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 STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, dissenting.

After Congress authorized a major amnesty program in 1986, the Government promulgated two regulations severely restricting access to that program. If valid, each regulation would have rendered ineligible for amnesty the members of the respective classes of respondents in this case. The Government, of course, no longer defends either regulation. See *ante*, at 4, 8. Nevertheless, one of the regulations was in effect for all but 12 days of the period in which applications for legalization were accepted; the other, for over half of that period. See *ante,* at 4, 6–7. Accordingly, after holding the regulations invalid, the District Courts entered orders extending the time for filing applications for certain class members. See *ante,* at 4, 8.

On appeal, the Government argued that the District Courts lacked jurisdiction both to entertain the actions and to provide remedies in the form of extended application periods. The Court of Appeals rejected the first argument on the authority of our decision in *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479 (1991). *Catholic Social Services, Inc.* v. *Thornburgh,* 956 F. 2d 914, 919–921 (CA9 1992). As the Court holds today, *ante*, at 9–12, that ruling was plainly correct. The Court of Appeals also correctly rejected the second argument advanced by the Government, noting that extension of the filing deadline effectuated Congress' intent to provide

“meaningful opportunities to apply for adjustments of status,” which would otherwise have been frustrated by enforcement of the invalid regulations. 956 F. 2d, at 921–922. We should, accordingly, affirm the judgment of the Court of Appeals.

This Court, however, finds a basis for prolonging the litigation on a theory that was not argued in either the District Courts or the Court of Appeals, and was barely mentioned in this Court: that respondents' challenges are not, for the most part, "ripe" for adjudication. *Ante*, at 13–17. I agree with JUSTICE O'CONNOR, *ante,* (opinion concurring in judgment), that the Court's rationale is seriously flawed. Unlike JUSTICE O'CONNOR, however, see *ante,* at 7, I have no doubt that respondents' claims were ripe as soon as the concededly invalid regulations were promulgated.

Our test for ripeness is two pronged, "requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149 (1967). Whether an issue is fit for judicial review, in turn, often depends on "the degree and nature of [a] regulation's present effect on those seeking relief," *Toilet Goods Assn., Inc.* v. *Gardner*, 387 U. S. 158, 164 (1967), or, put differently, on whether there has been some "concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him," *Lujan* v. *National Wildlife Federation*, 497 U. S. 871, 891 (1990). As JUSTICE O'CONNOR notes, we have returned to this two-part test for ripeness time and again, see *ante,* at 5, and there is no question but that the *Abbott Laboratories* formulation should govern this case.

As to the first *Abbott Laboratories* factor, I think it clear that the challenged regulations have an impact on respondents sufficiently "direct and immediate," 387 U. S., at 152, that they are fit for judicial review. My opinion rests, in part, on the unusual character of the amnesty program in question. As we explained in *McNary*, *supra:*

> "The Immigration Reform and Control Act of 1986 (Reform Act) constituted a major statutory response to the vast tide of illegal immigration

> that had produced a `shadow population' of literally millions of undocumented aliens in the United States. . . . [I]n recognition that a large segment of the shadow population played a useful and constructive role in the American economy, but continued to reside in perpetual fear, the Reform Act established two broad amnesty programs to allow existing undocumented aliens to emerge from the shadows." 498 U. S., at 481–483 (footnotes omitted).[1]

A major purpose of this ambitious effort was to eliminate the fear in which these immigrants lived, "`afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill.'" *Ayuda, Inc.* v. *Thornburgh*, 292 U. S. App. D. C. 150, 168, 948 F. 2d 742, 760 (1991) (Wald, J., dissenting) (quoting H. R. Rep. No. 99–682, pt. 1, p. 49 (1986). Indeed, in recognition of this fear of governmental authority, Congress established a special procedure through which "qualified designated entities," or "QDEs," would serve as a channel of communication between undocumented aliens and the INS, providing reasonable assurance that "emergence from the shadows" would result in amnesty and not deportation. 8 U. S. C. §1255a(c)(2); see *Ayuda*, 292 U. S. App. D. C., at 168, and n. 1, 948 F. 2d, at 760, and n. 1.

Under these circumstances, official advice that specified aliens were ineligible for amnesty was certain to convince those aliens to retain their "shadow" status rather than come forward. At the moment that decision was made—at the moment respondents conformed their behavior to the invalid regulations—those regulations concretely and directly

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[1]This case involves the first, and more important, of the two amnesty programs; *McNary* involved the second.

affected respondents, consigning them to the shadow world from which the Reform Act was designed to deliver them, and threatening to deprive them of the statutory entitlement that would otherwise be theirs.[2] Cf. *Lujan*, 497 U. S., at 891 (concrete application threatening harm as basis for ripeness).

The majority concedes, of course, that class members whose applications were "front-desked" felt the effects of the invalid regulations concretely, because their applications were "blocked then and there." See *ante*, at 19. Why "then and there," as opposed to earlier and elsewhere, should be dispositive remains unclear to me; whether a potential application is thwarted by a front-desk Legalization Assistant, by advice from a QDE, by consultation with a private attorney, or even by word-of-mouth regarding INS policies, the effect on the potential applicant is equally concrete, and equally devastating. In my view, there is no relevant difference, for purposes of ripeness, between respondents who were "front-desked," and those who can demonstrate, like the LULAC class, that they "`learned of their ineligibility following promulgation of the policy and who, relying upon information that they were ineligible, did not apply,'" *ante*, at 7, or, like the class granted relief in CSS, that they "`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," *ante*, at 4. As Judge Wald explained in *Ayuda*, *supra:*

> "[T]he majority admits that if low level INS officials had refused outright to accept legalization applications for filing, the district court could hear the suit. Even if the plaintiffs'

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[2]As the majority explains, the classes certified in both actions were limited to persons otherwise eligible for legalization. See *ante*, at 3, 7.

> affidavits are read to allege active discouragement rather than outright refusal to accept, this is a subtle distinction indeed, and one undoubtedly lost on the illegal aliens involved, upon which to grant or deny jurisdiction to challenge the practice." 292 U. S. App. D. C., at 169, n. 3, 948 F. 2d, at 761, n. 3 (Wald, J., dissenting) (internal citation omitted).

The second *Abbott Laboratories* factor, which focuses on the cost to the parties of withholding judicial review, also weighs heavily in favor of ripeness in this case. Every day during which the invalid regulations were effective meant another day spent in the shadows for respondents, with the attendant costs of that way of life. See *supra*, at 3. Even more important, with each passing day, the clock on the application period continued to run, increasing the risk that review, when it came, would be meaningless because the application period had already expired. See *Ayuda*, 292 U. S. App. D. C., at 178, 948 F. 2d, at 770 (Wald, J., dissenting).[3] Indeed, the dilemma respondents find themselves in today speaks volumes about the costs of deferring review in this situation. Cf. *Toilet Goods Assn.*, 387 U. S., at 164 (challenge not ripe where "no irremediable

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[3]"Absent judicial action, the period for filing for IRCA legalization would have ended and thousands of persons would have lost their chance for amnesty. In purely human terms, it is difficult—perhaps impossible—for those of us fortunate enough to have been born in this country to appreciate fully the value of that lost opportunity. For undocumented aliens, IRCA offered a one-time chance to come out of hiding, to stop running, to `belong' to America. The hardship of withholding judicial review is as severe as any that I have encountered in more than a decade of administrative review." 292 U. S. App. D. C., at 178, 948 F. 2d, at 770 (Wald, J., dissenting).

adverse consequences flow from requiring a later challenge").

Under *Abbott Laboratories*, then, I think it plain that respondents' claims were ripe for adjudication at the time they were filed. The Court's contrary holding, which seems to rest on the premise that respondents cannot challenge a condition of legalization until they have satisfied all other conditions, see *ante*, at 14–15, is at odds not only with our ripeness case law, but also with our more general understanding of the way in which government regulation affects the regulated. In *Northeastern Florida Chapter of Associated General Contractors of America* v. *Jacksonville*, ___ U. S. ___ (1993), for instance, we held that a class of contractors could challenge an ordinance making it more difficult for them to compete for public business without making any showing that class members were actually in a position to receive such business, absent the challenged regulation. We announced the following rule:

> "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The `injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." ___ U. S., at ___ (slip op., at 8–9).[4]

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[4]*Jacksonville* is, of course, an equal protection case, while respondents in this case are seeking a statutory benefit. If this distinction has any relevance to a ripeness analysis, then it should mitigate in favor of finding ripeness here; I assume we should be more reluctant to overcome jurisdictional hurdles to decide

Our decision in the *Jacksonville* case is well supported by precedent; the Court's ripeness holding today is notable for its originality.

Though my approach to the ripeness issue differs from that of JUSTICE O'CONNOR, we are in agreement in concluding that respondents' claims are ripe for adjudication. We also agree that the validity of the relief provided by the District Courts, in the form of extended application periods, turns on whether that remedy is consistent with congressional intent. See *ante,* at 10 (opinion concurring in judgment); *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 557–558 (1974) (equitable relief must be "consonant with the legislative scheme"); *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 313 (1982) (courts retain broad equity powers to enter remedial orders absent clear statutory restriction); *INS* v. *Pangilinan*, 486 U. S. 875, 883 (1988) (courts of equity bound by statutory requirements). Where I differ from JUSTICE O'CONNOR is in my determination that extensions of the application period in this case were entirely consistent with legislative intent, and hence well within the authority of the District Courts.

It is no doubt true that "[w]hen Congress passes a benefits statute that includes a time period, it has two goals." See *ante,* at 9 (opinion concurring in judgment). Here, Congress' two goals were finality in its one-time amnesty program, and the integration of productive aliens into the American mainstream. See *Perales* v. *Thornburgh*, 967 F. 2d 798, 813 (CA2 1992). To balance both ends, and to achieve each, Congress settled on a 12-month application period. Twelve months, Congress determined, would be long enough for frightened aliens to come to understand the program and to step forward with applications, especially when the full period was combined with

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constitutional issues than to effectuate statutory programs.

the special outreach efforts mandated by the Reform Act. *Ibid.;* see 8 U. S. C. §1255a(i) (requiring broad dissemination of information about amnesty program); 8 U. S. C. §1255a(c)(2) (establishing QDEs). The generous 12-month period would also serve the goal of finality, by "`ensur[ing] true resolution of the problem and . . . that the program will be a one-time-only program.'" 967 F. 2d, at 813 (quoting H. R. Rep. No. 99–682, pt 1, p. 72 (1986).

The problem, of course, is that the full 12-month period was never made available to respondents. For the CSS class, the 12-month period shrank to precisely 12 days during which they were eligible for legalization; for the LULAC class, to roughly 5 months. See *supra*, at 1. Accordingly, congressional intent required an extension of the filing deadline, in order to make effective the 12-month application period critical to the balance struck by Congress. See 956 F. 2d, at 922; *Perales*, 967 F. 2d, at 813.

That congressional intent is furthered, not frustrated, by the equitable relief granted here distinguishes this case from *Pangilinan*, *supra*, in which we held that a court lacked the authority to order naturalization for certain persons after expiration of a statutory deadline. 486 U. S., at 882–885. In *Pangilinan*, we were faced with a "congressional command [that] could not be more manifest" specifically precluding the relief granted. *Id.*, at 884. The Reform Act, on the other hand, contains no such explicit limitation.[5] Indeed, the

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[5]There is no language in the Reform Act prohibiting an extension of the application period. Section 1255a(f)(2), relied on by the Government, see Brief for Petitioners 28–29, precludes review of *individual* late-filed applications; like §1255a(f)(1), it has no bearing on the kind of broad-based challenge and remedy at issue here. See *ante*, at 11–12; *ante,* at 7–8 (opinion concurring in judgment).

Reform Act does not itself contain a statutory deadline at all, leaving it largely to the Attorney General to delineate a 12-month period. 8 U. S. C. §1255a(a)(1)(A). This delegation highlights the relative insignificance to Congress of the application cutoff date, as opposed to the length of the application period itself. See *Perales*, 967 F. 2d, at 813, n. 4.

Finally, I can see no reason to limit otherwise available relief to those class members who experienced "front-desking," on the theory that they have "applied" for legalization. *Cf. ante*, at 23, n. 29; *ante,* at 10 (opinion concurring in judgment). It makes no sense to condition relief on the filing of a futile application. Indeed, we have already rejected the proposition that such an application is necessary for receipt of an equitable remedy. In *Teamsters* v. *United States*, 431 U. S. 324 (1977), a case involving discriminatory employment practices under Title VII of the Civil Rights Act of 1964, we held that those who had been deterred from applying for jobs by an employer's practice of rejecting applicants like themselves were eligible for relief along with those who had unsuccessfully applied. We reasoned:

> "A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.
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> ". . . When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." 431 U. S., at 365–366.

The same intelligent principle should control this case. A respondent who can show that she would have applied for legalization but for the invalid

regulations is "in a position analogous to that of an applicant," and entitled to the same relief. See 431 U. S., at 368.

In my view, then, the Court of Appeals was correct on both counts when it affirmed the District Court orders in this case: Respondents' claims were justiciable when filed, and the relief ordered did not exceed the authority of the District Courts. Accordingly, I respectfully dissent.