No.

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, ET AL.,
PETITIONERS

v.

LEBENE KONAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
EPHRAIM A. MCDOWELL
Assistant to the Solicitor General
MARK B. STERN
URJA MITTAL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Federal Tort Claims Act (FTCA), ch. 753, 60 Stat. 842 (28 U.S.C. 1346(b), 2671 *et seq.*), generally waives the United States' sovereign immunity for suits seeking damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of an employee of the federal government "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). The FTCA, however, excepts from that waiver of immunity "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. 2680(b). The question presented is as follows:

Whether a plaintiff's claim that she and her tenants did not receive mail because Postal Service employees intentionally did not deliver it to a designated address arises out of "the loss" or "miscarriage" of letters or postal matter. 28 U.S.C. 2680(b).

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellees below) are the United States Postal Service and the United States of America.

Respondent (plaintiff-appellant below) is Lebene Konan.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

Konan v. *United States Postal Service*, No. 22-cv-139 (Jan. 19, 2023)

United States Court of Appeals (5th Cir.):

Konan v. *United States Postal Service*, No. 23-10179 (Mar. 20, 2024)

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Statutory provision involved ... 2
Statement ... 2
Reasons for granting the petition ... 9
A. The decision below is incorrect ... 10
1. A plaintiff's claim arises from the "miscarriage" of mail when she alleges that USPS intentionally did not deliver the mail to a designated address ... 11
2. A plaintiff's claim also arises from the "loss" of mail when she alleges that USPS intentionally did not deliver the mail to a designated address ... 14
B. The decision below warrants this Court's review ... 16
1. The decision below creates a circuit conflict ... 17
2. The decision below carries significant practical consequences for USPS ... 19
Conclusion ... 24
Appendix A — Court of appeals opinion (Mar. 20, 2024) ... 1a
Appendix B — District court memorandum opinion and order (Jan. 19, 2023) ... 14a
Appendix C — Court of appeals denial of rehearing en banc (June 4, 2024) ... 36a
Appendix D — Plaintiff's first amended complaint (Jan. 24, 2022) ... 38a

TABLE OF AUTHORITIES

Cases:

Benigni v. *United States*, 141 F.3d 1167 (8th Cir.), cert. denied, 525 U.S. 897 (1998) ... 9, 19
Bittner v. *United States*, 598 U.S. 85 (2023) ... 19

Cases—Continued: Page

Burlington N. & Santa Fe Ry. Co. v. *White*,
548 U.S. 53 (2006) 12
C.D. of NYC, Inc. v. *USPS*,
157 Fed. Appx. 428 (2d Cir. 2005), cert. denied,
549 U.S. 809 (2006)... 6, 9, 18
Dolan v. *USPS*, 546 U.S. 481 (2006) 3, 7-9, 12-15, 19, 21
Hatzlachh Supply Co. v. *United States*,
444 U.S. 460 (1980).. 20
Kosak v. *United States*, 465 U.S. 848 (1984)....................... 21
Levasseur v. *USPS*, 543 F.3d 23 (1st Cir. 2008)......... 6, 9, 17
Macquarie Infrastructure Corp. v. *Moab Partners, L.P.*, 601 U.S. 257 (2024).................................. 19
Marine Ins. Co. v. *United States*,
378 F.2d 812 (2d Cir.), cert. denied,
389 U.S. 953 (1967).. 18
Molzof v. *United States*, 502 U.S. 301 (1992)...................... 20
National Rifle Ass'n v. *Vullo*,
602 U.S. 175 (2024).. 3
Russello v. *United States*, 464 U.S. 16 (1983)..................... 12
USPS v. *Council of Greenburgh Civic Ass'ns*,
453 U.S. 114 (1981).. 19
USPS v. *Flamingo Indus. (USA) Ltd.*,
540 U.S. 736 (2004).. 20
Watkins v. *United States*,
No. 02-C-8188, 2003 WL 1906176
(N.D. Ill. Apr. 17, 2003) 22
Wisconsin Cent. Ltd. v. *United States*,
585 U.S. 274 (2018).. 10

Constitution and statutes:

U.S. Const. Art. I, § 8, Cl. 7 19
Federal Tort Claims Act, ch. 753, 60 Stat. 842
(28 U.S.C. 1346(b), 2671 *et seq.*)... 2

Statutes—Continued: Page

§ 421(b), 60 Stat. 845 10
28 U.S.C. 1346(b) 2
28 U.S.C. 1346(b)(1) 2, 6
28 U.S.C. 2680 2
28 U.S.C. 2680(b) 9, 10-12, 15, 16
Postal Reorganization Act, 39 U.S.C. 101 *et seq.* 3
39 U.S.C. 101(a) 19, 20
39 U.S.C. 403(c) 22
39 U.S.C. 409(c) 3
39 U.S.C. 3662(a) 22
39 U.S.C. 3662(c) 23
39 U.S.C. 3663 23
42 U.S.C. 1981 6
42 U.S.C. 1985 6

Miscellaneous:

Office of Inspector Gen., USPS, *U.S. Postal Service Mail Recovery Center: Audit Report* (Dec. 1, 2015), https://perma.cc/6LU6-RP57 21
Oxford English Dictionary (1933) 11
S. Rep. No. 1400, 79th Cong., 2d Sess. (1946) 20
USPS:
Fiscal Year 2023: Annual Report to Congress, https://perma.cc/SJ6X-5KTV (last visited Sept. 27, 2024) 20
Postal Facts: One Day in the Postal Service, https://perma.cc/VM2U-6AHL (last visited Sept. 27, 2024) 20
Webster's New International Dictionary of the English Language (2d ed. 1942) 11, 13, 14, 16

In the Supreme Court of the United States

No.

UNITED STATES POSTAL SERVICE, ET AL.,
PETITIONERS

v.

LEBENE KONAN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Postal Service and the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 96 F.4th 799. The memorandum opinion and order of the district court (App., *infra*, 14a-35a) is reported at 652 F. Supp. 3d 721.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2024. A petition for rehearing was denied on June 4, 2024 (App., *infra*, 36a-37a). On August 26, 2024,

Justice Alito extended the time within which to file a petition for a writ of certiorari to and including October 2, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. 2680 provides in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to— * * *
>
> > (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

STATEMENT

1. The Federal Tort Claims Act (FTCA), ch. 753, 60 Stat. 842 (28 U.S.C. 1346(b), 2671 *et seq.*), generally waives the United States' sovereign immunity for suits seeking damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of an employee of the federal government "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). The FTCA, however, excepts thirteen categories of governmental activity from that waiver of immunity. 28 U.S.C. 2680; see 28 U.S.C. 1346(b)(1) (qualifying the scope of the waiver).

One of those exceptions—the postal exception—preserves the federal government's 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).[1] In *Dolan* v. *USPS*, 546 U.S. 481 (2006), this Court explained that "as a general rule," the postal exception "retain[s] immunity" "for injuries arising, directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address." *Id.* at 489. The Court observed that "[i]llustrative instances of the exception's operation" include "personal or financial harms arising from nondelivery or late delivery of sensitive materials or information (*e.g.*, medicines or a mortgage foreclosure notice) or from negligent handling of a mailed parcel (*e.g.*, shattering of shipped china)." *Ibid.*

2. Respondent "owns several properties," including two properties in Euless, Texas at issue in this case where she rents rooms to individual tenants. App., *infra*, 39a, 41a. Respondent alleges that United States Postal Service (USPS) employees intentionally refused to deliver mail to those two properties. *Id.* at 46a.[2]

The two rental properties each had an assigned post office box in a structure in the neighborhood that contained a number of such boxes. App., *infra*, 41a. Respondent could access the post office box with a key, and her practice was to collect the mail from the box each day and distribute it to the tenants living at each property. *Ibid.* Respondent also had her own business mail

---

[1] The Postal Reorganization Act, 39 U.S.C. 101 *et seq.*, provides that the FTCA "shall apply to tort claims arising out of activities of the Postal Service." 39 U.S.C. 409(c); see *Dolan* v. *USPS*, 546 U.S. 481, 484 (2006).

[2] Because this case arises on a motion to dismiss, the government has not yet had a chance to contest respondent's allegations, which must be taken as true at this stage. See, *e.g.*, *National Rifle Ass'n* v. *Vullo*, 602 U.S. 175, 181 (2024).

delivered to one of the properties. *Id.* at 41a-42a. Respondent did not live at either property, though she stayed at them "[f]rom time to time." *Id.* at 41a.

Respondent alleges that a USPS mail carrier named Raymond Rojas changed the designated owner of one of the properties to a white man, Ian Harvey, who lived at the property. App., *infra*, 42a. Rojas also allegedly issued a new lock approval for the post office box so that the lock could be changed and only Harvey could access it. *Ibid.* Respondent's amended complaint does not address whether Harvey had told Rojas that he owned the property. Respondent alleges that Rojas "[a]pparently" engaged in the relevant conduct because he "did not like the fact that [respondent], an African-American woman, owned the" property and "leased rooms" there "to white people." *Id.* at 43a. Respondent also alleges that "[o]n information and belief," Rojas "has not unilaterally changed the lock on any other residence owner's address on his route; nor has he refused to deliver mail to residences owned by white people." *Ibid.*

Respondent alleges that she subsequently went to her local post office to inquire about the new lock on the post office box. App., *infra*, 43a. A USPS employee allegedly informed respondent that USPS would not deliver mail to the property until it had investigated the property's ownership and determined the correct owner. *Id.* at 44a. USPS allegedly did not deliver mail to the property for the next two to three months, and several tenants allegedly moved to different locations during that time. *Ibid.* Respondent alleges that she lost rental income because those tenants moved away. *Ibid.*

Respondent alleges that USPS subsequently confirmed her ownership of the property and that mail ser-

vice temporarily resumed. App., *infra*, 44a. Respondent alleges, however, that the local postmaster, Jason Drake, then directed USPS employees not to deliver any mail to respondent's property unless the individuals to whom the mail was addressed first provided proof that they lived there. *Id.* at 45a. Respondent alleges that, in accordance with Drake's instructions, Rojas delivered some mail to the property and marked other mail as undeliverable. *Ibid.* Respondent alleges that "[i]mportant mail" addressed to respondent and her tenants was "marked 'undeliverable,'" including "doctor's bills, medications, credit card statements, car titles, and property tax statements." *Ibid.* The undeliverable mail was allegedly returned to the local post office. *Id.* at 45a-46a. Respondent alleges that she informed USPS of the problems with her mail service and that USPS did not "tak[e] any corrective action." *Id.* at 47a.

Respondent alleges that she eventually "ask[ed] that all mail addressed to [one of the properties] be held at the [local] Post Office." App., *infra*, 49a. She alleges that USPS employees did not give her that mail "unless and until she supplied the personal ID's of each person living at the [property] to whom the mail was addressed." *Id.* at 50a.

3. Respondent filed this suit against USPS, the United States, Drake, and Rojas in the United States District Court for the Northern District of Texas. App., *infra*, 39a. Respondent asserted claims under the FTCA against USPS and the United States, including for nuisance, tortious interference with prospective business relations, conversion, and intentional infliction of emotional distress. *Id.* at 56a-62a. Those claims were based on Texas law, which is "the law of the place where

the act or omission occurred." 28 U.S.C. 1346(b)(1). Each of respondent's claims arose from USPS's alleged "intentional misconduct" in "refus[ing] to deliver mail to [respondent and] individuals residing at the Residences" respondent owned. App., *infra*, 56a-57a. Respondent also brought claims against Drake and Rojas in their individual capacities for allegedly conspiring to deny her equal protection of the laws, in violation of 42 U.S.C. 1981 and 1985. App., *infra*, 62a-63a.

The district court granted the government's motion to dismiss for lack of subject-matter jurisdiction. App., *infra*, 14a-35a. As relevant here, the court held that respondent's claims "fall within the postal-matter exception to the waiver of sovereign immunity under the FTCA." *Id.* at 20a.[3] The court rejected respondent's argument that the postal exception "applies only to negligent acts, not to intentional torts." *Id.* at 27a. "[A]ccording to the plain language of the statute," the court reasoned, "the word 'negligent' modifies only the noun 'transmission.'" *Ibid.* (citation omitted). Because "[n]o such qualifier modifies the nouns 'loss' or 'miscarriage,'" the court concluded that Congress sought "to retain immunity for intentional acts of 'loss' or 'miscarriage' of 'letters or postal matter.'" *Ibid.* (citation omitted). The court noted that "other courts have applied the [postal] exception in cases where the postal carrier intentionally or purposefully failed to deliver mail," and the court found those cases "persuasive." *Id.* at 27a-28a (citing, *inter alia*, *Levasseur* v. *USPS*, 543 F.3d 23, 24 (1st Cir. 2008) (per curiam); *C.D. of NYC, Inc.* v. *USPS*,

---

[3] The district court also explained that it "lack[ed] subject-matter jurisdiction over [respondent's] state-law claims against USPS because, under the FTCA, the United States is the only proper party to such claims." App., *infra*, 20a; see 28 U.S.C. 1346(b)(1).

157 Fed. Appx. 428, 429 (2d Cir. 2005), cert. denied, 549 U.S. 809 (2006)).

The district court found 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 sensitive materials or information.'" App., *infra*, 28a (quoting *Dolan*, 546 U.S. 488-489). The court observed, for example, that USPS allegedly "refus[ed] to deliver" and "retain[ed] possession of" mail, which allegedly cost respondent income "after her tenants moved out." *Ibid.* (citations omitted). The court determined that such allegations trigger "the postal-matter exception," and that respondent's claims are thus "barred by sovereign immunity." *Id.* at 29a.[4]

4. The court of appeals reversed in relevant part. App., *infra*, 1a-13a. It explained that the case "raises an issue of first impression in [the Fifth Circuit]: whether the postal-matter exception to the FTCA's immunity waiver applies to intentional acts." *Id.* at 5a. The court "disagree[d]" with the district court's conclusion that the exception applies to claims arising from the government's alleged intentional nondelivery of mail to a designated address. *Ibid.*

The court of appeals first concluded that respondent's claims do not involve the "'loss' of mail because the mail was not destroyed or misplaced by unintentional action." App., *infra*, 5a (citation omitted). The court observed that dictionaries contemporaneous with the FTCA's passage defined "loss" to mean "of which anything is deprived or from which something is separated,

---

[4] The district court also held that respondent "fail[ed] to state a viable equal protection claim" against the USPS employees in their individual capacities. App., *infra*, 30a.

usually unintentionally and to disadvantage." *Id.* at 6a (citation omitted). The court also stated that in *Dolan*, this Court "defined 'loss' as mail that is 'destroyed or misplaced' by USPS." *Ibid.* (quoting *Dolan*, 546 U.S. at 486-487). In the court of appeals' view, both of those definitions "carry the sense that the loss is *unintentional*." *Ibid.* Because "there are no allegations that [respondent's] mail was destroyed or that it was misplaced by unintentional action," the court determined that her "claims cannot be characterized as a 'loss.'" *Ibid.* And while the court acknowledged that "mail stolen in regular transit" by a government employee may "trigger[] the postal-matter exception's 'loss' provision," the court emphasized that here USPS "*intentional[ly]* fail[ed] to carry mail to [respondent's] properties." *Id.* at 7a (citation omitted).

The court of appeals next concluded that respondent's claims do not arise from a "miscarriage" of mail. App., *infra*, 7a-8a. The court cited a dictionary defining "miscarriage" as a "[f]ailure (of something sent) to arrive" or a "[f]ailure to carry properly." *Id.* at 7a (citation omitted; brackets in original). And the court observed that in *Dolan*, this 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.'" *Ibid.* (quoting *Dolan*, 546 U.S. at 487) (brackets in original). The court of appeals reasoned that "[u]nder either definition, a carriage *precedes* the 'miscarriage,'" and "there can be no 'miscarriage' where there is no attempt at carriage." *Id.* at 7a-8a. The court thus stated that "[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." *Id.* at 8a (second set of brackets in original). Accordingly, the court determined that respondent's "claims are not barred because no miscarriage occurred." *Ibid.*

The court of appeals recognized that its "determination that the intentional conduct in this case is not covered by the postal-matter exception puts [it] at odds with some of [its] sister circuits." App., *infra*, 9a (citing *Levasseur*, *supra*; *C.D. of NYC*, *supra*; *Benigni* v. *United States*, 141 F.3d 1167 (8th Cir.) (per curiam) (unpublished), cert. denied, 525 U.S. 897 (1998)). Notwithstanding the decisions of those courts, the Fifth Circuit held "that the terms 'loss,' 'miscarriage,' and 'negligent transmission' do not encompass the intentional act of not delivering the mail at all." *Ibid.*[5]

5. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 36a-37a.

REASONS FOR GRANTING THE PETITION

The court of appeals relied on an erroneous understanding of the FTCA's postal exception to hold that the exception does not apply to claims arising from a USPS employee's alleged intentional nondelivery of mail to a designated address. Such claims fall within the exception's plain terms because they "aris[e] out of the loss" or "miscarriage" of "letters or postal matter." 28 U.S.C. 2680(b). This Court's decision in *Dolan* v. *USPS*, 546 U.S. 481 (2006), confirms the point.

---

[5] The court of appeals affirmed the district court's dismissal of the claims against the USPS employees in their individual capacities. App., *infra*, 10a-13a. In so doing, the court of appeals noted that "no facts support [respondent's] assertion that Rojas and Drake continued to deliver mail to any similarly situated white property owners while denying her delivery of mail." *Id.* at 11a.

In holding that the postal exception does not apply here, the court of appeals recognized that its conclusion was "at odds with" decisions of the First and Second Circuits. App., *infra*, 9a. This Court's review is warranted to resolve that circuit conflict. Review is also warranted because the Fifth Circuit's decision threatens to inflict substantial practical harms on USPS and the United States. USPS delivers more than 300 million pieces of mail every day on average. Under the logic of the Fifth Circuit's decision, any person whose mail is lost or misdelivered could bring a federal tort suit—and potentially proceed to burdensome discovery—so long as she alleges that a USPS employee acted intentionally. Congress enacted the postal exception specifically to protect the critical function of mail delivery from such disruptive litigation. This Court should grant the petition for a writ of certiorari and reverse.

A. The Decision Below Is Incorrect

This case presents a pure question of statutory interpretation: whether a postal customer's claim alleging that USPS intentionally did not deliver mail to a designated address "aris[es] out of the loss" or "miscarriage" of "letters or postal matter." 28 U.S.C. 2680(b). To answer that question, this Court should "interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" *Wisconsin Cent. Ltd.* v. *United States*, 585 U.S. 274, 277 (2018) (citation omitted). When Congress enacted the FTCA's postal exception in 1946, see § 421(b), 60 Stat. 845, the term "miscarriage" encompassed the intentional failure to carry items to their proper destination, and the term "loss" encompassed deprivations resulting from intentional acts. The Fifth Circuit thus erred in holding that the postal exception does not apply to a plaintiff's claim

alleging that USPS intentionally did not deliver mail to her address and thereby deprived her of that mail.

1. A plaintiff's claim arises from the "miscarriage" of mail when she alleges that USPS intentionally did not deliver the mail to a designated address

a. At the time Congress enacted the postal exception, the ordinary meaning of miscarriage was "[f]ailure (of something sent) to arrive" and "[f]ailure to carry properly." *Webster's New International Dictionary of the English Language* 1568 (2d ed. 1942) (*Webster's*); see *Oxford English Dictionary* 497 (1933) ("[t]he failure (of a letter, etc.) to reach its destination"; "[f]ailure to carry or convey properly"). Here, respondent claims that mail sent to her rental properties failed to arrive there. See, *e.g.*, App., *infra*, 44a-45a, 56a-57a. For instance, she alleges that "[i]mportant mail addressed to both [respondent] and her tenants * * * [was] all returned marked 'undeliverable'" by USPS employees. *Id.* at 45a. Those claims thus plainly "aris[e] out of the * * * miscarriage" of mail. 28 U.S.C. 2680(b).

Respondent's allegation that USPS acted intentionally in its failure to deliver the mail does not change the analysis. The ordinary meaning of miscarriage does not turn on the intent (or lack thereof) of the carrier. Whenever a USPS employee fails to deliver mail to the designated address, USPS "fail[s] to carry [the mail] properly" and causes the mail to "fail[] * * * to arrive." *Webster's* 1568. That is true regardless of whether USPS's failure stemmed from accidental or intentional conduct.

Limiting the term "miscarriage" to unintentional conduct alone would be particularly unwarranted in the context of the postal exception. As noted above, the exception expressly applies to "*negligent* transmission,"

but includes no similar qualifier for the terms "miscarriage" and "loss." 28 U.S.C. 2680(b) (emphasis added). That language shows that if Congress had wanted to cover only negligent or unintentional miscarriage, it knew how to do so and would have said so explicitly. See, *e.g.*, *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 63 (2006) ("We normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

This Court's decision in *Dolan* solidifies the point. There, in the course of interpreting the phrase "'negligent transmission,'" the Court observed that the postal exception covers mail that "fails to arrive at all," and that the term "miscarriage" specifically "refer[s] to failings in the postal obligation to deliver mail in a timely manner to the right address." 546 U.S. at 487-489. As already explained, respondent claims that mail "fail[ed] to arrive at all" and was not "deliver[ed]" to her rental properties. *Id.* at 489. In fact, the Court in *Dolan* expressly described as "[i]llustrative instances of the [postal] exception's operation" claims for "personal or financial harms arising from nondelivery * * * of sensitive materials or information (*e.g.*, medicines or a mortgage foreclosure notice)." *Ibid.* That description precisely captures respondent's suit here. Indeed, the court of appeals itself summarized this suit in terms that match *Dolan*: "[Respondent] claims that she lost expected rental income when several tenants moved and that she and her remaining tenants did not receive important mail including 'doctor's bills, medications, credit card statements, car titles and property tax

statements.'" App., *infra*, 3a. Thus, under *Dolan*, respondent's claims are "[i]llustrative instances" of the postal exception's operation. 546 U.S. at 489.

b. The court of appeals' contrary holding lacks merit. The court acknowledged the dictionary definitions of "miscarriage" cited above, as well as this Court's description of the term "miscarriage" in *Dolan*. App., *infra*, 7a. But the court of appeals nonetheless stated that "[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." *Id.* at 8a (second set of brackets in original).

That reasoning is flawed twice over. First, it suggests that a miscarriage of mail may occur only when USPS erroneously delivers the mail to the wrong address. But a miscarriage can equally occur when USPS accepts mail from a sender, brings it to a processing facility or local post office, and leaves it there (or returns it to the sender), rather than delivering it to the designated address. In either scenario, there has been a "[f]ailure (of something sent) to arrive" and a "[f]ailure to carry properly." *Webster's* 1568. The court of appeals' suggestion that in the latter scenario the mail "was not carried at all," App., *infra*, 8a, ignores that USPS still carried the mail from wherever the sender deposited it (*e.g.*, a mailbox) to another location (*e.g.*, a local post office).

Second, the court of appeals erroneously stated that a miscarriage of mail may occur only "*mistakenly*" and not "intentionally." App., *infra*, 8a. As already explained, the term "miscarriage"—both standing alone and in the context of the postal exception—plainly encompasses intentional acts. And the effect on the postal

customer is the same whether the failure of the mail to arrive resulted from negligent or intentional conduct by USPS.

Moreover, by categorically excluding the intentional miscarriage of mail from the postal exception, the court of appeals gave plaintiffs a blueprint to circumvent the exception. Under the logic of the decision below, any time a plaintiff's mail is not timely delivered, the plaintiff could bring a federal tort suit alleging that the miscarriage was intentional. Indeed, the court's rationale would allow plaintiffs to bypass one of the "[i]llustrative instances of the exception's operation" provided by this Court in *Dolan*—"personal or financial harms arising from nondelivery * * * of sensitive materials or information"—simply by alleging that the nondelivery was intentional. 546 U.S. at 489. That result would run directly counter to Congress's purpose of "retain[ing] immunity" for "injuries arising, directly or consequentially, because mail * * * fails to arrive at all or arrives * * * at the wrong address." *Ibid.*

2. *A plaintiff's claim also arises from the "loss" of mail when she alleges that USPS intentionally did not deliver the mail to a designated address*

This Court could reverse the Fifth Circuit's decision solely by correcting its erroneous holding that "no miscarriage occurred," App., *infra*, 8a, without addressing its interpretation of "loss." But the court of appeals also erred in holding that respondent's "claims cannot be characterized as a 'loss,'" *id.* at 6a, and that error independently calls for reversal.

At the time Congress enacted the postal exception, loss meant "that of which anything is deprived or from which something is separated, *usually* unintentionally and to disadvantage." *Webster's* 1460 (emphasis added).

Thus, while the loss of an item is usually caused by unintentional conduct, that is not invariably so. For instance, it would be natural to say that someone lost his home if it were destroyed by an intentional act of arson. Indeed, in *Dolan*, this Court observed that "mail is 'lost' if it is destroyed," 546 U.S. at 487, without suggesting that intentional destruction of mail would not be covered.

The structure of the postal exception confirms that Congress did not exclude losses caused by intentional conduct. As noted above, Congress did not use the phrase "negligent loss" or "unintentional loss," even though it elsewhere used the phrase "negligent transmission." 28 U.S.C. 2680(b). That choice of language suggests that Congress sought to cover *all* losses of mail—regardless of whether a USPS employee somewhere along the chain of carriage allegedly caused the loss on purpose.

More fundamentally, Congress drafted the postal exception from the plaintiff's perspective: "[a]ny *claim* arising out of the loss * * * of letters or postal matter." 28 U.S.C. 2680(b) (emphasis added). And it is natural to say that a plaintiff whose mail went missing because of a postal worker's act, whether intentional or unintentional, has suffered a loss of mail. For instance, if an online shopper bought jewelry to be shipped to her home and a USPS employee stole the jewelry somewhere in transit, then the shopper would have suffered the loss of her jewelry—just as she would have if a USPS employee instead unwittingly dropped the jewelry package on the street. In both cases, a "claim" by the shopper would "aris[e] out of the loss" of the jewelry—and thus fall within the postal-matter exception. *Ibid.*

The court of appeals appeared to accept that basic point when it observed that "mail stolen in regular transit" by a government employee may "trigger[] the postal-matter exception's 'loss' provision." App., *infra*, 7a (citation omitted). But the court's acceptance of that point undermines its essential theory because mail of course cannot be stolen "*unintentional[ly]*." *Id.* at 6a. And contrary to the court's suggestion, there is no textual basis for distinguishing between a loss resulting from a USPS employee's intentional theft and a loss resulting from a USPS employee's "*intentional* failure to carry mail" to the designated address. *Id.* at 7a.

The court of appeals' additional reasoning was equally meritless. The court read the dictionary definition quoted above to "carry the sense that the loss is *unintentional*." App., *infra*, 6a. But the court simply disregarded the portion of the definition clarifying that loss is only "usually"—not always—"unintentional." *Webster's* 1460.

The court of appeals also observed that "no one intentionally loses something." App., *infra*, 6a. But that observation adopts the perspective of the actor (here, the USPS employee) who is alleged to have engaged in the conduct causing the loss. The postal exception, in contrast, adopts the plaintiff's perspective by focusing on "[a]ny *claim* arising out of the loss" of mail. 28 U.S.C. 2680(b) (emphasis added). And from the plaintiff's perspective, mail is lost when it does not arrive and is not recovered—regardless of the cause of that outcome.

B. The Decision Below Warrants This Court's Review

The traditional certiorari criteria counsel in favor of this Court's review: The Fifth Circuit's decision below conflicts with published decisions from other circuits

and threatens to have substantial practical consequences for USPS.

1. The decision below creates a circuit conflict

The court of appeals expressly recognized that its "determination that the intentional conduct in this case is not covered by the postal-matter exception puts [it] at odds with some of [its] sister circuits." App., *infra*, 9a. In particular, the decision below conflicts with published decisions of the First and Second Circuits.

In *Levasseur* v. *USPS*, 543 F.3d 23 (2008) (per curiam), the First Circuit held that the postal exception applies to "the theft or concealment of mail" by a USPS employee. *Id.* at 23. There, a "partisan postal employee" had "diverted" "political campaign flyers * * * to prevent them from being delivered to voters shortly before a municipal election." *Ibid.* The court rejected the plaintiff's contention "that the postal-matter exception does not apply to intentional torts," explaining that "the fact that the word 'negligent' only modifies the word 'transmission' indicates that intentional acts of 'loss' and 'miscarriage' are also covered." *Id.* at 23-24. The court found it "entirely reasonable to say * * * that mail that is stolen by a postal employee is thereby 'lost' from the postal system." *Id.* at 24. And the court observed that the claim at issue "complains of the 'nondelivery . . . of sensitive materials,'" which "falls squarely within th[e] category" of covered claims recognized by this Court in *Dolan*. *Ibid.* The First Circuit's holding in *Levasseur* is thus "at odds" with the Fifth Circuit's holding below that the postal exception does not apply to a USPS employee's alleged intentional nondelivery of mail. App., *infra*, 9a.

Similarly, in *Marine Insurance Co.* v. *United States*, 378 F.2d 812, cert. denied, 389 U.S. 953 (1967), the Second Circuit held that the postal exception applied to a plaintiff's claim that an international package had been stolen in transit by a customs employee. *Id.* at 813-814. The court devoted most of its opinion to rejecting an argument not at issue here—specifically, "that because the package was stolen in the Mail Division of the Bureau of Customs it was in the temporary custody of that Bureau and thereby temporarily lost its character as postal matter." *Id.* at 814. But the court then explained that the package had in fact been returned to "the normal channels of mail" before a customs employee stole it. *Ibid.* The court thus determined that the postal exception applies to claims that a parcel was "stolen while it was in the normal flow of mail." *Id.* at 815.

The Second Circuit has subsequently applied *Marine Insurance* as binding precedent in a case involving allegations similar to those here. In *C.D. of NYC, Inc.* v. *USPS*, 157 Fed. Appx. 428 (2005), cert. denied, 549 U.S. 809 (2006), the Second Circuit held that the postal exception applied to a claim that mail was "brought to a United States Post Office, handed to USPS employees, and stolen by persons employed by the USPS to handle mail." *Id.* 429-430. In so doing, the court relied on *Marine Insurance* for the proposition that "theft of parcels by a federal employee responsible for the supervision of mail * * * falls within the exception." *Id.* at 429. In the Second Circuit, then, the postal exception applies where a government employee allegedly causes the loss or miscarriage of mail through his intentional acts. As the

Fifth Circuit recognized, that legal rule conflicts with the holding below. App., *infra*, 9a.[6]

This Court has recently and repeatedly granted certiorari in cases arising from 1-1 or 2-1 circuit conflicts. See, *e.g.*, *Macquarie Infrastructure Corp.* v. *Moab Partners, L.P.*, 601 U.S. 257, 262 & n.1 (2024); *Bittner* v. *United States*, 598 U.S. 85, 89 (2023). Indeed, in *Dolan*, this Court's only case interpreting the postal exception, it granted certiorari in light of a 1-1 circuit conflict. See 546 U.S. at 485. Review is likewise warranted here.

2. The decision below carries significant practical consequences for USPS

a. Operation of the postal system is a "sovereign function" because it is a "sovereign necessity." *USPS* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121 (1981). Recognizing that "[g]overnment without communication is impossible," *ibid.*, the Founders empowered Congress "[t]o establish Post Offices and post Roads," U.S. Const. Art. I, § 8, Cl. 7. "The Post Office played a vital yet largely unappreciated role in the development of our new Nation," and its "growth" over the ensuing years "has been remarkable." *Greenburgh Civic Ass'ns*, 453 U.S. at 121-122.

Under current law, USPS remains "operated as a basic and fundamental service provided to the people by the Government of the United States." 39 U.S.C. 101(a).

---

[6] The decision below also conflicts with an unpublished decision of the Eighth Circuit. See *Benigni* v. *United States*, 141 F.3d 1167, 1167 (per curiam) (unpublished) (holding that a plaintiff's claim alleging that USPS "intentionally withheld his mail from home delivery on numerous occasions" was "barred by the postal exception to the FTCA"), cert. denied, 525 U.S. 897 (1998); App., *infra*, 9a (acknowledging conflict with *Benigni*).

Its "basic function" is "to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people." *Ibid.* This Court has accordingly recognized USPS's "broad[] obligations, including the provision of universal mail delivery, the provision of free mail delivery to certain classes of persons, and, most recently, increased public responsibilities related to national security." *USPS* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 747 (2004) (citation omitted).

USPS cannot perform its indispensable service of handling, processing, and delivering mail universally, efficiently, and inexpensively unless it is "free from the threat of damage[s] suit." S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946). "Through the § 2680 exceptions" to the FTCA's waiver of sovereign immunity, Congress "'protect[ed] the Government from liability that would seriously handicap efficient government operations.'" *Molzof* v. *United States*, 502 U.S. 301, 311 (1992) (citation omitted). And Congress included the postal exception specifically because it "relate[s] to activities for which, as a policy matter, the Government should be free from tort claims." *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 464 n.4 (1980) (per curiam).

b. Absent this Court's review, the decision below threatens to substantially interfere with USPS's operations in direct contravention of Congress's objective in enacting the postal exception. In fiscal year 2023, USPS delivered more than 116 billion pieces of mail to more than 166 million delivery points across the United States. USPS, *Fiscal Year 2023: Annual Report to Congress* 3, https://perma.cc/SJ6X-5KTV. That amounts to an average of 318 million pieces of mail delivered each day. See USPS, *Postal Facts: One Day in the Postal*

Service, https://perma.cc/VM2U-6AHL. While the vast majority of USPS deliveries are timely and successful, the staggering volume of mail means that some items will invariably be damaged, misdelivered, or lost.

In fiscal year 2014, for instance, USPS's Mail Recovery Center—which is USPS's "official lost and found department"—received 88 million items, of which 2.5 million were returned to customers. Office of Inspector Gen., USPS, *U.S. Postal Service Mail Recovery Center: Audit Report* 1 (Dec. 1, 2015) (*Audit Report*), https://perma.cc/6LU6-RP57.[7] And that figure does not account for mail that was lost or miscarried without reaching the Mail Recovery Center.

Customers frequently claim that mail-delivery errors stem from personal animus or misconduct by USPS employees. USPS has informed this Office that in 2023, it received approximately 425,000 administrative complaints about misconduct by USPS employees, including about 48,000 within the Fifth Circuit. While not every complaint involves allegations of intentional nondelivery of mail, it is reasonable to expect that under the decision below, some significant number of individuals who file administrative complaints may also file similar tort lawsuits in federal court. In turn, that constant "threat of damage[s] suits" would "disrupt[]" the vital "'governmental activit[y]'" that Congress specifically sought to protect. *Kosak* v. *United States*, 465 U.S. 848, 858 (1984).

As noted above, the decision below also opens the door for plaintiffs to circumvent the postal exception's ordinary operation. Before the Fifth Circuit's decision in this case, the postal exception would have plainly

---

[7] The items not returned to customers were sold at auction, donated, or destroyed. See *Audit Report* 1.

barred a claim brought by any of the countless people whose mail is inevitably lost or miscarried each day. Indeed, *Dolan* emphasized that the exception "retain[s] immunity, as a general rule, * * * for injuries arising, directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address." 546 U.S. at 489. But if the Fifth Circuit's decision is allowed to stand, people in that jurisdiction who have mail lost or miscarried could evade the postal exception—and potentially proceed to burdensome discovery—merely by alleging that the loss or miscarriage was caused by *intentional* conduct. As one court put the point in rejecting an argument similar to respondent's here, if the postal exception was "construe[d] * * * as excluding intentional torts, potential litigants would simply recast their lost-mail claims as ones for mail theft in order to survive the jurisdictional bar, thus opening the floodgates of litigation and contravening the intent of the exclusion." *Watkins* v. *United States*, No. 02-C-8188, 2003 WL 1906176, at *5 (N.D. Ill. Apr. 17, 2003).

c. Although a person whose mail allegedly was intentionally lost or miscarried for discriminatory reasons cannot file suit against USPS under the FTCA, such a person would have another avenue for redress: filing an administrative complaint with the Postal Regulatory Commission. The Commission has jurisdiction to hear complaints alleging violations of 39 U.S.C. 403(c), which bars "unreasonable discrimination" by USPS in the provision of postal services. See 39 U.S.C. 3662(a). And if the Commission were to find that a violation had occurred, it would have authority to "order that the Postal Service take such action as the Commis-

sion considers appropriate in order to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance." 39 U.S.C. 3662(c). A final decision by the Commission would then be judicially reviewable in the D.C. Circuit. See 39 U.S.C. 3663. Thus, if a USPS employee in fact were to discriminate against a mail customer in the delivery of her mail, that customer would not be left without recourse; the customer could seek and obtain administrative relief, subject to judicial review—even though she could not bring a tort action in federal court.[8]

---

[8] Here, the allegations of racial discrimination in respondent's amended complaint are notably cursory and devoid of factual content. See App., *infra*, 49a (alleging that "[o]n information and belief, mailman Rojas drew the conclusion that something fraudulent or nefarious was taking place at the Residences [respondent owned] because [respondent] is black"); *id.* at 46a (alleging without support that the USPS employees' "misconduct is attributable to a single factor: They do not like the idea that a black person owns the Residences, and leases rooms in the Residences to white people"). In rejecting respondent's equal protection claims against the USPS employees in their individual capacities, the court of appeals determined that "no facts support [respondent's] assertion that Rojas and Drake continued to deliver mail to any similarly situated white property owners while denying her delivery of mail." *Id.* at 11a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
EPHRAIM A. MCDOWELL
Assistant to the Solicitor General
MARK B. STERN
URJA MITTAL
Attorneys

SEPTEMBER 2024

APPENDIX

TABLE OF CONTENTS

Page

Appendix A — Court of appeals opinion (Mar. 20, 2024) 1a
Appendix B — District court memorandum opinion and order (Jan. 19, 2023) 14a
Appendix C — Court of appeals denial of rehearing en banc (June 4, 2024) 36a
Appendix D — Plaintiff's first amended complaint (Jan. 24, 2022) 38a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10179

LEBENE KONAN, PLAINTIFF-APPELLANT

v.

UNITED STATES POSTAL SERVICE; RAYMOND ROJAS, ALSO KNOWN AS RAY; JASON DRAKE; UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES

[Filed: Mar. 20, 2024]

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.

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 Sa-

ratoga 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 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.

---

[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.

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 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).

---

[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.").

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 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 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.

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 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.

---

[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' ")).

B. EQUAL PROTECTION CLAIM

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 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

---

[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).

(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 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.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:22-CV-0139-S

LEBENE KONAN

v.

UNITED STATES POSTAL SERVICE, UNITED STATES OF AMERICA, RAYMOND "RAY" ROJAS, AND JASON DRAKE

Filed: Jan. 19, 2023

MEMORANDUM OPINION AND ORDER

Before the Court are the Motion to Dismiss of Defendant United States of America [ECF No. 15], the Motion to Dismiss of Defendant United States Postal Service [ECF No. 17], and the Motion to Dismiss of Defendants Raymond "Ray" Rojas and Jason Drake [ECF No. 22] (collectively, "Motions"). The Court has considered Plaintiffs First Amended Complaint [ECF No. 7], the Motions, Plaintiffs Brief in Opposition to Defendant United States of America's Motion to Dismiss [ECF No. 19], Appendix to Plaintiffs Brief in Opposition to the United States of America's Motion to Dismiss Pursuant to FED. R. CIV. P. 12(b)(1) (ECF No. 20], Plaintiffs Response to the Motion to Dismiss Filed by the United States Postal Service [ECF No. 21], Reply in Support of Motion to Dismiss of Defendant United States of

America [ECF No. 24], Plaintiffs Surreply Brief in Opposition to Defendant United States of America's Motion to Dismiss [ECF No. 27], Reply in Support of Defendant United States Postal Service's Motion to Dismiss [ECF No. 28], Plaintiffs Response in Opposition to the Motion to Dismiss Filed by Defendants Rojas and Drake [ECF No. 29], Reply in Support of Motion to Dismiss of Defendants Raymond "Ray" Rojas and Jason Drake [ECF No. 30], and the applicable law. For the reasons set forth below, the Court **GRANTS** the Motions.

I. BACKGROUND

Plaintiff Lebene Kanan brings this tort and discrimination action against Defendants United States of America ("United States"); United States Postal Service ("USPS"); Raymond "Ray" Rojas ("Rojas"), a mail carrier for USPS; and Jason Drake ("Drake"), a Postmaster for USPS. *See* Plaintiffs First Amended Complaint ("Compl.") [ECF No. 7] ¶¶ 2-5. Plaintiff alleges that Rojas and Drake (collectively, "Individual Defendants"), "acting in their capacities as employees of the USPS[,]" intentionally withheld and refused to deliver Plaintiffs mail to two residences she owned and leased to tenants in Euless, Texas ("Residences"). *Id* ¶ 49; *see id* ¶¶ 13, 20, 23-25, 37-38, 49. According to Plaintiff, Rojas and Drake failed to deliver her mail because "[t]hey do not like the idea that a black person owns the Residences, and leases rooms in the Residences to white people." *Id.* ¶ 28.

Plaintiff alleges that the discrimination against her began when Rojas unilaterally changed the lock on a mailbox belonging to one of her Residences, located at 1207 Saratoga Drive ("Saratoga Residence"), without

her permission. *Id.* ¶ 13. Plaintiff claims that on information and belief, 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 people." *Id.* ¶ 16. Plaintiff states that on May 15, 2020, she went to the Post Office to inquire why the lock to her mailbox was changed without notice or consent. *Id.* ¶ 17, Plaintiff alleges the personnel at the Post Office advised her that USPS would not deliver any mail to the Saratoga Residence until its ownership was "investigated by USPS's Inspector General and conclusively established." *Id.* ¶ 19.

While the Inspector General conducted the investigation over the next two to three months, Plaintiff contends that no mail was delivered to the Saratoga Residence. *Id.* ¶ 20. Plaintiff claims she lost expected rental income when several of her tenants moved out as a result. *Id.* According to Plaintiff, while the investigation ultimately concluded that Plaintiff owned the Saratoga Residence and mail delivery temporarily resumed, Drake instructed Rojas and other employees working under him "not to deliver any mail properly addressed to the Saratoga Residence unless the individuals to whom mail was addressed at the Saratoga Residence first provided proof that they were actually living there." *Id.* ¶¶ 21-23.

Plaintiff alleges that Rojas, with Drake's encouragement, refused to deliver Plaintiffs mail and some of her tenants' mail, returning the mail to the Post Office where he had it marked as "undeliverable." *Id.* ¶¶ 1124-25. Plaintiff claims that she and some of her tenants did not receive important mail addressed to them including "doctor's bills, medications, credit card

statements, car titles and property tax statements." *Id.* ¶ 24.

Plaintiff alleges that in April 2021, Rojas discovered Plaintiff owned another residence located at 1116 Trenton Lane in Euless, Texas, and, with Drake's support, started to withhold mail addressed to this location as well. *Id.* ¶¶ 37-38. Plaintiff alleges Rojas and Drake have engaged in this behavior because she is African American. *Id.* ¶ 39. Plaintiff alleges she repeatedly advised USPS of Rojas and Drake's intentional misbehavior, but nothing has been done to correct the situation. *Id.* ¶ 42. "To this day," Plaintiff claims, "Rojas and Drake continue to refuse to deliver properly-addressed mail to" both Residences. *Id.* ¶ 148.

Plaintiff asserts common law tort claims against USPS pursuant to 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. *Id.* ¶¶ 68-96. Plaintiff also asserts these claims against the United States because she contends the United States "is liable to Plaintiff for the payment of" damages under these claims.[1] *Id.* ¶¶ 71, 76, 83, 96. Against Rojas and Drake, Plaintiff asserts claims for denial of equal protection of the law pursuant to 42 U.S.C. § 1981 and 42 U.S.C. § 1985. *Id.* ¶¶ 97-104.

USPS and the United States now move to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The Individual Defend-

---

[1] As discussed more fully below, some confusion has arisen as to whether Plaintiff also intends to allege her state-law tort claims against Rojas and Drake.

ants move to dismiss for failure to state a claim under Federal of Civil Procedure 12(b)(6) and based on qualified Rule' immunity.[2]

II. LEGAL STANDARD

A. *Rule 12(b)(1)*

"Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, lack the power to adjudicate claims." *La. Real Est. Appraisers Bd. v. Fed. Trade Comm'n,* 917 F.3d 389, 391 (5th Cir. 2019) (quoting *Texas v. Travis Cnty.,* 910 F.3d 809, 811 (5th Cir. 2018)). Courts "must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Howery* v. *Allstate Ins. Co.,* 243 F.3d 912, 916 (5th Cir. 2001).

A motion to dismiss under Rule 12(b)(1) is the vehicle through which a party can challenge a federal court's subject-matter jurisdiction. *See* FED. R. CIV. P, 12(b)(1). The district court may dismiss for lack of subject-matter jurisdiction based on the complaint alone. *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001) (citing *Barrera-Montenegro v. United States,* 74 F.3d 657, 659 (5th Cir. 1996)). The court must accept all factual allegations in the complaint as true. *See Den Norske Stats Oljeselskap As v. HeereMac Vof,* 241 F.3d 420, 424 (5th Cir. 2001). If the court determines that it lacks subject-matter jurisdiction, it must dismiss the action. FED. R. CIV. P. 12(h)(3).

---

[2] The Court does not reach the Individual Defendants' qualified immunity arguments because it finds dismissal of the First Amended Complaint proper on jurisdictional grounds and under Rule 12(b)(6).

B. *Rule 12(b)(6)*

To defeat a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007); *Reliable Consultants, Inc. v. Earle,* 517 F.3d 738, 742 (5th Cir. 2008). To meet this "facial plausibility" standard, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court must accept well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins.,* 509 F.3d 673, 675 (5th Cir. 2007). However, the court does not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.,* 484 F.3d 776, 780 (5th Cir. 2007) (citation omitted). A plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555 (citation omitted). "Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citations omitted).

In ruling on a Rule 12(b)(6) motion, the court limits its review to the face of the pleadings. *See Spivey v. Robertson,* 197 F.3d 772, 774 (5th Cir, 1999). The pleadings include the complaint and any documents attached to it. *Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498 (5th Cir. 2000). The ultimate question is whether the complaint states a valid claim when viewed in the light most favorable to the plaintiff.

Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 312 (5th Cir. 2002). At the motion to dismiss stage, the court does not evaluate the plaintiff's likelihood of success. It only determines whether the plaintiff has stated a claim upon which relief can be granted. *Mann v. Adams Realty Co.,* 556 F.2d 288, 293 (5th Cir. 1977).

III. ANALYSIS

Plaintiff alleges four state-law claims: nuisance, tortious interference with prospective business relations, conversion, and intentional infliction of emotional distress. Compl. ¶¶ 68-96. She also asserts a "denial of equal protection" claim against the Individual Defendants, citing 42 U.S.C. §§ 1981 and 1985. *Id.* ¶¶ 97-104. To the extent Plaintiff intended to allege her state-law claims against the Individual Defendants, those claims fail because the FTCA does not provide a jurisdictional basis for claims based on conduct falling outside the scope of a federal actor's employment or claims that name federal employees as defendants. The Court lacks subject-matter jurisdiction over Plaintiffs state-law claims against USPS because, under the FTCA, the United States is the only proper party to such claims. Plaintiffs state-law claims against the United States fail for lack of subject-matter jurisdiction because they fall within the postal-matter exception to the waiver of sovereign immunity under the FTCA. 28 U.S.C. § 2680(b). Plaintiff's constitutional allegations against the Individual Defendants fail to state a claim upon which relief can be granted because Sections 1981 and 1985 do not apply to federal actors and because Section 1985 does not apply to individuals employed by the same legal entity.

A. *FTCA Claims*

The United States and its agencies generally enjoy sovereign immunity from suit. *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands,* 461 U.S. 273, 287 (1983); *United States v. Mitchell,* 463 U.S. 206, 212 (1983); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.,* 668 F.3d 281, 287 (5th Cir. 2012) (providing the government's consent to be sued "is a prerequisite to federal jurisdiction"). Absent a waiver of this immunity or consent to be sued, any suit brought against the United States or any federal agency must be dismissed for lack of subject-matter jurisdiction. *See F.D.I.C. v. Meyer,* 510 U.S. 471,475 (1994); *Loeffler v. Frank,* 486 U.S. 549, 554 (1988); *Wagstaff v. US. Dep't of Educ.,* 509 F.3d 661, 664 (5th Cir. 2007) ("[T]he absence of such a waiver is jurisdictional defect." (quoting *Lewis v. Hunt,* 492 F.3d 565, 571 (5th Cir. 2007))); *Chapa v. U.S. Dep't of Justice,* 339 F.3d 388, 389 (5th Cir. 2003) ("Sovereign immunity implicates subject matter jurisdiction."). The plaintiff bears the burden of showing a waiver of sovereign immunity. *Freeman v. United States,* 556 F.3d 326, 334 (5th Cir. 2009) (citation omitted).

The FTCA performs three main functions: it confers federal courts with exclusive jurisdiction over state-law tort claims brought against the United States and its employees acting in the scope of their employment, it designates suit against the United States as the exclusive remedy for such claims, and it waives sovereign immunity from those claims, with certain exceptions. The jurisdiction provision of the FTCA provides that:

> [D]istrict courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, 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). Importantly, long-held precedent instructs that the phrase "the law of the place" refers "exclusively to state law." *In re FEMA Trailer Formaldehyde Prod Liab. Litig. (Mississippi Plaintiffs),* 668 F.3d 281, 287 (5th Cir. 2012) (citing *Brown v. United States,* 653 F.2d 196, 201 (5th Cir. 1981)). As such, the only "torts" contemplated by the FTCA are those arising under state law.

The FTCA also "waives the United States' sovereign immunity from tort suits" under 28 U.S.C. § 2674 and serves as "the exclusive remedy for compensation for a federal employee's tortious acts committed in the scope of employment" under 28 U.S.C. § 2674. *McGuire* v. *Turnbo,* 137 F.3d 321, 324 (5th Cir. 1998). "To sue successfully under the FTCA, a plaintiff must name the United States as the sole defendant." *Id.; see also Galvin v. Occupational Safety & Health Admin.,* 860 F.2d 181, 183 (5th Cir. 1988) ("It is beyond dispute that the United States, and not the responsible agency or employee, is the proper party defendant in a Federal Tort Claims Act suit."); *see also 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.").

i. *Individual Defendants*

The Court lacks subject-matter jurisdiction over Plaintiffs FTCA claims for nuisance, tortious interference with prospective business relations, conversion, and intentional infliction of emotional distress as to all Defendants, including the Individual Defendants. As a preliminary matter, it is unclear whether Plaintiff meant to allege these claims against all Defendants or just the United States and USPS. The Individual Defendants moved to dismiss only Plaintiff's constitutional claim, asserting that no state-law claims are alleged against them. ECF No. 30 at 5. In her Response to the Individual Defendants' Motion to Dismiss, Plaintiff argues not only that her claims against the Individual Defendants include torts governed by the FTCA, but also that the Individual Defendants waived their immunity under the FTCA by declaring in their Motion to Dismiss briefing that "Rojas and Drake are not arguing that Konan's claims against them are precluded by the immunity conferred in section 2679(b)(1)." ECF No. 29 at 6 n.2 (quoting ECF No. 22 at 6 n.3.). Plaintiff avers that this "waiver' could allow her to "sue the federal employee under any federal or state statute that may apply[.]" *Id.* at 7 n.4.

Assuming without finding that the First Amended Complaint plainly manifests an intent to allege state-law tort theories against the Individual Defendants, the Court finds that the quoted sentence from the Individual Defendants' Motion to Dismiss is not a waiver of immunity from Plaintiff's state-law claims because the Individual Defendants did not move to dismiss those

claims. ECF No. 22 at 1. Rather, the Individual Defendants' Motion to Dismiss, and any purported waiver or concession contained therein, could only encompass the claim subject to the motion—Plaintiff's constitutional claim—which has no relevance to Section 2679(b)(1) or any other FTCA provision. *Id.; Johnson v. Sawyer,* 47 F.3d 716, 727 (5th Cir. 1995) ("[E]ven a violation of the United States Constitution . . . is not within the FTCA unless the complained of conduct is actionable under the local law of the state where it occurred.").

Further, any state-law tort claims Plaintiff intended to assert against the Individual Defendants must fail for lack of subject-matter jurisdiction regardless of whether or not the Individual Defendants acted within the scope of their employment. The FTCA confers jurisdiction over claims for tortious acts "committed in the scope of employment." *McGuire,* 137 F.3d at 324. Plaintiff raises alternative arguments in her Response suggesting that the Individual Defendants' alleged conduct might fall outside the scope of their employment. *See, e.g.,* ECF No. 29 at 16. If the alleged conduct fell outside the scope of the Individual Defendants' employment, the FTCA would not cover Plaintiff's claims at all. *Leleux v. United States,* 178 F.3d 750, 757 (5th Cir. 1999) (citing *Sheridan v. United States,* 487 U.S. 392, 401 (1988) (interpreting statutory language of the FTCA to conclude that "[t]he tortious conduct of [a federal employee], not acting within the scope of his office or employment, does not in itself give rise to Government liability"). Without the FTCA, Plaintiffs state-law tort claims do not "aris[e] under the Constitution, laws, or treaties of the United States" for the purposes of 28 U.S.C. § 1331. The only other federal statute Plaintiff cites as a jurisdictional basis for her claims is

39 U.S.C. § 409, which directs her claims back to the FTCA. *See* § 409(c) ("The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service."). Thus, to the extent the Individual Defendants' alleged wrongful conduct falls outside the scope of their employment, Plaintiffs state-law claims lack federal question jurisdiction.

Despite Plaintiffs exploration of the scope of employment issue in her Motion to Dismiss briefing, she conceded on the face of the First Amended Complaint that, "[a]t all relevant times," the Individual Defendants "were acting in their capacities as employees of the USPS." Compl. 149. By conceding that the Individual Defendants acted in their capacities as federal employees, Plaintiff situated her state-law tort claims squarely within the ambit of the FTCA, which requires her to name the United States as "the sole defendant." *McGuire,* 137 F.3d at 324. "[T]he FTCA does not provide a jurisdictional basis" for state-law tort claims naming federal employees as defendants. *Walters,* 409 F. App'x at 784 (affirming dismissal of state-law tort claims alleged against Veterans Affairs (VA) hospital and VA doctor for lack of subject-matter jurisdiction because the FTCA only covers claims alleged against the United States and the plaintiff-appellants offered no other basis for federal jurisdiction). Accordingly, even if Plaintiff had alleged her state- law tort claims against the Individual Defendants, such claims could only survive in this Court as FTCA claims alleged solely against the United States.

ii. *USPS*

Similarly, Plaintiff cannot pursue her state-law claims against USPS in this Court. Under the FTCA, the United States is the sole party that may be sued for injuries arising out of the negligent or wrongful act or omission of its employees. *See* 28 U.S.C. § 1346(b). USPS, as an agency of the United States, may not be sued under the FTCA. *Galvin,* 860 F.2d at 183 ("It is beyond dispute that the United States, and not the responsible agency or employee, is the proper party defendant in a Federal Tort Claims Act suit."); *see also King v. US. Dep't of Veterans Affairs,* 728 F.3d 410, 413 n.2 (5th Cir. 2013); *Atorie Air, Inc. v. F.A.A. of US. Dep't of Transp.,* 942 F.2d 954, 957 (5th Cir. 1991) ("All suits brought under the FTCA must be brought against the United States." (citation omitted)). Therefore, the Court lacks subject-matter jurisdiction over Plaintiffs state-law claims against USPS.

iii. *United States*

The FTCA "waives sovereign immunity and permits suits against the United States sounding in state tort for money damages." *Freeman,* 556 F.3d at 335. "The FTCA subjects the United States to liability for personal injuries caused by the negligent or wrongful act or omission of any employee of the Government." *Metro. Life Ins. Co. v. Atkins,* 225 F.3d 510, 512 (5th Cir. 2000) (internal quotation marks and citation omitted). However, the FTCA exempts from this waiver of sovereign immunity "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. § 2680(b). Thus, the United States may be liable if postal workers "commit torts under local law, but not for claims defined by this exception." *Dolan v.*

US. Postal Serv., 546 U.S. 481, 485 (2006). When a claim falls within the statutory exception to the FTCA's waiver of sovereign immunity, the Court lacks subject-matter jurisdiction to hear the case. *See Cascabel Cattle Co., L.L.C v. United States,* 955 F.3d 445, 450 (5th Cir. 2020).

Plaintiff argues that her claims do not arise out of the "loss, miscarriage, or negligent transmission of letters or postal matter" because she has alleged that USPS intentionally and deliberately refused to deliver her mail. ECF No. 19 at 16-17. In her view, the "postal- matter exception" apples only to negligent acts, not to intentional torts. *See id.* However, according to the plain language of the statute, the word "negligent" modifies only the noun "transmission." 28 U.S.C. § 2680(b). No such qualifier modifies the nouns "loss" or "miscarriage," indicating an intent to retain immunity for intentional acts of "loss" and "miscarriage" of "letters or postal matter." *Id.*

The Fifth Circuit has not yet ruled on whether the postal matter exception applies to intentional acts, but other courts have applied the exception in cases where the postal carrier intentionally or purposefully failed to deliver mail. *Levasseur v. USPS,* 543 F.3d 23, 24 (1st Cir. 2008) (holding the exception barred claim alleging USPS employee had stolen or intentionally hidden political campaign flyers to prevent flyers from. being delivered to voters before the election); *C.D. of NYC, Inc. v. USPS,* 157 F. App'x 428, 429 (2d Cir. 2005) (holding "theft of parcels by a federal employee responsible for the supervision of mail . . . falls within the exception"); *Benigni* v. *United States,* 141 F.3d 1167, 1998 WL 165159, at *1 (8th Cir. 1998) (affirming dismissal of loss-of-mail claims against United States because

postal-matter exception barred suit for intentionally withheld mail); *Valdez v. United States,* 365 F. Supp. 3d 1181, 1185-86 (D.N.M. 2019) (holding mail tampering and refusal to deliver mail claims were barred); *Erlich v. United States,* No. 17-01245-RAJ, 2018 WL 3608404, at *4 (W.D. Wash. Jul. 26, 2018) (holding temporary suspension of home mail delivery was barred by the postal-matter exception). The Court finds the reasoning in the foregoing cases persuasive.

Plaintiffs allegations arise out of the "loss" and "miscarriage" of "letters or postal matter" because they all relate to "personal or financial harms arising from non-delivery . . . of sensitive materials or information *(e.g.,* medicines or a mortgage foreclosure notice)" and other mail. *Dolan,* 546 U.S. at 489 (reasoning that Congress's intent behind the postal-matter exception was to retain immunity "for injuries arising, directly or consequentially, because mail either *fails to arrive at all* or arrives late, in damaged condition, or at the wrong address," since such harms relate to "the Postal Service's function of transporting mail" (emphasis added)). Plaintiff alleges that:

- She suffered loss of income after her tenants moved out because USPS continually failed to deliver their mail. Compl. ¶ 69.
- The mail delivery problems interfered with her ability to attract new tenants. *Id.* ¶ 74.
- The Individual Defendants, acting in their capacity as employees of USPS, converted her property by refusing to deliver, and retaining possession of, her personal mail. *Id.* ¶¶ 81-82.

- She has suffered emotional distress and public humiliation because of USPS's refusal to step in and make Rojas deliver her mail to the Residences and because her tenants "constantly bombard[]" her with questions about "why she cannot stop Rojas from withholding and diverting their mail." *Id.* ¶¶ 88-89, 92-95.

All of these claims allege that Plaintiff suffered "personal [and] financial harms arising from nondelivery [of postal matter]." *Dolan,* 546 U.S. at 489. Thus, her FTCA claims against the United States fall within the postal-matter exception and are barred by sovereign immunity.

B. *Equal Protection Claim*

Citing 42 U.S.C. §§ 1981 and 1985,[3] Plaintiff alleges that the Individual Defendants "conspire[ed] to deprive Plaintiff of her constitutional rights to equal protection of the laws and the privileges and immunities guaranteed to her by the Fifth and Fourteenth Amendments to the Constitution of the United States." Compl. 30-31. Plaintiff's Section 1981 claim fails because the plain language of the statute limits its applicability to violations occurring "under color of State law." Plaintiff's Section 1985 claim fails because Fifth Circuit precedent limits its applicability to state actors and because the intracorporate-conspiracy doctrine bars Section 1985 claims against individuals employed by the same

---

[3] Plaintiff also cites 28 U.S.C. § 2679(b)(2)(A), but that provision does not create an independent right of action. *See Hernandez v. Mesa,* 140 S. Ct. 735, 748 n.9 (2020) (explaining that Section 2679(b)(2)(A) "is not a license to create a new *Bivens* remedy in a context we have never before addressed").

agency. Therefore, Plaintiff fails to state a viable equal protection claim.

i. *42 U.S.*C. *§ 1981*

Section 1981 states that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . 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). Section 1981 also states that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." *Id.* § 1981(c) (emphasis added). Plaintiff does not satisfy the "under color of State law" requirement of a Section 1981 claim because, as she concedes in the First Amended Complaint, the Individual Defendants were acting in their capacity as USPS employees, under color of *federal* law. *Magassa v. Mayorkas,* 52 F.4th 1156, 1163 (9th Cir. 2022) ("There is simply no cause of action under§ 1981 against federal actors[.]"); *McCoy v. Zook,* No. 3:20-CV-1051-B-BT, 2021 WL 811854, at *4 n.3 (N.D. Tex. Feb. 11, 2021) (noting that "[s]ection 1981 claims do not lie against federal actors" (alteration in original) (citation omitted)), *report and recommendation adopted,* No. 3:20-CV- 1051-B (BT), 2021 WL 807249 (N.D. Tex. Mar. 3, 2021).[4]

---

[4] While the Fifth Circuit has not expressly interpreted the plain language of Section 1981's "under color of State law" requirement, other Courts of Appeal have held that it excludes federal actors. *Magassa,* 52 4th at 1163 (9th Cir. 2022); *Sindram v. Fox,* 374 F. App'x 302, 304 (3d Cir. 2010) ("[Section 1981] does not protect against discrimination under color of federal law."); *Nghiem* v. *US. Dep't of Veterans Affs.,* 323 F. App'x 16, 18 (2d Cir. 2009) ("[Section

Plaintiffs argument that "[f]ederal employees who commit criminal acts in furtherance of their personal, nongovernmental, racially-motivated objectives are not acting within the scope of their federal employment" and are thereby engaged in "nongovernmental discrimination" is unavailing. *See* ECF No. 29 at 11-12. Her First Amended Complaint states otherwise:

- "Most critically, USPS, through the actions of mailman Rojas and Postmaster Drake, is intentionally destroying the value of Ms. Konan's properties . . . by driving both existing and prospective tenants away." Compl. ¶ 47.
- "At all relevant times, Rojas the mailman and Postmaster Jason Drake were acting in their capacities as employees of the USPS." *Id* at ¶ 49.
- "By virtue of the USPS's intentional misconduct through employees Rojas and Postmaster Drake, USPS has interfered with Plaintiffs ownership of the Residences and greatly diminished their value to her." *Id.* at ¶ 69.
- "Defendant USPS, through Rojas and Drake, assumed and exercised dominion and control over Plaintiff's property in an unlawful and unauthor-

---

1981] appl[ies] only to state actors, and not federal officials."); *Kimboko* v. *United States,* 26 F. App'x 817, 819 (10th Cir. 2001) ("[Section 1981] is inapplicable to alleged discrimination under color of federal law."); *Davis* v. *U.S. Dep 't of Just.,* 204 F.3d 723, 725 (7th Cir. 2000) ("[B]y its language, § 1981 does not apply to actions taken under color of federal law."); *Lee* v. *Hughes,* 145 F.3d 1272, 1277 (11th Cir. 1998) ("Section 1981 provides a cause of action for individuals subjected to discrimination by private actors and discrimination under color of state law, but does not provide a cause of action for discrimination under color of federal law.").

ized manner, to the exclusion of and inconsistent with Plaintiffs rights[.] . . . Defendant USPS has refused to deliver and has wrongfully withheld mail addressed to Plaintiff." *Id.* at ¶¶ 79, 81.

- "USPS, through mailman Ray Rojas and Postmaster Drake (and perhaps other of its personnel), has deliberately subjected Plaintiff Konan to humiliating treatment over a period of almost two years." *Id.* at ¶ 85.

Moreover, "[e]xtensive precedent makes clear that alleging a federal employee violated policy or even laws in the course of her employment-including specific allegations of defamation or of potentially criminal activities-does not take that conduct outside the scope of employment." *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)). Accordingly, the Court holds that Plaintiff fails to state a claim under Section 1981 against the Individual Defendants.

ii. *42 U.S.C. § 1985*

Plaintiffs Section 1985 claim against the Individual Defendants similarly fails to state a claim upon which relief can be granted. Section 1985(3) imposes liability on two or more persons 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). In *Mack v. Alexander,* the Fifth Circuit held that Section 1985(3) is inapplicable to federal actors. 575 F.2d 488, 489 (5th Cir. 1978) (holding Section 1985 "provide[s] a remedy for deprivation of rights under color of state law and does not apply when the defendants are acting under color of federal law").

Plaintiff correctly states that, in *Cantu v. Moody,* the Fifth Circuit acknowledged criticism of *Mack's* holding for "failing to grapple with Supreme Court precedent" in *Griffin v. Breckenridge,* 403 U.S. 88 (1971), which held that Section 1985(3) reaches private conspiracies. 933 F.3d 414,419 (5th Cir. 2019), *cert. denied,* 141 S. Ct. 112 (2020) (noting that *Mack's* holding has not "aged well"); *see also Ziglar v. Abbasi,* 137 S. Ct. 1843, 1865-69 (2017) (assuming that Section 1985(3) could apply to federal officials). However, the *Cantu* court recognized that, ultimately, "[o]ur precedent holds § 1985(3) does not apply to federal officers." 933 F.3d at 419.

Even if Section 1985(3) did apply to federal actors, Plaintiffs claim also fails under the well-established intracorporate-conspiracy doctrine, which precludes plaintiffs from bringing conspiracy claims under Section 1985(3) against multiple defendants employed by the same governmental entity, *See Thornton v. Merchant,* 526 F. App'x 385,388 (5th Cir. 2013). According to Fifth Circuit precedent, a governmental entity and its employees constitute "a 'single legal entity which is incapable of conspiring with itself.'" *Id.* (quoting *Benningfield v. City of Houston,* 157 F.3d 369, 378 (5th Cir. 1998)). Here, the Individual Defendants are both employees of USPS. Compl. ¶ 49. As such, Plaintiff cannot meet the Section 1985(3) requirement that the alleged conspiracy involve "two or more persons" because, "where all of the defendants are members of the same collective entity, the conspiracy does not involve two or more people." *Reynosa v. Wood,* 134 F.3d 369 (5th Cir. 1997) (internal citations omitted).

Plaintiff's only arguments against the application of this doctrine are that the Individual Defendants were not acting in their official capacities and that they were engaging in unauthorized acts. ECF No. 29 at 23-24. However, as outlined above, the First Amended Complaint contradicts her argument that the Individual Defendants were not acting "in the course of their official duties." *Ziglar,* 137 S. Ct. at 1867; *see supra* §§ III.A.i, III.B.i. And Plaintiff's "unauthorized acts" argument is foreclosed by Fifth Circuit precedent. *Tex. Democratic Party v. Abbott,* 961 F.3d 389, 410 (5th Cir. 2020) (holding that the intracorporate-conspiracy doctrine applied to bar Section 1985 voter-intimidation claim where the plaintiff accused a state official of conspiring with his employees to "issu[e] his threats"). Therefore, Plaintiff fails to state a claim under Section 1985.

IV. CONCLUSION

While "[t]he court should freely give leave [to amend] when justice so requires," it need not do so when amendment would be futile. See FED. R. CIV. P. 15(a)(2); *F.D.I.C. v. Conner,* 20 F.3d 1376, 1385 (5th Cir. 1994). In determining whether amendment would be futile, the Court considers whether "the amended complaint would fail to state a claim upon which relief could be granted." *Stripling v. Jordan Prod. Co.,* 234 F.3d 863,873 (5th Cir. 2000). Plaintiffs FTCA claims fail for lack of subject-matter jurisdiction because the FTCA does not provide a jurisdictional basis for Plaintiff's claims against individuals or federal agencies and the United States has retained sovereign immunity from such claims. Plaintiffs equal protection claim fails because the statutes cited by Plaintiff do not apply to the Individual Defendants due to the nature of their employment—the very means by which they were able

to cause Plaintiffs alleged injuries. Such fundamental defects go to "the core of [Plaintiff's] claims" and render them "clearly foreclosed by settled law." *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans,* 29 F.4th 226, 232 (5th Cir.), *cert. denied,* 143 S. Ct. 353 (2022). Therefore, the Court finds that amendment would be futile and **DISMISSES WITH PREJUDICE** Plaintiffs claims against all Defendants.

For the reasons stated above, the Court **GRANTS** Defendant United States of America's Motion to Dismiss [ECF No. 15], Defendant United States Postal Service's Motion to Dismiss [ECF No. 17], and Defendants Raymond "Rat' Rojas and Jason Drake's Motion to Dismiss [ECF No. 22].

SO ORDERED.

SIGNED January 19, 2023

/s/ KAREN GREN SCHOLER
KAREN GREN SCHOLER
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-10179

LEBENE KONAN, PLAINTIFF-APPELLANT

v.

UNITED STATES POSTAL SERVICE; RAYMOND ROJAS, ALSO KNOWN AS RAY; JASON DRAKE; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

[Filed: June 4, 2024]

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

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

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.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Case No. 3:22-cv-00139-S

LEBENE KONAN, PLAINTIFF

v.

UNITED STATES POSTAL SERVICE, UNITED STATES OF AMERICA, RAYMOND "RAY" ROJAS AND JASON DRAKE, DEFENDANTS

Filed: Jan. 24, 2022

PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff Lebene Konan ("Plaintiff") files the following as her First Amended Complaint alleging claims and causes of action against Defendants United States Postal Service ("USPS"), United States of America ("United States"), Raymond "Ray" Rojas ("Rojas") and Jason Drake ("Drake").

THE PARTIES

1. Plaintiff Lebene Konan ("Plaintiff") is a citizen of the State of Texas, and resides at 5902 Preston Oaks Rd., # 1104 Dallas Tx 75254. She is a naturalized citizen of the United States. One of her sons was a United States Marine. She pays federal taxes, as well as state sales and property taxes. Ms. Konan is a respected

and successful licensed realtor and licensed insurance agent in the State of Texas. She owns several properties throughout the Dallas/Ft. Worth area, including the properties located at 1116 Trenton Lane and 1207 Saratoga Drive in Euless, Texas (the "Residences").

2. Defendant United States Postal Service is an independent agency of the executive branch of the United States federal government responsible for providing postal service in the United States, including its insular areas and associated states. Pursuant to 39 C.F.R. § 2.2, the USPS may be served with process by serving its General Counsel, as its agent for service of process, with a copy of this Complaint, along with a summons issued by the Court. The current General Counsel and Executive Vice President of the USPS is Thomas J. Marshall. He is located at the following address:

United States Postal Service
475 L' Enfant Plaza, SW
Washington, D.C. 20260-1100

3. Defendant Raymond "Ray" Rojas is a citizen of the State of Texas and is a mail carrier employed by USPS. He may be served with process at 210 N. Ector Dr., Euless 76039.

4. Defendant Jason Drake is a citizen of the State of Texas, and is employed by USPS. He is the postmaster of the Euless, Texas post office, and may be served with process at 210 N. Ector Dr Euless 76039.

5. Defendant United States of America is joined as a party because it is liable for tort claims against USPS pursuant to 28 U.S.C. § 2674.

II.

SUBJECT MATTER JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction to hear the tort claims asserted herein against the United States Postal Service [39 U.S.C. § 409(a)], and the United States of America under 28 U.S.C. § 1346(b) [tort claim against the United States]. Pursuant to 28 U.S.C. §§ 1331, this Court also has subject matter jurisdiction over Plaintiff's claims predicated on Defendants' violations of the United States Constitution and 42 U.S.C. §§ 1981 and 1985.

Venue is proper in this District pursuant to 28 U.S.C. § 1402(a) and (b) and 32 CFR 750.32(a) because (i) Plaintiff's primary residence is in this District; and (ii) this District is the District in which the acts or omissions complained of occurred.

III.

FACTS COMMON TO EACH COUNT

Article 1, § 8 of the Constitution grants Congress the authority to "establish Post Offices and post Roads." Acting pursuant to its authority under the Constitution, Congress created the United States Postal Service and assigned it the following mission:

> The United States Postal Service shall be operated as **a basic and fundamental service** provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as **its basic function the obligation to provide postal services** to bind the Nation together through the personal, educational, literary, and busi-

> ness correspondence of the people. **It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities**.

39 U.S.C. § 101 [emphasis added].

9. As mentioned, Plaintiff Lebene Konan owns each of the Residences located in Euless, Texas. She leases rooms to individuals who reside at those locations. From time to time, Plaintiff stays at each Residence to keep a watchful eye on how the residents treat her properties.

10. The mailboxes for 1207 Saratoga and 1116 Trenton Lane Residences (and for other residences in their neighborhoods) are contained in single metal structures located in their respective neighborhood. Each residence within those neighborhoods is assigned a post office box contained in the metal structure. Thus, the box assigned to a particular residence is one of a group of boxes, all contained within a single structure stationed in the middle of the neighborhood. USPS provides the owner of each residence with a key that gives the owner access to the Post Office box; the mail addressed to each residence is deposited into the box that has been assigned to that residence address. Thus, the owner of the residence can access the box to recover mail delivered to the owner's address.

11. As the owner of the Residences, Ms. Konan has a key to the mailboxes that service each Residence. Every day, Ms. Konan collects the mail addressed to individuals at the Residences and distributes the mail to the individuals who reside at each Residence. Because she is there on a daily basis, Ms. Konan—at least until the events described herein—had much of her own busi-

ness mail delivered to the Saratoga address. For example, she received property tax statements, insurance policy correspondence and credit card statements at the Saratoga address.

<u>Rojas Becomes The Mail Carrier</u>:

12. Ms. Konan has owned the Saratoga Residence since 2015. Until May of 2020, all mail addressed to individuals residing at the Saratoga Residence was delivered without incident. That all changed in May of 2020.

13. For several days in May of 2020, no mail was delivered to 1207 Saratoga Drive in Euless, Texas. After investigating what the problem was, Ms. Konan learned that the USPS mail carrier who services that Residence address, a man named Raymond "Ray" Rojas, had unilaterally changed the owner of the Residence to Mr. Ian Harvey, an individual who was residing at the Saratoga Residence, but who was not—and never has been—the owner of the Saratoga Residence. Harvey was simply one of Plaintiff Konan's tenants who was residing at the Saratoga Residence. Without prior or subsequent notice to Ms. Konan, the only owner of the Saratoga Residence, Rojas had issued a new lock approval for Ms. Konan's box, thereby allowing the lock to be changed on the box to make it accessible only by Mr. Harvey.

14. Ian Harvey had a short-term living arrangement at the Saratoga Residence. Harvey lived there in a single room for approximately two months and paid rent to Plaintiff in exchange for his occupancy. At no time was Mr. Harvey ever the owner of the Saratoga Residence.

15. Apparently, Rojas the mail carrier did not like the fact that Plaintiff Konan, an African-American woman, owned the Saratoga Residence and leased rooms in the Saratoga Residence to white people. Mr. Harvey is white. Hence, Rojas changed the lock on the mailbox to Mr. Harvey's name—a man who had no ownership stake in the Saratoga Residence at all—without first giving any notice to Plaintiff.

16. On information and belief, mail carrier Rojas has not unilaterally changed the lock on any other residence owner's address on his route; nor has he refused to deliver mail to residences owned by white people where there are multiple individuals living at their properties. Mail carrier Rojas singled Plaintiff out for discriminatory treatment because she is a successful African American woman and Rojas is not happy about the fact that she owns Residences that he is required to service.

17. On or about May 15, 2020, Ms. Konan went to the Post Office located at 201 N. Ector Dr. in Euless, Texas to inquire about the new lock on her mail box and to determine why it was changed without giving her prior notice or securing her prior consent. The USPS personnel at that location did not provide an answer. Instead, they peppered Ms. Konan with questions. She was asked to confirm her identity, to explain who the actual owner of the Residence was and to provide information as to when she bought the Residence. No white person is subjected to that type of treatment.

18. Ms. Konan asked a USPS Supervisor (a lady named "Cheryl") why she did not ask Ian Harvey those questions before allowing him to change the lock on her mailbox. Cheryl replied that mail carrier Rojas be-

lieved that she was not the owner of the Saratoga Residence and that Mr. Harvey was the actual owner. Accordingly, Rojas submitted the lock change order without prior notice to Ms. Konan. It is unclear whether mailman Rojas informed Mr. Harvey of the change or whether Rojas secured Mr. Harvey's consent to change the name on the box and to put the lock change order in Mr. Harvey's name.

19. In addition, "Cheryl" advised Ms. Konan that USPS would not deliver any mail at all to the Residence address until ownership of the Residence location was investigated by USPS's Inspector General and conclusively established. Ms. Konan immediately contacted the USPS in Washington, D.C. and lodged a complaint.

20. For approximately the next 2 to 3 months, USPS did not deliver any mail at all to the Saratoga Residence. This forced several individuals residing at the Saratoga Residence to move to other locations. Plaintiff lost a minimum of 15 lessees during this period of time. Each of these individuals paid Ms. Konan approximately $6500 a year in rent.

21. Ms. Konan did not hear from USPS at all for the 2 to 3 months that USPS refused to deliver mail to the Residence. Then, in July or August of 2020 she suddenly received a replacement credit card from American Express in the mail, indicating that USPS had researched the issue and discovered that Ms. Konan, was in fact, the owner of the Saratoga Residence.

22. Ms. Konan has been told by USPS personnel that mail carrier Rojas and Euless Postmaster Jason Drake were instructed by USPS's Inspector General's office to deliver all mail addressed to the Saratoga Residence. Local USPS authorities have confirmed in

writing that Rojas received the same instructions from USPS's Customer Services for North Texas. Accordingly, Plaintiff assumed that the matter had been resolved and that USPS would again commence mail delivery to the Saratoga Residence. That assumption was incorrect.

23. Ms. Konan learned that, notwithstanding instructions given by the Inspector General to deliver all mail addressed to the Saratoga Residence, Mr. Jason Drake, the postmaster to whom Rojas reports, countermanded those instructions and directed employees working under him not to deliver any mail properly addressed to the Saratoga Residence unless the individuals to whom mail was addressed at the Saratoga Residence first provided proof that they were actually living there.

24. In August and September of 2020, Ms. Konan learned that mail addressed to her and others at the Saratoga Residence had been returned by USPS marked "undeliverable." Mail carrier Rojas was unilaterally deciding which items of mail addressed to the Saratoga Residence he would deliver and which items he would simply refuse to deliver and improperly mark as "undeliverable." Important mail addressed to both Plaintiff Konan and her tenants, including doctor's bills, medications, credit card statements, car titles and property tax statements were all returned marked "undeliverable" notwithstanding the fact that mail carrier Rojas knew full well that all mail addressed to the Saratoga Residence was and is deliverable.

25. Without any basis for doing so, Rojas retains possession of the items of mail he refuses to deliver to 1207 Saratoga. He then returns the mail to the Euless

Post Office where he has it improperly marked as "undeliverable." He knows full well that the mail is deliverable, but knowingly, deliberately and intentionally refuses to deliver it. Postmaster Drake knows all about Rojas's misconduct, but encourages and approves of it.

26. As a consequence of what mail carrier Rojas and Postmaster Drake have done, Plaintiff has had to make alternative arrangements to receive and pay her bills and to receive and transmit other critical mail using more expensive services (e.g. FedEx). In the case of her son's medications, Plaintiff now goes directly to the doctor's office to pick up his medications and to receive and pay the doctor's bills.

27. In addition to how her own mail has been impacted by Rojas's misconduct, Plaintiff Konan's tenants have had their mail improperly withheld and improperly marked "undeliverable." This has resulted in tenants moving from the Residences, and has directly impacted Plaintiffs ability to secure rent from her properties.

28. Rojas's and Drake's misconduct is attributable to a single factor: They do not like the idea that a black person owns the Residences, and leases rooms in the Residences to white people. This is intolerable racial discrimination that no one should have to bear. As described below, Defendant USPS is aware of the discrimination, but condones it.

USPS Informed Delivery:

29. To demonstrate what Rojas is doing, Ms. Konan signed up for USPS Informed Delivery, a service that identifies mail that is in the USPS system for delivery to a designated address.

30. Through the USPS Informed Delivery Service, Plaintiff has records demonstrating that Rojas the mail carrier has refused to deliver mail properly addressed to the residents of 1207 Saratoga. Rojas simply refused to deliver the mail. Notably, Rojas has been engaged in this misbehavior for two years, all without Defendant USPS taking any corrective action to prevent him from inflicting harm on Plaintiff.

31. Defendant USPS knows that mailman Rojas is not delivering mail to the Residence because (I) Plaintiff Konan has been informing USPS through its Informed Delivery Service that Rojas is not delivering the mail; (ii) Plaintiff Konan has filed more than fifty complaints about Rojas's and Drake's refusal to deliver mail to the Saratoga Residence with both the Inspector General's office in Washington D.C and USPS's local community service station; and (iii) Plaintiff Konan has filed a formal administrative claim with USPS describing in detail the misconduct of both Rojas and Drake with respect to mail delivery at the Residences.

32. Plaintiff Konan repeatedly has repeatedly informed Arthur Ortega, USPS's local field service agent, that Rojas was refusing to deliver mail to the Saratoga address. Ortega did nothing; he simply referred Plaintiff Konan to Defendant Drake. As mentioned, Drake and Rojas were (and continue to) work together to withhold mail delivery to the Residences.

33. As reflected in the records of USPS Informed Delivery, and as confirmed by the records retained by Ms. Konan, Rojas has been and is currently refusing to deliver mail to the Saratoga Residence. This is not negligence or misdelivery of mail. This is intentional non-delivery of mail motivated by an intention to dis-

criminate against Plaintiff Konan, and to hurt and injure Ms. Konan.

34. Ms. Konan has repeatedly attempted to secure relief from Rojas's and USPS's campaign of terror. Defendant Drake knows that mail carrier Rojas is ignoring the instructions he has been given; he knows that Rojas continues to return mail addressed to the Residences and to improperly mark such mail as "undeliverable." Drake knows that what Rojas is doing is harming Plaintiff Instead of taking corrective action, Drake has encouraged Rojas to continue withholding and refusing to deliver mail addressed to the Residences—mail that both Rojas and Drake know is deliverable.

35. Rojas has even taped a notice in red lettering to the interior of the mailbox assigned to the Residence at 1207 Saratoga. It states "These Names Only"; above the red tape are the few names of those who reside at the Residence who Rojas the mailman has unilaterally decided should receive their mail. He will not deliver to anyone else at the Residence. Rojas's acts are deliberate, discriminatory and carried out with the full knowledge and support of Postmaster Jason Drake.

36. Plaintiff's is the only mailbox contained in the group of boxes that serve the Saratoga neighborhood that Rojas has singled out in this manner.

<u>The Trenton Address Is Impacted</u>

37. In April of 2021, Rojas discovered that Plaintiff also owned the Residence located at 1116 Trenton Lane in Euless, Texas. Accordingly, he started to withhold mail addressed to that location as well.

38. Since discovering that Plaintiff owns the Trenton Lane Residence, Rojas, with the support of Drake,

treats the mail addressed to the Trenton Lane Residence in the same manner that he treats mail addressed to the Saratoga Residence. He refuses to deliver all the mail addressed to the Trenton Lane Residence.

39. On information and belief, mailman Rojas drew the conclusion that something fraudulent or nefarious was taking place at the Residences because Plaintiff Konan is black. Rojas is backed in his assessment by Postmaster Jason Drake. Rojas does not treat any other person in the neighborhood the way he treats Ms. Konan. He delivers mail addressed to residences owned by white people without exception, including residences in which there are multiple addressees. He does not demand that the identities of all addressees at other residences be confirmed before delivering their mail. He does not question who the owners of the other residences in the neighborhood are.

40. No one residing at either of the Residences has been informed that his/her mail is being withheld pursuant to an order of the Postal Service entered pursuant to 32 CFR § 3003(b). There is no mail fraud or other illegal activity being conducted out of the Residences. There is no dog or other danger interfering with the delivery of mail addressed to the Residences. There is no structural impediment that prevents the delivery of mail to either Residence. The withholding of mail addressed to the Residences is being unilaterally and intentionally carried out without authority or justification by mailman Rojas with the backing and support of the local Postmaster, Jason Drake.

41. At one point, Plaintiff attempted to avoid mailman Rojas by asking that all mail addressed to the Saratoga Residence be held at the Euless Post Office.

She then went to the Post Office to pick up all mail addressed to the Saratoga Residence. The employees at the Post Office in Euless, acting on the instructions of Postmaster Drake, refused to give Plaintiff possession of the mail addressed to the Saratoga Residence unless and until she supplied the personal ID's of each person living at the Saratoga Residence to whom the mail was addressed.

USPS Ratifies The Misconduct of Mailman Roias and Postmaster Drake

42. USPS has been repeatedly advised by Ms. Konan that mailman Ray Rojas and postmaster Drake are engaged in the intentional misbehavior described above. It has done nothing to correct the situation, and has given Rojas and Drake carte blanche to continue their discriminatory and damaging actions toward Ms. Konan.

43. A mail carrier who fails to deliver the mail as required by law commits a federal misdemeanor. 18 U.S.C. § 1693. Likewise, any person who "retards or obstructs" delivery of the mail commits a federal misdemeanor. 18 U.S.C. § 1701. Further, 18 USC § 1703 expressly provides that it is a felony for any postal employee to destroy, detain or delay mail that has been entrusted to USPS for delivery. Thus, a USPS employee's obligation to deliver the mail is not a discretionary function.

44. No mail addressed to occupants of either Residence is in furtherance of activity prohibited by 18 U.S.C. §§ 1302, 1341 or 1342. Thus, USPS has no authority to withhold its delivery under 39 U.S.C § 3003. In fact, no order has been issued by USPS pursuant to

39 U.S.C § 3003(b) authorizing the withholding and non-delivery of any such mail.

45. USPS's own regulations provide that its employees, while acting in their official capacity, shall not

> directly or indirectly authorize, permit, or participate in any action, event or course of conduct which subjects any person to discrimination, or results in any person being discriminated against, on the basis of race, color, religion, sex, national origin, or age.

39 FR § 447.2l(c).

46. As a consequence of the blatant misconduct engaged in by USPS, including the misconduct of mail carrier Rojas and Postmaster Jason Drake—conduct that USPS has ratified and implicitly approved of by its failure to take any action to stop it—Plaintiff Konan (i) has lost substantial income through the loss of tenants at the Residence; (ii) has been unable to timely protest property tax statements because Rojas refused to deliver them to the Saratoga Residence; (iii) has had to ask American Express to cause her statements to be sent by Federal Express so that she can make timely payments; and (v) has experienced the humiliation associated with being deliberately and openly discriminated against on the basis of her race by USPS and its employees.

47. Most critically, USPS, through the actions of mailman Rojas and Postmaster Drake, is intentionally destroying the value of Ms. Konan's properties at 1207 Saratoga Drive and 1116 Trenton Lane in Euless, Texas by driving both existing and prospective tenants away. When tenants cannot receive their mail addressed to the appropriate Residence, they leave.

48. To this day, Rojas and Drake continue to refuse to deliver properly addressed mail to the Residences. This is being done knowingly and intentionally. Both Rojas and Drake know that their deliberate actions are hurting Plaintiff Konan. Notwithstanding the fact that USPS has been fully informed of Rojas's and Drake's misconduct for more than a year, it has done nothing—absolutely nothing—to stop their blatant and illegal discrimination and attacks on Plaintiff.

49. At all relevant times, Rojas the mailman and Postmaster Jason Drake were acting in their capacities as employees of the USPS.

50. As described above, the USPS has been aware of their misconduct for over a year—and has done nothing to stop them.

51. In accordance with Texas law, Drake, as the postmaster of the Euless Post Office, is a vice-principal of USPS.

FEDERAL TORT CLAIMS ACT

52. The USPS is a "federal agency" within the meaning of 28 U.S.C. § 2671. Although USPS may "sue and be sued" in its own name [39 U.S.C. § 401(1)], Defendant United States of America is liable for torts committed by the USPS and/or its employees [28 U.S.C. §§ 2674 and 2679(a)].

53. There is a statutory exception to the general waiver of sovereign immunity for actions involving the USPS. In 28 U.S.C. § 2680(b), Congress provided that there is no waiver of sovereign immunity for actions predicated on "the loss, miscarriage, or negligent transmission of letters or postal matter."

54. None of the exceptions to Congress's waiver of the United States' or the USPS's sovereign immunity are applicable here. Mail addressed to each of the Residences is not "lost" because it is not being destroyed or misplaced; USPS knows exactly where the mail is, but refuses to deliver it to the appropriate Residence address. Mail addressed to each Residence address is not being "miscarried" because it is not being delivered to the wrong address; it is not being delivered at all. Finally, this is not a case concerning "negligent transmission" of the mail; the mail is being intentionally and deliberately withheld. *Dolan v. Postal Service,* 546 U. S. 481, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 (2006). There is no immunity available to either the United States or USPS for USPS's blatant, wanton and willful discriminatory treatment directed at Plaintiff Konan as described in detail above.

55. By virtue of USPS's intentional and continuing tortious conduct, as described above, Ms. Konan is being subjected to immediate, ongoing irreparable injury in that; (i) she is being financially destroyed by the loss of significant income relating to the Residences because tenants leave when they do not receive mail and prospective tenants do not choose to live at either Residence once they learn that Rojas refuses to deliver their mail; (ii) Plaintiff is personally being denied access to critical items of mail, exposing her to loss of medical records, and loss of access to time-sensitive mail (including tax statements and financial mail) to which she must respond by specific deadlines; and (iii) Plaintiff is being subjected to the humiliation and emotional distress occasioned by ongoing racial discrimination perpetrated by employees of the USPS.

56. For over a year, Ms. Konan has tried without success to secure relief from USPS. She has filed multiple complaints concerning Rojas with the local Postmaster, USPS's Inspector General's Office, USPS Customer Care Center, with Arthur Ortega and with Ms. Genevieve Ferguson, USPS Supervisor of Customer Support. Ms. Ferguson advised in writing that "the carrier has been instructed to deliver everything addressed to 1207 Saratoga." Notwithstanding Ms. Ferguson's representation, mail carrier Rojas and Postmaster Drake continue to refuse to deliver mail addressed to 1207 Saratoga. These two actors are refusing mail delivery to both Residences without any legal authority for doing so, and in direct violation of their responsibilities under law.

57. USPS has been consistently and repeatedly advised of the problems created by mailman Rojas and Postmaster Drake. Plaintiff has lodged at least fifteen complaints, but USPS has failed and refused to take any corrective action. At this point, it is abundantly obvious that USPS has no intention of correcting the situation, and that it knowingly ratifies the actions of Rojas and Drake in withholding delivery of mail properly addressed to 1207 Saratoga and 1116 Trenton Lane in Euless, Texas.

58. But for the actions of Defendants USPS, Rojas and Drake, Plaintiff Konan would not have suffered any of the injuries described in this Complaint.

ADMINISTRATIVE COMPLAINT—EXHAUSTION

59. On June 25, 2021, Plaintiff mailed an administrative claim to USPS. A genuine, true and correct copy of that claim is attached hereto as Exhibit A.

60. In a letter dated July 21, 2021, USPS acknowledged that it had received Plaintiff's administrative claim on July 7, 2021, and reminded Plaintiff that USPS had six months from July 7, 2021 to administratively adjudicate Plaintiffs claim. A genuine true and correct copy of USPS's letter acknowledging receipt of the claim is annexed hereto as Exhibit B.

61. To date, the USPS has not adjudicated Plaintiff's claim. It has not responded to Plaintiff's claim at all. Accordingly, pursuant to 28 U.S.C. § 2675(a), Plaintiff elects to treat the claim as having been finally denied by USPS. Thus, the exhaustion requirement has been fully satisfied.

POST-FILING INTIMIDATION AND OTHER INTERVENING FACTS IMPACTING PLAINTIFF'S DAMAGES

62. On or about September 16, 2021, well after Plaintiff had filed her administrative claim, she was leaving the Saratoga Residence when she was confronted on the front lawn of that Residence by a white male who claimed to be an agent with the "United States Postal Service's Bureau of Investigation."

63. The man in question told Plaintiff that the residents of the Saratoga Residence were required to register with the USPS if they wished to receive mail addressed to them at the Saratoga address. Plaintiff told the man that what he was saying was not true. She told him that Rojas and Drake were required to deliver all of the mail addressed to the Saratoga Residence, but were continuing to refuse to do so.

64. When Plaintiff mentioned Drake's name, the man became nervous. When Plaintiff asked the man

for identification, he hurriedly headed for his vehicle. He refused to provide his name or to provide identification. Plaintiff followed him to his car, repeatedly requesting that the man provide his name and identification. He ignored Plaintiffs requests, hopped into a silver Chevy Silverado with Texas license plate NVW 9166 and drove away without identifying himself.

65. There is no agency or department known as the "United States Postal Service's Bureau of Investigation."

66. Plaintiff believes that this man who confronted her on September 16, 2021 was not affiliated with USPS at all, but was sent by Rojas and/or Drake to intimidate her.

67. Rojas's and Drake's refusal to deliver all mail addressed to the Residences commenced in May of 2020, and they continue to engage in this behavior today. Although USPS has been repeatedly alerted to the misconduct of Rojas and Drake, it has done nothing to stop such misconduct. It has ratified and adopted their misconduct.

COUNT 1

NUISANCE

68. Plaintiff repeats and realleges the allegations set out in paragraphs 1-67 above as if set forth in their entirety herein.

69. By virtue of the USPS's intentional misconduct through employees Rojas and Postmaster Drake, USPS has interfered with Plaintiffs ownership of the Residences and greatly diminished their value to her. As mentioned, she leases rooms in both Residences.

When residents cannot get their mail, they leave. Plaintiff has lost at least $50,000 in revenue because residents at her two Residences were compelled to leave when they consistently failed to receive their mail.

70. USPS's refusal to deliver mail to individuals residing at the Residences has created a condition that substantially interferes with Plaintiff's ownership, use and enjoyment of the Residences. The actions of USPS, through Rojas and Drake, have caused unreasonable discomfort or annoyance to Plaintiff's (and her tenants') ability to use and enjoy the Residences.

71. As a direct consequence of USPS's intentional failure and refusal to deliver properly addressed mail to the respective Residences, Plaintiff Konan has sustained damages in the amount of at least $50,000. Pursuant to 28 U.S.C. § 2674, Defendant United States of America is liable to Plaintiff for the payment of such damages.

COUNT II

TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

72. Plaintiff repeats, realleges and incorporates the allegations set out in paragraphs 1 through 71 above as if set forth in their entirety at this point in her Complaint.

73. At all relevant times, USPS, through mailman Rojas and Postmaster Drake, was aware that Plaintiff leased rooms in the Residences to other individuals in exchange for rent.

74. By refusing to deliver mail to tenants residing at 1207 Saratoga and 1116 Trenton Lane in Euless,

Texas, USPS, through Mailman Ray Rojas and Postmaster Drake, knew that it would not only pressure Plaintiffs existing tenants to move out in lieu of extending their leasing arrangements, but also knew that its actions would interfere with Plaintiffs ability to enter into arrangements with new tenants and to extend leasing arrangements with Plaintiff's existing tenants.

75. By destroying Plaintiffs reputation as a landlord, USPS deliberately and intentionally interfered with Plaintiffs prospective business relations (as distinguished from interference with Plaintiff's existing contractual relations) with new tenants and with tenants who would otherwise have continued leasing from her.

76. As a direct consequence of Defendants' intentional misconduct, Ms. Konan has suffered actual damages in the amount at least equal to $25,000. Pursuant to 28 U.S.C. § 2674, Defendant United States of America is liable to Plaintiff for the payment of such damages.

COUNT III

CONVERSION

77. Plaintiff repeats, realleges and incorporates the allegations set out in paragraphs 1 through 76 above as if set forth in their entirety at this point in her Complaint.

78. Plaintiff was and is entitled to possession of all mail addressed to her at either Residence.

79. Defendant USPS, through Rojas and Drake, assumed and exercised dominion and control over Plaintiffs property in an unlawful and unauthorized manner,

to the exclusion of and inconsistent with Plaintiffs rights;

80. Plaintiff has made repeated demands that all of her mail be delivered into her possession.

81. Defendant USPS has refused to deliver and has wrongfully withheld mail addressed to Plaintiff.

82. By detaining Plaintiff's mail and refusing to deliver it into Plaintiffs possession, USPS has knowingly and willfully converted Plaintiffs property.

83. As a direct consequence of USPS's conversion of her property, Plaintiff Konan has suffered actual damages in an amount at least equal to $25,000. Pursuant to 28 U.S.C. § 2674, Defendant United States of America is liable to Plaintiff for the payment of such damages.

COUNT IV

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

84. Plaintiff repeats, realleges and incorporates the allegations set out in paragraphs 1 through 83 above as if set forth in their entirety at this point in her Complaint.

85. USPS, through mailman Ray Rojas and Postmaster Drake (and perhaps other of its personnel), has deliberately subjected Plaintiff Konan to humiliating treatment over a period of almost two years.

86. Notwithstanding the fact that she has repeatedly called USPS's attention to the fact that mail carrier Ray Rojas, with the consent and approval of Postmaster Drake, has and continues to withhold and divert her mail and mail addressed to the residents of her two Res-

idences without justification, it has allowed—and continues to allow—mail carrier Rojas and Postmaster Drake to continue engaging in this illegal, unethical and discriminatory behavior.

87. USPS is condoning what is clearly intentional, racially-motivated mistreatment of Ms. Konan. No other customer on Rojas's delivery route is subjected to the indignities to which mailman Rojas and Postmaster Drake have subjected Ms. Konan.

88. Plaintiff has experienced severe emotional distress as a consequence of actions taken by Rojas and Drake that have been ratified and approved by Defendant USPS. Among other thigs, she is constantly nervous about what Rojas and Drake will do next, constantly loses sleep thinking about it, feels helpless because USPS has done nothing to stop the actions of Rojas and Drake and constantly worries about the loss of her sources of income and the destruction of the value of her Residences.

89. In addition to the events described in Plaintiffs administrative claim, the attempt to intimidate Plaintiff launched by Rojas and Drake after the filing of her administrative complaint caused Plaintiff deep concern and worry for her physical safety.

90. The activities by the USPS employees described above reflect extreme and outrageous incidents of blatant racial discrimination.

91. Through its misconduct in this matter, USPS has deliberately and intentionally inflicted emotional distress on Ms. Konan.

92. Ms. Konan is extremely stressed and publicly humiliated by what USPS has done. She is constantly

bombarded with questions from the residents who live at her two Residences why she cannot stop Rojas from withholding and diverting their mail. She worries that Rojas's behavior is going to jeopardize her financial security; she worries that tenants will continue to leave, destroying her ability to generate the rental income that forms a substantial part of what she depends on in order to live.

93. Plaintiff has had to change the manner in which she lives her daily life in order to address the problems created by USPS. She now uses commercial carrier services to deliver items of importance (checks, property tax statements, drug prescriptions, etc.) that she had previously entrusted to USPS. If important materials are accessible to her locally, Plaintiff will personally pick them up instead of having them delivered to her by mail. She constantly wonders what items of important or time-sensitive mail Rojas might have withheld and diverted.

94. Plaintiff also worries about the potential for violence. In at least one instance, a resident at the Saratoga Residence whose mail was not being delivered directly confronted Rojas. This nearly led to a physical altercation between the resident and Rojas. Ms. Konan is constantly worried that Rojas and one of the residents living at the Saratoga or Trenton Lane Residences will engage in a violent confrontation where someone will be injured. She has advised all those living at her Residences that they are not to confront Rojas, and that the situation is being handled in the court; however, many are becoming exasperated with Rojas's misbehavior and their inability to receive mail.

95. Ms. Konan has personally had to change her normal daily routine due to Rojas's discriminatory behavior. When Rojas refused to deliver prescribed medications for her son to the Saratoga residence, Ms. Konan was compelled to change delivery instructions to enable her to pick the prescribed medications directly at the pharmacy. To ensure that she receives important notices, including property tax notices and financial statements, Ms. Konan has them delivered by private carriers (i.e. FedEx or UPS).

96. As a direct consequence of USPS's intentional misconduct, Ms. Konan has suffered emotional distress damages in the amount at least equal to $50,000. Pursuant to 28 U.S.C. § 2674, Defendant United States of America is liable to Plaintiff for the payment of such damages.

COUNT V

DENIAL OF EQUAL PROTECTION

(AGAINST DEFENDANTS ROJAS AND DRAKE)

97. Plaintiff repeats, realleges and incorporates the allegations set out above in paragraphs 1-96 above as if set forth at this point in her Complaint.

98. Plaintiff is an African-American woman.

99. Pursuant to 42 U.S.C. § 1981, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

100. Pursuant to 42 U.S.C. § 1985, "two or more persons in any State or Territory [who] conspire . . .

for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws" may be held liable "for damages occasioned by such injury."

101. Pursuant to 28 U.S.C. § 2679(b)(2)(A), Rojas and Drake may be sued for violating Plaintiffs constitutional rights. Through their actions described above, Defendants Rojas and Drake conspired to violate Plaintiffs constitutional rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

102. Specifically, by engaging in the conduct described above, Defendants Rojas and Drake deprived Plaintiff, directly or indirectly, of the equal protection of the laws and of her privileges and immunities under the Constitution on the basis of her race.

103. Rojas and Drake have singled Plaintiff out for discrimination on the basis of her race, and have denied her access to the postal privileges accorded to white citizens. She is suffering ongoing injury as a direct result of the unconstitutional actions of Rojas and Drake. Further, the latter have made it clear that they will continue to inflict irreparable injury on Plaintiff unless they are enjoined from doing so.

104. Plaintiff requests that Defendants Rojas and Drake (i) be held jointly and severally liable for damages to Plaintiff in the amount of not less than $100,000; and (ii) be permanently enjoined from directing or countenancing the non-delivery of mail addressed to either 1207 Saratoga Dr. or 1116 Trenton Lane in Euless, Texas.

ATTORNEYS' FEES

105. Plaintiff seeks recovery of attorneys' fees from Defendants USPS and United States in the maximum amount permitted under 32 CFR § 750.35.

PRAYER FOR RELIEF

Plaintiff Lebene Konan respectfully requests that the Court enter judgment in this matter awarding Plaintiff the following relief:

A. Monetary damages against defendants United States Postal Service and United States of America for (i) nuisance; (ii) tortious interference with prospective business relations; (iii) conversion; and (iv) intentional infliction of emotional distress, including attorneys' fees in the maximum amount allowed by 32 CFR § 750.35;

B. Pursuant to 42 U.S.C. §§ 1981 and 1985, monetary damages against Defendants Raymond "Ray" Rojas and Jason Drake, jointly and severally, for conspiracy to deprive Plaintiff of her constitutional rights to equal protection of the laws and the privileges and immunities guaranteed to her by the Fifth and Fourteenth Amendments to the Constitution of the United States;

C. A permanent injunction against Defendants Raymond "Ray" Rojas and Jason Drake (i) directing them to deliver all mail addressed to either Residence; and (ii) barring them from all further acts of racial discrimination against Plaintiff. Ms. Konan further requests that the Court enter judgment for such further and additional relief she may be justly entitled to receive.

Respectfully,

/s/ ROBERT CLARY
ROBERT CLARY
State Bar No. 04325300
405 Windward Dr.
Murphy, Texas 75248
Phone: (972) 757-5690
Fax: (972) 692-8212
COUNSEL FOR PLAINTIFF
LEBENE KONAN

PLAINTIFF'S VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 23, 2022.

/s/ LEBENE KONAN
LEBENE KONAN