

BREYER, J., dissenting

**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 BREYER, with whom JUSTICE O’CONNOR joins,  
dissenting.

Like the majority, I believe that petitioner National Park Hospitality Association has standing here to pursue its legal claim, namely, that the dispute resolution procedures set forth in the Contract Disputes Act of 1978 (CDA), 41 U. S. C. §601 *et seq.*, apply to national park concession contracts. But, unlike the majority, I believe that the question is ripe for our consideration.

I cannot agree with JUSTICE STEVENS that the trade association lacks Article III standing to bring suit on behalf of its members. See *ante*, at 4–5 (opinion concurring in judgment). In my view, the National Park Service’s definition of “concession contract” to exclude the CDA’s protections (a definition embodied in the regulation about which the Association complains, see 36 CFR §51.3 (2002)) causes petitioner and its members “injury in fact.” *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560 (1992) (discussing requirements of “injury in fact,” causation, and redressability); see also *Hunt v. Washington State Apple Advertising Comm’n*, 432 U. S. 333, 343 (1977) (association’s standing based on injury to a member).

For one thing, many of petitioner’s members are parties to, as well as potential bidders for, park concession con-

tracts. Lodging for Federal Respondents 6 (listing 590 concession contracts in 131 parks). Those members will likely find that disputes arise under the contracts. And in resolving such disputes, the Park Service, following its regulation, will reject the concessioners' entitlement to the significant protections or financial advantages that the CDA provides. See 41 U. S. C. §§605–612; *ante*, at 1–2 (STEVENS, J., concurring in judgment). In the circumstances present here, that kind of injury, though a future one, is concrete and likely to occur.

For another thing, the challenged Park Service interpretation causes a present injury. If the CDA does not apply to concession contract disagreements, as the Park Service regulation declares, then some of petitioner's members must plan now for higher contract implementation costs. Given the agency's regulation, bidders will likely be forced to pay more to obtain, or to retain, a concession contract than they believe the contract is worth. That is what the Association argues. Supplemental Brief for Petitioner 4–6. See also App. to Supplemental Brief for Petitioner 3a–4a. Certain general allegations in the underlying complaints support this claim. See, *e.g.*, App. 20–22, ¶¶35, 61–67; Amfac Resorts, L. L. C. Complaint in No. 1:00CV02838 (DC), pp. 4–5, ¶8 (available in Clerk of Court's case file); *id.*, at 31–33, ¶¶102–111. Cf. *Amfac Resorts, L. L. C. v. United States Dept. of Interior*, 282 F. 3d 818, 830 (CA DC 2002). And several uncontested circumstances indicate that such allegations are likely to prove true.

First, as the record makes clear, the trade association has a widespread membership, and many of its members regularly bid on contracts that, through cross-references to the Park Service regulation, embody the Park Service's interpretation. See, *e.g.*, App. 69, 80; Lodging for Federal Respondents 14, 25. See also Standard Concession Contract, 65 Fed. Reg. 26052, 26063, 26065 (2000); Simplified

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Concession Contracts, *id.*, at 44898, 44899–44900, 44910, 44912. Second, related contract solicitations are similarly widespread and recurring, involving numerous bidders. Third, after investigation, the relevant congressional committee found that the “way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for government contract business.” S. Rep. No. 95–1118, p. 4 (1978). Fourth, the CDA provides a prevailing contractor with prejudgment interest, and authorizes expedited procedures. 41 U. S. C. §§607(f), 608, 611. These are factors that make the inapplicability of the CDA more costly to successful bidders. See S. Rep. No. 95–1118, at 2–4; *ante*, at 1–2 (STEVENSON, J., concurring in judgment).

These circumstances make clear that petitioner’s members will likely suffer a concrete monetary harm, either now or in the foreseeable future. Such a showing here is sufficient to satisfy the Constitution’s standing requirements. And the threatened injuries, present and future—monetary harm, injuries to a potential or actual contractual relationship, and injuries that arguably fall within the CDA’s protective scope—are sufficient to satisfy “prudential” standing requirements as well. See *Federal Election Comm’n v. Akins*, 524 U. S. 11, 19–20 (1998); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U. S. 150, 153 (1970). Cf. *Columbia Broadcasting System, Inc. v. United States*, 316 U. S. 407, 421–422 (1942).

Given this threat of immediate concrete harm (primarily in the form of increased bidding costs), this case is also ripe for judicial review. As JUSTICE STEVENSON explains in Parts I and II of his opinion, the case now presents a legal issue—the applicability of the CDA to concession contracts—that is fit for judicial determination. That issue is a purely legal one, demanding for its resolution only use of ordinary judicial interpretive techniques. See *ante*, at 3 (opinion concurring in judgment). The relevant adminis-

trative action, *i.e.*, the agency's definition of "concession contract" under the National Parks Omnibus Management Act of 1998, 16 U.S.C. §§5951–5966, has been "formalized," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). It is embodied in an interpretive regulation issued after notice and public comment and pursuant to the Department of the Interior's formal delegation to the National Park Service of its own statutorily granted rule-making authority, §5965; *ante*, at 2–3. (Unlike the majority, I would apply to the regulation the legal label "interpretive rule," not "general statement of policy," *ante*, at 6 (internal quotation marks and alteration omitted), though I agree with the majority that, because the Park Service does not administer the CDA, see *ante*, at 5–6, we owe its conclusion less deference.) The Park Service's interpretation is definite and conclusive, not tentative or likely to change; as the majority concedes, the Park Service's determination constitutes "final agency action" within the meaning of the Administrative Procedure Act. *Ante*, at 8 (internal quotation marks omitted).

The only open question concerns the nature of the harm that refusing judicial review at this time will cause the Association's members. See *Abbott Laboratories, supra*, at 149. The fact that concessioners can raise the legal question at a later time, after a specific contractual dispute arises, see *ante*, at 9, militates against finding this case ripe. So too does a precedential concern: Will present review set a precedent that leads to premature challenges in other cases where agency interpretations may be less formal, less final, or less well suited to immediate judicial determination? See *ante*, at 8.

But the fact of immediate and particularized (and not totally reparable) injury during the bidding process offsets the first of these considerations. And the second is more than offset by a related congressional statute that specifies that prospective bidders for Government contracts can

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obtain immediate judicial relief from agency determinations that unlawfully threaten precisely this kind of harm. See 28 U. S. C. §1491(b)(1) (allowing prospective bidder to object, for instance, to “solicitation by a Federal agency for bids . . . for a proposed contract” and permitting review of related allegation of “any . . . violation of statute or regulation in connection with a procurement or a proposed procurement”). See also R. Nash, S. Schooner, & K. O’Brien, *The Government Contracts Reference Book* 308, 423 (2d ed. 1998). This statute authorizes a potential bidder to complain of a proposed contractual term that, in the bidder’s view, is unlawful, say, because it formally incorporates a regulation that embodies a specific, allegedly unlawful, remedial requirement. Cf. App. 25, ¶¶114–116 (excerpts from petitioner’s complaint making just this claim); App. to Supplemental Brief for Petitioner 2a, ¶¶121–122 (same). That being so, *i.e.*, the present injury in such a case being identical to the present injury at issue here, I can find no convincing prudential reason to withhold Administrative Procedure Act review.

In sum, given this congressional policy, the concrete nature of the injury asserted by petitioner, and the final nature of the agency action at issue, I see no good reason to postpone review. I would find the issue ripe for this Court’s consideration. And I would affirm the decision of the Court of Appeals on the merits, primarily for the reasons set forth in its opinion as supplemented here by the Government.