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How the Supreme Court Uses the Certiorari Process in the Ninth Circuit To Further Its Pro-Business Agenda: A Strange Pas de Deux with an Unfortunate Coda


Hope M. Babcock

Georgetown University Law Center, babcock@law.georgetown.edu

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How the Supreme Court Uses the Certiorari Process in the Ninth Circuit to Further Its Pro-Business Agenda: A Strange *Pas de Deux* with an Unfortunate Coda

Hope Babcock*

This Article examines the proposition that the Roberts Court has an unusually strong pro-business slant through the lens of the Court's certiorari process. The Article uses data from the grant or denial of certiorari petitions filed in environmental cases over a sixteen-year period in both the Ninth and District of Columbia Circuits, selected because each court hears a large number of environmental cases. The recent record in the Ninth Circuit, where environmentalists win below only to lose in the high court, or lose below and subsequently have their petitions denied, is quite different from that in the D.C. Circuit. In the D.C. Circuit, during the same period, the high court has not reversed a single positive environmental decision issued below. In fact, over the same period, there is no instance of the Court granting a petition where environmentalists won in the D.C. Circuit. This Article explores the proposition that the Ninth Circuit has become a unique and useful foil for the Court's conservative wing to advance its pro-business agenda through the manipulation of the certiorari process. The Article discusses various studies of the Roberts Court, which show that its decisions display a strong business bias, that the Court shapes its agenda through the certiorari process, and that the

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personal policy objectives and preferences of individual Justices play a critical role in that process. The Article also illustrates how the Court’s selection of cases signals its preferences, which in turn influences the agenda of issue-oriented lawyers and thus the dockets of lower courts. This interplay has resulted in the Ninth Circuit playing an unusually important role in the evolution of environmental and natural resources law, as its decisions, which generally favor citizen plaintiffs challenging the authority of agencies to issue permits and engage in planning activities, attract the attention of the business-leaning Roberts Court. This conclusion becomes even more apparent when the contrasting types of plaintiffs and cases filed in the D.C. Circuit are brought to the fore. The Article concludes that there is little on the immediate horizon short of a dramatic change in Court personnel that foretells a change in that story. Finally, the Article holds out only the faintest of hopes that exposing this record may change the behavior of those Justices to whom institutional credibility and public acceptance retain some importance.

“A cause is only a cause. It is not per se an excuse.”¹

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INTRODUCTION

Lately, commentators have argued over whether the Roberts Court has an unusually strong pro-business slant.² These analyses examine the Court’s decisions on the merits. This Article takes a different starting point by looking at an earlier stage in the Court’s process: the grant or denial of certiorari petitions. The analysis focuses only on environmental cases because of their perceived anti-business bias, which assumes that such cases increase the cost of conducting business activities and invite delay.³ The Article examines the

1. Stephen J. Morse, *Crazy Reasons*, 10 J. CONTEMP. LEGAL ISSUES 189, 208 (1999).

2. See *infra* Part II.

3. See *infra* pp. 15–16 (discussing how environmental litigation contributes to the cost of doing business).

Court's certiorari petition record in both the Ninth and District of Columbia Circuits over a sixteen-year period, eight of which occurred during John Roberts's tenure as Chief Justice. These two circuits were selected because each hears a large number of environmental cases.⁴ The recent record in the Ninth Circuit, where environmental plaintiffs win below only to lose in the high court, or lose below and subsequently have their petitions denied, is quite different from that in the D.C. Circuit. In fact, over the same time period, the high court did not reverse a single positive environmental decision issued by the D.C. Circuit—indeed, *Massachusetts v. EPA* stands as an example of the Court reversing an environmental loss in the D.C. Circuit⁵—and the review revealed no instance of the Court granting a petition where environmentalists won in the D.C. Circuit.

While this strange story might be viewed as merely a grudge between the Ninth Circuit and the Supreme Court, it is equally plausible to presume that there is something about the type of environmental cases that arise in the Ninth Circuit that does not sit well with the Supreme Court's conservative wing. Cases in the Ninth Circuit frequently involve citizen groups challenging federal programmatic land use planning decisions and direct challenges to agency authority, or lawsuits brought to stop some business activity, like mining or logging.⁶ Thus, the type of cases arising in the Ninth Circuit and the plaintiffs who are bringing them may be the pivotal factors in the Court's reaction, rather than only whether the lower court's decision had an environmentally favorable outcome.

The Court's recent grant of certiorari in *Pacific Rivers Council v. U.S. Forest Service*,⁷ which served as a catalyst for this analysis,⁸ may be an

4. Christopher Warshaw & Gregory E. Wannier, *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 HARV. L. & POL'Y REV. 289, 300 (2011) ("The Ninth and District of Columbia Circuits accounted for over half of all environmental cases brought in the appellate courts over the past thirty-five years.").

5. *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rev'd*, 549 U.S. 497 (2007); *see also* *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1593 (2014) (upholding the Environmental Protection Agency's (EPA) Cross-State Air Pollution Rule, thus reversing and remanding to the D.C. Circuit).

6. Challenges to agency planning are particularly bad for business because they slow down the first stage of the approval process and give the challenger multiple opportunities to challenge the decision-making process as it progresses, requiring the developer to expend significant resources protecting the agency's decision-making process and ultimately delaying project approval. These challenges also intrude into the agency's planning process.

7. *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 1582, *vacated as moot*, 133 S. Ct. 2843 (2013). In *Pacific Rivers Council*, an environmental organization successfully challenged a U.S. Forest Service (USFS) framework plan governing management of eleven national forests in the Sierra Nevada region of California on the grounds that it violated the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA). The Ninth Circuit found that plaintiffs had standing, that their lawsuit was ripe, and that the scope of the agency's programmatic environmental impact statement (EIS) was too narrow, thus raising both substantive and procedural issues of great importance to environmental plaintiffs. If the government's arguments had succeeded before the high court, a heightened pleading standard would have been applied to challenges to federal programmatic planning documents; the ripeness of NEPA claims against

example of this latter type of challenge. There was little reason for the Court to act positively on the petition, other than its desire to reverse a successful challenge to a U.S. Forest Service (USFS) framework plan governing management of eleven national forests in California's Sierra Nevada region.⁹ There was no conflict among the lower courts, and the issues raised in the case were not of substantial importance—two commonly given reasons as to why the Court accepts certiorari petitions.¹⁰ *Pacific Rivers Council* and other Ninth Circuit cases like it, therefore, present an opportunity to expose the interplay between at least one appellate court and the Supreme Court, and to examine this Article's thesis that the Court is using the certiorari process, particularly in the Ninth Circuit, to promote its pro-business agenda.¹¹

programmatic documents would no longer have been automatically assured; and federal agencies would have been able to hide from judicial review of formative decisions made in programmatic planning documents, delaying review until later stages, when such claims are no longer ripe. The case also gave the Court the opportunity to expand on its decision in *City of Arlington v. Federal Communications Commission*, 133 S. Ct. 1863 (2013), where the Court held that courts must apply the *Chevron* deference test to an agency's interpretation of any statutory ambiguity in its regulatory jurisdiction. If the Court had ruled as expected, it would have lessened the effectiveness of the National Forest Management Act and NEPA, making it more difficult for the public to hold federal land management agencies accountable for planning initiatives, and allowing agencies to self-determine the scope of their regulatory jurisdiction. See generally Hope M. Babcock, *Dismissal of the Certiorari Petition in Pacific Rivers Council: A Bullet Dodged in the Supreme Court's War against Public Challenges to Flawed Federal Land Use Planning*, 32 VA. ENVTL. L.J. (forthcoming) (discussing these points) (on file with author).

8. See Babcock, *supra* note 7 (discussing the grant of certiorari in *Pacific Rivers Council* and the arguments raised in the petition, including the impact such arguments would have had on federal land use planning had the petition not been dismissed).

9. Richard J. Lazarus identifies another possible explanation in his article, *Docket Capture at the High Court*, where he suggests that the Court may have been persuaded by experienced, high-powered, and well-known members of the elite Supreme Court Bar who filed amicus briefs in support of the USFS. 119 YALE L.J. ONLINE 89, 94–95 (2009), available at http://www.yalelawjournal.org/pdf/841_89m7e6cx.pdf. However, that does not seem to be what happened in this case.

10. See Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062, 1067–68 (2009). The Court grants certiorari to (1) resolve legal conflicts when two or more lower courts disagree over how a law should be interpreted or applied; (2) review lower court decisions declaring a federal law unconstitutional; or (3) when “[the] [J]ustices believe themselves obligated to grant review in cases that are legally important.” *Id.* Each of these circumstances increases the likelihood that a Justice will vote to grant review regardless of a Justice's feelings about the current state of the law, and, “therefore, cast a nonpolicy-based vote.” *Id.* at 1067–68, 1070 (“[J]ustices who otherwise would have cast policy-based votes because they prefer the status quo to the expected outcome on the merits instead are increasingly compelled by the presence of conflict and norms of legal clarity to grant review.”); see also *infra* Part III (discussing the certiorari process).

11. As proof of my thesis that the Supreme Court is overly eager to take and reverse certain types of cases, the Court took *Pacific Rivers Council* while it was on remand to the district court. The district court ultimately ruled against Pacific Rivers Council on all but the NEPA issue. As a result, Pacific Rivers Council filed a “hail Mary” motion on short order asking the Court to vacate the judgment below and dismiss the petition as moot. Motion to Vacate Judgment Below & Dismiss as Moot, U.S. Forest Serv. v. Pac. Rivers Council, No. 12-623, 2013 WL 2424934 (U.S. June 3, 2013). Although it is unusual for a party who did not file the original petition to request dismissal and seek vacation of their original victory, there seemed little doubt that the petition would be granted.

In support of this thesis, the first Part of the Article examines the certiorari record of the Court over a sixteen-year period in environmental cases arising in the Ninth and D.C. Circuits, half of which occurred under the leadership of Chief Justice Roberts. This Part contrasts the record of the Ninth Circuit with that of the D.C. Circuit, which shows that while both courts review many environmental decisions, only the Ninth Circuit appears to have a strange parasitic relationship with the Supreme Court's pro-business agenda. The second Part discusses several studies of the Roberts Court, most of which conclude that the Court's decisions display a strong pro-business bias. This Part of the Article also explains how the cases brought by environmentalists in the Ninth Circuit, more so than those brought in the D.C. Circuit, threaten the Court's agenda. The third Part takes a closer look at how the Court shapes its agenda through the certiorari process, concluding that the personal policy objectives and preferences of individual Justices are critical to this process. The fourth Part of the Article shows how the Court's selection of cases signals its preferences, which in turn influences the agenda of issue-oriented lawyers and thus the dockets of lower courts. This sequence has resulted in the Ninth Circuit playing a somewhat surprising role in the evolution of environmental and natural resources law, as its decisions, which are generally hostile to resource development interests and receptive to requests for greater public transparency and responsiveness in agency planning processes, seem to attract the attention of the business-leaning Court.¹²

The Article suggests that the Ninth Circuit's certiorari record in the Supreme Court presents an interesting postscript to the story being told by others about the dominant pro-business slant of the current Court. Given the importance of the Justices' personal policy objectives in case selection, the Article concludes that there is little on the immediate horizon short of a

12. Many articles have been written about the Court's standing decisions in environmental cases. See, e.g., Hope M. Babcock, *How Judicial Hostility toward Environmental Claims and Intimidation Tactics by Lawyers Have Formed the Perfect Storm against Environmental Clinics: What's the Big Deal about Students and Chickens Anyway?*, 25 J. ENVTL. L. & LITIG. 249 (2010) (arguing that environmental clinics represent the cases and clients that invoke judicial barriers and invite bullying by lawyers); Hope M. Babcock, *The Problem with Particularized Injury: The Disjuncture between Broad-Based Environmental Harm and Standing Jurisprudence*, 25 J. LAND USE & ENVTL. L. 1 (2009) (arguing that the Court's standing jurisprudence and its insistence on a showing of particularized injury are ill-suited for the types of broad-based, generalized harms that stem from complex, constantly changing ecosystems); David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808 (2004) (asserting that standing requirements do not affect decision making in public policy cases because courts ignore plaintiffs' injuries when deciding the merits of a case); Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505 (2008) (proposing a place-based standing test to replace the current standing doctrine, which requires that plaintiffs have a personal connection to the geographic area where environmental harms have allegedly occurred); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) (urging courts to abandon the current standing regime and replace it with a system that grants standing based on the merits of a petitioner's case). While this Article owes a debt to this earlier work, it moves the decision-tree timeline forward to the case selection process, where one can see the Court showing the same type of animosity toward cases brought by environmental plaintiffs.

dramatic change in Court personnel that foretells a change in the record. The result is that circuits like the Ninth, because of its prominence in environmental cases, will play an unexpected role in furthering the Roberts Court's pro-business agenda through the Court's discretionary power to select cases, rather than the Court's decisions on the merits.¹³ Perhaps exposing this record may change the behavior of those Justices to whom institutional credibility and public acceptance hold some importance.¹⁴

I. THE RECORD

The Supreme Court hears a lot of cases from the Ninth Circuit. This may simply be a matter of numbers, as it is the largest circuit with the largest docket.¹⁵ For example, comparing the Ninth Circuit to the D.C. Circuit from 1998 to 2012, a slightly smaller subset than this Article's sixteen-year study period, the Ninth Circuit heard 182,326 cases, while the D.C. Circuit heard only 19,486 cases.¹⁶ Because of its docket size, the Ninth Circuit hears many more environmental cases than the D.C. Circuit, despite the fact that many statutes grant the D.C. Circuit exclusive jurisdiction to hear challenges to national environmental rules.¹⁷ These comparative docket sizes may also explain why the Ninth Circuit filed more than four times as many certiorari petitions than did the D.C. Circuit over that same period.¹⁸ This past Term

13. Scholars may wish to perform a similar analysis of the Court's use of its certiorari power in other circuits involving other traditionally anti-business areas of law, including employment, disability, and civil rights issues to name a few.

14. Social norms, such as norms favoring environmental protection, are unlikely to influence the behavior of the Justices, as in all likelihood the Justices perceive their behavior as consistent with those norms, or consistent with competing norms embracing individualism and competition favored by the business community. See Hope M. Babcock, *Corporate Environmental Social Responsibility: Corporate "Greenwashing" or a Corporate Culture Game Changer?*, 21 FORDHAM ENVTL. L. REV. 1, 17 (2010). The Justices are not above caring about their personal reputation and are sensitive to public scorn and shame, just like the chief executive officers of large companies, although the concerns of chief executive officers may be largely monetary. *Id.* at 19.

15. See Lawrence Hurley, *Justices Request Obama Admin Views on 4 West Coast Environmental Cases*, GREENWIRE (Mar. 27, 2012), <http://www.cenews.net/stories/1059962065> ("[T]he appeals court is generally viewed as the court most out of sync with the Supreme Court's jurisprudence, partly because it is seen as more liberal-leaning than the high court, but also because it has more judges than any other circuit, which can lead to a wider array of possible outcomes."); see also Kedar Bhatia, *Final October Term 2012 Stat Pack*, SCOTUSBLOG (June 26, 2013, 6:36 PM), www.scotusblog.com/2013/06/final-october-term-2012-stat-pack [hereinafter *October Term 2012 Stat Pack*] ("The Ninth Circuit . . . has a reputation for being frequently reversed in the Supreme Court . . .").

16. See generally *Judicial Business Archive*, ADMIN. OFF. U.S. CTS., www.uscourts.gov/Statistics/JudicialBusiness/archive.aspx (last visited Sept. 11, 2014) (providing statistics on the work of the federal judiciary from 1997 to 2012). These statistics were calculated by adding up the total "Cases Commenced" for each circuit from Table B-1, found in the Judicial Business archives for the years 1998 to 2012. See *id.*

17. See, e.g., Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201–1328 (2012); Clean Water Act, 33 U.S.C. §§ 1251–1387 (2012); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992 (2012); Clean Air Act, 42 U.S.C. §§ 7401–7515 (2012).

18. Over the sixteen-year period under study, there were 28,177 certiorari petitions filed with the Court, including 3510 petitions from the Ninth Circuit and 777 petitions from the D.C. Circuit. Research

alone, the Court agreed to hear twenty-five out of seventy-five cases from the Ninth Circuit—33 percent of the total petitions granted—reflecting the size of the lower court's docket.¹⁹

The Ninth Circuit also had the worst reversal record before the Court during the period under review. As an example, the Supreme Court reversed the Ninth Circuit 86 percent of the time in 2012.²⁰ The next highest circuit in terms of cases heard that Term, the Second Circuit, was reversed 60 percent of the time.²¹ Over a sixteen-year period, the Supreme Court reversed the Ninth Circuit 144 times; by comparison, the D.C. Circuit was reversed only thirteen times.²² However, only two of the D.C. Circuit cases the Court reversed involved environmental law or court access issues like standing, ripeness, or mootness,²³ which often play an important role in environmental cases.²⁴ Meanwhile, sixteen of the cases reversed from the Ninth Circuit implicated environmental law or court access issues in an environmental context.²⁵ The Court granted certiorari from the D.C. Circuit in six environmental cases²⁶ and

assistants compiled the statistics of this Article's sixteen-year study period using Bloomberg BNA's Supreme Court Today and Supreme Court Today Navigator, which catalogues each Supreme Court session. See *Supreme Court Today Navigator*, BLOOMBERG BNA, 0-news.bna.com.gull.georgetown.edu/wln/display/sctd_tqb.adp (last visited Nov. 17, 2013) (on file with author).

19. Hurley, *supra* note 15.

20. *October Term 2012 Stat Pack*, *supra* note 15 (circuit scorecards).

21. See *id.* The D.C. Circuit's reversal record was 50 percent, but then three cases were elevated to the Court in the 2012 Term. See *id.*; Kedar Bhatia, *Update on October Term 2012 and a New Stat Pack*, SCOTUSBLOG (May 3, 2013, 3:57 PM), <http://www.scotusblog.com/2013/05/update-on-october-term-2012-and-a-new-stat-pack/> (circuit scorecard). One was affirmed and the other two were reversed. *October Term 2012 Stat Pack*, *supra* note 15 (circuit scorecards). Only the Sixth, Eighth, and Eleventh Circuits did worse than the Ninth Circuit, losing all of their cases in the higher court, but also bringing substantially fewer cases. *Id.* The Sixth and Eighth Circuits had just two cases heard by the Court and the Eleventh had six. *Id.*; see also Hurley, *supra* note 15 ("Of the [fifteen] [Ninth] Circuit cases the Supreme Court has issued decisions on so far this term, the [J]ustices have reversed the appeals court [twelve] times and affirmed it just twice . . . That's a reversal rate of 80 percent.").

22. See *Supreme Court Today Navigator*, *supra* note 18 (searching for cases between October 1, 1997 and September 30, 2013, judgments reversed and judgments vacated). Again, this observation may be a matter of the Ninth Circuit's size and not a comment on the merits of the cases. This Article is not trying to make a comparative statistical point, but rather to note that the Court has reversed a lot of Ninth Circuit decisions, including those favorable to environmentalists.

23. See *Am. Trucking Ass'n v. EPA*, 175 F.3d 1027, *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part, rev'd in part sub nom.* *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001), *and cert. granted, cause remanded sub nom.* *Am. Lung Ass'n v. Am. Trucking Ass'n*, 532 U.S. 901 (2001) (mem.), *and cert. granted, cause remanded sub nom.* *Massachusetts v. Am. Trucking Ass'n*, 532 U.S. 901 (2001) (mem.).

24. See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (holding that a member of an environmental group did not identify with sufficient particularity his connection to a particular site in a national forest where his alleged injury took place); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) (holding that land use plans are not ripe for judicial review); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990) (holding that environmental plaintiffs lack standing to challenge Bureau of Land Management (BLM) land withdrawals in a single programmatic lawsuit).

25. See *infra* notes 26–29 (listing these cases and their holdings).

26. See, e.g., *Whitman*, 531 U.S. 457 (affirming D.C. Circuit's finding that the EPA could not consider costs in setting National Ambient Air Quality Standards (NAAQS) and holding that the EPA's

denied petitions in another forty-two,²⁷ while in the Ninth Circuit, the Court granted twenty petitions in environmental cases²⁸ and denied ninety-two.²⁹

interpretation was unreasonable); *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1584, 1593 (2014) (upholding the EPA's Cross-State Air Pollution Rule and thus reversing and remanding to the D.C. Circuit); *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005) (upholding EPA's determination that the Clean Air Act (CAA) did not authorize EPA to address global climate change by regulating motor vehicle emissions), *rev'd*, 549 U.S. 497 (2007) (finding in favor of environmentalists and holding that greenhouse gases are clearly within the CAA's definition of air pollutants subject to EPA's motor vehicle emissions regulations).

27. See, e.g., *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 686 F.3d 803 (D.C. Cir. 2012) (finding that the court did not have jurisdiction under the CAA to consider whether the EPA violated the APA, and finding that the EPA's decision to revise the primary NAAQS was not arbitrary and capricious), *cert. denied*, 133 S. Ct. 983 (2013); *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012) (finding that plaintiffs lacked standing to challenge EPA's grant of CAA partial waivers that approved the introduction of a gas-ethanol blend into commerce), *cert. denied*, 133 S. Ct. 2880 (2013); *Am. Petroleum Inst. v. EPA*, 684 F.3d 1342 (D.C. Cir. 2012) (finding that EPA's final rule promulgating a one-hour primary NAAQS for nitrogen dioxide was not arbitrary and capricious), *cert. denied*, 133 S. Ct. 1724 (2013); *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145 (D.C. Cir. 2010) (finding against industry associations in a challenge to an EPA final rule), *cert. denied*, 132 S. Ct. 571 (2011); *Nat'l Corn Growers Ass'n v. EPA*, 613 F.3d 266 (D.C. Cir. 2010) (vacating the EPA's final rule that revoked import tolerances for carbofuran), *cert. denied*, 131 U.S. 2931 (2011); *Gen. Elec. Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010) (granting the EPA summary judgment against petitioner's claim that a unilateral administrative order violated due process), *cert. denied*, 131 S. Ct. 2959 (2011); *Am. Road & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109 (D.C. Cir. 2009) (finding that a trade organization's petition for review of two EPA emission-related regulations was time barred), *cert. denied*, 131 U.S. 388 (2010); *Cnty. of Rockland v. Fed. Aviation Admin.*, 335 Fed. Appx. 52 (D.C. Cir. 2009) (finding that the Federal Aviation Administration's EIS for a plan to modernize airspace over certain states was procedurally sound and substantively reasonable), *cert. denied*, 558 U.S. 1168 (2010); *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225 (D.C. Cir. 2009) (precluding plaintiffs' claims), *cert. denied*, 560 U.S. 926 (2010); *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008) (declaring that the EPA's final rule imposing less onerous emissions requirements on major sources of hazardous air pollutants violated the CAA), *cert. denied*, 559 U.S. 991 (2010); *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (holding that EPA did not have authority to delist coal- and oil-fired utility units without following CAA delisting provisions), *cert. denied*, 555 U.S. 1169 (2009); *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008) (deciding that Alabama and Florida had standing to challenge the Army Corps of Engineers' authority to divert water from a Georgia lake, and that the action required prior congressional approval), *cert. denied*, 555 U.S. 1097 (2009); *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882 (D.C. Cir. 2006) (finding, *inter alia*, that EPA had authority to revoke one-hour ozone NAAQS), *cert. denied*, 552 U.S. 1140 (2008); *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140 (D.C. Cir. 2006) (finding that EPA's approval of seasonal or annual loads that exceeded total maximum daily loads violated the Clean Water Act (CWA)), *cert. denied*, 549 U.S. 1175 (2007); *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) (finding that EPA rule excluding routine maintenance and equipment repairs from new source review violated the CAA when the change increased emissions), *cert. denied*, 550 U.S. 928 (2007); *Nebraska v. EPA*, 89 Fed. Appx. 277 (D.C. Cir. 2004) (holding that EPA was not required to provide additional analysis when it clarified the arsenic maximum for drinking water from ".01" to ".010"), *cert. denied*, 543 U.S. 817 (2004); *Nat'l Alt. Fuels Ass'n v. EPA*, No. 00-1147, 2003 U.S. App. LEXIS 18324 (D.C. Cir. Apr. 11, 2003) (preventing the National Alternative Fuels Association from challenging EPA's vehicle emissions standards for lack of standing), *cert. denied*, 546 U.S. 1025 (2005); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (holding that the government using the Endangered Species Act (ESA) to prevent construction of a real estate development does not violate the Commerce Clause), *cert. denied*, 540 U.S. 1218 (2004); *EPA v. Sierra Club*, 322 F.3d 718 (D.C. Cir. 2003) (granting environmental groups attorneys' fees in CAA case), *cert. denied*, 540 U.S. 1104 (2004); *Nat'l Tel. Coop. Ass'n v. Exxon Mobil Corp.*, 244 F.3d 153 (D.C. Cir. 2001) (reversing lower court decision in favor of citizen plaintiff alleging that gas station had negligently performed environmental remediation), *cert. denied*, 534 U.S. 1020 (2001); *Bldg. Indus.*

Ass'n of Superior Cal. v. Norton, 247 F.3d 1241 (D.C. Cir. 2001) (upholding district court's denial of summary judgment to landowner seeking review of Fish and Wildlife Service's designation of a species under the ESA), *cert. denied*, 534 U.S. 1108 (2002); Slinger Drainage, Inc. v. EPA, 237 F.3d 681 (D.C. Cir. 2001) (finding that petitioner's appeal of an EPA Environmental Appeals Board decision was untimely where petitioner alleged CWA violations), *cert. denied*, 534 U.S. 972 (2001); Allied Local & Reg'l Mfrs. Caucus v. EPA, 215 F.3d 61 (D.C. Cir. 2000) (affirming EPA's decision to regulate volatile organic compounds in architectural coatings categorically, rather than by individualized substance), *cert. denied*, 532 U.S. 1018 (2001); Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000) (denying petitioners review in part and dismissing in part for want of jurisdiction and for lack of ripeness in challenge alleging that EPA rules granted Native American tribes too much authority under CWA), *cert. denied*, 532 U.S. 970 (2001); Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 904 (2001); City of Alexandria v. Slater, 198 F.3d 862 (D.C. Cir. 1999) (finding that NEPA's "all reasonable alternatives" requirement did not substantively constrain the Federal Highway Administration's choice of objectives, and thus, agency action was not unreasonable), *cert. denied*, 531 U.S. 820 (2000); Am. Trucking Ass'n v. EPA, 195 F.3d 4 (D.C. Cir. 1999) (vacating EPA's final rule for failure to provide adequate notice to states of definition changes), *cert. denied*, 532 U.S. 903 (2001); Clean Air Implementation Project v. EPA, 150 F.3d 1200 (D.C. Cir. 1998) (dismissing trade associations' petition challenging application of EPA's rulemaking procedures), *cert. denied*, 527 U.S. 1021 (1999); Am. Lung Ass'n v. EPA, 134 F.3d 388 (D.C. Cir. 1998) (remanding to EPA to explain its conclusion that the symptoms experienced by some asthmatics from short-term, high-level exposure to sulfur dioxide do not amount to a public health problem), *cert. denied*, 528 U.S. 818 (1999); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (finding that Congress has the power under the Commerce Clause to prevent interstate competition that would result in the destruction of endangered species), *cert. denied*, 524 U.S. 937 (1998); Fafarman v. EPA, No. 96-1473, 1997 U.S. App. LEXIS 19032 (D.C. Cir. June 30, 1997) (granting summary judgment to defendants and summarily denying remaining claims in challenge to waiver in the Vehicle Smog Impact Fee), *cert. denied*, 522 U.S. 1016 (1997); North Carolina v. Fed. Energy Regulatory Comm'n, 112 F.3d 1175 (D.C. Cir. 1997) (finding that the Federal Energy Regulatory Commission was not required to obtain quality certification from state before granting foreign municipality's license to withdraw water from a power project), *cert. denied*, 522 U.S. 1108 (1998).

28. See, e.g., Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles, 673 F.3d 880 (9th Cir. 2011) (finding the Los Angeles County Flood Control District liable for discharging pollutants from monitoring stations), *rev'd sub nom.* L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc., 133 S. Ct. 710 (2013) (finding that water flowing out of a concrete channel within a river did not constitute a "discharge of a pollutant" under the CWA); Nw. Envtl. Def. Ctr. v. Brown, 640 F.3d 1063 (9th Cir. 2011) (allowing environmental groups to challenge a timber company's failure to obtain National Pollutant Discharge Elimination System permits as required by the CWA), *rev'd sub nom.* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013) (finding that though the CWA did not bar the challenge, it did not require permits in this instance); Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2010) (finding that a CWA compliance order was not subject to judicial review), *rev'd*, 132 S. Ct. 1367 (2012) (holding that EPA's compliance order was subject to APA review); Geertson Seed Farms v. Johanns, 570 F.3d 1130 (9th Cir. 2009) (requiring the Animal and Plant Health Inspection Service to issue an EIS on deregulating genetically modified alfalfa, and granting an injunction on planting altered alfalfa), *rev'd sub nom.* Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010) (concluding that the lower court abused its discretion by enjoining the Service from partial deregulation and prohibiting further planting of modified alfalfa); Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 658 (9th Cir.) (upholding preliminary injunction of Navy's use of sonar in training exercises), *rev'd*, 555 U.S. 7 (2008) (reversing the injunction and finding that the public interest in the Navy's training techniques outweighed the public interest in alleged irreparable harm to marine animals); Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, 486 F.3d 638 (9th Cir. 2007) (voiding discharge permits granted by Corps as incorrectly interpreting CWA), *rev'd sub nom.* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009); United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918 (9th Cir. 2007) (finding companies partly responsible for contaminating land and strictly liable to EPA), *rev'd*, 556 U.S. 599 (2009); Earth Island Inst. v. Ruthenbeck, 490 F.3d 687 (9th Cir. 2006) (finding five USFS regulations invalid and contrary to the Appeals Reform Act), *aff'd in part, rev'd in*

These numbers by themselves would not be startling given the size of the Ninth Circuit's docket. But what is troubling about the Ninth Circuit's recent record is the large number of certiorari petitions that have been denied in environmental cases where environmentalists are the petitioners. Similarly troubling is that those environmental petitions that are granted almost always involve a winning environmental plaintiff who then goes on to lose in the

part sub nom. *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (concluding that environmentalists did not have standing to challenge the regulations); *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005) (finding EPA's decision to delegate pollution permitting program to Arizona arbitrary and capricious), *rev'd sub nom.* *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (finding that section 7 of the ESA did not apply to nondiscretionary actions by the Fish and Wildlife Service); *Orff v. United States*, 358 F.3d 1137 (9th Cir. 2004) (finding that plaintiff farmers were not the intended third-party beneficiaries or parties to a government contract and thus could not invoke statutory waiver of government's sovereign immunity), *aff'd*, 545 U.S. 596 (2005); *Pub. Citizen v. U.S. Dep't of Transp.*, 316 F.3d 1002 (9th Cir. 2003) (finding that environmental groups had standing to petition for review, and that the Federal Motor Carrier Safety Administration's decision not to prepare an environmental assessment was arbitrary and capricious), *rev'd*, 541 U.S. 752 (2004) (finding that neither NEPA nor the CAA required the Administration to consider the environmental impacts of Mexican motor carriers crossing the border); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 309 F.3d 550 (9th Cir. 2002) (finding that the South Coast Air Quality Management District's rules were not preempted by the CAA), *vacated*, 541 U.S. 245 (2004) (finding that the District's rules set "standards" within the meaning of, and were thus prohibited by, the CAA); *Alaska Dep't of Env'tl. Conservation v. EPA*, 298 F.3d 814 (9th Cir. 2002) (denying petition for review of EPA regulations that would force the state to require better technology for certain CAA permits), *aff'd*, 540 U.S. 461 (2004) (holding that the CAA authorized EPA to bar construction of the facility in Alaska); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001) (finding that a real estate developer violated CWA by "deep ripping" the land), *aff'd mem.*, 537 U.S. 99 (2002) (per curiam); *Cent. Green Co. v. United States*, 177 F.3d 834 (9th Cir. 1999) (finding that the Federal Tort Claims Act granted the federal government immunity from suit), *rev'd*, 531 U.S. 425 (2001) (finding that the United States was not entitled to immunity because the waters in question were not necessarily "flood waters").

29. See, e.g., *Our Children's Earth Found. v. EPA*, 527 F.3d 842 (9th Cir.) (finding that environmental group had standing to challenge EPA's nondiscretionary duty, but that the lower court did not abuse its discretion in dismissing plaintiff's claims), *cert. denied*, 555 U.S. 1045 (2008); *U.S. Forest Serv. v. Earth Island Inst.*, 442 F.3d 1147 (9th Cir.) (granting a preliminary injunction in environmental group's attempt to stop USFS's postfire restoration program), *cert. denied*, 549 U.S. 1278 (2007); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004) (denying injunctive relief in environmentalists' claim that bluegrass farmers burning grass residue violated the Resource Conservation and Recovery Act), *cert. denied*, 544 U.S. 1018 (2005). In 2013, the Court denied petitions where environmental groups had won in at least two cases. *Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (expanding the class of activities that trigger section 7 consultation under the ESA to "any possible effect, whether beneficial, benign, adverse or of an undetermined character"), *cert. denied*, 133 S. Ct. 1579 (2013); *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216 (9th Cir. 2011) (reversing a lower court decision that Peru was a more convenient forum in a suit alleging environmental hazards caused by defendant's Peruvian subsidiary), *cert. denied*, 133 S. Ct. 1996 (2013). The Court also declined to review a petition from an indigenous group that sought to reverse the Ninth Circuit's decision in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (finding that the CAA precluded native tribes and an Alaskan city from bringing a nuisance claim against the oil industry for causing global warming), *cert. denied*, 133 S. Ct. 2390 (2013). See also *Pub. Lands for the People, Inc. v. U.S. Dep't of Agric.*, 697 F.3d 1192 (9th Cir. 2012) (finding that miners had standing to challenge USFS's decision to prohibit motor vehicles in certain areas), *cert. denied*, 133 S. Ct. 1464 (2013); *Am. Indep. Mines & Minerals Co. v. U.S. Dep't of Agric.*, 494 Fed. Appx. 724 (9th Cir. 2012) (finding that mining company lacked prudential standing to challenge U.S. Department of Agriculture's EIS), *cert. denied*, 133 S. Ct. 2766 (2013).

higher court.³⁰ In fact, since Chief Justice Roberts assumed leadership of the Court in 2005, there has not been a single environmental case decided by the Ninth Circuit in favor of environmental plaintiffs where the Court granted certiorari and then affirmed the Circuit's decision in its entirety.³¹ This observation by itself is not that unusual, as the Court usually grants a petition to reverse the lower court. What is surprising is the number of environmental cases petitioned by industry or government actors that result in the Court substantially curtailing government regulatory authority or allowing a hitherto denied environmental harm to occur. Recent examples of this are *Decker v. Northwest Environmental Defense Center*,³² *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*,³³ *American Trucking Ass'n, Inc. v. City of Los Angeles*,³⁴ *Sackett v. EPA*,³⁵ *Monsanto Co. v. Geertson Seed Farms*,³⁶ *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,³⁷ *Burlington Northern & Santa Fe Railway Co. v. United States*,³⁸ *Winter v. Natural Resources Defense Council, Inc.*,³⁹ *Summers v. Earth Island Institute*,⁴⁰ *Exxon Shipping Co. v. Baker*,⁴¹ *National Ass'n of*

30. The Supreme Court has reversed the Ninth Circuit 144 times in the last sixteen years, while the D.C. Circuit, which has a concededly smaller docket, has been reversed only thirteen times. *Supreme Court Today Navigator*, *supra* note 18 (searching for cases between October 1, 1997 and September 30, 2013, judgments reversed and judgments vacated). Two of the D.C. Circuit reversals involved environmental law. See *Am. Trucking Ass'n, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *modified on reh'g*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part, rev'd in part sub nom. Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001) and *cert. granted, cause remanded sub nom. Am. Lung Ass'n v. Am. Trucking Ass'n*, 532 U.S. 901 (2001) (mem.) and *cert. granted, cause remanded sub nom. Massachusetts v. Am. Trucking Ass'n*, 532 U.S. 901 (2001) (mem.).

31. Research assistants gathered the cases discussed in this Part of the Article using filters on the Bloomberg BNA Supreme Court Today Navigator. Although the Court frequently accepts petitions to reverse a lower court decision, this is not always the case. See generally Black & Owens, *supra* note 10 (discussing why the Court grants or denies petitions).

32. 133 S. Ct. 1326 (2013) (reversing and remanding a Ninth Circuit decision favorable to environmental plaintiffs on regulating runoff from timber haul roads).

33. 133 S. Ct. 710 (2013) (reversing and remanding a Ninth Circuit decision favorable to environmental plaintiffs on regulating pollution in the Los Angeles River).

34. 133 S. Ct. 2096 (2013) (reversing in part and remanding a decision by the Ninth Circuit upholding the Los Angeles Board of Harbor Commissioner's air quality regulations).

35. 132 S. Ct. 1367 (2012) (reversing and remanding a pro-environmental decision supporting EPA's enforcement authority).

36. 561 U.S. 139 (2010) (reversing and remanding a Ninth Circuit decision in favor of environmental groups on regulating genetically engineered corn).

37. 557 U.S. 261 (2009) (overturning the Ninth Circuit's decision to deny issuance of a permit for dumping mining waste in an Alaskan lake in a national forest).

38. 556 U.S. 599 (2009) (reversing and remanding a decision by the Ninth Circuit holding the two railroads and Shell Oil Company jointly and severally liable for the government's cleanup costs).

39. 555 U.S. 7 (2008) (reversing a decision by the Ninth Circuit in a case involving a challenge by environmental organizations to the Navy's allegedly harmful use of sonar equipment in training exercises).

40. 555 U.S. 488 (2009) (reversing in part and affirming in part a decision by the Ninth Circuit supporting an environmental organization's challenge of USFS regulations).

41. 554 U.S. 471 (2008) (vacating and remanding the Ninth Circuit's award of punitive damages against Exxon and reducing them from \$2.5 billion to \$507.5 million).

Home Builders v. Defenders of Wildlife,⁴² and *Department of Transportation v. Public Citizen*.⁴³ In one case, *National Ass'n of Home Builders*, the Court subordinated the substantive requirements of the Endangered Species Act (ESA) to the more mundane procedural requirements of the Clean Water Act (CWA).⁴⁴ In another, *Los Angeles County Flood Control District*, environmentalists lost a suit regarding the regulation of discharges into the Los Angeles River.⁴⁵

The record for environmental groups in the Ninth Circuit, who lost below and sought certiorari, was equally dismal—no grants were issued by the Court.⁴⁶ Yet, in the eight-year period prior to Roberts assuming the chief's chair, the record reveals that it was more common for the Court to affirm pro-environmental decisions after granting a petition for an environmental case decided in the Ninth Circuit.⁴⁷ Similarly, during this same eight-year period,

42. 551 U.S. 644 (2007) (reversing and remanding a pro-environmental decision by the Ninth Circuit that prevented EPA from delegating permitting authority to a state when it could not ensure that the transfer would not jeopardize listed species).

43. 541 U.S. 752 (2004) (reversing a decision that Department of Transportation had to prepare an EIS for regulations related to a lifted moratorium on Mexican motor carriers). The Court has also issued two standing decisions in nonenvironmental cases. See *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002 (9th Cir. 2009), *rev'd*, 131 S. Ct. 1436 (2011); *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2002), *rev'd sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

44. See *Nat'l Ass'n of Home Builders*, 551 U.S. 644.

45. *L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710, 710–11 (2013).

46. See, e.g., *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037 (9th Cir. 2011) (holding that a supplemental EIS for a travel management plan was not required in a lawsuit filed by recreational organizations), *cert. denied*, 132 S. Ct. 2439 (2012); *Our Children's Earth Found. v. EPA*, 527 F.3d 842 (9th Cir.) (holding that EPA was not required to use a technology-based approach in reviewing effluent guidelines under the CWA), *cert. denied*, 555 U.S. 1045 (2008). But note that the Court denied certiorari where environmentalists won against government agencies, especially against the BLM. See *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir.) (challenging BLM's grazing regulations), *cert. denied*, 132 S. Ct. 366 (2011); *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058 (9th Cir. 2010) (challenging BLM's approval of a land exchange facilitating the construction of a landfill), *cert. denied*, 131 S. Ct. 1783 (2011); *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2008) (holding that a copper mining company was not entitled to discharge permit), *cert. denied*, 555 U.S. 1097 (2009); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016 (9th Cir. 2006) (holding, *inter alia*, that the Nuclear Regulatory Commission's categorical refusal to consider the environmental effects of a terrorist attack on the Diablo Canyon nuclear power plant was unreasonable), *cert. denied*, 549 U.S. 1166 (2007); *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147 (9th Cir. 2006) (granting preliminary injunction against USFS and thus banning postfire logging activities as fire restoration projects), *cert. denied*, 549 U.S. 1278 (2007); *Ecology Ctr. v. Austin*, 430 F.3d 1057 (9th Cir. 2005) (finding USFS's plan for addressing wildfires in the Lolo National Forest arbitrary and capricious), *cert. denied*, 549 U.S. 1111 (2007); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004) (holding that grass residue is not solid waste and that burning it does not violate the Resource Conservation and Recovery Act), *cert. denied*, 544 U.S. 1018 (2005). One exception to this record is *Waterkeepers Northern California v. AG Industrial Manufacturing, Inc.*, 375 F.3d 913 (9th Cir. 2004) (reversing the lower court's dismissal for lack of jurisdiction in an action brought by an environmental group against a farm equipment manufacturer alleging illegal discharges under the CWA), *cert. denied*, 543 U.S. 1050 (2005).

47. From 1997 to 2005, the Supreme Court granted certiorari in six environmental cases and affirmed the favorable environmental decision in half those cases. See, e.g., *Alaska Dep't of Envtl.*

the Court rejected environmental groups' petitions in only two of four instances in which they lost in the Ninth Circuit.⁴⁸ The Court also denied certiorari petitions in seven additional cases where the Ninth Circuit supported a positive environmental outcome, thus affirming the lower court's pro-environmental stance.⁴⁹

The fate of environmentalists' petitions from cases in the D.C. Circuit is also quite different from those arising out of the Ninth Circuit. Petitions filed by industry or state interests to reverse environmentally favorable decisions by the D.C. Circuit are consistently denied by the Court, protecting environmental wins from possible reversal.⁵⁰ In fact, in one case where environmentalists (and

Conservation v. EPA, 298 F.3d 814 (9th Cir. 2002) (denying petition for review of EPA's regulations that would force the state to require better technology for its permits), *aff'd*, 540 U.S. 461 (2004) (holding that the CAA authorized EPA to bar the construction of the facility in Alaska); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001) (finding that a real estate developer violated CWA by "deep ripping" the land), *aff'd mem.*, 537 U.S. 99 (2002) (per curiam). The Court's most serious reversal of an environmentally favorable Ninth Circuit decision was *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 309 F.3d 550 (9th Cir. 2002), *vacated*, 541 U.S. 246 (2004).

48. See *Orff v. United States*, 358 F.3d 1137 (9th Cir. 2004) (finding federal government immune from liability on farmers' claims regarding water distribution), *aff'd*, 545 U.S. 596 (2005); *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003) (holding that EPA's failure to designate industrial sources of storm water for permitting was not arbitrary and capricious), *cert. denied*, 541 U.S. 1085 (2004); *Cal. Trout, Inc. v. Fed. Energy Regulatory Comm'n*, 313 F.3d 1131 (9th Cir. 2002) (holding that annual licenses for hydroelectric project were not subject to state water quality certification under the CWA after the original fifty-year license had expired), *cert. denied*, 540 U.S. 818 (2003); *Cent. Green Co. v. United States*, 177 F.3d 834 (9th Cir. 1999), *rev'd*, 531 U.S. 425 (2001).

49. See *Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661 (9th Cir.) (affirming district court's grant of summary judgment for state, which sought cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act), *cert. denied*, 543 U.S. 869 (2004); *Sierra Club v. EPA*, 346 F.3d 955 (9th Cir. 2003) (reversing EPA's conclusion that a California county met CAA standards but for the negative effects of Mexico's transborder emissions), *cert. denied*, 542 U.S. 919 (2004); *City of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081 (9th Cir. 2003) (affirming USFS's right to restrict use of water in ditches in times of low flow to protect endangered fish species), *cert. denied*, 541 U.S. 1029 (2004); *N. Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155 (9th Cir.) (holding that coal bed methane in groundwater was a pollutant within the meaning of the CWA and that state could not exempt such discharges from the Act), *cert. denied*, 540 U.S. 967 (2003); *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928 (9th Cir. 2002) (holding that certain provisions of a municipal environmental response and liability ordinance were preempted by the Comprehensive Environmental Response, Compensation, and Liability Act and state hazardous waste law, while other provisions would only be preempted if the city was found on remand to be a potentially responsible party), *cert. denied*, 538 U.S. 961 (2003); *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002) (holding that EPA did not exceed its statutory authority under the CWA by identifying a river as impaired and establishing total maximum daily loads even though it was polluted by nonpoint sources of pollution), *cert. denied*, 539 U.S. 926 (2003); *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002) (allocating liability for oil spill cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act), *cert. denied*, 537 U.S. 1147 (2003).

50. See, e.g., *Nat'l Env'tl. Dev. Ass'n's Clean Air Project v. EPA*, 686 F.3d 803 (D.C. Cir. 2012) (upholding EPA's discretion to set standard for maximum sulfur dioxide concentrations), *cert. denied*, 133 S. Ct. 983 (2013); *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145 (D.C. Cir. 2010) (finding against industry associations in a challenge against EPA final rule), *cert. denied*, 132 S. Ct. 571 (2011); *Gen. Elec. Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010) (rejecting challenge to EPA's unilateral administrative orders that directed hazardous waste cleanup), *cert. denied*, 131 S. Ct. 2959

several states) lost below in the D.C. Circuit, the Court granted their petition and reversed the unfavorable decision.⁵¹ Thus, while the numbers are too small at this stage to support anything more than an inference, they do suggest that something aberrant may be going on with certiorari petitions involving environmental claims from the Ninth Circuit, at least when compared to the D.C. Circuit.⁵²

While this situation is certainly disheartening for environmental litigants pursuing claims in the Ninth Circuit, it has a potentially more serious ripple effect.⁵³ The Court's conspicuous receptivity to certiorari petitions filed in the Ninth Circuit when business interests are affected signals to industry and government lawyers the Court's "willingness" to hear similar cases,⁵⁴ and thus acts as an inducement to bring those cases in the Ninth Circuit.⁵⁵ The wide discretion the Court has to determine which petitions it will accept,⁵⁶ and the abundance of petitions involving environmental claims from the Ninth Circuit, gives the pro-business members of the Court a somewhat unusual opportunity to use the certiorari process to shape environmental law and related court-

(2011); *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008) (challenging EPA's 2004 eight-hour ozone attainment rule), *cert. denied*, 559 U.S. 991 (2010); *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (holding that EPA had no authority to delist coal- and oil-fired utility units without conforming to CAA delisting provisions), *cert. denied*, 555 U.S. 1162 (2009).

51. See *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rev'd*, 549 U.S. 497 (2007); see also *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014) (reversing a potentially negative case for environmentalists and remanding to the D.C. Circuit).

52. See generally Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703 (2000) (discussing and analyzing the reasons behind the Supreme Court's apparent hostility towards environmental law).

53. The Court does not automatically grant certiorari. For example, it might deny a petition when it believes that a conflict between the circuits might be resolved by future decisions in the conflicting circuits, or when the Court discerns "some benefit from allowing the issue to percolate in the lower courts for a while longer, or if the conflict is over an issue that is insignificant or unlikely to recur." A. Raymond Randolph, Jr., *Certiorari Petitions in the Supreme Court*, 4 LITIG. 21, 24 (1978). Indeed, Rule 19 of the Supreme Court's rules states that certiorari petitions "will be granted only where there are special and important reasons therefor." *Id.* at 21.

54. See *infra* Part IV (discussing signaling and its consequences in greater detail). Of course, there are many factors that influence a Justice's decision to grant or deny a certiorari petition. See Black & Owens, *supra* note 10, at 1063–64 (listing and critiquing scholarship on this topic); Adam D. Chandler, *The Early Brief Gets the Worm*, SLATE (Dec. 5, 2008, 6:55 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2008/12/the_early_brief_gets_the_worm.html (describing the influence that amicus briefs filed at the petition stage have on the Court's certiorari process, and noting that amicus briefs are "one of four explicit factors the court weighs in deciding whether to grant a case"). These factors include the Court's jurisdiction to hear the case, conflict among the circuit courts, and conflicting petitions on disputed legal issues. *Id.* See generally Vanessa A. Baird, *The Effect of Politically Salient Decisions on the U.S. Supreme Court's Agenda*, 66 J. POL. 755 (2004) (discussing how Justices' signal to the litigation bar that they are interested in hearing certain types of cases).

55. See Baird, *supra* note 54, at 769 (describing the relationship between the Court and interest groups as "symbiotic").

56. See *id.* at 756 ("[T]he ability of the Court not to hear cases is unequivocal."); see also Black & Owens, *supra* note 10, at 1073 ("Justices have nearly total discretion to decide which cases the Court will hear, meaning they have freedom to pursue their raw policy goals with minimal constraints.").

access requirements to their liking. In this sense, the Ninth Circuit may be contributing indirectly to the Supreme Court's pro-business agenda, to which the next Part of the Article turns.

II. AN INCREASINGLY HOSTILE COURT FOR ENVIRONMENTAL PLAINTIFFS IN CASES CHALLENGING AN AGENCY PROCESS SHIELDING A PRO- BUSINESS DECISION

The Court's apparent negative attitude toward environmental cases like those arising in the Ninth Circuit in all probability reflects the increasingly pro-business perspective of the Justices.⁵⁷ Environmental causes are often perceived to be antibusiness, as they generally support the regulation of business activities, which can involve increased costs and lead to moratoriums or substantial modifications in the way businesses operate.⁵⁸ Environmental groups, who want to make government more transparent and responsive to critical public comment, are most often the plaintiffs behind these types of cases in the Ninth Circuit.⁵⁹ When successful, they can increase the time it takes for an agency to issue a plan or a permit, and thus increase the cost of the pending project.⁶⁰ Citizen suits that put both government agencies and business interests in the crosshairs—and that can increase the cost of business—are

57. Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1449 (2013) (describing the Roberts Court as "highly pro-business—the conservatives extremely so and the liberals only moderately liberal").

58. See Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 64 (2001) ("By increasing the potential costs associated with facility siting and upgrade, over-enforcement can forestall the environmental improvement that results from technological advance and economic development. . . . In addition, excessive enforcement of existing environmental rules can create perverse incentives to take 'preventative' action that actually entails the destruction or degradation of environmental resources."); see also Oliver A. Houck, *Standing on the Wrong Foot: A Case for Equal Protection*, 58 SYRACUSE L. REV. 1, 15 (2007) ("Nor has any body of law so broadly pitted public versus private interests in American life [as environmental law].").

59. David L. Markell, *Citizen-Friendly Approaches to Environmental Governance*, 37 ENVTL. L. REP. (Envtl. Law Inst.) 10,362, 10,363 (2007) ("Proponents suggest that greater opportunities for public involvement in agency decisionmaking processes may help enhance accountability and transparency in governance, contribute to more informed, and thereby improved, results, and foster a greater degree of connection between the governed and the governing (and a blurring of the line between the two) that leads to greater social capital and societal trust.").

60. By way of contrast, the Court was much friendlier toward cases brought by individuals seeking to improve agency conduct in the 1970s and 1980s, even before the advent of citizen suits. See Cassandra Stubbs, *Is the Environmental Citizen Suit Dead? An Examination of the Erosion of Standards of Justiciability for Environmental Citizen Suits*, 26 N.Y.U. REV. L. & SOC. CHANGE 77, 81–82 (2000–2001) ("Although the Supreme Court did not decide an environmental citizen suit case until the late 1980s, the Court was generous to environmental cases brought under judicial review provisions of the [APA] during the 1970s and early 1980s. These environmental cases were decided in a context of judicial support for expansion of access to the courts for the purpose of enforcing public law.").

precisely the cases that the current Court's pro-business conservative wing would like to discourage.⁶¹

Some have called the Roberts Court the most "pro-business court in the modern era."⁶² A study by Professors Lee Epstein, William Landes, and Richard Posner published last year in the *Minnesota Law Review* noted that "five of the ten Justices since 1946 friendliest to business are serving currently [on the Court] and that two of them—[Samuel] Alito and Roberts—rank first and second," respectively, in three of the four data sets used in the study.⁶³ The Epstein study also shows an increase in business-friendly certiorari petitioners relative to the number of business respondents.⁶⁴ According to Epstein, both business petitioners and business respondents have higher win rates than nonbusiness litigants, noting that "[w]hen a business petition winds up in the Supreme Court it means that the Court has reversed an anti-business decision, so the more pro-business the court, the more petitions by business litigants it can be expected to grant."⁶⁵ These data also show a steady increase in the proportion of pro-business certiorari petitions granted over a nearly seventy-year period, with 54 percent in the Vinson and Warren Courts, 54 percent in the Burger and Rehnquist Courts, and 64.9 percent in the Roberts Court starting in 2005.⁶⁶ This increase has been coupled with a "positive and significant trend in the win-rate" for business during the entire period.⁶⁷

Another indication of the current Court's pro-business slant is how poorly the Obama administration's regulatory agenda is faring before the Roberts Court. This record is reflected in the dismally low annual win rate for cases in which the solicitor general is a party; in 2013, this rate dropped to 39 percent from an average win rate of 70 percent.⁶⁸ In all likelihood, this record reflects

61. See Houck, *supra* note 58, at 12 ("The mob had taken over, and was interfering with what America is really about: private business." (describing a story about Professor James Q. Wilson, the leading academic proponent of the private rights school of standing)).

62. See Adam Liptak, *Roberts Pulls Supreme Court to the Right Step by Step*, N.Y. TIMES (June 27, 2013), <http://www.nytimes.com/2013/06/28/us/politics/roberts-plays-a-long-game.html>. Adam Liptak quotes Professor Lee Epstein as saying, "We shouldn't lose sight of the [C]ourt cementing its legacy as the most pro-business court in the modern era." *Id.* Liptak attributes this Court's pro-business tilt in part to Chief Justice Roberts's success in persuading his more liberal colleagues to join in what might be seen as more conservative opinions. *Id.* Liptak also quotes Doug Kendall, president of the Constitutional Accountability Center, as saying, "Anyone doubting that the most important story of the Roberts court is its business rulings has not been paying enough attention This term's [five to four] rulings, all favoring the [U.S. Chamber of Commerce], move the law sharply to the right and to the great detriment of consumers, employees, and other Americans trying to get their day in court." *Id.* This description certainly includes the Court's jurisdictional rulings on standing in environmental cases.

63. Epstein et al., *supra* note 57, at 1449. Epstein also notes that Roberts and Alito ranked first and third, respectively, in the fourth category of the study's business litigant data set (five to four decisions). *Id.*

64. *Id.* at 1453.

65. *Id.*

66. *Id.* at 1454.

67. *Id.* at 1454 n.32.

68. Liptak, *supra* note 62.

significant “philosophical differences” between the current democratic administration and the Court’s conservative majority.⁶⁹

This pro-business bias can also be seen in many of the Court’s rulings altering federal procedure in favor of the business community.⁷⁰ According to Professor Arthur Miller, the Court has done this by, among other things, tightening rules regarding the admissibility of scientific evidence and raising pleading barriers like standing and ripeness⁷¹—the latter rulings being all too familiar to environmental plaintiffs.⁷² Epstein’s study also found that the “Court is taking more cases in which business litigants lost in the lower court and reversing more of these—giving rise to a paradox that a decision in which certiorari is granted when the lower court decision was anti-business is more likely to be reversed than one in which the lower court decision was pro-business.”⁷³ This record parallels what is happening to environmental cases in the Ninth Circuit, as discussed in Part I.

One reason for the disparity between how the Ninth and D.C. Circuits fare in the Supreme Court may be that the type of environmental case that arises in the Ninth Circuit does not sit well with the Supreme Court’s pro-business wing.⁷⁴ Indeed, the pro-environmental record in the D.C. Circuit affirms the theory that it is the type of case arising in each circuit and the plaintiffs who bring them that are the pivotal factors in the Court’s reaction, not just whether

69. *Id.*

70. Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), <http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html> (“The Supreme Court has altered federal procedure in dramatic ways, one step at a time, to favor the business community . . .” (quoting Professor Arthur R. Miller)).

71. *Id.*

72. In *Pacific Rivers Council*, for instance, the Court could have heightened the pleading standard for the injury prong of Article III standing and eliminated long-standing precedent that a claim under NEPA is ripe when it first arises. See generally Babcock, *supra* note 7; *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 1582, *vacated as moot*, 133 S. Ct. 2843 (2013).

73. Epstein et al., *supra* note 57, at 1472; see also Babcock, *supra* note 7 (“The Roberts Court has affirmed more cases in which business is the respondent than its predecessor Courts did.”).

74. See Houck, *supra* note 58, at 18 (“[W]hat remains indelible is this world-view that fuses corporate enterprise with America, regards critics as enemies, and sees environmental law as the primary threat.”). Many articles have been written about the Court’s standing decisions as well as other Court-crafted barriers that make it more difficult for plaintiffs to bring environmental suits. See, e.g., John Harrison, *The Relation Between Limitations on and Requirements of Article III Adjudication*, 95 CALIF. L. REV. 1367, 1371 (2007); Houck, *supra* note 58, at 19–20 (“The private interest school . . . activated a wide range of defenses, including ripeness, mootness, private right of action and the political question doctrine . . . [and] constitutional challenges based, inter alia, on the commerce clause, the dormant commerce clause, private property rights, federalism and preemption, all with the goal of re-barring the door [to citizen suits].”); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 241 (2003) (“In more than half a dozen decisions over the past fifteen years, the U.S. Supreme Court has cut back on statutorily authorized attorneys’ fees given to prevailing parties in civil rights and environmental cases.”); James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits* at 30, 10 WIDENER L. REV. 1, 4 (2003) (“Case law demonstrates, if nothing else, that statutory shortcomings coupled with judicial ambivalence make for tough sledding for environmental citizen suit enthusiasts.”).

the lower court's decision had a positive outcome from an environmental standpoint.

Cases in the Ninth Circuit are frequently brought by environmental groups who want to make the business of federal land management agencies more transparent and responsive to critical public comment.⁷⁵ These suits are highly intrusive into the agency's decision-making process, and, in essence, second-guess the agency at every turn.⁷⁶ They challenge an agency's authority to take the action it did, often urging the court to stop some business activity, such as mining or logging.⁷⁷ Since the federal land use planning process is composed of multiple stages, it provides multiple opportunities for challengers to interject their concerns into the decision-making process. This ability can slow down the approval process and require developers to expend substantial resources repeatedly defending an agency's decision. Both *Pacific Rivers Council* and *Summers* exemplify this type of case, and in each case, the Court blocked

75. Houck, *supra* note 58, at 17–18 (“Environmental law became the *causa bellae* of corporations, conservative scholars and business-sponsored public interest firms that related in no way with its values. In their view they were responding to a movement of a Rastafarian underclass of hippies and radicals or, alternatively, of upper class and out-of-touch elites.”).

76. See Adler, *supra* note 58, at 57–58 (“Insofar as the environmental regulatory scheme is ill-equipped to address given environmental concerns, increasing the stringency of enforcement will do little, if anything, to advance ecological values. Insofar as detailed and complex regulatory provisions provide opportunities for special-interest rent-seeking, citizen suits can facilitate further exploitation outside of the legislative arena. Insofar as existing environmental programs embody mistaken priorities, citizen suits can amplify the improper emphases. And insofar as the existing regulatory regime is too rigid to allow for environmentally beneficial innovation, citizen suits threaten to ossify the process even more.”). Professor Jonathan H. Adler also notes that “[i]f the legal rule does not require the plaintiff to have an actual environmental stake in the case at hand, there is little to prevent private plaintiffs from using citizen-suit provisions as a means to pursuing other agendas—from NIMBY [not in my backyard] opposition to development of economic rent-seeking or organizational empire-building.” *Id.* at 61. *But see id.* at 44 (“[O]ne aim of environmental citizen suits is ‘to see that important legislative purposes heralded in the halls of Congress are not lost or misdirected in the vast hallways of the federal bureaucracy.’” (citing *Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971) (Wright, J.))); May, *supra* note 74, at 5–6 (“[C]itizen suits force rule of law and compliance with national environmental protection objectives . . . [and] help uphold bicameral lawmaking and tripartite governance and help effectuate often inscrutable congressional objectives. . . . They stem directly from the core of representation reinforcing democracy.”).

77. See Houck, *supra* note 58, at 16 (“[Environmental law] seemed perversely targeted at private industry [and federal agencies] . . . completely unaccustomed to the public eye, to say nothing of public challenge. The insult level was intense all around.”); see also Kenneth S. Weiner, *Accountability for Mitigation through Procedural Review: The NEPA Jurisprudence of Judge Betty B. Fletcher, a Trustee of the Environment and Woman of Substance*, 85 WASH. L. REV. 45, 58 (2010) (“[T]he Court’s NEPA jurisprudence has generally been to circumscribe NEPA for a number of reasons. Chief among them seem to be: (1) NEPA cases require detailed attention to the record to be fairly adjudicated; in this regard, they seem to have an uncanny relationship to death penalty, criminal, and immigration cases . . . (2) NEPA is an overarching statute that ‘overlays’ or injects discretion in any governmental action, discretion which is theoretically reviewable and thus increases access to the courts and potential court workload; (3) there have been relatively few Supreme Court [J]ustices with a strong environmental appreciation; and (4) almost since NEPA’s enactment, the Supreme Court has generally become more conservative with regard to access to the courts and judicial review of executive branch action.”).

environmental plaintiff organizations from challenging agency land use planning decisions that favored the extraction of a natural resource.⁷⁸

Assuming, as this Article posits, the existence of an increasingly pro-business Court, it is reasonable to conclude that the tilt reflects the current Justices' personal policy preferences. However, unless these preferences can be shown to influence how a Justice votes on a pending certiorari petition or the actual merits of a case, this nexus cannot be established. Part III of this Article illustrates that connection.

III. THE CERTIORARI PROCESS AND THE ROLE OF THE JUSTICES' PERSONAL POLICY PREFERENCES IN THE COURT'S SELECTION OF CASES

The 1925 Judiciary Act⁷⁹ gave the Supreme Court almost total discretion over its docket through the use of the certiorari process. A 1979 study of cases heard by the Court found that approximately 75 percent of all the cases that proceeded to oral argument reached the Court through the certiorari process, making it a critical part of the Court's "gatekeeping" function.⁸⁰ The Court denies the vast majority of petitions, leaving the decisions of the lower courts intact. During the 2008 to 2009 Term, for example, 8241 petitions were filed, with a grant rate of approximately 1.1 percent.⁸¹ Of the 8517 petitions filed in the Court's 2005 to 2006 Term, only seventy-eight were granted argument (0.9 percent).⁸² The petition review process is largely kept secret from the public, with the Justices rarely explaining why they have granted review, and even more rarely explaining why they decided not to review a case.⁸³ The fact that the Court receives over a thousand certiorari petitions a year but grants only a

78. See *U.S. Forest Serv. v. Pac. Rivers Council*, 133 S. Ct. 2843 (2013) (mem.), *vacating as moot* 689 F.3d 1012 (2012); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

79. Pub. L. No. 68-415, 43 Stat. 936 (1925).

80. Donald R. Songer, *Concern for Policy Outputs as a Cue for Supreme Court Decisions on Certiorari*, 41 J. POL. 1185, 1185 (1979). In spite of its importance, "at most each [J]ustice spends an average of 9.5 minutes per paid petition for certiorari and considerably less time on petitions filed in forma pauperis." *Id.* at 1186.

81. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 898 (2009) (Roberts, C.J., dissenting). Lazarus notes that "the influence of the expert Supreme Court bar over the plenary docket over this same time period [1980 to 2008] increased approximately tenfold." Lazarus, *supra* note 9, at 90. In 1980, expert Supreme Court advocates were responsible for 5.8 percent (6 of 102 cases) of granted certiorari petitions, but by 2008, that number had risen to 55.5 percent. *Id.* Lazarus sees "potential for an undesirable skewing in the content of the Court's docket." *Id.* An area for further research might be to examine the experience of attorneys either supporting or opposing the grant of certiorari in cases from the Ninth Circuit during the sixteen-year period under review in this Article, as there may be a perfect storm brewing.

82. David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 241 (2009).

83. Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 174 (2001); see also Black & Owens, *supra* note 10, at 1063 (briefly describing the certiorari process).

few⁸⁴ has enticed many academic scholars to theorize about what motivates the Justices to grant or deny a petition.⁸⁵

What emerges from the literature on this question “suggests that a complex interplay of internal norms among the [J]ustices and characteristics of the cases where review is sought drive[s] the certiorari process.”⁸⁶ For example, the Court may be more inclined to grant a petition when there is a dissenting opinion below, which can indicate a problem with the lower court’s decision. The Court may also be more disposed to hear a case when an appellate court has reversed a lower court or an agency decision, or when the solicitor general has filed the petition or a supportive amicus brief.⁸⁷ Professors Tracey George and Michael Solimine, for example, examined the Rehnquist Court’s record of reviewing petitions from en banc circuit court decisions and observed that lower court decisions that are ideologically inconsistent with the Court’s current majority are often granted certiorari to reverse the lower court.⁸⁸ Of the factors mentioned above, George and Solimine found that the only statistically significant factors in predicting which petitions the Court

84. See George & Solimine, *supra* note 83, at 191 (“[A] certiorari denial is twenty-five times more likely than a grant.”); see also Lazarus, *supra* note 9 (discussing the decline in the number of cases the Court hears and the simultaneous rise in influence of powerful economic interests over the Court’s docket at the jurisdictional stage).

85. Some scholars have adopted a theory called “cue theory,” which maintains that “the [J]ustices of the Supreme Court employ cues as a means of separating those petitions worthy of scrutiny from those that may be discarded without further study,” and that there are “a group of readily identifiable cues” for this purpose. See S. Sidney Ulmer et al., *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 6 LAW & SOC’Y REV. 637, 638 (1972). See generally Songer, *supra* note 80 (evaluating the strength of various cues, including the policy and party cues).

86. George & Solimine, *supra* note 83, at 175; see also *id.* at 188 (“Principal-agent theory suggests that the Supreme Court will review a circuit court decision if it believes that the circuit violated the terms of the relational contract among the courts.”); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 774 (2005) (“[E]ven when we examine the members of the Supreme Court, which has the greatest discretionary freedom and which decides the most controverted and difficult of cases, researchers find that these jurists ‘are driven by a complex mix of factors—legal, ideological, and strategic.’”).

87. George & Solimine, *supra* note 83, at 188–89. All three factors were present in *Pacific Rivers Council*. See Babcock, *supra* note 7 (discussing this case); see also Ulmer et al., *supra* note 85, at 636–38 (finding that, of the three cues identified by a study of 2361 cases from the 1947 to 1958 Court terms, the presence of the federal government as a petitioning party had a greater influence on which cases would make a “special list” of cases “than dissension among judges or lower courts, and the presence of a civil liberty question”). But see Songer, *supra* note 80, at 1194 (arguing that policy cues are as important as party cues in cases involving economic issues). Two additional factors—(1) the presence of amicus briefs in support of the petition, and (2) the presence of repeat players, especially state attorney generals—signal the relative importance of the case. George & Solimine, *supra* note 83, at 190, 191 n.68; see also Songer, *supra* note 80, at 1187 (arguing that the most important cue to a Justice is the presence of the national government as the petitioner).

88. George & Solimine, *supra* note 83, at 186; see also *id.* at 175 (“The Supreme Court is formally at the apex of the judicial pyramid, . . . [and] can be conceived as a principal directing (or attempting to direct) its agents, the lower courts. . . . [J]ustices seeking (among other things) to advance their own policy preferences, will utilize certiorari review and reversal of divergent opinions to monitor how Courts of Appeal apply Supreme Court doctrine.”).

would grant were the ideological tilt of the panel's ruling and the panel's recognition of an existing conflict among the circuits.⁸⁹

Other academic studies have similarly concluded that a Justice's policy goals play an important role in the Court's "screening decisions,"⁹⁰ and that a Justice's personal policy preferences play a large, even dominant role in the certiorari process, especially when it comes to directing the outcomes of lower courts.⁹¹ Professor Tonja Jacobi uses both game theory and the concept of economic equilibrium in her analysis of how judges shape the cases they hear by signaling what they think will be the likely outcome of the case. She discovered that the Justices decide to grant certiorari "on the basis of whether a case will be decided in accord with their policy preferences."⁹² Professors Ryan

89. *Id.* at 194–95. George and Solimine note that, though the presence of an amicus brief was generally insignificant, the presence of a brief or petition from a solicitor general was important, as was the presence of repeat players. *Id.* at 195; see also Songer, *supra* note 80, at 1193 ("When only conservative decisions of the courts below are considered, the relationship between the presence of the policy cue and the decision to grant certiorari is very strong."). Professor Donald R. Songer noted that this trend held true even when the party cue was absent. Songer, *supra* note 80, at 1193. During Chief Justice William Rehnquist's reign, petitions for certiorari stemming from liberal appellate decisions were twice as likely to be granted when accompanied by an intercourt conflict than cases without those variables. George & Solimine, *supra* note 83, at 195.

90. Lawrence Baum, *Policy Goals in Judicial Gatekeeping: A Proximity Model of Discretionary Jurisdiction*, 21 AM. J. POL. SCI. 13, 32 (1977) [hereinafter *Policy Goals in Judicial Gatekeeping*]. But see Lawrence Baum, *Case Selection and Decisionmaking in the U.S. Supreme Court*, 27 LAW & SOC'Y REV. 443, 452 (1993) [hereinafter *Case Selection and Decisionmaking*] (pointing to the number of cases the Court takes involving conflicts among the lower courts, which indicates the role legal goals play in case selection compared to decisions on the merits, where policy goals dominate). Professor Lawrence Baum also notes that the Court's limited resources inhibit the Justices from making "complex calculations" about the policy implications of the various petitions before them, which might lead them to "deemphasize policy considerations in favor of legal considerations that are more straightforward and thus easier to utilize." See *id.* at 453; see also Black & Owens, *supra* note 10, at 1063 ("[L]egal considerations strongly influence [J]ustices' agenda-setting behavior. . . . When legal and policy goals converge, legal factors make it easier for [J]ustices to seek policy.").

91. See Songer, *supra* note 80, at 1187 ("[P]olicy motivated judges would vote to grant certiorari whenever a lower court decision departed significantly from their preferred doctrinal position."); see also Kevin M. Scott, *Shaping the Supreme Court's Federal Certiorari Docket*, 27 JUST. SYS. J. 191, 201, 204 (2006) (suggesting that the Court is not willing to increase the size of its docket to address the decisions of aberrant lower courts); *Policy Goals in Judicial Gatekeeping*, *supra* note 90, at 14 (suggesting that a judge's goals can be as much a reflection of her desire to "improve" her court's existing position by voting to hear cases likely to be decided in favor of her policy preferences, as it may be simply to correct errors in a lower court that has distanced itself from the court's preferred doctrinal position). The definitive factor in determining the size of the Court's docket, according to Kevin Scott, is the preference of individual Justices. Scott, *supra*, at 204. Scott suggests that this factor is a more important predictor of the size of the Court's docket than the institutional environment of which the Justices are part. *Id.* But see Sisk & Heise, *supra* note 86, at 772 (noting that the margin of difference between judges of different political persuasions is "more often moderate than large"). Referring to the Supreme Court Justices, Professors Gregory C. Sisk and Michael Heise also observe, "Ideology then does not color everything (or even most things) nor does it explain everything (or even most things) where it does appear." Sisk & Heise, *supra* note 86, at 774. While ideology is an "important factor" in understanding what motivates a Justice, "the full complexity of this distinctive activity cannot be appreciated 'by assumption of a single-peaked preference along one dimension.'" *Id.*

92. Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Dockets*, 16 SUP. CT. ECON. REV. 1, 15 (2008).

Black and Ryan Owens, who analyzed the influence of the solicitor general on the certiorari behavior of the Rehnquist Court, found that the Justices vote to accept a petition “when they believe that the policy outcome of the merits decision will be better ideologically for them than the status quo.”⁹³ Black and Owens also determined that when the Justices are ideologically closer to the status quo, they will vote to deny petitions, which affirmed the authors’ conclusion that Justices are “policy-driven agenda setters who analyze both the Court’s expected policy decisions and the status quo.”⁹⁴ While other goals like limiting the amount of work a Justice must perform or improving her personal standing in the general public certainly play a role in whether a Justice decides to grant certiorari or not, Professor Lawrence Baum found that fulfilling the Justice’s policy goals nonetheless remains the ultimate priority.⁹⁵ Professors Christopher Casillas, Peter Enns, and Patrick Wohlfarth, who plotted the influence of public opinion on Supreme Court decisions from 1956 to 2000, agree that the greatest impact on the outcome of a case, regardless of its legal significance, is the “Justices’ collective political preferences.”⁹⁶

Justices think strategically when confronted with a decision on a certiorari petition that implicates their policy preferences.⁹⁷ Jacobi notes that Justices can be “long-term strategists,” content to forfeit a case’s outcome in order to shape the law’s future direction in a manner that they like: for example, by using the case as an excuse to write a strong dissent.⁹⁸ A Justice may also vote to deny a petition if she believes that her “side” is not likely to win on the merits of the case, that the case is not a “good vehicle” for producing a desired outcome, or that there is a better case in the “pipeline.”⁹⁹ The importance of a Justice’s policy preferences is also evident in Baum’s analysis of Justices’ tactical and strategic influences on case selection.¹⁰⁰ Collectively, these studies show that personal policy considerations appear to be the principal motivating factor in how a Justice votes on a petition, and that the Justices pursue these policy preferences strategically when voting on the fate of a particular petition.

93. Black & Owens, *supra* note 10, at 1072 (“Policy maximization—the outcome mode—is a strong predictor of Supreme Court agenda setting.”).

94. *Id.* at 1066–67.

95. *Case Selection and Decisionmaking*, *supra* note 90, at 444 n.4.

96. See Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 86 (2011).

97. See Black & Owens, *supra* note 10, at 1064 (reporting that Justices are reluctant to grant certiorari to cases that might negatively affect existing policy or out of fear of setting horrible precedent given a poor lower court decision); see also *id.* at 1063 (“[J]ustices strategically engage in aggressive grants [of certiorari petitions] . . . [but] do not act strategically by casting defensive denials.”).

98. Jacobi, *supra* note 92, at 12.

99. *Id.* at 15 (calling this rationale behind voting to deny petitions “an outcome-focused mode of judicial analysis”).

100. *Case Selection and Decisionmaking*, *supra* note 90, at 452. A Justice makes a tactical decision when she votes to accept a case that did not have a sound outcome in the court below and does not match her policy preferences. See *id.* Her vote to hear the case is strategic because she may reasonably expect to prevail on the merits. *Id.*

This is not to say that the law and legal principles do not influence a Justice's voting behavior. After all, Justices are "trained in the law and taught to approach decisions legalistically."¹⁰¹ They are also constrained to some extent by strong legal norms,¹⁰² such as those that compel the Court to grant review of a lower court decision declaring a federal law unconstitutional, or to resolve conflicts in the lower courts over how a law should be interpreted or applied.¹⁰³ Yet, Justices nonetheless have enormous discretion to select the cases they will review, which gives them latitude to pursue their individual policy goals with minimal checks on that discretion. The very fact that legal norms can still "thrive" in such an environment testifies to the strength of those norms.¹⁰⁴

While legal norms are relevant to the Justices in determining which petitions to grant, they also enable Justices to hide their policy preferences "under cover of the law."¹⁰⁵ As Black and Owens point out, when a Justice's policy goals conform to accepted legal norms, this "liberates" the Justice to pursue her individual policy goals.¹⁰⁶ Indeed, according to these two scholars, the law serves not to constrain a Justice, but "may actually place the [J]ustice in an enhanced position" to fulfill her policy goals. While "law is likely to matter," in other words, it can function as "either a constraint or a collaborator."¹⁰⁷

Nor are Justices impervious to the "social forces that shape public opinion."¹⁰⁸ As Justice Benjamin Cardozo once said, "The great tides and current which engulf the rest of men do not turn aside in their course and pass the judge by."¹⁰⁹ Supreme Court decisions that are oblivious to "the prevailing tides of public mood risk alienating the public, inciting negative reactions from

101. Black & Owens, *supra* note 10, at 1067.

102. *Id.*

103. *Id.* at 1068.

104. *Id.* at 1073. Black and Owens also note that the strength of legal norms and the relevance of legal issues are even more remarkable in an agenda-setting process that is "shrouded in secrecy." *Id.* ("The fact that legal concerns are relevant at all in such a private forum suggests, of course, that law matters.").

105. *Id.* at 1072 ("The law constrains [Justices] from acting on policy goals alone."); *see also id.* (using study findings to confirm that "while policy goals are quite substantial to [J]ustices, law and legal norms also influence their behavior"). *But see Case Selection and Decisionmaking*, *supra* note 90, at 454 (arguing that because the Court's agenda is dedicated to cases that are relevant to legal goals rather than the policy goals of individual Justices, "the Court's agenda setting is constrained by [J]ustices' perceptions of its institutional role").

106. Black & Owens, *supra* note 10, at 1067.

107. *Id.*

108. Casillas et al., *supra* note 96, at 75; *see also* George & Solimine, *supra* note 83, at 175 ("The cases that the Court places on its docket through the certiorari process may also reflect the societal forces that generate litigation and the [J]ustices' perception of the societal importance of certain issues."); Sisk & Heise, *supra* note 86, at 777 ("The empirical evidence of ideology as a factor in the aggregate cannot obscure the fact that any particular jurist is an 'individual human being [] whose particular behavior is not reducible to simple models.'").

109. Casillas et al., *supra* note 96, at 75 (quoting Supreme Court Justice Benjamin Cardozo).

the elected branches of government, and perhaps compromising the Court's institutional legitimacy."¹¹⁰ Therefore, "Justices who wish to create efficacious policy must—on the whole—comply with predominant community beliefs,"¹¹¹ because unpopular decisions by the Court can lessen public confidence in and support for it.¹¹² The Court's dependence on Congress and the executive branch to implement its decisions puts pressure on the Justices to engage in "normatively appropriate behavior" by issuing decisions that stay within the boundaries of what the community thinks is appropriate.¹¹³

To the extent that the Court is sensitive to its perceived public legitimacy because of its dependence on the other two branches of government to make its rulings effective, the Court's pro-business bias may reflect the public's increasing concern about the economy and the dwindling importance the public attaches to environmental causes.¹¹⁴ The fact that public opinion is not acting as a sufficient corrective may thus liberate the current members of the Court to engage in pro-business behavior.¹¹⁵

110. *Id.* at 76.

111. Black & Owens, *supra* note 10, at 1067; *see also* Casillas et al., *supra* note 96, at 86 ("The prevailing tides of public sentiment create an active, meaningful constraint on many of the tangible policies that emanate from the U.S. Supreme Court."). *But see* Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1033 (2004) (stating that the Justices' personal preferences play a stronger motivational role than public opinion).

112. Casillas et al., *supra* note 96, at 76.

113. Black & Owens, *supra* note 10, at 1067; *see also* Casillas et al., *supra* note 96, at 75 ("With little formal institutional capability to enforce the Court's decisions and to compel the elected branches or the public to respect its judgments, [J]ustices must often act strategically in their opinion writing, adjusting to shifts in the public mood in order to ensure the efficacy of their decisions."); McGuire & Stimson, *supra* note 111, at 1018–19. An example of the Court misreading public opinion and nearly losing its institutional legitimacy and the public's goodwill was its ruling in *Bush v. Gore*, 531 U.S. 98 (2000). Thus, "the Constitution affords the Supreme Court institutional independence, but it in no way guarantees the prestige upon which its success is so highly dependent." McGuire & Stimson, *supra* note 111, at 1023 & n.1 (noting also that "[a]t the very least, [the Justices] want to avoid the bureaucratic hassle of having to revisit the same issue repeatedly to 'demand' conformance, as they did in the case of school desegregation, for example").

114. *See* Lydia Saad, *More Americans Still Prioritize Economy over Environment*, GALLOP POL. (Apr. 3, 2013), <http://www.gallup.com/poll/161594/americans-prioritize-economy-environment.aspx#1> ("For the fifth consecutive year, more Americans are interested in protecting economic growth than in protecting the environment when the two goals are at odds. This year's 48% to 43% split represents a relatively narrow advantage for the economy, similar to last year's reading. But the latest result contrasts with 2011, when a record-high 54% chose the economy as the higher priority."); *see also* McGuire & Stimson, *supra* note 111, at 1018–19. Professors Kevin McGuire and James Stimson also discuss the strong motivational role played by the Justices' personal policy preferences. *Id.* at 1033. *But see* Lazarus, *supra* note 9, at 93 (rejecting the idea that the business-friendly Justices are more influenced by personal preferences than by the "heightened skills" of special influence advocates).

115. *See* Peter Manus, *Our Environmental Rebels: An Average American Law Professor's Perspective on Environmental Advocacy and the Law*, 40 NEW ENG. L. REV. 499, 500 (2006) ("It might be cynical to dismiss all environmental sentiment as a recurring fad that waxes and wanes and sometimes disappears altogether, more or less the sideburns of the social science world. It is probably the case, however, that the great majority of us persist in relegating environmental values to the world of politics, where 'the environmental problem' tends to knock around on the jumble table of hot-button issues along with classroom prayer, funding for the arts, and TV violence.").

While Supreme Court Justices may not be immune to community preferences, they still have “unusual freedom”¹¹⁶ to make decisions that are consistent with their personal policy goals. This is because they are unaccountable to the electorate, typically have no ambition for other positions, and need not worry about reversal by a higher court.¹¹⁷ “[T]his freedom allows the [J]ustices to follow their own inclinations, and their primary goals are *policy goals*,”¹¹⁸ as demonstrated above. Each member of the Court has preferences concerning the policy questions facing the Court, and when the Justices make decisions they want the outcomes to approximate those policy preferences as closely as possible.¹¹⁹ Since Justices are inclined to grant certiorari when an ultimate ruling on the merits will be consistent with their personal policy preferences,¹²⁰ the Court’s pro-business slant matters when it becomes a factor in setting the Court’s agenda.¹²¹ While this may always have been true, it is troublesome that these preferences have coalesced into a single voting block on the Court, thus privileging some interests at the expense of others. The Court’s certiorari record in the Ninth Circuit illustrates this problem, as business interests consistently prevail over the broader public interest in protecting environmental resources and ensuring a transparent and responsive government.

The next Part of this Article explores how the combination of an increasingly pro-business Court and a discretionary process that allows for agenda setting based on desired policy outcomes is playing out in the Ninth Circuit. The reader should be forewarned, however, that the Ninth Circuit’s story as told here is far from complete. The analysis set out in this Article does not factor in confounding considerations, such as whether the panel issuing a decision was unanimous, whether the Court’s ruling reversed a lower court

116. *Case Selection and Decisionmaking*, *supra* note 90, at 445.

117. *Id.*

118. *Id.* (internal quotation marks omitted).

119. *Id.* Regarding the Supreme Court’s decision making, Professors Gregory Caldeira and John Wright said, “Theoretically, we propose that [J]ustices of the U.S. Supreme Court are motivated by ideological preferences for public policy and that they pursue their policy goals by deciding cases with maximum potential impact on political, social, or economic policy.” *Id.* at 452 (citing Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1111 (1988)); *see also* Songer, *supra* note 80, at 1190–92 (providing statistically significant data showing that the Court granted certiorari 38.3 percent of the time when a lower court issued a decision that the Court majority “would evaluate as in error from a policy perspective,” compared to only 12.2 percent of the time when those same policy cues were absent). Even though a government petitioner has a reinforcing effect on the policy cue, it does not diminish the significance of the policy cue. *Id.*

120. Black & Owens, *supra* note 10, at 1064.

121. *See* Michael C. Blumm & Sherry L. Bosse, *Norton v. SUWA and the Unraveling of Federal Public Land Planning*, 18 DUKE ENVTL. L. & POL’Y F. 105, 123 (2007) (explaining that *Norton v. Southern Utah Wilderness Ass’n* reflects “Justice Scalia’s judicial philosophy of protecting the Executive from public challenges through citizen suits”—a philosophy that was already evident in his 1990 opinion in *Lujan v. National Wildlife Federation*, “where he concluded that environmentalists lacked standing to bring a programmatic challenge against a series of BLM actions in a single lawsuit”).

decision, or whether the government filed or supported a certiorari petition, all of which influence the Court. Nonetheless, the story is disconcerting if one believes in fair play, let alone cares about the environment. This latter concern gains considerable traction from the importance of the Ninth Circuit cases the current Court has taken under its wing only to set damaging precedent on matters of natural resource protection and court access.

IV. HOW THE ROBERTS COURT IS USING THE CERTIORARI PROCESS TO PROMOTE ITS PRO-BUSINESS AGENDA IN THE NINTH CIRCUIT

The Ninth Circuit hears many challenges to the federal government's management of natural resources and protection of the environment, as confirmed by a quick glance at the decisions listed in Part I.¹²² What these cases also show is that Supreme Court decisions reversing the Ninth Circuit's environmentally protective holdings have constrained the effectiveness of environmental and natural resources laws. For example, *Decker v. Northwest Environmental Defense Center* limited the ability of the federal government to regulate runoff from timber haul roads,¹²³ and *Sackett v. EPA* restricted the ability of the EPA to protect wetlands.¹²⁴ *Summers v. Earth Island Institute*, moreover, held that environmental plaintiffs lacked standing to facially challenge a USFS regulation, allowing the agency to ignore certain procedural requirements under the National Environmental Policy Act (NEPA).¹²⁵ In the aggregate, the Supreme Court's reversals of environmentally favorable Ninth Circuit rulings during the sixteen-year study period did more to weaken environmental and natural resource protections than the occasional environmentally adverse decisions emerging from the other circuits.¹²⁶

122. See *supra* pp. 111–12 (listing the most recent negative environmental decisions of the Court).

123. 133 S. Ct. 1326 (2013).

124. 132 S. Ct. 1367 (2012).

125. 555 U.S. 488 (2009). Had the Court proceeded to judgment in *Pacific Rivers Council*, in all likelihood, it would have extended the protection from environmentalists given to federal land use managers in *Summers*, 555 U.S. 488 (2009); *Norton v. Southern Utah Wilderness Ass'n (SUWA)*, 542 U.S. 55 (2004) (holding, *inter alia*, that land use plans are not judicially enforceable); and *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) (holding that land use plans are not ripe for judicial review). See Babcock, *supra* note 7 (discussing the significance of the questions certified to the Court for review). For more on *SUWA*'s negative effect, see Blumm & Bosse, *supra* note 121, at 135 ("Although *SUWA* did not entirely preclude judicial review of land plans, it has severely constricted the public's ability to challenge agency action on a land plan level. Litigants must now instead challenge individual actions taken under land use plans, even if it is the terms of the plans themselves that are objectionable.").

126. Judging from the subject matter of the holdings and the number of times each decision has been cited by other courts, most decisions from other circuits are of limited import. See, e.g., *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011) (cited nineteen times thus far) (denying class certification to village residents that sought to sue a chemical company for allegedly releasing pollutants into the air and drinking water); *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765 (7th Cir. 2011) (cited twenty-five times thus far) (denying state's motion for an injunction that would have required defendants to take additional measures to prevent spread of invasive species in the Great Lakes), *cert. denied*, 132 S. Ct. 1635 (2012); *Town of Winthrop v. Fed. Aviation Admin.*, 535 F.3d 1 (1st Cir. 2008)

If the Supreme Court acted in total isolation, the landscape for environmental advocates would be grim, but not yet beyond redemption, considering how few cases the Court hears. However, the Supreme Court's decisions not only predetermine the outcomes of lower court decisions, but also indirectly influence lower court agendas¹²⁷ through a process known as signaling.¹²⁸ Justices signal their desire to hear additional cases in a given policy area¹²⁹ through opinions, interviews, speeches, and even by reading opinions from the bench.¹³⁰ An equally clear way of signaling the Court's preferences, however, is through selecting the cases it wishes to hear. To the extent that litigants can discern the Court's policy preferences from its manipulation of the certiorari petition process, lawyers whose clients have anti-environmental policy goals can use that information to determine which cases to pursue.¹³¹ This is not particularly difficult for lawyers to do because the same or significantly similar issues often come before the Ninth Circuit and Supreme Court, and generally involve repeat players.¹³²

In addition, being able to concentrate on only one circuit, such as the Ninth Circuit, simplifies the job of litigants who look for cases that will push

(cited seventeen times thus far) (denying appellant's request for review of a Federal Aviation Administration decision to grant a permit for a new airport taxiway without preparing an EIS); *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257 (10th Cir. 2004) (cited sixty-four times thus far) (finding that the Corps' decision to issue a permit for constructing a housing development and golf course next to bald eagle habitat without an EIS was not arbitrary and capricious). There are, however, possible exceptions. *See, e.g.,* *Env'tl. Conservation Org. v. City of Dallas*, 529 F.3d 519 (5th Cir. 2008) (cited 145 times thus far) (dismissing environmental organization's suit for CWA violations as mooted by EPA-negotiated consent decree); *Nat'l Parks & Conservation Ass'n v. Norton*, 324 F.3d 1229 (11th Cir. 2003) (cited 129 times thus far) (dismissing claims because the state's failure to discontinue private occupancy of a building located on wetlands was not a "final agency action"); *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316 (2d Cir. 2003) (cited sixty-nine times thus far) (holding that EPA had complete discretion over whether to issue a notice of deficiency based on alleged deficiencies in the state's program for issuing permits under the CAA).

127. Baird, *supra* note 54, at 757.

128. Jacobi, *supra* note 92, at 13 (discussing how judges control what cases come before them by signaling a case's potential for victory). Jacobi explains that signaling is "a particularly apt form of inducement to litigate" because it is hard to value or forecast the result of litigation before the parties spend significant resources. *Id.*

129. *See, e.g.,* *Decker v. Nw. Env'tl. Def. Cent.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring) (indicating an interest in overturning *Auer v. Robbins*, 519 U.S. 452 (1997), but concluding that the parties' briefs did not properly raise the issue for the Court); *see also* Baird, *supra* note 54, at 769 (explaining that the Court "use[s] current decisions to focus the attention of litigants on particular policy areas, thereby increasing its ability to make comprehensive policy in those areas in the future").

130. Jacobi, *supra* note 92, at 15; *see also* Baird, *supra* note 54, at 760 n.8 (noting that a Justice may reverse lower court decisions more frequently than normal or accept more petitions in a particular policy area, among other mechanisms, to identify her priorities).

131. Jacobi, *supra* note 92, at 11 ("In the judicial signaling game, judges are like sellers, and litigants are like buyers. Litigants have to decide whether to expend the resources on the good, litigation, in order to gain the utility of a winning case.").

132. *Id.*

the Court's policy priorities in their direction.¹³³ Indeed, the fact that the Court reverses the Ninth Circuit so frequently on its pro-environment rulings and often grants certiorari petitions in environmental cases where environmentalists have won "signals" the Court's pro-business policy priorities to potential litigants.¹³⁴ Given the increasing frequency with which the Ninth Circuit's environmental decisions are finding their way to the Supreme Court only to be reversed, it is clear that business interests are correctly discerning the Court's signals about its policy preferences.

The Court's nearly unblemished recent record of taking certiorari and reversing when environmental plaintiffs have won in the Ninth Circuit will in all likelihood continue because the Ninth Circuit's cases represent everything that the pro-business Court wants to change.¹³⁵ The immutable nature of this history may seem somewhat counterintuitive if one assumes that the average circuit judge adjusts her behavior over time to avoid being reversed, to avoid putative damage to her professional reputation, and to avoid the additional workload resulting from remanded cases.¹³⁶ In the usual case, a lower court "balances" its interest in issuing a decision it might prefer with the need to fit within the higher court's penumbra to avoid being reversed.¹³⁷ The Court's limited resources, however, mean it cannot intervene in every lower court decision it dislikes, giving appellate courts some "'slack' to deviate from the Supreme Court's preferences without being reviewed."¹³⁸ Although different appellate courts may vary as to the strength of their policy preferences, their sensitivity to being reversed, and how much slack they think they have, the reversal rate of the Ninth Circuit in the Roberts Court could be indicative of a lower court underestimating the amount of slack it has. It may also reflect the Ninth Circuit's lack of concern about being reversed on matters it sees as important—perhaps including the environment. Accordingly, it appears that the Ninth Circuit is unlikely to change unless the policy preferences of a majority of its members shift.

Unlike many litigants before the Court, environmental plaintiffs emerging victorious from the Ninth Circuit are under no illusion about how their case will fare above.¹³⁹ Improving the batting average of environmental litigants

133. See Baird, *supra* note 54, at 757 ("[S]ince judicial policy making is an iterative process, justices rely on the ability of litigants to pay attention to the cues contained within previous cases to make effective, comprehensive policy.").

134. *Id.* at 760–61 n.8.

135. See *supra* Part II (discussing the pro-business leanings of the Roberts Court).

136. Kevin T. McGuire et al., *Measuring Policy Content on the U.S. Supreme Court*, 71 J. POL. 1305, 1307–08 (2009).

137. *Id.* at 1308.

138. *Id.*

139. Normally litigants decide whether to seek certiorari without information on the Justices' policy preferences. *Id.* Here there is almost no mystery. Indeed, concern for how the Court might have ruled on the merits in *Pacific Rivers Council* in all probability led environmentalists to take the unusual step of seeking dismissal of a granted certiorari petition and vacation of a favorable lower court decision.

who start out successfully in the Ninth Circuit only to be reversed above is not as simple as telling them that they should file suit in other, less friendly circuits; even if they were able to do so, a loss in a different circuit would fare no differently upon Supreme Court review given the Court's pro-business tilt. Perhaps unfortunately from the perspective of this Article, the Ninth Circuit is the circuit with the most natural resources in its jurisdiction—where most national forests, wilderness areas, public lands, national parks, and nonrenewable resources are located.¹⁴⁰ The Ninth Circuit includes land that is managed by the federal government for multiple purposes under a variety of federal planning statutes, frequently giving rise to resource management disputes. The Circuit also has jurisdiction over particularly environmentally active states, like California, that pass a significant number of environmental laws.¹⁴¹ Although perhaps not as significant to the development of environmental law as the D.C. Circuit,¹⁴² which presides over challenges to the EPA's rulemaking agenda, the Ninth Circuit is nonetheless almost equally significant due to the number of environmental cases it hears, especially in the area of federal natural resources management. That is what is so troubling about the story recounted in this Article.

CONCLUSION

While it may be true that “our aspirations for what a legal system can do to improve social circumstances is simply too high,”¹⁴³ the courts are the avenue open to anyone who believes she has been wronged in some way by the actions of another. Therefore, when the highest court in the land uses its discretionary authority to shape its agenda in a way that furthers the interests of some, but not others, it undermines the neutral remedial effect intended by our legal system.¹⁴⁴ Beyond “a sobering splash in the face with cold reality for those of us who retain an aspirational faith in principled judging,”¹⁴⁵ having

140. Hurley, *supra* note 15 (“[A] ‘high proportion’ of the [C]ourt’s environmental docket comes from the [Ninth] Circuit, which has jurisdiction over nine Western states.”). Some Western states, particularly California, pass more environmental legislation than other states. *Id.*

141. *Id.*

142. See Doug Kendall & Simon Lazarus, *Broken Circuit: Obstructionism in the Environment’s Most Important Court*, 30 ENVTL. F. 36, 36–40 (2013), available at <http://pubcit.typepad.com/files/broken-circuit.pdf> (discussing the D.C. Circuit’s importance in shaping environmental law).

143. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 14 (1997).

144. Markell, *supra* note 59, at 10,363 (“[Procedural justice literature] suggests that citizens’ assessments of the fairness of third-party decisionmaking [sic] procedures are important to judgments about the legitimacy of such processes, independent of the outcomes of such procedures.”); see also Stubbs, *supra* note 60, at 131–32 (“Perhaps the most troubling aspect of the Supreme Court’s jurisprudence in environmental citizen suits is its demonstrated willingness to erode congressional power to define legal rights and remedies and to rely instead on its own normative decision making. This approach has serious potential consequences far beyond the area of environmental citizen suits: it demonstrates general judicial hostility to all forms of nontraditional litigation.”).

145. Sisk & Heise, *supra* note 86, at 777.

some members of the Court “cook the books” by using the certiorari process to implement their policy preferences diminishes the credibility of the Court as an institution.

In order to further test this Article’s thesis about the Ninth Circuit’s role in furthering the Roberts Court’s pro-business agenda, research should be done to eliminate potentially confounding factors, such as whether there is a higher rate of Court reversals of environmental cases in general, whether there is a higher rate of petition acceptance when there is a divided panel below regardless of the circuit, or how the solicitor general’s involvement affects the Court’s decision-making process. Nonetheless, the rudimentary observations made here about the interplay between the Ninth Circuit and the Supreme Court are still stunning, particularly when compared to another environmentally active circuit court, like the D.C. Circuit. This *pas de deux* may only reflect a particularly sharp ideological divide between one circuit court, the Ninth Circuit, and the Supreme Court, at this particular time.¹⁴⁶ But the fact that the pattern revealed here is negatively shaping the development of environmental law makes the story worth telling, no matter the caveats. Perhaps by drawing attention to this story, this Article “could be the catalyst for more self-consciousness” on the part of all the Justices. A greater awareness of how the Justices’ personal backgrounds and attitudes influence their actions could lead to “greater self-conscious impartiality and objectivity.”¹⁴⁷ At the very least, the author hopes it may start a conversation and be a catalyst for additional research.

146. See Scott, *supra* note 91, at 201 (“The results suggest but do not clearly demonstrate that the ideological distance between the Supreme Court and the courts of appeals is positively related to the number of cases the Supreme Court hears in a given term.”).

147. Sisk & Heise, *supra* note 86, at 776. Lazarus proposes several structural changes to the Court’s decision-making process at the certiorari stage, including a proposal to replace the current single cert pool, which is staffed by inexperienced young recent law school graduates, with two competing pools and more clerks to give each petition a closer review. Lazarus, *supra* note 9, at 96. He also suggests introducing a two-step petition review process where clerks first identify potentially cert-worthy cases and then examine that smaller pool of petitions more closely. *Id.* Lazarus also urges the Court to solicit input from outside experts who are knowledgeable about the issues in a given petition, as it already does from the solicitor general, or to create an office of “seasoned career lawyers” to assess the cert-worthiness of petitions. *Id.* at 96–97. These lawyers would assist the Court by challenging “exaggerated claims” of some lawyers and making up for the “deficiencies” of others. *Id.*