No. 12-623

In the Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL., PETITIONERS

v.

PACIFIC RIVERS COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent Pacific Rivers Council (PRC) seeks to enjoin the Forest Service's 2004 general framework for managing 11.5 million acres of National Forest System land in the Sierra Nevada region, as well as every site-specific project throughout 11 covered National Forests. But PRC has not identified *even one* project that will adversely affect *even one* member. The court of appeals' conclusion that PRC has standing based on general assertions of unspecified potential harm directly conflicts with *Summers* v. *Earth Island Institute*, 555 U.S. 488 (2009); *Clapper* v. *Amnesty International USA*, No. 11-1025 (Feb. 26, 2013); and the decisions of several other courts of appeals. The decision should be reversed.

PRC's challenge to the 2004 Framework is also unripe. Absent approval of a site-specific project or other irreversible commitment of resources by the Forest Service, PRC's challenge to that programmatic decision

is merely an abstract disagreement not appropriate for judicial review.

Finally, PRC's opposition (at 26, 30-33) mischaracterizes the court of appeals' substantive ruling under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, as adopting a "rule of reason." The Ninth Circuit did not inquire whether the Forest Service's determination to delay more detailed analysis of effects on fish until more localized projects were under consideration was arbitrary, capricious, or an abuse of discretion, the applicable standard of review under the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A). Rather, it *required* the Service to undertake that analysis sooner if it was reasonably possible to do so. That is not the correct inquiry under NEPA, which assigns to the expert agency the decision when, among reasonable options, to complete various aspects of the required analysis.

A. PRC Has Not Established Article III Standing

1. PRC first contends (at 8) that the court of appeals' decision does not conflict with *Summers* because its recitation of general standing principles comports with *Summers*. But the Ninth Circuit's decision in *Summers* itself recited exactly the same general principles—and this Court still reversed the court of appeals' fundamentally erroneous application of that framework. Compare *Earth Island Inst.* v. *Ruthenbeck*, 490 F.3d 687, 693 (2007) (finding a plaintiff must demonstrate that it "has suffered 'injury in fact that is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical"), with Br. in Opp. 8 (quoting essentially identical language). The Ninth Circuit's ability to quote the general three-part test affirmed in *Summers* does

not insulate its ruling from review or excuse its serious departure from *Summers*' holding.

The decision below also conflicts with this Court's recent decision in *Clapper*, which reiterated that "'[a]llegations of *possible* future injury' are not sufficient" to establish Article III standing. Slip op. 10 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)) (alterations in original). The court of appeals sought to distinguish *Summers* by stating that, unlike PRC, the *Summers* plaintiffs "had not shown *any realistic likelihood* that they would come into contact with" affected land parcels. Pet. App. 21a (emphasis added). But *Clapper* rejected the Second Circuit's functionally indistinguishable "objectively reasonable likelihood" inquiry, holding that such a standard "is inconsistent with [the] requirement that 'threatened injury must be *certainly impending* to constitute injury in fact.'" Slip op. 10-11 (quoting *Whitmore*, 495 U.S. at 158) (emphasis added).

2. PRC rests its claim of standing (Br. in Opp. 9-13) entirely on the exceedingly general Anderson declaration it submitted in district court (Pet. App. 120a-123a). PRC argues at length that the declaration should be construed in the light most favorable to PRC. But even accepting PRC's spin on the declaration, it is wholly insufficient to establish Article III standing.

First, PRC insists that the declaration must "be understood to refer to Anderson's hiking, climbing, and fishing activities in the national forests of the Sierras," Br. in Opp. 10, though the declaration nowhere states that he or any PRC member had specific plans to use National Forest lands. Even if PRC were correct that such an inference should be drawn, it is simply insufficient under *Summers* for Anderson to assert (*ibid.*; Pet. App. 121a) that he "plan[s] to continue" hiking, climbing,

and fishing somewhere in 11.5 million acres of National Forest land, without identifying a single project authorized by the Forest Service under the 2004 Framework, much less one that would affect his enjoyment of those activities in any specific area that he has concrete plans to use. *Summers* rejected similarly vague injury assertions because the plaintiff "fail[ed] to allege that *any* particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of [the affiant's] to enjoy the National Forests." 555 U.S. at 495.

Second, PRC points to the assertion in Anderson's declaration that PRC members are harmed by "the current management direction of Sierra Nevada national forests *as directed by the 2004 Framework*," and to Anderson's statement later in the same paragraph that "[c]urtailed fishing and recreation opportunities due to the loss of native species such as bull trout and salmon have also injured me." Br. in Opp. 11 (quoting Pet. App. 122a) (emphasis added by respondent). The latter statement refers generally to curtailment of fishing over years past, not specifically to any consequences of the then-recent 2004 amendments. In any event, Anderson did not identify any project in the vast Sierra Nevada region that had been implemented as permitted by the 2004 Framework, let alone any project that had injured or would imminently injure the ability of Anderson (or any other PRC member) to enjoy fishing. He therefore has not remotely alleged any injury that is "certainly impending," *Clapper*, slip op. 11, and has failed to establish standing, see *Summers*, 555 U.S. at 495.[1]

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[1] PRC emphasizes Anderson's allegation that he will be injured by his future inability "to share the experience of observing and delighting in" fish species such as bull trout, salmon, and steelhead in the

3. Although the direct conflict with *Summers* and *Clapper* is sufficient to warrant certiorari and summary reversal, the court of appeals' decision also conflicts with decisions of the Sixth, Seventh, and D.C. Circuits.

PRC suggests (at 13) that the Sixth Circuit in *Heartwood, Inc.* v. *Agpaoa*, 628 F.3d 261, 268-269 (2010), disavowed requiring a plaintiff to identify a specific geographic area that would be harmed by challenged government activity. In fact, *Heartwood* acknowledged that the required specificity of injury allegations might vary with the scope of the challenged agency action. *Id.* at 268. But it also reiterated that the "specificity requirement of standing 'is assuredly not satisfied by averments which state that . . . [an individual] uses unspecified portions of an immense tract of territory.'" *Id.* at 267-268 (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 889 (1990)) (alterations in original). Anderson's averments are exactly that: assertions that he uses unspecified portions of an 11.5-million-acre area.

The same is true of *Pollack* v. *United States Department of Justice*, 577 F.3d 736, 742 (7th Cir. 2009), cert. denied, 130 S. Ct. 1890 (2010), which held that the plaintiff lacked standing because he did not establish that he would be affected by the challenged action. PRC attempts (at 14-15) to distinguish that holding because the

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Sierra Nevada region. Br. in Opp. 11; see Pet. App. 122a. Bull trout are not even present in the National Forest lands covered by the 2004 Framework. See http://www.fws.gov/pacific/bulltrout (last updated Oct. 12, 2010). And the presence of salmon or steelhead within the Sierra Nevada is very limited because dams and water projects severely restrict their ability to migrate upstream to the National Forests. See http://swr.nmfs.noaa.gov/recovery/centralvalleyplan.htm (last visited Feb. 28, 2013). Broad allegations of effects on species of such limited distribution cannot establish injury as a result of the Framework as a whole.

challenged activity was more discrete. But the guiding principle is the same: the plaintiff in *Pollack* could not establish that he was adversely affected by the allegedly unlawful act. Neither can PRC.

Finally, PRC contends (at 15-16) that *National Association of Home Builders* v. *EPA*, 667 F.3d 6 (D.C. Cir. 2011), does not conflict with the decision below because the plaintiffs there would not be harmed by the challenged decision without some further intervening action. Unless or until such action occurred, PRC argues, the plaintiffs faced only "the *possibility*" that they would be harmed by future government action. Br. in Opp. 15 (quoting *National Ass'n of Home Builders*, 667 F.3d at 13). That is true of PRC as well. The 2004 Framework does not authorize the actual carrying out of any specific action in the Sierra Nevada region. Any site-specific project with effects on the ground that would be governed by the Framework must first undergo the appropriate NEPA analysis and be authorized in a separate administrative decision. PRC members therefore face only the *possibility* that the Forest Service might render a decision in the future that might harm their interests without sufficient consideration of effects on fish. Such speculation about future government decisions cannot establish standing. See *Clapper*, slip op. 14.

4. PRC's argument that this is a poor vehicle to address the Ninth Circuit's misapplication of established standing rules also misses the mark. It is true (see Pet. 10 n.5) that the Supplemental Environmental Impact Statement (SEIS) associated with the 2004 Framework has been held inadequate based on *other* violations of NEPA and that the Forest Service is revising the SEIS to address those deficiencies. But those proceedings will not address the deficiency PRC alleges. A ruling

from this Court that PRC lacks standing would therefore have a real-world effect in this case—to say nothing of the prospective circuit-wide effect of correcting the Ninth Circuit's substantial departure from controlling Article III standing principles.

It is also no answer to characterize the court of appeals' decision as a "fact-bound determination" that Anderson's declaration was sufficient. Br. in Opp. 7. This Court's standing decisions always address whether particular plaintiffs have shown sufficient facts to establish standing. See *Clapper*, slip op. 10-19. But lower courts are then to apply the broader principles exemplified by those specific applications. The Ninth Circuit has flouted the direction this Court provided only four years ago in *Summers* based on a materially indistinguishable declaration and set of arguments.

Finally, PRC's suggestion (at 10) that the Forest Service obtained a "tactical advantage by eliminating the opposing party's opportunity to develop or clarify the facts" when it challenged PRC's standing for the first time on appeal (shortly after the decision in *Summers*) is meritless. PRC has already filed a supplemental Anderson declaration in the district court. 2:05-cv-953 Docket entry No. 183-2 (E.D. Cal. Oct. 15, 2012). Although that declaration does identify which National Forests Anderson and other PRC members plan to use, it still does not identify *any* project governed by the 2004 Framework that will adversely affect any PRC member. See *id.* at 2-3. That declaration thus merely confirms that PRC has not established standing.

B. PRC's Challenge To The 2004 Framework Is Not Ripe For Review

PRC contends (at 17-20) that this Court should not consider the government's ripeness argument because it

was raised for the first time in the certiorari petition. As noted in the petition (at 27), however, Ninth Circuit precedent foreclosed such an argument. This Court has held that "the question of ripeness may be considered" by a court even when no party has raised it and even when it "rais[es] only prudential concerns." *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808 (2003). Moreover, the ripeness question here is closely intertwined with the standing question, which warrants considering them together.

Considering ripeness is particularly important because the Ninth Circuit's erroneous view of the ripeness of programmatic NEPA challenges stems from a misinterpretation (shared by at least one other court of appeals, see Pet. 26 n.9) of *dictum* in this Court's decision in *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 737 (1998). In considering the ripeness of a challenge under the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, the Court noted that "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get any riper." *Ohio Forestry*, 523 U.S. at 737. But as explained in the petition (at 23-25), that *dictum* is properly limited to NEPA analysis of agency action that directly approves activity with immediate on-the-ground consequences, *not* programmatic decisions that will have no real-world effect absent subsequent agency action that will itself be accompanied by NEPA analysis and subject to judicial review under the APA by a person who is actually injured.[2] If PRC ever identifies a site-specific project

[2] PRC's cramped view (at 24-25) of *Center for Biological Diversity* v. *United States Department of the Interior*, 563 F.3d 466 (D.C. Cir. 2009), ignores that court's express statement—in conflict with the

governed by the 2004 Framework that injures at least one PRC member, it will have standing to challenge that project—and at that time its challenge to the 2004 Framework will be ripe insofar as the Framework affects that particular project.

C. NEPA Does Not Require Agencies To Analyze All Potential Environmental Effects "As Soon As It Is Reasonably Possible To Do So"

Finally, PRC's attempt (at 26, 30-33) to recharacterize and justify the Ninth Circuit's NEPA ruling as a "rule of reason" is without merit. The court held that the Forest Service must complete every aspect of environmental analysis of projects that might be governed by a programmatic rule "as soon as it is reasonably possible to do so." Pet. App. 28a (internal quotation marks and citation omitted). That is not a rule of reason. A rule of reason would acknowledge that there may be a range of times (or stages of tiered administrative decision-making) at which it would be reasonable—or, in APA terms, not arbitrary or capricious—for an agency to complete a particular aspect of the relevant environmental analysis. And any such rule would accord great deference to the agency with scientific expertise as to the choice among such reasonable options. That is not what the Ninth Circuit did. Instead, it held that the agency must choose the earliest practicable option—*i.e.*, that it must complete potential environmental analysis "as soon as it is reasonably possible to do so"—even if it

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court of appeals here—that the "dicta" in *Ohio Forestry* on which PRC relies "do[] not control" when a plaintiff challenges an agency's NEPA compliance before the agency has "'irreversibl[y] and irretrievabl[y] commit[ted] resources' to an action that will affect the environment." *Id.* at 480-481 (quoting *Wyoming Outdoor Council* v. *USFS*, 165 F.3d 43, 49 (D.C. Cir. 1999)).

would not be arbitrary or capricious to do so at a later stage.

The Ninth Circuit's as-soon-as-reasonably-possible standard is not found anywhere in NEPA or its complementary regulations, which merely require that the appropriate environmental analysis be completed "to the fullest extent possible," 42 U.S.C. 4332(2)(C), and that the NEPA process be "integrate[d] * * * with other planning at the earliest possible time," 40 C.F.R. 1501.2. That is how the Forest Service is proceeding here: it will complete the required NEPA analysis to the fullest extent possible before taking any action governed by the 2004 Framework, and it has integrated the NEPA process in its management of the Sierra Nevada forests from the beginning. Neither NEPA nor its regulations require an agency to *complete* particular aspects of environmental analysis at the first stage of a tiered decision-making process. That requirement was invented by the Ninth Circuit. The Forest Service reasonably decided to defer further analysis of potential environmental effects on fish of possible future projects until a site-specific project is under consideration. See Pet. 29-31.

In complaining that the Forest Service failed to explain why the SEIS did not include a more extensive analysis of the 2004 Framework's effects on fish, the court of appeals and PRC misunderstand the purpose of the 2004 SEIS. See Br. in Opp. 26, 28-29; Pet. App. 36a-37a. The SEIS was a supplement to the EIS prepared for the 2001 Framework. Its purpose was to analyze the environmental effects of the 2004 Framework that were materially different from those already discussed in the 2001 EIS. See 40 C.F.R. 1501.7(a)(3) (providing that agencies shall "[i]dentify and eliminate from detailed

study the issues * * * which have been covered by prior environmental review").

PRC errs in asserting (at 26) that the Forest Service "promised, but then without explanation failed to deliver," an analysis of the effects of the 2004 Framework on fish. The 2004 SEIS explained that, rather than mechanically duplicating the analysis in the 2001 EIS, the Forest Service analyzed whether the 2004 Framework would have a different effect on fish than the 2001 Framework. 1 USFS, *Sierra Nevada Forest Plan Amendment: Final Supplemental Environmental Impact Statement* 185 (Jan. 2004). And the Service concluded that the effects on fish would not be materially different because both Frameworks utilize virtually the same Aquatic Management Strategy. See *id.* at 416-418, 421-422. PRC thus errs in contending that the Forest Service simply ignored aquatic species in preparing the 2004 SEIS.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted. The Court may wish to consider summary reversal of the judgment below on the ground that respondent has failed to establish its standing.

Respectfully submitted.

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