No. 11-915

In the Supreme Court of the United States

CONSTANCIO LARA, ET AL., PETITIONERS

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the 60-day time limit for seeking Federal Circuit review of an order or decision of the Merit Systems Protection Board, 5 U.S.C. 7703(b)(1), is jurisdictional.

2. Whether the Federal Circuit clerk's office was "inaccessible" on the particular day that the petitions for review in this case were due, such that the deadline should have been extended under Fed. R. App. P. 26(a)(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) in petitioner Lara's case is not published in the Federal Reporter, but is reprinted in 421 Fed. Appx. 978. The opinion of the Merit Systems Protection Board in petitioner Lara's case (Pet. App. 4-22) is unreported.[*]

[*] Although there are a total of seven petitioners, the petition appendix reproduces record materials only for petitioner Lara. See Pet. 1 nn.1-2, 3 n.3. The Federal Circuit issued materially identical opinions in the other petitioners' cases, and reconsideration was denied in each of those cases on the same date as in petitioner Lara's case. Compare Pet. App. 1-3, 23-24, with *Rodriguez* v. *OPM*, 425 Fed. Appx. 908, reconsideration denied, 435 Fed. Appx. 952 (2011) (per curiam); *Vela* v. *OPM*, 425 Fed. Appx. 909, reconsideration denied, 435 Fed. Appx. 953 (2011) (per curiam); *Martinez* v. *OPM*, 425 Fed. Appx. 910, reconsideration denied, 437 Fed. Appx. 950 (2011) (per curiam); *Soto* v. *OPM*, 421

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2011. A petition for reconsideration was denied on October 26, 2011 (Pet. App. 23-24). The petition for a writ of certiorari was filed on January 24, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are former warehouse workers who were employed by a joint United States-Mexican Commission tasked with eradicating screwworms (a livestock parasite) from the cross-border region of the United States and Mexico. Pet. 2-3; Pet. App. 5, 7. The federal Office of Personnel Management (OPM) denied their applications for federal retirement benefits on the ground that their positions did not qualify them to receive such benefits. Pet. App. 7-8. On appeal, the Merit Systems Protection Board (MSPB) affirmed OPM's determination, finding "no evidence" that petitioners were "employee[s]" as defined in 5 U.S.C. 2105(a). Pet. 3 & n.3; Pet. App. 4-22.

The MSPB decisions informed petitioners of the date that the decision would become final, Pet. App. 19, and explained to them that they would have a right at that point to seek further review in the Federal Circuit, *id.* at 21. The decisions further notified petitioners that "[t]o be timely, your petition [for review] must be *re-*

Fed. Appx. 975, reconsideration denied, 435 Fed. Appx. 953 (2011) (per curiam); *Ochoa* v. *OPM*, 421 Fed. Appx. 976, reconsideration denied, 435 Fed. Appx. 952 (2011) (per curiam); *Mendoza* v. *OPM*, 421 Fed. Appx. 977, reconsideration denied 437 Fed. Appx. 949 (2011) (per curiam). For the sake of convenience, this brief, like the petition, will focus on petitioner Lara's case.

ceived by the court no later than 60 calendar days after this initial decision becomes final." *Ibid.* That notification reflected the statutory requirement of 5 U.S.C. 7703(b)(1), which provides that "[n]otwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the [MSPB]."

Despite petitioners' notice of the statutory deadline, the Federal Circuit did not receive their petitions for review until 62 days after the MSPB decisions became final. Pet. App. 2. The court of appeals accordingly dismissed the petitions as untimely. *Id.* at 3. The court noted that, pursuant to its longstanding interpretation of Section 7703(b)(1), a petition for review is deemed to be "filed" only when it is received by the court. *Id.* at 2 (citing *Pinat* v. *OPM*, 931 F.2d 1544, 1546 (Fed. Cir. 1991)). And it observed that under "controlling precedent," the requirements of Section 7703(b)(1) are jurisdictional. *Id.* at 2-3 (citing *Oja* v. *Department of the Army*, 405 F.3d 1349, 1360 (Fed. Cir. 2005)).

ARGUMENT

The decision of the court of appeals, which reflects longstanding precedent in the courts of appeals, is correct and does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. Subject to certain exceptions not relevant here, 5 U.S.C. 7703(b)(1) provides that "a petition to review a final order or final decision of the [MSPB] shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after

the date the petitioner received notice of the final order or decision of the [MSPB]." Contrary to petitioners' contention (Pet. 4-6), the court of appeals correctly concluded that it lacks jurisdiction to review a petition that fails to comply with Section 7703(b)(1)'s timing requirements.

This Court has previously recognized that Section 7703(b)(1) is jurisdictional in nature. As the Court explained in *Lindahl* v. *OPM*, 470 U.S. 768 (1985), Section 7703(b)(1) "confers the operative grant of jurisdiction" for the Federal Circuit to review MSPB decisions. *Id.* at 793. The Court in *Lindahl* expressly rejected the argument that Section 7703(b)(1) was "nothing more than a venue provision" with no "relat[ion] to the power of a court." *Id.* at 792-793 & n.30. Instead, the Court emphasized that Section 7703(b)(1) is what gives the Federal Circuit the "'power to adjudicate'" cases that "fall within [the section's] jurisdictional perimeters." *Id.* at 793 (citation omitted).

Although *Lindahl* did not specifically discuss Section 7703(b)(1)'s timing requirement, that condition is necessarily one of the "jurisdictional perimeters," *Lindahl*, 470 U.S. at 793, that defines the Federal Circuit's authority. Congress's inclusion of that condition within Section 7703(b)(1)'s "jurisdictional grant" demonstrates that Congress intended it as a limitation on the scope of that grant. Cf. *Gonzalez* v. *Thaler*, 132 S. Ct. 641, 651 (2012) (noting, in support of the conclusion that a particular requirement was nonjurisdictional, that Congress "set off" the jurisdictional and nonjurisdictional requirements in "distinct paragraphs").

The Federal Circuit has previously held that the timing requirements of Section 7703(b)(1) are jurisdictional, *Oja* v. *Department of the Army*, 405 F.3d 1349, 1360

(2005), and relied on that holding here. Other courts of appeals have also concluded that Section 7703(b)(1)'s time limit is jurisdictional. Although the current version of Section 7703(b)(1), as amended in 1982, channels review to the Federal Circuit, the original 1978 version provided for review in the regional courts of appeals. See Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1143-1144; Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 144, 96 Stat. 45. Various reviewing courts during that initial period recognized the jurisdictional nature of the statute's time limitations. *Oja*, 405 F.3d at 1357 n.5 (citing decisions from the Eighth, Ninth, and District of Columbia Circuits).

The conclusion that Section 7703(b)(1)'s time limit is jurisdictional accords with this Court's precedents addressing analogous time limits for seeking judicial review in a federal court of appeals. See, *e.g.*, *Bowles* v. *Russell*, 551 U.S. 205 (2007) (statutory time limit for filing a notice of appeal in a civil case is jurisdictional). The time limit at issue in *Stone* v. *INS*, 514 U.S. 386 (1995), for example, was materially similar to Section 7703(b)(1)'s, in that it set a deadline for seeking court-of-appeals review of a decision of an adjudicative administrative agency (there, the Board of Immigration Appeals). See *id.* at 390 (statute providing that "a petition for review [of a final deportation order] may be filed not later than 90 days after the date of the issuance of the final deportation order") (quoting 8 U.S.C. 1105a(a)(1) (1988 & Supp. V 1993)). The Court concluded in *Stone* that this statutory time limit was not subject to tolling. *Id.* at 405-406. The Court explained that "[j]udicial review provisions * * * are jurisdictional in nature and must be construed with strict fidelity to their terms."

Id. at 405. "This is all the more true," the Court continued, "of statutory provisions specifying the timing of review, for those time limits are, as we have often stated, 'mandatory and jurisdictional.'" *Ibid.* (quoting *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990)). Consistent with *Stone*, the courts of appeals have uniformly concluded that the 60-day time limit for court-of-appeals review of certain agency decisions under the Hobbs Act, 28 U.S.C. 2344, is likewise jurisdictional. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1204 (2011).

The Federal Rules of Appellate Procedure provide further support for treating time limits on court-of-appeals review of administrative decisions as jurisdictional. Rule 26(b)(2) states that a court of appeals "may not extend the time to file * * * a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law." See also Fed. R. App. P. 15(a)(1) ("Review of an agency order is commenced by filing, *within the time prescribed by law*, a petition for review with the clerk of a court of appeals authorized to review the agency order.") (emphasis added). The Rules thus expressly contemplate that limitations like Section 7703(b)(1)'s cannot be tolled by a court—a signature feature of a jurisdictional time limit. See *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134 (2008). Although Rule 26(b)(2) did not originate in Congress, it was presented to Congress before going into effect, see 28 U.S.C. 2074; its materially identical predecessor was in effect when Congress first enacted Section 7703(b)(1) in 1978 (see 28 U.S.C. App. at 367 (1976)); and that predecessor version provided the

background against which Congress drafted Section 7703(b)(1).

Congress has good practical reason to enact jurisdictional time limitations in circumstances in which a court of appeals is directly reviewing an agency decision. The factfinding that may be necessary to adjudicate a litigant's claim that a deadline should be equitably tolled in a particular case is more cumbersome when the court that must decide the equitable-tolling question is an appellate court. In this case, for example, petitioners allege that a snowstorm prevented their petitions (which, they claim, were mailed several days before the deadline) from arriving in time. Pet. 3. The Federal Circuit may not itself be able to perform the adjudicatory factfinding that might be necessary to evaluate that allegation. Although it could, if necessary, remand to the MSPB to develop those facts, Congress could reasonably have concluded that, on the whole, the administrative cost of such remands outweighs any potential benefit of trying to find the rare case in which equitable tolling might in fact be warranted. Cf. *John R. Sand*, 552 U.S. at 133 (2008) (listing "facilitating the administration of claims" and "promoting judicial efficiency" among the reasons why a statute might contain a jurisdictional time limit).

2. Petitioners offer no persuasive reason for treating Section 7703(b)(1)'s time limit as nonjurisdictional. They correctly point out (Pet. 4-5) that the Court's recent cases have sought to establish clearer rules about what statutory requirements will be considered jurisdictional. But as the Court's latest discussion of the issue makes clear, "context, including this Court's interpretation of similar provisions in many years past," remains "relevant to whether a statute ranks a requirement as

jurisdictional." *Gonzalez*, 132 S. Ct. at 648 n.3 (citation omitted). For reasons just discussed, the Court's decisions in *Lindahl* and *Stone* strongly support the conclusion that Section 7703(b)(1)'s timing requirement is jurisdictional.

Petitioners are incorrect in asserting (Pet. 4) that the Federal Circuit's decision in this case "conflicts with relevant decisions of this Court." None of the cases cited by petitioners controls the interpretation of time limits for seeking court-of-appeals review of agency decisions in general, or the interpretation of Section 7703(b)(1) in particular. See *Henderson*, 131 S. Ct. at 1204 (concluding that time limit for seeking "review by an Article I tribunal as part of a unique administrative scheme" was nonjurisdictional); *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237 (2010) (concluding that time limit for registering copyrighted works is nonjurisdictional); *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006) (concluding that Title VII provision for coverage of employers with at least 15 employees is nonjurisdictional); *Eberhardt* v. *United States*, 546 U.S. 12 (2005) (concluding that rules concerning timing of new-trial motions are nonjurisdictional); *Scarborough* v. *Principi*, 541 U.S. 401 (2004) (concluding that time limit for filing attorney fee applications is nonjurisdictional); *Kontrick* v. *Ryan*, 540 U.S. 443 (2004) (concluding that time limits on objections to bankruptcy discharge are nonjurisdictional); see also *Gonzalez*, 132 S. Ct. at 650 n.6 (concluding that substantive requirement for issuance of certificate of appeal in federal habeas case is nonjurisdictional, and distinguishing cases involving time limits).

Petitioners also err in contending (Pet. 5-6) that the time limitation in Section 7703(b)(1) has no connection to any provision governing subject-matter jurisdiction. As

explained above (see p. 4, *supra*), Section 7703(b)(1) *itself* functions as a "jurisdictional grant" of authority for the Federal Circuit to review MSPB decisions in certain circumstances. *Lindahl*, 470 U.S. at 792; see 28 U.S.C. 1295(a)(9) (describing the Federal Circuit's "jurisdiction" over "an appeal from a final order or final decision of the [MSPB], *pursuant to* Sections 7703(b)(1) and 7703(d) of Title 5") (emphasis added). The limitations on that grant of authority, including timing limitations, are thus inherently jurisdictional.

3. In any event, this case is an unsuitable vehicle for addressing the question whether Section 7703(b)(1)'s time limit is jurisdictional, because the answer will have no effect on the outcome. Even if petitioners were correct in their contention that the time limit is nonjurisdictional, the Federal Circuit was still required to dismiss their petitions for review.

As previously discussed (see p. 6, *supra*) Federal Rule of Appellate Procedure 26(b)(2) forbids courts of appeals from "extend[ing] the time to file * * * a petition to * * * review an order of an administrative agency, board, [or] commission * * * unless specifically authorized by law." No provision of law "specifically authorize[s]" the Federal Circuit to excuse petitioners' noncompliance with the timing requirements of Section 7703(b)(1). Accordingly, even if the Federal Circuit has jurisdiction over late-filed petitions for review, it is compelled by rule to dismiss them, as it did here. The government cited Rule 26(b)(2) in its motion to dismiss in this case, see Pet. App. 32, and the application of that rule independently supports the decision below.

4. As an alternative to their argument that the court of appeals could have considered their untimely filings, petitioners also contend (Pet. 6-8) that their filings were,

in fact, timely. In support of that argument, they invoke Federal Rule of Appellate Procedure 26(a)(3), which provides for an automatic extension of a filing deadline when the court of appeals' clerk's office is "inaccessible" at the time the filing is due. They claim that even though the Federal Circuit was open on the day their petitions were due, the courthouse was nevertheless "inaccessible," because severe weather prevented their mailed petitions from reaching the courthouse in time.

Petitioners' claim does not warrant this Court's review. First, petitioners did not raise the claim in the court of appeals, and the court of appeals did not consider it. See Pet. App. 1-3, 23-24, 35-42, 51-58. This Court generally does not review questions that were "not pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992), and there is no reason to deviate from that practice here. Second, petitioners' argument is fact-bound. Third, because petitioners are raising their claim for the first time in this Court, no court has developed the facts necessary to evaluate it. Finally, petitioners cite no authority for the proposition that severe weather outside the vicinity of the courthouse renders the courthouse "inaccessible" for purposes of Rule 26(a)(3). See Pet. 7-8 (citing *United States Leather, Inc.* v. *H & W P'ship*, 60 F.3d 222, 226 (5th Cir. 1995) ("An ice storm * * * rendering the federal courthouse inaccessible to those *in the area near the courthouse*, is enough to come within [Federal] Rule [of Civil Procedure] 6(a)'s weather exception.") (emphasis supplied)); cf. *Houston* v. *Lack*, 487 U.S. 266, 275 (1988) (noting that, as a general matter, "a civil litigant who *chooses* to mail a notice of appeal assumes the risk of untimely delivery and filing").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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