

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

NATIONAL FAMILY PLANNING
& REPRODUCTIVE HEALTH
ASSOCIATION, et al.

Plaintiffs,

v.

ROBERT F. KENNEDY, JR., et al.

Defendants.

No. 1:26-cv-1684-JPW

(Hon. Jennifer P. Wilson)

ORAL ARGUMENT REQUESTED

**DEFENDANTS’ SUPPLEMENTAL BRIEF ADDRESSING *RENO v.
CATHOLIC SOCIAL SERVICES, INC.*, 509 U.S. 43 (1993)**

In accordance with the Court’s September 1, 2026 Order (Dkt. 62), Defendants address whether *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (“CSS”), bears on ripeness here and, if so, how it applies. It does, and it requires dismissal of Plaintiffs’ priority-based claims as unripe.

CSS Governs Challenges to Discretionary-Benefit Rules

Under *Abbott Laboratories v. Gardner*, a regulation that commands primary conduct on pain of penalties may present a dispute fit for immediate review. 387 U.S. 136, 152–53 (1967). But under *Toilet Goods Ass’n v. Gardner*, a regulation whose effects depend on later agency action generally does not. 387 U.S. 158, 163–64 (1967). CSS places rules governing access to discretionary benefits on the latter side of that line.

The CSS plaintiffs challenged INS regulations implementing the legalization program established by the Immigration Reform and Control Act of 1986 (the “Reform Act”) arguing that the regulations were an impermissible construction of the statute. 509 U.S. at 47. The regulations restricted access to the benefit and, if applied, would have rendered members of the plaintiff classes ineligible. Yet the Supreme Court held the claims unripe. The regulations imposed no penalties for violating a new restriction but instead limited access to a benefit that was not automatically bestowed. 509 U.S. at 59. The applicants had to take further affirmative steps and satisfy additional statutory criteria, while the INS retained responsibility for determining, case by case, whether each applicant satisfied all applicable conditions. *Id.* at 57–59. Thus, promulgation of the regulations alone did not create a ripe claim. A claim ordinarily ripened only when the plaintiff took the necessary affirmative steps, and the agency applied the challenged regulation to the plaintiff. *Id.* at 59.

That reasoning maps onto this case directly. A NOFO is a benefit-access instrument, not a rule commanding regulated parties to alter their conduct on pain of penalties or automatic entitlement. It establishes the terms for competing for a discretionary grant that is not automatically awarded to any applicant. Each applicant must take affirmative steps—prepare and submit an application—and satisfy requirements beyond the challenged priorities, including the statutory and regulatory

requirements identified in the NOFO and the enumerated review criteria accounting for all 100 available points. A.R. 078–80, 109–11. HHS then determines, on a case-by-case basis, which applications merit funding.

Under *CSS*, those circumstances do not produce a ripe claim merely because HHS has announced the priorities. The priorities have not yet been applied to Plaintiffs—nor, on Plaintiffs’ own allegations, to anyone. No claim ripens until a plaintiff takes “the affirmative steps that [it] could take before” HHS “block[s its] path by applying the regulation to [it].” 509 U.S. at 59.

The case for ripeness is weaker here than it was in *CSS*. In *CSS*, the challenged regulations categorically rendered members of the plaintiff classes ineligible for legalization. Here, the priorities do not categorically disqualify anyone. The NOFO identifies a closed set of grounds for disqualification, and the priorities are not among them. A.R. 076, 107–109. The priorities instead inform discretionary scoring. If even regulations that would categorically bar eligibility did not create ripe claims before application, rules that merely affect the scoring of applications cannot do so absent their application to a plaintiff.

Nor does the impending application deadline alter the analysis. The Reform Act in *CSS* provided a single, fixed twelve-month period in which applicants could seek legalization, *see* 509 U.S. at 67 (O’Connor, J., concurring in the judgment), yet the Court held the claims unripe notwithstanding that fixed window. A funding

deadline likewise does not convert a prospective challenge into a concrete dispute. The burden of applying under criteria an applicant disputes is a resource expenditure, not the kind of hardship that makes an otherwise unripe claim reviewable. *See Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733–35 (1998). Notably, the argument Plaintiffs marshal through the declarants—that claims ripen the moment parties “conform[] their behavior to the invalid regulations—was the CSS dissent’s position. 509 U.S. at 79 (Stevens, J. dissenting).

CSS also identifies a limiting boundary. An applicant whose application was rejected at the agency’s “front desk” because of the challenged regulation could have a ripe claim because the regulation’s effect would have been felt “in a particularly concrete manner”: the application would have been blocked then and there. 509 U.S. at 63. That distinction reinforces the result here. The *Hennepin County* plaintiffs had existing grants that HHS terminated and faced conditions functioning as concrete gates to continued funding. 2026 WL 2426300 *18. Here, Plaintiffs have not applied, no application has been rejected, and no priority has been applied to any Plaintiff. They challenge the priorities facially, before any concrete application of them to their circumstances.

The line is straightforward. A rule that directly regulates present conduct or automatically disqualifies an applicant may be reviewable upon promulgation. But a rule that merely structures access to a discretionary benefit becomes ripe when it

is concretely applied to the claimant. *CSS*, 509 U.S. at 57–63. The NOFO does not command Plaintiffs to do anything, impose penalties for noncompliance, or itself deny them a benefit. It establishes criteria HHS will use in evaluating applications for a discretionary award. That is why, in applying *CSS*, the Supreme Court explained that even a final and “purely legal” agency pronouncement that “do[es] not command anyone to do anything” is unripe until it is applied. *Nat’l Park Hosp. Ass’n v. Dep’t of the Interior*, 538 U.S. 803, 808–12 (2003).

Accordingly, Plaintiffs’ priority-based claims here are not ripe. If HHS later applies a challenged priority to a Plaintiff’s application in a manner that concretely affects that Plaintiff, the Plaintiff may seek review on a record reflecting an application of the challenged provision. Until then, the claims present no sufficiently concrete controversy for judicial review and should be dismissed without prejudice.

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September 3, 2026

Respectfully submitted,

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/s/ Timothy S. Judge

TIMOTHY S. JUDGE

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.8

I certify that the foregoing brief complies with the Court's September 1, 2026 Order (Dkt. 62).

September 3, 2026

/s/ Timothy S. Judge
TIMOTHY S. JUDGE
Deputy Chief, Civil Division

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2026, I caused the foregoing Defendants' Supplemental Brief Addressing *Reno v. Catholic Social Services, Inc.*, 509 U.S. (1993), together with this Certificate of Compliance and Certificate of Service, to be filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record, each of whom is a registered CM/ECF participant. Service on any party who is not a registered CM/ECF participant has been made by first-class mail, postage prepaid, addressed to that party's last known address.

September 3, 2026

/s/ Timothy S. Judge
TIMOTHY S. JUDGE
Deputy Chief, Civil Division