No. 12-623

In The Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL., PETITIONERS

v.

PACIFIC RIVERS COUNCIL, ET AL., RESPONDENTS

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the factual averments in the Anderson declaration filed in this case are sufficient, read in light of the procedural posture of the case, to support standing under this Court's decision in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009).

2. Whether, in the absence of any exceptional circumstance or exigency requiring immediate resolution of the issue by this Court, this Court should grant certiorari to be the first to adjudicate the government's ripeness claim that was not pressed or passed upon in any court below.

3. Whether the court of appeals, after affording substantial deference to the agency in determining the level of detail appropriate for a programmatic environmental impact statement, correctly determined that the Supplemental Environmental Impact Statement in this case was inadequate in one respect.

CORPORATE DISCLOSURE STATEMENT

Pacific Rivers Council has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT

1. The National Environmental Policy Act ("NEPA") of 1969, 42 U.S.C. 4321 *et seq*., requires the Forest Service, like other federal agencies, "to the fullest extent possible," to prepare an EIS that informs other agencies and the public about the reasonably foreseeable environmental consequences of any "major [f]ederal action[]" that will "significantly affect[] the quality of the human environment." 42 U.S.C. 4332(2)(C); see 40 C.F.R. pts. 1502, 1508.

2. The eleven national forests in the Sierra Nevada mountains in California serve as a natural habitat for many species of animals and fish. Pet. App. 2a. The Forest Service manages national forests, including those in the Sierras, under land and resource management plans known as "Forest Plans." Pet. App. 4a; see 16 U.S.C. 1604(a). The plans set mandatory standards for all future projects in the affected forests. As the government explains, "Before proceeding with a site-specific project, the Forest Service must … ensure that the proposed project is consistent with the applicable forest plan." Pet. 2.

On January 12, 2001, the Forest Service adopted an amended Forest Plan ("2001 Framework") covering all eleven national forests in the Sierras. One of the amendment's primary goals was to reduce the risk of wildfires by thinning trees. The Forest Service also prepared a "programmatic environmental impact statement" ("2001 EIS") analyzing the effects of the Framework on natural ecosystems and habitats. Pet. App. 3a.

3. Later in 2001, Forest Service officials decided

to re-examine the 2001 Framework. Pet. App. 3a. In January 2004, the Forest Service adopted a superseding plan, which takes a much more aggressive approach. See Sierra Nevada Forest Plan Amendment Final Supplemental Environmental Impact Statement: Record of Decision (Jan. 2004) ("2004 Framework"). For example, the 2004 Framework allows the harvesting of an additional 4.9 billion board feet of timber during its first two decades and permits the harvesting of larger trees than did the 2001 Framework. It provides for mechanical logging of approximately 250% more acres, including more logging near streams. It also allows substantially more construction of logging roads than the 2001 Framework and considerably relaxes the grazing restrictions in the 2001 Framework. Pet. App. 8a-12a.

The Forest Service issued a supplemental EIS for the 2004 Framework ("SEIS"). The SEIS contained extensive analyses of the effects of the 2004 Framework on individual species of mammals and birds. Pet. App. 11a-12a, 31a-32a. It also said that it would address the 2004 Framework's "[e]ffects on species dependent on *aquatic* … habitats," but in fact it contained only limited analysis of effects on amphibians and none of effects on fish. Pet. App. 32a (court of appeals' emphasis).

4. Pacific Rivers Council ("PRC") brought suit in federal district court in 2005. PRC alleged, *inter alia*, that the SEIS did not adequately examine the 2004 Framework's consequences for fish and amphibian species. Pet. App. 3a. In the district court, PRC filed a declaration by its Chairman, Bob Anderson, which provided information concerning his and other PRC

members' ongoing use of the Sierra Nevada national forests. Pet. App. 120a-21a.

The government did not challenge either PRC's standing to sue or the ripeness of PRC's lawsuit. The district court granted summary judgment in favor of the Forest Service without addressing those issues, holding that the 2004 SEIS was adequate under NEPA. Pet. App. 96a-105a.

5. The court of appeals reversed in part, holding that PRC had standing and that the SEIS was inadequate because it did not analyze effects on individual fish species. Pet. App. 1a-45a. Judge N. Randy Smith dissented from that holding without addressing standing. Pet. App. 46a-74a. As in the district court, the government did not argue ripeness, and neither the court nor Judge Smith mentioned ripeness.

a. The court rejected the government's standing challenge, raised for the first time on appeal and based largely on *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). In *Summers*, plaintiffs challenged a rule exempting sales of salvage timber on national forest parcels of 250 acres or less from administrative appeal requirements. An affidavit supporting standing asserted as the affiant's injury-in-fact that he would visit several national forests at some time in the future and might come into contact with one of the parcels. *Id.* at 495. This Court held that the affidavit was insufficient, because it identified "no … application of the [challenged] regulation that threatens imminent and concrete harm to the interests of [the plaintiff]." *Ibid.*

The court of appeals in this case held that the Anderson declaration was sufficient to support standing. The court explained that *Summers* and the Ninth Circuit's own case law "demand[] more than a showing of a general intention of returning to a national forest." Pet. App. 18a. To establish standing, a plaintiff must show "that he is likely to encounter an *affected* area of the [forest]." *Ibid*. Given the broad effects of the 2004 Framework, the court found the facts in the Anderson declaration sufficient to make that showing. Pet. App. 20a-21a.

b. On the merits, the court held that the SEIS's analysis of effects on amphibians was adequate, but its analysis of fish was not. The court noted that "[a]n agency has flexibility in deciding when to perform environmental analyses." Pet. App. 35a. The court began with its prior opinion in *Kern v. BLM*, 284 F.3d 1062 (9th Cir. 2002), which stated that NEPA requires an EIS to analyze the consequences of a proposed plan "as soon as it is reasonably possible to do so." Pet. App. 28a (quoting *Kern*, 284 F.3d at 1072). The court then took into account that "[t]he required level of analysis in an EIS is different for programmatic and site-specific plans," and that the "reasonably possible" requirement "is tempered" when broad programs are at issue. Pet. App. 27a-28a.

The court held that the SEIS was inadequate because "in this case the Forest Service has largely resolved the debate" about the degree of specificity required. Pet. App. 36a. The agency stated in the SEIS that it would provide an analysis of "[e]ffects of the alternatives on species dependent on *aquatic* … hab-

itats," Pet. App. 32a (court's emphasis), but then failed to provide "any analysis whatsoever of environmental consequence[s] for individual species of fish," *ibid.* The 2001 EIS had contained 64 pages of such analysis. Pet. App. 32a, 35a. The court noted that, had the Forest Service attempted an explanation, "it might have been able to show that it is reasonable to postpone such analysis until it makes a site-specific proposal." Pet. App. 37a. But in the absence of any explanation for the omission, the court concluded that the SEIS was inadequate. Pet. App. 37a-38a.

The court also rejected the government's "fallback argument" that, even if an analysis of environmental consequences for individual fish species was "reasonably possible," the SEIS was adequate because it incorporated by reference two Biological Assessments ("BAs"). Pet. App. 38a. The court held that the SEIS's "brief description" of the BAs was inadequate for three reasons: First, regulations required incorporated material to be "described and analyzed in the text of the 2004 EIS," and the "BAs themselves should have been included in an appendix." Pet. App. 40a. Second, the BAs were inadequate because "[t]here was no analysis in either of the BAs of the manner or degree to which the alternatives may have affected these fish." Pet. App. 41a. Third, the BAs applied only to threatened and endangered species and said nothing about other "sensitive fish species" and "moderate and high vulnerability fish species." *Ibid.*

6. Judge Smith dissented on the merits. In his opinion, by applying an "as soon as reasonably pos-

sible" standard, the majority disregarded circuit precedent holding that an agency does not violate NEPA so long as it analyzes the environmental impact of a particular plan before a critical commitment of resources occurs. Pet. App. 46a.

7. The government filed a petition for rehearing, in which it again raised no challenge to the ripeness of PRC's lawsuit. No judge sought a vote on whether to rehear the matter en banc. Pet. App. 2a. In denying the government's petition, the court withdrew its original opinion and issued a slightly revised version that added a discussion of *Wilderness Society, Inc. v. Rey*, 622 F.3d 1251 (9th Cir. 2010). See Pet. App. 18a-19a.

ARGUMENT

The court of appeals applied settled legal standards to the particular facts of this case. The unusual procedural posture of the standing issue, which was never litigated in the district court and which turns on the interpretation of Anderson's declaration, makes it a particularly poor vehicle for this Court's review. Moreover, the practical importance of the decision here is in any event slight, because the 2004 Framework's SEIS has been held inadequate—and will likely have to be modified—for other reasons in two other cases based on entirely different standing allegations.

There is no exceptional circumstance that would warrant this Court's adjudication of the government's new ripeness claim, which no court below was asked to or did consider. Even if the ripeness issue had been considered and decided in favor of PRC below, that decision would merely have followed from

this Court's prior decisions and created no conflict in the circuits.

On the merits, the government asserts that the court of appeals gave insufficient deference to the agency's determination that it need not analyze effects on individual species of fish. In fact, the court expressly and repeatedly recognized the deference due the agency for that determination. The court's conclusion that the complete lack of analysis was inadequate was driven by the agency's own determination that such an analysis should be supplied, and by the agency's failure to give any explanation of why it did not do so. Further review of that particular fact-bound holding is unwarranted.

I. REVIEW OF THE COURT OF APPEALS' RULING ON STANDING IS UNWARRANTED

This case arises in an unusual procedural posture, in which the government did not challenge standing until the case was in the court of appeals. Given that posture, the government erroneously reads the Anderson declaration—which was not disputed in the district court—in the light most favorable to the government, rather than to PRC. When the belatedly challenged declaration is correctly read in the light most favorable to PRC, the court of appeals' fact-bound determination that it is sufficient does not conflict with any decision of any other court of appeals. In any event, if the Court determines that the standing issue may warrant further consideration, PRC should be afforded the opportunity to compile a complete record in the district court regarding the meaning of that declaration and the standing issue generally.

A. The Anderson Declaration Adequately Supports Standing at the Present Stage of This Case

1. The government argues that the decision of the court of appeals "directly conflicts with this Court's decision in *Summers*." Pet. 11. There is no such conflict, nor did the court create any broad or generally applicable standing rule. To the contrary, the court began its analysis by correctly stating that "a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized," and "the threat must be actual and imminent, not conjectural or hypothetical." Pet. App. 16a (quoting *Summers*, 555 U.S. at 493). It then relied on its decision in *Wilderness Society* to emphasize that "*Summers* demands more than a showing of a general intention of returning to a national forest." Pet. App. 18a. The court explained that to establish standing under *Summers* and *Wilderness Society*, a plaintiff must show "that *his* future enjoyment is in [some] way threatened" by the agency action he challenges. *Ibid.*

The government does not, and could not, take issue with that understanding of *Summers*, which is settled law in the Ninth Circuit. The Ninth Circuit has regularly held that plaintiffs failed to show standing under *Summers* because they failed to tie claims of procedural violations to the threat of an actual and imminent injury. See, *e.g.*, *Ashley Creek Props., L.L.C. v. Larson*, 403 F. App'x 273 (9th Cir. 2010); *Stop the Casino 101 Coal. v. Salazar*, 384 F. App'x 546 (9th Cir. 2010); *Glasser v. Nat'l Marine Fisheries Serv.*, 360 F. App'x 805 (9th Cir. 2009);

Clatskanie Peoples Util. Dist. v. Bonneville Power Admin., 330 F. App'x 637 (9th Cir. 2009).

2. The government's primary contention is that the court of appeals' application of *Summers* to the particular facts of this case was incorrect. See Pet. 12. The government, however, fails to take into account the procedural posture here.

This Court explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), that, in a standing challenge, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." Materials filed in connection with a summary judgment motion, like other evidence at that stage, "must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). "[A]ll justifiable inferences are to be drawn in [the nonmoving party's] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The procedural setting of this case is complicated by the fact that the government first challenged standing not in the course of litigating its summary judgment motion in the district court, but only in the court of appeals. The government was entitled to ask for what amounts to summary judgment on a jurisdictional standing issue at that time. But, as this Court recently noted, "[t]ardy jurisdictional objections can … disarm litigants." *Sebelius v. Auburn Reg'l Med. Ctr.*, 2013 WL 215485, at *6 (Jan. 22, 2013). District court litigation frequently clarifies ambiguity in evidentiary materials and allows fur-

ther submission of evidence when a fact is disputed. Parties who wait to raise standing challenges until appeal should not be permitted to obtain a tactical advantage by eliminating the opposing party's opportunity to develop or clarify the facts. It is thus particularly important in this context that a court rigorously observe the rules requiring that the record on summary judgment be construed in the light most favorable to, and all inferences be drawn in favor of, the non-moving party.

3. When read in light of those standards, the Anderson declaration establishes the following facts:

a. Anderson hikes, climbs, and fishes in the national forests at issue in this case. His declaration recites that his "enjoyment of the Sierra Nevada dates back to childhood trips with [his] family," that he and his wife have a home "at Lake Tahoe"—an area largely encompassed within national forests—and that they "frequently hike and climb in the Sierra Nevada Range." Pet. App. 121a. His first "backpacking trip" was in 2000, during which he "also fished," and he "plan[s] to continue these activities." *Ibid.* This case concerns the national forests in the Sierras. When read, as they must be, in the light most favorable to PRC, those statements can only be understood to refer to Anderson's hiking, climbing, and fishing activities in the national forests of the Sierras.[1]

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[1] In a declaration filed in remand proceedings in the district court on October 12, 2012, Anderson made clear that he engaged in these and other recreational activities, and will continue to do so, in the Sierra Nevada national forests. See Supplemental Decl. of Bob Anderson paras. 4-7.

b. The government asserts that Anderson "did not allege that any … injuries were caused by the 2004 Framework." Pet. 14. His declaration states, however, that he and other PRC members "are harmed by the current management direction of Sierra Nevada national forests *as directed by the 2004 Framework*." Pet. App. 122a (emphasis added). The same paragraph in the declaration also states that "[c]urtailed fishing and recreational opportunities due to the loss of native species such as bull trout and salmon have … injured me." *Ibid.* In context, that can only mean that the effects of the 2004 Framework have decreased his opportunities to fish and engage in other recreational activities.

The paragraph further states that Anderson "will be unable to ... observ[e] and delight[ ] in [bull trout and salmon] and other species in the Sierra Nevada *if current trends in land management continue*." Pet. App. 122a. (emphasis added). "[C]urrent trends in land management" refers back to the first sentence of the paragraph, *i.e.*, the "current management direction of Sierra Nevada national forests *as directed by the 2004 Framework*." *Ibid.* (emphasis added). Thus, the declaration avers that the "direct[ives]" of the 2004 Framework will continue to injure Anderson's ability to fish and enjoy fish in the national forests on his continuing planned future visits.

4. Those facts are sufficient to support standing for purposes of summary judgment in this case. They establish that Anderson has suffered injury, caused by the 2004 Framework, both from the loss of fishing opportunities and the loss of his aesthetic opportunity to "delight[ ] in" the fish and wildlife of the Sierra

Nevada national forests in which he hikes, climbs, and fishes. And they establish that Anderson will suffer continued and further injury if the 2004 Framework continues in effect. Any of those facts could be challenged by the government in later stages of litigation in this case, as *Defenders of Wildlife* makes clear. At most, the government has raised a disputed issue of fact, as to which, if it were litigated in the district court, PRC would have a further opportunity to submit evidence. See Pet. App. 19a (stating that, "[g]iven the timing of the Forest Service's objections," if standing is not established "on the current record," appropriate course is "remand to the district court to allow further development of the record"). The court of appeals correctly ruled that what is in effect a belated summary judgment motion by the government should be denied.

5. *Summers* itself arose from a final judgment on the merits by the district court, not a belated summary judgment motion in the court of appeals. 555 U.S. at 492. The result here is consistent with *Summers*. Anderson's declaration asserts not merely a past injury, but continued future injury from the 2004 Framework's ongoing harm to fish species and consequent injury to his ability to fish for, and "delight[] in," those species. The affidavit in *Summers* asserted merely "a chance," though "hardly a likelihood," that the affiant's "wanderings will bring him to a" 250-acre parcel within the 190 million acres of national forests that "is about to be affected by a project unlawfully subject to the regulations." *Ibid*. By contrast, Anderson asserts that he has suffered specific injury on the national forest land on which he hikes, climbs, and fishes, and he asserts that the

2004 Framework will cause him continued and further injury into the future. Rather than the inadequate "someday" intention to visit some national forest in *Summers* (and in the Ninth Circuit's own decision in *Wilderness Society*, see 622 F.3d at 1256), Anderson asserts that he has had a lifelong practice of visits to the national forests; that he currently resides near the national forests in question; that he "frequently hike[s] and climb[s]" and fishes in those national forests; and that he "plan[s] to continue these activities" in the future as in the past.

B. There Is No Conflict in the Circuits

The court of appeals' decision does not conflict with any decision of any other court of appeals. Each of the decisions cited by the government, see Pet. 16-17, like the decision in this case, applied settled standing principles to varying factual circumstances. None of them conflicts with the decision below.

1. In *Heartwood, Inc. v. Agpaoa*, 628 F.3d 261, 268-69 (6th Cir. 2010), the Sixth Circuit found that plaintiffs lacked standing to challenge a Forest Service plan affecting part of a forest in Kentucky. The court held that they failed to identify a connection between their activities and the portion of the forest that, according to Forest Service maps, would actually be affected by the challenged plans. It was decisive that the effects of the challenged activities were geographically isolated and designated on the maps. The Sixth Circuit explained that "[w]ere the Project less specific, we could not require Heartwood to detail what it did not know." *Id* at 268.

Unlike the projects in *Heartwood*, the 2004 Framework did not identify discrete areas of the na-

tional forests that would be affected; the Framework was designed to and does affect the Sierra Nevada national forests broadly. See, *e.g.*, 2004 Framework 3 ("changing the way management occurs in … treated areas," which "cover … 25-30% of the landbase"). And the Anderson declaration recites that Anderson himself has already been, and will continue to be, injured by the effects of the 2004 Framework in the areas in which he hikes, climbs, and fishes.

2. In *Pollack v. U.S. Department of Justice,* 577 F.3d 736, 737-38 (7th Cir. 2009), plaintiffs challenged the discharge of bullets into a particular area of Lake Michigan from a North Chicago gun range. The Seventh Circuit held that, although the plaintiffs stated that they suffered aesthetic harm because they enjoyed watching birds in the Great Lakes watershed and visiting public parks along the lake, they did not assert that they either visited any park near the "discrete" gun range or watched birds in that area. *Id.* at 742. The plaintiffs also stated that they suffered harm because they drank water from Lake Michigan, *id.* at 738, but they did not establish that they were downstream from the alleged pollution and thus did not show any effect on their drinking water. *Id.* at 741. And although they asserted that they ate freshwater and ocean fish, *id.* at 738, their failure to assert that they ate fish *from Lake Michigan* meant that they "failed to connect [their] desire to eat fish with the bullets in the water." *Id.* at 742.

Unlike the isolated discharge of bullets in *Pollack*, the 2004 Framework is designed to affect major projects throughout each of the eleven forests in the

Sierras. Moreover, Anderson averred that he has used and will continue to use areas of the national forests that have been and will continue to be affected by the 2004 Framework. The decision in this case does not conflict with *Pollack*.

3. In *National Ass'n of Home Builders v. EPA*, 667 F.3d 6, 9 (D.C. Cir. 2011), the D.C. Circuit found that three trade associations had no standing because they alleged entirely speculative injury. The associations challenged determinations by the EPA and the Army Corps of Engineers that two reaches of the Santa Cruz River constitute "traditionally navigable water[s]" (TNW) and thus are subject to the Clean Water Act. *Ibid*.

To support standing, plaintiffs alleged that many of their members would someday seek to obtain permits and thus "have an interest in the manner in which … regulation takes place, including the types of watercourses that are subject to the agencies' regulatory jurisdiction." *Id*. at 13. Plaintiffs did not, however, "contest … the only issue the TNW Determination in fact resolved"—whether the river itself "may be subject to [CWA] jurisdiction." *Ibid*. Instead, they challenged possible future jurisdictional determinations about *other* watercourses. *Ibid*. Until such determinations were made, however, the plaintiffs faced only the same risk they faced before the TNW determination—"the *possibility* of regulation" if other watercourses were ultimately determined to be navigable waters. *Ibid*. Because they faced "the same statutory and regulatory alternatives" after the TNW determination as before, the court concluded that they had shown no injury. *Id*. at 14 .

Unlike in *Home Builders*, where plaintiffs waived any challenge to the TNW determination, PRC has directly challenged the 2004 Framework. Moreover, the Anderson declaration establishes that he, unlike the plaintiffs in *Home Builders*, has already suffered specific and concrete harm to his recreational and aesthetic interests that will continue to occur as a result of the 2004 Framework.

C. This Case Is an Inappropriate Vehicle to Address Standing Issues

1. Review of the standing (or any) issue in this case is unwarranted for another reason. The SEIS has been held inadequate on other grounds, based on entirely different standing allegations, in two other cases that are now on remand in the district court. See *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1169 (9th Cir. 2011) (deciding both cases). As a result, the Forest Service will likely have to prepare a new EIS regardless of the outcome here, and further review in this case is unlikely to have any significant practical importance.

2. For the above-stated reasons, further review of the government's challenge to PRC's standing is unwarranted. Any dispute about the standing issue turns entirely on the interpretation of the Anderson declaration, which is not an issue of general or continuing importance, and further review of the merits of the standing issue would require the Court to devote its resources to addressing conflicting claims about the meaning of that particular declaration. If, however, the Court determines that the standing issue in this case is of sufficient importance and otherwise may warrant further consideration, the Court

should confine its action to remanding the case to the district court so that the parties can build an adequate record on standing that would provide a more appropriate focus if further review were ultimately warranted. See Pet. App. 19a.

II. CERTIORARI IS NOT WARRANTED TO ADJUDICATE A FACT-BOUND RIPENESS CLAIM THAT WAS NOT PRESSED OR PASSED UPON BELOW

The government urges this Court to adjudicate whether PRC's NEPA challenge to the 2004 Framework is ripe for judicial review. The government did not raise its ripeness claim in the district court, the court of appeals, or even in its petition for rehearing en banc. See Pet. 27. Nor did either of the courts below address the issue. This Court sits as "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The government advances no reason why the ordinary and sound justifications for that rule have less than full applicability here.

The government's claim of a circuit conflict is mistaken. Indeed, the lack of conflict should be no surprise, since the broad agreement in the courts of appeals that analogous challenges are ripe is based firmly on this Court's explicit reasoning in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998). If ripeness doctrine requires any refinement or elucidation, or if the reasoning of *Ohio Forestry* deserves reconsideration, the government should litigate the relevant issues, as is normally done, in the lower courts first.

A. The Government Raised Ripeness for the First Time in Its Petition for Certiorari

For the first time in this litigation, the petition for certiorari argues that PRC's NEPA challenge is unripe "[i]n the absence of a site-specific decision in which the 2004 Framework is applied." Pet. 20. Under settled law, ripeness depends on "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry*, 523 U.S. at 733. The government does not ask for reconsideration of those settled standards, but instead asks this Court to apply them in the first instance to this case.

1. The "traditional rule … precludes a grant of certiorari … when the question presented was not pressed or passed upon" in the court below. *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); accord *Duignan v. United States*, 274 U.S. 195, 200 (1927). That rule is fully applicable here. Application of the tripartite ripeness standard requires a close look at the contours and effects of the challenged decision. As in most cases, the Court would benefit from the lower courts' consideration of those questions as they apply to the particular administrative decision at issue here.

2. As the government argued to the Court just a few days ago, "'It is only in exceptional cases … from the federal courts that questions not pressed or passed upon below are reviewed,' … and petitioner makes no showing that this case is exceptional." 12-

684 Brief in Opp. 11 (filed Feb. 4, 2013) (quoting *Youakim v. Miller,* 425 U.S. 231, 234 (1976) (per curiam), and *Duignan*, 274 U.S. at 200). Indeed, the government does not even argue that "exceptional circumstances," *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977), or exigency excuse its failure to raise the issue below. The last Ninth Circuit decision cited by the government that addressed the ripeness of a NEPA challenge to a programmatic decision was ten years ago. See Pet. 27 (citing *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1090 (9th Cir. 2003)). The infrequency of rulings on the issue suggests that review, if warranted at all, can await a case in which the issue is properly raised and litigated in the lower courts first.

The government suggests that its failure to raise the issue below is excused by the "Ninth Circuit's rule that NEPA challenges to programmatic decisions are always ripe when the decisions are made," Pet. 25, and cites *Laub* for that rule, see Pet. 27. But the Ninth Circuit has not had the opportunity to address the ripeness of this case or to consider any qualifications or limitations to which its past holdings may be subject here. If the government believes that the court of appeals' precedents permit no such qualifications or limitations, the government should still have offered the court of appeals the opportunity to reconsider the question rather than bypassing the courts below and proceeding directly to this Court.

3. Even if the government were raising a *jurisdictional* ripeness claim that by definition could be raised at any time, *Nat'l Park Hospitality Ass'n v.*

Dep't of Interior, 538 U.S. 803, 808 (2003), the failure to present such a claim below would be a strong factor counseling against the Court's exercise of its certiorari jurisdiction to correct the error. But insofar as there is any jurisdictional issue in this case, it is encompassed in the government's claim that PRC lacks standing. While the government is correct that a court *may* consider prudential ripeness even when no party has raised it, Pet. 27 (quoting *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808), the Court has never suggested that a court *must* do so, much less that this Court should exercise its certiorari jurisdiction to consider such a question absent exceptional circumstances. Cf. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010) (refusing to consider a belatedly raised ripeness claim).

B. There Is No Circuit Conflict, Because *Ohio Forestry* Establishes the Governing Principles

1. Consideration of the government's ripeness claim is particularly unwarranted because the claim attacks this Court's own reasoning in *Ohio Forestry*. *Ohio Forestry* arose from a challenge to a forest plan under the National Forest Management Act ("NFMA"), 16 U.S.C. 1604. The Court explained that review of a forest plan's compliance with NFMA's *substantive* standards would benefit from "the focus that a particular logging proposal [under the plan] could provide." 523 U.S. at 736. Delaying such substantive review would avoid the possibility "of a premature review that may prove too abstract or unnecessary," *id.* at 735, and that could "interfere with the system that Congress specified for the

agency to reach forest logging decisions," *id*. at 736. Accordingly, the NFMA challenge in *Ohio Forestry* was unripe.

Ohio Forestry, however, explained that NEPA challenges like the one in this case are different. The Court distinguished the NFMA challenge in *Ohio Forestry* from a challenge, as here, to "an environmental impact statement prepared pursuant to NEPA," which "simply guarantees a particular procedure, not a particular result." *Id*. at 737. NEPA imposes "a set of 'action-forcing' procedures that require that agencies take a 'hard look at environmental consequences'" during their decisionmaking processes. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). When an agency is required to take a "hard look" at environmental consequences in connection with a particular agency action, "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 riper." *Ohio Forestry*, 523 U.S. at 737.

Nor does the ripeness of a NEPA claim turn on whether the agency action is programmatic or site-specific. If Congress indeed required a particular programmatic agency action to be accompanied by an adequate EIS, the failure to prepare it is fully ripe at the time the programmatic action is taken. Because the purpose of the EIS is to enable the agency to "plan actions and make decisions," 40 C.F.R. 1502.1, in connection with its *current* action, permitting review only at a later stage, in connection

with a site-specific determination, will not be an adequate substitute for judicial review now. Far from "interfer[ing] with the system that Congress specified for the agency to reach forest logging decisions," *Ohio Forestry*, 523 U.S. at 736, NEPA challenges ensure that the system that Congress specified is followed rather than circumvented.

Of course, as the court of appeals itself emphasized, Pet. App. 35a-36a, 43a-44a, the scope and level of detail of the EIS may vary depending on the particular action at issue. But, as this Court concluded in *Ohio Forestry*, a challenge to the adequacy of an EIS is ripe "at the time the failure takes place." 523 U.S. at 737. The courts of appeals have followed that rule. See, *e.g.*, *Heartwood, Inc. v. USFS*, 230 F.3d 947, 952-53 (7th Cir. 2000) ("[Plaintiffs] need not wait to challenge a specific project when their grievance is with an overall plan." (internal quotation marks omitted)); *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 32-33 (1st Cir. 2007); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1173-75 (11th Cir. 2006); *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 816 (8th Cir. 2006); *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1262-64 (10th Cir. 2002).

2. The same conclusion follows from an application of the three traditional ripeness factors. PRC will suffer hardship if it cannot challenge the 2004 Framework now, because the Framework will shape the agency's actions and decisionmaking processes between the promulgation of the forest plan and any later site-specific applications. As the agency made clear, "all projects" undertaken after the adoption of

the 2004 Framework "must be consistent with the new direction of the plan amendments." 2004 Framework at 24. Further, a challenge at the site-specific level may not provide a sufficient opportunity to challenge the original framework, because agencies are encouraged to "tier" their analyses at subsequent stages of development by merely summarizing and "incorporating by reference" the general discussions from previous statements and focusing "solely on the issues specific to the statement subsequently prepared." 40 C.F.R. 1508.28.

Review at this time would do no harm to the agency's functioning. The government argues that the agency may want to refine its environmental protections or modify the 2004 Framework in the future, see Pet. 22, but the government does not say that the agency has plans to take either step here. In any event, judicial review now would in no way obstruct possible revision of the program. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). If the 2004 SEIS is inadequate, the agency would benefit from being apprised of that fact now, so that it could ensure the compliance of its ongoing forest management efforts.

Similarly, a court would not be better able to rule on this procedural challenge because of factual development at the site-specific stage. The administrative record on the SEIS, on the basis of which the SEIS must be reviewed, is now closed. In addition, because of "tiered" analysis, any facts developed at a later stage would likely not focus on the 2004 Framework but rather on the impact of the site-specific project. The Government does not explain

how this type of information could help the court adjudicate PRC's procedural challenge under NEPA.[2]

4. The Government incorrectly contends that two D.C. Circuit cases create a blanket rule that programmatic NEPA challenges are generally unripe. See Pet. 25-26 (citing *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466 (D.C. Cir. 2009), and *Wyo. Outdoor Council v. USFS,* 165 F.3d 43 (D.C. Cir. 1999)).

Wyoming Outdoor Council arose from an agency's "identification and mapping of areas that might be suitable for leasing," which was the first stage of a five-stage oil and gas leasing program. 165 F.3d at 45. The agency issued an EIS, but expressly declined to make the finding required under 36 C.F.R. 228.102(e) that "NEPA compliance was adequate" and stated such a finding "would be made at a later date." 165 F.3d at 47. The court held that, under the leasing program, "the obligation to fully comply with NEPA do[es] not mature until leases are issued," *i.e.*, at "the point of irreversible and irretrievable com-

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[2] The Government quotes extensively from *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), to argue that the SEIS created in connection with the 2004 Framework is not a final agency action. *See* Pet. 24. The alleged "agency action" found to be nonfinal in *Lujan* was a "land withdrawal review program" that did not "refer to a single [BLM] order or regulation." 497 U.S. at 890. There is no question that the Forest Service took final agency action when it adopted the 2004 Framework, and the courts of appeals uniformly agree that when a final agency action is based on an EIS, the action may be challenged under the APA on the basis of the EIS's inadequacy. See, *e.g.*, *Or. Natural Desert Ass'n v. BLM,* 625 F.3d 1092, 1118-19 (9th Cir. 2010) (citing cases from seven other circuits).

mitment of resources." *Id.* at 49. Given that the obligation to comply with NEPA had not yet arisen, the court naturally concluded that the "NEPA challenge was premature." *Id.* at 50.

Center for Biological Diversity arose from a similar initiation by the agency of the first stage of a four-stage leasing process, 563 F.3d at 473, which also involved merely "identification and mapping of areas that might be suitable for leasing," *id.* at 480 (internal quotation marks omitted). Relying on *Wyoming Outdoor Council*, the court held that the plaintiffs' NEPA challenge was unripe. *Ibid.*

In both cases, the D.C. Circuit expressly relied on the specific features of the mineral leasing process, including, significantly, its holding that no EIS is even required at the preliminary stage involved in both cases. The D.C. Circuit has never suggested that no EIS is required for the type of forest plan at issue in this case, and even the government does not make that claim in its petition. Accordingly, even if the government had brought a timely ripeness challenge in this case and the court of appeals had rejected it, there would be no conflict in the circuits.

III. FURTHER REVIEW IS NOT WARRANTED TO APPLY SETTLED NEPA STANDARDS TO THE FACTS OF THIS CASE

The court of appeals correctly held that NEPA requires the SEIS to reasonably account for the environmental impacts of the 2004 Framework. That decision does not implicate any circuit split, but rather applies a standard that the government did not challenge in the court of appeals and that is deferential to agency decisions and firmly rooted in the

NEPA statute, regulations, and case law. Further review of the court's application of that standard to the particular facts of this case—including the fact that the agency promised, but then without explanation failed to deliver, a key part of the environmental analysis—is unwarranted.

A. The Ninth Circuit's Decision Clearly Recognized the Deference Due to the Agency

The government charges that the court of appeals in this case imposed a "requirement that an agency complete every possible aspect of an environmental analysis at the earliest stage of planning," Pet. 28, and "anticipate and account for all of the variables that could affect the relevant outcomes," Pet. 31. Those characterizations bear no resemblance to the Ninth Circuit's actual decision in this case.

1. The Ninth Circuit held that "NEPA requires that an EIS analyze environmental consequences of a proposed plan as soon as it is '*reasonably* possible' to do so." Pet. App. 28a (emphasis added). There is no doubt that the Ninth Circuit "employ[s] a 'rule of reason to determine whether [an] EIS contains a reasonably thorough discussion of the significant aspects of probable environmental consequences.'" *Kern*, 284 F.3d at 1071 (citation and internal quotation marks omitted); see *League of Wilderness Defenders–Blue Mountains Biodiversity Project v. USFS*, 689 F.3d 1060, 1075 (9th Cir. 2012) (Fletcher, J.) (same).

In the court of appeals here, the government did not challenge the "reasonably possible" formulation, but instead argued merely that the SEIS satisfied it. See, *e.g.*, Gov't C.A. Br. 25-26, 31-32, 39. Only in its

unsuccessful petition for rehearing did the government argue that the "reasonably possible" formulation was inconsistent with past Ninth Circuit precedent. Gov't Pet. for Reh'g 1, 10-13. But insofar as the government's current complaint is with the "reasonably possible" formulation, the government invited the panel to use it, did not timely inform the court of its argument to the contrary, and should not now be heard to complain about the court's use of that formulation. See *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001).

2. In any event, the court showed exceptional deference to the Forest Service and to its ability to engage in the "tiered" analysis that the government asserts is so important. See Pet. 28-29. The court noted that "a programmatic plan … must provide sufficient detail to foster informed decision-making, *but site-specific impacts need not be fully evaluated until a critical decision has been made to act on site development*." Pet. App. 27a (emphasis added; citation and internal quotation marks omitted). The court accepted that any requirement of early analysis is tempered both by the fact that a reviewing court must "focus upon a proposal's parameters as the agency defines them," *ibid.*, and by "the preference to defer detailed analysis until a concrete development proposal crystallized the dimensions of a project's probable environmental consequences," Pet. App. 28a. As the court explained, "An agency has flexibility in deciding when to perform an environmental analysis," Pet. App. 35a, and, because "[i]n some cases the appropriate level of environmental analysis in a programmatic EIS is fairly debatable, … [the court's] obligation is to defer to the expertise

of the agency," Pet. App. 36a.

2. The court's decision put those deferential principles into practice and fully recognized that the level of detail required in an EIS turns in large measure on the stage of the "tiered" process at which the EIS is prepared. See 40 C.F.R. 1508.28 (encouraging tiered decisionmaking so as to "focus on the actual issues ripe for decision at each level of environmental review"). For that reason, the court *rejected* PRC's challenge to the SEIS's analysis of effects on amphibians, holding "that the Forest Service's analysis was sufficient, *at this stage of the process*, given that the [SEIS] provides significant analysis of the environmental effects on amphibians, *and that site-specific projects are not yet at issue*." Pet. App. 43a-44a (emphasis added).

Moreover, the court did not, as the government charges, find the treatment of effects on fish in the SEIS inadequate on the ground that the agency was required to "give complete consideration to every environmental implication of a general agency plan." Pet. 28. Nor did the court "[take] it upon itself to determine when, in its view, would have been the preferable time to undertake" the analysis of the effects on individual species of fish. Pet. 31. To the contrary, *it was not the court but the agency* that in this case recognized the need for such an analysis and promised to provide it. See Pet. App. 32a ("The [SEIS] states, 'Effects of the alternatives on species dependent on *aquatic* … habitats are explained elsewhere in this [SEIS].'" (court of appeals' emphasis)). The court found the SEIS inadequate because that "promise is not fulfilled." *Ibid.* The SEIS "contains no

analysis whatsoever" of effects on individual species of fish, *ibid.*, even though such an analysis was obviously possible because it was performed earlier, in the 2001 EIS, see Pet. App. 32a-35a; 40 C.F.R. 1502.22 ("When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.").

Indeed, the court made clear that it was not even holding that an analysis of the effects on individual species of fish comparable to that in the 2001 Framework was necessary. It "d[id] not require the Forest Service to provide in the 2004 [SEIS] precisely the same level of analysis as in the 2001 EIS"; a shorter analysis "may be appropriate." Pet. App. 36a-37a. In addition, "if the Forest Service had explained its reasons for entirely omitting any analysis of the impact of the 2004 Framework on individual species of fish, *it might have been able to show that it is reasonable to postpone such analysis until it makes a site-specific proposal*." Pet. App. 37a (emphasis added). Absent such an explanation, however, the court's conclusion was unavoidable.[3] There is no trace in the court of appeals' decision of what the government claims is an attempt to subvert appropriate "tiering" of environmental analysis.

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[3] The petition does not challenge the court of appeals' correct holding that the BAs that were incorporated by reference into the programmatic EIS were inadequate. See Pet. App. 38a-41a; *supra* p.6.

B. There Is No Conflict in the Circuits

No court of appeals has rejected the Ninth Circuit's "reasonably possible" standard, nor has any circuit adopted an alternative standard for evaluating the required scope of a programmatic EIS supporting a forest plan. Indeed, the government twice concedes that the court of appeals' decision "does not directly conflict with the decision of another court of appeals." Pet. 31; see *id.* at 27 (decisions of other circuits "do[] not squarely conflict" with the lower court's decision).

In a footnote, the government contends that *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1055 (10th Cir. 2011), is "in tension" with the decision in this case. Pet. 31 n.10. In *Stiles*, the Tenth Circuit concluded that "[t]he essential test is reasonableness," *ibid.*—a conclusion entirely consistent with the rule of reason applied by the court of appeals here. Moreover, the Tenth Circuit's holding that the seven-page analysis of environmental mitigation challenged in *Stiles* was adequate in no way conflicts with the Ninth Circuit's conclusion that the SEIS here was inadequate because, despite its promise, it "contains *no analysis whatsoever* of environmental consequences … for individual species of fish." Pet. App. 25a (emphasis added). In a different case, the Tenth Circuit applied the same "reasonably possible" standard employed by the Ninth Circuit here in holding that an agency's failure to analyze certain environmental impacts in a programmatic EIS was arbitrary and capricious. See *New Mexico v. BLM*,

565 F.3d 683, 708 (10th Cir. 2009).[4]

The government also contends in the same footnote that *Center for Biological Diversity*, is "in tension" with the decision here. Pet. 31 n.10. But the D.C. Circuit's ripeness decision in that case did not address the merits of a challenge to a programmatic NEPA analysis. 563 F.3d at 480. And in a case that *did* address the merits of a NEPA challenge to a programmatic EIS, the D.C. Circuit held that "[a]gency decisions setting limits to the scope of their environmental review are … guided by the so-called 'rule of reason.'" *Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 889 (D.C. Cir. 1981); see also *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006) (recognizing that "the 'tiering' regulations do not relieve the DOE from taking a 'hard look' at the environmental impacts, including those included in a programmatic EIS"). There is neither a conflict, nor even "tension," in the circuits on the issue.

C. The "Reasonably Possible" Standard Comports with NEPA and the Implementing Regulations

The court of appeals' "reasonably possible" standard is firmly rooted in the NEPA statute, regulations, and case law.

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[4] Indeed, far from its current position that agencies may freely decide what level of detail to provide in a programmatic EIS, see Pet. 30-31, the government has previously *endorsed* the Tenth Circuit's conclusion in *New Mexico v. BLM* that "there is no bright line rule" and the "inquiry is necessarily contextual." 11-1378 & 11-1384 Br. in Opp. 30 (quoting 565 F.3d at 717-18).

1. The NEPA statute requires federal agencies, "*to the fullest extent possible*," to prepare a "detailed statement" about the "environmental impact" of every major action significantly affecting the quality of the human environment. 42 U.S.C. 4332(2)(C) (emphasis added). NEPA regulations instruct agencies to "integrate the NEPA process with other planning at the *earliest possible time*." 40 C.F.R. 1501.2 (emphasis added); see Pet. App. 30a. It is true, as the government asserts, that "the direction to 'integrate' the NEPA process as early as possible is not tantamount to a requirement that an agency complete every possible aspect of an environmental analysis at the earliest stage of planning, rather than later when the nature of a particular project is fleshed out," Pet. 28, and the court of appeals imposed no such requirement. But neither is the imperative to integrate "as early as possible" a grant of carte blanche to federal agencies to delay environmental analysis to whatever point in the process they wish. The rule of reason governs, and, whether an agency seeks to use a broad, programmatic EIS or a narrow, site-specific EIS to guide its decisionmaking, the EIS must adhere to the dictates of the NEPA statute and regulations.

That conclusion follows from this Court's recognition that in review of the merits of a NEPA challenge, "[t]he only role for a court is to insure that the agency has taken a 'hard look' at [the] environmental consequences" of its proposed action. *Kleppe*, 427 U.S. at 410 n.21. Agencies cannot take a "hard look" unless they have reasonably identified the consequences of their actions, and the courts of appeals have uniformly concluded that whether they have

done so is governed by the "rule of reason" applied by the court here.[5] The court of appeals' finding that the Forest Service omitted information that should reasonably have been included comports with the existing NEPA case law. Cf. *Robertson*, 490 U.S. at 352 ("[O]mission of a *reasonably complete* discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA." (emphasis added)).

2. The government argues that the court of appeals' decision is inconsistent with this Court's admonition in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), that the "only procedural requirements imposed by NEPA are those stated in the plain language of the Act," *id.* at 548, and that courts may not "engraft[] their own notions of proper procedures on agencies entrusted with substantive functions by Congress," *id.* at 525. But *Vermont Yankee* did not hold that agencies have free rein to decide whether to prepare an EIS and what to include in it. To the contrary, *Vermont Yankee* reaffirmed that courts should review an agency's compliance with NEPA procedures "to insure a fully informed and well-considered decision." *Id.* at 558. That is all the court of appeals did here.

3. The government argues that "NEPA affords

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[5] See, *e.g.*, *Lovgren v. Locke*, 701 F.3d 5, 37 (1st Cir. 2012); *Town of Huntington v. Marsh,* 859 F.2d 1134, 1140 (2d Cir. 1988); *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000); *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1243-44 (10th Cir. 2011), *cert. denied*, 133 S. Ct. 144 (2012); *Scientists' Inst. for Pub. Info, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

agencies the freedom to determine … when it makes sense to analyze different types of environmental effects." Pet. 32. As the court of appeals repeatedly recognized, agencies do have significant flexibility in this area. But that flexibility is not absolute. If an agency had absolute discretion to determine whether to analyze the effects of the 2004 Framework on fish species in this case, it would have similar discretion to determine whether to analyze the effects on amphibians, mammals, birds, plant life, and any other aspect of the environment. The result would be the effective elimination of the requirement that an EIS be prepared at all. That result is precluded by NEPA itself and this Court's decisions. See, *e.g.*, *Kleppe,* 427 U.S. at 409-10 (NEPA "may *require* a [programmatic] impact statement in certain situations where several proposed actions are pending at the same time" because "[o]nly through comprehensive consideration of pending proposals can the agency evaluate different courses of action" (emphasis added)).

4. The government's arguments are mistaken for an additional reason. "[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Because the Forest Service gave no explanation for its decision to delay analyzing the 2004 Framework's impact on individual species of fish—after having said it would do so—the court of appeals correctly discounted the government's post hoc rationalizations and found that the omission violated NEPA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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