²⁶⁸ *Id.* at 150, 157 (internal citations omitted).

²⁶⁹ *Id.* at 173–74.

²⁷⁰ See *supra* notes 1–19 and accompanying text.

²⁷¹ For an in-depth history of the genocide and land theft of Indigenous people by the United States, see William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO STATE L. J. 1, 8–16, 22–26 (2005).

²⁷² See *id.* at 13 (“Long before first contact with European ‘discoverers,’ Indians proclaimed a sacred responsibility to preserve and transmit Indian land, and with it identity, religion, and culture, to successive generations.” (internal citations omitted)); see also Adam Rutherford, *A New History of the First Peoples in the Americas*, THE ATLANTIC (Oct. 3, 2017), <https://perma.cc/79T4-7FKU> (“The indigenous people . . . had occupied these American lands for at least 20,000 years.”).

that requires financial means for survival. It is a difficult balance to strike.

All actors—be they private, federal, state, or tribal—should be accountable to the same environmental laws. Although tribal sovereign immunity is important for the reasons outlined above, waivers in environmental statutes should be read where they can be because Congress designed the environmental statutes for the sake of everyone. We all need clean water to drink and clear air to breathe. Unfortunately, the Supreme Court seems to value a monarchic maxim over future generations.

APPENDIX

I. Justice Thomas

a. Federal Sovereign Immunity

1. *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607 (1992) (voting with majority, finding no waiver of federal sovereign immunity in CWA and RCRA).
2. *FDIC v. Meyer*, 510 U.S. 471 (1994) (**writing for majority**, finding broad waiver in waiver of federal sovereign immunity in FTCA (**EXCEPTION**)).
3. *United States v. Williams*, 514 U.S. 527 (1995) (voting with dissent, finding no waiver of federal sovereign immunity in the FTCA for tax collection).
4. *Lane v. Peña*, 518 U.S. 187 (1996) (voting with majority, finding no waiver of federal sovereign immunity in 1973 Rehabilitation Act and 1991 Civil Rights Act).
5. *Scarborough v. Principi*, 541 U.S. 401 (2004) (**writing dissent**, finding no waiver of federal sovereign immunity in EAJA).
6. *Orff v. United States*, 545 U.S. 596 (2005) (**writing for majority**, finding no waiver of federal sovereign immunity in Reclamation Reform Act).
7. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481 (2006) (**writing dissent**, arguing FTCA did not waive federal sovereign immunity for negligent transmission of mail and that ambiguity should be resolved in the government's favor).
8. *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571 (2008) (voting with majority, finding no ambiguity in EAJA and stating that canon of sovereign immunity is just a cannon (**EXCEPTION**)).
9. *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284 (2012) (voting with majority, finding Privacy Act did not waive federal sovereign immunity).
10. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (voting with majority, finding waiver of federal sovereign immunity in APA for purposes of the Quiet Title Act (**EXCEPTION**)).
11. *Millbrook v. United States*, 569 U.S. 50 (2013) (**writing for majority**, finding FTCA's waiver of federal sovereign immunity for law enforcement extends beyond investigative activities (**EXCEPTION**)).
12. *Lanus v. United States*, 570 U.S. 932 (2013) (**dissenting from denial of cert**, finding sweeping waiver in FCTA for servicemen in the act of service (**EXCEPTION**)).
13. *United States v. Wong*, 575 U.S. 402 (2015) (voting with dissent, finding FTCA claims could not be equitably tolled).
14. *Daniel v. United States*, 139 S. Ct. 1713 (2019) (**dissenting from denial of cert**, finding sweeping waiver in FCTA for servicemen in the act of service (**EXCEPTION**)).
15. *Doe v. United States*, 141 S. Ct. 1498 (2021) (**dissenting from denial of cert**, finding sweeping waiver in FCTA for servicemen in the act of service (**EXCEPTION**)).

b. State Sovereign Immunity

1. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (voting with majority, finding Congress had no Art. I power to abrogate state sovereign immunity).
2. *Alden v. Maine*, 527 U.S. 706 (1999) (voting with majority, finding Congress cannot subject state to state to suit in state court without its consent).
3. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002) (voting with majority, finding a state waives sovereign immunity when it removes to federal court (**EXCEPTION**)).
4. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (**writing dissent**, finding no abrogation of state sovereign immunity for bankruptcy).
5. *Coleman v. Md. Ct. of Apps.*, 566 U.S. 30 (2012) (**writing concurrence**, finding no abrogation of state sovereign immunity in FMLA and no 14th Amendment power in self-care provision nor in family care provision).
6. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (**writing for majority**, finding no waiver of state sovereign immunity from suit by out-of-state taxpayer and a state can never be sued without its consent).
7. *Allen v. Cooper*, 140 S. Ct. 994 (2020) (voting with majority, finding that Congress had no Article I authority to abrogate state sovereign immunity and not extending *Katz* beyond bankruptcy).
8. *Penneast Pipeline v. New Jersey*, 141 S. Ct. 2244 (2021) (voting with dissent, finding no abrogation of state sovereign immunity for eminent domain).
9. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (voting with majority, finding state judge and clerk immune and *Ex parte Young* exception did not apply).

c. Tribal Sovereign Immunity

1. *South Dakota v. Bourland*, 508 U.S. 679 (1993) (**writing for majority**, finding Congress clearly abrogated tribal hunting and fishing rights (**EXCEPTION**)).
2. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) (**writing dissent**, finding abrogation of tribal sovereign immunity (**EXCEPTION**)).
3. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018) (**writing dissent**, finding immovable property exception should apply to tribal sovereign immunity (**EXCEPTION**)).

d. Statutory Construction

1. *Conn. Nat. Bank v. Germain*, 503 U.S. 249 (1992) (**writing for majority**, finding text to be conclusive of legislative intent).
2. *McFarland v. Scott*, 512 U.S. 849 (1994) (**writing dissent**, finding text to be the primary guide of interpreting congressional intent).
3. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (voting with dissent, finding a presumption against retroactivity absent clear congressional statement and no discernable legislative intent).
4. *Comm'r of Internal Revenue Serv. v. Lundy*, 516 U.S. 235 (1996) (**writing dissent**, relying on legislative history as a limited last resort).

5. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002) (**writing for majority**, finding text is a result of legislative compromise and thus finding limited value in legislative history).
6. *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (**writing dissent**, finding no money damages for tribe in common law trust relationship absent language in the statute establishing trust).
7. *Hamdi v. Rumsfeld*, 524 U.S. 507 (2004) (**writing dissent**, arguing the Executive's war powers should be given deference absent clear congressional disapproval).
8. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581 (2004) (**writing dissent**, relying on legislative history (**EXCEPTION**)).
9. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (**writing dissent**, finding no clear retaliation claims in Title IX).
10. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (voting with majority, using clear statement canon in spending clause jurisprudence to ignore legislative history).
11. *Zuni Pub. Sch. Dist. v. Dep't of Educ.*, 550 U.S. 81 (2007) (voting with dissent, finding it improper to discern congressional intent from beyond statutory text).
12. *Fla. Dep't of Revenue v. Piccadilly*, 554 U.S. 33 (2008) (**writing for majority**, finding congressional intent must be clear to exempt a debtor from taxation under Bankruptcy Code).
13. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (**writing dissent**, finding no clear retaliation claims in Title IX).
14. *Samantar v. Yousuf*, 560 U.S. 305 (2010) (**writing concurrence**, writing separately to not join the reliance on legislative history).
15. *King v. Burwell*, 576 U.S. 473 (2015) (voting with dissent, finding it improper to rely on structure, design, and purpose to discern congressional intent of ACA).
16. *Yates v. United States*, 574 U.S. 528 (2015) (voting with dissent, relying on legislative history (**EXCEPTION**)).
17. *RJR Nabisco v. European Cmty*, 579 U.S. 325 (2016) (voting with majority, finding RICO did not clearly extend private rights of action extraterritorially).
18. *Lockhart v. United States*, 577 U.S. 347 (2016) (voting with majority, finding statute clear and not using legislative history).
19. *Bank of Am. v. Miami*, 137 S. Ct. 1296 (2017) (**writing concurrence**, looking to statutory purpose to determine "zone of interests" (**EXCEPTION**)).
20. *Dig. Realty Tr. v. Somers*, 138 S. Ct. 767 (2018) (**writing concurrence**, opposing use of legislative history).
21. *Lamar, Archer, & Cofrin v. Appling*, 138 S. Ct. 1752 (2018) (concurring in judgment, opposing use of legislative history).
22. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019) (voting with majority, refusing to rely on legislative history).
23. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (voting with dissent, engaging in extratextual concerns about how Congress thought the statute would apply (**EXCEPTION**)).

II. Chief Justice Roberts

a. Federal Sovereign Immunity

1. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481 (2006) (voting with majority, finding waiver of federal sovereign immunity for negligent transmission of mail and relying on statutory purpose (**EXCEPTION**)).
2. *Richlin Sec. Ser. Co. v. Chertoff*, 553 U.S. 571 (2008) (voting with majority, finding no ambiguity in EAJA and stating that canon of sovereign immunity is just a cannon (**EXCEPTION**)).
3. *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284 (2012) (voting with majority, finding Privacy Act did not waive federal sovereign immunity).
4. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (voting with majority, finding waiver of federal sovereign immunity in APA for purposes of the Quiet Title Act (**EXCEPTION**)).
5. *Millbrook v. United States*, 569 U.S. 50 (2013) (voting with majority, finding FTCA's waiver of sovereign immunity for law enforcement extends beyond investigative activities (**EXCEPTION**)).
6. *United States v. Wong*, 575 U.S. 402 (2015) (voting with dissent, finding FTCA claims could not be equitably tolled).

b. State Sovereign Immunity

1. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (voting with dissent, finding no abrogation of state sovereign immunity for bankruptcy).
2. *Coleman v. Md. Ct. of Apps.*, 566 U.S. 30 (2012) (voting with majority, finding Congress did not abrogate state sovereign immunity under 14th Amendment in FMLA for self-care provision).
3. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (voting with majority, finding no waiver of state sovereign immunity from suit by out-of-state taxpayer and a state cannot be sued without its consent).
4. *Allen v. Cooper*, 140 S. Ct. 994 (2020) (voting with majority, finding that Congress lacked either Article I or 14th Amendment authority to abrogate state sovereign immunity for copyright protection and not extending *Katz*).
5. *Penneast Pipeline v. New Jersey*, 141 S. Ct. 2244 (2021) (**writing for majority**, finding state sovereign immunity implicitly waived for delegated eminent domain (**EXCEPTION**)).
6. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (**writing concurrence**, finding state judge and clerk were not immune and *Ex parte Young* exception did apply (**EXCEPTION**)).

c. Tribal Sovereign Immunity

1. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) (voting with majority, finding no abrogation of tribal sovereign immunity).
2. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018) (**writing concurrence**, finding immovable property exception should apply to tribal sovereign immunity (**EXCEPTION**)).

d. Statutory Construction

1. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (voting with majority, using clear statement canon in spending clause jurisprudence to ignore legislative history).
2. *Zuni Pub. Sch. Dist. v. Dep't of Educ.*, 550 U.S. 81 (2007) (voting with dissent, finding it improper to discern congressional intent from beyond statutory text).
3. *Fla. Dep't of Revenue v. Piccadilly*, 554 U.S. 33 (2008) (voting with majority, finding statute unambiguous and that congressional intent must be clear to exempt a debtor from taxation under Bankruptcy Code).
4. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (**writing dissent**, finding no clear retaliation claims in Title IX).
5. *Samantar v. Yousuf*, 560 U.S. 305 (2010) (voting with majority, relying on legislative history and finding foreign official not entitled to sovereign immunity (**EXCEPTION**)).
6. *Carr v. United States*, 560 U.S. 438 (2010) (voted with majority, relying on legislative history (**EXCEPTION**)).
7. *King v. Burwell*, 576 U.S. 473 (2015) (**writing for majority**, relying on structure, design, and purpose to discern congressional intent of ACA (**EXCEPTION**)).
8. *Yates v. United States*, 574 U.S. 528 (2015) (voting with majority, discerning congressional intent from statutory context (**EXCEPTION**)).
9. *RJR Nabisco v. European Cmty.*, 579 U.S. 325 (2016) (voting with majority, finding RICO did not clearly extend private rights of action extraterritorially).
10. *Lockhart v. United States*, 577 U.S. 347 (2016) (voting with majority, finding statute clear and not using legislative history).
11. *Dig. Realty Tr. v. Somers*, 138 S. Ct. 767 (2018) (voting with majority, using legislative history (**EXCEPTION**)).
12. *Lamar, Archer, & Cofrin v. Appling*, 138 S. Ct. 1752 (2018) (voting with majority, using legislative history (**EXCEPTION**)).
13. *Azar v. Allina Health Services*, 139 S. Ct. 1804 (2019) (voting with majority, refusing to rely on legislative history).
14. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (voting with majority, finding Title VII extends to sexual orientation, using legislative history (**EXCEPTION**)).

III. Justice Alito*a. Federal Sovereign Immunity*

1. *Richlin Sec. Service Co. v. Chertoff*, 553 U.S. 571 (2008) (**writing for majority**, finding no ambiguity in EAJA and stating that canon of sovereign immunity is just a cannon (**EXCEPTION**)).
2. *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284 (2012) (**writing for majority**, finding Privacy Act did not waive federal sovereign immunity).

3. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (voting with majority, finding waiver of federal sovereign immunity in APA for purposes of the Quiet Title Act (**EXCEPTION**)).
4. *Millbrook v. United States*, 569 U.S. 50 (2013) (voting with majority, finding FTCA's waiver of sovereign immunity for law enforcement extends beyond investigative activities (**EXCEPTION**)).
5. *United States v. Wong*, 575 U.S. 402 (2015) (**writing dissent**, finding FTCA claims could not be equitably tolled).

b. State Sovereign Immunity

1. *Coleman v. Md. Ct. of Apps.*, 566 U.S. 30 (2012) (voting with majority, finding Congress could not abrogate state sovereign immunity under 14th Amendment in FMLA self-care provision).
2. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (voting with majority, finding no waiver of state sovereign immunity from suit by out-of-state taxpayer and a state cannot be sued without its consent).
3. *Allen v. Cooper*, 140 S. Ct. 994 (2020) (voting with majority, finding that Congress lacked either Article I or 14th Amendment authority to abrogate state sovereign immunity for copyright protection and not extending *Katz*).
4. *Penneast Pipeline v. New Jersey*, 141 S. Ct. 2244 (2021) (voting with majority, finding state sovereign immunity implicitly waived for delegated eminent domain (**EXCEPTION**)).
5. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (voting with majority, finding state judge and clerk were immune and *Ex parte Young* exception did not apply).

c. Tribal Sovereign Immunity

1. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) (voting with dissent, finding abrogation of tribal sovereign immunity (**EXCEPTION**)).
2. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018) (voting with dissent, finding immovable property exception should apply to tribal sovereign immunity (**EXCEPTION**)).

d. Statutory Construction

1. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (**writing for majority**, using clear statement canon in spending clause jurisprudence to ignore legislative history).
2. *Zuni Pub. Sch. Dist. v. Dep't of Educ.*, 550 U.S. 81 (2007) (voting with majority, discerning congressional intent from beyond statutory text (**EXCEPTION**)).
3. *Fla. Dep't of Revenue v. Piccadilly*, 554 U.S. 33 (2008) (voting with majority, finding statute unambiguous and that congressional intent must be clear to exempt a debtor from taxation under Bankruptcy Code).
4. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (**writing for majority**, finding clear retaliation claims in Title IX).

5. *Samantar v. Yousuf*, 560 U.S. 305 (2010) (**writing concurrence**, writing separately to not join the reliance on legislative history).
6. *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (**writing for majority**, relying on legislative history (**EXCEPTION**)).
7. *King v. Burwell*, 576 U.S. 473 (2015) (voting with dissent, finding it improper to rely on structure, design, and purpose to discern congressional intent of ACA).
8. *Yates v. United States*, 574 U.S. 528 (2015) (**writing concurrence**, interpreting statute on strict textualist grounds).
9. *RJR Nabisco v. European Cmty.*, 579 U.S. 325 (2016) (**writing for majority**, finding RICO did not clearly extend private rights of action extraterritorially).
10. *Lockhart v. United States*, 577 U.S. 347 (2016) (voting with majority, finding statute clear and not using legislative history).
11. *Bank of Am. v. Miami*, 137 S. Ct. 1296 (2017) (voting with concurrence, looking to statutory purpose to determine “zone of interests” (**EXCEPTION**)).
12. *Dig. Realty Tr. v. Somers*, 138 S. Ct. 767 (2018) (voting with concurrence, opposing use of legislative history).
13. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (voting with majority, refusing to use legislative history).
14. *Lamar, Archer, & Cofrin v. Appling*, 138 S. Ct. 1752 (2018) (concurring in judgment, opposing use of legislative history).
15. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019) (voting with majority, refusing to rely on legislative history).
16. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (**writing dissent**, finding Title VII extends to sexual orientation, using legislative history (**EXCEPTION**)).

IV. Justice Sotomayor

a. Federal Sovereign Immunity

1. *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284 (2012) (**writing dissent**, finding Privacy Act waived federal sovereign immunity).
2. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (**writing dissent**, finding no waiver of federal sovereign immunity in APA for purposes of the Quiet Title Act (**EXCEPTION**)).
3. *Millbrook v. United States*, 569 U.S. 50 (2013) (voting with majority, finding FTCA’s waiver of sovereign immunity for law enforcement extends beyond investigative activities).
4. *United States v. Wong*, 575 U.S. 402 (2015) (voting with majority, finding FTCA claims could be equitably tolled).

b. State Sovereign Immunity

1. *Coleman v. Md. Ct. of Apps.*, 566 U.S. 30 (2012) (voting with dissent, finding Congress could abrogate state sovereign immunity under 14th Amendment in FMLA self-care provision).

2. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (voting with dissent, finding waiver of state sovereign immunity from suit by out-of-state taxpayer and Constitution does not require that a state cannot be sued without its consent).
3. *Allen v. Cooper*, 140 S. Ct. 994 (2020) (voting with majority, finding that Congress lacked either Article I or 14th Amendment authority to abrogate state sovereign immunity for copyright protection and not extending *Katz* (**EXCEPTION**)).
4. *Penneast Pipeline v. New Jersey*, 141 S. Ct. 2244 (2021) (voting with majority, finding state sovereign immunity implicitly waived for delegated eminent domain).
5. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (**writing concurrence**, finding state judge and clerk were not immune and *Ex parte Young* exception applied).

c. *Tribal Sovereign Immunity*

1. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) (**writing concurrence**, expressing strong support for tribal immunity with comity (**EXCEPTION**)).
2. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018) (voting with majority, finding immovable property exception should not apply to tribal sovereign immunity (**EXCEPTION**)).

d. *Statutory Construction*

1. *Samantar v. Yousuf*, 560 U.S. 305 (2010) (voting with majority, relying on legislative history to find foreign official not immune).
2. *Carr v. United States*, 560 U.S. 438 (2010) (**writing for majority**, relying on legislative history).
3. *King v. Burwell*, 576 U.S. 473 (2015) (voting with majority, relying on structure, design, and purpose to discern congressional intent of ACA).
4. *Yates v. United States*, 574 U.S. 528 (2015) (voting with majority, discerning congressional intent from statutory context).
5. *Lockhart v. United States*, 577 U.S. 347 (2016) (**writing for majority**, finding statute clear and not using legislative history (**EXCEPTION**)).
6. *Dig. Realty Tr. v. Somers*, 138 S. Ct. 767 (2018) (**writing concurrence**, supporting use of legislative history).
7. *Lamar, Archer, & Cofrin v. Appling*, 138 S. Ct. 1752 (2018) (**writing for majority**, using legislative history).
8. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (voting with dissent, relying on legislative history).
9. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019) (voting with majority, refusing to rely on legislative history (**EXCEPTION**)).
10. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (voting with majority, finding Title VII extends to sexual orientation, using legislative history).

V. Justice Kagan*a. Federal Sovereign Immunity*

1. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (**writing for majority**, finding waiver of federal sovereign immunity in APA for purposes of the Quiet Title Act).
2. *Millbrook v. United States*, 569 U.S. 50 (2013) (voting with majority, finding FTCA's waiver of sovereign immunity for law enforcement extends beyond investigative activities).
3. *United States v. Wong*, 575 U.S. 402 (2015) (**writing for majority**, finding FTCA claims could be equitably tolled).

b. State Sovereign Immunity

1. *Coleman v. Md. Ct. of Apps.*, 566 U.S. 30 (2012) (voting with dissent, finding Congress could abrogate state sovereign immunity under 14th Amendment in FMLA self-care provision).
2. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (voting with dissent, finding waiver of state sovereign immunity from suit by out-of-state taxpayer and Constitution does not require that a state cannot be sued without its consent).
3. *Allen v. Cooper*, 140 S. Ct. 994 (2020) (**writing for majority**, finding that Congress lacked either Article I or 14th Amendment authority to abrogate state sovereign immunity for copyright protection and not extending *Katz* (**EXCEPTION**)).
4. *Penneast Pipeline v. New Jersey*, 141 S. Ct. 2244 (2021) (voting with dissent, finding state sovereign immunity not implicitly waived for delegated eminent domain (**EXCEPTION**)).
5. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (voting with concurrence, finding state judge and clerk were not immune and *Ex parte Young* exception applied).

c. Tribal Sovereign Immunity

1. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) (**writing for majority**, finding no abrogation of tribal sovereign immunity (**EXCEPTION**)).
2. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018) (voting with majority, finding immovable property exception should not apply to tribal sovereign immunity (**EXCEPTION**)).

d. Statutory Construction

1. *King v. Burwell*, 576 U.S. 473 (2015) (voting with majority, relying on structure, design, and purpose to discern congressional intent of ACA).
2. *Yates v. United States*, 574 U.S. 528 (2015) (voting with majority, discerning congressional intent from statutory context).

3. *Lockhart v. United States*, 577 U.S. 347 (2016) (**writing dissent**, advocating use of legislative history).
4. *Dig. Realty Tr. v. Somers*, 138 S. Ct. 767 (2018) (voting with majority, using legislative history).
5. *Lamar, Archer, & Cofrin v. Appling*, 138 S. Ct. 1752 (2018) (voting with majority, using legislative history).
6. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (voting with dissent, relying on legislative history).
7. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019) (voting with majority, refusing to rely on legislative history (**EXCEPTION**)).
8. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (voting with majority, finding Title VII extends to sexual orientation, using legislative history).

VI. Justice Gorsuch

a. Federal Sovereign Immunity

1. *Bork v. Carroll*, 449 F. App'x. 719 (10th Cir. 2011) (**writing for majority**, finding no waiver of federal sovereign immunity for claim against army personnel).
2. *Shagoury v. United States*, 569 F. App'x 549 (10th Cir. 2014) (voting with majority, finding no waiver of federal sovereign immunity for DEA).

b. State Sovereign Immunity

1. *Sellers v. Cline*, 651 F. App'x. 804 (10th Cir. 2016) (**writing for majority**, finding state sovereign immunity precluded claim by inmate against state prison officials).
2. *Johnson v. Okla Dep't of Transp.*, 645 F. App'x 765 (10th Cir. 2016) (**writing for majority**, finding state officials entitled to sovereign immunity against § 1983 claim).
3. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (voting with majority, finding no waiver of state sovereign immunity from suit by out of state taxpayer and that a state cannot be sued without its consent).
4. *Allen v. Cooper*, 140 S. Ct. 994 (2020) (voting with majority, finding Congress lacked either Article I or 14th Amendment authority to abrogate state sovereign immunity for copyright protection and not extending *Katz*).
5. *Penneast Pipeline v. New Jersey*, 141 S. Ct. 2244 (2021) (**writing dissent**, finding state sovereign immunity not implicitly waived for delegated eminent domain).
6. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (**writing for majority**, finding state judge and clerk were immune and that *Ex parte Young* exception did not apply).

c. Tribal Sovereign Immunity

1. *Sanders v. Anoaubby*, 631 F. App'x 618 (10th Cir. 2015) (voting with majority, finding tribal sovereign immunity barred civil rights claims).

2. *Ute Indian Tribe of the Uintah and Ouray Rsrvs. v. Utah*, 790 F.3d 1000 (10th Cir. 2015) (**writing for majority**, finding tribe did not waive sovereign immunity by entering into a mutual assistance agreement with state).
3. *Upper Skagit Indian Tribe v. Lundgren* 138 S. Ct. 1649 (2018) (**writing for majority**, finding immovable property exception should not apply to tribal sovereign immunity).

d. Statutory Construction

1. *United States v. Hinckley*, 550 F.3d 926 (10th Cir. 2008) (**writing concurrence**, using legislative history and referring to congressional intent and purpose (**EXCEPTION**)).
2. *Lexington Ins. Co. v. Precision Drilling Co.*, 830 F.3d 1219 (10th Cir. 2016) (**writing for majority**, finding best evidence of legislative intent in text).
3. *Dig. Realty Tr. v. Somers*, 138 S. Ct. 767 (2018) (voting with concurrence, finding use of legislative history improper).
4. *Lamar, Archer, & Cofrin v. Appling*, 138 S. Ct. 1752 (2018) (concurring in judgment, opposing use of legislative history).
5. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (**writing for majority**, refusing to use legislative history).
6. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019) (**writing for majority**, refusing to rely on legislative history).
7. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (**writing for majority**, finding Title VII extends to sexual orientation, using legislative history (**EXCEPTION**)).

VII. Justice Kavanaugh

a. Federal Sovereign Immunity

1. *We the People Found., Inc. v. United States*, 485 F.3d 140 (D.C. Cir. 2007) (**writing for majority**, finding the Tax Anti-Injunction Act is an exception to the APA's waiver of federal sovereign immunity).
2. *Shuler v. United States*, 531 F.3d 930 (D.C. Cir. 2008) (voting with majority, finding no waiver in FTCA for discretionary functions).
3. *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008) (**writing for majority**, finding no waiver in FTCA for injuries suffered in foreign countries).

b. State Sovereign Immunity

1. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (voting with majority, finding no waiver of state sovereign immunity from suit by out of state taxpayer and a state cannot be sued without its consent).
2. *Allen v. Cooper*, 140 S. Ct. 994 (2020) (voting with majority, finding Congress lacked either Article I or 14th Amendment authority to abrogate state sovereign immunity for copyright protection and not extending *Katz*).

3. *Penneast Pipeline v. New Jersey*, 141 S. Ct. 2244 (2021) (voting with majority, finding state sovereign immunity implicitly waived for delegated eminent domain (**EXCEPTION**)).
4. *Whole Woman's Health v. Jackson* 142 S. Ct. 522 (2021) (voting with majority, finding state judge and clerk were immune and that *Ex parte Young* exception did not apply).

c. *Tribal Sovereign Immunity*

1. *Vann v. U.S. Dep't of the Interior*, 701 F.3d 927 (D.C. Cir. 2012) (**writing for majority**, finding *Ex parte Young* exception could apply to tribes (**EXCEPTION**)).

d. *Statutory Construction*

1. *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (**writing concurrence**, arguing canons are only applicable with delegated interpretive authority).
2. *Loving v. Internal Revenue Serv.*, 742 F.3d 1013 (D.C. Cir. 2017) (**writing for majority**, rejecting anti-redundancy canon because it makes unrealistic assumptions about congressional drafting but relying on legislative history (**EXCEPTION**)).
3. *Allina Health Servs. v. Price*, 863 F.3d 937 (D.C. Cir. 2017) (**writing for majority**, not using legislative history).
4. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (**writing dissent**, finding Title VII does not extend to sexual orientation, not legislative history).

VIII. Justice Barrett

a. *Federal Sovereign Immunity*

1. *Burns v. United States*, 762 F. App'x. 338 (7th Cir. 2019) (voting with majority, finding federal prosecutors and jurors and federal government protected by sovereign immunity).
2. *Neely-Bey Tarik-El v. Conley*, 912 F.3d 989 (7th Cir. 2019) (voting with majority, finding injunctive relief but not money damages available for suits against government officials under RLUIPA).

b. *State Sovereign Immunity*

1. *Haynes v. Ind. Univ.*, 902 F.3d 724 (7th Cir. 2018) (voting with majority, finding state sovereign immunity barred § 1981 claims for damages against university and officials).
2. *De Lima Silva v. Dep't of Corrs.*, 917 F.3d 546 (7th Cir. 2019) (voting with majority, finding Congress did not abrogate state sovereign immunity under § 1983).
3. *Penneast Pipeline v. New Jersey*, 141 S. Ct. 2244 (2021) (**writing dissent**, finding state sovereign immunity not implicitly waived for delegated eminent domain).

4. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (voting with majority, finding state judge and clerk were immune and that *Ex parte Young* exception did not apply).
