No. 24-337

In the Supreme Court of the United States

NANTUCKET RESIDENTS AGAINST TURBINES, ET AL., PETITIONERS

v.

BUREAU OF OCEAN ENERGY MANAGEMENT, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
TODD KIM
Assistant Attorney General
RACHEL HERON
THEKLA HANSEN-YOUNG
Attorneys

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

QUESTION PRESENTED

Section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, requires the National Marine Fisheries Service (NMFS) to consult with federal agencies about certain agency actions and prepare a biological opinion addressing whether the action is "likely to jeopardize the continued existence" of an endangered or threatened species. 16 U.S.C. 1536(a)(2) and (b). In fulfilling that obligation, the agency and NMFS must "use the best scientific and commercial data available." 16 U.S.C. 1536(a)(2); 50 C.F.R. 402.14(g)(8). The question presented is:

Whether Section 7 of the ESA requires NMFS, when preparing a biological opinion, to consider not only the effect on an endangered or threatened species of the specific agency action under review, but also the cumulative effects of potential future federal agency actions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

In the Supreme Court of the United States

No. 24-337

NANTUCKET RESIDENTS AGAINST TURBINES, ET AL., PETITIONERS

v.

BUREAU OF OCEAN ENERGY MANAGEMENT, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 100 F.4th 1. The opinion of the district court (Pet. App. 33a-102a) is reported at 675 F. Supp. 3d 28.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2024. On July 17, 2024, Justice Jackson extended the time within which to file a petition for a writ of certiorari to and including September 23, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, requires each federal

agency to "insure that any action authorized, funded, or carried out" by the agency "is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Agencies carry out their ESA responsibilities "in consultation with and with the assistance of" the National Marine Fisheries Service (NMFS) and the U.S. Fish & Wildlife Service (FWS) (together, the Services). *Ibid.*; 50 C.F.R. 402.14. If an agency proposes an action that "may affect listed species or critical habitat," it consults with either NMFS or FWS, depending on the species at issue. 50 C.F.R. 402.14(b). The relevant Service then issues a "biological opinion" addressing whether the proposed agency action is "likely to jeopardize the continued existence" of the species, and whether "reasonable and prudent alternatives" exist to avoid such outcomes. 50 C.F.R. 402.14(g) and (h). Under the ESA, "each agency shall use the best scientific and commercial data available" in carrying out its statutory responsibilities. 16 U.S.C. 1536(a)(2); see 50 C.F.R. 402.14(d). By regulation, NMFS and FWS must also "use the best scientific and commercial data" in formulating their biological opinions. 50 C.F.R. 402.14(g)(8).

NMFS and FWS jointly promulgated regulations that outline a four-step process for preparing biological opinions. See 50 C.F.R. 402.14(g). First, the Service must "[r]eview all relevant information provided by the Federal agency." 50 C.F.R. 402.14(g)(1). Second, the Service must "[e]valuate the current status and environmental baseline of the listed species or critical habitat." 50 C.F.R. 402.14(g)(2). The "environmental baseline" is the current condition of the listed species in the relevant area without considering the consequences of the proposed agency action, and it "includes the past

and present impacts of all Federal, State, or private actions" in the area as well as "all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation." 50 C.F.R. 402.02. Third, the Service must "[e]valuate the effects of the action and cumulative effects on the listed species." 50 C.F.R. 402.14(g)(3). As defined by regulation, "cumulative effects" include "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. 402.02. Fourth, the Service must "[a]dd the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate [an] opinion as to whether the action is likely to jeopardize the continued existence of" the listed species. 50 C.F.R. 402.14(g)(4).

2. In 2017, respondent Vineyard Wind 1, LLC submitted to the Bureau of Ocean Energy Management (BOEM) in the Department of the Interior a plan to construct and operate an offshore wind turbine project located about 14 miles southeast of Martha's Vineyard and Nantucket. Pet. App. 7a.

Pursuant to Section 7 of the ESA, BOEM requested consultation with NMFS about the possible impact of the project on protected marine species. Pet. App. 7a. In 2020, NMFS issued a biological opinion concluding that the Vineyard Wind project is not likely to jeopardize the continued existence of any endangered or threatened species, including the endangered North Atlantic right whale. *Id.* at 7a, 41a. BOEM and NMFS subsequently reinitiated consultation to consider the effects of newly proposed ecological monitoring surveys, as

well as updated information related to the status of the right whale population. *Id.* at 42a-43b.

NMFS issued a new biological opinion in October 2021, which superseded its 2020 biological opinion. Pet. App. 7a. Consistent with NMFS regulations, the 2021 biological opinion did not consider potential future federal offshore wind projects as part of the "effects" or "cumulative effects" of the Vineyard Wind project. C.A. S.A. 509-510, 692-693; see 50 C.F.R. 402.02. Instead, NMFS explained that "any future offshore wind project will require" its own consultation under Section 7, and "in each successive consultation, the effects on listed species of other offshore wind projects under construction or completed would be considered to the extent they influence the status of the species and/or environmental baseline according to the best available information." C.A. S.A. 693. NMFS did account in its environmental baseline for offshore wind projects that had already undergone Section 7 consultation. See *id.* at 696.

After considering the status of the species, the environmental baseline and the effects of the Vineyard Wind project, as well as cumulative effects, the 2021 biological opinion again concluded that the project is not likely to jeopardize the continued existence of any listed species, including the right whale. Pet. App. 7a-8a, 43a. NMFS also included in its 2021 biological opinion a list of reasonable and prudent measures that Vineyard Wind must take to minimize the potential impact on right whales. C.A. S.A. 751-787.

In addition to consulting with NMFS about the effect of the Vineyard Wind project on endangered species, BOEM also prepared an environmental impact statement pursuant to the National Environmental Policy

Act of 1968 (NEPA), 42 U.S.C. 4321 *et seq.* See C.A. S.A. 1118.

In July 2021, BOEM approved the Vineyard Wind project. Pet. App. 8a. Consistent with NMFS's 2021 biological opinion, BOEM imposed extensive mitigation measures to protect the right whale. *Id.* at 8a-10a. In 2022, after NMFS issued its updated biological opinion, BOEM subsequently adopted the findings of the 2021 biological opinion and concluded that Vineyard Wind could proceed with its project. *Id.* at 10a.

3. Petitioners, a nonprofit organization of Nantucket residents and the organization's founder, filed suit against BOEM and NMFS in the U.S. District Court for the District of Massachusetts in August 2021, alleging that the agencies violated the ESA and NEPA in evaluating and approving the Vineyard Wind project. Pet. App. 55a-57a. Vineyard Wind intervened as a defendant. *Ibid.*

The district court granted summary judgment to respondents on every claim. Pet. App. 72a-102a. The court first rejected several claims for lack of standing and failure to provide notice to respondents. See *id.* at 59a-72a, 76a-82a. Then, proceeding to the merits, the court considered petitioners' claim that NMFS's 2021 biological opinion failed to use the "best scientific and commercial data available" as required under the ESA. *Id.* at 82a (quoting 16 U.S.C. 1536(a)(2)). Petitioners had pointed to five scientific studies of right whales that NMFS assertedly failed to properly consider. *Ibid.* The court rejected petitioners' contention, explaining that NMFS had in fact engaged with all five studies, relying on some in its analysis and rejecting others as not the "best available" data. *Id.* at 85a-89a.

The district court next rejected petitioners' arguments that NMFS and BOEM had violated the ESA by failing to ensure that the project would not create various stressors that would jeopardize right whales. Pet. App. 89a-98a. The court held that the agencies fully considered and mitigated against the risk that project-related vessels would strike right whales. *Id.* at 89a-92a. The court further rejected petitioners' argument that NMFS failed to consider the level of harassment to which right whales would be exposed from pile driving noise during construction of the turbines, *id.* at 92a-94a, operational noise, *id.* at 94a-95a, potential loss of foraging opportunities, *id.* at 95a-96a, and entanglement in fishing gear, *id.* at 96a-97a. Finally, the court rejected petitioners' arguments that the agencies failed to consider all those potential stressors "synergistically," explaining that petitioners had not offered "any new arguments regarding the 'synergistic' impacts." *Id.* at 97a-98a (citation omitted).

The district court rejected petitioners' NEPA arguments for similar reasons, finding that the agencies took a sufficiently hard look at the project's environmental impacts. Pet. App. 89a-98a.

4. The court of appeals affirmed. Pet. App. 1a-32a.

The court of appeals first held that the 2021 biological opinion properly analyzed the right whale's status and the environmental baseline, and that NMFS thoroughly considered all the studies petitioners identified and the most current right whale population information. Pet. App. 13a-19a. The court also agreed with the district court that the 2021 biological opinion fully considered the project's potential stressors for right whales in the form of construction noise, operational noise, line entanglement, and vessel strikes. *Id.* at

19a-30a. The court sustained NMFS's determination that the required measures would mitigate those effects. *Ibid.*

The court of appeals further rejected petitioners' argument that "the additive effects of the Vineyard Wind project would jeopardize the continued existence of the right whale." Pet. App. 30a. The court noted that by regulation, NMFS must "add the effects of the action and cumulative effects to the environmental baseline and * * * formulate an opinion as to whether the action is likely to jeopardize the continued existence" of the right whales. *Id.* at 31a (quoting 50 C.F.R. 402.14(g)(4) (brackets omitted)). The court determined that petitioners' arguments on this point were largely repetitive of their other claims, except for "one new argument"—petitioners' reference to language in the Quintana-Rizzo study suggesting that "widespread wind farm development in southern New England could broadly 'affect the use of the region by right whales.'" *Ibid.* (citation omitted). The court held that those "generalized statements" in the Quintana-Rizzo study did not render the 2021 biological opinion's no-jeopardy conclusion arbitrary and capricious, because the study was not specifically analyzing the Vineyard Wind project and had not suggested that wind development was incompatible with right whale survival. *Ibid.*

Finally, the court of appeals rejected petitioners' arguments under NEPA, Pet. App. 32a, which petitioners do not raise here.

ARGUMENT

Petitioners contend (Pet. 13-29) that when NMFS prepared a biological opinion about the effect of the proposed Vineyard Wind project on right whales, it was required under the ESA to also consider the effect of

other potential future projects that have not yet been federally approved. That argument was neither pressed nor passed on below, and this Court therefore should not consider it. But even if petitioners' argument were properly before this Court, further review would be unwarranted. The court of appeals correctly upheld the agencies' evaluation and approval of the Vineyard Wind project, which properly accounted for all the statutorily required considerations. Petitioners do not identify a genuine conflict among the court of appeals even on their unpreserved theory, and in any event this case would be a poor vehicle to address petitioners' argument. This Court should deny the petition.

1. As an initial matter, this Court should not consider petitioners' claim because, as this Court has repeatedly emphasized, it is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and its "traditional rule * * * precludes a grant of certiorari" on a question that "was not pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). See *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (declining to review a claim "without the benefit of thorough lower court opinions to guide our analysis of the merits").

Petitioners' sole argument before this Court is that NMFS is statutorily obligated to consider the effects of potential future federal projects as part of the "best scientific and commercial data available" informing its biological opinion, and that NMFS's regulation excepting potential future federal action from consideration as a "cumulative effect" accordingly conflicts with the ESA. See Pet. 15-21 (citation omitted). But petitioners never presented that legal theory below. Instead, in the district court and the court of appeals, petitioners focused

their ESA arguments exclusively on the fact-based contention that NMFS failed to consider information in five scientific studies. See Pet. Mem. in Supp. of Mot. for Summ. J. 17-43; Pet. C.A. Br. 14-37.

Petitioners contend (Pet. 17) that they raised their current argument in the court of appeals as part of their discussion of the "2021 Quintana-Rizzo" study—one of the five scientific studies that petitioners accused the agencies of failing to consider. But petitioners' argument in the lower court was a factbound challenge to the agencies' supposed failure to adequately engage Quintana-Rizzo's findings; it was not a broader legal argument that the "plain language of the ESA" in all cases requires consideration of potential future federal actions, as petitioners now contend. See Pet. 21.

Attempting to tie their factbound challenge in the court of appeals to the legal theory they raise now, petitioners point out (Pet. 18) that they argued below that the agencies had inadequately considered Quintana-Rizzo's conclusions about the effects of "[e]normous development" of offshore wind-energy leases, and "various perturbations" that could arise "[c]ollectively." But a passing reference in the court of appeals to the "enormous development" of offshore wind turbines and their associated "perturbations" cannot be mistaken for the legal argument that petitioners raise now: that NMFS was statutorily required to consider 30 specific offshore wind projects currently in development in forming its biological opinion. Nor did petitioners challenge NMFS's contrary regulation exempting future federal agency actions not already in the ESA consultation process from the definition of "cumulative effects." Indeed, petitioners' briefing in the court of appeals never even

mentioned the phrase "cumulative effects" nor cited the relevant definition in the regulations.

Unsurprisingly, the court of appeals did not pass on an argument that petitioners did not press. The court instead considered and rejected the challenge petitioners made below, explaining that NMFS had in fact considered the best available science, including the 2021 Quintana-Rizzo study. Pet. App. 14a-17a. The court also observed that "generalized statements" in the 2021 Quintana-Rizzo study did "not render the biological opinion's no-jeopardy conclusion arbitrary and capricious." *Id.* at 31a. The court noted that Quintana-Rizzo had studied "the potential risks of the construction and maintenance of hundreds of wind turbines throughout southern New England," but emphasized that the study had not focused on Vineyard Wind specifically. *Ibid.* (brackets omitted). Importantly, the court did not consider Quintana-Rizzo's study of the potential effects of "hundreds of wind turbines" in response to a legal argument that the agencies had to consider future federal projects. Instead, consistent with petitioners' presentation of the issue below, the court addressed that aspect of the 2021 Quintana-Rizzo study as part of its fact-bound review under the arbitrary-and-capricious standard. *Ibid.*

2. Even if petitioners had adequately preserved their argument, further review would be unwarranted because the court of appeals' decision is correct, and the agencies acted in a manner consistent with their obligations under the ESA.

a. Under the ESA, agencies must consult with NMFS to determine when "any action" is "likely to jeopardize the continued existence" of any listed species. 16 U.S.C. 1536(a)(2). NMFS's approach under its

regulations tracks that statutory mandate. To determine the potential effect of a specific "agency action" on an endangered species, NMFS begins by looking at the status of the species and the environmental baseline. 50 C.F.R. 402.14(g). The environmental baseline accounts for the effects that existing federal actions already have on the species within the project area. See 50 C.F.R. 402.02 (defining the environmental baseline to include "the past and present impacts of all Federal, State, or private actions" as well as "Federal projects in the action area that have already undergone formal or early section 7 consultation"). Then NMFS determines how the specific "agency action" at issue will alter the baseline. See 50 C.F.R. 402.14(g)(3) and (4). The regulations recognize that multiple actions may combine to have cumulative effects on a species or its habitat. The analysis thus requires the agency to consider "future State or private activities * * * that are reasonably certain to occur" in the relevant area. 50 C.F.R. 402.02.

NMFS is not, however, required to speculate about the impacts of future *federal* actions. 50 C.F.R. 402.02. Including potential future federal actions in the analysis as petitioners propose would risk conflating jeopardy determinations for different "agency actions." Under such an approach, as the Services explained when they promulgated the regulations, "the jeopardy prohibition could operate to block 'nonjeopardy' actions"—that is, agency actions that do not themselves jeopardize the continued existence of endangered species and should be allowed to proceed—solely "because future, speculative effects occurring after the Federal action is over might, on a cumulative basis, jeopardize a listed species." 51 Fed. Reg. 19,926, 19,933 (June 3, 1986). That result would conflict with the statutory directive to

analyze whether the specific "agency action" at issue is "likely to jeopardize the continued existence" of any listed species. 16 U.S.C. 1536(a)(2) and (b)(1)(A). Instead, future federal actions are considered in their own subsequent ESA consultations. See 51 Fed. Reg. at 19,333 ("Future Federal actions proposed for the same area would have to be separately evaluated under section 7 and could not occur unless they were able, in their own right, to avoid jeopardizing the continued existence of the affected species or destroying or adversely modifying critical habitat.").

b. NMFS and BOEM correctly applied that approach here. NMFS appropriately conducted a jeopardy analysis for the "agency action" that BOEM proposed: approval of the construction and operations plan for the Vineyard Wind project. NMFS accordingly measured the effect of that specific action against the environmental baseline and the status of the right whale species. NMFS was not tasked with analyzing the "30 offshore wind projects" that petitioners contend should have been considered as cumulative effects. Pet. 10. If and when those projects go through their own Section 7 consultation processes, NMFS will analyze whether they are likely to jeopardize the continued existence of endangered species, including the right whale. See pp. 16-17, *infra*. Until then, the agency must focus on the specific agency action at issue and whether it is likely to jeopardize the continued existence of an endangered species. 16 U.S.C. 1536(a)(2).

c. Petitioners contend (Pet. 15-17) that NMFS's approach conflicts with the ESA's mandate to use the "best scientific and commercial data available." 16 U.S.C. 1536(a)(2). It does not. That statutory language speaks to the type of data the agency must consider

when conducting its jeopardy analysis, not the scope of that analysis. See 51 Fed. Reg. at 19,926 (explaining that the best-scientific-data standard creates a "reasonable information standard" that the agencies must follow during the consultation process).

In any event, petitioners fail to explain how information concerning the possibility of future federal offshore wind projects could have been considered part of the "best scientific and commercial data available" to NMFS before approving the Vineyard Wind project. If anything, such information may not be the best data available because the potential for future projects to occur is, to at least some extent, speculative. See 51 Fed. Reg. at 19,933 (explaining that "Congress did not intend that Federal actions be precluded by such speculative actions"). The better and more reliable approach—and the one taken by NMFS here—is to consider federal projects that have already undergone at least early Section 7 consultation in the environmental baseline for a particular species, and to determine the effects of future federal projects in their own subsequent consultations.

3. Petitioners contend (Pet. 21-26) that the court of appeals' decision conflicts with decisions of the Ninth and D.C. Circuits. No such conflict exists.

Petitioners first assert a disagreement with three Ninth Circuit decisions. They begin (Pet. 22-23) with *Conner* v. *Burford*, 848 F.2d 1441 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989), which involved a decision by the Forest Service to lease land in Montana for oil and gas development. FWS consulted with the Forest Service under the ESA, and in its biological opinion, it considered only the effect of the lease sales themselves and not the effects of the oil and gas development that

would follow. *Id.* at 1444. The Ninth Circuit rejected that approach, explaining that "the ESA requires the biological opinion to analyze the effect of the *entire* agency action," which the court determined "includes post-leasing activities" and not just the lease sale itself. *Id.* at 1453.

Connor is inapposite, because petitioners in this case do not fault NMFS for failing to consider later stages of the Vineyard Wind project that are part of the relevant "agency action." Instead, they contend that NMFS should have considered *entirely distinct* future federal projects as part of its review of Vineyard Wind. See Pet. 21. Petitioners attempt to link those potential future actions to the Vineyard Wind project by labeling them "coordinated projects." Pet. 28. But petitioners' only basis for that characterization is a White House fact sheet that postdates the final BOEM approval of Vineyard Wind. See Pet. 1 n.4, 9-10. In truth, petitioners' argument is that NMFS should have considered *other* wind projects that might be developed later by *other* companies on *other* offshore leases as part of the cumulative effects analysis for the Vineyard Wind project. *Conner* did not consider such a claim.

Petitioners' reliance on *Wild Fish Conservancy* v. *Salazar*, 628 F.3d 513 (9th Cir. 2010), see Pet. 23-25, is misplaced for the same reason. In that case, relying on *Conner*, the Ninth Circuit held that FWS erred when it limited its jeopardy analysis for a trout hatchery to five years instead of analyzing "the effect of the *entire* agency action"—that is, the hatchery's entire expected life. 628 F.3d at 522 (citation omitted). *Wild Fish Conservancy*, like *Conner*, did not hold that FWS was required to consider entirely distinct, future federal actions. There is thus no conflict between those decisions

and the decision below, even under petitioners' novel theory.

Petitioners' reliance on *Thomas* v. *Peterson*, 753 F.2d 754 (9th Cir. 1985), abrogation on other grounds recognized by *Cottonwood Environmental Law Center* v. *United States Forest Service*, 789 F.3d 1075, 1088-1091 (9th Cir. 2015), fares no better. There, the Ninth Circuit enjoined a Forest Service project because the agency had not conducted an ESA consultation. *Id.* at 764. The decision has no bearing on this case, where NMFS was consulted. Petitioners cite (Pet. 25) language from *Thomas* discussing the differences between the requirements of the ESA and NEPA, but they fail to identify any conflict between that language and the decision below.

Petitioners also contend (Pet. 26) that the decision below conflicts with the D.C. Circuit's decision in *Maine Lobstermen's Ass'n* v. *National Marine Fisheries Service*, 70 F.4th 582, 586 (2023). In that case, the D.C. Circuit held that, when faced with uncertainty about the effects of a particular agency action, NMFS may not apply a default presumption of generally relying on the data that would lead to conclusions of higher, rather than lower, risk to the species. *Id.* at 600-601. Petitioners do not contend that the First Circuit applied such a presumption in this case, or that the *Maine Lobstermen's* decision had anything to do with NMFS's consideration of cumulative effects in a biological opinion. Instead, petitioners pitch the supposed conflict at a higher level of generality, contending that the court of appeals below engaged in "kneejerk adoption of NMFS' interpretation of what constitutes best available information under the ESA," while the D.C. Circuit recognizes that "it is the Courts * * * who must determine the proper

meaning of the statute." Pet. 25-26. But the court below did not defer to NMFS's interpretation of the ESA. As discussed above, the court was not presented with competing interpretations of the ESA at all, as petitioners raised only factbound arbitrary-and-capricious challenges below. See pp. 8-10, *supra*.

4. Finally, this case would be a poor vehicle to consider petitioners' argument because the 2021 biological opinion that petitioners challenged in this litigation is no longer in effect.

In August 2024, after the court of appeals decided this case, NMFS issued a new biological opinion that superseded the 2021 biological opinion. See Nat'l Marine Fisheries Serv., U.S. Dep't of Commerce, *National Marine Fisheries Service Endangered Species Act Section 7 Consultation Biological Opinion* (Aug. 23, 2024), https://www.fisheries.noaa.gov/s3/2024-09/GARFO-2024-01318.pdf (2024 Biological Opinion). In that opinion, NMFS updated its analysis to account for the fact that construction of the project has taken longer than expected. *Id.* at 5-6. Consistent with NMFS's regulations and its approach in the 2021 biological opinion, the 2024 biological opinion does not consider potential future federal actions as part of the "cumulative effects" of the Vineyard Wind project. *Id.* at 331-333. But since the issuance of the 2021 biological opinion, NMFS had completed its ESA consultation for several additional offshore wind projects in the area. *Id.* at 135. NMFS accordingly considered those as part of its environmental baseline in the 2024 biological opinion concerning the Vineyard Wind project. *Id.* at 135-136; see 50 C.F.R. 402.02. The 2024 biological opinion also includes the latest information about the right whale population. 2024 Biological Opinion at 125-142. Accordingly, review in

this case would be on a stale record, making this an especially poor vehicle to consider petitioners' arguments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
TODD KIM
Assistant Attorney General
RACHEL HERON
THEKLA HANSEN-YOUNG
Attorneys

DECEMBER 2024