No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the common-law "mailbox rule" applies to claims brought under the Federal Tort Claims Act, 28 U.S.C. § 2675(a).

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PETITION FOR A WRIT OF CERTIORARI

Jessica Cooke petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The decision of the Second Circuit (Pet. App. 1a) is not yet reported. The decision of the district court (Pet. App. 15a) is unreported.

JURISDICTION

The judgment of the Second Circuit was entered on March 7, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. § 2675(a) provides in relevant part:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 C.F.R. § 14.2(a) provides:

> [A] claim [under the FTCA] shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

INTRODUCTION

Under the Federal Tort Claims Act ("FTCA"), a plaintiff may seek money damages against the United States "for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2675(a). A plaintiff may not, however, institute an FTCA claim in federal court, unless he or she has first presented the claim to the relevant federal agency. *Id.* The FTCA's implementing regulations provide that "a claim shall be deemed to have been presented" when an

agency receives from a claimant the documentation required to support a claim. 28 C.F.R. § 14.2(a).

This case presents the question of whether the presentment requirement of 26 U.S.C. § 2675(a) can be satisfied by the "mailbox rule," a common-law doctrine that creates a rebuttable presumption that a piece of mail properly addressed and mailed pursuant to normal procedures has been received by the addressee. In the decision below, the Second Circuit held that the mailbox rule was inapplicable as a matter of law to claims brought under the FTCA. Its decision thus requires a plaintiff to prove that the appropriate federal agency has actually received his or her claim—as opposed to showing that the claim was duly mailed to the agency—as a prerequisite to filing an FTCA suit in federal court.

In so ruling, the Second Circuit agreed with the position adopted by the Third, Fourth, and Ninth Circuits. *See Lightfoot v. United States*, 564 F.3d 625, 628 (3d Cir. 2009); *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1252 (9th Cir. 2006); *Rhodes v. United States*, 995 F.2d 1063, 1993 WL 212495, at *2 (4th Cir. 1993) (unpublished decision) (per curiam).[1] In contrast, the Second Circuit recognized that it was in square conflict

[1] As explained below, *see infra* at 20, five other courts of appeals—the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits—have rendered similar holdings without squarely considering the question presented in this case. *See Flores v. United States*, 719 F. App'x 312, 317 n.1 (5th Cir. 2018); *Moya v. United States*, 35 F.3d 501, 504 (10th Cir. 1994); *Bellecourt v. United States*, 994 F.2d 427, 430 (8th Cir. 1993); *Willis v. United States*, 972 F.2d 350, 1992 WL 180181, at *2 (6th Cir. 1992) (unpublished decision); *Overcast v. U.S. Postal Serv.*, 49 F. App'x 63, 66 (7th Cir. 2002); *Drazan v. United States*, 762 F.2d 56, 58 (7th Cir. 1985).

with the Eleventh Circuit, which has applied the mailbox rule in finding a presumption that a plaintiff who has mailed a claim to a federal agency has exhausted his or her administrative remedies and thus may bring an FTCA claim in court. *See Barnett v. Okeechobee Hospital*, 283 F.3d 1232, 1239 (11th Cir. 2002); *see also* Pet. App. 12a-13a. This conflict is direct, entrenched, and has been repeatedly recognized by the courts of appeals, the district courts, and the government itself.

As explained in detail below, this Court's review is warranted. Tens of thousands of FTCA claims are filed every year, and the question presented is relevant to the disposition of each of them because it implicates the basic issue of what actions a plaintiff must take in order to exhaust his or her administrative remedies—a prerequisite to filing suit. Indeed, this Court has previously explained that orderly and uniform rules are particularly critical in the FTCA context given the number of FTCA claims the government processes each year. *See McNeil v. United States*, 508 U.S. 106, 112 (1993).

Moreover, this case is an ideal vehicle for resolving the question presented. The Second Circuit squarely held that the mailbox rule is inapplicable as a matter of law to FTCA claims and there are no fact-bound disputes that might complicate this Court's review. To the contrary, having ruled as a legal matter that the mailbox never could apply to exhaust an FTCA claim, the Second Circuit expressly declined to address whether as a matter of fact the requirements of the mailbox rule were met, if the rule applied as a matter of law. Pet. App. 14a.

Finally, review is warranted because the Second Circuit's decision is wrong. The common law has long recognized the mailbox rule, and the text of the FTCA provides no reason to believe that Congress intended to exempt FTCA claims from normal common-law principles. Applying the mailbox rule to FTCA claims comports with Congress's intent when amending the statute in 1966—a change designed to ensure that FTCA plaintiffs need only provide "minimal notice" of a claim against the government. And the mailbox rule is entirely consistent with the FTCA's implementing regulations because it creates a rebuttable presumption that a duly mailed claim was received, thus satisfying the requirement that a claim be actually received by a federal agency. *See* 28 C.F.R. § 14.2.

The petition for certiorari should be granted.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The sovereign immunity of the United States historically "prevented those injured by the negligent acts of federal employees from obtaining redress through lawsuits." *Molzof v. United States*, 502 U.S. 301, 304 (1992). In 1946, Congress passed the FTCA, which "replaced that notoriously clumsy system of compensation with a limited waiver of the United States' sovereign immunity." *Id.* (internal citations and quotation marks omitted). The FTCA was designed "to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances."

Richards v. United States, 369 U.S. 1, 6–7 (1962); *see United States v. Muniz*, 374 U.S. 150, 154 (1963).

In its current form, the FTCA provides that the United States shall be liable to the same extent as a private party "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1); *see also* 28 U.S.C. §§ 2671-2680; *Kosak v. United States*, 465 U.S. 848, 851–52 (1984).

The FTCA requires that claimants first exhaust their administrative remedies with federal agencies before filing suit in federal court. If a claim is not presented in writing to the agency within two years after it accrues, it is forever barred. *See* 28 U.S.C. § 2401(b). The "presentment requirement" of the Act provides in relevant part:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

28 U.S.C. § 2675(a). The administrative notice requirement of 28 U.S.C. § 2765 "is jurisdictional and

cannot be waived." *See, e.g.*, *Lykins v. Pointer Inc.*, 725 F.2d 645, 646 (11th Cir. 1984).

Applying the plain language of § 2675(a), this Court has held that the FTCA bars plaintiffs from instituting "a claim against the United States for money damages unless the claimant has first exhausted his administrative remedies." *McNeil*, 508 U.S. at 107 (internal quotation marks omitted); *see also United States v. Gaubert*, 499 U.S. 315, 320 n.5 (1991); *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955).

In 2001, the Department of Justice promulgated rules elaborating upon the meaning § 2675(a)'s presentment requirement. In pertinent part, those regulations provide:

> [A] claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

28 C.F.R. § 14.2(a).

B. The "Mailbox Rule"

The "mailbox rule" is "a rebuttable, common-law presumption that a piece of mail, properly addressed and mailed in accordance with regular office procedures, has been received by the addressee." Pet. App. 10a; *see* 29 Am. Jur. 2d *Evidence* § 273, Westlaw (database updated Feb. 2019) (general background on the mailbox rule); *see also* 2 *Williston on Contracts* § 6:32, Westlaw (4th ed. database updated Nov. 2018) (noting that the common law deems contracts complete upon mailing of acceptance and that "it is immaterial that the acceptance never reaches its destination"). In short, the mailbox rule is an evidentiary presumption that allows courts to infer the conclusion that a piece of mail was actually received from the fact that the mail was properly dispatched. *See, e.g.*, *Phil. Marine Trade Ass'n -Int'l Longshoremen's Ass'n Pension Fund v. Comm'r.*, 523 F.3d 140, 147 (3d Cir. 2008) (noting "the common-law mailbox rule" provides "[i]f a document is properly mailed, the court will presume the United States Postal Service delivered the document to the addressee in the usual time"); *Mahon v. Credit Bureau of Placer Cty. Inc.*, 171 F.3d 1197, 1202 (9th Cir. 1999) (as amended) (same).

State and federal courts have relied on the common-law mailbox rule for over a century. That rule has been applied in a wide variety of contexts, including both contract cases and cases concerning whether a filing or notice of claim was presented within a statute of limitations. *See, e.g.*, *Lupyan v. Corinthian Colleges Inc.*, 761 F.3d 314, 319 (3d Cir. 2014) (noting "the longstanding common law 'mailbox rule'" and citing

precedent from 1884 suggesting that "a letter properly directed [and] proved to have been either put into the post-office or delivered to the postman" is presumed to have been "received by the person to whom it was addressed" (internal quotation marks omitted)); *In re Yoder Co.*, 758 F.2d 1114, 1118 (6th Cir. 1985) (citing 1932 precedent for the proposition that "[t]he common law has long recognized a presumption that an item properly mailed was received by the addressee"); C.C. Langdell, *A Summary of the Law of Contracts* 10-22 (2d ed. 1880) (similar).

This Court, too, has long applied the mailbox rule. As early as 1884, this Court recognized that, "if a letter properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed, from the known course of business in the post-office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed." *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884). Citing opinions from state courts of last resort from the 1830s and 1840s, this Court concluded in *Rosenthal* that the mailbox rule was "well settled" in the common law. *See id.* (citing *Callan v. Gaylord*, 1834 WL 3372, at *1 (Pa. 1834), and *Starr v. Torrey*, 22 N.J.L. 190 (N.J. 1849)); *see also Hagner v. United States*, 285 U.S. 427, 430 (1932) ("The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed."). And in the more recent case of *Houston v. Lack*, 487 U.S. 266, 276 (1988), the Court reaffirmed the common-law mailbox rule and held that a notice of appeal should be deemed "filed at the time

petitioner delivered it to the prison authorities for forwarding to the court clerk."

While the Court has not yet had occasion to consider the question of whether the mailbox rule applies to claims brought under the FTCA, it has more broadly observed that the FTCA was not formulated to "operate with complete independence from . . . the common law." *Richards*, 369 U.S. at 6–7. To the contrary, the FTCA was meant to be interpreted in conjunction with common law principles. *See id.*

C. Factual Background

On May 7, 2015, two agents of the United States Customs and Border Protection Agency ("CBP") affected a traffic stop of petitioner Jessica Cooke in upstate New York. Pet. App. 5a. During that traffic stop, the CBP agents shoved petitioner into the side of her car without cause, threw her violently to the ground, and repeatedly tased her. Pet. App. 5a, 16a. Petitioner—who is a United States citizen—was then brought to a holding cell and detained for four hours. At no time was petitioner offered medical treatment. Eventually petitioner was released without any charges filed. As a result of this encounter, petitioner suffered physical and emotional pain and injuries. Pet. App. 16a.

On April 1, 2016, petitioner (through counsel) submitted a civil rights complaint to the Department of Homeland Security's Office of Civil Rights and Civil Liberties (the "CRCL"). The complaint provided details regarding the incident and demanded that the violation of petitioner's rights be investigated and addressed.

Pursuant to CBP directives, all claims for $10,000 or less are to be directed to the CBP's office in Indianapolis and all claims for more than $10,000 are to be directed to the CBP Chief Counsel for the office in which the employee whose actions gave rise to the complaint is employed. Pet. App. 6a. Petitioner's counsel addressed the civil rights complaint to the Attorney General in Washington, D.C., with a copy mailed to:

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

Pet. App. 7a.

Petitioner's counsel also sent an administrative "Claim for Damage, Injury, or Death, Standard Form 95" ("Form SF-95") to the CRCL by first class mail on May 31, 2016. Pet App. 7a, 17a. That form claimed $2 million in damages stemming from injuries to Ms. Cooke's wrists, back, shoulders, and neck. It also claimed that Ms. Cooke's detainment caused her to suffer mental health problems.

Petitioner's Form SF-95 was mailed to "DHC/CRCL" in Washington, D.C. The CRCL acknowledged receipt of the civil rights complaint by letter dated June 22, 2016. Pet. App. 8a. The CRCL never acknowledged receipt of petitioner's Form SF-95. *Id.*

When petitioner did not receive a response from DHS/CRCL with respect to her Form SF-95, she filed a complaint in the United States District Court for the

Northern District of New York. In the complaint, petitioner alleged that the defendants—the CBP, two named CBP agents, the United States Department of Homeland Security ("DHS")—had violated her rights under the Fourth, Fifth, and Fourteenth Amendments of the Constitution and had also violated the statutory protections provided by 42 U.S.C. §§ 1981, 1983, 1985, and 1988. Petitioner later filed an amended complaint naming the United States as the sole defendant. In the amended complaint, petitioner brought suit under the FTCA and presented claims pursuant to 42 U.S.C. §§ 1983, 1985, and 1988; the Fourth, Fifth, and Fourteenth Amendments of the Constitution; *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); and *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

The government filed a motion to dismiss petitioner's amended complaint for lack of subject-matter jurisdiction. The government argued that petitioner had failed to exhaust her administrative remedies in the manner required by the FTCA because she had not first presented her claim to the appropriate federal agency. In support of its motion, the government submitted a declaration in which the CBP's Assistant Chief Counsel declared he had conducted a search in the CBP's tracking system and had found "no records of any claim filed by [petitioner] under the FTCA in the Office of Assistant Chief Counsel, Boston, the Office of Assistant Chief Counsel, Indianapolis, or any other CBP Counsel

office." Pet. App. 6a.[2] In opposition, petitioner's attorney submitted an affidavit describing the steps he had taken to mail the civil rights complaint to the Attorney General and DHS and to mail petitioner's Form SF-95 to DHS.

The district court dismissed petitioner's amended complaint. The court concluded that petitioner had failed to exhaust her remedies under the FTCA because petitioner had presented no evidence that the Form SF-95 was ever received by CBP. The district court concluded that the evidence "supports [petitioner's] assertion that a claim was prepared and mailed," but that there was "no proof of actual receipt upon a government agency." Pet. App. 25a. The district court held that proof of "actual receipt by the agency is required" because the mailbox rule—under which receipt of a properly-mailed document is presumed—does not apply to complaints filed under the FTCA. *Id.* Because the district court found no proof that petitioner had exhausted her administrative remedies by filing the Form SF-95 with the agency, the court determined it lacked subject-matter jurisdiction. Pet. App. 26a.

The Second Circuit affirmed. The Court of Appeals explained that it had "not [previously] examined the FTCA's presentment requirement" and recognized that

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[2] In explaining the rationale for this search, the government explained that pursuant to CBP directives, all claims received by CBP for $10,000 or less must be forwarded to the CBP's Office of Assistant Chief Counsel in Indianapolis and that all claims for more than $10,000 must be forwarded to the Assistant or Associate Chief Counsel with responsibility for the office in which the employee whose actions gave rise to the claim is located.

the other courts of appeals are divided on the proper construction of that statute. Pet. App. 11a. In describing the circuit conflict, the court recognized that Eleventh Circuit has applied the mailbox rule to claims brought under the FTCA whereas numerous other circuits "have held that the common-law mailbox rule is inapplicable to FTCA claims." Pet. App. 11a.

Joining the majority of courts to address the issue, the Second Circuit held "the mailbox rule is inapplicable to claims brought under the FTCA, and that therefore the mere mailing of a notice of claim does not satisfy the FTCA's presentment requirement." Pet. App. 13a. The court reasoned "[t]he statute and corresponding regulation make clear that actual receipt is required, and applying the mailbox rule to claims under the FTCA would be inconsistent with the principle that waivers of sovereign immunity must be strictly construed and limited in scope in favor of the sovereign." *Id.* Thus, the court determined "a plaintiff in a FTCA case may not invoke the common-law presumption of receipt . . . . [I]nstead, she must show actual receipt." Pet. App. 13a.

Having held that the mailbox rule did not apply as a matter of law to claims brought 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" were the rule to apply. Pet. App. 14a.

REASONS FOR GRANTING THE WRIT

This case presents the ideal vehicle for this Court to resolve an acknowledged and entrenched conflict among the circuits regarding the application of the mailbox rule to FTCA claims. If petitioner's case had arisen in the Eleventh Circuit, the mailing of her Form SF-95 would

have been sufficient to create a presumption that she had exhausted her remedies before CBP and thus satisfied the FTCA's presentment requirement. But, because petitioner's case arose in the Second Circuit—as would also have been the case had her case arisen in the Third, Fourth, or Ninth Circuits—the mailing of her Form SF-95 was not sufficient to create a presumption that she had exhausted her administrative remedies.

There is no reason in law or logic for why the meaning of administrative exhaustion under a federal statute differs solely based upon the geographic location in which a plaintiff files suit. This circuit conflict has existed for more than fifteen years, and the Eleventh Circuit—in which petitioner would have prevailed—adopted its position after at least one other circuit had held the mailbox rule did not apply to FTCA claims. There is no reason to believe further percolation will resolve this conflict and this issue is important given the thousands of FTCA claims filed annually. Finally, the position of the Second Circuit—and those courts with which it is aligned—is wrong as a matter of law.

The petition for certiorari should be granted.

I. THERE IS AN ACKNOWLEDGED CONFLICT OF AUTHORITY ON THE QUESTION PRESENTED.

As the Second Circuit acknowledged, its decision was squarely in conflict with binding authority from the Eleventh Circuit and in agreement with decisions from at least three other circuits. This square circuit conflict justifies this Court's grant of certiorari in this case.

A. The Eleventh Circuit Has Held That The Mailbox Rule Applies To Claims Brought Under The FTCA.

In *Barnett v. Okeechobee Hospital*, 283 F.3d 1232 (11th Cir. 2002), the plaintiff sued the United States Department of Veterans Affairs ("VA") for medical malpractice. The government moved to dismiss the complaint, arguing that the VA never received the plaintiff's Form SF-95 and thus that the plaintiff had failed to exhaust his administrative remedies as required by 28 U.S.C. § 2675(a). In response, plaintiff's counsel submitted a copy of the Form SF-95 that he had mailed to the VA, along with a copy of postage-paid envelope in which he had mailed that form. The district court granted the government's motion, holding "a claim is 'presented' when it is received by a federal agency . . . [M]ailing alone is not enough; there must be evidence of actual receipt." 283 F.3d at 1239 (internal quotation marks omitted) (alterations in original).

The Eleventh Circuit reversed. The court held that the plaintiff's mailing of the Form SF-95 to the VA "fulfilled the prerequisites of 28 U.S.C. § 2675 . . . by creating a presumption, which the VA has failed to rebut, that the agency received his completed [Form SF-95]." *Id.* at 1237. In so holding, the court reasoned "[t]he common law has long recognized a rebuttable presumption that an item properly mailed was received by the addressee" and found "no reason why" a similar presumption should not apply to the mailing of a Form SF-95 by a plaintiff exhausting his remedies under the FTCA. *Id.* at 1239 (internal quotation marks omitted); *see also id.* at 1240 ("[W]e simply believe that the VA

should not be accorded any special presumption of believability because it is a branch of the United States government and should be treated no differently than a private defendant.").[3]

Having held that the mailbox rule applied as matter of law to the FTCA, the court then determined that the plaintiff had satisfied the three factual prerequisites for the application of the rule: "(1) the document was properly addressed; (2) the document was stamped; and (3) the document was mailed." *Id.* at 1240 (citation and quotation marks omitted). Finding the government had not rebutted the presumption that it had received the plaintiff's Form SF-95, the court found the plaintiff had exhausted his administrative remedies and thus that the district court had subject-matter jurisdiction over the plaintiff's FTCA claim.[4]

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[3] *Barnett* is regularly applied in the Eleventh Circuit. *See, e.g.*, *Michel v. Fed. Bureau of Prisons FCI*, No. 716CV00863, 2018 WL 835101, at *2 (N.D. Ala. Feb. 13, 2018); *Elwyn v. Ars Nat'l Servs. Inc.*, No. 6:16-CV-16-ORL-31GJK, 2016 WL 6568077, at *2 (M.D. Fla. Nov. 4, 2016).

[4] *Barnett* has been cited for the proposition that the mailbox rule should apply to state analogues to the FTCA. *See, e.g.*, *Lee v. State*, 182 P.3d 1169, 1173 (Ariz. 2008) (citing *Barnett* for the proposition that the mailbox rule should apply to the Arizona analogue to the FTCA). Moreover, courts of appeals have cited with approval to *Barnett* when construing the application of the mailbox rule to other statutory schemes. *See, e.g.*, *Rios v. Nicholson*, 490 F.3d 928, 933 (Fed. Cir. 2007) (citing *Barnett* and holding that the mailbox rule applies to filing a notice of appeal from a decision of the Board of Veterans' Appeals with the Court of Appeals for Veterans Claims); *see also Ortiz-Rivera v. United States*, 891 F.3d 20, 27 (1st Cir. 2018) (citing *Barnett* when construing FTCA's presentment requirement in case concerning the timeliness of a claim).

B. The Second, Third, Fourth, And Ninth Circuits Have Held That The Mailbox Rule Does Not Apply To Claims Brought Under The FTCA.

In the decision below, the Second Circuit squarely held that the mailbox rule does not apply to exhaust a plaintiff's administrative remedies for claims made under the FTCA. Pet. App. 13a. That decision is consistent with the rule in the Third, Fourth, and Ninth Circuits. Moreover, the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have suggested they are likely to agree with the Second Circuit's approach when they squarely confront the question.

In *Lightfoot v. United States*, 564 F.3d 625, 628 (3d Cir. 2009), the plaintiff submitted an administrative claim to the U.S. Postal Service (USPS) alleging damages arising from a car accident caused by a USPS employee. The USPS denied the claim and the plaintiff submitted a request for reconsideration pursuant to 39 C.F.R. § 912.9(c) by mailing a first-class letter to the USPS. Over six months after receiving the USPS's initial denial, and having not received any response to his request for reconsideration, the plaintiff filed suit under the FTCA. The government moved to dismiss the claim, arguing that the plaintiff had failed to exhaust his administrative remedies because he filed suit more than six months after the initial denial, and because there was no evidence that the USPS had received the plaintiff's request for reconsideration.[5] The Third Circuit affirmed

[5] After the denial of an administrative claim, a claimant has two options: (1) he may file suit in the District Court within six months of the denial pursuant to 28 U.S.C. § 2401(b); or (2) he may file a

the district court's dismissal of the suit, "join[ing its] sister Courts in rejecting the mailbox rule and holding that a plaintiff must demonstrate that the Federal agency was in actual receipt of the claim, whether on initial presentment or on a request for reconsideration." *Id.* at 628. Holding that a claim under the FTCA is "deemed to have been filed when received," the court held that a plaintiff must "demonstrate that the Federal agency was in actual receipt of the claim" in order to satisfy the FTCA's presentment requirement. *Id.* at 627-28.

The Ninth Circuit reached the same conclusion in *Vacek v. U.S. Postal Service*, 447 F.3d 1248, 1251 (9th Cir. 2006), holding that the plaintiff's argument that the mailbox rule should apply to satisfy the FTCA's presentment requirement was foreclosed by its prior decision in *Bailey v. United States*, 642 F.2d 344 (9th Cir. 1981). *But see* 447 F.3d at 1257 (Thomas, J., concurring) (two-judge concurrence noting that the mailbox rule should apply to FTCA claims but finding that a contrary holding was compelled by circuit precedent that should be "re-examin[ed]"). In so ruling, the Ninth Circuit explicitly recognized that it was taking a position contrary to that reached by the Eleventh Circuit in *Barnett*. *Id.* at 1252.

The Fourth Circuit has likewise held, in an unpublished table decision, that "[a] tort claim is 'presented' when" the agency "receives from a claimant . . . an executed [Form SF-95] or other written

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request for reconsideration directly with the agency to which the claim was originally made.

notification of an incident, accompanied by a claim for money damages." *Rhodes*, 1993 WL 212495, at *2. In light of this rationale, the Fourth Circuit held that a plaintiff had not exhausted his administrative remedies as required to file an FTCA suit by mailing a complaint to United States Department of Agriculture, Animal & Plant Health Inspection Service because "[m]ailing alone is not enough; there must be evidence of actual receipt." *Id.*

In addition to the circuits that have squarely addressed the question and joined the Second Circuit's position, at least five other courts of appeals—the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits—have strongly suggested that they would hold that the mailbox rule does not suffice to exhaust claims under the FTCA should they confront the issue. *See Flores v. United* States, 719 F. App'x 312, 317 n.1 (5th Cir. 2018) (stating in dicta that "[t]he common law mailbox rule is inapplicable to the FTCA."); *Moya v. United States*, 35 F.3d 501, 504 (10th Cir. 1994) ("Mailing of a request for reconsideration is insufficient to satisfy the presentment requirement."); *Bellecourt v. United States*, 994 F.2d 427, 430 (8th Cir. 1993); *Willis v. United States*, 972 F.2d 350, 1992 WL 180181, at *2 (6th Cir. 1992) (unpublished decision); *Drazan v. United States*, 762 F.2d 56, 58 (7th Cir. 1985) (observing in the context of exhausting a claim for purposes or bringing suit under the FTCA that "mailing is not presenting; there must be receipt"); *see also Overcast v. U.S. Postal Serv.*, 49 F. App'x 63, 66 (7th Cir. 2002).

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Had petitioner's case arisen in the Eleventh Circuit, the mailbox rule would have applied as a matter of law, and the district court would then have been required to determine whether the factual circumstances surrounding the mailing of petitioner's civil rights complaint and Form SF-95 to the CBP satisfied the factual prerequisites for the mailbox rule. But because petitioner's suit arose within the Second Circuit (as would have been the case had it arisen in the Third, Fourth, or Ninth Circuits), the mailbox rule did not apply as a matter of law and petitioner was required to provide proof of actual receipt of her claims by the agency in order to satisfy the FTCA's presentment requirement.

This conflict amongst the circuits has been recognized by the courts of appeals as described above as well as numerous district courts around the country.[6] Moreover, both in its brief below, and in half a dozen other briefs filed in the federal courts of appeals, the

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[6] *See, e.g.*, *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, 88 n.16 (D.D.C. 2011); *Garland-Sash v. Lewis*, No. 05 CIV. 6827 (WHP), 2007 WL 935013, at *5 (S.D.N.Y. Mar. 26, 2007), *aff'd in part, vacated in 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).

government itself has expressly acknowledged that the circuits are in conflict on the question presented.[7]

There is no reason why the meaning of the FTCA's presentment requirement should differ based solely on the geographic happenstance of which circuit court a

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[7] Brief for the United States at 9, *Barber v. United States*, 646 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 (noting that "the majority of courts" have held that the mailbox rule should not apply to the FTCA, but noting that *Barnett* "arguably ha[s] applied the mailbox rule to the FTCA context"); 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).

Remarkably, the government when litigating in the Eleventh Circuit sought to use *Barnett* affirmatively to bolster its argument that a tax assessment notice was indeed mailed to a taxpayer, despite the fact that the government could not produce a certified mail receipt. *See* Reply Brief for the United States at 9, *Bonaventura v. United States*, 428 F. App'x 916 (11th Cir. 2011) (No. 10-11590), 2010 WL 4411183.

plaintiff's lawsuit arises within, and this Court should grant the petition to resolve this conceded conflict on an important issue of federal law.

II. THE QUESTION PRESENTED CONCERNS AN IMPORTANT, RECURRING, ISSUE OF FEDERAL LAW.

Every year, tens of thousands of FTCA claims are filed with federal agencies, and thousands of FTCA claims are litigated in the federal courts.[8] Those claims, collectively, are worth billions of dollars. *See* Gregory C. Sisk, *Litigation with the Federal Government* § 3.02, at

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[8] *See* Richard Parker & Ugo Colella, *Revisiting Equitable Tolling and the Federal Tort Claims Act: The Impact of* Brockamp *and* Beggerly, 29 Seton Hall L. Rev. 885, 889 & n.20 (1999) (noting that, as of 1999, "[a]pproximately 30,000 to 60,000 tort claims per year are filed against the United States"); Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims: Administrative and Judicial Remedies* § 1.01, at 1-8 (Dec. 2012) (estimating as of 2012 that 15,000-30,000 FTCA claims are presented to federal agencies each year, with an additional 1,500 claims filed in court); Rakesh A. Mittal, *The Accrual of Wrongful Death Claims Under the FTCA*, 82 U. Chi. L. Rev. 2169, 2171 (2015) (noting that "approximately two thousand federal suits and fifteen thousand to thirty thousand administrative claims [are] filed under the FTCA each year" (footnotes omitted)); *see id.* at 2171 nn.9-10; Br. of Southeastern Legal Foundation as *Amicus Curiae* in Support of Respondent at 12-13, *United States of America v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015) (No. 13-1075), 2014 WL 5906567 (estimating that "the government must defend between 15,000 and 30,000 FTCA claims every year," of which more than 2,000 reach the federal courts); *Penn Millers Ins. Co. v. United States*, 472 F. Supp. 2d 705, 718 (E.D.N.C. 2007) "[T]he United States undoubtedly faces a large number of FTCA claims per year"); *Forman v. United States*, No. CIV. A. 98-6784, 1999 WL 793429, at *10 (E.D. Pa. Oct. 6, 1999) (noting that FTCA claims number "in the thousands each year").

104 (4th ed. 2006) (noting the "billions of dollars in claims made against the United States 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*, 508 U.S. at 112. But as it stands now, different rules govern the exhaustion of FTCA claims in different parts of the country. For the more than thirty million Americans who live in the Eleventh Circuit, the mailbox rule applies. For the tens of millions of Americans who live elsewhere, the mailbox rule is not available to satisfy the FTCA's presentment requirement.

Resolution of this conflict is important because there is no logical justification—and significant unfairness—in the current heterogeneity among the circuits on the question of whether the mailbox rule applies to claims made under the FTCA. While some FTCA claims are meritorious, and others not, the "orderly administration" of those claims requires a uniform process, not one that differs sharply based upon the geographic location of the claim.

Moreover, as discussed below, the majority rule is wrong and can, as in petitioner's case, result in the denial of any recovery for plaintiffs who suffer significant harm as a result of torts committed by the United States or its agents.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THIS CONFLICT.

This case presents a strong vehicle for this Court to review the circuit split. The facts are undisputed, and

the Second Circuit squarely ruled as a matter of law on the question presented. Pet. App. 13a-14a. In so doing, the Second Circuit expressly considered and rejected the contrary rule of the Eleventh Circuit. Pet. App. 12a-13a. Moreover, the Second Circuit's ruling on the question presented was the dispositive—indeed sole—factor in the decision below: "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. Thus, there are no fact-bound issues or record disputes that would complicate this Court's review.

This record, and the courts' decisions based upon it, present the ideal vehicle for review of this question. And should the Court determine that the mailbox rule does apply as a matter of law to FTCA claims, the courts below would then have the opportunity in the first instance to apply the requirements of the mailbox rule to petitioner's case.

IV. THE SECOND CIRCUIT'S DECISION IS INCORRECT.

The Second Circuit concluded that the FTCA and its "corresponding regulation make clear that actual receipt is required" and that "applying the mailbox rule to claims under the FTCA would be inconsistent with the principle that waivers of sovereign immunity must be strictly construed and limited in scope in favor of the sovereign." Pet. App. 13a. That holding was in error.

First, as the Eleventh Circuit correctly explained in *Barnett*, the common law has long recognized the presumption that a piece of correspondence properly

mailed is received by the addressee and this presumption applies in numerous areas of the law. 283 F.3d at 1239. The statutory text of the FTCA contains no indication that Congress intended to exclude FTCA claims from these background common-law principles. *Id.* at 1240. To the contrary, this Court has recognized that Congress did *not* intend the FTCA to operate independently of normal common-law principles, and the mailbox rule is a prime example of precisely these principles. *See Richards*, 369 U.S. at 6–7 (noting that the FTCA "was not patterned to operate with complete independence from the principles of law developed in the common law," but rather was "designed to build upon the legal relationships formulated and characterized by the States"). Given the absence of any evidence that Congress intended to exempt the FTCA from the mailbox rule, the Second Circuit's decision to preclude application of the mailbox rule to the FTCA was erroneous. *See Vacek*, 447 F.3d at 1255 (Thomas, J., concurring) (noting that "the mailbox rule is a settled feature of federal common law, and may be applied so long as its application is consistent with Congress's statutory scheme" (internal quotation marks omitted)).

Second, applying the mailbox rule to FTCA claims comports with Congress's intent when amending the FTCA in 1966. Congress adopted the current form of 28 U.S.C. § 2675 in 1966, explaining that it intended to provide "for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government." S. Rep. No. 89-1327, at 2 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2515, 2515-16. In addition, Congress intended to "ease court congestion

and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States." *Id.*, *as reprinted in* 1966 U.S.C.C.A.N. at 2516. The lower courts have interpreted the 1966 amendments to mean that Congress intended only that claimants provide "minimal notice" of a claim against the government. *See, e.g.*, *Shipek v. United States*, 752 F.2d 1352, 1354 (9th Cir. 1985).

The mailbox rule "is consistent with this 'minimal notice' requirement and Congress's intent to make the FTCA claim procedure more fair to litigants." *Vacek*, 447 F.3d at 1255 (Thomas, J., concurring). Indeed, 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." *Id.* By contrast, the imposition of the mailbox rule merely creates a presumption that the claim form was received—a presumption the government can then rebut with proof to the contrary. *See also Bailey v. United States*, 642 F.2d 344, 348–49 (9th Cir. 1981) (Jameson, J., dissenting).

Third, it is no answer to suggest—as have some courts of appeals—that the language of 28 C.F.R. § 14.2 requires that the Form SF-95 be "receive[d]" by the agency before the presentment requirement is satisfied. Because the mailbox rule operates as a presumption that a properly mailed envelope was in fact "receive[d]," the application of the mailbox rule satisfies § 142's requirement. *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").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 29, 2019

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term 2018
(Submitted: October 24, 2018 Decided: March 7, 2019)
Docket No. 17-3911-cv

Jessica Cooke,
Plaintiff-Appellant,
v.

United States of America,
Defendant-Appellee.[*]

On Appeal from the United States District Court For the Northern District of New York

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[*] The Clerk of the Court is directed to amend the official caption to conform to the above.

Before:

Livingston and Chin, *Circuit Judges*, and Crotty,
District Judge[†]

[†] Judge Paul A. Crotty, of the United States District Court for the southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Northern District of New York (Suddaby, J.), dismissing plaintiff-appellant's amended complaint asserting claims under the Federal Tort Claims Act for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedures 12(b)(1), on the grounds that she failed to exhaust administrative remedies, and the claims therefore were barred by sovereign immunity.

Affirmed.

Stephen L. Lockwood, Stephen L. Lockwood, P.C., *and* Christopher J. Kalil, Law Office of Christopher J. Kalil, Utica, New York , *for Plaintiff-Appellant.*

Karen Folster Lesperance, Assistant United States Attorney, *for* Grant C. Jaquith, United States Attorney for the Northern District of New York, Albany, New York, *for Defendant-Appellee.*

Chin, *Circuit Judge:*

Plaintiff-appellant Jessica Cooke ("Cooke") commenced the action below alleging that agents of the United States Customs and Border Protection Agency ("CBP") wrongfully detained and assaulted her at a highway checkpoint stop. Although she initially purported to assert constitutional, civil rights, and state law claims, including claims against the individual CBP agents, she eventually limited her claims, as set forth in the amended complaint, to tort claims against the United States under the Federal Tort Claims Act (the "FTCA"). On Novmeber 7, 2017, the district court dismissed the amended complaint for lack of subject matter jurisdiction, holding that Cooke failed to administratively exhaust her claims, and the claims therefore were barred by the doctrine of sovereign immunity.

On appeal, Cooke principally contends that the common-law mailbox rule applies, such that mailing an administrative claim form satisfies the FTCA's jurisdictional "presentment requirement," even in the absence of proof that the appropriate agency received the claim, because of the presumption that a properly addressed and mailed letter will be delivered in the usual course.

As discussed more fully below, we hold that the mailbox rule does not apply to FTCA claims. Accordingly, the district court's order dismissing the amended complaint is AFFIRMED.

BACKGROUND

On February 17, 2017, Cooke commenced this action in the district court alleging that on or about May 7, 2015, CBP agents violated her constitutional rights when they violently and forcibly assaulted and tased her during a highway checkpoint stop in St. Lawrence County, New York. In her initial complaint, Cooke asserted claims against the CBP, two named CBP agents, and the United States Department of Homeland Security ("DHS") under the Fourth, Fifth, and Fourteenth Amendments to the Constitution; *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1976); and 42 U.S.C. §§ 1981, 1983, 1985, and 1988.

Before serving her complaint, Cooke filed an amended complaint on March 1, 2017 naming the United States as the sole defendant. In the amended complaint, Cooke described her lawsuit as a civil rights action brought pursuant to 42 U.S.C. §§ 1983, 1985, and 1988; the Fourth, Fifth, and Fourteenth Amendments; *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); and *Monell*. The amended complaint, however, also cited the FTCA, and Cooke's briefing, both in the district court and in this Court, makes clear that she is asserting only tort claims against the United States under the FTCA. Indeed, Cooke's brief on appeal confirms that she is pursuing only her tort claims against the United States -- claims for assault and battery, common law negligence, and failure to intervene.

On May 16, 2017, the government moved to dismiss the amended complaint for lack of subject matter jurisdiction, arguing, *inter alia*, that Cooke failed to exhaust her administrative remedies because she did not "first present[ ]" the claim to the appropriate federal agency as required by the FTCA, 28 U.S.C. § 2675. In support of its motion, the government submitted a May 12, 2017 declaration from Michael D. Bunker, a CBP Assistant Chief Counsel. Bunker explained that pursuant to a CBP directive, dated May 20, 2011, all claims received by CBP for $ 10,000 or less are to be forwarded to the Office of Assistant Chief Counsel in Indianapolis and all claims exceeding $ 10,000 are to be forwarded to the Assistant or Associate Chief Counsel who services the office in which the employee whose acts gave rise to the claim is located. All claims are entered into the CBP's Chief Counsel Tracking System ("CCTS"). Bunker further declared that he conducted a CCTS search for Cooke's name and "determined that CCTS contains no records of any claim filed by [Cooke] under the FTCA in the Office of Assistant Chief Counsel, Boston, the Office of Assistant Chief Counsel, Indianapolis, or any other CBP Counsel office." J. App'x at 29-30.

In response to the motion to dismiss, Cooke's counsel submitted a June 12, 2017 affidavit with attached exhibits. Cooke's counsel stated that on April 1, 2016, he "filed" a civil rights complaint form with DHS's Office of Civil Rights and Civil Liberties (the "CRCL"), detailing Cooke's May 2015 assault by CBP agents. J. App'x at 32. Exhibit A to the letter showed that counsel addressed

the civil rights complaint to the Attorney General in Washington, D.C., with a copy to:

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

J. App'x at 36; *see id.* at 32.

On May 31, 2016, Cooke's counsel sent an administrative "Claim for Damage, Injury, or Death, Standard Form 95" (SF-95), by first class mail, to the CRCL. J. App'x at 32. The back of the SF-95 form contained instructions, including the following:

> Claims presented under the Federal Tort Claims Act should be submitted directly to the "appropriate Federal agency" whose employee(s) was involved in the incident . . . . A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A **SUM CERTAIN** FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE

> INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN **TWO YEARS** AFTER THE CLAIM ACCRUES.

Id. at 48.

By counsel's own description, the paperwork was "misdirected" to the DHS/CRCL; the SF-95 was sent not to the CBP or its appropriate Chief Counsel's Office, but to "DHS/CRCL" in Washington, D.C. J. App'x at 32. Moreover, the mailing address omitted the street number (245) from the Murray Lane address. In addition, the affidavit of service by mail, claiming that the SF-95 form was mailed on May 31, 2016, was not executed until almost a year later -- May 30, 2017.

By letter dated June 22, 2016, the CRCL acknowledged receipt of Cooke's April 1, 2016 civil rights complaint, but the agency did not acknowledge receipt of Cooke's SF-95 submission or otherwise make any mention of it. On July 5 and October 17, 2016, Cooke's counsel wrote to the CRCL inquiring into the status of her civil rights complaint, but the letters made no reference to her misdirected SF-95.

On November 7, 2017, the district court granted the government's motion to dismiss the amended complaint, concluding that Cooke had failed to exhaust her administrative remedies under the FTCA because

she presented no evidence that a government agency received the SF-95.[1]

This appeal followed.

DISCUSSION

In reviewing a district court's dismissal for lack of subject matter jurisdiction, we review factual findings for clear error and legal conclusions *de novo*. *Liranzo v. United States*, 690 F.3d 78, 84 (2d Cir. 2012). To resolve jurisdictional issues, we may consider affidavits and other materials beyond the pleadings, but we cannot rely on conclusory or hearsay statements contained in the affidavits. *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004).

"The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *McGowan v. United States*, 825 F.3d 118, 125 (2d Cir. 2016) (internal quotation marks omitted). The plaintiff likewise bears the burden of showing that she exhausted her administrative remedies by presenting her claim to the appropriate federal agency before filing suit. *See* 28 U.S.C. § 2675(a); *Payne v. United States*, 10 F.Supp.2d 203, 204 (N.D.N.Y. 1998) ("A plaintiff bears the burden of demonstrating that he or she has presented a claim to the appropriate federal agency.") (citing *Keene Corp. v.*

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[1] The district court also ruled, in the alternative, that the first and second causes of action were barred because they relied on statutes, constitutional provisions, and claims applicable only to state actors and not the United States or federal actors.

United States, 700 F.2d 836, 842 (2d Cir. 1983)); *see also Mora v. United States*, 955 F.2d 156, 160 (2d Cir. 1992) ("[P]resentment is a prerequisite to the institution of a suit under the FTCA."). In addition, we must strictly construe matters concerning the waiver of sovereign immunity in favor of the government. *United States v. Sherwood*, 312 U.S. 584, 590 (1941); *McGowan*, 825 F.3d at 126.

Cooke principally argues that the district court erred in dismissing her amended complaint for lack of subject matter jurisdiction because she administratively exhausted her FTCA claim when she mailed her SF-95 to the CRCL. She does not argue actual receipt of her notice of claim, but relies on the mailbox rule, which is a rebuttable, common-law presumption that a piece of mail, properly addressed and mailed in accordance with regular office procedures, has been received by the addressee. *Akey v. Clinton Cty.*, 375 F.3d 231, 235 (2d Cir. 2004) (citing *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 817 (2d Cir. 1985)). The question presented is whether the presumption of receipt applies to claims brought under the FTCA. We conclude that it does not.

The United States, as sovereign, is immune from suit unless it waives immunity and consents to be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The Supreme Court has "frequently held" that waivers of sovereign immunity are "to be strictly construed, in terms of [their] scope, in favor of the sovereign." *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261, (1999). Moreover, a waiver must be "unequivocally expressed in

the statutory text." *Id.* at 261 (internal quotation marks omitted).

One such "limited waiver" of sovereign immunity is provided by the FTCA, which "allows for a tort suit against the United States under specified circumstances." *Hamm v. United States*, 483 F.3d 135, 137 (2d Cir. 2007). The FTCA has several jurisdictional requirements, including that a suit "shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency." 28 U.S.C. § 2675(a); *see also Adeleke v. United States*, 355 F.3d 144, 153 (2d Cir. 2004) ("[A] plaintiff must first file an administrative claim with the appropriate federal agency before suing for relief in federal court."). The contours of this presentment requirement have been clarified through regulation. A plaintiff satisfies the requirement when "a Federal agency *receives* from a claimant . . . an executed Standard Form 95 or other written notification of an incident." 28 C.F.R. § 14.2 (emphasis added).

The Supreme Court has not examined the FTCA's presentment requirement, nor have we squarely addressed whether the mailbox rule applies to claims under the FTCA such that mailing notice of a claim satisfies the statute's presentment requirement. We have recognized, in a summary order, that the majority of other courts that have addressed the question have held that the common-law mailbox rule is inapplicable to FTCA claims. *See Garland-Sash v. Lewis*, 348 F. App'x 639, 643 (2d Cir. 2009) (summary order) (citing *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248,

1252 (9th Cir. 2006) ("[V]irtually every circuit to have ruled on the issue has held that the mailbox rule does not apply to [FTCA] claims, regardless of whether it might apply to other federal common law claims.")); *see also Flores v. United States*, 719 F. App'x 312, 317 n.1 (5th Cir. 2018) ("The common law mailbox rule is inapplicable to the FTCA"); *Lightfoot v. United States*, 564 F.3d 625, 628 (3d Cir. 2009) (holding that mailing a FTCA claim does not satisfy the presentment requirement when the agency did not receive the claim); *Moya v. United States*, 35 F.3d 501, 504 (10th Cir. 1994) (same); *Bellecourt v. United States*, 994 F.2d 427, 430 (8th Cir. 1993) (same); *Drazan v. United States*, 762 F.2d 56, 58 (7th Cir. 1985) (same).

At least one other circuit and one district court in the Second Circuit have applied the mailbox rule to a FTCA claim. *See Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1238-39 (11th Cir. 2002) (holding that the common-law mailbox rule applies to FTCA claims); *Cordaro v. Lusardi*, 354 F.Supp. 1147, 1149 (S.D.N.Y. 1973) (holding that "[p]roof of mailing creates a rebuttable presumption of receipt" under the FTCA). More recently, however, district courts in our circuit, including in the Southern District of New York, have declined to apply the mailbox rule in FTCA cases, instead heeding the Supreme Court's instruction that courts must strictly construe FTCA filing requirements in favor of the government. *See, e.g., Arias-Rios v. U.S. Postal Serv.*, No. CV-07-1052, 2008 WL 11420060, at *2 (E.D.N.Y. July 9, 2008) ("Mere mailing of a notice of claim is insufficient to satisfy the presentment requirement of the FTCA, and

proof of actual receipt is necessary."); *Pinchasow v. United States*, 408 F.Supp.2d 138, 142 (E.D.N.Y. 2006) (holding that the mailbox rule is insufficient to satisfy the FTCA's presentment requirement because waivers of the United States' sovereign immunity must be strictly construed in favor of the government); *Vecchio v. United States*, No. 05 CIV. 393, 2005 WL 2978699, at *4 (S.D.N.Y Nov. 3, 2005) (same).

We now hold that the mailbox rule is inapplicable to claims brought under the FTCA, and that therefore the mere mailing of a notice of claim does not satisfy the FTCA's presentment requirement. The statute and corresponding regulation make clear that actual receipt is required, and applying the mailbox rule to claims under the FTCA would be inconsistent with the principle that waivers of sovereign immunity must be strictly construed and limited in scope in favor of the sovereign. *See Blue Fox, Inc.*, 525 U.S. at 261; *Honda v. Clark*, 386 U.S. 484, 501 (1967) ("[T]he Government is ordinarily immune from suit, and . . . it may define the conditions under which it will permit such actions."); *see also Bailey v. United States*, 642 F.2d 344, 347 (9th Cir. 1981) (rejecting appellants' "invitation to . . . in effect repeal [Section 14.2(a)] by holding that mailing alone is sufficient to meet the requirement that a claim be 'presented' "). Hence, we conclude, as have five circuits and numerous district courts, that a plaintiff in a FTCA case may not invoke the common-law presumption of receipt and that, instead, she must show actual receipt.

In light of our holding that the mailbox rule does not apply to claims under the FTCA, we do not reach the question of whether the requirements of the mailbox rule were met in this case.

CONCLUSION

For the reasons set forth above, the district court's order of dismissal is AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JESSICA COOKE,

Plaintiff,

v. 8:17-CV-0224 (GTS/DJS)

UNITED STATES OF AMERICA,

Defendant.

APPEARANCES:	OF COUNSEL:
STEPHEN L. LOCKWOOD, P.C. Counsel for Plaintiff 285 Genesee Street Utica, NY 13501	STEPHEN L. LOCKWOOD, ESQ.
HON. GRANT C. JAQUITH Acting United States Attorney for the N.D.N.Y. Counsel for Defendant 445 Broadway Albany, NY 12207-2924	KAREN F. LESPERANCE, ESQ. Assistant U.S. Attorney

GLENN T. SUDDABY,
Chief United States District
Judge

DECISION and ORDER

Currently before the Court, in this civil rights action filed by Jessica Cooke ("Plaintiff") against the United States of America ("Defendant"), is Defendant's motion to dismiss Plaintiff's Amended Complaint for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). (Dkt. No. 8.) For the reasons set forth below, Defendant's motion is granted.

I. RELEVANT BACKGROUND

A. Plaintiff's Claims

Generally, liberally construed, Plaintiff's Amended Complaint alleges that, during a traffic stop on or about May 7, 2015, in St. Lawrence County, New York, two U.S. Custom and Border protection ("CBP") officers, without cause, "shoved her into the side of her car," "threw her violently to the ground," and "violently and repeatedly tased [her] with [a] taser gun, causing [her] to suffer physical and emotional pain and injury." (Dkt. No. 4 [Plf.'s Am. Compl.] at ¶ 22.) Based on these factual allegations, Plaintiff claims that Defendant violated her following rights: (1) her rights under 42 U.S.C. §§ 1981, 1983, 1985, and the Fourth, Fifth, and Fourteenth Amendments by using excessive force; (2) her rights under 42 U.S.C. §§ 1981, 1983, 1985, and the

Fourth, Fifth, and Fourteenth Amendments by failing to intervene in the use of excessive force; and (3) assault and battery under 28 U.S.C. §§ 2679 ("FTCA"). (*See generally* Dkt. No. 4 [Plf.'s Am. Compl.].) Familiarity with the factual allegations supporting these claims in Plaintiff's Amended Complaint is assumed in this Decision and Order, which is intended primarily for the review of the parties. (*Id.*)

B. Relevant Procedural Background

On April 1, 2016, Plaintiff's counsel filed a "Civil Rights Complaint" with the United States Department of Homeland Security's Office of Civil Rights and Civil Liberties ("DHS/CRCL"), alleging violation of her civil rights due to the wrongful conduct of CBP agents. (Dkt. No. 9 at ¶ 5 [Plf.'s Aff. in Response to Def.'s Motion to Dismiss].) On May 31, 2016, Plaintiff sent by U.S. mail a "Claim for Damage, Injury or Death Standard Form 95" ("SF-95") to DHS/CRCL. (*Id.* at ¶ 6.) Plaintiff did not submit an administrative claim to the CBP. (*Id.*)

On June 22, 2016, DHS/CRCL acknowledged receipt of Plaintiff's April 1, 2016, civil rights complaint "regarding the treatment of Jessica Cooke by employees of U.S. Customs and Border Patrol (CBP)." (*Id.* at ¶ 7.) DHS/CRCL requested a signed authorization from Plaintiff allowing counsel to act on her behalf. (*Id.*) Plaintiff's counsel forwarded Plaintiff's executed authorization on July 5, 2016. (*Id.*)

Having received no reply from DHS/CRCL with respect to the SF-95, Plaintiff commenced this action by

filing her original Complaint on February 17, 2017. (Dkt. No. 1 [Plf.'s Coml.].)

Plaintiff's Complaint asserted claims against DHS, CBP, CBP Agent Chad Kenna, CBP Agent Nicole Martin, and one or more unidentified CBP agents. (*Id.*) Summonses were issued for these entities and individuals (except for the John and Jane Doe Defendants) on February 27, 2017. (Dkt. No. 2 [Summonses].)

On March 1, 2017, Plaintiff filed an Amended Complaint that named the United States as a Defendant and appeared to abandon her claims against the aforementioned entities and individuals (at least in their individual capacities). (Dkt. No. 4, at Caption and ¶¶ 4-10 [Plf.'s Am. Compl.].) On March 6, 2017, the Clerk's Office confirmed with Plaintiff's counsel that Plaintiff does not want to include the aforementioned entities and individuals as Defendants. As a result, on March 30, 2017, Plaintiff filed an affidavit of service regarding only the United States. (Dkt. No. 7.)

Defendant filed its motion to dismiss on May 16, 2017. (Dkt. No. 8.)

C. Defendant's Motion

Generally, in support of its motion to dismiss, Defendant asserts three arguments: (1) Plaintiff's third claim is barred by the FTCA, because Plaintiff failed to file an administrative claim with the appropriate federal agency before filing suit; (2) Plaintiff's first and second

claims (seeking relief for alleged constitutional violations) are barred by the doctrine of sovereign immunity and the FTCA, which permits recovery against Defendant for only tortious conduct; and (3) in the alternative, Plaintiff's first and second claims (which use federal statutes as the means by which to seek relief for alleged constitutional violations) are barred because (a) to the extent that she is basing her claims on 42 U.S.C. § 1983 and 42 U.S.C. § 1988, both of those statutes require that the CBP agents were acting under the color of state law, which they were not, (b) to the extent that she is basing her claims on 42 U.S.C. § 1981 and 42 U.S.C. § 1985, she is seeking to hold Defendant vicariously liable for the conduct of its employees under *Monell v. Department of Social Services*, 436 U.S. 658, 692-94 (1978), which applies only to municipalities, and (c) to the extent that she is asserting a Fourteenth Amendment claim under 42 U.S.C. § 1983, the Fourteenth Amendment applies only to states and state actors, which Defendant is not. (*See generally* Dkt. No. 8, Attach. 1 [Def.'s Memo. of Law].)

Generally, in response to Defendant's motion, Plaintiff asserts two arguments: (1) with regard to Defendant's first argument, the Court has subject-matter jurisdiction over Plaintiff's third claim, because she timely presented her administrative claim to the appropriate federal agency (specifically, by mailing a completed civil rights complaint to DHS/CRCL on April 1, 2016, mailing a completed Standard Form 95 or "SF-95" to DHS/CRCL on May 31, 2016, receiving an acknowledgment of receipt of her civil rights complaint

by DHS/CRCL on June 22, 2016, and never subsequently receiving a notice that either of her claims had been transferred to DHS/CBP or returned to her); and (2) with regard to Defendant's second argument, Plaintiff agrees with Defendant that her first and second claims are barred by the doctrine of sovereign immunity and the FTCA, and consents to the dismissal of those claims. (*See generally* Dkt. No. 10 [Plf.'s Opp'n Memo. of Law].)

Generally, in its reply, Defendant asserts two arguments: (1) with regard to Defendant's first argument, Plaintiff concedes that she did not file her tort claim with DHS/CBP but sent a civil rights complaint to DHS/CRCL (which not only did not assert a tort claim but did not contain the necessary claim for money damages in a sum certain), and then (through the use of an incomplete address) mailed a completed SF-95 to DHS/CRCL, which office never acknowledged receipt of the SF-95, and which may not be presumed to have received the SF-95 given the express nature of the exhaustion requirement as a jurisdictional prerequisite; and (2) with regard to Defendant's second argument, to the extent that Plaintiff still argues that she has adequately pled the elements of her first claim (for excessive force under the Fourth Amendment) despite her consent to the dismissal of that claim, that argument should be rejected, because the United States has not rendered itself liable under the FTCA for constitutional torts. (*See generally* Dkt. No. 13 [Def.'s Reply Memo. of Law].)

II. RELEVANT LEGAL STANDARD

"It is a fundamental precept that federal courts are courts of limited jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Generally, a claim may be properly dismissed for lack of subject-matter jurisdiction where a district court lacks constitutional or statutory power to adjudicate it. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). A district court may look to evidence outside of the pleadings when resolving a motion to dismiss for lack of subject-matter jurisdiction. *Makarova*, 201 F.3d at 113. The plaintiff bears the burden of proving subject-matter jurisdiction by a preponderance of the evidence. *Id.* (citing *Malik v. Meissner*, 82 F.3d 560, 562 [2d Cir. 1996]). When a court evaluates a motion to dismiss for lack of subject-matter jurisdiction, all ambiguities must be resolved and inferences drawn in favor of the plaintiff. *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005) (citing *Makarova*, 201 F.3d at 113).

III. ANALYSIS

A. Whether Plaintiff's Third Claim Should Be Dismissed Because Plaintiff Has Not Exhausted Her Administrative Remedies

After carefully considering the matter, the Court answers this question in the affirmative for the reasons stated in Defendant's memoranda of law. *See, supra*,

Part I.C. of this Decision and Order. To those reasons, the Court would add only the following analysis.

The Second Circuit has not yet decided the question of whether mere mailing of a notice of claim to the appropriate agency is sufficient. However, the majority of district courts in this circuit have held that a plaintiff must show proof that the agency actually received a claim in order to satisfy the FTCA's presentment requirement. *See, e.g.*, *Pinchasow v. United States*, 408 F. Supp. 2d 138, 143 (E.D.N.Y. 2006) (finding that plaintiff failed to satisfy the FTCA's presentment requirement despite proffering an affidavit that the notice of claim was timely sent by regular mail to the appropriate agency); *Vecchio v. United States*, 05-CV-0393, 2005 WL 2978699, at *5 (S.D.N.Y. Nov. 3, 2005) (finding no proof of receipt for a claim sent by regular mail and plaintiff did not conduct follow up); *Young v. United States*, 12-CV-2342, 2014 WL 1153911, at *8 (E.D.N.Y. Mar. 20, 2014) (finding no proof of receipt where plaintiff asserted in his deposition that he mailed the handwritten claim by certified mail, but he had no receipt or other evidence of mailing); *Jaghama v. United States*, 11-CV-5826, 2013 WL 508497, at *2 (E.D.N.Y. Feb. 11, 2013) (finding no proof of receipt of a SF-95 claim where the plaintiff, outside of the briefings, did not provide evidence that the form was mailed or received); *Garland-Sash v. Lewis, et al.*, 05-CV-6827, 2007 WL 935013, at *6 (S.D.N.Y. Mar. 26, 2007), *aff'd in relevant part*, 248 F. App'x 639, 642-43 (2d Cir. 2009) (finding no proof of receipt because plaintiff had provided "only bald assertions that she submitted a notice of claim").

Here, Plaintiff submitted an affidavit indicating that the completed SF-95 was mailed to DHS/CRCL on May 31, 2016. (Dkt. No. 9 at ¶ 6.) Plaintiff contends that administrative claim was "presumably received" by DHS/CRCL. (Dkt. No. 10 at 6.) Plaintiff relies on *Meckel v. Cont'l Res. Co.*, 758 F.2d. 811, 817 (2d Cir. 1985), *Cordaro v. Lusardi*, 354 F. Supp. 1147, 1148-49 (S.D.N.Y. 1973), and *Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1238-39 (11th Cir. 2002), for the point of law that receipt may be presumed.

Meckel, a securities case regarding a mass-mailing of redemption notices to 190 appropriate debenture holders advising them of their option to convert their debentures into common stock by a certain date, is inapplicable to the present case which involves the mailing of an FTCA claim to the inappropriate office.

In addition, Plaintiff's reliance on *Cordaro* and *Barnett* is misplaced. In *Cordaro*, the court held that proof of mailing an FTCA claim creates a rebuttable presumption of receipt. 354 F. Supp. at 1149. However, *Cordaro* was decided more than forty years ago, and in the intervening years the Supreme Court has cautioned that the FTCA filing requirements are to be strictly construed and applied in favor of the Government in order to protect the sovereign immunity of the United States from waiver in circumstances not contemplated by Congress. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) ("[A] waiver of the Government's sovereign immunity will be strictly construed . . . in favor of the sovereign."). The Second Circuit has ruled consistently with the Supreme Court's holdings regarding FTCA cases. *See*

Keene v. United States, 700 F.2d 836, 841 (2d Cir. 1983) (acknowledging that "because the FTCA constitutes a waiver of immunity, the procedures set forth in Section 2675 must be adhered to strictly"). Thus, the Court finds Plaintiff's reliance on *Cordaro* unpersuasive.

Lastly, in *Barnett*, the Eleventh Circuit held that proof of mailing created a rebuttable presumption of receipt of the plaintiff's claim. There, the plaintiff mailed his claim in an envelope supplied by the Government after the plaintiff mailed, and the Government received, an earlier, but inadequate, notice of claim. *Barnett*, 283 F.3d at 1237. The *Barnett* court explained as follows:

> The presumption of receipt is not a conclusive presumption of law, but a mere inference of fact, founded on the probability that the officers of the government will do their duty and the usual course of business; and when it is opposed by evidence that the letters never were received, must be weighed with all the other circumstances of the case . . . in determining the question whether the letters were actually received or not.

Id. at 1240 (quoting *Rosenthal v. Walker*, 111 U.S. 185, 193-94 [1884]). In *Barnett*, the government provided three employee affidavits claiming that the letter was not received. However, none testified about the agency's procedures for processing incoming mail. *Id.* at 1241-42. It was only on this unique set of facts that the court held that the government had not rebutted the presumption of receipt to which the plaintiff was entitled.

Here, Plaintiff provides in her affidavit a copy of the cover letter and SF-95 mailed to DHS/CRCL on May 31, 2016. Plaintiff's FTCA claim was admittedly mailed to DHS/CRCL rather than DHS/CBP. Moreover, DHS/CRCL's address was incomplete in that it listed "Murray Lane, SW" and rather than the complete "245 Murray Lane, SW" that was provided on page five of the Civil Rights Complaint. (Dkt. No. 9.) While this evidence supports Plaintiff's assertion that a claim was prepared and mailed, there is no proof of actual receipt upon a government agency. Thus, the Government need not rebut the presumption of receipt. The Court holds that actual receipt by the agency is required, and finds that Plaintiff provided no evidence of actual receipt by the agency. Therefore, Plaintiff failed to exhaust her administrative remedies, and the Court does not have subject-matter jurisdiction over Plaintiff's third claim.

B. Whether Plaintiff's First and Second Claims Should Be Dismissed

The Court answers this question in the affirmative for the reasons stated in Defendant's memoranda of law. *See, supra*, Part I.C. of this Decision and Order. To those reasons the Court adds only two points.

First, in this District, when a non-movant fails to oppose a legal argument asserted by a movant, the movant's burden with regard to that argument is lightened, such that, in order to succeed on that argument, the movant need only show that the argument possess facial merit, which has appropriately

been characterized as a "modest" burden. *See* N.D.N.Y. L.R. 7.1(b)(3) ("Where a properly filed motion is unopposed and the Court determined that the moving party has met to demonstrate entitlement to the relief requested therein . . . ."); *Rusyniak v. Gensini*, 07-CV-0279, 2009 WL 3672105, at *1 n.1 (N.D.N.Y. Oct. 30, 2009) (Suddaby, J.) (collecting cases); *Este-Green v. Astrue*, 09-CV-0722, 2009 WL 2473509, at *2 & nn.2, 3 (N.D.N.Y. Aug. 7, 2009) (Suddaby, J.) (collecting cases). Here, in her opposition memorandum of law, Plaintiff failed to oppose the third argument asserted by Defendant in its memorandum of law in chief. *See*, *supra*, Part I.C. of this Decision and Order. As a result, that third argument need possess only facial merit, which the Court finds it does. This third argument serves as an alternative ground upon which the Court may, and does, base its dismissal of Plaintiff's first and second claims.

Second, even if the Court were to find that Plaintiff has asserted claims against DHS, CBP, CBP Agent Kenna, CBP Agent Martin, and the John and Jane Doe Defendants in her Amended Complaint, the Court would dismiss those claims for failure to prosecute under Fed. R. Civ. P. 41(b), and/or failure to serve under Fed. R. Civ. P. 4(m).

ACCORDINGLY, it is

ORDERED that Defendant's motion to dismiss for lack of subject-matter jurisdiction (Dkt. No. 8) is **GRANTED**; and it is further

ORDERED that Plaintiff's Amended Complaint (Dkt. No. 4) is **DISMISSED**.

Dated: November 7, 2017
Syracuse, NY

/s/
Hon. Glenn T. Suddaby
Chief U.S. District Judge