No. 18-1260

In the Supreme Court of the United States

JESSICA COOKE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a claimant under the Federal Tort Claims Act, 28 U.S.C. 1346, 2671 *et seq.*, satisfies the requirement to present her claim to the appropriate federal agency before filing a complaint in district court, 28 U.S.C. 2675(a), if the claimant mails her claim but the federal agency never receives it.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 918 F.3d 77. The decision and order of the district court (Pet. App. 15a-27a) is not published in the Federal Supplement but is available at 2017 WL 5178761.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2019. The petition for a writ of certiorari was filed on March 29, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA or Act), 28 U.S.C. 1346, 2671 *et seq.*, waives sovereign immunity for certain tort claims against the United States. See 28 U.S.C. 1346(b)(1), 2671-2680. The Act makes the

United States liable for certain torts caused by government employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1).

Before a federal court may exercise jurisdiction over an action under the Act, a claimant must exhaust administrative remedies. See *McNeil* v. *United States*, 508 U.S. 106, 111 (1993). In particular, the claimant may not bring an action unless she has "first presented the claim to the appropriate Federal agency," and the claim has been "finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. 2675(a). Under the Act's statute of limitations, the claimant must present the claim to the agency "within two years after such claim accrues," and must bring the action in court "within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim." 28 U.S.C. 2401(b).

The Act empowers the Attorney General to adopt regulations governing the presentation and administrative review of claims. See 28 U.S.C. 2672. Under the Attorney General's regulations, "a claim shall be deemed to have been presented when a Federal agency receives" a written "notification of an incident, accompanied by a claim for money damages in a sum certain." 28 C.F.R. 14.2(a). A claimant may provide such a notification by completing a two-page form called Standard Form 95. See *ibid.* The regulations further provide that, if a claimant presents her claim to the wrong agency, that agency "shall transfer" the claim "to the appropriate agency, if the proper agency can be identified from the claim." 28 C.F.R. 14.2(b)(1).

2. Petitioner filed this lawsuit in 2017. Pet. App. 5a. She alleged that, in 2015, agents of U.S. Customs and Border Protection "wrongfully detained and assaulted her at a highway checkpoint stop." *Id.* at 4a. She asserted claims against the United States for assault, battery, negligence, and failure to intervene in the use of excessive force. *Id.* at 5a.

The United States moved to dismiss the claims against it for lack of subject-matter jurisdiction, arguing that petitioner had failed to exhaust administrative remedies by "first present[ing]" the claims to Customs and Border Protection. Pet. App. 6a (quoting 28 U.S.C. 2675). In support of its motion, the United States submitted an affidavit from an agency employee who explained that, under the agency's policies, tort claims received by the agency are forwarded to an Assistant or Associate Chief Counsel and then entered in a nationwide database under the name of the claimant. C.A. App. A28-A29. The employee further explained in the affidavit that he had searched the nationwide database, and that it contained no record of any claim filed by petitioner. *Id.* at A30.

In response, petitioner submitted affidavits from two of her attorneys. C.A. App. A31-A34, A49. According to those affidavits, counsel had sent a Standard Form 95, by first-class mail, to the Department of Homeland Security's Office of Civil Rights and Civil Liberties, at the following address:

> Department of Homeland Security
> CRCL/Compliance Branch
> Murray Lane, SW
> Building 410, Mail Stop #0190
> Washington, D.C. 20528

Pet. App. 7a-8a; see C.A. App. A49. One of the affidavits acknowledged that counsel had "misdirected" the form by sending it to the Office of Civil Rights and Civil Liberties rather than to Customs and Border Protection. Pet. App. 8a (citation omitted). In addition, the mailing address "omitted the street number (245)" of the building. *Ibid.*

According to the affidavits, counsel had also sent a separate "civil rights complaint" to the Attorney General and the Office of Civil Rights and Civil Liberties. Pet. App. 6a-7a. The Office acknowledged receipt of the civil-rights complaint, but not the Standard Form 95. *Id.* at 8a. Counsel and the Office subsequently exchanged correspondence regarding the status of the civil-rights complaint, but counsel did not inquire about the Standard Form 95. *Ibid.*

3. The district court dismissed petitioner's claims. Pet. App. 15a-27a. The court determined that, in order to satisfy the Act's presentment requirement, "a plaintiff must show proof that the agency actually received a claim," and that "mere mailing of a notice of claim" is not "sufficient." *Id.* at 22a. The court found that petitioner had "provided no evidence of actual receipt." *Id.* at 25a. The court acknowledged that, in *Barnett* v. *Okeechobee Hospital*, 283 F.3d 1232 (2002), the Eleventh Circuit had concluded that "proof of mailing created a rebuttable presumption of receipt." Pet. App. 24a. The court nonetheless determined that "the Government need not rebut the presumption of receipt" here, because petitioner had both misdirected the mailing (by sending it to the Office of Civil Rights and Civil Liberties instead of Customs and Border Protection) and misaddressed it (by omitting the Office's street number). *Id.* at 25a.

The court of appeals affirmed. Pet. App. 1a-14a. The court explained that a plaintiff satisfies the presentment requirement only by demonstrating "actual receipt," and that a plaintiff may not invoke a "presumption that a piece of mail, properly addressed and mailed in accordance with regular office procedures, has been received by the addressee." *Id.* at 10a. The court explained that "[t]he statute and corresponding regulation make clear that actual receipt is required." *Id.* at 13a. The court further explained that applying a presumption of receipt "would be inconsistent with the principle that waivers of sovereign immunity must be strictly construed and limited in scope in favor of the sovereign." *Ibid.* The court acknowledged that the Eleventh Circuit had allowed a plaintiff to invoke such a presumption in *Barnett*, but observed that every other court of appeals to address the question has concluded that such a presumption is inapplicable under the Act. *Id.* at 11a-13a.

ARGUMENT

Petitioner contends (Pet. 15-28) that she satisfied the FTCA's presentment requirement by relying on the mailbox rule—the presumption that an item that has been properly mailed has been received by its addressee. The court of appeals correctly determined, however, that the Act requires actual receipt of the claim by the agency, and that the claimant may not invoke the mailbox rule to demonstrate compliance with that requirement. Nearly every court of appeals to have considered the issue has agreed with that conclusion; the only contrary decision in the courts of appeals is 17 years old and involved a "unique set of facts." Pet. App. 24a. Any conflict with that solitary decision does not warrant this Court's intervention. In any event, this

case would be a poor vehicle for this Court to consider the question, because petitioner cannot satisfy the requirements for invoking the mailbox rule. This Court denied a petition raising the same question in *Vacek* v. *United States Postal Service*, 550 U.S. 906 (2007), and it should follow the same course here. See Pet., *Vacek*, *supra* (No. 06-8441).

1. The decision of the court of appeals is correct.

a. Under the FTCA, a claimant exhausts her administrative remedies only if the agency, at a minimum, actually receives her claim. The Act allows a claimant to sue the United States in federal court only if she has first "presented the claim to the appropriate Federal agency." 28 U.S.C. 2675(a). The ordinary meaning of the word "presented" requires receipt. A parent who says that he "presented" a Christmas gift to his child usually means that the child received the gift. A lawyer who says that he "presented" a brief to a court usually means that the court received the brief. So too, a claimant can have "presented" a claim to the agency only if the agency has received the claim.

Context confirms that the Act requires receipt. Under the Act's exhaustion provision, a claimant may sue the United States only after the claimant has "presented" the claim to the agency and the agency has "mail[ed]" its final denial back to the claimant. 28 U.S.C. 2675(a). In addition, under the Act's statute of limitations, an action is timely only if the claimant has "presented" the claim to the agency within two years after the claim accrues, and has brought the action within six months after the "mailing * * * of notice of final denial of the claim by the agency." 28 U.S.C. 2401(b). That difference in terminology—the claimant "presents" the claim, while the agency "mails" the final denial—is significant,

because "when Congress employs the same word, it normally means the same thing, [and] when it employs different words, it usually means different things." Henry J. Friendly, *Benchmarks* 224 (1967); see *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted). Congress's selection of the term "present" rather than "mail" confirms that a claimant cannot satisfy the prerequisite of presenting a claim simply by mailing it.

Requiring actual receipt also advances the purposes of the presentment requirement. The requirement ensures that a claimant gives the federal agency "a fair opportunity to investigate and possibly settle the claim before the parties must assume the burden of costly and time-consuming litigation." *McNeil* v. *United States*, 508 U.S. 106, 111-112 (1993). An agency can investigate and settle a claim, however, only if the agency actually receives that claim.

Quite apart from the statute, the Attorney General's regulations, promulgated under the authority granted in 28 U.S.C. 2672, expressly provide that "a claim shall be deemed to have been presented when a Federal agency *receives*" an appropriate written notification of a claim. 28 C.F.R. 14.2(a) (emphasis added). By its plain terms, the regulation requires that the agency receive the claim, not just that the claimant place it in the mail.

These requirements do not impose any significant burden on claimants. One "well known and easy way to establish receipt" is to send the claim by certified or registered mail. *Bailey* v. *United States*, 642 F.2d 344,

347 (9th Cir. 1981). A claimant can also call or email the agency to confirm receipt of the claim before filing a complaint in district court.

b. Petitioner nonetheless contends (Pet. 3) that mailing satisfies the presentment requirement under the common-law "'mailbox rule,'" a "presumption that a piece of mail properly addressed and mailed pursuant to normal procedures has been received by the addressee." The mailbox rule, however, is inapplicable in the present context on its own terms.

Traditionally, courts have applied the mailbox rule in cases involving contracts and commercial dealings, but not in cases about the filing of papers with courts or government agencies. For example, in *United States* v. *Lombardo*, 241 U.S. 73 (1916), this Court rejected the proposition that mailing was sufficient in the course of interpreting a statute making it a crime for certain persons to fail to "file" a specified form "with the Commissioner General of Immigration." *Id.* at 74 (quoting White-slave Traffic Act, ch. 395, § 6, 36 Stat. 827). The Court stated that it was unaware of "any case which decides that the requirement of a statute * * * that a paper shall be filed with a particular officer, is satisfied by a deposit in the post office at some distant place." *Id.* at 78. "To so hold," the Court continued, "would create revolutions in the procedure of the law and the regulation of rights." *Ibid.* The Court explained that adopting such a rule in the context of filing would replace "the certain evidence of the paper in the files" with "confusion," "controversies," and "the clash of oral testimonies," would create disputes regarding the "time" of the filing, and would put the evidence about the time of the filing "entirely in the hands" of the filer. *Id.* at 78-79.

Petitioner asserts (Pet. 8) that courts have applied the mailbox rule in cases concerning "filing[s]," but the principal case she cites (Pet. 9) to support that proposition, *Houston* v. *Lack*, 487 U.S. 266 (1988), in fact undermines her argument. In *Houston*, the Court explained that "a large body of lower court authority has rejected the general argument that a notice of appeal is 'filed' at the moment it is placed in the mail addressed to the clerk of the court—this on the ground that *receipt* by the district court is required." *Id.* at 274. The Court declined to "disturb" those cases to the extent they "state the general rule in civil appeals." *Ibid.* The Court merely carved out a special exception to address the "unique circumstances of a *pro se* prisoner," explaining that, unlike an ordinary litigant, a *pro se* prisoner "cannot take * * * precautions" to ensure that his notice is received. *Id.* at 271-272. Here, petitioner is not a *pro se* prisoner. This case thus falls within the "general rule" that the mailbox rule is inapplicable to filings, not within the special exception for *pro se* prisoners. *Id.* at 275.

c. Even assuming petitioner's premise that the mailbox rule could apply in the context of some federal filing requirements, the FTCA's presentment requirement still would not incorporate that common-law presumption. First, although courts often interpret statutes against the backdrop of the common law, they should not read a statute to incorporate common-law rules that are "inconsistent with 'the language of the statute, its structure, or its purposes.'" *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 447 (1999) (citation omitted). As already demonstrated (see pp. 6-8, *supra*), the language, structure, and purposes of the Act show that Congress understood the distinction between receipt

and mailing, and chose to require receipt rather than mailing in the present context. A court contradicts that congressional choice by simply presuming that a form that has been mailed has also been received.

Second, this Court has long held that a "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text," and that a court must interpret the "scope" of "a waiver of the Government's sovereign immunity" "strictly" and "in favor of the sovereign." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). The statutory text, interpreted strictly and in favor of the sovereign, shows that the United States has consented to be sued in cases in which the agency has received the claim. A court may not rely on principles developed at common law to expand the scope of that waiver to encompass cases in which the claimant mailed the claim, but the agency failed to receive it.

Third, this Court has long recognized an "inflexible" rule that a party who invokes the jurisdiction of a federal court must first "affirmatively" establish that jurisdiction. *Mansfield, Coldwater & Lake Mich. Ry. Co.* v. *Swan*, 111 U.S. 379, 382 (1884). As a result, "federal jurisdiction is never presumed." *Viqueira* v. *First Bank*, 140 F.3d 12, 16 (1st Cir. 1998). The presentment requirement is a prerequisite to the exercise of federal jurisdiction under the FTCA. *McNeil*, 508 U.S. at 111. Compliance with that requirement must thus be proved, not presumed.

2. Petitioner contends (Pet. 15-23) that the federal courts of appeals have reached conflicting decisions regarding the application of the mailbox rule in FTCA cases. Petitioner, however, overstates the extent of the conflict.

"[V]irtually every circuit to have ruled on the issue has held that the mailbox rule does not apply to [FTCA] claims." *Vacek* v. *United States Postal Serv.*, 447 F.3d 1248, 1252 (9th Cir. 2006), cert. denied, 550 U.S. 906 (2007). In particular, the Second, Third, Ninth, and Tenth Circuits have all held in published opinions that a litigant must prove receipt, rather than just mailing, in order to satisfy the Act's presentment requirement. See *Lightfoot* v. *United States*, 564 F.3d 625, 628 (3d Cir. 2009); *Bailey*, 642 F.2d at 347; *Moya* v. *United States*, 35 F.3d 501, 504 (10th Cir. 1994); Pet. App. 1a-14a. The Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have reached the same conclusion in dicta or in unpublished opinions. See *Rhodes* v. *United States*, 995 F.2d 1063, 1993 WL 212495, at *2 (4th Cir. 1993) (Tbl.) (per curiam) (unpublished); *Flores* v. *United States*, 719 Fed. Appx. 312, 317 n.1 (5th Cir. 2018) (per curiam) (unpublished); *Willis* v. *United States*, 972 F.2d 350, 1992 WL 180181, at *2 (6th Cir. 1992) (Tbl.) (unpublished); *Overcast* v. *United States Postal Serv.*, 49 Fed. Appx. 63, 66 (7th Cir. 2002) (unpublished); *Bellecourt* v. *United States*, 994 F.2d 427, 430 (8th Cir. 1993) (dicta), cert. denied, 510 U.S. 1109 (1994).

On the other side of the ledger, petitioner identifies (Pet. 16) a single, 17-year-old decision of the Eleventh Circuit, *Barnett* v. *Okeechobee Hosp.*, 283 F.3d 1232 (2002). The Eleventh Circuit, however, *agreed* with the other courts of appeals that "[a] claim is deemed to be presented 'when a Federal agency receives [it],'" and that a claimant accordingly "must show" that the agency "received" the claim that he sent. *Id.* at 1237 (citation omitted). To be sure, the court in that case allowed a claimant to make that showing by relying on a "presumption of receipt." *Id.* at 1239. As the district court

explained in this case, however, the Eleventh Circuit did so on a "unique set of facts." Pet. App. 24a. The Eleventh Circuit emphasized that the claimant used the very "'business reply mail' envelope" that the agency had provided him. *Barnett*, 283 F.3d at 1238, 1240, 1241. The Eleventh Circuit further emphasized that the claimant had addressed the letter "to an administrative *office* * * * and not to a *person*," and, although three specific persons at the agency attested that they had not individually received the letter, the court determined that was insufficient to find that the office as a whole had failed to receive it. *Id.* at 1241. Petitioner has not identified any case in which the Eleventh Circuit has extended *Barnett* beyond those unusual facts. The conflict between the overwhelming majority of the courts of appeals on the one hand, and a solitary, 17-year-old decision involving unusual facts on the other hand, does not warrant this Court's review.

3. In any event, this case would be a poor vehicle for addressing the question presented, because the answer to that question would have no effect on the outcome of the case.

First, as petitioner concedes (Pet. 3), the mailbox rule comes into play only if a letter is "properly addressed and dispatched." *Republic of Sudan* v. *Harrison*, 139 S. Ct. 1048, 1057 (2019). Indeed, in *Barnett*, the Eleventh Circuit explicitly limited its holding to letters that were "properly addressed" and "mailed." 283 F.3d at 1240 (citation omitted). Petitioner, however, has not demonstrated that she "properly addressed and dispatched" her claim. As the court of appeals observed, petitioner "misdirected" her Standard Form 95, incorrectly sending it to the Office of Civil Rights and Civil

Liberties rather than to Customs and Border Protection. Pet. App. 8a (citation omitted). And in doing so, petitioner "omitted the street number" from the address. *Ibid.* Even if the mailbox rule were available in FTCA cases, then, petitioner could not claim its benefit.

Second, there is no sound basis for applying a presumption of receipt where the sender "had strong reason to believe that the [agency] had not received her letter, yet * * * did nothing." *Moya*, 35 F.3d at 504. Here, petitioner had strong reason to believe that the Office of Civil Rights and Civil Liberties, the office to which the letter had been misdirected, had never received petitioner's Standard Form 95. As the Second Circuit noted, the Office expressly "acknowledged receipt" of petitioner's "civil rights complaint," but "did not acknowledge * * * or otherwise make any mention" of her Standard Form 95. Pet. App. 8a. Yet petitioner did nothing about the problem; she exchanged correspondence with the Office regarding her civil-rights complaint, "but the letters made no reference to her misdirected [Standard Form 95]." *Ibid.*

Finally, petitioner concedes (Pet. 5) that, even when it applies, the mailbox rule creates only "a rebuttable presumption" of receipt. The evidence in this case would rebut any presumption that Customs and Border Protection received petitioner's claim. As described above (p. 3, *supra*), the United States introduced an affidavit showing that the agency maintains a nationwide database of all the claims that it receives, and that a search of that database revealed no record of petitioner's claim. That affidavit—in conjunction with the fact that petitioner sent her claim to the wrong agency, the fact that she used an incomplete address for that wrong agency, and the fact that she failed to follow up

with that agency when it failed to acknowledge receipt even though it did acknowledge receipt of her civil-rights complaint—rebuts any presumption that Customs and Border Protection received petitioner's claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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