No. 15-1387

In the Supreme Court of the United States

UNITED STATES FOREST SERVICE, ET AL., PETITIONERS

v.

COTTONWOOD ENVIRONMENTAL LAW CENTER

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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Respondent has brought a programmatic challenge to the Forest Service's 2007 Northern Rockies Lynx Management Direction (the Lynx Amendments), which amended 20 forest plans covering 18 separate National Forest System (NFS) units in the northern Rocky Mountains. Although respondent has identified several geographic areas in which on-the-ground projects subject to the Lynx Amendments have been approved and in which respondent's members recreate, it has not identified *any* existing or imminent concrete injury to *any* of its members stemming from those site-specific actions. The court of appeals' conclusion that respondent nonetheless 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*, 133 S. Ct. 1138 (2013), and the decisions of sev-

eral other courts of appeals. The decision should be reversed.

Respondent's challenge to the Lynx Amendments is also unripe. Absent a challenge to a site-specific project that applies the standards in the Amendments and harms a member, respondent's challenge to that programmatic decision is an abstract disagreement not appropriate for judicial review.

Finally, on the merits respondent simply reiterates the court of appeals' erroneous conclusion that an agency's ability to amend or repeal an existing regulation or programmatic land-use plan, and the agency's obligation to enforce or apply it in undertaking individual projects, is the equivalent of retaining discretionary control over the completed adoption of the regulation or programmatic action. That submission finds no support in statute, regulation, or case law.

A. Respondent Has Not Established Article III Standing

1. Respondent first contends (Br. in Opp. 15) 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 ruling made in purported reliance on that framework. Compare *Earth Island Inst.* v. *Ruthenbeck*, 490 F.3d 687, 693 (9th Cir. 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. 15 (quoting essentially identical language). And this Court granted the government's petition for a writ of certiorari in *United States Forest Service* v.

Pacific Rivers Council, 133 S. Ct. 2843 (2013), based in part on the same failure to follow *Summers* and over the same objection from the environmental plaintiff in that case. The Ninth Circuit's ability to quote the general three-part test reaffirmed 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 decision in *Clapper*, which reiterated that "speculative" allegations of harm are not sufficient to establish Article III standing. 133 S. Ct. at 1148-1149. The court of appeals found respondent's member declarations sufficient to establish standing because they established that members "have a relationship to the areas affected" by two projects. Pet. App. 13a. But respondent did not challenge those (or any other) specific projects. C.A. E.R. 315; see Pet. App. 59a. And, absent identification of a concrete injury that has or will imminently result from application of the Lynx Amendments through *some* project, respondent's member declarations simply rely on the type of "speculative chain of possibilities" that this Court has routinely rejected as a proper basis for Article III standing. *Clapper*, 113 S. Ct. at 1150.

2. Respondent emphasizes that its members' declarations, see Pet. App. 78a-89a, identify "specific timber project areas containing newly designated lynx critical habitat," Br. in Opp. 15, with which the members have a relationship. Although respondent repeatedly asserts (*e.g.*, *id.* at 15, 16, 17) that the declarations demonstrate that its members will suffer concrete injury in those geographic areas, respondent conspicuously fails to identify *what* that injury is—much less how any injury could be caused by the For-

est Service's decision to consult with the Fish and Wildlife Service (FWS) about lynx critical habitat at the project-specific level rather than at the programmatic level.

Respondent's failure to identify any specific harm to its members from any site-specific project governed by the Lynx Amendments is not surprising. Before the Forest Service undertook each of the projects relied on by the court of appeals, Pet. App. 13a, it consulted with FWS concerning lynx critical habitat pursuant to Section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536(a)(2). FWS then issued a biological opinion concluding that neither project was likely to result in the destruction or adverse modification of lynx habitat. C.A. E.R. 93, 137. Because respondent did not challenge either project or the no-harm determinations in the biological opinions pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, those determinations are now controlling. And those determinations put into stark relief what is missing from respondent's member declarations: any allegation of concrete harm to a member based on an effect on lynx habitat.

Respondent errs in suggesting (Br. in Opp. 20) that the Forest Service's decision to consult on lynx critical habitat at the project level rather than the programmatic level is itself an Article III injury. Respondent relies on a statement in the 2000 rule listing the lynx as threatened—a statement that *preceded* adoption of the Lynx Amendments—that the single factor threatening the lynx was the lack of guidance for conservation of lynx and lynx habitat in forest plans and other land-use plans. See Br. in Opp. 4 (citing 65 Fed. Reg. 16,052 (Mar. 24, 2000)). Respondent implies that the

Forest Service has never considered conservation of lynx habitat at a programmatic level because all of the lynx critical habitat on NFS land was designated after the Lynx Amendments were adopted. But that is not correct. In adopting the Lynx Amendments, the Forest Service considered how the amendments would affect various features important for the health and survival of the lynx—including habitat features that now constitute the primary constituent elements of designated critical habitat. C.A. E.R. 150-151. Respondent cannot be correct, therefore, that merely identifying instances in which the programmatic plan (which considered effects on lynx habitat) was applied (after further consultation on lynx critical habitat) is sufficient to establish an Article III injury.[1]

3. The court of appeals' decision also conflicts with decisions of the Sixth, Seventh, and D.C. Circuits.

Respondent argues (Br. in Opp. 20-21) that the Sixth Circuit in *Heartwood, Inc.* v. *Agpaoa*, 628 F.3d 261, 268-269 (2010), found that the plaintiffs lacked standing because they failed to identify a specific geographic area where implementation of a project would harm the plaintiffs' interests. That is true, but respondent takes the wrong lesson from that holding. The problem in *Heartwood* was not just that the plaintiffs had failed to identify an area they used—the

[1] Contrary to respondent's contention (Br. in Opp. 18-19), the government made clear in the certiorari petition (Pet. 22) that, if respondent ever "challenges a site-specific project that threatens immediate injury to one of respondent's members," respondent "will be able to raise ESA objections in a suit challenging such a project," including its contention "that the Forest Service did not comply with Section 7 of the ESA when it failed to reinitiate consultation after designation of lynx critical habitat." Accord, *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 894 (1990).

problem was that the plaintiffs had failed to identify a specific area "that they use and will continue to use, *and that agency action will detrimentally affect*." *Id.* at 268 (emphasis added). In this case, respondent's members have identified areas that its members use. But respondent has not identified any *detrimental effect* on the lynx that has occurred or is threatened by site-specific projects subject to the Lynx Amendments.

The same is true of *Pollack* v. *United States Department of Justice*, 577 F.3d 736, 742 (7th Cir. 2009), cert. denied, 559 U.S. 1006 (2010), which held that the plaintiff lacked standing because he (like respondent) failed to offer support for his bare allegations that agency action would cause him concrete harm. Accord *Bensman* v. *United States Forest Serv.*, 408 F.3d 945, 952 (7th Cir. 2005) (holding that plaintiff asserting denial of procedural right must identify concrete harm connected to alleged denial).

Finally, respondent contends (Br. in Opp. 23-24) 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, respondent argues, the plaintiffs faced only "the *possibility*" that they would be harmed by future government action. Br. in Opp. 23 (quoting *National Ass'n of Home Builders*, 667 F.3d at 13). But that is true of respondent as well. The Lynx Amendments do not authorize the actual carrying out of any specific project, in any National Forest, and respondent has not identified any site-specific application of the Amendments that has caused or threatens imminent

cognizable harm to one of its members. Respondent's members therefore face only the *possibility* that the Forest Service might render a decision in the future that would harm their interests in observing lynx due to adverse effects on lynx critical habitat. Such speculation about future government decisions cannot establish standing. See *Clapper*, 133 S. Ct. at 1148.

4. Respondent attempts (Br. in Opp. 19-20) to avoid this Court's review by characterizing the court of appeals' decision as "rais[ing] nothing more than a fact-specific issue about the correctness of the lower courts' analysis of [respondent's] particular averments." This Court's standing decisions always address whether particular plaintiffs have shown sufficient facts to establish standing. See *Clapper*, 133 S. Ct. at 1147-1150. But lower courts are then to apply the basic principles exemplified by those specific applications. The Ninth Circuit has repeatedly flouted this Court's direction in *Summers* based on materially indistinguishable declarations and arguments.

B. Respondent's Challenge To The Lynx Amendments Is Not Ripe For Review

The ripeness question presented in this case is closely intertwined with the standing question and the Court should consider both together. Respondent argues (Br. in Opp. 24) that its claims are ripe merely because the Lynx Amendments have been applied to site-specific projects. But respondent does not challenge any of those projects, much less identify any harm caused by those projects through application of the Lynx Amendments. Postponing the initiation of a court challenge until respondent can do that would not cause hardship to respondent, would avoid unnecessary interference with further administrative action,

and would provide a court the benefit of further factual development of the issues presented. See Pet. 22-25; *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 733 (1998) (*Ohio Forestry*); cf. *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (noting that a programmatic action such as "a regulation is not ordinarily considered the type of agency action that is 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation *in a fashion that harms or threatens to harm him*") (emphasis added).

Respondent errs in contending (Br. in Opp. 26-28) that the court of appeals properly relaxed the usual rules governing ripeness because respondent's challenge to the Lynx Amendments is procedural rather than substantive. Respondent does not dispute that the Forest Service will conduct further environmental analysis—including consultation with FWS on the lynx and its critical habitat—before authorizing any on-the-ground action that could harm one of respondent's members. Without knowing the nature and conclusions of such analysis on an as-yet unidentified project, respondent's procedural challenge is purely abstract and unripe for judicial review.

Granting certiorari to consider the ripeness question is particularly important because the Ninth Circuit's erroneous ripeness analysis (see Pet. App. 18a) stems from a misinterpretation (shared by respondent, see Br. in Opp. 26-28, and at least one other court of appeals, see Pet. 27 n.4) of *dictum* in this Court's decision in *Ohio Forestry*, 523 U.S. at 737. 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 [a procedural requirement] 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. But that *dictum* is properly limited to environmental analysis of agency action that directly approves activity with immediate on-the-ground consequences that harm a potential plaintiff, *not* programmatic decisions that will have no real-world effect absent subsequent agency action that will itself be accompanied by additional environmental analysis and will be subject to judicial review under the APA by a person who is actually injured.[2] If respondent ever identifies a site-specific project affected by the Lynx Amendments that injures at least one member, it will have standing to challenge that project—and at that time its challenge to the Lynx Amendments will be ripe for review in that case.

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[2] Respondent's cramped view (Br. in Opp. 25, 27) 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 court of appeals here—that the "dict[um]" in *Ohio Forestry* on which respondent relies "does not control" when a plaintiff challenges an agency's compliance with a statute requiring environmental-effects analysis 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. *United States Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999)).

C. Section 7 Of The ESA Does Not Require An Agency To Reinitiate Consultation On A Completed Agency Action That Has No On-The-Ground Effects

1. Respondent does not contest the court of appeals' conclusion, Pet. App. 22a n.12, that a forest plan or an amendment to a plan is not a continuing action for which reinitiation of consultation might be required. That is not surprising because that conclusion follows directly from this Court's decision in *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (*SUWA*) (discussed at Pet. 29). But respondent attempts to distinguish *SUWA* by arguing that reinitiation of consultation was required on the completed Lynx Amendments because the Forest Service retains discretionary control over the Amendments—by virtue of its ability to, *e.g.*, amend the forest plans covered by the Amendments or to approve site-specific projects that are subject to the Amendments. That argument is incorrect.

As explained in the petition (Pet. 30-31), the Forest Service has continuing authority to take new and different agency actions related to the Lynx Amendments, including approving site-specific projects and further amending some or all of the 20 forest plans governed by the Amendments. But the ability to take *new* actions that would be governed by or would alter the Lynx Amendments is not the same as retaining "discretionary Federal involvement or control *over the action*" itself, *i.e.*, the *adoption* of the Lynx Amendments. 50 C.F.R. 402.16 (emphasis added). Approval of a site-specific project would be a new action subject to the consultation requirement of Section 7, as would be any further amendment of the Lynx Amendments (or covered forest plans).

The adoption of the Lynx Amendments (like the adoption of a forest plan) is the functional equivalent of an agency's promulgation of a regulation. Agencies are generally free to reconsider and amend or repeal existing regulations. And agencies are generally required to apply their regulations to subsequent distinct agency actions. But the fact that an agency may change, repeal, or apply a regulation does not mean that the agency retains discretionary involvement or control over the adoption of the existing regulation—the relevant "action" under 50 C.F.R. 402.16. The same is true here. In approving particular site-specific actions, the Forest Service has no discretion to change or ignore the provisions of its forest plans or the Lynx Amendments. 16 U.S.C. 1604(i). And when the Service decides to amend an existing plan, the amendment is a different agency action, not a continuation of (or control over) the prior (completed) action.

2. Respondent's attempt to distinguish (Br. in Opp. 31) the Tenth Circuit's conflicting result in *Forest Guardians* v. *Forsgren*, 478 F.3d 1149 (2007), is unpersuasive. The merits question presented in that case is the same as that presented here: Does Section 7 of the ESA require the Forest Service to consult on a completed forest plan when a new species is listed or new critical habitat designated. The Tenth Circuit's negative answer directly conflicts with the Ninth Circuit's affirmative answer.

3. Finally, in support of its submission (Br. in Opp. 31-32) that no real burden would result from requiring the Forest Service to reinitiate consultation on all completed programmatic actions every time a new species is listed or new critical habitat is designated,

respondent points out that the Forest Service has voluntarily amended some forest plans in response to new listings and designations. The adoption of the Lynx Amendments illustrates that an agency may choose, based on its expertise and knowledge of scarce agency resources, to undertake environmental analysis not required by statute or regulation. What respondent proposes—*mandating* such a programmatic undertaking after every new listing or designation—is something else altogether and would cripple the agencies charged with protecting the environment and administering public lands.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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