No. 20-

IN THE

# Supreme Court of the United States

Cynthia Rollo-Carlson, as Trustee for Jeremiah Flackus-Carlson, deceased,
*Petitioner*

v.

United States of America,
*Respondent*

## On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Under 28 U.S.C. §2675(a), is the requirement that an agency be presented with evidence of the claimant's authority to act during the administrative claims process jurisdictional in nature?

## RELATED PROCEEDINGS

Department of Veterans Affairs Office of General Counsel (Hines, Illinois):

Claim in Administrative Process, (Aug. 30, 2017), (no docket number assigned)

United States District Court for the District of Minnesota:

*Cynthia Rollo-Carlson, and Douglas Carlson v. United States of America*, No. 18-cv-996 (Aug. 27, 2018)

Benton County District Court, Benton County, Minnesota:

*In the Matter of the Appointment of a Trustee for the Next of Kin of Jeremiah Flackus-Carlson*, No. 05-CV-18-1848 (Oct. 2, 2018)

United States District Court for the District of Minnesota:

*Cynthia Rollo-Carlson, as trustee for Jeremiah Flackus-Carlson, deceased v. United States of America*, No. 18-cv-2842 (Mar. 18, 2019)

United States Court of Appeals for the Eighth Circuit:

*Cynthia Rollo-Carlson v. United States of America*, No. 19-1815 (Aug. 19, 2020); rehearing *en banc* denied (Oct. 23, 2020)

## TABLE OF CONTENTS

# TABLE OF AUTHORTIES

## Cases

**Federal Statutes**



**Federal Rules**



**Minnesota Statutes**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Cynthia Rollo-Carlson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The opinion of the Eighth Circuit is published at 971 F.3d 768 (8th Cir. 2020). The opinion of the United States District Court for the District of Minnesota is not published in the Federal Supplement but is available at 2019 WL 1243017 (D. Minn. Mar. 18, 2019).

## JURISDICTION

The Eighth Circuit issued its opinion and entered judgment on August 19, 2020. A timely petition for rehearing and rehearing *en banc* was filed on October 1, 2020 and denied on October 23, 2020. This Court's Order of March 19, 2020 extended the deadline to file a petition for a writ of certiorari due on or after the date of the order to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced at Pet. App. 24a – 28a.

## STATEMENT

### A. Factual Circumstances

Specialist Jeremiah John Flackus-Carlson enlisted in the United States Army on November 16, 2009, and in less than three years rose from E-1 to E-4. His successful military career came to a halt during his service in the Republic of Korea, when he was raped in the bathroom of a local establishment. Thus began the lengthy chain of failures that ultimately led to Specialist Flackus-Carlson's unnecessary death in October of 2015.

Following Specialist Flackus-Carlson's honorable discharge on October 1, 2012, he sought assistance from the Department of Veterans Affairs (hereinafter "VA"). The practitioner conducting the Compensation and Pension medical examination for the VA, on February 5, 2013, Dr. Leesa Scott-Morrow, J.D., diagnosed Specialist Flackus-Carlson with: Major Depressive Disorder, recurrent, severe, without psychotic features, and Post Traumatic Stress Disorder (hereinafter "PTSD"). Dr. Scott-Morrow further noted that Specialist Flackus-Carlson's prognosis was good if he remained in extended care. Despite this admonition Specialist Flackus-Carlson's care from the VA was indifferent and negligent.

Specialist Flackus-Carlson began treatment at the St. Cloud VAMC in October 2014, following inpatient psychiatric treatment in Hilo, Hawaii after overdosing on his prescribed medication. Specialist Flackus-Carlson was admitted to St. Cloud VAMC's Residential Rehabilitation Treatment Program (hereinafter "RRTP"). His initial evaluation recorded 5 or 6 self-reported psychiatric hospitalizations for

suicidal ideation, and a pattern of substance abuse well into its second decade. Despite, again, reporting the Military Sexual Trauma (hereinafter "MST") Specialist Flackus-Carlson suffered on Active Duty, and a congressional mandate, pursuant to 38 U.S.C. §1720D, that the VA operate a mental health treatment program to treat victims of MST, the VA continued to structure its treatment regime on "standard" psychiatric diagnoses. The VA did not structure its treatment regime specific to the treatment of MST.

Notwithstanding multiple indicators that Specialist Flackus-Carlson was not yet suited for outpatient treatment, as well as over the objections of Petitioner and Specialist Flackus-Carlson's stepfather, Specialist Flackus-Carlson was discharged from the RRTP after less than 2 months of treatment. Throughout 2015, Specialist Flackus-Carlson consistently missed scheduled appointments, displayed repetitive incidences of substance abuse, had persistent suicidal ideations, and was hospitalized in May for a Vicodin overdose. Specialist Flackus-Carlson's remains were discovered on November 11, 2015; his death was deemed an opiate overdose. The following day, the VA finally acknowledged that Specialist Flackus-Carlson was at high risk for suicide.

**B. Procedural Posture**

On August 30, 2017, Plaintiff, through counsel, initiated an administrative claim against the United States for the death of her son, under the provisions of the Federal Torts Claims Act (hereinafter "FTCA"). On October 19, 2017, the VA acknowledged initiation of the claim as of September 5, 2017. Despite a request for

adjudication of Administrative Claim, on March 2, 2018, the VA remained silent and no further response was made thereto. Approximately six weeks later, Plaintiff initiated an FTCA action (0:18-cv-00996) in the United States District Court for the District of Minnesota. Plaintiff voluntarily dismissed the action on August 27, 2018, and sought appointment as a trustee for the estate of Jeremiah Flackus-Carlson, pursuant to Minn. Stat. § 358.06. Plaintiff was appointed as trustee on October 2, 2018, in Minnesota Court File Number: 05-CV-18-1848. The following day, Plaintiff, as trustee, initiated the instant FTCA action (0:18-cv-02842) in the United States District Court for the District of Minnesota.

On December 4, 2018, the United States moved the District Court for an Order Dismissing Plaintiff's action with prejudice, arguing that the terms "claim" and "action" are interchangeable, and Plaintiff was obliged to be appointed trustee over her son's estate prior to initiating the administrative FTCA claim. The District Court granted the Motion to Dismiss on March 18, 2019. Plaintiff initiated a timely appeal with the United States Court of Appeals for the Eighth Circuit, which affirmed the District Court on August 19, 2020. Plaintiff's Petition for a rehearing *en banc* was denied on October 23, 2020, and the formal mandate, pursuant to Fed. R. App. P 41(a), issued on October 30, 2020. This Petition for *Certiorari* follows.

## REASONS FOR GRANTING THE PETITION

It is common knowledge that "the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any

court define that court's jurisdiction to entertain the suit.'"[1] The FTCA operates as a "limited waiver of sovereign immunity for tort suits brought against the United States or its agencies.[2] The FTCA requires that a claim be presented to the agency, and either be finally denied by the agency or six months lapse with no answer from the agency, before the claimant may sue in the federal district court.[3] Congress empowered federal agencies to settle claims.[4] In addition, Congress permitted the Attorney General to promulgate claims processing rules.[5] The Attorney General has promulgated such rules and, as far as is relevant here, the Seventh Circuit held that the rule mandates "this presentment requirement has four elements: (1) notification of the incident; (2) demand for a sum certain; (3) title or capacity of the person signing; and (4) evidence of the person's authority to represent the claimant."[6]

This case is the perfect vehicle to resolve the circuit split. This is a case where the "question of importance [has] not heretofore decided by this Court, and one over which the Circuits are divided."[7] Additionally, the question of evidence of authority problems in FTCA presentments has resulted in a "narrow but recurring question on which the courts of appeals have divided."[8] As laid out further *infra*, there is

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[1] United States v. Testan, 424 U.S. 392, 399 (1976)(*citing references omitted*).
[2] Pleasant v. United States ex rel. Overton Brooks VAH, 764 F.3d 445, 448 (5th Cir. 2014)(citing references omitted).
[3] *See* 28 U.S.C. §2675.
[4] Warren v . U.S. Dep't. of the Interior Bureau of Land Mgmt., 724 F.2d 776, 778 (9th Cir. 1984)(*en banc*).
[5] *See* 28 U.S.C. §2672.
[6] Chronis v. United States, 932 F.3d 544, 547 (7th Cir. 2019).
[7] Lehman v. Lycoming Cty. Children's Servs. Agency, 458 U.S. 502, 507 (1982).
[8] Clay v. United States, 537 U.S. 522, 524 (2003).

"longstanding division in authority among the Courts of Appeals on this question" that merits this Court's review.[9]

### A. The Evidence of Authority Requirement in Presentment Cannot be Jurisdictional under this Court's Precedent

During the October Term 2018, this Court revisited subject-matter jurisdiction to determine whether procedural rules are jurisdictional in nature. There are two situations in which the Supreme Court has held that a procedural rule is jurisdictional in nature: either "Congress may ... incorporat[e] them into a jurisdictional provision, as Congress has done with the amount-in-controversy requirement for federal court jurisdiction ..." or the Court will "treat a requirement as 'jurisdictional' when 'a long line of [S]upreme Cour[t] decisions left undisturbed by Congress' attached a jurisdictional label to the prescription."[10] Here, neither condition is satisfied.

The first condition, that Congress has incorporated a procedural rule into a jurisdictional statute, has plainly not been met. The jurisdiction conferring statute in this case provides that "[s]ubject to the provisions of chapter 171 of this title, the district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages ...."[11] However, the Supreme Court recently recognized that "when *Congress* does not rank a [prescription] as jurisdictional,

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[9] DePierre v. United States, 564 U.S. 70, 78 (2011).
[10] Fort Bend County, Texas v. Davis, 139 S. Ct. 1843, 1849 (2019).
[11] 28 U.S.C. §1346(b)(1).

courts should treat the restriction as nonjurisdictional in nature."[12] Here, the only requirements that Congress sought to treat as jurisdictional, by incorporating them into the statute, as a supermajority of other circuits have recognized, is that a claim submitted under the FTCA must be in writing and contain a sum certain.[13] As the E Court aptly noted in its 2011 decision, "the FTCA does not expressly articulate in §2671, its definitions section, what information must be included in a properly 'presented' claim."[14] The Eighth Circuit's decision in Mader, admittedly decided before Fort Bend County, plainly does not recognize the four-step framework for testing regulations laid down in a case which also emanated from the Department of Veterans Affairs.[15]

This Court's recent jurisprudence seems to indicate that treating the evidence of authority as jurisdictional, as the Eighth Circuit has done and continues to do, is inaccurate.

With the foregoing lack of clarity, it is not a surprise that the lower courts have developed different approaches as to whether evidence of authority must be presented with the claim. The Eighth Circuit noted in its 2011 decision that "there remains judicial discord over whether §2675(a) requires presentation of all of the evidence listed in §14.2(a). Specifically, courts have disagreed about whether

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[12] Fort Bend County, Texas v. Davis, 139 S. Ct. 1843, 1850 (2019)(internal citation omitted)(*emphasis added*).
[13] *See* 28 U.S.C. §2675. The claim submitted in writing is in subsection (a), while the sum certain is derived from subsection (b).
[14] Mader v. United States, 654 F.3d 794, 798 (8th Cir. 2011)(*en banc*).
[15] Kisor v. Wilkie, 137 S. Ct. 2400, 2415-17 (2019).

§2675(a) requires presentation of evidence of a representative's authority to submit a claim on behalf of a claimant."[16]

Since Mader was decided, the Supreme Court has intervened and determined that "procedural rules, ..., cabin a court's power only if Congress has 'clearly state[d] as much."[17] The Eighth Circuit, however, determined that its jurisdictional interpretation of presentment was not found in the express words of the statute but rather were "buttressed by the legislative history of §§2675(a) and 2672."[18] Therefore, as this Court ruled, and what is missing in Mader, is that "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences."[19] Instead, the Eighth Circuit held that there was "'no occasion to defer and no point in asking what kind of deference, or how much,' because §14.2(a)'s interpretation of §2675(a) is the interpretation 'we would adopt even if there were no formal rule and we were interpreting the statute from scratch.'"[20] This is far from the approach this Court sanctioned in Kwai Fun Wong and Kisor.

Additionally, addressing the circuit split exacerbated by the Eighth Circuit's decision in Mader will also resolve the circuit split created a decade ago. Most circuits have held, both pre- and post-Mader, that proper presentment occurs when a claim is presented to an agency containing sufficient information for the agency to

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[16] Mader v. United States, 654 F.3d 794, 798 (8th Cir. 2011)(*en banc*)(citing references omitted).
[17] United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632 (2015).
[18] Mader v. United States, 654 F.3d 794, 803 (8th Cir. 2011)(*en banc*).
[19] United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632 (2015).
[20] Mader v. United States, 654 F.3d 794, 804 (8th Cir. 2011)(*en banc*).

investigate and a demand for a sum certain.[21] It is only the Eighth Circuit that hangs onto an archaic remnant of prior practice.

**B. There Is a Circuit Conflict**

Decades ago, this Court stated the purpose of the presentment requirement is to allow agencies to investigate and settle cases, where appropriate, without use of the federal courts.[22] Without uniform guidance from this Court, the circuits appear to have developed three main approaches to the evidence of authority to act conundrum.

The three main approaches appear to be "full notice", "minimal notice", or "examination [case]-by-case". Full notice, as the Seventh Circuit held, mandates "this presentment requirement has four elements: (1) notification of the incident; (2) demand for a sum certain; (3) title or capacity of the person signing; and (4) evidence of the person's authority to represent the claimant."[23] The Ninth Circuit, sitting *en banc*, held that "[m]inimal notice requires claimants to (1) give an agency sufficient written notice to commence investigation and (2) place a value on the claim."[24] The First Circuit has described the minimal notice test "under §2675(a) as 'an eminently pragmatic one: as long as the language of an administrative claim serves due notice that the agency should investigate the possibility of particular (potentially tortious) conduct and includes a specification of the damages sought, it

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[21] *See, e.g.,* Pleasant v. United States ex rel. Overton Brooks VAH, 764 F.3d 445 (5th Cir. 2014);
[22] McNeil v United States, 508 U.S. 106, 111-12 & n.7 (1993).
[23] Chronis v. United States, 932 F.3d 544, 547 (7th Cir. 2019).
[24] Warren v. U.S. Dept. of Interior Bureau of Land Mgmt., 724 F.2d 776, 779 (9th Cir. 1984)(*en banc*).

fulfills the notice-of-claim requirement.'"[25] At least two circuits engage in an examination on a case-by-case basis to determine whether or not the failures in the claim hindered the agency from settling the claim, which was the primary intent of Congress.[26]

### *1. Seven Circuits Have Adopted the Minimal Notice Requirement*

#### *a. First Circuit*

Almost thirty years ago, the First Circuit acknowledged that because "the additional information [required by 28 C.F.R. §14.2(a)] is not relevant for notice purposes, this circuit has followed the general shift among all circuits toward a recognition of the distinction between presenting a claim in a section 2675 context and presenting a claim for settlement purposes."[27] The First Circuit accordingly ruled that "only after the process of settlement has been initiated does the additional information required by the regulations become relevant. All that is needed for notice is what the statute specifies."[28] In the context of another VA medical malpractice claim, the First Circuit examined the presentment issue and confirmed their view that "[t]he claimant need only indicate on the SF-95 '(1) sufficient information for the agency to investigate the claims, and (2) the amount of damages sought.'"[29] Indeed, the First Circuit also noted that "to file an administrative claim and preserve one's rights under the FTCA, one need only be in

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[25] Estate of Trentadue ex rel. Aguilar v. United States, 397 F.3d 840, 852 (10th Cir. 2005)(*citing* Dynamic Image Technologies, Inc. v. United States, 221 F.3d 34, 40 (1st Cir. 2000).
[26] *See, e.g.*, Romulus v. United States, 160 F.3d 161 (2d. Cir. 1998).
[27] Santiago-Ramirez v. Sec'y of Dep't of Defense, 984 F.2d 16, 19 (1st Cir. 1992).
[28] Santiago-Ramirez v. Sec'y of Dep't of Defense, 984 F.2d 16, 19 (1st Cir. 1992).
[29] Skwira v. United States, 344 F.3d 64, 70 (1st Cir. 2003)(citing reference omitted).

possession of 'sufficient information for the agency to investigate the claims.'"[30] Most recently, the First Circuit stated that they view "the notice requirement leniently, 'recognizing that individuals wishing to sue the government must comply with the details of the law, but also keeping in mind that the law was not intended to put up a barrier of technicalities to defeat their claims.'"[31]

*b. Third Circuit*

The Third Circuit holds that "a claim against the United States ... satisfies section 2675's requirement that 'the claimant shall have first presented the claim to the appropriate Federal agency' if the claimant (1) gives the agency written notice of his or her claim sufficient to enable the agency to investigate and (2) places a value on his or her claim."[32] The Third Circuit has continued to hold to this rule in more recent unpublished decisions.[33]

*c. Fourth Circuit*

The Fourth Circuit has held that "[s]ection 2675(a) of Title 28 and 28 C.F.R. §14.2(a) require two elements for sufficient presentment of a claim to an agency: 1) written notice sufficient to cause the agency to investigate, and 2) a sum-certain value on the claim."[34]

Just a year ago, a district court in the Fourth Circuit denied the Government's motion to dismiss a veteran FTCA action on behalf of his deceased son even though the plaintiff in that case was not approved as the personal representative until

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[30] Skwira v. United States, 344 F.3d 64, 70 (1st Cir. 2003)(citing reference omitted).
[31] Holloway v. United States, 845 F.3d 487, 490 (1st Cir. 2017)(citing references omitted).
[32] Tucker v. U.S. Postal Service, 676 F.2d 954 (3d. Cir. 1982).
[33] *See, e.g.*, Walker v. United States, 616 Fed. Appx. 497, 499 (3d. Cir. 2015).
[34] Ahmed v. United States, 30 F.3d 514, 517 (4th Cir. 1994).

three months after the FTCA suit was filed in the United States District Court.[35] The situation is strikingly similar to the case before this Court. The Petitioner here petitioned the agency as the next-of-kin of the Deceased, but gained the authority of Trustee that was required under Minnesota law before filing the instant suit in the District Court.[36]

*d. Fifth Circuit*

Three years after the Eighth Circuit's decision in Mader, the Fifth Circuit was called upon to determine whether lack of presenting the VA with evidence of authority to act was a jurisdictional defect.[37] In that case, the plaintiff did not have the legal authority to act on behalf of the children at any point.[38] However, the Fifth Circuit concluded that "an FTCA notice of claim need not be filed by a party with the legal authority or capacity under state law to represent the beneficiaries in state court. [Such authority] is not required simply to put the government on notice of the nature and value of a claim."[39]

*e. Sixth Circuit*

For thirty years, the Sixth Circuit has held that they "agree with the Fifth Circuit that the requirements of §2675 are met 'if the claimant (1) gives the agency written notice of his or her claim sufficient to enable the agency to investigate and

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[35] Washington v. Dep't. of the Navy, 446 F. Supp. 3d. 20, 23-25 (E.D.N.C. 2020)(explaining that father filed suit in June 2019 but did not obtain authority to act until September 2019).
[36] *See* Minn. Stat. §573.02 (requiring a trustee be appointed "to commence or continue [an] action and obtain recovery of damages therein.")
[37] Pleasant v. United States ex rel. Overton Brooks VAH, 764 F.3d 445 (5th Cir. 2014).
[38] Pleasant v. United States ex rel. Overton Brooks VAH, 764 F.3d 445, 448 (5th Cir. 2014).
[39] Pleasant v. United States ex rel. Overton Brooks VAH, 764 F.3d 445, 451 (5th Cir. 2014).

(2) places a value on his or her claim.'"[40] The district courts in the Sixth Circuit have continued to hold to this rule in more recent unpublished decisions by noting that "any failure to comply with the regulation capacity and authority requirements is meaningless in the Sixth Circuit for determining jurisdiction."[41]

*f. Ninth Circuit*

For almost thirty years, the Ninth Circuit has held that "Congress did not intend to treat regulations promulgated pursuant to section 2672 as jurisdictional prerequisites under section 2675(a)."[42] Almost twenty years ago, the Ninth Circuit continued to hold that only notice and a sum certain are the sole jurisdictional elements of a claim.[43]

*g. Tenth Circuit*

The Tenth Circuit has consistently followed the lead of the Ninth Circuit in following their analysis under Warren.[44] In one of the circuit's most recent decisions relying on Warren, the court reaffirmed Bradley in holding that "[t]he jurisdictional statute, 28 U.S.C. §2675(a), 'requires that claims for damages against the government be presented to the appropriate federal agency by filing "(1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim."'"[45] Additionally, the Tenth

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[40] Douglas v. United States, 658 F.2d 445 (6th Cir. 1981).
[41] Schaefer v. United States, 2014 WL 585365 (S.D. Ohio Feb. 14, 2014)
[42] Warren v. U.S. Dept. of Interior Bureau of Land Management, 724 F.2d 776, 778 (9th Cir. 1984)(*en banc*).
[43] Blair v. IRS, 304 F.3d 861, 865 (9th Cir. 2002).
[44] *See, e.g.*, Bradley v. United States, 951 F.2d 268 (10th Cir. 1991); Cizek v. United States, 953 F.2d 1232 (10th Cir. 1992); Trentadue v. United States, 386 F.3d 1322 (10th Cir. 2004).
[45] Estate of Trentadue ex rel. Aguilar v. United States, 397 F.3d 840, 852 (10th Cir. 2005).

Circuit stressed that they "agree[d] that the FTCA's notice requirements should not be interpreted inflexibly."[46]

*h. Eleventh Circuit*

The Eleventh Circuit has held, post-Mader, that "[a] claim is deemed presented when the federal agency receives the claimant's SF-95 or other written notification of [the] 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."[47]

*i. D.C. Circuit*

The D.C. Circuit has weighed in on the issue of whether evidence of authority of act is jurisdictional. The D.C. Circuit held, consistent "with the Ninth Circuit and the majority of appellate courts to have considered the question, that Section 2675(a) requires a claimant to file (1) a written statement sufficiently describing the injury to enable to begin its own investigation, and (2) a sum-certain damages claim."[48] Further, the D.C Circuit ruled that "[a] presentment of this character provides the agency all it needs, and all to which it is statutorily entitled, to make final disposition of the claim in accordance with Section 2675(a)."[49] Additionally, concerning the Attorney General's regulation, the D.C. Circuit held that "[a]long with the Fifth, Sixth, and Ninth Circuits, we hold that Congress has not delegated

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[46] Estate of Trentadue ex rel. Aguilar v. United States, 397 F.3d 840, 853 (10th Cir. 2005).
[47] Motta *ex rel.* A.M. v. United States, 717 F.3d 840, 843-44 (11th Cir. 2013).
[48] GAF Corp. v. United States, 818 F.2d 901, 919 (D.C. Cir. 1987).
[49] GAF Corp. v. United States, 818 F.2d 901, 920 (D.C. Cir. 1987).

to the agencies the power to determine, by regulation, the jurisdiction of Article III courts under the Act."[50]

### *2. Two Circuits Follow the Case-by-Case Examination Method.*

#### *a. Second Circuit*

In the Second Circuit, "a Notice of Claim filed pursuant to the FTCA must provide enough information to permit the agency to conduct an investigation and to estimate the claim's worth. [Citing reference omitted.] A claim must be specific enough to permit the agency to serve the purpose of the FTCA to enable the federal government to expedite the fair settlement of tort claims."[51]

#### *b. Seventh Circuit*

The Seventh Circuit employs a flexible test to ensure that the purpose of the claim process is not frustrated.[52] The circuit's main question is "[w]hy should courts stand in punctilious adherence to unimportant elements of the regulatory definition of a 'claim' under the FTCA?"[53] While the plaintiff in that case lost on evidence of authority to act, he did so because the agency asked him for evidence of authority to act and he did not respond to the agency's request for evidence of his authority to act.[54] The outcome of that case is inapposite here where the agency did not request such evidence of authority. Indeed, the Seventh Circuit recognized that "the United States could not use its own noncompliance as a defense to liability."[55] That is the

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[50] GAF Corp. v. United States, 818 F.2d 901, 920 (D.C. Cir. 1987).
[51] Romulus v. United States, 160 F.3d 131, 132 (2d. Cir. 1998).
[52] Kanar v. United States, 118 F.3d 527 (7th Cir. 1997).
[53] Kanar v. United States, 118 F.3d 527, 531 (7th Cir. 1997).
[54] Kanar v. United States, 118 F.3d 527, 531 (7th Cir. 1997).
[55] Kanar v. United States, 118 F.3d 527, 531 (7th Cir. 1997).

position of the Government here: they seek to use their own failure to ask for evidence of authority to act as a defense to liability. This is the classic doctrine of unclean hands and should not be endorsed by this Court.

In 2019, a Seventh Circuit panel held that "[a] claim has been presented to a federal agency once the plaintiff submits 'an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a form certain."[56] The Seventh Circuit recognizes that the "presentment requirement has four elements: (1) notification of the incident; (2) demand for a sum certain; (3) title or capacity of the person signing; and (4) evidence of the person's authority to represent the claimant."[57] However, failing to meet these elements "is 'only fatal if it can be said to have "hindered" or "thwarted" the settlement process "that Congress created as a prelude to litigation."'[58]

### *3. One Circuit Follows the Full Notice Test*

#### *a. Eighth Circuit*

In the Eighth Circuit, a claimant must provide, at the time of submission of the claim to an agency, notification of the incident, demand for a sum certain, title or capacity of the person signing, and evidence of the person's authority to represent the claimant.[59]

### *4. Excepting the Federal Circuit, All Circuits Have Spoken and Not of One Voice*

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[56] Chronis v. United States, 932 F.3d 544, 546-47 (7th Cir. 2019).
[57] Chronis v. United States, 932 F.3d 544, 547 (7th Cir. 2019).
[58] Chronis v. United States, 932 F.3d 544, 547 (7th Cir. 2019).
[59] *See generally* Mader v. United States, 654 F.3d 794 (8th Cir. 2011)(*en banc*).

As the D.C. Circuit noted, "[t]he sufficiency of presentments for jurisdictional purposes remain a matter for the courts to determine in light of the statutory framework."[60] However, almost the entirety of the federal appellate judiciary has weighed in on the issue of whether evidence of authority is required as part of presentment of a claim. As the circuit courts do not agree on what constitutes sufficiency of presentments under the statutes, and some circuits have called into question the validity of the Attorney General's regulations, this case should be resolved by this Court. There is no longer a good reason that "this Court should postpone consideration of the issue until more ... federal circuits have experimented with substantive and procedural solutions to the problem."[61]

## IMPORTANT QUESTION

The FTCA is a waiver of sovereign immunity. Pursuant to the statute, the Attorney General has issued regulations that increase the requirements on a person attempting to hold the Government to account for their actions. The statute allows the Attorney General to promulgate regulations to "consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States".[62] However, the statute does not expressly, or even impliedly, authorize the Attorney General to define the term "claim", or add to the jurisdictional burdens a claimant must clear to submit a claim."[63] Furthermore, the Eighth Circuit has

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[60] GAF Corp. v. United States, 818 F.2d 901, 920 (D.C. Cir. 1987).
[61] Gilliard v. Mississippi, 464 U.S. 867, 869 (1983) (Marshall, J., dissenting from the denial of *cert.*); *cf.* Mathis v. Shulkin, 137 S. Ct. 1994-95 (2017)(Sotomayor, J. dissenting from denial of *cert.* on the grounds that the Federal Circuit and the Ct. App. Vet. Cl. could continue their dialogue).
[62] 28 U.S.C. §2672.
[63] *See* Kanar v. United States, 118 F.2d 527, 528 (7th Cir. 1997)(discussing the ability to litigate despite the regulation).

interpreted this regulation in a manner far more restrictive than any of the other circuits. Even if the Attorney General had the authority to add to the plain language of the statute, the Eighth Circuit has gone beyond what Congress envisioned to constitute authority to initiate a claim.

The presence of the Government is pervasive across America. In very few instances, however, is the Government's presence more pervasive than in Veterans' healthcare. The Petitioner here is unable to vindicate the tragic rape of her son directly against the Department of the Army due to this Court's precedent refusing to extend the FTCA to the military.[64] However, she can (and has) attempted to hold responsible the Veterans Health Administration whose failures resulted in the passing of her son. This is what the FTCA explicitly allows through its own terms. The fact that two separate circuits (the Ninth and the Eighth), sitting *en banc*,[65] have come to opposite conclusions on the law surrounding what she needs to present in a claim to the Department of Veterans Affairs, and when, to demonstrate her authority to seek justice on behalf of her dead son demonstrates that this Court's supervisory authority is needed to review this question.

## THIS CASE IS A GOOD VEHICLE FOR RESOLVING THE DISPUTE

This case is a good vehicle for reviewing the question presented. The answer to whether or not the Attorney General's regulation is facially valid is in dispute.[66]

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[64] Feres v. United States, 340 U.S. 135 (1950).

[65] The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 10th, 11th, and D.C. Circuit Courts have all issued panel opinions contrary to the *en banc* holding of the 8th Circuit.

[66] GAF Corp. v. United States, 818 F.2d 901, 920 (D.C. Cir. 1987)("we hold that Congress has not delegated to the agencies the power to determine, by regulation, the jurisdiction of Article III courts under the Act.").

The Attorney General provides that "[f]or purposes of the provisions of 28 U.S.C. §2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives ... an executed Standard Form 95 ... accompanied by a claim for money damages ... 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."[67] However, several circuits have held that the Attorney General's regulation creates hurdles not required by Congress. Here, Petitioner sought the authority of the Benton County, Minnesota, District Court to be her son's estate's trustee before initiating the instant action. Petitioner had all the authority necessary to initiate a claim in front of the agency as the natural mother of the decedent. Petitioner then gained the additional authority she needed to file an action with the United States District Court as the trustee of her son's estate. The plain language of 28 U.S.C. §2675(a) differentiates between a claim and an action. The agency, and the Eighth Circuit, are the only authorities who consider the terms to be synonymous and interchangeable. Allowing the Eighth Circuit's decision to stand creates an Equal Protection problem. Americans residing everywhere else except the seven states the Eighth Circuit serves need only follow the minimal notice standards established by Congress, rather than the additional requirements promulgated by an administrative agency and adopted by the Eighth Circuit. Petitioner's Standard Form 95, concededly timely filed with the agency, contained all the evidence "[the agency] need[ed], and all to which it [was]

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[67] 28 C.F.R. §14.2(a).

statutorily entitled, to make final disposition of the claim in accordance with Section 2675(a)."[68]

Additionally, the case was halted at the motion to dismiss stage. Resolving the evidence of authority dispute will allow this case to proceed into discovery and, ultimately, either motions for summary judgment or trial on the merits. Therefore, the answer to the question will have an enormous effect on the outcome of the case and, indeed, for all those in the Eighth Circuit affected by Mader, and provide uniformity throughout the Nation.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Dated: March 22, 2021

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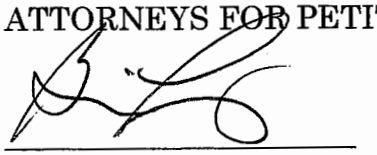
ATTORNEYS FOR PETITIONER



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[68] GAF Corp. v. United States, 818 F.2d 901, 920 (D.C. Cir. 1987).