No. 07-463

In the
Supreme Court of the United States

PRISCILLA SUMMERS, et al.,

Petitioners,

v.

EARTH ISLAND INSTITUTE, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

DAMIEN M. SCHIFF
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTIONS PRESENTED

1. Whether the Forest Service's promulgation of 36 C.F.R. §§ 215.4(a) and 215.12(f), as distinct from the particular site-specific project to which those regulations were applied in this case, was a proper subject of judicial review.

2. Whether respondents established standing to bring this suit.

3. Whether respondents' challenge to 36 C.F.R. §§ 215.4(a) and 215.12(f) remained ripe and was otherwise judicially cognizable after the timber sale to which the regulations had been applied was withdrawn, and respondents' challenges to that sale had been voluntarily dismissed with prejudice, pursuant to a settlement between the parties.

4. Whether the court of appeals erred in affirming the nationwide injunction issued by the district court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

Statutes

Rules

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Under Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of neither party. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

PLF was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates limited government, individual rights, and free enterprise. PLF has participated in a number of this Court's decisions presenting issues similar to those raised here. *E.g.*, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

PLF's analysis of the law of standing and ripeness, as here implicated, will provide a valuable and necessary viewpoint to assist the Court in resolving the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the constitutional and prudential boundaries of the power of judicial review

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

of courts constituted under Article III of the Constitution. With respect to the constitutional limitations imposed by Article III, Respondents' action raises the double question of (1) whether standing to challenge administrative regulations may be established without an allegation that the regulations as *actually* implemented will produce any injury to the parties challenging the regulations; and (2) whether procedural injury *per se* is sufficient to support a challenge to administrative regulations. With respect to the prudential limitations within Article III's shadows, Petitioners' basis for review implicate the extent to which prudential ripeness theory can be used to deny judicial review of administrative regulations.

Consistent with this Court's precedent, standing to sue may not be established by vague reference or by procedural injury alone. Rather, standing may be established only by specific allegation that a challenged action has or will cause discrete, particularized injury, that the Court, through favorable decision, can remedy. Moreover, a procedural injury can suffice to establish standing only where that injury arises from a process that may ultimately injure a substantive interest that the party has that may be negatively affected by the governmental action undergirding the procedural challenge.

Whereas this Court's standing jurisprudence can be demanding, its prudential ripeness doctrine, within the context of challenges to administrative regulations, is not nearly so. Under current ripeness law, this Court adjudges the ripeness of such a challenge according to whether the issues presented are fit for judicial review, and whether denial of review would

produce hardship for those parties seeking review. In contrast to the views of Petitioners, the Court's ripeness factors do not mandate a straitjacketed analysis: rather, they require a sliding scale analysis, such that where, for example, a challenge to an administrative regulation presents crystallized legal issues needing no factual development, parties seeking judicial review need not show significant hardship in the absence of judicial review. Were Petitioners' ripeness views to prevail, facial challenges to administrative regulations would be, for practical purposes, barred. To avoid that undesirable result, the Court should continue to adhere to its relaxed and nuanced approach to prudential ripeness, which is consistent with both the case law and the doctrine's equitable origins.

ARGUMENT

I

STANDING MAY NOT BE ESTABLISHED BY VAGUE REFERENCE OR BY UNSPECIFIED INTENTION

This Court has frequently noted that standing represents an essential element of the jurisdiction of courts constituted under Article III. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a plaintiff, whether individual or organizational, must articulate a concrete and particularized injury that is fairly traceable to the challenged action and that is likely to be redressible by a favorable decision of the court. *E.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). At the summary judgment stage, an organizational plaintiff must demonstrate by

"affidavits or other evidence showing . . . specific facts" that its cognizable interests are "in fact being threatened by [the challenged] activities," and that "one or more of . . . [its] members would thereby be 'directly' affected." *Defenders of Wildlife*, 504 U.S. at 563.

The Ninth Circuit in this case held that Respondents had established standing through the affidavit of Mr. Jim Bensman. *See Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 693 (9th Cir. 2007). According to the principles of standing enunciated above, the Bensman affidavit is a deficient basis to demonstrate Respondents' standing. Mr. Bensman states that he has visited about half of the National Forests, Bensman Aff. ¶ 4, that he plans to continue to use the National Forests for recreational and related purposes, *id.* ¶ 7, that certain activities allowed by Petitioners on the National Forests impair his enjoyment of them, *see id.* ¶¶ 10-11, and that he has a present intention to visit unspecified National Forests in Colorado, California, Oregon, and Indiana, *id.* ¶ 9. Mr. Bensman does not aver that he has visited Sequoia National Forest, where the challenged Burnt Ridge Project was to occur, *see id.* ¶ 5, nor does he state any intention to visit that National Forest specifically, *see id.* ¶ 9.

It is evident, therefore, that the Bensman affidavit cannot establish Respondents' standing to challenge governmental decisions concerning the Sequoia National Forest. In *Defenders of Wildlife*, this Court rejected affidavits of similar vagueness as a basis for establishing standing to challenge federal funding of overseas projects that might adversely affect species and habitat protected under the Endangered Species

Act. The Court there found to be insufficient affidavits that averred a present but unspecified intent to visit the particular areas where the protected species and habitat were located. *Defenders of Wildlife*, 504 U.S. at 564. Thus, if assertions of intent (regardless of specificity) to visit *particular areas* are inadequate to establish standing, *a fortiori* assertions of intent to visit *unspecified areas* also are inadequate. That is precisely what the Bensman affidavit amounts to: an expressed intent to visit National Forests, but no expressed intent to visit the National Forest wherein the challenged governmental action—the Burnt Ridge Project—was to occur. "Such . . . intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that [standing] require[s]." *Id.* Accordingly, this Court should reject the proposition accepted by the lower court that standing may be established on the basis of vague and unspecified intention.

II

STANDING MAY NOT BE ESTABLISHED BY PROCEDURAL INJURY ALONE

This Court has confirmed that the requisite injury for standing purposes may be established by a procedural wrong. *See Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007); *Defenders of Wildlife*, 504 U.S. at 572 n.7. But the Ninth Circuit below determined that a procedural injury, *standing alone*, entitles a litigant to seek redress in a court constituted under Article III. *See Earth Island Inst.*, 490 F.3d at 693-94. Such a proposition represents a significant departure from this Court's standing jurisprudence, and cannot be reconciled with this Court's decisional law.

As noted above, Article III requires plaintiffs to demonstrate that the challenged governmental action has caused them a distinct and particularized injury. *See Laidlaw*, 528 U.S. at 180-81. A plaintiff's interest in vindicating a procedural right granted by Congress or an administrative agency is therefore, jurisdictionally speaking, wholly a function of the plaintiff's principal and underlying *substantive* interest that is negatively affected by the governmental action in which the plaintiff also asserts a related procedural right. As this Court explained in *Defenders of Wildlife*, a plaintiff can enforce procedural rights "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Defenders of Wildlife*, 504 U.S. at 573 n.8. The Court elaborated that standing *cannot* be established by the assertion of "the Government's violation of a certain (undescribed) class of procedural duty . . . without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed)." *Id*. *See* Douglas Sinor, *Tenth Circuit Survey: Environmental Law*, 75 Den. U.L. Rev. 859, 879 (1998) ("If an environmentalist plaintiff were allowed to substitute a procedural injury for injury in fact, the standing barriers to challenging an agency's decision based on its failure to follow decision making procedures would largely disappear, because the injury and redressability requirements are more easily met when the injury is defined as procedural, rather than factual. Justice Scalia's majority opinion in *Lujan* made it clear that a plaintiff may not substitute procedural injury for injury in fact.") (footnote omitted).

To establish procedural standing consistent with *Defenders of Wildlife*, a plaintiff should demonstrate a "geographical nexus" between its physical location and the physical location of the area wherein the challenged governmental action occurs. *See* Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 Envtl. L. 1, 25 (2005). *Cf.* Randall S. Abate & Michael J. Myers, *Broadening the Scope of Environmental Standing: Procedural and Informational Injury-in-Fact After* Lujan v. Defenders of Wildlife, 12 UCLA J. Envtl. L. & Pol'y 345, 364 n.113 (1994) ("Although the Supreme Court [in *Defenders*] did not specifically address the geographic nexus requirement . . . Justice Scalia would appear to consider such a nexus to be a 'separate concrete interest.'"), *quoted in* Mank, *supra*, at 25 n.162.

Below, the Ninth Circuit made no effort to identify any such nexus. Rather, the appellate court labored under the misapprehension that procedural injury is sufficient by itself to meet Article III requirements. The court relied upon its own precedents *antedating* this Court's decision in *Defenders of Wildlife* to support its novel standing theory, *see Earth Island Inst.*, 490 F.3d at 693-94 (citing, *inter alia*, *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975), and *Friends of the Earth v. U.S. Navy*, 841 F.2d 927 (9th Cir. 1988)), as well as a general citation to *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), a precedent which, this Court frequently has intimated, represents the twilight of Article III standing. *See Whitemore v. Arkansas*, 495 U.S. 149, 158-59 (1990); *Lujan v. National Wildlife Federation (NWF)*, 497 U.S. 871, 889 (1990). *See also Massachusetts*, 127 S. Ct. at 1470-71 (Roberts, C.J.,

dissenting). It is not surprising, then, that the lower court's affirmance of Respondents' standing on procedural injury grounds finds no support in this Court's pertinent case law. The Ninth Circuit's upholding of Respondents' standing on the basis of free-form procedural injury exceeds the limits of Article III, and should be rejected by this Court.

III

PRUDENTIAL RIPENESS THEORY REQUIRES A SLIDING SCALE ANALYSIS BETWEEN THE FACTORS OF FITNESS FOR JUDICIAL REVIEW AND HARDSHIP IN THE ABSENCE OF JUDICIAL REVIEW

In *Abbott Laboratories v. Gardner (Abbott Labs)*, 387 U.S. 136 (1967), this Court established two general factors under which the ripeness of a facial challenge to an administrative regulation is analyzed: (1) the fitness for judicial review of the issues presented; and (2) the degree of hardship that will befall the parties seeking review if review is withheld. *Id.* at 149. Petitioners contend that a facial challenge to an administrative regulation can be ripe, under *Abbott Labs*, only if Congress has expressly authorized such review or if the challenged regulation has an immediate impact on the primary conduct of the parties seeking review. Petitioners' assertion is incorrect. Consistent with this Court's precedents, and the equitable origins of the prudential ripeness doctrine, such a challenge can be ripe even where it falls outside of Petitioners' highly formalized and manufactured categories.

Although the Court has set forth two broad factors to be taken into account when determining whether a given facial challenge to an administrative regulation is ripe, the Court has also specified the particular considerations, under those factors, that are to govern the ripeness inquiry.

Under the first *Abbott Labs* factor of "fitness," the Court has identified a number of observations that are probative of a case's ripeness. Perhaps most prominent among them is the degree to which the issues raised are legal or, instead, some mixture of law and fact. *See, e.g.*, *Abbott Labs*, 387 U.S. at 149; *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967); *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 812 (2003). In a related vein, the Court has considered to be of critical importance the degree to which the challenged regulation can be categorized as a "final agency action" within the meaning of the Administrative Procedure Act (APA), *see* 5 U.S.C. § 704.[2] *See, e.g.*, *Abbott Labs*, 387 U.S. at 149; *Toilet Goods Ass'n*, 387 U.S. at 162. Moreover, the extent to which an as-applied challenge would allow the Court to address the same legal issues in a pared-down and more manageable form, with those issues having been fleshed out by a history of regulation-to-fact

[2] The better view may be that an action's status as "final agency action" within the meaning of 5 U.S.C. § 704 is a necessary condition for judicial review that prescinds from any considerations of ripeness. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2530 (2007); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

application, also influences the "fitness" analysis. *See NWF*, 497 U.S. at 891. *See also Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 59 & n.19 (1993) (noting absence of "history of application behavior" as one reason why factual fleshing out is necessary to adjudicate claim); *Nat'l Park Hospitality Ass'n*, 538 U.S. at 812 (noting that "further factual development" would aid resolution of legal issues raised).

Under the second *Abbott Labs* factor of "hardship," the Court has looked to whether the challenged regulation affects the primary conduct of those parties seeking review, and the degree to which those parties would be negatively affected should the Court withhold review. The Court has held that a regulation requiring prescription drug manufacturers to print both the established and proprietary names of prescription drugs next to each other on prescription bottle labels creates the requisite impact on primary conduct. *See Abbotts Labs*, 387 U.S. at 152-53. The Court has reached the same conclusion with respect to Clean Water Act regulations governing effluent limitations for point sources. *See EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 72 n.12 (1980). Yet the Court has held to the contrary with respect to regulations requiring cosmetic manufacturers to make their facilities open to government inspectors on pain of removal of certification services, *Toilet Goods Ass'n*, 387 U.S. at 164-65, regulations narrowly interpreting amnesty provisions in immigration laws, *Reno*, 509 U.S. at 58-59, a Land Resource Management Plan governing timber harvesting on a National Forest, *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733-35 (1998), and a policy ostensibly placing concession contracts outside the scope of the Contract

Disputes Act (CDA), *Nat'l Park Hospitality Ass'n*, 538 U.S. at 810-11.

But importantly, the Court has never held that either of the *Abbott Labs* factors is a sine qua non to ripeness, nor has the Court ever ascribed decisive negative weight to either factor, or subfactors within them, when making the ripeness assessment. This observation is confirmed by the Court's analysis of its ripeness jurisprudence in *NWF*. There, several environmental groups challenged the land withdrawal review program operated by the Bureau of Land Management (BLM). In concluding that BLM's program as a whole was not susceptible to judicial review under the APA, the Court noted the interplay between the APA's agency action requirements, and the Court's prudential ripeness doctrine:

> Under the terms of the APA, respondent must direct its attack against some particular "agency action" that causes it harm. Some statutes permit broad regulations to serve as the "agency action," and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms

> or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is "ripe" for review at once, whether or not explicit statutory review apart from the APA is provided.)

NWF, 497 U.S. at 891. The Court's description of prudential ripeness makes clear that the *Abbott Labs* factors are tools designed to allow the Court accurately to assess whether it should stay the judicial hand; they are not meant to be applied mechanistically and without discretion. If the *NWF* Court had intended otherwise, it would not have considered the "primary conduct" factor to be a "major exception" to the rule that, "ordinarily," facial regulatory challenges should be broken down into smaller reviewable units that have been fleshed out by regulation-to-fact application. *See Ohio Forestry Ass'n*, 523 U.S. at 733 (concluding that the *Abbott Labs* factors, "taken together," precluded review of Land Resource Management Plan for Wayne National Forest). *Cf. Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000) (referring to the *Abbott Labs* factors as "exceptions" to the doctrine of ripeness).

The same flexible and equitable application of the *Abbott Labs* factors is evinced in the Court's analysis in *National Park Hospitality Association*. In that case, as noted above, the petitioners challenged a National Park Service policy that purported to exempt concession contracts from the CDA. The Court concluded that the challenge was not ripe. It did so first by definitively concluding that the petitioners

"ha[d] failed to demonstrate that deferring judicial review will result in real hardship." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 811-12. It then determined that deferred review also would allow for helpful factual development. *Id.* at 812 (citing, *inter alia*, *Toilet Goods Ass'n*). Obviously, the Court's latter assessment would have been purely gratuitous had the Court considered the absence of hardship to be dispositive of the ripeness issue.

One also encounters the same approach to the ripeness inquiry in *Reno*, where the Court noted, first, that the challenged regulations fell "on the latter side of the line" of ripeness in that they imposed no penalties for violations, *Reno*, 509 U.S. at 58, yet nevertheless proceeded to emphasize that the petitioners were required to take additional affirmative steps before their claims could ripen, *id.* at 59. *See also id.* at 66 ("This lack of evidence precludes us from resolving the jurisdictional issue here, because, on the facts before us, the front-desking of a particular class member is not only sufficient to make his legal claims ripe, but necessary to do so."). The Court went through three pages of extended analysis to arrive at the parenthetically quoted conclusion; Petitioners' interpretation of the *Abbott Labs* factors would render that discussion wholly superfluous.

Accordingly, a sound application of the *Abbott Labs* framework requires a sliding scale analysis using the factors of issue fitness and party hardship. That analysis requires a court to assess *all* the relevant factors and subfactors, and, following that analysis, to determine whether judicial prudence dictates that the court should address the plaintiff's claims, or instead defer review to some later time. Here, for example, it

may well be that the legal issues presented by Respondents' facial challenges are so crisply defined that additional factual development is unnecessary. In such a case, it would make sense why hardship to parties would be largely irrelevant; for if anything, hardship based on denial of judicial review is relevant only to justify review of what would otherwise be a prudentially unripe case. It would be conceptually backward to argue that the absence of hardship justifies refusing judicial review to a case otherwise fit.

The relaxed attitude to the *Abbott Labs* factors envisioned by this sliding scale analysis is fully consistent with the equitable origins of the Court's prudential ripeness doctrine. As this Court observed in *Abbott Labs*, "injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution."[3] *Abbott Labs*, 387 U.S. at 148. *See also Reno*, 509 U.S. at 57 (discussing this aspect of *Abbott Labs*).

Petitioners' theory is also in tension with the strong policy in favor of judicial review of administrative action. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (observing "strong presumption in favor of judicial review of administrative action");

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[3] *Cf.* David Floren, Comment, *Pre-Enforcement Ripeness Doctrine: The Fitness of Hardship*, 80 Or. L. Rev. 1107, 1121 (2001) (noting Erwin Chereminsky's view that "[t]he hardship prong is said to be constitutional, while the focus on the quality of the trial record is seen as prudential," and Alexander Bickel's position that ripeness is one of the passive virtues, which are "deployed as a matter of wise judging or constitutional politics, rather than as a matter of constitutional principle.").

Bowen v. Michigan Acad. of Family Physicians, 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of [agency] action."); *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 778 (1985) ("We have often noted that 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.'") (quoting *Abbott Labs*, 387 U.S. at 141). By the contention that parties seeking review of administrative regulations can always obtain "adequate" relief through as-applied challenges, Petitioners effectively read *Abbott Labs* out of existence, and convert what was once a prudential doctrine into a draconian and near-exceptionless retreat from the general policy in favor of judicial review.

Thus, were this Court to adopt Petitioners' highly formalistic understanding of *Abbott Labs* and ripeness, it would have to discard the traditional and oft-repeated equitable rationale for the doctrine. In so doing, the Court would also undercut most if not all of its precedents in this field, which emphasize the importance of a variety of subfactors, none of which is necessarily determinative in assessing ripeness. The better course therefore is to reject Petitioners' understanding in preference to the *Abbott Labs* framework, as it has developed in subsequent case law.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed in part.

DATED: April, 2008.

Respectfully submitted,

DAMIEN M. SCHIFF
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation