NO. 07-463

IN THE

# Supreme Court of the United States

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PRISCILLA SUMMERS, et al.,

*Petitioners*,

v.

EARTH ISLAND INSTITUTE, et al.,

*Respondents*.

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

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## BRIEF OF LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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## 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ripe and was otherwise judicially cognizable after the timber sale to which the regulations had been applied was withdrawn, and respondents' challenges to that sale had been voluntarily dismissed with prejudice, pursuant to a settlement between the parties.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.

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## IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Amici law professors teach and write in the areas of administrative and environmental law and take a professional interest in the development of this Court's justiciability jurisprudence.[1]

Amici do not take a position on the interpretation 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). Rather, Amici respectfully seek to alert the Court to the unprecedented nature of Petitioners' justiciability claim: contrary to Petitioners' assertion, this Court has never held that facial review of agency regulations is unavailable absent congressional authorization or imposition of penalties for regulatory violations. Rather, in facial review cases, the Court has determined standing by evaluating past, present, and threatened future injuries to the plaintiff as a result of the challenged rule, and has assessed ripeness by considering the fitness of the issue for judicial review and the hardship to the parties of delaying review. Under those traditional tests, Respondents' facial challenge to 36 C.F.R. §§ 215.4(a) and 215.12(f) was justiciable when it was filed and remains justiciable despite the settlement of Respondents' site-specific claims.

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[1] The parties have consented to the filing of this brief. Their consent letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, Amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than Amici has made a monetary contribution to the preparation and submission of this brief.

## SUMMARY OF ARGUMENT

This case presents the question whether a facial challenge to agency procedural rules can survive the settlement of a site-specific challenge to an action taken pursuant to those rules. The Court has never squarely addressed that question, but existing precedents make the task straightforward and the answer clear: as long as the plaintiffs establish standing to file a facial challenge in the first instance, and wait to file that challenge until site-specific action fleshes out the contours of the parties' dispute, the facial challenge is justiciable at the outset of the case and remains so even after settlement of any site-specific disputes.

The circumstances of this case are less complicated than the parties suggest. As relevant here, Respondents initially filed seven claims for relief.[2] Claims one through six challenged aspects of the Forest Service's Burnt Ridge Project, a proposed timber sale in the Sequoia National Forest in California. Claim seven challenged the validity of 36 C.F.R. §§ 215.4(a) and 215.12(f), regulatory provisions that purport to exempt many Forest Service actions, including the Burnt Ridge Project, from notice, comment, and administrative appeal procedures required by the ARA. The parties ultimately settled claims one through six, leaving only claim seven for the district court to resolve. Petitioners now assert that claim seven is

[2] Other claims in the case are not directly relevant to the questions presented to this Court. *See* Resp. Br. at 6.

nonjusticiable, because it is unripe and moot, and because Respondents lack standing.

The linchpin of Petitioners' various justiciability arguments is the assertion that the district court *never had*, and *never could have had*, jurisdiction to determine the facial validity of 36 C.F.R. §§ 215.4(a) and 215.12(f). Petitioners insist that from the start of this case, the district court's authority was necessarily limited to deciding the lawfulness of those provisions *as applied to the Burnt Ridge Project*. If that were true, then Petitioners would be correct that the parties' settlement of claims one through six rendered claim seven moot and unripe, and simultaneously stripped Respondents of standing. As Petitioners note, the controversy over the Burnt Ridge Project is over; any claim challenging the application of procedural provisions to that Project is no longer justiciable.

But this Court has never held that courts presumptively lack jurisdiction to review the facial validity of regulations like 36 C.F.R. §§ 215.4(a) and 215.12(f). Indeed, the Court has repeatedly assumed the reverse, assessing standing and ripeness for such challenges just as it would for any other claim. Yes, standing concerns obligate plaintiffs to establish that a challenged regulation causes them injury in fact—but Respondents did so here, noting that 36 C.F.R. §§ 215.4(a) and 215.12(f) regularly prevent them from submitting comments on or administratively appealing Forest Service actions, and that those Forest Service actions in turn threaten Respondents' use and enjoyment of specific forest areas, including but not limited to Burnt Ridge. Yes, ripeness

concerns sometimes obligate plaintiffs to defer filing suit until the agency applies the suspect regulation in a concrete setting—but Respondents did so here, waiting to challenge 36 C.F.R. §§ 215.4(a) and 215.12(f) until the Forest Service applied those provisions to the Burnt Ridge Project. Thus, at the time of filing, Respondents had standing to challenge the facial validity of 36 C.F.R. §§ 215.4(a) and 215.12(f), and their facial challenge was ripe for review.

The parties' voluntary settlement of Respondents' six Burnt Ridge-specific claims does not alter that analysis. Respondents' facial challenge to 36 C.F.R. §§ 215.4(a) and 215.12(f) is not moot, because the parties continue to dispute the lawfulness of those provisions. Respondents continue to have standing, because Forest Service reliance on the challenged provisions allegedly continues to erode statutory procedural protections and thereby to threaten the health of the many National Forests where Respondents routinely study and recreate. Finally, the facial challenge remains ripe, because the questions raised are legal, the challenged provisions are final, no further factual development is necessary to aid judicial review, and Respondents will suffer hardship if review is delayed.

In short, under the traditional standing and ripeness tests, Respondents' challenge to the facial validity of 36 C.F.R. §§ 215.4(a) and 215.12(f) was justiciable when filed and remains so today. Even if this Court disagrees with the foregoing standing and ripeness analyses, however, nothing about this routine regulatory challenge necessitates adoption of

Petitioners' novel rule barring certain types of facial challenge. If Respondents' affidavits fail to establish a real and immediate threat from continued Forest Service reliance on 36 C.F.R. §§ 215.4(a) and 215.12(f), or fail to demonstrate the harm of postponing review until a later day, this Court has ample authority within existing standing and ripeness doctrines to take account of those failings. There is no need for a new, per se justiciability rule governing facial challenges, particularly not a rule that creates a questionable and unnecessary categorical distinction between claims filed by regulatory objects and those filed by regulatory beneficiaries.

## ARGUMENT

### I. RESPONDENTS' FACIAL CHALLENGE TO 36 C.F.R. §§ 215.4(a) AND 215.12(f) WAS JUSTICIABLE WHEN FILED

#### A. Respondents Established Standing To Bring A Facial Challenge

This Court has never squarely addressed the issue of standing to challenge the facial validity of agency rules. On several occasions, however, the Court has applied traditional standing principles to assess a plaintiff's standing to seek prospective review of a governmental practice or rule. *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (suggesting that Lyons would have standing to seek prospective review of police practice of using chokeholds if he could demonstrate that he would "again experience injury as the result of that practice

… if continued"); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* (*Sweet Home*), 515 U.S. 687, 692 (1995) (reaching merits of facial challenge brought by plaintiffs who alleged that in certain applications, the challenged rule "injured them economically").

Five important standing principles relevant to this case emerge from these and other past cases. First, plaintiffs like Respondents must satisfy the familiar constitutional requirement: they must demonstrate a concrete and particularized injury that is either actual or imminent, and that is both fairly traceable to the challenged rule and likely to be redressed by a favorable court decision. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Massachusetts v. EPA*, 127 S.Ct. 1438, 1453 (2007). Institutional plaintiffs like Respondents may meet this requirement by submitting affidavits that identify such an injury to one or more members. *Defenders of Wildlife*, 504 U.S. at 563.

Second, plaintiffs like Respondents, who ask a court to declare an agency rule facially invalid, may not premise their standing solely on a past injury resulting from application of the challenged rule. A past harm does not "amount to that real and immediate threat of injury necessary to make out a case or controversy" for injunctive—or, equivalently, facial—relief. *Lyons*, 461 U.S. at 103. Rather, the plaintiffs must also demonstrate "continuing, present adverse effects" of the challenged rule. *Id*. at 102 (asserting that "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief'" (quoting *O'Shea v.*

*Littleton*, 414 U.S. 488, 495-496 (1974))); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* (*Laidlaw*) (2000) ("[I]n a lawsuit brought to force compliance, it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the 'threatened injury [is] certainly impending.'" (quoting *Whitmore v. Arkansas*, 495 U.S. 149 (1990))).

Third, plaintiffs who seek to vindicate procedural rights must identify concrete interests threatened by the agency's alleged disregard of those rights. That is, it is insufficient for the plaintiffs solely to aver that the agency violated statutory procedural requirements. The plaintiffs must further establish that "the procedures in question are designed to protect some threatened concrete interest of [the plaintiffs'] that is the ultimate basis of [their] standing." *Defenders of Wildlife*, 504 U.S. at 573 n.8.[3]

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[3] The Ninth Circuit seemingly disregarded this requirement in its assessment of Respondents' standing, instead asserting that an agency's violation of a plaintiff's statutory procedural rights may, without more, form "the basis for injury in fact for standing purposes." *Earth Island Institute v. Ruthenbeck*, 490 F.3d 687, 693 (2007). That the Ninth Circuit was too hasty in its standing analysis need not, however, affect this Court's consideration of the issue. "[I]t is well settled that an appellate tribunal may affirm a trial court's judgment on any ground supported by the record." *Lee v. Kemna*, 534 U.S. 362, 391 (2002) (citing *Smith v. Phillips*, 455 U.S. 209, 215, n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted.")). As discussed below, Respondents' affidavits amply

On the other hand, fourth, plaintiffs seeking judicial reinstatement of statutory procedural protections need not "'meet[] all the normal standards for redressability and immediacy.'" *Massachusetts v. EPA*, 127 S.Ct. at 1453 (quoting *Defenders of Wildlife*, 504 U.S. at 572 n.7). That is, such plaintiffs need not demonstrate that vacating the challenged, procedurally erosive agency rule would lead the agency to reconsider the concrete action or actions on which the plaintiffs' standing rests. Instead, the plaintiffs need only show that the challenged procedural rule was "'connected to'" the concrete harm. *Massachusetts v. EPA*, 127 S.Ct. at 1453 (quoting *Sugar Cane Growers Cooperative of Fla. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002)).

Finally, fifth, plaintiffs who claim that an agency violated their procedural rights do not face the same standing hurdle as other regulatory beneficiary claimants, whose "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Defenders of Wildlife*, 504 U.S. at 562 (emphasis in original). Neither procedural injury nor the concrete harm that may result from such injury "depends on the unfettered choices made by independent actors not before the courts." *Id*. (internal quotation and citation omitted). Rather, procedural plaintiffs challenge an agency action—here a procedural rule—that operates

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demonstrate that the procedural rights Respondents seek to vindicate in this case serve to protect Respondents' concrete interest in the lawful management and continued health of the many, individually identified National Forests that Respondents regularly use and enjoy.

directly on *them*, depriving them of procedural protections to which they are statutorily entitled, and in the process increasing the likelihood that the plaintiffs will suffer some identified concrete harm at the hands of the agency.

In summary, plaintiffs like Respondents, who question the facial validity of an agency rule that deprives them of statutory procedural protections, must establish injury in fact, causation, and redressability; they must allege not only past harm but some continuing threat from the challenged rule; and they must identify a concrete interest that is threatened by the alleged procedural default. Lightening this burden somewhat, however, such plaintiffs need not prove that reinstating the defaulted procedure would necessarily undo the identified concrete harm, nor must they clear the standing hurdle that faces some other regulatory beneficiary plaintiffs, whose affidavits must "adduce facts showing that [third parties'] choices have been or will be made in such manner as to produce causation and permit redressability of injury," *id.*

Respondents easily satisfy these requirements. Their affidavits identify two types of injury: (1) present injury from a concrete application of 36 C.F.R. §§ 215.4(a) and 215.12(f)—specifically, the injury caused by unlawful salvage logging in the Burnt Ridge area, undertaken without notice, comment, or administrative appeal; and (2) real and immediate threat of injury from ongoing and future applications of those regulations—specifically, the injury caused by Respondents' repeated exclusion from notice, comment, and administrative appeal

procedures in connection with Forest Service projects that threaten the health of the National Forests that Respondents frequent.

Petitioners acknowledge that references to the former injury in the declarations of Ara Marderosian adequately demonstrate Respondents' standing to challenge the Burnt Ridge Project itself. Pet. Br. at 28; *see also* J.A. 15-27. But Respondents' affidavits do not stop there. They go on to allege that Respondents' members regularly camp, canoe, raft, orienteer, hike, and swim not just in the Burnt Ridge area but in numerous National Forests nationwide, Pet. App. 68; that said members visit some forests multiple times per year, Pet. App. 69-70; that the members study and photograph the plants and animals in such forests, Pet. App. 68; that the members believe salvage timber sales in those forests threaten both the forests' "biological health" and the members' "recreational interests," Pet. App. 71; that the members regularly file successful administrative appeals of such timber sales, *id*.; that in 2004, as a result of 36 C.F.R. §§ 215.4(a) and 215.12(f), the Forest Service categorically excluded twenty timber sales from administrative appeal in the Allegheny National Forest alone, Pet. App. 71; and that even when administrative or judicial appeal remains available under 36 C.F.R. §§ 215.4(a) and 215.12(f), notice procedures are inadequate to permit Respondents' members to file appeals in time to save threatened stands of trees, Pet. App. 76a. *See also* Resp. Br. at 29-30, 41-43.

Thus, Respondents' affidavits not only support their claim that their members were concretely

injured by application of 36 C.F.R. §§ 215.4(a) and 215.12(f) to the Burnt Ridge timber sale, but also—more importantly for this case—allege a real and immediate threat of future *identical* injuries in connection with salvage timber sales and other Forest Service actions in the numerous forests where Respondents' members regularly study and recreate. These past and threatened future injuries are procedural in form, comprising exclusion from notice, comment, and administrative appeal procedures. As Respondents' affidavits make clear, however, the procedural injuries connect directly to concrete, on-the-ground harms—namely, unappealable salvage logging operations that threaten the health of the forests that Respondents' members use and enjoy.

Hence, Respondents' affidavits satisfy both the *Lyons* and the *Defenders of Wildlife* prerequisites for standing to bring a facial challenge to a procedural regulation. Specifically, the affidavits identify a real and immediate threat of *future* injury from the challenged regulations, and they provide details of the potential concrete consequences of such injury for both forest health and Respondents' members' scientific and recreational interests. At the outset of the case, therefore Respondents had standing to challenge not only the application of 36 C.F.R. §§ 215.4(a) and 215.12(f) to the Burnt Ridge Project, but also the facial validity of those provisions.

### B. Respondents' Facial Challenge Was Ripe When Filed

Ripeness poses no greater obstacle to Respondents' facial challenge. To begin with, this Court has never endorsed a categorical ripeness requirement for regulations of the sort advanced by Petitioners. To the contrary, the Court has consistently read the Administrative Procedure Act to create a presumption that regulations and other agency actions are reviewable. *See, e.g.*, *Barlow v. Collins*, 397 U.S. 159, 166 (1970) (allowing facial challenge to regulations by recipients of farm payments and stating that "judicial review of administrative action is the rule, and nonreviewability an exception which must be demonstrated"). The Court should hesitate to change that presumption, particularly given Congress's apparent acquiescence in it, and legislators' related understanding that special review statutes are not a prerequisite for facial review of regulations. *See, e.g.*, *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008) (noting importance of stare decisis in statutory interpretation).

Instead of a *per se* ripeness rule, the Court has consistently applied a balancing test, even when assessing the ripeness of facial challenges to broad agency regulations. While the Court has phrased this test in different ways at different times, it has always emphasized that the test is one that requires a nuanced, multi-factored analysis of the particulars of each individual case that comes before the courts.

For example, in *Ohio Forestry Ass'n v. Sierra Club*, the Court evaluated the ripeness of a challenge

to a broad forest management plan by proceeding methodically through a multi-factored analysis despite the fact that the respondents neither identified a statutory provision authorizing pre-enforcement review nor faced immediate economic consequences from implementation of the challenged plan. 523 U.S. 726, 733 (1998). The *Ohio Forestry* Court ultimately deemed the challenge in that case unripe, but the careful analysis in that opinion belies Petitioners' assertion that facial claims of the sort Respondents press are presumptively unreviewable. Indeed, the *Ohio Forestry* Court identified at least two circumstances in which a facial challenge to a broad forest management plan *would* be ripe when filed: (1) if the plaintiff alleged violations of the procedural National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 *et seq.*; or (2) if the forest plan allowed activity that would inevitably result in harm to the environment. *Ohio Forestry*, 523 U.S. at 737 and 738-39 (noting, respectively, that a procedural claim "can never get riper," and that the government conceded that a forest plan that "allow[ed] motorcycles into a bird-watching area or something like that, … would be immediately justiciable").[4] The lesson of *Ohio Forestry*, therefore,

[4] Lower courts have consistently followed *Ohio Forestry* in allowing review of National Forest plans in these circumstances. *See, e.g., Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1173-75 (11th Cir. 2006) (finding NEPA challenge to revisions to National Forest plans ripe, and citing *Ohio Forestry*); *Kern v. United States Bureau of Land Management*, 284 F.3d 1062, 1070-72 (9th Cir. 2002) (same for Bureau of Land Management plan); *Montana Snowmobile Ass'n v. Wildes*, 103 F. Supp. 2d 1239, 1243-44 (D. Mont. 2000) (finding

is that facial challenges to broad agency regulations may well be reviewable provided they satisfy the traditional, multi-factored ripeness test.[5]

The next step in this case, then, is to apply that multi-factored test to Respondents' facial claim. In *Abbott Laboratories v. Gardner* (*Abbott Labs*), the Court explained the test as follows:

> [The] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial

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challenge to decision to close National Forest areas to snowmobile use ripe as of date of plan adoption).

[5] Amici American Forest Paper Association, et al. (AFPA) characterize *National Wildlife Federation* and *Ohio Forestry* as limiting the available remedy in broad challenges to "the extent of the ripe as-applied controversy; a remedy that is not systemic, but is less far-reaching." AFPA Amicus Br. at 14-16 (internal quotations omitted). But *National Wildlife Federation* involved a challenge to a land withdrawal review program that did not comprise "a single [Bureau of Land Management] order or regulation, or even … a completed universe of … orders and regulations," and thus did not qualify as a reviewable agency action under the Administrative Procedure Act. 497 U.S. at 890. Likewise, the *Ohio Forestry* plaintiffs challenged a broad forest management plan before the Forest Service had applied the plan in a concrete setting, leading the Court to conclude both that judicial review "could hinder agency efforts to refine its policies," and that the Court itself might benefit from further factual development. 523 U.S. at 735, 737. Neither circumstance is present here: Respondents challenge duly promulgated regulations, not a nebulous agency "program," and they waited to file their challenge until the agency finalized those regulations and applied them in a concrete—and concretely harmful—manner.

> interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

387 U.S. 136, 148-49 (1967).[6]

Given this description, it is abundantly clear that Respondents' facial challenge to 36 C.F.R. §§ 215.4(a) and 215.12(f) was ripe when filed. This is not an "abstract disagreement[] over administrative policies," nor would judicial review interfere with an agency decision before it "has been formalized and its effects felt in a concrete way by the challenging parties." 387 U.S. at 148-49. Petitioners have not only finalized and published 36 C.F.R. §§ 215.4(a) and 215.12(f), they have also *applied* those provisions in numerous concrete circumstances that harmed Respondents—most obviously in connection with the Burnt Ridge salvage timber sale. Respondents concededly seek relief that extends beyond that sale, but Petitioners' application of 36 C.F.R. §§ 215.4(a) and 215.12(f) in the context of the sale prevents this

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[6] The *Ohio Forestry* Court provided an alternative exposition of this test but acknowledged that the two tests are the same in spirit. 523 U.S. at 733 (ripeness analysis requires courts to consider "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented").

from being an abstract disagreement, and serves as proof that the agency has already "formalized" the policy embodied in those provisions. Thus, informal consideration of the circumstances of this case suggests that the "basic rationale" for the ripeness inquiry is inapplicable here.

Evaluation of the fitness of the issues for judicial review and the hardship to Respondents of postponing review bears out this informal conclusion. This Court has identified three factors relevant to the fitness analysis: (1) whether the case raises purely legal issues that a court can assess in the absence of a concrete factual circumstance, *e.g.*, *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 812 (2003); (2) whether the challenged agency action is "final," *e.g.*, *Abbott Labs*, 387 U.S. at 149; and (3) whether "some concrete action applying the regulation" in a way that harms the plaintiff has "reduced … the scope of the controversy … to … manageable proportions, and … fleshed out … its factual components," *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 891 (1990). In this case, all three factors weigh in favor of immediate review.

First, the issues in the case are purely legal. Respondents' sole claim is that 36 C.F.R. §§ 215.4(a) and 215.12(f), which purport to exempt certain Forest Service actions from notice, comment, and administrative appeal, contravene the ARA, which requires the Forest Service to establish notice, comment, and administrative appeal processes for those same actions. Thus, Respondents ask this Court to answer precisely the same legal question

posed in *Abbott Labs*: "whether the statute was properly construed by" Petitioners. 387 U.S. at 149.

*Abbott Labs* is also instructive on the issue of finality. Like Petitioners in that case, Respondents here challenge a rule "promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties...." *Id.* at 151. There is nothing to suggest that 36 C.F.R. §§ 215.4(a) and 215.12(f) are anything but "definitive. There is no hint that [these] regulation[s are] informal, or only the ruling of a subordinate official, or tentative." *Abbott Labs*, 387 U.S. at 151 (internal citations omitted). On the contrary, 36 C.F.R. §§ 215.4(a) and 215.12(f) "mark the consummation of the agency's decisionmaking process...." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997).

Third, Respondents' simultaneous filing of challenges to the Burnt Ridge salvage timber sale and to the facial validity of the procedural regulations governing that sale (that is, 36 C.F.R. §§ 215.4(a) and 215.12(f)) alleviates any concern that this Court ought to delay review of the latter challenge until "the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action ... that harms or threatens to harm" Respondents. *Nat'l Wildlife Federation*, 497 U.S. at 891. The Burnt Ridge controversy has already "reduced ... the scope of the controversy" over 36 C.F.R. §§ 215.4(a) and 215.12(f) to "manageable proportions," and "fleshed out ... its factual components." *Id.* This Court can have no question

about the likely application of 36 C.F.R. §§ 215.4(a) and 215.12(f)—the Burnt Ridge project illustrates not just when but precisely how the Forest Service intends to apply those provisions.[7]

Moving to the second prong of the formal ripeness analysis, it is also clear that delaying review of 36 C.F.R. §§ 215.4(a) and 215.12(f) would harm Respondents. As discussed above, Respondents keep careful track of proposed Forest Service projects like "timber sales, [off-road vehicle (ORV)] trails, prescribed burns, [and] wildlife openings," J.A. 83, and they regularly submit comments on and file administrative appeals of such projects. *See supra* at 10. Respondents undertake these time- and resource-intensive efforts because they agree with the policy embodied in the ARA's notice, comment, and administrative appeal provisions: responsible forest management depends on the active involvement of all interested stakeholders—not only the companies that stand to profit from timber sales, but also the hikers, boaters, birdwatchers, photographers, ORV users, and naturalists who frequent and enjoy our national

[7] This observation serves to distinguish Respondents' facial challenge to 36 C.F.R. §§ 215.4(a) and 215.12(f) from several other claims that remained in the case after the parties settled the Burnt Ridge controversy, but which the Ninth Circuit subsequently dismissed as unripe: because Respondents had not established that the regulations challenged in *those* claims "were applied in the context of the Burnt Ridge Project," the record was insufficiently "concrete to permit th[e] court to review the application of the regulation[s] … and to determine" whether Petitioners planned to use the regulations in a manner "consistent with the ARA." Pet. App. 14a-15a. The same cannot be said of the record concerning application of 36 C.F.R. §§ 215.4(a) and 215.12(f).

forests and seek to ensure that Forest Service management policies effectively "protect[ forest] ecosystems, watersheds, and the environmental and social value of these areas" to meet both "present … needs and the needs of future generations." J.A. 16.

The challenged procedural provisions make the involvement of stakeholders like Respondents more difficult in some instances, impossible in others. The Forest Service frequently undertakes projects governed by 36 C.F.R. §§ 215.4(a) and 215.12(f), including timber sales, prescribed burns, and ORV trail development, in the many national forests that Respondents' members regularly visit. J.A. 85-88. Thus, it is concededly probable that Respondents will eventually have another opportunity to challenge 36 C.F.R. §§ 215.4(a) and 215.12(f) in the context of some future project. In the meantime, though, the absence of ARA-required notice and the preclusion of administrative appeal will not only force Respondents to go to great lengths to obtain their statutorily mandated access to Forest Service decisionmaking, Pet. App. 76a, but also prevent them from obtaining review of some projects in time to stop trees from being cut, J.A. 85-88. This combination of procedural harm to Respondents and consequent concrete damage to the forests they regularly visit easily satisfies the "hardship to the parties" prong of the ripeness analysis. *See, e.g.*, *Ohio Forestry*, 523 U.S. at 738-39 (discussing government concession that an agency rule resulting in immediate environmental harm is ripe for review).

Moreover, it is worth noting, as Amicus Curiae Pacific Legal Foundation observes, that the two

prongs of the ripeness inquiry "are tools designed to allow the Court accurately to assess whether [to] stay the judicial hand," rather than "sine qua non" requirements, to be applied "mechanistically." Pacific Legal Foundation Amicus Br. at 11-12. Consistent with this observation, the Court regularly evaluates both ripeness factors, even if one comes up short. *See, e.g.*, *Nat'l Wildlife Federation*, 497 U.S. at 891 (suggesting that regardless of the "fitness of the issues," facial review is available to plaintiffs who would be required to adjust their conduct immediately in the absence of such review); *Ohio Forestry Ass'n*, 523 U.S. at 733 (assessing the *Abbott Labs* factors "taken together"); *Nat'l Park Hospitality Ass'n*, 538 U.S. at 812 (considering whether the issue in the case was fit for review even after concluding that delayed review would work no real hardship on the parties). In practice, this fact suggests that a court need not stay its hand in a case like this, in which the issues are eminently fit for review, even if the court deems the plaintiff's hardship showing less than compelling.

In conclusion, contrary to Petitioners' suggestion, Respondents' facial challenge to 36 C.F.R. §§ 215.4(a) and 215.12(f) is not the sort of pre-enforcement claim that ordinarily troubles this Court. Indeed, it is not a pre-enforcement claim at all. True, Respondents filed a facial challenge to broad procedural regulations, but they waited to do so until the agency had applied those regulations in the concrete setting of the Burnt Ridge timber sale. In the aftermath of that sale, there can be no question about the Forest Service's intent to apply 36 C.F.R. §§ 215.4(a) and 215.12(f) to salvage timber sales and other actions that implicate

forest health, nor can there be any doubt about the harmful effects of those regulations when so applied. Thus, there is no reason for this Court to stay its hand.

## II. DESPITE SETTLEMENT OF THE BURNT RIDGE CONTROVERSY, THE DISTRICT COURT RETAINED JURISDICTION TO HEAR RESPONDENTS' FACIAL CHALLENGE TO 36 C.F.R. §§ 215.4(a) AND 215.12(f)

Given that Respondents had standing to challenge the facial validity of 36 C.F.R. §§ 215.4(a) and 215.12(f) at the outset of this case, and their claim was then ripe, the only remaining justiciability question is whether the parties' voluntary settlement of the Burnt Ridge controversy somehow mooted Respondents' facial challenge, or stripped Respondents of standing, or rendered the facial challenge unripe. The short answer to this question is no.

### A. Resolution Of A Site-Specific Dispute Does Not Moot A Facial Challenge

To begin with, settlement of a site-specific controversy need not and should not moot a contemporaneous facial challenge to the legal validity of a broad agency rule, even if the agency happened to apply the latter rule in the former context. *Cf. University of Texas v. Camenisch*, 451 U.S. 390, 393-94 (1981) (noting well-settled exception to the mootness doctrine when "one issue in a case has become moot, but the case as a whole remains alive because other issues have not become moot"). Indeed, the suggestion is somewhat absurd.

To see this absurdity, consider the facial challenge that this Court entertained in *Sweet Home*. In that case, the respondents challenged the facial validity of a Department of Interior rule that defined the term "harm" in the Endangered Species Act, 515 U.S. at 714 (O'Connor, J., concurring) ("This case, of course, comes to us as a facial challenge."), basing their standing on allegations that "application of the 'harm' regulation" to certain species "had injured them economically," *id.* at 692 (Stevens, J.). Putting the standing question to one side for a moment, it would be absurd to suggest that the Department of Interior could have mooted the respondents' facial claim by reaching voluntary side "deals" with the respondents one species at a time. An agency's voluntary agreement not to apply a challenged regulation in a particular circumstance does not answer the related but distinct—and considerably broader—question of the legality of all comparable applications.

The *Laidlaw* Court recognized this very distinction when it noted that a defendant's voluntary cessation of unlawful conduct may not moot a suit for injunctive relief provided the conduct was ongoing when the suit was filed (that is, provided there is no question of the plaintiff's standing at the outset of the case). The Court elaborated:

> Thus, in *Lyons,* ... we held that a plaintiff lacked initial standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat arising from the policy. Elsewhere in the opinion, however, we

> noted that a citywide moratorium on police chokeholds … would not have mooted an otherwise valid claim for injunctive relief, because the moratorium by its terms was not permanent. The plain lesson of [this case] is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.

528 U.S. at 190 (internal citations omitted).

Consistent with this lesson, Petitioners do not in fact claim that their settlement of the Burnt Ridge controversy moots any suggestion that 36 C.F.R. §§ 215.4(a) and 215.12(f) may continue to be harmful to Respondents. Instead, Petitioners premise their mootness argument on their central assertion that the district court only ever had jurisdiction to assess the legality of 36 C.F.R. §§ 215.4(a) and 215.12(f) as applied to the Burnt Ridge timber sale. If that assertion were true, then settlement of the timber sale controversy would indeed have mooted Respondents' procedural challenge. Once the parties resolved the controversy over the sale, the lawfulness of the agency's procedure in approving the sale no longer had moment.

As discussed above, however, when this case was filed, Respondents had standing to challenge the facial validity of 36 C.F.R. §§ 215.4(a) and 215.12(f), and their challenge was ripe. Settlement of the Burnt Ridge controversy did nothing to resolve or otherwise moot that challenge. Viewed in this light, Petitioners' mootness argument seems a cynical

effort to leverage their voluntary settlement of the Burnt Ridge controversy into a settlement of the parties' entire dispute—a settlement to which Respondents did not agree. *Cf. Laidlaw* 528 U.S. at 189 ("It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. … [I]f it did, the courts would be compelled to leave the defendant ... free to return to his old ways.'" (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, n.10 (1982) (internal quotation and citation omitted))).

Petitioners' suggestion that this case is moot fails for another reason, too: the tenor of the mootness doctrine favors Respondents here. As then-Chief Justice Rehnquist wrote in *Honig v. Doe*, "while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it." 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring). If there were any mootness concerns to override here (which there are not, as noted above), reasons exist to do so: it is alleged that the Forest Service adopted a rule grossly inconsistent with its governing statute; the parties extensively litigated that purely legal question below; the question was suited for judicial resolution; the lower courts resolved the question in Respondents' favor; and Petitioners chose not to pursue their merits arguments in this Court. "[T]o abandon the case at [this] advanced stage [would] prove more wasteful than frugal." *Laidlaw*, 528 U.S. at 191-92.

### B. Respondents Continue To Have Standing To Challenge The Facial Validity Of 36 C.F.R. §§ 215.4(a) And 215.12(f), And Their Facial Challenge Remains Ripe

Petitioners' standing and ripeness arguments are equally unavailing. Settlement of the Burnt Ridge controversy did indeed strip Respondents of standing to challenge the procedures used in approving the Burnt Ridge timber sale, and that settlement simultaneously rendered such a challenge unripe. But throughout this case, the Burnt Ridge sale has played a less central role in Respondents' facial challenge to 36 C.F.R. §§ 215.4(a) and 215.12(f) than Petitioners would have this Court believe.

It is worth exploring, briefly, the contours of that role. With respect to standing, the circumstances of the Burnt Ridge sale serve to illustrate the precise nature of the injury that Respondents suffer whenever and wherever the Forest Service relies on 36 C.F.R. §§ 215.4(a) and 215.12(f) in approving a timber sale or taking similar action. That is, the Burnt Ridge controversy supplies part of the answer to any claim that Respondents' injury from Forest Service reliance on 36 C.F.R. §§ 215.4(a) and 215.12(f) is hypothetical rather than actual, abstract rather than concrete. Specifically, if the Forest Service continues to rely on those provisions in approving timber sales, developing ORV trails, or carrying out prescribed burns in the forests that Respondents regularly visit, then Respondents will be injured actually and concretely, just as they were

in connection with the Burnt Ridge sale. *See supra* at 10; Pet. Br. at 28; J.A. 15-27.

The sale serves a similar role with respect to ripeness. In the ripeness context, the fact of the sale answers any prudential concern that the courts ought to wait to review 36 C.F.R. §§ 215.4(a) and 215.12(f) until the Forest Service takes "some concrete action" that harms respondents and renders the controversy less abstract, *Nat'l Wildlife Federation*, 497 U.S. at 891. The answer is simple—the Service has already taken such an action, by approving the Burnt Ridge sale without following the notice, comment, and administrative appeal procedures called for by the ARA. *See supra* at 17-18.

If Respondents had sought review of the facial validity of 36 C.F.R. §§ 215.4(a) and 215.12(f) before the Forest Service applied those provisions in a concrete context, some uncertainty would have remained as to how and in what circumstances the provisions would operate to strip Respondents of statutory procedural protections, and with what concrete result. The courts might well have found that uncertainty fatal to Respondents' claim, under the rubric of standing, or ripeness, or both.

But that is not this case. Whether through foresight or fortuity, Respondents waited to file their facial challenge together with their challenge to the Burnt Ridge timber sale. The sale then served both as Respondents' illustration of the sort of procedural and concrete harms they have suffered and will continue to suffer due to application of 36 C.F.R. §§ 215.4(a) and 215.12(f) (standing), and as their response to any prudential concerns about the timing

of facial review (ripeness). That the controversy over the sale has since been resolved changes nothing about this analysis; the circumstances of the sale still readily serve both functions.

## III. NOTHING ABOUT THIS CASE NECESSITATES ADOPTION OF A NOVEL JUSTICIABILITY RULE FOR FACIAL CHALLENGES

Finally, even if this Court disagrees with the foregoing mootness, standing, and ripeness analyses, nothing about this routine challenge to agency environmental rulemaking necessitates adoption of a novel categorical ban on certain facial challenges. On the contrary, the traditional standing inquiry and multi-factored test for ripeness provide this Court ample authority to evaluate the sufficiency of Respondents' affidavits. *See supra* at 9-11, 18-20. Moreover, those tests have a distinct advantage over any more categorical rule: they preserve judicial authority to hear facial challenges in this or future cases if the Court is convinced that delayed review would work a serious hardship on the parties.

Petitioners' suggested categorical rule, by contrast, contravenes this Court's precedent and enshrines an unfair and unnecessary categorical distinction between regulatory objects facing penalties and all other parties affected by agency action.[8] Petitioners argue that the only situation in

[8] Amici AFPA make the most explicit argument for such a distinction, claiming that "[m]ost … facial challenges to rules are not justiciable when brought by third parties who are not immediately burdened by the rules, but are justiciable when brought by the regulated industry." AFPA Amicus Br. at 21.

which an agency rule is reviewable absent statutory authorization or site-specific implementation is when the plaintiff faces "the prospect of serious penalties for an unsuccessful challenge." Pet. Br. at 20-21. But this Court has never suggested that the plaintiff's status as a regulatory object facing penalties is a touchstone for ripeness. Instead, the Court has consistently evaluated the practical impacts of the agency's rule on all parties, whatever their relationship to the agency, and whether or not penalties are threatened. *See, e.g., Reno v. Catholic Social Services*, 509 U.S. 43, 57 (1993) (explaining that ripeness depends on whether the "effects of the administrative action challenged have been 'felt in a concrete way by the challenging parties'" (quoting *Abbott Labs*, 387 U.S. at 148-49); *Ohio Forestry*, 523 U.S. at 733-34 (holding agency plan unripe because it neither "inflicts significant practical harm upon the interests that [plaintiff] advances" nor "force[s plaintiff] to modify its behavior … to avoid future adverse consequences"); *Nat'l Park Hospitality Ass'n*, 538 U.S. at 810 (finding regulation unripe for review because it causes plaintiff "no practical harm"); *Nat'l Wildlife Fed'n*, 497 U.S. at 894 (noting that the Court "intervene[s] in the administration of the laws only when … a specific 'final agency action' has an actual or immediately threatened effect").

Of course, one example of an agency action that is usually—but not always[9]—ripe for facial, pre-

[9] *See Catholic Social Services*, 509 U.S. at 57 (citing *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967) for the proposition that not "every case" involving regulations that constrain industry behavior is ripe for review, depending on the severity of the impacts on the industry).

enforcement review is a regulation that imposes serious penalties for noncompliance. *See, e.g.*, *Abbott Labs*, 387 U.S. 136. But that is hardly the only example. The Court has also allowed parties to challenge agency regulations involving the possibility of licenses or other future *benefits* from the government. *See, e.g.*, *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (allowing review of FCC order that would have denied future licenses to plaintiff); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983) (finding ripe challenge to state law regarding permitting requirements for nuclear power plants, even though no utilities had yet applied for permits). So too, the Court has made clear that a facial challenge brought by regulatory beneficiaries may be ripe in some circumstances. *See Ohio Forestry*, 523 U.S. at 737 (stating that a claim of procedural error with respect to an agency action of general applicability may be ripe whatever the status of the plaintiff); *id.* at 738-39 (observing that immediate environmental harm might justify facial review of an agency action of general applicability, again regardless of the plaintiff's status). In short, the per se distinction that Petitioners attempt to draw between regulated entities subject to penalties and everyone else affected by administrative actions finds no support in this Court's ripeness caselaw.

Petitioners' proposed distinction is also unsound as a policy matter. There is absolutely no reason to believe that regulated industry is so politically and administratively vulnerable that it should receive special access to the courts. Indeed, public choice theory suggests the opposite—relative to public

interest organizations, industry may well be better able to promote its interests in the legislature and the executive branch. *See, e.g.*, Cass R. Sunstein, *What's Standing after* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 218-220 (1992) (noting that regulated industry may have greater lobbying access and ability); Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 Admin. L. Rev. 1, 40-41 (2008) (same). Accordingly, it would be perverse for this Court to adopt a justiciability rule that distorts existing administrative law doctrines to provide special solicitude for regulated industries facing penalties.

## CONCLUSION

For the foregoing reasons, this Court should not accept the government's cramped view of courts' authority to assess the facial validity of agency regulations. The district court had ample authority to review the facial validity of 36 C.F.R. §§ 215.4(a) and 215.12(f) at all relevant times in this case: when the case was filed, when the parties settled the Burnt Ridge dispute, and when that court issued its judgment. Moreover, whatever one's view of the justiciability of Respondents' facial claim, this Court need not and should not adopt Petitioners' categorical distinction between regulatory objects facing penalties and all others affected by agency action. Such a distinction would not only contravene this Court's ripeness jurisprudence but unnecessarily restrict the Court's authority to hear this and other cases in which regulatory action threatens immediate harm to the parties.

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