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 WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## PETITIONERS' RESPONSE TO RESPONDENT PACIFIC RIVERS COUNCIL'S MOTION TO VACATE JUDGMENT AND DISMISS AS MOOT


DONALD B. VERRILLI, JR.
*Solicitor General*
*Counsel of Record*
IGNACIA S. MORENO
*Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
SARAH E. HARRINGTON
*Assistant to the Solicitor General*
ANDREW C. MERGEN
JENNIFER SCHELLER NEUMANN
BARCLAY T. SAMFORD
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

RAMONA E. ROMERO
*General Counsel*
JAMES L. ROSEN
*Senior Counsel*
ANDREW R. VARCOE
*Attorney*
*Department of Agriculture*
*Washington, D.C. 20250*

**TABLE OF AUTHORITIES**

# In the Supreme Court of the United States

No. 12-623

UNITED STATES FOREST SERVICE, ET AL., PETITIONERS

*v.*

PACIFIC RIVERS COUNCIL, ET AL.

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

**PETITIONERS' RESPONSE TO RESPONDENT PACIFIC RIVERS COUNCIL'S MOTION TO VACATE JUDGMENT AND DISMISS AS MOOT**

1. Respondent Pacific Rivers Council (PRC) brought this suit against the United States Forest Service asserting a facial challenge to the Forest Service's 2004 Framework governing the management of the 11.5 million acres of land in the 11 National Forests in the Sierra Nevada region. Pet. App. 4a, 14a, 75a-76a. Although PRC did not identify any site-specific project that was approved following adoption of the 2004 Framework that would adversely affect even one of its members, see *id.* at 120a-123a, it sought to invalidate the entire Framework based on its view that the environmental impact statement (EIS) the Forest Service had prepared in connection with the Framework pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, was inadequate, see Pet. App. 3a-4a, 14a. And PRC sought to enjoin all site-specific projects

within the 11.5 million-acre area covered by the Framework based on the alleged NEPA violation. See Complaint 21 (5/13/05).

The district court granted summary judgment to the Forest Service, holding that the EIS's analysis of the Framework's potential effects on fish and amphibians was sufficient. Pet. App. 75a-119a. The court noted that the Framework is a programmatic plan and does not authorize any site-specific project, because such projects require individualized approval. *Id.* at 93a-94a. Further environmental analysis of effects of any particular project on fish or amphibians, the court noted, could be undertaken in connection with such a project pursuant to NEPA. *Id.* at 96a-104a.

PRC appealed. The court of appeals rejected the Forest Service's argument that PRC does not have Article III standing to challenge the 2004 Framework because it cannot identify even one project that will be implemented pursuant to the Framework that would adversely affect even one member of PRC. Pet. App. 15a-23a. The court acknowledged this Court's decision in *Summers* v. *Earth Island Institute*, 555 U.S. 488 (2009), holding that an environmental organization's assertions that its members would "visit national forests in the future and might come in contact with a parcel of" land affected by the challenged nationwide regulation was insufficient to establish standing. Pet. App. 17a. The Ninth Circuit nevertheless found sufficient for standing purposes PRC's assertions that its chairman lives and "frequently hike[s] and climb[s] in the Sierra Nevada" and that "some" of PRC's more than 750 members "live in California" and "recreate in, fish throughout, and derive much satisfaction from the Sierra Nevada." *Id.* at 18a-19a; *id.* at 17a-21a, 120a-123a.

The court of appeals also reversed the district court's holding that the 2004 EIS's analysis of potential effects on fish was sufficient to satisfy NEPA. Pet. App. 25a-41a. The court held that "NEPA requires" both programmatic and project-specific EISs to analyze environmental consequences of a proposed plan "as soon as it is 'reasonably possible' to do so," even if the programmatic plan does not itself authorize any projects with on-the-ground consequences. *Id.* at 28a (quoting *Kern* v. *United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002)). Judge N. Randy Smith dissented from the panel's NEPA holding and would have held that the 2004 EIS complied with NEPA because its general analysis of effects on aquatic habitat was sufficient to foster informed decision-making on a project-specific basis in the future. *Id.* at 46a-74a.

The Forest Service filed a petition for rehearing en banc. At the court of appeals' request, PRC filed a response opposing rehearing. The court denied the government's rehearing motion and issued a slightly revised panel opinion. Pet. App. 1a-74a.

2. The Solicitor General, on behalf of the United States Forest Service and various Forest Service officials, filed a petition for a writ of certiorari, seeking review on issues of standing, ripeness, and the merits. The government also suggested summary reversal on standing grounds in light of *Summers*. PRC, after obtaining a 60-day extension, filed an opposition. On March 18, 2013, this Court granted the government's petition and set the case for briefing on the merits.

Meanwhile, in the wake of the court of appeals' decision, proceedings in the district court were ongoing and PRC continued to press for an injunction vacating the 2004 Framework and enjoining all site-specific projects

that are inconsistent with the previous Framework developed by the Forest Service in 2001. Trial Brief 3-22 (8/9/12). After this Court granted the government's petition for a writ of certiorari, the government filed a motion to stay the proceedings in the district court to avoid the need for the Forest Service to invest further resources in the litigation and in preparing a new EIS (or a new Framework) if this Court ultimately concluded that PRC has no standing, that PRC's claims are not ripe, or that there was no NEPA violation. The district court opted not to stay its hand, and on April 29, 2013, it denied PRC's motion to vacate the 2004 Framework. Although the district court denied PRC's request to vacate the 2004 Framework, the court did issue an injunction requiring the Forest Service to prepare a new EIS to address the alleged deficiencies that formed the basis of PRC's claim that the EIS did not sufficiently consider the effects of the Framework on fish. 4/29/13 Mem & Order.

3. Now PRC represents that it no longer wishes to pursue the claims it has pursued at every level of the federal judiciary for more than eight years because it does not wish to undertake "substantial costly and time-consuming additional litigation in order to achieve what it views as meaningful relief." PRC Mot. to Vacate J. and Dismiss as Moot 2 (Mot. to Vacate). PRC's motion is an extraordinary step, particularly after the government has itself undertaken the necessary costly and time-consuming efforts to defend the Forest Service's actions over those eight years and to file a successful petition for a writ of certiorari. This Court has rightly viewed "maneuvers designed to insulate a decision from review by this Court * * * with a critical eye." *Knox* v. *SEIU*, 132 S. Ct. 2277, 2287 (2012). But PRC admits

that the proper disposition of its motion is for this Court to vacate the court of appeals' decision and remand with instructions that the district court dismiss (with prejudice) the entire case as moot, including by vacating its injunction against the United States Forest Service and denying any future requests by PRC for costs or attorney's fees. Mot. to Vacate 2-4.

4. The district court's injunction against the Forest Service remains in place, and the government continues to be injured by the relief PRC has obtained against it from Article III courts. PRC's motion is properly viewed, however, as a complete abandonment of its claims against the government and all matters associated with them. In the absence of any ongoing adverseness between the parties, there is no case or controversy under Article III. PRC is correct that the proper disposition in such circumstances, where the prevailing party below abandons its claims, is vacatur of the court of appeals' decision and remand with instructions to the district court to dismiss the entire case with prejudice—including, here, vacating the injunction against the United States Forest Service. This Court has followed that course in several cases, including when the district court and court of appeals had granted relief in favor of a respondent who then decided to abandon his case after this Court granted the opposing party's petition for a writ of certiorari. *Arave* v. *Hoffman*, 552 U.S. 117, 117-119 (2008) (per curiam). See, *e.g.*, *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199-200 (2003) (vacatur, remand for dismissal with prejudice when respondent abandoned claim in merits briefing in this Court); *Deakins* v. *Monaghan*, 484 U.S. 193, 199-200 (1988) (vacatur, remand for dismissal with prejudice

when respondent stated it no longer sought any equitable relief in federal court).*

Thus, it would be appropriate for this Court to grant petitioner's motion, but only if the Court vacates the court of appeals' decision and remands the case with instructions to the district court to dismiss the entire case with prejudice.

---

* Of course, standing, like mootness, also goes to the existence of a case or controversy under Article III, and neither standing nor mootness is necessarily logically antecedent to the other. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 66-67 (1997) (noting that both standing and mootness "go[] to the Article III jurisdiction of this Court and the courts below"); cf. *Summers*, 555 U.S at 494 (noting that plaintiffs lacked standing to challenge the basis for a particular government action after a particular settling claim challenging that action). It therefore apparently would remain open to the Court to dispose of the case on standing rather than mootness grounds, and that option should not be foreclosed in a future case if the course of this litigation were repeated.

* * * * *

If the Court grants PRC's motion, the Court should vacate the decision of the court of appeals and remand the case with instructions to the district court to dismiss PRC's entire cause of action with prejudice.

Respectfully submitted.

DONALD B. VERRILLI, JR.
*Solicitor General*
IGNACIA S. MORENO
*Assistant Attorney General*
EDWIN S. KNEEDLER
*Deputy Solicitor General*
SARAH E. HARRINGTON
*Assistant to the Solicitor General*
ANDREW C. MERGEN
JENNIFER SCHELLER NEUMANN
BARCLAY T. SAMFORD
*Attorneys*

RAMONA E. ROMERO
*General Counsel*
JAMES L. ROSEN
*Senior Counsel*
ANDREW R. VARCOE
*Attorney*
*Department of Agriculture*

JUNE 2013