SUPREME COURT OF THE UNITED STATES

No. 91–1826

JANET RENO, ATTORNEY GENERAL, ET AL., PETITIONERS *v.* CATHOLIC SOCIAL SERVICES, INC., ET AL.

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

[June 18, 1993]

JUSTICE O'CONNOR, concurring in the judgment.

I agree that the District Courts in these two cases, *Reno* v. *Catholic Social Services, Inc. (CSS)* and *INS* v. *League of United Latin American Citizens (LULAC)*, erred in extending the application period for legalization beyond May 4, 1988, the end of the 12-month interval specified by the Reform Act. I would not, however, reach this result on ripeness grounds. The Court holds that a member of the plaintiff class in *CSS* or *LULAC* who failed to apply to the INS during the 12-month period does not now have a ripe claim to extend the application deadline. In my view, that claim *became ripe* after May 4, 1988, even if it was not ripe before. The claim may well lack merit, but it is no longer premature.

The Court of Appeals did not consider the problem of ripeness, and the submissions to this Court have not discussed that problem except in passing. See Pet. for Cert. 11, n. 13; Brief for Petitioners 20; Brief for Respondents 17, n. 23. Rather, certiorari was granted on two questions, to which the parties rightly have adhered: first, whether the District Courts had jurisdiction under 8 U. S. C. §1255a(f), the judicial-review provision of Title II of the Reform Act; and second, whether the courts properly extended the application period. See Pet. for Cert. I. The Court finds the jurisdictional challenge meritless under *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479 (1991), see *ante*, at 9–12, as do I. But instead of proceeding to consider the second question

presented, the Court *sua sponte* attempts to resolve the case on ripeness grounds. It reaches out to hold that "the promulgation of the challenged regulations did not itself give each *CSS* and *LULAC* class member a ripe claim; a class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him." *Ante*, at 15–16. This is new and, in my view, incorrect law. Moreover, even if it *is* correct, the new ripeness doctrine propounded by the Court is irrelevant to the case at hand.

Our prior cases concerning anticipatory challenges to agency rules do not specify when an anticipatory suit may be brought against a benefit-conferring rule, such as the INS regulations here. An anticipatory suit by a would-be beneficiary, who has not yet applied for the benefit that the rule denies him, poses different ripeness problems than a pre-enforcement suit against a duty-creating rule, see *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 148–156 (1967) (permitting pre-enforcement suit). Even if he succeeds in his anticipatory action, the would-be beneficiary will not receive the benefit until he actually applies for it; and the agency might then deny him the benefit on grounds other than his ineligibility under the rule. By contrast, a successful suit against the duty-creating rule will relieve the plaintiff immediately of a burden that he otherwise would bear.

Yet I would not go so far as to state that a suit challenging a benefit-conferring rule is necessarily unripe simply because the plaintiff has not yet applied for the benefit. "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 143 (1974). If it is "inevitable" that the challenged rule will "operat[e]" to the plaintiff's disadvantage—if the court can make a firm prediction that the plaintiff will apply for the benefit, and that the agency will deny the application by virtue of the rule—then there may well be a justiciable controversy that the court may find prudent to resolve.

I do not mean to suggest that a simple anticipatory challenge to the INS regulations would be ripe under the approach I propose. Cf. *ante*, at 14–15, n. 19. That issue need not be decided because, as explained below, these cases are *not* a simple

anticipatory challenge. See *infra*, at 5–8. My intent is rather to criticize the Court's reasoning—its reliance on a categorical rule that would-be beneficiaries cannot challenge benefit-conferring regulations until they apply for benefits.

Certainly the line of cases beginning with *Abbott Laboratories* does not support this categorical approach. That decision itself discusses with approval an earlier case that involved an anticipatory challenge to a benefit-conferring rule.

> "[I]n *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, the Court held to be a final agency action . . . an FCC regulation announcing a Commission policy that it would not issue a television license to an applicant already owning five such licenses, *even though no specific application was before the Commission*." 387 U. S., at 151 (emphasis added).

More recently, in *EPA* v. *National Crushed Stone Assn.*, 449 U. S. 64 (1980), the Court held that a facial challenge to the variance provision of an EPA pollution-control regulation was ripe even "prior to application of the regulation to a particular [company's] request for a variance." *Id.*, at 72, n. 12. And in *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190 (1983), the Court permitted utilities to challenge a state law imposing a moratorium on the certification of nuclear power plants, even though the utilities had not yet applied for a certificate. See *id.*, at 200–202. To be sure, all of these decisions involved licenses, certificates, or variances, which exempt the bearer from otherwise-applicable duties; but the same is true of the instant cases. The benefit conferred by the Reform Act—an adjustment in status to lawful temporary resident alien, see 8 U. S. C. §1255a(a)—readily can be conceptualized as a "license" or "certificate" to remain in the United States, or a "variance" from the immigration laws.

As for *Lujan* v. *National Wildlife Federation*, 497 U. S. 871 (1990), the Court there stated that:

> “Absent [explicit statutory authorization for immediate judicial review], 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 891–892 (citations omitted).

This language does not suggest that an anticipatory challenge to a benefit-conferring rule will of necessity be constitutionally unripe, for otherwise an “explicit statutory review” provision would not help cure the ripeness problem. Rather, *Lujan* points to the prudential considerations that weigh in the ripeness calculus: the need to “fles[h] out” the controversy and the burden on the plaintiff who must “adjust his conduct immediately.” These are just the kinds of factors identified in the two-part, prudential test for ripeness that *Abbott Laboratories* articulated. “The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” 387 U. S., at 149. See *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 581–582 (1985) (relying upon *Abbott Laboratories* test); *Pacific Gas*, *supra,* at 200–203 (same); *National Crushed Stone*, *supra,* at 72–73, n. 12 (same). At the very least, where the challenge to the benefit-conferring rule is purely legal, and

where the plaintiff will suffer hardship if he cannot raise his challenge until later, a justiciable, anticipatory challenge to the rule may well be ripe in the prudential sense. Thus I cannot agree with the Court that ripeness will never obtain until the plaintiff actually applies for the benefit.

But this new rule of ripeness law, even if correct, is irrelevant here. These cases no longer fall in the above-described category of anticipatory actions, where a would-be beneficiary simply seeks to invalidate a benefit-conferring rule before he applies for benefits. As the cases progressed in the District Courts, respondents amended their complaints to request an additional remedy beyond the invalidation of the INS regulations: an extension of the 12-month application period. Compare Sixth Amended Complaint in *CSS* (Record, Doc. No. 140), First Amended Complaint in *LULAC* (Record, Doc. No. 56) with Third Amended Complaint in *CSS* (Record, Doc. No. 69), Complaint in *LULAC* (Record, Doc. No. 1). That period expired on May 4, 1988, and the District Courts *thereafter* granted an extension. See App. to Pet. for Cert. 22a–28a, 50a–60a (orders dated June and August 1988). The only issue before us is whether these orders should have been entered. See *ante*, at 4–5, 8–9. Even if the Court is correct that a plaintiff cannot seek to invalidate an agency's benefit-conferring rule before applying to the agency for the benefit, it is a separate question whether the would-be beneficiary must make the wholly futile gesture of submitting an application *when the application period has expired and he is seeking to extend it.*

In the instant cases, I do not see why a class member who failed to apply to the INS within the 12-month period lacks a ripe claim to extend the application deadline, now that the period actually has expired. If Congress in the Reform Act had provided for an 18-month application period, and the INS had

closed the application period after only 12 months, no one would argue that court orders extending the period for 6 more months should be vacated on ripeness grounds. The orders actually before us are not meaningfully distinguishable. Of course, respondents predicate their argument for extending the period on the invalidity of the INS regulations, see *infra*, at 8–10, not on a separate statutory provision governing the length of the period, but this difference does not change the ripeness calculus. The "basic rationale" behind our ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements," when those "disagreements" are premised on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Union Carbide*, *supra*, at 580–581 (internal quotation marks omitted). There is no contingency to the closing of the 12-month application period. It is *certain* that an alien who now applies to the INS for legalization will be denied that benefit because the period has closed. Nor does prudence justify this Court in postponing an alien's claim to extend the period, since that claim is purely legal and since a delayed opportunity to seek legalization will cause grave uncertainty.

The Court responds to this point by reiterating that class members who failed to apply to the INS have not yet suffered a "concrete" injury, because the INS has not denied them legalization by virtue of the challenged regulations. See *ante*, at 16, n. 20. At present, however, class members are seeking to redress a different, and logically prior, injury: the denial of the very opportunity to apply for legalization.

The Court's ripeness analysis focuses on the wrong question: whether "the *promulgation* of the challenged regulations [gave] each *CSS* and *LULAC* class member a ripe claim." *Ante*, at 15 (emphasis added). But the question is not whether the class

members' claims were ripe *at the inception of these suits*, when respondents were seeking simply to invalidate the INS regulations and the 12-month application period had not yet closed. Whatever the initial status of those claims, they became ripe once the period had in fact closed and respondents had amended their complaints to seek an extension. In the *Regional Rail Reorganization Act Cases*, this Court held that "since ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the District Court's decision that must govern." 419 U. S., at 140. Accord, *Buckley* v. *Valeo*, 424 U. S. 1, 114–118 (1976) *(per curiam)*. Similarly, in the cases before us, it is the situation now (and, as it happens, at the time of the District Courts' orders), rather than at the time of the initial complaints, that must govern.

The Court also suggests that respondents' claim to extend the application period may well be "flatly" barred by 8 U. S. C. §1255a(f)(2), which provides: "No denial of adjustment of status [under Title II of the Reform Act] based on a late filing of an application for such adjustment may be reviewed by [any] court . . . ." See *ante*, at 16, n. 20. I find it remarkable that the Court might construe §1255a(f)(2) as barring *any* suit seeking to extend the application deadline set by the INS, while at the same time interpreting §1255a(f)(1) *not* to bar respondents' substantive challenge to the INS regulations, see *ante*, at 9–12. As the INS itself observes, the preclusive language in §1255a(f)(1) is "broader" than in §1255a(f)(2), because the latter provision uses the word "denial" instead of "determination." See Brief for Petitioners 19. If Congress in the Reform Act had provided for an 18–month application period, and the INS had closed the period after only 12 months, I cannot believe that §1255a(f)(2) would preclude a suit seeking to extend the period by 6 months. Nor do I think that §1255a(f)(2) bars respondents' claim to

extend the period, because that claim is predicated on their substantive challenge to the INS regulations, which in turn is permitted by §1255a(f)(1). In any event, §1255a(f)(2) concerns reviewability, not ripeness; whether or not that provision precludes the instant actions, the Court's ripeness analysis remains misguided.

Of course, the closing of the application period was not an unalloyed benefit for class members who had failed to apply. After May 4, 1988, those aliens had ripe claims, but they also became statutorily ineligible for legalization. The Reform Act authorizes the INS to adjust the status of an illegal alien only if he "appl[ies] for such adjustment during the 12-month period beginning on a date . . . designated by the Attorney General." 8 U. S. C. §1255a(a)(1)(A). As the INS rightly argues, this provision precludes the legalization of an alien who waited to apply until after the 12-month period had ended. The District Courts' orders extending the application period were not unripe, either constitutionally or prudentially, but they *were* impermissible under the Reform Act. "A court is no more authorized to overlook the valid [requirement] that applications be [submitted] than it is to overlook any other valid requirement for the receipt of benefits." *Schweiker* v. *Hansen*, 450 U. S. 785, 790 (1981) *(per curiam)*.

Respondents assert that equity requires an extension of the time limit imposed by §1255a(a)(1)(A). Whether that provision is seen as a limitations period subject to equitable tolling, see *Irwin* v. *Department of Veterans Affairs,* 498 U. S. 89, 95–96 (1990), or as a substantive requirement subject perhaps to equitable estoppel, see *Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 419–424 (1990), the District Courts needed some special reason to exercise that equitable power against the United States. The only reason respondents adduce is supposed "affirmative misconduct" by the INS. See

Irwin, supra, at 96. ("We have allowed equitable tolling in situations . . . where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"); *Richmond, supra,* at 421 ("Our own opinions have continued to mention the possibility, in the course of rejecting estoppel arguments, that some type of `affirmative misconduct' might give rise to estoppel against the Government"). Respondents argue that the INS engaged in "affirmative misconduct" by promulgating the invalid regulations, which deterred aliens who were ineligible under those regulations from applying for legalization. See Plaintiffs' Submission Re Availability of Remedies for the Plaintiff Class in *CSS,* pp. 6–15 (Record, Doc. No. 164), Plaintiffs' Memorandum on Remedies in *LULAC* (Record, Doc. No. 40). The District Courts essentially accepted the argument, ordering remedies coextensive with the INS' supposed "misconduct." The *CSS* court extended the application period for those class members who "knew of [the INS'] unlawful regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application," App. to Pet. for Cert. 25a; the *LULAC* court provided an almost identical remedy, see *id.*, at 59a.

I cannot agree that a benefit-conferring agency commits "affirmative misconduct," sufficient to justify an equitable extension of the statutory time period for application, simply by promulgating a regulation that incorrectly specifies the eligibility criteria for the benefit. When Congress passes a benefits statute that includes a time period, it has two goals. It intends *both* that eligible claimants receive the benefit *and* that they promptly assert their claims. The broad definition of "misconduct" that respondents propose would give the first goal absolute priority over the second, but I would not presume that Congress intends such a prioritization. Rather,

absent evidence to the contrary, Congress presumably intends that the two goals be harmonized as best possible, by requiring would-be beneficiaries to make a timely application *and* concurrently to contest the invalid regulation. “We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.” *Irwin*, *supra*, at 96. The broad equitable remedy entered by the District Courts in these cases is contrary to Congress's presumptive intent in the Reform Act, and thus is error. “`Courts of equity can no more disregard statutory . . . requirements and provisions than can courts of law.'” *INS* v. *Pangilinan*, 486 U. S. 875, 883 (1988) (quoting *Hedges* v. *Dixon County*, 150 U. S. 182, 192 (1893)).

I therefore agree with the Court that the District Courts' orders extending the application period must be vacated. I also agree that “front-desked” aliens already have “applied” within the meaning of §1255a(a)(1)(A). See *ante*, at 23, n. 29. On remand, respondents may be able to demonstrate particular instances of “misconduct” by the INS, beyond the promulgation of the invalid regulations, that might perhaps justify an extension for certain members of the *LULAC* or *CSS* classes. See Brief for Respondents 16–20, 35–42. I would not preclude the possibility of a narrower order requiring the INS to adjudicate the applications of both “front-desked” aliens and some aliens who were not “front-desked,” but neither would I endorse that possibility, because at this point respondents have made only the most general suggestions of “misconduct.”