No. 07-463

IN THE

Supreme Court of the United States

PRISCILLA SUMMERS, *ET AL.*,

Petitioners,

v.

EARTH ISLAND INSTITUTE, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in allowing a facial challenge to one set of regulatory provisions and dismissing challenges to seven others on ripeness grounds, where there is no dispute that the one set of rules allowed to be reviewed had been applied countless times by the Forest Service, including an application of the rules to a site-specific action challenged in the district court?

2. Did the respondents have standing, where it is undisputed that the challenged regulations had been applied to them countless times, including an application of the rules to a site-specific action challenged in the district court for which standing was not challenged?

3. Did the facial rule challenge become moot, where the site-specific action was preliminarily enjoined and then the challenges to it were settled, but there is no dispute that the agency continued to apply the regulations to countless other site-specific actions that adversely affected respondents?

4. Did the Ninth Circuit err in finding that the district court did not abuse its discretion in completely setting aside the challenged regulations instead of limiting relief to the Eastern District of California, where respondents are organizations affected by the challenged regulations throughout the country?

PARTIES TO THE PROCEEDINGS

Respondents concur in the statement of the Parties to the Proceeding in the petition.

RULE 29.6 STATEMENT

Respondents Earth Island Institute, Sequoia ForestKeeper, Heartwood, Center for Biological Diversity, and Sierra Club have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

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INTRODUCTION

The first Question Presented by Petitioners ("the Forest Service") involves ripeness and "final agency action" under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). The Ninth Circuit dismissed seven of eight claims brought by Respondents ("the Conservation Groups") as unripe, holding that because only one set of challenged regulatory provisions had been shown to have ever been applied by the Forest Service, only that challenge was ripe. In response to the Forest Service's petition for rehearing *en banc* on that single claim, no judge voted to rehear the case, nor did the Ninth Circuit request a response by the Conservation Groups. That is because the panel's decision was well in line with long-standing precedent of this Court and the circuits, holding that final, published rules are "final agency action" under the APA, and that a facial challenge to such rules is permitted if the plaintiff can show that the challenge presents purely legal issues and withholding review would allow the agency to continue to apply the challenged regulation to plaintiffs in a manner that causes them harm. The Forest Service demonstrates no division among the circuits or any other compelling reason for the Court to address this issue.

The Forest Service's second and third Questions Presented largely depend on the agency's prevailing on the ripeness and "final agency action" issue, and are garden-variety, fact-specific issues that do not warrant granting certiorari. The Forest Service argues that the Conservation Groups did not show standing to challenge the application of the regulations to the Burnt Ridge timber sale, and further that the claim is moot because the case-specific claims regarding that timber sale were settled by the parties. However,

whether respondents had standing to challenge that specific timber sale, and whether such a challenge would be moot, are not only factbound questions of little or no broad importance, but they are beside the point, because it is the facial challenge to the regulations for which standing and lack of mootness must be shown. There can be no doubt that the Conservation Groups have standing to assert that facial challenge or that it presents a live controversy. The Conservation Groups represent a broad spectrum of the public who have rights under the Forest Service Decision Making and Appeals Reform Act, Pub. L. No. 102-381, Title III, § 322, 106 Stat. 1419 (Oct. 5, 1992) ("ARA"), and who were directly affected by the challenged rules, which caused them environmental harm. Moreover, the rules were constantly applied by the Forest Service until they were enjoined.

The Forest Service's fourth and final Question Presented argues that the APA does not authorize a court to completely set aside regulations that it finds to be contrary to law, and that the Court of Appeals erred in finding that the district court did not abuse its discretion in refusing to limit its relief to the Eastern District of California. This argument flies in the face of the plain language of the APA and the consistent decisions of the courts of appeals, which hold that district courts have the power to set aside invalid rules when necessary to afford the plaintiffs full relief, which is precisely what the courts below found here. Again, the Forest Service points to no genuine disagreement among the lower courts over this issue and no other reason for granting review.

STATEMENT OF THE CASE

The Conservation Groups generally accept the Forest Service's Statement but add the following points for completeness:

- The Conservation Groups challenged regulations promulgated by the Forest Service in 2003 (36 C.F.R. §§ 215.4(a) & 215.12(f)), which exempted proposed Forest Service projects implementing Forest Service land and resource management plans from the public notice, comment and administrative appeal provisions of the ARA, simply because they were "categorically excluded" from the need to prepare an "environmental analysis" or "environmental impact statement" under the National Environmental Policy Act," 42 U.S.C. § 4321 *et seq.* ("NEPA"). The Conservation Groups alleged that these regulations were inconsistent with the language of the ARA, which requires a "notice and comment [and appeal] process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans." *See* ARA §§ 322(a), (c); Pet. App. 15a-20a.

- The agency projects deemed "sufficiently slight" by the Forest Service that were exempted from the public notice, comment, and administrative appeal provisions of the ARA by the challenged regulations included agency actions such as timber sales up to 250 acres. 68 Fed. Reg. 44,598, 44,607 (July 29, 2003); *see* Pet. 3.

- The Forest Service "withdrew its prior decision to implement the Burnt Ridge Project" only after that project had been preliminarily enjoined by the district court on December 6, 2003. *See* Pet. 4; Federal Appellants' Excerpts of Record at 33.

- The Forest Service mentions only one of eight declarations submitted by the Conservation Groups relevant to standing. The Conservation Groups submitted two declarations showing standing for the Burnt Ridge Project at the preliminary injunction stage when it was still at issue, which the Forest Service never challenged. District Court Docket ## 12, 38 (Declarations of Ara Marderosian). Although the Conservation Groups initially submitted only one standing declaration (of Heartwood member Jim Bensman) specific to the facial rule challenge, they eventually submitted four more declarations in the district court to counter the Forest Service's standing arguments. Plaintiffs/Appellees/Cross-Appellants' Supplemental Excerpts of Record at 43-68. The declarations submitted by the Conservation Groups, including Mr. Bensman's first declaration, show that the challenged regulations were being applied to them on a continual basis by the Forest Service, and address specific timber sales and other project sites that the declarants have visited and to which they intend to return. Mr. Bensman specifically names the National Forests he has visited; many of them are near his home, and he visits them regularly. Pet. 68a-70a. The Conservation Groups also submitted a third declaration by Mr. Bensman, explaining how he has been harmed by the challenged rules. Plaintiffs/Appellees/Cross-Appellants' Supplemental Excerpts of Record at 70-71. The Forest Service itself admitted below that it was applying the challenged regulations to "thousands of agency projects" nationwide. District Court Docket # 79 at 6.

- In the district court's post-judgment order clarifying that its injunction applied nationwide (*see* Pet. 6), it also clarified that it would not make the order

retroactive. Pet. App. 33a-36a. The district court made clear that it was exercising its discretion in setting the scope of its injunction in both regards. *Id.* at 30a-36a. Despite the court of appeals' prefatory statement that the district court's refusal to limit the reach of its order to the Eastern District of California was "compelled by the text" of the APA, the court's actual decision was that "[t]he district court did not abuse its discretion in issuing a nationwide injunction," Pet. 22a, implicitly recognizing that the district court retained discretion to constrain its injunction if the Forest Service had made a compelling argument on the facts that such limitation was warranted.

REASONS FOR DENYING THE PETITION

I. Final Rules Are "Final Agency Action" Challengeable Under the Circumstances Presented Here

The Forest Service, while framing the first Question Presented generally as one of ripeness, actually makes two distinct arguments: that the promulgation of a regulation does not constitute "final agency action" for purposes of APA review, and that absent a special judicial review statute, a facial challenge to a regulation not tied to a particular application of the regulation never presents a ripe issue for review. The Forest Service's arguments, if accepted, would drastically change the face of administrative law by precluding plaintiffs of all sorts—not only public interest organizations such as the Conservation Groups here, but also regulated industries—from bringing challenges to agency rules that adversely affect them. Both arguments are wholly at odds with decades of precedents of this Court and the lower federal courts,

and neither presents a question meriting the exercise of this Court's certiorari jurisdiction.

A. Issuance of a Final Regulation Is "Final Agency Action" under the APA

The crux of the Forest Service's petition is plainly stated in its introduction, where it argues that "[c]ontrary to the Ninth Circuit's understanding, the only reviewable 'final agency action' in this APA suit was the Burnt Ridge Project, not the Forest Service regulations … themselves." Pet. 9 (citations omitted). However, the government not only can point to no conflict among the circuits on this point, it can cite no case law at *any* level for its novel theory that promulgation of a rule is not a final agency action. In fact, this theory is flatly contradicted by decades of precedents of this Court and of the circuits, as well as by the government's own position in other cases and even its explicit position below.

The seminal case of *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), directly rejects the Forest Service's argument:

> [T]he regulations in issue we find to be "final agency action" within the meaning of § 10 of the Administrative Procedure Act, 5 U.S.C. § 704, as construed in judicial decisions.
>
> * * *
>
> The regulation challenged here, promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties is quite clearly definitive. There is no hint that this regulation is informal … or only the ruling of a subordinate official … or tentative.

Id. at 149, 151 (footnote and citations omitted); *see also Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967) ("[T]here can be no question that this regulation—promulgated in a formal manner after notice and evaluation of submitted comments—is a 'final agency action' under § 10 of the Administrative Procedure Act, 5 U.S.C. § 704."). The regulations at issue here were likewise published in the Code of Federal Regulations after notice and comment rulemaking in the Federal Register. A facial rule challenge can be *unripe* under the Constitution or due to prudential concerns if the rule might never be applied or if some other factor is present warranting deferred consideration, but an order promulgating a legislative rule is *final agency action* under the APA.

The lower courts are also in agreement that an agency's promulgation of a rule through notice and comment rulemaking proceedings is "final agency action" under the APA. *See*, *e.g.*, *Shays v. Federal Election Comm.*, 414 F.3d 76, 96 (D.C. Cir. 2005) ("[T]he regulations reflect final agency action under the APA."); *Preminger v. Secretary of Veterans Affairs*, 498 F.3d 1265, 1271-72 (Fed. Cir. 2007) (challenged regulation was "final agency action" when promulgated, citing, *inter alia*, *Abbott Labs.*); *Satellite Broad. & Commun. Ass'n v. FCC*, 275 F.3d 337, 369 (4th Cir. 2001) ("the [facially challenged] rule is a final agency action"), *cert. denied*, 536 U.S. 922 (2002); *Food Town Stores*, *Inc. v. EEOC*, 708 F.2d 920, 922 (4th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) ("The promulgation of 29 C.F.R. § 1601.16(a) is a final action because that regulation is 'definitive,' not 'informal ... or only the ruling of a subordinate official ... or tentative;' the 'process of rule making was complete' and Food Town 'claimed to be "aggrieved."'")

(quoting *Abbott Labs.*); *Texas v. United States*, 497 F.3d 491, 499 (5th Cir. 2007) ("The challenged Secretarial Procedures are a 'final agency action,' as they are final rules that were promulgated through a formal, notice-and-comment rulemaking process after announcement in the Federal Register.") (citing *Abbott Labs.*); *Franklin Fed. Sav. Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332, 1336-37 (6th Cir.) (agency legal bulletin sufficiently like the final regulations in *Abbott Labs.* to be considered "final agency action"), *cert. denied*, 502 U.S. 937 (1991); *Federal Lands Legal Found. v. U.S. Forest Service*, 13 F.3d 405, 1993 WL 503166 at *1 (10th Cir. 1993) ("[f]inal agency action includes promulgation of regulations") (citing *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 741 n.8 (10th Cir. 1982) ("Under the Administrative Procedures Act, reviewable 'final agency action' includes a 'rule.'") (citations omitted)).

Indeed, in some of these cases it was the *federal government* that argued that the promulgation of regulations is "final agency action," in order to trigger the running of statutes of limitations at the time of promulgation. *Preminger*, 498 F.3d at 1271-72; *Federal Lands Legal Found.*, 1993 WL 503166 at *1. Similarly, the government *agreed below* that promulgation of the regulations at issue here was "final agency action." Answering and Reply Brief of Federal Appellants-Cross-Appellees at 5 ("[T]he 2003 Rule is final agency action.") (citing *Toilet Goods Ass'n v. Gardner*, *supra*). The Forest Service's recognition below that the promulgation of the challenged regulations was final agency action precludes it from advancing the contrary position now.

In short, the lower courts' review of the challenged regulations as "final agency action" creates no split in

the circuits or discord with this Court's jurisprudence. The government's extraordinary and unsupported claim to the contrary, advanced for the first time in this Court, provides no basis for review.

B. Final Rules Can Present a Ripe Challenge, and the Challenged Rules Here Are Ripe

The Forest Service takes an equally extraordinary position on ripeness, arguing that a facial challenge to a regulation never presents a ripe question under the APA, and that a regulation may only be challenged "as applied" to some specific set of facts. However, like the government's "final agency action" argument, this argument is contrary to this Court's precedents and those of the lower federal courts, and the Forest Service presents no relevant conflict among the lower courts on the issue.

The Forest Service invokes two inapposite lines of cases to create the illusion that the decision below conflicts with precedents of this Court and other circuits. The first is *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) *("NWF")*, and its progeny, which foreclose review of broad agency programs untethered to specific reviewable actions. Here, by contrast, the Conservation Groups did not attempt a nebulous challenge to a broad agency "program," but sought review of a specifically identified agency action: the issuance of final agency regulations published in the Code of Federal Regulations. Such *bona fide* rule challenges are not foreclosed by *NWF*, but are governed by *Abbott Labs.* and its progeny, which hold that when plaintiffs have shown that a challenged regulation has actually been or is likely to be applied to them, a facial rule challenge is acceptable if it presents purely legal issues or otherwise does not

require additional "concreteness" to be capable of judicial resolution.

The second line of cases invoked by the Forest Service involves the exception to reviewability carved out in *Abbott Labs.* for cases where it appears that a challenged regulation may never be applied. However, because it is undisputed that the regulations challenged here had been applied countless times by the Forest Service causing harm to the Conservation Groups, including in the Burnt Ridge timber sale, this line of cases does not apply here either, and there is no conflict between the opinions below and the precedent of this Court or the circuits.

1. The *NWF* Line of Cases Does Not Apply to Published Rule Challenges, Which Are Governed by *Abbott Labs.* and Its Progeny

While this Court and the circuits have held that plaintiff-defined collections of agency operations, agency planning documents, and similar agency programs do not constitute challengeable, ripe final agency action, these opinions do not apply to final published regulations, and no court, to our knowledge, has ever accepted the argument proffered by the Forest Service that a facial challenge to regulations can never be ripe under the APA. Quite to the contrary, this Court and the circuits have been clear that facial challenges to published regulations are usually ripe under the APA, unless it can be shown that some special factor is present, such as that other than legal issues are presented, requiring further factual development, or that the regulation may never be applied.

In *NWF*,

> [Plaintiffs] challenge[d] the entirety of petitioners' so-called "land withdrawal review program." That is not an "agency action" within the meaning of § 702, much less a "final agency action" within the meaning of § 704. *The term "land withdrawal review program"* (which as far as we know is not derived from any authoritative text) *does not refer to a single BLM order or regulation*, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans …. It is no more an identifiable "agency action"—much less a "final agency action"—than a "weapons procurement program" of the Department of Defense or a "drug interdiction program" of the Drug Enforcement Administration. As the District Court explained, the "land withdrawal review program" extends to, currently at least, "1250 or so individual classification terminations and withdrawal revocations."

497 U.S. at 890 (emphases added). *See also Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) (cited at Pet. 11) (challenge to Forest Service management plan not ripe). The Ninth Circuit fully follows these holdings. *See, e.g., Ecology Ctr. v. U.S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir. 1999) (challenge to a general "monitoring [program, which is not] an action that marks the culmination of a decision making process" not ripe for review); *see also, e.g., Center for Biological Diversity v. Veneman*, 394 F.3d

1108 (9th Cir. 2005); *ONRC Action v. BLM*, 150 F.3d 1132 (9th Cir. 1998); *Northcoast Environmental Center v. Glickman*, 136 F.3d 660 (9th Cir. 1998).

In contrast, the jurisprudence governing challenges to *bona fide* regulations shows that facial challenges are normally permissible under the APA, as long as plaintiffs present purely legal issues and have shown that the regulations either have been applied or are likely to be applied to them. *See Abbott Labs.*, 387 U.S. at 139-151 (establishing general rule that final agency regulations are ripe for judicial review when issued, even in the pre-enforcement context; this is particularly true where resolution of the regulations' validity relies on purely legal issues). *See also Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967) (companion case finding regulation ripe for review); *compare Toilet Goods Ass'n v. Gardner*, 387 U.S. at 160-64 (ripeness not found for "this particular regulation in this particular context" because the regulation there only "*may* under certain circumstances" have been enforced, requiring some showing in future litigation that it had actually been applied) (emphasis in original); *see, e.g., Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 458 (2001) (where, as here, a party challenges a regulation's facial conformity with its authorizing statute, "[t]he question before [the Court] is purely one of statutory interpretation that would not benefit from further factual development of the issues presented."); *Sullivan v. Zelby*, 493 U.S. 521, 536-37 n.18 (1990) ("We fail to see why each [plaintiff] should be compelled to raise a separate, as-applied challenge to the regulations, or why a facial challenge is not a

proper response to the systemic [enforcement of the challenged regulations].").[1]

The Forest Service points to no conflict among the circuits over application of these principles. Indeed, the courts of appeals agree that a facial rule challenge may be brought, particularly where, as here, a rule has already been applied to plaintiffs. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 440 F.3d 459, 464-65 (D.C. Cir. 2006) (regulatory challenge ripe where the issue was the "'*faithful* application' of the regulation [which plaintiff] claims facially exceeds the agencies' statutory authority, and is not 'intertwined with how the Commission might exercise its discretion in the future.'" (citations omitted; emphasis in original citation)[2]; *Nat'l Mining Ass'n v. Fowler*,

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[1] The proposition that facial challenges to published regulations may be ripe has become so well-settled that often that issue does not even arise. *See*, *e.g.*, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (examining merits of facial challenge to regulation without raising ripeness); *Reno v. Flores*, 507 U.S. 292 (1993) (same).

[2] There is no argument by the Forest Service that the Conservation Groups' claim is anything other than "purely legal" involving the consistency of a "faithful application" of the regulations with the underlying statute. *See* Pet. 26-27 n.8 (discussing merits). The Conservation Groups' argument was that the language of the ARA, which states that the Forest Service is required to provide a "notice and comment [and appeal] process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans," did not permit the exemption for agency decisions that implemented such plans simply because the agency deemed them to be minor. *See* ARA §§ 322(a), (c). Contrary to the Forest Service's desultory argument on the merits, "'maintaining Forest Service buildings or mowing ranger station lawns'" are not activities "'implementing land and resource management plans,'" which explains why these activities may be exempted from pub-

(*Footnote continued*)

324 F.3d 752, 756-57 (D.C. Cir. 2003) (facial challenge to regulations ripe for review: "[W]e ask first whether the issue raised in the petition for review presents a purely legal question, in which case it is presumptively reviewable."); *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 854-55 (D.C. Cir. 2006) (facial challenge to majority of challenged agency appeal rules was ripe; only exception was "penalty mitigation" rule which could benefit from factual application); *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 92-96 (D.C. Cir. 1986) (facial rule challenges were ripe and would not benefit from deferring issues for further factual development); *Shays v. Federal Election Comm.*, 414 F.3d at 82 (D.C. Cir. 2005) ("[D]espite the pre-enforcement timing of Shays's and Meehan's suit, the purely legal nature of the issues removed any constitutional or prudential impediment to immediate consideration of their claims."); *Satellite Broad. & Commun. Ass'n*, 275 F.3d at 369 (facial rule challenge ripe as "the rule is a final agency action" presenting "purely legal questions"); *Ecee, Inc. v. FERC*, 611 F.2d 554, 556-57 (5th Cir. 1980) (regulation is "final agency action" and facial challenge to it is ripe); *Texas v. United States*, 497 F.3d at 499 (facial challenge to gaming regulations ripe for review); *Franklin Fed. Sav.*, 927 F.2d at 1336-37 (facial challenge to legal bulletin ripe because "the issues are, for the most part, purely legal."); *Triple G Landfills Inc. v. Board of Comm'rs of Fountain County, Indiana*, 977 F.2d 287,

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lic notice, comment and appeal under the language of the ARA while timber sales, oil and gas exploration and similar actions covered by the challenged rules may not. *See* Pet. 26-27 n.8 (comparing Pet. App. 51a-52a *with* ARA § 322(a)).

288-91 (7th Cir. 1992) (holding facial challenge ripe, finding: "The issues posed are purely legal …..").

If anything, as one district court recently noted, the decision below took a slightly more pro-government approach than other decisions have taken, in dismissing most of the Conservation Groups' claims on ripeness grounds even though they, too, presented purely legal issues. *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 39 (D.D.C. 2007) ("Defendants point to a recent decision from the Ninth Circuit, *Earth Island Institute v. Ruthenbeck*, [which] held that because only one of the regulations had actually been applied to a proposed project, only that regulation was ripe for review. . . . While this principle would bar plaintiffs' claims in this case, it is not law of this circuit.").

The widespread and longstanding acceptance of facial challenges to agency regulations was recognized and endorsed by the Administrative Conference of the United States in 1982:

> Under *Abbott Laboratories* and subsequent decisions, direct review of agency rules has become increasingly available. Congress in much recent regulatory legislation has specifically provided for immediate resort to judicial review at the conclusion of the rulemaking proceeding.[3] As a

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[3] Contrary to the Forest Service's assertion, the existence of such direct review statutes does not make facial review under the APA, as in *Abbott Labs.* and here, any less proper. *See* 387 U.S. at 140 n.2 ("'To preclude judicial review under this bill [the APA,] a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for

(*Footnote continued*)

> result, direct judicial review of rules has come to be regarded as the norm and review in an enforcement proceeding as something of an exception.[4]
>
> * * *
>
> Sound principles of administrative law favor prompt and dispositive resolution of issues arising from an administrative proceeding, whether that proceeding is rulemaking or adjudication.

47 Fed. Reg. 46,512, 46,512-513 (Oct. 19, 1982) (footnotes added). As the many appellate decisions cited above make clear, the Administrative Conference's statements remain valid today, and nothing in the *NWF* line of cases' rejection of programmatic challenges calls into doubt the consistent precedents of this Court and the courts of appeals accepting that facial challenges to agency regulations under the APA present ripe controversies absent some factor warranting delayed review.

2. Cases Where the Challenged Rule May Never Be Applied Are Inapposite

Beyond *NWF*, the Forest Service purports to find support for its ripeness argument in *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993), and *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803 (2003). *See* Pet. 10-11. Although those two

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judicial review is certainly no evidence of intent to withhold review.'") (quoting H.R. Rep. No. 79-1980, at 41 (1946)).

[4] Accordingly, while "[a]s applied challenges are the basic building blocks of *constitutional* adjudication," Pet. 29 n.9 (quoting *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007) (emphasis added)), facial *statutory* challenges to published regulations are quite normal and acceptable.

cases, unlike *NWF*, did at least involve challenges to published regulations, they have little bearing on this case because they involved circumstances where the challenged regulations might never be applied. In this case, by contrast, there is no dispute that the challenged regulations have been applied to the Conservation Groups countless times, including in the Burnt Ridge project.

In *Reno*, for example, not only had the challenged regulation *not* been applied, but the Court could not even make a "firm prediction" that it would *ever* be applied. 509 U.S. at 58 n.19.[5] Similarly, in *Hospitality Ass'n*, the Court observed that "[a]ll the regulation does is announce the position NPS *will* take with respect to disputes arising out of concession contracts." 538 U.S. at 810 (emphasis added). There was no evidence that the regulation had ever been enforced, or that it necessarily would ever be enforced. *Id.* at 810-11. *Reno* and *Hospitality Ass'n* thus involved nothing more than application of the holding of the *Toilet Goods v. Gardner* case from the *Abbott Labs.* trilogy, which similarly found a dispute unripe where the application of a regulation was uncertain. *See* 387 U.S. at 160-64. They are wholly distinguishable from cases like *Sullivan v. Zelby*, *supra*, and this one, where the

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[5] Further, in *Reno* the statute which the challenged regulations implemented provided the statutory means for an as-applied challenge, and "Congress may well have assumed that, in the ordinary case, the courts would not hear a challenge to regulations specifying limits to eligibility before those regulations were actually applied to an individual, whose challenge to the denial of an individual application would proceed within the Reform Act's limited scheme." *Id.* at 60. That is not the case here, where the APA provides the cause of action.

challenge is to a regulation that is regularly being applied on an ongoing basis.[6]

Hospitality Ass'n is also distinguishable because it involved a regulation that was "nothing more than a 'general statemen[t] of policy' designed to inform the public of [the agency's] views." 538 U.S. at 809. Here in contrast, the challenged regulations dictated which decisions of the Forest Service received public notice, comment and appeal opportunities. As such, the regulations had "strictly legal" effects, and imposed or withheld "legal rights and obligations," which were lacking in *Hospitality Ass'n. See Id.*

As one court distinguished *Hospitality Ass'n* in holding a facial challenge to a regulation ripe for review:

> [T]he Court's holding in that case turned on a determination that the National Park Service had no "delegated rulemaking authority" with respect to the Act it construed. As a result, its regulation was not "a legislative regulation with the force of law" and therefore did not create "adverse effects of a strictly legal kind" on concessionaires. *See* [538 U.S. at 808-09.] Accordingly, until the Act was further construed in a manner which actually bound third parties, the plaintiffs' challenge was not ripe for review.

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[6] In fact, this case is, if anything, even more ripe than *Abbott Labs.* and other "pre-enforcement" challenges that have been found ripe, as here we are in a post-enforcement posture because there is no dispute that the regulations have already been applied to the Burnt Ridge project as well as many other Forest Service actions.

> Conversely, it is undisputed in this case that the Services exercised statutorily delegated rulemaking authority when promulgating the challenged rules. It is also uncontested that both the [rules at issue] are currently binding on the Services themselves, and vest third parties with regulatory rights. Accordingly, this case is easily distinguished from that before the Court in *National Park Hospitality Ass'n v. Dept. of the Interior.*

Spirit of the Sage Council v. Norton, 294 F. Supp. 2d 67, 84-85 (D.D.C. 2003), *vacated as moot*, 411 F.3d 225 (D.C. Cir 2005). Here, the challenged rules likewise were promulgated pursuant to "delegated rulemaking authority" and had the "force of law." *See* ARA § 322(a).

3. The Plaintiffs Would Suffer Hardship If Review Were Withheld

Because the Forest Service's claim that there is a conflict over the legal principles that govern facial challenges to regulations is unfounded, its only remaining argument is that the facts in this case do not support a finding of ripeness because the Conservation Groups allegedly did not suffer sufficient hardship to justify facial review. See Pet. 11-12. Such a fact-specific argument would not warrant granting the petition even if it were correct, but the Forest Service's position is, in any event, unfounded: The "hardship" factor strongly supports the lower courts' conclusion that the Conservation Groups' challenge to the regulations was ripe for review.

"Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the

hardship to the parties of withholding court consideration." *Hospitality Ass'n*, 538 U.S. at 808. The Forest Service does not dispute that the rule challenge here presented a purely legal issue. Although a purely legal issue is presumptively fit for review, rendering consideration of hardship relatively insignificant, *see National Ass'n of Home Builders*, 440 F.3d at 464-65, in this case petitioners demonstrated that the hardship from deferring review would be substantial because, in many instances, the regulations' preclusion of public notice and opportunity for comment would prevent a plaintiff from even learning of a project until it had been completed and it was too late for an as-applied challenge.

For instance, declarant Jim Bensman discussed as examples "about 20 timber sales" on the Allegheny National Forest in Pennsylvania that he was not able to comment on or appeal, and explained that "[s]ince these regulations have been implemented there have been several projects I have not been able to appeal." Pet. App. 71a. The Conservation Groups submitted additional declarations explaining how, for example, "the El Dorado National Forest [in California] proposed to conduct most of its logging projects as categorically excluded projects exempt from NEPA and ARA procedures" and "[t]he rules have prevented me from commenting on the underlying documents for such decisions [and I have] been unable to appeal decisions which appear to rest on faulty science or which otherwise should be altered or reconsidered." Declaration of Craig Thomas, Plaintiffs/Appellees/Cross-Appellants' Supplemental Excerpts of Record at 67; *see also id* at 43-63 (additional declarations of plaintiffs). In many cases, the rules allowed a project to go forward without *any* notice to the public, which

would prevent even the possibility of trying to stop a project with a lawsuit. *Id.* at 70 (third declaration of Jim Bensman, explaining how "[o]n multiple occasions, the Forest Service has made the decision to conduct a [categorically excluded] project the day the project is implemented or we receive the decision in the mail after the project has been completed …. on the Daniel Boone, Monongahela, and Mark Twain National Forests [in Kentucky, West Virginia and Missouri] …..").

The Conservation Groups made a substantial showing of hardship that supported facial review of the challenged regulations because the rights afforded by the ARA will often be incapable of being meaningfully vindicated by an after-the-fact challenge to a specific action.[7] Ultimately, the Ninth Circuit took a

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[7] The Forest Service's claim that the challenged regulations do not affect the Conservation Groups' "primary conduct" is neither relevant nor accurate. *See* Pet. 11-12, 29 n.9. Although the hardship analysis can include that factor, it need not, as a plaintiff just needs to show hardship from withheld review. *See Texas v. United States*, 497 F.3d at 498 (collecting cases on ripeness standard with no mention of "primary conduct"; challenged rule directly affected Indian gaming, not the State of Texas). In any event, the challenged rules do affect the Conservation Groups' primary conduct, which includes influencing Forest Service decisions in order to protect the forests for their members. *See, e.g.*, Pet. App. 68a (declaration of Jim Bensman); Plaintiffs/Appellees/Cross-Appellants' Supplemental Excerpts of Record at 64-65 (declaration of Craig Thomas). Likewise, the Forest Service's substantive/procedural distinction (Pet. 12) is without merit, as "[t]here is no language in [*Abbott Labs.*] that supports the proposition that finality can turn on a substantive-procedural distinction." *Food Town Stores, Inc. v. EEOC*, 708 F.2d at 922 n.1. While *NWF* made a "drive by" statement invoking the distinction and citing *Abbott Labs.*, it was neither at issue in *NWF* nor mentioned in *Abbot Labs.* In any event, the chal-

(*Footnote continued*)

conservative view by dismissing most of the Conservation Groups' claims as unripe, while finding that the evidence showed that the one regulatory provision the court allowed to be challenged has been implemented by the Forest Service in a manner that harmed the plaintiffs. That conclusion, combined with the fact that the challenge presented purely legal issues, made the claim ripe under the precedent of this Court and all the circuits.

II. Standing and Mootness Issues Surrounding the Burnt Ridge Project Do Not Affect the Facial Challenge, and Do Not Otherwise Raise Substantial Issues

The Forest Service's second and third Questions Presented raise issues of standing and mootness focused on the Burnt Ridge timber sale project, and need not detain the Court long. They are principally relevant only if the Court accepts the agency's ripeness and "final agency action" arguments, and would only be applicable to an as-applied challenge to the Burnt Ridge project. If the regulations can be challenged on their face rather than simply as applied to a specific project, standing and mootness do not depend on the status of any one project, including the

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lenged regulations are substantive, in that they determine which Forest Service actions are subject to notice, comment and appeal, not the manner in which comments and appeals may be presented. "A useful articulation [regarding the procedural rule doctrine] is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980).

Burnt Ridge project.[8] However, even if the focus is limited to the Burnt Ridge project, the standing and mootness issues are fact-specific and not worthy of this Court's review. Indeed, the Forest Service does not even allege that the decision below exemplifies any relevant disagreement among the lower courts over the legal principles established in this Court's standing and mootness decisions. And in any event, the Forest Service's standing and mootness arguments are meritless.

The Forest Service is correct that the first standing declaration of Jim Bensman presented by the Conservation Groups only related to harm from the challenged regulations in other locales and not from the Burnt Ridge project, because by the time standing was raised by the Forest Service the issues specific to the Burnt Ridge project had been settled following the preliminary injunction, and briefing was only proceeding on the facial challenge to the regulations now at issue. However, the Conservation Groups had submitted two declarations showing standing and irreparable harm regarding the Burnt Ridge project when it was at issue in the preliminary injunction briefing preceding the settlement agreement on the project, and the Forest Service has never contested the adequacy of these declarations or the Conservation Groups' initial standing to challenge that project. *See* District Court Docket ## 12, 38 (Declarations of Ara Marderosian, member of respondents Sequoia ForestKeeper and Sierra Club). Thus, even if standing were dependent on injury from the Burnt Ridge sale,

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[8] The Burnt Ridge project remains relevant to the prudential ripeness inquiry in that it shows that the meaning of the regulations had been fleshed out in a concrete setting.

the Conservation Groups have shown unchallenged standing regarding that timber sale.

More importantly, there can be no serious dispute that the Conservation Groups showed injury in fact as a result of the application of the challenged regulations sufficiently to support standing for their facial challenge. The first declaration of Jim Bensman, as well as the other declarations in the record from the other Conservation Groups, which the Forest Service fails even to mention, clearly demonstrate injury. Mr. Bensman's first declaration describes his regular use of National Forests near his home and his advocacy efforts as a member of Heartwood to protect these National Forests from environmental degradation resulting from certain Forest Service projects, and it explains how the challenged regulations denied him notice, comment and appeal rights on these projects and how his use and enjoyment of the National Forests were harmed as a result. Pet. App. 68a-77a ¶¶ 4, 13-14, 10, 11, 32. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183-84 (2000) ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity"; actual harm from complained-of activity need not be shown, and "reasonable concerns" that harm is occurring is enough).

In response to the Forest Service's post-judgment filing reiterating its standing arguments, the Conservation Groups submitted additional declarations from Mr. Bensman and the other plaintiff groups showing how they were harmed by the challenged rules. Plaintiffs/Appellees/Cross-Appellants' Supplemental Ex-

cerpts of Record at 43-68. Erik Ryberg of plaintiff Center for Biological Diversity discusses the impact of the regulations on him and his organization and provides a specific example of a timber project in the Payette National Forest in Idaho that had been exempted from public comment, notice and appeal under the challenged regulations. Only through "happen[ing] to be personally familiar with the area" was he able to inform the Forest Service that the project should not have been approved because of inappropriate road building in the project. *Id.* at 58-60. Rene Voss of plaintiff Sierra Club discusses the impact of the regulations on him and his organization, and provides a specific example, the "Taylor Fork" logging project, in the Gallatin National Forest in Montana, where the challenged regulations were applied in order to exempt the project from public notice, comment and appeal. *Id.* at 62-63. Craig Thomas of the Sierra Club discusses the rules' effect on him and his organization with respect to numerous projects in California. *Id.* at 64-68. Mr. Bensman's second declaration discusses the effect of the regulations upon him as they were applied to several specific projects in the Midwest. *Id.* at 44-46. Finally, Mr. Bensman's third declaration, filed in the district court in response to the Forest Service's motion for stay pending appeal, discusses, with examples, how the challenged regulations' exemption of projects sometimes allowed such projects to be implemented without the public's prior knowledge, making even a court action impossible. *Id.* at 70.

This latter problem highlights that the plaintiffs also suffered "informational" injury as a result of the Forest Service's refusal to provide official notice of proposed projects under the challenged regulations.

Pet. App. 70a-71a; *see Federal Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998); *Heartwood v. U.S. Forest Service*, 230 F.3d 947, 952 n.5 (7th Cir. 2000) (such informational injury constitutes "injury in fact."). These injuries are within the "zone of interests" to be protected by ARA, the purpose of which is to provide for public information and participation in forest management decisions. Informational injury alone is sufficient to support the Conservation Groups' standing to assert their facial challenge.[9]

Just as the Conservation Groups' standing to bring the facial challenge to the rules does not depend on the Burnt Ridge project, neither does the settlement of their challenges to that project render the facial challenge moot. The Forest Service admits that its mootness argument depends upon its prevailing on its ripeness and final agency action argument when it concedes that "[i]f respondents had invoked a statutory provision authorizing a direct challenge to the regulations within a specified period, the fact that *one* application of the rules had run its course would not be a barrier to the court's resolution of the suit . . .." Pet. 23 (emphasis in original). But as explained above, *Abbot Labs.* and its progeny clearly state that the APA

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[9] Although the Forest Service does not appear to challenge causation and redressability here, and notes that their requirements are relaxed in cases like this (Pet. 18), the regulations at issue here obviously cause not only the Conservation Groups' informational injuries but also their "on the ground" harms by making it more difficult for plaintiffs to influence or challenge timber sales and other Forest Service proposals that cause them harm, leading to the "creation of an impediment to a reduction in that activity," to the detriment of plaintiffs. *See Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 264 (1991).

does authorize a facial challenge. Because the Forest Service not only does not argue that a facial challenge is moot but affirmatively acknowledges that if a facial challenge is appropriate this case is *not* moot, the Forest Service's third Question Presented adds nothing to its petition.

III. The Courts Below Did Exercise Their Discretion in Granting Nationwide Relief, Consistent with Precedent from All Circuits

As with its arguments that promulgation of a regulation is not final agency action and that a facial rule challenge under the APA is never ripe, the Forest Service provides *no* case law or other support for the proposition that the APA does not authorize a district court to vacate regulations that are contrary to law. *See* Pet. 24. Rather, it has always been the law throughout the circuits that the plain language of the APA provides that rules found to violate their implementing statutes should be "set aside" if necessary to afford the parties complete relief, unless equity demands a different outcome. That was the approach utilized below.

The Forest Service does not cite any statutory or judicial authority of any kind, at any level, for its utterly implausible reading of the term "set aside," and only cites a non-legal dictionary definition. Pet. 28 (citing Webster's Third New International Dictionary of the English Language 2077 (1993)).[10] The reason

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[10] Even if Webster's definition were to be considered, it includes "DISCARD" in its first definition, which contradicts the Forest Service's argument. The Forest Service also omits Webster's fourth definition—the one most clearly applicable in a legal setting—which is "ANNUL, OVERRULE." Webster's Third New International Dictionary 2077.

the agency cannot cite any case authority is that all the cases agree that the phrase "set aside" authorizes the vacatur of agency action, including rules. *See e.g. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("We have made clear that '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'") (citations omitted). As the D.C. Circuit recently put it:

> "Set aside" usually means "vacate." *See* BLACK'S LAW DICTIONARY 1404 (8th ed. 2004) (defining "set aside" as "to annul or vacate"); *cf. Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (op. of Randolph, J.) ("Setting aside means vacating; no other meaning is apparent."); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("To vacate ... means to ... set aside.") (internal quotation marks and citation omitted).

Virgin Islands Communications Corp. v. FCC, 444 F.3d 666, 671 (D.C. Cir. 2006).

The Forest Service argues that the APA does not strip the courts of their equitable power to fashion injunctive relief as necessary to the circumstances of the case, as if that were in dispute here. Pet. 28-29. But the agency is attacking a straw man, as the courts below *did* exercise their equitable powers in setting aside the regulations. The district court found: "The Court is sensitive to the Forest Service's interest[s] ….. However, in order to adequately redress the harm suffered by Plaintiffs, the invalidation of the Forest Service regulations as outlined in the July Order must

reach beyond the borders of the Eastern District of California." Pet. App. 32a.[11] As the court of appeals found, "[t]he district court did not abuse its discretion in issuing a nationwide injunction." Pet. App. 22a. The Forest Service might disagree with that exercise of discretion, but such a dispute hardly merits review by this Court.

The Forest Service cites cases involving non-APA claims to argue that the APA does not permit a court to set aside a rule. Pet. 29 (citing, *inter alia*, *Califano v. Yamasaki*, 442 U.S. 682 (1979)). However, *Califano* involved a class action in which relief was required to be tailored to that class, not a challenge to a regulation under the APA, and in any event the Court in *Califano* explicitly recognized the potential appropriateness of nationwide relief. 442 U.S. at 702. The Forest Service likewise cites several other cases with no relevance here. *See* Pet. 29-30 (citing *United States Dep't of Defense v. Meinhold*, 510 U.S. 939 (1993) (one-paragraph order of a single Justice granting a stay, which does not assert or establish any broad principle of law); *Everhart v. Bowen*, 853 F.2d 1532 (10th Cir. 1988) (not an APA action, but an action under the Social Security Act to review individual bene-

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[11] Similarly in its order denying a stay pending appeal (Pet. App. 25a-28a), the district court found that the Forest Service would suffer no harm from having to comply with the ARA's requirements, whereas "[p]laintiffs' concerns regarding ability to participate in the notice, comment and appeal procedures are significant. While in some instances these concerns could be abated by the ability to sue the Forest Service over specific projects, this is small comfort given the deferential standards courts often employ when evaluating agency decisions, and the potential for irreparable harm to the environment before and during suit." Pet. App. 27a.

fit determinations; relief had been granted as if a class had been certified when it had not), *rev'd on other grounds sub nom. Sullivan v. Everhart*, 494 U.S. 83 (1990); *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) (classwide relief inappropriate absent a certified class; no rule challenge presented), *cert. denied*, 496 U.S. 937 (1990)).

The only decision cited by the Forest Service involving an APA challenge to a regulation is *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001). However, the Fourth Circuit limited the injunction there only because "VSHL is the only plaintiff." *Id.* at 393. The Court specifically distinguished a rule challenge where, as here, plaintiffs include those affected throughout the country:

> Nationwide injunctions are appropriate if necessary to afford relief to the prevailing party. *See Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1988). For instance, in *Richmond Tenants Org. v. Kemp*, 956 F.2d 1300 (4th Cir. 1992), a nationwide injunction prohibiting the eviction of public housing tenants without notice and a hearing was appropriate because the plaintiffs were tenants from across the country. *See id.* at 1302, 1309.

263 F.3d at 393. Thus, even the Forest Service's principal authority acknowledges that in a case like this, presenting a challenge to a rule by groups affected by it around the country, vacating the rule nationwide can be appropriate to afford the plaintiffs full relief.

Indeed, any claim that there is a conflict on this point between the Fourth and Ninth Circuits is untenable in light of the Fourth Circuit's explicit reliance on the Ninth Circuit's *Bresgal* decision, which holds that

nationwide relief may be appropriate if the equities support it. 843 F.2d at 1169-71. *Bresgal* was cited by the district court below, and it continues to be recognized as controlling law in the Ninth Circuit. *See* Pet. App. 32a (district court decision); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996); *Image Technical Serv. Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1226 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). Other circuits in addition to the Fourth Circuit have cited *Bresgal*'s holding with approval as well. *Hernandez v. Reno*, 91 F.3d 776, 781 n.16 (5th Cir. 1996); *Ayuda Inc. v. Thornburgh*, 880 F.2d 1325, 1330 (D.C. Cir. 1989), *vacated on other grounds*, 498 U.S. 1117 (1991). There is no circuit split here.

Thus, the Forest Service points to no genuine disagreement over whether courts have authority under the APA, in appropriate cases, to fully set aside unlawful regulations; rather, there is wide agreement that courts have such authority. *See*, *e.g.*, *Nat'l Mining Ass'n*, 145 F.3d at 1409 (setting aside Clean Water Act rule nationwide); *Heartwood, Inc. v. U.S. Forest Service*, 73 F. Supp.2d 962, 977-80 (S.D. Ill. 1999), *aff'd*, 230 F.3d 947 (7th Cir. 2001) (setting aside nationally-applicable timber sale rule); *cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (rules found invalid under "the APA cannot be afforded the 'force and effect of law.'") (citations omitted).

Nonetheless, the Forest Service argues that a nationwide injunction must be prohibited because it would undermine limits on the precedential effects of decisions of the regional courts of appeals and the prohibition against invocation of "nonmutual collateral estoppel" against the government, effectively preventing the government from pressing arguments

in other courts that it lost in this case. *See* Pet. 25-26, *citing United States v. Mendoza*, 464 U.S. 154 (1984). However, neither *Mendoza* nor any other authority states that a district court's equitable power to issue nationwide relief is subject to the limits on stare decisis, collateral estoppel, or res judicata. Rather, the case law establishes that courts have authority to provide an effective remedy even if the benefits will be shared by people who could not, as a matter of preclusion law or stare decisis, invoke the judgment as binding in their own litigation against the government.[12] Even *Virginia Soc'y for Human Life* acknowledges that the scope of an injunction is not always limited to the territory of the court and the individuals before it, and the government cites no cases that say a court's equitable powers are limited by the preclusion-law concept of mutuality.[13]

Finally, the underlying merits in this matter highlight that this is not a case that deserves review by this Court. The rulings below merely restored the

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[12] Indeed, the Forest Service itself has recognized in other litigation—in which it *defended* a district court's authority to issue a nationwide injunction—that the argument it now advances "confuse[s] the distinction between: (1) legal precedent, which does not have binding authority outside a given jurisdiction; and (2) an injunction, which the Ninth Circuit has recognized can be crafted to reach conduct outside a specific jurisdiction." Federal Defendants' Reply in Support of Supplemental Brief Related to Inventoried Roadless Area Record of Decision, at 2-3, *Siskyou Regional Educ. Proj. v. Goodman*, Civ. No. 04-3058 (D. Or. filed July 11, 2005).

[13] Notably, even after the judgment in this case, the Forest Service remained free to, and did, argue the legality of the challenged rules in another court, making exactly the same arguments it lost below. *See Wilderness Soc'y v. Rey*, No. CV 03-119-M-DWM, Order at 25-29 (D. Mont. April 3, 2006).

regulatory status quo that was in place before the challenged rules were promulgated in 2003, which only requires the Forest Service to subject its substantive land use decisions to public notice, comment, and administrative appeal, with the prior rules' emergency exemptions from these requirements intact. No timber sales or other Forest Service projects have been enjoined. The lack of conviction of the government's token footnote on the underlying merits (Pet. 26-27 n.8) and the government's concession that the merits do not themselves warrant plenary review[14] further emphasize that this case was correctly decided below, and that a matter of public importance demanding review by this Court is not presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[14] The government's failure to argue the merits may also be motivated in part by the tactical consideration that a decision affirming the Ninth Circuit on the merits would render the nationwide injunction issue academic because it would necessarily be binding nationwide.

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