

No. 15-1462

In the Supreme Court of the United States

CENTER FOR ART AND MINDFULNESS, INC.,
PETITIONER

v.

POSTAL REGULATORY COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed the petition for review because it was filed before the agency had issued a final decision on reconsideration.

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OPINIONS BELOW

The order of the court of appeals summarily dismissing the petition for review (Pet. App. 1a-2a) is unreported. The orders of the Postal Regulatory Commission (Pet. App. 3a-9a, 10a-20a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2016. A petition for rehearing was denied on March 3, 2016 (Pet. App. 21a-22a). The petition for a writ of certiorari was filed on June 1, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Postal Regulatory Commission (Commission) is an independent agency within the Executive

Branch of the U.S. Government. See 39 U.S.C. 501 *et seq.* As relevant here, the Commission has authority to adjudicate certain administrative complaints against the U.S. Postal Service. See 39 U.S.C. 3662. Section 3662(a) provides that “[a]ny interested person * * * who believes the Postal Service is not operating in conformance with [specified statutory] requirements * * * may lodge a complaint with the Postal Regulatory Commission in such form and manner as the Commission may prescribe.” 39 U.S.C. 3662(a).

A person aggrieved by the Commission’s final disposition of a complaint may seek judicial review in the D.C. Circuit. See 39 U.S.C. 3663 (providing for review of “final order[s] or decision[s] of the Postal Regulatory Commission” in accordance with Chapter 158 of Title 28, often known as the Hobbs Act). Any petition for review must be filed “within 30 days after [the Commission’s] order or decision becomes final.” *Ibid.* Alternatively, a party may seek administrative reconsideration within a “short and reasonable time” after the Commission’s decision. U.S. Postal Regulatory Comm’n, *Order Denying Requests for Reconsideration, Addressing Confidential Matters, and Granting a Stay, Order No. 524*, at 8-9 & n.23 (Aug. 24, 2010), http://www.prc.gov/docs/69/69898/Order_No_524.pdf (PRC Order No. 524); see *id.* at 9 n.23 (stating that because 39 U.S.C. 3663 requires a petition for judicial review of a Commission order to be filed within 30 days, “it would be arguably anomalous to regard as timely a reconsideration request filed more than 30 days after a Commission order”).

2. In 2012, the Postal Service held an auction to sell one of its facilities in Stamford, Connecticut. Pet. App. 12a. Petitioner was the high bidder and entered

into a contract with the Postal Service to purchase the property, but petitioner refused to fund the purchase. *Ibid.* The Postal Service ultimately sold the property to the second-highest bidder. *Id.* at 12a-13a.

In December 2014, petitioner filed an administrative complaint with the Commission under 39 U.S.C. 3662(a), raising several claims relating to the sale of the property. Pet. App. 13a. As later amended, the complaint alleged, *inter alia*, that the Postal Service had engaged in undue preference and unreasonable discrimination and had breached a contract with petitioner. *Id.* at 13a-14a. The Postal Service moved to dismiss the complaint on the ground that the Commission lacked jurisdiction to hear the claims. *Id.* at 14a. The Postal Service further contended that the complaint failed to state a claim upon which relief could be granted, was barred by *res judicata*, was moot, and was procedurally defective. *Id.* at 14a-15a.

On March 4, 2015, the Commission granted the motion to dismiss, concluding that it lacked jurisdiction over petitioner's claims under Section 3662(a). Pet. App. 10a-19a.¹ On April 1, 2015, petitioner moved for reconsideration of that order. *Id.* at 3a. The Commission docketed petitioner's motion and proceeded to consider it. On April 3, 2015, before the Commission had acted on petitioner's motion for reconsideration, petitioner filed a petition for review of the Commission's March 4, 2015 order in the D.C. Circuit. Pet. for Review 1.

On April 23, 2015, the Commission denied petitioner's motion for reconsideration, concluding that the

¹ Because the Commission determined that it had no jurisdiction over the complaint, it did not address the other grounds for dismissal raised by the Postal Service. Pet. App. 18a.

motion “provide[d] no basis for the Commission to alter its prior conclusion” that it lacked jurisdiction over petitioner’s complaint. Pet. App. 6a. Petitioner did not seek further review of the Commission’s April 23, 2015 decision.

3. The court of appeals summarily dismissed the petition for review. Pet. App. 1a-2a. The court stated that it has “long held” that a petition for review “filed before the agency has issued its decision on reconsideration is ‘incurably premature,’ and subsequent action by the agency on a motion for reconsideration does not ripen the petition for review or secure appellate jurisdiction.” *Id.* at 1a (citing *Gorman v. National Transp. Safety Bd.*, 558 F.3d 580, 586 (D.C. Cir.), cert. denied, 558 U.S. 892 (2009), and *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam)). Applying that rule, the court dismissed the petition because it was filed while petitioner’s motion for reconsideration remained pending before the Commission. *Id.* at 1a-2a.

ARGUMENT

The court of appeals’ order is correct and does not conflict with any decision of this Court. Although petitioner cites two circuit court decisions that have declined to dismiss a petition for review in other circumstances, the analysis in those cases turned in part on considerations not present here. No further review is warranted.

1. By statute, the D.C. Circuit may only review a “*final* order or decision of the Postal Regulatory Commission.” 39 U.S.C. 3663 (emphasis added). For an order to be “final,” it must, among other things, “mark the ‘consummation’ of the agency’s decisionmaking process.” *Bennett v. Spear*, 520 U.S. 154,

177-178 (1997); see *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) (“The core question is whether the agency has completed its decisionmaking process.”). That finality principle generally is not satisfied when a motion for reconsideration remains pending before an agency, because the agency has not yet completed its decisionmaking process. Accordingly, “[t]he timely filing of a motion to reconsider” an administrative order ordinarily “renders the underlying order nonfinal for purposes of judicial review.” *Stone v. INS*, 514 U.S. 386, 392 (1995).

In accordance with those principles, the D.C. Circuit has long recognized that “a pending petition for administrative reconsideration renders the underlying agency decision nonfinal, and hence unreviewable, with respect to the petitioning party.” *United Transp. Union v. ICC*, 871 F.2d 1114, 1114 (1989). The court has reasoned that “[i]f a party determines to seek reconsideration of an agency ruling, it is a pointless waste of judicial energy for the court to process any petition for review before the agency has acted on the request for reconsideration.” *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam). The court has further held “that when a petition for review is filed before the challenged action is final and thus ripe for review, subsequent action by the agency on a motion for reconsideration does not ripen the petition for review or secure appellate jurisdiction.” *Ibid.* (describing petition as “incurably premature”). Rather, “[t]o cure the defect, the challenging party must file a new notice of appeal or petition for review from the now-final agency order,” which “discourage[s] the filing of petitions for review until after the agency completes the reconsideration process.” *Ibid.*

Applying that analysis here, the court of appeals correctly dismissed petitioner’s petition for review. Petitioner filed the petition on April 3, 2015, at a time when petitioner’s motion for reconsideration—which had been filed two days earlier—remained pending before the Commission. Under the general rule governing petitions for review under the Hobbs Act, “[t]he timely filing of [that] motion to reconsider render[ed] the underlying order nonfinal for purposes of judicial review.” *Stone*, 514 U.S. at 392. The court therefore properly dismissed the petition for review because it was “incurably premature.” Pet. App. 1a.

2. Petitioner offers no substantial argument to the contrary. Although petitioner notes (Pet. 4) that the Commission ultimately “denie[d] [its] motion for reconsideration,” it is well established that “subsequent action by the agency on a motion for reconsideration does not ripen the petition for review or secure appellate jurisdiction,” Pet. App. 1a. Thus, if petitioner wished to obtain judicial review, it was obliged to file its petition within 30 days after the Commission completed its decisionmaking process by denying the motion for reconsideration. See 39 U.S.C. 3663.²

² In the question presented, petitioner states that the issue before the Court “is whether the filing of a motion for reconsideration with the [Commission] tolls the statutory jurisdictional time limit for appeal.” Pet. ii; see *ibid.* (“Put more simply, ‘to toll or not toll’, that is the question.”). But the decision below did not involve the application or rejection of a tolling rule, because petitioner did not file a petition for review within 30 days of the Commission’s order denying reconsideration. Instead, the court of appeals’ disposition rested on the well-settled principle that when a petition for review is “filed before the agency has issued its decision on reconsideration,” that petition is “incurably premature.” Pet. App. 1a.

Petitioner’s argument (Pet. 4) that the court of appeals’ decision “results in the need for double filings of Petitions for Review” is incorrect. Petitioner is wrong to suggest (Pet. 4-5) that it was required to file a petition for review before the Commission issued its decision on the motion for reconsideration. See PRC Order No. 524, at 9 n.23 (stating that “a timely motion for reconsideration tolls the time for filing a petition for review”). Indeed, the court of appeals has no authority to consider such a petition because it involves agency action that is not yet final. See 39 U.S.C. 3663. Where a petitioner voluntarily seeks agency reconsideration, the proper time for filing a petition for review is after the agency disposes of the reconsideration request. At that time, a petitioner may obtain review of the agency’s final action, including any prior orders that constitute part of its decision. See *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002) (“[T]he party that had sought administrative reconsideration may, if reconsideration is denied, challenge that denial as well as the agency’s original order by filing a timely petition for review of both orders.”). Petitioner’s appeal (Pet. 4) to principles of “judicial economy” is thus misplaced, and its invocation (Pet. i) of Congress’s intent that the Postal Service “be operated efficiently” has no relevance here.

Petitioner similarly errs in emphasizing (Pet. 7-8) that the Commission has not promulgated a regulation governing the filing of motions for reconsideration. Unless Congress has specified otherwise, agencies have inherent authority to reconsider their own decisions, see, e.g., *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014), and consistent with that background rule the Commission entertains motions

for reconsideration. See PRC Order No. 524, at 8-10 & nn.23 and 25; see also Pet. App. 3a-7a. Petitioner objects (Pet. 8-9) that the Commission does not have a statute or regulation regarding the timeliness of a motion for reconsideration. But the Commission has established by adjudication that any motion for reconsideration must be filed within a “short and reasonable time.” PRC Order No. 524, at 9. Here, petitioner filed its motion for reconsideration within 30 days, see *id.* at 9 & n.23, and the Commission denied the motion on the merits, Pet. App. 3a-7a. That timely filed motion invited “[o]ngoing agency review” and thus rendered the existing order “nonfinal for purposes of judicial review.” *International Telecard Ass’n v. FCC*, 166 F.3d 387, 388 (D.C. Cir. 1999) (per curiam).³

Petitioner is also wrong to rely (Pet. 8-9) on *Stone*. *Stone* confirmed that the “conventional” rule is that “[t]he timely filing of a motion to reconsider renders the underlying order nonfinal for purposes of judicial review,” absent contrary instructions from Congress. 514 U.S. at 392, 398. The reconsideration motion at issue in *Stone* was held not to have that effect only because the Court concluded that, in enacting a particular provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, “Congress chose to depart from the ordinary judicial treatment of agency

³ In *Gorman v. National Transportation Safety Board*, 558 F.3d 580 (D.C. Cir.), cert. denied, 558 U.S. 892 (2009), the D.C. Circuit held that “the filing of an untimely petition for agency reconsideration does not render incurably premature an otherwise valid petition for judicial review,” because “[o]nce the time to file for agency reconsideration is past * * * the order is final and ripe for review.” *Id.* at 587. That holding has no application here, because petitioner timely filed a motion for reconsideration and thereafter sought judicial review of the agency’s nonfinal decision.

orders under reconsideration.” *Stone*, 514 U.S. at 393.⁴ Here, by contrast, Congress has not chosen to depart from the normal rule. The court of appeals’ application of that rule in this case presents no question warranting this Court’s review.

3. In accordance with the court of appeals’ decision, other courts have applied the “incurably premature” doctrine in analogous circumstances. See *Council Tree Commc’ns, Inc. v. FCC*, 503 F.3d 284, 287-291 (3d Cir. 2007); *Georgia Power Co. v. Teleport Commc’ns Atlanta, Inc.*, 346 F.3d 1047, 1049-1051 (11th Cir. 2003); cf. *AirTouch Paging v. FCC*, 234 F.3d 815, 818 (2d Cir. 2000) (dismissing petition for review both as “incurably premature” and for lack of standing). Petitioner contends (Pet. 6) that the court of appeals’ decision conflicts with decisions of the First and Tenth Circuits. Although those courts declined to apply the “incurably premature” doctrine in the two cases that petitioner cites, those cases arose in a different procedural posture and the decisions rested in part on alternative grounds not present here.

⁴ Petitioner thus mistakenly inverts the governing legal principle in stating that, under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, the filing of a motion for reconsideration “does not toll the [time to] appeal, absent a mandate from Congress that changes that rule.” Pet. 7 (citing 5 U.S.C. 704). As this Court recognized in *Stone*, Section 704 “relieve[s] parties from the *requirement* of petitioning for rehearing before seeking judicial review,” but does not “prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal.” 514 U.S. at 391 (quoting *ICC v. Brotherhood of Locomotive Eng’rs*, 482 U.S. 270, 284-285 (1987)). The Court in *Stone* concluded that Congress had expressly departed from that ordinary rule when it amended the INA. See *id.* at 393.

In *Craker v. DEA*, 714 F.3d 17 (1st Cir. 2013), a professor sought administrative reconsideration of a Drug Enforcement Administration (DEA) order denying his application for registration to cultivate marijuana for medical research. *Id.* at 18. While that motion was pending, the professor filed a petition for review of the DEA’s order and, “[a]t the same time, * * * filed a motion to stay the appellate proceedings and hold them in abeyance * * * until such time as the motion for reconsideration * * * was acted on.” *Id.* at 24. The professor “indicated that the goal of the motion was to preserve his appeal rights in the event that [the DEA order] was deemed to be a ‘final decision’ within the meaning of” the statute setting forth the time for seeking judicial review of that decision. *Ibid.* The court of appeals granted the motion to stay and abey and, after the reconsideration motion was denied, “lifted the abeyance and permitted the petition for review to proceed.” *Ibid.*

In concluding that it was appropriate to consider the petition for review, the court of appeals in *Craker* emphasized that “in the circumstances of th[e] case, holding the petition in abeyance,” rather than dismissing the petition as premature, “served equally the interests of judicial economy.” 714 F.3d at 25. The court also cited other factors, including the “ad hoc” nature of the DEA’s reconsideration process, *id.* at 26; the fact that the opportunity for reconsideration “was limited to contesting facts of which the agency had taken official notice,” *id.* at 25; and the court’s reluctance to apply the “incurably premature” doctrine “retroactively” to the case at bar, *id.* at 26. But the court’s opinion did not foreclose dismissing a prema-

ture petition for review in other cases that do not present the same circumstances.

In *City of Colorado Springs v. Solis*, 589 F.3d 1121 (10th Cir. 2009), the plaintiff brought suit under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, in district court seeking review of a Department of Labor (DOL) decision to certify a labor agreement as “fair and equitable” in accordance with Section 13(c) of the Urban Mass Transportation Act of 1964, codified at 49 U.S.C. 5333(b). 589 F.3d at 1124-1125. At the same time, the plaintiff made a further submission to the Department. *Id.* at 1127. In concluding that the Department’s decision remained final and reviewable notwithstanding that further submission, the court of appeals acknowledged the general rule that the timely filing of a motion to reconsider renders the underlying order nonfinal. *Id.* at 1130-1131 (discussing *ICC v. Brotherhood of Locomotive Eng’rs*, 482 U.S. 270, 279, 284-285 (1987), and *Stone*, 514 U.S. at 392). But the court found that general rule inapplicable because “the DOL has not established a rehearing or reconsideration procedure for [Section] 13(c) certifications.” *Id.* at 1131; see *id.* at 1130. The court also relied upon its conclusion that “it [wa]s not clear” that the plaintiff’s further submission was “intended to seek reconsideration of the [DOL] decision, as opposed to suggesting a procedure for moving forward during the pendency of the [plaintiff’s] challenge to that decision.” *Id.* at 1131. That analysis leaves open the possibility that the court will apply the “incurably premature” doctrine in other cases involving different circumstances, and the Tenth Circuit in fact has since cited the doctrine with approval. *In re FCC 11-161*, 753 F.3d 1015, 1134 n.6 (10th Cir. 2014) (noting rule

that “subsequent action by the agency on a motion for reconsideration does not ripen [a prematurely filed] petition for review or secure appellate jurisdiction”) (quoting *TeleSTAR, Inc.*, 888 F.2d at 134), cert. denied, 135 S. Ct. 2050 and 135 S. Ct. 2072 (2015).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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