

No. 20-1368

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 REHEARING

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PETITION FOR REHEARING

Pursuant to S. Ct. R. 44.2, Petitioner Cynthia Rollo-Carlson petitions for rehearing of the Court's order denying certiorari in this case. Petitioner further requests that the Court defer consideration of the petition pending the Government's decision on whether or not to petition this Court for certiorari in Collins v. United States, 996 F.3d 102 (2d Cir. 2021), and, if this Court accepts jurisdiction, consolidate this case with Collins and set it for oral argument. Alternatively, Petitioner requests that the Court grant the petition and set this case on the merits docket for argument.

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)

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REASONS FOR GRANTING THE PETITION

A petition for rehearing or an order denying certiorari requires a demonstration of intervening circumstances of a substantial or controlling effect.¹ Such intervening circumstances are present here.

Before the initial filing of the petition in this case, the Second Circuit required that “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.”²

In Collins, the Second Circuit panel went further. The panel first affirmed the core holding of Romulus that “based simply on the statutory text, we construe the presentment requirement as one of notice, not proof. An FTCA claimant must provide the appropriate agency with sufficient notice of his claim to permit the agency to conduct an inquiry into the merits of his demand for compensation.”³ Then, the panel determined that “[t]he Form 95 requirement, however, was promulgated by the Attorney General not on the basis of any authority conferred in §2675 to prescribe requirements for presentment but, rather, on the basis of §2672’s authority to establish regulations facilitating settlement. Accordingly, 39 C.F.R.

¹ S. Ct. R. 44.2.

² Romulus v. United States, 160 F.3d 131, 132 (2d. Cir. 1998).

³ Collins v. United States, 996 F.3d 102, 110 (2d Cir. 2021).

§912.5 cannot dictate presentment.”⁴ For all significant purposes, the regulation at issue in Collins is the functional equivalent of the one at issue in this case.⁵ If the Attorney General cannot govern the exercise of presentment with respect to the Postal Service, according to the opinion of the Second Circuit panel, neither does the Attorney General possess the authority to govern presentment for any other federal agency, including the VA.⁶

The Supreme Court has, as the Second Circuit panel recognized, determined that statutes are normally interpreted “in accord with the ordinary public meaning of its terms at the time of its enactment.”⁷ After extensively analyzing the word “present”, the Second Circuit determined that, “based simply on the statutory text, we construe the presentment requirement as one of notice, not proof.”⁸ Of course, if mere notice is all that is required at the point of presentment, there is not a significant dispute that Petitioner provided notice of the injury and a demand for a sum certain.

Of significant import for the case at bar is the fact that the Government asserted that Collins’ refusal to provide records concerning additional treatment rendered his presentment inadequate.⁹ The Second Circuit disagreed and first noted that “in past cases, we have found it unnecessary to address this issue

⁴ Collins v. United States, 996 F.3d 102, 110 (2d Cir. 2021).

⁵ Presentment to the VA is governed by 28 C.F.R. §14.2.

⁶ See 28 C.F.R. §14.2(a).

⁷ Collins v. United States, 996 F.3d 102, 109-110 (2d Cir. 2021)(citing Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020)).

⁸ Collins v. United States, 996 F.3d 102, 110 (2d Cir. 2021).

⁹ Collins v. United States, 996 F.3d 102, 113 (2d Cir. 2021).

because the challenged presentments were inadequate in any event.”¹⁰ In this case, “[b]y contrast, where, as here, we conclude that an initial administrative filing provides sufficient information for agency investigation, we cannot avoid the question of whether presentment requires the claimant to substantiate his claim with specific regulatory-defined evidence.”¹¹ As such, a new case facing a new issue that is similar to the issue in this case, Collins is an intervening circumstance of a substantial effect.

Just as in Collins, Rollo-Carlson was required to present specific regulatory-defined evidence by the district court, namely a very specific evidence of authority that bears no relationship to the statutory-defined presentment requirement, namely notice of claim and demand of a sum certain. The district court dismissed the action, conflating the statutory-defined presented requirement with the regulatory-defined evidence of authority requirement. Even if there was no direct conflict between the circuit decisions before, Collins creates, or deepens, a split between the Second and the Eighth Circuits. The Eighth Circuit holds that evidence of authority is a requirement of presentment; the Second Circuit does not, nor do many other Circuits as the petition for certiorari explained.

Should the petition for certiorari not be granted, Collins from New York will be able to continue his suit while Rollo-Carlson from Minnesota will not, despite the great degree of similarity between the two cases. They will have received inequal

¹⁰ Collins v. United States, 996 F.3d 102, 115 (2d Cir. 2021).

¹¹ Collins v. United States, 996 F.3d 102, 115 (2d Cir. 2021).

amounts of justice merely due to their geographical location. This should not happen absent a decision from this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Dated: June 10, 2021

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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

/s/Brian K. Lewis

Brian K. Lewis

Counsel of Record