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September 2, 2005

The Honorable Arlen Specter
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, DC

The Honorable Patrick Leahy
Ranking Member, Senate Committee on the Judiciary
United States Senate
Washington, DC

RE: Environmental Concerns with Supreme Court Nomination of Judge John G. Roberts, Jr.

Dear Senators Specter and Leahy:

Judge John G. Roberts, Jr. has been nominated to fill the Supreme Court seat being vacated by Justice Sandra Day O'Connor, who has frequently been a swing vote in important environmental cases. The Supreme Court has become an increasingly hostile forum for pro-environmental litigants in recent years, issuing rulings that have limited many of the nation's most important environmental safeguards. In other cases, environmental protections have withstood critical challenges by one or two votes, with one of those votes usually being cast by Justice O'Connor. The stakes for the environment in the Roberts' nomination could hardly be higher.

Having conducted a thorough review of Judge Roberts' record on environmental issues, we are writing to highlight two aspects of his record that give us reason for serious concern about his nomination. First, his well-publicized "hapless toad" opinion in *Rancho Viejo v. Norton*,[1] coupled with comments Roberts has made to the press in his capacity as a Supreme Court commentator, suggest that he might join a block of Supreme Court justices that in recent years have sought to significantly reduce the Constitutional authority of Congress to enact environmental safeguards. Second, throughout his career, Judge Roberts has expressed a limited view of the role of the judicial branch that could lead him to unduly restrict the right of citizens

[1] *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J. dissenting) (denying rehearing en banc), *cert. denied*, 124 S. Ct. 1506 (2004).

to access federal courts -- rights secured for citizens by environmental statutes. Particularly at risk is the critical role assigned citizens by Congress to act as "private attorneys general" where the federal government is unwilling or lacks the resources to enforce federal law against polluters.[2]

The undersigned groups are reserving judgment until the conclusion of the confirmation hearings on whether the Senate should confirm Judge Roberts to a lifetime seat on the Supreme Court. Judge Roberts has impressive credentials, but his record on environmental issues raises some troubling concerns. We strongly believe that, as a nominee to the nation's highest court, Judge Roberts bears the burden of proving that he can be fair and impartial in deciding environmental cases that would come before him. We therefore urge the Committee to fully explore Judge Roberts' judicial views and philosophy during the confirmation process, particularly with respect to the issues raised in this letter. We appreciate the leadership Chairman Specter, Ranking Member Leahy and other members of the Committee have shown in informing Judge Roberts of the areas that will be explored at his hearing and the types of questions he will be expected to answer.

I. Brief Overview of Judge Roberts' Environmental Record

Throughout John Roberts' career, he has been involved in environmental cases and disputes. As Special Assistant to Attorney General William French Smith, for example, Roberts wrote a speech for the Attorney General announcing the Reagan administration's states'-rights position on Western water rights. As Principal Deputy Solicitor General, Roberts briefed and argued *Lujan v. National Wildlife Federation,*[3] a critical case narrowing environmentalists' ability to challenge agency actions. In private practice at Hogan & Hartson, Roberts argued a number of important environmental cases.[4] During his brief tenure on the D.C. Circuit, Judge Roberts has written opinions on several environmental and access–to-courts issues.[5]

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[2] Examples of "private attorneys general" statutes include the Toxic Substances Control Act, 15 U.S.C. § 2619 (1994), the Clean Water Act, 33 U.S.C. § 1365 (1994), and the Clean Air Act, 42 U.S.C. § 7604 (1994).

[3] 497 U.S. 871 (1990) (successfully arguing that no one could bring an overall challenge to the Interior Department's Land Withdrawal Review Program, which reversed thousands of actions that had "withdrawn" (protected) millions of acres of federal land from mining and other development, even though, as four Justices explained in dissent, the Department had "attempted to develop and implement a comprehensive scheme for the termination of classifications and withdrawals.").

[4] *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) (unsuccessfully arguing that the EPA usurped state authority under the Clean Air Act when prohibiting a state PSD permit) (Another attorney argued the case before the Supreme Court, but Roberts was counsel of record on the petitioner's brief.); *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (successfully arguing that a temporary moratorium does not constitute a per se taking); *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987) (successfully arguing that the Clean Water Act does not authorize citizen suits seeking penalties for wholly past violations) (E. Barrett Prettyman, Jr., was counsel of record, though Roberts lists the case in his Senate Questionnaire); *Bragg v. Robertson*, 248 F.3d 275 (4th Cir. 2001) (in a mountaintop removal amicus brief for the National Mining Association, Roberts argued that the federal Surface Mining and Reclamation Act's (SMCRA's) citizen suit provision does not allow citizens to challenge the permitting decisions of state agency officials in federal court and that SMCRA's stream protection regulation, known as the buffer zone rule, does not prohibit the dumping

II. Judge Roberts and the Scope of Congressional Authority

The most far-reaching environmental question raised by Judge Roberts' record concerns his views on the power of Congress to enact environmental safeguards, including its authority to pass laws under the Constitution's Commerce Clause. Chairman Specter recently called the Supreme Court's cases eroding Congressional power "the hallmark agenda of the judicial activism of the Rehnquist Court."[6] Meanwhile, scholars and activists on the libertarian right have been urging the Court to expand these rulings into a full-blown restoration of what D.C. Circuit Judge Douglas Ginsburg called the "Constitution in Exile," with the result that environmental laws, and wide variety of other protections passed since the New Deal, would be rendered unconstitutional.[7] In our opinion, no nominee who supports a radical restriction of Congress' Commerce Clause authority or a restoration of the so-called "Constitution in Exile" should be confirmed to the Supreme Court.

Because almost every major federal environmental statute relies on Congress' Commerce Clause authority, the Supreme Court's rulings limiting the scope of that authority in *United States v. Lopez*[8] and *United States v. Morrison*[9] have triggered a flood of challenges to environmental laws, including the Clean Water Act, the Endangered Species Act, and the Safe Drinking Water Act. For example, in *SWANCC v. Army Corps of Engineers*,[10] the petitioners argued that Congress lacked authority under the Commerce Clause to protect so-called "isolated" waters under the Clean Water Act. While the Court limited its ruling to an interpretation of the statute, the 5-4 opinion narrowly avoided what the majority termed "significant constitutional

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of mining waste in Appalachian streams.), *cert. denied,* 534 U.S. 1113 (2002); *United States v. Smithfield Foods*, 191 F.3d 516 (4th Cir. 1999) (Roberts represented Smithfield Foods in a case in which the appeals court affirmed that the company was liable for Clean Water Act effluent limit violations, submission of false and late reports, and destruction of records).

[5] *Sierra Club v. EPA*, 353 F.3d 976 (D.C. Cir. 2004) (Roberts authored a decision upholding the EPA's refusal to adopt toxic air pollution emissions standards at the maximum degree achievable.); *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003) (Roberts dissented from a denial of rehearing *en banc* in a case that held that the Endangered Species Act was applicable to a commercial development harmful to the endangered species.); *Taucher v. Brown-Hruska*, 396 F.3d 1168 (D.C. Cir. 2005) (reversing, over a strong dissent, a district court's award of attorney's fees under the Equal Access to Justice Act (EAJA) to a public-interest law firm).

[6] Letter from Senator Specter to Judge John G. Roberts, Jr. August 8, 2005.

[7] See Jeffrey Rosen, *The Unregulated Offensive*, The New York Times, April 17, 2005 (chronicling the "Constitution in Exile" movement); Douglas Ginsburg, Book Review, *Delegation Running Riot*, 18 Regulation (1996) *available at* https://www.cato.org/pubs/regulation/regv18n1/reg18n1-readings.html ("So for 60 years the non-delegation doctrine has existed only as part of the Constitution in Exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty-even if perhaps not in their own lifetimes.")

[8] 514 U.S. 549 (1995).

[9] 529 U.S. 598 (2000).

[10] 531 U.S. 159 (2001).

questions," about Congress' authority under the Commerce Clause to protect certain waters and wetlands that were used by migratory birds.

It is not clear how Judge Roberts would rule on environmental Commerce Clause challenges if confirmed to the Supreme Court, but his one opinion on the issue as a D.C. Circuit judge – indeed the first opinion he wrote as a member of the bench – warrants close examination by the Committee and gives us serious concern. The opinion is *Rancho Viejo v. Norton,*[11] the now famous "hapless toad" case. In *Rancho Viejo*, a three-judge panel of the D.C. Circuit unanimously rejected a claim that Congress lacked the Commerce Clause authority to protect the toad, holding that the Endangered Species Act (ESA) was applicable to commercial development that threatened an endangered species.[12] A petition for rehearing by the entire court was denied 7-2, with Judges Roberts and Sentelle dissenting.

In his dissent, Judge Roberts wrote that: "the panel's opinion in effect asks whether the challenged regulation substantially affects interstate commerce, rather than whether the *activity* being regulated does so;" and concluded that "[s]uch an approach seems inconsistent with the Supreme Court's holdings . . ."[13] Judge Roberts' analysis is troubling because the panel's reasoning is arguably the strongest basis for distinguishing the Endangered Species Act from the Guns Free School Zone Act at issue in *Lopez* and the Violence Against Women Act at issue in *Morrison*. As the panel explains, the Endangered Species Act regulates the "taking" of species and such takings are almost always the result of commercial development activities. The Act thus regulates economic activity much more directly than did the laws in *Lopez* and *Morrison*, which regulated gun possession and domestic violence, activities the Court in *Morrison* deemed "non-economic" and "criminal."

Judge Roberts' opinion leaves open the possibility that he would uphold the Endangered Species Act protection of the arroyo toad on an alternative ground,[14] but it is still more than a little disconcerting that he would so publicly disagree with his colleagues on the court about a very solid basis -- probably the strongest basis -- for upholding ESA safeguards against constitutional challenges.[15] In addition, even if Roberts would ultimately rely on an alternative ground on the *Rancho Viejo* facts, it is essential to determine if the potential alternative grounds would be narrower in other contexts. In other words, Roberts should explain whether there are current (or reasonably foreseeable future) applications of environmental or other laws that might

[11] 334 F.3d 1158 (D.C. Cir. 2003).
[12] *Id.*
[13] *Id.* at 1160.
[14] Judge Roberts' reference to "alternative grounds for sustaining application of the Act" is accompanied by a citation to a footnote in the panel's decision, *Rancho Viejo*, 323 F.3d at 1067-68 n.2, which discusses other rationales.
[15] It is significant to note that dissents from denial of *en banc* review are extremely rare in the D.C. Circuit; since Roberts joined the court, judges have dissented in only three cases (including two cases in which Roberts dissented). On the other hand, it also should be noted that Judge Roberts wrote separately and did not join a more strident and more definitive dissent from *en banc* review written by Judge Sentelle.

be constitutional under the panel's reasoning, but might not be constitutional under one or more possible alternative grounds.

Roberts' brief opinion also appears to question whether Congress can protect endangered species found in only one state, stating that "[t]he panel's approach . . . leads to the result that regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes 'Commerce . . . among the several States.'"[16] This passage contrasts markedly with the recognition of the value of species that is reflected in the consistent rulings by every majority opinion to consider the issue, including decisions by conservative Republican-appointed judges that have upheld ESA safeguards against similar claims.

As Paul Clement, President Bush's Solicitor General, explained in successfully urging the Supreme Court to deny review of the case, no court "has invalidated any federal wildlife legislation as exceeding the reach of Congress's power under the Commerce Clause. Affirmation of federal authority to act in this sphere is particularly appropriate because systemic obstacles exist to the adoption and enforcement of effective state wildlife-protection measures."[17] The Supreme Court has repeatedly rejected, without recorded dissent, petitions to review appeals court decisions that have rejected Commerce Clause challenges to ESA safeguards.

Roberts sharply criticized an argument for congressional authority under the Commerce Clause that was signed onto by Judge Douglas Ginsburg, who, as noted above, coined the term "Constitution in Exile." His opinion in *Rancho Viejo* warrants careful examination at his upcoming hearing.

Another set of comments by Roberts also suggests he may have an unduly limited view of congressional power and, perhaps, some sympathy for the theory of a so-called Constitution in Exile. Roberts' comments came in the context of the Supreme Court's decision to review *Browner v. American Trucking Associations*,[18] a stunning decision by Judges Douglas Ginsburg and Stephen Williams of the D.C. Circuit to strike down a central provision of the Clean Air Act as an unconstitutional violation of what is known as the non-delegation doctrine.[19] EPA Administrator Carol Browner called the ruling "bizarre and extreme" and warned that, if upheld, it could "throw into complete turmoil the underpinnings of almost every single environmental and public health statute in the country."[20] The Supreme Court agreed with Browner and her

[16] 334 F.3d at 1160.
[17] See Brief of Respondents in Opposition, *Rancho Viejo LLC v. Norton, No. 03-761*, *available at* http://www.usdoj.gov/osg/briefs/2003/0responses/2003-0761.resp.html; See also *Gibbs v. Babbitt*, 214 F.3d 483, 501 (4th Cir. 2000) (Congress may act to "arrest the 'race to the bottom' in order to prevent interstate competition whose overall effect would damage the quality of the national environment"), *cert. denied*, 531 U.S. 1145 (2001);
[18] 175 F.3d 1027 (D.C. Cir. 1999).
[19] 531 U.S. 942 (2000).
[20] Margaret Kriz, *Why the EPA's Wheezing a Bit*, National Journal, June 24, 1999, at 2166.

Bush Administration successor, reversing the D.C. Circuit unanimously in a sharply worded opinion by Justice Scalia.[21]

Yet before the case was argued before the Supreme Court, Roberts expressed what a reporter called a "more positive view" of the D.C. Circuit's ruling, stating that a "revitalized non-delegation doctrine might force Congress to be more specific."[22] In words eerily similar to those of Judge Douglas Ginsburg, Roberts told another reporter: "[t]his case involves the moribund delegation doctrine, which has been as much of a dead letter as the Commerce Clause, until lately, or the 11th Amendment, a ghost from the past that might be revived."[23] It is possible that Roberts' remarks were mischaracterized, and these comments are far from conclusive concerning Roberts' views, but they warrant further exploration.

III. John Roberts and Access to Courts

A powerful innovation of modern environmental law is the authority Congress grants citizens to ensure that environmental statutes are implemented by regulatory agencies and obeyed by polluters. Congress has repeatedly included "citizen suit" provisions in numerous environmental, civil rights, and other laws in order to ensure that essential legal safeguards are upheld and enforced. For example, in upholding the ability of individuals and organizations to sue polluters, the Supreme Court recognized that: "Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance . . . they also deter future violations."[24]

There are significant reasons to believe that a Justice Roberts would write or join Supreme Court opinions that limit the ability of citizens to enforce environmental laws. A core aspect of Judge Roberts' self-described judicial philosophy is his view that judges must narrowly define their constitutional role in deciding "cases and controversies" in order to avoid any infringement of the powers assigned to other branches of government. Early in his career, for example, Roberts wrote a memo to then-Attorney General William French Smith in which he criticized the Carter administration's policy of "not raising standing challenges in the most vigorous fashion . . . particularly . . . in the environmental area."[25] Roberts urged Smith to inform reporters that "it will be our policy to raise standing and other justiciability challenges to the fullest extent possible."[26]

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[21] *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).
[22] Jonathan Ringel, *High Court to tackle Wide-Ranging Docket*, Fulton County Daily Report, September 25, 2000.
[23] Marcia Coyle, *Playing Variations on Legal Themes, federalism, First and Fourth Amendment Cases Dominate Those to be Heard This Term*, The National Law Journal, Volume 23, Number 6, October 2, 2000.
[24] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).
[25] Memorandum from John G. Roberts to William French Smith dated Nov. 21, 1981.
[26] *Id.* Roberts' proposed policy statement was sweeping and unqualified—it was not limited to cases in which the Justice Department believed there was no standing or even to cases where there was a serious question. Challenging standing "in the most vigorous fashion" and "to the fullest extent possible" delays decisions that block illegal pollution and other conduct and chills access to courts by individuals and small non-profit groups who have standing

Roberts' views on environmental standing are most fully explained in his 1993 Duke Law Journal comment on the *Lujan v. Defenders of Wildlife* (hereinafter *Defenders*) decision.[27] In *Defenders*, Justice Scalia's majority opinion denied standing to citizens concerned about the destruction of endangered species stemming from U.S. activities abroad. In his article, Roberts provided a robust defense of the opinion, stating that the ruling in *Defenders* was "hardly a surprising result under the Court's standing precedents, given the vague and amorphous nature of the plaintiff's claims of injury."[28]

But the ruling in *Defenders* was a bitter surprise for citizens seeking to enforce environmental laws and the ruling has raised the burden and costs of demonstrating standing in every subsequent citizen suit. It was also a surprise to Justice O'Connor, who joined a dissent by Justice Blackmun that ends as follows: "I cannot join the Court in what amounts to a slash-and-burn expedition through the law of environmental standing."[29] Roberts' comment that Congress may not ask the Courts to exercise "oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue,"[30] similarly suggests he may not fully appreciate the critical role citizen suits have played in the success of environmental law. It is also interesting to note that Justice Scalia appears to have picked up on Roberts' "John Q. Public" reference in a recent dissent in an environmental standing case.[31]

More broadly, Roberts' article on *Defenders* asserts that standing is "properly regarded as a doctrine of judicial self-restraint" and "(s)eparation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches."[32] Roberts specifically agreed with Scalia's argument in *Defenders* that courts should rigorously enforce Article III case or controversy limitations to avoid infringement upon the executive's authority under Article II.[33] In 1990, Roberts made a nearly identical argument on behalf of the United States in *Lujan v. National Wildlife Federation.*[34]

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but cannot afford to respond to the Justice Department's aggressive discovery requests and lengthy briefs. A few years later, as an Associate Counsel in the Reagan White House, Roberts continued his focus on restricting access to courts rather than ensuring or expanding it. In an April 28, 1983 memorandum, Roberts declared that 42 USC § 1983 "abuse really has become the most serious federal court problem" and only suggested delaying attempts to restrict it for political reasons: "the general sense is that it would be impolitic to touch the provision, which authorizes most actions for civil rights violations, until after 1984" [a presidential election year].

[27] John G. Roberts, Jr., *Article III Limits on Statutory Standing,* 42 Duke L.J. 1219, 1221 (1993).

[28] *Id.* at 1221.

[29] 504 U.S. 555, 606 (1992) (Blackmun, J. dissenting).

[30] John G. Roberts, Jr., *Article III Limits on Statutory Standing,* 42 Duke L.J. 1219, 1221 (1993).

[31] See *Friends of the Earth v. Laidlaw* (2000) 528 U.S. 167, 209 & n.2 (Scalia, J. dissenting) ("[b]y permitting citizens to pursue civil penalties payable to the Federal Treasury, the [Clean Water] Act … turns over to private citizens the function of enforcing the law.… [A]ccording the Chief Executive of the United States the ability to intervene does no more than place him on a par with **John Q. Public** who can intervene -- whether the government likes it or not -- when the United States files suit.")

[32] John G. Roberts, Jr., *Article III Limits on Statutory Standing,* 42 Duke L.J. 1219, 1221 (1993).

[33] Id. at 1230. ("Separation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches. Dean Nichol loses sight of this reality in criticizing Justice Scalia's

These views strongly suggest that Roberts would agree with Justice Scalia and decide that private attorney general suits, which allow citizens to sue polluters to win compliance with federal environmental safeguards, are an unconstitutional infringement on the executive's power under Article II to prosecute federal laws.

In a 2000 case called *Friends of the Earth v. Laidlaw Environmental Services, Inc.,*[35] a majority of the Supreme Court (including Justice O'Connor) rejected a challenge to Congress's ability to deputize citizens to help enforce environmental laws. In a key portion of her opinion for the Court, Justice Ginsburg rejected *Laidlaw's* challenge to private-attorneys-general suits, finding that, because of the deterrent effect, a fine paid to the federal treasury provides sufficient "redress" for environmental plaintiffs to meet the redressability element of Article III standing.[36] *Laidlaw* thus appears to have put to rest the notion that the "cases" or "controversies" requirement of Article III of the Constitution blocks Congress' ability to empower citizens to sue to enforce environmental laws.

A concurrence by Justice Kennedy[37] and a dissent by Justices Scalia and Thomas[38] express a willingness to consider the same constitutional question under a different constitutional lens: Article II of the Constitution.[39] While not explained in detail in *Laidlaw,* this Article II "unitary executive" theory is fleshed out in Justice Scalia's opinion for the Court in *Printz v. United States,*[40] and in Scalia's dissent in *Morrison v. Olson.*[41] Applied in the citizen suit

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invocation of the "take Care" clause of Article II. * * * The Article III standing requirement that the judiciary act only at the behest of a plaintiff suffering injury in fact, however, ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive's* responsibility of taking care that the laws be faithfully executed.").

[34] See Brief for Petitioners, *Lujan v. National Wildlife Federation,* 1989 U.S. Briefs 640 (1990)(arguing that if NWF was permitted to bring a suit on vague standing allegations resulting in a nationwide preliminary injunction, federal courts would "inevitably assume managerial responsibilities for wide ranging federal activities – activities whose administration properly belongs in the Executive Branch.") ("Managing a litigation of such dimension *aggregates expansive powers in the court, and withdraws them, correspondingly, from the executive officials* charged by law with the day-to-day responsibility for administering the public lands. Standing doctrines are designed to avoid such clashes between judicial and executive authority. Under our constitutional system, the judicial power may be invoked to resolve controversies between persons adversely affected by a particular governmental action and the officials who took that action, not to supervise public officials' general conduct of their duties.") (Emphasis added.).

[35] 528 U.S. 167 (2000).

[36] Id. at 185.

[37] Kennedy's short concurrence in *Laidlaw* states "Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States. The questions presented in the petition for certiorari did not identify these issues with particularity; and neither the Court of Appeals in deciding the case nor the parties in their briefing before this Court devoted specific attention to the subject. In my view these matters are best reserved for a later case. With this observation, I join the opinion of the Court." 528 U.S. at 197.

[38] *Id.* at 209-11.

[39] *Id.* at 197-215 (Kennedy, J. concurring, Scalia, J. and Thomas, J. dissenting).

[40] 521 U.S. 898, 921 (1997).

context, the argument would go as follows: Article II of the Constitution gives the President the power to "take care" that U.S. laws are faithfully executed. This gives the power to enforce the laws solely to the executive branch. Laws that deputize private attorneys general to petition courts for enforcement infringe on that exclusive executive power, turning it over to private citizens and the courts that hear their cases.

It is impossible to firmly predict how a Justice Roberts would decide an Article II challenge to a private-attorney-general action. But Judge Roberts has argued that separation of powers is a "zero sum game" and that Article II should inform Article III and should mandate a narrow interpretation of standing principles to avoid encroachment on executive authority. It is not too great of a leap to presume that he would decide that separation-of-powers concerns prohibit Congress from deputizing citizens to help enforce environmental safeguards.[42]

Citizen-suit provisions are among the most important and successful innovations of modern environmental law. These suits have ensured that environmental laws are enforced even where there is no will in Washington to take on corporate polluters. But these suits and the future of our environmental safeguards hang in the balance. As in many areas of the law, Justice O'Connor was a critical swing vote in environmental standing cases.[43] Most importantly, she (like Chief Justice Rehnquist, who may also retire in the near future) was a member of the *Laidlaw* majority, meaning the addition of Judge Roberts to the Court could alter the direction of the Court's environmental standing case law. The Senate needs to know if Roberts' views on standing and separation of powers are so rigid that he would be likely to undermine the enforcement of our most important and successful environmental statutes.

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[41] 487 U.S 654, 697 (1985) (Scalia J., dissenting).

[42] Judge Roberts' majority opinion in *Taucher v. Brown-Hruska*, 396 F.3d 1168 (D.C. Cir. 2005), also raises concerns about how he will rule on access to courts. In *Taucher*, Judge Roberts reversed a district court's award of attorney's fees under the Equal Access to Justice Act (EAJA) to a public-interest law firm that had successfully represented a publisher *pro bono* against the Commodities Futures Trading Commission (CFTC). EAJA provides for the award of attorneys' fees to a party in a lawsuit who prevails against the U.S. government, unless the government's legal position in the case was "substantially justified." Although he rejected CFTC's arguments against paying plaintiff's fees, Judge Roberts found that CFTC's position in the underlying case was substantially justified on other grounds. In a sharp dissent, Judge Harry Edwards argued that the court had exceeded its proper scope of review and had not given proper deference to the lower court, under an abuse-of-discretion standard.

[43] O'Connor voted with the majority in *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000) and in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); she dissented, along with Justice Blackmun in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); she voted with the majority in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

We appreciate your consideration of our views and stand ready to work with you and your staffs to ensure that Judge Roberts' confirmation process is fair and complete. Moreover, we believe that the burden is on Judge Roberts to demonstrate to the Senate during the confirmation process that he is committed to being a fair and neutral arbiter of the environmental cases that come before the Supreme Court.

Sincerely,

Doug Kendall
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cc: Members, Senate Committee on the Judiciary