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YOU'VE GOT MAIL, BUT NOT JURISDICTION: THE FEDERAL TORT CLAIMS ACT AND THE MAILBOX RULE

Abstract: The Federal Tort Claims Act provides private individuals with limited rights of action against the United States government if plaintiff-claimants meet certain jurisdictional requirements. Specifically, 28 U.S.C. § 2675(a) requires that plaintiff-claimants present claims to responsible federal agencies before filing suit in federal court. On March 7, 2019, in *Cooke v. United States*, the United States Court of Appeals for the Second Circuit, joining a majority of circuits to have considered the question, refused to apply the mailbox rule to the presentment requirement in section 2675(a). This Comment argues that the Second Circuit's ruling in *Cooke* is correct because the doctrine of sovereign immunity requires a strict construction that precludes applying the mailbox rule to section 2675(a)'s presentment requirement.

INTRODUCTION

The Federal Tort Claims Act (FTCA or the Act) governs tort actions brought against the United States.¹ Originally enacted in 1946, the FTCA, by making the federal government liable for certain torts that its employees commit,² creates a limited exception to the United States' sovereign immunity.³

¹ Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified as amended in §§ 2671–2680 and in scattered sections of 28 U.S.C. (2018)). Under the Federal Tort Claims Act (FTCA or the Act), individuals may seek monetary 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, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1).

² 28 U.S.C. § 1346(b)(1) (waiving liability on behalf of the United States for only some types of torts by employees of its government in certain circumstances); *see id.* § 2671 (defining who qualifies as a government employee under the Act). The FTCA holds the United States liable as a private person under the same circumstances, except for pre-judgment interest and punitive damages. *Id.* § 2674. Before the FTCA, individuals had to sue employees of the federal government in their individual capacity or petition Congress for relief. *See* Daniel Shane Read, *The Courts' Difficult Balancing Act to Be Fair to Both Plaintiff and Government Under the FTCA's Administrative Claims Process*, 57 BAYLOR L. REV. 785, 788–90 (2005) (explaining causes of action before the FTCA).

³ *United States v. Orleans*, 425 U.S. 807, 813 (1976). The doctrine of sovereign immunity states that the sovereign cannot be sued without its consent. *United States v. Lee*, 106 U.S. 196, 226 (1882) (remarking that consent by the sovereign is a necessary prerequisite for suit against it in any judicial forum). The Supreme Court has firmly established the doctrine's applicability to the United States. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983) (“It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.”); 14 CHARLES ALAN WRIGHT & ARTHUR P. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3654 (Helen

Section 2675(a) of the Act contains a “presentment requirement,” which requires that parties present their claims to the appropriate “Federal agency” and that the agency deny those claims before claimants seek relief in federal court.⁴ If claimants do not present their claims in writing either within two years after it accrues or within six months of final denial by the agency, then the claims are generally barred.⁵

Federal regulation explains that a plaintiff satisfies the presentment requirement “when a Federal agency receives from a claimant” written notification and a sum certain claim for money damages.⁶ Further, the receiving agen-

Hershkoff ed., 4th ed. 2015) (noting that this has been an established principle from at least the mid-eighteenth hundreds). Jurists and scholars frequently note that the American doctrine of sovereign immunity stems from an English legal principle that the king can do no wrong. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 766 (1982) (White, J., dissenting) (noting that, in the United States, sovereign immunity has preserved the idea that the king cannot do any wrong); WRIGHT & MILLER, *supra*, § 3654 (tracing the doctrine of sovereign immunity to the English legal tradition wherein kings and queens were ultimate and infallible legal authorities). Although mostly beyond the scope of this Comment, it is worth noting that disagreement exists about the constitutionality and proper interpretation of the doctrine. *Compare* Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 VILL. L. REV. 899, 922 (2010) (“I do submit that federal sovereign immunity was a natural and common-sense legal development and is justifiable in a regime of popular sovereignty and a constitutional system with separation of powers.”), *with* DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW: THE NEW FEDERALISM’S CHOICE 12 (2005) (“[T]o court and marry both sovereign immunity and the rule of law . . . requires . . . comfort[] with an extraordinary degree of cognitive dissonance.”), *and* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201–02 (2001) (arguing that sovereign immunity is “an anachronistic relic and the entire doctrine should be eliminated from American law” because it “undermines the basic notion” underlying the American government, that is, “the fundamental recognition that the government and government officials *can* do wrong and must be held accountable” (emphasis added)).

⁴ 28 U.S.C. § 2675(a) (conditioning causes of action under the FTCA upon the presentment of claims to appropriate agencies and their subsequent denial). In 1966, Congress added this administrative requirement to lessen pressure on the courts and promote the settlement of legitimate claims. *See* McNeil v. United States, 508 U.S. 106, 111–12 n.7 (1993) (attesting Congress’s rationale and noting that the majority of cases before this resulted in pre-trial settlement); Read, *supra* note 2, at 791–95 (discussing the adoption and contents of the 1966 Amendments’ mandatory administrative claims process); *see also* Act of July 18, 1966, Pub. L. No. 89-506, 80 Stat. 306 (1966). “The term ‘Federal agency’ includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.” 28 U.S.C. § 2671.

⁵ *See* 28 U.S.C. § 2401(b) (outlining the time limits for commencing action under the FTCA). The Supreme Court has held that the time limits under section 2401(b) are not jurisdictional and courts can waive them on equitable grounds. *United States v. Wong*, 575 U.S. 402, 412 (2015). Further, “[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.” 28 U.S.C. § 2675(a). For the purposes of these time limits, tort actions generally accrue at the time a plaintiff’s injury occurs. *Flores v. United States*, 719 F. App’x 312, 315 (5th Cir. 2018) (quoting *Trinity Marine Prods., Inc. v. United States*, 812 F.3d 481, 487 (5th Cir. 2016)).

⁶ 28 C.F.R. § 14.2(a) (2018) (“For 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 from a claim-

cy must be the agency “whose activities gave rise to the claim.”⁷ But courts disagree about the proper meaning and interpretation of “receives.”⁸ In particular, federal circuit courts are split as to whether the common-law mailbox rule, with its accompanying rebuttable presumption of receipt, is applicable to FTCA claims.⁹

This Comment argues that the mailbox rule should not apply to the FTCA’s presentment requirement under section 2675(a).¹⁰ Part I of this Comment introduces the mailbox rule and the circuit split over its application to FTCA claims, and it examines the most recent federal circuit decision on the issue, *Cooke v. United States*.¹¹ Part II explores the interpretative and policy concerns informing this split.¹² Part III then considers the majority and minority positions, as well as the relevant Supreme Court cases, and concludes that the mailbox rule does not apply to the FTCA’s presentment requirement.¹³

I. THE MAILBOX RULE AND THE FTCA

The FTCA requires that claimants present their claims to a responsible agency and that the agency deny those claims before filing for relief in federal court.¹⁴ Federal regulation provides that a claim is presented upon the agency’s receipt of a claim.¹⁵ Courts have disagreed whether the mailbox rule’s presumption of receipt qualifies as receipt for presentment purposes under the FTCA and this applicable regulation.¹⁶ Section A of this Part discusses the

ant, 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 . . .”).

⁷ *Id.* § 14.2(b)(1).

⁸ *See, e.g.,* *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1251–53 (9th Cir. 2006) (discussing disagreement about the interpretation of “receives” between the circuits).

⁹ *See* *Cooke v. United States*, 918 F.3d 77, 81–82 (2d Cir.), *cert. denied*, 139 S. Ct. 2748 (2019) (cataloging courts on each side of the split over whether the mailbox rule applies to FTCA claims). *Compare* *Lightfoot v. United States*, 564 F.3d 625, 628 (3d Cir. 2009) (refusing to apply the mailbox rule to FTCA claims), *with* *Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1238–42 (11th Cir. 2002) (applying the mailbox rule to the FTCA’s presentment requirement).

¹⁰ *See* *infra* notes 14–128 and accompanying text (detailing the different rationales for and against applying the mailbox rule to FTCA claims and then arguing against its application). *See generally* *supra* note 4 (providing an overview of the contents and history of the presentment requirement).

¹¹ *See* *infra* notes 14–45 and accompanying text (providing an overview of both the mailbox rule and which courts apply the rule to FTCA claims, as well as the general fact pattern of FTCA cases where the rule’s applicability receives discussion).

¹² *See* *infra* notes 46–85 and accompanying text (discussing the rationales behind applying and not applying the mailbox rule to FTCA claims).

¹³ *See* *infra* notes 86–128 and accompanying text (arguing that courts should not apply the mailbox rule to FTCA claims).

¹⁴ 28 U.S.C. § 2675(a).

¹⁵ 28 C.F.R. § 14.2(a).

¹⁶ *See* *infra* notes 23–31 and accompanying text (presenting the federal circuit split concerning this issue).

background and principles of the mailbox rule.¹⁷ Section B provides an overview of the circuit split concerning its application to the FTCA's presentment requirement.¹⁸ Section C introduces the most recent federal circuit case on this issue, *Cooke v. United States*.¹⁹

A. The Mailbox Rule

The mailbox rule stems from contract law and provides that a contract offer is deemed accepted once an offeree puts an acceptance in the mail.²⁰ The mailbox rule does not consider whether the offeror has actually received the acceptance upon mailing; rather, it finds mutual assent to a contract at the moment an offeree mails an acceptance, regardless of whether it reaches the offeror.²¹ This mutual assent depends upon a rebuttable presumption of receipt, that is, that a properly addressed mailing arrived at its intended destination and its addressee received it.²²

B. The Circuit Split

A majority of circuits to have considered the application of the mailbox rule to the FTCA's presentment requirement—the Second, Third, Fifth, Seventh, Eighth, Ninth, and Tenth—have refused to apply the rule.²³ This camp reads “receives” literally to mean that actual receipt of a claim is necessary to

¹⁷ See *infra* notes 20–22 and accompanying text (explaining the mailbox rule's origins and uses).

¹⁸ See *infra* notes 23–31 and accompanying text (laying out the disagreement between circuits over whether to apply the mailbox rule to the FTCA's presentment requirement).

¹⁹ See *infra* notes 32–45 and accompanying text (providing an overview of the facts, history, procedure, ruling, and rationale in the Second Circuit Court of Appeals' recent consideration of the mailbox rule's applicability to FTCA claims).

²⁰ *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1057 (2019) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 66 (AM. LAW INST. 1979)) (citing *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884)) (“As first-year law students learn in their course on contracts, there is a presumption that a mailed acceptance of an offer is deemed operative when ‘dispatched’ if it is ‘properly addressed.’”); RESTATEMENT (SECOND) OF CONTRACTS § 63.

²¹ RESTATEMENT (SECOND) OF CONTRACTS § 63.

²² *Rosenthal*, 111 U.S. at 193 (“The rule is well settled 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 . . . that it reached its destination at the regular time, and was received by the person to whom it was addressed.”); *Lupyan v. Corinthian Colls., Inc.*, 761 F.3d 314, 319 (3d Cir. 2014) (citing *id.*) (noting that a rebuttable presumption of receipt derives from the mailbox rule). The Supreme Court recognized the mailbox rule for the first time in 1884 in *Rosenthal v. Walker*, 111 U.S. at 193–94; *Sorrentino v. IRS*, 383 F.3d 1187, 1189 (10th Cir. 2004) (noting that *Rosenthal* was the first Supreme Court decision to recognize the mailbox rule).

²³ *Cooke*, 918 F.3d at 81–82 (noting that the majority of circuits have held that the mailbox rule is not applicable to FTCA claims and holding the same); *Flores*, 719 F. App'x at 317 n.1 (“The common law mailbox rule is inapplicable to the FTCA”); see *infra* notes 24–27 and accompanying text (detailing these circuits' rationales). *But see Vacek*, 447 F.3d at 1254–55 n.3 (Thomas, J., concurring) (arguing that the Seventh, Eighth, and Tenth Circuits' holdings on the matter are less clear).

meet the presentment requirement.²⁴ In other words, mailing does not qualify as presenting as it would if the mailbox rule applied.²⁵ Courts on this side of the split stress that the doctrine of sovereign immunity compels the construction of waivers of immunity, such as that contained within the FTCA, as limited and in favor of the sovereign.²⁶ And, the majority has suggested, equating “mailed” with “received” is not a limited construction of the waiver in favor of the sovereign.²⁷

On the contrary, in 2002, in *Barnett v. Okeechobee Hospital*, the Eleventh Circuit held that the mailbox rule is applicable to FTCA claims.²⁸ The *Barnett* court read “receives” more broadly to determine that it contains a rebuttable presumption of receipt through the mailbox rule.²⁹ A federal agency, the *Barnett* court stated, should be treated the same as a private defendant to whom the mailbox rule’s accompanying rebuttable presumption of receipt applies.³⁰ The Eleventh Circuit is the only federal circuit court to apply the mailbox rule to FTCA claims.³¹

²⁴ See *Lightfoot*, 564 F.3d at 628 (noting that plaintiffs need to show that the appropriate agency actually received their claims); *Vacek*, 447 F.3d at 1252 (refusing to accept that a presumption of receipt arises); *Bellecourt v. United States*, 994 F.2d 427, 430 (8th Cir. 1993) (holding that the presentment requirement was not met when the plaintiff failed to show that the federal agency actually received the claim).

²⁵ *Moya v. United States*, 35 F.3d 501, 504 (10th Cir. 1994) (“Mailing . . . is insufficient to satisfy the presentment requirement.”); *Drazan v. United States*, 762 F.2d 56, 58 (7th Cir. 1985) (“Mailing is not presenting; there must be receipt.”).

²⁶ *Cooke*, 918 F.3d at 81 (quoting *Dep’t of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999)) (“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.’”); see *infra* notes 50–52 and accompanying text (explaining in greater depth the doctrine of sovereign immunity and strict construction).

²⁷ See, e.g., *Vacek*, 447 F.3d at 1252 (“Put simply, it cannot be strict construction of the waiver to read the word ‘received’ as actually meaning ‘mailed.’”).

²⁸ *Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1238–42 (11th Cir. 2002).

²⁹ See *id.* at 1239–40 (“[W]e cannot go so far as to say that affirmative evidence of such receipt is required.”).

³⁰ *Id.* at 1240 (“[W]e simply believe that [a federal agency] 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 . . .”).

³¹ See *Vacek*, 447 F.3d at 1252 (observing that the Eleventh Circuit is the only federal circuit court that applies the mailbox rule to FTCA claims); *Barnett*, 283 F.3d at 1238–42 (applying the mailbox rule to a claim under the FTCA). In fact, only one court outside of the Eleventh Circuit has since found this position persuasive. See *Lauren v. United States*, No. 14-cv-03040, 2015 U.S. Dist. LEXIS 164335, at *24 (D. Colo. Dec. 8, 2015) (invoking the *Barnett* court’s test for establishing a rebuttable presumption of receipt). That court, however, may be in conflict with its own circuit court’s position. Compare *id.* (considering a test for applying a presumption of receipt), with *Moya*, 35 F.3d at 504 (refusing to apply the mailbox rule’s presumption of receipt to certified mail where the sender does not have the expected return receipt).

C. *Cooke v. United States: The Second Circuit Joins the Majority*

In 2019, in *Cooke v. United States*, the Second Circuit joined the majority of circuit courts in holding that the mailbox rule is not applicable to FTCA claims.³² In *Cooke*, plaintiff-appellant Jessica Cooke brought a tort claim for assault and battery under the FTCA against the United States.³³ Cooke alleged that, during a traffic stop on May 7, 2015 and without just cause, one Customs and Border Patrol (CBP) agent shoved her to the ground and another repeatedly shot her with a taser gun.³⁴

After the alleged incident, on April 1, 2016, Cooke's counsel incorrectly filed a civil rights complaint with the Department of Homeland Security's Office of Civil Rights and Civil Liberties (DHS-CRCL), instead of the CBP.³⁵ Cooke's counsel also mistakenly mailed the requisite Standard Form 95 (SF-95) to the DHS-CRCL rather than the CBP.³⁶ The DHS-CRCL acknowledged receipt of the civil rights complaint in a letter dated June 22, 2016, but it made no mention of the SF-95.³⁷

After inquiring with the DHS-CRCL twice about the civil rights complaint, but not mentioning the SF-95, Cooke filed suit in the United States District Court for the Northern District of New York.³⁸ The government moved to dismiss the action for lack of subject matter jurisdiction, arguing that Cooke had failed to exhaust the administrative remedies required under the FTCA.³⁹

³² See *Cooke*, 918 F.3d at 80–82; *supra* notes 23–27 and accompanying text (detailing the circuits in this majority and their rationales for not applying the mailbox rule to FTCA claims).

³³ *Cooke v. United States*, No. 8:17-CV-224, 2017 WL 5178761, at *1–2 (N.D.N.Y. Nov. 7, 2017), *aff'd*, 918 F.3d 77 (2d Cir.), *cert. denied*, 139 S. Ct. 2748 (2019). Cooke originally pled three causes of action, but agreed to the dismissal of the first two “because the United States has not rendered itself liable under the FTCA for constitutional torts.” *Id.* at *2; see Amended Complaint ¶¶ 27–35, *Cooke*, No. 8:17-CV-224 (N.D.N.Y. Mar. 1, 2017), ECF No. 4; Response to Motion at 10–11, *Cooke*, No. 8:17-CV-224 (N.D.N.Y. June 12, 2017), ECF No. 10; Reply to Response at 8–9, *Cooke*, No. 8:17-CV-224 (N.D.N.Y. July 5, 2017), ECF No. 13. Thus, Cooke's remaining allegation that the government sought to dismiss was against the United States for the assault and battery by United States Customs and Border Patrol (CPB) agents under 28 U.S.C. § 2679. Amended Complaint, *supra*, ¶¶ 31–35. Section 2679 instructs that plaintiff-claimants can only bring actions under the FTCA against the United States, not against the government's employees or agencies themselves. 28 U.S.C. § 2679.

³⁴ Amended Complaint, *supra* note 33, ¶¶ 21–22.

³⁵ Affidavit of Stephen L. Lockwood ¶ 5, *Cooke*, No. 8:17-CV-224 (N.D.N.Y. June 12, 2017), ECF No. 9. Customs and Border Patrol is a federal law enforcement agency under the Department of Homeland Security. *Id.* ¶ 3.

³⁶ *Id.* ¶ 6; see 28 C.F.R. § 14.2(a) (requiring claimants to mail a completed Standard Form 95 (SF-95) or its equivalent along with specific monetary claims); *id.* § 14.2(b)(1) (requiring that claimants mail their SF-95s to the agency responsible for the actions giving rise to the claim).

³⁷ *Cooke*, 918 F.3d at 79–80; Affidavit of Stephen L. Lockwood, *supra* note 35, ¶ 7.

³⁸ *Cooke*, 918 F.3d at 80; Complaint, *Cooke*, No. 8:17-CV-224 (N.D.N.Y. Feb. 17, 2017), ECF No. 1; Amended Complaint, *supra* note 33.

³⁹ Motion to Dismiss at 4–5, *Cooke*, No. 8:17-CV-224 (N.D.N.Y. May 16, 2017), ECF No. 8-1; see *infra* note 77 and accompanying text (outlining the jurisdictional nature of the presentment requirement).

The government maintained that the appropriate agency never received an SF-95, a point which Cooke did not dispute.⁴⁰ The district court granted the government's motion in explicit accordance with the majority of district courts in the Second Circuit, which requires proof of actual receipt by an agency to fulfill the presentment requirement.⁴¹ On appeal, the Second Circuit affirmed the dismissal of Cooke's case, and the Supreme Court subsequently denied certiorari to further appeal.⁴²

The material fact pattern in *Cooke* is straightforward: plaintiff-claimant allegedly has sent, but defendant-federal agency allegedly has not received, a claim.⁴³ Because plaintiff-claimants only try to invoke the mailbox rule in such instances, this general fact pattern is ubiquitous in cases where the applicability of the mailbox rule to the FTCA's presentment requirement is at issue.⁴⁴ Therefore, the facts specific to *Cooke* did not inform the Second Circuit's answer to the mailbox rule's applicability nearly as much as how the court defined the meaning of "receives" as a matter of law.⁴⁵

⁴⁰ *Cooke*, 918 F.3d at 81; Motion to Dismiss at 4–5, *supra* note 39; *see* Declaration of Michael D. Bunker, *Cooke*, No. 8:17-CV-224 (N.D.N.Y. May 16, 2017), ECF No. 8-2 (self-reporting by the relevant regional CBP assistant chief counsel that he found no record of plaintiff-claimant Cooke filing a claim with any CBP Counsel office and explaining the CBP claim tracking and review procedures).

⁴¹ *Cooke*, 2017 WL 5178761, at *3–5.

⁴² *Cooke v. United States*, 139 S. Ct. 2748 (2019) (Mem.) (denying certiorari); *Cooke*, 918 F.3d at 82.

⁴³ *See Cooke*, 918 F.3d at 79–80 (detailing this material dispute); Affidavit of Stephen L. Lockwood, *supra* note 35, ¶¶ 5–7 (same); Motion to Dismiss at 4–5, *supra* note 39 (same); *see also supra* notes 35–39 and accompanying text (same).

⁴⁴ *See, e.g., Lightfoot*, 564 F.3d at 626 (noting that the plaintiff allegedly sought agency reconsideration by mail, but the agency had no record of having received the letter); *Vacek*, 447 F.3d at 1252 (“*Bailey* presents virtually identical facts to the case at hand . . . [C]ounsel did not send the form by certified mail . . . [and] did nothing to verify that the claim had been received . . . [T]he government provided affidavits attesting that the claim was never received.”); *Moya*, 35 F.3d at 502 (noting that the plaintiff alleged she mailed a request for reconsideration to the appropriate agency, but the agency denied ever receiving such request). *But see infra* notes 117–119 (discussing *pro se* prisoners with FTCA claims as an exceptional fact pattern).

⁴⁵ *See Cooke*, 918 F.3d at 80–82 (focusing on the meaning of receipt). The Second Circuit's two-page discussion of the issue was a survey of the majority position that focused on the interpretive path that the court ultimately chose to follow, rather than the facts of the case. *See id.* at 82 (“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.”); *see also* Petition for Writ of Certiorari, *id.*, No. 18-1260, 2019 WL 1436685, at *4 (“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.”). On the other hand, the court devoted only one sentence to discussing the minority position, acknowledging two cases where it prevailed. *Cooke*, 918 F.3d at 81–82.

II. DEFINING THE BOUNDARIES OF RECEIPT

Section A of this Part discusses the rationale of the majority of circuit courts for not applying the mailbox rule in FTCA cases.⁴⁶ Section B then considers the minority position's contrary reasoning.⁴⁷ Finally, Section C explores the interpretive and policy concerns of each side in the context of relevant Supreme Court cases.⁴⁸

A. The Majority Rationales Against Applying the Mailbox Rule in FTCA Cases

The Second Circuit in *Cooke v. United States* and the majority position refuse to apply the mailbox rule because they believe that it would impermissibly stretch the definition of “received.”⁴⁹ This camp primarily invokes the sovereign immunity doctrine's strict construction rule—a practice that ensures constructing waivers of sovereign immunity strictly and in favor of the sovereign⁵⁰—as a limiting principle that precludes applying the mailbox rule.⁵¹ According to the majority, Congress has only waived the United States' sovereign immunity to claims under the FTCA that a federal agency actually “receives.”⁵² From a policy standpoint, these courts stress that claimants are al-

⁴⁶ See *infra* notes 49–53 and accompanying text (detailing the majority of circuit courts' interpretive and policy reasons for not applying the mailbox rule in FTCA cases).

⁴⁷ See *infra* notes 54–63 and accompanying text (exploring why the minority of courts applies the mailbox rule).

⁴⁸ See *infra* notes 64–85 and accompanying text (weighing the interpretive and policy narratives surrounding analysis of applying the mailbox rule to FTCA claims).

⁴⁹ *Cooke v. United States*, 918 F.3d 77, 82 (2d Cir.), *cert. denied*, 139 S. Ct. 2748 (2019) (“The statute and corresponding regulation make clear that actual receipt is required”); see *supra* notes 24–25 (citing other cases that agree with this interpretation of actual receipt).

⁵⁰ *F.A.A. v. Cooper*, 566 U.S. 284, 289 (2012); *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (“We have frequently held . . . that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign.”); *Lane v. Pena*, 518 U.S. 187, 192 (1996) (noting that waivers of sovereign immunity meet strict construction in favor of the sovereign); *WRIGHT & MILLER, supra* note 3, § 3654 (noting that a strict construction method does not allow looking beyond a statute's text to, for example, legislative history).

⁵¹ *Cooke*, 918 F.3d at 82 (citing *Blue Fox, Inc.*, 525 U.S. at 261) (“[A]pplying 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.”); *Lightfoot v. United States*, 564 F.3d 625, 628 (3d Cir. 2009) (“[T]he waiver is limited . . . and is strictly construed in favor of the sovereign.” (citation omitted)); *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006) (“Sovereign immunity is an important limitation on the subject matter jurisdiction of federal courts.”).

⁵² See *Vacek*, 447 F.3d at 1252 (“[I]t cannot be strict construction of the waiver to read the word ‘received’ as actually meaning ‘mailed.’”); *Lenius v. United States*, No. 2:18-cv-01829, 2019 U.S. Dist. LEXIS 120859, at *6 (W.D. Wash. July 19, 2019) (quoting *Vacek*, 447 F.3d at 1252) (same); *Jimenez v. U.S. Postal Serv.*, No. C-13-2883, 2013 U.S. Dist. LEXIS 144958, at *8–9 (N.D. Cal. Oct. 7, 2013) (quoting *Vacek*, 447 F.3d at 1252) (same).

ready on notice that they have made claims and have the ability to use certified mail to ensure receipt.⁵³

B. The Minority Rationales for Applying the Mailbox Rule in FTCA Cases

The minority position, essentially comprised of the Eleventh Circuit's 2002 opinion in *Barnett v. Okeechobee Hospital* and Judge Sidney Thomas's concurrence in the Ninth Circuit case of *Vacek v. United States Postal Service* in 2006, believes that a rebuttable presumption of receipt through the mailbox rule fits within the meaning of "receives."⁵⁴ This side largely addresses the mailbox rule as an evidentiary issue that is either beyond or unchanged by the FTCA and necessary to ensure fairness to plaintiffs.⁵⁵ The Eleventh Circuit did not address the doctrine of sovereign immunity and its strict construction rule; its interpretive analysis stopped after the evidentiary consideration.⁵⁶ But Judge Thomas seemingly engaged with the doctrine, although not through strict construction, because he looked beyond the text to legislative history and argued that equitable considerations are compatible with sovereign immunity's requirement of strict construction.⁵⁷ He advocated that the mailbox rule does not expand Congress's waiver of sovereign immunity because, rather than

⁵³ See *Vacek*, 447 F.3d at 1252 ("It would have taken minimal effort on the part of [Plaintiff's] attorney to verify that the claim had been received: sending it by certified mail."); *Bellecourt v. United States*, 994 F.2d 427, 430 (8th Cir. 1993) (dismissing an FTCA claim where the plaintiff did not use certified mail and the federal agency did not receive any mailing); *Bailey v. United States*, 642 F.2d 344, 347 (9th Cir. 1981) (outlining that the plaintiffs and their counsel were naturally aware that there was a claim to be received and that certified mail was a simple means of ensuring that receipt).

⁵⁴ See *Vacek*, 447 F.3d at 1253–57 (Thomas, J., concurring); *Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1238–42 (11th Cir. 2002). In *Vacek v. United States Postal Service*, Judge Sidney Thomas concurred that the plaintiffs-claimants' case should be dismissed because he agreed that *Bailey v. United States*, forbidding application of the mailbox rule to the FTCA's presentment requirement, controlled. See *Vacek*, 447 F.3d at 1253 (majority opinion) (citing *Bailey*, 642 F.2d at 347) (noting that *Bailey* controlled the case at bar and that counsel for the plaintiff conceded as much); *id.* at 1257 (Thomas, J., concurring) (pronouncing agreement with the majority opinion that *Bailey* controlled the case at hand). Judge Thomas wrote separately, however, to express his desire to overrule *Bailey* and adopt the reasoning of that case's dissent to apply the mailbox rule. *Id.* at 1253–57.

⁵⁵ See *Vacek*, 447 F.3d at 1256 (Thomas, J., concurring) (discussing the mailbox rule as an evidentiary presumption that should apply to FTCA claims because evidentiary standards ought to remain equal in cases against private defendants and the government, or else plaintiffs with FTCA claims would suffer a material disadvantage on account of evidentiary asymmetry between themselves and the government); *Barnett*, 283 F.3d at 1239 ("We see no reason why we should not . . . allow [plaintiff] the benefit of this 'traditional means of weighing evidence in order to determine whether receipt occurred.'" (quoting *Konst v. Fla. E. Coast Ry. Co.*, 71 F.3d 850, 853 (11th Cir. 1996))).

⁵⁶ See *Barnett*, 283 F.3d 1232, 1238–40 (noting only that the FTCA is an exception to the United States' general sovereign immunity).

⁵⁷ *Vacek*, 447 F.3d at 1254–55 (Thomas, J., concurring) (exploring the legislative history of the FTCA); *id.* at 1255–57 (citing *Bailey*, 642 F.2d at 349 (Jameson, J., dissenting)) (suggesting that the FTCA's partial waiver of sovereign immunity and section 2675's presentment requirement do not prevent courts from taking equitable factors into account when evaluating the effects of noncompliance with jurisdictional, administrative prerequisites).

changing the receipt requirement, it merely provides plaintiffs with a chance to prove in court that their claims have been received.⁵⁸ Further, he suggested that the mailbox rule is in line with the FTCA's legislative scheme requiring minimal notice.⁵⁹

Notions of fair play also inform the minority position's belief that the mailbox rule should apply to FTCA claims.⁶⁰ Judge Thomas posited that, because plaintiff-claimants cannot know what happens inside a government agency, allowing litigants to rely upon the mailbox rule's rebuttable presumption of receipt promotes fair settlement in tort claims against the United States.⁶¹ With a similar eye toward fairness, the Eleventh Circuit in *Barnett* was concerned that the government had a financial stake in the case as a defendant.⁶² In that court's opinion, it was prudent to apply the mailbox rule to guard against the harm of potential deceit.⁶³

C. Competing Narratives of Interpretation and Policy

Thus, two closely connected sets of competing narratives emerge from the federal circuit courts concerning application of the mailbox rule to the FTCA's presentation requirement: the first involves interpretation,⁶⁴ the second, fairness and administrability.⁶⁵ For the majority, the sovereign immunity doctrine

⁵⁸ *Id.* at 1255 (“[A] plaintiff must still prove receipt as the [FTCA] requires, but he may rely on the mailbox rule’s rebuttable presumption to do so.”); see *supra* note 54 and accompanying text (contrasting the majority’s position with more of Judge Thomas’s rationale).

⁵⁹ See *Vacek*, 447 F.3d at 1255 (quoting *Shipek v. United States*, 752 F.2d 1352, 1354 (9th Cir. 1985)) (noting that the mailbox rule’s rebuttable presumption of receipt aligns with the Ninth Circuit Court of Appeals’ previous interpretation of the presentment requirement in section 2675 as requiring minimal notice). Judge Thomas argued that the Ninth Circuit had assumed that the mailbox rule applies to FTCA claims and, because the mailbox rule is an established component of federal common law consistent with the FTCA’s statutory scheme, it should be applied. *Id.* at 1254–55 (quoting *Schikore v. BankAmerica Supplemental Ret. Plan*, 269 F.3d 956, 961 (9th Cir. 2001)); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 318–21 (2012) (providing an overview of the canon of presumption against change in the common law and discussing the need for clear changes under the doctrine).

⁶⁰ See *infra* notes 61–63 and accompanying text (discussing the minority position’s concerns regarding fairness for plaintiff-claimants).

⁶¹ See *Vacek*, 447 F.3d at 1255 (Thomas, J., concurring) (quoting S. REP. NO. 89-1327, at 2515–16 (1966), reprinted in 1966 U.S.C.C.A.N. 2515, 2515–16).

⁶² See *Barnett*, 283 F.3d at 1239–40. Although the *Barnett* court noted that its own dicta pointed against extending the mailbox rule to filings with government agencies, those agencies were not defendants and had no “pecuniary interest” in those instances. *Id.* (quoting *Konst*, 71 F.3d at 855).

⁶³ See *id.* at 1240 (noting that it was in the agency’s interest to deny having received the plaintiff’s SF-95 and to dismiss the suit).

⁶⁴ See *Cooke*, 918 F.3d at 82 (focusing upon understanding the meaning of the applicable statute and regulation); *Barnett*, 283 F.3d at 1239–40 (same); see also *supra* notes 49–52 and accompanying text (outlining the majority of circuit courts’ interpretive basis for not applying the mailbox rule to FTCA claims); *supra* notes 54–59 (explaining the minority of circuits courts’ interpretive reasons for applying the mailbox rule).

⁶⁵ See *Vacek*, 447 F.3d at 1252–53 (supplementing interpretive analysis with policy considerations); *Barnett*, 283 F.3d at 1240 (addressing how equitable considerations shape the court’s under-

compels a strict construction that precludes applying the mailbox rule to FTCA claims and finds support in a common-sense policy where claimants control their claims through certified mail.⁶⁶ For the minority, this strict construction is not a part of the central evidentiary considerations that dovetail concerns of fairness for adopting the mailbox rule.⁶⁷

In deciding whether a waiver of sovereign immunity exists in the first place, the Supreme Court demands strict construction of a statute because the determination is whether courts have subject-matter jurisdiction.⁶⁸ Whether a statutory condition to a waiver of sovereign immunity also receives strict construction depends upon the condition's jurisdictional significance.⁶⁹ If a statutory condition is nonjurisdictional, then a court should not presumptively afford the government the benefit of strict construction in interpreting that condition.⁷⁰ But if a statutory condition is jurisdictional, then courts should apply

standing); *see also supra* note 53 and accompanying text (detailing the reasons that the majority of circuits views applying the mailbox rule to FTCA claims as unfair and not administrable); *supra* notes 60–63 and accompanying text (discussing the minority of circuits' policy reasons for applying the mailbox rule to FTCA claims).

⁶⁶ *See, e.g., Vacek*, 447 F.3d at 1250–53 (noting that the presentment requirement is jurisdictional and requires strict interpretation that prevents the court from applying the mailbox rule or saving plaintiff-claimants and their counsels from failing to track their claims proactively through certified mail); *see also supra* notes 49–52 and accompanying text (outlining the majority's position that sovereign immunity requires strict construction in favor of the government, which precludes the mailbox rule and supports claimants controlling their claims through certified mail).

⁶⁷ *See, e.g., Barnett*, 283 F.3d at 1238–40 (holding that plaintiff-claimants litigating against the government under the FTCA deserve to have the same evidentiary standards apply to the government as would apply to private citizens and noting that to hold otherwise would be prejudicial to claimants); *see also supra* notes 54–63 and accompanying text (detailing the minority's position that evidentiary and policy reasons of consistency and fairness allow application of the mailbox rule to FTCA claims).

⁶⁸ *Blue Fox, Inc.*, 525 U.S. at 261 (“We have frequently held . . . that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign.”); *Lane*, 518 U.S. at 192 (noting the strict construction in favor of the sovereign in terms of scope that courts give waivers of sovereign immunity); *WRIGHT & MILLER, supra* note 3, § 3654 (providing examples and explanation of the Supreme Court applying strict construction to determine the existence and scope of a waiver of sovereign immunity); *Sisk, supra* note 3, at 923 (noting that the Supreme Court looks like it will continue to use strict construction and presumptions in favor of the government to determine the existence and basic scope of waivers of sovereign immunity).

⁶⁹ *See WRIGHT & MILLER, supra* note 3, § 3654 (showing that courts treat jurisdictional and non-jurisdictional conditions differently and detailing examples). Courts should not apply strict construction in determining whether a statutory condition is jurisdictional. *See United States v. Wong*, 575 U.S. 402, 405–12 (2015) (looking beyond the statutory text to determine that time bars attached to a statute with explicit waiver of sovereign immunity were not jurisdictional); *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 95–96 (1990) (same); *WRIGHT & MILLER, supra* note 3, § 3654 (noting that the Supreme Court did not follow the rule of strict construction in determining jurisdictional conditions in *United States v. Wong* and *Irwin v. Department of Veteran Affairs*).

⁷⁰ *See Wong*, 575 U.S. at 405–12 (applying equitable tolling to a statutory condition because the Court held that condition to be nonjurisdictional and thus exempt from strict construction).

strict construction because concerns about the scope of subject-matter jurisdiction resurface.⁷¹

In 1993, in *McNeil v. United States*, the Supreme Court interpreted the FTCA's presentment requirement as jurisdictional.⁷² Then, in 2004, in *Kontrick v. Ryan*, the Court unanimously insisted that jurisdictional is a term appropriate only for rules defining the cases and persons over which a court can exercise its power, and "not for claim-processing rules"⁷³ Since *Kontrick*, the Court has not addressed whether the FTCA's presentment requirement remains a jurisdictional requirement or if it is now a mere claim-processing rule under *Kontrick*.⁷⁴ But in 2015, in *United States v. Kwai Fun Wong*, the Court held that the FTCA's time bars were nonjurisdictional because they were essentially claim-processing rules.⁷⁵ The dissent, however, vehemently disputed the majority's proclaimed judicial presumption against jurisdictional pins, arguing that courts should uphold such labels where clearly established and followed, as it posited the FTCA's time bars were.⁷⁶

All but one of the federal circuit courts to have considered the application of the mailbox rule to the presentment requirement have interpreted the requirement as jurisdictional.⁷⁷ Only the Seventh Circuit Court of Appeals has moved away from this position, concluding that the presentment requirement is

⁷¹ See *id.* at 423–28 (Alito, J., dissenting) (refusing to entertain equitable tolling for the same because the dissent considered the statutory condition to be jurisdictional and thus requiring a strict and limited reading that precluded equitable considerations in favor of plaintiffs rather than the government as sovereign and defendant).

⁷² *McNeil v. United States*, 508 U.S. 106, 113 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.").

⁷³ *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (noting that courts should use the label "'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.").

⁷⁴ See *supra* notes 72–73 and accompanying text (showing that the Supreme Court's redefinition or clarification of jurisdictional labels in *Kontrick v. Ryan* succeeded the Court's classification of 28 U.S.C. § 2675 as jurisdictional in *McNeil v. United States* by more than a decade).

⁷⁵ *Wong*, 575 U.S. at 420; see *supra* note 5 and accompanying text (explaining that the FTCA generally bars claims that a plaintiff-claimant did not bring within two years of accrual or six months following agency denial).

⁷⁶ *Id.* at 428–32 (Alito, J., dissenting).

⁷⁷ See *Cooke*, 918 F.3d at 78 (stating that the FTCA's presentment requirement is jurisdictional); *Lightfoot*, 564 F.3d at 627 (same); *Vacek*, 447 F.3d at 1250; *id.* at 1257 (Thomas, J., concurring) (same); *Staggs v. United States ex rel. Dep't of Health & Human Servs.*, 425 F.3d 881, 885 (10th Cir. 2005) (same); *Barnett*, 283 F.3d at 1237, 1242 (same); *Bellecourt*, 994 F.2d at 430 (same). Additionally, many of these circuit courts have recently reiterated their view that the FTCA's presentment requirement is jurisdictional. See, e.g., *Bakhtiari v. Spaulding*, 779 F. App'x 129, 132 (3d Cir. 2019) (per curiam) (noting the jurisdictional nature of the FTCA's presentment requirement); *D.L. ex rel. Junio v. Vassilev*, 858 F.3d 1242, 1244 (9th Cir. 2017) (same); *Lopez v. United States*, 823 F.3d 970, 976 (10th Cir. 2016) (same); *Barber v. United States*, 642 F. App'x 411, 413 (5th Cir. 2016) (per curiam) (same).

more akin to a claim-processing rule than a truly jurisdictional one.⁷⁸ The Supreme Court has repeatedly denied requests for certiorari in cases where courts have treated the presentment requirement as jurisdictional and applied strict construction.⁷⁹

In 1988, in *Houston v. Lack*, the Supreme Court also applied the mailbox rule to a federal statute concerning administrative filing on evidentiary and policy grounds.⁸⁰ In that case, the Court ruled that a *pro se* prisoner who had no control over his administrative filing beyond handing his mail to a prison authority deserved the equitable, rebuttable presumption of the mailbox rule.⁸¹ To rule otherwise, the Court stressed, would be poor policy because the prisoner had no means of ensuring receipt or filing.⁸² Thus, there was an evidentiary imbalance where all parties and persons other than the prisoner himself had control over any evidence.⁸³ The Court made clear that this exception for a *pro se* prisoner should not extend to general civil cases.⁸⁴ Even this extreme example and limited exception, however, met strong opposition from a fervent dissent.⁸⁵

⁷⁸ See *Smoke Shop, LLC v. United States*, 761 F.3d 779, 786–87 (7th Cir. 2014) (quoting *Kontrick*, 540 U.S. at 455) (stating that the court was no longer treating section 2675(a) as a jurisdictional requirement because it considered that statutory condition more similar to a claim-processing requirement than a condition determinative of the types of cases a court can hear). In *Smoke Shop, LLC v. United States*, the Seventh Circuit still affirmed dismissal for failure to exhaust administrative remedies, stating that constructive notice was not adequate to meet the presentment requirement’s standards for enabling a settlement process before litigation. *Id.* at 787–89.

⁷⁹ *E.g.*, *Cooke v. United States*, 139 S. Ct. 2748 (2019) (Mem.) (denying certiorari); *Vacek v. U.S. Postal Serv.*, 550 U.S. 906 (2007) (Mem.) (same); *Bellecourt v. United States*, 510 U.S. 1109 (1994) (Mem.) (same). A full discussion about the disagreement among the federal circuit courts over the jurisdictional significance of administrative requirements like the presentment requirement is beyond the scope of this Comment. See WRIGHT & MILLER, *supra* note 3, § 3654 (surveying some disagreement among lower courts about whether administrative exhaustion requirements are claims-processing rules or jurisdictional).

⁸⁰ *Houston v. Lack*, 487 U.S. 266, 275–76 (1988) (noting that the general policy that a claimant has control over filing with an agency was inapposite where there was an imbalance in access to evidence regarding filing or delay on behalf of a *pro se* prisoner). In *Houston v. Lack*, the Court defined the time of “filing” a notice of appeal, which was necessary for the plaintiff’s habeas corpus suit under 28 U.S.C. § 2107 and Federal Rules of Appellate Procedure 3(a) and 4(a)(1), as the time at which the *pro se* prisoner-plaintiff delivered his notice of appeal to prison officials. *Id.* at 272–76.

⁸¹ *Id.* at 272–76.

⁸² *Id.* at 275 (“[P]ro se prisoners necessarily lose control over and contact with their notices of appeal . . . at delivery to prison authorities, not receipt by the clerk.”).

⁸³ *Id.* at 276 (“[E]vidence on any of these issues will be hard to come by for the prisoner confined to his cell, who can usually only guess whether the prison authorities, the Postal Service, or the court clerk is to blame for any delay.”).

⁸⁴ *Id.* at 274 (noting that the Court’s decision to extend the mailbox rule to filing time for the *pro se* prisoner-plaintiff in *Houston* should not affect filings in other civil cases, and nor should those cases benefit from the application of the mailbox rule to determine filing time).

⁸⁵ See *id.* at 280–81 (Scalia, J., dissenting) (“The rationale of today’s decision is that any of various theoretically possible meanings of ‘filed with the clerk’ may be adopted—even one as remote as ‘addressed to the clerk and given to the warden’—depending upon what equity requires Since

III. WHY THE MAILBOX RULE SHOULD NOT APPLY TO FTCA CLAIMS

Section A of this Part illustrates why the majority's stance that the mailbox rule does not apply to the FTCA is most persuasive.⁸⁶ Section B addresses the policy considerations surrounding this debate and how to address them.⁸⁷

A. Matters of Law: Jurisdiction and "Receives"

As a matter of law, the doctrine of sovereign immunity should prevent the application of the mailbox rule to the FTCA's presentment requirement.⁸⁸ As the majority rightly holds, the presentment requirement is a jurisdictional condition, so it must meet strict construction.⁸⁹ As the regulation explains, a claimant fulfills the condition of claim presentation when the appropriate federal agency "receives" the claim.⁹⁰ Thus, courts must interpret "receives" strictly, which undeniably entails actual receipt.⁹¹

there is no legal warrant for creating a special exception to the rule of receipt for the benefit of incarcerated *pro se* appellants, I cannot join the Court . . .").

⁸⁶ See *infra* notes 88–115 and accompanying text (arguing that the majority's decision not to apply the mailbox rule to FTCA claims is correct in light of the Supreme Court's instructions regarding strict construction under the sovereign immunity doctrine and addressing the minority position's counterarguments).

⁸⁷ See *infra* notes 116–128 and accompanying text (suggesting that the policy considerations concerning the presentment requirement are important but should not change the interpretation or outcome regarding the appropriateness of applying the mailbox rule to FTCA claims).

⁸⁸ See *Cooke v. United States*, 918 F.3d 77, 82 (2d Cir.), *cert. denied*, 139 S. Ct. 2748 (2019) (citing *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999)) ("[A]pplying 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."); *Lightfoot v. United States*, 564 F.3d 625, 627–28 (3d Cir. 2009) (considering sovereign immunity as a reason why the mailbox rule cannot apply to FTCA claims); *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1252 (9th Cir. 2006) (noting that sovereign immunity precludes application of the mailbox rule to FTCA claims).

⁸⁹ See *McNeil v. United States*, 508 U.S. 106, 113 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies."); *Vacek*, 447 F.3d at 1250 ("We have repeatedly held that the exhaustion requirement is jurisdictional in nature and must be interpreted strictly . . ."); *supra* note 77 (explaining that reading section 2675(a) as jurisdictional is the majority position and providing examples of cases).

⁹⁰ 28 C.F.R. § 14.2(a) (2018); *Cooke*, 918 F.3d at 80–82 (noting that 28 C.F.R. § 14.2(a) clarifies "the contours of the presentment requirement" and focusing on the word choice of "receives" before holding that "[t]he statute and corresponding regulation make clear that actual receipt is required" for FTCA claims); *Vacek*, 447 F.3d at 1251 (remarking that the clear language of 28 C.F.R. § 14.2(a) controls and forbids challenges to any actual receipt requirement).

⁹¹ See *Vacek*, 447 F.3d at 1252 ("[I]t cannot be strict construction of the waiver to read the word 'received' as actually meaning 'mailed.'"); *supra* notes 24–25 and accompanying text (showing that strict interpretation is actual receipt); *supra* notes 71, 77 and accompanying text (outlining the requirement of strict construction to jurisdictional conditions on waivers of sovereign immunity and the broad treatment of the presentment requirement as jurisdictional).

The minority position's evidentiary and policy concerns are ultimately unconvincing.⁹² First, because the presentment requirement, as a jurisdictional condition, demands a strict construction that requires actual receipt, evidentiary considerations are inapposite.⁹³ Regardless of whether a facial or factual attack is levied against plaintiff-claimants' attempts to meet their burden of proving receipt⁹⁴—and thus, regardless of the truth attributed to plaintiff-claimants' allegations—as a matter of law, courts must still interpret “receives” as actual receipt.⁹⁵ This legal standard has created concerns that the government can too easily dismiss a claim by lying.⁹⁶ But pressing upon this concern erroneously substitutes policy considerations of fair play for a necessarily antecedent fair interpretation of the law as written and according to the Supreme Court's attendant principles of construction.⁹⁷

The Supreme Court's recent FTCA decision in 2015, *United States v. Kwai Fun Wong*, also suggests that rebuttable presumptions should not apply to jurisdictional conditions.⁹⁸ The majority in *Kwai Fun Wong* found it appro-

⁹² See *infra* notes 93–115 (asserting that evidentiary and policy concerns have no role in the strict interpretation of the FTCA's presentment requirement that Supreme Court jurisprudence demands).

⁹³ See *Cooke*, 918 F.3d at 80–82 (determining that actual receipt is required and that holding otherwise would conflict with the principles of sovereign immunity, which requires courts to interpret waivers of sovereign immunity strictly and limited in the sovereign's favor); *Vacek*, 447 F.3d at 1252 (noting that sovereign immunity precludes the Eleventh Circuit's evidentiary considerations of treating the government-defendant in an FTCA case like a private citizen in *Barnett v. Okeechobee Hospital*); *supra* notes 24–25 and accompanying text (cataloguing multiple circuits' similar determinations that the FTCA's presentment requirement demands actual receipt).

⁹⁴ *Cooke*, 918 F.3d at 80 (explaining that the plaintiff must prove subject matter jurisdiction including the fulfillment of pre-suit jurisdictional requirements like the presentment requirement under section 2675); *Lightfoot*, 564 F.3d at 627 (same); see *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (discussing that federal courts are of limited jurisdiction and the party who argues that a claim falls within that limited jurisdiction also carries the burden of proving that assertion).

⁹⁵ See 5B CHARLES ALAN WRIGHT & ARTHUR P. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (3d ed. 2004) (detailing the standards of review for facial and factual attacks to subject matter jurisdiction in federal court); see also *Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1237–38 (11th Cir. 2002) (dealing with standards of review for facial and factual attacks needing resolution).

⁹⁶ See *Barnett*, 283 F.3d at 1240 (“All that we have said should not imply that we think that the VA lied to the district court as to whether it received Barnett's SF95.”); *Davis v. United States*, Civ. No. 08-184, 2010 WL 3294224, at *7 (E.D. Ky. Aug. 20, 2010) (“The plaintiff casts aspersions on two declarations offered by the defendant . . . Whatever may be the merits of the plaintiff's criticisms of the defendant's evidence, it is really beside the point.”), *vacated*, 2010 WL 5014533 (E.D. Ky. Dec. 3, 2010).

⁹⁷ See SCALIA & GARNER, *supra* note 59, at 343–46, 352–54, 364–66 (dispelling notions that (i) the spirit of a law or the outcomes that it promotes should influence judicial interpretation of it and (ii) that remedial statutes should be liberally construed); *infra* notes 116–128 and accompanying text (discussing policy considerations surrounding the mailbox rule's applicability to FTCA claims and evaluating their significance).

⁹⁸ Compare *United States v. Wong*, 575 U.S. 402, 411–12 (2015) (majority opinion) (applying equitable tolling to the FTCA's time bars because they considered the condition of time bars as non-judicial), and *Holland v. Florida*, 560 U.S. 631, 645–46 (2010) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990)) (noting that rebuttable presumptions of equitable tolling are

priate to apply a rebuttable presumption because it concluded that the requirement was nonjurisdictional.⁹⁹ Similarly, the minority in *Kwai Fun Wong* found such a rebuttable presumption inappropriate because it determined that the time bar was jurisdictional.¹⁰⁰ So, although the Court was split 5–4 over whether the FTCA’s time bar was jurisdictional, it seemed to agree that rebuttable presumptions should not apply to jurisdictional provisions.¹⁰¹

The only way to evade strict construction’s preclusion of the mailbox rule would be to determine that the presentment requirement is nonjurisdictional.¹⁰² But even when operating outside of the province of strict construction and looking beyond the text of the statute to legislative history and intent, application of the mailbox rule still seems inappropriate.¹⁰³ Judge Thomas suggested otherwise, but his argument appears problematic upon examination of the Supreme Court’s specific language concerning abrogation, that, where statutes

generally applicable to nonjurisdictional federal statutes of limitations), with *Wong*, 575 U.S. at 431–32 (Alito, J., dissenting) (rejecting the application of equitable tolling to the FTCA’s time bars because of an understanding that they are jurisdictional).

⁹⁹ *Wong*, 575 U.S. at 420 (“Congress has supplied no such statement [that the time limits are jurisdictional] Accordingly, we hold that the FTCA’s time bars are nonjurisdictional and subject to equitable tolling.” (emphasis added)); see *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (noting that courts should use “the label ‘jurisdictional’ not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority”).

¹⁰⁰ *Wong*, 575 U.S. at 431–32 (Alito, J., dissenting) (“[There is] unmistakable evidence that § 2401(b)’s limits are jurisdictional. . . . [Thus,] I would hold that § 2401(b) does not allow equitable tolling.” (emphasis added)).

¹⁰¹ See *id.* at 416–20 (majority opinion) (distinguishing the FTCA’s time bar as nonjurisdictional before holding that it is subject to equitable tolling); *id.* at 431–32 (Alito, J., dissenting) (maintaining that the FTCA’s time bar should not be subject to equitable tolling because it is jurisdictional). The dissent went further and posited that, even if a condition is nonjurisdictional, it should not be subject to a rebuttable presumption where its language clearly stands against such a presumption. *Id.* at 428 (“Where Congress imposes an inflexible claims processing rule, it is our duty to enforce the law and prohibit equitable tolling, whether it is jurisdictional or not.”).

¹⁰² See, e.g., *id.* at 405–12 (majority opinion) (applying equitable tolling to a statutory condition because the Court held that condition to be nonjurisdictional); see also *supra* notes 69–71 and accompanying text (discussing when courts will and will not apply strict construction to a statutory condition of a waiver of sovereign immunity, which is dependent upon the condition’s jurisdictional status).

¹⁰³ See S. REP. NO. 89-1327, at 2 (1966), reprinted in 1966 U.S.C.C.A.N. 2515, 2516 (quoting H.R. REP. NO. 89-1532, at 6 (1966)) (“The proposals embodied in H.R. 13650 are 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.”); H.R. REP. NO. 89-1532, at 4 (noting an intention for section 2675(a) to require filing claims with an agency before filing claims with a court); *Medina v. City of Philadelphia*, CIV. A. 04-5698, 2005 WL 1124178, at *3 (E.D. Pa. May 9, 2005), *aff’d*, 219 F. App’x 169 (3d Cir. 2007) (“[I]f courts allowed plaintiffs to ‘present’ administrative claims by affixing them as exhibits to lawsuits, these goals would be subverted and § 2675(a) would become meaningless.”); see also *infra* notes 104–115 (arguing that the mailbox rule does not seem to fit the presentment requirement even when strict construction’s presumption against it is removed because the FTCA contains statutory purposes contrary to that common-law rule).

conflict with established common-law principles, courts should favor the latter “*except* when a statutory purpose to the contrary is evident.”¹⁰⁴

The FTCA has three statutory purposes seemingly contrary to the mailbox rule.¹⁰⁵ First, the Act as a whole is meant to provide a limited waiver of sovereign immunity.¹⁰⁶ The mailbox rule is contrary to this purpose because it necessarily expands, rather than limits, the United States’ liability under the Act.¹⁰⁷ Second, the FTCA’s 1966 Amendments make it clear that the presentment requirement was enacted to avoid unnecessary litigation.¹⁰⁸ The mailbox rule also stands against this purpose because it can create litigation that settlement

¹⁰⁴ *United States v. Texas*, 507 U.S. 529, 534 (1993) (emphasis added) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). *Compare id.* (noting that a longstanding presumption to favor established common-law principles applies to statutes that infringe upon the common law unless such statutes evidence a contrary purpose), with *Vacek*, 447 F.3d at 1255 (Thomas, J., concurring) (asserting that the mailbox rule is applicable to FTCA claims because it is “consistent with [the Act’s] statutory scheme” (emphasis added)). In 1993, in *United States v. Texas*, the Supreme Court held that the Debt Collection Act of 1982 (DCA) did not abrogate the United States’ federal common-law right to collect prejudgment interest on debts to it held by the States. 507 U.S. at 539. First, the DCA did not directly address the federal government’s common-law right to prejudgment interest collection. *Id.* at 534–35. Second, the Court found no statutory purpose contrary to the federal government’s common-law right to collect prejudgment interest from debts held by the State. *Id.* Only then did the Court consider how the DCA’s scheme and legislative history, which showed that the DCA’s purpose was to create measures for the federal government to collect debts held by the States, supported their conclusion that the DCA did not abrogate the federal government’s common-law right to collect prejudgment interest on state-held debts. *Id.* at 536–37 (citing S. REP. NO. 97-378, at 2 (1982), reprinted in 1982 U.S.C.C.A.N. 3378).

As the Court noted in *Texas*, a federal statute abrogates common law when it “speak[s] directly” to the issue. *Id.* at 534. But, the Court explained that “Congress need not affirmatively proscribe the common law doctrine at issue.” *Id.* (quotation and citation omitted). Thus, the “speak directly” test requires Congress to directly address the issue that the common-law doctrine addresses, not to discuss the doctrine itself. *See id.* The test still lacks clarity, but the Court has said that the bar for abrogation of federal common law is lower than the clear evidence and Congressional purpose necessary to preempt state law. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423–24 (2011); *see* John David Ohlendorf, *Against Coherence in Statutory Interpretation*, 90 NOTRE DAME L. REV. 735, 765 (2014) (discussing the Supreme Court’s treatment of the “speak directly” test in *American Electric Power Co. v. Connecticut* as significantly more lenient than a requirement that statutes must directly address discrete issues and calling pronouncements by the court to the contrary “isolated and scattered”).

¹⁰⁵ *See* S. REP. NO. 79-1400, at 30–31 (1946) (citing H.R. REP. NO. 79-1287, at 1–3 (1945)) (evidencing the limited nature of suits permitted against the United States under the FTCA); Read, *supra* note 2, at 791–93 (discussing two aims of the 1966 Amendments to the FTCA, to lessen pressure on courts and to provide fair settlements to plaintiffs); *see also infra* notes 106–111 and accompanying text (outlining the FTCA’s statutory purposes and why the mailbox rule is contrary to each one).

¹⁰⁶ *See* S. REP. NO. 79-1400, at 30–31 (citing H.R. REP. NO. 79-1287, at 1–3) (detailing the FTCA’s first statutory purpose that is arguably contrary to the mailbox rule).

¹⁰⁷ *See* Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 519 (1996) (“[T]he mailbox rule effectively increases [an addressee’s] exposure . . .”).

¹⁰⁸ *See* S. REP. NO. 89-1327, at 2 (“The proposals embodied in H.R. 13650 are 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.”); *Medina*, 2005 WL 1124178, at *3 (noting that it undermines section 2675(a)’s goals to permit the attachment of claims as exhibits in lawsuits instead of requiring presentment to an agency).

could render unnecessary.¹⁰⁹ Third, the 1966 Amendments intended to promote fair settlement opportunities for claimants.¹¹⁰ The mailbox rule also appears contrary to promoting fair settlement because it allows claimants to circumvent pre-lawsuit settlement discussions.¹¹¹ Thus, these three statutory purposes contrary to the mailbox rule should preclude its application to section 2675(a).¹¹²

Thus, Judge Thomas's assertion that the mailbox rule is applicable because it is consistent with the FTCA's statutory scheme requiring minimal notice is inapposite.¹¹³ Further, the legislative history that supports minimal notice in kind does not evidence support of no notice at all.¹¹⁴ Therefore, whether one follows the text-only, strict construction approach that sovereign immunity

¹⁰⁹ See S. REP. NO. 89-1327, at 3 (quoting H.R. REP. NO. 89-1532, at 7) (noting that the presentment requirement allows agencies to settle meritorious claims in a faster process that avoids the expense and time that litigation otherwise would require).

¹¹⁰ See *id.* at 2 (quoting H.R. REP. NO. 89-1532, at 6) (noting the intention that the presentment requirement allow the Government to expedite fair settlement).

¹¹¹ *Medina*, 2005 WL 1124178, at *3 (noting that it undermines section 2675(a)'s goal of promoting settlement to permit the attachment of claims as exhibits in lawsuits instead of requiring presentment to an agency). The natural rejoinder is that a system that makes it arguably easier for agencies to lie and cheat plaintiffs out of claims cannot promote fair settlement. See *Vacek*, 447 F.3d at 1255 (Thomas, J., concurring) (arguing that fair settlement promotion means granting plaintiffs greater access to agency inner-workings through the mailbox rule); *Barnett*, 283 F.3d at 1239-40 (addressing the equitable concerns for plaintiff-claimants without the mailbox rule); see also *supra* note 96 and accompanying text (addressing fears of agencies lying). But Congress's aim in instituting the administrative requirement of section 2675(a) was specifically to put claims in agencies' hands to promote extra-judicial settlement. See S. REP. NO. 89-1327, at 7 (quoting H. REP. NO. 89-1532, at 4) (commenting that the 1966 Amendments' addition of section 2675(a) requires plaintiffs to submit administrative claims to agencies). And, of course, plaintiffs are not merely at agencies' whims because plaintiffs have the power of certified mail. See, e.g., *Bailey v. United States*, 642 F.2d 344, 347 (9th Cir. 1981) (explaining that certified mail is a simple means of ensuring that receipt); see also *supra* note 53 (detailing similar arguments that plaintiffs are ultimately in control of receipt).

¹¹² See *Texas*, 507 U.S. at 534 (quotation and citation omitted) ("Congress need not affirmatively proscribe the common-law doctrine at issue."); *supra* note 104 and accompanying text (explaining that a statutory purpose contrary to common-law principles negates the presumption toward retaining the latter).

¹¹³ See *Vacek*, 447 F.3d at 1254-57 (Thomas, J., concurring) (interpreting the FTCA's statutory scheme and suggesting that it stands for a kind of minimal notice consistent with the mailbox rule). Further, Judge Thomas's citation to his circuit's interpretation of Congress's goals in adopting section 2675(a) in *Shipek v. United States* undercuts his own notion, because in that case "minimal notice" applied only to the content of a received claim. Compare *id.* at 1255-57 (citing *Shipek v. United States*, 752 F.2d 1352, 1354 (9th Cir. 1985)) (discussing the Ninth Circuit's interpretation of section 2675(a) as requiring minimal notice), with *Shipek*, 752 F.2d at 1353-54 (analyzing minimal notice as the content required in a claim received by a federal agency necessary to put the agency on notice under section 2675(a)).

¹¹⁴ Compare H.R. REP. NO. 89-1532, at 4 (1966) (emphasis added) ("The new language [in section 2675(a)] would require that an administrative claim be filed with an agency or department in each instance prior to filing a court action against the United States."), with *Vacek*, 447 F.3d at 1254-57 (Thomas, J., concurring) (claiming that an assumption of the mailbox rule's applicability is sensible because it fits with the 1966 Amendments' intentions of promoting fair treatment for plaintiffs), and *id.* at 1255, 1257 (citing S. REP. NO. 89-1327, at 7) (identifying a consistent principle of fairness in the 1966 Amendments and the application of the mailbox rule to FTCA claims).

commands or engages with a more expansive interpretation of the FTCA, the conclusion is the same: the FTCA precludes application of the mailbox rule to claims under the Act.¹¹⁵

B. Matters of Fact: Policy Implications Are Not the Fact of This Matter, But They Matter, in Fact

The policy considerations that the majority and minority sides of the circuit split raise regarding the mailbox rule's applicability are just that: considerations, not reasons to adopt an erroneously loose interpretation of federal regulation.¹¹⁶ *Houston v. Lack* provides the singular, contrary example where policy concerns drove the Supreme Court to apply the mailbox rule to a federal statute where it otherwise would not have.¹¹⁷ In that case, the Supreme Court decided that application of the mailbox rule was appropriate in the unique circumstances of a *pro se* prisoner because he had no way of ensuring receipt of his claim.¹¹⁸ The *pro se* prisoner, of course, differs drastically from the typical FTCA claimant with access to certified mail.¹¹⁹ Thus, it is difficult to imagine the Supreme Court finding the minority position's policy considerations to be persuasive reasoning for essentially rewriting federal law or regulation.¹²⁰ Perhaps this is why the Supreme Court denied certiorari to *Vacek v. United States Postal Service*, despite its record containing the strongest policy argument for

¹¹⁵ See *Cooke*, 918 F.3d at 82 (holding that application of the mailbox rule to FTCA claims would be inconsistent with sovereign immunity's strict construction rule); S. REP. NO. 89-1327, at 2-3 (noting that the 1966 Amendments aim to lessen pressure upon courts and decrease unneeded litigation by requiring presentment to agencies before filing claims); see also *infra* notes 104-115 and accompanying text (arguing that the mailbox rule should not apply to the FTCA's presentment requirement even when strict construction's presumptions against it are removed, because the FTCA contains statutory purposes contrary to that common-law rule). Of course, a reading of section 2675(a) beyond strict construction is inappropriate as long as the presentment requirement remains jurisdictional. See *supra* notes 68-71 and accompanying text (laying out the appropriate interpretive approaches to different questions concerning waivers of sovereign immunity and their different types of attendant conditions and showing that strict construction is necessary for jurisdictional conditions like section 2675(a)).

¹¹⁶ See *Vacek*, 447 F.3d at 1253 (quoting *Bailey v. United States*, 642 F.2d 344, 347 (9th Cir. 1981)) ("We do not think that we should now stretch and distort the statute and the regulation to rescue counsel from their own carelessness."); see also SCALIA & GARNER, *supra* note 59, at 343-46, 352-54, 364-66 (dismissing the idea that courts should liberally construe remedial statutes).

¹¹⁷ See *Houston v. Lack*, 487 U.S. 266, 272-76 (1988) (explaining the Court's application of the mailbox rule as an exception on account of unique policy grounds).

¹¹⁸ See *id.* at 275-76 (remarking that *pro se* prisoners have no control over their notices once they hand them over to prison authorities and that this creates an evidence asymmetry for the *pro se* "prisoner confined to his cell, who can usually only guess" who is responsible for any delay).

¹¹⁹ See *id.* at 274 (noting that this exception for a *pro se* prisoner should not be extended to general civil cases); *Vacek*, 447 F.3d at 1252 (observing that it is simple for most plaintiffs to use certified mail to ensure receipt); *Bailey*, 642 F.2d at 347 (same).

¹²⁰ See *Vacek*, 447 F.3d at 1252 (quoting *Library of Cong. v. Shaw*, 478 U.S. 310, 318 (1986)) (expressing near disbelief at the Eleventh Circuit's rationale and claiming that that circuit's decision is "contrary to the law of the Supreme Court").

doing so in Judge Thomas's concurrence, notably signed onto by two-thirds of the circuit panel.¹²¹

Although this Comment cannot endorse Judge Thomas's or the Eleventh Circuit's positions, the consequences of certain outcomes under the current state of law are not trivial.¹²² *Vacek* itself provides a striking example that Judge Thomas put well: "[The plaintiff] was first struck by a Post Office truck, and then had his damage claim stamped out because the Post Office lost it in the mail."¹²³ Scenarios like this raise questions about the justice of sovereign immunity and the letter of the law.¹²⁴ Appreciating the entrenched and expansive scope of that doctrine,¹²⁵ the most practical solution to help plaintiff-claimants would be agency regulation specifying appropriate mailing procedures.¹²⁶ Until then, practitioners are advised to use methods of delivery that confirm receipt.¹²⁷ Although it is certainly possible that the Supreme Court could at some point open the door to the mailbox rule by refusing to afford

¹²¹ *Vacek v. U.S. Postal Serv.*, 550 U.S. 906 (2007) (Mem.) (denying certiorari); see *Vacek*, 447 F.3d at 1256–57 (Thomas, J., concurring) (discussing notions of fair play surrounding the presentment requirement and how the mailbox rule could provide plaintiffs with a level playing field).

¹²² See *Vacek*, 447 F.3d at 1253 (Thomas, J., concurring) (detailing how refusal to apply the mailbox rule to a plaintiff's FTCA claim meant that the plaintiff could not seek relief in federal court for his injuries resulting from a mail truck hitting him). This is not the only area of the FTCA to rightfully receive criticism for its exclusion of meritorious claims. See, e.g., Andrew F. Popper, *Rethinking Feres: Granting Access to Justice for Service Members*, 60 B.C. L. REV. 1491, 1500 (2019) (arguing that Congress and the Supreme Court should overrule *Feres v. United States* and amend the FTCA to allow service members to seek damages in federal court for civil torts). In 1950, in *Feres v. United States*, the Supreme Court held that the FTCA does not give military service members the ability to sue the federal government for injuries arising out of, or incurred in the course of, activities "incident to service." 340 U.S. 135, 146 (1950). It remains unclear what harms the "incident to service" bar prohibits relief for, but it has gradually broadened to bar service members from relief for injury arising from "medical malpractice, exposure to toxic substances, murders or suicides, sexual assault, and more." Popper, *supra*, at 1504–14. Where such harms involve nothing "essential to military service," service members should have the same rights of action under the FTCA as private citizens. See *id.* at 1540–43 (arguing in favor of overruling *Feres* and amending the FTCA to specify causes of action that are not incident to, or essential for, military service, such as rape or gross medical malpractice).

¹²³ *Vacek*, 447 F.3d at 1253 (Thomas, J., concurring).

¹²⁴ See *id.* (detailing a tragically ironic scenario). See generally Chemerinsky, *supra* note 3 (making a case for the unconstitutionality and abolishment of sovereign immunity).

¹²⁵ Chemerinsky, *supra* note 3, at 1201–02 (remarking that the doctrine of sovereign immunity is "not fading from American jurisprudence; quite the contrary, the Supreme Court is dramatically expanding its scope"); Helen Hershkoff, 39 SETON HALL LEGIS. J. 243, 257 (2015) ("[N]o principle is more entrenched in American law than that of sovereign immunity. . . .").

¹²⁶ See Philip N. Jones, *Circuits Split Over the Mailbox Rule, but IRS Issues a Fix*, 115 J. TAX'N 278, 284–85 (2011) (discussing how the IRS promulgated regulation to eliminate confusion over whether the mailbox rule was available for filers in light of statutory mailing rules by clarifying that the statutory scheme supplanted the mailbox rule).

¹²⁷ See *supra* note 53 and accompanying text (detailing the majority of circuits' expectation that counsel complete such steps).

administrative exhaustion conditions like the presentment requirement jurisdictional status, that time has not come.¹²⁸

CONCLUSION

With deference to current interpretative instructions from the Supreme Court concerning sovereign immunity's strict construction rules, it seems that the mailbox rule should not apply to FTCA claims. The jurisdictional nature currently widely attributed to the presentment requirement especially supports this view, but refusal to apply the mailbox rule seems appropriate even when moving past the limits of strict construction. Therefore, the Second Circuit made the precedentially sound decision in *Cooke v. United States* by joining the majority side of this debate and refusing to apply the mailbox rule to the FTCA's presentment requirement.

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¹²⁸ See, e.g., *Cooke v. United States*, 139 S. Ct. 2748 (2019) (Mem.) (denying certiorari); *Vacek v. U.S. Postal Serv.*, 550 U.S. 906 (2007) (Mem.) (same); *Bellecourt v. United States*, 510 U.S. 1109 (1994) (Mem.) (same).