SUPREME COURT OF THE UNITED STATES

No. 02–196

NATIONAL PARK HOSPITALITY ASSOCIATION, PETITIONER *v.* DEPARTMENT OF THE INTERIOR ET AL.

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

[May 27, 2003]

JUSTICE THOMAS delivered the opinion of the Court.

Petitioner, a nonprofit trade association that represents concessioners doing business in the national parks, challenges a National Park Service (NPS) regulation that purports to render the Contract Disputes Act of 1978 (CDA), 92 Stat. 2383, 41 U. S. C. §601 *et seq*., inapplicable to concession contracts. We conclude that the controversy is not yet ripe for judicial resolution.

I

The CDA establishes rules governing disputes arising out of certain Government contracts.[1] The statute pro-

[1] Title 41 U. S. C. §602(a) provides:

"Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) entered into by an executive agency for—

"(1) the procurement of property, other than real property in being;

"(2) the procurement of services;

"(3) the procurement of construction, alteration, repair or maintenance of real property; or,

vides that these disputes first be submitted to an agency's contracting officer. §605. A Government contractor dissatisfied with the contracting officer's decision may seek review either from the United States Court of Federal Claims or from an administrative board in the agency. See §§606, 607(d), 609(a). Either decision may then be appealed to the United States Court of Appeals for the Federal Circuit.[2] See 28 U. S. C. §1295; 41 U. S. C. §607(g).

Since 1916 Congress has charged NPS to "promote and regulate the use of the Federal areas known as national parks," "conserve the scenery and the natural and historic objects and the wild life therein," and "provide for [their] enjoyment [in a way that] will leave them unimpaired for the enjoyment of future generations." An Act To establish a National Park Service, 39 Stat. 535, 16 U. S. C. §1. To make visits to national parks more enjoyable for the public, Congress authorized NPS to "grant privileges, leases, and permits for the use of land for the accommodation of visitors." §3, 39 Stat. 535. Such "privileges, leases, and permits" have become embodied in national parks concession contracts.

The specific rules governing national parks concession contracts have changed over time. In 1998, however, Congress enacted the National Parks Omnibus Management Act of 1998 (1998 Act or Act), Pub. L. 105–391, 112 Stat. 3497 (codified with certain exceptions in 16 U. S. C. §§5951–5966), establishing a new and comprehensive concession management program for national parks. The 1998 Act authorizes the Secretary of the Interior to enact regulations implementing the Act's provisions, §5965.

"(4) the disposal of personal property."

[2]The CDA also provides that a prevailing contractor is entitled to prejudgment interest. §611.

NPS, to which the Secretary has delegated her authority under the 1998 Act, promptly began a rulemaking proceeding to implement the Act. After notice and comment, final regulations were issued in April 2000. 65 Fed. Reg. 20630 (2000) (codified in 36 CFR pt. 51). The regulations define the term "concession contract" as follows:

> "A *concession contract (or contract)* means a binding written agreement between the Director and a concessioner . . . . Concession contracts are not contracts within the meaning of 41 U. S. C. 601 *et seq.* (the Contract Disputes Act) and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions."[3] 36 CFR §51.3 (2002).

Through this provision NPS took a position with respect to a longstanding controversy with the Department of Interior's Board of Contract Appeals (IBCA). Beginning in 1989, the IBCA ruled that NPS concession contracts *were* subject to the CDA, see *R & R Enterprises,* 89–2 B. C. A., ¶21708, pp. 109145–109147 (1989), and subsequent attempts by NPS to convince the IBCA otherwise proved unavailing, *National Park Concessions, Inc.,* 94–3 B. C. A., ¶27104, pp. 135096–135098 (1994).

II

Petitioner challenged the validity of §51.3 in the District Court for the District of Columbia. *Amfac Resorts, L. L. C.* v. *United States Dept. of Interior,* 142 F. Supp. 2d 54, 80–82 (2001). The District Court upheld the regulation, applying the deference principle of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837

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[3] For ease of reference, throughout this opinion we will refer to the second sentence quoted in the text as §51.3.

(1984). The court concluded that the CDA is ambiguous on whether it applies to concession contracts and found NPS' interpretation of the CDA reasonable. 142 F. Supp. 2d, at 80–82.

The Court of Appeals for the District of Columbia Circuit affirmed, albeit on different grounds. *Amfac Resorts, L. L. C.* v. *United States Dept. of Interior,* 282 F. 3d 818, 834–835 (2002). Recognizing that NPS "does not administer the [CDA], and thus may not have interpretative authority over its provisions," the court placed no reliance on *Chevron* but simply "agree[d]" with NPS' reading of the CDA, finding that reading consistent with both the CDA and the 1998 Act. 282 F. 3d, at 835. We granted certiorari to consider whether the CDA applies to contracts between NPS and concessioners in the national parks. 537 U. S. 1018 (2002). Because petitioner has brought a facial challenge to the regulation and is not litigating any concrete dispute with NPS, we asked the parties to provide supplemental briefing on whether the case is ripe for judicial action. Tr. of Oral Arg. 62.

III

Ripeness is a justiciability doctrine designed "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 interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 148–149 (1967); accord, *Ohio Forestry Assn., Inc.* v. *Sierra Club,* 523 U. S. 726, 732–733 (1998). The ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," *Reno* v. *Catholic Social Services, Inc.,* 509 U. S. 43, 57, n. 18 (1993) (citations omitted), but, even in a case raising only prudential con-

cerns, the question of ripeness may be considered on a court's own motion. *Ibid.* (citing *Regional Rail Reorganization Act Cases,* 419 U. S. 102, 138 (1974)).

Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Abbott Laboratories*, *supra,* at 149. "Absent [a statutory provision providing for immediate judicial review], a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [Administrative Procedure Act (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. . . .)" *Lujan* v. *National Wildlife Federation,* 497 U. S. 871, 891 (1990). Under the facts now before us, we conclude this case is not ripe.

We turn first to the hardship inquiry. The federal respondents concede that, because NPS has no delegated rulemaking authority under the CDA, the challenged portion of §51.3 cannot be a legislative regulation with the force of law. See Brief for Federal Respondents 15, n. 6; Supplemental Brief for Federal Respondents 6. They note, though, that "agencies may issue interpretive rules 'to advise the public of the agency's construction of the statutes and rules *which it administers*,'" Brief for Federal Respondents 15, n. 6 (quoting *Shalala* v. *Guernsey Memorial Hospital,* 514 U. S. 87, 99 (1995)) (emphasis added), and seek to characterize §51.3 as such an interpretive rule.

We disagree. Unlike in *Guernsey Memorial Hospital*, where the agency issuing the interpretative guideline was

responsible for administering the relevant statutes and regulations, NPS is not empowered to administer the CDA. Rather, the task of applying the CDA rests with agency contracting officers and boards of contract appeals, as well as the Federal Court of Claims, the Court of Appeals for the Federal Circuit, and, ultimately, this Court. Moreover, under the CDA, any authority regarding the proper arrangement of agency boards belongs to the Administrator for Federal Procurement Policy. See 41 U. S. C. §607(h) ("Pursuant to the authority conferred under the Office of Federal Procurement Policy Act [41 U. S. C. §401 et seq.], the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this chapter, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards . . ."). Consequently, we consider §51.3 to be nothing more than a "general statemen[t] of policy" designed to inform the public of NPS' views on the proper application of the CDA. 5 U. S. C. §553(b)(3)(A).

Viewed in this light, §51.3 does not create "adverse effects of a strictly legal kind," which we have previously required for a showing of hardship. *Ohio Forestry Assn., Inc.,* 523 U. S., at 733. Just like the Forest Service plan at issue in *Ohio Forestry*, §51.3 "do[es] not command anyone to do anything or to refrain from doing anything; [it] do[es] not grant, withhold, or modify any formal legal license, power, or authority; [it] do[es] not subject anyone to any civil or criminal liability; [and it] create[s] no legal rights or obligations." *Ibid.*

Moreover, §51.3 does not affect a concessioner's primary conduct. *Toilet Goods Assn., Inc.* v. *Gardner,* 387 U. S. 158, 164 (1967); *Ohio Forestry Assn., supra,* at 733–734. Unlike the regulation at issue in *Abbott Laboratories*, which required drug manufacturers to change the labels, advertisements, and promotional materials they used in marketing prescription drugs on pain of criminal and civil

penalties, see 387 U. S., at 152–153, the regulation here leaves a concessioner free to conduct its business as it sees fit. See also *Gardner* v. *Toilet Goods Assn., Inc.,* 387 U. S. 167, 171 (1967) (regulations governing conditions for use of color additives in foods, drugs, and cosmetics were "self-executing" and had "an immediate and substantial impact upon the respondents").

We have previously found that challenges to regulations similar to §51.3 were not ripe for lack of a showing of hardship. In *Toilet Goods Assn.*, for example, the Food and Drug Administration (FDA) issued a regulation requiring producers of color additives to provide FDA employees with access to all manufacturing facilities, processes, and formulae. 387 U. S., at 161–162. We concluded the case was not ripe for judicial review because the impact of the regulation could not "be said to be felt immediately by those subject to it in conducting their day-to-day affairs" and "no irremediabl[y] adverse consequences flow[ed] from requiring a later challenge." *Id.,* at 164. Indeed, the FDA regulation was more onerous than §51.3 because failure to comply with it resulted in the suspension of the producer's certification and, consequently, could affect production. See *id.*, at 165, and n. 2. Here, by contrast, concessioners suffer no practical harm as a result of §51.3. All the regulation does is announce the position NPS will take with respect to disputes arising out of concession contracts. While it informs the public of NPS' view that concessioners are not entitled to take advantage of the provisions of the CDA, nothing in the regulation prevents concessioners from following the procedures set forth in the CDA once a dispute over a concession contract actually arises. And it appears that, notwithstanding §51.3, the IBCA has been quite willing to apply the CDA to certain concession contracts. *Watch Hill Concessions, Inc.,* 01–1 B. C. A., ¶31298, pp. 154520–154521 (IBCA 2001) (concluding that concession contract was subject to

the CDA despite the contrary language in §51.3).

Petitioner contends that delaying judicial resolution of this issue will result in real harm because the applicability *vel non* of the CDA is one of the factors a concessioner takes into account when preparing its bid for NPS concession contracts. See Supplemental Brief for Petitioner 4–6. Petitioner's argument appears to be that mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis. We are not persuaded. If we were to follow petitioner's logic, courts would soon be overwhelmed with requests for what essentially would be advisory opinions because most business transactions could be priced more accurately if even a small portion of existing legal uncertainties were resolved.[4] In short, petitioner has failed to demonstrate that deferring judicial review will result in real hardship.

We consider next whether the issue in this case is fit for review. Although the question presented here is "a purely legal one" and §51.3 constitutes "final agency action" within the meaning of §10 of the APA, 5 U. S. C. §704, *Abbott Laboratories*, *supra,* at 149, we nevertheless believe

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[4] Petitioner notes that its complaint challenged not only the regulation but also two specific prospectuses issued by NPS in late 2000. Thus, petitioner argues, even if the first challenge is not ripe, the latter two are reviewable under the Tucker Act, 28 U. S. C. §1491(b)(1). See Supplemental Brief for Petitioner 6–8. Petitioner did not seek certiorari review on these issues; accordingly, we decline to consider them. See this Court's Rule 14.1(a); *Yee* v. *Escondido,* 503 U. S. 519, 535–536 (1992).

Similarly, JUSTICE BREYER's reliance on the Tucker Act to show that the hardship requirement of *Abbott Laboratories* v. *Gardner,* 387 U. S. 136 (1967), has been satisfied, see *post*, at 4–5 (dissenting opinion), is misplaced. The fact that one "congressional statute" authorizes "immediate judicial relief from [certain types of] agency determinations," *ibid.*, says nothing about whether "immediate judicial review" is advisable for challenges brought against other types of agency actions based on a *different* statute.

that further factual development would "significantly advance our ability to deal with the legal issues presented," *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U. S. 59, 82 (1978); accord, *Ohio Forestry Assn., Inc.,* 523 U. S., at 736–737; *Toilet Goods Assn., supra,* at 163. While the federal respondents generally argue that NPS was correct to conclude that the CDA does not cover concession contracts, they acknowledge that certain types of concession contracts might come under the broad language of the CDA. Brief for Federal Respondents 33–34. Similarly, while petitioner and respondent Xanterra Parks & Resorts, LLC, present a facial challenge to §51.3, both rely on specific characteristics of certain types of concession contracts to support their positions. See Brief for Petitioner 21–23, 36; Brief for Respondent Xanterra Parks & Resorts, LLC, 20, 22. In light of the foregoing, we conclude that judicial resolution of the question presented here should await a concrete dispute about a particular concession contract.

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For the reasons stated above, we vacate the judgment of the Court of Appeals insofar as it addressed the validity of §51.3 and remand with instructions to dismiss the case with respect to this issue.

It is so ordered.