No. 24-351

IN THE

Supreme Court of the United States

UNITED STATES POSTAL SERVICE, ET AL.,

Petitioners,

v.

LEBENE KONAN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

Section 2680(b) of the Federal Tort Claims Act—the postal-matter exception—exempts the Government from liability for lost, miscarried, or negligently transmitted mail. The United States should not be liable, Congress decided, for glassware that shatters during shipping or a birthday gift that arrives two months late.

This case couldn't be more different. Two USPS employees engaged in a racially motivated harassment campaign against respondent Lebene Konan solely because she is Black. It's true that as part of their campaign, they refused to deliver mail to her and her tenants. But that doesn't make Ms. Konan's a case about the postal-matter exception; her case is far afield from the typical case where the exception is invoked. Indeed, this case is so far afield from the postal-matter exception that the Government does not even argue that much of the conduct at issue in the case (harassing Ms. Konan by changing her mailbox lock, for instance) falls within the exception.

Besides, the question presented rarely comes up. The Government can point to only a half dozen circuit-court cases in 80 years that even plausibly implicate the question presented. Unable to point to complaints filed in federal court, the Government instead gestures at the thousands of complaints lodged with USPS. But typing a few sentences in an online form is a far cry from filing a federal lawsuit, and the Government provides no reason to believe those thousands of claimants will suddenly become litigants.

This Court should deny certiorari.[1]

STATEMENT OF THE CASE[2]

1. In 2020, two employees of the United States Postal Service, Raymond Rojas and Jason Drake, began a years-long campaign of racial harassment against respondent Lebene Konan, a respected Black realtor, insurance agent, and landlady in Euless, Texas. Although Rojas and Drake serviced nearby properties owned by white landlords without incident, they made it impossible for Ms. Konan or her tenants to receive mail. Pet. App. 49a. They targeted Ms. Konan because they did not "like the idea" that a Black person owned the properties and leased rooms to white people. *Id.* 46a.

The harassment campaign started when Rojas, the local mail carrier, changed the designated owner of one of Ms. Konan's properties to one of her white tenants. Pet App. 42a-43a. Rojas also changed the mailbox lock at the property so that only the tenant—and not Ms. Konan—could access the box. *Id.* 42a.

When Ms. Konan complained to the local post office, the USPS Inspector General "confirmed that [she] owned the property" and ordered "that mail be delivered." Pet. App. 2a. But Drake, the local postmaster, overrode the Inspector General's

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[1] Ms. Konan has also filed a conditional cross petition seeking review of the Fifth Circuit's dismissal of her 42 U.S.C. § 1985 claim. Should this Court decide to grant the Government's petition, it should grant the cross petition as well.

[2] Because Ms. Konan's claims were dismissed at the complaint stage, the facts alleged in her complaint are taken as true.

command, encouraging his subordinates to ignore the order. *Id.* 45a.

With Drake's green light, Rojas's harassment campaign escalated. Rojas affixed a notice to one of Ms. Konan's mailboxes with the names of tenants to whom he was willing to deliver mail. Pet. App. 48a. He frequently marked mail as "undeliverable" even though it was otherwise properly addressed to Ms. Konan or her tenants. *Id.* 45a. And when Rojas learned that Ms. Konan owned a second property, he refused to deliver mail to that property as well. *Id.* 48a-49a.

Ms. Konan knew mail addressed to her and her tenants was being held at the local USPS office because she had subscribed to the Postal Service's Informed Delivery service. Pet. App. 47a. When she attempted to retrieve the mail in person, the employees, acting on Drake's instructions, continued to resist. *Id.* 50a.

Ms. Konan submitted over fifty complaints to the Postal Service, including a formal administrative complaint. Pet. App. 47a. But the harassment persisted. *Id.* 55a-56a.

Withholding mail from Ms. Konan violated federal law. *See, e.g.*, 18 U.S.C. § 1703(a). And Rojas and Drake's campaign inflicted significant harm upon Ms. Konan. Ms. Konan and her tenants did not receive "important mail," including "doctor's bills, medications, credit card statements, car titles and property tax statements." Pet. App. 45a. And the inability to receive mail drove away "both existing and prospective tenants," causing the value of Ms. Konan's properties to decline and costing her rental income. *Id.* 51a.

Even as Rojas and Drake withheld mail addressed to Ms. Konan's properties, they continued to deliver mail to neighboring, white-owned residences. Pet. App. 49a. They never changed the mailbox locks on other residences in the neighborhood or claimed that a tenant was the rightful owner of other properties. *Id.*

2. In 2022, after two years of harassment, and having gotten no relief through USPS's administrative process, Ms. Konan filed suit in the U.S. District Court for the Northern District of Texas. *See* Pet. App. 38a. She brought claims under the Federal Tort Claims Act (FTCA) and two equal-protection statutes, 42 U.S.C. §§ 1981 and 1985(3). Pet. App. 3a, 29a, 56a-63a.

The FTCA waives the United States' sovereign immunity "under circumstances where the United States, if a private person, would be liable." 28 U.S.C. § 1346(b)(1). Ms. Konan alleged that Rojas and Drake would be liable under Texas law for nuisance, conversion, intentional infliction of emotional distress, and tortious interference with prospective business relations. Pet. App. 57a-62a.

The FTCA contains several exceptions to its waiver of sovereign immunity. *See* 28 U.S.C. § 2680. Invoking one such exception, the "postal-matter exception," the Government moved to dismiss Ms. Konan's complaint. Pet. App. 4a. The postal-matter exception preserves 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). But it does not immunize all misconduct by USPS employees. For example, "injuries resulting from auto accidents in which employees of the Postal System were at fault" are not covered by the exception. *Kosak v. United States*, 465 U.S. 848, 855 (1984). Indeed, accidents by USPS drivers were "the sort of suit[s] that

Congress was most concerned to authorize" when it enacted the FTCA. *Id.*

The district court dismissed Ms. Konan's FTCA claims. Believing that her allegations arose from the "loss" and "miscarriage" of postal matter, the district court concluded that they were "barred by sovereign immunity." Pet. App. 28a-29a.

The district court dismissed Ms. Konan's Section 1981 and 1985 claims as well. Pet. App. 32a, 34a.

3. The Fifth Circuit unanimously reversed the district court's dismissal of Ms. Konan's FTCA claims.

In "an issue of first impression" in the circuit, the court held that the United States had waived sovereign immunity for claims against USPS for postal employees' refusal to deliver mail. Pet. App. 5a. Specifically, the Fifth Circuit held that under the "plain language" of Section 2680(b) and this Court's opinion in *Dolan v. USPS*, 546 U.S. 481 (2006), an intentional refusal to deliver mail was not "loss," "miscarriage," or "negligent transmission" within the meaning of the postal-matter exception. *Id.*

First, the court held that Ms. Konan's claims did not arise out of a "loss" of mail. Looking to contemporaneous dictionary definitions and to *Dolan*, the Fifth Circuit concluded that the word "loss" "carr[ies] the sense that the loss is *unintentional*." Pet. App. 6a. The Court thus found that Drake and Rojas's "continued, intentional effort not to deliver [Ms.] Konan's mail over a two-year period" did not constitute a "loss" under Section 2680(b). *Id.*

Next, the court held that the postal workers' refusal to deliver Ms. Konan's mail did not amount to a "miscarriage." Again looking to dictionaries and to *Dolan*, the court reasoned that "there can be no

'miscarriage' where there is no attempt at carriage" to begin with. Pet. App. 7a-8a. Because Rojas and Drake had "refus[ed] to deliver [Ms. Konan's] mail"—as opposed to "*mistakenly* deliver[ing] the mail to a third party"—they had "not carried [Ms. Konan's mail] at all" and so could not have "miscarried" it. *Id.* 8a.

Finally, the court held that "the postal workers' actions were intentional and thus" could not "constitute a 'negligent transmission'" within the meaning of the postal-matter exception. Pet. App. 5a.

Separately, the Fifth Circuit affirmed the district court's dismissal of Ms. Konan's civil rights claims. Pet. App. 10a. As relevant at this juncture, the court concluded that Ms. Konan's 42 U.S.C. § 1985(3) claim was not viable because that section "does not apply to federal actors." Pet. App. 11a. The court also determined that Ms. Konan's 42 U.S.C. § 1985(3) claim was independently barred by the "intracorporate-conspiracy doctrine, which precludes plaintiffs from bringing conspiracy claims [] against multiple defendants employed by the same governmental entity." *Id.* 12a.

The Fifth Circuit denied the Government's petition for rehearing en banc. Pet. App. 36a-37a.

4. The Government now petitions this Court for review on the FTCA claims. In its petition, the Government argues that Ms. Konan's claim fits within the "loss" and "miscarriage" categories of Section 2680(b). It does not contest the Fifth Circuit's holding that the "negligent transmission" category is inapplicable to this case.

Ms. Konan has filed a conditional cross petition seeking review of the Fifth Circuit's dismissal of her civil rights conspiracy claim against Rojas and Drake

under 42 U.S.C. § 1985(3). No. 24-495 (filed Oct. 28, 2024).

REASONS FOR DENYING THE WRIT

The Government positions the opinion below as potentially impacting every case where a customer can allege a postal worker stole a package in transit. But this isn't about a one-time missing Christmas package. Instead, two USPS employees coordinated a years-long racially motivated harassment campaign against respondent Lebene Konan. And it's only by conflating this case with the average stolen-package case that the Government can conjure a split or suggest the Fifth Circuit's decision has any broader import.

I. There is no genuine split amongst the courts of appeals.

Even on the Government's telling, the split in question is shallow—three circuits have weighed in over the course of 80 years.[3] And it's not even clear those circuits would disagree in Ms. Konan's case.

1. Start with the Government's lead argument: that an intentional refusal to deliver mail is a "miscarriage" within the meaning of Section 2680(b). Pet. 11. No court has ever accepted that argument. The court below squarely rejected it, Pet. App. 7a-8a, and the only other court that has opined on the meaning of "miscarriage" suggested it would reject the

[3] Other than the First and Second Circuit cases, the Government mentions only one other case, a two-paragraph, unpublished Eighth Circuit opinion. *Benigni v. United States*, 141 F.3d 1167 (8th Cir. 1998). But that case has no precedential value. Indeed, even the Government relegates it to a footnote.

Government's argument as well. *See Birnbaum v. United States*, 588 F.2d 319, 328 (2d Cir. 1978) ("miscarriage" limited to "misdelivery").

2. The Government argues the decision below conflicts with cases from the First and Second Circuits over whether Rojas and Drake's intentional refusal to deliver is a "loss" within the postal-matter exception. But neither the First nor the Second Circuit has had the opportunity to weigh in on a refusal-to-deliver case like this one, and it's not at all clear that they would have decided Ms. Konan's case differently than the court below did here.

a. The Fifth Circuit explicitly acknowledged that "mail stolen in regular transit trigger[s] the postal-matter exception's 'loss' provision." Pet. App. 7a. But it went on to recognize a key difference in Ms. Konan's case—Ms. Konan's mail "was not stolen." *Id.* And it held that an intentional refusal to deliver does not fall within the postal-matter exception. *Id.*

b. The First Circuit is not to the contrary. In *Levasseur v. USPS*, 543 F.3d 23 (1st Cir. 2008) (per curiam), the First Circuit addressed a case involving political flyers stolen by a postal employee. Like the Fifth Circuit, the First Circuit held that "mail that is stolen by a postal employee is thereby 'lost.'" *Id.* at 24. Unlike the Fifth Circuit, the First Circuit did not have occasion to consider whether an intentional refusal to deliver mail, as opposed to theft, would also be covered by Section 2680(b).

And *Levasseur* provides no basis for predicting how the First Circuit would rule on intentional refusal to deliver mail. The court had no occasion in its two-page-long opinion to consider the issue. Nor did the

court even engage in any textual analysis about the breadth of the postal-matter exception.

c. The Second Circuit too has addressed only whether theft of mail constitutes a "loss." The one published case the Government cites concerned the theft of a package containing emeralds. *See* Pet. 18 (citing *Marine Insurance Co. v. United States*, 378 F.2d 812 (2d Cir. 1967)). The Second Circuit, like the Fifth, held that theft was within the scope of the postal-matter exception. *Marine Insurance*, 378 F.2d at 813-14. Indeed, in this case, the Fifth Circuit agreed with *Marine Insurance* that theft is "loss." Pet. App. 7a.

Refusal to deliver was not at issue in *Marine Insurance*, and the Government provides no reason to believe the Second Circuit would rule on refusal to deliver any differently than the Fifth. *Marine Insurance* focused on whether the package was "postal matter" at all, given that it had been intercepted by the Bureau of Customs. 378 F.2d at 814. It assumed without analysis that, if the package was postal matter, its theft would fit within Section 2680(b). *Id.* at 813-14. The only other Second Circuit case the Government references is an unpublished opinion that was also about theft and cited *Marine Insurance* for its analysis. *See C.D. of NYC, Inc. v. USPS*, 157 Fed. Appx. 428 (2d Cir. 2005). And the Second Circuit hasn't considered the scope of the postal-matter exception at all since this Court's exposition of that provision in *Dolan* in 2006.

If anything, the Second Circuit has suggested it would come out the same way as the Fifth as to intentional refusals to deliver mail. The Fifth Circuit's reasoning turned on the notion that "loss is *unintentional*." Pet. App. 6a. In a case not mentioned

by the Government, the Second Circuit also opined that the language of Section 2680(b) "itself indicates that it was not aimed to encompass intentional acts." *Birnbaum*, 588 F.2d at 328.

Thus, the Government has provided no reason to believe Ms. Konan's case would come out differently in any other circuit.

II. The question presented does not warrant this Court's review.

1. The dearth of real-world cases makes clear there's no need for this Court's intervention. Start with the courts of appeals. Ms. Konan's suit raised an "issue of first impression" before the Fifth Circuit. Pet. App. 5a. And again, across the country, fewer than a half dozen cases in 80 years—by the Government's own count—address the question presented.

Now consider district courts. The Fifth Circuit is illustrative. Excluding duplicate litigation and cases where the USPS was not even sued, just 22 opinions in the 18 years since *Dolan* even cite Section 2680(b). A grand total of one case other than Ms. Konan's turns on whether a refusal to deliver mail falls within the postal-matter exception. *See Dennis v. Postal Service*, 2012 WL 7037766, at *1 (W.D. La. Dec. 18, 2012). And just one additional case alleges facts that could even be construed as mail theft. *See Duran v. U.S. Att'y Gen.*, 2024 WL 3843576, at *1 (N.D. Tex. July 16, 2024). The remainder either involve facts far afield from the question presented (delivery to the wrong address, damage to a package, and so on) or were independently barred for another reason (such as failure to exhaust).

An issue that recurs so infrequently does not threaten to "handicap efficient government operations" (Pet. 20) and thus does not warrant this Court's attention. That's presumably why this court has denied certiorari in three of the four cases petitioners cite for their purported split. *See C.D. of NYC, Inc. v. USPS*, 157 Fed. Appx. 428 (2d Cir. 2005), *cert. denied*, 549 U.S. 809 (2006); *Benigni v. United States*, 141 F.3d 1167 (8th Cir. 1998), *cert. denied*, 525 U.S. 897 (1998); *Marine Insurance Co., v. United States*, 378 F.2d 812 (2d Cir. 1967), *cert. denied*, 389 U.S. 953 (1967).

2. Unable to point to actual federal court cases, the Government gestures at the tens of thousands of misconduct complaints filed with USPS every year. Pet. 21. But per USPS's website, misconduct complaints can include everything from "[r]ude or unprofessional USPS employee behavior" to "[c]omplaints about USPS vehicle parking," not just complaints about mail delivery. U.S. Postal Service Office of Inspector General, *File an Online Complaint*, https://perma.cc/MFW7-3EJR (last visited Dec. 11, 2024).

Even assuming some meaningful fraction of USPS administrative complaints are about mail delivery, there's no reason to believe those will end up in federal court. Frustrated customers often file a complaint simply by typing a few sentences into an online form. That's a far cry from deciding to undertake federal litigation.

The Government also doesn't supply any reason to believe that federal cases about two categories of conduct covered by its question presented—theft and refusal to deliver—will multiply. To begin with, any concern about opening the door to claims of mail theft

is a red herring: Remember that every circuit to consider the question—including the Fifth Circuit—holds that theft claims are barred by the postal-matter exception. Moreover, the average mail theft claim is of an online order gone missing, not of a box of emeralds stolen as part of a string of international heists. *See Marine Insurance*, 378 F.2d at 813. No one files a lawsuit over a missing Amazon package. Among other things, it would make no financial sense: The potential recovery would rarely justify even the $405 of filing and administrative fees, let alone the time and expense of litigating the case.

There's similarly no reason to think there will be an epidemic of refusal-to-deliver cases if the Fifth Circuit's opinion stands. Most refusal-to-deliver cases are surely one-off incidents, not years-long campaigns that deprive the victim of thousands of dollars in rental income.

And even among the small fraction of claimants for whom litigation would make any sense, few will go through with filing a lawsuit. The vast majority of claims are resolved at the administrative level, seventy-six percent within three days of filing. Gov't Accountability Office, *U.S. Postal Service: Customer Complaints Process*, at 13 (2021), https://perma.cc/ZK79-WSTV. Of the remainder, some will founder on the FTCA's exhaustion requirement, which contains numerous provisions about the form and timing of an administrative complaint. *See* 28 U.S.C. § 2675(a); *Adams v. United States*, 615 F.2d 284, 289 (5th Cir. 1980). And only a handful of potential plaintiffs will be able to credibly claim that

their mail has been intentionally withheld instead of misplaced or stolen.[4]

Ms. Konan's is thus the rare case that makes it to federal court: USPS employees' years-long racial harassment campaign cost Ms. Konan significant rental income; USPS failed to resolve the problems despite dozens of complaints; and she has concrete evidence that her mail was intentionally withheld and not simply misplaced.[5]

3. So the Government is wrong that the opinion below will unleash a flood of litigation. But even if it were correct, a better vehicle—one where postal delivery is the heart of the issue—will surely come along. At core, Ms. Konan's case isn't about the mail;

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[4] The Government claims that people "who have mail lost or miscarried could evade the postal exception" simply by alleging that "the loss or miscarriage was caused by *intentional* conduct." Pet. 22. But the "ordinary protections against frivolous litigation"—the *Twombly/Iqbal* pleading standard, the possibility of attorney or party sanctions, and the like—"must suffice here." *Dolan v. USPS*, 546 U.S. 481, 491 (2006).

[5] The Government notes that, in addition to the USPS administrative process, some plaintiffs may be able to seek relief from the Postal Regulatory Commission. *See* Pet. 22-23. If that's so, there's even less reason to worry about claims flooding federal court—still more claimants will have their issues resolved at the administrative level. But to be clear, the Postal Regulatory Commission cannot give a complainant damages, *see* 39 C.F.R. § 3022.50, and the United States itself encourages claimants to use the Postal Regulatory Commission only for "complain[ts] about a policy change, such as postage rates," not for complaints about individual employee misconduct. *See* USA.gov, *How to File a U.S. Postal Service Complaint*, https://perma.cc/FQK4-BLZQ (last visited Dec. 4, 2024).

it's about racial discrimination. Withholding mail was just one way that USPS inflicted that harm.[6]

Moreover, the question presented doesn't stand to change much about the outcome of this litigation. Most of Ms. Konan's damages are attributable to conduct that no one would even argue constitutes a "loss," "miscarriage," or "negligent transmission" of mail—things like changing her mailbox lock or wrongfully denying her ownership of her properties. *See* Pet. App. 42a-44a. Indeed, all but one of the underlying torts Ms. Konan has alleged (intentional infliction of emotional distress, tortious interference with prospective business relations, and nuisance) can be established without reference to the undelivered mail. Ms. Konan would be able to seek affirmance as to much of her case even if this Court were inclined to accept the Government's merits arguments, because not even the Government argues that any conduct other than refusal to deliver mail is covered by the postal-matter exception. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

III. The Fifth Circuit is correct: The postal-matter exception doesn't cover refusal to deliver mail.

USPS's intentional refusal to deliver Ms. Konan's mail was neither "loss" nor "miscarriage" within the meaning of Section 2680(b). The plain meaning of each of those terms makes that clear, as does the structure of the remainder of the statute.

1. Refusal to deliver is not "loss" within the meaning of Section 2680(b).

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[6] For that reason, if this Court is inclined to grant the Government's petition, it should grant Ms. Konan's conditional cross-petition regarding her civil rights conspiracy claims.

a. "Loss" is an "unintentional parting with something of value." Pet. App. 6a (quoting Webster's New Int'l Dictionary of the English Language 1460 (2d ed. 1942)). Rojas and Drake's intentional withholding of Ms. Konan's mail falls outside that definition. As the Fifth Circuit explained, "no one intentionally loses something." Pet. App. 6a. And even the Government admits that "the loss of an item is usually caused by unintentional conduct." Pet. 15. Plus, Rojas and Drake did not "part[] with something of value"; they had Ms. Konan's packages in custody at the local post office. Pet. App. 16a, 45a-46a. So USPS did not "los[e]" Ms. Konan's mail.

The Government makes no attempt to argue that someone can lose an item intentionally. Instead, it argues that the postal-matter exception must be construed "from the plaintiff's perspective." Pet. 15. That is, the Government claims that the relevant question is not, "Did USPS lose the plaintiff's mail?" but rather, "Did the plaintiff lose her mail?" *See id.* But that cannot be right. Both other categories in the postal-matter exception—"miscarriage" and "negligent transmission"—are written from the Government's perspective. For those categories, the question is not "Did the plaintiff miscarry or negligently transmit his mail?" It is instead, "Did postal workers miscarry or negligently transmit the plaintiff's mail?" So, too, for "loss."

Besides, the plaintiff can't "lose" mail that never made it to her—she didn't have it to lose in the first place. A teenager who drops her car key on the subway has "lost" the key; a teenager who is promised her grandmother's car but is never given the key has not. If the relevant question were, "Did the plaintiff lose

her mail?" the answer would almost always be "no"—the mail was lost before it was ever hers to lose.

The Government's only argument for the "Did the plaintiff lose her mail?" perspective is the word "claim" in Section 2680(b). *See* Pet. 15. But that word does nothing for the Government. No one disputes that the "claim" is the plaintiff's; the question is what Government employees did to yield that claim.

b. Treating the postal-matter exception as written from the Government's perspective resolves this case. The Government tries to complicate the question by quoting this Court's opinion in *Dolan*. But the definition of "loss" was not the focus of *Dolan*; the parties did not argue over the meaning of that word, and the language the Government quotes is dicta. *See Dolan v. USPS*, 546 U.S. 481, 487 (2006). In any event, *Dolan*'s definition—"loss" covers mail that is "destroyed or misplaced"—still wouldn't encompass Ms. Konan's case.

To start, even those two definitions assume the plaintiff at some point had possession of the lost property before it was misplaced or destroyed.

Moreover, loss as misplacement doesn't cover Ms. Konan's case because that definition is limited to something "of unknown whereabouts." *See, e.g.*, 2 The New Century Dictionary 980 (1940) ("something dropped, misplaced, or of unknown whereabouts," as in, to "discover the loss of a bracelet or of a document"). So if someone loans a book to a friend, and the friend refuses to return it, she would not say the book is "lost" in the sense of being "misplaced"—she knows her friend has the book. In this case, both Ms. Konan and

USPS know where the mail is, so it has not been "lost."[7]

And loss as destruction doesn't cover Ms. Konan's case, either. If the Government is right that a home destroyed by an arsonist is a "loss," Pet. 15, it's only because the term "loss," in that context, refers to the destruction of the home. *See, e.g.*, Webster's New International Dictionary of the English Language Unabridged 1277 (1930) ("ruin; destruction; perdition"). But Ms. Konan's mail was not destroyed, so the arsonist example has no purchase.

2. The Postal Service's refusal to deliver also was not a "miscarriage" of postal matter.

To start, the Government's expansive definition of "miscarriage" as any "failure of the mail to arrive," Pet. 13-14, poses a surplusage problem. That's because on the Government's view, the term "miscarriage" swallows "loss." Every time USPS loses mail, the mail fails to arrive. This Court "should not interpret a statute in a manner that makes some of its language superfluous." *Flores-Figueroa v. United States*, 556 U.S. 646, 653 (2009) (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

Again, the Government tries to complicate the point by quoting from *Dolan*. Pet. 12. Again, *Dolan*'s discussion is dicta at best. But in any event, *Dolan* explained that mail is "miscarried" when "it goes to the wrong address"—not when, as here, postal workers refuse to deliver it at all. 546 U.S. at 487.

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[7] If, as some circuits have held, theft is a "loss," it's presumably because an item stolen may have "unknown whereabouts."

The use of the prefix "mis"—as opposed to "non"—confirms that's what "miscarriage" means. The prefix "mis" refers to actions attempted, though done improperly, while a different prefix, "non," refers to cases where there's no attempt at all. For example, "misdelivery" refers to a delivery of property "to a person not authorized by the owner or person to whom the carrier or warehouseman is bound by his contract to deliver it"—that is, delivery to the wrong person. Black's Law Dictionary (3rd ed. 1933); Black's Law Dictionary (4th ed. 1951). That stands in contrast to "non-delivery," which is a "failure" or "refusal" to deliver goods altogether. Black's Law Dictionary (3rd ed. 1933); Black's Law Dictionary (4th ed. 1951).

Similarly, contract law distinguishes between "misperformance"—a "faulty attempt to discharge an obligation"—and "nonperformance," i.e. the "failure to discharge an obligation" at all. Black's Law Dictionary (12th ed. 2024). And legal dictionaries differentiate between "misuse" and "nonuse": The former is a "defense alleging that the plaintiff used the product in an improper" manner, whereas the latter is "[t]he condition of not being put into service" at all. *See id.*

Thus, as the court below explained, "there can be no 'miscarriage'" where a postal worker intentionally "refuses to deliver mail" because there is no carriage—indeed, not even an "attempt at carriage"—to begin with. Pet. App. 7a-8a.[8]

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[8] Even though Rojas and Drake did not attempt to deliver Ms. Konan's mail from the post office to her property, the Government claims that there was nonetheless "carriage" because other postal employees transported her mail from the sender to the local USPS office. Pet. 13. But Ms. Konan's claims

3. The Government suggests that because the word "negligent" only precedes "transmission," the remaining categories in the postal-matter exception cover intentional acts. Pet. 11-12, 15. Not so. The word "transmission" without the modifier "negligent" would encompass intentional and unintentional conduct. The same isn't true for the rest of the postal-matter exception. For example, as described above, a "loss" is understood to be unintentional even where there's no modifier. The word "negligent" simply isn't necessary to limit the term "loss" to non-intentional conduct.

4. Finally, the broad language of several other exceptions under Section 2680 contrasts markedly with the narrowness of the postal-matter exception. For example, Section 2680(m) preserves immunity for "[a]ny claim arising from the activities of the Panama Canal Company," while Section 2680(j) preserves immunity or "[a]ny claim arising out of the combatant activities of the military." *See also* 28 U.S.C. §§ 2680(l), (n). Congress could have used "similarly sweeping language," *Dolan*, 546 U.S. at 490, to preserve immunity for "any claim arising out of the mail handling activities of USPS." But it did not do so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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arise out of Rojas and Drake's refusal to deliver, and it's clear that those two made no attempt at "carriage."

Respectfully submitted,

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December 13, 2024