

No. 02-196

In the Supreme Court of the United States

NATIONAL PARK HOSPITALITY ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *ET AL.*,

Respondents.

**On Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit**

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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This supplemental brief is filed in response to the Court's March 4, 2003, order that the parties address the issue of ripeness.

Petitioner's challenge to 36 C.F.R. § 51.3 is plainly ripe under this Court's ripeness jurisprudence. As this Court has repeatedly explained, the "basic rationale" for the ripeness doctrine "is to prevent the courts * * * from entangling themselves in abstract disagreements over administrative policies" and to protect "agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). This inquiry "is best seen in a twofold aspect, requiring [the Court] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149.

Here, the question presented is eminently fit for judicial decision. The regulation at issue is final agency action, promulgated after notice-and-comment rulemaking and incorporated into the Code of Federal Regulations. The dispute is one of statutory interpretation; the legal positions of the parties are clearly established, and no factual development is required. Similarly, deferring adjudication would cause a significant hardship to NPS concessioners, who need to know *before* a dispute arises – and in fact, *before* deciding whether to bid on a concessions contract – what procedural mechanisms will apply to contractual disputes. In the CDA, Congress provided contractors a host of dispute-resolution protections, such as *de novo* review of agency decisions. See page 5, *infra*. As Congress recognized, the availability of these protections is critical to contractors in deciding "whether, and at what prices [to] compete for Government contract business." S. REP. NO. 95-1118, at 4; J.A. 21. Thus, no good reason exists to defer adjudication of an important question the answer to which will not change in the future.

A. The Issue Presented In The Petition Is Fit For Judicial Decision.

The question presented – whether disputes under NPS concessions contracts must be resolved pursuant to the CDA – is plainly fit for adjudication. As in *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), “[t]he question before [the Court] is purely one of statutory interpretation that would not ‘benefit from further factual development of the issues presented.’ Nor will * * * review ‘inappropriately interfere with further administrative action,’ since the [NPS] has concluded its consideration of the * * * issue.” *Id.* at 479 (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)).

Although the parties have referred to specific concessions contracts in their briefs (see, e.g., Pet. Br. 20-22; NPS Br. 31, 34) – and, as discussed below in Part C, this case involves not only an Administrative Procedure Act (“APA”) challenge to the NPS regulation but also Tucker Act challenges to specific prospectuses for specific NPS contracts – the legal issue presented does not depend *in any way* on the specific details of individual concessions contracts. The NPS has consistently argued that *no* concessions contracts are subject to the CDA, the position codified in its binding regulation; by contrast, petitioner contends that *all* of these commercial contracts are subject to the CDA.¹

Further administrative action is also not forthcoming. The NPS has steadfastly asserted in this case and for the past 20

¹ Even if the Court were to conclude – despite the contrary arguments of the parties in their briefs – that only some NPS concessions contracts are covered by the CDA, that determination could be made at this stage, without any further factual development. The only plausible subdivisions identified in the parties’ briefs are that not all concessions contracts procure the construction, repair, or maintenance of real property owned by the United States (see Pet. Br. 36; NPS Br. 33) and that a few concessions contracts authorize, but do not require, services (NPS Br. 34; Reply Br. 18). But neither of these subdivisions requires a fact-specific inquiry.

years that none of its concessions contracts are covered by the CDA. See NPS Br. 12 (“long-held view”); *id.* at 47; NPS Lodging 1. This case is therefore far removed from a situation, like that in *Ohio Forestry*, where a legal challenge is to a policy that would *curb*, but not *determine absolutely*, the result of future agency decision-making. In *Ohio Forestry*, for example, the “Land and Resource Management Plan” for Wayne National Forest “[did] not itself authorize the cutting of any trees.” 523 U.S. at 729. Rather, any actual logging would have to be proposed under a specific project authorization under that Plan, which could then be challenged in court. Thus, “immediate judicial review directed at [the Plan] could hinder agency efforts to *refine* its policies: (a) through revision of the Plan * * *, or (b) through application of the Plan in practice, *e.g.*, in the form of site-specific proposals, which are subject to review by a court.” *Id.* at 735 (emphasis added, citations omitted). In other words, in *Ohio Forestry* “the possibility that further consideration will actually occur * * * [was] not theoretical, but real.” *Ibid.* Here, by contrast, the NPS position that the CDA does not apply to any of its concessions contracts is fixed in a final agency action embedded in a regulation published in the C.F.R.

Finally, it is indisputable that, in an \$800 million program involving 590 concessions contracts in 131 national parks (see NPS Lodging 6), there *will* be disputes under concessions contracts in the future, which *will* need to be resolved. Accordingly, there is no chance that the issue of CDA coverage might simply go away and not need resolution.

B. Substantial Hardship Will Result From a Failure To Resolve The Question Presented At This Time.

The dispute here also fulfills the second prong of this Court’s ripeness jurisprudence – that the parties will suffer hardship were the Court not to reach the issue presented. The classic dichotomy for “hardship” purposes is between decisions where there is serious potential that delay will cause

significant hardship (exemplified by *Abbott Laboratories*) and those where delay has little cost and thus is appropriate (exemplified by *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967)). Immediate review is particularly warranted in “situation[s] in which primary conduct is affected” by a government rule (*id.* at 164), as in *Abbott Laboratories*.

1. This case falls firmly in the *Abbott Laboratories* category and thus should be immediately reviewed. In fact, the first example listed in *Toilet Goods* of a situation in which “primary conduct is affected” is “*when contracts must be negotiated*” (387 U.S. at 164 (emphasis added)) – exactly the situation presented here. A failure to review the NPS’s regulation now will affect these contract negotiations and thus “irremediable adverse consequences [will] flow from requiring a later challenge to this regulation.” *Id.* at 165.

That the regulation at issue here will impact the negotiation of NPS concessions contracts is evident. As Congress recognized when it enacted the CDA, “the way potential contractors view the disputes-resolution system influences how, whether, and at what prices they compete for Government contract business” (S. REP. NO. 95-1118, at 4).² In other words, as the NPHA explained in its Complaint, “[t]he manner in which the NPS deals with its concessioners is a significant factor in how much concessioners * * * will bid for

² See also, e.g., Edward A. Bernstein, *Law & Economics & the Structure of Value Adding Contracts: A Contract Lawyer’s View of the Law & Economics Literature*, 74 OR. L. REV. 189, 192 (1995) (“In general, the value to the promisee of a transaction implemented by a promise * * * depends upon the benefit of performance, the probability of performance, and *what the promisee will get in the event of nonperformance.*”) (emphasis added); Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 299 (1986) (uncertainty in the law may lead to excessive risk-aversion and thus to a loss of possible gains); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1741-1742 (2001).

concessions contracts.” See J.A. 21.³

The significant dispute-resolution protections contained in the CDA increase the attractiveness of concessions contracts. In particular, the CDA mandates (1) *de novo* review of NPS decisions in a contract dispute; (2) the payment of prejudgment interest to contractors in any successful dispute with the agency; and (3) the availability of an administrative process and far less formal and less costly adjudicatory procedures for small disputes. See Pet. Br. 3-4. If the CDA does not apply, the NPS will be free to impose almost any decision making procedure it chooses for disputes under concessions contracts, the results of which might thereafter be reviewed only under the deferential arbitrary and capricious standard.

Without the CDA, NPS concession contracting would thus be returned to a chaotic pre-CDA world in which contractors were deprived of the “procedural safeguards and other elements of due process that should be the right of litigants.” S. REP. NO. 95-1118, at 4. Moreover, instead of serving Congress’s express goal of making the NPS concessions program and procedures “more cost effective, more process efficient, less burdensome, and timelier” (16 U.S.C. § 5958(b)(1)(B)), removing CDA protections would have the exact opposite result. And the prices at which concessioners “compete for Government contract business” would be directly affected. S. REP. NO. 95-1118, at 4.

The NPS is expected to issue a large number of prospectuses during 2003, for contracts that have expired or are about to expire. A decision now will apprise bidders – many

³ In our district court briefing we explained that this issue is “ripe for review because [it] turns on a pure question of law that needs to be decided before interested parties must bid on NPS concessions contracts that will inevitably give rise to disputes that the parties will consider resolving through formal mechanisms. Whether the winning bidder will have effective remedies in the event of a breach by the NPS is material to the decision whether to bid and, if so, how much to bid.” See App., *infra*, 3a-4a.

of whom will be members of the NPHA – in these and future solicitations of their legal rights in the event of a dispute. This will impact the bids that the NPS receives, and will obviate the need for repeated adjudication of the subject in an unnecessary case-by-case fashion.

2. Delaying adjudication of the question presented would also increase the risk that the NPS will later argue that concessioners have acceded to the notion that the CDA does not apply to their contracts. The “Standard Concession Contract,” 65 Fed. Reg. 26,052 (May 4, 2000), provides in section 5(a) that it is subject to all “Applicable Laws” (*id.* at 26,065), a term defined in section 2(a) specifically to include 36 C.F.R. Part 51. See *id.* at 26,063. The two “Simplified Concession Contracts,” 65 Fed. Reg. 44,894 (July 19, 2000), duplicate this incorporation (see *id.* at 44,898, 44,899-44,900, 44,910, 44,912), as has every concessions contract issued under these form contracts. See, *e.g.*, J.A. 69, 80 (Grand Canyon contract); NPS Lodging 14, 18 (Denali contract).

Thus, the regulation exempting NPS concessions contracts from the CDA is incorporated as a term into each such contract, and indeed the NPS is required to reject any bid that deletes or objects to the terms of a proposed contract (see 36 C.F.R. §§ 51.3, 51.18), including the incorporated regulation asserting CDA inapplicability. The mere possibility that the NPS will make this waiver argument as a result of the illegal regulation challenged in this case has a chilling effect on the willingness of petitioner’s members to bid on contracts and thus is itself a harm to concessioners – even if, as we believe (see *Xanterra Br. 3*), CDA coverage could not be waived merely by entering into a concessions contract.

C. Even If Petitioner’s Challenge To The NPS Regulation Is Not Ripe, Its Challenges To Two Specific Solicitations Are Ripe.

Although the briefing has, to date, focused the Court’s attention on our APA challenge to 36 C.F.R. § 51.3, it bears

emphasis that we in fact brought five related legal challenges in our complaint.⁴ Even if the APA challenge to the regulation is not ripe, our challenge under the Tucker Act to *two specific prospectuses* issued by the NPS in late 2000 – the Yellowstone (“Hamilton Stores”) and Antelope Point prospectuses – which raise the issue whether the CDA applies to NPS concessions contracts, would nonetheless be ripe.⁵

These claims are included within the Question Presented. Although petitioner has, as a shorthand, explained its challenge to be generally to the validity of 36 C.F.R. § 51.3, the Question Presented is instead phrased in terms of the legal question “[w]hether the [CDA] applies to contracts between the [NPS] and private parties for the development, operation, and maintenance of concessions * * * in the national parks.” See Pet. I; see also Pet. Br. I. It was only because no one ever questioned the parallel nature of each of these challenges that the APA challenge to the regulation has been stressed in all of the parties’ briefs.

The Tucker Act specifically authorizes potential bidders, such as the NPHA’s members, to bring suit to challenge any term of “a solicitation by a Federal agency for bids or pro-

⁴ We challenged (1) the NPS’s final Regulation governing the concessions program, under the APA (Cplt. Ct. I, J.A. 23-24); (2) the Standard Concession Contract implementing that regulation, under both the APA and the Tucker Act (Cplt. Cts. II, III, J.A. 24-25), and (3) two specific prospectuses issued by the agency, under both the APA and the Tucker Act (Cplt. Cts. IV, V, App., *infra*, 1a-2a).

⁵ Portions of the Complaint addressing these two prospectuses were omitted from the Joint Appendix, because neither the petitioner nor the NPS believed them to be necessary to the Court’s adjudication of this matter. They are reproduced in the Appendix to this Supplemental Brief. See App., *infra*, 1a-2a.

The three other plaintiffs below also brought challenges to other specific solicitations. For example, respondent Xanterra sought declaratory and injunctive relief under the Tucker Act with respect to the NPS’s solicitation of the Grand Canyon contract discussed in our opening brief (at 20-22). See Xanterra Reply Br. 5.

posals for a proposed contract” and any “alleged violation of statute or regulation in connection with a procurement or a proposed procurement.” See 28 U.S.C. § 1491(b)(1).⁶ Thus, the Tucker Act, which effectively codified *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), makes clear that bidders on government contracts have the undisputed right to challenge unlawful contract solicitations either before or after the agency awards that contract.

Accordingly, were the Court to dismiss this case on ripeness grounds, it would effect a revolution in government contract law that would disrupt not only NPS contracting but *all* government contracting. Under settled principles of government contract law, there can be no doubt that the Tucker Act challenges to these two prospectuses, brought on behalf of NPHA members who were considering bidding on those contracts, are plainly ripe *even if* the challenge to the regulation itself is not ripe.⁷ And, because these challenges are substantively identical to the challenge to the regulation itself, previous briefing suffices to allow this Court to reach the merits of the Question Presented.

D. This Litigation Is Ripe Even If The NPS No Longer Claims Its Regulation Is A Binding Legislative Rule.

There has been some uncertainty expressed in other par-

⁶ At the time this litigation commenced, jurisdiction over such suits was shared between the district courts and the Court of Federal Claims. Since January 1, 2001, that jurisdiction has been consolidated in the Court of Federal Claims. See Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(d), 110 Stat. 3870.

⁷ The NPHA had associational standing to challenge these prospectuses: members of the NPHA were considering bidding on, and in fact did bid on, each of these two contracts; this litigation is germane to the NPHA’s purpose; and the declaratory relief sought in this litigation does not require that individual members participate in the lawsuit. See *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 552-553 (1996); *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977).

ties’ briefs over how to characterize the NPS’s regulation. See NPS Br. 15 n.6; Xanterra Reply Br. 3-4. As the court of appeals held, the NPS has no authority to administer the CDA, so this portion of 36 C.F.R. part 51 is not due deference. See Pet. Br. 11 n.2; Reply Br. 2 n.1. However, the regulation *as a whole* – 36 C.F.R. Part 51 – was issued under a specific grant of authority from Congress, contained in the 1998 Act. See 16 U.S.C. § 5965 (“the Secretary shall promulgate regulations appropriate for [the 1998 Act’s] implementation”). Thus, the regulation is plainly a legislative rule – in the sense that it binds both the agency and concessioners, was issued after notice-and-comment rulemaking, and is published in the Code of Federal Regulations – but is one that *in this particular respect* is not due deference. See Pet. Br. 11 n.2; cf., e.g., *Grand Canyon Trust v. F.A.A.*, 290 F.3d 339, 342 (D.C. Cir. 2002) (not giving deference to FAA under National Environmental Policy Act, because NEPA applies across agencies). In fact, the NPS defended its regulation as a binding rule in both the district court and the D.C. Circuit. See, e.g., NPS D.C. Cir. Br. 48 (claiming *Chevron* deference for 36 C.F.R. § 51.3).

At oral argument, counsel for the NPS indicated that the regulation might lack even the level of legal authority normally afforded to *interpretive* rules. However, even if the NPS now maintains that the rule at issue is merely an NPS directive of some indeterminate form – despite having been published in the C.F.R. after notice-and-comment rulemaking – this litigation would remain ripe. As discussed above, this Court has recognized that government contractors need to know the terms of contracts *before* they must bid on those contracts. See *Toilet Goods*, 387 U.S. at 164; see also pages 4-5, *supra*. Thus, a challenge even to *informal* agency action affecting the terms of a government contract would be ripe.⁸

⁸ We note that NPS concessions contracts purport to incorporate by reference not just “rules” and “regulations” but also the “policies” of the

Furthermore, in *Abbott Laboratories* this Court explained that an after-the-fact retreat from a regulation by the government should not affect ripeness. There, the Solicitor General asserted that the government would seek only civil injunctive relief under the statute at issue – rather than the criminal sanctions also available – and argued that as a result the litigation should be dismissed as unripe. This Court rejected that argument, explaining that the government’s retreat was irrelevant: “This action *at its inception* was properly brought and this subsequent representation of the Department of Justice should not suffice to defeat it.” 387 U.S. at 154 (emphasis added). Here, the fact that the NPS defended its regulation as a binding rule below means that its subsequent assertion that the regulation may in fact not warrant that level of authority is irrelevant.⁹

CONCLUSION

For the foregoing reasons, this Court should hold that the instant litigation is ripe and should reverse the judgment of the court of appeals.

NPS. See 65 Fed. Reg. at 26,063; 65 Fed. Reg. at 44,898, 44,910.

⁹ The only way in which the question whether 36 C.F.R. § 51.3 is lawful might not be subject to adjudication now is if the NPS’s retreat from this regulation is so extreme as to amount to a complete refusal to defend the regulation. As this Court recognized in *E.P.A. v. Brown*, 431 U.S. 99 (1977), if the government truly declines to defend a regulation, further adjudication of the lawfulness of that regulation would involve rendering an improper “advisory opinion.” *Id.* at 104. But, as Xanterra has explained, by publishing the regulation in the C.F.R. the NPS implicitly asserts that it is binding (see also, e.g., *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (Scalia, J.) (“[t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations”)) – and as discussed above, NPS concessions contracts include as incorporated terms all NPS “policies.” Thus, if the NPS is no longer willing to defend the regulation, that regulation should be vacated. See Xanterra Reply Br. 2-4.

Respectfully submitted.

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APPENDIX A

FURTHER EXCERPTS FROM NPHA COMPLAINT

[The following paragraphs were not included in the excerpts of the complaint reproduced in the Joint Appendix. In the original complaint, they appear after the conclusion of the text reproduced at J.A. 25.]

* * *

COUNT IV

(The Hamilton Stores and Antelope Point Prospectuses Violate The Administrative Procedure Act)

117. Paragraphs 1-105 are incorporated herein as if set forth in full.

118. Under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, a reviewing court has a duty to “hold unlawful and set aside” agency action found to be any of the following: (1) “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;” (2) “contrary to constitutional right, power, privilege, or immunity;” (3) “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;” and (4) “unsupported by substantial evidence.” 5 U.S.C. § 706(2).

119. The Hamilton Stores and Antelope Point Prospectuses must be held unlawful and set aside, because (as delineated above) they contain numerous terms that violate the 1998 Act, the 1965 Act, other statutory mandates, and contractual obligations of the agency under its existing contracts with concessioners.

COUNT V

**(The Hamilton Stores and Antelope Point Prospectuses
Violate The Tucker Act)**

120. Paragraphs 1-105 are incorporated herein as if set forth in full.

121. Under the Tucker Act, 28 U.S.C. § 1491, a reviewing court has a duty to “afford any relief that the court considers proper, including declaratory and injunctive relief except that monetary relief shall be limited to bid preparation and proposal costs” (28 U.S.C. § 1491(b)(2)), if agency action related to the “solicitation * * * for bids or proposals for a proposed contract or to the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement” (28 U.S.C. § 1491(b)(1)) is found to be any of the following: (1) “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;” (2) “contrary to constitutional right, power, privilege, or immunity;” (3) “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;” and (4) “unsupported by substantial evidence” (28 U.S.C. § 1491(b)(4) (incorporating the APA standard)).

122. The Hamilton Stores and Antelope Point Prospectuses must be held unlawful and set aside, because (as delineated above) they contain numerous terms that violate the 1998 Act, the 1965 Act, other statutory mandates, and contractual obligations of the agency under its existing contracts with concessioners.

* * *

APPENDIX B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

[CAPTION OMITTED]

**MEMORANDUM IN SUPPORT OF
CONCESSIONERS' SECOND JOINT MOTION
FOR PARTIAL SUMMARY JUDGMENT, ON THE
GROUNDS THAT PROVISIONS OF THE NPS
SOLICITATIONS AND REGULATIONS PERTAINING
TO CONTRACT PERFORMANCE AND CONCESSIONER CHOICE VIOLATE THE 1998 ACT**

* * *

**II. THE CONTRACT DISPUTES ACT GOVERNS NPS
CONCESSIONS CONTRACTS, JUST AS IT GOVERNS ALL PROCUREMENT CONTRACTS.**

In addition to asserting the right to change the terms of the bargain, the NPS also asserts the right to deprive concessioners of recourse to standard dispute resolution mechanisms. Specifically, the NPS claims that it is exempt from the Contract Disputes Act of 1978 (“CDA”), 41 U.S.C. § 601 *et seq.*, because concessions contracts are purportedly not “procurement” contracts. But this self-serving attempt to carve out the NPS from set rules that apply to almost all government agencies is squarely precluded by precedent. It is also ripe for review because the issue turns on a pure question of law that needs to be decided before interested parties must bid on NPS concessions contracts that will inevitably give rise to disputes that the parties will consider resolving through formal mechanisms. Whether the winning bidder

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will have effective remedies in the event of a breach by the NPS is material to the decision whether to bid and, if so, how much to bid. Accordingly, this Court should reverse the NPS's incorrect legal position on this important issue.

* * *