



Roberts at 10:

Roberts's Environmental Law Record: It's Not Good, But Don't Count Him Out

By Brianne Gorod

I. Overview

Many of the snapshots in our [yearlong](#) “Roberts at 10” project have concluded that Chief Justice John Roberts has consistently voted for conservative outcomes in significant areas of the law. For much of Robert’s first decade as Chief Justice, his record on environmental law—the topic of this snapshot—followed the same pattern: in every major environmental law case that divided the Supreme Court during Roberts’s first eight years as Chief Justice, Roberts voted against environmental protection, including in the most significant case decided in that period—*Massachusetts v. EPA*.¹ Roberts’s ninth Term was different, however, as he voted for two significant environmental victories in *EPA v. EME Homer City Generation* and *Utility Air Regulatory Group v. EPA* (“UARG”), both cases about Environmental Protection Agency (“EPA”) regulation under the Clean Air Act.² Against the backdrop of many votes to limit environmental regulation, there’s only so much one can read into Roberts’s votes in those two cases, but at a minimum, they do suggest that no one should count out Roberts’s vote as the Court prepares to hear *Michigan v. EPA*, another Clean Air Act case that could affect the EPA’s ability to regulate hazardous air pollutants emitted by electric utilities, later this month.

It’s perhaps not surprising that the story of Roberts’s decisionmaking in environmental law cases is at least somewhat complicated. In the lead-up to his confirmation, Roberts came under significant attack from many members of the environmental community, who feared that his views on federal power were likely to pose an obstacle to robust enforcement of the nation’s environmental laws. Roberts aggressively defended his record on this score, repeatedly noting at his confirmation hearing that, as an attorney, he’d argued cases on both sides of the issue and assuring Senators that he could be counted on to give cases presenting environmental issues a “fair hearing.”

This snapshot will focus on two broad categories of environmental law cases: (1) those that affect the ability of individuals and organizations to sue to prevent or redress environmental harm, and (2) those that affect the ability of governments to regulate pollutants

¹ 549 U.S. 497 (2007).

² While the EPA lost on one question in *UARG*, and the opinion included some language that was harshly critical of the agency, we nonetheless believe that *UARG* should be considered an environmental victory, given that the EPA prevailed on the question in the case that was more important from an environmental policy perspective. See *infra* notes 52-56 and accompanying text.

and polluters. Unfortunately, Roberts's votes in the vast majority of environmental cases that have divided the Court during his tenure thus far have called into question the assurances he gave at his confirmation hearing. Moreover, his more general record on standing suggests little room for optimism on that front, as one of our previous [snapshots](#) discusses. But Roberts's most recent decisions on the second front suggest that while Roberts's environmental law record thus far has been bad, those who favor strong environmental protections still shouldn't count him out going forward.

II. Confirmation Hearing

John Roberts had only served on the United States Court of Appeals for the D.C. Circuit for little more than two years when he was elevated to the Supreme Court, but during that time he wrote a short opinion that garnered significant attention after his nomination to the High Court. In *Rancho Viejo, LLC v. Norton*, the D.C. Circuit considered whether the Endangered Species Act could be constitutionally applied to prevent a construction project that the U.S. Fish and Wildlife Service had determined was “likely to jeopardize the continued existence of the arroyo southwestern toad, which the Secretary of the Interior had listed as an endangered species since 1994.”³ A three-judge panel of the D.C. Circuit rejected the challenge to the Act's application, but two judges—Judge David Sentelle and then-Judge John Roberts—dissented when the full court declined to re-hear the case *en banc*.⁴ Roberts issued a written dissent, criticizing the panel's decision as seemingly “inconsistent with” Supreme Court precedent.⁵ Although leaving open the possibility that there might be “alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent,” Roberts clearly found objectionable the fact that “[t]he panel's approach in this case 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 regulating ‘Commerce . . . among the several States.’”⁶

When Roberts was nominated to the Supreme Court roughly two years later, that case—often referred to as the “hapless toad” case after Roberts's description in his dissent—became the subject of frequent discussion. To many in the environmental community, it was cause for alarm, suggesting that Roberts not only took a narrow view of federal power under the Commerce Clause, but also that he was dismissive of environmental concerns. One article on the topic suggested the latter point in its first sentence: “It's only a ‘hapless toad,’ in John Roberts' words.”⁷ The article went on to quote one law professor who noted that “[t]he issue Roberts raised is ‘huge in the broader context of all environmental laws,’” and an environmental advocate who worried that “[t]his case calls into serious question [Roberts's]

³ 323 F.3d 1062, 1064 (D.C. Cir. 2003).

⁴ *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003) (per curiam).

⁵ *Id.* at 1160 (Roberts, C.J., dissenting).

⁶ *Id.*

⁷ Bob Egelko, “*Hapless Toad*” Case Shows How Court Nominee Thinks, S.F. GATE (Aug. 1, 2005), <http://www.sfgate.com/green/article/Hapless-toad-case-shows-how-court-nominee-thinks-2619236.php>.

views on the scope of the (Constitution's) commerce clause . . . which might have serious implications for other environmental laws”⁸

At his confirmation hearing before the Senate Judiciary Committee, Roberts was repeatedly asked about the “hapless toad” case, as well as a law review article he had written that defended a then-recent Supreme Court decision that had made it more difficult for environmental organizations to sue to prevent harm to the environment.⁹ In response to all of these questions, Roberts steadfastly resisted any suggestion that he was someone that environmental advocates should fear on the bench.

About the “hapless toad” case, for example, Roberts emphasized that he thought his court should have revisited the case to “look at other grounds that were also under the Commerce Clause” because “another circuit court ha[d] suggested pointedly that the approach in the panel opinion was inconsistent with the Supreme Court.”¹⁰ As he explained it, “if there was another basis for sustaining the Endangered Species Act that was not inconsistent in the view of another circuit court, that we ought to look at that and try to do it” because that is the “restrained and minimalist approach.”¹¹ He emphasized: “I did not take the position that it was outside the scope of the Commerce Clause.”¹² He also explained that his dissenting opinion should not be read to suggest he would impose limits on other environmental laws. In response to one Senator’s concern that the opinion “sets a prelude for the Clean Water Act and the Clean Air Act,” Roberts noted that “in those areas . . . the commercial impact of pollution, those are things that I think are not going to present as difficult an issue remotely as if you look at each individual species.”¹³

About his law review article, Roberts emphasized that environmental harms can provide grounds for standing and suggested that people should not read the article too broadly. “Well, one thing I would tell them to do is read the rest of the *Duke Law Journal* article, because one thing it makes—point it makes is that environmental interests, it goes on to say aesthetic interests, those are all protected under the law, and that one reason courts should insist that those who bring suit have standing—that’s the issue—that are actually injured, is because standing can encompass certainly environmental harms.”¹⁴ Roberts further explained that “[t]he issue that was being addressed in the *Duke Law Journal* article was whether anyone

⁸ *Id.* (parenthetical in original).

⁹ John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993) (defending the Court’s decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

¹⁰ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 226 (2005), available at <http://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/content-detail.html>.

¹¹ *Id.*

¹² *Id.* at 226; see *id.* at 405.

¹³ *Id.* at 406.

¹⁴ *Id.* at 156.

could bring a lawsuit just because they are interested in the issue, or whether the plaintiffs had to show that they had been injured.”¹⁵

Finally, Roberts repeatedly emphasized at his hearing that during his career as an attorney, he had regularly helped attorneys on both sides of contested issues, including environmental cases, at one point specifically invoking “the environmental interests [he] represented in the *Tahoe* case.”¹⁶ As he explained at length, “as far as someone going into Court and looking to see why they would expect to get a fair hearing from me, I think—and I can answer this with respect to the court I am on now. It’s hard for me to imagine what their case is about that I haven’t been on their side at some point in my career. If it’s somebody who’s representing welfare recipients who have had their benefits cut off, I’ve done that. If it’s somebody who’s representing a criminal defendant who’s facing a long sentence in prison, I’ve done that. If it’s a prosecutor who’s doing his job to defend society’s interest against criminals, I have been on the side of the prosecution. If it’s somebody who’s representing environmental interests, environmentalists in the Supreme Court, I’ve done that. If it’s somebody who’s representing the plaintiffs in an antitrust case, I’ve been in that person’s shoes; I’ve done that. If it’s somebody representing a defendant in an antitrust case, I’ve done that as well.”¹⁷

Thus, over the course of his confirmation hearing, Roberts repeatedly assured members of the environmental community that they would get a fair hearing from him. Unfortunately, years of rulings against the environmental community and rulings limiting access to the courts to enforce environmental regulations call that assurance into question, as the next section discusses.

III. Environmental Cases During John Roberts’s First Decade on the Court

A. Standing and Injunctive Relief

In the context of environmental law, the Court often faces questions not only about the meaning of various environmental statutes, but also about which parties can seek relief—and what kind of relief—pursuant to those statutes. There have been several such cases during the first decade of John Roberts’s tenure as Chief Justice.

In *Massachusetts v. EPA*, the most significant of these cases, the Court held, 5-4, that Massachusetts had standing to challenge the EPA’s failure to regulate greenhouse gases under

¹⁵ *Id.*; see *id.* at 343 (“The Supreme Court has explained in cases like *Sierra Club v. Morton*, it can be aesthetic, it can be environmental, it can cover a wide range of injuries, but you do have to show some injury that separates you from the general public, so you’re just not voicing a gripe, you’re trying to get a case decided. That’s the importance of the standing doctrine.”).

¹⁶ *Id.* at 392.

¹⁷ *Id.* at 388-89; see *id.* at 166 (“I regularly handled moot courts for people. I did one for minority plaintiffs in a voting rights case out of Louisiana. I did one challenging environmental effects in Glacier Bay and another one in the Grand Canyon.”); *id.* at 392 (noting “environmental interests in Glacier Bay that I represented or in the Grand Canyon on a pro bono basis”).

the Clean Air Act.¹⁸ As we discussed more fully in our [snapshot](#) on access to the courts, Chief Justice Roberts wrote a forceful dissent in that case in which he suggested that standing could never exist to redress global warming. According to Roberts, “‘particularized injury’” is a requisite to standing, and “[t]he very concept of global warming seems inconsistent with this particularization requirement.”¹⁹

Two years later, in *Summers v. Earth Island Institute*, the Court again considered the standing of plaintiffs seeking to prevent alleged environmental harm. In this case, also discussed at greater length in our access to the courts snapshot, the Court held, again 5-4, that environmental organizations did not have standing to challenge the decision of the United States Forest Service to exempt salvage sale of timber on hundreds of acres of fire-damaged federal land from the notice, comment, and appeal process set forth in the Forest Service Decisionmaking and Appeals Reform Act.²⁰ According to the majority (in an opinion authored by Justice Scalia and joined by Chief Justice Roberts), the environmental organizations and their members could not demonstrate that they had suffered a “concrete harm.”²¹ In a dissent, Justice Breyer (joined by Justices Stevens, Ginsburg, and Souter) countered that the conclusion that the environmental organizations and their members suffered no “‘concrete injury’ when the Forest Service sells timber for logging on ‘many thousands’ of small . . . woodland parcels without following legally required procedures” is “counterintuitive.”²²

Finally, in *Winter v. Natural Resources Defense Council, Inc.*, the Court considered not standing, but the standard by which plaintiffs can secure injunctive relief—an important tool for preventing or limiting environmental harm. In that case, environmental organizations sought to enjoin certain Navy training exercises that they alleged harmed marine mammals on the ground that the Navy had failed to complete an Environmental Impact Statement.²³ In a 5-4 decision, the Court vacated the injunction imposed by the lower court to the extent the Navy had challenged it. According to the Court, in an opinion authored by Chief Justice Roberts, the Ninth Circuit had improperly required the plaintiffs to show only a possibility of irreparable harm, rather than a likelihood of it, and that “even if plaintiffs have shown irreparable injury . . . any such injury is outweighed by the public interest and the Navy’s interest in effective, realistic training of its sailors.”²⁴

In dissent, Justice Ginsburg (joined by Justice Souter) explained her belief that the Court’s opinion undermined the ability of environmental plaintiffs to vindicate the law’s requirement that agencies complete Environmental Impact Statements before acting. According to Ginsburg, “Because an EIS is the tool for *uncovering* environmental harm,

¹⁸ 549 U.S. 497 (2007).

¹⁹ *Id.* at 541 (Roberts, C.J., dissenting).

²⁰ 555 U.S. 488 (2009).

²¹ *Id.* at 495.

²² *Id.* at 501 (Breyer, J., dissenting).

²³ 555 U.S. 7 (2008).

²⁴ *Id.* at 22, 23.

environmental plaintiffs may often rely more heavily on their probability of success than the likelihood of harm,” meaning that the Court imposed too high a burden on the plaintiffs to show a likelihood of harm. According to Justice Ginsburg, “[t]he Court is correct that relief is not warranted ‘simply to prevent the possibility of some remote future injury,’” but “the injury need not have been inflicted when application is made or be certain to occur; a strong threat of irreparable injury before trial is an adequate basis.”²⁵

In short, during John Roberts’s first decade as Chief Justice, he has repeatedly voted to make it more difficult for environmental organizations to sue and to seek injunctive relief to prevent environmental harm. Given Roberts’s more general views on access to the courts, these votes are not surprising. Unfortunately, they are also consistent with many of his votes on the merits in environmental law cases, as the next section discusses.

B. Regulation

Substantive environmental law cases can touch upon a wide variety of federal statutes and regulations, but despite the diversity of legal issues they can present, the Chief Justice’s votes have (until last Term) been remarkably consistent.

One of the first significant environmental law cases heard by the Roberts Court came very early in Roberts’s tenure. In 2006, in *Rapanos v. United States*, the Court held, in a 4-1-4 opinion, that the federal government could not regulate a landowner’s decision to backfill wetlands on his land because such wetlands were not “waters of the United States” within the meaning of the Clean Water Act.²⁶ In an opinion written by Justice Scalia (and joined by Chief Justice Roberts²⁷), a plurality of the Court emphasized the burden that federal regulation imposes, describing the discretion enjoyed by the U.S. Army Corps of Engineers in determining whether to grant permits to fill “waters of the United States” as akin to that of “an enlightened despot”²⁸ and noting that “[t]he enforcement proceedings against [the landowner] are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations.”²⁹ By adopting a more narrow definition of “waters of the United States” than that used by the federal government, the Court imposed limits on what it clearly

²⁵ *Id.* at 51-52 (Ginsburg, J., dissenting) (citation omitted). Moreover, as Justice Breyer (joined in part by Justice Stevens) explained in his separate opinion concurring in part and dissenting in part, the Court could have left some measures in place to mitigate environmental harms because “the Navy’s past use of mitigation conditions makes clear that the Navy can effectively train under *some* mitigation conditions.” *Id.* at 42 (Breyer, J., concurring in part and dissenting in part).

²⁶ 547 U.S. 715 (2006).

²⁷ Roberts also wrote separately to criticize the Army Corps of Engineers for failing to complete a rulemaking that had been initiated following an earlier Supreme Court decision rejecting as too broad the Army Corps’s view of its authority. *Id.* at 758 (Roberts, C.J., concurring) (discussing *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng’rs*, 531 U.S. 159 (2001)).

²⁸ *Id.* at 721; see *id.* (“[O]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.” (quoting David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 81 (2002))).

²⁹ *Id.* at 722.

perceived to be an overly expansive regulatory state. Notably, Justice Kennedy concurred on narrower grounds, but Chief Justice Roberts chose to join Justice Scalia's broad opinion with its language that was harshly critical of the agency's exercise of its regulatory authority.

In a dissenting opinion, Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer) highlighted the environmental stakes: "The broader question [presented in the case] is whether regulations that have protected the quality of our waters for decades, that were implicitly approved by Congress, and that have been repeatedly enforced in case after case, must now be revised in light of the creative criticisms voiced by the plurality and Justice [Kennedy] today."³⁰ According to the dissenters, the "proper analysis [was] straightforward. The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term 'waters of the United States' is a quintessential example of the Executive's reasonable interpretation of a statutory provision."³¹

The following year, 2007, the Court considered two more significant environmental law cases. First, as noted earlier, the Court decided *Massachusetts v. EPA*—probably the most significant environmental case decided during Chief Justice Roberts's tenure to date. This case addressed the EPA's authority to regulate greenhouse gases under the Clean Air Act. Having decided 5-4—over Roberts's strong dissent—that the plaintiffs had standing to challenge the EPA's failure to regulate, the Court further held, also 5-4, and also over Roberts's dissent, that "[b]ecause greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,' . . . [the] EPA has the statutory authority to regulate the emission of such gases from new motor vehicles" and that its claim that it would be "unwise" to regulate "rest[ed] on reasoning divorced from the statutory text."³² In dissent, Justice Scalia (in an opinion joined by Roberts) criticized the majority for "distort[ing] the outcome of this litigation" based on its "alarm over global warming."³³

Second, in *National Association of Home Builders v. Defenders of Wildlife*, the Court held, 5-4, that the Environmental Protection Agency had lawfully transferred to state officials its authority to administer the state's National Pollution Discharge Elimination system (NPDES) permitting program.³⁴ According to the Court, in an opinion authored by Justice Alito (and joined by Roberts), the EPA did not need to consider whether the transfer of the program would likely jeopardize an endangered or threatened species, notwithstanding a provision of the Endangered Species Act ("ESA") requiring agencies to "insure" that a proposed agency

³⁰ *Id.* at 787-88 (Stevens, J., dissenting).

³¹ *Id.* at 788 (Stevens, J., dissenting).

³² 549 U.S. at 532.

³³ *Id.* at 560 (Scalia, J., dissenting).

³⁴ 551 U.S. 644 (2007).

action would be unlikely to do so.³⁵ In a dissenting opinion, Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer) observed that the Court had previously held that the ESA “‘reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies,’” and that Chief Justice Burger’s “exceptionally thorough and admirable opinion [in that prior case] explained that [the relevant provision in the ESA] ‘admits of no exception.’”³⁶ The dissent accused the Court of “whittl[ing] away at Congress’ comprehensive effort to protect endangered species from the risk of extinction and fail[ing] to give the ESA its intended effect” by “[c]reating precisely such an exception.”³⁷

In the years that followed, the same trend continued: whenever the Court was divided in an environmental case, Chief Justice Roberts was part of a majority that endorsed limited government regulation at the cost of potentially significant harms to the environment. In 2009, for example, in *Entergy Corp. v. Riverkeeper, Inc.*, the Court considered a challenge by environmental groups and various states to regulations promulgated pursuant to the Clean Water Act to govern large power plants.³⁸ According to the environmental groups, the relevant statute did not permit the EPA to engage in cost-benefit analysis in promulgating the regulations. The Court, in a 5-1-3 decision, disagreed. In an opinion authored by Justice Scalia (and joined by Roberts), the Court held that cost-benefit analysis was permissible under the text of the statute and noted the agency’s longstanding view that while the statute does not “‘require cost-benefit analysis, it is also not reasonable to ‘interpret [it] as requiring use of technology whose cost is wholly disproportionate to the environmental benefit to be gained.’”³⁹ In dissent, Justice Stevens (joined by Justices Souter and Ginsburg) described how “[a]llowing cost-benefit analysis . . . fundamentally weakens the [statute’s] mandate” because “cost-benefit analysis often, if not always, yields a result that does not maximize environmental protection.”⁴⁰ Further, as he explained, “[u]nless costs are so high that the best technology is not ‘available,’ Congress has decided that they are outweighed by the benefits of minimizing adverse environmental impact.”⁴¹

Also in 2009, in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, the Court held, in a 6-3 decision authored by Justice Kennedy (and joined by Roberts), that the Army Corps of Engineers, rather than the Environmental Protection Agency, had authority to issue a permit for the discharge of fill material, and that the Corps of Engineers’ issuance of a permit was lawful.⁴² In a dissent, Justice Ginsburg made clear the ramifications of the Court’s decision to allow 210,000 gallons per day of mining waste to be discharged into a lake in a national forest: “The ‘tailings slurry’ would contain concentrations of aluminum, copper, lead, and

³⁵ *Id.* at 649.

³⁶ *Id.* at 674 (Stevens, J., dissenting) (quoting *TVA v. Hill*, 437 U.S. 153, 185, 173 (1978)).

³⁷ *Id.*

³⁸ 556 U.S. 208 (2009).

³⁹ *Id.* at 224 (quoting *In re Pub. Serv. Co. of N.H.*, 1 E.A.D. 332, 340 (1977) (emphasis in original)).

⁴⁰ *Id.* at 245, 237 (Stevens, J., dissenting).

⁴¹ *Id.* at 237 (Stevens, J., dissenting).

⁴² 557 U.S. 261 (2009).

mercury. . . . It is undisputed that the discharge would kill all of the lake's fish and nearly all of its other aquatic life.”⁴³ She went on to explain that “Congress announced in the [Clean Water] Act itself an ambitious objective: to eliminate, by 1985, the discharge of all pollutants into the Nation's navigable waters,”⁴⁴ and “[t]he use of waters of the United States as ‘settling ponds’ for harmful mining waste, the Court of Appeals correctly held, is antithetical to the text, structure, and purpose of the Clean Water Act.”⁴⁵

Finally, in 2013, in *Koontz v. St. Johns River Water Mgmt. Dist.*, a divided Court again decided a significant case with potential environmental implications, and again Chief Justice Roberts voted against the environmental interests in the case. In that case, the Court held, 5-4, in an opinion authored by Justice Alito (and joined by Roberts) that when governments engage in land-use regulation, they must show that there is a nexus and rough proportionality between the demands on the landowner and the effects of the proposed land use even when the government simply denies a permit.⁴⁶ As Justice Kagan noted in dissent, the Court’s “new rule . . . threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny.”⁴⁷ The inevitable result of this constitutional scrutiny, as CAC noted at the time, will be to make it “more difficult for state and local officials to strike an appropriate balance between protecting the environment and promoting development.”⁴⁸

In short, looking at the first eight years of John Roberts’s tenure as Chief Justice, the story of his votes in divided environmental law cases would have been an uncomplicated one: vote after vote against environmental protection, weakening critical environmental laws passed by Congress. But then there was John Robert’s ninth year as Chief Justice, when the Court heard two more significant environmental law cases, and, in both, Roberts voted to uphold important environmental protections.

In *EPA v. EME Homer City Generation, L.P.*, the Court, in a 6-2 decision, upheld a rule promulgated by the EPA pursuant to the Clean Air Act that was enacted to limit the air pollution emitted in upwind states that causes harm in downwind states.⁴⁹ In an opinion authored by Justice Ginsburg (and joined by Roberts), the Court discussed the significant problem of interstate air pollution and the “complex challenge” it poses for “environmental regulators” before concluding that the “text of the statute supports EPA’s position.”⁵⁰ Justice Scalia wrote a scathing dissent (joined by Justice Thomas) that accused the majority of “approv[ing the]

⁴³ *Id.* at 296-97 (Ginsburg, J., dissenting).

⁴⁴ *Id.* at 298.

⁴⁵ *Id.* at 303.

⁴⁶ 133 S. Ct. 2586 (2013).

⁴⁷ *Id.* at 2604 (Kagan, J., dissenting).

⁴⁸ *Prior Cases: Koontz v. St. Johns River Water Management District (U.S. Sup. Ct.)*, CONST. ACCOUNTABILITY CTR., <http://theusconstitution.org/cases/koontz-v-st-johns-river-water-management-district> (last visited Mar. 12, 2015).

⁴⁹ 134 S. Ct. 1584 (2014).

⁵⁰ *Id.* at 1593, 1600.

undemocratic revision of the Clean Air Act” based on what he described as a “justification . . . so feeble that today’s majority does not even recite it, much less defend it.”⁵¹

Just two months later, Chief Justice Roberts joined another decision that conferred a significant (if partial) win on the environmental community. In *Utility Air Regulatory Group v. EPA*, the Court considered a challenge to the EPA’s decision to apply a specific Clean Air Act permitting program to stationary sources of greenhouse gas emissions.⁵² The Court, in a 7-2 decision authored by Justice Scalia (and joined by Roberts), held that the EPA had the authority to regulate greenhouse gases from stationary sources already subject to the Clean Air Act’s permitting requirements. Although the Court rejected an alternative reading of the Clean Air Act that the EPA proposed, the decision gave the EPA, as Justice Scalia said when he read his decision from the bench, “almost everything it wanted in this case.”⁵³ As CAC put it at the time, the decision was a “97% victory for the environment.”⁵⁴ To be sure, there were some troubling elements to Scalia’s opinion: for example, the conclusion that the Clean Air Act’s “any air pollutant” language was ambiguous seemed odd in light of *Massachusetts v. EPA*, not to mention the term’s capacious definition.⁵⁵ But what is perhaps most notable for present purposes is that the Chief Justice chose to join the majority and not Justice Alito’s dissent (joined by Thomas) that reiterated Alito’s belief that “*Massachusetts v. EPA* was wrongly decided” and took the position that *UARG* “further expose[d] the flaws with that decision.”⁵⁶ Instead, by joining the Court’s opinion, Roberts indicated his willingness to accede (at least in part) to reasonable interpretations by the EPA of a statute it is charged with administering.

In short, although Chief Justice Roberts’s record on the environment has been far from good in his first decade on the Supreme Court—indeed, it’s been quite bad—his votes in *EME Homer* and in *UARG* nonetheless suggest that he should not be automatically counted out when it comes to cases involving the environment. Given that, Court watchers will no doubt be interested to see what he does this Term in *Michigan v. EPA*,⁵⁷ an important case about the EPA’s ability to regulate hazardous air pollutants (like mercury and arsenic) emitted by electric utilities. If Roberts’s votes in *EME Homer* and *UARG* reflect an openness to giving agencies some discretion to carry out their statutory commands as they interpret them (an openness that will, after all, only sometimes lead to stronger environmental protections), then he should agree that the EPA has correctly understood its statutory authority to regulate hazardous air pollutants in *Michigan*. That said, there are certainly cases (environmental and otherwise) in

⁵¹ *Id.* at 1610 (Scalia, J., dissenting).

⁵² 134 S. Ct. 2427 (2014).

⁵³ Doug Kendall & Mei-Wah Lee, *The Supreme Court’s Latest Greenhouse-Gas Ruling Is a 97% Victory for the Environment*, CONST. ACCOUNTABILITY CTR. (Jun 24, 2014), <http://theusconstitution.org/text-history/2718/supreme-court%E2%80%99s-latest-greenhouse-gas-ruling-97-victory-environment>.

⁵⁴ *Id.*

⁵⁵ 134 S. Ct. at 2439. Justice Scalia’s opinion was also colorfully critical of the EPA and its efforts to regulate. See *id.* at 2446 (“EPA asserts newfound authority to regulate millions of small sources We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery.”).

⁵⁶ *Id.* at 2455 (Alito, J., dissenting).

⁵⁷ Nos. 14-46, 14-47, 14-49 (Sup. Ct.).

which Chief Justice Roberts has made clear that he's not always a fan of agency discretion,⁵⁸ which makes predicting Roberts's vote in *Michigan* difficult. In sum, while the EPA and environmental advocates certainly shouldn't count on Roberts's vote in *Michigan*, they shouldn't count it out either.

IV. Conclusion

When John Roberts was nominated to the Supreme Court, his record on the environment was the subject of significant discussion. At the same time that many in the environmental community sounded the alarm, Roberts pointed, in part, to his significant work as an advocate in one environmental case in an effort to show that the environmental community could expect to receive a fair hearing from him—on that issue and more generally. For much of his first decade on the Court, Roberts's votes have called those assurances into question, as he has consistently voted against stronger environmental protections in the most controversial cases involving environmental interests. Last Term, though, he joined two big decisions that were environmental wins. With another significant environmental case on the Court's docket this Term—and more sure to come in the near future—Roberts will no doubt have additional opportunities to weigh in on the meaning and proper application of the Nation's environmental laws. While it seems very unlikely that Chief Justice Roberts's record in environmental law cases will end up being good, his vote still shouldn't be counted out.

⁵⁸ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting) ("My disagreement with the Court is fundamental. It is also easily expressed: A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference."); see Tom Donnelly & Doug Kendall, *Scalia vs. Roberts*, SLATE (May 24, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/scalia_vs_roberts_conservatives_face_off_on_the_supreme_court.html (discussing *City of Arlington* and how "Roberts decried the government for its 'thousands of pages of regulations' and agencies such as the FCC for 'poking into every nook and cranny of daily life'").