No. 07-463

In the Supreme Court of the United States

PRISCILLA SUMMERS, ET AL., PETITIONERS

v.

EARTH ISLAND INSTITUTE, ET AL.

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

BRIEF FOR THE PETITIONERS

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ripe and was otherwise judicially cognizable after the timber sale to which the regulations had been applied was withdrawn, and respondents' challenges to that sale had been voluntarily dismissed with prejudice, pursuant to a settlement between the parties.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

The amended opinion of the court of appeals (Pet. App. 1a-22a) is reported at 490 F.3d 687. The original opinion of the court of appeals is reported at 459 F.3d 954. The opinion of the district court declaring various regulatory provisions to be invalid (Pet. App. 38a-67a) is reported at 376 F. Supp. 2d 994. Additional opinions of the district court (Pet. App. 23a-28a, 29a-37a; J.A. 70-72, 78-82) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2006. The court of appeals issued an amended opinion and denied a petition for rehearing on June 8, 2007. On August 27, 2007, Justice Kennedy extended the time within which to file a petition for a writ of cer-

tiorari to and including October 5, 2007, and the petition was filed on that date. The petition for a writ of certiorari was granted on January 18, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are reproduced in the appendix to the petition for a writ of certiorari (Pet. App. 78a-84a): 5 U.S.C. 702, 703, 704, 706; Section 322(a) and (c) 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); and 36 C.F.R. 215.4, 215.12.

STATEMENT

1. In 1992, Congress enacted 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). The ARA states that "the Secretary of Agriculture, acting through the Chief of the Forest Service, shall establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans * * * and shall modify the procedure for appeals of decisions concerning such projects." ARA § 322(a), 106 Stat. 1419. The ARA further provides:

> Not later than 45 days after the date of issuance of a decision of the Forest Service concerning actions referred to in subsection (a), a person who was involved in the public comment process under subsection (b) through submission of written or oral comments or by otherwise notifying the Forest Service

> of their interest in the proposed action may file an appeal.

ARA § 322(c), 106 Stat. 1419.

Section 322(c) of the ARA does not require that every decision implementing a forest plan be subject to notice, an opportunity for public comment, and a formal administrative appeal. In June 2003, the Forest Service issued regulations (see 36 C.F.R. 215.4(a), 215.12(f)) that provide, in pertinent part, that the ARA's notice-and-comment and administrative-appeal requirements do not apply to projects whose expected environmental impacts are sufficiently slight that the "proposed actions [are] categorically excluded from documentation in an environmental assessment (EA) or an environmental impact statement (EIS)," 68 Fed. Reg. 33,585 (2003), under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq*. In promulgating those regulations, the agency explained that "not every decision of the Forest Service was subject to appeal before [Congress] passed the ARA"; that "[t]here was no indication in the ARA that Congress intended to extend the notice, comment, and appeal requirements to all classes of categorically excluded activities"; and that Congress had not specified the precise way in which the line between appealable and non-appealable decisions should be drawn, but had instead left that choice to the Forest Service's discretion. 68 Fed. Reg. at 33,585. The agency concluded that projects categorically excluded from EA and EIS requirements under NEPA were appropriately exempted from the ARA's notice-and-comment and administrative-appeal requirements, because, "[b]y their very nature, activities that have been categorically ex-

cluded generally have no significant environmental effect." *Ibid.*[1]

2. Respondents filed this suit in the Eastern District of California, naming as defendants the Forest Service, the Secretary of Agriculture, and two individual Forest Service officials (petitioners in this Court). See J.A. 28-69. The first six claims for relief in respondents' corrected complaint asserted various challenges to the legality of the Burnt Ridge Project, a proposed timber sale in the Sequoia National Forest in Tulare County, California. See J.A. 51-61. The Seventh Claim for Relief alleged that

> [petitioners] have violated the ARA sections (a) and (c) by issuing regulations codified at 36 C.F.R. §§ 215.4(a) and 215.12(f) (2003), which exempt all decisions that are categorically excluded from NEPA analysis but which implement forest plans, from notice, comment, and appeal. By doing so, [petitioners] have taken a final agency action that is arbitrary, capricious, and not in accordance with law, and which should be set aside under the judicial review provision of the APA [Administrative Procedure Act], 5 U.S.C. § 702 *et seq.*

J.A. 61. The remaining eight claims for relief asserted APA challenges to other Forest Service regulations implementing the ARA. See J.A. 61-66.

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[1] The Forest Service noted during the 2003 rulemaking that, in promulgating the 1993 regulations that first implemented the ARA, the agency had concluded that categorically excluded projects "were generally not of the sort for which Congress intended to apply additional notice, comment, and appeal requirements given the generally minor potential for environmental effects." 68 Fed. Reg. at 33,585; see 58 Fed. Reg. 58,905 (1993); 36 C.F.R. 215.4(b) (1994).

Petitioners moved for a temporary restraining order and preliminary injunction against implementation of the Burnt Ridge Project. In support of that motion, respondents submitted declarations of Ara Marderosian (J.A. 15-27), which described the declarant's visits to the project area and the harms that he expected to suffer if the project were carried out. See J.A. 17-18, 19. On December 10, 2003, the district court issued a preliminary injunction barring implementation of the project. J.A. 70-72.

In March 2004, the Forest Service withdrew its prior decision to implement the Burnt Ridge Project. See J.A. 74. In July 2004, the parties to the instant suit entered into a partial settlement agreement. J.A. 73-77. The Forest Service agreed that it would "not reissue the Burnt Ridge Timber Sale without first preparing an [EIS] or [EA] for the project in accordance with NEPA." J.A. 74. Respondents in turn agreed to "dismiss with prejudice" their first six claims for relief, which challenged the legality of the Burnt Ridge Project. *Ibid.* Later that month, the district court approved the settlement and respondents' challenges to the Burnt Ridge Project were accordingly dismissed. J.A. 77; see Pet. App. 39a.

3. Respondents thereafter pursued the suit as a direct facial challenge to the Forest Service regulations. See Pet. App. 7a, 39a. The district court held that at least one of the respondents (Heartwood) had standing to sue. The court relied solely on a declaration dated July 23, 2004, that was submitted by Jim Bensman, a resident of Illinois and an employee and member of Heartwood. See *id.* at 43a-44a, 68a, 77a. In that declaration, Bensman identified a number of National Forests he had visited in the past, and he expressed an intention

to visit unidentified National Forests in Colorado, California, Indiana, and Oregon later that year. *Id.* at 69a-70a. He also alleged that he had commented on approximately 1000 Forest Service projects in the past and that he had appealed (sometimes successfully) various Forest Service decisions. *Id.* at 71a.

Bensman stated that after the Forest Service's 2003 regulations were implemented, there had been several projects that he had not been able to appeal. Pet. App. 71a. The only examples he cited, however, were approximately 20 unidentified timber sales that had been approved in the Allegheny National Forest in Pennsylvania, which Bensman said were "in places I have been before and want to go back and see again," and "[s]everal" of which had been approved. *Ibid.* Bensman did not state that he had concrete plans to visit the site of the projects in question in the near future. The district court found Bensman's allegations sufficient to establish standing. *Id.* at 43a-44a. The court also held that respondents' facial challenges to the 2003 rules were ripe for judicial review because "[t]he regulations are the Forest Service's definitive position on how to best implement the ARA and have been enforced on numerous occasions." *Id.* at 46a; see *id.* at 45a-47a.

On the merits, the district court struck down five aspects of the regulatory scheme, including 36 C.F.R. 215.4(a) and 215.12(f). Pet. App. 49a-65a. The court acknowledged that "[t]he ARA certainly permits exclusion of environmentally insignificant projects from the appeals process," *id.* at 51a, but it concluded that the Forest Service had not "delineate[d] between major and minor projects in a way that gives permissible effect to the language of the ARA," *id.* at 52a. On September 16, 2005, the court issued a further order clarifying that its

injunction applies nationwide. *Id.* at 29a, 31a-33a. On October 19, 2005, the court issued an additional order clarifying the intended scope of the injunction. J.A. 78-82. The court explained that, under its decision, the ARA's notice, comment, and administrative-appeal requirements did not apply to all projects categorically excluded from the EIS and EA provisions under NEPA, but rather were applicable to timber sales and to ten other categories of Forest Service activity. J.A. 79-80.

3. The court of appeals affirmed in part and remanded in part. Pet. App. 1a-22a.[2]

a. The court of appeals first held that respondents had standing to sue. Pet. App. 8a-11a. The court decided that the allegations in the Bensman affidavit were sufficient to establish standing, on the theory that "Bensman's preclusion from participation in the appeals process may yield diminished recreational enjoyment of the national forests." *Id.* at 9a. The court of appeals also concluded that respondents had alleged sufficient "procedural injury" to demonstrate standing. *Ibid.* The court noted that respondents were "unable to appeal the Burnt Ridge Project because the Forest Service applied 36 C.F.R. § 215.12(f)," and concluded that "the loss of that right of administrative appeal is sufficient procedural injury in fact to support a challenge to the regulation." *Id.* at 10a. The court further stated that respondents had suffered the type of injury that the ARA was intended to prevent because they were "precluded from appealing decisions like the Burnt Ridge Project, and that Project itself, under" Section 215.12(f). *Ibid.*

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[2] The original opinion of the court of appeals is reported at 459 F.3d 954. On denial of rehearing, the court issued an amended opinion that replaced the original opinion. See Pet. App. 2a.

b. The court of appeals held that respondents' challenges to most aspects of the regulatory scheme were unripe. See Pet. App. 11a-15a. The court explained that, under this Court's precedents, a regulation is not ordinarily ripe for judicial review until it has been applied to a concrete factual setting. *Id.* at 12a-14a. The court stated that respondents had "established ripeness only with respect to 36 C.F.R. §§ 215.12(f) and 215.4(a)," which had been applied to the Burnt Ridge Project, the only project referred to in the complaint. *Id.* at 14a.[3] With respect to those two regulations, the court stated:

> The parties' agreement to settle the Burnt Ridge Timber Sale dispute does not affect the ripeness of [respondents'] challenge to 36 C.F.R. §§ 215.12(f) and 215.4(a). The record remains sufficiently concrete to permit this court to review the application of the regulation to the project and to determine if the regulations as applied are consistent with the ARA.

Id. at 15a.

c. The court of appeals held that 36 C.F.R. 215.4(a) and 215.12(f) are inconsistent with the ARA and are therefore invalid. Pet. App. 15a-20a. The court explained:

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[3] By contrast, the court of appeals found that respondents "ha[d] not shown that the other challenged regulations were applied in the context of the Burnt Ridge Timber Sale or any other specific project. The record is speculative and incomplete with respect to the remaining regulations." Pet. App. 14a. The court of appeals therefore vacated the district court's injunction with respect to all but one of the challenged regulatory provisions other than 36 C.F.R. 215.4(a) and 215.12(f). See Pet. App. 22a. The court of appeals declined to decide whether the district court had properly enjoined one of the challenged provisions (36 C.F.R. 215.18(b)(1)) because the government had not appealed that aspect of the district court's ruling. See Pet. App. 22a.

> The plain language of the ARA states that the Forest Service "shall" provide for administrative notice, comment and appeal. The statutory language does not refer to NEPA. The statute does not provide for any exclusions or exemptions from its requirement that the Forest Service provide notice, comment, and an administrative appeal for decisions implementing Forest Plans. Accordingly, 36 C.F.R. §§ 215.12(f) and 215.4(a) conflict with the plain language of the statute.

Id. at 18a.

d. The court of appeals upheld the district court's issuance of a nationwide injunction against enforcement of 36 C.F.R. 215.4(a) and 215.12(f). Pet. App. 21a-22a. The court stated (see *id.* at 21a) that the nationwide scope of the injunction was "compelled by the text of" 5 U.S.C. 706(2)(A), which authorizes the court in an APA suit to "hold unlawful and set aside agency action, findings, and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court apparently construed that provision to require the district court in this APA suit to "set aside"—and enjoin—on a nationwide basis the regulatory provisions that the court had found to be invalid. See Pet. App. 21a.

SUMMARY OF ARGUMENT

I. This Court has repeatedly held that, except where Congress specifically authorizes pre-enforcement judicial review of agency regulations apart from any concrete application of the rules, such review is generally unavailable unless the regulations govern primary conduct and impose serious penalties for violations. Although the Court has discussed those principles under

the rubric of "ripeness," those principles do not simply identify the *time* at which judicial review may take place, but rather reflect and define the "agency action" that is the proper *subject* of that review. Even after a regulation has been applied in a concrete setting, the reviewable "agency action" is the agency's application of the regulation in the concrete decision, rather than the regulation itself.

This Court's jurisprudence reflects a recognition that declaratory and injunctive remedies under the APA are equitable in nature, and that a court of equity therefore should stay its hand unless and until the Court's ripeness criteria have been satisfied. The text of the APA also supports the legal framework described above. The APA authorizes judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. If a plaintiff can challenge a concrete application of a particular regulation only by violating the rule and risking serious penalties if his challenge is unsuccessful, judicial review of the rule's application generally will not be an "adequate remedy" within the meaning of Section 704. But where deferring review until the regulation has been applied will not subject the plaintiff to that sort of risk, a pre-enforcement challenge will generally be unavailable unless Congress has specifically authorized the suit.

Under the foregoing principles, the Forest Service regulations at issue in this case are subject to judicial review only within a challenge to a specific agency project to which those regulations have been applied. No special statute authorizes pre-enforcement review of this category of agency regulations. And a suit challeng-

ing a site-specific Forest Service action would provide an "adequate remedy" for any legal defect in the rules.

II. Respondents failed to establish standing to challenge the relevant Forest Service regulations. Although one of respondents' declarations demonstrated a likelihood of injury from the Burnt Ridge Project, the parties' settlement eliminated the prior justiciable controversy concerning that project. The Bensman declaration, on which the courts below relied, did not identify any other specific project to which the regulations had been applied that, if consummated, would injure respondents or their members. The court of appeals erred in concluding that respondents' inability to file administrative appeals concerning unspecified projects was a judicially cognizable "procedural injury." Under this Court's decisions, deprivation of a procedural right will constitute judicially cognizable harm only if the required procedures pertain to a *substantive* decision in which the plaintiff has a concrete interest. Respondents' additional declarations, which were submitted after the district court rendered its judgment and were not cited by the Ninth Circuit, were untimely and should not be considered.

III. Although respondents initially established standing to challenge the Burnt Ridge Project, the parties settled their dispute over that timber sale on terms wholly favorable to respondents. While recognizing that respondents' challenges to *other* Forest Service regulations were not ripe for review, the court of appeals held that 36 C.F.R. 215.4(a) and 215.12(f)—the two regulatory provisions that had been applied to the Burnt Ridge Project—remained justiciable even after that project had been withdrawn. That conclusion is mystifying. Respondents' challenge to Sections 215.4(a) and 215.12(f)

was initially justiciable only because the Burnt Ridge Project provided a reviewable "agency action" whose legality depended on the validity of those rules. Once the parties settled their dispute over that project, there was no proper basis for distinguishing Sections 215.4(a) and 215.12(f) from the other regulations challenged in respondents' complaint, which the court of appeals correctly held to be unripe for review.

IV. The court of appeals erred in affirming the nationwide injunction entered by the district court. Contrary to the court of appeals' holding, the text of the APA does not require the entry of a nationwide injunction in this case, both because the reviewable agency action in a suit like this one is the specific agency project to which the challenged regulations are applied, and because courts in APA suits always retain discretion to tailor equitable relief to the circumstances of the case. Entry of nationwide injunctions in cases like this will hinder the development of the law by preventing the government from relitigating disputed legal issues in different circuits. The broad relief entered and affirmed by the courts below is particularly inappropriate because the course of proceedings in the courts below subjected the government to the risks and burdens of a nationwide class action or special review proceeding, but could not have produced a definitive resolution of the disputed issues in the government's favor, since other private parties would have been able to challenge 36 C.F.R. 215(a) and 215.12(f) in other circuits if the government had prevailed in this suit. The practical effect of that approach is that the government is bound nationwide by an adverse decision regarding a regulation's validity, but derives no commensurate benefit if the first judicial decision is favorable.

ARGUMENT

Respondents' complaint alleged that a specific timber sale (the Burnt Ridge Project) was unlawful in a number of respects, and it also asserted facial challenges to several Forest Service regulations implementing the ARA. Well before the district court ruled on the merits, the parties settled their dispute over the Burnt Ridge Project on terms wholly favorable to respondents. The Ninth Circuit correctly recognized that, insofar as respondents challenged regulations that had not been applied to the Burnt Ridge Project, their claims were not ripe for judicial review.

The court of appeals held, however, that respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) (which had been applied to the Burnt Ridge Project) remained justiciable even though that project had been withdrawn and respondents' challenge to it had been dismissed with prejudice pursuant to their settlement with the government. The court of appeals appears to have found the moot as-applied challenge sufficient to confer a kind of virtual standing and ripeness to mount a facial challenge to the regulatory provisions that had been relevant to the former as-applied challenge. The court's analysis is contrary to bedrock principles of justiciability established by this Court's decisions. The court of appeals compounded its error by treating respondents' vague and conclusory allegations of future injury as sufficient to establish standing for that facial challenge and by affirming the grant of a nationwide injunction against application of 36 C.F.R. 215.4(a) and 215.12(f), thereby precluding the government from applying those regulations to numerous and varied projects not before the court, including projects in other districts and circuits.

For the most part, the court of appeals' errors flowed from its misidentification of the agency action that was the proper subject of judicial review. Contrary to the Ninth Circuit's understanding, the only reviewable "final agency action" in this suit under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, was the decision approving the Burnt Ridge Project, including the application of the Forest Service regulations to that project, not the regulations themselves. The decision of the Ninth Circuit conflicts with this Court's precedents, and it obscures the clear distinction between review under the APA and review under special statutory review provisions that authorize direct pre-enforcement challenges to agency regulations even before they are applied in a particular context. By decoupling respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) from their challenge to the Burnt Ridge Project, the decision below effects dramatic changes in the timing, context, and venue for challenges to administrative action under the APA, as well as a dramatic expansion of the relief that may be awarded in a successful suit.

I. THE AGENCY ACTION SUBJECT TO JUDICIAL REVIEW IN THIS CASE WAS THE BURNT RIDGE PROJECT, NOT THE FOREST SERVICE REGULATIONS IMPLEMENTING THE APPEALS REFORM ACT

A. This Court's Decisions Recognize That An Agency Regulation Is Ordinarily Subject To Judicial Review Only As Part Of A Challenge To A Particular Application Of The Regulation

In *Lujan* v. *National Wildlife Federation*, 497 U.S. 871 (1990) (*NWF*), this Court explained:

> Under the terms of the APA, [a plaintiff] 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.)

Id. at 891.

Subsequent decisions of this Court are to the same effect. In *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (*CSS*), the Court applied *NWF* in rejecting, as unripe, the plaintiffs' challenge to regulations issued by the Immigration and Naturalization Service that would be applied in individual agency adjudications to determine whether an alien was eligible for legalization, a particular form of immigration relief. The Court in *CSS* explained that newly promulgated regulations may be ripe for judicial review outside the context of any particular affirmative application by the agency if the regulations "present[] plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation." *Id.* at 57 (citing, inter alia, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 152-153 (1967)).

The Court cited *NWF*, however, for the proposition that, if such a dilemma is absent, "a controversy concerning a regulation is not ordinarily ripe for review under the [APA] until the regulation has been applied to the claimant's situation by some concrete action." *Id.* at 58. Noting that the regulations at issue in *CSS* "impose[d] no penalties for violating any newly imposed restriction," *ibid.*, the Court held that the plaintiffs' challenge would not be ripe until the plaintiffs had taken the steps necessary to cause the regulations to be applied to their own applications for legalization, see *id.* at 58-59. See also *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808-812 (2003); cf. *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 732-737 (1998) (*Ohio Forestry*) (holding that facial challenge to land and resource management plan for a particular National Forest was not ripe for judicial review, and that review should instead focus on the application of the plan's provisions in agency decisions approving site-specific projects).

Thus, under the Court's decisions in *NWF* and subsequent cases, one of two special circumstances—*i.e.*, a special statutory provision authorizing direct review of agency regulations within a specified period after their promulgation, or a substantive rule requiring immediate adjustment of primary conduct under threat of serious penalties—is ordinarily required in order to "permit broad regulations to serve as the 'agency action' and thus to be the object of judicial review directly." *NWF*, 497 U.S. at 891. Although the Court has addressed those principles under the rubric of "ripeness," that term does not fully capture the substance of the Court's rulings. The applicable rules of reviewability identify

not simply the *time* at which judicial review may take place, but also the proper *subject* of that review.[4]

Absent one of the circumstances identified in *NWF*, an agency regulation is not an independently reviewable agency action for purposes of 5 U.S.C. 704 and 706 *even after* the regulation has been applied in the course of making a site-specific decision. Rather, the agency action that is the proper focus of judicial review is the site-specific decision (the Burnt Ridge Project) in which the regulation was *applied* in a concrete context. Insofar as the legality of the site-specific decision turns on the validity of the regulation, the plaintiff in challenging the site-specific decision may assert that the regulation is contrary to the governing statute or is otherwise unlawful; but the agency action that the court ultimately upholds or sets aside is the site-specific decision rather than the regulation as such.[5]

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[4] The court of appeals recognized that, under *NWF* and similar precedents, the challenged Forest Service regulations would not have been judicially reviewable before they were applied to the Burnt Ridge Project. See Pet. App. 12a-14a. Indeed, the court held that respondents' challenge to regulatory provisions other than 36 C.F.R. 215.4(a) and 215.12(f) was not justiciable in this suit because respondents "ha[d] not shown that the other challenged regulations were applied in the context of the Burnt Ridge Timber Sale or any other specified project." Pet. App. 14a; see *id.* at 22a (directing district court to vacate its injunction with respect to other aspects of the regulatory scheme). The court of appeals apparently concluded, however, that, once Sections 215.4(a) and 215.12(f) had been applied to a particular set of facts—even one no longer before the court—that application had some sort of residual effect, such that the district court could engage in the same direct review of the regulations qua regulations, standing alone, that otherwise would be impermissible except under the sort of special statutory review provisions referred to in *NWF*.

[5] If a court of appeals holds that a site-specific agency action is unlawful because the regulation that purports to authorize it is contrary

B. The Text Of The Administrative Procedure Act And Principles Of Equitable Discretion Support The Conclusion That Pre-Enforcement Judicial Review Of Agency Regulations Should Be Available Only In Limited Circumstances

Two mutually reinforcing sets of controlling principles under the APA support the legal framework described above.

1. The declaratory and injunctive remedies that respondents seek are equitable in nature. Under 5 U.S.C. 702, the right of judicial review under the APA does not affect "the power or duty of the court to dismiss any action or deny relief on any * * * appropriate * * * equitable ground." As the Court explained in *Abbott Laboratories*, "injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative de-

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to a statute or otherwise invalid, the court's decision will be binding precedent in future judicial proceedings in that circuit, and it may as a practical matter restrict the agency's ability to invoke the regulation as a basis for future site-specific decisions within the circuit. To that extent, a plaintiff can legitimately seek and obtain a judicial ruling that will affect future agency decisions. Cf. *NWF*, 497 U.S. at 894 (explaining that judicial review of site-specific actions "may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole 'program' to be revised by the agency in order to avoid the unlawful result that the court discerns"). That sort of indirect impact on future agency conduct, however, is simply a byproduct of ordinary stare decisis principles and the common practice of federal agencies, in conducting their activities within a particular judicial circuit, of following legal rules announced in the prior decisions of the relevant court of appeals. The procedure countenanced by the court of appeals in this case, under which a single district judge issued a nationwide injunction against application of 36 C.F.R. 215.4(a) and 215.12(f), raises very different practical and conceptual issues.

terminations unless these arise in the context of a controversy 'ripe' for judicial resolution." 387 U.S. at 148; see *CSS*, 509 U.S. at 57; *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 542-543 (1987); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311-313 (1982). Congress may of course override the equitable limitations that would otherwise apply by directing that particular categories of regulations will be reviewable (at the behest of a plaintiff who can establish standing) as soon as they are promulgated. See, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 479-480 (2001) (citing *Ohio Forestry* and explaining that the Clean Air Act's special review provision rendered a pre-enforcement challenge to regulations justiciable, whether or not the challenge would have been cognizable under APA standards). Absent such a statutory directive, however, the ripeness principles announced in this Court's prior APA decisions define the manner in which a reviewing court's equitable discretion should be exercised.

2. The APA defines the term "agency action" to include "the whole or a part of an agency rule." 5 U.S.C. 551(13). Under that definition, 36 C.F.R. 215.4(a) and 215.12(f) are "agency action[s]." The APA does not authorize direct and immediate judicial review of every agency action, however, but only of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704.

Under *NWF* and the other decisions of this Court discussed above, the circumstances in which a regulation may be the subject of judicial review correspond closely to those set out in Section 704. First, and most obviously, the *NWF* Court's recognition that "[s]ome statutes permit broad regulations to serve as the 'agency

action,' and thus to be the object of judicial review directly," 497 U.S. at 891, reflects Section 704's authorization of judicial review of "[a]gency action made reviewable by statute." 5 U.S.C. 704.[6] It is undisputed that no such special statute authorizes judicial review of the Forest Service regulations at issue in this case.

Section 704 also authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. An agency's promulgation of a substantive rule that "as a practical matter requires the plaintiff to adjust his conduct immediately," *NWF*, 497 U.S. at 891, is the principal example of an agency regulation that is subject to pre-implementation judicial review under that grant of authority. In *Abbott Laboratories*, for example, the plaintiff could have pursued an as-applied challenge to newly-promulgated agency regulations only by *violating* the regulations and subjecting itself to a government enforcement action. Although the regulated party could have raised an as-applied challenge to the regulations as a defense to that enforcement suit, it would have been subject to potential "serious criminal and civil penalties" if that as-applied challenge was ultimately unsuccessful. See *Abbott Labs.*, 387 U.S. at 153.

If a particular mode of review carries with it the prospect of serious penalties for an unsuccessful chal-

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[6] When Congress expressly authorizes judicial review of agency regulations apart from any concrete application thereof, it often imposes constraints (such as a specified appellate-court venue and a short filing period) that are not applicable to APA actions generally. See, *e.g.*, 42 U.S.C. 7607(b)(1) (petition for review of an Environmental Protection Agency regulation of nationwide applicability under the Clean Air Act must be filed in the District of Columbia Circuit within 60 days after the rule is published in the *Federal Register*).

lenge, that mode of review is not "adequate" within the meaning of Section 704 as a general matter. But where, as here, judicial review can be deferred until a later concrete application of a rule without subjecting the challenger to the dilemma described in *Abbott Laboratories*, immediate pre-enforcement review of agency regulations is unavailable under Section 704. In those circumstances, judicial review of the rule's application is an "adequate remedy" for any legal defect in the regulation. See *CSS*, 509 U.S. at 60-61; *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 165 (1967) (where non-compliance with an agency regulation would result in only a minor sanction, which could then be challenged in court, "[s]uch review will provide an adequate forum for testing the regulation in a concrete situation"). That conclusion is especially compelling in the context of this case, because the relevant regulations do not even prescribe substantive standards for on-the-ground, site-specific activities of the sort that could cause injury to individuals, including any of respondents' members who use the areas affected by such projects. Rather, the regulations govern the *procedures* to be followed by the Forest Service in rendering decisions concerning site-specific projects, and they therefore can have no application until a particular project is under consideration.

C. Under The Legal Framework Established By This Court's Decisions, The Burnt Ridge Project Rather Than 36 C.F.R. 215.4(a) And 215.12(f) Was The Proper Subject Of Judicial Review

It is undisputed that no special statutory provision of the sort to which the *NWF* Court alluded authorized respondents' challenge to the Forest Service regulations at issue in this case. Respondents contend, however,

that their suit may nevertheless go forward under the principles announced in *Abbott Laboratories* and subsequent cases. That contention lacks merit. The challenged regulations govern the agency's administrative procedures, not the primary conduct of respondents' members or other members of the public. The Forest Service rules therefore do not remotely impose the sort of dilemma faced by the regulated parties in *Abbott Laboratories*, who risked serious penalties if they did not conform their private conduct to the regulations' requirements.

1. Respondents seek to avoid that result by asserting (Br. in Opp. 20-21, 24-26) that, if the notice-and-comment procedures of the ARA do not apply to the types of site-specific projects that are covered by 36 C.F.R. 215.4(a) and 215.12(f), potential plaintiffs cannot learn about such projects early enough to seek judicial review of particular applications of those rules. Respondents are wrong (as their own ability to challenge the Burnt Ridge Project demonstrates). The public receives prior notice even of activities (like the Burnt Ridge Project) that are excluded by 36 C.F.R. 215.4(a) from the regulations implementing the ARA's notice-and-comment procedures, which provide for notice of a proposed project to be published in a designated newspaper of record for each National Forest. See 36 C.F.R. 215.5(b)(2).

The Forest Service provides such public notice through two other mechanisms. The first is the "scoping" process under NEPA. See 40 C.F.R. 1501.7 and 1506.6; 69 Fed. Reg. 40,594-40,595 (2004). The second is through the quarterly issuance of schedules of proposed

actions, which each National Forest distributes, posts on the agency's website, and makes available to the public.[7]

Here, notice of the Burnt Ridge Project was given through a NEPA scoping notice, see Pet. App. 7a, and respondents obtained a preliminary injunction before that project proceeded, see *id.* at 39a. And while Jim Bensman's declaration states that he was unable to comment on or appeal other timber projects, in the Allegheny National Forest, the declaration also makes clear that he received notice of the projects through the scoping process. See *id.* at 71a; see also *id.* at 72a.[8] The public routinely receives notice of categorically excluded projects through NEPA scoping or schedules of proposed activities for each National Forest in sufficient time to allow judicial review of categorically excluded projects.[9] To be sure, the Forest Service does not pro-

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[7] See United States Forest Service, *Amend. No. 1909.15-2004-1, Environmental Policy and Procedures Handbook* (approved June 29, 2004) <http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15_zero_code.doc>; United States Forest Service, *Amend. No. 1909.15-2007-1, Environmental Policy and Procedures Handbook* (approved Feb. 9, 2007) <http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15_30.doc>.

[8] Relying on a post-judgment declaration, respondents assert (Br. in Opp. 21, 25) that various projects involving off-road vehicle use might proceed without notice. Even if that declaration warranted consideration, but cf. *NWF*, 497 U.S. at 894-898; pp. 33-34, *infra*, Forest Service regulations separately provide for public notice of such projects. 36 C.F.R. 212.50, 212.52.

[9] See, *e.g.*, *Colorado Wild* v. *USFS*, 435 F.3d 1204, 1212, 1221 (10th Cir. 2006) (categorically excluded timber project); *League of Wilderness Defenders* v. *Smith*, 491 F. Supp. 2d 980, 984-985 (D. Or. 2007) (same); *Forest Serv. Employees for Envtl. Ethics* v. *USFS*, No. C 05-2220 SI, 2005 WL 1514071, at *1, *3 (N.D. Cal. June 27, 2005) (same), vacated on other grounds, 408 F. Supp. 2d 916 (N.D. Cal. 2006); *RESTORE: The N. Woods* v. *USDA*, 968 F. Supp. 168, 169-171 (D. Vt. 1997) (categorically excluded land exchange).

vide notice to the public of every minor activity, such as maintaining existing roads, repaving parking lots, and mowing lawns. Respondents, however, disavow any contention that the ARA's notice-and-comment procedures apply to such activities, see Br. in Opp. 13 n.2, and the district court's injunction does not encompass such projects, see J.A. 79-80.

2. Respondents further contend that "the challenged rules do affect [respondents'] primary conduct, which includes influencing Forest Service decisions." Br. in Opp. 21 n.7. But while 36 C.F.R. 215.4(a) and 215.12(f) may preclude respondents and their members from pursuing administrative appeals of certain Forest Service decisions, such participation in agency proceedings is not *primary* conduct protected by the *Abbott Laboratories* exception. The regulations that the court of appeals ultimately held to be invalid do not require any person outside the government "to adjust his conduct immediately." *NWF*, 497 U.S. at 891. They are instead *procedural* regulations that govern the Forest Service's own process for making decisions on individual site-specific projects. Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (explaining that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish") (internal quotation marks omitted).

The potential impact of the regulations on respondents' submission of public comments or their filing of an administrative appeal, moreover, does not prevent an as-applied challenge to a later application of the rules in a decision approving a site-specific action, and it does not prevent a court from affording adequate relief in such a suit. Thus, if the Forest Service seeks to imple-

ment a future timber sale or similar site-specific action without first providing an opportunity for an administrative appeal, respondents (if they satisfy Article III and prudential standing requirements) can challenge the project in court on the ground that the agency failed to comply with the ARA's procedural requirements. In such a suit, the reviewing court could determine the validity of 36 C.F.R. 215.4(a) and 215.12(f) in the course of resolving respondents' challenges to the site-specific action. If respondents prevailed, the court could enjoin the Forest Service from implementing the project unless and until the required procedures had been followed, thereby protecting the individuals on whom respondents depended for their standing from the injury that the consummated project would entail. If the government prevailed, respondents would lose the lawsuit, but they would not be subject to any punitive sanction, let alone to the "serious criminal and civil penalties," *Abbott Labs.*, 387 U.S. at 153, that could have been imposed if the *Abbott Laboratories* plaintiffs had been forced to violate the contested substantive regulations in order to obtain judicial review. To the contrary, a decision in the government's favor would indicate that respondents suffered no legal injury at all. In either event, a challenge to the later site-specific project would provide a fully adequate mechanism for judicial review of the pertinent Forest Service regulations.

3. Respondents may find it more convenient to pursue a single lawsuit in which the court could review a variety of regulatory provisions as part of a "programmatic" challenge, rather than to challenge individual site-specific projects in which the regulations have been applied. The district court observed in that vein that, if respondents' facial challenges to various regulatory pro-

visions were deemed unripe, respondents "could be faced with bringing multiple lawsuits in multiple jurisdictions in order to challenge the regulations as they are applied to specific projects." Pet. App. 46a. But, of course, advisory opinions are quite efficient—and quite inconsistent with Article III. And in the ripeness context in particular, this Court

> has not considered this kind of litigation cost saving sufficient by itself to justify review in a case that would otherwise be unripe. The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of—even repetitive—postimplementation litigation.

Ohio Forestry, 523 U.S. at 735; see *NWF*, 497 U.S. at 894. When Congress concludes that a different balance should be struck with respect to a particular category of agency regulations, it can authorize plaintiffs who have standing to challenge such rules immediately upon their promulgation. Absent a special statutory provision of that nature, however, any perceived inefficiency in piecemeal as-applied challenges to agency regulations does not render that mode of review inadequate. As a result, in a case such as this, "respondent[s] cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *NWF*, 497 U.S. at 891.

The course of proceedings in the courts below also makes clear that the courts' misidentification of the proper subject of judicial scrutiny resulted in the "too abstract" (*Ohio Forestry*, 523 U.S. at 735) mode of review that this Court's decisions warn against. Respon-

dents' complaint identified a single site-specific project—a timber sale (the Burnt Ridge Project)—to which 36 C.F.R. 215.4(a) and 215.12(f) had been applied. The district court, however, ordered that those regulations be set aside in their entirety and that the Forest Service's pre-existing regulatory regime be reinstated. In addition to timber sales, moreover, the court identified ten other distinct categories of site-specific actions as to which the ARA's notice-and-comment and administrative-appeal requirements would apply. See J.A. 79-80. The district court found Sections 215.4(a) and 215.12(f) to be invalid with respect to those types of Forest Service action even though no project within those categories was before the court.[10]

The district court reached that conclusion, moreover, despite its acknowledgment that "[t]he ARA certainly permits exclusion of environmentally insignificant projects from the appeals process. For example, actions such as maintaining Forest Service buildings or mowing ranger station lawns need not be subject to the notice, comment, and appeal procedures." Pet. App. 51a-52a. The district court's recognition that the Forest Service possesses some discretion to distinguish between appealable and non-appealable agency actions should have made the court particularly reluctant to pronounce on the manner in which that discretion had been exercised with respect to types of actions removed from the Burnt Ridge Project itself, and demonstrates that this suit was ill-conceived as a "facial" challenge to the regulations even if such a challenge could properly have been entertained. Cf. *Babbitt* v. *Sweet Home Ch. of Cmtys. for a*

[10] The district court also concluded that all other projects were properly excluded from the ARA's notice-and-comment procedures, even though no such project was before the court either. See J.A. 80.

Great Or., 515 U.S. 687, 699-700, 708 (1995); *id.* at 709 (O'Connor, J., concurring) (finding it inappropriate to "strike a regulation on a facial challenge" where "there are many [relevant] circumstances in which the regulation might validly apply").

II. RESPONDENTS FAILED TO ESTABLISH STANDING TO CHALLENGE THE REGULATIONS AT ISSUE IN THIS CASE

In order to establish standing to sue in federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Hein* v. *Freedom from Religion Found.*, 127 S. Ct. 2553, 2562 (2007) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)); see, *e.g.*, *Defenders of Wildlife*, 504 U.S. at 560; *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990). In support of their request for a temporary restraining order or preliminary injunction, respondents submitted the declarations of Ara Marderosian, which described the harms that Marderosian expected to suffer if the Burnt Ridge Project went forward. See J.A. 15-27. We agree with respondents (see Br. in Opp. 23-24) that the first of those declarations (J.A. 17-18, 19) established a likelihood that Marderosian would be injured by that site-specific action, and thus demonstrated respondents' standing to challenge the Burnt Ridge Project *itself*.

Well before the district court issued its ruling on the merits, however, the parties' dispute concerning the Burnt Ridge Project was settled on terms wholly favorable to respondents. See J.A. 73-77. That settlement eliminated the prior justiciable controversy concerning the Burnt Ridge Project. See pp. 34-36, *infra*. Respondents contend, and the court of appeals agreed, that re-

spondents established a likelihood of continuing injury from other, future applications of 36 C.F.R. 215.4(a) and 215.12(f). That argument lacks merit.

A. The Courts Below Identified No Site-Specific Forest Service Activity Other Than The Burnt Ridge Project That Could Serve As A Proper Subject Of Judicial Review

Neither the district court nor the court of appeals identified any site-specific activity other than the Burnt Ridge Project that (1) was governed by the challenged regulations, (2) was the subject of a site-specific decision approving the project, and (3) would result in injury to Jim Bensman or another of respondents' members who used the area affected by the project. Nevertheless, the court of appeals found standing because "Bensman's preclusion from participation in the appeals process may yield diminished recreational enjoyment of the national forests." Pet. App. 9a. Such a generalized conclusion that preclusion of administrative appeals "may" yield diminished enjoyment of "the national forests" generally, without any allegations concerning the impact of a particular project on any identified members of the respondent organizations who use the area affected by such a project, falls far short of the requirement in this Court's cases that, to satisfy Article III, injury must be both "concrete and particularized" and "actual or imminent." *Defenders of Wildlife*, 504 U.S. at 560; *NWF*, 497 U.S. at 891.

Indeed, Bensman's declaration would have been insufficient to establish standing even if respondents had invoked a special statutory provision authorizing direct judicial review of the regulations qua regulations. Even under such a statute, it still at least would have been

necessary for respondents to show that the regulations would likely be applied to some specific project that, if consummated, would impair the enjoyment of the affected area by identified members. Bensman's declaration did not identify any such specific project.

B. Respondents' Claimed "Procedural Injury" Is Not An Adequate Basis For Standing

As an alternative rationale for standing, the court of appeals held that respondents had suffered a "procedural injury" because they "are precluded from appealing decisions like the Burnt Ridge Project, and that Project itself, under the" challenged regulations. Pet. App. 10a. That theory of standing is also misconceived. Even if respondents had shown a likelihood that they would have submitted comments and filed an administrative appeal of a decision approving an identified site-specific project if those mechanisms had been available, the unavailability of those procedural avenues would not subject any of respondents' members to judicially cognizable injury unless they had a tangible stake in the outcome of the agency's decision-making process. That tangible stake would depend in turn on a showing that the members' enjoyment of the area affected by the relevant project would be impaired if the project were approved and carried out. See *Defenders of Wildlife*, 504 U.S. at 572-573.

This Court has stated that a "person who has been accorded a procedural right *to protect his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n.7 (emphasis added). That principle does not assist respondents here. As the italicized language makes clear, a plaintiff who asserts the

deprivation of a procedural right still must demonstrate that he has a concrete stake in the substantive agency decision to which the relevant procedures pertain. See *id.* at 573 n.8 (explaining that a plaintiff can file suit to vindicate his 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"). The concrete injury to the plaintiff that would result if the project were carried out would be redressed if the agency's decision is set aside and the project enjoined for failure to comply with the required procedures. The normal requirement of redressability is relaxed only in the further sense that "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an [EIS], even though he cannot establish with any certainty that the [EIS] will cause the license to be withheld or altered"; and the requirement of immediacy is relaxed by allowing review "even though the dam will not be completed for many years." *Id.* at 572 n.7.

Thus, if respondents could demonstrate a likelihood of concrete injury to their members from an identified site-specific activity, they could challenge the Forest Service's failure to provide notice-and-comment and administrative-appeal procedures under the ARA regulations as part of a challenge to the Forest Service's final decision approving that project. In those circumstances, respondents' claim to standing would not depend on proof that the Forest Service's use of the allegedly required procedures would have led the agency to rescind or modify the proposed action. See *Massachusetts* v. *EPA*, 127 S. Ct. 1438, 1453 (2007) ("A litigant who alleges a deprivation of a procedural protection to which

he is entitled never has to prove that if he had received the procedure the substantive result would have been altered.") (brackets omitted) (quoting *Sugar Cane Growers Coop.* v. *Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002)). But the inability of respondents or their members to participate in notice-and-comment and administrative-appeal procedures is not, *in and of itself*, a judicially cognizable "injury in fact." Rather, respondents must demonstrate a concrete stake in the *outcome* of the Forest Service's decision-making process. See *ibid.* (stating that a plaintiff who alleges the deprivation of a procedural right "has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider *the decision that allegedly harmed the litigant*") (emphasis added); *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2008 n.3 (2007) (Scalia, J., concurring in the judgment in part and dissenting in part) ("Under Article III, one does not have standing to challenge a procedural violation without having some concrete interest in the outcome of the proceeding to which the violation pertains.").[11]

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[11] Other circuits have recognized that deprivation of a "procedural right" is insufficient, standing alone, to confer Article III standing. In *Bensman* v. *USFS*, 408 F.3d 945 (2005)—involving the same individual, Jim Bensman, who was a declarant in the case—the Seventh Circuit explained that, under *Defenders of Wildlife*, "unless the denial of a procedural right endanger[s] a separate substantive right of the plaintiff, a plaintiff may not invoke the federal judicial power to vindicate the denial of that procedural right." *Id.* at 952; see *id.* at 952-953. The court held in particular that the Forest Service's refusal to consider the merits of the plaintiffs' administrative appeals would subject the plaintiffs to judicially cognizable injury only if they could demonstrate concrete harm to themselves resulting from the specific projects that were the subject of those appeals. See *id.* at 953-963. The District of Columbia Circuit has similarly recognized that "[a] party has standing to

C. Respondents' Supplemental Declarations Were Untimely And Should Not Be Considered By This Court

Respondents also rely (Br. in Opp. 24-25) on additional declarations that were submitted after the district court entered judgment. Those declarations, which were not cited by the Ninth Circuit, were untimely under Federal Rules of Civil Procedure 6 and 56. Cf. *NWF*, 497 U.S. at 894-898. If the evidentiary materials that were before the district court when it entered judgment were insufficient to establish respondents' standing, the later-filed declarations cannot rescue the suit. See *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 235 (1990) (explaining that a particular affidavit could not be used to establish standing "because it is evidence first introduced to this Court and 'is not in the record of the proceedings below'") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970)); cf. *Adickes*, 398 U.S. at 157-158 n.16 (explaining that evidence that was "not in the record of the proceedings below and therefore could not have been considered by the trial court * * * cannot be properly considered by [this Court] in the disposition of the case").

This is not to say that appellate courts can *never* consider post-judgment declarations in ruling on questions of justiciability. The "case-or-controversy requirement" imposed by Article III "subsists through all stages of

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challenge an agency's failure to abide by a procedural requirement only if the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff." *Fund Democracy, LLC* v. *SEC*, 278 F.3d 21, 27 (2002); see, *e.g.*, *Animal Legal Def. Fund, Inc.* v. *Glickman*, 204 F.3d 229, 236 (2000) ("[S]tanding to raise a procedural injury requires that the procedural norm be one 'designed to protect some threatened concrete interest' of the plaintiff.") (quoting *Defenders of Wildlife*, 504 U.S. at 573 n.8).

federal judicial proceedings, trial and appellate." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). For a federal appellate court to exercise jurisdiction, "it is not enough that a dispute was very much alive when suit was filed." *Ibid.* Rather, "[t]he parties must continue to have a personal stake in the outcome of the lawsuit." *Id.* at 478 (internal quotation marks omitted).

If a plaintiff had established the requisite concrete stake in the suit at the time the district court ruled, and a question later arises as to whether the case has become moot on appeal, the district court record may be insufficient to allow the appellate court to discharge its responsibility to determine its own jurisdiction. Under those circumstances, post-judgment declarations may appropriately be submitted by the parties and considered by the appellate court in order to decide whether a live controversy continues to exist. But where (as here) a plaintiff fails to establish its standing at the time the district court enters judgment, that evidentiary gap cannot be filled by later-submitted materials.

III. RESPONDENTS' SUIT BECAME MOOT WHEN THE PARTIES SETTLED THEIR DISPUTE OVER THE BURNT RIDGE PROJECT AND RESPONDENTS' CHALLENGES TO THAT PROJECT WERE DISMISSED WITH PREJUDICE

A. The Parties' Settlement Eliminated The Prior Justiciable Controversy Concerning The Burnt Ridge Project

As explained above (see pp. 5, 28, *supra*), respondents demonstrated at the outset of their suit that carrying out the Burnt Ridge Project was likely to impair enjoyment of the forest by one of their members. Respondents' challenge to that project, however, was dismissed with prejudice and ceased to be justiciable well

before the district court ruled on the merits in this case. In July 2004, while respondents' complaint was pending in the district court, the parties entered into a partial settlement of their dispute. The settlement provided for voluntary dismissal with prejudice of the first six claims for relief in respondents' complaint, which asserted various challenges to the Burnt Ridge Project, in return for the Forest Service's commitment not to reauthorize that timber sale without first preparing an EIS or EA pursuant to NEPA. See J.A. 74.[12] The district court accepted the settlement and incorporated it into an order of the court. See J.A. 77.

Under 36 C.F.R. 215.4(a) and 215.12(f), the availability of notice-and-comment and administrative-appeal procedures depends on whether particular actions are subject to the requirement that an EIS or EA be prepared. Because the settlement embodies the Forest Service's commitment to prepare an EIS or EA before implementing the Burnt Ridge Project, it effectively en-

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[12] Respondents' first five claims for relief alleged that the Forest Service had violated NEPA and had acted arbitrarily and capriciously by failing to perform sufficient environmental analysis in connection with the Burnt Ridge Project. See J.A. 51-59. Their sixth claim for relief alleged that the Burnt Ridge Project violated the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, because the sale was inconsistent with the governing land management plan. See J.A. 59-61. Respondents' complaint did not include a specific claim for relief alleging that the Forest Service had violated the ARA by failing to provide notice-and-comment and administrative-appeal procedures in connection with the Burnt Ridge Project itself. Rather, respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) was contained in their seventh claim for relief, which asserted a facial attack on the regulations themselves and identified the issuance of those regulations as the "final agency action" subject to review under the APA. See J.A. 61; p. 4, *supra*.

sures that the project will not go forward in the future without the notice-and-comment and administrative-appeal procedures that respondents contend are required by the ARA. Thus, with respect to the application of Sections 215.4(a) and 215.12(f) to the Burnt Ridge Project—the only site-specific action challenged in this case—the settlement provided respondents all the relief they sought. In any event, because the counts of respondents' complaint challenging the Burnt Ridge Project were *dismissed with prejudice* pursuant to the parties' agreement, there was no longer any case before the courts below (much less a "Case or Controversy" in the Article III sense) in which the legality of that project could properly be adjudicated.

B. After Respondents' Challenges To The Burnt Ridge Project Were Settled And Dismissed, The Prior Existence Of That Controversy Provided No Legitimate Ground For The Courts Below To Determine The Validity Of 36 C.F.R. 215.4(a) And 215.12(f)

The court of appeals recognized that, under *Abbott Laboratories* and subsequent cases, respondents had failed to establish a ripe controversy with respect to regulatory provisions other than 36 C.F.R. 215.4(a) and 215.12(f). See Pet. App. 12a-15a. The court explained that the Burnt Ridge Project was "the only project specifically referenced in the complaint," and that, although Sections 215.4(a) and 215.12(f) "were applied in the context of the Burnt Ridge Project," respondents had "not shown that the other challenged regulations were applied in the context of the Burnt Ridge Timber Sale or any other specified project." *Id.* at 14a. The court concluded that "[t]he record is speculative and incomplete with respect to the remaining regulations, so the issues

are not fit for judicial decision under *Abbott Laboratories*." *Ibid.* Respondents have not sought review of that holding in this Court.

Despite the parties' settlement of the Burnt Ridge Project dispute, however, the court of appeals held that respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained justiciable. Pet. App. 15a. The court explained:

> The parties' agreement to settle the Burnt Ridge Timber Sale dispute does not affect the ripeness of [respondents'] challenge to 36 C.F.R. §§ 215.12(f) and 215.4(a). The record remains sufficiently concrete to permit this court to review the application of the regulation[s] to the project and to determine if the regulations as applied are consistent with the ARA.

Ibid. That reasoning is erroneous in several respects.

1. While the court of appeals may have been correct that a mooting event, such as the settlement here, generally "does not affect the ripeness" of a pending legal challenge, such an event hardly leaves the case's justiciability unaffected. Under established mootness principles, a claim does not remain justiciable simply because the existing record is sufficient to allow an informed decision on the merits of a legal issue. Rather, the plaintiff must establish a *continuing concrete stake* in the outcome of the litigation in order to obtain relief in court. See, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) ("The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins * * * [this Court's] mootness jurisprudence."); pp. 33-34, *supra*. Once the Forest Service withdrew the Burnt Ridge Pro-

ject and agreed to prepare an EIS or EA with respect to any future implementation of the project (thereby triggering the availability of the notice, comment, and appeals procedures under the ARA regulations), respondents had no concrete practical stake in the question whether 36 C.F.R. 215.4(a) and 215.12(f) could validly have been applied to that agency action.[13]

2. Because two of the respondent organizations (Sequoia ForestKeeper and the Sierra Club) established that one of their members (Ara Marderosian, see J.A. 16-17) would likely have been injured if the Burnt Ridge Project had gone forward, they had standing to challenge that site-specific action. In that regard, those organizations were entitled to argue that the project could not lawfully be implemented unless and until the ARA's notice-and-comment and administrative-appeal requirements had been satisfied, and that the regulatory exemptions from those procedural requirements were contrary to statute and therefore invalid. The reviewable "agency action" in such a suit, however, would have been the Burnt Ridge Project itself, not 36 C.F.R. 215.4(a) and/or 215.12(f). See pp. 14-28, *supra*. Once the parties settled their dispute concerning the only "agency action" that was properly subject to judicial review, and respondents dismissed their challenge to that project, their entire suit ought to have been dismissed.

In holding that the parties' settlement did not preclude respondents' challenge to 36 C.F.R. 215.4(a) and

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[13] In the settlement, the parties agreed that Counts 7-15 of respondents' complaint, which asserted facial challenges to various Forest Service regulations implementing the ARA, were "not affected by this settlement and that this settlement shall not deprive the Court of jurisdiction over these claims." J.A. 75. At the same time, the settlement preserved all of the government's defenses to those claims. J.A. 76.

215.12(f), the court of appeals suggested that it would "review the application of the regulation[s] to the [Burnt Ridge] [P]roject and * * * determine if the regulations as applied are consistent with the ARA." Pet. App. 15a. The court's subsequent merits analysis (see *id.* at 15a-20a), however, did not mention the Burnt Ridge Project, nor did the court analyze the challenged regulations "as applied" to that or any other site-specific action (doing so presumably would have underscored that the site-specific dispute was moot). Rather, having found that a single identified application of Sections 215.4(a) and 215.12(f) rendered those rules ripe for judicial review, the court purported to conduct the same sort of direct inquiry into the validity of the regulations on their face that might have been appropriate under a special statute in which "Congress explicitly provides for [the courts'] correction of the administrative process at a higher level of generality." *NWF*, 497 U.S. at 894. The court of appeals ultimately concluded, moreover, not that Sections 215.4(a) and 215.12(f) are invalid "as applied" (Pet. App. 15a) to the Burnt Ridge Project, but simply that they "are invalid" (*id.* at 20a), and it affirmed the district court's nationwide injunction "precluding any enforcement and implementation of the invalidated regulations" (*id.* at 21a). See *id.* at 21a-22a; pp. 40-47, *infra*.[14]

The court of appeals concluded that the settlement "does not affect the ripeness" of respondents' contention that 36 C.F.R. 215.4(a) and 215.12(f) are contrary to statute. Pet. App. 15a. Respondents' attack on Sections 215.4(a) and 215.12(f) was initially ripe for judicial con-

[14] As noted above, however, in the counts of their complaint challenging the Burnt Ridge Project, respondents did not actually challenge the two regulations at issue here as applied to that project. See note 12, *supra*.

sideration, however, precisely and only because the Burnt Ridge Project provided a reviewable agency action whose legality depended in part on the validity of those regulations. And although the settlement rendered that project-specific challenge no less ripe, it rendered it moot beyond peradventure. Once respondents' challenge to that project ceased to be justiciable as a result of the parties' settlement, respondents did not enjoy some sort of residual standing, but were left with the same sort of direct facial challenge to Sections 215.4(a) and 215.12(f) that they attempted to pursue with respect to the other contested regulations—*i.e.*, the same facial challenge that the court of appeals held was unripe for review.

IV. THE NATIONWIDE INJUNCTION WAS IMPROPER

As a final manifestation of its conflation of the moot as-applied challenge and the unripe facial challenge, the district court concluded that its injunction should be given nationwide effect, on the ground that, "[a]lthough this action originally challenged the Burnt Ridge Project in California, the case evolved from challenging a specific project in a specific forest to challenging regulations, applicable nationwide, promulgated by the Forest Service." Pet. App. 32a. The court of appeals held that the nationwide injunction was "compelled by the text of the [APA]," and specifically by 5 U.S.C. 706, which directs the reviewing court to "set aside" agency action that is found to be unlawful. See Pet. App. 21a. That holding is erroneous.

A. The Text Of The APA Does Not Support, Let Alone Compel, The Nationwide Injunction Entered In This Case

The APA provides that "[t]he reviewing court shall * * * (2) hold unlawful and set aside agency action,

findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706. In construing that language to require a nationwide injunction against enforcement of 36 C.F.R. 215.4(a) and 215.12(f), the court of appeals implicitly assumed that the relevant "agency action[s]" to be "h[e]ld unlawful" and "set aside" were the regulations themselves. That is incorrect.

The term "agency action" in 5 U.S.C. 706 refers back to 5 U.S.C. 704, which authorizes judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." See pp. 19-21, *supra*. Where (as here) no special statutory provision "permit[s] broad regulations to serve as the 'agency action,' and thus to be the object of judicial review directly," *NWF*, 497 U.S. at 891, the final agency action that is the proper subject of judicial review (and the proper subject of any injunction) is the agency decision approving a site-specific project, not the regulation itself. If the court finds that a regulation on which the agency relied in rendering that decision is unlawful (and that its application was not harmless error, see *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2530 (2007)), the proper relief is for the court to hold the site-specific decision unlawful (*i.e.*, to "hold unlawful" the *reviewable* "agency action") because it rests on the regulation the court found to be invalid, not to go beyond the confines of the case and invalidate the regulation in all of its potential applications to *other* site-specific decisions. If the court of appeals in this case had correctly identified the Burnt Ridge Project as the only "final agency action" properly subject to challenge, the appropriate relief (even if the case had remained live) could have extended no further

than a declaratory judgment that the decision approving that project was unlawful or an injunction prohibiting petitioners from carrying out that project until the Forest Service had satisfied the requirements the court of appeals found to be imposed by the ARA.

Furthermore, where, as here, no special statutory review provision applies, the proper form of proceeding under the APA is a suit for declaratory or injunctive relief. See 5 U.S.C. 703 (in the absence of a special statutory review procedure relevant to the subject matter, the form of proceeding under the APA is "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction"). Declaratory and injunctive remedies are equitable and therefore discretionary in nature. See *CSS*, 509 U.S. at 57 (quoting *Abbott Labs.*, 387 U.S. at 148); pp. 18-19, *supra*. Indeed, the APA's very reference to actions for "declaratory judgments" makes clear that *no* injunction—much less a nationwide injunction—is in any sense compelled by the APA when agency action is held unlawful. See H.R. Rep. No. 1980, 79th Cong., 2d Sess. 42 (1946) (referring to possibility of suits for declaratory relief to "determine the validity or application of a rule or order"); see also S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). Rather, equitable relief must be tailored to the particular final agency action and parties before the court and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); see *United States DoD* v. *Meinhold*, 510 U.S. 939 (1993) (granting stay of Armed-Forces-wide injunction, except as to individual plaintiff). Cf. *Gonzales* v. *Carhart*, 127 S. Ct. 1610, 1639 (2007) (noting that "[a]s

applied challenges are the basic building blocks of constitutional adjudication") (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)).[15]

B. The Court Of Appeals' Approach Disserves The Orderly And Evenhanded Development Of The Law With Respect To Questions Concerning The Validity Of Agency Regulations

1. Construing the APA to require a nationwide injunction in cases like this one would also impede the usual process by which disputed legal issues are considered by different circuits before (if necessary) being resolved by this Court. In holding that nonmutual collateral estoppel should not apply against the United States, this Court explained:

> A rule allowing nonmutual collateral estoppel against the government * * * would substantially thwart the development of important questions of law by

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[15] Accordingly, even when a regulation is ripe for pre-enforcement review because it governs primary conduct and would require a regulated party either to change its behavior immediately or to risk serious penalties, a court that finds a rule to be invalid should "set aside" the regulation only in the sense of putting the rule to one side and removing it from consideration as a lawful basis for sustaining the application of the regulation to the plaintiff. See *Webster's Third New International Dictionary of the English Language* 2077 (1993) ("set aside") (definition 1: "to put to one side: DISCARD"; definition 3: "to reject from consideration"); *Webster's New International Dictionary of the English Language* 2291 (2d ed. 1958) (definition a: "To put to one side; discard; dismiss"; definition b: "To reject from consideration; overrule"). Even in such a case, the regulation therefore should be declared unlawful or enjoined only as to the party before the court. See, *e.g.*, *Virginia Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 392-394 (4th Cir. 2001).

> freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.

United States v. *Mendoza*, 464 U.S. 154, 160 (1984); see *id.* at 163 (explaining that the Court's preferred approach "will better allow thorough development of legal doctrine by allowing litigation in multiple forums"). The Court has thus recognized that, as a general matter, recurring legal issues involving the federal government should be subject to relitigation in different circuits.

The court of appeals' approach in this case reintroduces the same practical difficulties that this Court in *Mendoza* sought to avoid.[16] The Ninth Circuit's affirmance of the nationwide injunction forced the government either to forgo implementation of 36 C.F.R. 215.4(a) and 215.12(f) altogether, or to seek this Court's review of the first court of appeals decision that had ad-

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[16] In support of its conclusion that the injunction in this case should be given nationwide effect, the district court quoted with evident approval the Third Circuit's. statement that "in most situations, a far better approach for an administrative agency would be to accept the first ruling of a court of appeals on a particular point or else seek reversal in the Supreme Court or a statutory change by Congress. To shop in a number of courts of appeals in hopes of securing favorable decisions is not only wasteful of overtaxed appellate resources but dissipates agency energies as well." Pet. App. 32a (quoting *Hi-Craft Clothing Co.* v. *NLRB*, 660 F.2d 910, 912 n.1 (3d Cir. 1981)). The Third Circuit's discussion in *Hi-Craft Clothing Co.* concerns the precedential effect of appellate decisions, not the proper scope of a district court injunction. In any event, it is clearly inconsistent with, and has been superseded by, this Court's intervening decision in *Mendoza*.

dressed the validity of those regulations.[17] Except where Congress has specifically authorized a single lower court to vacate a regulation and resolve such questions on a nationwide basis, this Court's precedents make clear that the government should not be put to that choice (with the attendant distortion of this Court's normal ability to defer review, absent relatively unusual

[17] The government has not petitioned for certiorari at this time on the merits question whether 36 C.F.R. 215.4(a) and 215.12(f) are consistent with the ARA. Respondents' current challenge to those regulations is non-justiciable, the nationwide injunction was in any event improper, and no other court of appeals has yet addressed the merits issue. Indeed, if this Court had not granted certiorari to review the Ninth Circuit's decision in this case, that ruling would have prevented any other court of appeals from considering the question.

The analysis of the merits issue by the courts below, however, is seriously flawed. The ARA directs the agency to "establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans," ARA § 322(a), 106 Stat. 1419, and it provides a right of administrative appeal to persons who have participated in the public-comment process, ARA § 322(c), 106 Stat. 1419. The statute does not expressly state that the notice-and-comment and administrative-appeal procedures must apply to *all* such projects, and Congress did not likely intend for the ARA's procedural requirements to apply inflexibly to *every* action, no matter how minor, that might be characterized as "implementing land and resource management plans." See 68 Fed. Reg. at 33,585; pp. 3-4, 27-28, *supra*. Indeed, the district court acknowledged that the ARA allows the Forest Service to exempt at least *some* "environmentally insignificant projects" from the ARA's notice-and-comment and administrative-appeal requirements. Pet. App. 51a; see *id.* at 51a-52a; J.A. 79-80; pp. 6, 27, *supra*. If the ARA permits the Forest Service to distinguish between environmentally significant and insignificant projects, and to exempt the latter from the notice-and-comment and administrative-appeal procedures mandated by the statute, nothing in the text or purposes of the ARA precludes the agency from incorporating the pre-existing distinction between projects that require an EIS or EA and those that do not.

factors, until more than one court of appeals has addressed the question).

2. Under certain circumstances, specialized mechanisms are available to provide a broader resolution of a legal issue that can be expected to affect a large number of persons. If the criteria set forth in Federal Rule of Civil Procedure 23 are satisfied, for example, a class can be certified and a recurring question of law resolved more generally, sometimes even on a nationwide basis. See *Yamasaki*, 442 U.S. at 701 (explaining that "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [potential plaintiff] to be litigated in an economical fashion under Rule 23"). Congress also occasionally confers upon a single court, typically the District of Columbia Circuit, the exclusive authority to determine (subject to review by this Court) whether particular categories of agency regulations are valid. See, *e.g.*, 42 U.S.C. 7607(b)(1) (petition for review of an Environmental Protection Agency regulation of nationwide applicability under the Clean Air Act must be filed in the District of Columbia Circuit within 60 days after the rule is published in the *Federal Register*). Except where such a mechanism is expressly made available, however, the "case-by-case approach" described in *NWF* "is the traditional, and remains the normal, mode of operation of the courts." *NWF*, 497 U.S. at 894.[18]

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[18] Cf., *e.g.*, *Everhart* v. *Bowen*, 853 F.2d 1532, 1539 (10th Cir. 1988) ("Absent a class certification, the district court should not have treated the suit as a class action by granting statewide injunctive relief, and accordingly should have tailored its injunction to affect only those persons over whom it has power.") (citations, brackets, and internal quotation marks omitted), rev'd on other grounds *sub nom. Sullivan* v. *Everhart*, 494 U.S. 83 (1990); *Brown* v. *Trustees of Boston Univ.*, 891

The approach taken by the court of appeals in this case is particularly unwarranted because it subjects the government to the risks and burdens associated with a nationwide class action or special review provision, without providing the government the corresponding benefit—a definitive resolution of the disputed legal issue binding upon a broad range of potential plaintiffs, see, *e.g.*, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (explaining that Federal Rule of Civil Procedure 23 "was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit")—that such mechanisms ordinarily entail. Having held on the merits that 36 C.F.R. 215.4(a) and 215.12(f) are contrary to the ARA and therefore invalid, the courts below imposed substantially the same relief as might have been appropriate in a nationwide class action or special review proceeding. By contrast, if the courts below had *sustained* Sections 215.4(a) and 215.12(f) against respondents' statutory challenge, other plaintiffs would have remained free to relitigate the same issue when the regulations were applied to projects in other jurisdictions. Absent clear statutory text compelling that asymmetrical result—and the text of 5 U.S.C. 706 contains nothing remotely so requiring—the court of appeals plainly erred in approving a nationwide injunction.

F.2d 337, 361 (1st Cir. 1989) (holding injunction overbroad insofar as it extended beyond that necessary to redress the plaintiff's injury, and explaining that "[o]rdinarily, classwide relief * * * is appropriate only where there is a properly certified class"), cert. denied, 496 U.S. 937 (1990).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to dismiss the complaint.

Respectfully submitted.

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