No. 07-463

In the Supreme Court of the United States

PRISCILLA SUMMERS, ET AL., PETITIONERS

v.

EARTH ISLAND INSTITUTE, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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The certiorari petition demonstrates that the Ninth Circuit's decision conflicts with decisions of this Court and other courts of appeals with respect to ripeness, standing, and the scope of injunctive relief (see Pet. 9-14, 19-20, 25, 29-30) and is fundamentally flawed in a number of respects. Respondents' arguments that the Court should deny review are unavailing.

A. The Only Reviewable Agency Action In This Case Was The Burnt Ridge Project

1. Respondents' argument reflects serious misconceptions as to the government's position. Respondents describe the government as contending that (1) "the promulgation of a regulation does not constitute 'final agency action' for purposes of APA review," and (2) "a facial challenge to a regulation not tied to a particular application of the regulation never presents a ripe issue

for review." Br. in Opp. 5. In fact, the certiorari petition specifically disavows both of those arguments.

The petition explains that 36 C.F.R. 215.4(a) and 215.12(f)—the regulations that respondents challenge—*are* "agency actions" within the meaning of the APA. Pet. 12 n.2 (quoting 5 U.S.C. 551(13)). The petition further explains, however, that the APA does not authorize judicial review of *all* "agency actions." *Ibid.* Rather, review is available only if the relevant agency action (1) is "made reviewable by statute" or (2) is "final agency action" for which "there is no other adequate remedy in a court." *Ibid.* (quoting 5 U.S.C. 704). Respondents do not contend that a special review provision authorizes their suit. The thrust of Part A of the certiorari petition is that the second potential basis for review is likewise inapplicable here because, if and when the challenged regulations are applied to future projects, judicial review of those site-specific actions will provide an "adequate remedy" for any defect in those regulations. That conclusion also rests on the Court's recognition that APA suits for declaratory or injunctive relief—the standard form of judicial review in the absence of a special statutory review procedure, see 5 U.S.C. 703—are equitable in nature, and that relief therefore is not available as an equitable matter where the Court's ripeness criteria are not satisfied. See *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967); *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 (1993) (*CSS*).

Far from advocating a categorical rule that a challenge to agency regulations cannot proceed before their enforcement or application in a particular case, the petition identifies the specific class of challenges that *can* go forward under this Court's precedents even in the absence of a special statutory review provision: "a substan-

tive rule requiring immediate adjustment of primary conduct under threat of serious penalties" is ordinarily subject to immediate judicial challenge under the APA. Pet. 12; see Pet. 10, 11; *Abbott Labs.*, 387 U.S. at 152-153. Respondents contend that "the challenged rules do affect [respondents'] primary conduct, which includes influencing Forest Service decisions." Br. in Opp. 21 n.7. But while 36 C.F.R. 215.4(a) and 215.12(f) may preclude respondents and their members from pursuing administrative appeals of certain Forest Service decisions, such participation in agency proceedings is not *primary* conduct protected by the *Abbott Laboratories* exception. Moreover, those regulations do not expose respondents to serious *penalties* if judicial review is deferred. Absent the sort of dilemma that was present in *Abbott Laboratories*, where the plaintiff could have pursued an as-applied challenge only by *violating* the regulations and subjecting itself to a government enforcement action (and to potential "serious criminal and civil penalties" if the as-applied challenge was ultimately unsuccessful, see 387 U.S. at 153), a challenge to regulations qua regulations will not lie.

2. This Court has repeatedly articulated and applied the two-part test described above, under which agency regulations ordinarily are not subject to a pre-enforcement challenge unless a special review provision applies or deferring review would subject the plaintiff to serious adverse consequences. See Pet. 9-11; *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (*NWF*); *CSS*, 509 U.S. at 57; *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808 (2003) (*NPHA*). Respondents seek to distinguish *NWF* on the ground that the plaintiffs there challenged a broad agency "program." Br. in Opp. 9, 11. That is no basis,

however, for ignoring the *NWF* Court's considered explication (see 497 U.S. at 891) of the legal framework governing challenges to regulations.

That is particularly true in light of this Court's reliance on *NWF* in both *CSS* and *NPHA* in holding that the plaintiffs' challenges *to regulations* were unripe. See *CSS*, 509 U.S. at 58; *NPHA*, 538 U.S. at 808. Respondents characterize those decisions as resting on the possibility that the challenged regulations might never be applied. Br. in Opp. 16-17. That is incorrect.

In *CSS*, the Court explained that a challenge to final agency action will ordinarily be considered ripe for judicial review only if the effects of that action "have been 'felt in a concrete way by the challenging parties.'" 509 U.S. at 57 (quoting *Abbott Labs.*, 387 U.S. at 148-149). The Court further explained that, under *NWF*, *Abbott Laboratories*, and *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967), a regulation is subject to pre-enforcement review only if it immediately exposes the plaintiff to serious adverse consequences. See 509 U.S. at 57-58. In holding that the regulations at issue were not immediately reviewable, the Court explained that the rules "impose[d] no penalties for violating any newly imposed restriction." *Id.* at 58. Similarly in *NPHA*, the Court concluded that the plaintiff's challenge to a regulation was not immediately reviewable because the plaintiff had "failed to demonstrate that deferring judicial review will result in real hardship." 538 U.S. at 811-812. Thus, rather than expressing doubt that the challenged regulations would ever be applied, the Court in both cases emphasized that the plaintiffs were unlikely to suffer serious harm if review was deferred.

3. Respondents contend (Br. in Opp. 13-15) that the courts of appeals routinely entertain direct APA chal-

lenges to regulations so long as the challenges are "purely legal." In many of the cases they cite, however, the courts concluded that the plaintiffs had established immediate *Abbott Laboratories*-type injury. See *National Ass'n of Home Builders* v. *United States Army Corps of Eng'rs*, 440 F.3d 459, 465 (D.C. Cir. 2006) (challenged regulation "as a practical matter requires the [appellants] to adjust [their] conduct immediately") (quoting *NPHA*, 538 U.S. at 808); *National Treasury Employees Union* v. *Chertoff*, 452 F.3d 839, 853-855 (D.C. Cir. 2006) (distinguishing challenges to regulations affecting plaintiffs' primary conduct from procedural regulations that "do not have any 'direct and immediate' impact on the Unions' 'primary conduct'"); *Better Gov't Ass'n* v. *Department of State*, 780 F.2d 86, 93, 95-96 (D.C. Cir. 1986) (immediate review appropriate where challenged regulation had "direct and immediate" impact on appellants' "day-to-day business").

Courts of appeals have sometimes entertained "purely legal" facial challenges to agency regulations, even when the plaintiff established no immediate harm from the regulation's existence. See, *e.g.*, *National Mining Ass'n* v. *Fowler*, 324 F.3d 752, 756-758 (D.C. Cir. 2003). That approach, however, cannot be reconciled with this Court's precedents. The fact that other courts have sometimes made the same error as the Ninth Circuit did here only strengthens the case for this Court's review.

4. Respondents contend (Br. in Opp. 20-21, 24-26) that judicial review of site-specific applications of 36 C.F.R. 215.4(a) and 215.12(f) will not provide adequate relief because, if the notice-and-comment procedures of the Forest Service Decisionmaking and Appeals Reform Act (ARA), Pub. L. No. 102-381, Tit. III, 106 Stat. 1419

(16 U.S.C. 1612 note), do not apply to the relevant site-specific projects, potential plaintiffs will not timely receive the information needed to bring such a challenge. That argument lacks merit. Even with respect to activities (like the Burnt Ridge Project) that are excluded by 36 C.F.R. 215.4(a) from the ARA's notice-and-comment procedures, the Forest Service provides public notice through two other mechanisms. The first is the "scoping" process under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* See 40 C.F.R. 1501.7, 1506.6; 69 Fed. Reg. 40,594-40,595 (2004). The second is through the quarterly issuance of schedules of proposed actions, which each National Forest distributes, posts on the agency's website, and makes available to the public.[1]

Here, respondents received notice of the Burnt Ridge Project through a NEPA scoping notice, see Pet. App. 7a, and obtained a preliminary injunction before it proceeded, see *id.* at 39a. And while Jim Bensman's declaration states that he was unable to comment on or appeal other timber projects in the Allegheny National Forest, the declaration also makes clear that he received notice of the projects through the scoping process. See

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[1] See U.S. Forest Service, *Amend. No. 1909.15-2004-1, Environmental Policy and Procedures Handbook* (approved June 29, 2004) <http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15_zero_code.doc; U.S. Forest Service, *Amend. No. 1909.15-2007-1, Environmental Policy and Procedures Handbook* (approved Feb. 9, 2007) <http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15_30.doc>; see also *Schedule of Proposed Actions (SOPA), 01/01/2006 to 03/31/2006 Sequoia National Forest* (visited Dec. 20, 2007)<http://www.fs.fed.us/sopa/components/reports/sopa-110513-2006-01.html>.

id. at 71a; see also *id.* at 72a.[2] The public routinely receives notice of categorically excluded projects through NEPA scoping or schedules of proposed activities for each National Forest in sufficient time to allow judicial review of categorically excluded projects.[3] The Forest Service does not provide notice to the public of every minor activity, such as maintaining existing roads, repaving parking lots, and mowing lawns. Respondents, however, disavow any contention that the ARA's notice-and-comment procedures apply to such activities. See Br. in Opp. 13 n.2.

B. Respondents Lack Standing To Challenge The Forest Service Regulations

1. The court of appeals held that respondents had standing to challenge the regulations because (1) Bensman's declaration established his continuing interest in the national forests and his regular filing of administrative appeals, and (2) denial of the right to file an administrative appeal constitutes a judicially redressable "procedural injury," whether or not the plaintiff suffers any tangible harm as a result of the For-

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[2] Relying on a post-judgment declaration, respondents assert (Br. in Opp. 21, 25) that various projects involving off-road vehicle use might proceed without notice. Even if that declaration warranted consideration, but cf. *NWF*, 497 U.S. at 894-898; note 4, *infra*, Forest Service regulations separately provide for public notice of such projects. 36 C.F.R. 212.50, 212.52.

[3] See, e.g., *Colorado Wild* v. *USFS*, 435 F.3d 1204, 1212, 1221 (10th Cir. 2006) (categorically excluded timber project); *League of Wilderness Defenders* v. *Smith*, 491 F. Supp. 2d 980, 984-985 (D. Or. 2007) (same); *Forest Serv. Employees for Envtl. Ethics* v. *USFS*, No. C 05-2220 SI, 2005 WL 1514071, at *1, *3 (N.D. Cal. June 27, 2005) (same); *RESTORE: The North Woods* v. *USDA*, 968 F. Supp. 168, 169-171 (D. Vt. 1997) (categorically excluded land exchange).

est Service action to which an appeal would pertain. Pet. App. 8a-11a. The court of appeals erred in finding standing on those bases. See Pet. 15-20.[4]

2. The petition argues (at 15-20) that respondents' standing to initiate this suit depended on a showing of harm from the Burnt Ridge Project; that the courts below identified no basis for concluding that respondents had established such injury; and that the lower courts therefore erred in allowing the suit to go forward. Respondents contend (Br. in Opp. 23-24) that the declarations of Ara Marderosian, which were submitted in conjunction with respondents' request for a temporary restraining order or preliminary injunction, established a likelihood that Marderosian would be injured by the Burnt Ridge Project. The courts below did not rely on those declarations, and government counsel on the petition were not aware of them at the time the petition was filed. After reviewing those documents, however, the government agrees that the first declaration appears to establish Marderosian's standing to challenge the Burnt Ridge Project. Unlike the Bensman declaration, on which the courts below relied (see Pet. App. 9a, 43a-44a), the Marderosian declaration specifically describes the harms that the declarant would personally suffer as a result of the Burnt Ridge Project itself.

As the petition explains (at 20-24), however, the parties' dispute over the Burnt Ridge Project was settled, and respondents' claims concerning that project were *dismissed with prejudice*, before the district court ruled

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[4] Respondents rely (Br. in Opp. 24-25) on additional declarations that were submitted after the district court entered judgment. Those declarations, which were not cited by the Ninth Circuit, were untimely under Federal Rules of Civil Procedure 6 and 56. Cf. *NWF*, 497 U.S. at 894-898.

on the merits. The court of appeals nevertheless held that respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained justiciable. Pet. App. 15a. The court distinguished Sections 215.4(a) and 215.12(f) from the other regulations that respondents challenged, which the court held were unripe for review, solely on the ground that the remaining regulations had not been applied to the Burnt Ridge Project. See *id.* at 14a.[5] The court thus based its ripeness holding on the parties' *prior* dispute over the Burnt Ridge Project, even though that dispute had been resolved and dismissed from the case. See Pet. 21. That approach cannot be reconciled with this Court's recognition that the ripeness inquiry crucially depends on "the degree and nature of the regulation's *present* effect on those seeking relief." *Toilet Goods*, 387 U.S. at 164 (emphasis added); see *Webb* v. *Department of Health & Human Servs.*, 696 F.2d 101, 106-108 (D.C. Cir. 1982) (plaintiff's challenge to regulation rendered non-justiciable when dispute over specific application became moot).

C. The Nationwide Injunction Was Improper

1. Respondents contend (Br. in Opp. 28-29) that the nationwide injunction reflected the district court's exercise of equitable discretion, and that the court of appeals did nothing more than uphold that permissible discretionary choice. Those contentions lack merit.

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[5] Respondents contend (Br. in Opp. 1) that "[t]he Ninth Circuit dismissed seven of eight claims brought by Respondents * * * because only one set of challenged regulatory provisions had been shown to have ever been applied by the Forest Service." That is incorrect. The court did not question respondents' allegation that the other regulations "ha[d] been applied to decisions across the nation." Pet. App. 14a. Rather, it relied on the fact that the other regulations had not been applied *to the Burnt Ridge Project*. See *ibid.*

The district court awarded nationwide relief based on two factors: (1) the fact that the pertinent regulations were "applicable nationwide" and (2) the court's determination that respondents had "suffered actual injury" as a result of the regulations. Pet. App. 32a-33a. Because injury-in-fact is an Article III prerequisite to any successful suit, the court's two-factor analysis amounts in substance to a holding that nationwide relief is appropriate whenever a regulation of nationwide applicability is held to be invalid. The court of appeals concluded that "[t]he nationwide injunction * * * is compelled by the text of the [APA]." *Id.* at 21a. Although the court also stated that "[t]he district court did not abuse its discretion in issuing a nationwide injunction," *id.* at 22a, that statement, read in the context of the opinion as a whole, simply means that no abuse of discretion occurred because the district court was required to fashion the injunction as it did.

2. The court of appeals' remedial approach obscures the distinction between individual and classwide relief and prevents the government from relitigating legal issues in different circuits. Pet. 24-31. Its practical effect is that the government is bound nationwide by an *adverse* decision regarding a regulation's validity, but derives no commensurate benefit if the first judicial decision is favorable. The decision below also obscures the distinction between review in an equitable action for declaratory or injunctive relief under the APA and review under special statutory provisions through which Congress occasionally chooses to centralize and expedite judicial challenges to agency regulations. Pet. 24. Here again, the effect of the Ninth Circuit's decision is that the government bears the burdens associated with a special review provision but derives none of the benefits.

In a variety of circumstances, courts of appeals have recognized that district courts, in fashioning appropriate equitable relief, should be sensitive to the considerations described above. See Pet. 29-30. Respondents correctly observe (Br. in Opp. 29-30) that many of those cases did not involve challenges to agency regulations.[6] This Court has made clear, however, that equitable considerations are similarly applicable to judicial review of agency rules. See *CSS*, 509 U.S. at 57. Once it is understood that 5 U.S.C. 706(2) does not compel the nationwide injunction issued by the district court in this case (see Pet. 27-29), there is no justification for such relief in a garden-variety APA suit like this one.

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

Respectfully submitted.

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DECEMBER 2007

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[6] Respondents' reliance (Br. in Opp. 30) on *Virginia Society for Human Life* v. *FEC*, 263 F.3d 379 (4th Cir. 2001), is misplaced. As respondents point out, the court in that case approved a nationwide injunction against enforcement of the regulation that the court held to be invalid. As modified on appeal, however, the injunction applied only to enforcement of the regulation *against the plaintiff*. *Id.* at 392-394. The court explained that the broader injunction issued by the district court (which barred the agency from enforcing the regulation against non-parties as well) was inappropriate because, inter alia, it would prevent the government from relitigating the issue in other circuits. *Id.* at 393; see Pet. 29.