No. 18-1260

IN THE
Supreme Court of the United States

JESSICA COOKE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY ON PETITION FOR CERTIORARI

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In its brief in opposition to certiorari, the government concedes that a conflict of authority exists on the question presented. The government also does not dispute that tens of thousands of claims under the Federal Tort Claims Act ("FTCA"), 26 U.S.C. § 2675(a), are filed each year, and that the disposition of the question presented governs the rules concerning the timeliness of each of those claims. The government nonetheless opposes certiorari on two principal grounds. Neither suggests the petition for certiorari should not be granted.

First, and tellingly, the government argues at length that the decision below is correct on the merits. But even if that were true—and it is not—that is no reason to deny certiorari on an important legal question over which there is an acknowledged split of authority.

Second, the government argues that this case is a poor vehicle because *if* the Second Circuit had applied the mailbox rule as a matter of law—which it did not—petitioner's actions may nonetheless not have satisfied the rule's factual prerequisites. But in making this argument, the government entirely ignores the fact that the Second Circuit *expressly declined* to "reach the question of whether the requirements of the mailbox rule were met" and instead ruled solely based on its legal interpretation of the FTCA. Pet. App. 14a. And with good reason. As discussed below, had the mailbox rule applied as a matter of law, petitioner would have been able to make a number of arguments before the district court and Second Circuit that her actions satisfied the rule. This Court is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and

once the question presented is resolved any issues regarding the application of the mailbox rule to the facts of petitioner's particular case can, and should, be addressed on remand.

The petition for certiorari should be granted.

I. AS THE GOVERNMENT CONCEDES, THERE IS A CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

There exists a square conflict of authority on the question presented. *See* BIO 5, 11, 12; Pet. 16-18. The Eleventh Circuit has held that the mailbox rule applies to claims brought under the FTCA. Pet. 16-18; *see Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1238-39 (11th Cir. 2002). The Second, Third, Fourth, and Ninth Circuits have held that the mailbox rule does not apply to claims brought under the FTCA. Pet. 18-20. Five other courts of appeals have implied they would agree with the majority rule if the issue were squarely presented. *See id.* 20. The Second Circuit expressly recognized this conflict of authority in its decision below (Pet. App. 12a), as have numerous other courts around the country.[1] There is no reason to believe that the

[1] *See Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1252 (9th Cir. 2006); *Barber v. United States*, 642 F. App'x 411, 414 (5th Cir. 2016) (per curiam); *see also Powell v. Matthew*, No. 16-CV-1654, 2017 WL 8161187, at *3 n.3 (W.D. La. Oct. 6, 2017), *report and recommendation adopted*, 2018 WL 1188531 (W.D. La. Mar. 6, 2018); *Barber v. United States*, No. 1:14CV470-HSO-JCG, 2015 WL 13101940, at *3 (S.D. Miss. May 7, 2015), *aff'd*, 642 F. App'x 411 (5th Cir. 2016); *Olaniyi v. Dist. of Columbia*, 763 F. Supp. 2d 70, 87 n.16 (D.D.C. 2011); *Garland-Sash v. Lewis*, No. 05 CIV. 6827 (WHP), 2007 WL 935013, at *5-*6 (S.D.N.Y. Mar. 26, 2007), *aff'd in part, vacated in*

entrenched disagreement on the question presented will be resolved absent this Court's intervention, and the government does not suggest otherwise.

In its brief in opposition, as it has done in numerous other briefs filed in federal courts in recent years,[2] the government frankly acknowledges this circuit split exists. *See* BIO 5 (noting that "[n]early every court of appeals" agrees with the Second Circuit's approach, but that the Eleventh Circuit has reached a "contrary decision"); BIO 12 (acknowledging a "conflict between

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part, 348 F. App'x 639 (2d Cir. 2009); *Arias v. United States*, No. CIV A 05-4275 JLL, 2007 WL 608375, at *4 n.4 (D.N.J. Feb. 23, 2007); *Vecchio v. United States*, No. 05 CIV. 393 (PAC), 2005 WL 2978699, at *5 (S.D.N.Y. Nov. 3, 2005).

[2] Brief for the United States at 9, *Barber v. United States*, 642 F. App'x 411 (5th Cir. 2016) (No. 15-60614), 2015 WL 8593094 (noting that "nearly all the courts of appeals . . . have concluded that § 2675(a) requires actual receipt of an FTCA claim" but that the Eleventh Circuit delivered a "contrary holding in *Barnett*"); Brief for the United States at 30 n.8, *Lassic v. United States*, 668 F. App'x 395 (2d Cir. 2016) (No. 15-3240), 2016 WL 1728875 (arguing that *Barnett* "goes against the weight of the authority in other circuits"); Brief for the United States at 14-15, *Wheeler v. United States*, 571 F. App'x 504 (8th Cir. 2014) (No. 13-3706), 2014 WL 906035 (recognizing split); Brief for Bureau of Prisons Defendants-Appellees at 33 & n*, *Garland-Sash v. Lewis*, 348 F. App'x 639 (2d Cir. 2009) (No. 08-0740), 2009 WL 6705940 (arguing that the "majority" of courts have "held that the mailbox rule does not apply to claims submitted pursuant to the FTCA," but noting that "one circuit [the Eleventh Circuit in *Barnett*] has held to the contrary"); Brief for the United States at 29, *Lightfoot v. United States*, 564 F.3d 625 (3d Cir. 2009) (No. 08-2602), 2008 WL 8129312; Brief for the United States at 10 & n.2, *Estes v. United States*, 302 F. App'x 563 (9th Cir. 2008) (No. 07-56141), 2007 WL 4755625 (recognizing conflict).

the overwhelming majority of the courts of appeals on the one hand" and the Eleventh Circuit's decision in *Barnett* on the other hand); BIO 11 (noting that at least four courts of appeals have held that "a litigant must prove receipt, rather than just mailing, in order to satisfy the [FTCA's] presentment requirement" but that the Eleventh Circuit in *Barnett* "allowed a claimant to make th[e] showing by relying on a presumption of receipt" (internal quotations omitted).

Although acknowledging that this entrenched conflict exists and presenting no reason why it will resolve on its own accord, the government nonetheless attempts to minimize the extent of the conflict in two ways. Neither is persuasive.

First, the government claims the Eleventh Circuit's decision in *Barnett* "involved a unique set of facts." BIO 5 (internal quotations omitted). But the allegedly "unique" fact in *Barnett* is that when the claimant filed his FTCA claim, he used a "business reply mail" envelope the agency had provided to him. *Barnett*, 283 F.3d at 1238-42; *see* BIO 12. The government does not explain what relevance the provenance and characteristics of an envelope could possibly have in determining whether the mailbox rule applies to FTCA claims. The mailbox rule is a legal doctrine concerning the placement of a claim in the mail. The nature of the physical envelope in which the claim is mailed is simply irrelevant. More to the point, the Second Circuit's decision did not turn on the "unique facts" of this case or of *Barnett*. Rather, it was premised on the straightforward legal holding that "the mailbox rule does not apply to claims under the FTCA." Pet. App.

14a. That holding squarely conflicts with the rule in the Eleventh Circuit and this Court's intervention is needed to resolve this split.

Second, the government suggests that *Barnett* is a "solitary decision [that] does not warrant this Court's intervention." BIO 5. But this Court regularly grants certiorari in cases presenting splits where only one Circuit has adopted a certain legal position.[3] Indeed, this Court recently granted a case presenting a lopsided five-to-one split and then issued a unanimous opinion vindicating the minority view. *See Honeycutt v. United States*, 137 S. Ct. 1626, 1631 & n.1 (2017). Moreover, the question presented is important. Tens of thousands of FTCA claims (collectively worth billions of dollars) are filed with federal agencies each year. Given that the FTCA "governs the processing of a vast multitude of claims," this Court has recognized the government's strong "interest in orderly administration of this body of litigation." *McNeil v. United States*, 508 U.S. 106, 112 (1993). And even if *Barnett* could properly be characterized as a "solitary" decision,[4] that opinion

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[3] *See, e.g.*, *Ocasio v. United States*, 136 S. Ct. 1423 (2016) (one-to-one split); *Nichols v. United States*, 136 S. Ct. 1113 (2016) (one-to-one split); *Luis v. United States*, 136 S. Ct. 1083 (2016) (one-to-one split); *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750 (2016) (one-to-one split); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (two-to-one split); *Taylor v. United States*, 136 S. Ct. 2074 (2016) (two-to-one split); *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581 (2016) (two-to-one split).

[4] As explained in the petition (*see* Pet. 19, 26-27), a majority of the Ninth Circuit panel in *Vacek* suggested that circuit precedent

presently controls the timeliness of FTCA claims for the thirty million Americans living in states within the Eleventh Circuit. The current heterogeneity among the circuits on the question of whether the mailbox rule applies to claims made under the FTCA creates significant unfairness and allows geographical happenstance to control whether an FTCA claim is deemed timely.[5] *See* Pet. 23-24.

II. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

"In light of [its] holding that the mailbox rule does not apply to claims under the FTCA," the Second Circuit expressly declined to "reach the question of whether the requirements of the mailbox rule were met in this case." Pet. App. 14a. Ignoring the Second Circuit's decision not to reach the factual specifics of petitioner's claim, the government argues that this case is a poor vehicle to resolve the question presented because a court on

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declining to apply the mailbox rule to the FTCA should be "re-examined." 447 F.3d at 1254-55 (Thomas, J., concurring).

[5] The government suggests in passing that certiorari is not warranted because the Eleventh Circuit's opinion is "17 years old." BIO 5. But *Barnett* is regularly applied within the Eleventh Circuit, and that opinion has been given dispositive weight in recent cases. *See* Pet 17 n.3. In any event, the government cites no support—legal or otherwise—for its surprising suggestion that the *longer* a court of appeals decision has existed and been followed, the *weaker* the force of the decision's holding. Disproving the government's suggestion, this Court has recently granted cases presenting circuit splits involving decisions from the courts of appeals that are substantially older than *Barnett*. *See, e.g.*, *CITGO Asphalt Ref. Co. v. Frescati Shipping Co., Ltd.*, 139 S. Ct. 1599 (2019) (granting certiorari on split premised in part on Second Circuit cases dating back to the 1930s).

remand might determine that the particular circumstances of petitioner's case did not satisfy the mailbox rule's factual requirements. The government's supposition presents no reason to deny certiorari in this case.

First, as this Court has oft-emphasized, it is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Thus, this Court does not consider arguments—like those presented in the government's brief in opposition, *see* BIO 12-14—that were "not addressed by the Court of Appeals." *Id.*; *see Skinner v. Switzer*, 562 U.S. 521, 537 (2011) ("[Respondent] presents several reasons why [petitioner's] complaint should fail for lack of merit. Those arguments, unaddressed by the courts below, are ripe for consideration on remand."); *see also Thacker v. Tenn. Valley Auth.*, 139 S. Ct. 1435, 1443 (2019) (similar); *Byrd v. United States*, 138 S. Ct. 1518, 1526-27 (2018) (similar); *Manuel v. City of Joliet*, 137 S. Ct. 911, 922 (2017) (similar). Even if the government were correct that the requirements of the mailbox rule are not satisfied on these facts, the Second Circuit could address that issue—for the first time—on remand.

Second, the wisdom of this Court's policy not to address factual issues unaddressed by a court below is vindicated by the very facts of petitioner's case. Contrary to the government's bald assertion that the mailbox rule would not apply to petitioner, that factual issue remains an open question that the parties can, and would, dispute on remand. For example, the government concedes that federal regulations require agencies to forward misdirected claims to the proper

government office once received. *See* BIO 2; 28 C.F.R. § 14.2(b)(1) (explaining 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"). On remand, the court below would have to decide whether that regulation would have required the Office of Civil Rights and Civil Liberties at the Department of Homeland Security to forward petitioner's SF-85 to Customs and Border Protection upon receipt.

Moreover, contrary to the government's apparent suggestion that mailbox rule never applies if the letter at issue is incorrectly addressed, BIO 12-13, some "courts considering whether *pro se* inmate papers mailed to an incorrect address may invoke the mailbox rule have given *pro se* prisoners the benefit of the doubt." *Chandler v. United States*, No. CR 06-107-01-M, 2011 WL 6097378, at *4 (D.R.I. Dec. 6, 2011); *see Mayne v. Hall*, 122 F. Supp. 2d 86, 97 (D. Mass. 2000); *Hollins v. United States*, No. 4:04CV1205 RWS, 2005 WL 1827914, at *3 (E.D. Mo. Aug. 2, 2005). These decisions demonstrate that under the common law the mailbox rule might well apply even to misaddressed letters. This of course would make sense given that the mailbox rule does not establish that a letter was actually received, but rather creates a rebuttable presumption of receipt. For all the reasons the mailbox rule should apply to FTCA claims—*see* Pet. 25-28, *infra* 9-11—a court could well find the rule to apply regardless of the manner in which a letter was addressed. More critically, however, this Court need not—and should not—address this question now in the first instance when the Second Circuit expressly declined to reach it.

Petitioner's case presents a strong vehicle through which this Court can resolve the legal question of whether the mailbox rule applies to FTCA claims. The facts are undisputed, and the Second Circuit squarely ruled as a matter of law on the question presented. Pet. App. 13a-14a. Should this Court determine that the mailbox rule does apply to FTCA claims, the court below would then have the opportunity in the first instance to apply the requirements of the mailbox rule to petitioner's case.

III. THE SECOND CIRCUIT'S DECISION IS INCORRECT.

Tellingly, the government spends the majority of its brief in opposition arguing that the Second Circuit's decision is correct on the merits. *See* BIO 6-10. Given the government's concession that a circuit split exists on the precise legal question presented here, whether this Court would eventually affirm the Second Circuit on the merits is irrelevant to the question of whether certiorari should be granted. In any event, the Second Circuit's decision is incorrect. As explained in the petition, this Court has recognized that Congress did *not* intend the FTCA to operate independently of common-law principles such as the mailbox rule. *See* Pet. 26-27. The government's arguments in defense of the decision below are unpersuasive.

First, the government argues that the plain text of the FTCA establishes that "actual receipt" is required to satisfy the FTCA's presentment requirement. BIO 6-8. The government argues that this reading is bolstered by regulations providing that "a claim shall be deemed to have been presented when a Federal agency receives"

notification of the claim. 28 C.F.R. § 14.2(a); *see* BIO 7. This argument misunderstands the purpose of the mailbox rule, which is to establish a rebuttable *presumption* of receipt if a letter is properly mailed. The question is not whether the FTCA requires receipt of a claimant's Form SF-85—it clearly does—but instead is whether receipt can be established by presumption in the event that the form is properly mailed. *See Vacek*, 447 F.3d at 1255 (Thomas, J., concurring) (noting that, even if the mailbox rule applied to FTCA claims, "a plaintiff must still prove receipt as the statute requires, but he may rely on the mailbox rule's *rebuttable* presumption to do so"). In discussing the fact that an agency must "receive" a claim, the government focuses on a point upon which there is no dispute between the parties.

Second, the government argues that the majority rule serves public policy by "advanc[ing] the purposes of the presentment requirement." BIO 7. On the contrary, it is the Eleventh Circuit's rule that best comports with public policy and congressional intent. In 1966, Congress amended the FTCA in order to achieve "more fair and equitable treatment of private individuals and claimants when they deal with the Government." S. Rep. No. 89-1327, at 2 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2515, 2515-16. As Judge Thomas noted in his concurrence in *Vacek*, "[t]o require the litigant—who has no access to the annals of a government agency—to present concrete evidence of receipt in the absence of certified or registered mail would impose an insurmountable obstacle." 447 F.3d at 1255 (Thomas, J., concurring). That "insurmountable obstacle" cannot be

squared with Congress's desire to promote "fair and equitable" treatment of FTCA claimants.

Third, the government argues that the mailbox rule does not apply "in cases about the filing of papers with courts or government agencies." BIO 8. But *Barnett* is proof to the contrary. Moreover, the government provides no logical reason as to why the mailbox rule should not apply to administrative filings in the same manner as it applies to contracts or to the mailings of prisoners. This is all the more so given Congress's intent that the FTCA operate in a manner that is "fair" to FTCA claimants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 3, 2019