No. 24-351

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, *ET AL.*, *Petitioners*,

v.

LEBENE KONAN, *Respondent*.

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF APA WATCH IN SUPPORT OF RESPONDENT IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*

Amicus curiae APA Watch[1] is a nonprofit association advocating for judicial review of governmental action and inaction. That advocacy includes review not only via judicial review provisions such as the Administrative Procedure Act ("APA") and its state and common law analogs but also via tort law. For these reasons, APA Watch has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Amicus adopts the facts as stated by respondent Lebene Konan. *See* Resp. Br. 2-6. In general, for motions to dismiss, this Court assumes the well-pleaded facts of the complaint. *Hernandez v. Mesa*, 582 U.S. 548, 550 (2017). The complaint is set out in the appendix to the petition for a writ of *certiorari*. ("Pet. App."). In summary, Konan sued the U.S. Postal Service, the United States, and individual postal workers under the Federal Tort Claims Act, 28 U.S.C. §§2671-2680 ("FTCA"), 42 U.S.C. §1985(3), and Texas tort law for intentionally withholding mail delivery to her and the tenants of her property.

Although the FTCA made it easier to sue for injuries from federal actors and provided the United States as a "deep pocket" defendant, the original

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[1] Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity—other than *amicus* and its counsel—contributed monetarily to preparing or submitting the brief.

FTCA did not bar state tort suits against individual federal actors. *See*, *e.g.*, *Westfall v. Erwin*, 484 U.S. 292, 295 (1988), *abrogated in part by* Federal Employees Liability Reform and Tort Compensation Act of 1988, PUB. L. NO. 100-694, §5, 102 Stat. 102 Stat. 4563, 4564 ("Westfall Act"). After *Westfall*, Congress enacted the Westfall Act to counter this Court's *Westfall* decision by adding provisions for FTCA exclusivity to 28 U.S.C. §2679(b)(2).

Contrary to the apparent holding of *United States v. Smith*, 499 U.S. 160 (1991), FTCA exclusivity does not apply when one of the FTCA exceptions applies: "*Smith* does not even cite, let alone discuss, the 'shall not apply' language 'Exceptions' provision." *Simmons v. Himmelreich*, 578 U.S. 621, 628 (2016). The confusion results from a *Smith*-specific statute that made the FTCA the exclusive remedy for the military, 10 U.S.C. §1089(a) (1988), which barred non-FTCA claims by the serviceman injured in Italy from alleged medical malpractice in an Army hospital.

The Postal Service's implementing legislation has a less restrictive—indeed, ambiguous—provision about the FTCA's applicability to postal matters: "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." 39 U.S.C. §409(c). Applying the FTCA (*i.e.*, chapter 171) to postal matters is ambiguous when the entire FTCA does not apply if an FTCA exception applies.

SUMMARY OF ARGUMENT

This Court should read give the FTCA's postal exception a "fair" reading. Under a fair reading, "loss"

and "miscarriage" which would exclude intentional interference with mail delivery. Section I, *infra*.

If the Court finds the FTCA's postal exception to apply, the Court's decision should make clear—under 28 U.S.C. §2106—that Konan can revisit her state tort claims because FTCA exclusivity under 28 U.S.C. §2679(b)(2)—indeed, the *entire FTCA*—does not apply when an FTCA exception applies. Section II.B, *infra*. As applied to ambiguity *vis-à-vis* causes of action, the canon against repeals by implication requires reading 39 U.S.C. §409(c) to preserve Konan's causes of action. Section II.C, *infra*. The core point here is that Konan could have sued the postal workers before the FTCA was enacted. The FTCA added a cause of action, and where that action exists, the Westfall Act makes the new FTCA action exclusive. But nothing in the FTCA was intended to take away a right of action and replace it with nothing.

Similarly, and again, if the Court finds the FTCA's postal exception to apply, the Court revisit its denial of Konan's petition for a writ of *certiorari* on her claim under 42 U.S.C. §1985(3). Congress intended that landmark statute to apply to the federal government as indicated by the 7-1 Circuit split against the Fifth Circuit's position. Moreover, the individual defendants could not rely on the intracorporate conspiracy doctrine—assuming *arguendo* that it applied—when their alleged misconduct did not further Postal Service policy. Section III, *infra*.

ARGUMENT

I. FTCA EXCEPTIONS SHOULD BE READ FAIRLY AND IN CONTEXT.

The Postal Service argues for a broad reading of the terms "loss" and "miscarriage" without focusing on the context of the FTCA's exceptions. "This Court has 'no license to give statutory exemptions anything but a fair reading.'" *BP P.L.C. v. Mayor of Baltimore*, 593 U.S. 230, 239 (2021) (quoting *Food Marketing Inst. v. Argus Leader Media*, 588 U.S. 427, 439 (2019)); *accord HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 594 U.S. 382, 396 (2021). Reading "loss" and "miscarriage" fairly would limit the FTCA exception to accidental failures in the mail system.

II. IF THE FTCA'S POSTAL EXCEPTION APPLIES, KONAN MAY PRESS HER STATE TORT CLAIMS ON REMAND.

If this Court finds the FTCA's postal exception to bar Konan's FTCA claim, the Court's decision should make clear that—on remand—Konan is free to revive her state-law tort claims against the individual postal workers. If—as the district court opined—that would put her claims outside the district court's subject-matter jurisdiction, Pet. App. 23a-25a; *cf.* 28 U.S.C. §1367 (supplemental jurisdiction for state claims tied to federal claim), Texas law would give her 60 days to replead her case in state court. *See* TEX. CIV. PRAC. & REM. CODE ANN. §16.064(a)(1)-(2). That relief on remand would not only be just to the parties but also would clarify for the courts and the public the disconnect between *Smith*, *Simmons*, and *Thacker*.

A. If the Court finds the postal exception to apply, the Court's remand should allow Konan to assert her tort claims.

Before the FTCA, injured parties could sue federal officers in tort. *See*, *e.g.*, *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 125 (1804) (permitting claim against U.S. federal official for improper seizure); *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 490, 492 (1806) (same). Other than the President in some unique contexts, *Trump v. United States*, 603 U.S. 593, 610-11 (2024), individual federal officers have always lacked sovereign immunity. The FTCA expanded the right to sue. The FTCA did not create immunity where none previously existed.

As explained in the next two sections, applying an FTCA exception generally removes the issue of FTCA exclusivity and the Postal Service's implementing legislation does not require a departure from that general principle. Under the circumstances, this Court has authority to allow further proceedings consistent with a finding that the FTCA's postal exception applies:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or *require such further proceedings to be had as may be just under the circumstances*.

28 U.S.C. §2106 (emphasis added). Removing the FTCA from consideration would lift the jurisdictional

barrier to suing individual federal actors. *Cf.* Stern & Gressman, SUPREME COURT PRACTICE §5.14 (2019) (rehearing usually unsuccessful absent new decision or removal of jurisdictional barrier). Konan deserves the chance to bring her claims against the individual defendants if the FTCA does not allow suit against the United States.

B. Generally, if FTCA exceptions apply, the *entire* FTCA—including exclusivity—does not apply.

For torts excepted from the FTCA by 28 U.S.C. §2680, the plain language of that section makes clear that, if one of the FTCA exceptions applies, the entire FTCA does not apply: "The provisions of this chapter and section 1346(b) of this title shall not apply to [the list of FTCA-excepted torts]." 28 U.S.C. §2680; *Simmons*, 578 U.S. at 628 ("*Smith* does not even cite, let alone discuss, the 'shall not apply' language 'Exceptions' provision"); *accord Thacker v. TVA*, 587 U.S. 218, 221-22 (2019) ("Congress specifically excluded from *all the FTCA's provisions*—including the discretionary function exception—[claims exempted by §2680]") (emphasis added). This Court should clarify its *Smith* decision—which the Court decided correctly—because the context there rendered the FTCA exclusive, without resort to the Westfall Act. *See* 10 U.S.C. §1089(a) (making FTCA the exclusive remedy); 10 U.S.C. §1089(a) (1988) (same). Any language in *Smith* supporting general FTCA exclusivity is *dicta* because the Gonzales Act already prohibited non-FTCA suits.

C. 39 U.S.C. §409(c) does not save FTCA exclusivity.

The Postal Service's implementing legislation is ambiguous: "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." 39 U.S.C. §409(c). That could mean that FTCA exclusivity under 28 U.S.C. §2679(b)(2) applies as part of chapter 171, or it could mean that FTCA exclusivity under 28 U.S.C. §2679(b)(2) does not apply because 28 U.S.C. §2680—another part of chapter 171—provides the entire chapter does not apply when an FTCA exception applies.

The canon against repeals by implication requires "clear and manifest" legislative intent, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007), and that "canon … applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975). With §409(c) amenable to either construction, the better reading is that §409(c) does not displace causes of action that the FTCA would have allowed before Congress enacted §409(c).

III. IF THE FTCA'S POSTAL EXCEPTION APPLIES, THE COURT SHOULD REVERSE DISMISSAL OF THE FEDERAL TORT.

Konan petitioned for a writ of *certiorari* to review the Fifth Circuit's affirmance of the dismissal of her claim under 42 U.S.C. §1985(3), and this Court denied her petition on April 21, 2025. *Konan v. U.S. Postal Serv.*, 145 S.Ct. 1918 (2025). Konan petitioned on two issues: (1) whether §1985(3) applies to federal actors,

and (2) whether the "intracorporate conspiracy doctrine" applies to the §1985(3) claim under the circumstances of this case. Dismissing her FTCA claim on a technical battle of dictionary definitions and canons of construction—in the face of racial discrimination—would be unjust.

This Court has both inherent and statutory authority to reconsider its denial of *certiorari* in that related petition. *See* 28 U.S.C. §2106; *United States v. Benz*, 282 U.S. 304, 306-07 (1931), *abrogated in part by* 28 U.S.C. §452;[2] Stern & Gressman, SUPREME COURT PRACTICE §15.8 (2019). If this Court reverses the Fifth Circuit's reinstatement of Konan's FTCA claim, the Court should reconsider the dismissal of her §1985(3) claim not only to achieve justice between the parties but also to resolve an important Circuit split.

Amicus respectfully submits that the Court could answer both questions by summary decision, without further briefing beyond the parties' petition-stage filings.

- The Fifth Circuit itself acknowledged that its Circuit precedent that §1985(3) does not apply to federal actors "has not aged well," Pet. App. 11a (cleaned up), but remaining binding Circuit

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[2] *Benz* limited that inherent power to actions taken with the same court term, but Congress abolished the common law limitation while leaving the common law power intact: "The continued existence or expiration of a session of court in no way affects the power of the court to do any act or take any proceeding." 28 U.S.C. §452.

precedent. The Fifth Circuit precedent is plainly wrong and amenable to summary reversal. *See* Pet. at 11-15 (Oct. 24, 2024), *Konan v. U.S. Postal Serv.*, No. 24-495 (U.S.) (discussing 7-1 Circuit split on §1985(3)'s application to federal actors).

- In finding that the intracorporate conspiracy doctrine *potentially* applies to civil rights law and then pointing to that uncertainty as the basis for qualified immunity, *Ziglar v. Abbasi*, 582 U.S. 120, 154-55 (2017), considered federal policymakers' roles in developing and implementing a federal policy that—because of the issue—had a race-correlated disparate impact. There is nothing here to suggest that the postal workers' alleged misconduct served or implemented federal policy.

Of course, "the qualified immunity defense … provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The second category—knowing violators—requires only that a reasonable federal actor would know if conduct would violate federal rights, which does not require that "the very action in question has previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). As in *Hope*, the individual defendants had ample reason to know that blatant race discrimination was illegal.

If the Court needs further briefing on §1985(3), the Court should request briefing. The Court should not, however, reverse the Fifth Circuit on the FTCA issue without revisiting the denial of *certiorari* on the §1985(3) issue.

CONCLUSION

This Court should affirm that the FTCA exception for the "miscarriage" or "loss" of mail does not include the intentional refusal to deliver mail. Alternatively, if the Court finds the FTCA's postal exception applies here, then the entire FTCA does not apply and—on remand—Konan may press tort claims against the individual defendants without regard to FTCA exclusivity under the Westfall Act.

August 20, 2025

Respectfully submitted,

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