

IN THE SUPREME COURT OF THE UNITED STATES

No. 24A _____

UNITED STATES POSTAL SERVICE,
ET AL., APPLICANTS

v.

KONAN

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, the Solicitor General, on behalf of the United States and the United States Postal Service (USPS), respectfully requests a 30-day extension of time, to and including October 3, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The court of appeals entered its judgment on March 20, 2024, and denied a timely filed petition for rehearing en banc on June 4, 2024. Therefore, unless extended, the time within which to file a petition for a writ of certiorari will expire on September 3, 2024. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). A copy of the opinion of the

court of appeals, which is reported at 96 F.4th 799, is attached. App., infra, 1a-11a.

1. a. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 et seq., authorizes plaintiffs to bring "claims against the United States, for money damages, * * * for injury or loss of property * * * caused by the negligent or wrongful act or omission of" federal employees while operating within the scope of their employment, 28 U.S.C. 1346(b)(1); see 28 U.S.C. 2674. That waiver of sovereign immunity is subject to certain exceptions, including a postal-matter exception for "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. 2680(b). Claims covered by the postal-matter exception are thus barred by sovereign immunity.

b. Respondent claims that USPS and two USPS employees intentionally withheld and refused to deliver mail to two residences that she owned and leased to tenants. App., infra, 2a. She alleges that the employees engaged in that conduct because they did not "'like the idea that a black person own[ed]'" the two residences. Ibid. And she alleges that she "lost expected rental income when several tenants moved" to different apartments because of the employees' conduct. Ibid.

Respondent sued the United States and USPS in the United States District Court for the Northern District of Texas. See 652 F. Supp. 3d 721. She asserted tort claims under the FTCA, including nuisance, tortious interference with prospective

business relations, conversion, and intentional infliction of emotional distress. App., infra, 3a.*

The district court found that respondent's claims come within the postal-matter exception and are therefore barred by sovereign immunity. 652 F. Supp. 3d at 730-731. The court explained that respondent's "allegations arise out of the 'loss' and 'miscarriage' of 'letters or postal matter' because they all relate to 'personal or financial harms arising from nondelivery'" of mail. Id. at 731 (quoting Dolan v. USPS, 546 U.S. 481, 489 (2006)). The court rejected respondent's argument that the postal-matter exception "applies only to negligent acts, not to intentional torts," reasoning that "the word 'negligent' modifies only the noun 'transmission,'" thus "indicating an intent to retain immunity for intentional acts of 'loss' and 'miscarriage' of 'letters or postal matter.'" Id. at 730 (citation omitted). The court also observed that while "[t]he Fifth Circuit has not yet ruled on whether the postal matter exception applies to intentional acts, * * * other courts have applied the exception in cases where the postal carrier intentionally or purposefully failed to deliver mail." Ibid. (citing, inter alia, Levasseur v. USPS, 543 F.3d 23, 24 (1st Cir. 2008) (per curiam); C.D. of NYC, Inc. v.

* Respondent also sued the two USPS employees in their individual capacities for denying her equal protection of the law. App., infra, 3a. The court of appeals affirmed the dismissal of those claims, id. at 11a, and they are not at issue here.

USPS, 157 Fed. Appx. 428, 429 (2d Cir. 2005); Benigni v. United States, 141 F.3d 1167 (8th Cir. 1998) (per curiam) (unpublished)).

c. The court of appeals reversed in relevant part, holding that the postal-matter exception does not apply to respondent's claims because they allege "intentional conduct." App., infra, 8. In so doing, the court acknowledged that its holding "puts [it] at odds with some of our sister circuits." Ibid. (citing Levasseur, C.D. of NYC, Inc., and Benigni, supra).

The court of appeals first construed the available definitions of the term "loss" to "carry the sense that the loss is unintentional." App., infra, 6. Because respondent alleged only an "intentional effort not to deliver [her] mail," the court reasoned, her "claims cannot be characterized as a 'loss.'" Ibid.

The court of appeals next determined that "there can be no 'miscarriage' [of mail] where there is no attempt at carriage." App., infra, 7. In the court's view, therefore, "[w]here USPS intentionally fails or refuses to deliver mail to designated addresses, and never mistakenly delivers the mail to a third party, the mail is not 'miscarr[ied],' as it was not carried at all." Ibid. (brackets in original). The court accordingly concluded that respondent's claims "are not barred because no miscarriage occurred." Ibid.

d. The court of appeals denied the government's petition for rehearing en banc. App., infra, 12a.

2. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. The additional time sought in this application is needed for further consultation with USPS regarding the potential legal and practical ramifications of the court of appeals' decision. Additional time is also needed, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

AUGUST 2024

APPENDIX

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United States Court of Appeals
for the Fifth Circuit

No. 23-10179

United States Court of Appeals
Fifth Circuit

FILED

March 20, 2024

Lyle W. Cayce
Clerk

LEBENE KONAN,

Plaintiff—Appellant,

versus

UNITED STATES POSTAL SERVICE; RAYMOND ROJAS, *also known as*
RAY; JASON DRAKE; UNITED STATES OF AMERICA,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:22-CV-139

Before WIENER, WILLETT, and DOUGLAS, *Circuit Judges.*

DANA M. DOUGLAS, *Circuit Judge:*

Lebene Konan claims that United States Postal Service employees did not deliver her mail for two years in violation of the Federal Tort Claims Act and her equal protection rights. The district court dismissed her claims for lack of subject matter jurisdiction and for failure to state a claim. For the following reasons, we AFFIRM IN PART and REVERSE IN PART.

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I

Konan alleges that the United States Postal Service (USPS), and two of its employees, Jason Rojas and Raymond Drake, intentionally withheld and refused to deliver mail to two residences that she owned and leased to individual tenants in Euless, Texas because they did not “like the idea that a black person own[ed]” them.

Konan owns two rental properties, the “Saratoga Residence” and the “Trenton Residence.” The mailboxes at the Saratoga Residence are centrally located in a single, metal structure. Each residence is provided with one key to access the mailbox. Konan possessed the key to the Saratoga Residence’s mailbox and would daily distribute the mail to each tenant. Konan also received “business mail” at the Saratoga Residence and stayed there from “time to time,” but it was not her permanent home.

In May 2020, Rojas allegedly changed the lock on the mailbox at the Saratoga Residence without her permission. According to Konan, Rojas did not change the lock on mailboxes belonging to any other residence owner on his route or refuse to deliver mail to similar multi-family residences owned by white individuals. When Konan went to the Post Office to inquire as to why the lock to her mailbox was changed without notice or consent, she was advised that USPS would not deliver any mail to the Saratoga Residence until its ownership was “investigated by USPS’s Inspector General and conclusively established.”

USPS delivered no mail to the Saratoga Residence for the next two to three months. When USPS confirmed that Konan owned the property and the Inspector General instructed that mail be delivered to the Saratoga Residence, Rojas and Drake allegedly refused to deliver Konan’s or her tenants’ mail, instead marking it as undeliverable. As a result, Konan claims that she lost expected rental income when several tenants moved and that she

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and her remaining tenants did not receive important mail including “doctor’s bills, medications, credit card statements, car titles and property tax statements.”

The situation continued to escalate. In April 2021, Konan alleges that Rojas stopped delivering mail to her Trenton Residence, because Rojas thought that something “nefarious” was afoot.¹ Konan alleges that Rojas and Drake engaged in this behavior because she is African American, and despite repeatedly advising USPS of this conduct, nothing has been done to correct it. “To this day,” Konan alleges that “Rojas and Drake continue to refuse to deliver properly-addressed mail” to both Residences.

Konan asserts common law tort claims against USPS and the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.* (FTCA), including nuisance, tortious interference with prospective business relations, conversion, and intentional infliction of emotional distress. She also asserts claims for denial of equal protection of law pursuant to 42 U.S.C. §§ 1981 and 1985 against Rojas and Drake.

USPS and the United States moved to dismiss Konan’s complaint for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Rojas and Drake moved to dismiss for failure to state a claim under Rule 12(b)(6).

The district court granted the motions to dismiss, concluding that her FTCA claim failed for lack of subject matter jurisdiction because it was barred by sovereign immunity based on the postal-matter exception under 28

¹ Generally, a USPS employee, with proper notice, may withhold a resident’s mail and require proof of identity if the employee feels threatened or believes there is illegal activity underway. *See* 39 U.S.C. § 3003. There is no record that USPS either filed the required order or gave notice of such a § 3003 claim being filed at either of Konan’s residences.

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U.S.C. § 2680(b). It likewise determined that Konan had failed to state a viable equal protection claim against Rojas and Drake.

On appeal, Konan concedes that USPS is the appropriate defendant in this FTCA action but disputes whether sovereign immunity shields it from liability.² Konan also challenges the district court’s conclusion that she failed to state a valid equal protection claim against Rojas and Drake.

II

We review de novo the application of sovereign immunity. *Russell v. Jones*, 49 F.4th 507, 512 (5th Cir. 2022); *see also Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 962 (5th Cir. 2014). When reviewing a motion to dismiss for failure to state a claim, we apply de novo review and “construe the complaint in the light most favorable to the plaintiffs.” *Jones v. Admin. of the Tulane Educ. Fund*, 51 F.4th 101, 109 (5th Cir. 2022) (internal citation omitted).

III

A. FTCA

This case raises an issue of first impression in our circuit: whether the postal-matter exception to the FTCA’s immunity waiver applies to intentional acts. The FTCA authorizes plaintiffs to obtain compensation for the negligent or wrongful acts or omissions of the government and its employees in limited circumstances. It nevertheless contains several exceptions that categorically bar plaintiffs from recovering damages. *Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983); *United States*

² *See Walters v. Smith*, 409 F. App’x 782, 783 (5th Cir. 2011) (“It is well established that FTCA claims may be brought against only the ‘United States,’ and not the agencies or employees of the United States.”).

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v. Mitchell, 463 U.S. 206, 212 (1983). The postal-matter exception, at issue here, retains sovereign immunity for “[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.” 28 U.S.C. § 2680(b); *Dolan*, 546 U.S. at 485 (“[T]he United States may be liable if postal workers commit torts under local law, but not for claims defined by the [postal-matter] exception.”).

But § 2680(b)’s plain language does not shield against all failures to deliver mail; it preserves immunity only in the limited situations outlined by its terms. The district court held that Konan’s claims were precluded by sovereign immunity because the claims arose out of a “loss” or “miscarriage.” We disagree. This case does not fall into one of those limited situations. As discussed in detail below, there was no “loss” of mail because the mail was not destroyed or misplaced by unintentional action. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 487 (2006). Likewise, there was no “miscarriage” because there was no attempt at a carriage. *Id.* Finally, the postal workers’ actions were intentional and thus cannot constitute a “negligent transmission.” *Birnbaum v. United States*, 588 F.2d 319, 328 (2d Cir. 1978). We address each in turn.

1. “Loss”

We begin with the definition of loss. To define “loss,” USPS points to the definition in *Webster’s Second New International Dictionary*, published in 1942, shortly before the 1946 enactment of the FTCA and the postal-matter exception. WEBSTER’S SECOND NEW INTERNATIONAL DICTIONARY 1460 (1942 ed.). *Webster’s* defines “loss” as the “[a]ct or fact of losing . . . or suffering deprivation . . . unintentional parting with something of value; as, the loss of property” and “that which is lost; of which anything is deprived or from which something is separated, usually unintentionally and to disadvantage.” *Id.* (emphasis omitted). And in *Dolan*

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v. United States Postal Service, the Supreme Court defined “loss” as mail that is “destroyed or misplaced” by USPS. 546 U.S. at 487. Both definitions carry the sense that the loss is *unintentional*. And they square with the plain meaning of loss—no one intentionally loses something. Here, there are no allegations that Konan’s mail was destroyed or that it was misplaced by unintentional action. Instead, the facts present a continued, intentional effort not to deliver Konan’s mail over a two-year period. Therefore, Konan’s claims cannot be characterized as a “loss,” as defined in either the contemporaneous dictionary definition or *Dolan*.

USPS relies on two circuit cases decided before *Dolan* to argue that the postal-matter exception applies because there was a “loss.” Both are distinguishable. The first is *Ruiz v. United States*, 160 F.3d 273 (5th Cir. 1998). There, a pro se incarcerated plaintiff argued that prison officials failed to deliver his mail in violation of the FTCA. *Id.* at 274. *Ruiz* involved a third-party intermediary in the form of the prison officials, unlike here, where Konan alleges that USPS itself intentionally failed to deliver her mail. *Id.* Thus, *Ruiz* is inapposite.

Likewise, *Marine Insurance v. United States*, 378 F.3d 812 (2d Cir. 1967) is unpersuasive. There, mail stolen in regular transit triggered the postal-matter exception’s “loss” provision. *Id.* at 813. Here, Konan’s mail was not stolen in transit. Instead, USPS never transmitted it to her address in the first place. Konan’s damages arose from USPS’s *intentional* failure to carry mail to her properties and thus do not constitute a “loss.”

2. “Miscarriage”

We next consider whether USPS’s actions constitute a “miscarriage.” USPS contends that under a plain reading of § 2680(b), the failure to deliver Konan’s mail constituted a miscarriage and thus her suit is barred.

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To define “miscarriage,” USPS looks again to the definition provided in *Webster’s Second New International Dictionary*. *Webster’s* defines “miscarriage” as a “[f]ailure (of something sent) to arrive” or a “[f]ailure to carry properly; as, miscarriage of goods.” WEBSTER’S SECOND NEW INTERNATIONAL DICTIONARY 1568 (1942 ed.) (emphasis omitted). In *Dolan*, the Supreme Court opined that mail is “miscarried if it goes to the wrong address,” and that the term “refer[s] to failings in the postal obligation to deliver mail in a timely manner to the right address.” 546 U.S. at 487. Under either definition, a carriage *precedes* the “miscarriage.” In other words, there can be no “miscarriage” where there is no attempt at carriage. Where USPS intentionally fails or refuses to deliver mail to designated addressees, and never *mistakenly* delivers the mail to a third party, the mail is not “miscarr[ied],” as it was not carried at all. Konan’s claims are not barred because no miscarriage occurred.

3. “Negligent transmission”

Finally, we turn to “negligent transmission.” This phrase only covers “negligence causing mail to be lost or to arrive late, in damaged condition, or at the wrong address.” *Dolan*, 546 U.S. at 486. When the Supreme Court interpreted this term in *Dolan*, it applied the associated-words canon and determined that “loss” and “miscarriage” “limit the reach of ‘transmission.’ ‘[A] word is known by the company it keeps—a rule that is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.’” *Id.* Thus, “negligent transmission” does not sweep so broadly as to encompass “injuries that happen to be caused by postal employees but involve neither failure to transmit mail nor damage to its contents.” *Id.* at 487.

Here, Rojas and Drake *intentionally* chose not to deliver mail to Konan and her tenants. They marked it undeliverable and returned to sender even

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after they were instructed to deliver the mail by the Inspector General. Because Konan's damages arise from USPS's intentional failure to transmit mail to her and her tenants, "negligent transmission" does not apply to Konan's claim and sovereign immunity does not apply.

Because the conduct alleged in this case does not fall squarely within the exceptions for "loss, miscarriage, or negligent transmission," sovereign immunity does not bar Konan's FTCA claims.

Our determination that the intentional conduct in this case is not covered by the postal-matter exception puts us at odds with some of our sister circuits. See *Levasseur v. U.S. Postal Serv.*, 543 F.3d 23, 23-24 (1st Cir. 2008) (determining that the postal-matter exception applied where an employee stole campaign flyers and refused to deliver them until after the election); *C.D. of NYC, Inc. v. USPS*, 157 F. App'x 428, 429 (2d Cir. 2005) (determining the postal-matter exception applied where a diamond store employee conspired with USPS employees to steal jewelry); *Benigni v. United States*, 141 F.3d 1167, 1167 (8th Cir. 1998) (determining the postal-matter exception applied where USPS intentionally withheld his mail from home delivery).³ With respect to these courts, we hold that the terms "loss," "miscarriage," and "negligent transmission" do not encompass the intentional act of not delivering the mail at all.

B. EQUAL PROTECTION CLAIM

³ The D.C. Circuit has favorably cited district court cases that conclude that "miscarriage" does not encompass intentional acts. See *Lopez v. Postal Regul. Comm'n*, 709 F. App'x 13, 15-16 (D.C. Cir. 2017) (citing *Colbert v. USPS*, 831 F.Supp.2d 240, 243 (D.D.C. 2011) ("In th[e] narrow window of intentional mis-transmission, [the Postal Service] is not entitled to sovereign immunity.") and *LeRoy v. U.S. Marshal's Serv.*, 2007 WL 4234127, at *1 n.2 (E.D. La. 2007) (noting that a postal employee's "refusal to deliver plaintiff's mail to him was an intentional act," not "the loss, miscarriage, or negligent transmission of letters or postal matter"))).

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Next, Konan appeals the district court's dismissal of her § 1981 and § 1985 claims against Rojas and Drake in their individual capacities. The district court dismissed those claims for failure "to state a viable equal protection claim." The court also found that "the intracorporate-conspiracy doctrine bars Section 1985 claims against individuals employed by the same agency." We agree.

1. Section 1981

Section 1981 provides the right "to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981(a). These rights "are protected against impairment by nongovernmental discrimination and impairment *under color of State law*." § 1981(c) (emphasis added). We have consistently found that federal employees acting "under color of State law" are protected from liability even if there are "specific allegations of defamation or of potentially criminal activities." *Bolton v. United States*, 946 F.3d 256, 262 (5th Cir. 2019) (quoting *Smith v. Clinton*, 886 F.3d 122, 126 (D.C. Cir. 2018)); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 945 n.3 (1982).

The following elements must be met for a successful § 1981 claim: "(1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerns one or more of the activities enumerated in the statute." *Green v. State Bar of Tex.*, 27 F.3d 1083, 1086 (5th Cir. 1994).

Here, Konan is African American and thus satisfies the first element. Beyond that, however, her allegations fall short. Specifically, no facts support her assertion that Rojas and Drake continued to deliver mail to any similarly situated white property owners while denying her delivery of mail. *Jackson v. City of Hearne, Tex.*, 959 F.3d 194, 201-02 (5th Cir. 2020); *Arguello v. Conoco, Inc.*, 207 F.3d 803, 807 (5th Cir. 2000). Nor does Konan allege that

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the discrimination concerns her right to any of the enumerated provisions of § 1981(a).⁴ Therefore, Konan fails to state a § 1981 claim, and she does not explain how amending the complaint would address the deficiencies in her argument.

2. *Section 1985(3)*

Section 1985(3) imposes liability on “two or more persons in any State or Territory [who] conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws.” 42 U.S.C. § 1985(3). We have consistently held that § 1985(3) does not apply to federal actors. *Mack v. Alexander*, 575 F.2d 488, 489 (5th Cir. 1978).

While Konan is correct that *Mack*’s holding has been widely questioned, it has not been overturned. *Cantu v. Moody*, 933 F.3d 414,419 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 112 (2020) (stating that *Mack* has not “aged well” but our circuit holds that § 1985(3) does not apply to federal actors); *Carpenters v. Scott*, 463 U.S. 825, 828 (1983) (applying § 1985(3) and finding there was no animus, so it was inapplicable to the federal actors); *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1865-69 (2017) (applying § 1985(3) to protect federal officers).

Konan contends that we should ignore this circuit’s precedent in *Mack* and apply the Supreme Court’s decision in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), which pre-dates *Mack* by several years. *Mack*, 575 F.2d at 488. However, absent a Supreme Court decision or our court sitting en banc and providing an “intervening contrary or superseding decision,” we “cannot

⁴ The enumerated rights of the statute include: “to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.” 42 U.S.C. § 1981(a).

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overrule a prior panel's decision." *Burge v. Par. of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999).

Furthermore, as the district court noted, even if § 1985(3) applied to federal actors, Konan's claim is barred by the "intracorporate-conspiracy doctrine, which precludes plaintiffs from bringing conspiracy claims [] against multiple defendants employed by the same governmental entity." Konan also claims that the intracorporate-conspiracy doctrine does not bar her claim because Rojas and Drake were conspiring to commit a criminal act against Konan outside of their official duties. However, we have consistently held that an agency and its employees are a "single legal entity which is incapable of conspiring with itself." *Thornton v. Merchant*, 526 F. App'x 385, 388 (5th Cir. 2013) (quoting *Benningfield v. City of Hous.*, 157 F.3d 369, 378 (5th Cir. 1998)); see also *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 410 (5th Cir. 2020) (holding "a corporation cannot conspire with itself any more than a private individual can" quoting *Hilliard v. Ferguson*, 30 F.3d 649, 652–53 (5th Cir. 1994)).

Therefore, the district court correctly concluded that Konan's § 1981 and § 1985(3) equal protection claims fail.

IV.

Accordingly, we REVERSE the judgment of the district court as to Konan's FTCA claim and REMAND for further proceedings consistent with this opinion. We AFFIRM the district court's dismissal of Konan's equal protection claims.

United States Court of Appeals
for the Fifth Circuit

No. 23-10179

United States Court of Appeals
Fifth Circuit

FILED

June 4, 2024

Lyle W. Cayce
Clerk

LEBENE KONAN,

Plaintiff—Appellant,

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UNITED STATES POSTAL SERVICE; RAYMOND ROJAS, *also known as*
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Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:22-CV-139

ON PETITION FOR REHEARING EN BANC

Before WIENER, WILLETT, and DOUGLAS, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

*Judge Irma Carrillo Ramirez, did not participate in the consideration of the rehearing en banc.