NOTES

Louisiana Environmental Action Network v. City of Baton Rouge: Fifth Circuit Rules Clean Water Act's Diligent Prosecution Bar to Citizen Suits Is Nonjurisdictional

I. OVERVIEW

For nearly a quarter century, wastewater treatment plants operated by the City of Baton Rouge, Louisiana (City), and East Baton Rouge Parish (Parish) have been illegally polluting the Mississippi River, despite efforts by the federal government and the State of Louisiana to compel the City and the Parish to comply with the conditions of their discharge permits.[1] The City and the State of Louisiana originally entered into a consent decree with the federal government to remedy violations of the Clean Water Act (CWA)[2] at the plants in 1988.[3] In 2002, the City and the Parish entered into a new consent decree—superseding and terminating the original agreement—which reduced pollution limitations and pushed the deadline for compliance back to 2015.[4] After providing the proper notice to the City and the Parish, in 2010, the Louisiana Environmental

1. *See* La. Envtl. Action Network v. City of Baton Rouge (*LEAN*), 677 F.3d 737, 740-41 (5th Cir. 2012) (per curiam). The wastewater plants are not properly cleaning the wastewater that enters the plants, allowing more dissolved oxygen and suspended solids to be dumped into the Mississippi River than is permitted. *See id.* at 741-42 (discussing the requirements to reduce biochemical oxygen demand and total suspended solids); *see also Dissolved Oxygen and Biochemical Oxygen Demand*, U.S. ENVTL. PROT. AGENCY (EPA), http://water.epa.gov/type/rsl/monitoring/vms52.cfm (last updated Mar. 6, 2012) (explaining biochemical oxygen demand); *Total Solids*, EPA, http://water.epa.gov/type/rsl/monitoring/vms58.cfm (last updated Mar. 6, 2012) (explaining total suspended solids).

2. 33 U.S.C. §§ 1251-1387 (2006).

3. *LEAN*, 677 F.3d at 741. The consent decree required compliance with the CWA by December 31, 1996. *Id.* The decree was subsequently modified in 1997 to extend the deadline further. *Id.*

4. *Id.* at 741. The 2002 consent decree was also later modified in 2009, but retained the original 2015 deadline. *Id.* at 741-42.

Action Network (LEAN)[5] filed suit in federal district court against the City and the Parish under the CWA's citizen suit provision.[6] LEAN alleged that the plants were violating the CWA and the operating permits issued to them by the State of Louisiana.[7] LEAN asked the court for a declaration that the wastewater plants were in violation of the CWA, an injunction forcing the plants to comply with their state permits, and civil penalties.[8]

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the United States District Court for the Middle District of Louisiana granted the defendants' motion to dismiss for failure to state a claim on which relief may be granted.[9] In essence, however, the district court dismissed the suit on grounds of mootness, concluding that the defendants' purported compliance with the 2002 consent decree adequately addressed LEAN's concerns.[10] While the court did not rule on whether LEAN's suit was barred by the "diligent prosecution" provision of the CWA, as defendants had argued, the court did note that the provision "strips courts of subject matter jurisdiction over citizen suits once the EPA has timely

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5. According to the court:

> The Louisiana Environmental Action Network ("LEAN") is a non-profit community organization incorporated and operating under the laws of Louisiana. LEAN describes itself as "an umbrella organization for several environmental and citizen groups in Louisiana . . . . LEAN has more than 1,700 individual members, some of whom reside, own property, work, and recreate in areas near and downstream of [the City and Parish's] plants . . . . LEAN's purpose is to preserve and protect Louisiana's land, air, water, and other natural resources.

Id. at 742 (alteration in original).

6. *Id.*; *see also* 33 U.S.C. § 1365 (authorizing a private right of action for violations of the CWA).

7. *LEAN*, 677 F.3d at 742.

8. *Id.* Civil penalties awarded in citizen suits are given to the U.S. Treasury. Gwaltney of Smithfield v. Chesapeake Bay Found., Inc., 484 U.S. 49, 53 (1987).

9. *LEAN*, 677 F.3d at 743.

10. *Id.* Although the district court granted defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim, as the United States Court of Appeals for the Fifth Circuit noted, the district court's reasoning was actually based on mootness, which strips courts of authority to hear a case. *See id.* at 744. The "[m]ootness doctrine encompasses the circumstances that destroy the justiciability of a suit previously suitable for determination." *Id.* at 745 (emphasis omitted) (quoting 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3533 (3d ed. 1998) (internal quotation mark omitted)). Said another way, "any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519, 527 (5th Cir. 2008) (citation omitted) (internal quotation marks omitted). "If a case has been rendered moot, a federal court has no constitutional authority to resolve the issues that it presents." *Id.* at 525 (citation omitted). In the noted case, having found the case to be moot, the district court instructed that if LEAN was unsatisfied with the defendants' compliance with the 2002 consent decree, the proper recourse lay with addressing its concerns to EPA. *LEAN*, 677 F.3d at 743.

commenced judicial or administrative enforcement actions."[11] On appeal, the United States Court of Appeals for the Fifth Circuit *held*, first, that because the citizen suit was filed *after* the consent decrees, there was no issue of mootness and, second, that the "diligent prosecution" provision was a nonjurisdictional procedural rule separate from the issue of subject-matter jurisdiction. *Louisiana Environmental Action Network v. City of Baton Rouge*, 677 F.3d 737, 745, 748-49 (5th Cir. 2012) (per curiam).

II. BACKGROUND

In 1972, Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[12] To bolster enforcement, Congress allowed for ordinary citizens to bring private enforcement actions.[13] Generally, "any citizen may commence a civil action on [their] own behalf . . . against any person . . . who is alleged to be in violation of [the CWA]."[14] The United States Supreme Court has noted, however, "[T]he citizen suit is meant to supplement rather than to supplant governmental action."[15] Citizen suits are not allowed where the EPA or state government "has commenced and is diligently prosecuting a civil or criminal action . . . to require compliance with [a] standard, limitation, or order."[16] This "diligent prosecution" bar, as it is known, has been the undoing of many citizen suits and the subject of much litigation.[17] Quite often, courts have dismissed citizen suits for lack of subject-matter jurisdiction upon determination that existing

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11. *LEAN*, 677 F.3d at 743 (citing La. Envtl. Action Network v. City of Baton Rouge, No. 10-187-BAJ-SCR, 2011 WL 1882439, at *2 (M.D. La. May 17, 2011), *rev'd*, 677 F.3d 737 (5th Cir. 2012) (internal quotation mark omitted)).

12. 33 U.S.C. § 1251(a) (2006). Specifically, with certain exceptions, the CWA commands, "[T]he discharge of any pollutant by any person shall be unlawful." *Id.* § 1311(a).

13. *See id.* § 1365(a).

14. *Id.* "Citizen" under the CWA is any "person or persons having an interest which is or may be adversely affected." *Id.* § 1365(g).

15. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987).

16. 33 U.S.C. § 1365(b)(1)(B). An additional procedural requirement demands that notice of the violation be given to the EPA, the state with jurisdiction over the violation, and the alleged violator at least sixty days before the suit is filed. *Id.* § 1365(b)(1)(A). The notice provision reinforces the supplementary role of citizen suits. *LEAN*, 677 F.3d at 740 ("[T]he requirement that notice be given to the responsible officials highlights their primary role in enforcing the [CWA] compared to the supplementary position of the citizen." (quoting Hamker v. Diamond Shamrock Chem. Co., 756 F.2d 392, 396 (5th Cir. 1985))).

17. *See* Derek Dickinson, Note, *Is "Diligent Prosecution of an Action in a Court" Required To Preempt Citizen Suits Under the Major Federal Environmental Statutes?*, 38 WM. & MARY L. REV. 1545, 1546-47 (1997) ("One statutory restriction, precluding citizen suits when an agency has already brought and is diligently prosecuting its own action, has generated much litigation . . . ." (footnote omitted)).

government action precludes a citizen suit.[18] Until recently, courts have not questioned whether the "diligent prosecution" provision is actually jurisdictional, i.e., whether it grants federal courts subject-matter jurisdiction over citizen suits.[19]

While the Supreme Court has not yet directly weighed in on whether the "diligent prosecution" provision of the CWA or similar laws is jurisdictional,[20] the Court has provided guidance for determining whether statutes are to be considered jurisdictional. As part of its efforts to prevent "drive-by jurisdictional rulings"[21] and to resolve a circuit split, the Court in *Arbaugh v. Y&H Corp.* considered whether the requirement that employers have fifteen or more employees to fall within the purview of Title VII of the Civil Rights Act of 1964[22] was an issue of subject-matter jurisdiction or, rather, an issue of the adequacy of a Title VII claim.[23] The Court noted that there are substantial implications involved in resolving the "subject-matter jurisdiction/ingredient-of-claim-for-relief

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18. *See* Heather L. Maples, Note, *Reforming Judicial Interpretation of the Diligent Prosecution Bar: Ensuring an Effective Citizen Role in Achieving the Goals of the Clean Water Act*, 16 VA. ENVTL. L.J. 195, 196 (1996) ("[C]ourts dismiss many citizen suits for lack of subject matter jurisdiction because of the unclear definition of diligent enforcement . . . .").

19. *Compare* Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 556 F.3d 603, 606 (7th Cir. 2009) ("The [CWA] strips the courts of subject matter jurisdiction over citizens' suits where the State has timely commenced judicial or administrative enforcement actions."), *with* Adkins v. VIM Recycling, Inc., 644 F.3d 483, 492 (7th Cir. 2011) ("[I]t's hard to fit into the concept of subject matter jurisdiction the idea that the ability to pursue the citizen suit could disappear, return, and disappear again, depending on the government agency's changing approach to its own enforcement action.").

20. *LEAN*, 677 F.3d at 749 ; *see* Hallstrom v. Tillamook County, 493 U.S. 20, 23, 31 (1989) (holding that the plaintiffs' failure to comply with the sixty-day notice provision of the Resource Conservation and Recovery Act barred their suit but finding it unnecessary to decide whether the provision was jurisdictional or procedural).

21. Arbaugh v. Y&H Corp., 546 U.S. 500, 511 (2006) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998) (internal quotation marks omitted)). The Supreme Court has been on a concerted mission to curb the ease with which courts—the Court included—conflate subject matter jurisdiction and "the essential ingredients of a federal claim for relief." *See id.* at 503; Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1244 (2010) ("Our recent cases evince a marked desire to curtail such 'drive-by jurisdictional rulings,' which too easily can miss the 'critical difference[s]' between true jurisdictional conditions and nonjurisdictional limitations on causes of action." (citations omitted)); Howard M. Wasserman, *The Demise of "Drive-by Jurisdictional Rulings,"* 105 NW. U. L. REV. 947, 947 (2011) (noting the Court's "multi-[t]erm effort towards better defining which legal rules properly should be called 'jurisdictional'"). In these situations, courts issue jurisdictional rulings without an "attempt to distinguish 'between true jurisdictional conditions and nonjurisdictional limitations on causes of action.'" *LEAN*, 677 F.3d at 746 n.3 (quoting *Reed Elsevier*, 130 S. Ct. at 1244).

22. *See* 42 U.S.C. § 2000e(b) (2006). Title VII is an antidiscrimination law that makes it unlawful for "an employer . . . to discriminate against any [employee] . . . because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1). An "employer" in this context is "a person . . . who has fifteen or more employees." *Id.* § 2000e(b).

23. *Arbaugh*, 546 U.S. at 509-11.

dichotomy," because subject-matter jurisdiction directly affects federal courts' authority to hear cases.[24] Given this importance, there must be a *clear* indication from Congress that a statute is meant to be jurisdictional; otherwise, courts "should treat the restriction as nonjurisdictional in character."[25] Applying its new "readily administrable bright line," the Court held that in the absence of clear Congressional intent, "the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue."[26]

In a subsequent case, the Supreme Court held in *Reed Elsevier, Inc. v. Muchnick* that failure to register copyrights as required by statute did not strip courts of subject-matter jurisdiction over copyright infringement suits.[27] The Copyright Act typically requires copyright holders to register their work before they can sue for copyright infringement.[28] Employing the *Arbaugh* test, the Court found the registration requirement was neither clearly identified by Congress as being jurisdictional, nor located in a jurisdiction-granting portion of the Copyright Act.[29] Without such clear legislative intent, the Court concluded that registration was a nonjurisdictional claim-processing rule, a procedural "precondition" to copyright infringement actions.[30]

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24. *Id.* at 511, 514-15 (listing three implications of subject-matter jurisdiction). In *Arbaugh*, the plaintiff had already prevailed at trial on her sexual harassment claim when the defendant employer raised the issue that it employed fewer than fifteen employees and was therefore outside of Title VII's reach. *Id.* at 504. Believing the fifteen-or-more-employees requirement to be a matter of subject-matter jurisdiction, the magistrate judge begrudgingly dismissed the case on the theory that the merits of the case should never have been heard or tried in the first place. *Id.*

25. *Id.* at 516.

26. *Id.* Because the Court held that the employee-numerosity requirement was an element of a Title VII claim and not a subject-matter threshold, once the trial had concluded, it was too late for the defendant to claim that it had too few employees to be covered by Title VII. *See id.* at 510-11.

27. 130 S. Ct. 1237, 1247 (2010).

28. *See* 17 U.S.C § 411(a) (2006).

29. *Reed Elsevier*, 130 S. Ct. at 1244-47.

30. *Id.* at 1247. The Court was not entirely consistent in its terminology regarding nonjurisdictional rules: at times, the Court drew "distinctions between jurisdictional prescriptions and claim-processing rules," while at other times it distinguished "'jurisdictional' conditions from claim-processing requirements *or* elements of a claim." *Id.* at 1243-44 (emphasis added). In *Arbaugh*, the Court treated the nonjurisdictional numerosity requirement as an element a plaintiff must prove for a Title VII claim. *See supra* text accompanying note 26. By contrast, the Court has defined "claim-processing rules" as rules "that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1203 (2011) (citations omitted). While the Court did not specify whether the Copyright Act's registration requirement was a claim-processing rule or an element of a copyright infringement action, it concluded that the registration provision was "a type of precondition to suit," a phrase that suggests the required procedural step

In the absence of instruction from the Supreme Court on the jurisdictionality of the CWA's "diligent prosecution" provision, lower courts have engaged in so-called "drive-by jurisdictional rulings" for the last forty years, concluding that the provision confers subject-matter jurisdiction.[31] The United States Court of Appeals for the Fourth Circuit, for example, held that the "diligent prosecution" bar is "an exception to the jurisdiction granted in subsection (a) of § 1365," the section of the CWA authorizing citizen suits.[32] More directly, the United States Court of Appeals for the Seventh Circuit stated that the "diligent prosecution" provision "strips the courts of subject matter jurisdiction over citizens' suits where the State has timely commenced judicial or administrative enforcement actions."[33] The notion that the "diligent prosecution" bar destroys subject-matter jurisdiction over citizen suits was taken for granted; the defendants in the noted case asserted the court's lack of jurisdiction in their brief as though it were a given, citing nothing but the statute as support.[34]

In *Adkins v. VIM Recycling, Inc.*, the Seventh Circuit broke with its own precedent and became the first circuit to find that the "diligent prosecution" bar is nonjurisdictional.[35] A group of citizens brought suit against a solid waste facility for alleged violations of the Resource Conservation and Recovery Act (RCRA), which has citizen-suit and diligent prosecution provisions similar to those in the CWA.[36] The district court dismissed the suit for lack of jurisdiction due to ongoing litigation between the government and the solid waste facility over the same alleged RCRA violations.[37] On appeal, the Seventh Circuit reversed, holding that the "diligent prosecution" provision of RCRA was not jurisdictional but, rather, a "claim-processing rule."[38] While Congress could have explicitly made the "diligent prosecution" provision

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of a claim-processing rule rather than a substantive element of a copyright infringement action like the employee-numerosity requirement in Title VII. *Reed Elsevier*, 130 S. Ct. at 1247.

31. *See, e.g.*, Knee Deep Cattle Co. v. Bindana Inv. Co., 94 F.3d 514, 516-17 (9th Cir. 1996) (determining that a lack of diligent prosecution granted subject-matter jurisdiction over the CWA suit at hand).

32. Chesapeake Bay Found. v. Am. Recovery Co., 769 F.2d 207, 208 (4th Cir. 1985) (per curiam).

33. Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 556 F.3d 603, 606 (7th Cir. 2009).

34. *See* Brief of Appellees at 19, La. Envtl. Action Network v. City of Baton Rouge, 677 F.3d 737 (5th Cir. 2012) (No. 11-30549), 2011 WL 5154947, at *19.

35. 644 F.3d 483, 492 (7th Cir. 2011).

36. *Id.* at 486-89; *see* 42 U.S.C. § 6972(a)-(b) (2006).

37. *Adkins*, 644 F.3d at 490.

38. *Id.* at 492.

jurisdictional, it chose not to.[39] Likewise, Congress did not make diligent prosecution an "absolute," but rather gave it "the potential to ebb and flow," depending on how diligently the government prosecutes its claims.[40] This variability conflicts with the binary nature of subject-matter jurisdiction, which "either exists or . . . does not," and does not come and go depending on the adequacy of a government action at different points in time.[41]

III. THE COURT'S DECISION

In the noted case, the United States Court of Appeals for the Fifth Circuit reversed the district court's decision. The court found that LEAN's suit was not moot and that the "diligent prosecution" provision pertaining to citizen suits under the CWA was procedural rather than jurisdictional.[42] Beginning with the issue of mootness, the court determined that the district court erred in applying the wrong standard for mootness.[43] The district court based its analysis on a Fifth Circuit case in which a consent decree was entered *after* the citizen suit was initiated, resolving the plaintiff's concerns.[44] In the noted case, however, the consent decree was entered eight years *before* LEAN's suit, meaning it was not a *subsequent* development that settled the controversy.[45] Where a consent decree has already been entered, the diligence of the government's prosecution determines whether a related citizen suit is precluded.[46] The Fifth Circuit chose not to engage in this inquiry in the noted case, leaving it instead for the district court on remand.[47]

The Fifth Circuit next addressed whether the CWA's "diligent prosecution" bar was jurisdictional—a matter of first impression for the circuit.[48] Employing the bright line rule set forth by the Supreme Court in *Arbaugh*, the court first found that "Congress has not clearly mandated that the CWA's 'diligent prosecution' provision is jurisdictional."[49] The court also noted, "The placement of the 'diligent

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39. *Id.*
40. *Id.*
41. *Id.*
42. La. Envtl. Action Network v. City of Baton Rouge (*LEAN*), 677 F.3d 737, 745-49 (5th Cir. 2012) (per curiam).
43. *Id.* at 744.
44. *Id.*
45. *Id.* at 744-45 (distinguishing Envtl. Conservation Org. v. City of Dallas, 529 F.3d 519 (5th Cir. 2008)).
46. *See id.* at 745; 33 U.S.C. § 1365(b)(1)(B) (2006).
47. *LEAN*, 677 F.3d at 749-50.
48. *Id.* at 745.
49. *Id.* at 747.

prosecution' bar in the 'Notice' section, alongside a typical claim-processing rule, suggests that Congress intended the 'diligent prosecution' bar to be a claim-processing rule."[50] Finally, the court pointed out that the "diligent prosecution" provision was in a different part of the CWA than the one granting courts subject-matter jurisdiction over citizen suits.[51] The Fifth Circuit concluded that, given a lack of clear Congressional intent and no Supreme Court case on point, under the *Arbaugh* test the "diligent prosecution" provision of the CWA citizen suit statute is nonjurisdictional.[52]

IV. ANALYSIS

The Fifth Circuit's determination in the noted case that the "diligent prosecution" provision of the CWA is nonjurisdictional marks a watershed moment for citizen enforcement suits brought under the CWA and similar laws. After nearly forty years of misconstruing the "diligent prosecution" provision as jurisdictional, the Fifth Circuit has finally recognized that diligent prosecution of a similar claim by the government merely speaks to the adequacy of a citizen-plaintiff's claim, not to whether courts have authority to hear the case at all. The court faithfully applied the *Arbaugh* bright line jurisdictionality test and reached a conclusion consistent with the Supreme Court's desire to stamp out "drive-by jurisdictional rulings." The decision is also in line with the Seventh Circuit's recent *Adkins* decision that reached the same conclusion regarding the nonjurisdictional nature of a similar "diligent prosecution."[53]

The implications of the Fifth Circuit's ruling are subtle but profound, something not lost on the court.[54] Because the diligent prosecution provision is nonjurisdictional, citizen-plaintiffs may still have a colorable

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50. *Id.* at 748 (citing Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1205 (2011)). For a discussion of "whether nonjurisdictional preconditions should be understood as procedural claim-processing rules or substantive merits rules," see Wasserman, *supra* note 21, at 958-59.

51. *LEAN*, 677 F.3d at 748. The court instructed: "The district courts have subject matter jurisdiction over CWA citizen suits pursuant to the general federal question jurisdiction statute, 28 U.S.C. § 1331, and the CWA's jurisdictional provision, 33 U.S.C. § 1365(a)." *Id.* (footnotes omitted).

52. *Id.* at 749 (citing Arbaugh v. Y&H Corp., 546 U.S. 500, 516 (2006) ("[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.")).

53. Adkins v. VIM Recycling, Inc., 644 F.3d 483, 492 (7th Cir. 2011).

54. *LEAN*, 677 F.3d at 745 ("This issue has important practical implications for the court and parties in this case."). The court was cognizant of the Supreme Court's admonition that "[the] question is not merely semantic but one of considerable practical importance for judges and litigants." *Henderson*, 131 S. Ct. at 1202, *quoted in LEAN*, 677 F.3d at 746-47.

claim *even if* there is an existing government action, and they could therefore survive a Rule 12(b)(6) motion to dismiss for failure to state a valid claim.[55] When defendants seek dismissal on the pleadings, courts must accept well-pleaded facts as true and view those facts in the light most favorable to the plaintiff.[56] Whether the government action constitutes "diligent prosecution" is now, thus, a question of fact for the jury to determine at trial. Were the "diligent prosecution" provision jurisdictional, the determination of "diligence" would control whether subject-matter jurisdiction existed, and "if subject-matter jurisdiction turns on contested facts," such as whether the government is diligently prosecuting a related claim, "the trial judge may be authorized to review the evidence and resolve the dispute on her own."[57] Moreover, were the provision jurisdictional, defendants could question the adequacy of government prosecution at any point in citizen-suit litigation—including after trial[58]—and courts would be obligated to consider the issue sua sponte regardless of whether defendants raised it or tried to waive it earlier in the proceedings.[59]

The only flaw in the Fifth Circuit's reasoning might lie in its classification of the "diligent prosecution" provision as a "claim-processing rule." While the court did not explicitly label the provision as such, it was surely implied.[60] As the court explained, "claim-processing

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55. *See LEAN*, 677 F.3d at 745. Plaintiffs are also safe from Rule 12(b)(1) dismissal for lack of subject-matter jurisdiction because such jurisdiction comes from sources other than the citizen suit provision itself. *See supra* text accompanying note 51 (explaining sources of subject-matter jurisdiction for citizen suits).

56. *See LEAN*, 677 F.3d at 745 (citation omitted); FED. R. CIV. P. 12(b)(6).

57. *Arbaugh*, 546 U.S. at 514 (citations omitted). Citizen-plaintiffs have good reason to want their cases resolved through a formal trial rather than through pretrial adjudication. *See, e.g.*, Richard L. Steagall, *The Recent Explosion in Summary Judgments Entered by the Federal Courts Has Eliminated the Jury from the Judicial Power*, 33 S. ILL. U. L.J. 469, 471 (2009) (identifying the "systemic judicial bias in favor of defendants created by today's summary judgment norm"); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1273-74 (2005) ("The trial is a site of 'deep accountability' where facts are exposed and responsibility assessed, a place where the ordinary politics of personal interaction are suspended and the fictions that shield us from embarrassment and moral judgment are stripped away.").

58. *See* discussion *supra* note 24 (detailing facts of *Arbaugh* involving the postverdict dismissal of a suit for lack of subject-matter jurisdiction).

59. *See* FED. R. CIV. P. 12(h)(3); *Arbaugh*, 546 U.S. at 514 ("[C]ourts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." (citation omitted)); Wasserman, *supra* note 21, at 962 ("Judges at every level have an independent obligation to raise subject matter jurisdiction sua sponte, and the court or a party can raise jurisdiction at any time throughout the litigation process." (footnote omitted)).

60. *See LEAN*, 677 F.3d at 745-46. The court quoted Supreme Court precedent that stated certain rules should not be considered jurisdictional and then quoted language from the

rules" are "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[61] The "diligent prosecution" provision, however, does not entail a procedural step like the registration of a copyright in *Reed Elsevier*, nor does it seem to "promote the orderly progress of litigation," because the initiation of a government action against a polluter is outside of a plaintiff's control. Rather, the provision appears to be more akin to an element of a claim—a fact-based inquiry that must be satisfied to prevail on a claim—as was the Title VII numerosity requirement in *Arbaugh*. The court believed that "[t]he placement of the 'diligent prosecution' bar in the 'Notice' section, alongside a typical claim-processing rule, suggests that Congress intended the 'diligent prosecution' bar to be a claim-processing rule."[62] The problem with this line of reasoning is that the function of the notice requirement—a true procedural "claim-processing rule" designed to ensure the orderly progression of litigation—is clearly quite different from that of the "diligent prosecution" provision, which determines the adequacy of a plaintiff's claim. Given the substantive differences between a procedural rule and a substantive-merits rule,[63] the Fifth Circuit should have characterized the "diligent prosecution" provision as the latter.

While this distinction between nonjurisdictional "claim-processing rules" and nonjurisdictional elements of a claim does not ultimately affect the Fifth Circuit's decision, it nonetheless seems prudent to avoid conflating the two. The noted case stems from the Supreme Court's attempts to curb "drive-by jurisdictional rulings." As part of that effort, the Court has warned that courts "have sometimes mischaracterized claim-processing rules *or* elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the

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Court holding that the "claim-processing rules" were one category of rules that should not be considered jurisdictional. *Id.* (quoting Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1202-03 (2011)). The court did not mention any other categories of rules that were not jurisdictional and relied heavily on Supreme Court cases that determined nonjurisdictional provisions to be "claim-processing rules." *Id.* at 746-49. The court seemed to reason that if the provision was nonjurisdictional, it must therefore be a "claim-processing rule." *See also infra* text accompanying note 62 (noting the court's classification of the diligent-prosecution bar as a "claim-processing rule").

61. *LEAN*, 677 F.3d at 746 (quoting *Henderson*, 131 S. Ct. at 1203 (internal quotation marks omitted)).

62. *Id.* at 748.

63. *See* Wasserman, *supra* note 21, at 958 ("[P]rocedural rules are about rights and obligations within the courtroom and within litigation, whereas merits rules are about real-world rights and duties outside the four walls of the courtroom.").

case, and thus did not require close analysis."[64] Conflating "claim-processing rules" and "elements of a cause of action," as the Fifth Circuit has done here, "when that characterization was not central to the case, and thus did not require close analysis," only seems to shift the mischaracterization problem downstream. In the Fifth Circuit's defense, the Supreme Court cases on which it relied also engaged in this loose wordplay.[65] But where there exist distinctly different ways of categorizing nonjurisdictional provisions, it seems wise to pick the one that best fits the provision in question and provide an explanation for that choice. Otherwise, "drive-by jurisdictional rulings" will simply give way to "drive-by" *nonjurisdictional* rulings.

V. CONCLUSION

The Fifth Circuit correctly identified the "diligent prosecution" provision of the CWA as nonjurisdictional. While citizen suits still will fail if a fact finder finds that the government has commenced diligent prosecution of polluters, such government action is no longer fatal to a court's authority to hear the case. The decision will likely give citizen enforcement suits in the Fifth Circuit a better chance of surviving motions to dismiss on jurisdictional grounds and being decided on their merits, which will in turn hopefully lead to more guidance from courts on what constitutes "diligent prosecution."

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64. Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1243-44 (2010) (emphasis added) (citations omitted).

65. *See supra* text accompanying note 30 (illustrating the Court's inconsistency surrounding the nature of nonjurisdictional provisions).

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